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JUDICIAL PERSPECTIVES ON COMPETITION LAW

Contribution from Kazakhstan

-- Session II --

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Judicial Perspectives on Competition Law

-- Kazakhstan --

1. Procedural perspectives of investigations of the violations of the Competition Law of the Republic of Kazakhstan

1. Competition related issues in the Republic of Kazakhstan are regulated under the Part IV “Economic Competition” of the Entrepreneurial Code of the Republic of Kazakhstan (hereinafter - the Code).
2. The competition authority of the Republic of Kazakhstan (Committee on Regulation of Natural Monopolies, Protection of Competition and Consumer Rights under the Ministry of National Economy of the Republic of Kazakhstan (hereinafter - the Committee)) investigates violations of the Competition Law of the Republic of Kazakhstan in accordance with its mandate and makes decisions on the results of an investigation.
3. According to the Competition Law of the Republic of Kazakhstan, the investigation is understood as the activities of the competition authority aimed at collecting actual data confirming or refuting the violation of the Competition Law of the Republic of Kazakhstan in the manner prescribed by the Code.
4. The basis for the initiation of the investigation is the receipt by the competition authority of information on violation of the Competition Law of the Republic of Kazakhstan, which are:
 1. materials received from state agencies, indicating violation of the Competition Law of the Republic of Kazakhstan;
 2. appeal of a physical and (or) legal entity, indicating signs of violation of the Competition Law of the Republic of Kazakhstan;
 3. detection signs of violation of the Competition Law of the Republic of Kazakhstan by the competition authority when carrying out its activities in the actions of the market entity, state bodies, local executive bodies;
 4. media reports on the presence of signs of violations of the Competition Law of the Republic of Kazakhstan, received by the competition authority.
5. The investigation begins with the order to conduct an investigation. So, in the case of the availability of factual data indicating that there are signs of violations of the Competition Law of the Republic of Kazakhstan in the actions of a market entity, state body, local executive body established within the framework of consideration of the information specified above, the competition authority issues an order to conduct an investigation.
6. An order to conduct an investigation shall contain:
 1. the name of the object of investigation;
 2. the basis for investigating violations of the Competition Law of the Republic of Kazakhstan;
 3. signs of violation of the Competition Law of the Republic of Kazakhstan, which are seen in the actions (inaction) of the object of investigation;

4. the date of commencement and termination of the investigation;
 5. the surname, name and patronymic (if it is indicated in the identity document) of the official of the competition authority authorized to conduct the investigation;
 6. the rights of persons participating in the investigation of violations of the Competition Law of the Republic of Kazakhstan.
7. Investigation of violations of the legislation of the Republic of Kazakhstan in the field of competition protection is carried out within a period not exceeding three months from the date of issuing an order to investigate violations of the Competition Law of the Republic of Kazakhstan. The investigation term can be extended by the competition authority, but not more than for two months. In case of extending of the period, an appropriate order shall be issued, copies of the order within three working days from the date of its publication are sent to the applicant and the object of investigation.
8. Evidence of violations of the Competition Law of the Republic of Kazakhstan can be any factual data that are relevant for the proper conduct of the investigation, including:
1. explanations of the applicant, the object of the investigation, interested persons and witnesses;
 2. expert opinions;
 3. material evidence;
 4. other documents (including materials containing computer information, photo and filming, audio and video recordings).
9. Collection of evidence is carried out by an official of the antimonopoly authority.
10. An official of the competition authority prepares a conclusion based on the results of the investigation of Competition Law of the Republic of Kazakhstan. On the basis the conclusion the competition authority takes one of the following decisions:
1. on termination of investigation of violation of the Competition Law of the Republic of Kazakhstan on the grounds provided for in Article 223 of the Code;
 2. on initiation of a case on an administrative offense and in the cases established by subparagraphs 1) and 2) of paragraph 1 of Article 226 of the Code, issuance of a prescription;
 3. on issuing a prescription to eliminate violations of the Competition Law of the Republic of Kazakhstan;
 4. on the transfer of materials to law enforcement agencies for the conduct of pre-trial investigation.
11. The draft of the conclusion on the results of the investigation of violations of the Competition Law of the Republic of Kazakhstan shall be served or sent by letter with notification to the object of investigation not later than thirty calendar days before the end of the investigation.
12. If the object of investigation applies within a period not less than twenty calendar days before the investigation is completed, the official (officials) of the antimonopoly authority shall submit to the conciliation commission a draft conclusion on the results of the investigation of violations of the Competition Law of the Republic of Kazakhstan. The conciliation commission considers the draft conclusion submitted with inviting the persons participating in the investigation.
13. The end of the investigation is considered to be the day when the official (officials) of the competition authority signed conclusions on the results of the investigation of violations of the Competition Law of the Republic of Kazakhstan.

14. The approval of the conclusion on the results of the investigation of violations of the Competition Law of the Republic of Kazakhstan shall be formalized by an order of the competition authority within a period of not more than ten working days from the date of completion of the investigation.

15. The day of signing the order to approve the conclusion on the results of the investigation (decision-making) is considered to be the moment of detection the fact of committing an administrative offense.

