CIS LCN*

*The CIS Leading Counsel Network

Comparative Summary of Antitrust Laws in the CIS Economic Region

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We are glad to present the second joint publication of the CIS Leading Counsel Network.

The leading law firms from nine countries of the CIS (Commonwealth of Independent States) economic region overview current antitrust regulations in Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Turkmenistan, Ukraine.

Each country material consists of five sections covering:

1. Overview of competition regulations and authorities

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We hope this work of the LCN integrated team will serve as a practical guide on antitrust regulation to international companies working in CIS Economic Region.

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Armenia

CIS LCN Member for Armenia

Founded in 1998, Ameria is a leading advisory firm in Armenia. It acts as a financial, legal and strategic development counsel and partner to the public and private sectors, as well as to international organizations in Armenia and the South Caucasus. Ameria advises its clients through an effective structure of five advisory units comprising Management Advisory Services, Legal Practice, Assurance and Taxation, and Investment Banking. Ameria Group of Companies includes Ameriabank CJSC and Ameria Invest CJSC.

Overview of antitrust laws in Armenia

David Sargsyan, Partner, AMERIA CJSC

1. Overview of competition regulations and authorities

1.1. Underlying competition regulations

The main law regulating relations in antitrust and antimonopoly policies in the Republic of Armenia is the RA Law on **"Protection of economic competition".** But there are also the RA "Civil Code", the RA Law on "Trademarks", and the RA Law on "Firm names".

International agreements

- Agreement on Partnership and Collaboration between the Republic of Armenia and the European Communities and their Member Countries
- Contract on "Maintaining Agreed Antimonopoly Policy" between CIS member countries (Contract is in Russian)
- Agreement on Cooperation in Economic Competition Policy Between The National Agency for the Protection of Competition of the Republic of Moldova and The State Commission for the Protection of Economic Competition of the Republic of Armenia

Internal normative-legal acts

- On the procedure for maintaining a Centralized Registry (Register) of economic entities that have a dominant position
- On approving the procedure for defining the monopolistic or dominant position of an economic entity
- On approval of "Order of definition of dominant position of economic entity on product market" and "Order of definition of product market boundaries and volumes" and invalidating a number of decisions of the State Commission for the Protection of Economic Competition of the Republic of Armenia
- On official clarification on concentration

1.2. Antitrust authorities: structure and competencies

Antitrust authorities in RA: the main body is the State Commission for Protection of Economic Competition, other agencies: Ministry of Economy, Intellectual property Agency.

Power of the Commission: competencies and structure

The Commission is entitled to:

a) Make decisions with respect to:

- Possible or actual violations of the Law on "Protection of economic competition";
- Studies of product markets;

- Research, inspection, study and/or monitoring in connection with initiating or conducting administrative cases;
- Boundaries of product markets, the existence of a dominant position of the economic entities in these markets, as well as on the implementation of measures conditioned by that;
- Disaggregating (division, separation, alienation of shares or assets) of economic entities abusing their dominant position twice or more within a year;
- Discontinuation of infringements of the Law on protection of economic competition by economic entities or elimination of their consequences, restoration of the original position, amendment or dissolution of contracts contradicting the Law on protection of economic competition, signing of contracts with other economic entities;
- Incompliance with legal acts adopted by the state and local government bodies or their officials with the legislation on economic competition protection, providing conclusions on agreements to be signed, this applies to state aids as well as concentrations;
- Suspension, liquidation (annulment, ceasing), recognizing void of a concentration or state aid;
- Imposition of penalties upon economic entities and their officials, officials of the state and local government bodies for infringement of the Law on the protection of economic competition.

b) Control over implementation (maintenance) of the Commission decisions;

c) Conducting research, inspection, study and (or) monitoring according to the procedure defined by the law in order to disclose the reliability of information presented by economic entities, the actual activity of economic entities, or to exercise control over enforcement of the Commission decisions;

d) Apply to the court in connection with violations of the Law on the protection of economic competition, including legal acts adopted by the state and local government bodies, with the request to recognize void, fully or partially, the contracts signed by economic entities in violation of the Law on the protection of economic competition, as well as to amend or dissolve such contracts;

e) Apply to the Government of the Republic of Armenia with a petition to cease the actions of state bodies or their officials which conflict with the Law on the protection of economic competition;

f) Impose fines, exercise other sanctions stipulated by the Law on the protection of economic competition;

g) Adopt appropriate procedures connected with monopolistic agreements, dominant positions, concentrations, unfair competition, state aid, as well as the determination of product market;

h) Provide explanations with respect to issues relating to the enforcement of the economic competition protection legislation;

i) Exercise other powers envisaged by the legislation.

1.3. Extraterritoriality

If international treaties of the Republic of Armenia define norms other than those stipulated by the Law, the international treaties shall apply.

Within the limits of its **functions** the Commission co-operates with the international agencies and organizations operating in the Republic of Armenia as well as the similar structures and international bodies of foreign countries.

International co-operation of Commission is aimed at:

- Accomplishment of obligations contained in international contracts signed on the issues referring to the Commission's competency;
- Exchange of experience and collaboration with similar structures;
- Study of economic competition protection processes in foreign states, introduction of advanced experience and the improvement of staff qualifications;
- Drafting and implementation of international technical assistance programs deriving from the Commission's interests;
- Support in integration into the global economic environment within the limits of its powers;
- Enhancing relationships with competent bodies of foreign states and international organizations;
- Execution of other powers delegated to the Commission according to the legislation of the Republic of Armenia.

In 2007 the Commission expanded and developed its relationships with international organizations (**OECD**, **EC**, **USAID**, **WB**, **UNCTAD**, **ICN**) and similar departments of foreign states.

Negotiations to implement a new project on enhancing economic policy with the Organization of Security and Co-operation in Europe (**OSCE**) are resumed. The project will be executed by the **OSCE** Yerevan office and Commission.

2. Prevention of monopolistic activities and unfair competition

2.1. Overview

Economic entities, the state administration and local government bodies and their officials incur liability for the violation of the Law on the "Protection of economic competition" according to the procedure defined by this legislation.

2.2. Dominance

An economic entity is considered to have a monopolistic or dominant position in a product market if it has no competitor as a seller (acquirer) or if it captures at least one third of the given market in terms of sale volumes. The abuse of a monopolistic or dominant position (hereinafter "Dominant Position") by economic entities is prohibited.

Abuse of a dominant position is considered to be the:

a) Establishment or application of unjustified, discriminatory and (or) differentiated sale or acquisition prices, or direct or indirect binding of other trading conditions conflicting with the legislation;

b) Restriction of trade or modernization of production or the investments of another economic entity;

c) Creation or maintenance of a deficit in a product market that prejudices consumers' interests by means of product imports, or the unjustified contraction of production, or keeping, spoiling and destroying the products;

d) Application of discriminatory conditions towards consumers or other economic entities;

e) Binding additional obligations on a contract party, including trading objects, which in their nature or implementation aspect are not related to the subject of the contract;

f) Forcing economic entities to restructure or break economic relations;

g) Impediment to the market entry (restriction of the market entry) of other economic entities, or ousting them out from the market, as a result of which the economic entity did not enter the market or was ousted from the market or made additional expenses not to be ousted from the market

h) Offering or the application of conditions that create or may create unequal competitive conditions, when similar conditions have not been offered to other economic entities operating in the product market;

i) Establishment, change or maintenance of discounts or privileges of sale or acquisition prices if they are targeted at the restriction of competition.

2.3. Monopolistic agreements and concerted actions

M*onopolistic agreements* are all transactions signed between economic entities, their agreements, directly or indirectly concerted practices or conduct, and decisions adopted by unions of economic entities (hereinafter "agreements"), which lead or may lead to, directly or indirectly, restriction, prevention or prohibition of competition in any product market. For example:

a) Establishment of discriminatory and/or differentiated sale and/or acquisition prices;

b) Unjustified increase, decrease or maintenance of a product price;

c) Division of the market according to territorial principle, sale or purchase volumes, product assortment, groups of sellers or acquirers, or otherwise;

d) Impediment to the market entry (restriction of the market entry) of other economic entities, or ousting them from the market, as a result of which the economic entity did not enter the market or was ousted from the market or made additional expenses not to be ousted from the market;

e) Establishment, change or maintenance of discounts or privileges for sale or purchase prices, if they are targeted at ousting other economic entities from the market; etc.

The conclusion of monopolistic agreements between economic entities is prohibited.

2.4. Unfair competition

1. Any entrepreneurial activity or conduct, breaking the principles of fairness, i.e. honesty, equity, verity and impartiality among competitors or between the latter and consumers is considered as unfair competition.

Unfair competition is prohibited.

2. Any interested person, including consumers, who has incurred damage due to unfair competition can apply to the Commission or court. This right is also reserved for organizations empowered to defend the interested persons' economic interests.

3. Any entrepreneurial activity or conduct, which causes or may cause confusion with respect to another economic entity, its activity or offered products, is considered an act of *unfair competition.*

In the context of this Article, confusion may be caused in particular with respect to:

a) Trademark and service mark, whether registered or not;

b) Firm name;

c) Appearance of products, for instance, industrial design, whether registered or not, packaging, color or any other non-functional features;

d) Civil circulation participants, products, other means of identification, for instance, business symbols, signs or letters substituting words, slogans;

e) Types of product presentation, including advertisement, uniform, product delivery style;

f) Use of names of celebrities, as well as popularity or reputation of recognized characters from fiction or art to foster product consumption demand.

4. Any false or unjustified statement concerning entrepreneurial activity, which discredits or may discredit an economic entity, its activity or offered products, is considered as an act of *unfair competition*.

Discrediting may occur while implementing measures to facilitate the promotion or dissemination of products like:

- Production process;
- Suitability of products for certain purpose;
- Quality, quantity or other features;
- Offer and delivery conditions;
- Price or its computation method.

5. Any entrepreneurial activity or conduct that misleads or may mislead the public with respect to an economic entity or its activities or its offered products is considered as an act of *unfair competition*. Misleading could happen during the implementation of measures to facilitate the promotion or advertisement of products, in particularly it may happen with respect to the geographic origin of a product: any unjustified exaggeration of the product quality, the failure to provide relevant information regarding the quality, quantity or other features, which may lead to a false impression (misinformation).

6. Any entrepreneurial activity or conduct which, irrespective of creating confusion, may cause damage to the reputation or goodwill of an economic entity is considered as an act of *unfair competition.*

2.5. Antitrust investigation

As already noted, investigations are performed by the Commission and they may be started at the the initiative of the commission or by a complaint of a third party. Any interested person, including consumer, who has incurred damage due to unfair competition can apply to the Commission or court. This right is also reserved for organizations empowered to defend the interested persons' economic interests.

The Commission carries out its activities through meetings. The Commission considers the issues in open meetings, except the cases when this could prejudice the interests of persons concerned. Interested parties have a right to adduce evidence, give explanations and present arguments, raise objections against the application of intended responsibility measures, as well as to produce other mediations.

As a result of discussions the Commission makes a decision (conclusion), setting out therein the facts that support the given decision. At the Commission meetings the decisions are passed by majority vote of attending members. In case of equal votes the Chairman's or the Deputy Chairman's vote is decisive.

Within 5 days of making the decision (conclusion) a copy of it is provided to the person concerned or is sent to him by certified mail. The Commission's decision takes effect upon its promulgation and can be appealed to the administrative court within 30 days. The maximum term for the Commission to conduct an administrative proceeding is 90 days.

2.6. Implications for infringers

RA Criminal Code provides with sanctions and punishments in cases of:

The establishment and maintaining of illegal, artificially high or low, monopolistic prices, as well as, restriction of competition by prior agreement or by coordinated actions, in order to divide the market by territorial principle, to restrict entry into the market, to force other economic subjects out of the market, to establish and maintain discriminative prices, is punished with a fine of the amount of 300 to 500 minimal salaries, or with either with imprisonment for 2 to 3 months, or with imprisonment for the term of up to 2 years.

2. The same action committed:

- by violence or threat of violence;
- by damaging or destruction of somebody's property, or by threat of damaging;
- by abuse of official position,
- by an organized group,
- is punished with a fine of the amount of 400 to 600 minimal salaries, or with imprisonment for the term of 3 to 8 years, with or without property confiscation.

Besides**.**

1. Entering into (establishing, participating in) anticompetitive agreement shall lead to the imposition of a fine on the economic entity (the anticompetitive agreement participant) at the rate of 2% of revenue in the year preceding entry into (establishment, participation in) the agreement, but not exceeding three hundred million AMD. In cases where the conducted activity lasted less than 12 months in the previous year, the stipulated infringements shall lead to the imposition of a fine at the rate of 2% of revenue (however not exceeding three hundred million AMD) from the activity conducted prior to the entry into (establishment, participation in) that agreement but not exceeding the 12 month period.
2. Abuse of dominant position shall lead to the imposition of a fine on the economic entity at the rate of 1% of revenue of the previous year, but not exceeding three hundred million AMD. In cases where the conducted activity lasted less than 12 months during the previous year, the stipulated infringements shall lead to the imposition of a fine at the rate of 1% of revenue (however not exceeding three hundred million AMD) from activity conducted in the period preceding the infringement but not exceeding the 12 month period.

3. Failure to declare the concentration as stipulated by this Law, or enactment of (participation in) prohibited concentration shall lead to the imposition of a fine on the economic entity-concentration participant at the rate of 4% of revenue of the year preceding the participation in the concentration, but not exceeding five hundred million AMD. In cases where the activity conducted in the previous year lasted less than 12 month, the stipulated infringement shall lead to the imposition of a fine upon the economic entity-concentration participant at the rate of 4% of revenue (however not exceeding five hundred million AMD) of the year preceding the concentration but not exceeding the 12 month period.
4. Action of unfair competition shall lead to the imposition of a fine the size of five hundred thousands AMD.

Repetition of an infringement stipulated in this part during 1 year shall lead to imposition of a fine at the size of one million AMD.

5. Receipt of prohibited state aid shall lead to the imposition of a fine on the economic entity at the rate of 2% of revenue of the year preceding the infringement, but not exceeding three hundred million AMD. In cases where the activity conducted in the previous year lasted less than 12 months, the stipulated infringement shall lead to the imposition of a fine at the rate of 2% of revenue (however not exceeding three hundred million AMD) from activity conducted in the period preceding the infringement but not exceeding the 12 month period.
6. Failure to submit documents or other information as defined by the Commission decision, or submission of unreliable or false data shall lead to the imposition of a fine of five hundred thousand AMD. Repetition of the stipulated violation during one year shall lead to imposition of a fine of two million AMD.
7. Preventing the Commissioners or Commission staff from performing the rights or duties reserved to them by this Law, the Statute or other legal acts shall lead to imposition of a fine of five hundred thousands AMD.

3. Control over economic concentration

3.1. Transactions subject to approval

The following is considered as concentration of economic entities:

a) Amalgamation or merger of economic entities;

b) Acquisition of assets or shares of one economic entity by another if the acquisition, per se or together with the assets or share already possessed by the acquirer, constitutes 20% of assets or shares of such economic entity;

c) Any amalgamation of economic entities as a result of which one economic entity may, directly or indirectly, influence on the decision making or competitiveness of another economic entity.

3.2. Approval / notification thresholds

See below

3.3. “Groups” and “intragroup deals”

n/a

3.4. Exceptions from transaction approval requirements

1. Any concentration leading to a dominant position shall be prohibited, except for cases when it promotes the interests of consumers and (or) the development of a competitive environment in the product market.

2. A concentration which is subject to declaration or leads to a dominant position shall be permitted on the basis of the Commission's decision.

3. It shall be prohibited to practice or participate in concentration subject to declaration or leading to a dominant position prior to the adoption of Commission's decision.

4. Enacted prohibited concentration shall be subject to liquidation (annulment, ceasing) according to the procedure defined by the legislation.

3.5. General approval procedure

In RA the notification or approval process is the by the ***declaration*** process. Concentration of economic entities, before its practicing or participation therein, shall be subject to declaration if:

a) The joint value of assets of the participants was at least 3 billion AMD in the financial year preceding its establishment;

b) Participants operate on the same product market, and the joint value of their assets was at least 1 billion AMD in the financial year preceding its establishment;

c) The value of assets of one of the participants was at least 3 billion AMD in the financial year preceding its establishment;

d) Participants operate in the same product market, and the value of assets of one of them was at least 1 billion AMD in the financial year preceding its establishment.

The declaration form shall consist of the:

a) Name, residency (location) address and business address;

b) Financial statements of annual activity as of the end of the year preceding the declaration and the auditing conclusion concerning them. If one of the concentration participants started its activity in that year, the financial statements and auditing conclusion concerning them shall be presented as of the end of the month preceding the declaration.

c) Volumes of products sold during the preceding year according to their assortment, as well as the description of production capacities;

d) Other information referring to the product market and the activities of the market participants, if the declarer so wishes.

The procedure for the declaration of concentration and the form of declaration shall be defined by the Commission.

3.6. Implications of a failure to obtain approval

See point 2.6

4. Current case law trends

Anticompetitive agreement

1. About "Sale of air tickets for the direction "Yerevan - Antalia (Turkey) - Yerevan" commodity market - SCPEC RA decision N 121-A, October 19, 2005

Abuse of dominant position

1. About imposing penalty on "ArmenTel" CJSC - SCPEC RA decision N29-A, Mart 10, 2006
2. About violation of RA law "On the Protection of Economic Competition"- SCPEC RA decision N 105-A, December 15, 2003
3. "Cellular Communications" commodity market - SCPEC RA decision N 95-A, October 22, 2003
4. About imposing penalty on "ArmenTel" CJSC - SCPEC RA decision N 38-A, April 19, 2002

Unfair competition

1. Concerning the action of "Autumn 2005" - SCPEC RA decision N 122-A, October 19, 2005
2. "Refreshing waters" commodity market - SCPEC RA decision N 145-A, October 20, 2004
3. On the basis of application-compliant of "M.W. Chemical Group" - SCPEC RA decision N 123-A, September 01, 2004
4. "Medicine" commodity market - SCPEC RA decision N13-A, February 28, 2003

About the results of the research into other violations of the RA Law "On the Protection of Economic Competition"

1. About the results of the research conducted into commodity markets of "Services of leased international systems for accessibility of Internet connection" and "Services of international accessibility of the given information (for accessibility of Internet connection)" - SCPEC RA decision N 129-A, November 19, 2005
2. About the discussion on application of "Aeroflot-Don" company - SCPEC RA decision N 116-A, August 02, 2004
3. About research in the sphere of outer advertisement - SCPEC RA decision N 101-A, July 09, 2004
4. "Medicine" commodity market - SCPEC RA decision N 109-A, December 24, 2003
5. On the basis of application of "Alliance plus" LLC - SCPEC RA decision N1-A, January 29, 2003

5. Basic trends in the development of antitrust laws in 2011-2012

The Commission is working on further developing the law to streamline the processes and procedures in relation to antitrust enforcement and to properly define the powers and competences of the Commission to avoid possible misinterpretations and improper and inefficient enforcement of the legislative provision. Draft was adopted in the first reading in November/December 2010 and its final adoption is scheduled for 2011.

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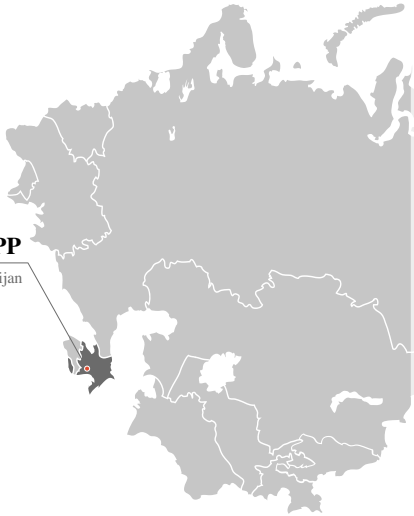

FINA LPP

Baku, Azerbaijan

CIS LCN Member for Azerbaijan

FINA LLP was founded in 2002 in Baku and offers a variety of domestic and international business and commercial legal services in Azerbaijan. This leading Azeri firm seeks to establish long-term relationships with its clients, and to provide effective solutions to their problems based upon a clear understanding of their needs. All attorneys of FINA LLP maintain the same standards of professional responsibility and performance that clients would expect from them practicing in the world's leading commercial centers.

Overview of antitrust laws in Azerbaijan

Nariman Ramazanov, Managing Partner, FINA LLP
Kamala Khalilova, Senior Lawyer, FINA LLP

1. Overview of anti-monopoly and competition regulations and authorities

1.1. Underlying anti-monopoly and competition regulations

General principles of protection of consumers rights and state guarantees of prevention of unfair competition and monopoly activity in Azerbaijan are provided by the Articles *15, 16, 31, 39, 50, 57, 59, 68, 71 and 72* of the Constitution of the Azerbaijan Republic dated 12 November 1995.

1.1.1. International and intergovernmental agreements, treaties and regulations on anticorruption and competition

- The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, United Nations, 1980;
- General Principles on the Protection of Consumers Rights approved by the General Assembly of UN No 39/248, dated 09 April 1985;
- CIS Intergovernmental Treaty on the Implementation of a Coordinated Competition Policy, dated 23 December 1993;
- Competition related extracts from the "Partnership and Cooperation Agreement" signed between the European Communities and their Member States and the Republic of Azerbaijan. European Council and Commission Decision, dated 31 May 1999 (99/614/EC, ECSC);
- Agreement for Implementation of the Harmonized Antimonopoly Policy, dated 25 January 2000 (*effective in Azerbaijan since 04 November 2000*)

Annex 1. Regulations on the Prevention of Monopolistic Activity and Unfair Competition, dated 25 January 2000

Annex 2. Regulations on the Interstate Council for Antimonopoly Policy, dated 25 January 2000;

- European Neighbourhood Policy (Article 66), (*Decision of the EC on the 18 June 2004 on adoption of Azerbaijan as a member*);
- Agreement for Cooperation of the CIS Member States in the Sphere of Regulation of Advertising Activity, dated 19 December 2003;
- Treaty on Cooperation between the Government of Azerbaijan and the Government of Bulgaria in the sphere of antimonopoly policy and protection of competition, 2007.

1.1.2. Codes

- Civil Code of the Azerbaijan Republic effective from 01 September 2000 (ratified by Law No 779-IQ, dated 28 December 1999 and gained legal effect by Law No 886-IQ, dated 26 May 2000);
- Administrative Infringement Code of the Azerbaijan Republic effective from 01 September 2000 (ratified by Law No 906-IQ, dated 11 July 2000);
- Criminal Code of the Azerbaijan Republic effective from 01 September 2000 (ratified on 30 December 1999).

1.1.3. Laws

- Law on Antimonopoly Activity, No. 526, dated 04 March 1993
- Law on Protection of Consumer Rights, No.1113, dated 19 September1995
- Law on Unfair Competition, No. 1049, dated 02 June 1995
- Law on Natural Monopolies, No. 590-IQ, dated 15 December 1998

1.1.4. Presidential Decrees and Resolutions

- Decree of the President of the Azerbaijan Republic "On Ensuring the activity of the State Service for Antimonopoly Policy and Protection of Consumers' Rights under the Ministry of Economic Development of the Azerbaijan Republic" (and also on approval of the Statute of the State Service for Antimonopoly Policy and Protection of Consumers' Rights under the Ministry of Economic Development of the Azerbaijan Republic), No 203, dated 25 December 2009;
- Decree of the President of the Azerbaijan Republic "On Improvement of the activity in the sphere of Antimonopoly Policy and Protection of Consumers' Rights" No 113, dated 24 June 2009;
- Decree of the President of the Azerbaijan Republic "On implementation of the Law "On Natural Monopolies" of the Azerbaijan Republic" No 107, dated 12 March 1999.

