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COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

Monopolisation, Moat Building and Entrenchment Strategies – Note by Kazakhstan

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This document reproduces a written contribution from Kazakhstan submitted for Item 2 of the 139th meeting of Working Party 3 on 11 June 2024.

More documents related to this discussion can be found at
www.oecd.org/competition/monopolisation-moat-building-and-entrenchment-strategies.htm

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1. Introduction

1. In economics "Moat Building" refers to a sustainable competitive advantage that allows a company to maintain and even strengthen its position in the market. Accordingly, "Entrenchment Strategies" refers to the defence own competitive advantage in market.
2. None of the above terms are explicitly mentioned in the legislation of Kazakhstan and decisions of the authorised body and courts.
3. According to the opinion of the Competition Agency of the Republic of Kazakhstan for the purposes of competition law enforcement is not necessary to make a semantic distinction between economic moats and entrenchment. Both can broadly refer to strategies and tactics employed by companies to protect and maintain their long-term competitive advantages.
4. Typically, economic "moats" and "entrenchment" are relevant to digital markets. The leaders in creating moats and entrenchment are IT giants. Conversely, economic "moats" are rarely found in traditionally markets with developed competitive environments.

2. Approaches used in Kazakhstan

5. At the moment, the current antimonopoly legislation provides the traditional structural indicators of competition conditions in markets.
6. In 2021, it was planned to introduce and consolidate the concepts of "digital platform" and "network effect" into the Entrepreneurial Code of the Republic of Kazakhstan, as well as to develop a new Methodology for Competition Assessment in digital markets, but the Parliament of the Republic of Kazakhstan did not support the Agency's initiative. Nevertheless, the current antimonopoly legislation does not prevent investigations into economic "moats" and "entrenchment".
7. Along with that, as part of the pilot project, the Agency's subordinate organisation (unit ARCCD) is applying dynamic and non-structural indicators such as the entry coefficient of new players into the market, the HHI covariance coefficient, the Lerner Index, the Boone indicator, the H-statistics (Panzar-Rosse) in its market analyses, as well as paying increased attention to the presence of network and lock-in effects.
8. It seems very difficult to measure all the benefits and costs of creating economic "moats" and "entrenchment".
9. For example, some binding clauses (most-favoured-nation clauses or price parity clauses) may be motivated not only by the desire of digital platforms to strengthen their market power, but also by the objective need to prevent the practice of using digital platforms as advertising platforms for goods, but selling them on other marketplaces, websites or outlets. At the same time, such binding conditions can have a hard-to-measure negative impact on a country's economy.
10. The economic concepts of "Moat Building" and "Entrenchment" can be interpreted as "barriers to entry into the commodity market" in accordance with the Methodology for Competition Assessment in the commodity Markets of the Republic of Kazakhstan.

11. There are barriers, including **technological restrictions**, which imply technological superiority of companies already operating in the commodity market; **administrative restrictions** imposed by state authorities, granting privileges to certain market players.

12. Meanwhile, the most effective tools for identifying potential anticompetitive practices related to economic "moats" and "entrenchment" strategies include:

- assessment of the dynamics of mergers and acquisitions of IT companies (regardless of their specifics) and fintech ecosystems;
- quantifying the negative impacts on the economy and consumers, as a consequence of the already identified facts of creating economic "moats" and "entrenchment";

13. At the same time, when examining economic "moats" and "entrenchment", the key market indicators for ARCCD are:

- number of users of digital platforms to determine minimum thresholds for inclusion of network effects;
- the presence of vertical constraints;
- facts of acquisitions of companies in adjacent markets, allowing monopolists to strengthen their market power in their own markets;
- consumer losses from restricting competition.