Antitrust regulation by OECD standards in Kazakhstan

Abstract. The article deals with issues and challenges related to the antitrust regulation in the Republic of Kazakhstan. The government has set ambitious tasks for itself to be counted among developed countries with a stable level of economic development. Given market conditions, effective economic development depends on the level of competition within the country. In this regard, a large-scale reform of Kazakhstan's antimonopoly policy has been carried out in order to bring it in line with the best global practices, following the recommendations of the OECD and the World Bank. The main goal of this reform is to increase the effectiveness of antimonopoly legislation with the aim of facilitating business in an atmosphere of healthy competition. This is why the author focuses on the analysis of the reforms carried out in 2015-2016.

The present research enables us to analyse the positive and the negative sides of the implemented reform of the antitrust regulation in the Republic of Kazakhstan. It can be seen from this research that the abolition of state registry of dominant players has lead to more than 1,150 market entities being free from the burden. Additionally, the introduction of cautioning and notification institutions has allowed more than hundred firms to escape from the investigations. Furthermore, the introduction collegiate body reduced the burden of labour on both the judicial system and economic actors. As a result of focusing on struggle against cartels, five cartels were identified in 2016 and 2017. It is concluded that the reform has positively impacted the business environment. However, several problems have been identified which should be solved in the future. The results of the research can be useful for developing countries that focus on the improvement of antitrust regulation.

Keywords: Antitrust Legislation; Antitrust Regulation; Antitrust Authority; Dominant Position; Fixed Prices; Investigation; Cartel; Merger

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1. Introduction

In today’s environment of global economic integration, maintaining a stable economic growth is a major issue for every developing country. The Republic of Kazakhstan, which occupies a vast territory in Central Asia, has provided a huge reform in the antitrust legislation in order to support an atmosphere of competition in the business environment. As part of this reform, antitrust legislation has been raised from the level of a simple law. Now it is part of the Legal Code. Since 2015 all norms pertaining to the antitrust law have been included in the entrepreneurial code (including the rules which are provided by the reform of the antitrust policy), thereby increasing its importance in the legal hierarchy.

The reform carried out in 2015-2016 was implemented by the Committee on Regulation of Natural Monopolies, Protection of Competition and Consumer Rights under the Ministry of National Economy of the Republic of Kazakhstan (CRNMPCCR) and led to the liberalisation of the antimonopoly legislation. Thus, the state register of market agents occupying a dominant or monopoly position was abolished; institutions for notification and sanctioning were introduced, along with a collegiate review body; cartels were defined as the most dangerous type of violations impeding the development of competition and the participation of the state in entrepreneurial activity was reduced. These changes were aimed at increasing the effectiveness of antitrust authorities, as well as at reducing the burden on the judicial system and thereby decreasing the burden on economic agents. Analysing each of the above measures allows us to determine to what extent they have been effective.

2. Brief Literature Review

Issues related to antitrust regulation have already been studied by distinguished scholars such as H. Hovenkamp (2016), T. Sullivan (2014), P. Marioti (2006), M. Utton (2003), S. Colino (2012), S. Everett (2011) and others. Problems of antitrust regulation in developing countries have been considered by A. Rodriguez (2016), S. Afrika (2011), E. Fox (2016), R. Michaels (2016), A. Aitzhanov (2012) and others.

3. Purpose

The purpose of this article is to study the reform of the antitrust legislation in the Republic of Kazakhstan, identifying both positive and negative results, present an analysis of all the changes carried out as a result of the reform using the methodology of comparative analysis to reflect the state of the antitrust regulation before and after it was enacted.

4. Results

4.1. Abolition of the state registry

State registration of market agents occupying a dominant or monopoly position was widely used in the Republic of Kazakhstan before the implementation of reforms to the antitrust legislation. The registry included all business sector organisations that were recognised as having a dominant position in the market. The list was elaborated based on results from the analysis of commodity markets. If a specific market participant accounted for more than 35% of the market being considered, then it would be included in the registry. In addition, if three entities accounted for over 50% of the market, or if four entities accounted for over 70% of market share, those would also be included in the register as group of dominant market players (Aitzhanov, Kniazova, and Radostovcev, 2015).

