



Competition Law and Policy in Kazakhstan

A Peer Review



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A Peer Review

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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

For many years, OECD competition law and policy peer reviews have proved to be a valuable tool for countries, whether OECD members or not, to reform, strengthen, and improve their competition frameworks. A peer review is a two stage process: first a report on the current state of Kazakhstan's competition framework and its enforcement practice; and second a peer review based on the report. Kazakhstan underwent its peer review at the OECD Global Forum on Competition in 2015 which was attended by almost 90 delegations from around the world.

This report assesses the development and application of competition law and policy in Kazakhstan on the basis of the 2008 Laws "On Competition" and "On Natural Monopolies and Regulated Markets", with a focus on activities between 2010 and 2014.

The report concludes that Kazakhstan has a competition regime that is in many enforcement areas based on sound principles but is in need of moving from a rather prescriptive application to a more effects based enforcement. Enforcement should tackle the underlying causes of competition problems and should not focus on imposing pricing controls. The recommendations in the report focus inter alia on:

- Cartel enforcement and the need for better detection instruments and a stricter standard of proof;
- Abuse of dominance proceedings where the focus should shift from price control to abusive practices that foreclose markets and erect barriers to entry;
- Advocacy and action by the competition authority against anti-competitive acts by state bodies and regulators and encourages the competition authority to continue its good work;
- Rule of law needs to be strictly applied by granting the right to be heard, providing access to file and increasing transparency and publishing decisions; and,

- Institutional design and the need for a truly independent enforcement authority.

The report's analysis and recommendations are very timely. Kazakhstan introduced in 2015 an action plan for economic development, "100 Concrete Steps", that envisages many institutional reforms, including reform of both the competition law and the authority to align them better with OECD standards and best practices. In addition, in 2014, Kazakhstan became member of the Eurasian Economic Union, requiring it to align its competition law with the EAEU standards.

This report was undertaken at the request of the government of Kazakhstan. The lead reviewers were Mr Robledo de Castillo and Mr Garcia Pineda, Colombia; Mr Juhani Jokinen, Finland; Mr Bogdan Chiritoiu, Romania; and Lord David Currie, United Kingdom. The report was prepared by Alexey Ivanov working as a consultant for the OECD Secretariat, with the support of Lynn Robertson and Sabine Zigelski of the OECD Secretariat.

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EXECUTIVE SUMMARY

Kazakhstan is still in a process of transition from a centrally planned economy to a market economy. The competition law and institutions are subject to continued legislative and institutional changes reflecting Kazakhstan's efforts to tackle economic challenges. These challenges include, promotion of small businesses and small enterprises; regulation of both state owned and private monopolistic or dominant undertakings; and initiatives to offset inflation. Competition law and economic regulation have always been interrelated and a highly regulatory approach remains the main characteristic of Kazakhstan's competition law today. In 2014, Kazakhstan joined the Eurasian Economic Union (EAEU). Membership obligates Kazakhstan to comply with the EAEU competition law framework which it has yet to do.

This peer review is both a stocktaking exercise and an assessment of Kazakhstan's competition law and enforcement practice based on international best practices and established standards. The review outlines the main legal provisions of the competition law and the institutions that enforce the law. The OECD studied case law and decisions to assess enforcement practice. Stakeholders from the business community, legal practice, politicians and authority officials provided their views and experiences. At the Global Forum on Competition in 2015, four countries, Colombia, Finland, United Kingdom and Romania, acted as lead examiners and peer reviewed Kazakhstan using this report as a basis for their examination. During this session, the Chairman of the Agency of the Republic of Kazakhstan for Competition Protection, Serik Zhumangarin, answered questions from the lead examiners and provided his assessment of competition law and enforcement.

The OECD's assessment of the strengths and weaknesses of Kazakhstan's competition law regime resulted in findings and recommendations to the government of Kazakhstan and the competition authority. Specifically, the recommendations address restrictive agreements and concerted practices, dominance and monopolisation, concentration control and to institutional and procedural aspects.

Restrictive agreements and concerted practices

The enforcement practice focuses on observed cases of parallel price increases and reflects the assumption that the competition authority should prevent price increases. The law does not provide for effective cartel detection tools, such as unannounced inspections, and the leniency programme is ineffective. Vertical competition restraints are dealt with under a per-se prohibition rule with no exemptions. The review recommends the clarification of legal terms. Enforcement must be focussed exclusively on practices that harm competition. The review also advises improved detection tools and a more stringent standard to prove collusive practices. Vertical restraints should be considered under a rule of reason approach. Restrictions relating to intellectual property rights should be assessed under the general framework of exemptions instead of being treated as a separate, excluded, category of agreements.

Dominance and monopolisation

The competition authority has far reaching powers to control dominant undertakings. Dominance is established based solely on market shares and without any in-depth analysis of market conditions. Once undertakings cross the legal market share thresholds, they are entered into a “State Register for Dominant Undertakings”. This results in a de facto system of price controls for all undertakings that are defined as dominant. The enforcement practice thus focuses on price and profit controls. Kazakhstan is encouraged to abolish the State Register for Dominant Undertakings. Identification of dominant undertakings should be based on an economic analysis of market structures as well as an analysis of the effects of alleged abuses. The authority should shift focus from price and profit controls to control of exclusionary practices.

Concentration Control

The competition authority deals with a large number of merger cases. The legal framework for the control of concentrations seems to be sound and in line with best international practices. As the process is not transparent and the decisions on mergers are neither published nor have yet been appealed, the peer review had to assess the enforcement process on the basis of the outcomes of the investigations. There seems to be a mismatch between highly concentrated market structures on one side and a very low intervention rate on the other side. Because decisions are not made public, this peer review presumes that this situation is explained partially by the use of behavioural remedies in the majority of the

decisions. As in dominance and monopolisation, the authority should move to a more effects based analysis of mergers and should focus on unilateral or co-ordinated merger effects. Publishing merger decisions would give guidance and provide legal certainty to the business community. Conditions and obligations should whenever possible be based on structural measures.

Institutional and procedural aspects and international co-operation

The enforcement process is not transparent and is incoherent with an overall commitment to the rule of law. The undertakings involved in the authority's proceedings are not granted the right to be heard or an access to file. The OECD strongly recommends incorporating basic legal rights into the procedural rules, to increase the overall transparency of the proceedings. Legal deadlines should be extended to enable a better legal and economic analysis. Court review procedures suffer from a lack of sufficiently trained or specialised judges and extremely short deadlines. Courts should be either specialised or cases should at least be concentrated on a few generalist judges. Kazakhstan should consider removing the competition authority from the Ministry of National Economy and establishing it as an independent state authority in order to minimize the risk of conflict of interest and undue influence. As a member of the EAEU, Kazakhstan is obligated to align its competition law framework with EAEU standards which should rectify many of the current weaknesses.

1. History and foundations

1.1. Economic and political context

Kazakhstan is a Central Asian country, sharing borders with the Russian Federation (Russia) to the north, the People's Republic of China (China) to the east and Kyrgyzstan, Uzbekistan and Turkmenistan to the south. Kazakhstan is among the top 10 countries of the world by area covering a vast territory of more than 2.7 million square kilometres. With a population of approximately 17 million, Kazakhstan is among the least densely populated countries in world.

Kazakhstan's current state borders were established in 1936 as one of the USSR constituent regions. In Soviet times, especially in the period after the Second World War, Kazakhstan's economic and social structures were transformed from primarily agrarian and nomadic to create an industrialised and urbanised society. Throughout that period, more than 40 new cities and 500 large-scale industrial complexes were built in Kazakhstan.

Kazakhstan gained its independence in 1991 with the break-up of the Soviet Union. Its economy was severely affected resulting in a period of hyperinflation reaching a record 3000 % 12-month rate in 1992, accompanied by a full-scale de-industrialisation and a dramatic decline in Gross Domestic Product (GDP) with a record low of USD 16.90 billion in 1999. GDP climbed back to USD 212.25 billion in 2014¹. Per capita GDP based on purchasing power parity (PPP) in 2014 amounted to USD 24 019², about 38% below OECD average of USD 39 000 and 4% below per capita GDP of Russia of

¹ 15 Years of the Commonwealth of Independent States (1991–2005). Statistical Data. Moscow. CIS Statistic Committee. 2006. P. 56, 93, 109 (in Russian). See also: Zhukov S.V., Resnikova O.B. Central Asia in Social-Economic Structures of the Modern World. Moscow Social Science Foundation. 2001. Academic Papers N 134. P. 58 (in Russian) (Р. Жуков С.В., Резникова О.Б. Центральная Азия в социально-экономических структурах современного мира. М.: Московский общественный научный фонд, 2001. Научные доклады. № 134. С. 58).

² Source: International Monetary Fund, World Economic Outlook Database, April 2015, <http://www.imf.org/external/pubs/ft/weo/2015/01/index.htm>

USD 25 600.³ The GDP value of Kazakhstan currently represents 0.34 % of the world economy.

Kazakhstan's main export commodities are oil, coal, metals, chemicals, and grain. Main import products are machinery and equipment, as well as foodstuffs and other consumer goods. In 2013, exports amounted to USD 78.237 billion and imports were at USD 41.213 billion,⁴ with China being the biggest trading partner in exports and Russia the biggest supplier of imports⁵

In the early 2000s, Kazakhstan entered a period of dynamic economic growth which would last until 2014. Its economy grew on average 8% per year for more than a decade. In 2013⁶, GDP reached an all-time high of USD 231.88 billion. This period of growth was primarily due to the dramatic increase in prices for Kazakhstan's main exports, oil and gas. However, growth can also be attributed to the country's increasing integration into global commerce. Throughout this period Kazakhstan registered significant increases in foreign direct investment, from USD 7.9 billion in 2005 to a record USD 28.8 billion in 2012⁷.

In 2014, economic growth slowed to 4.3% from 6.0% in 2013⁸. The main reasons being a sharp decline in oil prices and spill over effects from sanctions imposed on Russia, a major trading partner⁹. The European Bank for

³ Source: OECD.Stat, https://stats.oecd.org/Index.aspx?DataSetCode=PDB_LV

⁴ Source : <http://wits.worldbank.org/countrysnapshot/en/KAZ>

⁵ Source :
[http://wits.worldbank.org/CountryProfile/en/Country/KAZ/Year/2014/Trade Flow/Export](http://wits.worldbank.org/CountryProfile/en/Country/KAZ/Year/2014/TradeFlow/Export).

⁶ Source: <http://www.imf.org/external/pubs/ft/reo/2014/mcd/eng/pdf/cca0514.pdf>.

⁷ Source: Ministry of Investments and Development of the Republic of Kazakhstan, <http://www.invest.gov.kz/?option=content§ion=4&itemid=75>.

⁸ Source:
<http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG/countries/kz-7E?display=graph>.

⁹ Source: Asian Development Bank, Economic Outlook 2015, <http://www.adb.org/sites/default/files/publication/154508/ado-2015.pdf>.

Reconstruction and Development predicts Kazakhstan's GDP growth to be no higher than 1.5%¹⁰ in 2015.

Kazakhstan faces structural problems similar to those of other ex-Soviet republics including Russia. The World Bank states, “[e]nhancing medium- to long-term development prospects depends on Kazakhstan’s success in diversifying its endowments, namely, creating highly skilled human capital, improving the quality of physical capital, and more importantly, strengthening institutional capital—all of the necessary ingredients for the development and expansion of the private sector in the country”¹¹.

The first wave of privatisation started in Kazakhstan immediately after the collapse of the Soviet Union in 1991. Russia’s large-scale privatisation of the 1990s was primarily political: to remove resources from the Soviet administrative apparatus. In contrast, Kazakhstan’s privatisation was carefully measured and controlled by the state. With some noticeable exceptions, the state in Kazakhstan has secured control over the most important economic sectors like oil and gas production, electricity, transport, and telecoms¹². These sectors are dominated by the few national holding companies established and managed by the government¹³. In 2014, the government of Kazakhstan introduced a new, large-scale, 2-year privatisation plan aimed at the privatisation of about 800 enterprises.

Kazakhstan is a republic with strong presidential rule and a noticeable concentration of power within the executive branch that is also the primary source of legislative initiatives. The main political party controlling more than

¹⁰ <http://en.trend.az/casia/kazakhstan/2355453.html>.

¹¹ Source: <http://www.worldbank.org/en/country/kazakhstan/overview>.

¹² Maslov D. Privatization in Kazakhstan: losses and achievements // Continent. Vol. 11. December 8-21, 1999 (in Russian) (Маслов Д. Приватизация в Казахстане: потери и приобретения. // Континент. № 11, 8-21 декабря 1999).

¹³ For instance, the largest state owned conglomerate – Foundation for National Welfare “Samruk-Kazyna” is managing such national companies as Kazakhstan Electricity Grid Operating Company or Kazakhstan Oil & Gas Company “Kazmunaigaz”; National Management Holding Company “KazAgro” is aggregating assets in the agrarian sector; National Management Holding Company “Baiterek” in development and high-tech; and National Information Technology Holding “Zerde” covers IT and communications.

80% of the Mazhilis, the lower chamber of Kazakhstan's parliament, seats is "Nur Otan" established and led by Nursultan Nazarbaev, the current President. With industrialisation and urbanisation occurring fairly recently, Kazakhstan remains, to a certain extent, a traditional society with high importance placed on family and informal clan relations. Most of the ethnic Kazakh population is divided along three major traditional tribal lines ("zhuzes"): so called *Great Zhuz* (southern and south-east Kazakhstan), *Middle Zhuz* (central and eastern Kazakhstan), and *Lesser Zhuz* (western Kazakhstan). A substantial portion of the current political elite, including Kazakhstan's President Nursultan Nazarbaev, belongs to the Great Zhuz. According to the last census, ethnic Kazakhs now constitute more than 60% of the population as a result of the exodus from the early 1990s to mid-2000s of migrants, primarily from Russia and Ukraine, who had come to Kazakhstan during the massive industrialisation and urbanisation projects of Soviet times¹⁴. At the same time, Kazakhstan's leadership has been gradually implementing an ambitious political programme of modernisation aimed at increasing diversification and inclusiveness of Kazakhstan's society in the recent years.

In the latest corruption perception index, Kazakhstan is ranked 126 out of 175 countries and scores a 29 (whereby 0 means highly corrupt and 100 means very clean).¹⁵ However, awareness of the need to fight corruption is growing and statements show a declared will to fight corruption. For example, President Nursultan Nazarbayev, in a nationwide interview broadcasted by the main Kazakh television channels, confirmed that the fight against corruption would continue without any compromises.¹⁶ There exists a corruption analysis and detection division, which searches for concrete corruption loopholes and submits proposals to end enabling conditions for corruption in the public sector.¹⁷

¹⁴ Heleniak T. Mass Migration in Post-Soviet Space // Transition. World Bank. 1997. August. № 8. P. 16.

¹⁵ Transparency international, <https://www.transparency.org/country/#KAZ>, last accessed 09/09/2015.

¹⁶ «С Назарбаевым о главном», документальный фильм, национальный телеканал «Хабар» («With Nazarbaev About Essential», Documentary, National TV Channel «Habar»), <http://khabar.kz/ru/arkhiv/dokumentalnye-filmy/item/27422-s-nazarbaevym-o-glavnom>

However, programmes to fight corruption have been criticised as being a too formal.¹⁸ OECD analysis shows that corruption remains an acute problem.¹⁹

In May 2014, Kazakhstan with Armenia, Belarus, and the Russian Federation, established the Eurasian Economic Union (EAEU)²⁰, a common market modelled as a regional economic integration project analogous to the European Union. In May 2015, the Kyrgyz Republic joined the Union. The EAEU promotes trade liberalisation in goods and services among its members. While the economic union brings new opportunities to Kazakhstan, it also exposes Kazakh enterprises to more competition from businesses of the other EAEU members. Competition from abroad is expected to increase further with Kazakhstan's membership in the WTO scheduled for June 2015.²¹

The low intensity of Kazakhstan's domestic competition is among the major challenges for its economic development. According to the Global Competitiveness Report 2014-15 of the World Economic Forum²² Kazakhstan ranked 50 out of 144 economies surveyed, but it ranked 111 for *intensity of local competition*. Kazakhstan also scored low for the prevalence of the foreign ownership of companies in its economy.

¹⁷ OECD (2015), *Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia*, OECD Anti-Corruption Network for Eastern Europe and Central Asia, page 52.

¹⁸ OECD (2013), *Anti-corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges, 2009-2013*, Fighting Corruption in Eastern Europe and Central Asia, OECD Publishing, page 30.

¹⁹ OECD (2013), *Anti-corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges, 2009-2013*, Fighting Corruption in Eastern Europe and Central Asia, OECD Publishing, page 12, 30.

²⁰ More on the EAEU see here: <http://www.eaeunion.org/?lang=en>.

²¹ On this occasion, President Nazarbaev summarised the challenges as: "... now is the time when we have to compete with other countries, not only within the EAEU, but on the scale of the WTO. As I have always warned, along with reaping the benefits of joining the organization, the competition for our country will also intensify. All producers have to catch up to the world level"²¹

²² Source: <http://www.weforum.org/reports/global-competitiveness-report-2014-2015>.

Although the government has tried, in the past, to make economic diversification and intensification of domestic competition a priority, these efforts have been at odds with the reality of a gradually increasing role of the state and oligarchic groups. As in many of its former Soviet peers, there remain serious obstacles to economic development, including extensive problems with law enforcement and the rule of law.

Recently, Kazakh leadership announced a new, large-scale national plan to modernise both the economy and society in order to address structural problems inhibiting economic development. Five major initiatives are aimed at regulatory, public administration and judiciary reform, in order to improve the competitiveness of Kazakh enterprises and thereby providing impetus for economic growth and development. These reforms are intended to promote Kazakhstan to the club of the world's 30 most developed countries.

On 6 May 2015, the President of Kazakhstan announced a detailed action plan for economic development called “100 Concrete Steps” to implement the aforementioned institutional reforms. According to the action plan Kazakhstan will reform the competition authority and align the competition law and enforcement with OECD standards. The new authority, according to this plan, must be focused primarily *on the promotion of competition between businesses*.

1.2. *Institutional and legislative history*

Since 1990 with the first market-era law “On Freedom of Economic Activity and Promotion of Entrepreneurship” of the then Kazakh Soviet Socialist Republic and the first specialised competition act “On Promotion of Competition and Limitation of the Monopolistic Activities” in 1991, Kazakhstan has undergone multiple changes in legal bases and institutional design in the area of competition law.

From the start of its competition law and policy development, until the late 1990s, the laws on competition in Kazakhstan aimed to stimulate small businesses and private enterprises and to grant them the same rights as the established state enterprises and ensure competitive neutrality. Similar developments occurred in Russia at the same time. Kazakh laws also focused on a deliberate de-monopolisation of the formerly planned economy. The newly created competition authority was mandated to analyse market concentration in different sectors of the economy; to identify enterprises holding monopolistic or dominant positions; and to subsequently de-monopolise through either

reorganisation or partition of the dominant firms. In cases where reorganisation or division would not provide positive market effects (evaluated on the basis of productive efficiency, consumer prices and technological development), the authority would be responsible for executing, as it was stated in the law, other measures of antimonopoly regulation including price administration.

During the first years of economic transition, a shift in policy goals can be seen in the area of competition. In 1994, Kazakhstan's first competition authority²³ merged with the state committee on prices creating the State Committee on Prices and Antimonopoly Policy. Prices came first not only in the new name of the authority. According to its statute²⁴, the new institution was responsible for price administration, de-monopolisation, promotion of competition, and consumer protection. Although de-monopolisation stayed on the agenda, most of the authority's decisions were focused on defining tariffs and retail prices in different sectors of the economy from utilities to construction and dental services.

This shift was supported by a broader change in Kazakhstan's laws. The first Constitution adopted in early 1993 embraced a strong anti-monopolistic sentiment explicitly prohibiting any form of monopolisation and anti-competitive behaviour²⁵. This provision was included in the same chapter as protection of private property and in the same article as freedom of entrepreneurship, thus showing support for competition at a high constitutional level. But already in 1995, as the first turbulent years of independence passed, Kazakhstan adopted a new Constitution with a much less restrictive approach to monopolisation and monopolistic activities focusing more on regulation of

²³ The State Committee on Antimonopoly Policy.

²⁴ The Decree of the Government of Kazakhstan of 6 September 1994.

²⁵ **Constitution of Kazakhstan of 1993**

Article. 48

The State guarantees freedom of private entrepreneurship and provides it with support and protection.

Monopolistic and other forms of activity that aim to constrain or eliminate lawful competition; achievement of unjustifiable advantages; infringement of consumer rights and legal interests, are prohibited.

monopolistic activities rather than on de-monopolisation and the promotion of competitive market structure²⁶.

In 1998, following the Russian model, Kazakhstan adopted a new law with a focus on direct price control in certain sectors. It was called the Law “On Natural Monopolies” and introduced the concept of natural monopoly as a sphere of commerce in which administrative regulators would carry out price regulation²⁷. The competition authority assumed responsibility for promoting competition and enforcing against anti-competitive conduct of market participants; as well as, administering natural monopolistic activities. The authority became the “State Committee on Natural Monopolies and Antimonopoly Policy”.

Major reforms of the competition laws were realised in 2001, 2006, 2007, 2008, 2013 and 2015 with new laws on competition drafted in 2001, 2006 and 2008. The Competition Act of 2001 defined the structure and main substantive provisions, which the Acts of 2006 and 2008 follow. The law of 2001 introduced the Register of Dominant Market Subjects, a state register of dominant enterprises that has become an instrument of price and behavioural

²⁶

Constitution of Kazakhstan of 1995

Article 26

1. *Citizens of the Republic of Kazakhstan may privately own any legally acquired property.*
2. *Property, including the right of inheritance, shall be guaranteed by law.*
3. *No one may be deprived of his property unless otherwise stipulated by a court decision. Forcible alienation of property for the public use in extraordinary cases stipulated by law may be exercised on condition of its equivalent compensation.*
4. ***Everyone shall have the right to freedom of entrepreneurial activity, and free use of their property for any legal entrepreneurial activity. Monopolistic activity shall be regulated and limited by law. Unfair competition shall be prohibited.***

²⁷

The Law defined an open list of 9 primary sectors. It included transportation of oil, oil products and gas; transportation and supply of electricity and heat; railways; aero navigation; seaports and airports; telecommunications; mail services; water supply and canalisation.

control of dominant market participants similar to the one established for natural monopolies. This register system peaked in 2006, introducing formal market share criteria²⁸ thus resulting in widespread registration and price administration by the enforcement agencies of a majority of large enterprises. According to the last annual report of 2013²⁹ published by the authority, 84% of the analysed markets (102 out of 122) were still highly concentrated.

The 2008 reforms extended direct price and behavioural regulation in the application of competition law to markets identified as social and economic importance but not considered as naturally monopolistic. The Law “On Natural Monopolies” became the Law “On Natural Monopolies and Regulated Markets” to cover both natural monopolies and some other important sectors of the economy as defined by the government.

This interplay between economic regulation and protection of competition has been an ongoing characteristic in the institutional design of the competition authority. After its merger with the State Committee on Prices in 1994, the authority dealt with both matters until 2004 when it was split into two executive agencies within the government. In August 2014, the agencies were merged again into the existing Committee on Regulation of Natural Monopolies and Protection of Competition under the auspices of the Ministry of National Economy. The authority now combines the functions of both price administration and competition law enforcer. The authority is also responsible for enforcement of unfair competition restrictions, which are embedded in the Law “On Competition”³⁰.