1.1.5. Regulations of the Cabinet of Ministers

- Rules "On Consideration of the Issues concerning violation of Antimonopoly Legislation" approved by the Cabinet of Ministers of the Azerbaijan Republic regulation "On Approval of the Rules on Consideration of the Issues concerning violation of Antimonopoly legislation" No 120 of 29 May 1998.

1.1.6. Legal-Normative Acts of the Central and Local Executive Power Bodies regulating antimonopoly and competition policy issues in Azerbaijan

- Rules "On Protection of Consumers' Rights and the Requisite Documents issued for violation of the legislation on Advertisements and the order of their Usage" approved by the State Service for Antimonopoly Policy and Protection of Consumers' Rights under the Ministry of Economic Development of the Azerbaijan Republic, No 2989, dated 05 September 2003;
- Rules "On Implementation of the Control Measures carried out in the Consumer Market" approved by the State Service for Antimonopoly Policy and Protection of Consumers' Rights under the Ministry of Economic Development of the Azerbaijan Republic, No 3544, dated 02 July 2007.

1.2. Antitrust authorities: structure and competencies

The state policy on prevention, restriction and suppression of monopolistic activity and unfair competition and on the coordination of activities of state bodies in this sphere is carried out by the State Service for Antimonopoly Policy and Protection of Consumers' Rights under the Ministry of Economic Development of the Azerbaijan Republic ("AMSAR") within the limits of its authorities and competences as provided by law and the Statute of AMSAR approved by the Decree of the President of the Azerbaijan Republic "On Ensuring the activity of the State Service for Antimonopoly Policy and Protection of Consumers' Rights under the Ministry of Economic Development of the Azerbaijan Republic" No 203, dated 25 December 2009.

AMSAR was established to replace the former "*State Antimonopoly Service and the State Service on Control over the Consumer Market*" under the Ministry of Economic Development of the Azerbaijan Republic in accordance with the Decree of the President of the Azerbaijan Republic "On Improvement of the activity in the sphere of Antimonopoly Policy and Protection of Consumers' Rights" No 113, dated 24 June 2009;

In fact, according to its Statute and the relevant Presidential Decrees on implementation of the antimonopoly and competition laws of Azerbaijan, AMSAR is delegated substantial powers and competences to regulate antimonopoly policy and unfair competition. The orders issued by AMSAR within its competences provided by law on the prevention, restriction and suppression of the monopolistic activity are legal requirements.

There are also some other entities such as state bodies (*State Service on Supervision over the Consumer Market under the Ministry of Economic Development, The Hygienic-Epidemiological Center under the Ministry of Health, The State Agency on Standardization, Metrology and Patent of Azerbaijan, etc.*), public unions and associations, NGOs, etc. that are actively involved (within the limits of their powers and competences) in the process of prevention and restriction of antimonopoly activity and unfair competition in Azerbaijan (*for example, the "Union of Independent Consumers", registered as an NGO in Azerbaijan*).

1.3. Extraterritoriality

The provisions of the Azerbaijani antimonopoly and unfair competition laws are valid and effective in the territory of Azerbaijan Republic and are applicable to all legal entities and natural persons. These laws shall also apply to cases when agreements and contracts concluded between economic subjects, executive power and administrative bodies with natural persons and legal entities of foreign countries lead to direct or indirect prevention, restriction or distortion of competition within the Azerbaijani market. However, the antimonopoly regulations shall not be applicable to relationships resulting from the rights of economic subjects to inventions, trade marks and authorship with the exception of deliberate use of such rights with the aim of restriction of competition.

As Azerbaijan (*represented by AMSAR*) is an adopted partner of the European Neighbourhood Policy ("*ENP*") under the Decision of European Commission of 18 June 2004, it is also actively involved in the process of cooperation with the European Commission and with other ENP partners in relation to antimonopoly regulations and infringements of competition and antimonopoly laws.

AMSAR also closely cooperates with the other CIS countries in the antimonopoly and competition area within the framework of the Interstate Council for Antimonopoly Policy (ICAP), established in 1993 for the purposes of coordinating activities among member states in the sphere of competition, the rapprochement of national laws and the creation of a legal basis for the elimination of monopolistic activities and unfair competition in the CIS common economic area. The main principles of coordination and cooperation among the CIS countries in the competition sphere are outlined in the Intergovernmental Treaty on Implementation of a Coordinated Competition\Antimonopoly Policy, signed on 23 December 1993 in Ashkhabad (Turkmenistan).

The 7th (on 02-04 October 1996), 22nd (26 September 2005) and 26th (20-21 September 2007) sessions of the Interstate Council for Antimonopoly Policy were held in Baku, Azerbaijan.

Azerbaijan (represented by AMSAR) is also a member of the International Competition Network (ICN), which is the only international body focusing exclusively on competition law enforcement. Its members represent national and multinational competition authorities.

2. Prevention of monopolistic activities and unfair competition

2.1. Overview

2.1.1. Identification of monopolistic activity and unfair competition under Azerbaijani law

Types and forms of monopolistic activity and unfair competition as specified by the acting law of Azerbaijan, are as follows:

1) Types of monopolistic activities:

- ***State monopoly*** resulting from the illegal actions of the relevant central executive power bodies which leads or may lead to the restriction or elimination of competition and to the infringement of the interests of economic subjects and customers:
- ***Branch monopoly*** resulting from the illegal actions of branch administrative bodies;
- ***Local monopoly*** resulting from the illegal actions of local bodies of executive power (regional, city and constituent administrative-territorial bodies);
- ***Monopoly of economic subjects*** resulting from the illegal actions of economic subjects creating or maintaining a dominant position in the national Azerbaijani market;
- ***Financial-credit monopoly*** resulting from the illegal actions of financial-credit organizations;
- ***Monopoly formed as a result of horizontal and vertical agreements between market subjects*** resulting from the conclusion of illegal horizontal and vertical agreements between the central\local executive power and administrative bodies, between economic subjects or between the bodies of executive power, administration and economic subjects which cause or may cause a restriction of competition;
- ***Natural monopoly –*** special form of antimonopoly control, over activity of the administrative bodies and economic subjects which, abusing their own power and authority as the only monopolist in the sphere of production of one or many kinds of commodities and services, cause damage to the interests of the country, rights of economic subjects and consumers[1];
- ***Patent-license monopoly*** resulting from the illegal actions of administrative bodies and economic subjects abusing, with the objective of restriction or elimination of competition in some market, their monopolistic right on patents and licenses;
- ***Monopoly for use of subsoil*** resulting from unlawful actions of administrative bodies and economic subjects (users of subsoil) on use of subsoil.

2) Forms of unfair competition in entrepreneurship:

- copying of economic activity of a competitor;
- discrediting of economic activity of a competitor;
- interference into the economic activity of a competitor;
- unfair entrepreneurship;
- unscrupulous business behaviour
- delusion of consumers

[1] *(the list of goods (works, services) prices of which are regulated by the state (Tariff Council) is approved by the Regulation of the Cabinet of Ministers of Azerbaijan No 178, dated September 28, 2005)*

2.1.2. Methods of prevention of monopolistic activity and unfair competition

2.1.2.1. Restriction of monopoly activity

In the case of economic subjects abusing their dominant position to carry out monopolistic activity and where these actions result in the restriction of competition and the violation of consumers' rights and interests, and the forced breakup of the economic subject does not seem possible for technological, territorial or organizational reasons, then AMSAR may apply to the respective executive power and administrative bodies with any of the following proposals concerning:

- the establishment of state control over the prices of products (or services) of the economic subjects which keep the monopolistic position in the market and, in certain cases, the fixing of permissible limits on market prices of one or another products (or services);
- the application of progressive tax rates on the revenue of the economic subjects in accordance with their market share;
- the application of unified standards for produced commodities with the objective of the simplification of entry barriers to that market;
- the replacement of accelerated depreciation with normative depreciation;
- changing the terms of credit allotment to make them more rigid;
- the forced licensing of new patents at relatively moderate cost whenever the economic subject abuses its right to patent;
- the annulment of limitation provisions in agreements concluded between the market subjects whenever they individually or collectively exercise monopolistic activity;
- the suspension of all kinds of state support;
- the establishment of restrictions on barter operations;
- the annulment of issued licenses on import-export operations.

2.1.2.2. Termination of monopolistic activity

If the economic subjects occupying a dominant position begin monopolistic activity and their actions lead to significant restriction of competition, AMSAR, where the organizational, technological and territorial conditions allow, may make a decision about the forced break up of the economic subject. In this case, AMSAR, taking into account the specificities of economic subjects, establishes the terms of their forced break up for a minimum 6 month period.

2.1.2.3. Right to information

AMSAR has the right to obtain any information necessary for implementation of its obligations and functions, including written (or oral) explanations in connection with violation of antimonopoly legislation by state control bodies, organization-administrative structures and economic subjects. The State Committee of the Azerbaijan Republic on Statistics provides AMSAR with statistical data determining the dominating position of enterprises in the national market based on an agreed program on keeping a State Register of enterprises-monopolists.

The enterprises-monopolists should present a report about monopolistic areas of their activity based on state statistical accountancy approved in the order stipulated by the State Committee on Statistics at the request of AMSAR. It is the obligation of AMSAR to keep confidential the information obtained from economic subjects within the limits of the provisions and requirements of antimonopoly law.

2.1.2.4. Obligation to disclose the information

Legal entities, occupying a dominant position in the local commodity market and having a special or exclusive right or natural monopoly, based on methods stipulated by the legislation, are obliged to disclose any information with regard to terms of goods or services offer and their prices, changes in such terms and prices at least 30 days prior to offer of such conditions, or prior to making changes to such terms and prices.

2.2. Dominance

In fact, the antimonopoly legislation of Azerbaijan does not prohibit or restrict a *dominant position* of market power *per se*. Only abuse of a dominant position is prohibited by the law. The Antimonopoly Law of Azerbaijan (*Article 4*) defines *dominant position* as an exclusive position of an economic subject enabling it to exert decisive influence on goods circulation in a given market or to limit access to a relevant market for other companies. The key feature here is the use of an additional criterion - *market share* - for determination of the dominant position. This criterion is defined as a market share in excess of *35%* or by a maximum rate established by the law or by the antimonopoly authorities.

The following acts or behaviour are considered by Azerbaijani antimonopoly legislation as being abusive:

- Creation of market access barriers for other companies;
- Maintaining or raising prices for the purpose of obtaining monopolistically high profits;
- Discriminatory (i.e. unjustifiably differentiated) pricing or terms and conditions for the supply or purchase of goods;
- Making the supply of particular goods dependent upon the acceptance of conditions in which a contractor is not interested or which do not relate to the subject of the contract;
- Withdrawing goods from circulation to create a scarcity or to increase prices;
- Refusing to conclude a contract with a particular buyer (customer) in the absence of alternative sellers/buyers;
- Violation of existing business relations with the contractors without preliminary notification and consent of the contractor;
- Reducing or stopping production of goods in demand (provided they can be produced without incurring losses).

It is expected that these provisions may be changed in the process of further modernization of the law. The list of actions defined by the antimonopoly laws as abuse of a dominant position is not exhaustive, thus enabling AMSAR to include other kinds of abuse in the enforcement process.

The natural monopoly entities (which are mostly state or state owned monopoly entities) with a dominant position in their respective markets are recognized as monopolistic entities. The antimonopoly law of Azerbaijan defines the "*natural monopoly*" as a status of commodity market when satisfaction of demand is more efficient in conditions of the absence of competition due to specific technological characteristics of production and when the commodity produced (sold) by the monopolist cannot be replaced with another commodity. The spheres of activity of a natural monopolist are specified by antimonopoly law and the filing and state registration of the natural monopolist is carried out by the respective executive power body (*by AMSAR, the Ministry of Economic Development of Azerbaijan*).

2.3. Monopolistic agreements and concerted actions

As a rule the antimonopoly and competition laws of Azerbaijan prohibit horizontal agreements between rival or potentially rival firms and apply a rule-of-reason approach to vertical agreements (between enterprises at different stages of the manufacturing and distribution processes).

The following kinds of horizontal and vertical agreements are prohibited by the Azerbaijani antimonopoly legislation:

- agreements concluded between competing subjects if one of them occupies dominating place in the market, and leading to monopolization of the market by means of a restriction of economic activity, as follows:

  i) *division of the market according to territorial principle, volume of sales or purchases, assortment of commodities or contingent of buyers (customers);*

  ii) *establishment of fixed prices (tariffs), discounts, extra payments (extra charges);*

  iii) *restriction on entry to the respective market and boycott against competitor, refusal in business relations with competitor;*

  iv) *coordination of production quotas aimed to artificially change the amount of tender;*

  v) *increase, decrease or maintenance of prices at one and the same level in auctions and sales;*

  vi) *blocking market prices;*

  vii) *establishment of price discrimination;*

  viii) *holding several administrative posts in two or more market subjects producing and selling similar products by one and the same person*

- agreements between non-competing market subjects, one of them occupying a dominating position, and another being its supplier or buyer (customer) which are, or might become, the cause of restriction of competition in the market;
- agreements which by joining or amalgamation of economic subjects, and as a result of their integral market share, results in or strengthens their dominating position;
- agreements on the establishment of joint ventures incorporated between market subjects with the objective of restriction or elimination of competition;
- agreement about acquisition of a foreign company by an Azerbaijani company which might result in restriction of competition in the national market;
- binding agreements which put out conditions of sale of specific products or purchase of specific products;
- exclusive agreements requesting purchase of some product from a specific seller rather than from its competitors;
- agreements leading to the establishment of standards on produced commodities with the objective of the replacement of competitors from the market and creating in such a way barriers to entry of other economic subjects to the market.

As can be noticed this list of prohibited horizontal and vertical agreements stipulated by the law is, as a rule, not definitive, which means that other kind of agreement between rivals may also be prohibited by AMSAR.

The agreements between rival firms are also considered illegal if at least one of these firms occupies a dominant position in the market and if these agreements lead to monopolization of the markets.

Any concerted actions on mergers and acquisitions of economic entities are considered illegal if they lead to the creation or strengthening of these companies' dominant positions in Azerbaijan.

2.4. Unfair competition

Unfair competition is determined by Azerbaijani law as an action of a market-oriented subject aimed to achieve advantage in entrepreneurship through application of illegal and unscrupulous methods, which can prejudice other market-oriented subjects (competitors) or lessen their business authority.

The forms of unfair competition in entrepreneurship prohibited by the Azerbaijani competition law are specified under the p. 2.1.1 above.

The profit, illegally raised by economic subjects through unfair competition, is withdrawn to the state budget in accordance with resolution of court.

Remuneration of losses, caused by unfair competition, is regulated in accordance with civil legislation of the Azerbaijan Republic.

2.5. Antitrust investigation

The order and terms of an antitrust investigation and the adoption of the appropriate decisions on violation of the requirements of antimonopoly and competition legislation in Azerbaijan are regulated by the Rules "On Consideration of the Issues concerning violation of Antimonopoly legislation" approved by the Regulation of the Cabinet of Ministers of the Azerbaijan Republic "On Approval of the Rules On Consideration of the Issues concerning violation of Antimonopoly legislation" No 120, 29 May 1998 ("Rules").

Under the Rules an antitrust investigation may be initiated and started on the basis of information and an application on infringements submitted to AMSAR by:

- individuals and legal entities acting as local market subjects;
- executive power bodies, municipalities, respective state and governmental authorities;
- NGOs, and other public entities;
- mass media; and
- by AMSAR in the course of its activities.

An application on infringements submitted to AMSAR is considered by the commission ("Commission") established by AMSAR (which usually consists of 3 members) within a month from the date of the registration of an application.

While investigating the application, in case the Commission reveals any breach of antimonopoly law, it issues an order on starting the legal proceedings and sends copies to all parties concerned by registered mail. Legal proceedings take 3 months from the date of issuance of the order on starting the legal proceeding and can be prolonged by AMSAR for another 6 month period if necessary.

Information on the start of antitrust proceedings may also be published on the official website of AMSAR.

If the Commission identifies any evidence of criminal activity undertaken by the heads of economic subjects, individual entrepreneurs and officials of executive power bodies in the course of investigation, the commission reaches a decision on referring the materials of the case to the respective state administrative bodies.

The proceeding is to be held by participation of the representatives of concerned parties.

The decision of the Commission, which may be appealed in a court order, is taken by a majority vote of the Commission members and may contain a request that the economic subject stops violations, and\or eliminates the consequences of breaches by specifying deadlines.

The Commission's decision is to be announced immediately upon completion of proceeding and comes into effect from the date of that announcement. The Commission may apply additional financial sanctions, if the instructions specified in the decision of the Commission are not fulfilled in due time, by initiating execution of its instructions in a court order.

2.6. Implications for infringers

In case of violation of the provisions of antimonopoly and competition regulations economic subjects, executive power bodies and their officials should:

- based on instructions of AMSAR, stop violations, restore original situation, change or annul the agreement and undertake other actions envisaged in said instructions;
- repay the profit obtained as a result of violation of the antimonopoly law to the state budget in the order envisaged by the legislation;
- reimburse the losses;
- pay the fines.

The fines applied to the economic subjects, their managers and also the officials of respective executive power bodies for violation of the requirements of antimonopoly regulations shall be as follows:

- in case of non-fulfillment of legal instructions of the respective executive power body within stipulated terms, for each day of delay - up to fifty five manats, but not exceeding in total twenty two thousand manats;
- in the form of financial sanction - up to five thousand five hundred manats in case of non-filing for obtaining the prior consent of AMSAR and for non-presentation of information and documents specified by the antimonopoly law to AMSAR or presentation of wrong information.

The financial health of economic subjects is taking into consideration when determining the level of fines applied by AMSAR.

Penalties in the form of financial sanctions are levied to the state budget within 30 days after the date of decision taken about it by AMSAR.

In case of late or partial payment of the penalty by the economic subjects AMSAR may apply to court about payment of a fine of 1% of the total sum or the unpaid part of the penalty for each day of delay.

Persons shall also bear *criminal responsibility* for monopolistic actions and violation of competition regulations stipulated by the legislation in accordance with the provisions of the Criminal Code of the Azerbaijan Republic.

Competent officials of AMSAR are responsible in an order established by the legislation for non-disclosure of information that is either a state or commercial secret and also for causing damage to economic subjects and the state as a result of wrong performance of their official duties.

3. Control over economic concentration

3.1. Transactions subject to approval

Under the provisions and requirements of the antimonopoly law of Azerbaijan the following transactions, concluded between economic subjects shall require prior approval and consent of AMSAR:

- amalgamation and association of economic subjects (if it results in the establishment of economic subjects, the share of which exceeds 35% at respective commercial market);
- association and amalgamation of economic subjects, the total value of whose assets exceeds 75 000 times the minimum salary (which is 6,373.000 AZN);
- liquidation (except for cases of liquidation of enterprises as a result of a court decision) and division of the enterprises, the total value of assets of which exceeds 50 000 times of the minimal amount of salary, and also national and municipal enterprises (if it results in the establishment of economic subjects, the share of which exceeds 35% at respective commercial market).

Establishment, reorganization and liquidation of economic subjects, envisaged above is to be carried out on the basis of the consent of AMSAR. The persons or economic subjects, making the decision about the establishment, reorganization and liquidation of specified economic subjects must apply to AMSAR for its prior consent. The respective agreement and/or resolution on establishment, reorganization or liquidation of the business entities and information about volumes of sale of main products (goods, services, and works) at the respective commercial market should be enclosed in the application.

Also according to the provisions of Article 13-1 ("*State control over observance of antimonopoly legislation in carrying out of transactions, concluded between economic subjects when purchasing the shares*") of the Law of the Azerbaijan Republic "On Antimonopoly Activity", the following transactions concluded between economic subjects such as:

- when purchasing more than 20% of shares constituting partnership capital of one economic subject and giving the voting right to another economic subject - association of economic subjects or group of persons carrying out control over property of each other (these restrictions are not applied to the constitutors or founders when establishing an economic subject);
- if in a case of transfer of main means of production and/or non-material assets of one economic subject to the ownership or use of another economic subject (association of economic subjects or group of persons carrying out the control over property of each other), the balance value of the property, being the subject of the transaction, exceeds 10% of the main means of production and non-material assets of economic subject, alienating this property;
- when an economic subject (association of economic subjects or group of persons carrying out the control over the property of each other) purchases the rights of the other economic subject specifying the terms of business activity and/or giving the possibility to carry out the functions of its supreme management body are also subject to obtaining the prior consent of AMSAR if:
- total balance value of assets of economic subjects specified above exceeds the amount of 75 000 times of the minimal amount of salary (which is 6,373,000 AZN);
- the commercial market share of one of economic subjects exceeds 35%;
- the economic subject, purchasing shares controls the activity of an economic subject, alienating these shares.

The applicant for the conduct of transactions such as establishment, reorganization and liquidation of economic subjects and also the transactions, concluded between economic subjects on purchasing shares which meet the "antimonopoly approval" criteria specified above should submit to AMSAR: i) the application; and ii) the respective agreement and/or resolution on establishment, reorganization or liquidation of the business entities; and iii) information and\or documents about the volumes of sale of main products (or services) at the respective commercial market enclosed in the application. In spite of the strict provision

of the law prohibiting AMSAR from demanding any other documents from the applicant(s) or economic subjects , in practice AMSAR may demand some additional documents depending upon the specifics of the case. For example, the aforementioned list does not include submission of any By-laws, documents or information about shareholders\founders, decisions makers - competent officials, annual reports, etc of the applicant including the other parties to transaction, however, those documents can and will be required by AMSAR.

If AMSAR refuses to grant its prior consent for whatever reason, the applicant has a right: i) to appeal in an administrative order to the highest state body; and to also ii) raise a claim in the relevant Economic Administrative court of Azerbaijan for the annulment of the decision of AMSAR.

3.2. Approval/notification thresholds

All transactions of the economic subjects on establishment, reorganization and liquidation of specified economic subjects and also transactions, concluded between economic subjects on purchasing the shares meeting the criteria provided under p. 3.1 must be carried out upon receipt of a prior written consent of AMSAR.

However, the law does not clearly specify the time limits or deadlines when (at what stage of transaction) and namely by whom (from the various parties in the transaction) the application for approval should be made.

3.3. "Groups" and "intragroup deals"

The acting Azerbaijani antimonopoly and competition legislation does not specifically provide any express rules or exemptions for so called "*groups*" or "*intra-group*" transactions. Both group and intra-group transactions are still subject to the prior approval of AMSAR to determine if such transactions meet the required criteria.

Under the requirements of antimonopoly law the intra-group transactions between the economic subjects on:

i) purchasing more than 20% of shares constituting partnership capital of one economic subject and giving the voting right to other economic subject-association of economic subjects or group of persons controlling each other's property (*however, these restrictions are not applied to the constitutors or founders of economic subjects at the initial stage of establishment of the economic subject*);

ii) transfer of main means of production and/or non-material assets of one economic subject to the ownership or use of another economic subject (association of economic subjects or group of persons controlling each other's property), the balance value of the property, being the subject of transaction, exceeds 10% of main means of production and non-material assets of economic subject, alienating this property;

iii) acquisition of the rights of the other economic subject specifying the terms of business activity and/or giving the possibility to carry out the functions of its supreme management body (when the economic subject - association of economic subjects or group of persons controlling each other's property)

are also subject to prior approval and consent of AMSAR if:

- total balance value of assets of economic subjects specified above exceeds 75 000 times of the minimal amount of salary (which is 6,375,000 AZN);
- the respective commercial market share of one of economic subjects exceeds 35%;

- the economic subject purchasing shares controls the activity of economic subject, alienating these shares.

