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LEGAL MECHANISMS OF COMPETITION PROTECTION IN THE CIS COUNTRIES: THE REPUBLIC OF KAZAKHSTAN CASE STUDY

The article considers the features of legal protection of business competition as a basic element of economic system of market type in the CIS countries. The range of typical problems in the legal framework of the Republic of Kazakhstan and other post-soviet states in the competition protection is analyzed; their decision options are formulated. The features of legislative base formation for the competition protection as the most effective element of legal mechanism of its protection at internal and interstate levels are described.

Keywords: competition; antimonopoly policy; the CIS; the Customs Union.

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ПРАВОВІ МЕХАНІЗМИ ЗАХИСТУ КОНКУРЕНЦІЇ В КРАЇНАХ СНД (НА ПРИКЛАДІ РЕСПУБЛІКИ КАЗАХСТАН)

У статті розглянуто особливості правового захисту економічної конкуренції як основного елемента економічної системи ринкового типу в країнах СНД. Виявлено та проаналізовано коло типових проблем у правовому полі Республіки Казахстан та інших пострадянських держав щодо захисту конкуренції, сформульовано пропозиції з їх вирішення. Описано особливості формування законодавчої бази про захист конкуренції як найбільш дієвого елемента правового механізму її захисту на внутрішньому і міждержавному рівнях.

Ключові слова: конкуренція; антимонопольна політика; СНД; Митний союз.

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ПРАВОВЫЕ МЕХАНИЗМЫ ЗАЩИТЫ КОНКУРЕНЦИИ В СТРАНАХ СНГ (НА ПРИМЕРЕ РЕСПУБЛИКИ КАЗАХСТАН)

В статье рассмотрены особенности правовой защиты экономической конкуренции как основного элемента экономической системы рыночного типа в странах СНГ. Выявлен и проанализирован круг типичных проблем в правовом поле Республики Казахстан и других постсоветских государств в сфере защиты конкуренции, сформулированы предложения по их решению. Описаны особенности формирования законодательной базы о защите конкуренции как наиболее действенного элемента правового механизма ее защиты на внутреннем и межгосударственном уровнях.

Ключевые слова: конкуренция; антимонопольная политика; СНГ; Таможенный союз.

Problem statement. As a result of the collapse of the Soviet Union, the stronghold of the administrative command economic system, the states which were parts of a single country gained independence and started building market economy. Since the successful transition to market economy is not possible without the appearance of free competition on state markets, each of the newly created states makes all efforts to promote and protect economic competition. For this reason the study of legal mechanisms for the protection of competition attracts the attention of scientists and researchers in the post-soviet countries.

Latest researches and publications analysis. Theoretical and practical issues of the perfection of legal mechanisms of competition protection were researched by

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M. Buji (1993), K.Yu. Totjev (1998), A.Zh. Bikebaev (2010), V.I. Jeremenko (2001) and other authors.

The research objective. The study of competition laws in the Republic of Kazakhstan and other CIS countries as the main element of the legal mechanism of competition protection. The study of integration processes aimed at the promotion and protection of the competition in the CIS and occurring in connection with these reorganization processes in the antimonopoly laws of the CIS countries.

Key research findings. In December 1991 ceased to exist the Union of Soviet Socialist Republics – the state that has implemented the administrative-command form of management based on socialist ownership of production means. After the collapse of the Soviet Union all the countries that were part of it, have embarked on the building market economy.

Despite the fact that every post-soviet state has identified its way of economic development, being in the past the part of a single country, faced similar problems and obstacles in building the competitive environment.

The majority of these countries aim at creating favorable conditions for the development of competition.

Different branches of contemporary science ambiguously interpret the concept of competition. Thus, competition can be: the rivalry between people, and the basis for the commodity-money relationship between producers, the key elements, attributes of the market, part of the economic mechanism, the main engine of social progress etc. The main part of the definitions comes down to understanding the competitive rivalry, competition among market participants to achieve the best results in any field, with the most favorable business conditions.

In economic science competition is the situation conducive to free formation of prices and to the laws of supply and demand in a particular market (Buji, 1993). From the legal point of view, competition can be viewed as an object of legal protection and the subject of legal regulation.

