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Antitrust regulation of information exchange in CIS and China

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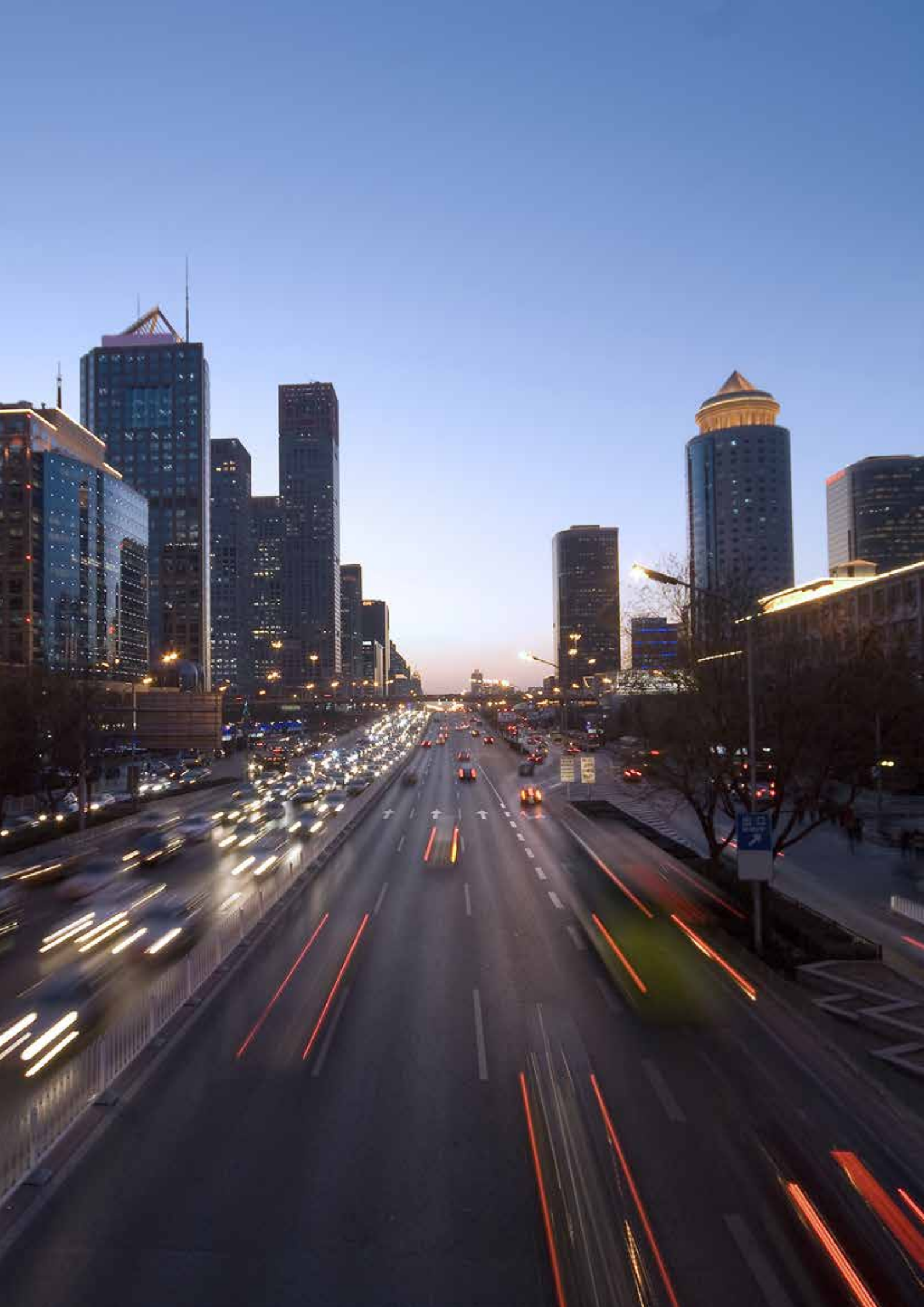
Exchange of information, whether among competitors or in vertical relationships, can involve substantial risks from the perspective of local antitrust regulation. Although it is not expressly prohibited to exchange information in any form in any of the countries referred to in this brochure, such exchange may be one of the signs of such offenses as anticompetitive vertical agreements, cartels or concerted practices. We present more detailed information about antitrust regulation of information exchange in Russia, Belarus, Kazakhstan, Azerbaijan, Armenia and China in our latest overview.

The articles have been prepared by lawyers from Dentons' offices and by our partner, K&P law firm (Armenia).



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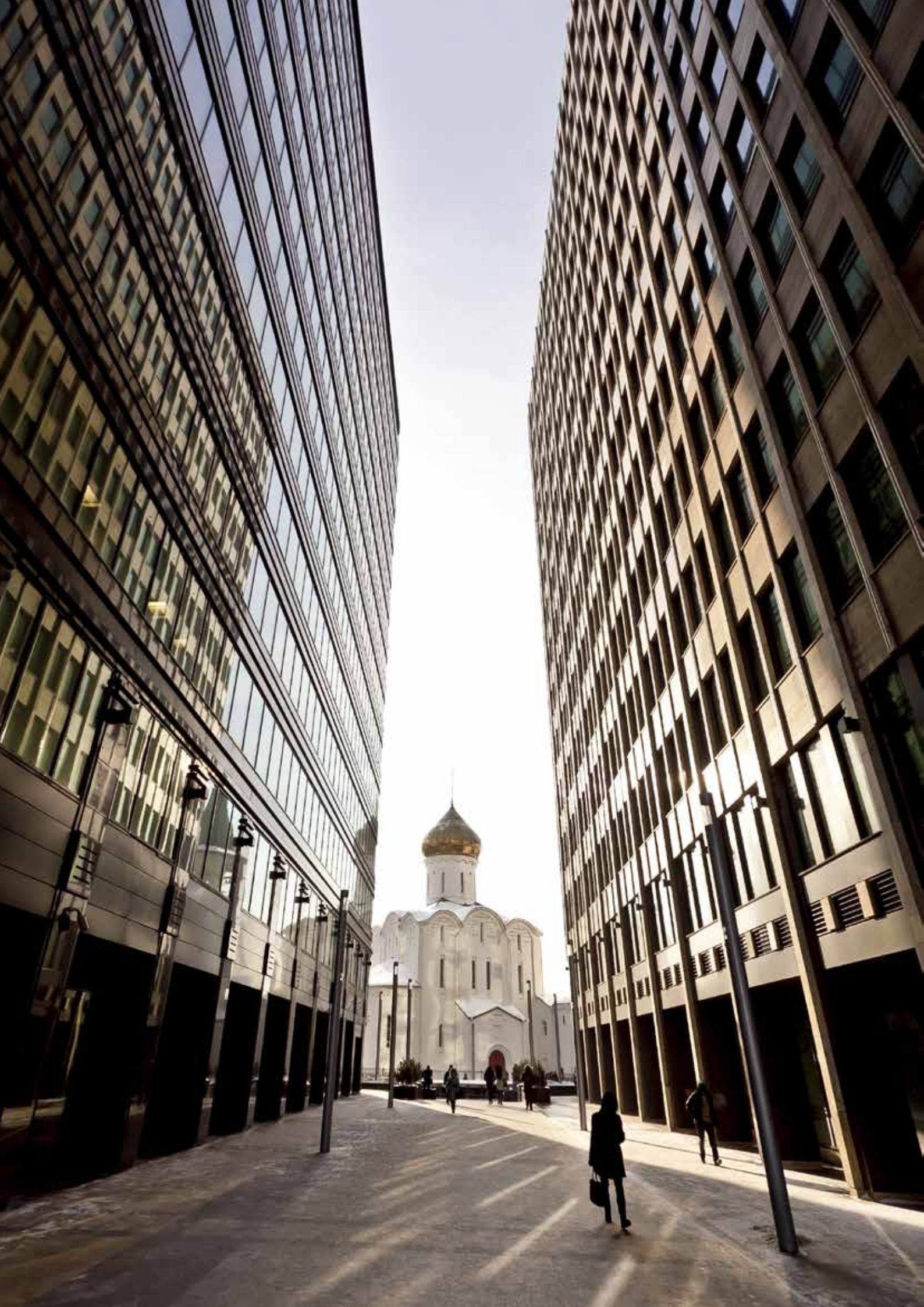

Russia

Direct and indirect exchange of information

In contrast to some Western jurisdictions, exchange of information between competitors in itself is not a violation of Russian antitrust law. However, if the competitors exchanging information become participants in illegal anticompetitive practices, then such information exchange may serve as evidence of an arrangement and collusion. The form in which the information is exchanged (for example, electronic correspondence or joint participation in associations or unions) is generally not important—any such action may be considered as evidence of a violation if it results in parallel market conduct restricting competition.

Exchange of information negatively affecting the competitive environment on the market may serve as evidence of both cartels and other forms of anticompetitive agreements and of collusion. So, as much attention as possible should be paid to any direct or indirect communication with competitors and, if possible, to avoiding any subjects that could have to do with joint conduct of business entities on the market. In particular, it is recommended to avoid discussing the following subjects: prices (discounts, surcharges, bonuses, markups, etc.), client databases, manufacturing and marketing plans and sales plans, information about product development and other information of commercial value and/or that is confidential. That said, such topics of discussion as legislative initiatives, non-confidential technical information, quality and safety standards, various aspects of industry development as a whole, and other publicly available information is permitted—in other words much less risky. Competitors should be careful about discussing such topics as economic indicators affecting development of the industry, the history of price changes and past sales trends and comparing their conduct on the market.