3.4. Exceptions from transaction approval requirements

The acting antimonopoly and competition legislation does not provide any approval and/or consent requirements by AMSAR:

i) for the transactions on the transfer of the rights of economic subjects to inventions, trade marks and authorship except cases of deliberate use of such rights with the aim of the restriction of competition;

ii) transactions on the establishment of economic subjects by the constitutors or founders of economic subjects even if the newly established economic subject falls under the criteria which require AMSAR's prior approval and consent;

iii) the transactions covered by the laws on ratification of the Azerbaijani Production Sharing Agreements (PSA) and main pipeline and other similar agreements and deals;

iv) all other kind of transactions which are not covered by the provisions of p. 3.1. above.

3.5. General approval procedure

The general rule is that the parties to transaction must apply to AMSAR requesting its prior approval for the transactions on establishment, reorganization and liquidation of the economic subjects and also the transactions concluded between the economic subjects on purchasing the shares that meet the necessary criteria provided by antimonopoly law to obtain prior approval and the consent of AMSAR.

But the law does not clearly specify exactly which of the parties to transaction should act as an "*applicant*" for getting the prior consent of AMSAR – the party alienating the shares and/or purchasing party or the economic subject whose shares are subject to alienation. Therefore, due to the gap in the current legislation, in practice these issues are usually negotiated and agreed with the competent officials of AMSAR before filing the application.

According to the provisions of Article 13 of the Law "On Antimonopoly Activity", AMSAR should inform the applicant in writing about its decision not later than 15 days after the receipt of the required documents attached to the application.

There is no payment of "filing fee" required by law.

3.6. Implications of a failure to obtain approval

First of all, the transactions conducted without obtaining a prior consent of AMSAR which are subject to such consent under the requirements of law may be considered invalid by court following the claim and action raised by AMSAR.

Besides, a financial sanction up to five thousand five hundred manats can be applied by AMSAR to the economic subjects for the conduct of such transactions without obtaining a prior consent and also for non-presentation of information and documents specified by the antimonopoly law.

The transaction can be restored only after payment of financial sanctions applied by AMSAR and receipt of prior consent of AMSAR.

4. Current Case Law trends

The major focus in investigating antitrust law violations and the enforcement of antitrust and competition laws in Azerbaijan is on the supervision and control of the activities of local *medium and small scale entities* involved in entrepreneurial activities. However, the practice of revealing large scale competition-restrictive arrangements and concerted actions of the key-players, such as producers and service providers with a dominant position in respective sectors of economy is quite limited. The relevant information and publications on infringements and violation of antitrust law investigated by AMSAR can be reviewed by visiting the official website of AMSAR at: http://www.consumer.gov.az/az/xeberler.

5. Basic trends in the development of antitrust laws in 2011-2012

Within the framework of the Interstate Council on Antimonopoly Policy, AMSAR and other antimonopoly authorities of Azerbaijan oversee the harmonization of national antimonopoly competition laws, draft model laws and guidelines, coordinate their joint activities, exchange information and organize consultations on cases with a cross border effect on competition. These activities lead, first of all, to the creation of a harmonized business environment with the other CIS countries, promoting the free movement of goods and services and reducing market entry barriers. One of the basic trends in development of antitrust and competition regulations in Azerbaijan is the recent initiative taken by the Azerbaijani government in unifying the separate individual laws and legislative acts on unfair competition and antimonopoly activity in a single Code. Consequently, the new draft of the Competition Code of Azerbaijan has already been worked out and submitted to Milli Mejlis – Parliament of the Azerbaijan Republic. It is most probable that on adoption of this Code the current antimonopoly and competition laws of Azerbaijan will lose their legal effect, and the existing gaps and collisions in the current competition and antimonopoly laws will be removed.

* * *

Due to the character of its sphere of activity FINA LLP law firm is in close contact with the authorized representatives and officials of AMSAR (*including the Ministry of Economic Development of Azerbaijan*) and takes an active part in the process of development of antitrust and competition regulations of Azerbaijan. The attorneys of FINA LLP participated in drafting the Civil Code of Azerbaijan (which includes the clauses on antitrust and unfair competition regulation), and also in drafting changes and amendments to the Foreign Investments Protection Law of Azerbaijan. Moreover, under the relevant TACIS Project the attorneys of FINA LLP were actively involved in preparation of the package of laws regulating the energy sector of Azerbaijan such as: Law on "Gas Supply"; Energy Law; Law on "Electro-Energy Industry"; Oil and Gas Law; etc. Consequently, the drafts of these laws were submitted to the legislative body of Azerbaijan for consideration and the attorneys of FINA LLP took part in internal discussions of the permanent commission of the Parliament of Azerbaijan while considering and ratifying these laws. All of the draft Laws (*with the exception of the "Oil and Gas Law"*) were ratified and adopted by the Milli Mejlis of Azerbaijan with some slight changes and amendments.

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Vlasova, Mikhel and Partners was created in 1991. For the last three years the company was recognized as the best law firm of the country by the Ministry of Justice of the Republic of Belarus. For the five years in a raw Global Chambers recognized law firm Vlasova, Mikhel and Partners as the leading Belarusian consultant in commercial law. Partners of the firm are on the top of the list of best Belarusian lawyers. The company has more than 20 lawyers who ensure legal support of businesses of both national and foreign companies in Belarus. Vlasova, Mikhel and Partners has been selected as local counsel by many international law firms.

Overview of antitrust laws in Belarus

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1. Overview of competition regulations and authorities

1.1. Underlying competition regulations

Competition regulations have not yet reached a high degree of development in Belarus. As of now these regulations comprise:

- The Law of the Republic of Belarus "On Counteraction to Monopolistic Activities and Development of Competition" No. 364-Z of 10 December 1992 (hereinafter – the **Antimonopoly Law**);
- Edict of the President of the Republic of Belarus "On Certain Measures for Improvement of the Antimonopoly Regulation and Development of Competition" No. 499 of 13 October 2009;
- Resolutions of the Ministry of Economy on practical aspects of state antimonopoly control (determination of dominant market position, procedure for implementing merger control, procedure for conducting antimonopoly investigations and imposing sanctions, etc.)

1.2. Antitrust authorities: structure and competencies

Thus far there is no independent and separate antimonopoly authority in the Republic of Belarus. The functions of antimonopoly authorities are vested on the special division of the Ministry of Economy - Department of Pricing Policy (**DPP**).

Main competencies of the DPP are:

- monitoring of competition on various products' markets;
- overseeing behaviour of dominant entities, precluding abuse of market power and dominant market position;
- revealing and voiding prohibited competition-restrictive agreements and arrangements;
- exercising state control over economic consolidation, creation of associations and unions of legal entities.

DPP is entitled to issue binding orders requiring stopping competition-restrictive practices.

1.3. Extraterritoriality

Unless binding international treaties state otherwise, Article 3 of the Antimonopoly Law extends its applications to the situations whereby competition-restrictive actions are committed outside the territory of Belarus, but affect or may affect competition or entail other adverse consequences at the Belarusian product market(s).

Having said that, practice of extraterritorial application of Belarusian laws is quite limited and mainly deals with merger control.

DPP on a regular basis cooperates with other (mainly CIS) competition authorities through exchange of information, holding joint training sessions and participation in the Interstate Competition Policy Council.

The legal basis for the Interstate Competition Policy Council's work is the Treaty on Conducting of Coordinated Antimonopoly Policies of 25 January 2000 (between Belarus, Russia, Ukraine, Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan and Uzbekistan).

In addition to that Belarus is a party to the Agreement on Uniform Principles and Rules of Competition. This Agreement was reached on 9 December 2010 between Belarus, Russia and Kazakhstan and envisages closer cooperation of the contracting parties' national competition authorities and grants supra-national competition control competence to the Commission of the Customs Union.

2. Prevention of monopolistic activities and unfair competition

2.1. Overview

DPP is to ensure observance of the antimonopoly regulations in Belarus. To achieve this DPP periodically conducts monitoring of competition at various product markets, reveals dominant entities and competition-restrictive practices and implements control over transactions that may result in monopolistic concentration.

In the recent years DPP succeeded in limiting market powers of the dominant entities through various instruments (mainly control over transactions in respect of such entities and their price-formation policies), although merger control regime remains underdeveloped.

Grounds for liability for infringement of antimonopoly regulations in Belarus are rather standard: a company might be held liable in case it is found to abuse its dominant market position, engage in prohibited competition-restrictive practices (agreements and concerted actions), use unfair competition methods or do large transactions without approval of the antimonopoly authority (when it is required).

There are little specifics in approach of Belarusian competition regulations to various sectors and various product markets. For example, there are specific rules for calculation of the market share and, accordingly, dominancy determination in financial services sector. DPP also applies antimonopoly rules to acquisition of the financial sector entities with certain exemptions (only to those entities having a dominant position at the market).

2.2. Dominance

Dominant market position under Belarusian laws extends to exclusive market position of a given economic entity or several entities of such products that do not have alternatives, or on a market of products that do have alternative products but where such market position of an entity (entities) provides it (them) with an opportunity to exercise decisive control over general conditions of the market or to restrict market access for other entities.

Basic criteria to qualify for a dominant market position are:

1) exceeding of certain market share (market shares for different sectors are provided by the Ministry of Economy's regulations) except for the cases of a state or other lawful monopoly;

2) DPP's determination that based on the stable market share of a given entity comparing to competitors of such entity and with regard to the easiness of market access and/or other parameters of the product market, market position of a given entity is dominant.

An entity might be found holding a dominant market position not only on the national (republican) market but also on a local (regional) market within the country. There is also a concept of "joint domination" by a group of entities.

Forms of abuse of dominant market position include *inter alia*:

- creating restrictions to market access by other entities;
- monopolistic price-fixing or price-setting;
- entering into pricing agreements limiting counterparty's ability to freely set prices;
- tied-in arrangements;
- entering into discriminating agreements and agreements limiting counterparty's ability to freely choose its contractors.

However, there is a general rule that the abuse of a dominant market position might be justified by DPP as a matter of exception if a company in question succeeds in proving that operation of such practices is needed to implement requirements of statutory acts enacted in compliance with the Constitution of the Republic of Belarus, and that limitation of competition is being effected only inasmuch as it is unavoidable or required to precisely and duly implement relevant statutory acts.

2.3. Monopolistic agreements and concerted actions

Article 6 of the Antimonopoly Law deals with prohibited, competition-restrictive agreements and arrangements. It should be noted that not only formal written agreements but also informal arrangements and concerted actions are considered.

Non-exhaustive list of prohibited competition-restrictive practices includes:

- market sharing by territory, types and amounts of transactions, by price or by customers;
- restricting of market access by other entities;
- unjustified increases, decreases or maintenance of prices;
- unjustified limitation of production of goods and control of goods distribution in the markets;
- transactions with securities, currencies and financial facilities with the view to create, strengthen or preserve dominant market position;
- refusal to contract with certain counterparties.

Antimonopoly Law provides for an exemption whereby arrangements similar to the prohibited ones might yet be justified: it is required to demonstrate that general positive economic effect of an arrangement on a given product market or Belarusian economy would outweigh the negative consequences of competition restriction as well as that their implementation is expressly required by the statutory acts enacted in compliance with the Constitution of the Republic of Belarus.

Where commercial entities intend to enter into a transaction triggering competition-restrictive concerns, such entities may benefit from a formal procedure of DPP's review of the terms and conditions of the transaction and of DPP's approval of the transaction. The procedure is voluntary, not overly formalized and relatively quick: DPP is to issue or decline its approval within one month from the filing date.

2.4. Unfair competition

Unfair competitive practices are prohibited and challengeable in front of DPP by any parties suffering from unfair competition.

There are two main types of unfair competion:

- actions that may potentially result in confusion regarding the identity of commercial entities (unlawful use of trade names, trademarks, origin indications etc., unlawful copying of goods' package or appearance; trade in misleadingly identified goods, etc.)
- unlawful statements discrediting competitors, their products or commercial activities: direct and indirect (e.g. through any media) dissemination of wrongful discrediting information about commercial entities, their financial position, commercial activities, products and manufacturing capacities; dissemination of information damaging the commercial reputation of an entity, its personnel or shareholders, that may undermine commercial reputation of such entity.

2.5. Antitrust investigation

Investigations are mostly initiated by third-party complaints, however, DPP is entitled to start investigations at its own initiative if it finds competition-restrictive behaviour (e.g., as a result of routine monitoring of the markets).

The DPP investigation is to be concluded within one month, although the term is extendable to two months in case there is not enough evidence to reach a conclusion.

Procedural rights and obligations of the parties involved in investigation are not sufficiently regulated. Regulations only expressly provide that such parties (as well as DPP itself) may invite experts or specialists in a given sector if the investigation calls for some specific knowledge or skills.

Although regulations are silent on confidentiality, normally, confidentiality is preserved over the course of the proceedings. For example, technical experts and parties' representatives are required to maintain confidentiality of commercial secrets disclosed in the course of the proceedings.

DPP is entitled to seek explanations and request relevant documentation from the parties. As a result, DPP's enquiries are legally binding.

Based on the results of the investigation, DPP may issue a binding order requiring stopping infringements and imposing administrative fines on the infringing entity.

2.6. Implications for infringers

In the event that DPP issues a binding order an infringer is obliged to report about its implementation and to send DPP a "compliance notice" within the term specified in the order.

There are several administrative offences stipulated by Belarusian law to categorize infringement of competition regulations:

- failure to comply with binding orders of DPP;
- undue or late implementation of binding orders of DPP;
- submission of misleading information to DPP;
- engaging in prohibited competition-restrictive agreements and concerted actions.

Administrative penalty is the fine in the amount of up to 50 basic units (approximately USD$580). Besides imposition of administrative fines, another implication is that competition-restrictive arrangement may be challenged and invalidated in court.

Repeated infringements of competition regulations may result in personal criminal liability of an infringing entity's officers (major fine and/or up to 5-year imprisonment).

It should be noted that Belarusian antimonopoly regulations do not provide for any leniency programs – so far regulations do not offer exemptions from liability for companies that report about existing competition-restrictive arrangements.

As regards to third-party enforcement, those suffering from alleged competition-restrictive practices can file petitions to DPP seeking to stop such practices, but cannot claim recovery of damages.

3. Control over economic concentration

3.1. Transactions subject to approval

As a general rule, despite potential application of extraterritoriality competence provision, Belarusian antimonopoly authority (DPP) monitors straightforward acquisitions of Belarusian target companies (see below for applicable thresholds).

There are no specific regulations for different sectors of economy in terms of antimonopoly compliance, although in some sectors (e.g. banking, insurance and financial services) the applicability of the Antimonopoly Law is limited to the cases when market dominancy is involved.

3.2. Approval / notification thresholds

Approval of a transaction by the antimonopoly authority is required:

(a) when a company holding more than a 30% share of a relevant product/services market acquires participatory interests in another company operating in a similar product/services market; OR

(b) when a company holding more than 30% share of a relevant product market enters into a transaction in respect of shares of another company operating in a similar product/services market; OR

(c) when a company, an individual, a foreign state, an international organisation or their bodies acquire more than 25% of participatory interest in a company or enter into any other transactions, whereby as a result of such transactions they obtain a possibility to influence decisions of a company which has a dominant position on the market; OR

(d) when a company, an individual, a foreign state, an international organisation or their bodies enter into transactions involving more than 25% of shares of a company as well as other transactions provided as a result of such transactions they obtain a possibility to influence decisions of a company which has a dominant position on the market; OR

(e) when a company, an individual, or groups thereof, as well as a foreign state, international organisation and its bodies acquire 20% or more shares / participating interest in a company under a share sale-purchase agreement, trust agreement, joint venture agreement or commission agreement and such a company's financials exceed following thresholds: (i) balance value of assets as of the latest reported date exceeds 100 000 basic units (currently about € 857,200), or (ii) receipts of the company for the preceding financial year exceed 200 000 basic units (currently about EUR € 1,714, 400).

When assessing market share/dominancy to determine whether the thresholds are met for applying paragraphs (a) – (d) above, relevant shares of both parties (the acquirer and the target) at national and regional markets in Belarus are to be considered.

3.3. “Group” and “intragroup deals”

There are no express exemptions for intra-group transactions – an intra-group acquisition is still subject to the antimonopoly approval in case it meets the above thresholds. In practice, DPP normally takes into consideration the intra-group character of the transaction, which facilitates the issue of the approval.

3.4. Exceptions from transaction approval requirements

No statutory exceptions are applicable. In practice, indirect acquisition (i.e. when shares/participatory interest in a Belarusian entity are acquired indirectly) do not require antimonopoly approval, however, such an approach is confirmed by DPP on a case-by-case basis, upon submission of a preliminary inquiry by the parties to the transaction.

3.5. General approval procedure

Where one of the above thresholds are met, seeking DPP’s approval of the transaction becomes mandatory. The burden of obtaining the DPP’s approval rests with the acquirer.

Although it is still a debatable issue, conservative (and the safest) approach is that approval of the antimonopoly authority is to be sought before execution of a transaction subject to merger control. Belarusian procedure for seeking antimonopoly approval is rather strict: not just the parties are required to suspend implementation of the transaction, they are not allowed to sign it prior to issue of the approval.

For a merger control filing, scope of the information to be disclosed is as follows: details and description of financial position and business activities of the target and the acquirer, statement of products/works/services output and market share of the target entity, chart showing corporate interconnection, affiliates and subsidiaries of the parties involved.
It should be noted that for foreign acquirers it would be necessary to provide copies of constitutive documents, trade registry excerpts (good-standing certificates) and statement of sound financial position issued by the foreign parties’ servicing bank.

In addition to the above the acquirer may need to provide further info to facilitate approval of the transaction (description of the market, technologies, competitors, business plans showing positive prospects of the transaction, etc.)

There is no filing fee.

Normally the procedure is kept fully confidential and no third parties are involved. In the course of the proceedings, however, DPP may contact various governmental authorities to double-check information supplied by transaction parties. Competitors of the parties are never involved in the proceedings.

The procedure is not broken down into any specific stages – there are no formal hearings contemplated by the regulations. In practice, the parties or their representatives are normally invited to voice their understanding of the transaction and its impact on competition.

DPP is to issue antimonopoly approval within 30 days from the filing date (the filing date is the date on which DPP receives full package of the required documents).

It should also be noted that approval issued by DPP is valid for 12 months.

The Antimonopoly Law fails to set out a substantive test for DPP’s clearance or non-clearance of transactions. It is only stipulated that transactions should be cleared where such transactions do not excessively restrict or eliminate competition in a given market. The interpretation and practical implementation of this general statutory provision is totally in the hands of DPP.

Although it is not expressly provided by the Antimonopoly Law and regulations, DPP may issue "conditional approvals", i.e. to impose conditions on the parties' post transaction market behaviour. Such conditions are normally sector-specific or social ones, but thus far there is no uniform practice in place.

3.6. Implications of a failure to obtain approval

Failure to seek approval or implementing transaction before or without such approval may result in potential invalidity of the transaction: DPP can challenge the transaction in court.

Failure to provide required information to DPP in the course of merger control proceedings entails administrative liability in the form of a fine (for details see Section 2.6 above).

It is not clear under the Antimonopoly Law as to whether DPP's refusal for merger clearance can be appealed in court.

4. Current Case Law trends

There is a clear trend in DPP unfair competition practice that mainly targets "pirate" registration of trademarks, being a pre-requisite to cancellation of such trademark registration by the Board of Appeal of the Belarusian Trademark Office.

Practice of revealing competition-restrictive arrangements and concerted actions is quite limited. Normally such investigations are initiated by third parties affected by restrictive practices rather than by DPP itself, and there are not many examples of this type of investigations. One dated 2010 is an investigation that revealed a competition-restrictive agreement between chains of retail stores and tobacco goods manufacturers and wholesalers. Remarkably, this investigation was initiated by a third-party small tobacco producer that experienced restrictions in market access.

There is little publicly available information on DPP's implementation of merger controls. In 2010 DPP considered 73 merger filings, most of which were cleared. To the best of our knowledge, DPP's binding orders, approvals and denials have never been challenged in courts.

5. Basic trends in the development of antitrust laws in 2011-2012

The most awaited development of the coming years is the creation of a separate and independent competition authority (as noted above DPP is now a part of the Ministry of Economy) with wider competence and powers as well as a boost in inter-state cooperation with other CIS countries' competition authorities, specifically, within the framework of the United Economic Area and harmonization of antimonopoly regulations.

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Aequitas was founded in January 1993 with offices in Almaty, Astana and Atyrau. This leading Kazakh firm advises some of the biggest international corporations working in Kazakhstan and major national companies and provides a full range of legal services from support on complex new ventures to obtaining licenses or representation in the court of any level. Partners of Aequitas directly participated in the development and improvement of the most important acts of civil and economy legislation of Kazakhstan.

Overview of antitrust laws in Kazakhstan

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1. Overview of competition regulations and authorities

1.1. Underlying issues of competition regulations

Law No. 112-IV, On Competition, dated 25 December 2008 (*Law on Competition* or the *Law*) is the main act in the sphere of protection of competition in the Republic of Kazakhstan (the *RoK*). Certain relationships in connection with the protection of competition and restriction of monopolistic activities are governed by the following regulations:

International antitrust regulations

- Treaty on Implementation of Coordinated Antimonopoly Policy (Moscow, 25January 2000) approved by Decree No. 1922 of the RoK Government, dated 28 December 2000;
- Agreement between the RoK Government and the Government of the People's Republic of China on Cooperation in the Sphere of Antimonopoly Policy and Combating Unfair Competition (Beijing, 23 November 1999);
- Treaty on Implementation of Coordinated Antimonopoly Policy (Ashgabat, 23 December 1993) ratified in accordance with Decree No. 97-XIII of the RoK Supreme Council, dated 22 June 1994;
- Agreement on Antimonopoly Policy Coordination (Moscow, 12 March 1993).

Codes

- Civil Code (General Part), dated 27 December 1994;
- Administrative Violations Code No. 155-II, dated 30 January 2001;
- Criminal Code, dated 16 July 1997.

Laws

- RoK Law No. 124-III, On Private Entrepreneurship, dated 31 January 2006;
- RoK Law No. 272-I, On Natural Monopolies and Regulated Markets, dated 9 July 1998.

Kazakhstan President's Edicts

Edict of the RoK President on Certain Issues of the Agency of the Republic of Kazakhstan for Competition Protection.

Resolutions of the Government

- RoK Government Decree No. 141, Issues of the Agency of the Republic of Kazakhstan for Competition Protection (Antimonopoly Agency) , dated 15 February 2008;
- RoK Government Decree No. 2341, On the Strategic Plan of the Agency of the Republic of Kazakhstan for Competition Protection (Antimonopoly Agency) for 2010-2014, dated 31 December 2009; and
- RoK Government Decree No. 1115, On Approval of the Program for Competition Development in the Republic of Kazakhstan for 2010-2014, dated 26 October 2010.

Certain issues of internal activities of the antimonopoly authority are regulated by orders issued by the Board of the Antimonopoly Agency.

1.2. Antitrust authorities: structure and competencies

The RoK Agency for Competition Protection (Antimonopoly Agency) (the *Agency*) together with its subordinate territorial inspectorates constitute the central executive authority (not included in the RoK Government) in the sphere of protection of competition, restriction of monopolistic activities and protection of consumers' rights.

Beside control over economic concentration and compliance with antitrust legislation; demonopolization of market entities that impede competition; prevention, identification, investigation, and suppression of antitrust legislation violations, the Agency's competence encompasses the following key areas:

1) development and implementation of proposals regarding formation of the state policy in the sphere of protection of competition and restriction of monopolistic activities;
2) implementation of cross-industry coordination among governmental authorities and other organizations in the sphere of protection of competition and restriction of monopolistic activities;
3) international cooperation; and
4) development of measures for improvement, of antitrust legislation as well as development and approval of laws and regulations in the sphere of development of competition, restriction of monopolistic activities and functioning of commodity markets.