Legal protection of competition consists of the promotion and protection of competition freedom and preventing and suppression of unfair competitive behavior.

The first component is the legal protection of the very existence of competition, prevention and suppression of any attempt of limiting it. The second one involves the need to combine the preservation of freedom in entrepreneurial activity with the presence of at least a minimal number of obligatory rules of behavior not allowing competition without limitation, in which all means of struggle would be recognized as valid in the legal sense.

Economic competition as the main element of market form of economic, forcing market players put all the power to increase the demand for manufactured goods. The result of this competition, as a rule, is enhancing the quality of products and lowering prices.

It should be noted that among the main causes for the economic collapse of the Soviet Union an important role was played by the fact of complete lack of competition in the USSR as a civilized, legalized form of struggle between sellers (producers) and buyers (consumers) for better conditions of purchase and sale of goods, works and services.

In the Soviet economy there were attempts to engender competition among businesses with the aim of improving productivity and quality of goods (services). They were trying to achieve this by the way of imposing socialist competition, which is a perverse form of competition of producers and sellers of goods, not for better conditions and business results, but for implementation, overimplementation and early implementation of plans established for each company by the state. The example of legal regulations of such competition is the Law of the USSR "On state business" (June 30, 1987), the paragraph 4 of the Article 2 which established the principle of economic competition as one of the principles for enterprises. This principle is defined as the main form of socialistic competition for the most complete satisfaction of consumers' demands for effective, high quality and competitive production (works, services) with the lowest costs.

The presence in the Soviet Union of such form of competition, as socialist one, even to a small degree, but possessing the characteristics of competition in its, market understanding, indicates the presence of acute overdue at the time the problem of motivating the producers who have no incentive to improve quality and expand the range of products. By the mid of 1980s all the problems of the planned economy in the Soviet Union had exacerbated, and by 1990 the basic idea became already not "socialism perfecting" but the transition to market economy and the capitalistic type of democracy building.

The classic market economy is based on self-regulation by virtue of objective economic laws, such as, for example, the law of supply and demand. However, market self-regulation not always has positive effects. It calls the necessity of correcting the spontaneous regulation by deliberate action on the economic system in order to reduce its negative manifestations. The most effective form of such an impact is antimonopoly regulation.

Antimonopoly regulation is a purposeful activity of state realized on the basis and to the extent permitted by applicable laws, for the establishment and implementation of the rules of the economic activity at the commodity markets in order to protect fair competition and ensure market effectiveness (Totjev, 1998).

Effective antimonopoly regulation is unthinkable without the presence of robust legal acts, regulating the activity of state legislation to counter the raw power of monopolies, unhealthy and unfair competition and to create and maintain fair competition. It should be noted that in all effectiveness countries with mature market economies antimonopoly regulation is one of the most important components of economic policy.

The first step in the formation of competition law on the territory of the CIS was made still in the era of the Soviet Union. It was a law adopted by the Supreme Soviet of the USSR "On Restriction of Monopolistic Activity in the USSR" (July 19, 1991), which almost did not have time to realize its potential regulation due to the collapse of the state. As a result, the emerged 12 independent states were forced to shape their legislation, including antimonopoly, almost from ground zero, taking into consideration mentality and experiences, not always positive and also the experience of other states.

For Kazakhstan as an independent state, the formation of an antimonopoly law began with the adoption on 11 December 1990 of the Law of the Kazakh Soviet

Socialist Republic "On freedom of economic activity and business development in the Kazakh Soviet Socialist Republic", which regulated this area for over 15 years. The Article 15 of this law established the liability for unfair competition by banning and persecution. Unfair competition are actions of businessmen aimed at undermining the reputation of a competitor and any collusion between businessmen on production quotas, markets shares, supply and service of maintaining monopolistically high or low prices in order to obtain excessive profits on this basis, or bring a competitor into bankruptcy.

The next piece of legislation aimed at protecting competition in Kazakhstan was the Law of the Kazakh Soviet Socialist Republic "On the development of competition and restriction of monopolistic activity" (June 11, 1991) aimed at the integrated management of relations on the development of competition, restriction of monopolistic activity and unfair competition.