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The intention was that, in order to avoid the total violation of the antitrust legislation by dominant market actors, the registry would act as an alternative deterrent to methods of strict control, where precautionary measures (such as issuing of warnings and notifications) would be sufficient. In practice, however, following the cancellation of the registry, the antitrust authority turned out to be far less agile. At the same time, an investigation that could rely on information from the registry could be carried out at an accelerated pace, in a period between two and six months, following the abolition of the registry, the time-frame increased to over six months. The antitrust authority was restructured, combining the analysis, management and investigation directorates in order to increase its effectiveness. The issue of extending the period of analysis for commodity markets to six months or more to improve the quantity of cases being investigated is also being reconsidered in the registry.

The criteria for determining dominant market agents have not been struck down, since practice shows that only dominant actors can have a major impact on the market. If the entity is not dominant, then it will not be investigated because of their lack of influence on the market. This is done to prevent misuse of resources by the antitrust authority (Aitzhanov, 2016).
for six months (CRNMPCCR, 2016). This served as a clear warning for other market actors across the Kazakh economy.

Despite some negative effects caused by the cancellation of the registry, the move has had a positive impact on businesses by relieving them from the body’s encumbrance and excessive control. Thus, the measure can be considered a revolutionary step towards the liberalisation of the antitrust regulation in Kazakhstan.

4.2. Introduction of a cautioning institution

A new Cautioning Institution was introduced in order to prevent violations of the country’s antitrust legislation. It applies to cases of public statements made by business leaders or government agencies that could lead to legal actions (Altzhanov, 2016). Prior to this innovation, antitrust authorities would only react after actions that led to violations of antitrust law.

The introduction of cautions and warnings allowed the antitrust authority to respond more effectively to this situation by tackling them early, before they even commenced. On the other hand, this is an effective signal for market participants to help avoid undesirable consequences. Cautions are yet another step towards the liberalisation of the antitrust regulation, and results for the 2016-2017 period show the effectivenes of its implementation. For example, in 2016 the rate of compliance with cautions was 90%, while in 2017 it reached 100% (Table 1). As a result, the potential number of investigations has been greatly reduced.

4.3. Introduction of a notification institute

The introduction of indications of possible violations to the antitrust legislation seen in the actions or inactions of an economic agent allows the agent to correct any illegal actions before the start of a formal investigation, without resorting to antitrust measures. This allows market actors to either independently stop or correct their illegal actions, making it an important step towards the liberalisation of the antitrust regulation. Moreover, it allows the antitrust authority to concentrate on the struggle against malicious offenders, rather than use their limited resources against law-abiding subjects who realised and willingly corrected their mistakes. Additionally, such a measure is an effective signal from the antitrust authority for market players to avoid the application of undesirable measures. Before the reform, such actions implied mandatory investigations, with punitive measures often applied without offering a chance for economic agents to independently correct their behaviour.

The results for the 2016-2017 period show a gradual improvement in self-discipline on behalf of economic entities that receive notifications. For instance, in 2016 the rate of compliance with these notices was about 71%, while in 2017 it reached approximately 84% (Table 2). It would appear that the level of performance in 2016 is particularly low due to a less serious attitude on behalf of market players. Additionally, the desire to profit through illegal actions also played a significant role. Despite this, we conclude that this measure is a fairly effective innovation which leads to a reduction in the potential number of frivolous investigations.

4.4. Introduction of the collegiate body

The collegiate body is a commission operating under the antitrust authority, tasked with reviewing case materials over violations of economic competition before the final decision is made. This introduction allows business entities to provide arguments that may protect their interests directly after the investigation, and before the final decision is made by the antimonopoly body. This measure is also a step towards the liberalisation of the antitrust regulation (CRNMPCCR, 2015). The main purpose of this institution is to reduce the burden of labour on both the judicial system and economic actors. Moreover, it seeks to increase the effectiveness of the antitrust authority.

The collegiate body, represented by the conciliation commission, involves representatives from all public associations representing the interests of the business community. Among them is the National Chamber of Entrepreneurs (NCE), which is the country’s most important organisation in the field business advocacy, which should be especially highlighted. Sessions of the collegiate body simulate a pre-trial proceeding. As the accusing party, the antitrust authority presents the results of their investigation. The role of lawyers is filled by public associations and organisations headed by the NCE. The main task of the collegiate body is to reconcile the results of the investigation with the market actor in question. The purpose of negotiations is to minimise the possibility of resorting to court proceedings against market actors, allowing both parties to avoid unnecessary litigation.

