

COMPETITION LAW OBJECTIVES IN KAZAKHSTAN



DR. CLAUDIO LOMBARDI,
Assistant Professor, KIMEP
University, School of Law (Almaty),
PhD, Director, Centre for Law,
Innovation and Development
(ECLID)

This article analyses the current competition law objectives of Kazakhstan and compares them to those of other jurisdictions, including the EU and the EAEU. The discourse around the competition law objectives in Europe and in the US has been ongoing for a long time. From a normative perspective the EU Treaties do not confine competition law to the pursuit of a specific aim, neither they explicitly define its object. Hence, scholars, public officials, and practitioners have long grappled with this interpretative conundrum.

Since its inception, the main goal of EU competition law was the integration of the internal market. Moreover, according to the CJEU's case law and the Treaties, competition law has a number of other objectives, including economic freedom, economic efficiency, justice and fairness. However, the broad spectrum of the different issues that may be categorised as been part of these objectives led to the formulation of narrower theories. In particular, one prevailed over the others, in the last decade, which comes under the name of consumer welfare theory. In a 2010 speech, after being nominated commissioner in charge of competition policy, Vice-President Almunia said that competition policy is a tool at the service of consumers and that consumer welfare is at the heart this policy and its achievement drives the Commission's priorities and guides their decisions. Moreover, in its «General Guidelines» (a non-binding guidance paper), the Commission stated that the objective of Article 101 TFEU is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. By contrast, in Kazakhstan the competition policy objectives have not received similar attention and have been rarely discussed by scholars and judges alike.

This article explains the importance of setting clear goals for competition law enforcement and policy. Finally, it argues that the antitrust law objectives of Kazakhstan should differ from those established in the EU and the US, in particular aiming at sustainable development, growth, innovation, and redistribution.

Keywords: competition law; antitrust; antimonopoly law; objectives; public interest; economic objectives; competition enforcement; development; growth; innovation; distribution.

Introduction

The last four decades have witnessed an unprecedented wave of liberalizations all over the world, followed by privatizations of state-owned assets and free-market oriented economic reforms.¹ These reforms have generally allowed and empowered firms and entrepreneurs to create value through their own private initiative. However, if market players are left free to compete, they may decide to use this freedom to collude or abuse their dominant position in the market, thus distorting or restricting competition. For this reason, the most common form of regulation against these conducts in free market economies has become antitrust law. So much so that, in the last three decades, competition law jurisdictions have exponentially multiplied; from a handful in the 1980s to more than 130 today. Kazakhstan and the Eurasian Economic Union are not exceptions.

Competition policy is therefore an instrument used to ensure that all firms are fairly competing in the market.² Despite the clarity of this general objective of competition law, it is a moot point what should be the specific aims of competition law and if they should be universal, or rather change according to the jurisdiction.

There are many attempts to define the past and present aims of competition policy in many jurisdictions.³ Dealing with the behavior of firms in the market, competition law is potentially a far-reaching legal instrument. And strict definitions hardly capture the multiform nature of this policy instrument. Testament to this, is also the fact that the goals of competition law have sensibly changed over time in virtually all jurisdictions.⁴ However, more than ever in the last thirty years, scholars and practitioners have started to engage in heated debates on the objectives of competition law, in what has been already defined a «battle for the soul of antitrust».⁵

The policy objectives of a law contribute to determine the scope of the application of that specific legal instrument.⁶

¹Simmons B.A., Dobbin F., Garrett G. *The Global Diffusion of Markets and Democracy*. Cambridge University Press, 2008. P. 1.

²For an introduction to competition law in Kazakhstan, see: Конкурентное право Республики Казахстан. Астана: Центр развития и защиты конкурентной политики, 2015. 297 с.; *Competition Law and Policy in Kazakhstan-2016* // URL: <https://www.oecd.org/competition/competitionlawandpolicykazakhstan2016.htm> (26.02.2020). For an introduction to competition law in the EU, see: Whish R., Bailey D. *Competition Law*. Oxford University Press, 2015; Monti G. *EC Competition Law*. Cambridge University Press, 2007.

³Foer A.A. *The Goals of Antitrust: Thoughts on Consumer Welfare in the US* // In: *Handbook of Research in Trans-Atlantic Antitrust* / Ed. by Marsden Ph. Edward Elgar Publishing, 2006. URL: https://ideas.repec.org/h/elg/eechap/3692_21.html (29.07.2017); Zimmer D. *The Goals of Competition Law*. Edward Elgar Publishing, 2012.

⁴Patel K.K., Schweitzer H. *The Historical Foundations of EU Competition Law*. Oxford: OUP, 2014 // URL: <http://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=4700321> (26.02.2020).