This law has become one of the most important events in the process of the country transition to market. Since its adoption in Kazakhstan antimonopoly regulation emerged. It is important to note that the Competition Law of 1991 was constructed by the analogy with European antitrust laws, which, in contrast to American one does not establish a ban on monopolies and monopolistic activities; it is based on the control of monopolies by curbing their abuses.

In general, the law had a very progressive nature. Along with the traditional goals of competition and consumer protection, its purpose was to stimulate businessmen. In addition to the classical compositions of antimonopoly offenses in the Competition Law of 1991 were recognized as invalid acts and agreements of state bodies, bearing the anti-competitive nature. To the progressive norms of the law can be attributed its position on the extraterritorial effect of the law in respect to the actions of economic entities outside the Kazakh SSR, entailing the restriction of competition at national markets. Despite the fact that the law has been equipped with an efficient mechanism of action aimed at protecting competition, public authorities at that time were not willing to adhere to its provisions and competition itself was not a priority.

A significant step in the formation of competition law was the adoption of the Constitution of the Republic of Kazakhstan (January 28, 1993), the part 1 of Article 48 of which consolidated the legal framework for free competition, including state guarantees for freedom of private enterprise, its protection and support, and the prohibition of all monopolistic activities aimed at restricting or eliminating legitimate competition, obtaining unfair advantage, violation of rights and legitimate interests of consumers. The second part of the same article set the number of restrictions on free enterprise by prohibiting any activity that could harm competition. Under such activities were meant unfair competition and anticompetitive actions of state authorities. We agree with A.Zh. Bikebaev, who considers that "special value of the first constitution lies not only in the fact that it had been properly defined boundary restrictions of freedom of business, and with them the criteria of monopolistic activity, anti-competitive actions of state bodies and unfair competition, and that competition law of the Republic of Kazakhstan in the period of its validity was a really high standard, as was limited to the main origin of the artificial and unfair monopolies – state power" (Bikebaev, 2010).

New Constitution of the Republic of Kazakhstan (August 30, 1995), unfortunately, unlike the Constitution of 1993 didn't limit the ability of government agencies negatively effect competition because it contains no prohibition of any activity (including the governmental one) to affect competition in the country. Instead, the Article 26 set the right of freedom, of business activity, and free use of property for any lawful business activities, and the Part 4 of the same article defined that "monopoly activity is regulated and limited by law. Unfair competition is prohibited".

It must be emphasized that constitutional provisions establishing the basis for state protection and support of competition is the basis of competition law and its most stable part. Today most of the CIS countries are on the path to constitutional entrenchment foundations of antimonopoly regulation. For example, the Article 8 of the Constitution of the Russian Federation (December 12, 1993) guarantees the unity of economic space, free movement of goods, services and financial resources, support, competition, freedom of economic activity. Thus, in contrast to Kazakhstan, competition was settled through the construction of its support to the level of constitutional guarantees.

Otherwise the constitutional provision on competition in the Constitution of the Republic of Azerbaijan was formulated (November 12, 1995). In accordance with the Article 15 of the Constitution of Azerbaijan, state on the basis of market economy creates the conditions for economic development, social orientation, guarantees free business activity and prevents monopoly and unfair competition. In this case, monopoly regulation is expressed in the activities of the state to prevent unfair competition and monopoly.

The Article 42 of Ukraine's Constitution (June 28, 1996) states that "everyone has the right of business activity that is not prohibited by law. The State shall ensure the protection of competition in business. Prevent the abuse of monopoly position in the market, the undue restriction of competition and unfair competition. Types and limits of monopoly are established by law". Here, similar to the norm of the Constitution of the Republic of Kazakhstan, the guarantee of business freedom and competition are combined into one provision. However, the list of actions restricting competition that determines the types and extent of monopoly, is much wider than that, of course, and has a positive effect on the overall regulation of competition in this state.

The Article 9 of the Constitution of Moldova (July 29, 1994) relates market and fair competition to the fundamental principles of economics, which is based on the economic system of the state.

However, some CIS countries do not use this approach. In particular, in the Republic of Belarus and Uzbekistan antimonopoly rules in the sections of the Constitution on economic and social rights are not available.