Whatever the subject of the meeting, it is recommended, if possible, to avoid in person meetings with competitors, especially if those meetings are held not within the framework of sector events or as part of sessions of expert boards, associations, unions and the like. The reason for this is that if hypothetically some participants in such meetings are involved in synchronized conduct that cannot be explained by objective economic market indicators equally affecting all market players, the Federal Antimonopoly Service of Russia (FAS Russia) will have an easier time proving that such conduct is the result of an anticompetitive arrangement reached at such a meeting.

Just as information exchange, a business entity's mere participation in associations and unions is not an action prohibited by Russian anti-competition laws. However, as is apparent from the experience of considering antitrust cases at FAS Russia, the activities of associations and unions can often essentially "cover" the creation of a cartel. For example, in the case of Ryba-Vietnam (pangasius), when Russian fish importers entered into an anticompetitive agreement that resulted in the fixing of prices for pangasius,[1] sharing the product market by sales volume and product purchase, types of sellers and customers. This activity was coordinated by the Association of Manufacturing and Retail Enterprises of the Fish Market nonprofit organization.

Public appearances of the representatives of associations and business entities about economically significant events, for example, announcements about price increases, are fraught with the same risks. Although announcing a price increase is not a violation of the law, if it was made publicly and then competitors' prices went up at the same time, the antitrust authority may consider such actions as evidence of an antitrust violation, in particular, in the form of collusion.

1. RF Supreme Court Ruling No. 305-AD15-10488 of 17 February 2016.

For example, when FAS Russia issued a warning to seven travel agencies[2] for publishing "an open letter from tour operators," the warning itself was not a form of penalty for violation of antitrust laws. The tour operators published an open letter in which they listed complaints about how the tour operator Coral Travel was operating. The letter also contained a call to all travel agencies to give preference to other tour operators in their operations. FAS Russia warned the agent networks, reminding them that such actions could result in a violation of the Federal Law on Protection of Competition.

Therefore, if direct or indirect exchange of information with competitors is unavoidable in one form or another, in particular, if the company participates in expert boards, various associations and unions and/or its representatives often appear at public events, the following recommendations should be borne in mind:

- Meeting programs and speeches should be coordinated in advance with lawyers.
- If possible, it is recommended to arrange for minutes of any meeting with competitors to be taken so that statements of all participants can be recorded in the minutes.
- Public discussion of prices, sales volumes and similar issues should be avoided (if possible, by making the relevant note in the minutes or sending the relevant information letter to organizers).
- It is recommended to avoid announcements and specific predictions of one's company's commercial policy.
- If the format of the meeting/event allows, it is recommended to develop rules (a code) for the conduct of participants, stating in the rules the subject of discussion and the purpose of the meeting/event.

The issue of antitrust risks involved in information exchange is currently becoming more acute. This is because recently FAS Russia has held a certain position according to which information exchange is more likely to result in cartels than in collusion. This position is not quite clear; however, in practice it turns out that it is easier to prove that there is a verbal arrangement than to establish that one of the business entities has publicly announced a change in its conduct that resulted in collusion of other market players.

Requests for information by the antitrust authorities

In accordance with Article 25 of the Federal Law on Protection of Competition, commercial entities are required to submit to the antitrust authority further to its reasoned request, documents, explanations in written or oral form, information (including information constituting a commercial, official or other legally protected secret) required by the antitrust authority in accordance with the powers vested in it to monitor economic concentration or determine the state of competition.

FAS Russia's powers include quite a wide range of procedural capabilities of FAS when conducting audits.[3] In particular, FAS Russia may carry out unscheduled sudden field audits of companies suspected of participating in a cartel. Other audits are conducted with advance notice. Regardless of the type and grounds for conducting the audit, FAS Russia has the authority to request information concerning the subject of the audit from the audited entities. FAS Russia may also send an information request that has nothing to do with audit of a particular business entity. At this time legal entities can face a fine of up to 500,000 rubles for failing to provide information to FAS Russia.[4]

The case of Argus-Spektr CJSC was important for the business community in the practice of cases involving failure to provide information.[5] In February-March of 2013, as part of an unscheduled audit FAS Russia sent Argus-Spektr CJSC a request to provide documents and information needed to determine the legally relevant circumstances of the legal entity's business. Argus-Spektr CJSC refused to provide the requested information, reasoning that the information could not be requested as part of conducting an unscheduled field audit without initiating an antitrust law violation case. Based on the refusal it received, FAS Russia initiated administrative proceedings and subjected Argus-Spektr CJSC to an administrative fine of 300,000 rubles. The company disagreed with the punishment and filed with the commercial court.The courts confirmed that as part of conducting an unscheduled audit FAS Russia has the legal authority to request that audited entities submit information and documents required for oversight without initiating an antitrust law violation case.

Later, FAS Russia representatives pointed more than once to the need to cooperate with the state authorities and have said that the business would suffer financial losses if it refused to cooperate.

2 On 25 July 2014 FAS Russia issued seven warnings to the companies Vell (Warning No. IA/34156/14), Global Travel (Warning No. IA/34154/14), Sputnik (Warning No. IA/34162/14), 1001 Tour (Warning No. IA/34161/14), Travel Business Service (Warning No. IA/34164/14), Goryachiye Tury (Warning No. IA/34159/14), and Set Magazinov Goryashchikh Putevok (Warning No. IA/34158/14).
3 Article 25.1 of Federal Law No. 135-FZ on Protection of Competition dated 26 October 2006.
4 Clause 7 of Article 19.8 of the RF Code on Administrative Offenses.
5 RF Supreme Court Ruling No. 400-ES14-2879 dated 15 October 2014.

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Kazakhstan

Information Exchange: Legal Risks

In this day and age information movement and exchange are important forms of any business's activity. Such forms include the collection and processing of information about market behavior, trends in demand, alternative supply from competitors, etc. However, generally information is directly or indirectly obtained or exchanged with different intentions (e.g., negotiating prices, general discounts or obtaining information to monitor competitors). Therefore, there are considerable risks involved with obtaining and, in particular, exchanging information, because under certain conditions such actions can be considered as anticompetitive agreements or may serve as a basis to declare one or another action collusion. So, many people want to know how to distinguish between legitimate actions and violation of the law.

Written exchange of information between competitors that clearly shows that such information exchange is a form and result of written arrangements that have been reached will likely be considered an anticompetitive agreement. It is also possible to find evidence of anti-competitive agreements reached when information is exchanged orally, for example, at joint meetings. Such an anticompetitive agreement via information exchange may be provable with the help of audio and video recording, etc.

Lawmakers distinguish between "anticompetitive agreements" and "anticompetitive collusion." Anti-competitive collusion is defined as a tacit expression of the will to establish an agreement, i.e., behavior on the basis of which one may conclude that there is such intent. In such instances it is difficult to prove the fact that information was exchanged, and so the effective antitrust legislation sets criteria for considering actions anticompetitive collusion.

Anticompetitive agreements

The newly introduced Entrepreneurial Code (the Code) states that the actions of market participants may be deemed anticompetitive agreements if they have arrangements that lead or may lead to restriction of competition (whether in written or oral form).[1]

The antitrust authority generally analyzes the following when attempting to prove that there are anticompetitive agreements:

- Agreements in written form
- Various forms of written information exchange between competitors that may be proved by written documents (for example, emails or paper letters)
- Various forms of oral information exchange between competitors via in-person meetings, telephone conversations, public price announcements (dissemination of a new price list, pricing advertisements) to agents and intermediaries, including through various associations of which the market participants are members; such forms of contact may be proved with the help of audio and video recording
- Minutes of meetings that reflect certain arrangements between competitors.

Based on the above, one may assume that information exchange in certain forms and in certain instances may be the determining criterion for deeming one or another agreement anticompetitive.

Anticompetitive collusion

All of the following must be proved to establish the presence of anticompetitive collusion:

a) The results of the actions taken are in the interest of each of the market participants.

b) Each of the market participants is aware of the actions in advance.

c) The actions of each of the market participants are caused by the actions of other market participants

and are not the consequence of circumstances equally affecting those market participants; and

d) The market participants involved in such actions hold a total market share of 35% or more.

Therefore, considering the legislative requirements, it cannot be said that information exchange alone is a determining factor for considering actions collusion. The fact that information is exchanged can be considered merely as one of the pieces of evidence to be established when attempting to prove that the above-mentioned conditions are present (for example, items (a) and (b).)

However, we would like to note again that in practice the antitrust authority's actions are aimed not at proving that all of the above-mentioned criteria exist and that there are contacts between market participants (including facts of information exchange), but at identifying the consequences and fact that the competitors acted concurrently. Given such an approach, a market participant's best line of defense will be to submit evidence to the antitrust authority that there are objective reasons for such actions, for example, concurrent increase of product prices. Otherwise, there is an increased risk of market participants' actions being deemed "collusion."