⁵Fox E.M. *The Battle for the Soul of Antitrust* // *California Law Review*. Vol. 75 (3), 1987. – P. 917.

⁶However, they should not be confused with the scope of the norm that defines the rights and expectations of each party.

1. The objectives of competition law and policy

Competition is, in many jurisdictions, a personal right, a public interest concern, and a policy agenda item. As such, determining its objectives normatively is not essential. But, the interpretation of the norms on anticompetitive agreements, abuses of dominance and concentration can dramatically change depending on the objectives that the enforcer has to pursue. For example, certain mergers may cause a considerable consumer welfare loss but no total welfare loss or vice versa.⁷ The fact that the overall goal of competition law is protecting consumer welfare or total welfare will decide whether the merger will be cleared or not. And yet, there is no consensus on what these goals should be.

In its seminal and extremely influential book, Robert Bork observed that «Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give (...) Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules».⁸ Although it is widely recognized the importance of defining the objectives of competition law, it is often argued as which ones should be preferred. The difficulty in determining a single goal for antitrust resides mainly in the multiform nature of this legal instrument.⁹

2. Competition Law's Objectives and Goals in the EU

The discourse around the competition law objectives in Europe and in the US has been ongoing for a long time. From a normative perspective the EU Treaties do not confine competition law to the pursuit of a specific aim, neither they explicitly define its object. Hence, scholars, public officials, and practitioners have long grappled with this interpretative conundrum.

Since its inception, the main goal of EU competition law was the integration of the internal market.¹⁰ Moreover, according to the CJEU's case law and the Treaties, competition law has a number of other objectives, including economic freedom, economic efficiency, justice and fairness.¹¹

However, the broad spectrum of the different issues that may be categorised as been part of these objectives led to the formulation of narrower theories. In particular, one prevailed over the others, in the last decade, which comes under the name of consumer

⁷The goals of competition law / ed. by Zimmer D. Edward Elgar Publishing Limited, 2012. P. 7.

⁸Bork R.H. Antitrust Paradox. Simon & Schuster, 1993. P. 50.

⁹This article is mainly concerned with competition law enforcement objectives. More broadly, it can be observed that in competition policy while there are five main dimensions: i) theoretical; ii) institutional; iii) normative-legislative-positive; iv) political; v) pragmatic. The mistake is believing that competition law and policy can work based on one of these dimensions alone. As in any other sphere of legal enforcement, each of them has to be considered and weighted against the other, although the venues for doing so might differ. See: Lombardi C. Economic Objectives and the Rule of Law, paper presented at the 2019 ASLI Conference.

¹⁰Patel K.K., Schweitzer H. The Historical Foundations of EU Competition Law. Oxford: OUP, 2014 // URL: <http://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=4700321> (26.02.2020).

¹¹The goals of competition law / ed. by Zimmer D. Edward Elgar Publishing Limited, 2012. P. 65 ff.

welfare theory. In a 2010 speech, after being nominated commissioner in charge of EU competition policy, Joaquín Almunia said that «[a]ll of us here today know very well what our ultimate objective is: Competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions».¹² Moreover, in its «General Guidelines» (a non-binding guidance paper), the Commission stated that «objective of Article 81 [now Article 101 TFEU] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources».¹³

However, what is consumer welfare, and how does it ensure protection against market distortions? While for Robert Bork, who coined the term, consumer welfare referred more generally to the concept of «total welfare»,¹⁴ meaning consumer and producer surplus together, economists have a narrower view on the definition of consumer welfare today. This concept usually addresses only the individual benefits derived from the consumption of goods and services. In particular consumer welfare is the «difference between what consumers would have been willing to pay for a good and what they actually had to pay. It is the «surplus» that consumers get from buying a good, and the term «consumer surplus» is therefore often used as a synonym for consumer welfare».¹⁵

Secondly, the consumer object of the analysis is not the final consumer but any buyer of a good or service.¹⁶ Hence, the «consumer» has to be intended more as a customer. Paragraph 84 of the General Guidelines explains that «consumers within the meaning of Article 81(3) [now Article 101(3) TFEU] are the customers of the parties to the agreement and subsequent purchasers».

For the traditional antitrust enforcement based on neoclassical economic theories,¹⁷ competition authorities should consider only the economic concerns related to the prevention, distortion or restriction of competition, which are not to be weighed against public interest concerns, of any kind.¹⁸ For the supporters of this position, balancing competition goals with

¹²Almunia J. Competition and consumers: the future of EU competition policy, speech at European Competition Day, Madrid, 12 May 2010 // URL: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_233.

¹³Paragraph 13 in Commission Notice: Guidelines on the application of Article 81(3) of the Treaty // Official Journal of the European Union. C 101/98. 2004.

