Control of economic concentration in the CIS and Georgia
Control of economic concentration in the CIS and Georgia

Factors determining whether a country is attractive to investors include the existence of barriers to market entry by foreign investors, as well as the ease of doing business, including in terms of antimonopoly control over mergers, acquisitions, and acquisitions of control over domestic economic undertakings. This brochure contains in-depth information on the economic concentration controls in various countries in the post-Soviet space. The information is split into two parts: articles on each jurisdiction, and a table containing brief, practical information.

The brochure presents articles prepared by Dentons offices in various CIS countries, as well as our partners – Karakhanyan & Partners Law Office LLC (Armenia), and Mgaloblishvili Kipiani Dzidziguri (Georgia).

The brochure provides information on the following jurisdictions:

- Russia
- Kazakhstan
- Ukraine
- Belarus
- Azerbaijan
- Georgia
- Armenia
- Uzbekistan
- Kyrgyzstan
Russian Federation

Control over economic concentration has the express aim of preventing restrictive business practices, counteracting monopolistic activities and protecting markets. For market participants, concentration control (“Control”) usually means having certain transactions approved by the Federal Antimonopoly Service of the Russian Federation (“FAS”). But recent (and ongoing) changes to Control regulations are showing a trend towards liberalization.

Control: basics and specifics

Most Control regulations and procedures are set forth in chapter seven of Russian Federal Law No. 135-FZ of 26 July 2006 on the Protection of Competition (the “Competition Law”).

Various transactions involving the assets (including fixed capital and soft assets) of, shares and participatory interests in, and other rights related to Russian companies fall within the scope of Control. Transactions involving foreign entities are also captured by Control if such foreign entities imported goods with an aggregate value of over one billion rubles into the Russian Federation during the previous year.

One of the primary Control procedures is mandatory FAS approval for certain transactions. Approval is obtained by an entity contemplating the transaction (typically the potential acquirer) filing a petition.

The cases when the transaction requires FAS approval is often determined by whether the entities entering the transactions, or any entities in the group1 of the parties to transaction, meet the basic approval criteria. These criteria are as follows:

• aggregate asset value (as of the last reporting date preceding the filing date) exceeding seven billion rubles; or,

• aggregate revenue (over the calendar year preceding the year of transaction) exceeding ten billion rubles; or,

• for financial organizations, aggregate asset value (as per the latest balance sheets) exceeding the thresholds set forth by the Government of the Russian Federation.2

A transaction therefore needs FAS prior approval if:

1. at least one entity meeting the basic approval criteria is involved in the merger (irrespective of whether the merger results in the incorporation of a new entity or the absorption of one into another);

2. the charter capital of a newly formed entity is paid using the shares or participatory interest in or assets of another commercial entity, and the newly incorporated company gains rights over such shares/interest/assets that can only be transferred subject to FAS approval as described in point 3 below – again, if the basic approval criteria are met;

3. if an entity or a corporate group of entities (except for founding members at the moment of incorporation) acquires:

   a. a shareholding or participatory interest exceeding thresholds of 25% (one third for participatory interest), 50% or 75% (two thirds for participatory interest), if the acquirer previously held a shareholding or participatory interest below such threshold;

   b. title/possession/usage rights with respect to fixed capital assets (excluding non-industrial immovable buildings and structures, as well as land plots) and soft assets of another entity, if the book value of the acquired property exceeds 20% of the book value of the fixed capital assets and soft assets of the seller;

   c. rights to determine the conditions on which a Russian or foreign company does business or the right to act as its executive body;

   d. if such transactions are carried out by entities or corporate groups meeting the basic approval criteria and the aggregate asset value as per the latest balance sheet of the target entity and its group exceeds 250 million rubles; or

5. if one of the entities participating in any transaction detailed in points 1-3 above or a member of the corporate group of the participating entity is in the Register of entities with a dominant market position (the “Register”). Notably, no other criteria (including the basic approval criteria) will be considered if one of the participating entities is in the Register – in this event approval is mandatory (more on the Register in part 3 of this review below).

While most of the above criteria are clearly and definitively stated, “rights to determine the conditions on which an entity does business” raises the most questions: the law does not provide a clear definition (although it does state that rights transferred under trust,
joint venture and suretyship agreements fall within its scope). Unsurprisingly, the rule applies to the purchase of a controlling shareholding or participatory interest, but, in general, the FAS takes a case-by-case approach. The antimonopoly authority is not opposed to changing its views: for example, veto rights, previously a matter of much disagreement between lawyers of transacting entities and the FAS, are now quite clearly no longer considered “rights to determine the conditions on which the entity does business”.

There are exceptions to the prior approval requirements. Transactions entered into pursuant to acts of the President or Government form one such exception, as do transactions within a group of entities. The latter are covered by a simpler procedure of subsequent FAS notification provided that (a) the transaction would generally need to be approved under any of the criteria outlined above, and (b) the list of entities constituting the corporate group was submitted to the FAS at least a month before the transaction and the information in the list is still relevant. The notification is to be filed within forty-five days of concluding the transaction by an entity “interested in the transaction or created as a result of the transaction”.

The provisions relaxing Control over intra-group transactions appear a reasonable way to simplify the conclusion of common restructuring transactions. However, at the same time, a reasonably extensive set of documents must be sent with the notification – identical, in fact, to the set of documents filed with a petition – so the difference effectively comes down to interacting with the FAS at a later point. There is also another major exception – transactions between parents and subsidiaries are excluded from Control.

The procedures for submitting the requested information and consideration of petitions and notifications, and scope and the form of documents to be provided (including the form for the list of entities constituting the group) are regulated by the Competition Law and FAS Orders and Regulations. If the information required under the law is not submitted in full, the petition will not be considered filed (although the FAS may, in fact, request certain data from the filing entity or obtain it from other authorities). State duty of 20,000 rubles is charged for an FAS decision on a Control-related petition.

The decision must be made within 30 days of receiving the petition; over this period the FAS must approve the transaction, reject the petition, or extend the consideration period (the Competition law provides grounds for extension and rejection, including similar decisions having been made on petitions related to

the same transaction submitted pursuant to the Law on Foreign Investments in Strategic Companies). FAS approval is sometimes delivered to the participating entities together with a directive containing a list of actions the petitioning entity must undertake to avoid “restricting competition”. In this case the approval is only valid if the directive is fulfilled. The actions prescribed by the FAS may vary. The participating entity may be required to maintain a certain internal structure, elect an executive board, or regularly report certain data to the FAS. Bans on participating in mergers and raising prices over a certain period of time are also quite common.

FAS approval is valid for a year, during which the transaction must be concluded or the whole procedure has to be performed again.

Violation of the Control regulations may result in the transaction being judged unlawful and invalid if it actually does restrict competition, in which case all consequences provided by Russian law will apply, up to and including complete restructuring or dissolution of the newly incorporated company. A penalty of up to 500,000 rubles may also be levied under the Russian Code on Administrative Violations.

Past and future changes

With reference to the liberalization of Control regulations, two things in particular stand out: the recent abolition of subsequent notification for a number of transactions and upcoming changes that may just abolish the Register.

Subsequent FAS notification, a procedure discussed above with respect to intragroup transactions, was previously required for a much wider scope of transactions. The asset value and revenue thresholds triggering such notification were, in fact, quite low. However, the policies of “reducing administrative burdens”, “strengthening competition conditions”, etc. prevailed, and this procedure is no longer required for transactions concluded after 30 January 2014.

The Register has been repeatedly criticized. As of right now, entities controlling more than 35% of a certain market or otherwise in a dominant market position must be entered in the Register. As opponents have brought up

5. The quotes taken from the comments of authorities, bill originators to the draft amendments bill No. 423-FZ on Amendments to Federal Law No. 135-FZ on the Protection of Competition.
more than once, no developed country has a control tool analogous to the Register. In addition, some companies widely known informally as the obvious dominant players on their market (such as Rostekhnologii, Obyedinennaya sudostroitelnaya korporatsiya, etc.) are not in the Register at all, with only “small and medium businesses” mainly featuring. Such businesses struggle to survive Russian competition as it is, and so many of them being in the Register (necessitating a considerable amount of transaction approvals and filing of additional report forms) appears to be a direct contradiction of the official state goal of supporting small and medium businesses.