The Agency is headed by the Chairman, who is appointed and dismissed by the RoK Government.

Alongside the Agency, the authorized body performing administration in the sphere of naturally formed monopolies and regulated markets is the RoK Agency for Regulation of Natural Monopolies. Certain natural monopolies are governed by industry regulatory authorities (Ministry of Communications and Information, RoK Agency for Regulation and Supervision of Financial Market and Financial Organizations).

1.3. Extraterritoriality

The Law on Competition also applies to actions of market entities performed outside Kazakhstan, if such actions:

1) affect, directly or indirectly, fixed assets located on the RoK territory and/or intangible assets or shares (participatory interests) of market entities, or property or non-property rights with respect to RoK legal entities; or
2) limit competition in the RoK.

Kazakhstan is a party to the Agreement on Implementation of Coordinated Antimonopoly Policy (Moscow, 25 January 2000) and party to bilateral agreements in the sphere of coordinated antimonopoly policy implementation, which provides for the grounds and opportunities for joint actions in investigating violations of antitrust laws.

The Antimonopoly Agency is a member of the International Competition Network (ICN), which enables cooperation with antitrust agencies in the sphere of competition policy and updating the world business community on Kazakhstan's achievements in the development of competition policy.

2. Prevention of monopolistic activities and unfair competition

2.1. Overview

State regulation of monopolistic activities and unfair competition prevention in Kazakhstan is achieved by way of setting criteria for recognition of market entities as monopolistic and dominant and inclusion of such entities in the register, establishing a list of actions considered to be violations of antitrust legislation, and classifying certain commodity markets as regulated markets. In particular, the following activities in Kazakhstan are referred to naturally formed monopoly:

1) transportation of oil and petroleum products via trunk pipelines;

2) storage and transportation of gas or gas condensate via trunk and distribution pipelines;

3) transfer and distribution of electric and heat power;

4) services of trunk railway networks, ports and airports.

2.2. Dominance

The Law on Competition differentiates between the concepts of *dominant position* and *monopolistic position.* Recognized as dominant is a position of a market entity whose share in the relevant commodity market is 35% or more, or a position of several entities, if: 1) the aggregate share of three or less market entities holding the largest shares in a certain market is 50% or more; or 2) the aggregate share of four or less market entities holding the largest shares in a certain market is 70% or more. Financial institutions are subject to other criteria. Entities whose share is 15% or less cannot be recognized as dominant.

When classifying market entities as dominant entities, only quantitative, not qualitative indicators of the market are taken into consideration.

The position of naturally formed monopoly entities, state monopoly entities, and market entities holding 100% dominance share is recognized as monopolistic.

The state carries out monitoring of such entities by way of putting them on State Registers.

The Law provides for a number of restrictions for the said entities; failure to comply with such restrictions is regarded as abuse of one's position. Thus, actions or omissions, which resulted or may result in limitation of access to the relevant commodity market; prevent, restrict or eliminate competition; and/or prejudice consumers' legitimate rights, are prohibited.

The Law provides for the creation of state monopoly entities based on the RoK Government decision.

2.3. Monopolistic agreements and concerted actions

Although the Law on Competition employs the concepts of *anti-competition agreements* and *anti-competition concerted actions,* there is no clear delimitation between them, because the Law sets forth that any form of agreement may be recognized as anti-competition.

The following indirect evidences are sufficient for recognizing actions as concerted:

1) concurrent actions of market entities performed within a three month period, each market

entity gaining an uncontemplated benefit as a result;

2) actions of market entities were known to each of them in advance;

3) actions of each market entity did not result from the circumstances equally affecting such market entities.

Provisions restricting anti-competition agreements do not apply to a number of agreements, for example, to licensing agreements, franchising agreements, agreements and actions within the same group of persons, and to long-term investment or concession agreements.

Anti-competition agreements and concerted actions between market entities are permitted if they do not prejudice consumers' legitimate rights and:

1) their aggregate share in the commodity market does not exceed 15%;

2) they are aimed at improving production by way of introduction of advanced or resource-saving technologies;

3) they are aimed at small and medium business development; and

4) they are aimed at drafting and application of regulatory documents on standardization.

Concerted actions are permitted between entities, which are part of the same group of persons.

2.4. Unfair competition

The key regulations restricting unfair competition are set forth in the Civil Code and the Law on Competition. Any actions in competition aimed at achievement or provision of unlawful advantages as well as those violating consumers' legitimate rights are recognized as unfair competition and are prohibited. The Law contains an exhaustive list of 12 actions recognized as unfair competition, which does not contain any reference to violation of requirements of honesty, reasonableness or ethics, as well as to some other forms of unfair competition, which are very common worldwide.

2.5. Antitrust investigation

An antitrust investigation may be initiated on the basis of information about violations received by the Agency, as follows:

1) materials from governmental authorities

2) application from an individual or a legal entity

3) signs of antitrust legislation violations in the actions of market entities identified by the Agency in the course of its activities. The legislation, however, does not provide for regular inspections of market entities' activities by the Agency

4) address from mass media to the Agency.

Identification of violations of antitrust legislation goes in three stages, as follows:

1) preliminary review of information about the violation

2) investigation of the violation

3) legal proceedings on the case.

The period of preliminary review cannot exceed one month and the period of investigation

cannot exceed two months. However, these periods may be extended. The period of legal proceedings on the case is 15 days.

Information about commencement of investigation is to be published on the official website of the Agency, including information on the imposed liability measures and the particular market entities and violations committed thereby.

Beside the claimant and the subject of investigation, the interested parties, witnesses and experts may also participate in the investigation conducted by the Agency officials.

In case a violation is identified in the course of investigation, the Agency may choose one of the three options to be applied to the offender: 1) initiate an administrative case; 2) issue ordinance to rectify the violation; 3) transfer materials to law enforcement authorities for initiation of a criminal case.

Ordinances of the Agency, which may be appealed in court, may contain demands that market entities stop violations or eliminate their consequences, make restitution, terminate or amend agreements contradicting the legislation, or enter into an agreement with another market entity.

Administrative proceedings, depending on the case category, may be conducted by either the Agency, or specialized administrative courts. The Agency's competence includes review of violations connected with economic concentration, unfair competition, and failures to perform under Agency's ordinances. The head of the Agency and his/her deputies, as well as heads of the Agency territorial subdivisions and their deputies, have the right to review cases and impose administrative penalties.

Acts issued upon the results of proceedings may be appealed by interested parties. A ruling issued by a specialized court may be appealed in a higher court instance; a decision issued by an official may be appealed in a specialized court.

2.6. Implications for infringers

Civil liability

Civil liability for violating the antitrust laws is primarily based on the general grounds of applying liability for causing damage (tort liability). The method of protecting one's rights and interests in the form of filing a claim in court is available to all market entities and consumers.

The Agency is vested with powers to claim in judicial authorities invalidation of transactions consummated without obtaining prior consent to economic concentration. The Agency may also file a claim in court for a forced split of a market entity or spin-off of one or more legal entities from such market entity, if such market entity twice in one year committed violations associated with the abuse of its position, commitment of anticompetitive actions or execution of anticompetitive agreements.

Moreover, the Agency has the right to file in judicial authorities claims for declaration as illegal the state registration or re-registration of legal entities, as well as rights to immovable property obtained as a result of transactions entailing economic concentration consummated without the Agency's prior consent.

Administrative liability

The RoK Administrative Violations Code provides for the following types of penalties for violation of antitrust legislation: fines and confiscation of monopolistic profit.

The Code provides for the grounds for exempting persons from administrative liability due to the expiration of period of limitations, which is one year for individuals and five years for legal entities.

A conflict of laws regarding administrative liability of foreign market entities exists between the RoK administrative legislation and the Law on Competition. The Law on Competition applies to relationships, including those effectuated outside the RoK, while the RoK Administrative Violations Code is limited to actions, which commenced, continued or terminated in the territory of Kazakhstan. The foregoing does not allow applying to full extent administrative penalties, particularly to acts associated with entering into anticompetitive agreements or abuse of dominant or monopolistic position, committed by foreign market entities. However, if there a legal assistance treaty is in place between Kazakhstan and another state, in which the foreign person committing violations of Kazakhstan's antitrust laws is a resident, such foreign person may theoretically be subject to administrative penalty.

Criminal liability

The Criminal Code provides for market entity officers' liability for monopolistic activities if such activities resulted in a large damage to an individual, organization or state, or if such activities are connected with derivation of large profit by the market entity. Such actions are punishable by a fine, corrective labor, or deprivation of liberty for a period, which depends on the qualifying elements of crime.

3. Control over the scope of economic concentration

3.1. Transactions subject to approval

The following types of transactions, subject to certain conditions, can be recognized as economic concentration:

1) re-organization of a market entity by way of merger or accession;

2) purchase by a person of voting shares (participatory interests, equity positions (hereinafter, when reference is made to shares, it implies participatory interest or equity position)) of a market entity, whereby such person obtains a right to dispose of more than 25% of shares, if prior to such purchase such person disposed of no shares or of 25% or less shares of the said market entity;

3) entering by a market entity into ownership, possession and use, including on account of payment (transfer) of the 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 balance value of the fixed production assets and intangible assets of the market entity that alienates or transfers the property;

4) acquisition by amarket entity of rights (including under a trust management agreement, joint operating agreement, or agency agreement), permitting to issue binding instructions to another market entity in the course of such entity's carrying out entrepreneurial activities, or to perform the functions of such entity's executive body;

5) participation of the same individuals in 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. Approval / notification thresholds

Application for the Agency's prior consent is required in cases where the aggregate book value of assets of market entities (group of persons) under re-organization or the purchaser (group of persons), as well as the market entity, whose shares are to be purchased, or their aggregate volume of sales of goods for the past financial year exceeds two million monthly calculation indexes[1] as of the date of application submission (at the time of this review preparation, this amount is approximately US$20,572,000), or where one of the persons participating in the transaction is a market entity holding a dominant or monopolistic position on one of the RoK commodity markets. The aggregate volume of sales of goods is defined as the amount of income (proceeds) from the sale of goods for the past financial year, less value added tax. Separate criteria are established for transactions consummated by financial organizations.

3.3."Groups" and "intra-group deals"

As mentioned above, all provisions of the Law on Competition relating to market entities apply to groups of persons.

A *group of persons* is understood as an aggregate of individuals and/or legal entities satisfying one of the following conditions:

1) a person has the right to directly or indirectly dispose of more than 25% of voting shares in the charter capital of a legal entity;

2) a legal entity or a number of affiliated legal entities have the authority to influence decisions taken by another person, including the opportunity to determine the terms and conditions of such person's entrepreneurial activities, or to exercise the powers of its management body;

3) an individual, his spouse, or close relatives are in a position to influence decisions taken by another person, including the terms and conditions of such person's entrepreneurial activities, or to exercise the powers of its management body;

4) persons, who are in a group with one and the same person on any of the grounds listed above, and other persons, who are in the same group with each such person on any of the said grounds.

The above definition and criteria allow for the authorized agency to construe the concept of a "group of persons" as broadly as possible, which enables demanding the provision of full information when preparing application for consent to an economic concentration *(*the *application).*

There is a concern regarding a proper legal definition of the concept of "*market entities*," which includes individuals and legal entities of the RoK, as well as foreign legal entities (their branches and representative offices) carrying out entrepreneurial activities. Even though foreign individuals and certain formations that do not possess the status of a legal entity are not covered by the concept of market entity, when preparing the application, it is required to provide documents with respect to such persons as well.

[1] Monthly calculated index -) means a legislatively established amount used for the calculation of the amounts of allowances and other social payments and also for the application of penal sanctions, taxes, and other payments. In 2011, the MCI amounts to 1,512Tenge, which is approximately US $ 10 at the current exchange rate of the RK National bank.

3.4. Exceptions from transaction approval requirements

Requirement for prior approval of transactions by the Agency does not apply to: 1) acquisition of a market entity shares by financial organizations, if such acquisition is made with the purpose of further shares resale, provided, however, that the said organization does not participate in the voting in management bodies of such market entity; 2) appointment of rehabilitation manager, receiver in bankruptcy, or temporary administration; 3) consummation of the above transactions within the same group of persons.

3.5. General approval procedure

Pursuant to the legislation, application for consent to economic concentration must precede the consummation of transaction.

The duty to apply for consent to economic concentration lies with the buyer under the transaction; no state duty is charged.

Due to unclear definition of the documents and information required for the application preparation, and broad interpretation of the concept of a group of persons, the Agency requests a maximum scope of information on all entities on the same group of persons with the buyer, up to the ultimate individual beneficiary. In case it is impossible to provide full information, a forecast or estimate information is to be provided. Confidential information is to be provided appropriately marked as such.

The total period for review of the application by the Agency is 60 calendar days. The grounds for suspension of review and appropriate extension of the said period are also provided for.

The review of application is a closed procedure. Pursuant to the legislation, third parties may be involved in the review of application, in case the Agency's decision can affect their rights and interests.

Upon review of the application, the Agency may issue a decision on consent to economic concentration or on its prohibition. The Agency's consent may be subject to the economic concentration participants' meeting certain requirements or performing certain obligations. The Agency has the right to issue consent to economic concentration, even if such concentration will result in the establishment or strengthening of the market entity's dominant position or a restriction, in case the participants of economic concentration prove that the positive effect of their actions will supersede the negative implications on the commodity market. In certain cases the Agency may reverse its decision.

Economic concentration must be implemented within one year from the moment of obtainment of the consent; otherwise, a new application is to be submitted.

In some cases, certain actions of authorized agencies depend on the Agency's decision on economic concentration. For instance, state registration and re-registration of market entities and rights to immovable property, may in certain cases be performed only with the consent of the Agency; otherwise such actions may be invalidated upon a claim from the Agency.

3.6. Implications of a failure to obtain approval

Economic concentration without obtaining the Agency's consent and failure to meet the requirements and perform the obligations, which conditioned the decision to issue consent to economic concentration, entail an administrative fine up to US$20,500.

4. Current Case Law trends

Major lawsuits involving the Agency relate to investigation of violations associated with market entities' abuse of their dominant or monopolistic position; bringing the entities included in the State Register to liability for a failure to provide information to the Agency, and appeals against the Agency resolutions to include market entities in the State Register of dominant or monopolistic entities.

The most notorious case, which received extensive coverage in mass media, was a joint investigation by the Agency and the Russian Federation's Federal Antimonopoly Service (FAS) in relation to the major cellular communication operators of the RoK and Russia -- GSM LLP, Kazakhtelecom OJSC, Kar-Tel LLP, and Mobile Telecom-Service LLP (RoK) and Vympelcom OJSC, MTS OJSC, and MegaFon OJSC (Russian Federation). The investigation revealed that international roaming tariffs used by Kazakhstan's and Russia's cellular operators were overrated. The tariffs inside the CIS exceeded similar tariffs applied in the European Union by 3 to 10 times.

The antimonopoly agencies of the two countries qualified the actions of cellular operators on establishing unreasonably high international roaming tariffs as abuse of their dominant position aimed at establishing monopolistically high prices. As a result of the investigation, the cellular operators voluntarily lowered their international roaming tariffs. For instance, Kazakh cellular operators lowered their international roaming voice call tariffs by 1.5-2 times, SMS tariffs by 3-10 times, and GPRS (Internet) tariffs by 6-10 times per 1 Kb.

5. Basic trends in the development of antitrust laws in 2011-2012

Basic trends in the development of antimonopoly policy and improvement of the antitrust legislation of the Republic of Kazakhstan are set forth in the Program for Development of Competition in the Republic of Kazakhstan for 2010-2014 and in the Strategic Plan of the Agency of the Republic of Kazakhstan for Competition Protection for 2010-2014. The following is defined as the long-term objectives: creation of competitive markets, demonopolization of certain commodity markets, improvement of competition development tools, including improvement of the antitrust legislation.

The plans include improvement of procedural rules with a view to eliminate the deficiency of the Agency's powers in relation to investigation and review of cases, as well as reduce the duration of procedures for antitrust response measures application.

It is also planned to revise and expand the list of the types of unfair competition and to provide clearer definitions of the "market entity" and "group of persons" concepts.

AEQUITAS law firm maintains regular contacts with the Agency representatives on the issues of clarifying the interpretation of antitrust legislation to work out and present recommendations on elimination of legislative gaps, and participates in the events organized by the Agency. The firm's lawyers are members of the Non-Profit Partnership "Assistance to Development of Competition in the CIS Countries" set up based on the FAS resolution, which allows AEQUITAS to stay updated on the developments in the antitrust sphere in the near and far abroad countries.

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Founded in 2002, Kalikova & Associates has rapidly grown into one of the leading law firms in Kyrgyzstan specializing in Business Law. The firm has proudly built a strong reputation as a reliable partner to many leading foreign companies, international organizations and diplomatic missions. Kalikova & Associates' strength lies in thorough analysis of current law in combination with economic, political and cultural trends in Kyrgyzstan and a bespoke approach to every client project.

Overview of antitrust laws in Kyrgyzstan

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1. Overview of competition regulations and authorities

1.1. Underlying competition regulations

The key international obligations of the Kyrgyz Republic are contained in the following international treaties to which the Kyrgyz Republic is a party:

1. Agreement on conformed antimonopoly policy (among the CIS members) dated, 12th March 1993;
2. Agreement on conformed antimonopoly policy (among the CIS members) dated, 25th January 2000;
3. Agreement on creating the Economic Union dated, 24th September 1993;
4. Agreement on creating the Unified economic area among the Kyrgyz Republic, the Republic of Kazakhstan and Uzbekistan, dated 30th April 1994;
5. Agreement on the Custom Union and the Unified economic area dated, 26th February 1999;
6. Agreement on main directions of collaboration between the CIS members in the area of protection of consumers rights dated, 25th January 2000;
7. Convention on the protection of rights of investors, dated 28th March 1997;
8. other, including bilateral treaties with Kazakhstan, Uzbekistan, Russian Federation, European Union, Moldova, etc.

The principal competition and antimonopoly laws and Government resolutions are as follows:

- **Codes of the Kyrgyz Republic:**

1. Code of Administrative Liability of the Kyrgyz Republic, dated 14th August 1998;
2. Civil Code of the Kyrgyz Republic (part 2), dated 5th January 1998;
3. Criminal Code of the Kyrgyz Republic, dated 1st October 1997;

- **Laws of the Kyrgyz Republic:**

1. Law on Limiting Monopoly Activity and the Development and Protection of Competition, dated 15th April 1994 (the "Antimonopoly Law");
2. Law on Natural and Permitted Monopolies in the Kyrgyz Republic, dated 8th October 1999 (the "Law on Monopolies");
3. Law on Advertisement dated 24th December 1998;
4. Law on Protection of Consumers Rights, dated 10th December 1997;

- **Resolutions of the Government of the Kyrgyz Republic:**

1. Resolution approving the Regulation of the procedure for setting prices (tariffs) of goods (works, services) of business entities regulated by the state, dated 17th July 2003;

2. Resolution approving the Rules for controlling observance of the antimonopoly laws of the Kyrgyz Republic during economic integration, dated 15th March 2008;

3. Resolution approving the Rules for suppressing agreements on fixing prices (tariffs) to limit competition, dated 2nd October 2009;

4. Resolution on the Antimonopoly Agency, dated 4th December 2009.

In addition to the above legal articles, issues relating to competition and antimonopoly policy are governed by the acts of the Antimonopoly Agency, the National Bank of the Kyrgyz Republic and other public authorities.

1.2. Antitrust authorities: structure and competencies

The Antimonopoly Agency is a government agency pursuing the unified government antimonopoly and price regulation policy which consists of the central and the regional bodies established in six regions of the Kyrgyz Republic. It should be noted that the functions of the Antimonopoly Agency in the telecommunications and energy sectors are performed by other special authorities who act as the regulators of their respective sectors.

The main tasks of the Antimonopoly Agency:

- development and protection of competition for the efficient functioning of markets of goods, works and services;
- state enforcement of antimonopoly and pricing legislation;
- protection of legal rights of consumers against monopoly and unfair competition;
- state enforcement of the legislation on advertising.

The main functions of the Antimonopoly Agency, among others, include:

- implementation of unified state antimonopoly, pricing policy in the economy;
- review of complaints and allegations of individuals and legal entities of non-compliance with competition, consumer protection, advertising, and antimonopoly laws of the Kyrgyz Republic, including the illegal actions of government bodies and local authorities;
- imposing fines and economic sanctions on the persons violating the antimonopoly laws of the Kyrgyz Republic;
- participating in court hearings in cases involving violations of antimonopoly legislation, consumer protection and other regulations;
- agreeing the costs of permits issued by the state authorities;
- reviewing applications and notifications of the merger, reorganization, liquidation, purchase of shares in the charter capital of business entities, making other transactions and adopting relevant decisions;
- deciding on the forcible division of business entities with a dominant position in the market;
- carrying out the state antimonopoly examination of the restructuring and liquidation of business entities, transactions and investments made by natural and permitted monopolies, acquisition of shares in the charter capital of business entities and others as provided by law;

- establishing a ceiling for the dominance of business entities in the relevant market of goods, works and services;
- determining, in accordance with Kyrgyz legislation methods of regulating the activity of natural and permitted monopolies;
- negotiating prices (or tariffs) for services (or works), provided by government agencies, local governments and their subdivisions, organizations, institutions, etc.

The Antimonopoly Agency is headed by the Director, appointed by the President of the Kyrgyz Republic. The Director of the Antimonopoly Agency has one deputy.

1.3. Exterritoriality

The Antimonopoly Law is effective in the entire territory of the Kyrgyz Republic and covers relations in national and regional markets with the participation of any business entities, executive authorities and public officials. The relations connected with competition development in goods and services markets and the restriction of monopolistic activity in the Kyrgyz Republic are regulated by the Antimonopoly Law in compliance with international agreements and corresponding acts of the international organizations in which the Kyrgyz Republic is a member.

Moreover, the Law on Monopolies provides that state control in the spheres of natural and permitted monopolies incorporates any transactions made by groups of people, based on definition that allows application of the extraterritorial principle.

2. Prevention of monopolistic activities and unfair competition

2.1. Overview

The Antimonopoly Law prohibits unfair competition which includes disclosure of information that might impair the business reputation of another business entity or mislead consumers regarding the quality of goods or the advertising of goods which do not meet the quality requirements.

Also it is prohibited for business entity to create a dominant position in the market which includes the prohibition of withdrawing goods from circulation for the purpose of the creation and maintenance of a deficit in the market or price increase, imposing conditions that are unprofitable for counteragents, the creation of barriers to entry or exit from the market for other business entities, or the infringement of pricing policy established by law.

The antimonopoly regulations prohibit any agreements (or coordinated actions) between competing business entities (potential competitors) taking in aggregate the dominant position if such agreements (coordinated actions) could cause a substantial restriction of competition. Also, the acts of executive authorities restricting the rights of business entities when selling goods in the market, except for those acts that are allowed by the laws of Kyrgyz Republic, might be invalidated under these regulations.

2.2. Dominance

The Antimonopoly Law differentiates between such concepts as “monopolistic activity” and “dominant position”.

Monopolistic activities are those of business entities or executive authorities undertaken to achieve the restriction or elimination of competition, or to misuse a dominant position in the market or the economic dependence of counteragents, which result in damage to public interests, interests of other business entities and the interests of consumers.

