

Comparative Summary of Antitrust Laws in the CIS Economic Region

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Kyrgyzstan



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Founded in 2002, Kalikova & Associates has rapidly grown into one of the leading law firms in Kyrgyzstan specializing in Business Law. The firm has proudly built a strong reputation as a reliable partner to many leading foreign companies, international organizations and diplomatic missions. Kalikova & Associates' strength lies in thorough analysis of current law in combination with economic, political and cultural trends in Kyrgyzstan and a bespoke approach to every client project.

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Overview of antitrust laws in Kyrgyzstan

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1. Overview of competition regulations and authorities

1.1. Underlying competition regulations

The key international obligations of the Kyrgyz Republic are contained in the following international treaties to which the Kyrgyz Republic is a party:

1. Agreement on conformed antimonopoly policy (among the CIS members) dated, 12th March 1993;
2. Agreement on conformed antimonopoly policy (among the CIS members) dated, 25th January 2000;
3. Agreement on creating the Economic Union dated, 24th September 1993;
4. Agreement on creating the Unified economic area among the Kyrgyz Republic, the Republic of Kazakhstan and Uzbekistan, dated 30th April 1994;
5. Agreement on the Custom Union and the Unified economic area dated, 26th February 1999;
6. Agreement on main directions of collaboration between the CIS members in the area of protection of consumers rights dated, 25th January 2000;
7. Convention on the protection of rights of investors, dated 28th March 1997;
8. other, including bilateral treaties with Kazakhstan, Uzbekistan, Russian Federation, European Union, Moldova, etc.

The principal competition and antimonopoly laws and Government resolutions are as follows:

- **Codes of the Kyrgyz Republic:**

1. Code of Administrative Liability of the Kyrgyz Republic, dated 14th August 1998;
2. Civil Code of the Kyrgyz Republic (part 2), dated 5th January 1998;
3. Criminal Code of the Kyrgyz Republic, dated 1st October 1997;

- **Laws of the Kyrgyz Republic:**

1. Law on Limiting Monopoly Activity and the Development and Protection of Competition, dated 15th April 1994 (the “Antimonopoly Law”);
2. Law on Natural and Permitted Monopolies in the Kyrgyz Republic, dated 8th October 1999 (the “Law on Monopolies”);
3. Law on Advertisement dated 24th December 1998;
4. Law on Protection of Consumers Rights, dated 10th December 1997;

- **Resolutions of the Government of the Kyrgyz Republic:**

1. Resolution approving the Regulation of the procedure for setting prices (tariffs) of goods (works, services) of business entities regulated by the state, dated 17th July 2003;

2. Resolution approving the Rules for controlling observance of the antimonopoly laws of the Kyrgyz Republic during economic integration, dated 15th March 2008;
3. Resolution approving the Rules for suppressing agreements on fixing prices (tariffs) to limit competition, dated 2nd October 2009;
4. Resolution on the Antimonopoly Agency, dated 4th December 2009.

In addition to the above legal articles, issues relating to competition and antimonopoly policy are governed by the acts of the Antimonopoly Agency, the National Bank of the Kyrgyz Republic and other public authorities.

1.2. Antitrust authorities: structure and competencies

The Antimonopoly Agency is a government agency pursuing the unified government antimonopoly and price regulation policy which consists of the central and the regional bodies established in six regions of the Kyrgyz Republic. It should be noted that the functions of the Antimonopoly Agency in the telecommunications and energy sectors are performed by other special authorities who act as the regulators of their respective sectors.

The main tasks of the Antimonopoly Agency:

- development and protection of competition for the efficient functioning of markets of goods, works and services;
- state enforcement of antimonopoly and pricing legislation;
- protection of legal rights of consumers against monopoly and unfair competition;
- state enforcement of the legislation on advertising.