Factors mitigating risks

In order to mitigate the risks of violating antitrust legislation, it is recommended:

- To pay particular attention to various forms of direct or indirect information exchange, and also to arrangements that may be made in written and/or oral form
- To take certain actions (particularly when the actions are taken concurrently with other market participants) only if there are sufficient objective reasons and economic grounds (for example, it is necessary to increase prices on goods when there are sufficient economic grounds and/or circumstances that affect all market participants equally)
- To carry out a detailed legal analysis before taking the actions.

Participation in associations and public appearances

Kazakh law allows for the creation of associations of large manufacturers in the form of nonprofit organizations. Market participants generally join various associations in order to coordinate their actions to develop the relevant industry by promoting new world-class technologies, upgrading and improving the production process and providing services the purpose of which is to improve the quality of goods manufactured and services provided, and also representing their common interests before governmental and other authorities and international organizations.

In doing so, particular attention should be paid to information exchange between competitors through various associations of which the market participants are members. As stated above, there are considerable risks associated with the various forms of information exchange between competitors (particularly through associations).

In order to mitigate the risk of participation in associations being deemed a coordination of economic activity of the market participants by a third party and/or information exchange between competitors through such associations being deemed anticompetitive agreements/collusion, it is very important to set forth special provisions about the subject matter and purposes of the activity in the founding agreements of the associations and consistently in their charters, and the issues for discussion and decisions taken in the minutes of meetings. Such steps will help to avoid violations of antitrust law, including in the form of using any information that became available through the association's work, when engaging in business, discussing trade secrets and strategies, etc.

Requests for information from the antitrust authorities

The Law on Competition that was adopted on 25 December 2008 and entered into force on 1 January 2009 (hereinafter the Law) marked a new milestone in the development and improvement of antitrust legislation. The new Law contained a number of novelties and enshrined the right of the antitrust authority to request and receive the necessary information, including information constituting trade secrets and other legally protected secrets from the state authorities and from market participants and other individuals and legal entities.

However, on the basis of its own internal order of 9 July 2009 (the Order) the antitrust authority set a short time period (five business days) for submitting information regardless of the amount of information requested. It goes without saying that market participants were unhappy with such time limits, as in practice they did not manage to prepare all of the requested information (including financial documents) in time. Moreover, the very legality of the antitrust authority setting time limits for submitting information was questioned, given that the Law did not contain any requirements as to time limits.

Lengthy discussions resulted in the antitrust authority issuing an order on 22 January 2014 amending the first Order to cancel that requirement. However, the Law was amended on 5 May 2015. The amendments established on the legislative level the right to request

any information and to set time limits. That requirement is now contained in the Entrepreneurial Code that entered into force on 1 January 2016 and superseded the Law that was formerly in effect.

Thus, in accordance with Article 214 of the Code, when performing their job duties, including when considering claims of antitrust law violations in the protection of competition, when investigating cases of antitrust law violations having to do with protection of competition, exercising control over economic concentration and determining the degree of competition, in accordance with the authorities vested in them, the employees of the antitrust authority have the right:

- To unhindered access to the premises and territory of state authorities and market participants while observing the requirements of law
- To request and receive written information within not more than five days from the state authorities, local executive authorities, market participants, officers/officials and legal entities, and also written and/or oral explanations regarding legal violations committed in the protection of competition.

The following are violations of the procedure for submitting information to the antitrust authority:

- Failure to carry out an order or failing to carry it out in full
- Failure to submit information or submission of incomplete information within the prescribed time period
- Submission of inaccurate and/or false information.

The administrative penalty for these violations is a fine on officers and small businesses[2] or non-profit organizations of 160 MCI,[3] on medium-sized businesses[4] of 360 MCI,[5] and on large businesses [6] of 1,600 [7] MCI [8].

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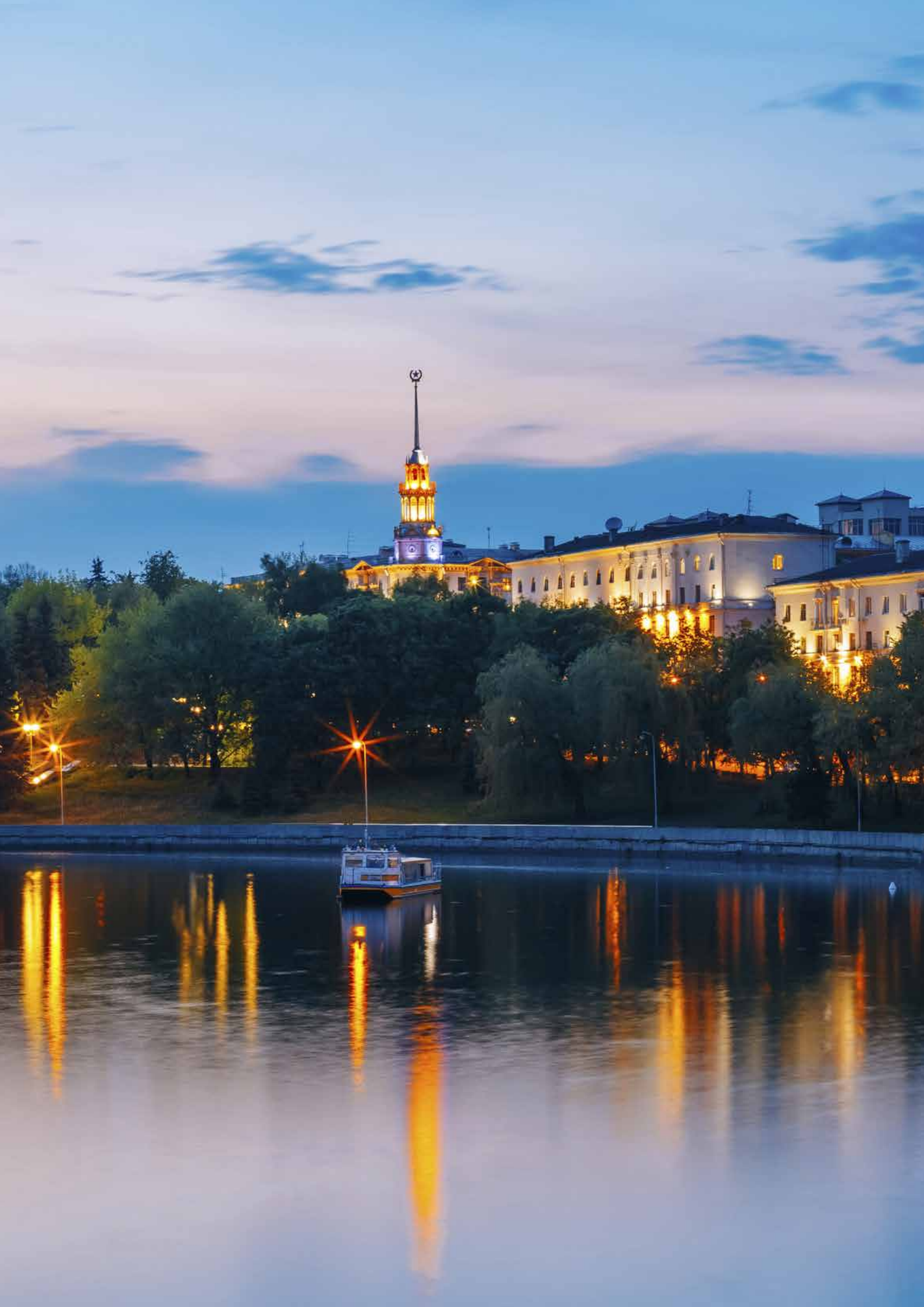
1 Article 169 of the Entrepreneurial Code
2 Small businesses are unincorporated sole proprietors and legal entities that engage in private business, have not more than one hundred employees on average in a year and average annual revenue of not more than three hundred thousand monthly calculation indices.
3 Equivalent in US dollars: 1,008,000 Tenge
4 Medium-sized businesses are unincorporated sole proprietors and legal entities that engage in private business and are not small or large businesses.
5 Equivalent in US dollars: 2,118,000
6 Large businesses are sole proprietors and legal entities that engage in private business and meet one or both of the following criteria: they have more than 250 employees on average in a year and/or average annual revenue greater than three million monthly calculation indices
7 Equivalent in US dollars: 10,085,000
8 1 monthly calculation index (MCI) = 2,121 Tenge



Belarus

Direct and indirect information exchange between competitors

Exchange of information between competing business entities is not prohibited by the legislation of the Republic of Belarus, unless such information exchange results in a violation of antitrust law and, in particular, is a form of collusion restricting competition, a form of illegal coordination of economic activity, and may result in allocation of the product market in terms of territory, transaction volumes, range of sellers or consumers, exclusion or restriction of access to a product market by other business entities, setting, increasing, decreasing or maintaining prices (rates), or other consequences that may lead to the prevention, restriction or elimination of competition.

In accordance with Article 13 of Republic of Belarus Law No. 94-Z on Counteraction to Monopolistic Activities and Promotion of Competition dated 12 December 2013 (hereinafter the Law), prohibited collusion of business entities is defined as actions meeting all of the following criteria:

- They are known in advance to each of them.
- The result of such actions is in the interest of each of such business entities.
- The actions of one of the business entities are caused by the actions of other business entities participating in collusion and are not the consequence of circumstances equally affecting all business entities on the relevant product market.

