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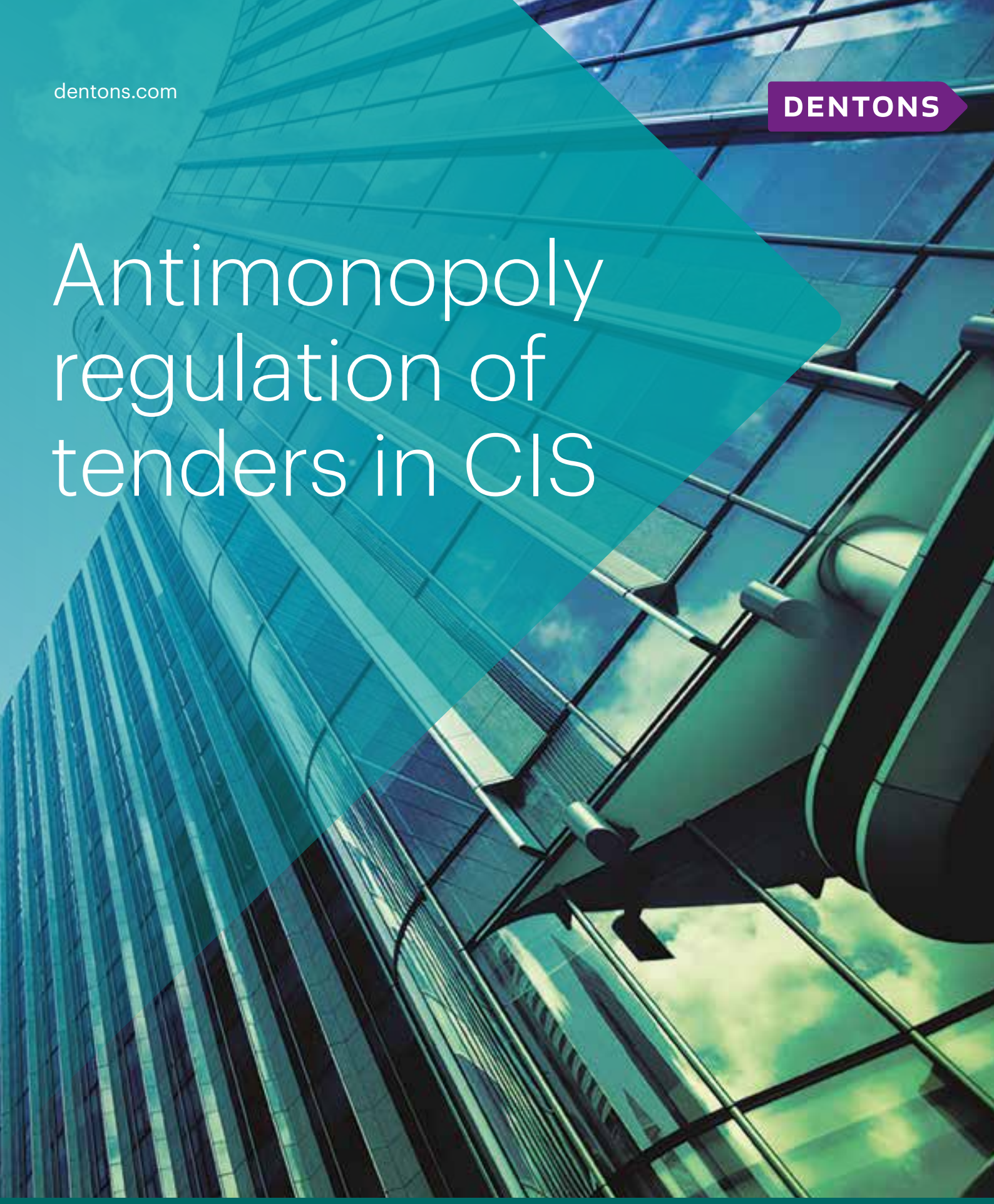
Antimonopoly regulation of tenders in CIS



Antimonopoly requirements for tenders in the CIS

The sale of goods and services through tenders has become normal practice for many companies operating in CIS markets. The establishment and maintenance of transparent and honest conditions for bidding in tenders is one of the fundamental principles for developing competition on relevant markets. However, most CIS countries lack detailed antimonopoly regulation of tenders. This brochure provides more details on competition law and tenders' regulation.

The articles in this brochure have been prepared by DENTONS offices in various CIS countries, as well as our partner K&P Law Firm LLC (Armenia).

The brochure provides information on the following jurisdictions:

- Russia
- Kazakhstan
- Ukraine
- Belarus
- Azerbaijan
- Armenia
- Uzbekistan

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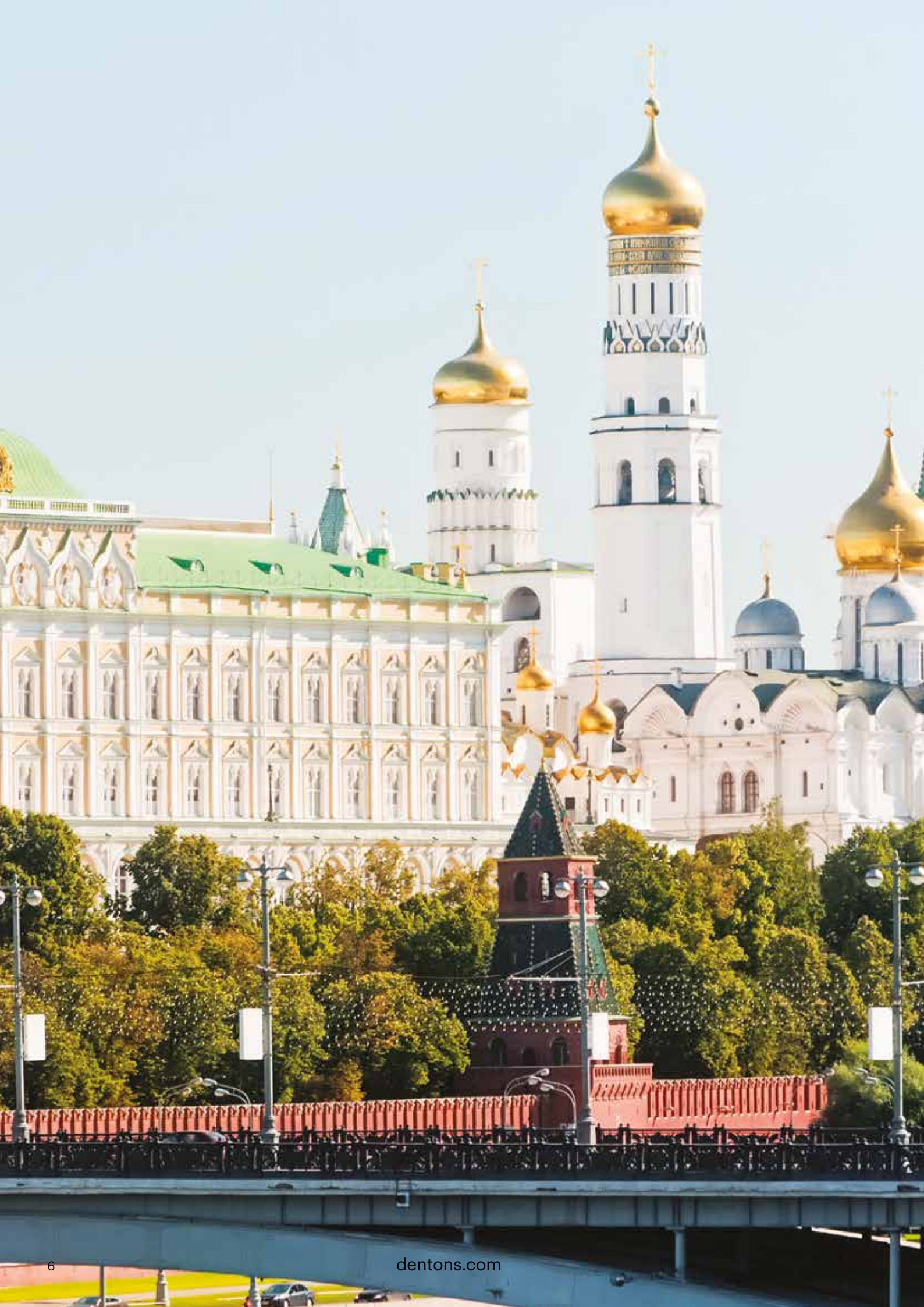

