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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
JEL Classification: L4; K21
DOI: https://doi.org/10.21003/ea.V171-02

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Анотація. У статті розглянуто питання й проблеми, пов'язані з антимонопольним регулюванням у Республіці Казахстан. Уряд Казахстану поставив перед собою амбітне завдання домогтися входження до групи розвинутих країн зі стабільним рівнем економічного розвитку. В умовах ринкової економіки ефективний розвиток країни залежить від рівня конкуренції. У зв'язку з цим у Казахстані було проведено широкомасштабну реформу антимонопольного законодавства з метою приведення його у відповідність до рекомендацій ОЕСР і Світового банку. Основною метою реформи 2015–2016 рр. було підвищення ефективності антимонопольного законодавства, сприяння розвитку бізнесу в атмосфері здорової конкуренції. Дане дослідження дозволяє проаналізувати слабкі та сильні сторони реформи, показує, що внаслідок скасування державного реєстру суб'єктів ринку, що займають домінуюче положення, понад 1150 підприємств було звільнено від навантаження. Результатом боротьби з монополіями стало виявлення п'яти картелів у період 2016–2017 рр. Проведене дослідження дозволяє зробити висновок, що реформа позитивно впливає на бізнес-середовище в Казахстані.
Ключові слова: антимонопольне законодавство; антимонопольне регулювання; антимонопольний орган; домінуюче становище; фіксовані ціни; розслідування; картель; злиття.

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Аннотация. В статье рассмотрены вопросы и проблемы, связанные с антимонопольным регулированием в Республике Казахстан. Правительство Казахстана поставило перед собой амбициозную задачу по вхождению в число группы развитых стран со стабильным уровнем экономического развития. В условиях рыночной экономики эффективное развитие страны зависит от уровня конкуренции. В связи с этим в Казахстане была проведена широкомасштабная реформа антимонопольного законодательства с целью приведения его в соответствие с лучшей мировой практикой на основе рекомендаций ОЭСР и Всемирного банка. Основной целью данной реформы является повышение эффективности антимонопольного законодательства с целью содействия развитию бизнеса в условиях здоровой конкуренции. Данное исследование позволяет проанализировать слабые и сильные стороны проведённой в 2015–2016 гг. реформы. Результаты исследования показывают, что вследствие отмены государственного реестра субъектов рынка, занимающих доминирующее положение, более чем 1150 предприятий были освобождены от обременения. Кроме того, внедрение института уведомления и предостережения позволило более чем ста предприятиям избежать процедуры расследования. Появление коллегиального органа также поспособствовало сокращению трудовой нагрузки на судебную систему и субъектов рынка. Следует отметить, что в результате концентрированной борьбы против картелей в период 2016–2017 гг. были выявлены пять картелей. Данное исследование позволяет сделать вывод о том, что проведенная реформа положительно повлияла на бизнес-среду. Вместе с тем были выявлены проблемы, которые должны быть решены в ближайшем будущем.
Ключевые слова: антимонопольное законодательство; антимонопольное регулирование; антимонопольный орган; доминирующее положение; фиксированные цены; расследования; картель; слияние.

1. Introduction

In today's environment of global economic integration, maintaining 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 the administrative 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. Sallivan (2014), P. Moriati (2006), M. Utton (2003), S. Colino (2012), S. Evenett (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 Radostovec, 2015).

The registry of dominant players was very convenient for the Kazakhstan Antimonopoly Service. First and foremost, it allowed for a constant control to be enforced over all business agents recognised as dominant in their sector. All companies included in the registry were obliged to provide quarterly information about their activities (CRNMPCCR, 2015). Second, the presence of the registry allowed the antitrust authority to carry out investigations quickly, from 3 to 6 months on average. This was possible due to their circumvention of in-depth analyses of the commodity markets, where the main goal was to determine the presence of a dominant player and to identify signs of violations to antitrust legislation. The registry allowed for the immediate launch of an investigation in order to reveal the presence and the extent of the violation, also providing a determination of responsibility.

The abolition of the registry was welcomed by the business community, particularly by market agents that had been subject to its control. This measure has proved to be a significant step towards the liberalisation of the antitrust regulation. The OECD (2016) and the World Bank (2014) have noted that the figure of a state registry does not conform to global best practices, and is excessively burdensome for entrepreneurs. Such an observation was justified, since the policy forced the company to provide the antitrust authority with quarterly information on its activities. That was a significant burden for firms, whereas not providing these reports could lead to large fines. Additionally, being under constant supervision also provided extra pressure on the business. Moreover, market agents included in this register could quickly lose their dominant over time, yet continued to be subjected to those obligations until they were excluded from the registry. Similarly, those market participants who gained a large market share and were not yet included in the register were not placed under similar control and could abuse their dominant position until the registry was updated. The interval between inclusion and exclusion from such a register could span from three to six months, which was a fairly long period of time.