16. The order to approve the conclusion on the results of the investigation can be appealed by the object of the investigation in court in the manner prescribed by the Civil Procedure Code of the Republic of Kazakhstan.

17. In accordance with the Article 713 of the Code of the Republic of Kazakhstan on Administrative Offenses, the Competition authority of the Republic of Kazakhstan considers the cases on an administrative offenses on the following:

- Non-compliance by the entity of the state monopoly with the restrictions established by the legislation of the Republic of Kazakhstan on state monopoly;
- Illegal actions of market entities at economic concentration
- Failure to comply with the prescription or its implementation in full, failure to provide information or providing information to the competition authority in full within the established timeframe, providing unreliable and (or) false information to the competition authority, obstructing the officials of the competition authority conducting the investigation access to premises and on the territory;
- Anticompetitive actions (inaction) of state, local executive bodies, organizations having functions of the state regulation of activity of market entities;
- Unfair competition.

18. The head of the competition authority and his deputies, as well as the heads of the territorial subdivisions of the competition authority and their deputies, are entitled to consider cases on administrative offenses and impose administrative penalties.

19. Other cases on an administrative offenses of the Competition Law of the Republic of Kazakhstan are reviewed by the courts.

20. The interaction between competition authority of the Republic of Kazakhstan and judicial authorities are regulated under the provisions of the Code, Code of the Republic of Kazakhstan on Administrative Offenses and Civil Procedure Code of the Republic of Kazakhstan.

2. Judicial cases on Competition Law of the Republic of Kazakhstan

1. Cartel agreement between “STOFARM” LLP, “Kazakh Pharmaceutical Company “MEDSERVICE PLUS” LLP and “Pharmaceutical Company “Romat” LLP

21. Committee has detected signs of an anticompetitive agreement (cartel) by logistics service providers and has conducted an appropriate investigation. According to the results of investigation, a fact of cartel collusion was determined in the market for storage and transportation of medicines and medical products.

22. So, it was determined that during three years (2011-2013) “SK-Pharmacia” LLP have purchased Services from a single source - “STOFARM” LLP, which, in its turn has attracted two companies “Kazakh Pharmaceutical Company MEDSERVICE PLUS” LLP and “Pharmaceutical Company “Romat” LLP to subcontract.

23. Thus, all these 3 companies were in fact competitors in relation to each other by rendering the same kind of services, At the same time only "STOFARM" LLP took part in tender by prior agreement, guaranteed to “Kazakh pharmaceutical company “MEDSERVICE PLUS" LLP and “Pharmaceutical company “Romat” LLP give a subcontract in equal volume (not more than 1 / 3) to provide the Services, under condition if they do not create potential competition at the contest for a procurement of Services.

24. As a result of this investigation, administrative cases were initiated against all three companies, the materials of it were sent to the court.

25. The court has found all three companies guilty with imposing fines (administrative fine and monopoly income), total amount of which for three companies was about 500 million tenge (1.5 million US dollars).

2. According to subparagraphs 1) to 4) of paragraph 4 of Article 225 of the Code, monopoly income is determined when a market entity that has a dominant or monopoly position sets monopolistically high or low prices, as well as for market entities committing anti-competitive agreements or concerted actions.

26. Thus, the territorial Department of the Committee for Astana city investigated the “Zenit TTK” LLP on the abuse of the dominant position, which resulted in the creation of the creation of barriers to access to the commodity market or the exit from the commodity market to other market entities in the technical service maintenance of gas-consuming systems market.

27. Based on the decision of the specialized inter-district administrative court of Astana, the “Zenit TTK” LLP was brought to administrative responsibility under part 3 of Article 159 of the Code of the Republic of Kazakhstan on Administrative Offenses and subjected to an administrative fine of KZT 5 853 250.59 (USD 17 577) with confiscation of the monopoly income in the amount of KZT 49 225 770 (USD 147 824).

28. In this case, the court does not take into account that for this offense confiscation of monopoly income under the Code is not provided.

3. The Committee conducted an investigation into Kazzinc LLP and Kazakhmys Corporation LLP on the fact of the cartel's conclusion regarding the establishment of prices at the auction, distortion of the results of the tenders, the division of the commodity market according to the territorial principle, the volume of sales and the composition of sellers for the sale of sulfuric acid.

29. However, the actions of Kazakhmys Corporation LLP, one of the participants in the cartel, was re-qualified to coordination of economic activity by the Specialized Inter-District Administrative Court of the Karaganda Region.

30. In this case, in accordance with paragraph 5 of Article 169 of the Code, the coordination of the actions of market entities by a third person who is not part of the same group of persons with either of these market entities and who does not operate in the commodity market (commodity markets), in which the coordination of actions of market entities is carried out, it is recognized as the coordination of economic activity.

31. At the same time, it is worth noting that the competition authority during the investigation revealed the fact of a cartel agreement between two market entities (Kazakhmys Corporation LLP and Kazzinc LLP), at a time when economic coordination presupposes the presence of three or more market entities (1 coordinator and 2 or more coordinated market entities).