A dominant position is the exceptional position of a business entity in the market of certain goods which enables it to impact upon competition or to complicate access to the market to other business entities. A business entity has a dominant position if its share of the corresponding market of certain goods exceeds 35% or another percentage annually set by the Antimonopoly Agency.

To prevent certain business entities attaining a dominant position the Antimonopoly Agency exercises preliminary state control of the creation, merger and joining of unions, associations, concerns, interindustrial, regional and other consolidations, enterprises, and other.

2.3. Monopolistic agreements and concerted actions

The Antimonopoly Law prohibits any agreements (or coordinated actions) of competing business entities (potential competitors) taking in aggregate the dominant position if such agreements (coordinated actions) are aimed at:

1. the establishment (maintenance) of prices (tariffs), discounts, allowances (surcharges), margins;
2. increasing, decreasing or maintaining the prices at auctions;
3. market division by territory, sales and purchases volume, assortment of the goods or by sellers or buyers (customers);
4. restriction of access to market or exclusion from it of other business entities as sellers or buyers (customers) of certain goods;
5. refusal of contract with certain sellers or buyers (customers).

In exceptional cases, the above-stated agreements (coordinated actions) of business entities can be recognized by the Antimonopoly Agency as lawful if the business entities prove that their agreements (coordinated actions) promote or will promote the market saturation of goods, lead to an improvement of consumer welfare and increase their competitiveness, in particular in foreign markets.

2.4. Unfair competition

Unfair competition is any action of business entities aimed at gaining an advantage in entrepreneurial activities which contradicts current legislation, customs of trade, the requirements of respectability, rationality and justice, and can cause or has caused losses to other competing business entities or can impair or has impaired their business reputation.

The Antimonopoly Law contains the list of actions which can be regarded as unfair competition:

1. spreading false, inaccurate information (misrepresentation of information), with the capacity to damage the business reputation of another business entity;
2. misleading consumers regarding the character, method and place of production, properties, usability or quality of goods;
3. unauthorized use of a trade mark, company name or goods marking, unauthorized copying of the form, packaging, or attribute of the goods of other business entities;
4. advertizing of goods which do not meet the quality requirements;
5. unauthorized use or disclosure of confidential scientific and technical, production or trading information;
6. actions which can cause doubts concerning the enterprise, goods or industrial or trading activity of a competitor.

Antitrust investigation

An antimonopoly review is instigated based on the claims of individuals and legal entities, state government or local self-government bodies or on the initiative of the Antimonopoly Agency (e.g. as result of inspection). In cases of an infringement of legislation on unfair competition, the Director of Antimonopoly Agency makes the decision whether or not to order an investigation by the Antimonopoly Agency's Board in which state government, local self-government bodies, and public associations are represented.

Based on the findings of the investigation on antimonopoly legislation infringement, the Board can make the decision in the form of a resolution (prescription) which can lead to:

1. elimination of violations of antimonopoly legislation, in the case of unfair competition;
2. imposition of a penalty, including the recovery of illegally received income;
3. referral of the case to state bodies, which have the competence to conduct a criminal investigation;
4. referral of the case to judicial or law enforcement bodies;
5. termination of the case.

Persons, in whose respect the decision was made, must, within the time specified in the decision, report to the Antimonopoly Agency about the actions taken. In the case of a disagreement with the decision, the parties may appeal it to the court.

2.6. Implications for infringers

Civil liability

Pursuant to Kyrgyz laws, transactions made in violation of antitrust laws might be declared invalid at the claim of the person concerned. In addition, Kyrgyz antimonopoly laws provide for the common type of civil liability in the form of compensation of damages caused by violation of antimonopoly laws. A claim for compensation of damages may be filed with the court by any individual or legal entity whose rights were abused by the violation.

Administrative liability

As the body with administrative liability for breach of antimonopoly laws, the Antimonopoly Agency may request the downsizing of a business entity and confiscate the profit received by the entity which committed violations. Moreover, the Antimonopoly Agency may apply, among others, the following administrative fines:

- for officers of business entities which used their dominant position, or executed an agreement limiting competition – from 2,000 KGS to 3,000 KGS;
- for withdrawal of goods from circulation in order to raise the prices, or artificial creation of barriers to entry for other business entities, or execution of agreements on raising prices, or the division of market into spheres of influence – from 1,000 KGS to 2,000 KGS;
- for officers of business entities which committed unfair competition, *i.e.* the distribution of false, inaccurate information capable of impairing the reputation of other business entities, misinterpretation about the character, way and place of production of goods, features, usability and quality of goods, unauthorized use of trademarks, company names, disclosure of confidential information, application of dumping prices – from 2,000 KGS to 3,000 KGS;
- for failure by a dominantly positioned business entity to timely declare prices, as well as a breach of the antimonopoly review procedure – from 1,000 to 2,000 KGS;
- for officers of business entities, for avoiding the fulfillment or failing to timely fulfill the prescriptions of the Antimonopoly Agency responsible for consumer rights protection – up to 1,000 KGS.

The fine imposed by the Antimonopoly Agency shall be paid within 30 days of issuing the relevant prescription to the legal entity.

Criminal liability

Kyrgyz Criminal Code provides for the liability of individuals for the establishment and maintenance of monopolistically high prices or monopolistically low prices as well as the limitation of competition through conspiracy or agreed actions aimed at the division of the market, exclusion of other players from the market, establishment and maintenance of unified prices, if such actions are committed by a group of persons or group of persons upon preliminary consent. Such actions are punishable by fine, or imprisonment, or imprisonment with confiscation of property depending on the qualifying elements of the criminal offence.

The Criminal Code imposes this liability irrespective of the amount of damages caused by such crime.

3. Control over economic concentration

3.1. Transactions subject to approval

The following types of transactions are subject to preliminary consent given by the Antimonopoly Agency:

1) merger and consolidation of unions, associations, concerns, interindustrial, regional and other integration of enterprises, as well conversion to the said structures of public authorities or business entities;

2) merger, consolidation and liquidation of state and municipal enterprises if such leads to the creation of an entity with a dominant position;

3) creation, merger and consolidation of joint stock companies and limited liability partnerships;

4) creation, merger and consolidation of other partnerships and integrations the participants of which are legal entities, if such actions lead to creation of an entity having a dominant position;

5) acquiring by a business entity which has 35% market share of certain good of shares in another business entity operating in the same market, as well as purchase by any person of 50% or more shares in a business entity having a dominant position;

6) increase of charter capital of a business entity (consolidation thereof) having the charter capital of 15,000,000 KGS;

7) re-organization (merger, consolidation, conversion) of business entities if the total value of their assets for the last financial period exceeded 10,000,000 KGS;

8) liquidation of business entities which have assets with a total value of more than 5,000,000 KGS;

9) all transactions leading to a natural or permitted monopoly acquiring ownership right or right to use fixed assets not designated for production (sale) of goods under the regulation, subject to the balance value of such assets exceeding 10% of the net assets of a natural or permitted monopoly, determined in accordance with the last approved balance sheet;

10) sale, leasing or other transactions leading to a business entity acquiring ownership right or right to the use of a part of a natural or permitted monopoly's fixed assets designated for production (sale) of goods falling under the regulation, subject to the balance value of such assets being 10% of the net assets of a natural or permitted monopoly determined in accordance with the last approved balance sheet;

11) investments of a natural or permitted monopoly into production (sale) of goods not falling under the regulation, subject to the balance value of such investments being more than 10% of the natural/permitted monopoly's net assets determined in accordance with the last approved balance sheet.

3.2. Notification requirements

In addition to the transactions described above, Kyrgyz antimonopoly laws require business entities to provide notification to the Antimonopoly Agency in the following cases:

1) creation of a business entity (association of business entities) having the charter capital equal to or exceeding 1,500,000 KGS – the notification shall be submitted within 10 days after establishment of the business entity;

2) if a person or a group of persons through the purchase of shares or other transactions (including agent, trust management, pledge agreement) acquires more than 10% of the shareholding in natural/permitted monopoly or any further change to the number of votes owned, or if a natural/permitted monopoly acquires more than a 10% shareholding in another business entity - the notification shall be made within 30 days after acquisition of shares.

3.3.”Group of persons”

As can be inferred from the provisions of the Law on Monopolies, it defines a *group of persons*.

A *group of persons* is an aggregate of individuals and/or legal entities with one or more of the following features:

1) a person or a group of persons that jointly, based on agreement (agreed actions) has the right to directly or indirectly dispose of more than a 50% shareholding in the charter capital of a business entity;
2) two or more persons have an agreement pursuant to which one has a right to give to another, or other persons, mandatory instructions related to conducting entrepreneurial activities, or to exercise the powers of its management body;
3) a person has a right to appoint more than 50% of the management body and/or supervising body (board of directors) of a business entity;
4) the same individuals represent more than 50% of the management body and/or supervising body (board of directors) of two or more business entities.

3.4. General approval procedure

Pursuant to legislation, application for consent for economic concentration must precede the execution of transaction.

To receive consent to create the union, association, concern, interindustrial, regional or other amalgamation of enterprises, founders shall submit, to the Antimonopoly Agency, the application for consent, data on primary activities of each of uniting business entities, their share in a respective goods market and consent to associate. The Antimonopoly Agency, no later than 30 days from the date of application, reports to the applicant in writing detailing the decision - consent or refusal. Refusal should be for a reason. There is no state charge for filing an application. Due to uncertainty about the documents and information required by the Antimonopoly Agency, it may request the maxi

The Antimonopoly Agency has the right to issue its consent to economic concentration, even if such concentration will result in the dominant position and/or restriction of competition, if such concentration may lead to saturation of the market, improvements in the quality of goods and their competitive advantage, including in external markets.

3.6. Implications of failure to obtain approval

Failure to obtain approval of the Antimonopoly Agency might lead to the administrative fine of up to KGS 2,000 unless the actions are qualified as a crime due to the broad definition provided in the Criminal Code.

4. Current case law trends

Kyrgyzstan does not have a large judicial practice related to the breach of antimonopoly laws though the Antimonopoly Agency is quite active in applying administrative measures.

In practice, the Antimonopoly Agency mostly deals with the issues of consumer rights protection and pricing policy. In 2010 the Antimonopoly Agency imposed KGS 8.7 million of fines for the violation of consumer rights. The Antimonopoly Agency issued 39 prescriptions, 38 of which were fulfilled voluntarily. In 2010, the Antimonopoly Agency had only 3 court cases related to the violation of consumer rights. With regard to the breach of pricing laws, the Antimonopoly Agency imposed KGS 61.9 million sanctions on infringers in 2010.

5. Basic trends in the development of antitrust laws in 2011-2012

Basic trends in the development of antimonopoly laws of the Kyrgyz Republic are generally related to strengthening the powers of the Antimonopoly Agency. Such developments are particularly important because of rising food prices. For instance, it has been proposed that the Antimonopoly Agency is given powers to regulate the prices for flour, bread, sugar, vegetable oil, rice, tea, cement, coal, the most important drugs, fuels and lubricants.

The Antimonopoly Agency requires additional powers to control the implementation of antimonopoly laws, including powers to conduct criminal investigation, initiate unexpected inspections and obtain printouts of telephone conversations.

Moreover, currently the Government of the Kyrgyz Republic is preparing a new law *On Competition* that is to give the Antimonopoly Agency a right to reduce the market share of companies from 25% to 10%.

Kalikova and Associates Law Firm has, and effectively maintains, regular communication with the Antimonopoly Agency on various issues of Kyrgyz antimonopoly policy, including the interpretation of antimonopoly laws, giving comments on the draft legislation and industry reports, participating in the events organized by the Antimonopoly Agency. Kalikova and Associates provided, critical organizational support to the creation of Non-Profit Partnership “Assistance to Development of Competition in CIS Countries”, the association of economists and lawyers supporting the development of competition in CIS. The association was originally formed in Bishkek in 2009 at the initiative of the Interstate Council of Antimonopoly Policy. The Firm’s lawyers, being the members of the association, participate in various initiatives of the association which allow K&A to stay aware of all current developments in the antimonopoly laws and policy in CIS countries.

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The firm's team is described by researchers as "clearly the best" in Moldova, "a clear leader in the Moldovan market", and "leading law practice in the country", while the "level of service " is described by clients and researches as "superb". The firm made 'best friends' among fellow leading law firms in Almaty, Ashgabat, Astana, Baku, Bishkek, Bucharest, Kyiv, Moscow, Minsk, St. Petersburg, Tashkent, Tbilisi and Yerevan. The firm is an advocate of reform and improvement of the legal environment for doing business and an active member of the Moldovan business community.

Overview of antitrust laws in Moldova

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1. Overview of competition regulations and authorities

1.1. Underlying competition regulations

Matters of market competition in the Republic of Moldova are regulated mainly by the Law on Protection of Competition, No. 1103-XIV, dated 30th June 2000 (the "**Competition Law**"). The law explains the concepts of monopolistic activities and unfair competition and prohibits the abuse of dominant position, anticompetitive agreements as well as the actions of public authorities that restrict competition. The Competition Law also establishes control over economic concentrations and empowers the National Agency for the Protection of Competition (the "**NAPC**") with the competences to enforce the competition legislation.

The functions of NAPC are listed in Article 12 of the Competition Law and the Regulation of the National Agency for the Protection of Competition (the "**Regulation**") provision for which was made in the Competition Law.

An additional law relating to certain competition issues, namely prohibiting unfair competition by means of advertising, is the Law on Advertising, No. 1227-XIII, dated 27th June 1997. Also, the Criminal Code of the Republic of Moldova, dated 18th April 2002, contains provisions establishing criminal liability and penalties for the limitation of competition and unfair competition.

The Law on Economic Communications, No. 241-XVI, dated 15th November 2007, empowers the National Regulatory Agency for Electronic Communications to ensure fair competition in the relevant markets and to identify the dominant businesses in the electronic communications markets.

The first Moldovan Law governing competition issues is still in force, namely the Law on the Limitation of Monopoly Activity and the Development of Competition, No. 906-XII, dated 29th January 1992 (the "**Law No. 906-XII**") as well as the subsequently approved Government Decision No. 619, dated 5th October 1993, (the "**Government Decision No. 619**") which completed the Law No. 906-XII, *inter alia*, with the procedure of examination of the notifications on the execution of transactions and the creation of economic concentrations and the mechanism for the investigation of competition infringements.

The Competition Law has not expressly abolished these pieces of legislation (i.e. Law No. 906-XII and Government Decision No. 619) but does limit them to the extent that they don't contradict the provisions of the Competition Law. In practice the Law No. 906-XII and the Government Decision No 619 became obsolete and are not applied by NAPC.

To enable the uniform applicability of the competition legislation, NAPC has to issue administrative regulations, instructions and guidelines. The sole disclosed normative act of NAPC is the Guideline of 17 May 2007 on establishing the dominant position of a business on the market (the "**Guideline**"). However, the adoption of this Guideline has been made without observing the procedure of adoption of normative acts provided by the law and its applicability may be challenged in court by the business entity in which respect its provisions have been applied.

1.2. Antitrust authorities: structure and competencies

The National Agency for Protection of Competition is the public authority empowered to protect competition in the Republic of Moldova. NAPC was created in 2007 by the Resolution of the Moldovan Parliament No 21-XVI, dated 16th February 2007. The main role of NAPC is to promote state competition policy in order to limit and suppress the anticompetitive activities of private and public entities, as well as enforce the Moldovan legislation for the protection of competition.

The Administrative Council is the collegial governing body of NAPC in charge of fulfilling NAPC's duties and the issuance of NAPC's resolutions on matters on which it is competent. It consists of 7 NAPC's officers, including its leaders (i.e. General Director and two Vice-directors).

The day by day management of NAPC is performed by the General Director and two Vice-directors, appointed for a five year period by the Parliament of the Republic of Moldova.

NAPC consists of several departments out of which the Department of Abuse of Dominant Position, the Anti-competition Agreements Department, the Control of Economic Concentrations Department and the Control of Unfair Competition and Advertising Department are the most important.

The Competition Law specifies the competencies of NAPC and, inter alia, it empowers the National Agency for Protection of Competition to:

- investigate violations of competition legislation;
- order termination of anticompetitive conduct and practices;
- require the cancellation or modification of agreements (concerted actions) and decisions infringing competition legislation;
- bring actions to court, including for confiscation of parts of revenues obtained as a result of the infringement of competition legislation;
- control economic concentrations and monitor relevant markets of goods, including their functioning and changes of structure;
- identify the dominant position of businesses in relevant markets;
- elaborate and develop state policy and legislation for the protection of competition and issue further secondary regulations and guidelines to implement.

At the judicial level, the Economic Appeal Court is in charge of examination of claims on the invalidation of anticompetitive agreements (concerted actions); remedy the consequences of the violation, and the confiscation of a part of revenue obtained as a result of infringement of competition legislation. The binding orders of NAPC may be challenged in Chisinau Court of Appeal. The Chisinau Economic Court is empowered to judge the claims relating to damages incurred by one business as a result of the anticompetitive activities of another.

The investigation of criminal offences under Article 246 and 246/1 of the Moldovan Criminal Code is conducted by the officers of the Center for Combating Economic Crimes and Corruption and the Anticorruption Prosecutor's Office.

1.3. Extraterritoriality

The Competition Law applies to the entire territory of the Republic of Moldova in respect of businesses registered in Moldova. However, according to the Article 2 (1) of the Competition Law, it also applies to the actions of Moldovan businesses acting outside the state territory which affects or may affect competition in the domestic market.

We have not yet encountered such cases of extraterritorial application and enforcement of the Competition Law by NAPC.

In matters of cooperation, NAPC has signed five Cooperation Agreements with the competition regulatory authorities of Austria, Bulgaria, Romania, Armenia and Hungary these facilitate the bilateral exchange of experience and information, assistance in establishing contacts with the legislative, executive and judiciary bodies of the signatory parties, assistance in the enforcement of competition regulations.

NAPC also collaborates with the competition regulatory authorities of Russia, Czech Republic, Estonia, Italy, Azerbaijan, Ukraine, USA and Japan.

Moreover, NAPC is a member of the International Competition Network, the Interstate Council for Anti-Monopoly Policy of the Community of Independent States and cooperates with the Budapest Regional Competition Center of the Organization for Economic Co-operation and Development.

2. Prevention of monopolistic activities and unfair competition

2.1. Overview

Article 5 of the Competition Law lists anticompetitive activities prohibited for businesses and public authorities, namely:

1. Monopolistic activity
   a) abuse of a dominant position on the market
   b) anticompetitive agreements between businesses (monopolistic agreement and concerted actions)
2. Unfair competition
3. Public authorities' activity that leads to the restraining of competition.

The involvement of businesses and public authorities in any anticompetitive activity listed above leads to the issuance of binding orders by NAPC and the imposition, on businesses or public authorities, of the sanctions provided for by the Competition Law, as follows:

- modification, termination or invalidation of anticompetitive agreements or provisions;
- remedy the consequences of violations and returning to the situation before the infringement;
- confiscation of a part of unlawfully generated revenue;
- forced division or separation of the dominant business.

Also, restraint of competition and conducting of unfair competition may result in the criminal liability of a business and its officers.

The application of specific pieces of legislation regulating the prevention of monopolistic activities and unfair competition in particular sectors/industries is insignificant in Moldova. For instance, there are specific rules on the identification of dominant businesses in the electronic communications markets. Moreover, the state and natural monopolies are governed by the Governmental Decision on Regulation of Monopolies, No. 582, dated 17th August 1995, and not regulated by the Competition Law unless the activities of such monopolistic undertakings threaten fair competition in relevant markets.

2.2. Dominance

The concept of dominance is laid down in Article 2 of the Competition Law and is when a business has an exclusive position in a market for goods, which confers, alone or in collusion with other companies, the possibility to exercise decisive influence on the general conditions of movement of goods on a relevant market or to restrain the access of other businesses to such markets.

From the outset, the law requires that in order for a company to be recognized as being in a dominant position, it has to own at least 35% of market share. The market share of a business is determined at group level, taking into account affiliated businesses.

Identification of a dominant position is done by NAPC, except for the electronic communication market, under the provisions of the Guideline. In accordance with these provisions, the 35% threshold is not enough to qualify a business as dominant. To qualify as dominant a business must also restrain competition in the market.

Dominance itself does not represent an anticompetitive activity and is not subject to prohibition. Only the abuse of dominant position is forbidden under the Competition Law.

Article 6 of the Competition Law qualifies as abuse of dominance as actions of one or more businesses (dominant either alone or together) which restrain, or potentially restrain competition and/or affect the interests of other businesses and/or natural persons on the relevant market, including the following non-exhaustive list of actions:

a) intentional constraint of the counter-signatory to less favorable conditions or to conditions that have no connection with the subject matter of the agreement (unjustified requests on transfer of funds, other assets or property rights);

b) Forcing a counterpart to enter into a contract subject to agreement by the counterpart to buy (sell) other goods in addition to the main contract, or to refrain from buying goods from other suppliers, or selling goods to other businesses or consumers;

c) artificially maintaining a shortage of goods in the market through deliberate reduction, limitation or termination of production regardless of favourable conditions for it, removal of goods from circulation, accumulation of goods, operation of other measures;

d) undertaking certain discriminatory actions towards a counterpart thereby placing it at a competitive disadvantage;

e) imposing a cap on the re-sale prices of goods;

f) creating barriers to entry/exit of the market;

g) dumping practices;

h) establishing high monopoly prices;

i) groundless refusal to conclude contracts with certain buyers/beneficiaries when there is a possibility to manufacture and supply the requested goods;

If, after the investigation of a situation, NAPC concludes that an abuse of dominant position occurred, it will issue a binding order to the relevant business obliging it to terminate illicit actions and/or remedy the consequences of the violation, or to modify or terminate the agreement which led to the abuse of the dominant position.

If a business fails to observe the binding order, NAPC is entitled to file the action with the courts to ensure the remedy of consequences of the breach, modification, termination, invalidation of the unlawful agreement or provision or confiscation of unlawfully generated revenue.

When a business abuses its dominant position two or more times, NAPC is entitled to force its division or separation through the court system, if the conditions provided by the Competition Law for conducting such forced division or separation are met.

There are no exclusions or exceptions for the abuse of a dominant position.

2.3. Monopolistic agreements and concerted actions

Monopolistic agreements and concerted actions defined as "anticompetitive agreements" under the Competition Law represent both formal agreements and informal practices entered into or conducted by:

- competing businesses together holding more than a 35% share of a relevant market;
- non-competing businesses one of which holds a dominant position in a relevant market, while the other is its supplier, or purchaser (beneficiary); or
- non-competing businesses that are not suppliers or purchasers of each others goods, when each of them (or at least one) holds a dominant position in the relevant market;

In order for the prohibition or the making void entirely or in part, of such agreements (coordinated actions) they should lead, or potentially lead, to the restraint of competition.

Article 7 of the Competition Law includes non-exhaustive lists of forbidden competition restraint practices:

(i) In cases of anticompetitive agreements between competing businesses holding together more than a 35% share of a relevant market:

a) making (maintaining) of prices (tariffs), discounts, extra charges (additional payments) directed at the infringement of competitors' interests;

b) increase, reduction or maintenance of prices at auctions;

c) conducting auctions by collusion;

d) geographic division of the market, division by volume of sales or purchases, range of sold products, or circle of sellers or purchasers (customers);

e) limitation of manufacturing, supply, including by establishment of quotas;

f) limitation of access to the market, or elimination from the market of other sellers of certain products or their purchasers (beneficiaries);

g) groundless refusal to conclude agreements with certain sellers or purchasers (beneficiaries).