Russian Federation

Types of "tender"

The word "tender," one that has entered the spoken language, means a **call for bids (torgi)** (in the form of an auction or competitive tender (konkurs), in which a company or an individual meeting the criteria set by a potential client and offering the best terms for performance of the contract which is the subject of the tender obtains the right to enter into / perform such contract.

Russian Federation law identifies several types of calls for bids:

- Private, held in accordance with the requirements of the civil legislation.
- Calls held by so-called "certain types of legal entities," which means state corporations and companies, natural monopolies, public-funded institutions, etc. Such calls for bids are governed by Federal Law No. 223-FZ on the Procurement of Goods, Works and Services by Certain Types of Legal Entities of July 18, 2011, which lists the criteria for the calls for bids to which it applies.
- Calls held to satisfy state and municipal needs. They are regulated by Federal Law No. 44-FZ on the Contract System for Procurement of Goods, Works, and Services for State and Municipal Needs of April 5, 2013.

Antimonopoly regulation of calls for bids is a central issue in both the public and private sectors. Chapter 4 of Federal Law No. 135-FZ on the Protection of Competition of July 26, 2006 (the "**Competition Law**") determines the basic rules for antimonopoly regulation of calls for bids applicable to all types of calls mentioned above (and also contains special rules governing specific types of calls).

Antimonopoly requirements to the holding of calls for bids

Article 17 of the Competition Law establishes **prohibitions** on certain practices that may lead to the prevention, restriction or elimination of competition in a call for bids, namely:

1. Coordinating activities of tenderers by the organizers of calls for bids, requests for quotations or requests for proposals (hereinafter "Calls") or by clients.
2. Creating preferential terms of participation for one or more tenderers in the Calls, including via access to information.
3. Violating the procedure for determining the winner or winners of the Calls.
4. Participating in the Calls of the organizers or clients and/or employees of the organizers or employees of clients.

There is additional antimonopoly regulation for certain types of Calls: for example, contracts of authorities of the Russian Federation or its subjects, local government authorities and state extrabudgetary funds with financial organizations may be concluded only based on the results of public Calls.

In practice one of the most frequent violations of antimonopoly legislation with respect to Calls is collusion of tenderers, or of tenderers and the organizer, to achieve a specific outcome of the Calls. Such collusion is considered a cartel, an anti-competitive agreement among business entities (Article 11 of the Competition Law), strictly prohibited under Russian law.

Practices of tenderers

Generally tenderers enter into cartel agreements before the start of the Calls. There are several long-standing forms of such agreements:

1. Several dishonest tenderers intentionally decrease ("beat down," "taranyat") the price at the Calls until it becomes unreasonable from the economic standpoint, thereby depriving a bona fide tenderer of economic interest in the Calls. A few seconds before the end of the Calls the last participant of the cartel, who until that point had not made a bid, offers a price that is slightly lower than the price offered by the bona fide company. When determining the winner it is discovered that the companies that "beat down" the price do not meet some of the mandatory criteria of the Call, for example, they do not have the required permits. In the end, the contract is concluded with the dishonest tenderer that submitted the tender in the final seconds. A well-known example of the use of such a scheme is the case of a number of construction companies belonging to brothers that used it to ensure that one of their companies won the Calls[1]. The case was considered by the Federal Antimonopoly Service of the Russian Federation (FAS) on the basis of a complaint from a bona fide tenderer.

2. Dishonest entities register to bid in the Call; however, only one company actually submits a bid (one for the entire Call or a different one for each specific lot). In this way the client is compelled to enter into the contract on the terms of a single bid. One of the most notable cases using such a scheme was the cartel of pharmaceutical companies investigated in 2010-2012. Seventeen entities participated in the cartel, and they were tenderers in a large number of Calls in which the colluders won in turns[2]. The case was investigated by the FAS on the instruction of the RF Government jointly with the General Prosecutor's Office of the Russian Federation.

An anti-competitive agreement does not have to be stable or permanent; it is possible for one tenderer to coerce others to withdraw from a specific Call through bribery[3]. There are also cases of threats and violence from a dishonest tenderer against a potential competitor.

Practices of the Call Organizer

In practice, call organizer, operator of an electronic tendering platform, tender or auction commission (**Call Organizer"**) often engages in anti-competitive practices by agreement with tendering companies: the Call is held counting on the fact that a specific tenderer will win.

The following are possible practices of a Call Organizer that are recognized as violations of the antimonopoly legislation:

1. The setting of unfair, unnecessary or discriminatory tendering criteria for participation or terms of the Calls. Such terms may include integration of unrelated lots into a single lot, setting the requirement to have documents or equipment unrelated to the subject of the contract, etc. For example, the Government of Stavropol Kray when holding a public competitive tender among automotive businesses set the evaluation criterion at 7 points for businesses owning their production and technical facilities, and 0 points for those leasing them. Such a criterion was deemed to be invalid (as ownership of facilities does not affect the quality of services provided) and discriminatory against small and medium businesses[4]. The case was considered under a complaint from the automotive businesses.

2. The Call Organizer prevents participation in the Calls. For example, it does not publish information on the date and time of the Calls, does not provide the address of the electronic tendering platform, etc[5].

3. The Call Organizer violates the procedure for determining the winner: it accepts a tender that does not meet the established criteria, selects a tenderer who did not make the best offer, etc[6].

When considering cases of antimonopoly law violations in Calls (and when rendering decisions) the FAS may use a wide range of evidence of an offense. This includes:

- Witness testimony, minutes and recordings confirming the fact of a cartel agreement or another violation of antimonopoly law.
- Characteristics of the tenderers (they show signs of being "shell companies," operate from a single email address, are registered in a single building, etc.).
- Factual information concerning the holding of the Calls and the practices of the Call Organizer (for example, absence of data on the electronic tendering platform during the Calls, confirmed by a notarized screenshot).
- Information on activities of the tenderers (for example, a tenderer not being actually able to carry out a contract at the time the tender was submitted).
- Circumstantial conclusions (inferences). For example, the conclusion that absolute coordination by tenderers is not possible without prior collusion.

Appealing the actions of the Call Organizer

The FAS may find "anti-competitive" violations in Calls during its own audits of compliance with antimonopoly legislation (including on the instruction of the Russian Federation Government within the scope of its authority, or on the basis of information received on violations[7]) or during the consideration of complaints against the actions of the Call Organizers. Such complaints may be filed by tenderers, or by third parties whose rights and legitimate interests could be infringed by violation of the procedure for holding the Calls (the complaint procedure is set forth in Article 18.1 of the Competition Law).