The main functions of the Antimonopoly Agency, among others, include:

- implementation of unified state antimonopoly, pricing policy in the economy;
- review of complaints and allegations of individuals and legal entities of non-compliance with competition, consumer protection, advertising, and antimonopoly laws of the Kyrgyz Republic, including the illegal actions of government bodies and local authorities;
- imposing fines and economic sanctions on the persons violating the antimonopoly laws of the Kyrgyz Republic;
- participating in court hearings in cases involving violations of antimonopoly legislation, consumer protection and other regulations;
- agreeing the costs of permits issued by the state authorities;
- reviewing applications and notifications of the merger, reorganization, liquidation, purchase of shares in the charter capital of business entities, making other transactions and adopting relevant decisions;
- deciding on the forcible division of business entities with a dominant position in the market;
- carrying out the state antimonopoly examination of the restructuring and liquidation of business entities, transactions and investments made by natural and permitted monopolies, acquisition of shares in the charter capital of business entities and others as provided by law;

- establishing a ceiling for the dominance of business entities in the relevant market of goods, works and services;
- determining, in accordance with Kyrgyz legislation methods of regulating the activity of natural and permitted monopolies;
- negotiating prices (or tariffs) for services (or works), provided by government agencies, local governments and their subdivisions, organizations, institutions, etc.

The Antimonopoly Agency is headed by the Director, appointed by the President of the Kyrgyz Republic. The Director of the Antimonopoly Agency has one deputy.

1.3. Extraterritoriality

The Antimonopoly Law is effective in the entire territory of the Kyrgyz Republic and covers relations in national and regional markets with the participation of any business entities, executive authorities and public officials. The relations connected with competition development in goods and services markets and the restriction of monopolistic activity in the Kyrgyz Republic are regulated by the Antimonopoly Law in compliance with international agreements and corresponding acts of the international organizations in which the Kyrgyz Republic is a member.

Moreover, the Law on Monopolies provides that state control in the spheres of natural and permitted monopolies incorporates any transactions made by groups of people, based on definition that allows application of the extraterritorial principle.

2. Prevention of monopolistic activities and unfair competition

2.1. Overview

The Antimonopoly Law prohibits unfair competition which includes disclosure of information that might impair the business reputation of another business entity or mislead consumers regarding the quality of goods or the advertising of goods which do not meet the quality requirements.

Also it is prohibited for business entity to create a dominant position in the market which includes the prohibition of withdrawing goods from circulation for the purpose of the creation and maintenance of a deficit in the market or price increase, imposing conditions that are unprofitable for counteragents, the creation of barriers to entry or exit from the market for other business entities, or the infringement of pricing policy established by law.

The antimonopoly regulations prohibit any agreements (or coordinated actions) between competing business entities (potential competitors) taking in aggregate the dominant position if such agreements (coordinated actions) could cause a substantial restriction of competition. Also, the acts of executive authorities restricting the rights of business entities when selling goods in the market, except for those acts that are allowed by the laws of Kyrgyz Republic, might be invalidated under these regulations.

2.2. Dominance

The Antimonopoly Law differentiates between such concepts as “monopolistic activity” and “dominant position”.

Monopolistic activities are those of business entities or executive authorities undertaken to achieve the restriction or elimination of competition, or to misuse a dominant position in the market or the economic dependence of counteragents, which result in damage to public interests, interests of other business entities and the interests of consumers.

A dominant position is the exceptional position of a business entity in the market of certain goods which enables it to impact upon competition or to complicate access to the market to other business entities. A business entity has a dominant position if its share of the corresponding market of certain goods exceeds 35% or another percentage annually set by the Antimonopoly Agency.

To prevent certain business entities attaining a dominant position the Antimonopoly Agency exercises preliminary state control of the creation, merger and joining of unions, associations, concerns, interindustrial, regional and other consolidations, enterprises, and other.