(*ii) In cases of anticompetitive agreements between non-competing businesses one of which holds a dominant position in a relevant market, while the other is its supplier, or purchaser (beneficiary):*

a) limitation of the sales territory or the circle of buyers;

b) establishing restrictions on the resale prices of products sold to buyers;

c) preventing businesses from selling products manufactured by competitors.

Businesses which intend to enter into horizontal or vertical agreements (coordinated actions) containing competition restraint arrangements may require the clearance of NAPC for the conclusion of such agreements. In cases where approval is given, the agreement is considered consistent with the legislation subject to the observance of the conditions imposed by NAPC.

In exceptional situations (case by case) NAPC may grant an exemption and allow the conclusion of anticompetitive agreements between non-competing businesses that are not suppliers or purchasers of each others goods, and each of them (or at least one) holds a dominant position in a relevant product market, if the benefits resulting from such actions outweigh the restraints of competition on a relevant product market.

2.4. Unfair competition

According to Article 2 of the Competition Law, "unfair competition" is defined as the actions of a business aimed at obtaining unjustified advantages from its business activity that damages or is likely to cause damages to other businesses or injure their business reputation.

Businesses are banned from conducting unfair competition practices, including:

- dissemination of false or incomplete information that is likely to damage another business, and/or damage its business reputation;
- misleading consumers in respect to the nature, method and place of products manufacturing, consumer properties, suitability, quantity and quality of the products;
- unfair comparison of its manufactured or commercialized products with the products of other businesses for advertising purposes;
- unauthorized use of trademark, service mark of other objects of industrial property, trade name of another business, as well as to imitate the shape, packaging and general appearance of the goods belonging to other businesses;
- unlawful receipt, use or disclosure of information representing a commercial secret of another business;

2.5. Antitrust investigation

Antitrust investigations are started by NAPC, ex officio, or at the request of businesses, their organizations and associations, organizations and associations of consumers or public authorities. The form of application for the commencement of an antitrust investigation is approved by NAPC. The fee for examination of the application is MDL 90 (USD 7)

The procedure for starting, conducting and terminating an antitrust investigation is poorly regulated at the moment. The provisions of the Regulation on Examination of Violations of Antitrust Legislation, approved by Government Resolution No. 619, dated 5th October 1993, are obsolete and not applicable by NAPC, while the new Regulation on the Manner of Investigation of Violations of Legislation on Protection of Competition has not yet been approved properly. However, NAPC applies the provisions of this 'unapproved' regulation as a result the procedure for investigation is completely non-transparent. So, the stages of an antitrust investigation, the time limits, the rights and obligations of the parties involved in the investigation remain a "mystery" for businesses.

Within the investigation procedure, NAPC is entitled to request relevant documents, written and verbal explanations, and other necessary information from businesses, their officers and public authorities. Moreover, NAPC representatives have the right to free access to the premises and to the business' property.

NAPC shall keep commercially sensitive information obtained in the course of investigation confidential. The confidential character of information is determined by the parties involved in the investigation. The parties may also request confidential treatment of some information submitted by NAPC. The damages caused by NAPC officers through dissemination of the confidential data of businesses shall be remedied.

At the end of the investigation, if the violation of competition legislation is determined, NAPC will issue a binding order obliging businesses and/or public authorities:

- to stop the violation of the competition legislation;
- to amend, terminate or cancel the agreements or decisions;
- to remedy the consequences of the violation by restoring the situation existing before the infringement.

2.6. Implications for infringers

The binding order is submitted by NAPC to the infringer within 5 days as of its adoption. Such order should be implemented by a business / public authority within the term specified in it.

NAPC binding orders may be appealed in the Chisinau Court of Appeal within 6 month period of their issuance.

Failure of the infringer to implement the terms of the binding order issued by NAPC may result in the referral of the case to the competent court.

NAPC is not entitled to amend, terminate or invalidate the anticompetitive agreements or to force remedy of the consequences of the violation by restoring the situation that existed before the infringement or to confiscate a part of the business' revenue by itself. All the above listed sanctions may only be applied by the competent court.

As of July 2009, NAPC has lost its right to apply administrative fines on infringers for violation of the competition legislation due to an amendment of the contraventional legislation which removes the classification of competition restrictive practices as contraventions (petty offences).

At the same time, the restraint of competition by entrance into anticompetitive agreements leads to the criminal liability of the individuals (officers of businesses) who may be punished with a fine between MDL 20,000 (USD 1,675) and MDL 40,000 (USD 3,350) or up to 3 years imprisonment. Also, infringing businesses involved in unfair competition practices are penalised with (i) a fine between MDL 20,000 (USD 1,675) and MDL 40,000 (USD 3,350) or up to 1 year imprisonment on infringing individuals (officers of businesses) and (ii) a fine of MDL 70,000 (USD 5,862) and MDL 100,000 (USD 8,374) with the removal of the right to carry out a business activity from 1 to 5 years.

Moldovan legislation is not lenient towards infringers.

Any party that has suffered from competition restraint actions (abuse of dominance, monopolistic agreements and concerted actions, unfair competition) are entitled to challenge such anticompetitive activities using NAPC or by claims to the competent court seeking to stop competitive restraint actions and the recovery the damages suffered.

3. Control over economic concentration

3.1. Transactions subject to approval

The following transactions shall be subjected to mandatory *ex ante* control and approval of NAPC under Moldovan competition rules:

a) formation, enlargement, merger of business associations;

b) formation, enlargement, merger of holding companies, transnational corporations, and industrial-financial groups;

c) enlargement, merger of undertakings which could lead to the formation of a business entity with a market share of more than 35% in the Moldovan market;

d) a party acquires controlling block of shares (more than 50% of voting shares) of a company having a dominant position (more than 35%) in the Moldovan market;

e) a party with a dominant position on the relevant Moldovan market acquires shares of an entity in the same Moldovan product market.

The rules governing economic concentrations are the same for all markets in Moldova. However, there are specific provisions regulating mergers and acquisitions in particular sectors:

- Banking: direct or indirect acquisitions of a qualifying share (5% and above) in Moldovan banks have to be notified to and cleared by the National Bank of Moldova (NBM). Similarly, acquisitions of substantial stakes, by banks, in businesses active in industries other than banking, require prior approval of the NBM.
- Energy: all mergers, joint ventures, and separations involving suppliers or providers of electricity as well as acquisition of the shares by suppliers or providers of the electricity in the share capital of other suppliers or providers of the electricity have to be cleared/*ex ante* approved by the National Agency for Energy Regulation (NAER). The NAER has a 30-day period following the notification to approve or prohibit the specified transaction. Such verification period may be prolonged up to 2 months. In case of inaction over the specified timeline the transaction is considered to be approved.

- Natural gas: mergers, joint ventures and separations of businesses operating on the market for supply of natural gas as well as acquisition of the shares by businesses operating on the market of natural gas supply from the share capital of other businesses operating on the natural gas market have to receive *ex ante* approval from the NAER. The NAER has a 30-day period following the notification to approve or prohibit the specified transaction. Such verification period may be prolonged up to 2 months. In case of inaction over the specified timeline the transaction is considered to be approved.

Such specific sector regulations do not exclude NAPC approval where any of the parties to merger or acquisition has a dominant position in a market in Moldova.

3.2. Approval / notification thresholds

The thresholds triggering the approval of NAPC are relevant only for the transactions noted by letters c), d) and e) of the Section 3.1. above. Such thresholds are as follows:

- when a concentration leads to the creation of a business entity that possesses more than 35% of the relevant market;
- when a dominant business (holding more than 35% of the relevant market) acquires shares from a competing business;
- when more than 50% of (voting) shares of a dominant business entity (holding more than 35% of the relevant market) are acquired;

For the transactions noted by the letters a) and b) of the Section 3.1. above, there are no thresholds for the transaction to be covered by the rules on transaction notification and approval.

There are no specific thresholds for different industries or business sectors involved.

Moldovan competition rules do not regulate any turnover or assets thresholds.

3.3. “Groups” and “intragroup deals”

The “groups” and “intra-group deals” are not specifically regulated by Moldovan competition legislation. Thus “intra-group deals” do not benefit from any exemption and are subject to *ex ante* notification and approval procedures under the general terms and conditions provided by the Competition Law.

3.4. Exceptions from transaction approval requirements

The law does not provide any exceptions from transaction approval requirements. However, despite the regulatory norms of other jurisdictions, Competition Law does not regulate the notification of indirect acquisitions of shares. Thus, only the direct acquisitions of shares are subject to competition approval.

3.5. General approval procedure

All the transactions provided in the Section 3.1. above must be filed with NAPC.

Under Competition Law, all the parties involved in the transaction are responsible for submitting an application to NAPC. In practice, in the case of an acquisition the purchaser files the application. NAPC is entitled to require documents from all involved parties.

There is no statutory deadline for notification of the transaction. As a rule, the notification shall be made prior to the closing of the transaction once the decision on formation, enlargement, merger or acquisition has been taken.

Failure to provide notification of the transaction before its completion will lead to the refusal of state registration of the formation, reorganization or liquidation of the business (for transactions provided by letters a)-c) of the Section 3.1. above) and to the invalidation of the acquisition agreement by the competent court at the claim of NAPC (for transactions provided by letters d) and e) of the Section 3.1. above).

In 2010, NAPC approved a new format for the notification specifying the content of the application as well as the list of documents and information to be disclosed.

Thus, the notification shall mandatorily provide the following data:

- identification details of the parties involved in the transaction;
- number of shares intended for acquisition and their value for acquisition transactions;
- content of the transaction;
- name of the contact person;
- list of documents and information to be submitted for notification;
- confirmation of payment of filing fee.

The list of documents and information to be submitted and disclosed for notification purposes depends on the type of transaction.

Thus for transactions provided by letters b)- e) of the Section 3.1. above, the list shall include:

- information on the businesses involved in the transaction (address for correspondence; information on the business activities carried out, specifying the main activities and the secondary ones; copy of the charters; copy of the power of attorney and identity cards of representatives; copy of respective resolutions on formation, enlargement, merger of businesses or acquisition of shares; copy of the drafts of respective agreements on formation, enlargement, merger of businesses or acquisition of shares);
- information on the transaction (details on the nature of transaction, including if it is related to all involved parties or only to their subdivisions; other required approvals and the stage of their obtainment; if the performance of the transaction is subject to certain conditions or events; any financial or other type of aid obtained by the parties from any sources, the source and the value of aid as well as the purpose of performing the transaction);
- information on ownership and control (list of affiliated persons, i.e. all the parties/ individuals directly or indirectly controlling the involved businesses as well as all undertakings from a relevant market directly or indirectly controlled by the involved businesses or the persons directly or indirectly controlling the involved businesses, the controlling structure, details on acquisitions of shares in the share capital of businesses conducted by the affiliated persons within the last 3 years);

- information on economic features of the transaction (for each involved undertaking – information on total sales income, including sales income obtained in Moldova; sales income for each conducted business activity for the last 3 years as well as the copy of financial reports for the last 3 years in respect of each involved party);
- information on relevant product market (geographic and product markets affected by the transaction, list of the products manufactured or sold by the parties involved in the transaction, information for the last 3 years on the products and the relevant markets related to and affected by the transaction).

In the case of formation, enlargement, merger or liquidation of an association of businesses the list shall include (depending on each separate case):

- information on the business activities carried out by the founders of association, the related sold products and services and the territory of selling;
- related documents: minutes of incorporation of the association; draft of the association's charter; minutes of merger and merger agreement; list of the members of association; minutes of liquidation.

The notification shall be filed in written form and be signed by the empowered representative of the business.

The fees for the examination of a notification by NAPC are as follows:

- 360 Moldovan Lei (about USD$30) for applications related to the formation, enlargement, merger of associations of businesses and holding companies, transnational corporations, and industrial-financial groups;
- 270 Moldovan lei (about USD$25) for applications related to the enlargement, merger of businesses which could lead to the formation of a business entity with a market share of more than 35% in the Moldovan market;
- 216 Moldovan lei (about USD$18) for applications related to the acquisition of a controlling block of shares (more than 50 percent of voting shares) of a business with a dominant position (more than 35%) in the Moldovan market;
- 216 Moldovan lei (about USD$18) for applications related to acquisition by a business with a dominant position in a Moldovan market of shares of an entity in the same Moldovan market.

Under Article 17 (3) of the Competition Law, the review of a notification lasts up to 30 days from the filing date for transactions noted by letters a)-c) of the Section 3.1. above. The timetable may be extended by NAPC for an additional 15 days, if additional verification of the submitted information or specification of certain data is required. In practice, NAPC applies the same timetable for the transactions d) and e) of the Section 3.1. above.

The substantive test applied by NAPC is whether the formation, enlargement, merger or acquisition will establish or strengthen a dominant position or will result in a substantial restriction of competition in the Moldovan market.

Upon the assessment of the notified economic concentration, NAPC shall issue one of the following decisions:

- to prohibit the notified concentration that will lead to the strengthening of a dominant position or limitation of competition or in cases where the information submitted in the application was false;

- to approve the notified concentration in the absence of anticompetitive concerns or where despite the existence of anticompetitive concerns, the parties involved prove that the positive effects of their activity would outweigh potential negative effects on the relevant market.

According to the administrative litigation procedure it is possible to challenge the refusal to approve a transaction. This procedure consists of two steps: (i) a preliminary appeal examined by NAPC within 30 calendar days from the day when the NAPC decision was communicated to the plaintiff and (ii) an appeal examination by the Chisinau Court of Appeal within 30 calendar days of the day NAPC's response was received, or from the day when NAPC should answer under the law.

3.6. Implications of a failure to obtain approval

Failure to obtain NAPC clearance or the completion of the transaction before such clearance is received will lead to:

- Prohibition from the registration of new businesses or associations of businesses or their reorganization with the state registration body;
- potential for the transaction to be declared invalid by the competent court at the request of NAPC;
- confiscation of a part of the businesses' revenue under the court decision at the request of NAPC. The exact amount of revenue to be confiscated shall be determined by the court.

4. Current case law trends

At present the court's record in the field of competition law is quite poor. Most cases brought by NAPC to court refer to: (i) invalidation of the agreements and coordinated actions of, or between, business entities holding a dominant position and (ii) confiscation of the part of the revenue of the businesses obtained as a result of the infringement of competition legislation. For instance, in 2008 there were only 2 cases brought to court, while in 2009 this number increased to 8 cases.

On the other hand, in most cases businesses challenge the binding orders of NAPC in court.

The most intensive activity conducted by NAPC is on merger implementation. This has been caused partially by unlawful notifications (later canceled) issued by NAPC and addressed to Moldovan notaries requiring them to provide notification of share sale and purchase agreements only with NAPC clearance. Thus, in 2008, NAPC cleared 1369 share acquisitions and in 2009 – 482.

The most recent investigation conducted by NAPC refers to a supposed "administrative cartel" in the oil market and anticompetitive arrangements between 7 of the most important oil trading companies. We are waiting the ruling by NAPC in the Economic Appeal Court for confiscation of about MDL 2,000,000 (USD$165,963) from the revenues of involved businesses as well as, on the other hand, the challenging of the NAPC binding order by the oil companies involved in the investigation.

5. Basic trends in the development of antitrust laws in 2011-2012

The basic trend in development of competition legislation in Moldova focuses on the harmonization of the national legislation with European Union directives and practices regulating competition matters.

In the near future, important amendments to competition legislation are expected. The draft of the Law on State Aid has already been elaborated by NAPC. However, it remains to be approved by the Parliament of the Republic of Moldova. Also, a new law on the protection of competition will soon be presented for public discussion. Turcan Cazac law firm will be involved and contribute to the coordination and improvement of the draft of the new law on the protection of competition.

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Egorov Puginsky Afanasiev & Partners is the leading national law firm in Russia with offices in Moscow, St. Petersburg and an associated office in London. Founded in 1993, the firm combines extensive emerging markets experience with international professional standards. It regularly represents international companies doing business in Russia and Russian companies abroad. The firm regularly acts for the Russian Federation in transactions and litigation matters and serves as Russian counsel to leading international law firms.

Overview of antitrust laws in Russia

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1. Overview

1.1. Underlying competition regulations

Part 1 of article 8 of the RF Constitution guarantees shared economic space, the free transfer of goods, services and financial resources, competition support and freedom of economic activity. Part 2 of article 34 of the RF Constitution prohibits economic activities aimed at monopolization and bad faith competition.

The main regulation governing and ensuring competition is Federal Law No. 135-FZ, dated July 26, 2006, "On the Protection of Competition". In addition, a number of laws governing certain areas of commercial activity contain provisions aimed at protecting competition:

- Federal Law No.35-FZ, dated March 26, 2003, "On Introducing the Specifics of Antitrust Regulation in the Power Industry", which introduces the concept of dominance and exclusivity of competitors in the power market and establishes an indicative list of activities that may prevent, restrict or eliminate competition or damage the interest of third parties;
- Federal Law No.36-FZ, dated March 26, 2003, "On the Peculiarities of Power Industry Operations in the Transition Period", which prohibits a group from combining activities related to the transfer of power and operational and dispatch management with activities relating to power generation and sale/purchase;
- Federal Law No.160-FZ, dated July 9, 1999, "On Foreign Investment in the Russian Federation", which prohibits foreign investors from engaging in bad faith competition and restrictive practices, including creating a shortage of goods within Russia by means of liquidating their own entities/branches in Russia, entering into wrongful arrangements concerning pricing, division of distribution markets or participation in tenders;
- Federal Law No.381-FZ, dated December 28, 2009, "On the Framework for State Regulation of Trade Activities in the Russian Federation", which establishes the specifics of antitrust regulation in trade.

The scope of the Federal Antimonopoly Service's is further detailed in Federal Law No. 57-FZ, dated April 29, 2008, "On the Procedure for Making Foreign Investment in Business Entities Having Strategic Importance for State Defense and Security".

1.2. Organizational Structure of the Russian antitrust agency (the FAS)

The Federal Antimonopoly Service (FAS of Russia) and its local agencies serve as the antitrust authority in Russia. The head of the FAS of Russia is its chief, who is appointed and dismissed by the Government of the Russian Federation. The organizational structure of FAS includes a central office consisting of departments that cover the main areas of the agency's operations. Local offices of the FAS of Russia operate in the constituent entities

of the RF. The heads of the local offices of the FAS are appointed by the chief of the FAS of Russia.

1.3. General areas of FAS concern:

The FAS of Russia is responsible for legally regulating and controlling

- compliance with antitrust law;
- compliance with the regulations applicable to the operations of natural monopolies;
- compliance with advertising regulations;
- procurement orders for the federal government, including sale of goods, provision of labour or services, etc; and
- foreign investment in companies having strategic importance for national defense and security of the RF.

1.4. Extraterritoriality

The provisions of Russian antitrust law apply to agreements made outside of the Russian Federation between Russian and/or foreign entities or organizations, as well as to the actions they take, if such agreements are made and the actions taken affect any tangible and/or intangible assets located in Russia or any shares (equity interests) in any companies and any titles to for-profit companies operating in Russia or if they have any other impact on competition in Russia.

2. Preventing monopolistic activities and unfair competition

2.1. Grounds for liability

The antitrust laws prohibit the following actions:

- abuse of a dominant position;
- entering into anticompetitive agreements and taking concerted actions;
- facilitating collusion;
- engaging in unfair competition;
- government and municipal authorities adopting regulations restricting competition;
- entering into anticompetitive agreements and taking concerted actions with state and municipal authorities;
- violating antitrust bidding requirements.

In addition, there are certain ‘derivative’ antitrust offences (specifically, these include violation of a prescription issued by an antitrust authority, failure to provide data requested by the FAS of Russia, etc.).

1.2. Concept of dominance. Abuse of dominance

Dominance is the position held by a competitor in a certain commodity market that allows it to have a decisive impact on the general circulation of a product in the respective market and/or eliminate from such market other competitors and/or hamper other competitors' access to such commodity market.

The market share held by a competitor is a key criterion for establishing dominance.

Single firm dominance. A competitor is presumed to be dominant if its market share exceeds 50%. A competitor may provide evidence of the fact that its position is not dominant. If the market share of a competitor is within the 35-50% range, it may be found to be dominant by an antitrust authority. In exceptional cases, subject to compliance with additional conditions, a competitor with a market share below 35% may be found to be dominant.

Collective dominance. If demand for a commodity is not price elastic, the product may not be substituted and the shares of competitors in a commodity market are stable, one or several competitors may be found to be dominant if the aggregate market share held by up to three competitors with the largest market shares is in excess of 50% or if the aggregate share of not more than five competitors with the largest market shares is in excess of 70% (this provision does not apply if the market share of at least one of the competitors is less than 8%).

The law provides for a non-exhaustive list of actions considered to be an abuse of a dominant position (including establishing and maintaining monopolistically high or low prices, product recalls, etc.). Such actions result or may result in the prevention, restriction or elimination of competition and/or cause damage to other parties.

There are special rules for establishing the dominance of financial institutions.

Abuse of dominance (except for certain violations) may be found to be acceptable if it is in line with the provisions of article 13 of the Law on the Protection of Competition, subject to the following conditions:

- Such actions do not threaten to eliminate of competition;
- Inadequate restrictions are not imposed on the market players;
- Such actions result or may result in the improvement of operations/products sales or may stimulate progress, as well as promote adequate advantage (benefits) for buyers.

2.3. Concept of agreements and concerted actions. Sanctionable cases

An agreement is a written arrangement contained in a document or several documents and can also be a verbal arrangement. The antitrust law differentiates between 'vertical' and 'horizontal' agreements. 'Horizontal' agreements are subject to a number of absolute prohibitions. For 'vertical' agreements, there are other grounds making it unacceptable to enter into such agreements. In addition, it is prohibited to enter into any (either horizontal or vertical) agreements that may restrict competition. However, subject to compliance with certain requirements (improvement of operations, benefits and advantages for buyers, etc.), it is possible to argue that such agreements are acceptable. 'Vertical' agreements are also found to be acceptable if they are franchising agreements or if the market share held by each party to such agreements does not exceed 20%.

The rules applicable to the process of entering into such agreements - also apply to concerted actions.

2.4. Unfair competition

Unfair competition is a separate antitrust violation that consists of competitors' wrongful actions intended to obtain advantages against their rivals in business operations, as well as to eliminate rivals in a particular commodity market (e.g., circulating false, inaccurate or distorted data, or by introducing products based on the unlawful use of intellectual property, etc.).

2.5. Antitrust investigation (general examination procedure)

Antitrust cases are considered by a FAS of Russia commission specifically set up by the FASof Russia within nine months of the date of the order scheduling a hearing in the case. Based on the case hearing results, a decision is delivered, and, in some cases, an order is issued prescribing a number of conditions to be met. The procedure for hearing a case is regulated by the Law on the Protection of Competition and the administrative regulations of the FAS of Russia.

As of August 2009, antitrust cases are subject to a limitation period of three years from the date of the offence or the date of its detection or termination (for continued offences). A case may not be initiated after the expiration of this period, and an initiated case is subject to termination.

2.6. Implications for a company found to be in breach of the antitrust laws (compliance notice, sanctions, criminal and civil liability)

Based on the results of a hearing in an antitrust case, an order may be issued to the respondent describing the prescribed conduct, as well as an order to surrender the proceeds derived from engaging in monopolistic activities to the federal government. Such orders shall take into account each respondent's proportionate wrongdoing and indicate the amount of revenues to be surrendered to the government. Recovery of monopolistic proceeds is a compensatory sanction rather than a government-applied liability measure and, thus, it may be combined with an administrative fine.

A decision in an antitrust case also gives rise to administrative proceedings. The Administrative Offences Code provides for liability in the case of abuse of dominance, entering into and being party to anticompetition agreements and concerted actions, coordination of economic activities and unfair competition. The main sanction imposed on companies is a fine levied on their turnover (from 1% to 15% of the proceeds from sales in the commodity market where the offense was committed for the year when the offence was committed or the year preceding the discovery of the offence). Fines of up to RUR 50,000 and a disqualification are provided for the officers of such companies.