The most frequent case is that of collusion of business entities either setting or maintaining a certain level of prices for goods or services. We can cite the following instance as an example. In May 2014 the Economy Ministry raised the maximum manufacturer's price for chicken meat by 10%, after which four of the biggest manufacturers of semi-finished products and byproducts made from chicken meat simultaneously increased the prices for their products by 16-20%. Suspecting price-fixing by the poultry plants, the antitrust authority carried out an audit that resulted in no economic basis being found for those manufacturers to increase prices, and orders to eliminate the violation and decrease product prices were issued to all four manufacturers.

In 2014 the Law first introduced the term "coordination of economic activity," which is defined as the agreement of actions of business entities by a third party that is not in the same group with any of the business entities and does not engage in activity on the product market on which the business entities engage in collusion. At this time, we are not aware of the antitrust authority's practice of suppressing prohibited coordination of economic activity.

It is worth mentioning separately the prohibition on anticompetitive agreements reached in any form, concerted actions (inaction) of a state authority with another state authority or business entity. In accordance with Article 15 of the Law, state authorities are prohibited from entering into agreements or taking other actions (inaction) creating discriminatory conditions of activity for certain business entities, if such agreements or actions result or may result in the prevention, restriction or elimination of competition and/or the causing of harm to the rights, freedoms and legitimate interests of legal entities or individuals, including from establishing prohibitions on business entities engaging in certain forms of activity, from establishing prohibitions or imposing restrictions on the rights of business entities to sell, buy or otherwise acquire or exchange goods, giving business entities instructions to supply goods to a certain group of consumers first or to enter into contracts as a priority, etc.

Based on the reports from the departments for antitrust and pricing policy of oblast executive committees, one may conclude that the practice of issuing orders to state

authorities to eliminate violations of Article 15 of the Law is quite extensive. In particular, in the majority of cases the violation consists in the executive authorities setting unequal (discriminatory) conditions for different groups of business entities when granting them trading places on the market.

We remind you that in accordance with Clause 1.4 of Decree No. 114 of the President of the Republic of Belarus on Certain Measures to Increase State Antimonopoly Regulation and Control dated 27 February 2012 ("Decree No. 114"), the entry into and performance of agreements, collusion and an arrangement to engage in or engaging in other types of coordinated activity restricting competition result in the imposition of a fine on a legal entity of up to 10% of the amount of proceeds from the sale of goods (work, services) on the market on which the violation is committed, for the calendar year preceding the year in which the administrative offense was discovered, but not less than 400 basic units (approximately US$4,200).

It should be noted that according to information from the National Center of Legal Information of the Republic of Belarus, the Law will undergo a number of major changes concerning the regulation of agreements restricting competition, collusion and coordination of economic activity. The antitrust authority has prepared a draft of those amendments to the Law. The draft will be proposed for discussion to the autumn parliamentary session and may be adopted by the end of 2016.

Participation in associations and public appearances

A business entity's participation in associations and issuance of press releases and public appearances of officers of business entities on how they do business are not prohibited per se and are not a violation of antitrust legislation, unless that activity is carried out in violation of the laws on advertising or competition, and unless they show signs of prohibited coordination of economic activity as mentioned above.

It should be noted that the consent (permission) of the antitrust authority must be obtained in order to create associations of business entities in the form of associations or unions in the conditions defined in Article 17 of the Law. In accordance with the requirements of Resolution No. 156 of the Council of Ministers of the Republic of Belarus dated 17 February 2012, in order to obtain such consent an application is submitted to the antitrust authority stating the reasons for creating the association of business entities, information about the book value of assets and revenue of the association's participants, types and markets of their activity, volumes of production and supply, information about affiliates of the association's participants, etc.

Thus, the antitrust authority has the power to not allow the creation of a union, association or other grouping of business entities at all if that association may result in them acquiring or increasing their dominant position on any product market and/or in the prevention, restriction or elimination of competition.

It is noteworthy that in 2012 the antitrust authority approved the creation of the Belarus Association of Retailers "for the purposes of protecting and promoting the interests of representatives of the retail business;" the Association was made up of seven of Belarus' biggest retail chains despite the general unhappiness of the state authorities with the activity of those chains on the market which, in the opinion of the state authorities, considerably impact prices on food products and, consequently, competition.

Requests for information from the antitrust authorities

In accordance with Article 23 of the Law, business entities, officers of business entities and individuals are required to submit to the antitrust authority at its request—and within the time period set by the antitrust authority—the documents, explanations and information in written and/or oral form—including information constituting a trade, official or other legally protected secret—required by the antitrust authority in accordance with the powers vested in it.

We note that in accordance with Article 12 of Law No. 16-Z of the Republic of Belarus on Trade Secrets dated 5 January 2013, in order to keep information comprising a trade secret that is submitted to the antitrust authority confidential, the media containing the trade secret submitted must be identified by the owner of the trade secret by labeling it "Trade Secret" and indicating the owner (full name and place of business of the legal entity).

The legislation on oversight activity is clarifying the powers of the antitrust authority to request those documents from business entities and to carry out audits of compliance with antitrust legislation.

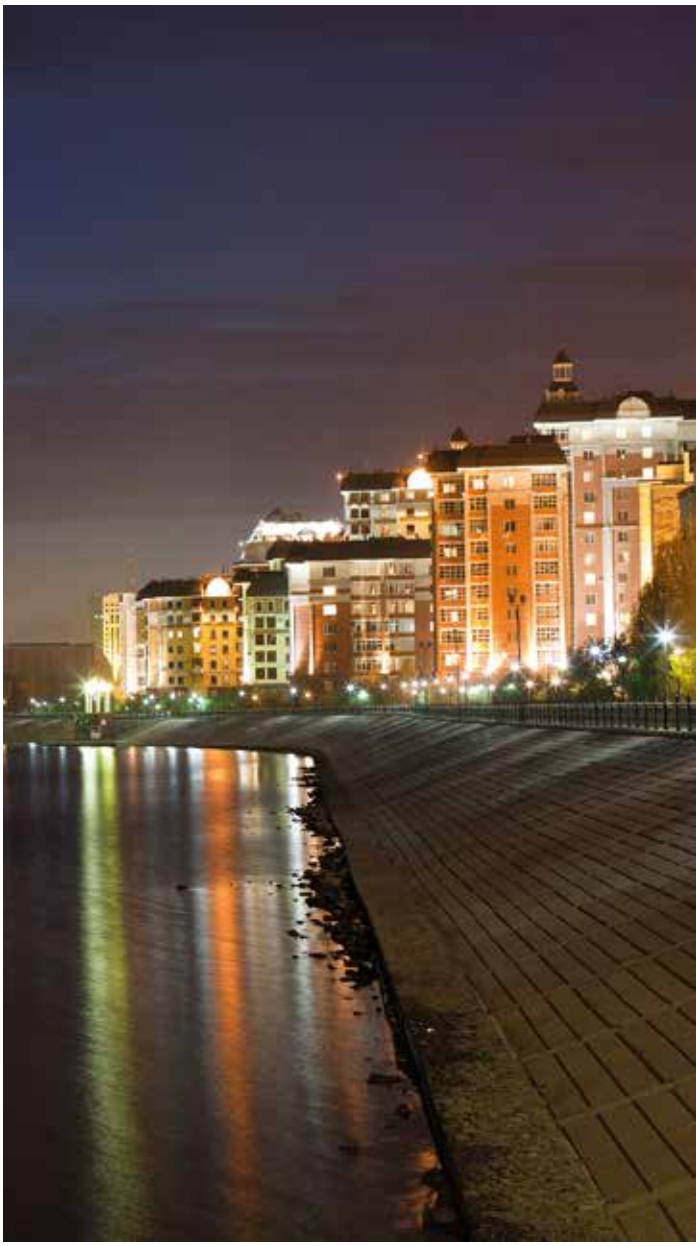
For example, Decree No. 114 entered into force in 2012, as did Decree No. 332 of the President of the Republic of Belarus on Certain Measures to Improve Oversight Activity in the Republic of Belarus, in accordance with the provisions of which, in order to promptly identify and curtail violations of antitrust legislation and the legislation on prices and pricing, the antitrust authority was given the right to carry out unscheduled audits of legal entities' and sole proprietors' compliance with antitrust legislation whether or not there were grounds provided for by legislative acts, i.e., whether or not the antitrust authority had sufficient information evidencing that a violation was being or had been committed.

The antitrust authority may carry out an unscheduled subject-specific on-the-spot audit of all points of sale and other places, manufacturing and warehouse premises belonging to the entity being audited at the same time, including those located in different administrative units, and the antitrust authority may demand that the entity being audited submit all of the required documents having to do with antitrust law compliance and compliance with the laws on prices and pricing, which must be submitted no later than the business day following the date of the request for provision of documents.

In accordance with Article 11.24 of the Administrative Code, failure by the officer of a business entity to comply with the legal requests of the antitrust authority or failure to submit or late submission to the antitrust authority of information (documents, explanations) required for the antitrust authority to perform its functions, or provision of information that is known to be false results in a fine on the officer of between 20 and 50 basic units (approximately US$210 to US$520). This violation, if repeated within one year after the administrative penalty for such violations was imposed in accordance with Article 244 of the Criminal Code results in punishment and may be subject to imprisonment for up to two years without the right to hold certain positions.