The following are some of the most frequently encountered grounds for complaints regarding the practices of Call Organizers:

- Unfair tendering criteria.
- Unfair terms of the Calls, for example, combining unrelated subjects of a Call into a single lot.

Complaints must be filed with the FAS within **ten days** of tallying the result of the Call (or of publication of the Call results on the Internet, if such publication is required). The time period may vary depending on the result or the nature of the Call. Together with filing a Complaint, the results of the Call may be challenged in court.

The FAS is required to consider the complaint on the merits within **seven business days** of **receiving** the complaint. Once the complaint is received FAS is required to notify the Call Organizer that a complaint has been received and suspend the Calls until the complaint has been considered on the merits. The Call Organizer and the tenderers may send the antimonopoly authority an objection or an addendum to the complaint and participate in the consideration of the complaint. The Call Organizer also cannot enter into a contract with a tenderer until FAS renders a decision on the complaint, otherwise the contract will be considered void.

The appellant may renounce its complaint (without the right to submit a complaint again). The decision or order of the FAS commission may be appealed in court within three months of the date of the decision or issuance of the order.

If, during consideration of a complaint, some of the arguments set out in the complaint are confirmed while some are not, the complaint is declared valid[8]. If the arguments set out in the complaint are not confirmed, but the FAS commission has determined that there were other violations that were not the subject of a complaint, the Complaint is deemed invalid, but the discovered violation is stated in the decision and, if necessary, the appropriate order is issued[9].

Consequences of finding violations of antimonopoly law

FAS orders to eliminate antimonopoly law violations may include requirements to extend the Call once the criteria for participation and terms have been changed, or other violations have been eliminated, orders to strictly supervise the tendering procedure (including documenting all practices of a participant), etc.

Violation of the requirements of antimonopoly legislation is a ground for **a court to invalidate the Call and transactions concluded on the basis of the Call**, including further to a claim of the antimonopoly authority.

It is possible to impose administrative liability on violators, primarily under Article 14.32 (Conclusion of an anti-competitive agreement, taking anti-competitive coordinated actions, coordination of economic activity) of the Russian Federation Code of Administrative Offenses No. 195-FZ dated December 30, 2001.

Finally, if the anti-competitive practices have resulted in major (more than 10,000,000 rubles, or approx. US$17,185) damage to individuals, organizations or to the state, or have resulted in the deriving of a large amount of revenue (more than 50,000,000 rubles or approx. US$859,550), **criminal prosecution** of individual violators is possible. In this case primarily Article 178 (Prevention, restriction or elimination of competition) of the Russian Federation Criminal Code No. 63-FZ dated June 13, 1996 will apply. Penalties under the main component of this article reach a fine of 500,000 rubles (approx. US$8,595) or amount equal to the income of two years, forced labor or imprisonment for up to three years with possible deprivation of the ability to hold certain positions or engage in certain activities. The presence of aggravating circumstances may result in up to seven years of imprisonment.

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1 Case No. 05-10-07/2011 (decision of the FAS department for Orenburg dated September 2, 2011)
2 Case No. 1 11/158-10 (decision of the FAS Commission dated July 6, 2011) and others. For example, case No. 1 11/194-11 (decision of the FAS Commission dated December 2, 2011): one tenderer gave another tenderer money not to participate in the Calls. The case was considered at the confession of the bribed tenderer.
4 Case No.67 (decision of the FAS department for Stavropol Kray dated July 20, 2011)
5 For example, case No.132-/2014 (decision of the FAS Russia department for Krasnodar dated November 6, 2014): the client did not publish information on the Calls on the electronic tendering platform. The case was considered at the complaint of a potential tenderer.
6 For example, case No. 60 (decision of the FAS Russia department for Novosibirsk dated December 18, 2013): the tender commission awarded the winning tenderer the maximum number of points according to a criterion which it did not in fact meet. The case was considered further to wan application of the acting prosecutor.
7 For example, further to an inquiry from senator Ruslan Gattarov, the FAS audited an auction of the Ministry of Health to develop infrastructure for the Unified State Health Information System (FAS official website: http://www.fas.gov.ru/fas-in-press/fas-in-press_36824.html)
8 FAS Russia letter No. ATs /16109/14 dated April 23, 2014 on the Sending of Clarifications on the Adoption of Decisions by the Antimonopoly Authority based on the Results of Consideration of Complaints against Violation of the Procedure for Mandatory Callses in accordance with Russian Federation Legislation and the Procedure for Concluding Contracts according to the procedure of Article 18.1 of Federal Law No. 135-FZ on Protection of Competition dated July 26, 2006.
9 Ibid.

Ukraine

In accordance with Ukrainian laws, the following types of tenders can be identified:

- Private tenders, i.e., tenders conducted by business entities in the private sector of the economy for their own needs and not at the expense of public funds. Such tenders are conducted in accordance with the general rules of civil legislation.
- Procurement for the needs of the State and the needs of territorial communities conducted in accordance with the Law of Ukraine on Public Procurement No. 1197-VII of April 10, 2014 **(the "Public Procurement Law").**
- Procurement by business entities operating in areas specified in the Law on the Specifics of Procurement in Certain Areas of Business Activity No. 48851-VI of May 24, 2012. Subject to the specific treatment established by that law, such procurement is carried out in accordance with the Public Procurement Law.

Article 6 of the Law of Ukraine on Protection of Economic Competition establishes a general rule for all types of competitive procurement: any agreements, actions, or inactions associated with a distortion of the results of auctions, competitions, or tenders are considered anticompetitive concerted actions. Anticompetitive concerted actions are prohibited, with certain exceptions. The Law on Protection of Economic Competition also prohibits the inducing or compelling of such actions.

Unfortunately, the term "distortion of the results of auctions, competitions, or tenders" is undefined in the current legislation. As a result, the Antimonopoly Committee of Ukraine ("AMC") can interpret this term quite broadly at its discretion. Based on an analysis of decisions of the AMC and jurisprudence, one can identify the following actions that are considered a distortion of tender results:

- Pre-agreement of bidders in tenders (competitions, auctions) not to compete with one another.
- Fictitious participation to create the appearance of competition in a tender.
- Collusion between bidders on setting inflated prices or including other non-market conditions in bids.

Collusion between the organizer of a tender and a bidder for the purpose of gaining advantages for that bidder over other bidders or excluding other bidders may also be considered a distortion of tender results. Such vertical agreements are practically never encountered in the AMC's practice of investigating anticompetitive concerted actions.

It may also be noted that private tenders (competitions, auctions) are practically never encountered in the AMC's cases concerning anticompetitive concerted actions. With rare exceptions, such cases always concern public procurement.

The legislation on public procurement contains special provisions aimed at ensuring and protecting competition in the process of such procurement. First, the very concept of "tendering," as formulated in the Public Procurement Law, implies competition: tendering (competitive bidding) is a competitive selection of bidders with the aim of determining a successful bidder (in competitive bidding) in accordance with the procedures established by the Law of Ukraine on Public Procurement (except for the negotiated procurement procedure).

Second, article 3 of the Public Procurement Law sets out a number of principles of procurement aimed at protecting competition, including:

- Fair competition among bidders
- Maximum economy and effectiveness
- Openness and transparency at all stages of the procurement
- Nondiscrimination of bidders

Third, the principles of transparency, openness, and nondiscrimination of bidders are not only declared in the law but also ensured by specific provisions.