²⁸ 35% for a single firm (or a group of related companies); 50% for 2 or 3 independent market subjects; and 70% if 4 firms have this share collectively.

²⁹ More recent reports are not available due to the reorganisation of the authority in 2014.

³⁰ A special law “On Unfair Competition” was adopted in 1998. It was an unusual attempt to use a ban on unfair competition to counter other types of anticompetitive practices. For example, the law prohibited anticompetitive agreements and concerted practices among economic agents, as well as anticompetitive acts and practices of the state authorities, like those aimed at establishing a discriminatory or preferential regime for certain market players. Even restrictive economic concentration was prohibited as a form of unfair competition by this law. This law had overlapped seriously with the

The legal instruments, backed by the Kazakh Constitution, always included prohibitions on anti-competitive agreements and other forms of anti-competitive conduct, as well as unfair competition. However, the authority did not enforce them as actively as price administration and oversight and handling of registers which characterised the first two decades of Kazakh competition law application. Even though the development of Kazakhstan's competition law and policy started under similar post-communist circumstances as the Russian institutions, Russia has shown “*considerable progress in establishing the necessary legal and institutional framework for competition*”³¹. In contrast, Kazakhstan has drifted more towards price administration and other forms of direct economic regulation rather than in the direction of an efficient pro-competitive legal environment.

The 2008 “Law on Competition” is the current general act, which together with the “Law on Natural Monopolies and Regulated Markets” of 1998, including further amendments, forms the legal framework³². Important changes were made in 2013 after the Supreme Eurasian Economic Council, the governing body of the Eurasian Economic Union (EAEU)³³, consisting of head of states, agreed on a model law on competition for Eurasian integration. Further changes occurred in May 2015 as part of the new modernisation plan announced by the Kazakh President. The EAEU model law on competition copies to a large extent the Russian Federal Law “On Protection of Competition”, minus recent amendments, while providing flexibility in the way EAEU Member States adopt this model law. It contains provisions related to all aspects of anti-competitive conduct, economic concentration and administrative procedures within a competition authority. In 2013, only some provisions of the EAEU model law were included in Kazakhstan’s 2008 Law on Competition. The model law is not a binding document, but still the Eurasian Economic

Law “On Promotion of Competition and Limitation of the Monopolistic Activities” of 1991 and was rarely used. It was annulled in 2008 by a new law “On Competition”.

³¹ Competition Law and Policy in the Russian.

Federation 2013. OECD. P. 8. Available at: <http://www.oecd.org/daf/competition/CompetitionLawandPolicyintheRussianFederation.pdf>

³² Including several amendments since 2008.

³³ See chapter 5.

Commission is expecting that the Member States will comply with its implementation³⁴.

A more substantive rather than merely nominal implementation of the EAEU Model Law on Competition could give a substantial impetus to the development of the Kazakh competition law and policy in the direction of the OECD standards. Fulfilling its obligations to the EAEU would reinforce the call for competition reform found in the President's "100 Concrete Steps" action plan for economic development cited above. The EAEU Model Law and the action plan are mutually reinforcing.

The competition authority has gone through periods of highs and lows in its political existence. The authority started as the State Committee on Support of New Economic Structures and Limitation of Monopolistic Activities under the president's direct authority, the most privileged status for an executive agency in Kazakhstan's political realm. It subsequently slipped to a subordinate position under the supervision of, first, the Agency on Strategic Planning and Reforms responsible for industrial policy and then the Ministry of Industry and Trade, before returning to the central government in 2007. However, the authority was then relegated back to a subordinate role, this time under the Ministry of National Economy. Since political power in Kazakhstan is highly concentrated, the authority's position within the executive power structure has a direct impact on the agency's ability to influence state policy and decide on priorities in law enforcement particularly. In its current position, the authority is again more of a policy instrument subordinated to the views and wills of the government rather than an independent law enforcer.

The Parliament of Kazakhstan is considering a new, major reform of the Law on Competition under the detailed action plan for economic development called "100 Concrete Steps". This reform is proposed by the President and supported by the National Chamber of Entrepreneurs of the Republic of Kazakhstan, "Atameken". The Atameken is also pushing for an enactment of a special Code of Commerce embracing competition policy.

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Interview of Minister on Competition of the Eurasian Economic Commission Nurlan Aladabergenov, available at: <http://bnews.kz/ru/news/post/251105/> (in Russian).

2. Substantive Issues: Content of the Competition Law

Kazakhstan's competition law has been developing along the path paved by the Russian legislation and to a certain extent modelled on it. Both jurisdictions share similar, but relatively unusual provisions, designed to meet the special concerns raised by their economic transition, following the collapse of the Soviet system. These provisions include a broad authority to enforce against state actions and state decisions that limit competition; a focus on de-monopolisation; and wide use of different instruments to control the pricing policies and market behaviour of dominant enterprises. The latter continues to play a very important role, forcing the authority to address a number of socially important issues like inflation and non-discriminatory access to infrastructure and utilities. Furthermore, the authority also has the ability to supervise the behaviour of dominant firms in highly concentrated markets.

Although some parts of the competition law seem well designed for Kazakhstan's particular circumstances, specific provisions of the law, like the provisions on vertical restraints or consumer harm, create serious obstacles to effective promotion of competition and even lead to enforcement actions that are themselves limiting competition. These provisions also prevent the effective use of the competition authorities' resources for much needed competition advocacy towards policy makers and the business community.

The two laws administrated by the competition authority are the generally applicable Law "On Competition" adopted in 2008 and the Law "On Natural Monopolies and Regulated Markets", which now covers a vast range of important industries and economic sectors. The Law on Competition contains provisions typical for most competition jurisdictions: on anti-competitive agreements and concerted actions; abuse of dominance; economic concentration and unfair competition. The Law also contains provisions that are relatively unusual for OECD countries but common for transition economies such as, on anti-competitive actions and agreements of state bodies and de-monopolisation mechanisms. The Law also regulates administrative procedures within the authority and covers its investigative powers. Administrative and criminal sanctions are stipulated in the specialised codes on administrative and criminal violations.

The Law on Competition exempts abusive conduct of natural monopolies from the scope of its regulation with regards to activities constituting a naturally monopolistic sphere. Abusive conduct by these market subjects is regulated solely by the Law "On Natural Monopolies and Regulated Markets". The Law

on Competition also contains other exemptions: for example, state monopolies are understood in classical terms as an exclusive right granted by the state to exercise certain types of commercial activities and intellectual property rights.

The terminology used by the Law on Competition has some peculiarities. For example, the term “group of related persons” is a broad category, which covers all of the individuals and legal entities who satisfy certain conditions³⁵, and which are considered by the law to be a single economic entity. The term “market subject” used by the law to define regulated market participants includes both individuals and legal entities, Kazakh and foreign, including non-commercial organisations (Article 6, section 9). Basically all types of persons enjoying legal personality in Kazakhstan and other jurisdictions are understood as “market subjects”. In contrast to other jurisdictions, Kazakhstan does not recognise partnerships and other forms of non-corporate entities as a form of “market subject”.

2.1. *Restrictive agreements and concerted practices*

The Law on Competition prohibits both “anti-competitive agreements” and “anti-competitive concerted practices”³⁶ as distinct categories of restrictive

³⁵ Those conditions are: 1) a person (legal or physical) directly or indirectly owns a share of over 50% of the capital stock of a legal entity; 2) a legal entity or a group of affiliated legal entities is able to exert a decisive influence on the decision-making process of another legal entity; 3) an individual, his/her spouse, close relatives has an ability to exercise functions of the governing bodies of a legal entity; and 4) persons, which are related to the same group through one of the above-mentioned criteria (Section 1 of Article 7).

³⁶ Article 11 (section 2) defines concerted practices as a behaviour without agreement meeting three necessary conditions:

- 1) parallel actions of market participants conducted over the course of three months, as a result of which every involved market participant has received economic benefits which would not have been received in the absence of such actions;
- 2) the actions are known in advance to each involved market participant, and
- 3) the actions of each of the involved market participants are caused by the actions of the other market participants and not due to circumstances equally affecting all market participants on the relevant goods market.

conduct. In its current version, the law formally distinguishes such categories as cartels, vertical and horizontal agreements, concerted practices, and agreements involving state bodies and officials. The general articles on agreements and on concerted actions do not cover intra-group agreements. The provisions also cover any agreement or concerted practice involving potential competitors³⁷. Potential competitors as an extremely broad category of economic entities could, in theory, bring basically any market participant under the authority's radar. This provision has not been tested in practice, but is heavily criticised by those active in the legal professions as a potential threat for the predictability of competition law enforcement.

2.1.1 Restrictive agreements

Anti-competitive agreements play a much lesser role in Kazakhstan's competition law enforcement compared to more mature competition jurisdictions. There have only been a few cases concerning anti-competitive agreements during the life of the Law on Competition. In 2013-14, no cases reached the courts at all³⁸. In previous years, only very few of the cases that were pursued successfully ended in court: 2 out of 4 investigated cases in 2012. The pursuit of these kinds of cases has been hampered by a lack of complaints, insufficient investigative powers of the authority, and, most importantly, by a different set of priorities with much more attention paid to concerted practices in the form of parallel price increases and various forms of abusive behaviour of dominant undertakings.

Before the 2013 amendments, the Law on Competition did not differentiate between the treatment of horizontal and vertical agreements. All restrictive anti-competitive agreements were regulated under the same provision of section 1 of Article 10. Considering that after the reform of 2013, the authority did not take

³⁷ A potential competitor is understood as “*a market subject, which has an opportunity (owns equipment, technologies) to produce and (or) sell goods analogous or interchangeable with the competitive products, but does not produce or sell them in the relevant market*” (Article 6, sec. 1-1). For the vertical agreements a potential competitor is defined as “a potential buyer” or “a potential seller” (Article 9, sec. 2).

³⁸ The competition authority has reported about only one investigation started in 2013-2104 and closed without a judicial review.

any decisions on anti-competitive agreements at all, the distinction between horizontal and vertical agreements is still merely theoretical.

In its current version, the Law on Competition distinguishes the following types of regulated market conduct under the Article 10:

1. horizontal anti-competitive agreements (section 1);
2. vertical anti-competitive agreement which are treated as illegal *per se* (section 2);
3. other anti-competitive agreements both vertical and horizontal (a general prohibition under section 3);
4. co-ordination of economic activity by a third party (section 4).

Horizontal anti-competitive agreements, which “*infringe upon consumers rights and (or) lead or might lead*” to one of the following consequences approximating “hard core cartels”: price fixing; bid rigging; market division; output restriction or collusive boycotts, are additionally defined as “cartels” in Article 6 of the law. This term was introduced in the Law on Competition in May 2015, and there is no established enforcement practice in this area. The term “cartel” also covers a broad concept of concerted practices for the same violations. The main purpose of this amendment is to improve the efficiency of investigations against anti-competitive agreements and practices fitting the category of cartels. According to these recent amendments, the authority would not be required to inform suspects in cartel cases before the initiation of the investigation.

The language of the provisions related to cartels as it is currently stated does not appear to require a simultaneous infringement upon the interests of consumers and the actual or potential anti-competitive effects. This often leads in practice, as will be shown in the concerted practices part of this report, to investigations based primarily on an infringement on individual consumers’ immediate interests rather than on a broader anti-competitive effect leading to less consumer welfare in general. In its current state, the law often confuses the protection of consumers’ interests as one of the main objectives of the competition law and policy with the protection of the legal rights of individual consumers.

Vertical agreements listed in section 2 of Article 10 are prohibited strictly by the law and do not benefit from any of the exemptions that Article 10 provides for other types of agreements, including other types of vertical agreements. No cases on vertical agreements have been reported so far, but the strict prohibition of exclusivity agreements (paragraph 2, section 2 of Article 10) could inhibit any potential economic benefits and, in fact, could create an obstacle to increase market efficiency and promoting of competition.

The Law “On Competition” of 2008

Article 10. Anti-competitive agreements – Section 2

2. Vertical anti-competitive agreements among market participants are prohibited, if:

- 1. Any agreement that leads or might lead to price fixing, except when the seller imposes a maximum resale price on the buyer;*
- 2. Any agreement that includes the buyer’s commitment not to sell goods from the seller’s competitors. This prohibition should not cover agreements on the trade of goods under trademarks or other means of identification owned by the buyer or seller.*

Other types of anti-competitive agreements, both vertical and horizontal, according to section 3 of Article 10 of the Law on Competition, are prohibited if they restrict competition or may do so in one of the following forms, among others:

1. discriminatory treatment of market participants, including agreement on settled terms of purchasing and (or) sale of goods;
2. bid rigging;
3. unjustified output restriction;
4. restriction of market access;
5. tying sales of goods and provision of services with other goods or services not requested by the buyer.

This list overlaps with the one defined in the section 1 of the same Article.

Interestingly, Article 10, section 4, on anti-competitive agreements also includes the co-ordination of economic activities by a third party. The co-ordination of activities of market participants, competitors or potential competitors, by another market participant who does not belong to the same group of related entities and does not operate in the same market, is prohibited if such co-ordination leads or may lead to one of the consequences in the anti-competitive agreements list. This provision was originally intended to address the risk of industry associations co-ordinating the market activities of their members. However, in its current wording, it could be used to cover all sorts of agreements, including joint ventures and management contracts.

Box 1. Anti-competitive Agreements – Recent Practice

1. In 2009, the Pavlodar Oil & Gas Refinery signed a 4-year sales contract with the largest Kazakh gas station chain, “Helios”, to supply 100% of its liquid natural gas production for a fixed price of 100 USD per a metric ton. Other consumers of liquid natural gas in the region complained to the competition authority that such an agreement violated Article 10 of the Law on Competition as an agreement restricting competition through excluding other liquid natural gas consumers, i.e. gas stations, in the region from the market. In 2011, the authority launched an investigation which resulted in finding the state oil and gas company “Kazmunaigaz” controlling the refinery liable of violating the provision of Article 10 (in its pre-2013 edition) prohibiting anti-competitive agreements among the market subjects aimed to refuse to deal with certain enterprises. In 2012, the Pavlodar Regional Appellate Court upheld the decision of the authority and imposed a fine of KZT 438 million (Kazakhstan Tenge) approximately USD 2.9 million, on “Kazmunaigaz”. At the same time, the authority did not find any “monopolistic profit”, i.e. an income received due to a violation of the law on the side of the infringer to confiscate.

2. In 2012, the authority started an investigation against two major mobile operators “Kar-Tel” and “Kcell” accusing them of an anti-competitive agreement restricting access to the market of electronic payments for a number of independent service providers. The telecom companies settled the case and loosened the market access restrictions for the independent e-payment providers. The authority did not impose any sanctions on the telecom companies.

2.1.2 Concerted Practices

The vast majority of cases initiated by the authority under Articles 10 and 11 of the Law on Competition are related to concerted practices. In 2014, all 38 cases launched by the authority under a joint category of restrictive agreements and practices turned out to be concerted actions of market participants. Most of the cases were initiated on the basis of price fixing and concerted price increase allegations.

Article 11, section 2, defines concerted practices as actions by market participants in the absence of an agreement cumulatively meeting three necessary conditions:

1. there are parallel actions by the market participants conducted over the course of three months, as a result of which every market participant has received economic benefits which he would not have received in the absence of such actions;
2. the actions are known in advance to each market participant, and
3. the actions of each market participant are caused by the actions of the others and are not due to circumstances equally affecting all participants in the relevant goods market.

The concerted action under Article 11, section 1, is deemed illegal if it “aims at the restriction of competition” and (or) “infringes upon consumers' rights, and is related but not limited to”: 1) the fixing of prices or other terms of the commercial activity; 2) unjustified output restriction; 3) unjustified refusal to deal; 4) discriminatory treatment.

The language of the provision is similar to Article 10 on anti-competitive agreements and does not appear to require both the infringement upon the interests of consumers and the anti-competitive effects. In some cases, in the enforcement practice, this leads to the authority finding entities liable for violations of this provision merely on the basis of an infringement upon the rights and interests of individual consumers. In cases of an allegedly concerted increase in prices, the authority seems inclined to see any increase in consumer prices as a form of consumer rights' violation.

Box 2. Parallel Increase in Prices – Recent Practice

1. In 2011, the Shymkent Regional Court upheld a series of the decisions made by the competition authority against seven local yeast producers. Over the course of a three-month period from October to December of 2010, these producers had raised their selling price of yeast due to a seasonal increase in the market price of wheat, which is used as a main ingredient for yeast production. The authority's investigation showed that the increase of the yeast price did not fully correlate with the increase in the price of wheat. While the prices of wheat in the region showed a 14% increase on average from September to December, the average market price of yeast increased by 81% in the same period. Despite the fact that all seven regional producers increased their prices at different rates and paces, the authority decided that their actions were concerted. The observed price increases of the different market participants in November 2010 were 16%, 21%, 22% and 90%. One other producer the authority also considered as a participant of the concerted action even decreased its price in November by 26%. The main approach employed by the authority and supported by the courts was that any parallel increase in consumer prices, which could not be explained by an influence of a single factor having a similar impact at the same time on all the producers' output prices in the region, should be deemed as a concerted action, if it happened over the course of the three ensuing months. All the yeast producers in the region were fined a total amount of about KZT 31 million (or approximately USD 200 000), which constituted about 5% of the profit earned through their illegal concerted action. As the court has discretion, it decided not to confiscate the "monopolistic profit" from two producers and confiscated it from others.

2. In 2008, three cement producers controlled more than 65% of the cement market in Kazakhstan – JSC “Buhtarma Cement Company”, “Semey Cement Factory” Ltd., and JSC “Central Asia Cement”. In 2009, the competition authority launched an investigation against two of these cement producers - Buhtarma and Semey - to prove that they were involved in a concerted action aimed at increasing the prices of cement in the East-Kazakh region of the country. The authority showed that over a period of less than three months - May to June 2008 - both producers increased their prices in parallel and without a justified reason, i.e. an increase in costs of production. In 2011, the courts of the East Kazakh region confirmed the authority's decision to impose a fine of KZT 54 million (approximately USD 360 000) on the two cement producers.

3. In 2011, in the city of Ust-Kamenogorsk, four private entrepreneurs A.N.Vlasov, V.I.Popov, A.M.Baranov, N.K.Zanudina, and a smaller enterprise “Nome Master” were providing home intercom services to the inhabitants of the large former Soviet apartment buildings which make up the main urban landscape of the city. In September and October 2011, the house intercom service providers increased in parallel their monthly fees by 10%. The competition authority, on the basis of consumers' complaints, initiated an investigation, which resulted in a decision that all five service providers were liable for entering into an anti-competitive concerted practice aimed at increasing and fixing consumer prices for their services. In the court hearings, all of the suspected defendants argued that the monthly fees for their services increased due to a number of objective factors, including inflation, problems with collecting payments and regular theft of the installed equipment in the apartment buildings' communal areas.

They also argued that the price increase was not co-ordinated, but determined by a generally uniform economic situation in the region. The court did not find these arguments persuasive, stating that the defendants did not prove to the court that their actions were due to circumstances equally affecting all economic entities in the relevant goods market. The house intercom service providers were fined a total amount of KZT 1 million (USD 6 500) and their “monopolistic income” was calculated as the profit extracted throughout the period of the anti-competitive concerted practice but for not more than one year and a total amount of KZT 3 million (USD 20 000) was additionally disgorged.

Adequate proof of concerted action was an issue in most of these cases. Enforcement efforts were based primarily on the observation of parallel pricing and the explanations of those involved in this pricing behaviour. Parallel pricing in most of the cases does not require proof of co-ordination or collusion among the market participants involved in parallel actions.

Many practitioners of competition law in Kazakhstan insist that this provision allows the authority to accuse undertakings of concerted practices on the basis of mere parallel actions undertaken in a course of three months. As one authoritative commentary put it, “*according to the current law, any increase in prices made by two or more market participants and exceeding the growth rate of costs of production could be considered as anti-competitive concerted action*”³⁹. This instrument was used by the authority to establish price controls in a number of socially important and highly concentrated or oligopolistic markets susceptible to sudden price fluctuations, either seasonal such as the cement market or due to fluctuations in commodities prices like in the gas and grain markets.

Concerted practices, as they are described in the law and especially as enforced in practice, are an extremely controversial instrument used by Kazakhstan’s competition authority. They have to be considered primarily as a price regulation tool rather than a form of competition law enforcement against anti-competitive collusive conduct.

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Aldash Aitzhanov “*Investigations against market participants: scary parallels of concerted practices*” // Market and Competition. Vol. 4, 2013, P. 26 (in Russian), available at: <http://www.czk.kz/upload/iblock/9e5/9e567b9d43052ef705d9e2331f19c929.pdf>.

2.1.3 *Exemptions*

The law provides for a general exemption of all types of anti-competitive agreements and concerted practices except, quite unusually, some vertical agreements, named in section 2 of Article 10, and the co-ordination of economic activities by a third party.

According to Article 10, section 7 of the Law on Competition, all other forms of agreements, including cartels, can be exempted from the general prohibition if they cumulatively do not impose on the undertakings concerned restrictions which are indispensable to the attainment of these objectives; and if they do not create the opportunity to eliminate competition in the relevant goods market for the undertakings involved. The exemption also applies if the agreement results or can result in: 1) the improvement of production, sale of goods or stimulation of technical or economic progress or in an increase of the competitiveness of the parties to the agreement on the world market; 2) consumer benefits (advantages) which are proportionate to the benefits (advantages) obtained by the parties to the agreement.

The authority could not identify any cases where a market participant used this exemption as a defence in courts or administrative proceedings. Considering the negligible number of cases reaching the courts under Article 10, this is understandable.

Before the amendments of 2013, a general exemption applied to market participants having a combined market share of less than 15% in the relevant goods market and to all forms of anti-competitive agreements and practices. Currently, this exemption applies only to concerted practices. According to section 4 of Article 11, prohibited concerted actions can be recognised as permissible if they are carried out by entities either belonging to the same “group of related persons,” or having a collective market share of less than 15%. Furthermore, these actions are permitted if they do not infringe upon the rights of consumers and result in: 1) improvement of production through technical modernisation; 2) promotion of small and medium size businesses; or 3) development of industrial standards.

In practice, the basis for enforcement reduces all of the above-mentioned considerations to a single formal criterion of a combined market share of the market subjects involved in the concerted actions. Normally, the authority stops an investigation and closes the concerted practices case if it finds out that the

market share of the involved undertakings is lower than 15%. Practically, it means that the majority of cases of concerted actions are not covered by this exemption. Market definition is primarily based on the administrative borders of the country and applies a formal approach to the substitution analysis of goods and services that regularly leads to findings of market shares well above 15 %.

The Law on Competition also exempts all forms of the exercise of intellectual property rights, including trademarks and commercial names, from the anti-competitive agreements provisions (including cartels) actions. Similarly, public-private partnerships (concessions) and franchising are exempt from the prohibition of vertical agreements.

All exemptions provided by the law are based on a self-assessment by the parties to the agreement and could be used either as a defence in court or in cases of administrative investigations started by the authority.

2.1.4 Future Developments

Currently, the Parliament of Kazakhstan is considering a major reform of the law on competition in the course of the enactment of a special Code of Commerce embracing competition. According to this proposal considered by the Parliament in August 2015, the prospective Code of Commerce would eliminate some of the flaws in the Law on Competition related to anti-competitive agreements and concerted practices.