The RF Criminal Code establishes criminal responsibility for individuals who enter into anticompetition agreements and concerted actions, as well as repeated abuse of dominance in the form of establishing and/or maintaining a monopolistically high or low price, unmotivated refusal or failure to enter into a contract and restricting access to the market, if such actions caused substantial damage to individuals, entities or the government, or substantial profit was derived. The statutory sanctions are fines and imprisonment.

An antimonopoly offence may result in civil liability, specifically, in connection with a claim for recovery of losses. Seeking a remedy from an antitrust agency does not prevent a person from bringing a lawsuit for the recovery of losses.

3. Control over economic concentration

3.1 Transactions subject to approval, their categories

The following transaction categories are subject to antimonopoly regulation in the RF:

1. incorporation of a legal entity, provided (1) that its authorized capital is paid for with the shares of another for-profit company or the entity being incorporated acquires shares/property of another for-profit company and (2) the incorporation of the legal entity results in:

- The acquisition of more than 25%, 50% or 75% of the voting shares of a Russian joint-stock company;
- The acquisition of more than one-third, one-half or two-thirds of the equity interests in the authorized capital of a limited liability company;
- The acquisition of the right to own, use or possess the fixed assets or intangible assets of another competitor, where the book value of the target's assets exceeds 20% of the value of the fixed and intangible assets of the legal entity selling such assets (10% in the case of purchasing the assets of a financial institution);
- The acquisition of rights in respect of another for-profit company allowing the purchaser to direct the business activities of the latter.

2. conversion by merger or consolidation;
3. acquisition of more than 25%, 50% or 75% of the voting shares in a Russian joint-stock company;
4. acquisition of more than one-third, one-half or two-thirds of the equity interests in the authorized capital of a Russian limited liability company;
5. acquisition of the right to own, use or possess the fixed assets or intangible assets of another for-profit company, where the book value of the target's assets exceeds 20% of the value of the fixed and intangible assets owned by the for-profit company selling such assets (10% in case of purchasing assets of a financial institution);
6. acquisition of rights allowing the purchaser to determine the terms of the commercial operations of another competitor (e.g., under trust management or agency agreements, etc.).

These transactions (actions) are subject to the FAS of Russia control if:

(1) the statutory thresholds are exceeded, calculated on the basis of the financial performance of the entities that are parties to the transaction and their groups; and/or

(2) if an entity that is a party to the transaction is listed in the Registry of Business Entities as holding a market share in a particular commodity market exceeding 35% or is dominant in a certain commodity market (hereinafter, the '**Register'**). The Register is displayed on the FAS of Russia's official website.

The FAS of Russia exercises control by way of prior transaction approval and review of notices regarding completed transactions.

3.2 Approval/notification thresholds

Prior transaction (action) approval is required for exceeding the following thresholds:

1. the value of the assets of the buyer (its group) and the assets of the target entity (its group) is in excess of RUR 7,000,000,000 (RUR 3,000,000,000 for mergers (consolidations)); provided that the total value of the assets of the target entity (group) exceeds RUR 250,000,000; or
2. the value of the proceeds of the buyer (its group) and the target entity (its group) is in excess of RUR 10,000,000,000 (RUR 6,000,000,000 for mergers (consolidations)); provided that the total value of the assets of the target entity (its group) exceeds RUR 250,000,000; or

If an entity exceeds the thresholds provided below, it must duly notify the FAS of Russia: the value of the assets of the entities involved in a transaction (action) and their groups exceed RUR 400,000,000, and the total value of the assets of the entity being purchased, established, restructured, etc. (its group) exceeds RUR 60,000,000.

The thresholds for financial organizations are established in a separate regulation approved by the RF Government and are currently as follows: for preliminary clearance of transactions (actions) - more than RUR 33 billion; for subsequent notification – more than RUR 2.5 billion.

3.3 “Groups” and “intragroup deals”

It is typical for a group to maintain internal control over relations between individuals and/or legal entities that meet one of 15 statutory criteria. The key criteria are as follows: the entity that is in a position to control over 50% of the total votes attributed to the voting stock of a company; the person acting as the chief executive officer; the entity that is in a position to give binding instructions to the company, etc.

As a general rule, intragroup deals (actions) are subject to the control of the FAS of Russia.

In certain cases, there is no need to obtain prior FAS of Russia approval for intragroup transactions. However, this does not exempt the parties from the obligation to subsequently notify the FAS of Russia that the transaction has been concluded.

3.4 Exceptions from transaction approval requirements

It is possible to enter into transactions (actions) without obtaining the prior approval of the FAS of Russia in the circumstances described below:

- the transactions (actions) are performed by entities that form a group based on the criteria of having control of over 50% of the total votes attributed to the voting stock (shares);
- the transactions (actions) are performed by entities that form a group based on other statutory criteria, provided that they disclose information on their group on the FAS of Russia website no later than one month before the transaction and provided that the group remains unchanged through the date of the transaction;

- the transaction (action) is authorized by order of the RF President or the RF Government.

Even if a transaction is exempt from the prior approval rule, the party to the transaction (normally, the buyer) must subsequently notify the FAS of Russia that it has entered into the transaction by the statutory deadline.

There are no exceptions provided from having to make subsequent notification.

3.5 General approval procedure

The procedure for obtaining prior FAS of Russia approval for a transaction includes the following steps:

1. Submission of an application to the FAS of Russia, along with documents pertaining to the applicant's group and the target company being acquired/incorporated, as well as other data related to the business operations of the companies and their groups.
2. The FAS of Russia considers the application. The consideration period is 30 days, but may be extended by 2 months. Where a transaction is also subject to approval under the Law for Investing in Strategic Entities, the consideration period may be extended until a decision approving the transaction under the Law for Investing in Strategic Entities is obtained.
3. Based on the results of the application review, the FAS of Russia issues a decision:

- to grant the application; or
- to grant the application and issues a prescription to perform certain actions aimed at securing competition; or
- to deny the application in the event that the transaction (action) restricts competition, as well as in cases where unreliable data has been provided.

The approval of a transaction by the FAS of Russia remains valid for one year from the approval date.

The subsequent notification process includes: (1) submission of a notice within 45 days after the transaction date with the same documents that would have been provided along with an application for prior transaction approval; and (2) review of this notice by the FAS of Russia (the review period is not regulated, but in actual practice generally amounts to 30 days). Based on the review of the notice, a prescription may also be issued to perform certain actions aimed at securing competition.

3.6 Implications of a failure to obtain approval

The following penalties may be imposed for breaching the approval or subsequent notification procedures:

1) attachment of an administrative penalty in the form of a fine (up to RUR 500,000 for legal entities);
2) a transaction may be held to be invalid based on a lawsuit filed by the FAS of Russia, if it is proved that it restricted or may restrict competition;

3) based on a lawsuit filed by the FAS of Russia, a for-profit company that has been established, including by merger or consolidation, may be liquidated or reorganized through a spin-off or de-merger, if it is proved that establishing the company restricted or may restrict competition.

4. Control over foreign investment

4.1. Grounds for approval

Approval must be sought when a foreign investor or group makes an investment by purchasing shares in the authorized capital of companies which have strategic importance for national defense and security of the RF (hereinafter, 'Strategic Entities'), as well as when a foreign investor or group enters into other transactions that result in foreign investors or groups acquiring control over Strategic Entities.

A foreign investor is any foreign entity that invests within the territory of the RF.

A group that includes a foreign investor is also subject to the Law on Investing in Strategic Entities.

A Strategic Entity is an entity established in the RF that is engaged in at least one activity having strategic importance for the national defense and security of the RF. A list of such activities is provided in the Law on Investing in Strategic Entities.

The FAS of Russia is charged with ensuring compliance with the Law on Investing in Strategic Entities. However, decisions on the applications filed by foreign investors are made by the Government Commission headed by the Russian Prime Minister.

4.2. Transactions subject to approval

The Law on Investing in Strategic Entities contains a list of transactions that are subject to prior approval by the Government Commission.

This list includes:

1. Transactions aiming to establish control over a Strategic Entity that does not operate subsoil plots of federal importance;
2. Transactions aiming to establish control over a Strategic Entity operating subsoil plots of federal importance;
3. Other transactions aiming to transfer to a foreign investor (group) the right to direct the decision making process of the management bodies of a Strategic Entity, including the course of its business operations.

The law also stipulates the need to obtain the consent of the Government Commission in circumstances where the foreign investor acquires control of a Strategic Entity as a result of a change in the proportion of votes attributed to its shares (e.g., when the company in question buys back its own shares).

The elements of control are determined by law. The main elements include: direct or indirect acquisition of more than 50% of the voting shares of a Strategic Entity (or 10%, when a company is operating subsoil plots of federal importance), the power to appoint the chief executive officer, more than 50% of the Board of Directors (more than 10%, if the company is a subsoil user); the power to otherwise direct the business operations of the company, etc.

4.3. General approval procedure

Obtaining an approval includes the following steps:

1. submission of an application to the FAS of Russia for obtaining prior consent and enclosing the documents specified in the list contained in the Law on Investing in Strategic Entities;
2. preparation by the FAS of Russia of the application for review by the Government Commission (i.e., preparing proposals, working with the Federal Security Service (FSB) to obtain an opinion as to whether a threat is created to national defense and security as a result of the transaction, etc.).
3. review of the application by the Government Commission, based on which one of the following decisions is made:

(i) to give prior approval to the transaction; or

(ii) to give prior approval to the transaction and to enter into an agreement binding the applicant to perform certain obligations ensuring the security of the state (with the FAS of Russia being a party to the agreement); or

(iii) to refuse to approve the transaction.

As a rule, the Government Commission is convened on a quarterly basis to review the applications submitted.

There is no duty levied for the review of an application.

The period during which the prior approval remains valid is established by the Government Commission based on the applicant's proposal.

4.4. Implications of a failure to obtain approval

Transactions entered into in breach of the statutory requirements applicable to foreign investors or groups investing in Strategic Entities are null and void. Interested parties may bring a lawsuit seeking to enforce the invalidity of the transaction.

If the approval procedure is violated, the FAS of Russia may also seek a court decision requiring that the foreign investor (group) be deprived of its right to vote at the general shareholders meeting and may also bring a lawsuit for the purpose of invalidating the decisions of the general shareholders meeting and other management bodies of a Strategic Entity made after such control was acquired.

5. Current case law trends

The 2010 case involving OJSC TNK-BP Holding oil company was very significant. The company was accused of establishing and maintaining monopolistically high prices for gasoline and jet fuel in Russia, setting economically unjustifiable varying wholesale prices for jet fuel and creating discriminatory conditions in the wholesale gasoline and jet fuel markets of the Russian Federation.

The decision of the antitrust agency was successfully contested by OJSC TNK-BP Holding in the trial court, the appellate court and the court of cassation.

During the supervisory review of the decision, the Presidium of the Supreme Arbitrazh.

Court of the Russian Federation found that:

- In this case the antitrust agency correctly applied the provisions concerning the collective dominance of business entities;
- The prohibition on creating discriminatory conditions and establishing different prices not motivated by economic, technological or other necessity applies to both intragroup and extragroup transactions;
- Establishing different prices is also unacceptable where domestic consumer prices, on the one hand, and external prices, on the other hand, are compared.

After the Law on Investing in Strategic Entities came into effect in 2008, some cases critical to the subsequent application of the Law were reviewed. For example, in the OJSC TGK-2 case' 2010, the court held that the mere fact that a foreign investor was included in the group to which the buyer acquiring control of a Strategic Entity belonged (whether or not such foreign investor controls the buyer or its group) is sufficient for the transaction to be classified as one requiring prior consent.

In the case of OJSC Novatek' 2010, the court delivered an opinion on indirect control over a Strategic Entity. The court held that the concept of indirect control consists of the foreign investor being able, by means of third parties, to actually manage the votes attributed to the voting shares in the authorized capital of a Strategic Entity - in other words, a foreign investor has the right to direct the intent of the third party when the latter votes at a general shareholders meeting.

6. Basic trends in the development of antitrust laws in 2011-2012

Currently, the Russian antitrust law is undergoing reform.

The RF Government has developed a Competition Development Program in Russia, the tasks of which were mostly shaped in reliance on the experience of various European countries and the United States of America.

Another round of reform is expected in 2011-2012 when a 'third package' of amendments to the antitrust laws will be developed.

The major anticipated amendments are the following:

- liability for the abuse of dominance will be differentiated based on whether the actions of a competitor restrict competition or only damage the rights of a third party;
- the concept of concerted actions will be updated. Specifically, a provision will be included stating that actions may only be classified as concerted actions if performed by rivals;
- the concept of coordinating economic operations will change and a provision will be included stating that only a person not operating in the market in which the coordination takes place may act as a coordinator;
- the requirements for agreements and concerted actions restricting competition will be updated: the number of absolute prohibitions will be reduced, and the FAS of Russia will have to demonstrate the fact of the alleged restriction or possible restriction of competition in all other cases;

- when determining whether the price of a product is monopolistically high, the FAS will have to be guided by the fair stock exchange price;
- the range of transactions engaged in by foreign companies that require approval of an antitrust agency will be clearly determined (the criterion being the volume of the product imported to Russia).
- the asset value thresholds that trigger the prior approval mechanism for mergers of for-profit companies and consolidation of one or several for-profit companies with another for-profit company will be materially increased - from RUR 3 to 7 billion, with the amount of proceeds increasing from RUR 6 to 10 billion. This will materially reduce the number of transactions requiring approval.

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Turkmenistan

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ACT is nationally recognized as being in the top tier of legal service providers in Turkmenistan. ACT provides advice on legal, financial and taxation issues; it advices multinational corporations, major financial institutions and international law firms in regards to banking, insurance, oil and gas, telecommunications, shipping, construction, foreign investment and other matters of Turkmenistan legislation.

Overview of antitrust laws in Turkmenistan

Vladimir Dolzhikov, Managing Partner, ACT

1. Overview of competition regulations and authorities

In the early years of its independence, Turkmenistan made efforts to create legislative frameworks to support the introduction of free and fair competition and to force de-monopolization. In particular, under the resolution of the President of Turkmenistan No1532, dated 21st October 1993, a Committee on Restricting Monopolistic Activities has been established with broad powers and functions aimed at protecting enterprises and other entities from the impact of monopolistic conduct and practices and promoting the formation of free markets on the basis of the development of competition and entrepreneurship. Moreover, Turkmenistan became a party to the Intergovernmental Treaty on the Implementation of a Coordinated Competition Policy, signed on 24th December 1993 in Ashkhabad (Turkmenistan). However, the increasing dominance of the State in major sectors of the Turkmen economy severely undermined the initial efforts. As a result, the above mentioned Committee was abolished by the Presidential Resolution 2057 of January 11 of 1995. Since then no other governmental body with similar functions has been set up to replace it.

Turkmen legislation has few fragmented and unconnected references to antimonopoly practices and/or unfair competition. These references are contained in Article 780 of the Civil Code of Turkmenistan (2000), Article 9 of the Law of Turkmenistan "On Commerce", Article 16 of the Law of Turkmenistan "On Foreign Investments" (2008), Article 245 of the Criminal Code of Turkmenistan, etc.

However, the general and declarative character of these reference, lack of information on their practical application as well as the existing administrative practices in the field of economic regulation in the country show that:

- Anti-monopoly legislation is practically non-existent in Turkmenistan;
- There is no governmental body in Turkmenistan which is in charge of the control, supervision, or prevention of monopolistic and/or unfair competition practices.

2. Prevention of monopolistic activities and unfair competition

2.1. Overview

Monopolistic activity and unfair competition is generally prohibited by the legislation of Turkmenistan. There are no special regulations concerning the concept of market dominance, monopolistic agreements and concerted actions, or unfair competition. No industry is specifically restricted in regards to monopolistic activity.

The grounds for liability in the case of monopolistic activity are laid out in the **Criminal Code (2010)** as follows (see details in section 2.6):

(1) setting up and maintaining monopolistically high or low prices;

(2) collusion or concerted coordinated actions aimed at market sharing;

(3) restraint of market entry;

(4) removing other participants from the market;

(5) setting up or maintaining uniform prices.

A range of other laws provide some regulation of monopolistic activities and unfair competition:

Civil Code of Turkmenistan (2000)

Article 80. Invalidity of transaction due to abuse of (dominant) position

A transaction may be considered invalid when transaction performance and remuneration are obviously disproportionate and if the transaction was concluded exclusively as a result of the party's abuse of its dominant position, or if one party was obviously exploited as a result of inexperience.

Article 780. Competition clause

1. Without the consent of the entrepreneur it's commercial representative is not competent to act outside the territory or group of customers, or sphere, within which the commercial representative acts for the entrepreneur; or directly or indirectly to act for a competing entrepreneur (competition clause), with the exception of financial participation in other enterprises. Consent for participation in activity with a competing entrepreneur is considered as granted if it was acknowledged in the original contract.

2. In the case of violation of this obligation by the commercial representative, the entrepreneur can require compensation in the form of damages, also, the entrepreneur can require the commercial representative to transfer transactions concluded for the competing entrepreneur, to him, or return profit obtained from these transactions, or waive any profit obtained as a result of unlawful actions.

3. If it is provided for by the agreement that the competition clause shall be effective even after completion of contractual relations, then such clause shall be effective only in the case where the entrepreneur pays compensation for it, and this compensation is calculated according to the provisions of the Article 782 of the present Code. Such agreement can be concluded for a term not exceeding one year.

Law of Turkmenistan "On Commerce" (2002)

Article 9. State policy in the sphere of commerce

State policy in the sphere of commerce is aimed at:

…

The creation of favorable conditions for the development of various types of commerce, the provision of a stable sales promotion system and the prevention of the creation of monopolies in the consumer's market;

Law of Turkmenistan "On Foreign Investments" (2008)

Article 16. Observance of fair competition by foreign investors and enterprises with foreign investment

Foreign investors and enterprises with foreign investments are not permitted to act so as to encourage unfair competition, including by the creation of an enterprise for the manufacture of any product of higher demand in the territory of Turkmenistan, and then terminating this

activity for the purpose of the promotion of similar foreign products in the market, and also by concluding agreement on prices or on the distribution of trading areas, or restricting rights of other economic agents in Turkmenistan.

Law of Turkmenistan "On licensing of certain types of activity" (2008)

Article 3. Basic principles for implementation of licensing

…

3. Licensing shall not facilitate monopolization or the restriction of freedom of entrepreneurial activity and activity in the rendering of professional services.

Law of Turkmenistan "On Tourism" (2010)

Article 11. Principles of governmental regulation in the sphere of tourism

The main principles of government regulation in the sphere of tourism in Turkmenistan are:

…

- the development of competition and the prohibition of government monopolies in the tourist market in Turkmenistan…

Law of Turkmenistan "On Communications" (2010)

Article 45. Legal basis for activity of telecommunications operators

2. The legal basis for activity of telecommunications operators is:

…

4) The prohibition of discrimination on the part of telecommunications operators, which occupy monopolistic (dominant) positions in relation to other legal and physical bodies in the telecommunications market.

2.5. Antitrust investigation

No specified antitrust regulator and no specific administrative or legal procedure exist. Therefore such investigation would be conducted by the general law enforcement body – the prosecutor's office. .

2.6. Implications for infringers

Civil liability

Civil liability may appear in cases where the transaction is considered invalid due to the monopolistic/dominant entity's abuse of its dominant position. The aggrieved person has a right to claim indemnification where the court upholds the point that the transaction was concluded as a result of the abuse of the respondent's dominant position. Civil liability under this point shall apply to the monopolistic/dominant entity that in turn may claim indemnification through legal action against its CEO, directors or managers.

Civil liability also may take place within criminal trial when court may hold the monopolistic/dominant entity or/and its CEO, directors or managers liable for indemnification. If the monopolistic/dominant entity was held liable it may claim indemnification in recourse action against its CEO, directors or managers.

Criminal liability

(1) The following monopolistic actions and the restriction of competition can result in criminal liability (Criminal Code of Turkmenistan, Article 245. Monopolistic actions and restriction of competition):

(a) setting up and maintaining monopolistically high or low prices;

(b) collusion or concerted coordinated actions aimed at the division of a market;

(c) restriction of market entry;

(d) removing other participants from market;

(e) setting up or maintaining uniform prices.

Criminal liability applies only to physical persons so an entity cannot be held liable for a crime, instead in the case of criminal investigation for monopoly activity its CEO, directors or managers are the persons who will be held liable.

The punishment for monopolistic activity is a fine of the amount from twenty up to forty average monthly salaries.

If monopoly activity is performed:

(a) repeatedly;

(b) with the application of violence or threat of its application;

(c) using an official position;

(d) by the group of persons on previous concert or by organized group,

then punishment will be a fine of the amount of five up to seventy five average monthly salaries or imprisonment for a term of up to three years.

(2) Criminal liability of the entity's CEO, directors or managers for monopolistic activity or other similar activity that is considered to have caused damage can also be charged with under the Abuse of Authority (Article 267, Criminal Code of Turkmenistan). Abuse of authority is punishable with a fine in the amount from twenty to forty average monthly salaries or correctional works for a term of up to two years or imprisonment for a term of up to two years; abuse of authority with grave consequences is punished with a fine in the amount of fifty up to one hundred average monthly salaries or imprison for a term of up to four years.

The Criminal Code of Turkmenistan considers persons performing management functions in commercial or other organizations (CEO, directors or managers) to be the persons that constantly, temporarily or by special authority implement organizational management or administrative economic duties in said commercial organizations, irrespective of the form of ownership, and also in non-commercial organizations, not including bodies of the state authority, bodies of local self-government, and government institutions.

No leniency programs exist in Turkmenistan.

Third parties can bring claims within civil or criminal procedure as regulated by Civil Procedure Code and Criminal Procedure Code.

3. Control over economic concentration

No regulation concerning control over economic concentration exist in Turkmenistan

4. Current case law trends

Monopolistic positions are not unusual in the Turkmeni market. Strategic market segments are generally implied to be monopolistic, sometimes even legally (the Law "On Communication" provides that the operators that hold monopoly position shall not discriminate against other market participants). Therefore a monopolistic position is not illegal on the condition that such position is permitted by the government (as a rule in form of license). Licenses are so rarely granted that the holding of such a license can automatically create a monopolistic or dominant position.

The Civil Code allows the creation of a competition clause in contracts whereby without the consent of an entrepreneur, their commercial representative is not eligible to act outside the territory or circle of customers. It's not clear where competition restriction extends beyond this lawful competition clause and becomes abuse of dominant position.

Taking the unclear status of monopoly activity in Turkmenistan into consideration it's advisable to consult with local counsel.

5. Basic trends in the development of antitrust laws in 2011-2012

No changes in antitrust regulations are going to be adopted in the near future.

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Overview of antitrust laws in Ukraine

Dr. Irina Paliashvili, President, RULG-Ukrainian Legal Group
Ms. Xenia Eremenko, Senior Counsel, RULG-Ukrainian Legal Group

1. Overview of competition regulations and authorities

1.1. Underlying competition regulations

The fundamentals of competition regulation in Ukraine are stipulated by Article 42 of the Ukrainian Constitution, dated 28 June 1996, and Chapter 3 "Property Basis of a Business" of the Commercial Code of Ukraine, dated 1 January 2004.

