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Ex-Post Assessment of Merger Remedies – Contribution from Kazakhstan

- Session IV -

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More documentation related to this discussion can be found at: oe.cd/eamr.

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Ex-Post Assessment of Merger Remedies

- Contribution from Kazakhstan -

1. Introduction

1. Mergers and acquisitions (M&A) are pivotal elements of the contemporary corporate landscape. Over recent decades, M&A activities have increasingly become a central aspect of corporate strategic planning, serving as a crucial tool for companies to fulfill their objectives and ambitions.
2. Kazakhstan, with its abundant natural resources and diverse business sector, actively participates in this global trend. The country's M&A market is a focal point for investors and constitutes a vital segment of Kazakhstan's corporate sector.
3. Aiming to modernize its economy, Kazakhstan draws attention from both domestic and international investors for investments and M&A activities.
4. The M&A sector in Kazakhstan is particularly vibrant in various industries, including oil and gas, finance, telecommunications, and renewable energy. The nation's significant role in the regional economy and its strategic geographical position — providing access to markets in Central Asia, China, Russia, and Europe — further amplify its appeal in the M&A arena.
5. Effective control over the M&A market is crucial to prevent unfair transactions that might compromise the interests of consumers and competitors, as well as to ensure adherence to antitrust laws. This oversight is essential to maintain a healthy and competitive economic environment conducive to sustainable growth and development.

2. M&A regulation in Kazakhstan

6. In line with the Entrepreneurial Code of the Republic of Kazakhstan (the Code), the antimonopoly authority regulates economic concentration (M&A) to prevent the emergence of monopolistic positions and/or competition restriction. Economic concentration is facilitated through mergers and other actions that enable control over the commercial activities of market entities. This includes trust management agreements, joint activities, and contracts of assignment. While the pooling of capital and other resources from concentration can enhance the efficiency of certain companies and industries, under specific conditions, it may adversely affect competition. Therefore, preventing excessive market power concentration is crucial.
7. Consequently, for the successful M&A transactions in Kazakhstan, companies must adhere to the regulatory standards set by the country's antimonopoly authority. Under Kazakhstani legislation, economic concentration encompasses several forms:
 - Reorganization of a Market Entity: This includes mergers or accessions.
 - Acquisition of Voting Shares: This refers to an individual or a group of persons acquiring voting shares, participation shares in the authorized capital, or shares of a market entity.

- Acquisition of Assets: Market entities or groups of persons acquiring ownership, possession, and use of fixed production assets and/or intangible assets of another market entity, including the payment (transfer) of the authorized capital.
 - Acquisition of Control Rights: Market entities obtaining rights that allow them to give binding instructions to another market entity in business conduct or perform the functions of its executive body. This can be based on trust management agreements, joint activity agreements, or assignment agreements.
 - Shared Executive Participation: Involvement of the same individuals in the executive bodies, boards of directors, supervisory boards, or other management bodies of two or more market entities.
8. Key markets in Kazakhstan where economic concentration transactions frequently occur include the oil and gas market, renewable energy sources market, financial market, and information technology market.

3. Trends in the Regulation of Economic Concentration

9. Currently, the Agency for the Protection and Development of Competition of Kazakhstan administers the review of notifications for economic concentration as a public service. This service, offered free of charge to legal entities and individuals, is exclusively accessible online via the "eLicense" portal. In this year, the antimonopoly authority received 63 notifications for economic concentration, granting consent to 35, while 2 transactions were terminated due to withdrawal, and 4 did not require consent.

10. The next stage involves partial automation of the information data collection process from service recipients to validate reliability and streamline the information provided. Applications for economic concentration are evaluated in two stages:

1. Initial Review (10 calendar days): Assessing the completeness and relevance of submitted materials, after which the authority notifies the applicant of acceptance or refusal.
2. Competition Restriction Assessment (30 calendar days, with suspension rights): Following this, a decision on consent is made. If interchangeable or similar activities exist, a competition analysis is conducted in the relevant market, potentially resulting in specific requirements and obligations to mitigate negative impacts on competition.

11. In addition to reviewing incoming applications, the antimonopoly authority also can revise the previously considered cases, including in the cases of non-compliance M&A participants with set requirements. One notable example involved revising the decision related to a dominant company in the cellular market, particularly concerning the revision of radio frequencies for cellular services.

12. Another case involved a company's application for economic concentration to acquire subsurface exploration rights. It is identified that subsoil use contract provides the right to extract discovered minerals without a tender process.

13. The Agency, considering opinions from the relevant state bodies, granted consent with obligations to prevent competition restrictions, including mandatory notifications about planned resource extraction volumes.

14. Additionally, a joint investigation with law enforcement on a liquefied petroleum gas market transaction led to the discovery of violations in fulfilling conditions for granted consent, resulting in the cancellation of the previous consent order.

15. Moreover, the introduction of **the trusted person (trustee)** system at the legislative level is a significant step forward. The OECD notes the effectiveness of involving trustees for transaction execution and independent monitoring in many countries. These trustees, who are independent and approved by the antimonopoly authority, play a crucial role in complex business unbundling operations and ensuring compliance with behavioral conditions.

16. To enhance monitoring and control over economic concentration transactions, a register of authorized persons, comprising experts from various economic sectors, was approved. Future plans include refining the regulatory and methodological framework, focusing on improving economic concentration regulations. Proposed changes include revising the threshold for required antimonopoly authority consent and considering intra-group transactions.

17. Such legislative modifications are driven by the cases such as the acquisition of a 49% stake in a Kazakhstani airport, which bypassed the economic concentration concept, and an IT company acquisition by a Kazakh technology company, facilitated by forming a Supervisory Board with direct affiliations to the acquiring company's group.

18. The M&A market in Kazakhstan, while currently small, provides significant opportunities for business growth and investment attraction. However, companies often circumvent legislation by exploiting loopholes in antimonopoly laws, leading to adverse effects on economic activity. Hence, adherence to antimonopoly legislation is paramount for ensuring a healthy and competitive business environment.