Nevertheless, the FAS has supported the Register for a long time, claiming it was essential to control “local monopolies”. Long and heated debate ensued, finally reaching a conclusion among all concerned: the abolition of the Register is indeed in the books as part of the fourth “wave” of changes to antimonopoly law. The amendments introduced in this “wave” are considered among the harshest yet, with many in the business community commenting on the potential for abuse and generally restrictive nature. However, these amendments (likely to be approved by the end of 2014) will most probably also remove the Register from the long list of FAS powers. This in turn will lead to significantly fewer applications for prior FAS approval. At the same time, the FAS will continue the fight against local monopolies, as affirmed by the head of the service, Igor Artemiev. To compensate for the lack of the Register, the FAS plans to make good use of sufficiently heavy administrative penalties with the idea that if “local monopolies start acting up”, the penalties “will make them behave”.

From present to future

Past and future changes in Control regulations have been met with cautious optimism. However, many market-hindering blind spots and imperfections remain. One of the most persistent problems is disclosure of the ultimate beneficiary of a corporate group. Ever since the financial crisis of 2008-2009, the FAS has been firmly of the mind that such information is necessary to approve a transaction, noting that the service wants to know “who is behind the deal”?. The authority has not changed its position since then, and for all the complaints and talks of unlawful intrusion into personal lives, information on the ultimate beneficiary has become required for the approval of transactions by all FAS divisions. Non-disclosure may lead to the stay of a petition, return of the petition, or even rejection (although the latter is now a rarity).

A development program exists for antimonopoly legislation (aptly named the “Road map”), although in reality this does little to deter everyday debates and initiatives with respect to the Competition Law and relevant acts (and indeed may even encourages). It is safe to say that the amendments to antimonopoly regulations are not over, and there is a strong possibility that regulation of economic concentration will also see changes. So far, the amendments have made Control procedures simpler, giving markets grounds for optimism. But there will be no future regulations to change the most important constant: FAS requirements for approval and notification and other Control procedures must be followed scrupulously.

Contact

Marat Mouradov
Partner, head of Dentons’ Russian Competition Practice
T +7 495 644 05 00
marat.mouradov@dentons.com
dentons.com


7. The quotes taken from the comments of authorities, bill originators to the draft amendments bill No. 423-FZ on Amendments to Federal Law No. 135-FZ on the Protection of Competition.
Kazakhstan

Today, one of the procedures limiting investment is excessive state control of economic concentration, which takes the form of requiring the prior consent of the Antimonopoly Agency for the transactions referred to in article 50 of the RK Law on Competition (the “Law”).

According to the Law, the following transactions require approval by the Anti-Monopoly Agency:

• reorganization of a market entity in the form of merger and incorporation;
• acquisition of more than 25% of shares in the charter capital of the legal entity if prior to the acquisition the acquirer (or its group) did not own shares in the target or owned 25% or less of the voting shares in the target;
• acquisition, receipt into possession or use, including through payments (transfers) to the charter capital, by a market entity of fixed assets and/or intangible property of another market entity, provided that the balance sheet value of the property subject to the transaction exceeds 10% of the balance sheet value of the fixed assets and intangible property of the transferring market entity (i.e., seller);

According to recent amendments to the Law, notification regarding the acts mentioned below must be filed with the Antimonopoly Agency within 45 days from the date of such acts:

• acquisition of rights allowing obligatory executive orders to be issued to another market participant, allowing such market participant’s business activities to be influenced, or allowing a member of the executive body or board of directors/supervisory board of one market participant to serve in another market participant’s executive body or board of directors/ supervisory board;
• participation of the same individual(s) in the executive bodies, boards, supervisory councils or other management bodies of two or more market participants, if such individuals exercise control over the business activities of said market participants.

At first glance it may seem that recent amendments introducing the notification procedure are intended to improve the consent procedures for market participants. However, from a practical viewpoint these amendments are not significant. First, the list of documents to be presented to the Antimonopoly Agency with the notice is the same as for obtaining consent to economic concentration. The issue here is that the current Law requires large market participants submitting petitions to present a large volume of documents and information, which may take several months to review. Second, the Agency continues to have the right to cancel transactions or suspend closing for 45 days from receipt of the notice. The practical effect of the second factor is that due to the risk of cancellation the parties must still wait for review of the notice to be completed before closing the transaction.

Transactions defined as an economic concentrations are subject to approval by or notification of the Anti-monopoly Agency if the total balance sheet value of the assets of (i) the market entities which are under reorganization (including their group of companies) or (ii) the acquirer (including its group of companies) and also the market entity the shares/ charter capital participatory interest/ unit shares with voting rights of which are being purchased; or their total volume of sales of goods for the last financial year exceeds ten million times the amount of the monthly assessment index (i.e., approx. US$101.7 million); or one of the entities participating in the transaction is a market entity holding a dominant or monopoly position in the appropriate commodity market.

Certain provisions of current legislation are still drawing questions from market participants and obstructing the simplification of the antimonopoly authority’s prior consent procedure as part of economic concentration control. Some of these questions are described below.

Petition review periods

The Law requires the antimonopoly authority to verify that all materials have been submitted and notify the petitioner in writing whether a petition for consent to economic concentration has been accepted for review or rejected within 10 calendar days of its receipt (preliminary review). If accepted, it should be reviewed within 50 calendar days. Therefore, the total period is 60 days. However this period established by the Law is excessively long for most investment projects. Investors simply cannot wait that long to complete a transaction. Investors have abandoned some deals because of this extended review period, which reduces Kazakhstan’s attractiveness for investment and is hindering economic development. In the Russian Federation and Belarus the review period is 30 days, which makes Kazakhstan less attractive by comparison.
In practice, even if the Antimonopoly Agency does not request additional information, the actual period needed for review is usually delayed to 80-90 days.

**Scope of information provided**

The Law provides a precise list of the documents and information that require a notice/petition to be filed with the Antimonopoly Agency with respect to an economic concentration. However, in addition to the indicated information, the antimonopoly authority often requests information of the following nature:

However in practice provision of the following poses certain problems: name, legal and actual address, form of shareholding, size of charter capital or size of shareholding(s), and types of shares, and for individuals: information about ID card (passport or other document certifying the individual's identity), and information about nationality and place of residence (the "General Information").

Collection and provision of the above information is not difficult when it applies to local or small foreign companies. But it is practically impossible when it applies to major multinationals, which commonly have groups comprising several hundred affiliates around the world.

In practice, gathering this kind of information, allowing for the need to obtain corporate disclosure approvals, can take a few months. These periods are economically unjustified in view of the importance and urgency of many projects. Therefore, investors turn to transaction structuring and investing in other regions. Moreover, companies often refuse to present any information if their additional business is not related to the subject of the transaction.

In addition to the above, the Antimonopoly Agency usually requests the following information:

"Please confirm that (i) no member of the executive body, board of directors/supervisory board of any company in the Purchaser’s group owns shares and/or participatory interests in the charter capital of any other market participant in the Republic of Kazakhstan and (ii) that no member of the executive body, board of directors/supervisory board of a company in the Purchaser’s group holds a position in the executive body, board of directors/supervisory board of any other market participant in the Republic of Kazakhstan."

We believe that confirmation of the above is also difficult and impractical, since this takes a considerable amount of time.

**Incorporation**

The Law provides an exhaustive list of the transactions that are deemed economic concentration. This list does not include the establishment of a market participant, in which case prior consent of the Antimonopoly Agency is not required. This was confirmed by the Antimonopoly Agency in official letter No. 03-5/7503 of November 11, 2009.

However, in a reply dated February 1, 2011, the Antimonopoly Agency took a different position and asserted that the notion of “acquisition of rights to property” encompasses the notion of “creation”. Therefore, the acquisition by a market participant of more than 25 percent of a new company (i.e., the company to be established), provided the established threshold is met, is economic concentration and requires prior consent. Such a requirement is stipulated in the newly adopted Model Law on Competition of CES.

The situation described above suggests that there is no clear position on this issue in the law or enforcement practice.

**Conditional approval of economic concentration**

The Law as applicable until the amendments of March 6, 2013 provided that consent may be obtained for an economic concentration where a market participant or group obtains or strengthens a dominant or monopoly position and/or the transaction restricts competition if the participants in the economic participation can prove that the benefits of their acts will outweigh the adverse consequences on the goods market where the economic concentration takes place. However, this rule no longer exists. The Law also contains no express provision for this possibility. This rule gave dominant market participants the opportunity, provided the economic concentration had beneficial effects and mitigated the adverse consequences, to develop their businesses, fairly increase their market share and establish major companies in Kazakhstan capable of competing not only in the SES but also in the WTO-members. It could, therefore, be sensible to provide this rule in the Antimonopoly Code of the Common Economic Space, which is to be adopted within the next few years.