The next step in the development of competition legislation in Kazakhstan was enacted June 9, 1998 – The Law of the Republic of Kazakhstan "On Unfair Competition" (hereinafter – the Law on Unfair Competition) which represented the first comprehensive legal act, including the rules on the prevention, detection and suppression of unfair competition.

As the basis for this law the experience of the countries with developed market economies was set where the sources of legal regulation of unfair competition and

monopoly activity are different (Eremenko, 2001). However, despite the clear intention of the legislator to delineate the scope of legislation on unfair competition and antitrust laws, unfair competition laws still contained anti-trust rules. At the same time, the Law of RK on competition, along with the competition rules prohibit unfair competition. Thus, there is a situation in which two different laws regulate the same. To correct this mistake on January, 19, 2001 the second Law on competition was adopted. This act was intended to include standards in accordance with the provisions between the CIS countries in the framework of international cooperation agreements on competition. Unfortunately, the Competition Act of 2001 had antibusiness character and within 2 years after its adoption the competition authorities began preparing its new edition. On July 7, 2006 was adopted the Competition Act, which went down in history as the most rigid in relation to business and competition. With the adoption of the Competition Act in 2006 the effectiveness of the mechanisms of legal protection of competition has reached its minimum.

In 2007 large-scale transformations in antimonopoly law were initiated. In April 2007, with the advent of the bill "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the issues of competition and restriction of monopolistic activity" had started the new circle in the development of legal protection and competition support. Bill included the provisions involving such changes in the regulation of competitive relations, such as: rejection of planned audits by business the introduction of extraterritoriality provisions of the law, the refusal of the state through coordination with the competition authority in the process of merging businesses, granting antitrust authorities the power to conduct search operations etc.

As a result, was adopted the current law of RK "On Competition" (December 25, 2008), which included all the previously proposed changes initiated and supported by the bill in 2007 within the trend to liberalize business regulation. In addition, one of the most important innovations was the fact that the rules on unfair competition were included in the new law, and therefore, the adoption of the Competition Act 2008 not only terminated the Competition Act 2006, but also the law of unfair competition 1998.

As a result of the legacy of the planned economy of the USSR economic problems, one of the most important tasks for the CIS was the creation of an effective system of antitrust regulation that promotes competition and ensures its protection. Beginning of international cooperation of the CIS countries on the protection of competition was initiated by the Agreement on the harmonization of competition policy (March 12, 1993), which was the first major step in the joint actions of the CIS countries in prevention, control and suppression of monopolistic activity. The agreement was preliminary and established only a general agreement on the intention of the parties as for antitrust policy, cooperation in the areas of suppression of monopolistic activity and competition, as well as the intention to achieve uniformity in the establishment of criteria and methods for assessment of monopolistic activity and unfair competition and harmonization of antitrust laws. A year after the Agreement came into force the parties created the agreement "On coordinated antimonopoly (together with the regulations "On intergovernmental council ob antimonopoly policy)" (December 23, 1993). The tendency of the contract embodied in the Agreement.

The important point is the establishment of common rules in the Treaty of competition businesses of the participating countries and the establishment of the Interstate Council for Antimonopoly Policy (Anti-Monopoly Board, ICAP). The main aim of the Antimonopoly Council was the establishment of the criteria and methods for assessment of monopolistic activities and unfair competition, the procedures for investigating the cases on violation of competition rules, regulations and mechanisms of impact on businesses, violating the rules of competition in the common economic space, and coordination between the parties. ICAP has been vested with supranational functions, namely, the power to settle disputes between business entities of the participating states on the subject matters of the Agreement and to issue binding orders for the decisions taken.

As of today valid is the new agreement "on coordinated antimonopoly policy" (January 25, 2000) which repealed the basic functions of the supranational authority ICAP.

Currently the pressing issue is the creation of the Customs Union between Belarus, Kazakhstan and the Russian Federation. The framework of the Union is not expected to carry out a coherent and unified antimonopoly policy. The results expected from the uniform policy, intended to affect competition in each of the 3 countries participating, in the most positive way. At the present moment the states are in the process of adaptation for changes in legislation. The framework of the Customs Union is still too small to be able to identify the major problems and have at least some statistics. The positive and negative aspects consideration in Kazakhstan's accession to the Customs Union will be the next stage of our research.