Transparency and openness of public procurements (hereinafter called "tenders") are ensured through procedures of mandatory publication of information about tenders and their results on the Internet, on a special site of the Ministry for Economic Development and Trade of Ukraine (tender.me.gov.ua). That information includes:

- An announcement of the tender and the relevant tender documentation: no later than 20 days before the date of the tender (date on which bids are opened).
- Changes in tender documents: no later than 7 days before the date of the tender.
- The bid opening record and information on the rejection or acceptance of bids: within 3 days.
- An announcement of the results of the procurement procedure: within 7 days after a contract is concluded or the tender is canceled or declared void.
- Information on amendments to the contract concluded on the basis of the procurement procedure, and a report on the performance of the contract: within 3 days from the date of the amendments or the date of expiration, performance, or termination of the contract.

Article 5 of the Public Procurement Law places Ukrainian and foreign bidders on an equal footing in tenders, requires tender organizers to provide all bidders with free access to the procurement information, and prohibits the setting of discriminatory requirements for bidders. The Public Procurement Law also states that tender documents cannot contain requirements that would restrict competition or lead to discrimination of bidders, and only the qualification criteria set out in article 16 of the Public Procurement Law can be used. The law specifically prohibits the establishment of quali-fication criteria for tenders conducted by means of the request for price quotations procedure, as well as the procurement of certain goods and services, which are listed in the law, where quality is standard and price is the decisive criterion. Article 17 of the Public Procurement Law sets out an exclusive list of the grounds on which participation in a tender can be denied, the criteria for assessing bids and the grounds for rejecting them.

It may be noted that the Public Procurement Law was adopted in the Spring of 2014 at an accelerated pace, as part of the preparation and signing of the Association Agreement with the EU and accession to the WTO Agreement on Government Procurement. For that reason, it initially contained many gaps and deficiencies, and seven amendments have already been made to it. As far as we are aware, new amendments to the Public Procurement Law are planned as well, including amendments aimed at protecting competition.

Appeal and challenge of tenders

In 2010, with the adoption of the Law of Ukraine on Public Procurement No. 2289-VI of May 1, 2010, the AMC was invested with the powers of the review body for public procurement procedures. As a result, the AMC now performs two functions:

- Considers complaints concerning failure to comply with public procurement procedures in accordance with the Public Procurement Law.
- Considers cases of violation of laws on the protection of economic competition in accordance with the Law on Protection Against Unfair Competition and the Law on Protection of Economic Competition, including anticompetitive concerted actions associated with distortion of tender results.

Within the scope of considering complaints concerning failure to comply with public procurement procedures, the AMC may suspend a public procurement procedure and, after considering a complaint, if violations have been discovered:

- Require the procurement organizer to fully or partly cancel its decisions, eliminate any discriminatory terms and conditions, and bring documents into conformity with the law.
- Cancel the procurement.
- Appeal through the courts a contract concluded on the basis of a canceled procurement.

When a procurement is canceled by the AMC, a contract concluded on the basis of the procurement may be appealed in court by any interested party, and not only by the AMC.

For purposes of appeal of public procurement procedures to the AMC, in accordance with the law, a Board for the review of complaints of violations of laws on public procurement has been created.

Decisions on complaints concerning failure to comply with public procurement procedures are made by the Board within 30 business days from the date of receipt of the complaint. A decision of the AMC may be appealed through the courts, likewise within 30 days.

Based on its findings in a case concerning violations of laws on the protection of economic competition in the form of anticompetitive concerted actions, the AMC may impose a fine on the parties to such actions in the amount of up to 10 percent of the respective party's annual revenue for the year preceding the year in which the violation was discovered. Cases concerning violations of laws on the protection of economic competition are heard by the AMC itself, its regional offices, and administrative boards of the AMC and its regional offices. No time limit is set by law for the review of cases concerning protection of economic competition, but the decisions of the AMC and its bodies in such cases may be appealed in court within two months.

In the process of an appeal of public procurement procedures, the AMC generally considers discriminatory actions of the procurement organizer against one or more bidders. Such actions can also be characterized as anticompetitive concerted actions associated with a distortion of tender results, i.e., as a violation of competition laws. In practice, however, in terms of violations of competition law, the AMC generally investigates collusion and other concerted actions among bidders in public procurement, and not between a procurement organizer and a bidder. Therefore, an absolute majority of the cases concerning anticompetitive concerted actions associated with a distortion of the results of public procurement relate to "horizontal" collusion between bidders, not "vertical" collusion between an organizer and a bidder.

AMC identifies the following signs of possible concerted actions associated with a distortion of tender results:

- Similarity in the execution of bids, including common spelling, syntactic, mathematical, and technical errors.
- Preparation of tender documents on the same computer, by the same preparer, using the same programs.
- Offer prices put forward by bidders that are significantly higher than current average market prices in the tender period, including the selling prices of the bidders' themselves.
- Intensification of telephone calls and electronic correspondence between the bidders in the bid preparation period and during the tender period.
- Systematic participation of the same businesses in the same tenders and a "rotation" of tender wins among such bidders.
- These signs may serve as indirect evidence of collusion associated with a distortion of tender results. Such indirect evidence operates, as a rule, only in totality and in the absence of evidence that the bidders' bids are economically justified. Direct evidence, such as written agreements, correspondence of bidders and other documents or testimony of bidders, is very seldom encountered.
- According to an AMC report for 2014, 81 percent of the anticompetitive concerted actions identified in 2014 relate specifically to distortion of tender results. Meanwhile, anticompetitive concerted actions make up 26 percent of the total number of competition law violations identified by the AMC in 2014.