**Potential consequences for failing to obtain consent**

Economic concentration that was made without the consent of the antimonopoly body and which resulted in establishment or consolidation of the dominant or monopoly position of the market entity or group of persons and/or restriction of competition may be recognized by a court as invalid under a claim of the antimonopoly body. Such violation also leads to administrative penalty (up to 3,704,000 tenge (approximately $20,350)).
Contacts

Aygoul Kenjebayeva
Managing Partner, Dentons Almaty
T +7 727 258 2380
aigoul.kenjebayeva@dentons.com
dentons.com

Akylbek Kussainov
Associate, Dentons, Almaty
T +7 727 258 2380
akylbek.kussainov@dentons.com
dentons.com
Ukraine

The 2001 Law on the Protection of Economic Competition (the “Law”) established a list of acts deemed economic concentration, cases where the consent of the Anti-Monopoly Committee of Ukraine (the “AMK”) is required for concentration (thresholds), criteria of acts not deemed concentration, and other fundamental rules relating to regulation of economic concentration by the AMK.

Under art. 22 of the Law, the parties to acts qualifying as concentration must obtain the prior consent of the AMK for such acts, provided the acts meet certain economic criteria (thresholds) established by the law. The following acts are deemed concentration:

1. Merger or accession of economic undertakings;
2. Acquisition of control over an economic undertaking or part thereof, including by means of acquisition of ownership or use (lease) of the assets of an economic undertaking as an entire property complex or structural division, or acquisition of control over the governing bodies of an economic undertaking (including through the conclusion of various agreements governing the management of companies or their property, appointment of persons to management bodies, etc.);
3. Creation by two or more economic undertakings of a new economic undertaking that will independently carry out economic activities on a long-term basis;
4. Direct or indirect acquisition or management of shares/participatory interests in an economic undertaking giving 25 or 50 percent or more votes in the supreme governing body of such undertaking.

Ukrainian antimonopoly law uses the term “economic undertaking”, which has certain nuances, when discussing concentration control. Under the Law, an economic undertaking is any legal entity or individual that carries out activities to produce, sell or purchase goods, or other economic activity, including exercising control over another person. In practice, however, the AMK considers an economic undertaking to be any legal entity that holds any kind of assets and has the potential to conduct economic activities, even if such entity has only just been established. Therefore, it is common practice to obtain AMK consent for the acquisition of shares in a company that is not conducting any economic activity and is not controlling other companies, i.e., which is not captured by the definition of “economic undertaking”, but which has certain assets of interest to the purchaser. Notably, the AMK takes the clear position that foreign individuals and legal entities are also economic undertakings for the purposes of the Law.

Certain acts that meet the formal requirements of concentration are not deemed concentration and do not require the AMK’s consent. These acts include:

1. the creation of an economic undertaking for the purpose of coordinating competitive behavior (this is considered an approved anticompetitive act and requires special consent from the AMK);
2. acquisitions of shares/participatory interests in an economic undertaking by a financial institution or securities trader, if such acquisition is made for the purpose of subsequent resale within one year of the acquisition of such shares/participatory interests;
3. in certain cases, acts between economic undertakings with control relations;
4. acquisition of control over an economic undertaking or part thereof by an arbitration administrator or authorized representative of state authorities.

The most important of these exceptions is the one concerning transactions within a group of companies with control relations. Under this rule, transactions within a group are not concentration, since no changes affecting market behavior or participation in competition by such undertakings take place.

As noted above, acts that are deemed concentration require the consent of the AMK if such acts reach the thresholds established by the Law. These thresholds include sales volumes and book asset value of the parties to the concentration for the financial year preceding the concentration, or share of the market in which the concentration is to take place.

At present, AMK consent is required for transactions that are deemed concentration and which meet all of the following three criteria:

1. total asset value or total goods sales for all parties to the concentration, with consideration for control relations (as defined below) for the last financial year in Ukraine and abroad exceeds the equivalent of EUR 12 million;
2. asset value or goods sales in Ukraine and abroad by at least two parties to the concentration, with consideration for control relations, exceeds the equivalent of EUR 1 million; and
3. asset value or goods sales in Ukraine by at least one party to the concentration, with consideration for control relations, exceeds the equivalent of EUR 1 million.

Consent for concentration is also required irrespective of asset value or sales volumes in cases where the market share of at least one party to the concentration or the total share of all parties to the concentration, with
consideration for control relations, exceeds 35 percent and the concentration is on that or a neighboring market.

Importantly, “control relations” must be taken into consideration when determining the above thresholds, i.e., the group of the respective party to the concentration. This means that when calculating asset value, goods sales volume, or market share it is necessary to consider not only the respective indicators for the parties directly involved in the concentration, but also for the persons related to them by “control relations”, up to their beneficiary owners.

The above thresholds are clearly obsolete and out of line with current economic conditions and the objectives of antimonopoly control over concentration. The Supreme Rada is considering draft amendments to the Law that provide for a significant increase in the thresholds triggering the requirement for AMK consent to transactions.

The procedure for filing and consideration of applications for consent to concentration are governed by the Concentration Regulations approved by the AMK in 2002. The documents to be filed with the AMK include the consent application, information on all the parties to the concentration, their related persons, the nature and financial and market aspects of the concentration, information on the economic activities of the parties to the concentration, members of their governing bodies, the economic justification for the concentration, corporate documents and financial statements. This list of documents is not exhaustive, as the AMK has the right to request any other documents that, in its view, are necessary for full and impartial analysis of the concentration.

The principal difficulties encountered by transaction parties when preparing documents for the AMK arise during preparation of information on related persons and calculation of the market shares of the parties to the concentration. In the first case, the issue is the depth and breadth of the information to be disclosed. The AMK demands the provision of information on all beneficiary owners (individuals) of the purchaser and the acquisition target owning 10% or more votes in the parent company of the group. Often the applicant is not inclined to divulge this information, or other information on its related persons. Notably, the failure to provide or provision of incomplete information may be formal grounds for refusal to consider an application or delay in consideration until all the necessary documents have been filed.

Independently calculating market shares can also be problematic, since it requires at least the availability of market research for the respective goods markets that appears reliable and persuasive to the AMK. If neither the seller nor the purchaser has such research, determining market share can have a significant impact on the time needed to file the application with the AMK, since it may become necessary to engage an expert organization to carry out the calculation.

Upon consideration of the concentration application, a decision may be made to approve or prohibit the concentration. In the event that consent is refused, the AMK may suggest the applicant undertake certain actions or obligations as conditions for the AMK granting consent to the concentration. A decision to grant consent to the concentration may also be contingent on the parties to the concentration meeting certain requirements and obligations to avoid or mitigate adverse consequences for competition. Such conditions may include the sale of certain assets, obligations not to implement unjustified price increases or not to reduce production volumes, etc.

An AMK decision prohibiting concentration may be appealed in court. However, although the court may cancel the AMK prohibition, it does not have the authority to grant consent for a concentration, which is in the sole competence of the AMK. Therefore, even in the event of a win in court, the parties to a prohibited concentration will have to reapply to the AMK for consent to the previously prohibited concentration. As a result, such court disputes are rare in practice. In theory, a concentration prohibited by the AMK may be permitted by the Ukrainian Cabinet of Ministers if the public interest advantages of the concentration outweigh the adverse consequences of the restriction of competition.

Effecting a concentration without obtaining the AMK’s consent is a violation of the Law. The Law imposes penalties for such violations in the form of a fine of up to 5% of the annual income of the party to the concentration that committed the violation. The “party to the concentration that committed the violation” does not only mean the actual purchaser of the shares, participatory interests, etc., but also any parties in control relations with that party. In practice, the AMK imposes fines for such violations that are significantly below the maximum established by law. The statute of limitations for such violations is five years from the date of the violation, that is, from the date the concentration took place.
Contact

Vladimir Monastyryskyy
Dentons Partner, Kyiv
T +380 44 494 4774
volodymyr.monastyryskyy@dentons.com
dentons.com
Belarus

Amendments to Republic of Belarus legislation on economic concentration

Republic of Belarus Law No. 94-Z on the Prevention of Monopolistic Activity and Development of Competition of 12 December 2013 (the “Law”), which enters into force on 1 July 2014 and replaces the previous antimonopoly law, imposes new requirements on transactions that affect or are capable of affecting competition, and revises the procedure for control of economic concentration.

The Law consolidates the provisions governing economic concentration in existing regulatory legal acts concerning state control over economic concentration, and revises these rules on the basis of article 10 of the Agreement on Common Principles and Rules of Competition of December 9, 2010.