Prior to the introduction of the collegiate body, investigation results could only be appealed in court. From year to year, almost all investigated cases went through litigation. In most cases the original decision taken by the antitrust authority remained unchanged following the court proceedings. Only in rare cases was the amount of fines issued by the antitrust body reduced. Litigation cases could drag on for several years. Additionally, it was required to go through all judicial instances, leading to additional burdens on all participants. The results of the establishment of the collegiate body show that the number of investigations that went through litigation has slightly fallen from about 96% of all cases in 2016 to 87% in 2017 (Table 3). The proceedings mainly concern the amount of fines imposed.

The outcomes of investigations submitted to the collegiate body changed 73% of the time and mainly in favor of the economic agent (Table 4). However, this does not reveal any incompetence on behalf of the antitrust authority. Rather, it is likely that this is a strategy deployed by the state organisation. Excessive fines and additional violations are imposed to be considered by the collegiate body. During their intervention, the amount of fines is reduced, and the types of violations are changed. This action is aimed at satisfying representatives of business communities and economic actors. As a result, the antitrust authority reduces the probability of being challenged in court by an economic agent. It seems that such an innovation has played a positive role in reducing the number of cases going through litigation. Thus, its main goal was achieved quite effectively.
 Identifying the role of cartels

Before the reform, the struggle against cartels was not consistent with the authority's goals. As a result, there was no history of cartel investigations, which is a notoriously difficult task. Recommendations by the OECD (2016) and the World Bank (2014) note the importance of combating cartels. In this regard, according to the principles of the reform conducted in 2015, the role of cartels was identified as the most dangerous type of violation for free competition. In addition to amendments to the business code, the administrative code was also modified. The essence of these changes is that any participant in the cartel who aids in the investigation will be completely discharged of responsibility. If the second participant of a cartel also helps in the investigation, then it will be partially exempt from liability. This was done to raise the level of disclosure and deter businesses from creating cartels (Aitzhanov, 2016).

The struggle against cartels required the application of considerable efforts by the antitrust authority (OECD, 2018). Therefore, a special department for combatting cartels was created. The best experts within the authority were selected to integrate the department and sent to foreign countries to improve their skills. This was not enough, however, given the complexity of extracting information. In this regard, the antitrust authority issued a memorandum to all law enforcement agencies, which could provide access to sources of information at a moment’s notice.

As a result of these measures, five cartels were identified in 2016 and 2017 (CRNMPCCR, 2017). This is not a very high indicator. However, taking into account the complexity of identifying cartels, it is considered as a satisfactory achievement. Eventually, this measure has allowed the antitrust service to demonstrate their focus on the struggle against malicious violators of antitrust laws, thereby increasing the organization's effectiveness.

Measures to support business

In addition to the measures described above, many others were adopted. First, they reduced state participation in entrepreneurial activity. For example, in 2016 the antimonopoly authority cut down the list of authorized activities for state participation almost in half (from 652 to 346) over a two-year period. As a result, despite the opposition from state bodies, the Antitrust Service has achieved its goal in giving greater opportunity to private enterprises.