Decree No. 188 of the President of the Republic of Belarus on the Antimonopoly Regulation and Trade Authorities dated 3 June 2016, which will enter into force in September 2016, introduced major changes to the powers of the antitrust authority. For example, the Decree envisions reforming the Ministry of Trade and transferring to it the functions of the antitrust authority that are currently carried out in the Republic by the Economy Ministry's Pricing Policy Department. That reform will result in the Ministry of Trade being renamed the Ministry of Antimonopoly Regulation and Trade and being responsible for three main groups of functions: 1) the functions of the antitrust authority, 2) functions to regulate the consumer market, protect consumer rights and regulate prices, and also 3) functions in the area of non-tariff regulation, regulation of state procurement and advertising oversight.

Thus, as of September of this year, the oblast and district trade inspectorates that report to the Ministry of Trade will be empowered to carry out audits not only for compliance with trade and pricing legislation, but also in the area of antitrust regulation.



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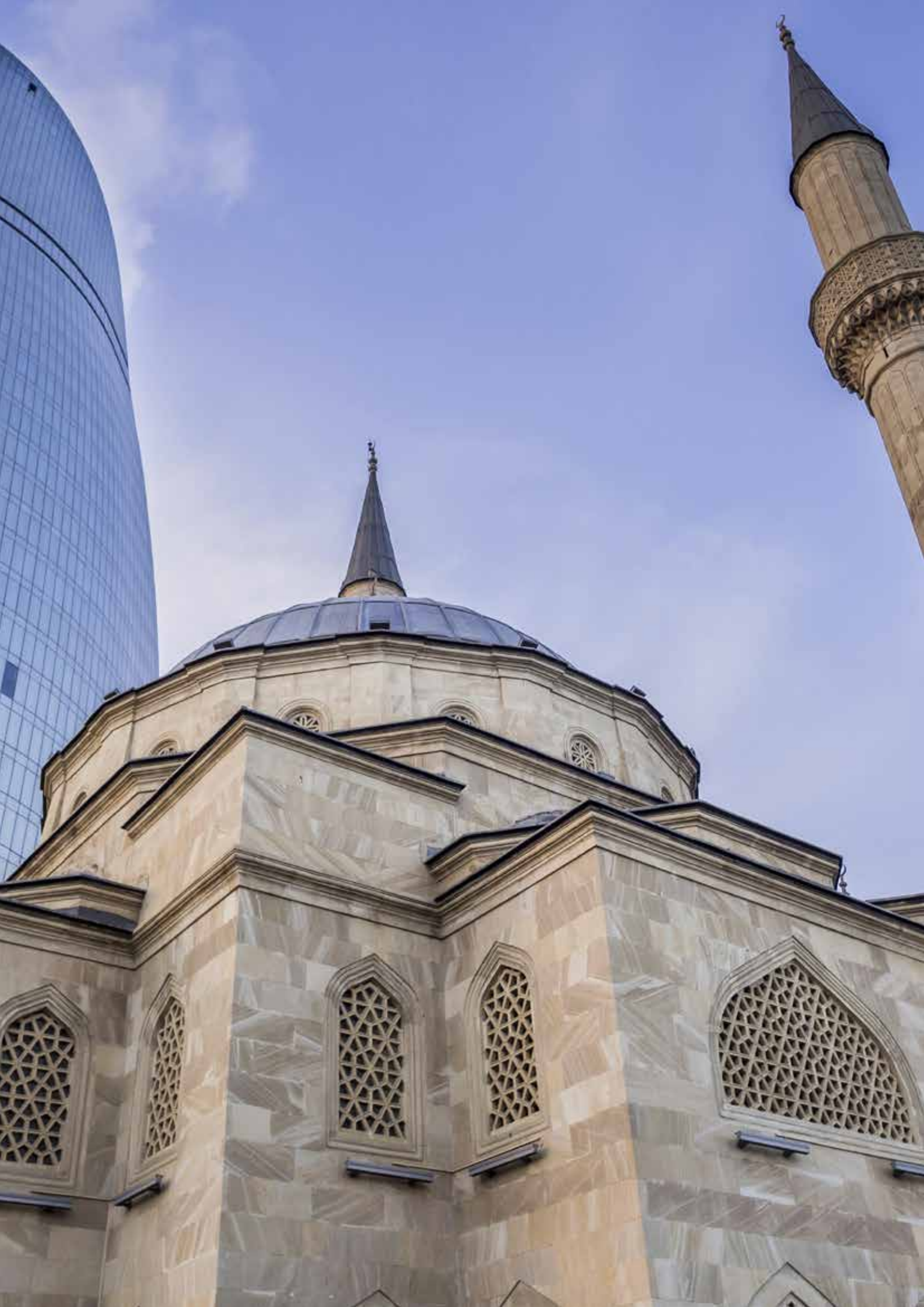

Azerbaijan

Information Exchange under the Antitrust Legislation of Azerbaijan

The Law of the Republic of Azerbaijan on Antimonopoly Activity dated 4 March 1993 (hereinafter the Law on Antimonopoly Activity) determines the organizational and legal framework for the prevention, restriction and elimination of monopolistic activity, including the legal provisions governing exchange of information under the antitrust laws, which, in our opinion, require large-scale improvements.

The obligation of monopolies (dominant entities) to publish information

According to the Law, legal entities that are dominant on a product market and hold a special or exclusive right or are natural monopolies are required to publish information about the terms for offering goods and services and the prices for them, and changes to those terms and prices at least 30 days before offering those conditions or changing those terms and prices.

The amendments to the Law dated 5 April 2016 introduced for the first time in the practice of Azerbaijan's antitrust legislation the term *cartel agreement,* which is defined as a voluntary agreement in any form concluded for the purpose of two or more financially and legally independent business entities competing on the same market for goods/services eliminating other market competitors and/or preventing new competitors from entering the market, on allocating the market in terms of territory, volume of sale and purchase, product range or depending on clients (customers); on refusing to buy or sell goods (services); on increasing, decreasing or maintaining prices (rates) at the same level; on determining surcharges, discounts or concessions for the sale of goods or provision of services or on using other methods restricting competition.

According to the Law, the cartel agreement is among the illegal horizontal and vertical agreements between executive or administrative authorities, between business entities or between executive or administrative authorities and business entities that have caused or may cause restriction of competition.

Considering the fact that lawmakers recently prohibited such antitrust agreements, there are no examples of this in practice.

The right of the State Service for Antimonopoly Policy and Consumer Rights Protection to obtain information

The State Service for Antimonopoly Policy and Consumer Rights Protection at the Ministry of Economic Development (the Antimonopoly Service) is the State executive authority responsible for antitrust regulation in Azerbaijan.

According to the Law, the Antimonopoly Service is entitled to request from State administrative authorities, from organizational and administrative associations, from business entities and officers any information needed for them to perform their duties and functions, including to request the submission of written or oral explanations regarding a violation of antitrust law.

At the same time, the State Statistics Committee of the Republic of Azerbaijan provides the Antimonopoly Service with statistical data determining the dominance of businesses on the domestic market based on an agreed program for keeping the national registry of monopolist enterprises.

Monopolist enterprises submit to the Antimonopoly Service a report on monopolistic positions of their activities based on state statistical reporting approved according to the procedure stipulated by the State Statistics Committee at the request of the Antimonopoly Service. The Antimonopoly Service is required to keep this information as state and trade secrets.

Liability (penalties and financial sanctions) on market participants for failure to submit information under antitrust law

According to the Law, market participants (business entities and governing bodies that are participants in market relationships), their directors and officials of the relevant executive authorities are liable for failure to submit or illegal/incomplete submission of information under antitrust law.

For example, business entities that are dominant on a market may be fined for failure to publish information, or failure to submit documents, or for submitting incorrect or false information to the Antimonopoly Service. That being said, the economic status of such business entities is taken into consideration when determining the fine amounts.

Fines in the form of a penalty contemplated by the Law are paid to the state treasury within 30 days of the Antimonopoly Service's decision.

The procedure for considering antitrust law violation cases is determined by the relevant Rules approved by the Government dated 29 May 1998.

According to those Rules, for (i) late submission of information to the Antimonopoly Service according to the Law, and (ii) in the event of submission of incorrect or false information, the Antimonopoly Service shall impose fines and penalties for violation of antitrust law.

Liability of officials of the executive authority

According to the Law, officials of the executive authorities are also liable in the manner established by law for keeping information constituting a state or trade secret, and also for causing damage to business entities or the state as a result of incorrectly performing their official duties.