Requirements for transactions that affect or may affect competition

Under the applicable Law No. 2034-XII on the Prevention of Monopolistic Activities and Development of Competition of 10 December 1992, and Presidential Decree No. 499 on Certain Measures to Improve Antimonopoly Regulation and Develop Competition of 13 October 2009, the following acts require the prior consent of the antimonopoly authority:

• certain transactions to acquire direct or indirect control over the activities of a dominant economic undertaking;

• transactions to acquire a participatory interest/shares in an economic undertaking operating on the market for a certain good, if the purchaser has 30% of the market for a similar good;

• transactions to acquire 20% of shares/participatory interest in the charter capital of a legal entity holding a “special” economic status, namely an entity with a book asset value of more than 100,000 basic units8 (approximately EUR 1,071,430), or a goods/works/services sales volume of more than 200,000 basic units (approximately EUR 2,142,857).

Applicable law also provides separate rules on the procedure for obtaining the antimonopoly authority’s consent for the establishment or restructuring of holding companies, unions, associations, and other groupings of economic undertakings, which are not covered in this article.

The new Law provides that the antimonopoly authority’s consent is only required for corporate transactions if one of the parties to the transaction meets the previously established criteria for a person with “special” economic status, or holds a dominant position on a certain goods market.

In particular, consent is required for transactions to restructure legal entities, provided that one of the restructuring commercial organizations or one of the founders of the commercial organization or association of economic undertakings being established has “special” economic status or a dominant position on a certain goods market.

Certain transactions to acquire participatory interests/shares in Belarusian legal entities require the prior consent of the antimonopoly authority if the target entity has “special” economic status.

Notably, in addition to transactions to acquire participatory interests/shares in legal entities, the Law introduces a new category of transactions that require antimonopoly consent if the criteria established in the Law are met, namely that transactions to acquire the right of one and the same persons to participate in the executive bodies or other governing bodies of two or more economic undertakings operating on a market for interchangeable (similar) goods, provided that the said persons are able to determine the conditions on which the said economic undertakings do business. Previously, there were only certain restrictions on such transactions provided in the regulations on transactions with affiliated companies.

The Law also resolves the ongoing debate with respect to situations in which over the course of a year a purchaser may acquire, for example, 15% of shares/participatory interests in a legal entity with “special” economic status, followed by an acquisition of a further 10%, where each individual transaction is less, but the aggregate is more, than the 20% of shares/participatory interests threshold triggering the requirement for prior consent of the antimonopoly authority. In particular, with respect to share/participatory interest transactions, the Law provides that consent is required for transactions by persons holding less than 25% of shares/participatory interest if they are purchasing 25% or more of the shares/participatory interest in an entity with “special” economic status, as well as transactions by persons holding from 25% to 50% of shares if they are acquiring more than 50% of shares/participatory interest in an entity with “special” economic status.

---

8 As at 12 June 2014 a basic unit is 150,000 Belarusian rubles. For the purpose of this article an average euro/Belarusian ruble exchange rate of EUR 1/BYR 14,000 has been used.
The Law introduces a number of exemptions from antimonopoly authority consent in cases where a restructuring transaction or acquisition of participatory interests/shares in a company is effected by persons within a single group of persons, provided any party to the transaction has more than 50% of the total voting shares/participatory interest in another party to the transaction. Such transactions between persons in a group of persons are to be carried out with subsequent written notification of the antimonopoly authority. The Law also provides a number of cases in which the antimonopoly authority may approve a transaction that may create or strengthen the dominance of the parties on a goods market if the parties can prove that the transaction will have certain socially beneficial results.

We also note that neither the Law on the Prevention of Monopolistic Activities and Development of Competition of 1992 nor the new Law require the consent of the antimonopoly authority for transactions between companies in foreign jurisdictions that sell goods/services in Belarus, irrespective of their volume and value, independently, via a distributor network, or through subsidiaries, provided such subsidiaries do not have a dominant position on the market.

The procedure for obtaining antimonopoly authority consent for transactions with participatory interests/shares in legal entities, as well as the list of documents to be submitted for consideration by the antimonopoly authority, is provided in Republic of Belarus Ministry of Economics Resolution No. 188 of 30 November 2009. The antimonopoly authority has the right to deny consent if the transaction may result in the creation or strengthening of economic undertakings’ dominant position on a goods market, and/or the prevention, restriction, or elimination of competition.

However, practice shows that transactions may be denied consent for other reasons. In particular, this applies to entities that have state capital or are otherwise under the control of the state. For example, when reviewing documents for a proposed transaction the antimonopoly authority has the right to request the opinion of unions/associations existing in sectors corresponding to the principal goods of the parties to the transaction, as well as the unions and associations in which the parties to the case are members.

**Consequences of effecting economic concentration without obtaining antimonopoly consent**

Presidential Decree No. 499 previously provided for the right of the antimonopoly authority to bring an action in court seeking the invalidation of agreements concluded contrary to antimonopoly law. This rule is also reflected in the new Law, however, the language has been changed. The Law provides separate consequences for effecting a transaction without the prior consent of the antimonopoly authority (where such consent was required) for restructuring of legal entities and share/participatory interest acquisitions. Failure to obtain antimonopoly consent to the reorganization of a legal entity is grounds for a court to declare such acts invalid upon a claim by the antimonopoly authority. We note that this framing is inconsistent with the terminology of procedural and civil law, which does not provide for deeming acts of parties in the commercial cycle invalid (void or voidable). The consequences effecting transactions with shares/participatory interests in legal entities without obtaining the consent of the antimonopoly authority are analogous to those provided in Decree No. 499.

Like the 1992 Law on the Prevention of Monopolistic Activities and Development of Competition, the Law provides for compulsory restructuring of dominant entities upon a claim by the antimonopoly authority in the event that such entity violates competition law. We note that in practice there has not yet been a case of such compulsory reorganization.

Republic of Belarus administrative penal legislation also provides administrative liability in the form of a fine of up to 50 basic units (approximately EUR 536) for persons that violate antimonopoly law. Notably, despite the status of the Republic of Belarus Administrative Penal Code as the only regulatory legal act that can establish administrative liability rules, certain penalties for violation of competition law are also provided in Presidential Decree No. 114 of 27 February 2012 on Certain Measures to Strengthen State Antimonopoly Regulation and Control. In particular, in accordance with this Decree, a corporate officer that fails to comply with the lawful requirements of antimonopoly authorities or complies with such requirements improperly or late, or fails to present information necessary for the antimonopoly authorities to perform their functions, shall be subject to a fine of up to 100 basic units (approximately EUR 1,070).

In conclusion, we note that, following the entry into force of the Law, a number of secondary acts governing
procedural issues may be correspondingly amended and revised. Therefore, the antimonopoly authority’s practice in granting consent to such economic concentration transactions will also be adjusted in accordance with the new requirements of law. In our view, it will not be possible to assess the practical enforcement of the Law with respect to economic concentration until at least a year after it enters into force.
Economic Concentration Control

It is only natural that in order to expand business and reduce costs, businesses will seek to merge with or acquire other enterprises. Generally, mergers occur through either a stock or asset purchase. However, even where expansion is economically justified and springs from business requirements rather than the aim of monopolizing the market, this intention for expansion may, depending on the size and strength of the companies involved, have adverse effects on other market players and competition in general.

1. How the regulatory control is exercised

In Azerbaijan, competition law is principally set out in the Law on Antimonopoly Activity dated 4 March 1993 (the “Antimonopoly Law”). The State Service for Antimonopoly Policy and Consumer Protection (the “Antimonopoly Service”) is the primary body responsible for enforcing competition law.

The Antimonopoly Law does not expressly provide for the term of economic concentration. Nor are the provisions for such effect sufficiently detailed. The economic concentration control provisions are mainly embedded in the merger and acquisition requirements of the Antimonopoly Law.

Azerbaijani competition law has significant shortcomings in determining the transactions for which the antimonopoly consent should be required, as well as in the analysis of whether or not a contemplated transaction is likely to have a restrictive effect on competition. In this aspect, Azerbaijani practice significantly loses in comparison with common law practice which distinguishes various types of mergers and allows that their impact may not be solely to restrict competition, facilitate collusion among the remaining competitors, or create barriers to entry for new market players. For instance, it is understood that horizontal mergers (merger of directly competing entities which eliminates competition between the merging entities) may serve useful economic purposes. Depending on the particular circumstances, horizontal mergers may create joint operating efficiencies, economies of scale, and financial economies, and even result in price reductions for consumers.

In Azerbaijani practice, economic concentration control is mainly exercised through the Antimonopoly Service granting prior consent with regard to certain transactions provided in the Antimonopoly Law. Antimonopoly consent must be obtained and failure to do so will invalidate the transaction concerned. The concept of preliminary application, post-transaction or voluntary notification are absent in existing legislation.