Due to the mutual work of the CIS countries in the direction of protecting competition and restriction of monopolistic activity and integration into the community of economically developed states Kazakhstan has managed to achieve impressive results in the implementation of economic reforms. As a result of hard work on the harmonization of competition law in the CIS countries in the short term has been formed quite an effective regulatory framework in the field of protection of competition – both at domestic and international levels. The adopted legislation covers almost all the areas of coherent policies to promote and protect competition. Changing economic situation in the states, the growing influence of the world market and the need for further harmonization of legislation on competition in the CIS stimulate continuous improvement of the regulatory framework within the overall legal framework require integration of competition rules in the laws related to the adjacent legal areas: constitutional, administrative, financial, civil rights and others.

Conclusion. Today the transition period in the CIS countries is formally completed; their economic systems have gained market attributes. However, we can not say that the functioning of economic institutions in the Commonwealth countries already meet the current requirements for the organization of national economies. Imperfect market economy requires further reforms, the continuation of breaking the cardinal planned management practices and replacing them with market methods.

The protection of competition in the CIS has gone beyond individual state as a result of deep integration process is actively occurring on the territory of the former Soviet Union (Kazakhstan, for example, the creation of the Eurasian Economic Community, in its formation of the Customs Union of Belarus-Kazakhstan-Russia

and the Common Economic Space). Big potential lies in the formation of various groups of integration among the countries of the CIS, a coordinated anti-monopoly policy, the protection of competition, harmonization of competition laws, and the revival of economic ties.

Even the most positive experience of the countries with developed market economies, does not always apply to the CIS, which inherited the "fruits" of the monopolized Soviet economy. Therefore, all the members of the Commonwealth have an uphill work together to build a functioning market economy.

References:

О согласовании антимонопольной политики: Соглашение государств-участников союзства от 12.03.1993 // kazakhstan.news-city.info.

О проведении согласованной антимонопольной политики (вместе с Положением О межгосударственном совете по антимонопольной политике): Договор стран СНГ от 23.12.1993 // adilet.zan.kz.

О проведении согласованной антимонопольной политики: Договор стран СНГ от 25.01.2000 // online.zakon.kz.

Конституция Республики Казахстан от 28.01.1993 // online.zakon.kz.

Конституция Республики Казахстан от 30.08.1995 // online.zakon.kz.

Конституция Украины от 28.06.1996 // zakon.rada.gov.ua.

Конституция Российской Федерации от 12.12.1993 // www.constitution.ru.

Конституция Азербайджанской Республики от 12.11.1995 // www.ru.president.az.

Конституция Республики Молдова от 29.07.1994 // lex.justice.md.

О государственном предприятии (объединении): Закон СССР от 30.06.1987 // www.consultant.ru.

О развитии конкуренции и ограничении монополистической деятельности: Закон Казахской ССР от 11.12.1990 // pavlodar.com.

Об ограничении монополистической деятельности в СССР: Закон СССР от 10.07.1991 №2326-1 // www.zakon.law7.ru.

О недобросовестной конкуренции: Закон Республики Казахстан от 9.06.1998 №232-I // online.zakon.kz.

О конкуренции: Закон Республики Казахстан от 25.12.2008 №112-IV ЗРК (с изм. и доп. на 03.07.2013) // online.zakon.kz.

Бикебаев А.Ж. Конкурентное (антимонопольное) право и политика Республики Казахстан. – Алматы: ЮФ «Саят Жолши и партнеры», 2010. – 496 с.

Бүйін М. Торговое право. Словарь французских терминов. – М.: Международные отношения, 1993. – 272 с.

Еременко В.И. Правовое регулирование конкурентных отношений в России и за рубежом: Дис... док-ра юрид. наук: 12.00.03 / МГУ им. М.В. Ломоносова. – 2001. – 457 с.

Тотьев К.Ю. Конкуренция и монополии. Правовые аспекты регулирования // Правоведение.– 1998.– №1. – С. 219–220.

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