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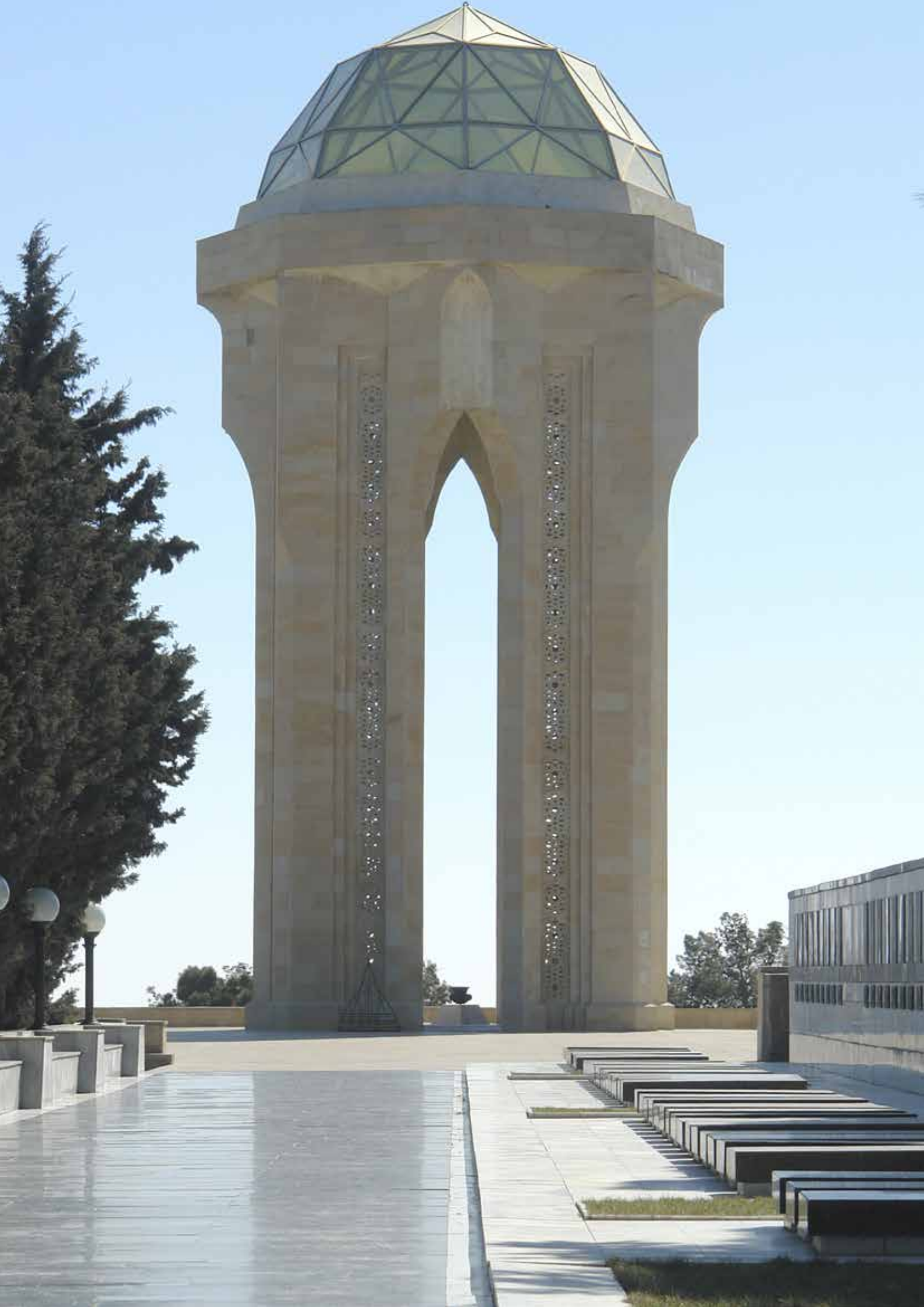

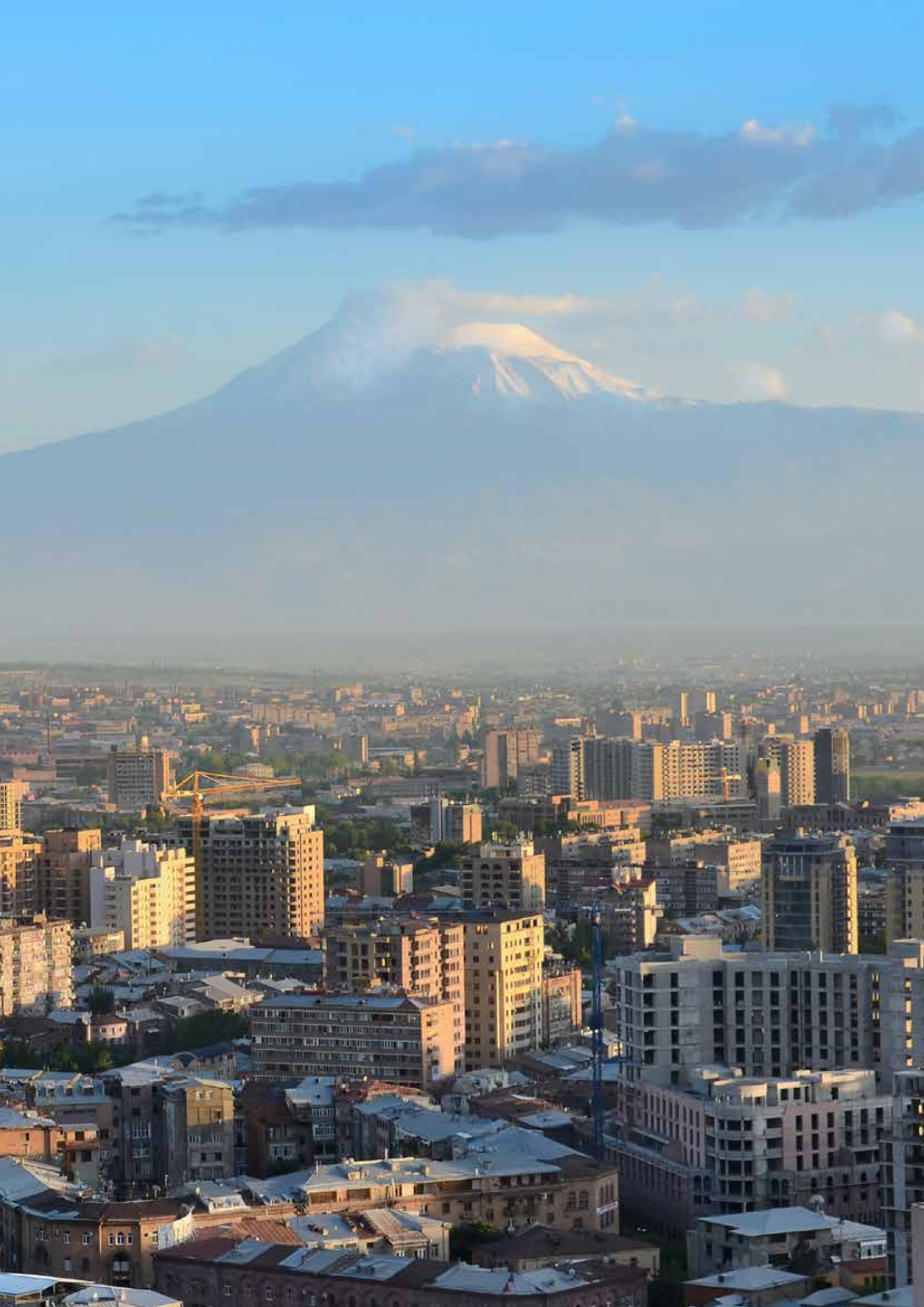

Armenia

Information Exchange in the Context of Anticompetitive Agreements

Exchange of information between competitors

Armenian law does not specifically regulate issues of information exchange in the context of anticompetitive agreements. However, information exchange is often considered one of the criteria for identifying anticompetitive agreements (including agreements made via collusion).

Information exchange may facilitate the coordination of conduct between competitors, which may result in anticompetitive collusion. That being said, exchange of information between competitors, regardless of the content, is not in itself evidence of an anticompetitive agreement. Therefore, it is necessary first to determine in which circumstances information exchange may give rise to a risk of violating the antitrust legislation. As the Armenian legislation does not directly answer this question, we consider it necessary to analyze the basic provisions of the legislation that govern the specifics of anticompetitive agreements and, based on an understanding of those provisions, to clarify the cause and effect relationship of information exchange between competitors and anticompetitive practices arising between them.

In accordance with the Law of the Republic of Armenia on Protection of Economic Competition (hereinafter the Law), anticompetitive agreements are contracts or agreements concluded between business entities or their direct or indirect collusion that may lead to the restriction, prevention or elimination of competition.

It is conventionally accepted in competition law practice that horizontal anticompetitive agreements (as opposed to vertical and mixed agreements) belong in a category of their own. This approach is explained by the negative effect from such agreements, which is so universally accepted that there is generally no necessity to prove economic harm but simply to establish the conduct, that is to establish the existence of an agreement between competitors to fix prices, allocate markets or rig bids.[1]

Information exchange between competing companies—the purpose of which is to set anticompetitive prices or implement other anticompetitive practices—may distort the operation of the competition mechanism and harm the interest of third parties.

A vertical agreement, particularly one in which a dominant party does not participate, is rarely examined by the regulatory authorities, which do not have a single approach to analyzing their anticompetitive nature. For example, there is no single opinion about whether the practice of setting minimum resale prices is anticompetitive.

Information exchange may be considered as part of a cartel (anticompetitive collusion) if the information exchange results in:

- Discriminatory pricing
- Artificial increase, decrease or maintaining of prices on the product market
- Allocation of the market in terms of territory, sales or purchase volume, product range, groups of consumers or suppliers, etc.
- Prevention (restriction) of access to the market by other business entities or displacing them from the market.