Under existing competition law, the requirement to obtain the consent will be triggered once certain statutory thresholds are exceeded as follows:

a. Merger or consolidation where the resulting ‘economic entity’ has a share in the relevant market segment in excess of 35%;

b. Merger or consolidation of economic entities where the merging or consolidating economic entities have a combined asset value exceeding 75,000 minimum salaries (currently AZN 7,875,000, or approximately EUR 7,354,315);

c. Liquidation (except for cases of liquidation by a court decision) or deconsolidation of state or municipal enterprises where the liquidating or deconsolidating economic entity has an asset value exceeding 50,000 minimum salaries (currently AZN 5,250,000 or approximately EUR 4,902,876) (provided, in case of deconsolidation, that this creates an economic entity with a share in the relevant market segment in excess of 35%);

d. The acquisition of more than 20% of the voting shares of one economic entity by another (or by an ‘association of economic entities’ or by a group of persons ‘exercising control over the assets of each other’). This does not apply to the incorporation of an entity;

e. The granting of the right of ownership or use of assets representing more than 10% of the balance value of fixed production and intangible assets of an economic entity (or an ‘association of economic entities’, or by a group of persons ‘exercising control over the assets of each other’);

f. The acquisition by an economic entity (or an ‘association of economic entities’, or a group of persons ‘exercising control over the assets of each other’) of the right to determine the business activity or carry out the functions of the ‘supreme management body’) of another economic entity.
The events referred to in (d)-(f) above will require antimonopoly consent provided that:

a. the parties’ aggregate asset value exceeds 75,000 minimum salaries (currently AZN 7,875,000, or approximately EUR 7,354,315); or

b. the market share of any party to the transaction in the relevant market segment exceeds 35%; or

c. the acquirer of shares controls the seller of the shares.

When considering whether to grant the antimonopoly consent with regard to a contemplated transaction, the analysis of the Antimonopoly Service is primarily limited to the above-mentioned criteria, and such factors as market power, actual impact on the market, strength of competition, efficiency of the transaction, etc., are not considered.

The Antimonopoly Law determines the dominant position based on the market entity’s share in the respective market as a numerical value, i.e., more than 35% in the relevant market segment. The new draft Competition Code proposes the introduction of the notion of market power, also elaborating the notion of market dominance, including such factors as (i) the presence of developed competition in the relevant market coupled with the opportunity to impact the goods’ turnover; (ii) joint holding of more than 50% of the market share by a maximum of 3 economic entities; and (iii) joint holding of a maximum of 5 economic entities with a market share in the same goods market of more than 70%.

The draft Competition Code also proposes that dominance in the financial services market is separately identified. It is proposed that financial institutions should be considered to be dominant in the financial services market when: (i) the share of the financial institutions in the market for banking, insurance, leasing and non-governmental pension fund services is more than 25%; (ii) the joint share of at most 3 financial institutions with the largest share is more than 45%; (iii) the joint share of at most 5 financial institutions with the largest share is more than 65%; and (iv) the share of the securities trader in the securities market is more than 10%.

In its current version the draft Competition Code provides separate provisions for merger control, which provide that, whenever required to consider a merger, the regulator must initially determine whether or not the merger is likely to substantially restrict or eliminate competition. When doing so the regulator shall determine whether or not the merger is likely to result in any technological efficiency or other pro-competitive gain which will be more positive than, and offset, the effects of any prevention or lessening of the competition, that may result or is likely to result from the merger, and would not likely be obtained using other methods.

The draft Competition Code proposes that when determining whether or not a merger is likely to substantially restrict or eliminate competition, the Antimonopoly Service shall assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or collude.

The Antimonopoly Law does not provide sufficient clarity in respect of the scope of the application of antimonopoly legislation, and determining its applicability to various transactions have posed challenges in the past. For instance, the Antimonopoly Law does not provide clarity on whether or not global turnover should be considered in the threshold requirements. Nor is it certain whether or not a transaction between two foreign companies involving the acquisition of shares in a foreign target that does not have a presence in Azerbaijan, but has certain business links to Azerbaijan, should trigger the consent requirement.

The Antimonopoly Law defines the scope of application of the law as follows:

- The Law shall be effective within the entire territory of the Republic of Azerbaijan and shall extend to legal entities and physical persons; and

- The Law shall apply even in those cases where contracts and agreements being concluded by commercial entities and regulatory and administrative authorities with individuals and legal entities of foreign countries lead to a restriction of competition in the national market.

Thus, the Antimonopoly Law should not apply in relation to transactions between two foreign entities, so long as such acquisition does not lead to a restriction of the competition in the local market of Azerbaijan.

However, when a market player has certain operations in Azerbaijan, there may be an argument that the proposed assets’ acquisition may have an adverse effect on competition in the local market.

Whether the transaction in question may lead to a restriction of competition in the Azerbaijani market may require a comprehensive economic analysis. If the results of such analysis demonstrate that the transaction may negatively affect competition in the Azerbaijani market, a filing with the Azerbaijani Antimonopoly Service should be contemplated, provided that relevant thresholds are met.
Contact

Kamal Mamadzade
Dentons Partner, Baku
T +994 12 4 90 75 65
kamal.mammadzada@dentons.com
dentons.com
Georgia

Antitrust Control over Economic Concentration

In May 2012 the Parliament of Georgia adopted a new Antitrust Law (the “Law”) based on the recommendations of the European Union. The Law has been in force since 31 March 2014. This is a large step forward for Georgia, as during the last six years the government has been exercising no antitrust control whatsoever. Based on the recommendations of the EU, the Law introduces updated competition regulations and establishes a Competition Agency (the “Agency”) which will be responsible for implementing the Law. The new Law is much more sophisticated and comprehensive than those existing previously, although as in old versions only the abuse of monopoly positions are prohibited, not such positions per se.

Definition of economic concentration

According to the Law, an economic concentration means:

• A merger of two or more independent economic agents, when one new economic agent is formed;
• When a person controlling at least one economic agent acquires direct or indirect control over another economic agent or over a part of its business via the transaction, through the purchase of securities or assets or through other means;
• Participation of one and the same person in governing bodies of various economic agents.

The Law also determines that if a joint enterprise is founded that exercises all the functions of an independent economic agent (entities who regardless of their legal structure perform commercial activities, as well as non-entrepreneurial (non-commercial) legal entities and other types of associations which are participants in a market and/or perform a commercial activity) over a long period of time, this is deemed to be concentration.

Concentration is compatible with a competitive environment only if it does not generally restrict effective competition on the market for goods or services in Georgia or a significant part thereof and which results in a dominant position or strengthening thereof.

Control over Concentration

According to the Law, control over concentration is expressed in rights, agreements or other means that jointly or separately create the opportunity to influence an enterprise or its part, particularly:

• Possession of the enterprise and/or its assets or the right of total or partial usage of its assets;
• A right (including those foreseen under an agreement) that grants influence over the membership of the governing bodies of an economic agent, voting rights or the opportunity to generally influence decisions.

Notification

The Agency is authorized to request information from economic agents acquiring a dominant position as a result of concentration related to those transactions which might substantially restrict competition on the relevant market. This is an additional mechanism of control by the Agency that enables it to prevent the abuse of a dominant position by the economic agent.

Concentration is subject to preliminary notification of the Agency if the value of separate or joint assets or annual turnover (according to the data of the previous financial year of concentration) of its participant economic agent/agents (except economic agents of specially regulated areas of the economy) on the territory of Georgia exceeds the established limited amount by the Rule of Submission and Consideration of the Notification on Concentration (this document has not yet been adopted). The Agency is obliged to consider the notification and inform the applicant of its decision within a month. Based on the possible complexity of a case, this term may be prolonged for a maximum of 2 weeks. Failure of the Agency to respond within the established term will be deemed a positive answer.

The notification on mergers/acquisitions of economic agents must be supported by information on the competitive effect of the envisaged merger/acquisition. A negative conclusion by the Agency shall serve as a ground for the Public Register National Agency to refuse to register the economic agent.

Release from the Obligation of Notification

Activities stipulated under the provisions on concentration shall not be deemed to be a concentration of market power and correspondingly economic agents will not be obliged to give preliminary notification to the Agency if:

• The merger/acquisition of economic agents has insignificant market power;
• The concentration is a result of insolvency and is exercised in accordance with the procedures provided under the Law of Georgia on Insolvency Proceedings and as part of liquidation procedures, except when a competitor entrepreneur or a group that contains competitors of the bankrupt enterprise gains control through this process;
• Control is gained temporarily for the purpose of securing a loan provided that no rights acquired as a result of such possession of assets shall be exercised, except for the right to sell;

• The concentration concerns the participants of mutually dependent persons;

• A financial institution as part of generally authorized activities purchases shares in another enterprise with its own or its client’s funds and gains temporary control over it or acquires assets, provided that a subsequent transaction of its sale takes place within one calendar year of the date of purchase/gaining control. Such institution shall not have rights related to the possession of shares except the right to receive a dividend and it exercises its rights only in preparation for the total or partial sale of assets or shares in the enterprise.