For instance, the Code of Commerce would eliminate the concept of “potential competitor”, which now creates considerable uncertainty in competition law enforcement. “Potential competitor” prohibits agreements between all types of economic actors and not only between those acting in the same market, as this concept is broad enough to fit any undertaking.

The Code of Commerce will also apparently exclude from the regulation of horizontal anti-competitive agreements and concerted actions the criteria of “infringing upon consumers’ rights” used to qualify such agreements and actions as anti-competitive. This provision, and in particular one on concerted actions, was widely used to prohibit conduct which does not restrict competition as such, but has some negative effects on certain consumers. The language of this provision as currently stated does not appear to require both the infringement upon the interests of consumers and the anti-competitive effects to be proven by the authority in order to prohibit the suspected conduct.

Another novel provision would ban bid rigging in government procurement procedures, even when these agreements are conducted among undertakings belonging to the same “group of related persons”. Considering the broad nature of this concept, in some cases a “group of related persons” would be artificially created just to participate in public procurement tenders and to co-ordinate bidding without the threat of violating competition law.

A procedure of prior approval for permissible restrictive agreements will also be proposed by the draft Code of Commerce.

2.1.5 Investigations and Sanctions

Chapter 9 of the Law on Competition regulates investigation procedures. The competition authority can initiate an investigation based on the following grounds: 1) information provided by other state authorities indicating a possible competition law violation; 2) petitions from consumers and (or) market participants; 3) discoveries by the competition authority of indications of a possible competition law violation by market participants, state organs or regional authorities; 4) information from the mass media received by the competition authority.

To launch an investigation, the competition authority issues an executive order, which has to be delivered to the investigated market participant within three days. After the recent 2015 reform, investigations initiated on the grounds of suspicions of cartels were excluded from this requirement, in order to give the authority extra powers to fight the cartels.

Given that currently almost all cartel proceedings are based on observed parallel increases in consumer prices over the course of three months, the new provision could also be seen as being detrimental to a transparent investigatory process. These cases do not seem to require extra powers of the authority.

The authority can only collect information by sending requests to market participants and state organs. According to Article 162 of the Code on Administrative Violations, non-compliance with information requests sent by the competition authority constitutes an administrative offence and can be punished with a fine of up to KZT 300 000 (approximately USD 1 500) for individuals and officials, and up to KZT 3 million (approximately USD 15 000) for large enterprises.

The antimonopoly authority cannot force market participants to provide oral or written testimonies or to collect data through inspections on business or private premises, announced or unannounced. Authority officials are, however, allowed to enter the business premises but without powers to collect materials. This type of investigative powers is seen by the government as part of the competence of police and other security services and not necessary for a civil service like the competition authority.

The authority clearly needs additional investigative powers to fight and prove hard core cartels and anti-competitive agreements. The inability to conduct dawn raids has already resulted in a lack of enforcement against hard-core anti-competitive agreements and practices like bid-rigging or price-fixing among competitors. As long as unspecified infringements upon consumer rights are sufficient to find a cartel, agreement or concerted practice, and collateral evidence normally suffices to prove concerted actions, questions could be raised about the proportionality of dawn raids and other strong investigative powers.

The Law on Competition requires that an investigation, including those against hard-core cartels, has to be completed within a period of two-months after the initiation of proceedings. The period may be extended for a maximum of two more months. Article 65 allows the authority to suspend an investigation for the time necessary to request an expert opinion or to undertake a market analysis, but in practice the authority rarely uses this opportunity. The short deadlines are another reason for the lack of complex cases and a lack of enforcement against hard-core cartels.

In the last five years, the number of cases related to restrictive agreements and practices have generally been stable, with a slight decrease in 2013. Most of the investigations resulted in formal decisions either in the form of executive injunctions or resolutions finding the market subjects liable of violating competition law. As is described in more detail in the institutional section of this report, for the resolutions of the authority to become effective, they have to be confirmed by the administrative courts through a compulsory judicial review.

Table 1. Enforcement Statistics – Restrictive Agreements and Practices

Year	Articles 10 and 11, Anti-competitive Agreements and Practices ⁴⁰	
2010	Investigations	39
	Decisions ⁴¹	29
2011	Investigations	34
	Decisions	30
2012	Investigations	35
	Decisions	32
2013	Investigations	25
	Decisions	21
2014	Investigations	38
	Decisions	33

Despite amendments to Article 159 of the Code on Administrative Violations, which entered into force on 1 January 2015, sanctions for anti-competitive agreements and concerted practices remain relatively high.⁴² These amendments lowered the previous level of sanctions due to complaints from the business community⁴³. According to the current version of the Code on

⁴⁰ In its response to the OECD questionnaire and earlier reports published by the authority, the number of cases investigated under Article 10 and 11 are not differentiated according to the categories. But we know that in 2013 and 2014 there was only one case investigated and no cases reached the courts under Article 10, and in 2012 there were 4 cases investigated with 2 ending with a decision.

⁴¹ This includes any forms of decisions issued by the competition authority and finding market participants violating competition law.

⁴² A table summarizing the fines imposed for the years 2010-14 can be found in section 4.2 of this report. Due to the reorganisation, the authority could not provide a statistic that differentiated fines by types of violations.

⁴³ According to the previous version of the Code, the maximum fine for the first violation was double the current level – up to 10% of the annual income generated over the course of the violation for large enterprises, and 5% for small and medium sized enterprises. A repeat offence within the course of a year

Administrative Violations, if an individual or an undertaking is found liable of illegal agreements or concerted actions for the first time, the authority may ask the court to order a violator to disgorge its “monopolistic income” – one annual income received due to a violation of the law - and to also impose a fine of up to 3% of the annual income received over the course of the violation for small and medium sized enterprises and of up to 5% for large enterprises (Sections 1 and 2, Article 159 of the Code on Administrative Violations). If within one year from the first violation an undertaking would repeat an offence, the fine for the new violation would be doubled.

The law and enforcement practice operate with two similar categories – “monopolistic income” and income received as a result of violation. An income received as a result of a violation is used to define the fine, and includes all proceeds the offender earned by the anti-competitive conduct. According to Article 68 of the Law on Competition a “monopolistic income” resulting from anti-competitive agreements and practices is calculated as the difference between the full incomes earned by the undertaking as a result of the violation and its justified costs including taxes. In some cases, like in the case of the anti-competitive agreement between Kazmunaigaz and Helios described above (see Box 1), the authority did not find any “monopolistic income” as the justified costs shown by the offender were equal to the income resulting from the anti-competitive conduct. At the same time, the amount of the fine imposed on Kazmunaigaz was calculated on the basis of its income received as a result of violation. In practice, there seems to be no clear definition of the income received as a result of the anti-competitive agreement or practice. In a number of cases, courts applied different methodologies to calculate this amount.

Before the reform of 2013, when the new Code on Administrative Violations was drafted, the courts had discretion whether to disgorge “monopolistic income”. In most of the cases analysed, the courts did not explain why they made a certain decision. In the example shown above of the parallel increase in prices for yeast, the courts decided to confiscate “monopolistic income” from some producers and not from others, although all were found liable of exactly the same violation and fined an amount of 5% of their income resulting from the violation. The courts did not give reasons for the unequal treatment of the offenders.

would be punished with a doubled fine as well. The previous version of the Code also contained disgorgement of the “monopolistic profit” as a sentence.

The construction of the sanctions provided in the Code on Administrative Violations makes it also impossible to materially fine an enterprise who has not extracted any proven income from the violation. For example, in cases of bid-rigging when the violation is discovered too early for the offenders to receive any income, they would not be financially punished as fines are calculated on the basis of the received income in the course of violation.

Quite unusually, by international standards, the Law on Competition also allows the authority to ask a court to issue an order to break up an undertaking involved in an anti-competitive agreement or practice in the case of repeated competition law violations. This provision, although mostly not in use, is a legacy of the period of the early 1990s when competition policy considered demonopolisation its main priority.

Criminal sanctions, which are available in theory, are as yet untested by courts. Article 221 of the Criminal Code applies to “monopolistic activities” in general and does not distinguish between hard-core anti-competitive agreements and practices and other types of anti-competitive conduct. In its current version, the Article covers under the heading of “monopolistic activities”: the division of markets; pricing agreements; attempts to create barriers to entry or to remove competitors from the market; the charging of monopolistically high or low prices, which are classified in the Law on Competition as types of abuse of dominance as well as other “activities aimed at restricting competition”, if they seriously harm consumers, market participants, or the state, or result in a large profit for the offender.

The competition authority does not have the competence to investigate criminal cases. According to Article 67, if the authority in the course of investigation finds that an anti-competitive conduct also constitutes a criminal violation, it has the discretion to transfer the file to the office of criminal investigators responsible for enforcement of the economic crimes in Kazakhstan⁴⁴. According to estimates by the authority staff, about 10% of all files have been transferred to the criminal prosecutors, but the vast majority of them were not dealt with by the criminal investigators. From 2011 to 2014, the

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Currently, the Committee on State Earnings under the Ministry of Finance, and before the recent reform of criminal justice happened in 2014, the Agency on Economic Crimes and Corruption (Financial Policy).

Financial Police started investigations in only two cases referred from the competition authority and did not find them worth bringing to court⁴⁵.

2.1.6 *Leniency*

Until recently, the only instrument supporting a leniency programme was an indemnity for confiscation of a “monopolistic income” under Article 76 of the Law on Competition. Administrative fines before the reform of May 2015 were not covered by this immunity offered by the Law on Competition. In May 2015, a similar provision was included in the Code on Administrative Violations, extending a possible indemnity to other forms of administrative sanctions, including fines.

Article 76 gives the authority the right to apply to the court with a request for leniency for a particular offender. If the offender’s behaviour satisfies certain criteria mentioned in this Article, the court is allowed, but not obliged, to decide to excuse the offender, and under the current norm release it from full administrative liability or until recent amendments of May 2015 only from confiscation of “monopolistic income”. Article 76 requires the fulfilment of the following criteria in order to grant leniency:

1. at the moment when a market participant asks the authority for leniency, the authority does not know about the anti-competitive agreements or actions concerned;
2. a market participant immediately ceases participation in the anti-competitive agreement or actions;
3. a market participant is reporting all available information about the violation over the course of the whole period of the investigation;
4. a market participant has reimbursed any damages caused to consumers as the result of the violation.

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Aldash Aitzhanov, Kuanysh Kholtursunov “Kazakhstan” // Cartels.

Enforcement, Appeals & Damages Actions. Third Edition published by Global Legal Group. 2015. P. 184.

Kazakhstan's leniency programme is not yet an efficient instrument for cartel detection. Recent changes may lead to more applications especially if the courts can demonstrate predictability. Consistency by the courts on whether or not to grant leniency is particularly important given the large scope for discretionary action granted to the courts by the law.

The Criminal Code does not have any specific provisions regarding leniency for anti-competitive conduct. This could also reduce the potential attractiveness of the leniency program for market participants involved in anti-competitive agreements and practices.

2.1.7 Conclusion

The absence of effective detection and enforcement instruments may partly explain why the authority tackles concerted actions almost exclusively in the form of price increases. It has little options to do otherwise and this kind of enforcement is very much in line with the highly regulatory stance of the authority. However, in cases of parallel price increases, the authority reacts merely to potential symptoms of anti-competitive concerted actions without ever being able to tackle the underlying causes.

Price increases should not be unduly suppressed given that there may have many reasons for them. Price changes are an important signal in a market economy, creating incentives to expand production, enter markets, change suppliers and actively look for substitutes. Under the current enforcement policy and legal framework, there is a real danger that economic activity could be slowed or dampened. In addition the enforcement policy is bound to create large legal insecurity in the business community, as it is very hard to foresee which kind of activity will be considered illegal by the competition authority. This legal insecurity, together with the insufficient detection tools, will largely explain the ineffectiveness of the leniency programme. The risk of detection of real anti-competitive agreements or concerted actions is very low and these days no one knows exactly what falls under these categories. The very indeterminate criterion of "infringement upon consumers' rights" on a stand-alone basis should be reconsidered. Another cause for concern is the per-se prohibition of vertical competition restraints, in particular for exclusivity agreements. These are known to potentially improve efficiencies in many business relationships and should be considered on a case-by-case basis, closely balancing potential benefits and threats to competition.

2.2. *Dominance and Monopolisation*

The rules on market dominance are among the most controversial provisions of the Law on Competition.

The priorities of Kazakhstan's competition policy shifted from an unsuccessful attempt at large-scale demonopolisation in the 1990s to extensive price and behavioural control of dominant firms since 2001. This shift and evolution has resulted in a unique mechanism of conduct regulation aimed at dominant firms in Kazakhstan's generally highly concentrated markets.

2.2.1 *Definition of Dominance and Register of Dominant Undertakings*

Article 12, section 1, of the Law on Competition defines dominance as an ability of one or several undertakings to control the relevant goods market or to exert decisive influence on the conditions of the circulation of a good. Section 1-1 of this Article explains that in order to establish dominance, the antimonopoly agency has to define the following elements constituting the undertaking's market power: 1) a share in the relevant market and its correlation with the shares of other undertakings active in the relevant market; 2) an ability of the dominant firm to unilaterally fix prices and to exert decisive influence on the conditions of the circulation of a good; and, 3) the existence of economic, technological, administrative and other barriers to entry to the market.

At the same time, Article 12, section 2, simply states that a market subject with a market share of over 35% is considered as dominant. This rule is applicable to all types of undertakings and sectors of the economy, except for natural and state monopolies, which are considered as holding monopoly positions by default, regardless of their actual market shares, but are covered by another law⁴⁶.

The Law on Competition also recognises the concept of collective or joint dominance (Article 12, section 3). Each of several undertakings may be considered dominant if the collective share of three or less undertakings with the largest market shares is higher than 50%; or the collective share of the five largest undertakings is higher than 70%. For financial markets, the provision is

⁴⁶ Please see more about regulation of state and natural monopolies in the sections 5.2 and 5.3 of this report respectively.

different. Joint dominance will be established if the collective shares of 50% and 70% are held by not more than two and three financial undertakings respectively. In order to establish joint dominance, the competition authority does not need to show a common pattern of behaviour, nor is it necessary to establish that there is an absence of competition among them. Once the quantitative criteria for joint dominance has been met, each of the economic entities is considered separately to be dominant. The behaviour of each entity can be evaluated under the legal provisions concerning abuse of dominance independently of that of the others within the “jointly dominant group.”

An economic entity with a market share below 15% cannot be found to be dominant in the joint dominance setting described above. This level, which works as a “safe harbour” for jointly dominant firms, is not applied to single-firm dominance. This nevertheless is hardly relevant. The law allows the competition authority to find dominance in cases where undertakings have a market share of less than 35%. However, in practice the only criterion of dominance, which the authority has applied so far, is a market share of more than 35%. The market share analysis is the only kind of analysis used to determine dominance. The authority will not take an economic effects based approach nor will it consider any other qualitative evidence.

The competition authority administrates the State Register of Dominant Undertakings and Monopolies, which lists undertakings having a market share of more than 35%, as well as jointly dominant undertakings.

A “group of related persons”, which includes all the individuals and legal entities satisfying certain conditions⁴⁷, and is considered by the law as a single economic entity, shall be listed in the Register if it includes a dominant entity. The Register entry will also show all the individual or legal entities constituting the group.

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Those conditions are: 1) a person (legal or physical) owns directly or indirectly a share of over 50% of capital stock of the legal entity; 2) a legal entity or a group of affiliated legal entities is able to exert a decisive influence on the decision-making process of another legal entity; 3) an individual, his/her spouse, close relatives has an ability to exercise functions of the governing bodies of the legal entity; and 4) persons, which are related to the same group through one of the above-mentioned criteria (Section 1 of Article 7).

In 2015, the Register listed 824 market participants, including individuals active in different areas typical for small and medium sized businesses, such as operating a regional gas station, or the management of city waste. These 824 entities were divided into 678 groups of related persons. The register only shows that the market share of the undertakings exceeded 35% (or 50 or 70% in cases of collective dominance) at the time the undertaking was entered into the Register. Once recorded, the shares are not updated at regular intervals. They may, however, be updated on the basis of new market studies. In practice, information received from market participants and showing changes in their market shares is not considered by the authority for revision of the Register.

2.2.1.1 Investigations and Consequences

Enterprises are entered into or removed from the Register on the basis of a market analysis conducted by the authority, which is performed normally as part of a general market study.

The authority is requested by law to conduct a regular analysis of the state of competition in different markets. The authority staff considers this activity to constitute approximately 30-35% of their total workload.

According to Article 47 of the Law on Competition, the purpose of a market analysis is to define the level of competition in the market; to identify dominant market participants; and, to design a set of measures to promote competition and prevent monopolistic activities. The Ministry of the National Economy regulates the detailed procedure of the market analysis⁴⁸.

Market studies are conducted on a scheduled basis by the authority. For 2015, 39 market studies are planned covering a wide range of markets from the telecom sector to dairy products.

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On 2 April 2015, the new Guidelines on Market Analysis were adopted (The Decree of the Minister of the National Economy N 303).

Table 2. Market Studies Statistics

Year	2010	2011	2012	2013	2014	2015 (plan)
Number of Market Analyses	23	45	41	36	21	39

The sources used for market studies are state statistics, as well as information received from undertakings and state bodies upon request by the authority. The authority has a legal mandate to collect all kinds of information necessary for a market analyses, including confidential data. For the most part, information is collected through information requests sent to all market participants in the relevant market without identifying the purpose of the inquiry. Some undertakings which provided the requested information in the course of what was understood to be a general market analysis complained that information was used by the authority to then identify the undertaking as dominant and, consequently, to list them in the Register. The important legal consequences of inclusion in the Register as well as the notable risk of inaccuracies in defining both the market boundaries and the shares of the enlisted market subjects often results in a large number of court appeals. Therefore, market participants would prefer to have an opportunity to provide more specific information and expert opinions about their market shares while the market analysis is still on-going rather than to appeal against an already established decision of the authority.

In reality, enrolment in the Register serves as the only evidence of dominance in a listed market. No further investigation is required by the competition authority should a case arise in which it must determine whether or not an undertaking is dominant. This is true regardless of the date of entry into the Register, and the authority is not obliged to conduct a new analysis of the relevant market.

Once an undertaking is listed in the Register, it must submit: 1) audited financial reports on an annual basis⁴⁹; 2) quarterly reports on the activities regarding their shareholdings in amount exceeding 10% of their capital stocks; and 3) quarterly reports concerning the goods for which they are listed in the Register, including information on sales, pricing, costs and profitability. The competition authority defines the format of reporting.

The authority uses the Register and data collected through the disclosure of information by market subjects for a variety of purposes, such as monitoring of changes in highly concentrated markets and monitoring the behaviour of dominant enterprises for potential competition law violations. Reporting requirements have also become an important instrument of price control. Dominant firms reporting to the authority about their pricing and profitability usually expect the authority to approve these parameters as justified and acceptable for the authority. In markets of particular social importance, the dominant undertakings try not to increase prices without securing support first from the authority. In addition, undertakings listed in the Register must file if they are involved in a merger, takeover or other form of concentration, regardless of whether the concentration meets any legal value thresholds.

An undertaking has the right to appeal its entry into the Register at any time. According to the information provided by the authority and the courts, appeals of this kind constitute a large proportion of the competition cases. In fact, these types of cases constitute more than half of the caseload of the specialised economic court in Astana, where the central office of the authority is located. Most appeals claim inaccuracy in defining the relevant markets and the respective market shares of the undertakings. For almost all of the markets analysed, the authority defines geographical boundaries corresponding to the administrative divisions of Kazakhstan. In many cases, the allegedly dominant entities have argued that their goods and services were subject to intense competition in wider interregional or even international markets. Authority staff indicated that they lack the necessary resources to conduct a proper market analysis; have only access to poor sources of state statistics and must act within restrictive time frames. As a result, it is difficult for the authority to conduct rigorous economic analyses to define markets and clarify the market shares of multiple participants.

⁴⁹ Before the recent amendments of May 2015, six-month reports were required.

The existing judicial review of the authority's decisions is extremely rapid due to restrictive deadlines imposed by the procedural rules: one month from accepting an appeal to judgement with a possible extension to one more month only, in most cases, the courts have neither the resources nor the time to check the data provided by the authority. The undertakings contesting the decisions of their entry into the Register do not have access to all the information used by the authority to conduct the market analysis. The authority often claims confidentiality reasons for its refusal to provide full access to the data to either the undertakings or the courts.

Box 3. Market Analysis and Enrolment in the Register of Dominant Market Subjects and Monopolies – Recent Practice

1. The egg factory “Kazger Kus”, located in the Pavlodar region of Kazakhstan, appealed its entry into the Register on the grounds of incorrect calculation of its market share. “Kazger Kus” stated that the authority excluded from its market analysis strong competition from the Russian egg producers located in the neighbouring Pavlodar border regions of Russia. In March 2015, the courts refused to remove the appellant from the Register, although the appellant has shown that its actual market share was less than 17% in the geographical borders of the Pavlodar region. The court decided that the market analysis provided by the authority was sufficient to establish the dominance without further review.

2. In 2013, the authority conducted an analysis of the status of competition in the market for ice hockey arena rental services, such as providing ice time to play in Almaty. The analysis was initiated in response to a petition filed by a consumer living in Almaty, who complained about high prices for ice hockey arena rental services in the city, particularly those charged by the B. Sholak Palace of Sports and Culture. The authority's analysis showed that the B. Sholak Palace of Sports and Culture is the only arena in the city that fully satisfies the strict requirements imposed by the International Ice Hockey Federation and the Continental Ice Hockey League. All other arenas in Almaty had different characteristics and could not be used for professional training. As a result of this analysis, the B. Sholak Palace of Sports and Culture was found to be a dominant enterprise in the market for ice hockey arena rental services, and was enlisted in the Register. The price charged by the B. Sholak Palace of Sports and Culture was compared to the prices of similar arenas in Astana, and found to be higher (KZT 59 000 per hour compared to KZT 50 000 per hour). Once listed as a dominant undertaking, the B. Sholak Palace of Sports and Culture was also found liable for an abuse of dominance and asked to adjust its pricing policy to existing market benchmarks without considering possible reasons for price differences between Astana and Almaty.

3. In February, 2014, the Almaty administrative court upheld the competition authority's decision, finding that one of the local mobile telecom operators “Mobile-Telecom Service” charged monopolistically high prices for international roaming. The prices charged to guest customers were up to nine times higher prices than those charged to home customers. “Mobile-Telecom Service” was included in the Register and found liable of an abuse of dominance. The fine was KZT 253 390 (about USD 1 400) without the confiscation of the monopolistic income. The court did not consider the argument brought forward by the operator that its market share in the mobile telecom sector was less than 5% at the time of the alleged violation. Furthermore, the court did not review the authority's market analysis which had been undertaken before dramatic changes in the mobile telecom market introduced vibrant competition in the sector.

2.2.1.2 Conclusions

The authority recognises the controversial nature of the existing regulation. In its annual report of 2013,⁵⁰ the authority explicitly cites the Register system as one of the major shortcomings in Kazakhstan's competition law and policy. In this criticism, the authority refers to the uneven playing field in the Eurasian Economic Union (previously the Customs Union) for Kazakh enterprises. Russia does not have this system and Russian undertakings are not subject to such rigid price and behavioural regulation.

The reform of the competition law of Kazakhstan proposed by the National Chamber of Entrepreneurs of the Republic of Kazakhstan, "Atameken", and currently under consideration by the Parliament will supposedly eliminate the existing system of registration of dominant undertakings, limiting it solely to regulated markets. At the same time, the existing system still has support from some groups within the government as it provides price and behavioural control tools, which could be used in a wide range of economic sectors.