¹⁴Crane D.A. The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy // *Antitrust Law Journal*. 79, 2013. P. 835.

¹⁵Albaek S. Consumer Welfare in EU Competition Policy // In: *Aims and Values in Competition Law*. DJØF Publishing, 2013. P. 70.

¹⁶*Ibid.*

¹⁷For a succinct introduction, see: Weintraub R.E. Neoclassical Economics // URL: <https://www.econlib.org/library/Enc1/NeoclassicalEconomics.html> (05.11.2020).

¹⁸See, for instance: ICN Recommended Practices for Merger Analysis, the Legal Framework for Competition Merger Analysis // URL: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf.

¹⁹Dorsey E., Rybnicek J., Wright J.D. Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking. *Competition Policy International Antitrust Chronicle* (April 2018). George Mason Law & Economics Research Paper. 18-20 // URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165192#.

other interests «has the potential to have a significant adverse effect on legal certainty (among other things)». In their opinion, «environmental and sustainability goals are better served via separate macro-level policy (e.g. emissions targets, animal welfare standards, etc.).¹⁹

For others, competition law enforcement and competition policy entail the application or at least the consideration of a number of different policy objectives. In other words, for some it is important to understand if and to what extent competition law is «permeable» to the penetration of other public interest concerns,²⁰ and which public interest concerns – over the years – have been legally associated to specific competition policy aims.

2.2. Competition law objectives in Kazakhstan

Smaller and younger competition authorities have, sometimes, departed from this strict application of neoclassical price theories. Kazakhstan has recently amended its competition law adding a Section 160 to the «Enterprise Code» establishing the objectives of competition law.

In this perspective, Kazakhstan seems to adopt a tailored version of the structuralist approach. Section 160 establishes that the national «antimonopoly law» aims at: i) protecting competition; ii) maintaining and creating favorable conditions for fair competition in the internal market; iii) ensuring the effective functioning of the market; iv) ensuring the unity of the economic space; v) freedom of movement and of economic activity; vi) and promoting fair competition.²¹ However, it is not clear what some of these objectives intend to protect and how they relate to each other. For instance, what does it mean to ensure the effective functioning of the market? What if a merger is procompetitive, in the sense that leads to a price reduction but segments the economic space? What if it raises the barrier to entry, thus restricting the freedom of economic activity? It is hard to determine whether there is any hierarchical relation between these objectives or how such conflicts could be solved.

Another important interpretative issue regards the last point on the promotion of fair competition. Article 162(2) establishes that «competition is based on the principles of [...] honesty, legality, and respect for the rights of consumers, which are applied in the same way, equally and on equal terms to all market entities, regardless of the organizational and legal form and place of registration of such market entities». However, it is not clear how the effectuation of these principles should take place.

²⁰Ezrachi A. Sponge // Journal of Antitrust Enforcement. 5, 2016. P. 49.

²¹Article 160. Objectives of state regulation of competition *The objectives of state regulation of competition are the protection of competition, the maintenance and creation of favorable conditions for fair competition in the commodity markets of the Republic of Kazakhstan and the effective functioning of commodity markets, ensuring the unity of the economic space, the free movement of goods and freedom of economic activity in the Republic of Kazakhstan, regulation and restriction of monopolistic activities in accordance with this Code, promoting fair competition and warning Conduction of violations of the legislation of the Republic of Kazakhstan in the field of protection of competition, suppression of anti-competitive actions of state and local executive bodies, organizations endowed with state functions of regulating the activities of market entities, and unfair competition.*

The previous Law of the Republic of Kazakhstan on Competition approved in 2008,²² had even more far-reaching objectives. Article 1 of the law stated that the antimonopoly law of Kazakhstan was aimed at maintaining and creating favorable conditions for fair competition in the commodity markets of the Republic of Kazakhstan. Moreover, its purpose was to protect competition, create conditions for the effective functioning of commodity markets, ensure unity of the economic space, free movement of goods and freedom of economic activity in the Republic of Kazakhstan.²³ The law was inspired by four fundamental principles: competitiveness; good faith; legality; observance of consumer rights.²⁴

Since its independence, Kazakhstan has developed an economy mainly based on the exportations of commodities such as oil, coal, minerals, chemicals, and grains. This heavy dependence on commodities exportation has however endangered the competitiveness of its internal economy. In 2014 Kazakhstan was ranked 111th (out of 140 countries) for intensity of local competition.²⁵ This was deemed to be one of the main obstacles to the further development of the country.