Shortcomings and Recommendations

When no antitrust control was exercised in Georgia, two major monopolized market sectors emerged – pharmaceuticals and oil. However, now that the new Law is applicable, control over these sectors will become stricter and abuse of a monopoly position will not be permitted (according to the Law, a company is considered to be a monopolist if it holds more than 40% of the relevant market).

Recent changes to Georgian antimonopoly legislation now enable the Agency to monitor the market, although antimonopoly control is carried out only when a notification is submitted. However, to improve the activities of the Agency changes to the relevant regulations are required. Such changes should prevent agreements restricting competition. The Agency should actively exercise control over economic concentration, however such control should not entail permanent instructions for or intervention in the activities and interaction between the companies on a market.

The application of antitrust regulations is quite new for the Georgian economy and free market. Taking this into account, the respective authorities should adopt guidelines based on foreign practice which would ensure correct and effective implementation of the Law and would facilitate the process for the actors involved.

Contact

Victor Kipiani
Partner,
Mgaloblishvili, Kipiani, Dzidziguri
T + 995 32 2553880/82
vkipiani@mkd.ge
mkd.ge
Armenia

The Armenian Law “On Protection of Economic Competition” (the “Law”) is the main legal basis for economic competition matters in Armenia and also regulates relations with respect to economic concentration. The general definition of concentration is given in Paragraph 4 of the Law under Articles 8, 9 and 10. Furthermore, there are a number of interpretations made by the State Commission for the Protection of Economic Competition of the Republic of Armenia (the “Commission”) which aim to provide clarifications on concentration matters.

Pursuant to Armenian legislation economic concentration is described as the merger of economic entities or acquisition of the assets or shares of another economic entity which either separately or together with other assets or shares already held by the economic entity constitute 20% of the assets or charter capital of the acquired entity, as well as any other unification of economic entities enabling one economic entity to directly or indirectly influence the decisions or the competitiveness of another economic entity.

According to the Law the participants in a concentration are:

- In the event of a **merger**: the economic entities who merge.
- In the event of **acquisition of assets**: the selling and acquiring economic entities.
- In the event of **acquisition of shares**: the acquiring economic entity and the entity in which shares were acquired.

There are three types of economic concentration:

- **Horizontal concentration** – between economic entities that operate in the same product market (competitor entities).
- **Vertical concentration** – between interrelated entities that operate in different product markets (non-competitor entities that sell or acquire the same or substitutable products).
- **Mixed concentration** – between entities that operate in different product markets.

Concentration of economic entities before it occurs shall be subject to prior declaration if:

a. Participants operate on the same product market (horizontal concentration), and in the financial year preceding the concentration the joint value of their assets was at least 500 million AMD (approximately 42 million rubles) or the value of assets of one participant was at least 300 million AMD (approximately 25 million rubles);

b. Participants operate on the same product market (horizontal concentration), and in the financial year preceding the concentration the joint value of their turnover was at least 1 billion AMD (approximately 84 million rubles) or the value of turnover of one participant was at least 700 million AMD (approximately 59 million rubles);

c. Participants do not operate on the same product market (vertical and mixed concentration), and in the financial year preceding the concentration the joint value of their assets was at least 1 billion AMD (approximately 84 million rubles) or the value of assets of one participant was at least 700 million AMD (approximately 59 million rubles);

d. Participants do not operate on the same product market (vertical and mixed concentration), and in the financial year preceding the concentration the joint value of their turnover was at least 3 billion AMD (approximately 251 million rubles) or the value of turnover of one participant was at least 2 billion AMD (approximately 168 million rubles);

e. Any participant of the concentration has a dominant position in any product market.

Economic concentration, subject to declaration or concentration which significantly hinders economic competition, including concentration resulting in a dominant position or in the strengthening of a dominant position, is legitimate provided that the permission of the Commission is obtained. Such permission may contain binding obligations for the participants of the economic concentration. Completion of economic concentration which is subject to prior declaration without the permission of the Commission is prohibited by law. Any prohibited concentration shall be subject to liquidation (termination) in accordance with the Armenian legislation.
Failure to declare a concentration as stipulated by Article 36 of the Law, or participation in (enactment of) a prohibited concentration leads to the imposition of a fine upon the economic entity of up to 4% of turnover for the year preceding the participation in the concentration, which shall however not exceed 500 million AMD (approximately 42 million rubles).

In the event that an economic entity has conducted activities for less than 12 months in the previous year, breach of the above article leads to a fine of up to 4% of turnover for the preceding participation in the concentration, but not more than 12 months of the period of activity, which shall however not exceed 500 million AMD (approximately 42 million rubles).

As mentioned above, there are a number of available clarifying decisions (official interpretations) of the Commission, which also covers concentration matters.

In Decision N 579-N of 9 December 2011, the Commission clarifies the status of the state and state bodies (public authorities) as possible participants of concentration transactions. According to the official clarification of the Commission, the state and state bodies are excluded from concentration control, and no forms of transaction with economic entities will be regarded as concentration. The Commission interprets that for the purposes of the Law the terms “economic entity” and “state body” are separate and independent terms and one does not include the other. In view of Article 8 of the Law, participants to a concentration may be economic entities only.

In Decision N 341-N of 19 August 2011, the Commission clarified the situation where one participant in a transaction is an individual. In determining whether the concentration is subject to declaration under Article 9 of the Law, the participants’ joint value of assets or turnover for the preceding year is considered. For individuals, calculating or considering this is impossible. The Commission subsequently clarified that, in cases where one or more participants in a concentration are individuals, the calculations will be made only for those participants which are not individuals.

Decision N 343-N of 28 December 2010 is particularly noteworthy, as it concerns banks which are participants in concentration transactions. The decision was issued to clarify the situation where, after non-performance of a loan agreement by the borrower, a bank as creditor forecloses the collateral and becomes the owner of 100% of the shares in the economic entity. The Commission clarified that such types of transactions constitute concentration and should be declared to the Commission in accordance with the Law. For the purposes of the Law, banks are also considered economic entities and the Law does not provide special regimes for any specific kind of economic entities, hence banks are also required to submit prior declarations if participating in economic concentrations.

The latest decision of the Commission concerns the calculation of the joint value of assets and the dominant position of an economic entity in the product market. Decision N 294-N of 27 July 2012 provides that calculations concerning concentration shall be made based on legislative acts related to accounting, as well as accounting standards. For the purposes of participation in a concentration, the dominant position of an economic entity in a product market may not necessarily be acknowledged as such by the Commission prior to the concentration transaction, therefore the economic entity bears clear responsibility for a prior declaration of the concentration should the assets thresholds provided by the Law be met.

Contact

Vardan Stepanian
Managing Partner, OOO Karakhanian & Partners Law Firm
T +374 10 529 539
vardan@kp.am
kp.am
Uzbekistan

Economic concentration is defined by the Law of the Republic of Uzbekistan on Competition\(^9\) (the “Competition Law”) as actions leading to the domination of an economic entity or group of individuals which impacts competition in a particular goods or financial market.

Competition is defined by the Competition Law as the ability of economic entities (competitors) through their independent actions to exclude or limit the opportunity for each of them to unilaterally impact the general conditions of goods turnover in a particular goods or financial market.

The State Committee of the Republic of Uzbekistan on Privatization, Demonopolization, and Development of Competition and its territorial bodies (the “Antimonopoly Agency”) is the state agency exercising control over economic concentration in goods or financial markets of Uzbekistan.

Control is aimed at preventing the restriction of competition and the emergence or consolidation of monopolistic activity. Such control is practiced through the review of applications seeking approval for actions defined by the Competition Law.

In Uzbekistan, the following actions of economic entities are subject to control:

- establishment of associations of economic entities;
- merger and acquisition of economic entities;
- purchasing of stocks/shares and other proprietary rights.

**Establishment of association, merger and acquisition of economic entities**

The establishment of associations of economic entities generally requires the prior consent of the Antimonopoly Agency save for some exclusions. This requirement of the Competition Law does not affect the establishment of associations by decisions of the President of the Republic of Uzbekistan or the Cabinet of Ministers of the Republic of Uzbekistan as well as the establishment of holdings.\(^{10}\)

Prior consent of the Antimonopoly Agency for mergers and acquisitions is not needed in every case. However, if at least one of the following criteria defined by the Competition Law is present on the date an application is submitted to the Antimonopoly Agency, prior consent will be required:

**In goods markets**

- total balance sheet value of assets of parties participating in the relevant actions exceeds 100,000 minimum wages\(^{11}\); or
- total revenue from sale of goods for the last calendar year preceeding the year of merger or acquisition exceeds 100,000 minimum wages; or
- one of the economic entities participating in the transaction dominates the relevant market.