The register system should be abolished given that the process and subsequent inclusion imposes high burdens on the undertakings and the benefits are dubious, at best. There seems to be a high risk of overregulation as long as the authority lacks the necessary tools, procedures and time to investigate and define markets to reflect accurately their economic reality,. If the current practice effectively extends price control to potentially competitive markets then the involvement of the competition authority will inevitably lead to a misallocation of productive resources and will ultimately diminish economic activity. An ineffective appeal procedure only reinforces these tendencies.

2.2.2. Abuse of dominance

The Law on Competition in Article 13 defines abuse of dominance as actions or omissions of an economic entity being in a dominant position, which result or may result in the restriction of access to the relevant market, the prevention, restriction, or elimination of competition "*and (or) infringement upon the interests of consumers or other persons*". Eleven types of abusive behaviour are listed in the law, but the list is an open one and other types of

⁵⁰ 2013 is the last report available due to the reorganisation of the authority which occurred in 2014.

behaviour could be found to fall under the general definition, although this is relatively rare.

The types of abusive conduct specifically prohibited by Article 13, Section 1, are:

1. charging or support of monopoly high or low prices, or monopsony low prices;
2. charging of different prices for the same product without objectively justified grounds;
3. restrictions on downstream distribution of a produced good with regards to the area of distribution, types of consumers, contractual conditions, as well as price and quantity;
4. tying or forcing of unrelated products or onerous or unrelated conditions of contract;
5. refusal without economic or technological reasons, to conclude contracts with specific purchasers, if the product can be produced or supplied; or evasion in a form nonresponse to the offer to conclude such an agreement in a 30-day term;
6. making the sale of goods conditional upon the acceptance of restrictions on buying competitor's goods;
7. reduction or termination of production and (or) supply of a product without economic or technological reasons, when there is consumer demand or orders for the product and it can be produced;
8. withdrawal of a product from circulation if the result of such withdrawal was an increase in price of the product;
9. forcing of economically or technologically unjustified and unrelated conditions of contract;
10. creation of barriers to entry to or exit from the market for other economic entities;

11. economically, technically or otherwise unjustified establishment of different prices for the same product, creation of discriminatory conditions;

Similarly to Articles 10 and 11, the language of this provision does not appear to require an infringement upon the interests of consumers and, at the same time, the actual or potential anti-competitive effects. This allows the authority to initiate investigations solely on the basis of consumers' complaints without proving actual anti-competitive effects as such.

Box 4. Infringement on Consumer Interests by Dominant Enterprises – Recent Practice

On the basis of complaints received from two consumers living in Almaty, between September to December 2013, the competition authority conducted an investigation against one of the leading mobile telecom companies in Kazakhstan "Kcell" for an alleged abuse of dominance. The operator was listed in the Register of Dominant Enterprises as exercising a "collective dominance" with another telecom operator, "Kar-Tel", jointly controlling more than 50% of the relevant market. The authority discovered that over the course of 2012 and for nine months of 2013, "Kcell" had not been terminating pre-paid voice and internet connections when customers had used the entirety of their pre-paid amounts. "Kcell" allowed its customers to continue voice or internet connections and would charge their accounts for the extended services as soon as they were topped up. The authority decided that this conduct constituted a form of abuse of dominance infringing upon consumers' rights. The consumers had not granted their explicit consent for the extension of services or for further charges to their accounts for extended connections to "Kcell". In February 2014, the authority published a decision finding "Kcell" liable of an abuse of its dominant position for infringing on consumers' rights, and proposed to punish the offender with a fine equal to 10% of the annual income it received over the course of the violation, which constituted KZT 160.5 billion (approximately USD 800 million). The Almaty administrative court, in its decision from March 2014, confirmed the authority's decision but reduced the calculated amount of the monopolistic income. The court considered that only the services, which were prolonged without the consumer's consent, should be included in the calculation. The final amount of the fine imposed on "Kcell" was KZT 325 million (approximately USD 2 million).

2.2.3 *Monopolistically high and low prices*

The concept of monopolistically high and low prices is described in more detail in Article 14 of the Law on Competition. A monopolistically high price is defined as a price charged by a dominant economic entity when it satisfies cumulatively two criteria: 1) it exceeds a maximum price charged by an

undertaking not belonging to the same group of related undertakings, or it exceeds a price charged under comparable economic conditions but in competitive markets; and 2) it exceeds the costs necessary for the production and distribution of the product in question. Similarly, a monopolistically low price is understood as a price, which is lower than the minimum price charged in the relevant market by other undertakings and the actual costs of production and distribution.⁵¹

These rules on monopolistically low prices do not have much in common with the concept of predatory pricing as normally used in abuse of dominance cases. Practitioners in Kazakhstan say this creates an incentive for dominant undertakings to lower the intensity of competition. Dominant undertakings therefore care more about the stability of prices rather than more efficient pricing strategies beneficial to consumers.

With such a broad concept of monopolistically high – or low - prices, it is not surprising that given Kazakhstan’s context, the competition authority is equipped with a powerful instrument of direct price control over undertakings listed in the Register. In most of the decisions related to the abuse of dominance in a form of monopolistically high pricing, the authority considers that it has the responsibility to check the justified level of profits of the alleged dominant market players⁵². The authority analyses similar markets or pricing strategies as well as the profitability levels in the relevant industry and subsequently adjusts the pricing and profitability of the concerned dominant enterprises to the sector

⁵¹ For low prices, the law does not require consideration of similar but competitive markets as per the monopolistically high price provision in cases when there are no other benchmarks.

⁵² An illustrative example of this approach is shown by the former head of the competition authority (before its merger with the natural monopolies regulator) in an interview published in February 2014. He expressed his disappointment about the lack of the state regulation of pricing in the construction industry, which “makes developers able to hide their extremely high unjustified profits” and suggested that their profits should not exceed 20%. Furthermore, the authority had to find a way to deal with this challenge to protect consumers’ interests in the construction sector. (See Galym Orazbakov “Creating an atmosphere of fair competition to become one of the 30 developed countries in the world” // Market and Competition. Vol. 2, 2014. P. 14 (in Russian).

average. The combination of a formalistic approach to the market definition based primarily on the administrative divisions of Kazakhstan and the state statistics, along with a solely quantitative criterion for dominance, makes the competition authority a mega price regulator for a much wider range of economic sectors than actually defined by the Law “On Natural Monopolies and Regulated Markets”.

Prices charged by natural and state monopolies, as well as by subjects of the regulated markets are not considered as monopolistically high or low under the Law on Competition. These prices are only dealt with by the Law “On Natural Monopolies and Regulated Markets”⁵³.

⁵³ Please see more details on this in the sections 5.3 and 5.4 of this report.

Box 5. Monopolistically High Pricing – Recent Practice

- In November 2012, “Zhasyl El – Taraz”, a medium-sized enterprise specialising in city waste management and operating in the local market of the city of Taraz in the Zhambylsk region of Kazakhstan, increased the price for its services. In 2009, “Zhasyl El-Taraz” had been entered into the Register of Dominant Undertakings as an undertaking with a market share of more than 35% in the relevant market for city waste management services within the geographical borders of the city of Taraz. On the basis of a complaint filed by affected consumers, the competition authority launched an investigation, which was completed by July 2013. The undertaking was found liable of an abuse of dominance in the form of monopolistically high pricing, as its prices grew 59% faster than prices of its direct competitors in the Zhambylsk region, and 36% faster than prices for similar services in the comparable market of the neighbouring Pavlodar region. In August 2013, the administrative court of the city of Taraz confirmed the decision of the competition authority and fined “Zhasyl El-Taraz” a total amount of KZT 154 544 (USD 1 000). Its “monopolistic income” was calculated as the profit extracted as a result of and throughout the period of the anti-competitive conduct but for not more than one year’s duration. A total amount of KZT 3 million (USD 20 000) was confiscated.
- In March 2011, the competition authority issued a decision accusing the JSC “AES Ust-Kamenogorsk TEC” of charging monopolistically high prices in the wholesale market for electricity within the geographical borders of the East-Kazakhstan region. JSC “AES Ust-Kamenogorsk TEC” was listed in the Register of Dominant Undertakings as a member of a “group of related persons” along with four other generating companies in the region, together controlling more than 68% of the wholesale electricity market in the East-Kazakhstan region. On 1 January 2008, the JSC “AES Ust-Kamenogorsk TEC” increased its price for electricity by 51.89% from KZT 2.12 to 3.22 per kW/hour. Meanwhile, the average increase in prices for electricity in the East-Kazakhstan region, according to the Agency of State Statistics, was about 38.49%. The wholesale price for electricity exceeding the justified market average increase of 38.49% in 2008 was considered by the authority as the monopolistic income. In June 2011, the Ust-Kamenogorsk administrative court confirmed the decision of the authority and imposed a sanction on the “AES Ust-Kamenogorsk TEC” in the form of a fine for abuse of dominance of about KZT 136 million (USD 900 000). At the same time, the court decided not to confiscate the monopolistic income of the enterprise adding up to KZT 136 billion (USD 900 million) in this case.

2.2.4 Investigations and Sanctions

Abuse of dominance cases have always been a noticeable part of the Kazakh competition authority's caseload, accounting for a similar number of investigations as cases on restrictive agreements and practices each year.

Table 3. Enforcement Statistics – Abuse of Dominance

Year	Articles 13 Abuse of Dominance	
2010	Investigations	53
	Decisions ⁵⁴	37
2011	Investigations	31
	Decisions	29
2012	Investigations	51
	Decisions	46
2013	Investigations	46
	Decisions	41
2014	Investigations	44
	Decisions	38

Investigations against abusive conduct, like other types of investigations, are regulated by Article 9 of the Law on Competition. The competition authority can initiate an investigation on the following grounds: 1) information provided by other state authorities indicating a possible competition law violation; 2) petitions from consumers and (or) market participants; 3) discoveries by the competition authority of indications of a possible competition law violation by market participants, state organs or regional authorities; 4) information from the mass media received by the competition authority. The majority of abuse cases come to the attention of the authority through a complaint by an affected customer and most address the behaviour of the dominant undertaking in relation to this specific customer alone, rather than addressing a broad policy or practice of the dominant entity.

⁵⁴ This includes any forms of decisions issued by the competition authority and finding market participants violating competition law.

The authority can only collect information by sending requests to market participants and state organs. According to Article 162 of the Code on Administrative Violations, non-compliance with information requests sent by the competition authority constitutes an administrative offence and can be sanctioned with a fine of up to KZT 300 000 (approximately USD 1 500) for individuals and officials, and up to KZT 3 million (approximately USD 15 000) for large enterprises.

The competition authority cannot force market participants to provide oral or written testimonies or collect data through inspections on business or private premises, announced or unannounced. This type of investigative powers has been seen by the government as part of the competence of the police and other security services and not necessary for a civil service institution like the competition authority.

The Law on Competition requires that an investigation is completed within two months term the initiation of proceedings. The term may be extended for a maximum of two more months. Article 65 authorises the authority to suspend an investigation for the time necessary to request an expert opinion or to undertake a market analysis. In practice, the authority rarely uses this opportunity.

The pattern of sanctions for abuse of dominance mirrors that described above for cases concerning restrictive agreements and practices – “monopolistic income” may be disgorged as well as sanctions of 3% or 5% to small or large undertakings may be imposed, with double sanctions for repeat offenders.

The competition authority is also empowered to issue an order to stop a recognised violation. As many of the cases in this category concern contract provisions, the competition authority also has the power to order that a contract between a dominant undertaking and its customer be concluded on specific terms. There are difficulties in attributing the authority’s order to a particular legal entity being part of the same group as an offender. The difficulties stem from the broad definition of the “group of related persons”, used by the Law on Competition as it covers all the individuals and legal entities satisfying certain

conditions⁵⁵. Furthermore, a “group of related persons” is considered by the law as a single economic enterprise.

Box 6. Groundless Refusal to Deal – Recent Practice

In November 2014, the competition authority issued a decision accusing the JSC “AES Ust-Kamenogorsk TEC” of a refusal to sell electricity to the JSC “Ust-Kamenogorsk Titanium and Magnesium Plant”. JSC “AES Ust-Kamenogorsk TEC” was listed in the Register as a member of a “group of related persons” which included four other generating companies in the region, together controlling more than 68% of the wholesale electricity market in the East-Kazakhstan region. The authority ordered JSC “AES Ust-Kamenogorsk TEC” to conclude an agreement with the applicant and imposed a fine for abusing its dominant position. JSC “AES Ust-Kamenogorsk TEC” argued that since one of the undertakings (JSC “AES Shulbino TEC”) was part of a group of dominant undertakings who had already signed a contract with JSC “Ust-Kamenogorsk Titanium and Magnesium Plant” for the supply of the requested amount of electricity, and as the group was treated by the law as a single entity, JSC “AES Ust-Kamenogorsk TEC” asked the authority to stop the investigation because it already complied as a group with the authority’s order. The authority partially accepted the argument, agreeing that the dispute between the applicant and the JSC “AES Ust-Kamenogorsk TEC” was settled due to the supply of electricity by another member of the group, but at the same time the JSC “AES Ust-Kamenogorsk TEC” was fined for groundless refusal to deal with the applicant for the period preceding the settlement.

The enforcement practice in the area of abusive practices again raises concerns. Given that the existence of dominance is already established on weak grounds and that an abuse can be found if a consumer feels harmed, there is a high risk of a potentially excessive and overly regulatory approach. As there also seems to be a focus on so-called monopolistically high and low prices, price regulation is the logical consequence of this approach. Many competition authorities struggle, and even avoid, excessive pricing cases because of their inherent difficulties. Comparable markets are hard to be found and costs can be

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Those conditions are: 1) a person (legal or physical) owns directly or indirectly a share of over 50% of capital stock of the legal entity; 2) a legal entity or a group of affiliated legal entities is able to exert a decisive influence on the decision-making process of another legal entity; 3) an individual, his/her spouse, close relatives has an ability to exercise functions of the governing bodies of the legal entity; and 4) persons, which are related to the same group through one of the above-mentioned criteria (Section 1 of Article 7).

measured in many different ways. The question of what a justified profit is has yet to be answered.⁵⁶ The risks of getting it wrong are considerable for these kinds of abuses, with substantial harm to productivity, growth and ultimately consumer welfare. For these reasons, many authorities concentrate more on exclusionary kinds of abuses, in order to keep markets open and to allow competitive forces to act. This is liable to be more difficult in the context of highly concentrated markets which seem to prevail in Kazakhstan. However, price regulation does not appear to lead to efficient outcomes either. Price regulation can only deal with symptoms, while a more rigorous analysis of markets and market behaviours that create or reinforce entry barriers has the potential to get to the source of the competition problems and thus lead to solutions.

2.3. *Concentration Control*

The Law on Competition (Article 50) defines five types of economic concentrations. These are:

1. a merger in the form of corporate reorganisation (when two or more legal entities become a single corporation);
2. an acquisition of shares constituting more than 50% (before the reform of 2013 – more than 25%) of the target company's capital stock;
3. a purchase or lease of the main productive assets of an undertaking exceeding 10% of the value of its entire assets;
4. the entry into a management (or similar) agreement allowing for an entity to control the decision-making process within another undertaking;
5. the appointment or any other form of designation of an individual (or a group of individuals) to the governing organs of two or more undertakings allowing them to control the decision-making process within those undertakings.

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OECD Roundtable on Excessive Prices (2011) -
<http://www.oecd.org/daf/competition/abuse/49604207.pdf>

The Law on Competition due to the 2013 reform provides for two forms of concentration control. Concentrations of the types 1 – 3 require prior notification (petitions) and concentrations of the types 4 and 5 require post-transaction notification. According to Article 49, a concentration may be prohibited if it may lead to a restriction of competition, including the creation or strengthening of a dominant position. The procedures to examine concentrations, including the documents to be filed, are specified in the law.

The 2013 amendments also increased substantially the basic value threshold for the notification of a concentration from 2 million of “monthly factors”⁵⁷ to 10 million of “monthly factors”. In 2015, the value threshold equals KZT 19 820 million (slightly less than USD 20 million). It is calculated on the basis of the most recent balance sheet value of the assets of the companies involved, i.e., the acquirer and its group of related persons as well as the target and its group of related persons, and their annual turnover, based on worldwide assets and turnover.

The National Bank of Kazakhstan defines a different value threshold for economic concentration in financial markets. The existing value thresholds vary from 2% to 15% of the total financial assets of the relevant financial sector in the country. Undertakings listed in the Register of Dominant Undertakings must file a notification for any kind of economic concentration, regardless of whether the deal meets any value thresholds.

All intra-group transactions and transactions required by the law or acts of the president and the government are excluded from concentration control. The Law on Competition does not foresee any local nexus requirement nor does it define clearly which foreign economic entities could be subject to Kazakh concentration control. In principle, Article 3, section 2, extends the scope of the Law on Competition to any economic activity abroad if it directly or indirectly affects any assets, including intangibles and company shares, located in Kazakhstan or restricts competition in Kazakhstan.

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The “monthly factor” in Kazakhstan’s law is an amount annually defined by the budgetary law and used for social security purposes and to calculate fines for administrative and criminal violations. In 2015, the monthly factor equals KZT 1 982.

The administrative procedures for handling concentration control petitions and notifications, are based on the provisions of the Law on Competition (Articles 51-54-2) and described in more detail in the Standard on Civil Service Provision “Review of petition for approval of economic concentration”, enacted by the Decree of the Government dated 24 January 2014. These administrative procedures are different from investigations against anti-competitive conduct and regulated by a different set of norms.

The law specifies a list of documents to be submitted to the authority simultaneously with the petition or notification. The applicants must submit information about all of the members constituting the group of related persons, including individuals. This information must cover personal data of the individuals involved; economic parameters of the business units involved in the transaction, such as, output, export and import with regard to Kazakhstan, business plans etc.; the structure of the group and information about the corporate governance of its member enterprises. If the information is available to one of the notifying parties then a location abroad is not a valid reason for not submitting the required information. For some kinds of information, estimates may be submitted, provided a party indicates the source of the information and the method used to calculate the estimate.

Article 56-1 gives the authority the right to order the parties involved to reverse the transaction in case the authority finds within 45 days that the transaction has resulted or may result in the restriction or elimination of competition. This provision also obligates the market entities entering into transactions to wait a further 45 day term after submission of the notification before closing the notified deal. In many cases, the market participants prefer to submit a prior notification petition rather than use the post-transaction notification. Furthermore, a post-transaction notification has to be filed within 45 days by the concerned parties. The parties must also provide an almost identical set of materials to the authority. As this norm was introduced in 2013 and is still relatively new, there has yet to be any cases of reversal of such transactions.

The competition authority has 10 days upon the receipt of a petition for pre-transaction approval to decide whether it meets the formal requirements. The competition authority must issue a written response indicating the formal decision taken and the reasons within 30 days after acceptance of the petition. Prior to the May 2015 reforms, this period was 50 days. The period allocated for the examination of the concentration can be extended if additional information needs to be collected. The law does not define a maximum length

of this extension. In practice, it gives the authority an unlimited time frame for the review of notified concentrations, although on average this term rarely exceeds 90 days. The time frame is the same for pre- and post-merger notifications.

Once issued, the approval for a transaction is effective for a period of one year. An issued approval may include conditions to be met by the parties to the transaction, including obligations to sell or transfer property, to grant access to facilities, and so forth. The rules for conditions and obligations are laid down broadly in Article 56, section 3, allowing the authority to impose any forms of behavioural conditions. These rules are the same for pre- and post-merger transactions. They state that the authority may condition its approval of the economic concentration in order to balance the possible negative effects for competition caused by the approved transaction. The legal provisions do not differentiate between structural or behavioural conditions. In practice, the authority makes little use of its right to issue a conditional merger approval. The majority of conditions imposed merely require general compliance with the requirements of the law, such as reiterating the abuse provisions of the law.

According to Article 56, section 5, the authority is allowed to reverse or modify its approval of an economic concentration on its own initiative or on the grounds of a complaint from any interested market subject. In these cases the authority can ask the court to reverse the transaction. The law provides three possible reasons for this:

1. within 3 years from the initial approval if new facts are brought to light that would have prevented the approval of the concentration if these facts had been known to the authority at the time of approval;
2. if information submitted by the petitioner was incorrect and led to a misinformed decision;
3. if the parties did not comply with conditions the authority imposed on them while granting its consent.

2.3.1 Behavioural Conditions – Recent Practice

Box 7. Platinum Train Services

In 2013, the authority approved a new joint venture, “Platinum Train Services”, between the JSC “Remlokomotiv”, a Kazakh company providing railway services, and a Singaporean company “Platinum Support Services”, specialising in premium class train services. While approving the deal, the authority ordered the partners to avoid any forms of anti-competitive conduct in the future, including abusive practices and entering into anti-competitive agreements in line with the general restrictions of anti-competitive conduct defined in the law. The joint venture, shortly after it was established, entered into a contract with the dominant firm in the Kazakh passengers’ railway transportation market, the JSC “Passengers transportation”. One of the contractual provisions granted to the joint venture an exclusive right to provide certain services to the JSC “Passengers transportation” for a period of 10 years. The authority found this agreement anti-competitive and filed a suit to annul the joint venture as it violated the imposed condition not to engage in anti-competitive conduct. The courts have upheld the decision. In June 2015, the Department of Justice of Astana revoked the registration of “Platinum Train Services” as a legal entity, i.e. started its liquidation.

The number of applications handled by the authority decreased substantially after the 2013 increase of the notification threshold, from 395 petitions and notifications in 2012 to 228 petitions and notifications in 2013. In 2014, the authority received 179 applications for economic concentrations, including 21 post-transactional notifications.

Only a tiny portion of filed transactions is blocked by the authority because they restrict competition. In 2013, only one proposed transaction was prohibited. In 2014, the authority refused to approve five requests for economic concentrations. The authority does not publish its decisions related to economic concentrations in order to protect information provided by the market participants involved. It is known that in recent decisions the authority denied consent for transactions in the retail market of gasoline (concentration of gas station chains and of gasoline storages), which involved already dominant

market subjects. The arguments provided by the authority were mainly based on reinforcement of dominance in already highly concentrated markets⁵⁸.

The competition authorities' analysis in cases of economic concentrations follows the same pattern prescribed by the Guidelines on Market Analysis (Decree of the Minister on National Economy N 303 of 2 April 2015) for general market studies conducted by the authority under Article 47 of the Law on Competition as described in the section on dominance. Economic analysis normally includes a definition of the relevant market in terms of products and substitutes, geographic boundaries and market participants, as well as an assessment of the concentration level. As the technical capacities reserved for handling economic concentration cases are extremely limited (as reported by the business community and confirmed by the authority, only three members of the authority's professional staff are dealing with concentration cases), the authority conducts a market analysis only in rare cases requiring special attention. Such an analysis can again be described as rather technical, paying little attention to market dynamics and market-individual analysis and not focusing on a prediction of merger induced effects or even including potential merger related efficiencies.

A substantial number of petitions are rejected on the basis of procedural flaws and insufficient information provided by the applicants. For instance, in 2012, the authority rejected 132 out 228 petitions for procedural reasons. There are no statistics available on how the rejected petitions are handled after being thus rejected. The authority staff sees a number of such petitions resubmitted after necessary corrections. Some market participants changed their minds and did not return for approval of the economic concentration. There is no information available if they gave up on the concentration or simply disregarded the notification requirements.