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References

1. Hovenkamp, H., Ben, V., & Willie, D. (2016). Federal antitrust policy: the law of competition and its practice. St. Paul, MN: West Academia Publishing.
2. Sullivan, E. T., Harrison, L. J., & O’Connell, C. S. (Eds.). (2014). Understanding antitrust and its economic implications (6th edition). New Providence, N.J.: LexisNexis.
3. Moriati, P. (Ed.). (2006). Antitrust policy issues. New York: Nova Science Publisher.
4. Utton, M. A., & Aitzhanov, A. T. (Eds.). (2016). Antitrust, Market dominance and antitrust policy. Northampton, MA: Elgar.
5. Colino, S. M. (Ed.). (2012). Cartels and anti-competitive agreements. England: Burling: Ashgate.
6. Evenett, S. J., & Stern, R. M. (Eds.). (2011). Systemic implications of transatlantic regulatory cooperation and competition. Singapore: Hackensack, N.J.: World scientific.
7. Afrika, S.-L., & Bachmann, S.-D. (2011). Cartel regulation in three emerging BRICS economies: cartels and competition policies in South Afrika, Brazil, and India - a comparative overview. The International Lawyer, 45(4), 975-1003. Retrieved from https://www.istore.org/download/23827200
8. Afnika, S.-L., & Bachmann, S.-O. (2011). Cartel regulation in three emerging BRICS economies: cartels and competition policies in South Afrika, Brazil, and India - a comparative overview. The International Lawyer, 45(4), 975-1003. Retrieved from https://www.istore.org/download/23827200
9. Fox, E. M. (2016). Competition policy: The comparative advantage of developing countries. Law and Contemporary Problems, 79, 69-84. Retrieved from https://scholarship.law.duke.edu/lcp/vol79/iss4/4
10. Michaelis, R. (2016). Supplanting foreign antitrust. Law and Contemporary Problems, 79, 223-247. Retrieved from https://scholarship.law.duke.edu/lcp/vol79/iss4/8
11. Aitzhanov, A. T. (2015, May 28). Legal competition bodies and antimonopoly policy effectiveness in transition economies. CPI Antitrust Chronicle, 2, 1-5. Retrieved from https://www.competitionpolicyinternational.com/assets/uploads/Alitzhanov/MAY-122.pdf
12. Aitzhanov, A. T., Kniazova, I. V., & Radostovec, N. V. (Eds.) (2015). Competition law and policy in Kazakhstan, a peer review. England: Burlington: Ashgate.
13. Committee on Regulation of Natural Monopolies, Protection of Competition and Consumer Rights under the Ministry of National Economy of the Republic of Kazakhstan (2016, June 23). For 180 days, temporary price regulation is introduced in the liquefied gas market in Mangistau region. Retrieved from http://adilet.zan.kz/ru/docs/V150001073146/ (in Russ.)
14. Organisation for Economic Co-operation and Development (2016). Competition law and policy in Kazakhstan, a peer review. Retrieved from https://www.oecd.org/ daf/competition/OECD2016_Kazakhstan_Peer_Review_ENG.pdf
15. Organisation for Economic Co-operation and Development (2018). Annual Report on Competition Policy Developments in Kazakhstan - 2017. Retrieved from https://www.oecd.org/document/DAF/COMP/AR2018/23/en/pdf
16. World Bank (2014). Component 1: Kazakhstan: Report to discuss the basics of competition policy. Retrieved from http://www.kreml.gov.kz/details/ nشورigion pdf/7601/lang-rus (in Russ.)
17. Dosayev, E. A. (2016). From January 1, 2017 in Kazakhstan, the register of dominants of natural monopolies will be abolished. Official web-site. Retrieved from https://kreml.gov.kz/s/RU/4783548#-v=january-2017-goda-v-Kazakhstane.html (in Russ.)
18. Aitzhanov, A. T. (Ed.) (2016). Scientific and practical commentary on the entrepreneurial code. Astana: Center for Competition Policy Development and Protection (in Russ.)
19. Committee on Regulation of Natural Monopolies, Protection of Competition and Consumer Rights under the Ministry of National Economy of the Republic of Kazakhstan (2016, June 23). For 180 days, temporary price regulation is introduced in the liquefied gas market in Mangistau region. Retrieved from http://adilet.zan.kz/ru/docs/V150001073146/ (in Russ.)
20. Committee on Regulation of Natural Monopolies, Protection of Competition and Consumer Rights under the Ministry of National Economy of the Republic of Kazakhstan (2015). The position and the rules of the conciliation commission. Official web-site. Retrieved from http://adilet.zan.kz/ru/docs/V1500012593/ (in Russ.)
21. Committee on Regulation of Natural Monopolies, Protection of Competition and Consumer Rights under the Ministry of National Economy of the Republic of Kazakhstan (2017). Regarding administrative fines imposed by the Cartel Control Authority. Official web-site. Retrieved from http://www.kreml.gov.kz/ru/menu2/ stat_info/po_konkurencii/adm_vzyskaniya/?cid=0&rid=38661 (in Russ.)