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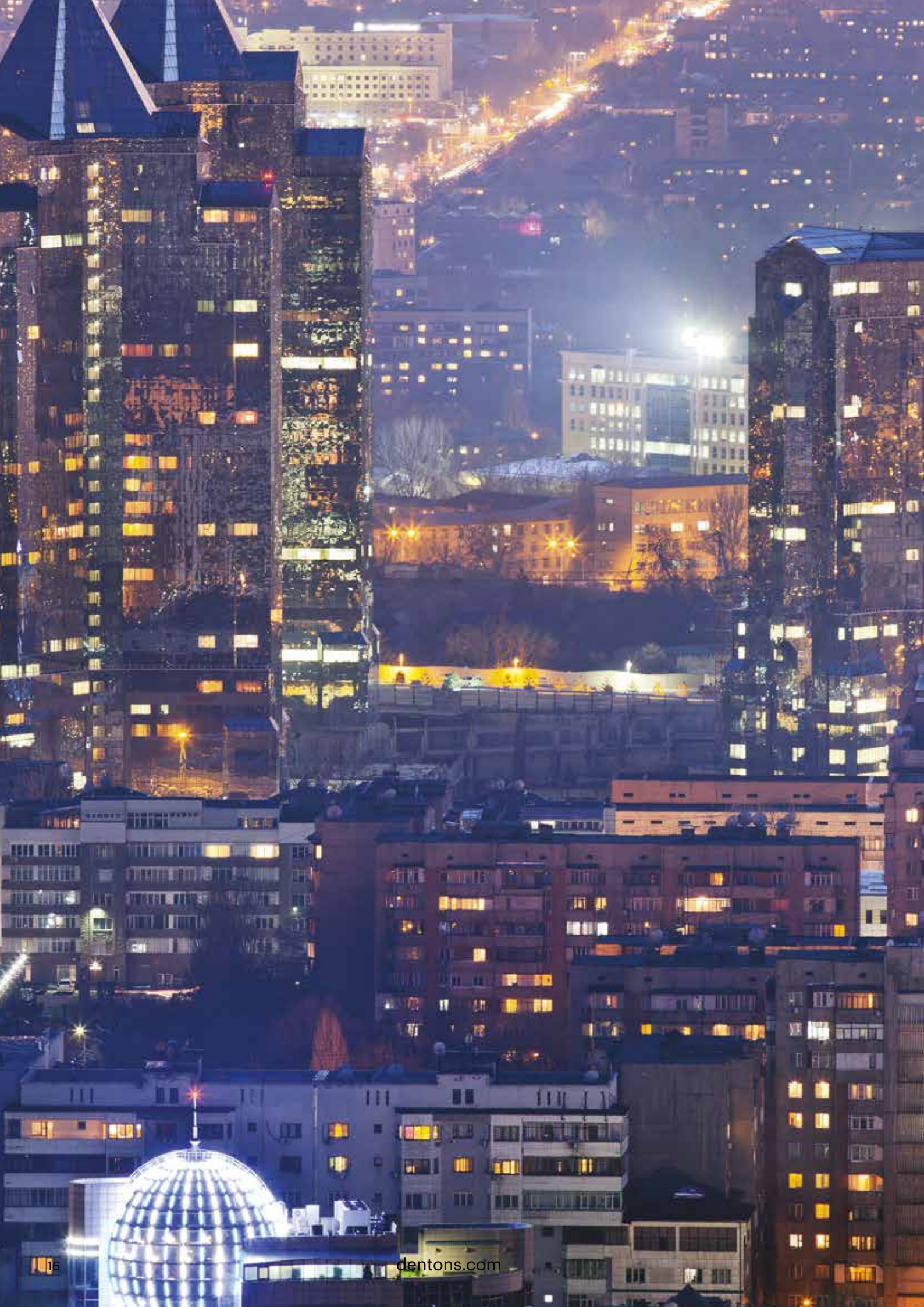

Kazakhstan

In Kazakhstan, the regulation of procedures for tenders, both public and private, is generally divided into four categories:

1. Antimonopoly Regulation of Tenders

Antimonopoly regulation of tenders is carried out by the antimonopoly body – the Committee of the Ministry of the National Economy of RK for the Regulation of Natural Monopolies and Protection of Competition and its territorial units:

- Under the RK Law on Natural Monopolies and Regulated Markets: purchases the expenses for which are taken into account in approvals of tariffs (prices, charge rates) or the tariff maximum levels and tariff cost sheets for the regulated services (products, works) of subjects of a natural monopolies.

- Under the RK Law on Competition: in terms of the anticompetitive agreements between the market participants:

a. horizontal, i.e. those which interfere with legal rights of consumers and/or result/may result in increase, decrease or maintenance of prices at tenders.

b. agreements, which lead or may lead to restriction of competition, including those related to distortion of the results of tenders, auctions, contests as a result of the violation of the established procedure, which includes separation of lots.

c. Regulation of Government Purchases.

In Kazakhstan, regulation of the procedure for government purchase is carried out by an authorized body which is the Committee of the RK Ministry of Finance for Government Purchases. Consequently, realization and control functions are performed by the Committee of the RK Ministry of Finance for Financial Control (the "CFC").

2. Regulation of Purchases of Goods, Works, Services for Subsoil Use Operations

Acquisition of goods, works and services for subsoil use operations is carried out by way of tenders (Article 77 of the RK Law on Subsoil and Subsoil Use). The authorized body in this area is the Ministry for Investment and Development of the RK and the Committee of the named Ministry for Geology and Subsoil Use.

3. Purchases of the JSC "National Prosperity Foundation JSC "Samruk-Kazyna"

In Kazakhstan, the area of government purchases includes, along with the state bodies, agencies and enterprises, the joint-stock companies where the government holds a controlling share, i.e. national companies and their affiliated legal entities where 50% or more of the shares belong to the given customers. Tenders held by the aforementioned companies are regulated by the RK Law on the National Prosperity Foundation, the Rules on Procedure for the Purchase of Goods, Works and Services of the JSC "Samruk-Kazyna" and the organizations where 50% or more of the voting shares is owned or held in trust by JSC "Samruk-Kazyna" (as approved by Decision No. 02/14 of the Board of the JSC "Samruk-Kazyna" on 22 January 2014 and amended on 24 June 2014), the Rules on Purchase of Goods, Works and Services by the JSC "National Prosperity Foundation "Samruk-Kazyna" and the organizations where 50% or more of the voting shares is owned or held in trust by JSC "Samruk-Kazyna" (as approved by the Board of Directors of JSC "National Prosperity "Samruk-Kazyna" on 26 May 2012 No. 80 and amended and supplemented on 18 December 2014).

In these cases, the authorized body of the JSC for the purchase of goods, works and services is the executive body of the joint-stock company and the committee for tender. Disputed issues must be referred to the courts in accordance with the civil procedure legislation.

Antimonopoly regulation of tenders conducted in accordance with the RK Law on Natural Monopolies and Regulated Markets is carried out by the antimonopoly body as a result of the following authorities provided for in the Law:

a. Cancellation of the results of a tender held by a subject of a natural monopoly before entering into an agreement with the winner of the tender conducted in violation of the RK legislation and power to impose an obligation to hold a new;

b. Cancellation of an application of a subject of a natural monopoly for approval of tariffs (prices, fee rates) and the tariff maximum levels in case of a violation by the subject of the requirements on holding of a tender established by the legislation on natural monopolies and regulated.

As shown from the practice, application of the first measure by the antimonopoly body is rare. However, the second measure is applied quite often. For example, over the 1st quarter of 2012, the Almaty Oblast Department of the RK Agency on Regulation of Natural Monopolies (the "DRNM") refused two applications for tariff approval submitted from two subjects of natural monopoly due to the ground of violation by the subjects of a natural monopoly of the requirement on holding a tender for the regulated services of water supply system and access roads.

Antimonopoly regulation of tenders in accordance with the RK Law on Competition is carried out by the antimonopoly body in relation to both the government purchases tenders and tenders conducted by commercial entities. Under this Law, the regulation is carried out in two ways:

a. As a result of a finding of horizontal agreements which lead to an increase, decrease or maintenance of prices at tenders. As a negative consequence of such violation of the antimonopoly legislation, legal rights of consumers of goods, works and services are interfered with

Bearing in mind that the given norm has only recently entered into force, on 6 March 2013, it has been rarely applied in practice.

b. As a result of finding of agreements which distort the results of tenders, auctions, contests as a result of the violation of the established procedure, which includes separation of lots, resulting in the restriction of competition.

Notwithstanding the fact that it is within the competence of the antimonopoly body to prevent the conclusion of anticompetitive agreements, the antimonopoly body does not take part in tenders. As a rule, the antimonopoly body is notified of a violation of the procedure for the tender by public bodies, the media, private citizens, legal entities as well as by way of actual discovery of the event of an antimonopoly violation. Often the motivation behind notifications of the antimonopoly body by the subjects of the market is to remove the competitor, i.e. unfair competition. Given that, it seems that the market participants tend not to be imposed with an administrative liability for anti-competitive agreements entered into as a result of tenders.