In such a case, information exchange between competitors that resulted in the above-mentioned consequences may be considered proof of an anticompetitive agreement. That being said, depending on the content and type of information being conveyed, how the market is set up and the consequences of

conveying the information, information exchange may be considered as proof of anticompetitive collusion even if the participants in the exchange did not initially pursue anticompetitive goals. So, in our opinion, each exchange of information should be analyzed on a case-by-case basis taking into account the nature of the market on which the information is exchanged and the content of the information to be exchanged, as well as the purposes and intentions of the participants exchanging information.

Participation in associations and information exchange

According to Article 125 of the Civil Code of the Republic of Armenia, commercial entities may create unions of legal entities for the purposes of coordinating their business activity and representing and protecting common property interests.

It is obvious from the content of the aforementioned article of the Civil Code of the Republic of Armenia that a union (association) of legal entities is an organization within which it is possible for business entities to exchange information among themselves. It is also obvious that "coordination of business activity" between competing business entities (it is mainly participants of one or several interrelated product markets that join business unions) assumes information exchange. Nevertheless, such "coordination of business activity" and exchange of information within its framework should not hinder the development of competition between business entities, the stimulation of competitive production or the protection of consumer interests. If the purposes for which a union of legal entities was created and its activity do not comply with the requirements of antitrust legislation of the Republic of Armenia, this may be considered proof that an anticompetitive agreement has been concluded.

Requests for information from the antitrust authorities

The authority implementing the state's policy for protection of economic competition is the State Commission for the Protection of Economic Competition of the Republic of Armenia (hereinafter the Commission). The Commission is independent of other State authorities in carrying out its objectives and functions established by the Law.

One of the Commission's objectives is to suppress, restrict and prevent anticompetitive practices. In achieving this objective, the Commission is entitled to request from business entities documents and other information needed for review, processing, audit, examination and/or monitoring. If any business entity fails to submit documents within the set time period or otherwise interferes with the above-mentioned processes, or the required documents and other information are unavailable, the Commission may make a decision based on the documents and other information at its disposal and also impose the penalties stipulated by the Law. The taking of decisions on these matters does not release business entities from the obligation to submit documents and other information and does not release them from liability for failing to submit them within the stipulated time period or for interfering with exercise of the powers established by the above-mentioned part.

The Law also empowers the Commission to carry out audits and examinations (including of sample purchases) to determine whether the information submitted by business entities is correct.

In recent years there have been no cases in practice of business entities refusing to submit the information requested by the Commission. However, an analysis of the Commission's decisions taken over the past year shows that there are many cases where business entities have submitted the requested information late, or have submitted incomplete information.

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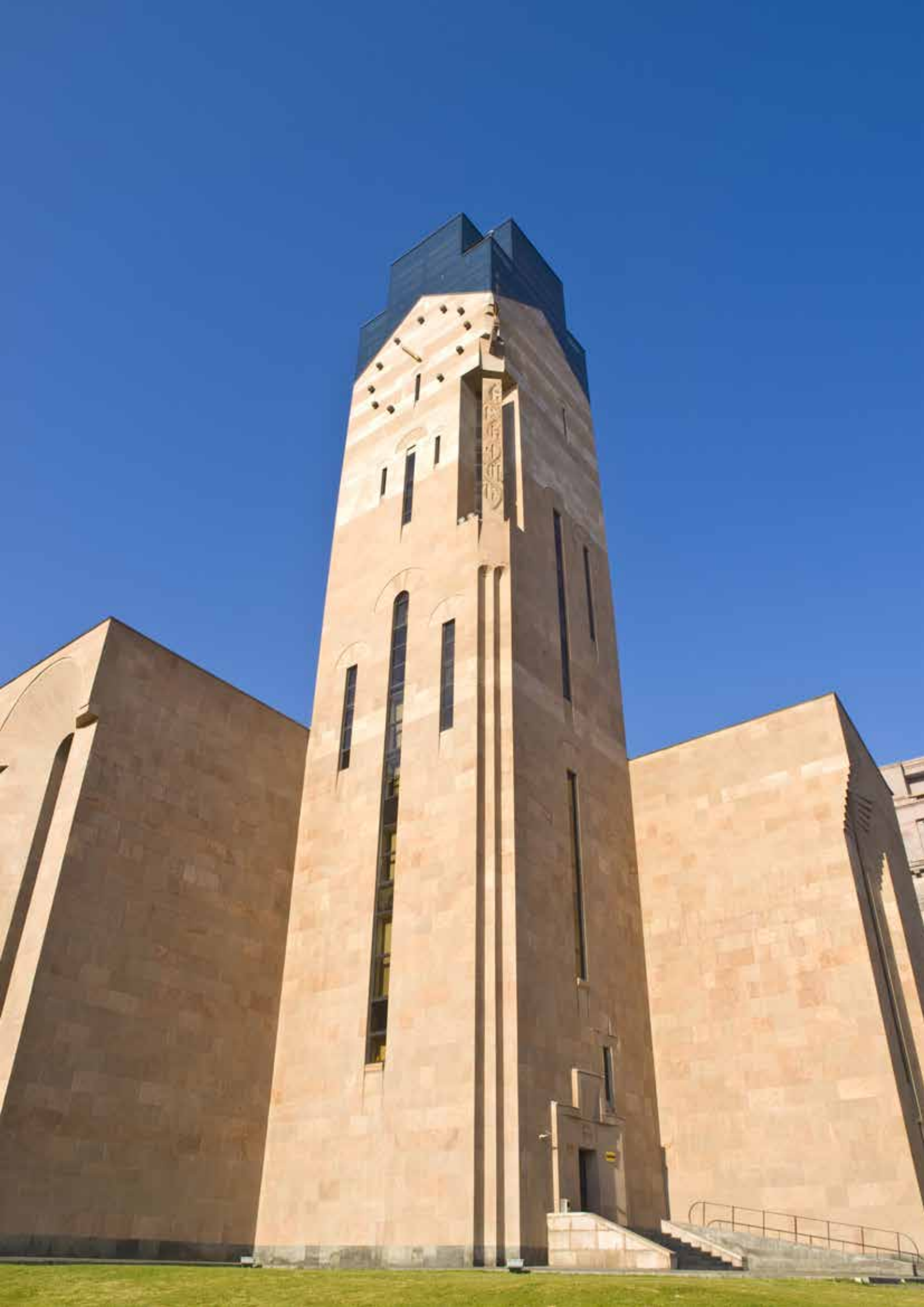
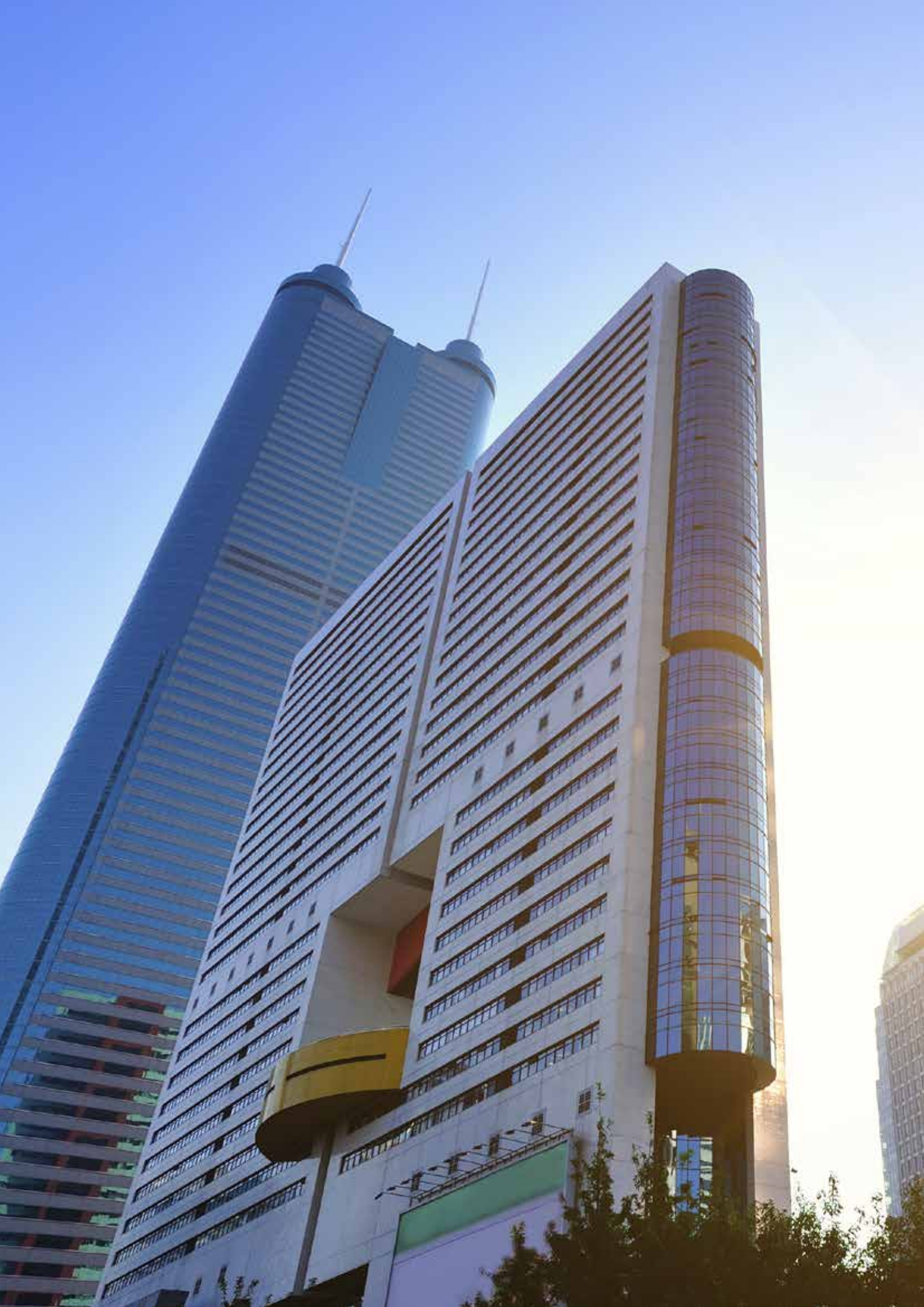
1 Voluntary Peer Review of Competition Policy: Armenia, Report by the UNCTAD secretariat, United Nations, New York and Geneva, 2010.