32. Notwithstanding the above, the court resolution does not specify the coordination of actions of which market entities was carried out by Kazakhmys Corporation LLP, nor did it indicate how the consequences listed in paragraphs 1 to 3 of Article 169 of the Code were mentioned.

33. In addition, the actions of Kazakhmys Corporation LLP and Kazzinc LLP were qualified as a cartel by the Committee, for which criminal liability is provided under Article 221 of the Criminal Code of the Republic of Kazakhstan.

34. At the same time, the court re-qualified violations of Kazakhmys Corporation LLP from Part 1 of Article 159 at Part 5 of Article 159 of the Code on Administrative Offenses of the Republic of Kazakhstan (coordination of economic activity), in the disposition of which there is no need for the court to verify the presence or absence of signs of a criminal offense, and reduced the fine more than 600 times.

4. The issuance of a notification on the presence in the actions (inaction) of a market entity of signs of violation of the Competition Law of the Republic of Kazakhstan is provided by the Article 199 of the Code.

35. The notification is a new instrument of antimonopoly regulation in the Republic of Kazakhstan, the purpose of which is the application of preventive measures in the presence of signs of offenses. At the same time, the issuance of a notification to a market entity does not mean that the competition authority revealed the fact of the violation in the relevant actions of the market entity.

36. Thus, the Committee sent a corresponding notification to the market entity. On the basis of paragraph 2 of Article 199 of the Code, the Committee decided to conduct an investigation in connection with the lack of information on the termination of the actions specified in the notification by the market entity.

37. At the same time, the market entity applied to the judicial authorities for a declaration that the notification was illegal and to be canceled, which was the first precedent in the judicial practice of the Republic of Kazakhstan.

38. However, the court, having examined the materials of the statement of claim, as well as the evidence presented during the meeting, in accordance with paragraph 1 of Article 277 of the Civil Procedure Code of the Republic of Kazakhstan, discontinued the proceedings.

39. Thus, to date, in the practice of the Committee there is a positive result for the consideration by the judicial authorities of the issue of appealing the notification of the presence in the actions (inaction) of the market entity of signs of violation of the Competition Law of the Republic of Kazakhstan.

5. The Committee has completed the investigation against KazTransGas Aimak JSC (hereinafter - the Company).

40. According to the results of the investigation, the facts of abuse of the dominant position regarding the application of different prices and charging double payments from consumers and the contractor organization for the service of coordination of working projects of gas supply of residential (non-residential) facilities by the Kyzylorda branch of the Company were confirmed.

41. In accordance with Part 1 of Article 684 of the Code of the Republic of Kazakhstan on Administrative Offenses, the materials of the administrative case were sent for consideration to the specialized inter-district administrative court of Astana.

42. So, during the trial, the court decided to bring to administrative responsibility the Company for committing an administrative offense provided for by part 3 of Article 159 of the Code of the Republic of Kazakhstan on Administrative Offenses and subject it to an administrative fine.

43. In addition, it should be noted that the Company complied with the competition authority's prescription to eliminate violations of the Competition Law of the Republic of Kazakhstan in the form of repayment of money received illegally.

44. From the examples of these litigations it follows that in the course of appealing the antimonopoly response measures adopted by the Committee, the courts of the first and appellate instance of specialized inter-district courts were affected.

45. Also, it should be noted that the competition authority faces some difficulties during interaction with the judicial bodies.

3. Conclusions

46. The most of the cases on administrative offenses in the Republic of Kazakhstan are reviewed by the administrative courts and the minor part of the cases are considered by economic courts.
47. At the same time, as many experts and judges of specialized economic courts say, the position of administrative courts usually has a certain accusatory orientation in connection with the types of cases with which they work on a daily basis. Most of the cases that are submitted to administrative courts are minor offenses of traffic rules or other forms of offenses committed by citizens (compared to cases related to business).
48. The shortage of properly trained or specialized judges and extremely short periods of time adversely affect the conduct of judicial consideration procedures.
49. Moreover, procedural norms of judicial review require the administrative courts to complete the case within fifteen days (with a possible extension for another month). According to many experts, such a strict time limit, coupled with a lack of experience in dealing with economic issues, forces judges of administrative courts to concentrate mainly on procedural matters.
50. Very few court decisions contain at least a basic economic analysis of the subject matter. And even in these rare cases, courts mainly cite the findings made by the competition authority, instead of considering possible alternative opinions or involving experts.
51. It seems that at present judges and courts do not specialize in competition law. Since antitrust issues are often complex from an economic point of view, a certain specialization of judges or a certain concentration of cases among several general judges could greatly help in the verification of such cases, which then will require more time for verification.
52. In the interests of the antimonopoly regime, a strict and objective verification procedure is necessary, which introduces the necessary disciplinary rules for law enforcement agencies. Proper due diligence procedures help to create the proper practice of the antimonopoly authority and serve as a reference point for future cases. Legal certainty and predictability of coercive measures expand and ultimately enhance the effectiveness of the antimonopoly regime.
53. It is necessary that either the courts be specialized, or that, at least, the cases are concentrated among several universal judges.