**In financial markets**

- total balance sheet value of assets of individuals participating in the relevant actions exceeds the equivalent value of:
  a. US$450 million for banks;
  b. US$25 million for insurance companies;
  c. US$3 million for leasing companies; and
  d. US$400,000 for non-bank credit organizations that are professional securities market participants; or
- one of the participants dominates the financial market.

**Transactions with participatory interest/shares and other proprietary rights of economic entities**

Transactions with stocks/shares and other proprietary rights of economic entities may also be subject to government control.

Such transactions require the prior consent of the Antimonopoly Agency only in cases when at the time of transaction the following circumstances are present:

- total balance sheet value of assets or total revenue from sale of goods for the last calendar year preceeding the year of the parties participating in relevant actions exceeds 100,000 minimum wages; or
- one of the participants is an economic entity holding a dominant position.

---

10. A Holding is an open joint stock company with majority ownership of other companies (Regulation on Holdings approved by Decision of the Ministers’ Bureau of the Republic of Uzbekistan No. 398 dated 12 October 1995, amended on 23 May 2012).
11. 100,000 minimum wages is approximately US$4,214,614.
Furthermore, the Competition Law defines which thresholds for acquired shares/participatory interests in economic entities require the prior consent of the Antimonopoly Agency.

For transactions with shares in joint stock companies, prior consent from the Antimonopoly Agency is required if as a result an individual or group of individuals (the “Person”) receives the right to dispose of:

- 35 percent or more of shares in the joint stock company, if prior to the transaction this Person could only dispose of less than 35 percent of the shares;

- 50 percent or more of the shares in the joint stock company, if prior to the transaction the Person disposed of less than 35 percent and not more than 50 percent of the shares;

- 75 percent or more of shares in the joint stock company, if prior to the transaction the Person disposed of not less than 50 percent and not more than 75 percent of the shares.

To complete transactions with participatory interest in a company with limited or additional liability (the “Company”), prior consent from the Antimonopoly Agency is necessary if as a result the Person receives the right to dispose of:

- 50 percent or more of the participatory interest in the Company, if prior to the transaction this Person could only dispose of less than 50 percent of the shares;

- more than 2/3 of the participatory interest in the Company, if prior to the transaction the Person disposed of not less than 50 percent and not more than 2/3 of the participatory interest.

Prior consent from the Antimonopoly Agency is not required when an economic entity acquires participatory interest or shares in a company by virtue of decisions of the President of the Republic of Uzbekistan or the Cabinet of Ministers of the Republic of Uzbekistan.

The State Committee of the Republic of Uzbekistan on Privatization, Demonopolization and Development of Competition examined 199 applications for prior consent to the purchase of 35 percent stocks and 50 percent of shares in economic entities in the first quarter of 2014.12

---

Contact

Mouborak Kambarova  
Dentons Managing Associate, Tashkent  
T +998 71 120 69 46  
mouborak.kambarova@dentons.com  
dentons.com

Kyrgyzstan

The legal framework for the protection and development of competition is laid down in the law of the Kyrgyz Republic on Competition dated 22 July 2011, which aims to prevent, control and suppress monopolistic activity and unfair competition and ensure conditions for the establishment and efficient functioning of markets (the “Competition Law”).

According to the Competition Law, the consent of the State Agency for Antimonopoly Regulation of the Government of the Kyrgyz Republic (the “Agency”) is required in the following cases:

1. acquisition by an economic entity which occupies a dominant position of shares, stakes or interests in the charter capital of another economic entity operating in the market of the same product;
2. acquisition by any legal entity or individual of a controlling block of shares, stakes or interests in an economic entity which occupies a dominant position (a controlling block is understood as such quantity that directly or indirectly provides for more than 50% of the votes in making decisions at the general meeting of shareholders, founders or interest holders);
3. reorganization (merger, acquisition, transformation) of economic entities (their associations), if it results in the emergence of an economic entity occupying a dominant position;
4. liquidation of entities of natural monopolies and permitted monopolies;
5. merger, acquisition and liquidation of state-owned and municipal enterprises, if it results in the emergence of an economic entity occupying a dominant position.

Consequently, when identifying transactions to be agreed, the Competition Law focuses mainly on the concept of “dominant position”, not on the value of such transactions. The position of an economic entity in a market will be recognized as dominant if one of the following conditions is met:

- the share of the economic entity in a given market is 35% or higher;
- the share of the economic entity exceeds the maximum percentage of dominance established by the Agency, if abuse of a position by economic entities in the market is discovered
- the economic entity holds market power that could have a significant impact on the market (demand, supply, prices, conduct of market players, etc.);
- aggregate dominance of more than three economic entities, where the share of each entity is greater than the share of other entities in this market and in the aggregate exceeds 50%, or the aggregate share of no more than five economic entities where the share of each entity exceeds the shares of other economic entities in the relevant market;
- for a long period (for a period of at least one year or, if that period is less than one year, during the lifetime of the relevant market) the relative sizes of the shares of economic entities have not changed or slightly changed and access by new competitors to the relevant market has been hindered;
- goods sold or acquired by economic entities cannot be replaced by other goods in consumption (including consumption for production purposes), or the information about prices, terms and conditions of sale or acquisition of such goods in the relevant market is only available to a specific group of persons.

Transactions falling within cases (i) and (ii) and concluded without the consent of the Agency that lead to or strengthen a dominant position and, as a result, restrict competition are invalidated in accordance with the legislation of the Kyrgyz Republic.

In cases (iii) to (v), state registration (re-registration) of reorganized or liquidated economic entity is carried out by the Ministry of Justice of the Kyrgyz Republic only with the prior consent of the Agency. Registration carried out without the consent of the Agency is recognized as invalid.

The Agency may deny its consent if such consent may lead to or strengthen the dominant position of the economic entity (or group of persons) and, as a result, restrict competition, or if false information was found to have been provided in the approval process.

The Competition Law establishes that the Agency must inform an applicant in writing of its decision within 10 calendar days of the receipt of all required documents. This rule is established with respect to transactions falling within cases (iii) to (v) above. The Competition Law does not specify the period within which the Agency must make a decision on transactions falling under (i) and (ii). However, it appears that a 10-day period may be applied by analogy to such transactions.
Contacts

Aygoul Kenjebayeva  
Managing Partner, Dentons Almaty  
T +7 727 258 2380  
aigoul.kenjebayeva@dentons.com  
dentons.com

Nurzhan Albanov  
Senior Associate, Dentons Almaty  
T +7 727 258 2380  
nurzhan.albanov@dentons.com  
dentons.com
Control of economic concentration in the CIS and Georgia: a brief summary
## Covered transactions

- Mergers;
- Accessions;
- Establishment (in certain circumstances);
- Acquisition of a controlling stake (25%, 50% or 75% of shares/participatory interests);
- Acquisition of more than 20% of fixed assets;
- Acquisition of rights to determine terms of business; and
- Acquisition of more than 50% of shares/participatory interests or other rights to determine the terms of business of foreign legal entities (if such entity supplies goods worth more than 1 mln rubles to Russia)

## Prior consent/thresholds

**Assets** of the acquirer’s group and the target entity exceed approximately $201.5 mln

**Turnover** of the acquirer’s group and the target entity exceed approximately $290 mln

**Assets** of the target entity exceed approximately $7.2 mln

Any party to the transaction is in the register of entities with a market share of more than 35%

## Post notification/thresholds

Not applicable (except for certain intragroup transactions – according to prior consent thresholds)

## Review period

30 days + 2 month extension

## Consequences of not obtaining consent

- Transaction may be declared invalid
- Administrative fine of up to $14,500.

---

1. This table does not include information relating to control over economic concentration of financial organizations.
# Kazakhstan

## Covered transactions

- Mergers and accessions;
- Acquisition of voting shares/participatory interests in a market actor if the acquirer acquires the right to dispose of more than 25% of the said shares/participatory interests, if the acquirer did not dispose of shares/participatory interests in the said market actor, or disposed of 25% or less prior to the acquisition;
- Obtaining ownership, possession or use of fixed production assets and/or intangible assets) with a book value exceeding 10% of the balance sheet value of the fixed and intangible assets of the market actor alienating or transferring the said property.

## Prior consent/thresholds

Total book value of the assets of the market actors involved in the reorganization or the acquirer and the market actor in which shares/participatory interests are acquired, or their aggregate sales in the previous financial year exceed approximately $101.7 mln.

OR

One of the parties to the transaction is dominant or a monopoly on the respective goods market.