Under Articles 49, 56 and 56-1 of the Law on Competition, the authority may file lawsuits to annul transactions to which the pre- and post-notification requirements apply. Annulment may occur if the transactions were completed in violation of the legal notification requirements and the transaction can be shown to have led to a restriction of competition. A court may annul a transaction if the undertakings fail to abide either by an issued decision of the authority or by the

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Aldash Aitzhanov, Nikolay Radostovets & Kuanysh Kholtursunov "Kazakhstan" // Merger Control. Fouth Edition. Published by Global Legal Group. P. 153.

conditions. Up until October 2015, the only reported case of this kind is the case of “Platinum Train Services” mentioned above Box 7).

During the proceedings, the merging parties do not enjoy any particular procedural rights, such as a right to be heard or to get access to files. The concentration is considered by the authority behind closed doors. The authority has not adopted any substantive guidelines. Only the procedural aspects of handling economic concentration cases are regulated by the above-mentioned Standard on Civil Service Provision “Review of petition for approval of economic concentration”.

Parties to a concentration have the right to appeal the competition authorities’ decisions. This right includes an appeal of conditional clearances, although in most cases these conditions just replicate general restrictions already imposed by the Law on Competition. Considering the very few prohibitions in the authority’s merger control practice, the courts have not yet heard any appeals in the area of economic concentration.

To date, no guidance exists for undertakings and their advisors on the enforcement practices and policies of the Kazakh competition authority in the area of concentrations, possibly due to a lack of enforcement practice. Given that decisions are not published, enforcement guidance is very important.

In the context of the information on Kazakhstan that this report provides, it is remarkable that merger control seems to play an insignificant role. In highly concentrated markets with a large number of undertakings that are considered dominant, judging from the register on dominant undertakings and that are all obliged to notify mergers, one would expect higher intervention rates. If enforcement worked on the basis of rather schematic market definitions and market share thresholds for dominance, then a significant number of mergers should meet the criterion of strengthening a pre-existing dominant position or creating one. Due to a strong lack of transparency in merger enforcement, one may only guess the reasons for the low intervention rate. One explanation may be that many clearances come with behavioural conditions that merely oblige the merging parties to refrain from anti-competitive agreements and abuse practices. If this is the case, than the merger control system largely misses the point. It is particularly important in already highly concentrated markets that merger control should prevent a further increase in market power in order to keep the markets as open as possible and to make more competition possible – now or in the future. Once structural changes have been allowed, the larger

entities can only be controlled by less effective means. In the case of Kazakhstan, this means price control. It may be the case that the merger control policy contributes to a general tendency to work on symptoms rather than tackling the causes of anti-competitive behaviour.

We have not been able to assess the adequate use of economics in merger analysis or the role potential merger efficiencies play in this process due to a lack of deeper insights into the unpublished Kazakh merger control decisions.

2.4. *Unfair Competition*

Article 26 of the Constitution of Kazakhstan explicitly prohibits any unfair competition. The Law on Competition (Article 16) defines unfair competition as “*any action in the course of competition that is directed towards the receipt or provision of an unlawful advantage, and that also infringes upon consumers' rights*”. This Article prohibits unfair competition, in the following forms:

1. the unlawful use of trademarks or other means of identification of products;
2. the unlawful use of goods of another producer;
3. the unauthorised copying of industrial design;
4. discrediting a market participant;
5. intentionally false and unfair advertisement;
6. the tying of selling (purchasing) of a good with unrelated products;
7. the calling for a boycott of a seller;
8. the calling for discrimination of a purchaser;
9. persuading a market subject to breach a contract with a competitor;
10. bribing employees of a seller;
11. bribing employees of a buyer;
12. the illegal use of information that is a commercial secret;

- 13. the selling the goods while creating confusion about the qualities or quantities of products or the identity of producers or place and means of production;
- 14. inaccurate comparisons of products.

Articles 17-28 are devoted to the particular forms of unfair competition listed above.

Some forms of unfair competition as defined by the Law on Competition are similar to those in other mainstream jurisdictions, while others are unique to Kazakhstan. For instance, the tying of unrelated goods when this does not result from a dominant market position is rarely considered elsewhere as a form of unfair competition.

Box 8. Tying of Unrelated Goods as a Form of Unfair Competition – Recent Practice

In October 2013, the authority ordered all of the major cinema theatres in Almaty to stop the established practice of prohibiting their customers from bringing their own snacks and beverages. The authority found that this practice constituted a form of unfair competition. It hurts consumers by tying the main entertainment services with the selling of snacks and beverages not requested by the consumers. Some cinema theatres chose to follow the order, others contested it in court. For instance, “Kinopark Sputnik” argued in its appeal that, first, by prohibiting snacks and beverages from outside, it preserved its facilities from damage (e.g. stains) by foods like hamburgers; and, second, that selling snacks and beverages at the cinema has always been an integral part of the cinema experience. “Kinopark Sputnik” in its submission to the court also insisted that the contested practice did not restrict competition as all of the major cinemas in the city applied the same snacks and beverages policy.

The court did not find the arguments persuasive and decided that “Kinopark Sputnik” was liable for unfair competition in the form of tying of unrelated goods. The court fined the offender an amount of KZT 432 750 (approximately USD 2 400). The total amount of fines collected by the authority from the major cinema theatres in Almaty on the basis of this violation reached KZT 1.2 million (approximately USD 6 600).

Box 9. An Attempted Boycott as a Form of Unfair Competition

In 2011, one of the leading mobile operators in Kazakhstan “Kar-Tel” was accused by the authority of unfair competition by attempting to instigate a boycott of its competitor “Mobile Telekom-Service” in the city of Aktoba. During a ground promo-campaign launched by “Mobile Telekom-Service” and targeting new customers in Aktoba, “Kar-Tel” started a counter-campaign in the same parts of the city trying to persuade consumers not to sign up for its competitor’s services. For this “Kar-Tel” offered to exchange the discount certificates of “Mobile Telekom-Service” for its own promo flyers, thus proposing a better offer to the potential customers of its competitor. Also, “Kar-Tel” approached its local dealers and persuaded them not to deal with the newcomer. The authority fined “Kar-Tel” KZT 1.6 million (approximately USD 7 000) and ordered it to refrain from engaging in this type of unfair competition.

Most of the cases are initiated by the authority on the basis of complaints from consumers and competitors. As in other cases, the authority is obliged to react to any complaints received. In rare cases, the authority may initiate investigations of its own volition.

Usually, should the authorities determine a violation; the behaviour will be declared illegal and the offender will be ordered to cease the activity. Failure to abide by the order may result in a fine under the Code of Administrative Violations.

Unfair competition cases are a significant part of the authorities’ overall caseload and account for a similar proportion of the authorities’ work compared to restrictive agreements and practices and abuse of dominance. Just over a half of the unfair competition cases relate to the tying of unrelated products and different forms of attempted boycotts and discriminations. The majority of the other half of the cases, over the last five years, dealt with the improper use of trademarks or other means of identification of products; and misleading consumers about the origin, quality, producer or other aspects of products.

Table 4. Enforcement Statistics – Unfair Competition

Year		Articles 16 Unfair Competition
2010	Investigations	32
	Decisions ⁵⁹	28
2011	Investigations	47
	Decisions	42
2012	Investigations	59
	Decisions	53
2013	Investigations	53
	Decisions	51
2014	Investigations	39
	Decisions	37

According to the Code on Administrative Violations, market participants engaged in unfair competition may be subjected to administrative sanctions. As of January 2015, a fine of up to 200 “monthly factors”⁶⁰ for small business, up to 300 “monthly factors” for medium-sized entities, and up to 1 500 “monthly factors” for large enterprises can be imposed for a first offence. A doubled fine may be imposed for a second offence by an enterprise which has already been sanctioned once for a similar violation over the course of one year.

2.5. *Consumer protection*

Throughout its complicated history, the competition authority in Kazakhstan has been involved in matters related to consumer protection on various levels. Between 2009 and 2013, the Agency on Protection of Competition played a major role in the enforcement of consumer protection law, dealing directly with up to

⁵⁹ This includes any forms of decisions issued by the competition authority and finding market participants violating competition law.

⁶⁰ The “monthly factor” in Kazakhstan’s law is an amount annually defined by the budgetary law and used for social security purposes and to calculate fines for administrative and criminal violations. In 2015, the monthly factor equals KZT 1 982.

several thousand complaints each year. After an administrative reform in 2013, an independent Agency on Consumer Protection was established. In 2014, the Agency's functions were transferred to the Committee for Consumer Protection within the Ministry of the National Economy.

The current role of the competition authority in the area of consumer protection is still important given the current wording of the Law on Competition. The competition law's provisions generally require that a violation "infringes upon consumers' rights". For this reason, the competition authority is inclined to combine enforcement of the Law on Competition with consumer protection in order to tackle violations affecting individual consumers. It is co-operating with the Committee for Consumer Protection primarily in form of information exchange.

Both business representatives and legal practitioners in the field heavily criticise the current language of the Law on Competition as it relates to consumer protection. In its present state, the law often confuses the protection of consumers' interests as one of the main objectives of the competition law and policy with protection of the legal rights of individual consumers. As is shown in the respective parts of this report, quite a few investigations of allegedly anti-competitive conduct was based primarily on infringements of individual consumers' immediate interests rather than broader anti-competitive effects. This may have resulted in a loss of consumer welfare in general.

Taken together, all of the findings on the application of the rules on dominance and abuses; on anti-competitive agreements and concerted practices; on the schematic use of the merger control provisions; and on the broad range of business practices considered to be unfair or in violation of consumer rights, create a far reaching system of behavioural control by the competition authority over most parts of the economy. The authority seems to essentially be free to choose on which grounds it opposes any kind of agreement, or economic act. As long as at least one individual consumer is adversely affected, there will be, in principle, a legal basis to intervene in most cases.

This creates a huge workload for the authority undermining its capacity to set sound priorities. Furthermore, the authority is hampered in its ability to tackle those competition law infringements which are most harmful to the proper functioning of the economic system and to the overall welfare of the society and its consumers.

3. Public Actors Restricting Competition

Like many of its post-Soviet peers, the Kazakh competition authority enjoys wide powers to apply the competition law prohibitions of anti-competitive acts, actions and agreements to state bodies, if they prevent, restrict or eliminate competition or “infringe upon consumers’ rights” (Article 33 of the Law on Competition). The provisions apply to executive agencies of the central government, to all regional bodies and to bodies of local administrations.

This wide control of economic activities of the state is another strong characteristic of the post-communist transition origins of the Kazakh competition law and policy. In addition to Article 33, Article 31 of the Law on Competition requires prior permission from the competition authority before state bodies and enterprises are allowed to establish new undertakings, a move to limit any unnecessary state involvement in the market economy. The Law on Competition goes even further and requires all of the state-owned companies and state enterprises to ask for the competition authorities’ consent to its existence (Articles 77 and 78) within three years after the adoption of this law, i.e. by 2012. These strong powers targeting de-monopolisation and the promotion of competition could enable the authority to become a transformative force behind the structural change in the still highly concentrated and state managed economy of Kazakhstan.

3.1. Anti-competitive acts by public authorities

Article 33 of the Law on Competition prohibits a number of specific forms of anti-competitive conduct by public bodies, which lead or may lead to restriction or elimination of competition or infringing upon consumers’ rights, including:

1. imposing limitations on the creation of new enterprises;
2. the unjustified obstruction of the economic activity of any market participant;
3. the restriction or prohibition of trade between regions or localities or restrictions on the sale of goods or services;
4. mandatory instructions concerning the priority supply of specific customers;

5. restriction on purchasers in their choice of suppliers of goods;
6. actions aimed at increasing, decreasing or fixing prices;
7. actions aimed at market division;
8. restrictions of market access, exit from markets, or pushing market participants out of the market;
9. creating discriminatory conditions; and other specified conduct.

This list is not exhaustive, however, and other acts or actions of state bodies may also be found to restrict competition improperly. As in other instances, the language of this norm does not appear to require both the infringement upon the interests of consumers and the anti-competitive effects.

The provisions on acts restricting competition by public authorities include omissions, also known as failures to act. This allows for instance, to address not only direct market interferences; but also, to address failures of a public institution to respond resulting in harm. For example, a failure to respond to licensing requests from new entrants into a monopolised market.

Section 3 of Article 33 also prohibits the state and municipal bodies from entering into agreements, if these could result in the prevention, restriction or elimination of competition. This covers agreements between state and municipal bodies as well as between state, or municipal, bodies and market participants, with the exception of agreements directly allowed by the laws of Kazakhstan and its international treaties.

Anti-competitive acts and omissions of state bodies are a major part of the competition authority's investigations caseload, growing steadily since 2012.

Table 5. Enforcement Statistics – Anti-competitive Acts of the State Bodies

Year		Articles 33 Anti-competitive acts (and omissions) of state bodies
2010	Investigations	22
	Decisions ⁶¹	20
2011	Investigations	16
	Decisions	15
2012	Investigations	24
	Decisions	21
2013	Investigations	44
	Decisions	41
2014	Investigations	62
	Decisions	60

Historically, as the competition authority and the regulator of natural monopolies and regulated markets were different agencies, a number of competition authority investigations were devoted to the actions of the regulator. The competition authority exercised checks and balances towards the regulation of natural monopolies and other regulated industries. After the recent merger of the authorities in August 2014, it has become more difficult to check the regulation processes internally.

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This includes any forms of decisions issued by the competition authority and finding market participants violating competition law.

Box 10. Anti-competitive Actions of the Economic Regulator – Recent Practice

In May 2011, the West Kazakhstan regional division of the Agency on Regulation of Natural Monopolies refused to approve a new tariff for retail sales of gasoline requested by a local undertaking operating in this market. The undertaking complained to the competition authority, and the case was investigated. The competition authority found the regulator to be liable of violation of Article 33 of the Law on Competition prohibiting anti-competitive conduct of the state bodies. The regulator refused to approve the tariff without justified reasons. This seriously damaged the applicant's business, as it could not continue to trade gasoline without the regulator's consent to its retail price formation. The competition authority ordered the regulator to approve the tariff. On the basis of this investigation and order, the applicant filed a lawsuit against the regulator and was compensated for its losses including loss of possible income with a total amount of KZT 3.1 million (approximately USD 20 000).

The competition authority may issue an order requiring the state body in violation of the competition law to stop the violation and to repeal or amend the relevant document or decision.

Individual state officials may also be subjected to administrative sanctions for anti-competitive acts or actions or omissions. According to Article 163 of the Code on Administrative Violations as of July 2009, a fine of 300 “monthly factors”⁶² equal to about KZT 600 000 (or USD 3 000) can be imposed for a first offence, and a doubled fine for a second offence. These relatively modest sanctions, although individuals are paying themselves, render the strong powers given to the authority by the Law on Competition less efficient.

In many cases, the competition authority has to deal with public authorities having a higher rank in the state hierarchy. To its credit, the authority has managed to insist on the implementation of its decisions.

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The “monthly factor” in Kazakhstan’s law is an amount annually defined by the budgetary law and used for social security purposes and to calculate fines for administrative and criminal violations. In 2015, the monthly factor equals KZT 1 982.

Box 11. Anti-competitive Acts of the Ministry of Oil and Gas

In 2013, the competition authority investigated an alleged violation of Article 33 by the Ministry of Oil and Gas. The Ministry had granted an exemption from a general temporal restriction imposed by the government on the importation of petrol and diesel from Russia to three companies. All other competitors except the three enterprises chosen by the Ministry were not allowed to buy petrol and diesel from the Russian suppliers. The Kazakh industrial association of fuel companies complained to the competition authority about this restriction. After an investigation, the competition authority found the Ministry of Oil and Gas liable of violating Article 33 in the form of creating discriminatory conditions and a market division. The authority ordered the Ministry to correct the problem. The Ministry complied with the order.

3.2. *Competition impact assessment, de-monopolisation and advocacy*

The Law on Competition puts a strong emphasis on the *ex-ante* control of state involvement in competitive sectors of the market economy, as well as on *ex-post* review of state participation in the economy.

Article 31 provides for an elaborate set of rules on the creation of new state enterprises and subsidiaries of the existing state enterprises. The law prohibits state engagement in business activities except in special cases defined by section 1 of this Article:

1. in cases required by national security and other strategic considerations;
2. for the management of state owned strategic assets;
3. in sectors reserved for the state monopoly;
4. if required by the needs of the state administration;
5. in case of lack of private enterprises in a market;

6. in the framework of the national holding company⁶³;
7. in cases defined by laws and decrees of the president and the government.

In all cases, when a state body decides to establish a state-owned enterprise or a subsidiary of an existing state-owned company, it has to apply to the competition authority with a notification similar to the one for the clearance of an economic concentration. The authority must respond to the applying state body within 60 days after its receipt with either an authorisation or a refusal to approve the creation of the new state controlled enterprise. The authority, according to Section 5 of Article 31, must conduct a market analysis and prepare a report on the state of competition in the relevant market. This report shall provide a conclusive argument about potential restrictions of competition in the concerned markets.

In 2012⁶⁴, the authority reviewed 463 petitions from state executive agencies and regional administrations on the creation of new state enterprises; and 254 petitions on the formation of new corporate subsidiaries of the state owned companies. In total, the authority processed 721 petitions under Article 31 in 2012, which is almost four times more than notifications of economic concentration under Article 50. The number of refusals in this category of controlled

⁶³ According to the Law “On State Assets” of 2011, a national holding company is a state owned corporation established and managed by the government for operating of a number of national companies and other enterprises in certain sectors of the national economy. According to the government’s Decree of 6 April 2011 (as amended on 19 December 2014) there were established 4 national holding companies: the largest conglomerate – Foundation for National Welfare “Samruk-Kazyna” (managing such national companies as Kazakhstan Electricity Grid Operating Company or Kazakhstan Oil & Gas Company “Kazmunaigaz”), National Management Holding Company “KazAgro” (managing assets in the agrarian sector), National Management Holding Company “Baiterek” (development, high-tech, etc.) and National Information Technology Holding “Zerde” (IT and communications).

⁶⁴ Due to the recent reorganisation of the authority no exact data is available for 2013 and 2014. But according to authority staff, the number of cases handled under Article 31 is almost constant.

transactions is also substantially higher than in the area of economic concentrations. In 2012, the authority refused to approve 40 petitions for the creation of new state enterprises and 29 petitions for new corporate subsidiaries on the grounds of unjustifiable restrictions of competition in the concerned sectors.

After the Law on Competition came into force in 2009, the competition authority was required to reconfirm the legality of every state enterprise⁶⁵ (Article 77) and every state owned company (Article 78). As a result, the authority launched a major three-year project, in November 2009 to demonopolise Kazakhstan's economy. The authority designed the project in line with the initial competition legislation of the early stage of transition. Under the project, the authority analysed all of the relevant markets where state enterprises or state owned companies are active to determine if these sectors would be more productive without state involvement. The authority had an open mandate for this work, with the sole purpose of increasing the intensity of market competition in the Kazakhstan's economy.

From 2009 to 2011, the competition authority received 5,477 petitions under Articles 77 and 78. Under Article 77, the authority reviewed 4 818 petitions of which 252 were refused. Under Article 78, 659 petitions were reviewed and 195 rejected. Most of the state enterprises and companies which did not receive approval were subsequently either privatised or liquidated. The authority issued refusals primarily because it judged that a strong potential existed for developing competition in the relevant markets.

The competition authority is also engaged in the competition assessment of draft laws or decrees or of general policy proposals. The authority is one of the executive committees under the Ministry of the National Economy, who acts as an overarching regulator covering a broad range of sectors and policies. Much of the authority's competition advocacy in relation to legislative measures takes place within this framework. The authority relies on its role and functions as defined by official procedures, including the ones issued by the Ministry of the National Economy, rather than on independent reform efforts. Normally, as a committee within the structure of the Ministry of the National Economy, the competition authority has the opportunity to comment on most of the draft laws or draft decrees of the government or on general policy proposals discussed

⁶⁵ A special form of corporation as defined in Articles 102-104 of the Civil Code of Kazakhstan with a state as a single owner.

within the Ministry and related to the competition issues. The authority does not have the necessary administrative or political resources to intervene on its own initiative in the legislative process within the government nor to comment on draft laws not related to competition policy that are referred to the authority by the Ministry of National Economy.

The competition authority is also active in other forms of competition advocacy.

In the course of regular market studies conducted by the authority according to Article 47 of the Law on Competition, the authority pays attention to entry barriers and other obstacles to the efficient functioning of the analysed markets. In its regular reports to the government, the authority advocates, based on these market studies, policy measures to be taken by the government to address any identified shortcomings. For instance, in 2014, the authority reported to the government that during its analysis of the market for precious stones, it had found out that only one entity was authorised to make expert assessments of precious stones exported to the countries not belonging to the Eurasian Economic Union. The competition authority asked the government to reconsider the Law “On Precious Stones and Metals” to intensify competition in this market. The government accepted this recommendation and changed the law eliminating the identified market barrier.

The authority works closely with the business community, especially with National Chamber of Entrepreneurs of the Republic of Kazakhstan “Atameken” as well as other industrial organisations. It is also trying to engage in academic work. For example, together with the Centre for Development and Protection of Competition Policy⁶⁶, the authority is organising a series of workshops and meetings with the academic community. The authority is currently launching a specialised educational program on competition law and policy at the Gumilev National Eurasian University in Astana, the first of its kind in Kazakhstan.

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An expert institution established by the government and managed by the Agency on Antimonopoly Policy to promote studies of competition law and policy in Kazakhstan. In 2011, according to the decision of the authority issued in the course of realisation of Article 78 of the Law on Competition as an organisation operating in a competitive market it was privatised. Currently, the institution is a leading expert centre on competition law and policy in Kazakhstan.

4. Institutional issues: Enforcement Structure and Practices

The competition authority's positioning within the structure of the executive power in Kazakhstan's highly centralised government has a direct impact on the agency's ability to influence state policy and prioritise its own law enforcement activity. On the one hand this structure places the authority close to process to draft laws and regulations allowing it to react quickly to any perceived anti-competitive effects. On the other hand, in its current role and within the existing legal framework, the authority is a policy instrument subordinate to the views and wills of the government. This status is in contrast to the role of independent law enforcer focused primarily *on the promotion of competition among enterprises*, as suggested by the President of Kazakhstan in his recent action plan for economic development. The President called for the alignment of Kazakhstan's competition law and enforcement with the OECD standards.

The development of Kazakhstan's competition law and policy could benefit substantially from the Eurasian integration project which is in the process of establishing a solid legal and institutional framework for competition modelled on the Russian law.

4.1. Competition policy institutions

Section 6 of Article 6 of the Law on Competition defines the competition authority as a state agency responsible for "governance" in the area of the protection of competition, including unfair competition, and restriction of monopolistic activities as well as the control and regulation of state monopolistic activities.

According to Article 5 of the Law on Competition, the government defines the main aspects of state policy in the area of competition, and the competition authority implements the policy. The competition authority, as stated in the section 1-1 of Article 5, is also responsible for the development of competition policy by advising the government on this matter.

Article 5 requests other central and regional state agencies to contribute to the implementation of the competition policy goals within their spheres of competence. The provision clearly states that the executive agencies are obliged to support the promotion of competition and to refrain from any anti-competitive actions themselves.

On 6 August 2014, the President introduced the Committee on Regulation of Natural Monopolies and Protection of Competition (KREMZK) as the competition authority. KREMZK is also tasked with the regulation of natural monopolies and regulated markets in Kazakhstan under the Law “On Natural Monopolies and Regulated Markets”.