As an example, in February 2014 SIAC (the Specialized Interdistrict Administrative Court) of Almaty reviewed and dismissed the case on the ground of absence of elements of the offense charged to the market participants by the antimonopoly body under Part 1 of Article 147 of the previous RK Code of Administrative Offences **(the "Administrative Code")** on the committal of anticompetitive agreements. Given market participants had entered into conspiracy, in the course of the tender for the purchase of control-measuring equipment for the branches of a national telecommunication company, by alternate concession of prices. Dismissing the case, the court held that there had been three winners of the tender while the antimonopoly body claimed that there had been two winners. Moreover, the court clarified that the elements of the offense are only established if the results of the tender are held illegally and did not correspond to the relevant rules, for example, by charging the accused with the administrative liability for the violation of the established procedure for tenders, auctions and contests within the framework of administrative legislation. In this case, the antimonopoly body failed to prove this fact.

In our view, application of the law in this area has not yet been laid down. However, it is already clear that in order to avoid the objections of the courts in the course of inspections of the procedure of the tender for its legality and any violations, the antimonopoly body has the right to engage experts from other State bodies and cooperate with law enforcement bodies. In other words, having detected the violations in the course of a tender, experts from the authorized bodies of public revenue (Committee for the Financial Control, Departments of Public Revenue, etc.) issue administrative protocols and examine administrative materials. After receipt of the results of the administrative case and review of the content of agreements of the tender participants and upon the end of the antimonopoly investigation, the antimonopoly body may issue an administrative protocol under Part 1 of Article 159 (i.e. "Anticompetitive agreements") of the new Administrative Code and forward it to the courts for examination.

Thus, shortcoming of the antimonopoly body in proving the anticompetitive agreements that were mentioned in the judicial ruling above, are in practice purely formal and easily overcome. Furthermore, if the antimonopoly body manages to prove the fact of alternate concession of prices by the market participants in the course of a tender, the antimonopoly violation will be established (i.e. an anticompetitive agreement by the market participants in the course of a tender). The only insurmountable obstacle in the above example is the fact of participation of at least three market participants, as opposed to two market participants. For this reason the court refuses to accept the fact of alternate concession of prices by two market participants in the presence of a third one.

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Belarus

The new version of the Law of the Republic of Belarus No. 94-Z "On Counteracting Monopolistic Activity and Developing Competition" of December 12, 2013, which came into force in July of last year, as the competition legislation previously in effect, does not contain special provisions devoted to antimonopoly regulation of tenders held for purposes of public and/or private procurement.

Tenders and procurement conducted by non-public organizations are governed by the general provisions of the civil legislation and competition laws of the Republic of Belarus. The procedures for appealing such tenders, in particular when distortion of competition is involved, are non-specific and are not the subject of this survey.

The key regulatory legal acts governing general provisions in public procurement[1] are the Law of the Republic of Belarus No. 419-Z "On Public Procurement of Goods" (Works, Services) of July 13, 2012 (the "Public Procurement Law"); the Decree of the President of the Republic of Belarus No. 590 "On Certain Matters Relating to Public Procurement of Goods (Works, Services)" of December 31, 2013 (as amended on December 31, 2014); the Decision of the Council of Ministers of the Republic of Belarus No. 1987 "On Certain Matters Relating to Public Procurement" of December 20, 2008; and the Decision of the Council of Ministers of the Republic of Belarus No. 229 "On Improvement of Relations in the Self-Funded Procurement of Goods (Works, Services)" of March 15, 2012. For specific categories of goods, works and services—such as in the fields of construction, medicine and information technology—procurement is carried out in accordance with special legislation.

The legislation on public procurement contains only general provisions regarding the need to comply with competition laws when engaging in procurement activities. It also requires impartiality toward potential suppliers, prohibits the combining of technologically and functionally unrelated, dissimilar goods, works or services in a procurement order for purposes of precluding fair competition between suppliers, etc. At the same time, the legislation on public procurement does not exempt relations in that sphere from the general rules laid down in the Competition Development Law with regard to anti-competitive instruments, actions/inaction, agreements and concerted actions of state authorities, anti-competitive agreements and concerted actions of other economic entities, etc.

In the absence of specific antimonopoly regulation of tenders and procurement, and in the absence of any practice of challenging (invalidating) tenders and tender-based agreements on the ground of a violation of competition laws, the specific decision as to how to protect the rights and legitimate interests of a bidder or other interested person in connection with distortions of competitive conditions must be worked out on a case-by-case basis.

Challenging tenders and agreements concluded on the basis of tenders

With regard to the process of challenging (invalidating) public tenders and agreements concluded on the basis of a tender, one significant problem is the vague delineation of the powers of the antimonopoly authority and the state body responsible for public procurement with respect to consideration of complaints relating to public procurement.

For example, the body responsible for public procurement is the Ministry of Trade of the Republic of Belarus, which, according to the Public Procurement Law, has the authority to hear and resolve any complaints about actions/inaction and/or decisions of an organizer, tender committee, or other persons involved in conducting a tender who violate the rights and legitimate interests of a bidder or other interested person. The Ministry of Trade also has the power to issue a binding decision reversing or modifying an unlawful decision of a tender organizer or persons involved in conducting a tender, to order that the tender process be halted, and to require

an organizer to repeat the tender process. At the same time, according to the Law on Countering Monopolistic Activity and Developing Competition, the Pricing Policy Department of the Ministry of Economy of the Republic of Belarus (antimonopoly and pricing policy departments of regional executive committees and the Minsk City Executive Committee) is a special body mandated to hear reports of competition law violations, to determine whether such violations have (or have not) been committed, to suppress such violations, to issue binding instructions to state authorities and other entities, and to prosecute in administrative proceedings for violations of competition laws.

From a systematic interpretation of public procurement laws and competition laws (and in the absence of relevant practice, as mentioned above), we believe that tenders and agreements concluded on the basis of tenders can be challenged in the following manner:

before a contract is concluded on the basis of the tender results, and before a relevant complaint is filed with the Ministry of Trade, a bidder is entitled, under the Public Procurement Law, to lodge a complaint with the tender organizer, tender committee, or persons involved in conducting the tender, who must review the complaint and adopt a written decision on it within seven days after receiving it; if the complaint is not reviewed or the decision on the complaint does not rectify the unscrupulous actions and/or decisions of the tender organizer and/or other persons involved in conducting the tender, such actions or decisions prior to the conclusion a contract on the basis of the tender are appealable to the Ministry of Trade, which hears a complaint and makes a decision on it within 30 days after receiving it. We note that unscrupulous actions and/or decisions committed during the tender process can be appealed to the Ministry of Trade or a court (including when a contract has already been concluded on the basis of the tender), bypassing the above claim procedure. If the unscrupulous actions and/or decisions of the tender organizer and other persons stem from any circumstances other than a violation of the established public procurement rules and procedure, the applicant should, when filing a complaint with the Ministry of Trade, at the same time submit an application to the Pricing Policy Department of the Ministry of Economy, and also petition the Ministry of Trade for suspension of the public procurement process and suspension of the complaint review process until a decision is made by the antimonopoly authority, attaching a copy of the relevant application to the antimonopoly authority. Any appeal of the Ministry of Trade's decision on a complaint or request for invalidation of an agreement concluded on the basis of a tender is done through the courts.

If a business entity's rights and legitimate interests are violated in connection with a single-source public procurement process (as in the case of procurement by the Ministry of Public Health of the Republic of Belarus of medical equipment maintenance and repair services solely from Belmedtechnika UP), that business entity can immediately submit an application to the Pricing Policy Department of the Ministry of Economy, bypassing the procedure prescribed by public procurement laws.