## Post notification/thresholds

- Acquisition of rights to give binding instructions to another market actor during its business activities or to perform the functions of its executive body;
- Participation of one and the same persons in the governing bodies of two or more market actors provided that the said individuals determine their terms of business.

## Review period

10 days for preliminary consideration +50 days, 60 days total

## Consequences of not obtaining consent

- Transaction may be declared invalid;
- Administrative fine of up to $20,352
| Covered transactions | • Mergers and accessions;  
|                     | • Acquisition of control over an economic undertaking or part thereof, or acquisition of control over the governing bodies of an undertaking;  
|                     | • Establishment of a new entity by two or more founders;  
|                     | • Direct or indirect acquisition or obtaining of management of shares/participatory interests in an economic undertaking resulting in control of more than 25 or 50 percent of votes in the supreme governing body of the undertaking |
| Prior consent/thresholds | Assets or turnover of all parties to the concentration exceeds approximately $16.4 mln  
|                        | OR  
|                        | assets or turnover of at least two parties to the concentration exceed approximately $1.36 mln,  
|                        | AND  
|                        | assets or turnover of at least one party to the concentration exceed approximately $1.36 mln,  
|                        | OR IF  
|                        | market share of at least one party to the concentration or the aggregate share of all parties to the concentration exceeds 35% |
| Post notification/thresholds | Not applicable |
| Review period | 15 days (verification of sufficient documents and information) + 30 days (consideration on the merits) - may be extended up to 3 months |
| Consequences of not obtaining consent | • Fine of up to 5% of annual income (income of entire group of related entities) of the offending party to the concentration.  
|                                      | • Transaction may be declared invalid (not applied in practice) |
### Belarus

<table>
<thead>
<tr>
<th>Covered transactions</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Certain transactions to acquire direct or indirect control over an economic entity;</td>
<td></td>
</tr>
<tr>
<td>• Transactions to acquire participatory interests/shares in an economic entity operating on the market for a specific good, with a share of 30% of the market for similar goods;</td>
<td></td>
</tr>
<tr>
<td>• Transactions to acquire shares/participatory interests in the charter capital of a legal entity by a person owning less than 25% of shares/participatory interests, if 25% is acquired, and transactions by persons owning between 25 and 50% of shares/participatory interest if they acquire more than 50% of shares/participatory interests;</td>
<td></td>
</tr>
<tr>
<td>• restructuring;</td>
<td></td>
</tr>
<tr>
<td>• transactions to acquire rights for the same persons to participate in the governing bodies of two or more economic undertakings operating on a market for interchangeable (similar) goods, if such persons determine the terms of business</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Prior consent/ thresholds</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Assets</strong> of the restructuring entity, founder of the restructuring entity, entity in which shares/participatory interests or rights are acquired, exceed approximately $1.46 mln or their <strong>turnover</strong> exceeds approximately $2.9 mln,</td>
<td></td>
</tr>
<tr>
<td>OR</td>
<td></td>
</tr>
<tr>
<td><strong>Dominance</strong> of the entity acquiring the shares/participatory interests, person over which control is established</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Post notification/ thresholds</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Not applicable (except intragroup transactions – according to prior consent criteria)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Review period</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 month</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Consequences of not obtaining consent</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Transaction may be deemed invalid;</td>
<td></td>
</tr>
<tr>
<td>• Administrative fine of up to $733;</td>
<td></td>
</tr>
<tr>
<td>• Fine of up to $1,462 provided for by Presidential Decree</td>
<td></td>
</tr>
</tbody>
</table>
# Azerbaijan

## Covered transactions
- Mergers and accessions;
- Acquisition of 20% or more voting shares/participatory interests in an economic entity;
- Transfer of fixed and intangible assets into the ownership or use of another entity;
- Acquisition of rights to determine terms of business or perform the functions of the supreme governing body.

## Prior consent/thresholds
**Assets** of the entities in which property, rights, or participatory interests are acquired, or which are parties to the restructuring exceed approximately $10 mln, for liquidation and demergers – approximately $6.7 mln,

OR

**market share** of a transaction party on the respective goods market exceeds 35%, or such an entity will result from the restructuring,

OR

The economic undertaking acquiring the shares **controls** the activities of the entity alienating the shares,

OR

The book value of the transferred property exceeds **10%** of the fixed and intangible assets of the alienating entity

## Post notification/thresholds
Not applicable

## Review period
15 days

## Consequences of not obtaining consent
- Cancellation of the respective transaction;
- up to approximately $6,800.
## Georgia

| **Covered transactions** | • Mergers;  
• Acquisition by an individual controlling at least one economic agent of control over another economic agent, or part of its business;  
• Participation of one and the same person in the governing bodies of various economic agents;  
• Establishment of joint ventures performing all functions of an independent economic agent on a long-term basis  
• Ownership of an enterprise and/or its assets, or rights to full or partial use of its assets;  
• Ability to influence the members of the management board of an economic agent, or the right to vote in and ability to generally influence the decisions of the management bodies. |
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prior consent/ thresholds</strong></td>
<td>The value of individual or joint assets, or the annual turnover of the transaction parties in Georgia exceeds the thresholds established by a special regulatory document (not yet adopted).</td>
</tr>
<tr>
<td><strong>Post notification/ thresholds</strong></td>
<td>Not applicable</td>
</tr>
<tr>
<td><strong>Review period</strong></td>
<td>1 month + extension of up to 2 weeks</td>
</tr>
<tr>
<td><strong>Consequences of not obtaining consent</strong></td>
<td>Refusal to register the new economic agent</td>
</tr>
</tbody>
</table>
## Armenia

### Covered transactions

- Mergers;
- Acquisition of more 20 percent of the assets of the economic undertaking;
- Acquisition of more than 20 per-cent of the shares, or participatory interests of the economic undertaking;
- Any other combination of economic undertakings that results in one party being able to affect the decision-making or competitiveness of the other entity.

### Prior consent/thresholds

If the parties operate **on the same goods market**: their assets exceed **$1.22 mln**;

OR

the assets of one of the parties exceed **$729,000**;

OR

their aggregate turnover exceeds **$24 mln**;

OR

the revenue of one party exceeds **$1.6 mln**.

If the parties operate on **different goods markets**: their assets exceed **$24 mln**;

OR

the assets of one of the parties exceed **$1.6 mln**;

OR

their aggregate turnover exceeds **$7.32 mln**;

OR

revenue of one party exceeds **$4.9 mln**.

OR

Any of the parties to the concentration is dominant on the market.

### Post notification/thresholds

Not applicable

### Review period

Up to 90 days

### Consequences of not obtaining consent

Fine of up to 4% of revenue of the economic entity party to the concentration for the year preceding the concentration, but not more than **$1.22 mln**.
Uzbekistan

| **Covered transactions** | • Establishment of associations of economic undertakings;  
• Mergers and accessions;  
• Transactions with shares/participatory interests and other property rights, including transactions with shares/participatory interests exceeding thresholds of 35%, 50% and 70% of shares for joint stock companies, 50% and 2/3 of participatory interests for companies |
|--------------------------|---------------------------------------------------------------------------------------------------------|
| **Prior consent/thresholds** | Assets or turnover of the participating entities exceed approximately $4.2 mln.  
OR  
one of the parties is dominant on the goods market |
| **Post notification/thresholds** | Not applicable |
| **Review period** | 10 business days + extension by not more than one month |
| **Consequences of not obtaining consent** | • Transaction may be declared invalid  
• Administrative fine |
## Kyrgyzstan

| Covered transactions | • Acquisition by a dominant entity of shares/participatory interests, equity in another economic undertaking, and acquisition by any legal entity or citizen of a controlling stake in a dominant entity;  
|                      | • Restructuring (merger/accession, transformation);  
|                      | • Liquidation of natural and permitted monopolies;  
|                      | • Mergers, accessions, and liquidations of state and municipal enterprises. |
| Prior consent/ thresholds | If the acquirer, the target entity or the entity created as a result of the restructuring:  
|                          | • obtains/has a market share of 35% or more (or such market share exceeds the maximum value for dominance established by the antimonopoly authority for the said organization),  
|                          | • has/obtains market power capable of materially influencing the market,  
|                          | • meets/will meet other criteria for market dominance. |
| Post notification/ thresholds | Applicable in the event of acquisition of 10% of shares/participatory interests in a natural or permitted monopoly, acquisition by a natural or permitted monopoly of 10% of shares/participatory interest in another economic undertaking |
| Review period | 10 days |
| Consequences of not obtaining consent | • Refusal to register/reregister the new or restructured legal entity  
|                                         | • Transaction may be declared invalid  
|                                         | • Administrative fine of approximately $1,900. |