KREMZK is not an independent authority. It is a legally dependent institution under the Ministry of National Economy, which is responsible for a wide range of the state policies. The Ministry of National Economy is a “mega regulator”,⁶⁷ overseeing a range of important sectors, including: strategic planning; fiscal and budget policies; customs regulations; public-private partnerships; management of state enterprises and other state assets; provision of state services; census data and state statistics; labour migration; economic integration and international economic co-operation; foreign trade; regional development and urban planning; housing and land management; utilities; consumer protection; technical regulation; as well as, regulation of natural monopolies and competition.

To accomplish these functions, the Ministry of the National Economy coordinates five committees. Besides KREMZK, the Ministry manages the Committee on Construction, Utilities and Land Management; the Committee on State Statistics; the Committee on Consumer Protection; and the Committee on State Reserves.

This structural setting does not fully correlate to the provisions of the Law on Competition mentioned above which defines the competition authority as a governing body in the sphere of competition responsible for both enforcement and policy. As the Ministry of National Economy is also mandated to set policy priorities for competition, the competence defined by the law is now split between two institutions. As of the time of this report, KREMZK has been operating in its current form for barely a year now, and there is not yet sufficient enforcement practice and data to make a conclusive argument about its actual degree of independence.

KREMZK consists of a central office in Astana and 16 territorial administrations (departments) that are located throughout Kazakhstan. The central office investigates cases involving national economic issues, keeps the

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By government decision from 25 September 2014.

Register of Dominant Enterprises, analyses markets of the national level, and organises law enforcement activities. It is also tasked with overarching functions for all departments, namely budgetary support, educational measures, legislative work, analytical work and methodological guidance for investigations.

The central office of KREMZK is responsible for four main tasks, each managed by several divisions. A group of six units, previously constituting the Agency on National Monopolies, is responsible for the regulation of specific sectors under the Law “On Natural Monopolies and Regulated Markets”. These units are organised in accordance with the regulated markets: railways, airports, heat, water and so on. Five divisions deal with market analysis and are responsible for keeping the Register of Dominant Enterprises in special sectors of the economy: 1) fuel and energy; 2) transport and communications; 3) industry and construction; 4) agribusiness; and 5) financial markets and other industries. Two divisions are leading anti-competitive conduct investigations – one against private market participants and another against public authorities. One division is dealing with economic concentration. Other divisions of the central office are responsible for specific and mainly administrative functions within KREMZK (i.e. methodology, legal, personnel, finance and so forth). There is no specific division in the central office responsible for enforcement of the competition law rules on unfair competition, which are enforced by the investigations division. KREMZK has also a steering committee responsible for work prioritisation called *Pravlenie*. Its composition and competence are defined by the Ministry of National Economy. *Pravlenie* focuses mainly on the authority’s strategy and policy prioritisation.

As a result of the merger in 2014 of the Agency on Protection of Competition and the Agency on Regulation of Natural Monopolies, KREMZK counts 517 employees, including its regional branches. Prior to the merger 200 people were working in the Agency on Protection of Competition in 2013. These figures include professionals responsible for market analysis, investigations and handling of petitions and notifications for economic concentration and creation of state enterprises, as well as for the regulatory overview of state monopolies, natural monopolies and regulated markets, and tariffs, and support staff.

This merger could be considered as the acquisition of the competition authority by the economic regulator. It would also appear that the merger has created more opportunities for the economic regulator rather than for the

competition authority. For example, 13 out of 16 territorial offices of the new authority are headed by the former staff of the Agency on Regulation of Natural Monopolies, the economic regulator. The steering committee of KREMZK (*Pravlenie*) includes seven working groups. Six working groups are focused on tariffs of natural monopolies and subjects of the regulated markets. Only one working group is dealing with competition issues.

The territorial administrations are responsible for the enforcement of the laws in one or more of the administrative regions of Kazakhstan. They also participate in analytical work, policy development, and economic forecasting of their areas.

The annual budget of KREMZK is similar to other executive agencies of this size in Kazakhstan. In 2014, it was close to USD 11.7 million.

Table 6. Budget and Staff Statistics of KREMZK and the Agency on Protection of Competition (a previous authority)

	Staff	Budget (KZT, thousands)	Budget (USD, millions, assessment by the exchange rate at the time)
2014	517	2 120 074,2	11.7
2013	203	1 015 080,4	5,6
2012	206	736 854	4,5
2011	218	611 356	3,4
2010	n/a	493 416	3,3

4.2. Competition law enforcement

The competition authority enforces cases against actual or potential anti-competitive conduct through investigations subject to special procedural regulations. These regulations cover all kinds of investigations except for the review of economic concentrations and the creation of state enterprises⁶⁸.

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Procedures are detailed in sections 2.3 and 3.2.

Article 9 of the Law on Competition regulates the procedure for the investigations. The competition authority can initiate an investigation on the following grounds:

1. information provided by other state authorities indicating a possible competition law violation;
2. complaints from consumers and (or) market participants, showing indications of the competition law violations;
3. ex-officio based on facts related to a potential competition law violation by market participants, state bodies or regional authorities;
4. information from the mass media.

The authority enjoys a limited level of discretion on whether or not to start an investigation on the basis of the received information. In cases when consumers or market participants complain to the authority, it must reply within 30 days and identify whether the complaint provides indications of a possible competition law infringement. If this is the case, the authority is obliged to start an investigation. The authority lacks any real discretion to prioritise cases based on the strength of the indication of a violation. An institute of warnings⁶⁹ or other forms of soft enforcement could help the authority respond adequately to consumers' and market participant's complaints without overloading its staff and while respecting established priorities. The development of private enforcement could also be of help. Currently, private enforcement although not prevented by law is non-existent in practice, in all likelihood for two reasons. First, the authority is obliged to react to any complaints submitted by consumers or market participants and, second, the cheap or free administrative procedures provide little incentive for consumers and market participants to use any form of private enforcement.

Once an investigation is started, the competition authority issues an executive order as a formal requisite of the investigation. The executive order has to be delivered to the market participants involved in the investigation within three days.

⁶⁹ A warning identifies an anticompetitive behaviour and gives the identified offenders a chance to correct their behaviour without imposing a fine.

The authority has two months to complete an investigation. This term may be extended but for no more than another two months. In extremely rare cases, the authority has suspended investigations in order to request an expert opinion. When an investigation is completed, the authority has to issue a decision: either find an alleged violator liable and submit materials to the court for mandatory judicial review; or find the alleged violator liable and issue a cease-and-desist order; or close the case without further administrative consequences. Cease-and-desist orders can be appealed in court but are not subject to mandatory court review as decisions to impose administrative sanctions (fines and confiscation of “monopolistic income”). After the 2013, the authority was allowed to combine both types of remedies. In practice, the authority issues pure cease-and-desist orders only in very few cases, preferring to address most of the cases to the court, as this is considered to be a safer option to avoid possible allegations of corruption.

Administrative sanctions for anti-competitive conduct are stipulated in the Code on Administrative Violations, allowing both to disgorge “monopolistic income” – one annual income received due to a violation of the law - and to also impose a fine of up to 3% of the annual income received over the course of the violation for small and medium sized enterprises and of up to 5% for large enterprises (Sections 1 and 2, Article 159 of the Code on Administrative Violations). Criminal sanctions, which are available in theory, are yet untested by courts. Article 221 of the Criminal Code applies to “monopolistic activities” in general and does not distinguish between hard-core anti-competitive agreements and practices and other types of anti-competitive conduct. In its current version it covers under the title “monopolistic activities”: the division of markets, pricing agreements, attempts to create barriers to entry or to remove competitors from the market, the charging of monopolistically high or low prices, which are classified in the Law on Competition as types of abuse of dominance, as well as other “activities aimed at restricting competition”, if they seriously harm consumers, market participants, or the state, or result in a large profit for the offender. The Criminal Code does not have any specific provisions relating to leniency for anti-competitive conduct. The Criminal Code is enforced by the office of criminal investigators of the Committee on State Earnings under the Ministry of Finance. Before the recent reform of criminal justice in 2014, the Agency on Economic Crimes and Corruption (Financial Policy) undertook the investigations.

Table 7. Enforcement Statistics – Fines and Confiscated Income

Year	Amount of Administrative Fines Imposed and “Monopolistic Income” Confiscated⁷⁰ (KZT/approx. USD)	Fines and “Monopolistic Income” Actually Transferred by Violators to the State Budget (KZT/approx. USD)
2010	74 229 955 / 412 000	64 951 720 / 355 000
2011	578 665 117 / 3 200 000	546 803 084 / 3 000 000
2012	409 954 831 / 2 200 000	402 823 998 / 2 200 000
2013	376 902 250 / 2 000 000	279 158 323 / 1 500 000
2014	1 538 631 405 / 8 300 000	722 519 507 / 4 000 000

The Law on Competition (Article 60) guarantees some procedural rights to the involved undertakings to participate in the investigation. However, these rights are not clearly defined and the authority is not obliged to engage the undertakings in any particular form or through any concrete procedure. In practice, the investigatory process is conducted with only negligible participation of the involved undertakings. Previous to the competition law reform of 2014, the authority included a body responsible for considering the results of investigations, and which engaged the involved undertakings in a semi-public hearing of its cases. Now, the investigatory work is primarily done by the authority’s staff, and the involved enterprises receive a final report upon completion of the investigation. The authority does not have a formal, internal approval process of the investigations’ results. Currently, this process includes mainly a confirmation by the head of the authority or his deputy, done normally behind the closed doors.

There are various possibilities to appeal in connection with the investigations conducted by the authority: appeals against the initiation of an investigation, as well as against decisions made by the authority upon completion of the investigation. Other appeals include against cease-and-desist orders issued by the authority; and judicial reviews of administrative sanctions.

⁷⁰ Due to the recent reorganisation, the authority could not provide more detailed statistics differentiated by types of violation or with separate information on fines and “monopolistic income”.

Before 2012, the judicial review of the authority's decisions and actions was exercised primarily by specialised economic courts dealing routinely with disputes among undertakings on commercial matters. After the 2012 reform of the Code on Administrative Violations, specialised administrative courts hear most of the cases related to judicial review of the investigations conducted by the competition authority.

Although the Law on Competition (section 6 of Article 67) still refers to specialised procedural rules for economic disputes rather than administrative procedural rules for appeals against the authority's decisions on the initiation of investigations, in practice, after the 2012 reform of the Code of Administrative Violations, the commercial courts refuse to admit this type of cases. Commercial courts continue to refer them to the specialised administrative courts. In fact, only appeals against cease-and-desist orders issued by the authority can be subject to the judicial review in the specialised commercial courts.

Many practitioners and judges of the specialised commercial courts have noticed that the administrative courts have a certain accusatory inclination due to the type of cases they have to deal on a daily basis. Most of the cases coming to the administrative courts are minor violations of traffic laws or other forms of citizens', rather than business related, administrative offences.

Procedural rules for judicial review require an administrative court to complete a hearing of the case within one month, with a possible extension of an additional month. In the opinion of many practitioners, this severe time restriction, combined with a lack of expertise in dealing with economic matters, forces the administrative judges to focus primarily on procedural issues. Very few courts' decisions include even basic economic analysis of the subject matter. In those few cases that do include such an analysis, the courts describe primarily the authority's findings rather than look for any alternative opinion or expertise.

The enforcement process seems to suffer from a severe lack of involvement of the undertakings, as well as a lack of general transparency and inclusiveness. These deficiencies may be explained in part by the extremely tight deadlines faced by the competition authority and the courts. In practical terms, it is next to impossible to grant any meaningful right to be heard, including access to file and the necessary exclusion of confidential documents from the files, within the short time periods currently stipulated. Such a process does not fit well with an overall commitment to the rule of law. The authority and the government should seriously consider changing the relevant legal

provisions and processes to allow for an adequate involvement of the undertakings concerned, including access to file. This would not only raise the legal standards of the process, but also give the authority a chance to improve its analysis. Only by being confronted with a defence and potential counter arguments and facts that might not have been adequately considered can the outcome be considered an analysis that reflects the economic reality, assesses causes and effects and weighs pro- and anti-competitive outcomes.

This is of course all the more true for the appeal stage. Sufficient time should be given to present and exchange arguments and to review the facts, preferably by judges familiar with the often difficult economic analysis in competition law matters.

4.3. International Issues

Kazakhstan is part of the Eurasian Economic Union (EAEU)⁷¹. The EAEU is a new international organisation for regional economic integration launched on 1 January 2015 and currently has five Member States: Russia, Kazakhstan, Belarus, Armenia, and Kyrgyzstan. The organisation builds upon past regional integration initiatives, in particular the Eurasian Economic Community and the Russia-Kazakhstan-Belarus Customs Union.

The EAEU is founded on the Treaty on the Eurasian Economic Union, which provides for the free movement of goods, services, capital as well as labour, and pursues coordinated, harmonised and single policies in a broad range of sectors. The sectors and policies include various aspects of trade, economy, finance, technical regulation, sanitary and phytosanitary measures, energy, transport and infrastructure, agriculture, industry, and competition.

However, integration in the EAEU framework is a work in progress, and different sectors are at different stages of development and differ in their aims and ambitions. Thus, certain sectors do not go beyond co-ordination of activities between Member States, while others aim at - or have already established - single EAEU policies. Since competition is the foundation of an efficient economy, the corresponding legal framework for trade and ensuring equal conditions of competition had to be established in the EAEU as early as

⁷¹ Official web-site of the Eurasian Economic Union, available at: <http://www.eaeunion.org/?lang=en>.

possible. Therefore, competition policy is currently one of the most developed policies in the EAEU.

The main EAEU competition rules are stipulated in the Section XVIII of the EAEU Treaty⁷² as “General Principles and Rules of Competition” and in Annex 19 to the EAEU Treaty as the “Protocol on General Principles and Rules of Competition”⁷³.

The EAEU Treaty (Articles 75 and 76) defines general principles and rules of competition law in the Union and the national competition laws of the Member States have to be adjusted to comply with them. One of the main principles stipulated by the Treaty obliges the Member States to apply their competition laws to all economic entities of the Member States in an equitable manner and on equal terms. Meanwhile Article 74 obliges Member States to exercise a co-ordinated competition policy regarding actions of economic entities of third countries, if such actions could negatively affect the competition in markets of the Member States. The general principles also ask the competition authorities of the Member States to interact with each other by, sending notices and requests for information; holding consultations; sending notifications on investigations (examination of cases) affecting the interests of another Member State; conducting investigations (examination of cases) by request of a national competition authority of any Member State; and, providing information on their results (including confidential information if necessary).

The EAEU general rules of competition (Article 76) include provisions on abuse of dominance and anti-competitive agreements between economic entities, including “vertical” agreements. The EAEU Treaty defines all relevant competition law terms and establishes criteria for each of the competition rules, including the criteria for exceptions. These rules are to be enforced by Member States on their territories, where also adequate fines have to be determined. The Commission enforces the rules on the cross-border markets and imposes fines as foreseen in the EAEU Treaty (Annex 19).

⁷² The EAEU Treaty has incorporated the provisions of the previous international Agreement on Principles and Rules of Competition of 9 December 2010,⁷² but has also introduced some important changes.

⁷³ Treaty on the Eurasian Economic Union, available at:
<https://docs.eaeunion.org/en-us>.

Most of the provisions embedded in Section XVIII of the EAEU Treaty, as well as in Annex 19 are, to a large extent, replicating the Russian antimonopoly regulation. However, the Member States are free to introduce in their national legislation additional requirements and restrictions with regard to the prohibitions set out in Articles 75 and 76 of the EAEU Treaty.

The competition rules in Articles 75 and 76 of the EAEU Treaty (as well as in Annex 19 to the Treaty) resemble the existing rules of the Kazakh Law on Competition. Major differences are to be found in the substantive aspects of the regulation, especially in the provisions on the different types of anti-competitive conduct. The EAEU rules do not include provisions similar to the ones embedded in the Kazakh law on the register system, extensive control of dominant enterprises' behaviour, concerted practices or infringing upon the rights of consumers mentioned above. In general, the EAEU rules could be considered as more balanced and focused on the objectives of promotion of competition rather than price and behavioural control.

The enforcement of competition rules is entrusted to the Member States and the Eurasian Economic Commission, which is the main regulatory body of the EAEU. The Commission has a Minister in charge of Competition and Antitrust Regulation, Nurlan Aladabergenov⁷⁴, a national of Kazakhstan. Mr. Aladabergenov was a first deputy head and afterwards a head at the Agency on Regulation of Natural Monopolies in Kazakhstan from 2004 to 2007⁷⁵. He supervises two departments within the Commission: the Department for Antimonopoly Regulation and the Department for Competition and Public Procurement Policy.

The Commission⁷⁶ enforces competition rules if violations have or may have an adverse effect on competition in cross-border markets, except for cross-border

⁷⁴ Nurlan Aldabergenov's profile at the Eurasian Economic Commission website: <http://www.eurasiancommission.org/en/act/caa/Pages/default.aspx>.

⁷⁵ Given the accession of new Member States to the EAEU, a reshuffle will take place at the Commission and a new Minister could be appointed later in 2015.

⁷⁶ Eurasian Economic Commission (EEC) is a permanent regulatory body of the Eurasian Economic Union. The main objective of the Eurasian Economic Commission is to ensure functioning and development of the EAEU and to prepare proposals for its further integration. The EEC holds the status of supranational regulatory body. Decisions of the Commission are binding on

financial markets. It controls the abuse of dominant positions, anti-competitive agreements and unfair competition on cross-border markets. Currently, particular attention is paid to possible competition restrictions in markets for food products, mobile services, and aviation. It can issue binding decisions and impose fines on violators, which are enforceable by the relevant enforcement authorities (like bailiffs or execution officers) of the Member States. The individual Member States enforce EAEU competition rules on their territories.

The Commission's decisions as well as the decisions by national competition authorities, which are based on EAEU law, can be contested in the EAEU Court. The Court is the judicial review body of the Union tasked with ensuring the uniform application of the EAEU rules by the Member States and EAEU bodies. The Commission has formed working groups together with representatives of the competition authorities of the Member States in order to ensure the enforcement of EAEU competition rules⁷⁷.

Special attention is devoted to the harmonisation of Member States' legislation. In 2013, the EAEU adopted a "Model Law on Competition"⁷⁸. The Model Law approximates the national competition rules of Member States. Even though it is not a binding document, it is expected that the Member States will soon finalise its implementation⁷⁹. In 2013, Kazakhstan had only included some provisions of the EAEU model law in the 2008 Law on Competition of

the territory of the EAEU member states. The Commission's decisions are taken on collective basis. The Board of the EEC consists of 15 members (each member state is represented by 3 Board Members (Ministers), and one of them is the Chairman of the Board of the Commission. The Chairman and Members of the Board are appointed by the Supreme Eurasian Economic Council at the level of the member states heads for a four year renewable term. At present time the EEC comprises of 23 departments.

⁷⁷ Eurasian Economic Union Annual Report 2014, p. 97, available at: http://eec.eaeunion.org/ru/Documents/EEC_ar2014.pdf (in Russian).

⁷⁸ Decision of the Supreme Eurasian Economic Council No 50 of 24 October 2013, available at: https://docs.eaeunion.org/sites/storage0/Lists/Documents/a_0218ef2-d7a2-4999-b643-dcc8d1819250/fe5d8c0c-1aec-4969-b1c3-690bca0c976d_635183168478190807.pdf (in Russian).

⁷⁹ Interview of Minister in charge of Competition and Antitrust Regulation of the Eurasian Economic Commission Nurlan Aladabergenov, available at: <http://bnews.kz/ru/news/post/251105/> (in Russian).

Kazakhstan. The main provisions of the Model Law reflect the EAEU Treaty's competition rules and reproduce the Russian Federal Law "On Protection of Competition" with some variations. As Russia, according to the recent OECD assessment, has shown a "*considerable progress in establishing the necessary legal and institutional framework for competition*"⁸⁰, a substantive implementation of the EAEU Model Law on Competition could give a serious impetus to the development of Kazakh competition law and policy in the direction of recommended OECD standards.

As of 1 January 2015, the Commission is required to publish annual reports on the competitive situation in cross-border markets and the measures taken against violations of the EAEU competition rules. In addition, there are plans to draft a 2020 concept strategy for the development of competition policy and public procurement rules in the EAEU⁸¹.

Since the EAEU competition rules were introduced recently, there has not yet been any implementation practice to speak of. The Commission has not yet taken any decisions; nor have the Member States competition authorities on the basis of the EAEU competition rules. In general, the new powers of the Commission and the rules enhancing co-operation with and between Member States competition authorities provide a sound framework for establishing efficient and consistent competition enforcement practices in the EAEU and its Member States.

⁸⁰ Competition Law and Policy in the Russian.

Federation 2013. OECD. P. 8. Available at: <http://www.oecd.org/daf/competition/CompetitionLawandPolicyintheRussianFederation.pdf>.

⁸¹ Eurasian Economic Union Annual Report 2014, p. 99, available at: http://ec.eaeunion.org/ru/Documents/EEC_ar2014.pdf (in Russian).

5. Limits of Competition Policy: Exemptions and Special Regulatory Regimes

5.1. *Economy-wide Exemptions and Special Treatment*

The Law on Competition contains few explicit exemptions. In most of the cases mentioned below, an exemption from competition law means that the undertaking or economic sector benefitting from the exemption is subject to special monopoly regulation instead.

The general exemptions that are not valid only for natural or state monopolies are all in the area of anti-competitive agreements and practices: for the use of intellectual property rights, for vertical agreements and concerted practices below certain market share thresholds and for intra-group agreements.

Before the amendments of 2013, a safe harbour combined market share threshold of less than 15 % for undertakings for all forms of anti-competitive agreements and practices existed. Currently, this safe harbour applies only to concerted practices.

Agreements related to intellectual property rights are fully excluded from the scope of the article prohibiting restrictive agreements and also covering hard-core cartels (Article 10, section 6). Considering the broad language of this exemption covering all types of anti-competitive agreements with regard to intellectual property rights, this could be used to circumvent the prohibition of restrictive agreements for all kinds of restrictive business practices. This exemption also applies to franchising agreements, which are specifically mentioned as exempt from the prohibition of anti-competitive vertical agreements.

According to Article 10, section 3, vertical agreements with a combined party market share of less than 20% on the relevant goods market are also exempt. It is not clear how this exemption is to be applied to vertical agreements since the parties to a vertical agreement may not have a “combined share” in any market at all. So far there is no enforcement practice related to this provision.

In addition, all intra-group agreements and practices are exempt from the scope of Articles 10 (agreements) and 11 (concerted practices). The term “group of related persons” is a broad category including both individuals and legal entities. As the law treats this group as a single enterprise, its internal relations are normally excluded from competition law review.

Anti-competitive agreements between state and municipal bodies and between state (municipal) bodies and market subjects are prohibited in general. However, they may be exempt directly by the laws of Kazakhstan in cases when it is necessary for the protection of “the constitutional order, national security, public order, human rights and freedoms, and public health” (Article 33).

The Law on Competition and the Law “On Natural Monopolies and Regulated Markets” define three distinct categories of regulated activities to a different extent exempt from the general application of the competition law. Those are 1) state monopolies; 2) natural monopolies; and 3) regulated markets. Even though historically these categories were based on clear definitions related to specificity of the regulated area, the distinctions between these regulated sectors have since become less articulated and, to a certain degree, even confused. Basically, any regulated industry could be named either as a state or natural monopoly or a regulated market. The regulatory regimes implied by all these models are primarily based on extensive price and behavioural regulations of the involved undertakings.