Recent changes to legislation on public procurement

Since 2013, following the entry into force of the Public Procurement Law, as a result of which information about public procurement (plans, invitations to tender and notices of tender results, tender and auction documents, information on concluded contracts, etc.) has become publicly available on the Internet and tender procedures have become more transparent, the number of complaints from tender participants to the Ministry of Trade has grown considerably. According to the Ministry of Trade's data, in 2014 approximately 450 complaints from public procurement participants were heard, 47 percent of which were found to be substantiated.

The amendments to the Decree of the President of the Republic of Belarus No. 590 of December 31, 2013, "On Certain Matters Relating to Public Procurement of Goods (Works, Services)" that have been in force since January 1, 2015, are aimed at further improving the electronic procurement process, and in particular at ensuring the openness of that process. For example, the amendments to Decree No. 590 provide that, in the bid solicitation process, the documents provided for bid preparation and any replies to requests for clarification of the tender documents are to be made publicly available. The decision selecting the successful bidder, cancelling the bid solicitation process, or declaring it void is to be documented in a report made publicly available on the e-trading platform, containing information about the successful bidder, the bid price of the successful bidder, the time limit for appealing the selection decision, the period for concluding a contract with the successful bidder, and information on the results of appraisal and comparison of the bids, including information about the bids of other participants.

After the report is made publicly available, free access is given to all bidders' bids, excluding documents that contain sensitive information.

Information on the receipt of complaints by the Ministry of Trade against actions/inaction and/or decisions of the tender organizer or other persons involved in conducting the tender, as well as information on the contents of the complaints and the decisions on them, are made publicly available by the Ministry of Trade on the official site.

The above amendments to public procurement laws do not contain provisions aimed specifically at antimonopoly regulation of tenders, but they do ensure greater transparency of the tender process, which, first, makes it possible to reduce abuse in public procurement and, second, gives bidders and other interested persons ready access to information and documents, to which such persons may refer in support of their claims when appealing procurement procedures and agreements concluded on the basis of the public procurement process.

1 According to the Public Procurement Law, "public procurement" means the acquisition of goods, works, or services fully or partly with the use of budget resources and/or resources of public extra budgetary funds by the recipients of such resources.

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Azerbaijan

Introduction

In general, Azerbaijani law in the field of antimonopoly regulation is quite fragmented and out-dated. The existing legal framework consists of several major pieces of legislation that have a number of overlapping objectives. Among these objectives are the establishing equality of market subjects regardless of their ownership; fostering free and fair competition; preventing, restricting and eliminating monopolistic activities; and consumer protection.

Consequently, Azerbaijani antimonopoly law declares certain types of behaviour as illegal monopolistic activity that leads or may lead to the restriction or elimination of competition, as well as to infringement of interests of economic subjects and consumers. These include, among others, anticompetitive behaviour, agreements among competitors to fix prices or rig bids. Such anticompetitive behaviour is punishable, depending on the type of a particular infraction, by profit disgorgement, compensation of damages or financial sanctions.

In this article we cover antimonopoly regulation as it relates to State procurement in Azerbaijan.

Bid rigging

Although not named as such, the following actions that lead or may lead to restriction or elimination of competition are considered to be illegal in Azerbaijan:

- **Customer or market allocation** – division of the market based on territory or customers (for instance, where one or more competitors collude not to bid to certain customers or to those in certain territories, so that each of the competitors is able to win the bid with the designated customer or territory).
- **Auction fixing** – colluding to increase, decrease or maintain prices on auctions (for instance, via using phantom bids).
- **Price fixing** – colluding to fix prices, discounts and charges for extras on submitted bids.
- **Boycotting** – boycotting a competitor or refusal to establish business relations with a competitor.

Enforcement and Sanctions

The State Service for Antimonopoly Policy and Protection of Consumers Rights (the "**Antimonopoly Service**") is the governmental authority in charge of enforcing the antimonopoly legislation in Azerbaijan. It also establishes the fact of restriction of competition – however, the criteria used by the Antimonopoly Service in this regard are neither publicly available nor predicable.

The law provides the Antimonopoly Service with a range of regulatory tools to punish the actions stated above, including:

- Antimonopoly Service may seek a court order requiring the disgorgement of any unlawful profits.
- Forced payment of the profit to the State budget.
- Compensation of damages to the injured persons based on a court decision.

Furthermore:

- Failure to implement a decision of the Antimonopoly Service within the stipulated time could result in a penalty in the amount of AZN 55 (approximately US$70) for each day of delay, but in no event in excess of AZN 22,000 (approximately US$28,200); and/or
- Failure to present information and documents, where such presentation is required under the law, or presentation of false information could result in a penalty in the amount of up to AZN 5,500 (approximately US$7,050).

Penalties are levied upon economic entities, their officials and officials of executive authorities. There are also potential criminal sanctions for monopolistic activity in the form of fixing prices, setting excessively low or high prices, dividing territories, limiting access to the market, and/or marginalizing competitors. Such activity is punishable by financial sanctions in the amount of AZN 100 – AZN 500 (approximately US$128 – US$640) or up to one year of corrective labor.

Fraud

The State Procurement Law 2001 does not specifically address the issue of antimonopoly issues or bid rigging. However, the law does state that if the State Procurement Agency (being the state agency responsible for holding procurement processes for State related entities) determines that a bidder is involved in falsification in order to influence the decision making process relating to procurement procedures, it may:

- Reject the bid, offers and quotations submitted by such bidder.
- Prohibit participation of bidder in question in further procurement procedures for a fixed period of time or indefinitely.
- Submit information for investigation of the fact of falsification to the competent bodies.
- Inform the bidder about the rejection of a tender proposal, along with including reasons for such rejection into procurement procedures report.

Unfortunately, the State Procurement Law 2001 does not provide a definition of what constitutes falsification, and we failed to identify any public available court cases adjudicating this question.

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1 A new Competition Code is in the process of being considered by the Azerbaijani parliament and, once adopted, will likely consolidate these pieces of legislation. However, according to the listed information available to us, the current draft Competition Code in the third reading has not been yet offered for inclusion in the agenda of a parliamentary hearing. Therefore, it is not possible to state accurately if and when the code will become law.

2 Including:
- Law "On Entrepreneurship" No. 405, dated 2 June 1992 (the **"Entrepreneurship Law 1992**")
- Law "On Anti-monopoly Activities" No. 526, dated 4 March 1993 (the **"Antimonopoly Law 1993"**)
- Law "On Unfair Competition" No. 1049, dated 2 June 1995 (the **"Unfair Competition Law 1995"**)
- Law "On Natural Monopolies" No. 590, dated 15 December 1998 (the **"Natural Monopolies Law 1998"**)
- Law "On State Procurement" No. 245-IIQ, dated 27 December 2001 (the **"State Procurement Law 2001**")

3 Entrepreneurship Law 1992, Preamble, Articles 4.1 and 5.1;
Antimonopoly Law 1993, Article 1;
Unfair Competition Law 1995, Preamble; and
Natural Monopolies Law 1998, Article 1.

4 Antimonopoly Law 1993, Article 10(1).

Uzbekistan

In accordance with Uzbek legislation, the holding of tenders is mandatory in respect of the procurements financed by budgetary funds, non-budgetary funds of budgetary organisations, state funds, foreign grants provided under governmental agreements and foreign loans under the guarantee of the Republic of Uzbekistan (hereinafter the "state funds").