Further criticism of the registry was based on the criteria for determining dominant actors. The World Bank (2014) notes that, even if the economic agent takes a dominant position, they may not necessarily abuse it and be considered in violation of antitrust laws. Thus, the applicable criteria for determining dominant positions are not objective and can lead to *bona fide* companies being burdened with inclusion in the registry. For example, if one company holds a 35% share of their market, then two other economic agents, who each account for no more than 15% of the market share, could find themselves included in the registry as part of a dominant group. In other words, almost any company with a significant market share could fall under the oversight of the antimonopoly authority through inclusion in the registry.

As a result of the cancellation of the registry, more than 1,150 market entities have been freed from this burden, which is a big step towards the liberalisation of the antitrust legislation in the country (Dosayev, 2016). However, the cancellation has also led to an increase in the time it takes to carry out analyses and investigations of commodity markets. The relevant process used to take from three to 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 quality of cases being investigated is also being considered.

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).

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 its cancellation investigations would regularly require more than 6 months. For instance, in 2016 in the oil-producing Mangyatsu region of Kazakhstan fuel prices for motor vehicles increased by more than 200%, from KZT 35 to KZT 80. Traditional measures taken in response to that situation proved to be ineffective, since the issue required immediate action. Then, for the first time, the most stringent measures available in antitrust legislation were used. In order to resolve a situation that could have quickly turned into a regional strike and increase social tensions, a Law was enforced which allowed for the authority to fix prices in the market for 180 days. The Antitrust authority then set a price for consumers in the region at KZT 45, which stood

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 (Aitzhanov, 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 effectiveness 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 notification 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.

Tab. 1: **Cautions issued by the antimonopoly authority of Kazakhstan to market entities in 2016-2017**

Year	Cautions (number)	Executed number of cautions (number)
2016	21	19
2017	26	26

Source: Compiled by the author based on information by the CRNMPCCR

Tab. 2: **Notifications issued by the antimonopoly authority of Kazakhstan to market entities in 2016-2017**

Year	Notifications (number)	Executed number of cautions (number)
2016	124	88
2017	151	127

Source: Compiled by the author based on information by the CRNMPCCR

Tab. 3: **The number of antitrust investigations and litigation in Kazakhstan in 2016-2017**

Year	Investigations (number)	Went through litigation (number)
2016	279	268
2017	212	184

Source: Compiled by the author based on information by the CRNMPCCR

Tab. 4: **The number of investigations submitted to the collegiate body in Kazakhstan in 2016-2017**

Year	Investigations (number)	Investigations recommended to finalize (number)
2016	10	5
2017	37	27

Source: Compiled by the author based on information by the CRNMPCCR

4.5. Identifying the role of cartels

Before the reform, the struggle against cartels was not considered to be a prerogative of the antitrust authority. 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 aides 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 combating 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.

4.6. 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 authorised 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.

Second, the threshold for merger was increased twofold. It is necessary to receive a permission from the antimonopoly authority if one firm has an intention to purchase more than a 50 percent (the figure was 25 before the reform) share from another company. This implies lower burdens for businesses (Aitzhanov, 2016).

It should be noted that the reform of the antitrust regulation was carried out on the basis of recommendations and best practices of leading countries around the world. However, some of the recommendations were missed. They are related to the criteria for the definition of dominant players and the importance of preserving the authority's independence, which is the most important recommendation directly related to the effectiveness of the antitrust authority. Currently, the antitrust authority functions as a committee under the Ministry of the Economy of the Republic of Kazakhstan. Thus, the antimonopoly authority is not an independent state organisation, posing a big disadvantage for the entire antitrust system.

5. Conclusions

The reforms made to the antitrust regulation in the Republic of Kazakhstan were motivated by the requirements of a new age. It is evident that all the changes were purposefully made in support of businesses, and with the aim of increasing the effectiveness of the antitrust authority. Our analysis shows that the cancellation of the national registry has caused some difficulties for Kazakhstan's antitrust authority. However, on the whole, it had a huge positive impact on businesses. Additionally, the newly introduced figures of caution and notification have had a positive impact in terms of avoiding negative consequences from overzealous investigations and enforcement measures for antitrust violations.

Moreover, the institution of the collegiate body has made it possible to avoid additional burdens on all participants in the proceedings. Concerning the the role of cartels, we see that this measure has allowed for a greater focusing on malicious violators of the law which inflict great damage on the country's economy. The additional measures and the aforementioned steps taken during the reform show its liberal character in relation to the business environment. Thus, this reform can be summarised as a liberalisation of the antitrust regulation in the Republic of Kazakhstan.

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Received 20.06.2018