In general, both state and natural monopolies are covered by the provisions of the Law on Competition with certain exceptions. For instance, Article 39 (section 7) exempts abusive conduct of natural monopolies from the competition law regulation. Abusive conduct of naturally monopolistic undertakings in the area of natural monopolies is regulated solely by the Law “On Natural Monopolies and Regulated Markets”. Both monopolistically high and low pricing cannot be considered as anti-competitive conduct if the price is established according to the laws of Kazakhstan (Article 14). This exemption is related both to state and natural monopolies and regulated markets. Both general and special regulations of natural and state monopolies are supervised and applied by the competition authority if not in conflict with specialised sectoral laws, like the laws on telecommunications, electricity or railway transportation.

The six units of the central office of the authority are predominantly occupied with tasks related to the regulation of the subjects of natural monopolies and regulated markets. These departments previously constituted the Agency on Regulation of National Monopolies and were responsible for the regulation of specific sectors under the Law “On Natural Monopolies and Regulated Markets”. The units reflect the regulated markets (railways, airports, heat, water and so on). About a half of the more than 500 employees working at the competition authority are now involved in different aspects of economic regulation.

The competition authority's combined responsibilities of economic regulation and enforcement of the competition law requires intra-authority co-operation between departments responsible for different tasks. Considering the relatively recent merger (less than a year ago), co-operation is mostly based on information sharing and general advice. The authority leadership is considering improving consistency of the enforcement action and prioritisation within the authority to better align the competition and regulation elements of its mandate.

5.2. *State Monopolies*

Article 32 of the Law on Competition introduces the concept of “state monopoly” that is understood in classical terms as an exclusive right granted by the state to exercise certain types of commercial or quasi-commercial activities. A state monopoly can only be granted to state enterprises created with a government decree and only in cases when competition in certain sectors would be detrimental for “the constitutional order, national security, public order, human rights and freedoms, and public health”. The state monopolies are created and regulated by specific legislation in the sectors in which they are established. In addition, the competition authority is responsible for price regulation and general supervision of the state monopolies. For instance, the competition authority exercises control over compliance of the state monopolies with the general restrictions to combine monopolistic and other activities.

Currently, there are about 20 state monopolies in Kazakhstan. They are not registered or classified systematically, as the state monopoly status is granted and regulated by different laws for each economic sector. Most of the existing state monopolies are operating in areas which traditionally were considered basic public services such as expert assessment of patent applications, veterinary control, expert assessment of precious metals or production of passport blanks. Some of these services could certainly be offered by private undertakings in competitive or regulated markets.

However, some state monopolies are granted in sectors where the risks of competition for the environment or socially sensitive areas, such as wild life protection or provision of security related services, are considered to be too high by the government of Kazakhstan. For instance, according to the Law “On Protection, Reproduction and Use of Wild Animals” fishing and processing of wild sturgeon and export of sturgeon caviar is reserved for the state monopoly. This monopoly is justified by the requirements of Article 32 of the Law on Competition, which allows state monopolies only in cases when

competition in certain spheres could be detrimental for “the constitutional order, national security, public order, human rights and freedoms, and public health”. Considering the difficult task of a proper supervision of these kinds of sensitive activities if private actors were to exercise them, the Kazakh government decided on a state monopoly to secure administrative control over the protection of endangered wild life susceptible to predatory usage.

If an exclusive right establishing a state monopoly has been granted, the activity has to be conducted by a state enterprise. This requires a special decree by the central government which then gives central, regional or local authorities the right to establish such a state enterprise. The undertakings exercising state monopolies are not allowed to engage in any other business activities, to own shares in other undertakings, nor to transfer their exclusive monopolistic rights to third parties. State monopolies operate under a strict direct price control exercised by the competition authority. The competition authority also has general supervisory powers over state monopolies (Article 32 of the Law on Competition). The competition authority has expressed concern that it lacks capacity and expertise to define tariffs for all of the existing state monopolies, as required by the Law on Competition after the reform of 2013. Before 2013, different regulators in the respective industries were responsible for prices of state monopolies.

The Law on Competition also prescribes that if the legislator introduces a new state monopoly on a previously competitive market, the existing market participants are to be compensated for the damages incurred by such a new provision. This provision is as yet untested in practice.

5.3. *Natural Monopolies*

The Law “On Natural Monopolies and Regulated Markets” was adopted in 1998 during a severe large-scale economic crisis in Kazakhstan. In 1997, the inflation rate in the country was about 117%. Stopping inflation was among the most important political tasks at that time. The government considered the regulation of utilities and other important sectors of the economy to tackle the increase of consumer prices as a mechanism to implement anti-inflation policy. The law built a complex, and to a certain extent self-sufficient, legal regime including all sorts of restrictions and regulations for the conduct of natural monopolies. After its inception, the law was amended more than 200 times by 15 different new laws enacted over the last 17 years. The area of natural monopolies is thus considered by the authority to be distinct from competition

law. This approach is noticeably different from the one applied in Russia and other members of the Eurasian Economic Union.

The law defines a natural monopoly as a state of the market that does not allow for competition in the production of certain goods or the provision of certain services because it is either impossible or economically inefficient in the area. The legal provision contains an exhaustive list of economic sectors or types of business activities that are considered to be natural monopolies:

1. transportation of oil and petroleum products through main pipelines (except transit and export);
2. transportation of gas through pipelines (except transit and export), operation of reservoirs;
3. transmission of electric energy;
4. transmission of heat energy and production of heat energy except geothermal and heat generated through water;
5. the operative-dispatcher service controlling transmission in the market for electric energy;
6. the balancing of generation of electric energy in the wholesale market;
7. main railroad transportation;
8. transportation through railroads managed in public-private partnership in the event of lack of alternatives;
9. local roads in the case of lack of alternatives;
10. air navigation;
11. services of terminals, airports and ports;
12. telecommunications in the case of lack of competition in services, basic telecommunication services;
13. provision of underground channels and other facilities necessary for the organisation of local telecommunication services;

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- 14. postal services;
 - 15. water supply and utilisation (canalisation).

The competition authority prepares lists of the exact services provided by natural monopolies that are subject to regulation in the course of regular market analyses. The Ministry of the National Economy adopted the current joint list of the natural monopolistic services by decree on 30 December 2014. For instance, in the sphere of railroad transportation this list includes 1) leasing of main railroads; 2) organisation of the transportation through main railroads; 3) provision of railroads with transportation equipment managed in public-private partnership in the event of lack of alternatives; 4) provision of rail sidings, feeder lines and connecting tracks for transportation in the event of lack of alternatives; 5) provision of rail sidings, feeder lines and connecting tracks for manoeuvring, freight handling, other technical operations and lay-over in the event of lack of alternatives.

Currently, the state register of enterprises acting in these naturally monopolistic spheres includes 1 186 economic entities. These enterprises provide 1 643 regulated services to consumers, including: 850 in water supply and utilisation; 456 in electric and heat energy sector; 279 in the transport area including railways; 52 in oil and gas transportation, and 6 in post and telecommunication sectors.

Post and telecommunication services, according to the decree of the Ministry of Investments and Development of the Republic of Kazakhstan dated of 14 October 2014 are regulated by the Committee on Communications, Information Technologies and Information under the Ministry of Investments and Development.

The law on Natural Monopolies and Regulated Markets prohibits an undertaking working in a naturally monopolistic sphere and providing regulated services from combining this activity with any other businesses, when these businesses are either not technologically connected to the monopolistic sphere or generate more than 5% of the undertaking's annual income.⁸² The main

⁸² There are exceptions to the rule. In 2013, in order to support the development of airports in Kazakhstan the limit of 5% of the enterprise's annual income

intention of the law is to focus the activity of naturally monopolistic undertakings exclusively on the regulated areas. The law also accepts the existence of accidental natural monopolies for which monopolistic activity is rather a side effect (generating less than 1% of total income) than a core area of business. For instance, if an industrial undertaking owns some local roads or a power plant producing heat for the local community and neighbouring enterprises, these sort of accidental or “small” monopolies are considered an unintended result of privatisation, which produced “small” natural monopolies that control other parties’ access to basic services. Such a random division of the basic infrastructure built during the Soviet era was typical for most of the post-communist states surviving the “shock therapy” reforms in 1990s and has multiplied the number of firms that are now accidental monopolistic service providers. The “accidental” natural monopolies are regulated under the Law “On Natural Monopolies and Regulated Markets” only in respect to the services that are covered by the list of naturally monopolistic services.

In principle, the behaviour of natural monopolies is extremely restricted. Articles 5 and 7 of the Law “On Natural Monopolies and Regulated Markets” define in detail all of the restrictions and duties of natural monopolies. According to Article 5, they must not own any assets or own any capital of any undertaking not related to the naturally monopolistic activity. The productive assets used for the provision of the regulated services (for example, generating facilities for the production of heat) must not be rented out or transferred to other undertakings under any sort of trust or management agreement. Transactions, which transfer the rights to use the basic productive assets of natural monopolies, are to be conducted on the basis of open competitive bids or auctions. Natural monopolies are subject to strict conduct regulation requiring them to grant non-discriminatory access to the monopolistic services for all customers. The law mandates the authority to enact “standards of provision of monopolistic services”, which the natural monopolies have to comply with. These standards describe in detail the general terms and conditions, quality requirements and other important parameters for each regulated service.

Article 7 in addition to Article 5 consists of more than 30 specific obligations. Among them are various comprehensive reporting obligations –

from non-monopolistic activities was eliminated for airports (Section 1-2 of Article 5).

from the annual auditing of financial reports to separate book keeping for each regulated service and the publication on the internet of information on productive capacities and output. Direct regulation of contract forms or contract terms (other than prices and tariffs) by the authority through either standards and forms or individual orders is also part of the regulatory regime of the natural monopolies, exercised by the competition authority.

Price regulation is a central piece of this legislation. The law introduces a number of rules on primarily cost-based price regulation for natural monopolies. This can take the form of either specifically set prices or price caps, sometimes with a designation of customers that must be served by the natural monopoly on a mandatory basis. Along with prices, the natural monopolies must get approval from the authority for their investment decisions.

The law on natural monopolies provides a framework for more detailed regulation, empowering both the government and the authority to enact detailed guidelines and regulations. Currently, about 80 regulations further elaborate on the rules embedded in the law. Most of these documents provide guidance for price (tariff) formation and investment policies of natural monopolies.

According to Article 164 of the Code on Administrative Violations, non-compliance with information requests sent by the authority to natural monopolies is considered as an administrative offence and can be punished with a fine of up to 200 “monthly factors”⁸³ (approximately USD 2 000) for small and medium sized enterprises, and 800 “monthly factors” (approximately USD 8 000) for large enterprises. The refusal to submit information necessary for enrolment in the Register of the Natural Monopolies after 15 days from being involved in the naturally monopolistic business is fined with an amount of 100% of the profits received through such a business.

Kazakhstan’s program for “Tariff Policy in the Spheres of Natural Monopolies until 2020” of 19 December 2014 describes measures to be undertaken in between 2015 to 2020, to establish a new regulatory framework for naturally monopolistic activities. This framework would be defined as an

⁸³ The “monthly factor” in the Kazakhstan’s law is an amount annually defined by the budgetary law and used for the social security purposes and to calculate fines for administrative and criminal violations. In 2015, the monthly factor equals to KZT 1 982.

“efficient, balanced system of regulations aimed at increasing the attractiveness of investments, the transparency in setting tariffs, and the transformation from naturally monopolistic to competitive markets”. The key element of the reform is a change in an exclusively costs based tariff formation methodology.

The government aims to achieve this goal through the implementation of the following major reforms:

1. eventual transformation of price regulation from the cost-based methods to more flexible and investment stimulating methods;
2. reducing the number of administrative procedures and obligations for natural monopolies;
3. direct application of the law while reducing the volume of other types of regulations;
4. increasing the transparency and efficiency of the authority work including better use of economic analysis and expertise;
5. improving control and supervising functions of the regulatory authority.

In May 2014, the government also adopted a roadmap for a complex analysis of the regulated sectors to facilitate their transition from a state of natural monopoly to a competitive status.⁸⁴ This roadmap defines eight markets where this analysis has to be conducted by the competition authority in 2014-15. These sectors include services in the areas of railroads, sea ports, telecommunications and oil transportation. There are already some limited results of this work. One company operating railways in a public-private partnership was excluded from the register of natural monopolies as the existence of potential competition in this particular local market was recognised by the authority.

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As described previously, the categorisation as state monopoly, natural monopoly or regulated sector is not clear-cut and has become somewhat arbitrary over time. So a natural monopoly might have never been one, had it been properly defined, or the circumstances on the markets have changed, allowing for a competitive market structure.

5.3.1. Electricity

Kazakhstan Electricity Grid Operating Company (KEGOC) is the major player responsible for the Kazakh national electric grid operation and dispatching. It is a state owned corporation established in 1997 as a result of the structural reforms in the sector aimed at a division of the monolithic state enterprise of Kazakhenergo, which previously combined all sorts of production and services in the production and distribution of electric energy.

The sector is also regulated by the law “On the Electric Power Industry” of 2004 which provides rules governing the wholesale and retail markets; non-discriminatory access to infrastructure; and some principles for price formation. The separation of generation and sale of electricity from transmission and dispatch is an important element of the 2004 reforms. The latter services are regulated as natural monopolies and the former are moving gradually away from strict forms of regulation.

In addition to “KEGOC”, 128 independent market actors were created in the segment of electric energy transmission: 20 large regional grid companies, and 108 small-sized local grid enterprises operating primarily the “last mile” segments of the grid.

This market structure has increased significantly the transaction costs for consumers. For example, the price for electric energy for consumers of the small city of Zhezkazgan of the Karaganda region includes tariffs of 22 transmitting organisations operating the electric grid. In total, there are 41 grid-operating companies in the Karaganda region.

The government reports that the deterioration level of the industry is now close to 70 % and that about 13.5 % of electrical energy is lost in transmission. This shows an urgent need to invest in and modernise the sector. Meanwhile, the adopted methodology of price formation is primarily based on the calculation of operating costs and justified profitability, neglecting incentives for private investments and capital returns.

The reform of 2004 was expected to intensify competition in the wholesale market for electric energy, and to consequently lower prices in this for a long time centrally administrated sector. However, prices for consumers have not declined throughout the after-reform decade, but instead have shown a stable trend to grow. There is no a clear-cut explanation for this negative trend, but the

government of Kazakhstan in its programme, “Tariff Policy in the Spheres of Natural Monopolies until 2020” adopted in 2014, suggests that the main reason is the creation of an inefficient market structure increasing transaction costs in the transportation of electric energy and consequently prices for consumers.

5.3.2. *Heat and Water*

About 300 undertakings are involved in the production and transmission of heat in Kazakhstan. The sector is also struggling as the basic infrastructure continues to deteriorate. In 2014, deterioration reached a level of 71% and substantial losses (up to 19%) of energy due to the poor quality of the grid.

In water supply and water canalisation sectors, 537 undertakings operate. The industry has a similar level of deterioration and transmission losses – 66% and 18% respectively. Capital expenses in these sectors are funded primarily from the state budget. From 2007 and 2011, the central government’s spending covered 72%, and financing from the regional governments 17% of all the capital costs of the industry.

As most of the undertakings in these sectors are rather small utilities companies, the government is considering structural reforms. However, as the government views its primary task as increasing the attractiveness of the sector to private investors, it plans to reconsider its approaches to tariff formation as described above.

5.3.3. *Transportation of Oil and Gas*

The oil and gas pipelines are operated by the state corporations “KazTransOil” and “KazTransGas” both subsidiaries of the national holding company in the oil and gas sectors “KazMunayGas”.

“KazTransOil” and its subsidiaries have a market share of 65% in oil transportation through the main oil pipelines in Kazakhstan. “KazTransGas” is responsible for 95% of natural gas transportation via gas pipelines.

Both corporations entered into joint venture agreements with Chinese companies for the development of new pipelines and modernisation of old ones in Kazakhstan. “KazTransOil” established two joint ventures with equal shares of the partners – “Asian Gas Pipeline” in partnership with the Chinese corporation “Trans-Asia Gas Pipeline Company”; and “SZTK Munay Tas” with

“CNPC Exploration and Development Company”. “KazTransGas” has also established a joint venture company with a Chinese partner – “Kazakh-Chinese Pipeline” together with “China National Oil and Gas Exploration and Development Corporation”.

5.4. *Regulated markets*

When the law “On Competition” of 2006 was in force, an idea gained ground that some dominant enterprises operating in socially important economic sectors like civil aviation or telecom, should be subject to stricter regulation than other dominant firms included in the Register of the Dominant Market Subjects, but still slightly looser than for natural monopolies.

After the enactment of the new law on competition in 2008, this idea took hold. The provisions relating to this type of regulation (regulated markets not covered by the category of natural monopoly) were moved from the general law on competition to the law on the natural monopolies, which was renamed to the Law “On Natural Monopolies and Regulated Markets”. Under this new provision, dominant enterprises operating in regulated markets, as defined by the law as an open list of the sectors of the economy leaving the government with an authority to add sectors, became subject to similar price and, to a certain extent, behavioural regulation as natural monopolies.

Article 7-1 of the Law “On Natural Monopolies and Regulated Markets” says that “the state regulation of prices covers goods and services provided by the subjects of the following regulated markets: railway transportation, electricity and heat energy, production of petroleum products, transportation of oil, civil aviation, ports, telecommunications and mail, as well as gas with exceptions defined by the Law “On Gas and Gas Supply”.

The regulated markets are a distinct category of economic regulation with its own features and legal norms. Even though the above mentioned list of markets seems to be covered by the previously mentioned list of natural monopolies, they are effectively separated from these natural monopolies by the types of regulated services. For example, railways are considered to be a natural monopoly, but legally they are naturally monopolistic only for a part of the related services - those that are mentioned in the list adopted by the authority (see above). All other railway services not included in the natural monopolies’ list, but still provided by the railway companies, could be regulated under the regulated markets regime (as this regime covers railways too).

Under the regulated markets regime, market participants are not subject to the strict restrictions stipulated for natural monopolies. For instance, the prohibition of combining monopolistic activity with any other businesses, or the restriction on transfer of productive assets used for the provision of the regulated services (for example, generating facilities for the production of heat) including transfer under any sort of trust or management agreement, and so on. As the main intention of the law with regards to natural monopolies is to focus the activity of naturally monopolistic undertakings exclusively on the regulated areas, in the case of regulated markets the law is primarily concerned with price regulation of the regulated services.

Before the recent reform of May 2015, all subjects of the named regulated markets were exposed to a price and behavioural regulation under the Law “On Natural Monopolies and Regulated Markets”. Also the government, according to Section 2 of Article 7-1, was allowed to define some goods and services in other sectors, which should be subject to the same regulatory regime.

In 2014, the competition authority suggested to the government to review this approach and to define particular goods and services rather than sectors to be covered by this type of price and behavioural control. This proposal was accepted. In May 2015, amendments to the Law “On Natural Monopolies and Regulated Markets” were passed, delegating the responsibility for designating exact goods and services in the regulated markets, which should be subject to price and behavioural control, to the competition authority. The authority is now working on the preparation of this list of goods and services and plans to publish it later this year.

According to Article 7-2, the competition authority drafts rules for price regulation in the regulated markets. The last rules were adopted by the decree of the Ministry of the National Economy from 29 December 2014. The adopted price regulation is primarily based on an assessment of costs and a justified profitability.

The authority is also responsible for expert analysis and prior authorisation of price levels in the regulated markets and for constant price monitoring. The market subjects are obliged to abide by the authority’s decisions on price caps for their goods and services. Investments made by the market subjects in the regulated sectors may be reflected in their prices only if such investment decisions were pre-authorised by the authority. The authority defines the rules regulating the procedure of this pre-authorisation.

Subjects of the regulated markets are obliged to disclose to the authority information on their prices with explanatory materials, quarterly financial reports, quarterly reports on output and profitability, any information requested by the authority necessary for the price assessment, six-month reports on investments, etc. They also must report in advance any increase in their prices if it exceeds the established price cap, and they have to provide all necessary explanatory materials to the authority.

The Code on Administrative Violations imposes administrative sanctions on the subjects of the regulated markets similar to those defined for the natural monopolies (Article 164).

6. Conclusions and Recommendations

6.1. *Strengths and Weaknesses of the Kazakhstan Competition Law Regime*

The history of competition law and its enforcement in Kazakhstan since the abrupt dissolution of the centrally planned economic system of the Soviet times is marked by constant legislative and institutional changes. Competition policy was either subordinated to other policy goals; used as an instrument for crisis recovery; the creation of an independent and sustainable national economy; or, the satisfaction of popular demands. But mostly, competition policy has been used to fight consumer price increases as a result of inflation. The economy is, in many areas, still characterised by the prevalence of a few powerful undertakings as well as natural or state monopolies. The competition authority in Kazakhstan has always played an important role during transition in identifying and helping to fill major gaps in legal and institutional structures for the regulation of activities of companies in the market.

The KREMZK is an authority with a large remit. The wide ranging responsibilities - regulation, consumer protection, competition law enforcement and competition advocacy and assessment - give it an extremely large mandate and the large number of staff should enable it to cover this mandate. At the same time, the wide remit seems to create sometimes overwhelming expectations by policy makers and the public and also confusion with regard to the priorities and principles of law application internally. KREMZK is a mega-regulator and still struggling to put its resources to optimal use. A lack of discretion for selecting cases brought by consumers or competitors aggravates this situation. KREMZK could also benefit from more internal co-ordination and co-operation between the enforcers in charge of competition law enforcement, consumer protection matters and regulation.

6.1.1 *Restrictive Agreements and Concerted Practices*

There is a relatively high and constant level of enforcement with on average 30 cases per year. Most, if not all, of the cases are based on Article 11 of the Law on Competition: concerted practices. Furthermore, most cases also seem to be a reaction to individual consumer or competitor complaints based on the legal provision “infringement upon consumers’ rights” and the observation of parallel price increases, which is also a legal provision. Therefore, enforcement does not seem to target so called “hard core cartels” and appears to be aimed instead at the prevention or prohibition of price increases. Effective

“dawn raid” powers do not exist and the provisions for leniency have not yet been applied.

The absence of effective detection and enforcement instruments may partially explain the focus on parallel price increases. KREMZK has few options to do otherwise and this kind of enforcement is very much in line with the highly regulatory stance of the authority. However, in cases of parallel price increases, the authority reacts to potential symptoms of allegedly anticompetitive concerted actions without necessarily being able to tackle the underlying causes.

Price increases should not be unduly suppressed given that they may have many causes and are an important signal in a market economy, creating incentives to expand production, enter markets, change suppliers and actively look for substitutes. Under the current enforcement policy and legal framework, there is a real danger that economic activity could be slowed or dampened by artificially depressing prices. In addition, the enforcement policy may create legal uncertainty in the business community, as it is very hard to foresee which kind of activity will be considered illegal by the competition authority. This legal uncertainty, together with the insufficient detection tools, will largely explain why the leniency programme has not been effective. The risk of detection of anticompetitive agreements or concerted actions is very low and it is difficult to know exactly what falls under these categories. The use of the wide legal provision of “infringement upon consumers’ rights” on a stand-alone basis should be reconsidered. The per-se prohibition of vertical competition restraints, in particular for exclusivity agreements, should also be reconsidered. Vertical agreements may improve efficiencies in many business relationships and should therefore be considered on a case-by-case basis under competition law, balancing the potential benefits against the adverse effects on competition.