2.3. Monopolistic agreements and concerted actions

The Antimonopoly Law prohibits any agreements (or coordinated actions) of competing business entities (potential competitors) taking in aggregate the dominant position if such agreements (coordinated actions) are aimed at:

1. the establishment (maintenance) of prices (tariffs), discounts, allowances (surcharges), margins;
2. increasing, decreasing or maintaining the prices at auctions;
3. market division by territory, sales and purchases volume, assortment of the goods or by sellers or buyers (customers);
4. restriction of access to market or exclusion from it of other business entities as sellers or buyers (customers) of certain goods;
5. refusal of contract with certain sellers or buyers (customers).

In exceptional cases, the above-stated agreements (coordinated actions) of business entities can be recognized by the Antimonopoly Agency as lawful if the business entities prove that their agreements (coordinated actions) promote or will promote the market saturation of goods, lead to an improvement of consumer welfare and increase their competitiveness, in particular in foreign markets.

2.4. Unfair competition

Unfair competition is any action of business entities aimed at gaining an advantage in entrepreneurial activities which contradicts current legislation, customs of trade, the requirements of respectability, rationality and justice, and can cause or has caused losses to other competing business entities or can impair or has impaired their business reputation.

The Antimonopoly Law contains the list of actions which can be regarded as unfair competition:

1. spreading false, inaccurate information (misrepresentation of information), with the capacity to damage the business reputation of another business entity;
2. misleading consumers regarding the character, method and place of production, properties, usability or quality of goods;
3. unauthorized use of a trade mark, company name or goods marking, unauthorized copying of the form, packaging, or attribute of the goods of other business entities;
4. advertizing of goods which do not meet the quality requirements;
5. unauthorized use or disclosure of confidential scientific and technical, production or trading information;
6. actions which can cause doubts concerning the enterprise, goods or industrial or trading activity of a competitor.

Antitrust investigation

An antimonopoly review is instigated based on the claims of individuals and legal entities, state government or local self-government bodies or on the initiative of the Antimonopoly Agency (e.g. as result of inspection). In cases of an infringement of legislation on unfair competition, the Director of Antimonopoly Agency makes the decision whether or not to order an investigation by the Antimonopoly Agency's Board in which state government, local self-government bodies, and public associations are represented.

Based on the findings of the investigation on antimonopoly legislation infringement, the Board can make the decision in the form of a resolution (prescription) which can lead to:

1. elimination of violations of antimonopoly legislation, in the case of unfair competition;
2. imposition of a penalty, including the recovery of illegally received income;
3. referral of the case to state bodies, which have the competence to conduct a criminal investigation;
4. referral of the case to judicial or law enforcement bodies;
5. termination of the case.

Persons, in whose respect the decision was made, must, within the time specified in the decision, report to the Antimonopoly Agency about the actions taken. In the case of a disagreement with the decision, the parties may appeal it to the court.

2.6. Implications for infringers

Civil liability

Pursuant to Kyrgyz laws, transactions made in violation of antitrust laws might be declared invalid at the claim of the person concerned. In addition, Kyrgyz antimonopoly laws provide for the common type of civil liability in the form of compensation of damages caused by violation of antimonopoly laws. A claim for compensation of damages may be filed with the court by any individual or legal entity whose rights were abused by the violation.

Administrative liability

As the body with administrative liability for breach of antimonopoly laws, the Antimonopoly Agency may request the downsizing of a business entity and confiscate the profit received by the entity which committed violations. Moreover, the Antimonopoly Agency may apply, among others, the following administrative fines:

- for officers of business entities which used their dominant position, or executed an agreement limiting competition – from 2,000 KGS to 3,000 KGS;
- for withdrawal of goods from circulation in order to raise the prices, or artificial creation of barriers to entry for other business entities, or execution of agreements on raising prices, or the division of market into spheres of influence – from 1,000 KGS to 2,000 KGS;
- for officers of business entities which committed unfair competition, *i.e.* the distribution of false, inaccurate information capable of impairing the reputation of other business entities, misinterpretation about the character, way and place of production of goods, features, usability and quality of goods, unauthorized use of trademarks, company names, disclosure of confidential information, application of dumping prices – from 2,000 KGS to 3,000 KGS;
- for failure by a dominantly positioned business entity to timely declare prices, as well as a breach of the antimonopoly review procedure – from 1,000 to 2,000 KGS;
- for officers of business entities, for avoiding the fulfillment or failing to timely fulfill the prescriptions of the Antimonopoly Agency responsible for consumer rights protection – up to 1,000 KGS.