China

Antitrust risk for information exchange: Perspective of China Legal framework and enforcement practice

Dentons' Antitrust Team in China

Similar to other jurisdictions, information exchange between competitors can be risky in China, which may lead to a monopoly agreement (more specifically, a horizontal monopoly agreement or a cartel) and thus violate China's Anti-Monopoly Law (AML) that entered into force on 1 August 2008.

According to Article 13 of the AML, monopoly agreements mean agreements, decisions or other concerted practices which eliminate or restrict competition. Generally speaking, information exchange may violate the AML in two ways—either it is part of a wider cartel agreement or it leads to a concerted practice. The main difference between the two is that the latter does not contain any written or oral, express or implied agreement between the competitors. In the case of a wider cartel agreement, information exchange is a form of reaching and implementing the agreement, while in the case of a concerted practice, information exchange is an indispensable and constitutive element.

Wider cartel agreement

To date, all the cartel cases involving information exchange that were sanctioned in China are cases containing a wider cartel agreement:

- LCD cartel (2013): This case relates to a wider price fixing cartel. The cartelists discussed prices and also exchanged relevant information.
- Auto parts and bearings cartel (2014): This is also a wider price fixing cartel. The cartelists exchanged information on price, production quantity and sales volume.
- Car shipping cartel (2015): This case relates to a wider cartel on price fixing and market sharing. The cartelists exchanged information, among other things, on offer price, bidding intention, freight rate, shipping volume and market share.

All the cases listed above were investigated by the NDRC (National Development and Reform Commission, the antitrust authority in charge of price-related monopoly agreements and dominance abuse.) The NDRC found and treated information exchange as part of wider cartel agreements in these cases. As for the SAIC (State Administration for Industry and Commerce, the antitrust authority in charge of non-price-related monopoly agreements and dominance abuse,) it has not published any case in this area, but we understand it adopts a similar approach to handling this type of information exchange.

Concerted practice

It needs to be noted that information exchange is still being developed in China, in respect of both antitrust legislation and enforcement. Particularly, it is difficult for Chinese antitrust authorities to sanction standalone information exchange under the current legal framework. That is to say, mere exchange of information on price, quantity and other competitively sensitive information cannot be penalized unless a concerted practice needs to be substantiated, or a wider cartel agreement is found.

As for the concept of concerted practice, the AML does not provide for a definition of its meaning. In this regard, two supporting rules of the AML formulated by Chinese antitrust authorities elaborate on the factors to be considered in determining whether a conduct amounted to concerted practice. According to the Provisions on Anti-Price Monopoly formulated by the NDRC, the factors include (i) the price-related conducts of undertakings are consistent; and (ii) undertakings have communicated their intentions with each other. In addition, market changes and other situations shall also be considered.

According to the *Provisions on Prohibition of Monopoly Agreements by Administrative Agencies for Industry and Commerce* formulated by the SAIC, the factors include (i) whether the undertakings' market conducts are consistent; (ii) whether the undertakings have communicated their intentions or information with each other; and (iii) whether the undertakings are able to make reasonable explanations for the consistent conducts. In addition, the structure, competition conditions, market changes, industry conditions of the relevant markets and other situations shall also be considered.

In view of the above, there are two constitutive elements of the concerted practice, namely consistent conducts and communication of intention (the SAIC supporting rule also explicitly considers communication of information). Obviously, communication of intention implies information exchange.

Although these supporting rules elaborate on the concept of concerted practice, they are couched in broad terms and more detailed guidance is needed. Also, there is no concerted practice case yet where standalone information exchange is the sole basis for finding a violation. Hence, information exchange within the meaning of concerted practice is currently undeveloped in China.

It is noteworthy that in a chemical case in 2011, the NDRC tried to find existence of a concerted practice between several undertakings where they publicly announce the intention of raising prices. However, the difficulty of substantiating the concerted practice frustrated this potential first concerted practice case in China. Finally, one undertaking was fined under the Price Law, which prohibits spreading information about price hikes so as to disturb the order of market price. Although this case did not end up with a finding of concerted practice, it did illustrate the NDRC's position that public announcement of information on price hikes may constitute anti-competitive information exchange, which can lead to a concerted practice.

Antitrust risks

Within a wider cartel agreement, information exchange will not be sanctioned alone for violation of the AML. However, the number of times or the number of incidents of information exchange may have a significant impact on the amount of fine imposed finally. In this sense, information exchange is riskier within a wider cartel agreement than within a concerted practice, as proof of the existence of consistent conducts may not be required in the former.

For the information exchange constituting concerted practice, although China lacks both detailed legislation and enforcement, Chinese antitrust authorities have been studying this area and may draw on the experience of EU competition law. In this regard, no matter information is exchanged directly or indirectly (e.g., the hub-and-spoke cartel which has been targeted by Chinese antitrust authorities in some cases,) and no matter information is exchanged in the context of trade association meetings or through public announcement, such behaviors would be risky if they may lead to elimination or restriction of competition and may be regarded as anti-competitive in other antitrust jurisdictions. This reflects a convergence trend of global competition laws.

Information request

In spite of the convergence of the substantive aspect of competition laws, the procedural aspect varies from jurisdiction to jurisdiction. Even in China, there are two antitrust authorities (NDRC and SAIC) in charge of cartels, and each of them has its own and somewhat different investigation procedures. When investigating a cartel case (including information exchange related case), both of them will request information from the undertakings under investigation. This information request can occur in various scenarios:

- When the authorities conduct a dawn raid on the premises of the undertakings
- When the authorities require the undertakings to take part in the meetings in the premises of the authorities
- When the authorities receive information from interested parties
- When the undertakings apply for leniency
- When relevant information is located outside China (e.g. data stored in overseas servers).

When investigating an information exchange case, the antitrust authorities will focus on the following aspects, among others:

- The channel of information exchange (through the media, distributor, supplier, trade association, or in the process of certain activities, visit or conference)
- The content of information exchanged (historic, current or future information on pricing, quantity, cost, profit and other competitively sensitive information)

- The purpose of information exchange
- The conduct/reaction following the information exchange.

Undertakings should cooperate with the information request, as those who refuse to provide information, or provide false information, or conceal, destroy or transfer evidence, or refuse or obstruct investigation in any other way, they may be fined up to RMB 100,000/US$15,000 (on an individual who conducts such behaviors) and RMB 1,000,000/US$150,000 (on an undertaking). Under certain conditions, even a crime can be constituted.

Final remarks

China's AML has only been enforced for less than eight years, and the antitrust legal system still needs a number of improvements including more guidance on the information exchange. In this respect, lack of detailed guidance should not be an excuse for undertakings to overlook the compliance risk in this area. Rather, due to the possibility of evolving into a wider cartel agreement and the great discretion of the antitrust authorities, it is advisable for undertakings to conduct antitrust training for their employees on information exchange.

Additionally, there are developments in the antitrust legislation and enforcement in China every year, so it would also be helpful to keep an eye on this relatively new antitrust system and get updated regularly. We will continue to report on any development in this area, where we understand some cases that have not been publicized yet will shed more light on how to manage information exchange issues in China.

Dentons' Antitrust practice in China

Dentons lawyers are among the pioneering lawyers practicing antitrust law in China. The Antitrust team of Dentons in China is led by Dr. Jet Deng and Ken Dai, two partners located in Beijing and Shanghai respectively. Jet has participated in the legislative procedures of the AML since 2004 and has represented multinational and domestic clients for dozens of antitrust cases including merger filing, antitrust investigation, litigation as well as compliance. With strong theoretical and practical knowledge, he is routinely invited to participate in the drafting of the AML supporting rules and judicial interpretation in a thorough and comprehensive way. Ken has practiced antitrust for more than ten years, rendering legal service for many domestic and multinational companies. He is a member of the Antitrust Committee of the IBA, the Competition Committee of the IPBA and the Asian Competition Forum.

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CS29646-AntitrustregulationofinformationexchangeintheCISandChina_ENGLISH—12/08/2016