Below are the relevant intergovernmental agreements within the CIS:

- Antimonopoly Policies Harmonization Agreement dated 12 March 1993 (took effect in Ukraine on 12 March 1993)
- Harmonized Antimonopoly Policy Implementation Agreement dated 25 January 2000 (ratified in Ukraine on 16 January 2003)

Annex 1. Regulations on the Prevention of Monopolistic Activity and Unfair Competition dated 25 January 2000

Annex 2. Regulations of the work of the Interstate Council for Antimonopoly Policy dated 25 January 2000

- Cooperation Agreement between the Ministry of Entrepreneurship and Investment of the Republic of Belarus and the Antimonopoly Committee of Ukraine dated 18 February 1997
- Agreement for the Principal Lines of Cooperation of the CIS Member States in the Sphere of Consumer Protection dated 25 January 2000 (ratified in Ukraine on 7 March 2002 and concluded in the course of the implementation of the Agreement for Creation of the Free Trade Zone dated 15 April 1994, and the Protocol of Amendments thereto dated 2 April 1999)
- Agreement for Cooperation of the CIS Member States in the Sphere of Regulation of Advertising Activity dated 19 December 2003 (ratified in Ukraine on 13 December 2004)

The following laws that specifically relate to competition are now in operation in Ukraine:

- the Law of Ukraine No.3659 "On the Antimonopoly Committee of Ukraine", dated 26 November 1993;
- the Law of Ukraine No.22-10 "On Protection of Economic Competition" dated 11 January 2001;
- the Law of Ukraine No.236/96-VR "On Protection against Unfair Competition" dated 7 June 1996.

There are a number of more specific regulations such as:

- Regulations "On Concentration" approved by the Antimonopoly Committee of Ukraine Order No.33-r dated 19 February 2002;
- Regulations "On Filing an Application to Obtain the Prior Approval for Concerted Actions" approved by the Antimonopoly Committee of Ukraine Order No.26-p dated 12 February 2002;

- Procedure “For Determining the Monopolistic (Dominant) Position of Subjects of Economic Activity on the Market” approved by the Antimonopoly Committee of Ukraine Order No.49-r dated 5 March 2002;
- Procedure “For the Cabinet of Ministers of Ukraine Approving Coordinated Actions and Economic Concentrations of Subjects of Economic Activity” approved by the Cabinet of Ministers of Ukraine Resolution No.219 dated 28 February 2002.

1.2. Antitrust authorities: structure and competencies

The authorities responsible for applying merger legislation are:

- the Antimonopoly Committee of Ukraine (“**the AMCU**”), a central body of executive power with a special status, whose purpose is to ensure the state protection of competition;
- the Cabinet of Ministers of Ukraine (to the extent provided under Ukrainian laws).

If a transaction requires clearance, the parties must file an application with the AMCU requesting the transaction approval. If the AMCU refuses to grant a prior approval, the parties have the right to request such an approval from the Cabinet of Ministers of Ukraine.

1.3. Extraterritoriality

The AMCU conducts international cooperation in three ways:

- bilateral agreements with several European states;
- multilateral international treaties between CIS member states; and
- cooperation with specialized international organizations (CIS International Council for Antimonopoly Policy, International Competition Network).

The following intergovernmental bodies operate within the CIS:

- Interstate Council for Antimonopoly Policy (ICAP) (acts on basis of Annex 2 to the Agreement for Implementation of the Harmonized Antimonopoly Policy dated 25 January 2000)
- The Headquarters for Joint Investigations of Violations of the Antimonopoly Laws of the CIS Member States (was set up in accordance with the resolution of the ICAP’s 23-rd Meeting (30-31 May 2006, Kyiv)). The purpose of setting-up the Headquarters was to conduct joint investigations of violations of the antimonopoly legislation in socially significant and infrastructural markets, successful operation of which directly influences the CIS citizens’ well-being and promotes the CIS states’ integration.

2. Prevention of monopolistic activities and unfair competition

2.1. Overview

General practices and grounds for liability

According to Ukrainian regulations, concerted actions comprise the following:

- concluding an agreement of any form;

- approving a decision of any form by associations;
- establishing a joint venture (**"JV"**) which aims at the coordination of the competitive activities of the JV or its founders;
- any other concerted actions of business entities.

Concerted actions which have resulted or may result in the banning, elimination or limitation of competition are forbidden. Any concerted actions may not be authorized if, as a result, competition is substantially restricted in the whole market or in a significant part thereof.

Are any industries specifically regulated?

There no specific regulations for specific industries.

2.2. Dominance

A monopoly position is defined as a dominant position of a business entity that allows it, on its own, or together with other entities, to restrict competition in the market of a particular product. The position of an economic entity shall be considered as a monopoly (dominant) if its share in the relevant market exceeds 35%, unless the economic entity proves that it is exposed to substantial competition. Where the market share is less than 35%, the AMCU may still decide that the entity has a dominant position depending on the circumstances. Relevant regulations declare that the imposition of onerous contract terms, limiting or stopping production, refusing to buy or sell goods in an absence of alternatives, creation of barriers to entry, and discriminatory and monopoly pricing constitute an abuse of a monopoly position if they result in the restriction of competition.

The AMCU compiles a list of economic entities that have a monopoly position. The list facilitates permanent state control over the economic activities of monopolies. The AMCU may conduct planned inspections of monopolistic structures and examinations of their adherence to the antimonopoly legislation.

2.3. Monopolistic agreements and concerted actions

Sanctionable actions

In particular, the following concerted actions of business entities are recognized as anticompetitive:

- fixing of prices or other conditions of acquisition or sale of goods;
- limitation of production, commodity markets, technical development, investments or establishment of control over them;
- distribution of markets or supply sources based on territorial principle, assortment of goods, volumes of sale or acquisition thereof, the circle of sellers, buyers or consumers, etc.;
- distortion of results of auctions, competitions, tenders;
- removal of other business entities from the market or restricting their access to (or exit from) the market;
- applying different terms to similar agreements with other business entities thus placing them at unacceptable competitive disadvantage;

- concluding agreements on the condition that other business entities undertake additional obligations which, by their nature or according to trade and other fair practices in entrepreneurial activity, have nothing to do with the subject of such agreements;
- substantial limitation of competitiveness of other business entities in the market without objective cause.

There is a procedure for seeking the authorization of anti-competitive concerted actions. The AMCU can allow such actions if their participants prove that the actions promote efficiency and the development of relevant markets.

Exemptions

Under vertical agreements (i.e. agreements of any form between a seller and a buyer, in a market, that do not compete with each other), a party to concerted actions may set limitations on:

- use of goods supplied by such party or other suppliers;
- acquisition of other commodities from other business entities or the sale of other commodities to other business entities or consumers;
- acquisition of goods, which by their nature or according to trade and other fair practices in entrepreneurial activity have nothing to do with the subject of the agreement;
- fixing of prices or other conditions of the agreement for sale of the supplied goods to other business entities or consumers.

However, the above rules are not applied where such concerted actions result in a substantial limitation of competition in the entire market or in a considerable part thereof, including monopolization of the relevant markets; the restriction of other business entities' access to the market; an economically unjustified price increase; or generate a shortage of goods.

2.4. Unfair competition

Unfair competition is determined by Ukrainian law as any kind of action in competition that contradicts the rules of fair and honest business conduct.

The AMCU considers as unfair competition: dishonest actions of businessmen directed at withdrawal or restriction of competition on the market; unlawful use of another person's or entity's business reputation; creating of obstacles for competitors to gain illegal advantages in competition in the market; illegal gathering of business intelligence and improper use of commercial secrets. According to the AMCU's official website, the most widespread violations of fair competition are: illegal use of trademarks for commodities and services and other signs, company names, and discrediting the management of a competitor.

2.5. Antitrust investigation

The AMCU may start an investigation into an alleged competition law breach based on:

- applications regarding violations submitted by business entities, physical persons, organizations, etc.
- requests by government bodies, local authorities, administrative and business management and control bodies; or
- at its own discretion.

The AMCU has competence to perform two different types of inspections: scheduled inspections (conducted on a yearly basis) and unscheduled ones. The inspection is performed by a commission appointed by the AMCU's chairman or office.

The AMCU has broad investigatory powers. AMCU commissions are entitled to freely enter the premises of businesses and organizations, have access to all documents and other materials, can demand oral and written statements from management, and request written and material evidence. It has the right to collect evidence from businesses as well as from government bodies and local governments. The extensive list of material evidence that the AMCU is entitled to demand includes corporate documents (articles of association and bylaws), accounting and financial statements, and commercial agreements; the information it may seize includes confidential and classified information. The law establishes strict rules for the data reporting procedure, for data the AMCU has requested, and provide the information requested by the AMCU is mandatory.

At the end of an inspection the AMCU issues, upon request, a certificate containing the analysis, conclusions and recommendations it has reached.

Decisions of the AMCU and its territorial divisions may be appealed at the commercial court.

AMCU decisions (i.e. excerpts thereof that do not contain classified information, information identifying an individual, and information the disclosure of which could harm the interests of the state, persons involved in the case, etc.) can be published on its official website (http://www.amc.gov.ua), printed or distributed electronically.

2.6. Implications for infringers

Administrative sanctions

For breaches of competition law, infringers maybe punished with fines imposed by the AMCU of an amount of up to 5% of the entity's revenues from the sales of products, works, and services over the financial year preceding the year in which the fine was imposed. Persons who suffer damage as a result of unfair competition actions may file a court claim for compensation. The AMCU or the person whose rights were infringed may apply to the court for withdrawal of improperly labeled goods and copies of the products from the manufacturer/retailer. The AMCU may take a decision on the formal denial, by the offender, of untruthful, inaccurate or incomplete information.

For anticompetitive concerted action and abuse of a monopolistic (dominant) position, infringers maybe punished with fines imposed by the AMCU of an amount of up to 10% of the entity's revenues from the sales of products, works, and services over the financial year preceding the year in which the fine was imposed.

For refusing to submit information by the date requested, submitting incomplete information, submitting inaccurate information and obstructing the AMCU's officers during collection of evidence, the AMCU may impose fines of up to 1% of the relevant parties' turnover.

When a business entity abuses its monopolistic (dominant) position on the market, the AMCU has a right to file the relevant court claim to compel the compulsory split-up of the business entity which occupies that monopolistic (dominant) position.

Leniency

A person who has carried out an anticompetitive concerted action, but voluntarily informed the AMCU of the fact and submitted information of essential importance to taking a

decision on the case before other participants in that action did so, is relieved from liability for committing an anticompetitive concerted action, except where he did not take efficient measures to terminate the action; or was the initiator of the anticompetitive concerted actions or managed them; or did not submit all such evidence or information that was known and that could be freely imparted, about the relevant violation committed by the person.

3. Controlling the scope of economic concentration

3.1. Transactions that are subject to approval

Transaction Types falling under Local Merger Control Rules

The following transactions may require prior merger clearance:

(1) merger or consolidation of a business entity;

(2) acquisition of direct, or indirect, control over a business entity, by means of:

(a) acquisition of the title to assets comprising the integral property complex or its part (structural subdivision), as well as the rent, lease, concession or acquisition by other means of the right to use such assets, including the acquisition of such assets from a business entity being liquidated;

(b) appointment/election to the senior management position of an individual who already holds a similar level position in another legal entity;

(c) actions resulting in the cross-over of more than half of the members of the supervisory board, management, or another supervisory or executive body of two or more business entities;

(3) establishment of a business entity, a JV between two or more business entities that are independently engaged in business activity for an extended period of time, provided that establishment of such JV is not aimed at, and shall not result in, the coordination of competitive behaviour (a) of its founders; or (b) of the legal entity and its founders; and

(4) direct or indirect acquisition, obtaining ownership of, or management over, the shares (participating interest) of the business entity, if such acquisition results in the obtaining of over 25 % (but under 50%) or 50% (or more) of the voting rights of the target business entity.

Are there any industries specifically regulated?

The thresholds are the same for all markets in Ukraine. No specific sectoral requirements, including specific procedures for transactions in particular sectors, are established under the laws of Ukraine.

Are all JVs notifiable if the relevant thresholds are met?

According to Ukrainian law, a JV is subject to merger control if: (a) two or more entities jointly set up a unit of business activity; and (b) the relevant turnover thresholds are satisfied; and (c) setting up a business unit does not result in the coordination of competitive behaviour between the founders of the business unit or between these founders and the business unit itself. In case the incorporation of a JV aims at (or results in) the coordination of competitive behaviour (a) of its founders or (b) of the legal entity and its founders, under Ukrainian law it is considered to be a concerted action requiring the prior approval of the AMCU.

3.2. Approval / notification thresholds

Prior approval of a business concentration is mandatory where:

1. (a) the combined worldwide total asset value or aggregated sales turnover for the last financial year of all participants in the concentration, taking into account their relations of controls, exceeds €12 million; and

(b) the worldwide total asset value or aggregated sales turnover for the last financial year of at least two individual participants in the concentration, taking into account their relations of controls, exceeds €1 million; and

(c) the total asset value or total sales of goods in the Ukraine for the last financial year of at least one individual participant in a concentration, taking into account its relations of controls, exceeds €1 million.

Or, irrespective of the above thresholds,

2. One or all the participants of the concentration-together with controlled or controlling entities have a market share which exceeds 35% of this or an adjacent product market.

3.3. "Groups" and "intragroup deals"

The transaction between business entities associated by relations of control is not subject to prior approval, provided that the relations of control were initially established in accordance with the requirements of Ukrainian antitrust legislation. A group of companies is a group controlled by one holding company. Control usually implies holding more than a 50% shareholding, or control through managing bodies (e.g. the same person occupies CEO position in two companies), or control through agreements.

3.4. Exceptions from transaction approval requirements

The following transactions are exempted from the prior approval of the AMCU:

- acquisition of shares (participation interest) of a business entity by an entity (person) whose principal business is the performance of financial or securities operations, provided that such acquisition has been made with a purpose of subsequent resale of the above shares; and that such entity has voting rights in the governing body; and that the shares are to be resold within one year after their purchase;
- acquisition of control over a business entity or its division, including the right to manage and to administer the property of such business entity, by an appointed receiver in bankruptcy proceedings or by a State official.

3.5. General approval procedure

Is notification mandatory or voluntary?

If a transaction falls within the parameters of an economic concentration that requires clearance, the parties must file an application with the AMCU requesting its prior approval of the transaction. The transaction cannot be completed before the AMCU issues its approval.

When should AMCU be notified of a transaction?

A complete notification must be submitted to the AMCU no more than one year, and no less than 45 calendar days, prior to a transaction. In practice, it is advised to file a notification several months in advance.

Is it possible to obtain formal or informal guidance before notification?

The subjects of economic activity may, at their own discretion, apply to the AMCU to obtain a preliminary determination on the planned concentration. Consideration of such application takes one month. Obtaining a preliminary conclusion does not release the parties from having to apply to the AMCU for granting a formal merger clearance approval. The fee for such application is UAH 3,740 (approx. €346).

Who should notify?

Any party to a transaction can file the notification. However, the usual procedure is for the acquirer and the seller, or their parent companies, to jointly file the notification. Any participant in a transaction can file the notification, because the AMCU approves transactions in general, rather than approving any given participant's role in a transaction. Current practice is that the acquirer usually files; less often, the acquirer and seller, or their parent companies, file jointly.

What form of notification is used?

Recently the AMCU has changed the procedure for submission of applications for the clearance of concentrations and concerted actions by introducing an electronic filing system. Under the amended procedure, the application and all supplementary documents should be submitted to the AMCU both in hard copy and in electronic format. Failure to submit the application in electronic format amounts to sufficient grounds for a refusal without any obligation to consider its substance.

Is there a filing fee? If so, what is it?

There is a filing fee of UAH 5,100 (approximately €490).

Is there an obligation to suspend the transaction pending the outcome of an investigation?

The transaction cannot be completed worldwide before the AMCU grants its approval. Ukraine cannot be severed in terms of clearance, i.e. it is not permissible to complete the transaction everywhere in the world except for Ukraine, where the completion occurs after the AMCU permit is granted. Until clearance is obtained, the parties can only enter into a binding agreement if it contains a condition precedent whereby the transaction can only proceed after the AMCU has given its prior approval.

Scope of information to be disclosed

An application shall contain a brief description of the transaction, a request to the AMCU to grant a prior approval thereto and several special forms that must be filled in. These contain information on the parties, their managing bodies, the amount of sales in, and share of, Ukrainian markets, a detailed description of the economic concentration, including its financial aspects, information about shares, assets, time frames, etc. These forms include:

- Information about the parties to the concentration, their control relations, corporate groups to which they belong and their ownership interests in other companies; a detailed description of the transaction; vertical and horizontal relationships concerning the goods the parties manufacture; financial aspects of the concentration; a calculation of the aggregate values of the parties' assets and aggregate sales in the last fiscal year; and market share calculations.
- Information about the parties' principal activities in Ukraine.

- Lists of members of supervisory councils or other managing bodies who serve as directors, deputy directors and chief accountants of the parties, and of other individuals affiliated with the parties.
- Lists of individuals who are spouses, parents, children or siblings of members of the parties' management who are authorized to vote in the supreme management body.
- Foundation documents and certificates of registration (excerpts from trade/court registers) for all parties.
- Balance sheet of the acquirer for the most recent reporting period.
- Feasibility study of the transaction.
- All transactional documents (i.e. an agreement with a condition precedent concerning the AMCU's prior approval, or a draft agreement with or without such condition precedent, and any other relevant documents).
- Bank confirmation that the state fee for reviewing the application has been paid.
- Other specific documents that the AMCU requests to be provided, which depend on the nature, type and specifics of the concentration. The AMCU has the right to request any documents or information that it deems necessary.

Stages of merger clearance procedure timetable

Normally, the duration of the review procedure is up to 45 calendar days after filing the notification with the AMCU (the "45-day procedure"). This term can be split into two main stages:

(a) The first 15 days – the AMCU decides whether to accept the application (it checks whether all relevant documents have been filed, and all formalities observed) and then

(b) The next 30 days – the AMCU considers the application on its merits and decides whether to grant its approval.

If a transaction is very complex/unclear, or if it requires expert evaluations, or there is a risk that competition can be negatively affected, the AMCU may request additional documents/information from the parties and initiate a "case on economic concentration" (the "in-depth procedure"). In this case, clearance may take up to a total of three calendar months beginning from the date when the parties provided the AMCU with all additional documents.

If the AMCU refuses to grant its approval, the parties have the right to appeal to the Cabinet of Ministers of Ukraine to grant the approval.

3.6. Implications of a failure to obtain approval

What are the penalties for Implementation before approval?

Fines of up to 5% of revenues from sale of products (goods, works, services) for the past fiscal year of all participants to the concentration including their groups may be applied. If the revenue cannot be determined or the violator does not provide authorities with the details of its revenue, then the fine is imposed in amount up to 10,000 times of the non-taxed lowest income of individuals, i.e. 17 UAH X 10,000 = 170,000 UAH (approx. €16,200) or it can be calculated on the basis of other sources of information to which the AMCU has access.

In addition to imposing fines, the AMCU is authorized to oblige the parties to eliminate the negative consequences (losses) of the failure to obtain prior merger clearance, in case there are any.

A transaction which is closed without merger clearance with the AMCU is legally binding on the parties. However, the AMCU may apply to the court in order to recognize the transaction as invalid if the aforementioned transaction has adversely affected/may adversely affect competition in Ukraine.

What are the penalties for failure to notify correctly (incomplete notification)?

If the parties do not present all documents/information required by law, the AMCU (during the first 15 calendar days after the filing) can ask the parties to present such documents/information without stopping the clock. However, if the parties ignore this request, the AMCU has the right to refuse to accept the notification. In this case, the parties will have to prepare a new notification.

In this case, the fine is imposed in amount of up to 1% of the annual revenue of the relevant party's entire group of companies.

If the incomplete or misleading information materially affects the AMCU's previous findings, the AMCU can cancel its prior approval and initiate an "in-depth procedure". Then it can either confirm its approval or cancel it. In the latter case, the AMCU can demand that the parties terminate the transaction contract. If the incomplete or misleading information is not material, the AMCU can collect the fine, but permit the transaction to proceed without any other negative consequences for the parties.

4. Current Case Law trends

The judicial precedents provided by previous rulings relating to antitrust legislation of the Highest Commercial Court indicate that:

- Proof of damages arising from concerted practices is not required in order to confirm that such concerted practices took place and that a violation of competition law occurred. A claimant in a previous case argued that the AMCU had no right to classify an action as 'concerted' within the meaning of the law if no proof of damage can be adduced. It maintained that if a market participant's actions do not inflict damages, no violation can be said to have occurred. The court disagreed, stating that the Competition Law provides that it is sufficient to establish the commission of acts falling within the definition of 'anticompetitive concerted practices' and the possible occurrence of damages.
- A commercial court has no competence to determine the monopoly status of a market participant, either independently or on the basis of any expert opinions. To make such a determination is an exclusive competence of the AMCU. A finding of monopoly status can be reached only as the result of a specific enquiry, which must include an analysis of the use of structural and behavioral indicators that characterize the state of competition in a particular market. As the court highlighted, the relevant legislation emphasizes that the AMCU is best placed to perform such evaluations.
- A simultaneous price rise in order to equalize prices which is made without reasonable justification may be viewed as an anticompetitive concerted practice. In a previous case involving several transport providers, the claimants challenged the commission's assertion that their actions constituted anticompetitive concerted practices, pointing to the absence of an agreement. The court rejected this argument and stated that a simultaneous increase of tariffs by all carriers on a particular route - which equalized the price for passengers for no objective reason and above a limit set by the competent authority - was sufficient to demonstrate anticompetitive concerted practices by said market participants.

5. Basic trends in the development of antitrust laws in 2011-2012

Trends

As for the basic trends in the development of competition regulation in Ukraine in 2011-2012 we note the following:

- competition law in Ukraine is becoming more transparent; the AMCU is actively cooperating with competition authorities around the world in an effort to harmonize both the procedural and substantive aspects of the Ukrainian law;
- the AMCU will continue its efforts to modernize Ukrainian competition law, both through a series of amendments and reforms of current legislation, and through the introduction of newly drafted legal instruments. Over the past two years several important amendments were introduced that included a detailed definition of certain characteristics of unfair competition, broader definition of misleading information, established a new procedure for conducting unscheduled on-site inspections, stipulating new alternative means for serving information requests, and tightening criteria for exemption from the standard requirement to provide notification of concerted actions, etc. At present, relevant drafts regarding new increased thresholds, new grounds for dismissing the case on concerted actions and concentrations of business entities, increase in scrutiny and control over competition matters, etc. are being published for public consideration or pending in parliament;
- the AMCU will continue to enforce competition law in priority areas; at present great attention is paid to monopolistic abuses and unfair competition in the energy sector, transport, communications and retail sectors, and the advertising of medicines, baby food, financial services, etc.

RULG-Ukrainian Legal Group

The RULG - Ukrainian Legal Group attorneys have wide-ranging experience advising international companies on major global and regional deals involving antitrust, unfair competition and regulatory issues in Ukraine. To date, we have enjoyed a 100% success rate in obtaining antimonopoly clearances from the AMCU, and often succeed in obtaining clearance ahead of schedule. We were invited by the United Nations Development Program (UNDP) to conduct training sessions on antitrust and competition compliance issues for Ukrainian judges from all over Ukraine under the UNDP - European Commission Project "Reform of Arbitration Courts and Support to Court Administration". In the course of this work, we prepared Ukraine-focused presentations for annual "Compliance, Law and Ethics Day" antimonopoly compliance training sessions held by a major multinational client. Our firm also conducted interactive Q&A sessions, "Dos-and-don'ts" exercises, risk assessments, gave practical advice on compliance in dealings with business partners (distributors, customers, etc.) and competitors, and covered liability issues, relations with regulators and many other issues.

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