In accordance with the Decree of the Cabinet of Ministers of the Republic of Uzbekistan "On Measures to Improve Organisation of Tenders," No. 456, dated 21 November 2000, starting from 1 December 2000, in Uzbekistan, imported and local raw materials, materials, component parts and equipment in amounts exceeding in equivalent US$100 thousand under one contract are procured on a tender basis, as well as freight-forwarding companies providing transportation of freights under tender contracts concluded with foreign suppliers selected on a tender basis.

The above Decree of the Cabinet of Ministers approved the "Regulation on Holding Tenders for Procurements of Raw Materials, Materials, Component Parts and Equipment" ("**Regulation on Tenders**").

The Regulation on Tenders establishes the procedure for holding tenders for procurements by means of the state funds for amounts exceeding the equivalent of US$100 thousand and the procedure for procuring amounts less than US$100 thousand without holding tenders based on selection of best proposals, or by electronic auctions organised by Uzbek Republican Commodity Exchange.

When procuring by means of the funds, which are not the state funds as stated above, it is advised to observe the requirements of the Regulation on Tenders.

As established by the Regulation on Tenders, the main principles of organising tenders are openness and fairness in decision-taking, creation of equal competitive conditions for tender participants preserving the priority of local manufacturers (suppliers).

The Regulation on Tenders set requirements as to the following:

- Procedure for formation of tender commissions.
- Stages of holding tenders.
- Preparing and announcing publications on tender.
- Requirements for tender documents.
- Tender rules.
- Procedure for assessing tender proposals
- Guarantees of execution, registration of and monitoring over the execution of contracts concluded under tender results.

In addition to the Regulation on Tenders, tenders are regulated by other legislative acts and decisions of the Governmental Commission for Public Procurements under the Cabinet of Ministers of the Republic of Uzbekistan.

In order to arrange and hold tenders in respect of public procurements, a specialized state agency "Uzbektenderconsulting" was formed under the Ministry for Foreign Economic Relations, Investments and Trade of the Republic of Uzbekistan.

When holding tenders it is mandatory to comply with the legislation on competition.

In accordance with article 14 of the Law of the Republic of Uzbekistan "On Competition" (hereinafter the "**Competition Law**"), when holding tenders, actions that result or may result in the limitation of competition are prohibited, including the following actions:

- Violation of the tender holding procedure established by the legislation.

- Coordination by organizers and / or ordering parties of the activity of tender participants.
- Unreasonable refusal in accepting documents from business entities for the participation in a tender.
- Unreasonable disqualification of tender participants.
- Creation for one or more tender participants of preferential conditions for participation in tender, including by giving access to information, except as envisaged by the legislation.
- Pointing at a particular manufacturer of goods, except when the goods are incompatible and as otherwise envisaged by the legislation.

Violation of antimonopoly requirements is the grounds for invalidating tender decisions and tender agreements.

Control over the compliance with the requirements of antimonopoly legislation when holding tenders is exercised by the antimonopoly authority in the process of exercising the controlling functions and based on the requests of business entities and state power and administration authorities.

In case a fact of violation is detected when holding a tender, the antimonopoly authority shall initiate a case on the violation of legislation and render a prescription to terminate the violation. For example, in case of the discovery in tender documents of requirements leading to limitation of competition, the antimonopoly authority may render a prescription demanding to exclude anti-competitive requirements from tender documents.

In case of a violation of antimonopoly requirements when holding a tender, the antimonopoly authority has the power to apply to a court with the claim to invalidate tenders and transactions (agreements) concluded under the results of such tenders.

If the court decides that the tender and transactions are invalid, each of the parties to the transaction must return to the other party everything that was received under such invalid transaction, and if it is impossible to return everything that was received in kind, it shall compensate its value in cash.

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Armenia

Under the Armenian legislation the tenders are regulated by the law of Republic of Armenia "On Procurement" (hereinafter – the Law). The Law regulates the procedure of acquisition of goods, works and services by the Customer, and defines the rights and obligations between the parties.

The definition of the Customer under the given law includes the following:

a) The State and local government agencies, municipal institutions.

b) Central Bank of the Republic of Armenia.

c) State or municipal non-profit organizations,

d) Organizations in which more than 50 per cent of the shares are owned by the State or municipal institutions.

e) Organizations which have received donations from the Customers with respect to the procurements made at the expense of such donations.

f) Public service organizations. (Natural or legal persons who operate in the field of public services (electricity, telecommunication, water etc.) and are included in the list approved by the Public Services Regulatory Commission of Armenia).

The relationship related to the tenders performed by private parties does not have any specific regulation under Armenian legislation. Considering the above definition of the law save for the public service organizations, the Law is not applicable with respect to private parties.

We can however identify the principles of fair competition under the given Law. The latter imposes an obligation for the parties to organize a procurement procedure in such a way that is to respect the rules of fair competition and promote equal rights to the Participants in procurement procedure. In accordance with Article 3 of the Law the procurement procedure shall apply uniform rules for all participants and the procurement procedure shall be organized on competitive, transparent, open and non-discriminatory basis. Furthermore, according to the Article 3 the procedure shall promote competition between the participant companies, as well as shall ensure an equal right to participate in the procurement procedure for every eligible company and individual. According to Article 5 of the Law the bidder has been caught by a decision of Commission for Protection of Economic Competition of the Republic of Armenia (hereinafter – the Commission) for anti-competitive behaviour during a procurement process (such as anti-competitive agreements or abuse of dominant position), shall not have the right to participate in the procurement if such decision was taken during the preceding year. In addition, the Law stipulates the obligation of the authorized body to cooperate with other relevant bodies in order to identify cases of infringement of legislation on protection of economic competition in the procurement process, including anti-competitive agreements and abuse of dominant position.

Meanwhile, the Law "On Protection of Economic Competition" does not provide a special regulation for the procurement or tender, but being a general law for the economic competition, it regulates the procedure in compliance with the principles of fair competition.

One of official clarifications issued by the Commission relates to participation of State and State bodies in concentration transactions and may be applicable also to tender and procurement matters. By Decision N 579-N dated 09.12.2011 the Commission officially clarifies the status of the State and state bodies (public authority) as possible participants of the concentration transactions. According to the official clarification of the Commission, the State and state bodies are not subjects in the context of concentration matters and any kind of transactions

between the State and state bodies with the economic entities shall not be regarded as a concentration. The Commission interprets that for the purposes of the Law "On Protection of Economic Competition" the terms "Economic entity" and "State body" are separate and independent terms and one of them does not include the other. In the view of Article 8 of the Law "On Protection of Economic Competition", the participants to the concentration may be economic entities only. Thus the Commission finds that the State bodies are not participants to the concentration and the transactions between the economic entities and state bodies are not qualified as concentration under the Law "On Protection of Economic Competition". Consequently antimonopoly rules applied to tenders do not cover state bodies as well.

The other regulatory mechanism in the field of procurement is the Procurement appeals council.

For the purposes of protection of economic competition, one of the members of the Council in practice is nominated from the Commission, which further emphasizes the importance of fair competition within the procurement procedure and implements additional control mechanism over the potential infringements of anti-trust legislation in Armenia.

Summarizing the above, we achieve the understanding that the protection of economic competition within the procurement procedure is not properly regulated under Armenian legislation. Such regulation has rather scattered and generic nature, whereby anti-trust legislation shall be applicable to tender and procurement matters in the same way, as to the other commercial transactions and actions except for the matters described in Decision N 579-N of the Commission dated 09.12.2011 as stated above.

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