The fine imposed by the Antimonopoly Agency shall be paid within 30 days of issuing the relevant prescription to the legal entity.

Criminal liability

Kyrgyz Criminal Code provides for the liability of individuals for the establishment and maintenance of monopolistically high prices or monopolistically low prices as well as the limitation of competition through conspiracy or agreed actions aimed at the division of the market, exclusion of other players from the market, establishment and maintenance of unified prices, if such actions are committed by a group of persons or group of persons upon preliminary consent. Such actions are punishable by fine, or imprisonment, or imprisonment with confiscation of property depending on the qualifying elements of the criminal offence.

The Criminal Code imposes this liability irrespective of the amount of damages caused by such crime.

3. Control over economic concentration

3.1. Transactions subject to approval

The following types of transactions are subject to preliminary consent given by the Antimonopoly Agency:

- 1) merger and consolidation of unions, associations, concerns, interindustrial, regional and other integration of enterprises, as well conversion to the said structures of public authorities or business entities;

- 2) merger, consolidation and liquidation of state and municipal enterprises if such leads to the creation of an entity with a dominant position;
- 3) creation, merger and consolidation of joint stock companies and limited liability partnerships;
- 4) creation, merger and consolidation of other partnerships and integrations the participants of which are legal entities, if such actions lead to creation of an entity having a dominant position;
- 5) acquiring by a business entity which has 35% market share of certain good of shares in another business entity operating in the same market, as well as purchase by any person of 50% or more shares in a business entity having a dominant position;
- 6) increase of charter capital of a business entity (consolidation thereof) having the charter capital of 15,000,000 KGS;
- 7) re-organization (merger, consolidation, conversion) of business entities if the total value of their assets for the last financial period exceeded 10,000,000 KGS;
- 8) liquidation of business entities which have assets with a total value of more than 5,000,000 KGS;
- 9) all transactions leading to a natural or permitted monopoly acquiring ownership right or right to use fixed assets not designated for production (sale) of goods under the regulation, subject to the balance value of such assets exceeding 10% of the net assets of a natural or permitted monopoly, determined in accordance with the last approved balance sheet;
- 10) sale, leasing or other transactions leading to a business entity acquiring ownership right or right to the use of a part of a natural or permitted monopoly's fixed assets designated for production (sale) of goods falling under the regulation, subject to the balance value of such assets being 10% of the net assets of a natural or permitted monopoly determined in accordance with the last approved balance sheet;
- 11) investments of a natural or permitted monopoly into production (sale) of goods not falling under the regulation, subject to the balance value of such investments being more than 10% of the natural/permitted monopoly's net assets determined in accordance with the last approved balance sheet.

3.2. Notification requirements

In addition to the transactions described above, Kyrgyz antimonopoly laws require business entities to provide notification to the Antimonopoly Agency in the following cases:

- 1) creation of a business entity (association of business entities) having the charter capital equal to or exceeding 1,500,000 KGS – the notification shall be submitted within 10 days after establishment of the business entity;
- 2) if a person or a group of persons through the purchase of shares or other transactions (including agent, trust management, pledge agreement) acquires more than 10% of the shareholding in natural/permitted monopoly or any further change to the number of votes owned, or if a natural/permitted monopoly acquires more than a 10% shareholding in another business entity - the notification shall be made within 30 days after acquisition of shares.

3.3. "Group of persons"

As can be inferred from the provisions of the Law on Monopolies, it defines a *group of persons*.