6.1.2 Dominance and Monopolisation

The Law on Competition gives the competition authority far reaching powers to control dominant undertakings. While Article 12 Section 1 provides for a general description of dominance very much in line with other countries’ competition laws, Section 2 simply states that an undertaking is dominant if its market share is higher than 35 % (50/70 % in case of collective dominance). In order to establish dominance, KREMZK conducts 21 – 45 market studies a year and has an average of approximately 40 abuse cases a year. The market analysis appears rather prescriptive and to be, at least partly, based on

information sources which might not be the most reliable. There is no indication that any kind of economic analysis takes place to define the markets nor to investigate closer the competitive situation in a market. On the basis of this analysis, undertakings are entered into the State Register for Dominant Undertakings and have strenuous reporting obligations as a result. De facto, undertakings also submit to price control once entered into the register.

An abuse can be found if the behaviour of an undertaking restricts competition or, similar to the anticompetitive agreements provision, if it infringes upon the interests of consumers or other persons. The law also provides a long list of practices that will be considered to be abusive. The list ranges from price differentiation to withdrawal of a product from the market and is not exhaustive. In addition, monopolistically high or low prices are prohibited and these seem to be the focus of KREMZK's work.

Given that the existence of dominance itself is already established on weak grounds, there is a high risk of a potentially excessive and overly regulatory approach. As there also seems to be a focus on so-called monopolistically high and low prices: price regulation is the logical consequence of this approach. Many competition authorities struggle with – or avoid - excessive pricing cases because of their inherent difficulties. Comparable markets are hard to be found and costs can be measured in many different ways. The question of what a justified profit is has yet to be answered.⁸⁵ The risks of getting it wrong are considered to be very high for these kinds of abuses, with considerable harm to productivity, growth and ultimately consumer welfare. For these reasons, many authorities concentrate more on exclusionary kinds of abuses, in order to keep markets open and to allow competitive forces to act. This might be more difficult in the highly concentrated markets which seem to prevail in Kazakhstan. However, price regulation does not appear to lead to efficient outcomes either. Price regulation can only deal with symptoms, while a more rigorous analysis of markets and market behaviours that create or reinforce entry barriers might get to the roots of the competition problems and thus lead to solutions.

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OECD Roundtable on Excessive Prices (2011) -
<http://www.oecd.org/daf/competition/abuse/49604207.pdf>.

6.1.3 *Concentration Control*

The provisions of the Law on Competition on concentration control seem to be sound and in line with international best practices if one looks at the concentrations that are subject to pre- or post-merger notification and the intervention threshold. There is some doubt if the local nexus for concentrations to be reviewed is sufficiently clear and high. The notification requirements can be considered very challenging as undertakings have to provide a significant amount of information already with the initial notification, regardless of the competition concerns the concentration might or might not raise. This results in a larger number of notifications that are rejected by the authority due to insufficient or lacking information. Compared to the small number of staff in charge of concentration control, three persons, the number of notifications is very high (228 in 2013 and 179 in 2014). This might explain the low intervention rate and a possibly too prescriptive analysis, based mostly on market share criteria and legal presumptions of dominance.

In highly concentrated markets with a large number of undertakings that are considered dominant, judging from the Register on Dominant Undertakings, and that are all obliged to notify mergers, one would expect higher intervention rates. If enforcement worked on the basis of rather prescriptive market definitions and market share thresholds for dominance, then a significant number of mergers should meet the criterion of strengthening a pre-existing dominant position or creating one. Due to a strong lack of transparency in merger enforcement, one may only guess the reasons for the low intervention rate. One explanation may be that many clearances come with behavioural conditions that merely oblige the merging parties to refrain from anticompetitive agreements and abuse practices. If this is the case, then the merger control system does not fulfil its intended purpose. In already highly concentrated markets, merger control should especially prevent a further increase in market power in order to keep the markets as open as possible and preserve the potential for competition both now or in the future. Once structural changes have been allowed, the larger entities can only be controlled by less effective means. In the case of Kazakhstan, this means price control. It may be the case that the merger control policy contributes to a general tendency to work on symptoms rather than tackling the causes of anticompetitive behaviour.

6.1.4 Additional Competences: Consumer Protection, Competition Assessment and Regulation under the Law on Natural Monopolies and Regulated Markets

KREMZK is a multi-regulator with far reaching tasks including unfair competition and consumer protection, competition assessment and interventions against state actors and the regulation of natural monopolies and actors on other regulated markets. This could make KREMZK a very powerful actor in Kazakhstan's economy.

In the areas of unfair competition and consumer protection, the legal criterion to be applied is very similar to the one found in the cartel and abuse provisions: "infringes upon consumer's rights". Taken together, all of the findings on the application of the rules on dominance and abuses; on anticompetitive agreements and concerted practices; on the schematic use of the merger control provisions; and on the broad range of business practices considered to be unfair or in violation of consumer rights, create a far reaching system of behavioural control by the competition authority over most parts of the economy. The authority seems essentially to be free to choose on which grounds it opposes any kind of agreement, or economic act. As long as at least one individual consumer is adversely affected, there will be, in principle, a legal basis to intervene in most cases.

This obviously also creates a huge workload for the authority which will inevitably decrease its capacity to set sound priorities. Furthermore, the authority is hampered in its ability to tackle those competition law infringements which are most harmful to the proper functioning of the economic system and to overall welfare of the society and its consumers.

KREMZK also has the right to supervise state bodies and to intervene against anticompetitive acts by public authorities and it makes good use of these competencies, as shown by the impressive number of annual cases. Before merger of the competition authority and the regulators for state and natural monopolies and regulated markets, the regulators were frequently targeted by the competition authority. This seems to have decreased since the regulator and competition enforcer now form one authority.

Regulation of natural monopolies and undertakings in regulated markets accounts for more than 50 % of KREMZK's activities and is thus one of its major tasks. All regulated undertakings are subject to strict conduct and price

regulation. It is not always clear which sector is regulated under which legal provisions and where differences in the regulation stem from. In addition, there seems to be scope for reducing regulation by liberalising sectors and changing the approach to regulation.

6.1.5 Institutional and Procedural Aspects and International Co-operation

Although the Kazakh competition authority throughout its history has been extremely active in de-monopolization and supportive of Kazakhstan's economic transition, some serious structural and legal problems currently interfere with the competition authority's ability to promote competition effectively. The enforcement process seems to suffer from a severe lack of involvement of the undertakings, as well as a general lack of transparency and inclusiveness. These deficiencies may be explained in part by the extremely tight deadlines faced by the competition authority and the courts. In practical terms, it is next to impossible within the stipulated short time periods to grant any meaningful right to be heard, including access to file and the necessary exclusion of confidential documents from the files. Such a process does not fit well with an overall commitment to the rule of law. This situation is aggravated by procedural rules for judicial review that require an administrative court to complete a hearing of a case in no more than one month, with a possible extension of an additional month. The severe time restriction, combined with a lack of expertise in dealing with economic matters, forces the administrative judges to focus primarily on procedural issues. Very few courts' decisions include even basic economic analysis of the subject matter. In those few cases that do include such an analysis, the courts describe primarily the authority's findings rather than look for any alternative opinion or expertise.

The competition authority' positioning within the structure of the executive power in a highly centralized political, context and as part of the very large Ministry of National Economy, has a direct impact on the authorities' ability to influence state policy and to decide on priorities in law enforcement. In its current role and within the existing legal framework, the authority is a policy instrument subordinated to the views and wills of the government rather than an independent law enforcer focused primarily on the promotion of competition among enterprises.

Kazakhstan is a member of the EAEU which offers the opportunity for a regionally integrated approach to competition problems. Since the EAEU competition rules were only introduced recently, there has not yet been any

implementation practice to speak of. The Commission has not yet taken any decisions, nor have the Member States competition authorities, on the basis of the EAEU competition rules. In general, the new powers of the Commission and the rules enhancing co-operation with and between Member States competition authorities provide a sound framework for establishing efficient and consistent competition enforcement practices in the EAEU and its Member States.

6.2. Policy Options for Consideration

6.2.1 Restrictive Agreements

6.2.1.1 Abolish or clarify the legal provision for illegal agreements, concerted practices and abusive practices: “infringement upon consumers’ rights” and “infringement upon the interests of consumers or other persons”

The legal provisions appear to facilitate enforcement action based on individual consumers’ or competitors’ complaints. While anticompetitive conduct will ultimately harm consumers and so these are essentially sound provisions, the focus might be better placed on “harm to competition”, a provision which is also in the law. Focussing on harm to competition would help the authority to better differentiate complaints and to exercise discretion and set priorities according to anticompetitive practices which have the largest potential for harm to competition and to prioritise those with the highest potential for welfare losses to society as a whole. At the very least it should be ensured that no enforcement action is possible without ascertaining harm to competition at the same time (which could be achieved by deleting the “or” in the relevant provisions). Otherwise there is a risk of confusing (individual) consumer protection matters with competition law enforcement.

6.2.1.2 Cease the practice of prosecuting parallel price increases without the need to prove collusion among the undertakings involved.

The enforcement practice of KREMZK seems to focus mainly on observed parallel price increases without much further analysis into the reasons for such behaviour and an investigation within a very short timeframe. This enforcement practice may divert resources from hard core cartels based on agreements or other forms of direct or indirect, formal or informal co-ordination. Parallel price increases may be a symptom of such a hard core cartel although are also many benign explanations.

6.2.1.3 Give KREMZK better and more powerful investigation tools like unannounced inspections and mandatory information requests as well as the right to interview suspects and witnesses.

One of the defining features of a hard core cartel or a concerted practice to the same effect is its covert nature. In order to uncover these practices, KREMZK needs the power to conduct unannounced inspections and to seize incriminating evidence. Otherwise it will be very difficult to prove a cartel or concerted practice. This power should go along with the right to request information on a mandatory basis and the right to summon witnesses for interviews. To address potential concerns about granting too wide powers to the competition authority, the right to conduct unannounced inspections could be subject to mandatory court approval. This court approval could be obtained without informing the undertakings concerned and with sufficient safeguards against untimely disclosure and information leaks.

6.2.1.4 Abolish the strict prohibition of vertical agreements involving exclusivity contracts.

Vertical agreements are treated as per-se violations of the competition law and a strict enforcement of the existing provisions would suppress vertical agreements including those that can actually be efficiency enhancing. A rule of reason approach, carefully weighing the pro-competitive effects and the anti-competitive effects of vertical agreements on a case by case basis would address this and would also be more in line with international best practice.

6.2.1.5 Allow for an exemption of anticompetitive agreements relating to intellectual property rights only within the general framework for exemptions.

All action, including (cartel) agreements, relating to the exercise of intellectual property rights is currently exempt from the application of competition law. As certain such agreements may be harmful to competition, there is no obvious reason for excluding them systematically as a category from the scope of competition law application. Any benefits and any anti-competitive effects can be properly balanced on a case by case basis in a system that allows for the exemption of agreements that benefit consumers, for example by promoting innovation, and do not unduly restrict competition, as foreseen in the generally applicable rules on exemptions.

6.2.1.6 Revise the fining rules for anticompetitive agreements and do not require the authority to base them on actual, cartel related income of the offenders.

A system for fines based on the actual cartel related surplus of the offenders suffers from two major weaknesses. First, it is often very hard to attribute income and overcharge to cartels and to determine the exact amounts to be disgorged. Secondly, it does not apply to an anticompetitive agreement or concerted practice if it has not been put into practice at the time it was uncovered. The potential of such an agreement to harm competition should be sufficient for the law to enable a fine to be imposed. Such a change would also create a larger deterrent effect. A system that can only impose fines on the basis of cartel related income effectively punishes only successful cartels.

6.2.2 Dominance and Monopolisation

6.2.2.1 Eliminate the State Register for Dominant Undertakings and introduce sound economic analysis of markets, dominance and potential abusive practices.

The State Register for Dominant Undertakings is based on insufficient data and not constantly updated. Entries are made on the basis of a rather schematic market share calculation. The Register should be abolished and replaced by a case by case analysis of an undertaking's market position if there is a reason to suspect abusive behaviour. KREMZK has confirmed that the Register will be abolished in 2017 and this is strongly encouraged. At the same time, KREMZK must be guaranteed to be in a position to conduct market analysis on a case by case basis and to possess the required economic expertise and tools. Even without a register, the market share criteria for establishing dominance will still be in the law. While market shares may be a valuable tool for an initial screening of potentially problematic cases, the analysis must not stop there. Dominance presumptions based on market shares should be rebuttable. In almost all cases, additional analysis will have to include: barriers to entry, the nature of the products, competitors and competition on the market, technological developments, market phase and the history, as well as foreseeable developments, of the market.

6.2.2.2 Introduce a more effects-based analysis of alleged abusive practices and rely less on standardised criteria.

The list of abusive practices given in Article 13 Section 1 of the Law is long and not exhaustive. It uses many unspecified terms, such as “onerous” and “unjustified” and includes vertical distribution relationships as well as obligations to deal. This has the potential of creating strong legal insecurity for undertakings and of deterring economically beneficial behaviour and investment. It should be ensured that none of the practices listed establishes a per-se abuse that will be fined or stopped without further analysis of the effects of the behaviour. For example, if price differentiation is the result of volume based rebates, it will often not give rise to competition problems. It also has to be ensured that no action is taken to protect competitors which are less efficient than the incumbent(s) in the market. This will require an “as efficient competitor test” in margin squeeze and predation cases. KREMZK should always ensure that its measures will benefit competition and not individual competitors or customers.

6.2.2.3 Shift the focus from controlling prices to a control of exclusionary practices.

The control of prices characterises the work of KREMZK in the area of abuses and monopolisation. This does not even include the price regulation of state and natural monopolies. As pointed out in the conclusions section, the control of prices and profits is considered to be a highly challenging exercise. The risks of interfering unduly in markets and of distorting price signals are very high. A market economy should resort to price and/or profit control primarily in well-defined cases, such as natural or state monopolies. For markets that are generally open to competition, abuse proceedings should focus on practices that lead to the exclusion of competitors and that establish or reinforce barriers to entry. In addition, attention should be paid to the reasons for non-competitive market structures. Measures to be taken or proposed by competition authorities should directly address these reasons. It is through the opening of markets or keeping them contestable that the symptoms of dominance such as high prices and profits will be abolished. Measures and proceedings targeting market structures would also have much more lasting effects than those interventions directed at prices, which would have to be repeated continuously if the underlying reasons for dominance are not addressed.

6.2.3 Concentration Control

6.2.3.1 Introduce a clear and easily defined and calculated notification threshold that ensures a concentration that has a sufficient local nexus.

Just looking at total assets and turnover of undertakings will lead to notifications that are potentially of no relevance to Kazakhstan, as one or more parties to a merger might not be active in Kazakhstan. An additional criterion related to economic activity in Kazakhstan, such as turnover, could remedy this situation.

6.2.3.2 Clearly define the information requirements for a notification and reduce them to the information that is indispensable for a phase one investigation.

The current notification requirements seem to be very burdensome and it seems that some of the information asked for would not be needed in order to establish that merger notification criteria have been formally met and to conduct a preliminary analysis. Business plans and imports and exports could for example be asked for in additional information requests at a later stage. The authority would be required to have sufficient powers and instruments in the process of the investigation to request this information from the merging parties and their competitors. Kazakhstan has indicated that the information requirements will be subject to change in 2016 which will be welcomed.

6.2.3.3 Ensure a thorough and case-by-case analysis of concentrations and a focus on unilateral or co-ordinated effects of the concentration.

Mergers can be economically beneficial and efficiency enhancing. An intervention is only justified if a merger gives rise to competition concerns and would lead to unilateral or co-ordinated price increases or the worsening of other competition parameters like quality, innovation etc. The potentially negative effects of mergers have to be ascertained adequately requiring a proper, and in some cases very detailed, analysis of both the market and competitive conditions. An appropriate market definition is only a starting point and market shares can at best be first indicators showing a need for a closer examination or not. A detailed market investigation will be required in cases that raise initial concerns and this should accompany an economic analysis of merger effects and potential efficiencies that could offset negative effects. An analysis based on pre-determined markets and inflexible market share criteria does not fulfil these requirements. It seems that the number of staff currently

allocated to concentration control is very low and would not be adequate for the recommended type of analysis. Merger control teams should include lawyers and economists.

6.2.3.4 Apply predominantly structural remedies to remedy anticompetitive mergers. Whenever possible the emphasis should be put on structural remedies.

The Law on Competition does not seem to differentiate between behavioural and structural merger remedies. Structural remedies ensure that a competition problem is not created in the first place. Behavioural remedies usually allow a merger that raises competition concerns to proceed, but establish safeguards against a behaviour that would be considered to be anti-competitive. In practice, this puts a high burden on competition authorities and requires ongoing monitoring and, often, intervention. Competition authorities usually lack the necessary resources for the effective monitoring. More importantly, behavioural remedies generally fail to address the core problem, thus missing the point of merger control. Merger control is usually established to safeguard market structures that ensure competition, so that an anticompetitive behaviour cannot be exercised by one of the market players in the first place. KREMZK should try to limit behavioural remedies as much as possible and whenever possible introduce structural remedies, based on a thorough market analysis, in cases that raise competition concerns.

6.2.3.5 KREMZK should be required and enabled to publish its merger decisions.

So far KREMZK does not publish any decisions nor does it provide any kind of material guidance to merging parties. According to this report there have not been any appeals and published court judgements. This lack of transparency makes it very hard for undertakings and their advisors to assess the potential outcome of any intended merger and to anticipate any possible remedies. Mergers may be discouraged because it is difficult to foresee the outcome of a possibly burdensome and costly procedure. It may also increase the case load of the authority as mergers will be filed that have no chance to pass. Due to a lack of guidance, undertakings and their advisors cannot anticipate this and refrain from a notification of these cases. In both cases the result is not satisfactory. Fears that the publication of decisions will increase the workload of the authority or would give away business secrets are not justified. It can be expected that any merger analysis results in a written report as a basis

for decision making and future reference. These reports can be drafted easily in such a way that they can be used for publication purposes as well. It might be sufficient to subject phase 2 clearances, prohibitions or conditional approvals to the publication requirement. Business secrets do not pose an insurmountable barrier to most competition law regimes. There are many ways of respecting confidentiality when publishing a decision.

6.2.3.6 Introduce procedural rules that safeguard the undertakings' right to be heard.

Undertakings involved in merger proceedings need to be heard and have to be given a chance to explain their arguments and to counter the arguments of the authority. Under a system that applies the rule of law, it is a necessity to grant these rights in a timely and sufficient manner during the proceedings. This should also include an appropriate access to file. The authority should not consider this as an unnecessary burden. It is a chance to discover, in a timely way, weaknesses in the analysis and facts that have been overlooked. This will enable the authority to come to a decision based on sound reasoning with a better chance of standing up in court.

6.2.4 Additional Competences: Consumer Protection, Competition Assessment and Regulation under the Law on Natural Monopolies and Regulated Markets

6.2.4.1 Make best use of the knowledge from different parts of the authority that is available within KREMZK.

Competition law and laws on unfair competition and consumer protection need not be mutually exclusive. They should, however, not be confused with each other and the legal basis for intervention should always be clear both internally and externally. Often competition problems can be approached from both sides but this requires communication among the enforcers to choose the optimal strategy. A potential abusive conduct might be tackled with more mandatory information to consumers, for example. In market analysis, different parts of KREMZK might also benefit from existing knowledge in other units. KREMZK should encourage information exchange, co-operation and communication.

6.2.4.2 Reduce the number and scope of state monopolies.

Many of the commercial or quasi-commercial activities considered as state monopolies and conducted by state enterprises under tight regulation could be realised in competitive markets and by private undertakings such as, expert assessments or the production of passport blanks. Wherever possible, these state monopolies should be critically assessed and activities could be opened to private actors and competition. In many cases, the reasons and goals for treating industries as state monopolies can also be met by framework legislation and regulation, for instance environmental standards, that sets limits to the activities of private undertakings. These could then compete and act freely within these limits, often with significant cost savings for consumers.

6.2.4.3 Continuously monitor and review the regulated sectors and the regulatory rules.

Wherever possible, an intelligent regulation should be used that incentivises efficient behaviour of the subjects under regulation. Intelligent regulation should replace the existing system of very tight conduct and price regulation. Sectors that could be opened to competition should be opened and released from unnecessary regulation in due time. Sectors with the potential for more market activity and less regulation, include a number of telecommunication markets and also parts of the electricity markets. Kazakhstan could benefit from the experiences of its peers in introducing regulation that ensures investment, cost savings and productivity increases.

6.2.5 Institutional and Procedural Aspects and International Co-operation

6.2.5.1 Consider establishing KREMZK as an independent state authority outside the Ministry of National Economy.

The current setting is bound to create conflicts within the Ministry of the National Economy. There will be conflicting interests between the many areas within the Ministry's remit. Labour market interests, international trade, regional development, public private partnerships, just to list a few of the areas of activity of the Ministry, will sooner or later conflict with findings and actions of the competition authority. It is unclear how conflicts will be resolved in a transparent process. Even if no conflicts seem to have yet materialised, the potential is obvious. An authority like KREMZK that is part of the Ministry can be influenced and directed in many ways, starting with direct instructions and

ending in budget and staff cuts. Many forms of influence can be prevented or at least made more difficult by establishing KREMZK as an independent authority. Independence does not mean that it will not be accountable for its budget and actions.

6.2.5.2 KREMZK should be able to prioritise its work and to have discretion to refuse cases.

KREMZK cannot refuse to act on complaints. This makes prioritisation very difficult. By giving discretion to KREMZK to refuse cases, the authority could focus on those cases which are most relevant to the economy or from a legal or procedural point of view. In order to prevent any accusations of improper authority conduct, to which young authorities are particularly vulnerable, the prioritisation criteria and a brief outline of the reasons for accepting or refusing a case should be made public.

6.2.5.3 The competition law procedures have to reflect the rule of law and have to incorporate basic legal rights of undertakings and individuals affected by the proceedings.

Undertakings directly involved in competition law proceedings, but also affected third parties, need to be informed about the initiation of proceedings in a timely manner. In the course of the proceedings, they need to be informed about major steps in the investigation and they need to be heard before a final decision is taken in any competition law proceeding. This right to be heard includes a right to access to file. Otherwise an informed statement will not be possible. The authority has to reflect the statements and has to argue its case in the light of the statements.

6.2.5.4 The legal deadlines for proceedings should be extended.

In anticompetitive agreements and abuse cases, the legal deadlines are two months with a possible extension of another two months. Compared to the practice of many mature competition law regimes this is an extremely short timeframe that does not allow for an in-depth investigation and assessment of facts. A market analysis, including an economic analysis, is hardly possible. The short deadlines make it harder to grant an adequate right to be heard.

6.2.5.5 Review courts should be specialised on competition law matters and need sufficient time to review competition law cases.

Currently, the judges and courts do not seem to be specialised in competition law. As competition law matters are often complex and economically sophisticated, some specialisation of the judges, or some concentration of the cases on a few generalist judges, would greatly help the review of these cases which then would require longer timeframes for review. It is in the interest of a competition law regime to have a strict and objective court review procedure that imposes an essential discipline on the enforcers. Good review procedures help to establish a good authority practice and a reference base for future cases. Legal certainty and the foreseeability of enforcement actions are enhanced and ultimately strengthen the effectiveness of the competition law regime.