A *group of persons* is an aggregate of individuals and/or legal entities with one or more of the following features:

- 1) a person or a group of persons that jointly, based on agreement (agreed actions) has the right to directly or indirectly dispose of more than a 50% shareholding in the charter capital of a business entity;
- 2) two or more persons have an agreement pursuant to which one has a right to give to another, or other persons, mandatory instructions related to conducting entrepreneurial activities, or to exercise the powers of its management body;
- 3) a person has a right to appoint more than 50% of the management body and/or supervising body (board of directors) of a business entity;
- 4) the same individuals represent more than 50% of the management body and/or supervising body (board of directors) of two or more business entities.

3.4. General approval procedure

Pursuant to legislation, application for consent for economic concentration must precede the execution of transaction.

To receive consent to create the union, association, concern, interindustrial, regional or other amalgamation of enterprises, founders shall submit, to the Antimonopoly Agency, the application for consent, data on primary activities of each of uniting business entities, their share in a respective goods market and consent to associate. The Antimonopoly Agency, no later than 30 days from the date of application, reports to the applicant in writing detailing the decision - consent or refusal. Refusal should be for a reason. There is no state charge for filing an application. Due to uncertainty about the documents and information required by the Antimonopoly Agency, it may request the maxi

The Antimonopoly Agency has the right to issue its consent to economic concentration, even if such concentration will result in the dominant position and/or restriction of competition, if such concentration may lead to saturation of the market, improvements in the quality of goods and their competitive advantage, including in external markets.

3.6. Implications of failure to obtain approval

Failure to obtain approval of the Antimonopoly Agency might lead to the administrative fine of up to KGS 2,000 unless the actions are qualified as a crime due to the broad definition provided in the Criminal Code.

4. Current case law trends

Kyrgyzstan does not have a large judicial practice related to the breach of antimonopoly laws though the Antimonopoly Agency is quite active in applying administrative measures.

In practice, the Antimonopoly Agency mostly deals with the issues of consumer rights protection and pricing policy. In 2010 the Antimonopoly Agency imposed KGS 8.7 million of fines for the violation of consumer rights. The Antimonopoly Agency issued 39 prescriptions, 38 of which were fulfilled voluntarily. In 2010, the Antimonopoly Agency had only 3 court cases related to the violation of consumer rights. With regard to the breach of pricing laws, the Antimonopoly Agency imposed KGS 61.9 million sanctions on infringers in 2010.

5. Basic trends in the development of antitrust laws in 2011-2012

Basic trends in the development of antimonopoly laws of the Kyrgyz Republic are generally related to strengthening the powers of the Antimonopoly Agency. Such developments are particularly important because of rising food prices. For instance, it has been proposed that the Antimonopoly Agency is given powers to regulate the prices for flour, bread, sugar, vegetable oil, rice, tea, cement, coal, the most important drugs, fuels and lubricants.

The Antimonopoly Agency requires additional powers to control the implementation of antimonopoly laws, including powers to conduct criminal investigation, initiate unexpected inspections and obtain printouts of telephone conversations.

Moreover, currently the Government of the Kyrgyz Republic is preparing a new law *On Competition* that is to give the Antimonopoly Agency a right to reduce the market share of companies from 25% to 10%.

Kalikova and Associates Law Firm has, and effectively maintains, regular communication with the Antimonopoly Agency on various issues of Kyrgyz antimonopoly policy, including the interpretation of antimonopoly laws, giving comments on the draft legislation and industry reports, participating in the events organized by the Antimonopoly Agency. Kalikova and Associates provided, critical organizational support to the creation of Non-Profit Partnership “Assistance to Development of Competition in CIS Countries”, the association of economists and lawyers supporting the development of competition in CIS. The association was originally formed in Bishkek in 2009 at the initiative of the Interstate Council of Antimonopoly Policy. The Firm’s lawyers, being the members of the association, participate in various initiatives of the association which allow K&A to stay aware of all current developments in the antimonopoly laws and policy in CIS countries.

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