Sweeping changes to the industrial policy and competition law of Kazakhstan and important liberalizations have immediately followed. And these changes have considerably increased the level of domestic competitiveness.²⁶ But, if this is going to last depends on whether competition laws will be correctly interpreted and enforced. Liberalizations are indeed a double-edged sword. On the one hand, they increase the market access for new entrants. On the other hand, they offer the possibility, if not monitored by antitrust agencies, to monopolization by dominant businesses or to collusive behaviours, at the same time increasing the level of cronyism in the country.

The Kazakh antitrust authority has pursued, in the past, a number of different tasks, including price regulation and supervision of natural monopolies. This has affected also the aims it has pursued over time. Moreover, the law often mixes consumer protection and unfair competition regulation with antimonopoly law, further creating a blend of powers that may confuse the enforcers' agenda.

However, the law is generally subject to a particularly positivistic and formalistic application. The Entrepreneurial Code of Kazakhstan is indeed characterized by very detailed rules illustrating conducts and describing the modes and limits of the enforcement procedure.

In a recent public speech, a Member of the Committee on Economic Reform and Regional Development of the Parliament of the Republic of Kazakhstan, Azat Turlybekuli

²²The law of the Republic of Kazakhstan «On Competition» dated 25 December, 2008 N 112 – IV. Became null and void by the Code of the Republic of Kazakhstan dated 29.10.2015 N. 375-V // URL: http://adilet.zan.kz/eng/docs/Z080000112_.

²³Ibid. Article 1(2).

²⁴Ibid. Article 4.

²⁵Schwab K. The Global Competitiveness Report 2013-2014. World Economic Forum Geneva 2015 // URL: http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf.

²⁶Schwab K. The Global Competitiveness Report 2018-2019. World Economic Forum Geneva 2019 // URL: http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf.

Peruashev, remarked that the latest reform of competition law aims at spurring economic growth. In this vein, the MP observed that «competition is the driving force behind economic development, it provides incentives for the continuous improvement of the quality of goods, work and services, and allows the formation of fair and reasonable prices for goods in a market regime».²⁷ He continued remarking that creating conditions for the harmonious development of entrepreneurship, in turn, is a prerequisite for increasing the competitiveness of the national economy as a whole, improving the welfare of citizens, as well as the dynamic development of innovative sectors of the economy, which are currently extremely relevant and in demand.²⁸

Considered these statements within the current regulatory framework, it seems that competition policy in Kazakhstan aims at the growth, development, and innovation of the economy, more than consumer welfare. However, this rarely translates into legal informants of the interpretation of antitrust law by courts and authorities, which still tend to prefer a formalistic application of the law. But, as the markets continue to open up, state authorities will be progressively more compelled to grapple with these interpretative issues, to guide their enforcement. For example, the new code has given more relevance to 'by effect' infringements. This means that antitrust authorities will have to determine the anticompetitive effects of an infringement more often and, thus, determine what is their assessment standard. The standard adopted for this analysis does not have to coincide with the objectives of competition policy. It is, however, of fundamental importance to establish and delimit this benchmark, as seen in the previous chapter. In the case of antimonopoly law and policy Kazakhstan, these principles -to some extent- also need to be coordinated with the competition law of the Eurasian Economic Union, which applies to inter-state restrictions of competition.

2.3. Competition law objectives of the EAEU

In 2014, the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation signed in Astana a Treaty for the creation of the Eurasian Economic Union (EAEU),²⁹ which started a new stage of economic integration of these countries.

The EAEU Treaty aims at creating the conditions for the stable development of member states' economies, while raising the living standards of their populations. The ultimate objective of the Union is to create a single market for goods, services, capital and labor,³⁰ and to foster economic growth by ensuring fair competition in the internal market.³¹ In this

²⁷Speech (in Russian) by Azat Peruashev at the international forum «Antitrust Legislation of the Republic of Kazakhstan and the Eurasian Economic Union» = Выступление Азата Перуашева на международном форуме «Антимонопольное законодательство Республики Казахстан И Евразийского Экономического Союза» // URL: <http://www.parlam.kz/ru/blogs/peruashev/Details/4/27614> (26.02.2020).

²⁸Ibid.

²⁹The Republic of Armenia and the Kyrgyz Republic also joined the Union.

³⁰Article 1 of Treaty on the Eurasian Economic Union of 29 May, 2014 // URL: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACKAZ85_LEG_1.pdf.

³¹Article 3 of Treaty on the Eurasian Economic Union of 29 May, 2014 // URL: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACKAZ85_LEG_1.pdf.

vein, the Eurasian Economic Union Treaty provides some general guidance in the Recitals stating that the overall objective of the Treaty is to «strengthen the economies of the Member States of the Eurasian Economic Union and to ensure their balanced development, convergence, steady growth in business activity, balanced trade and fair competition». ³² However, the EAEU law does not establish clear objectives for antitrust policy and enforcement.

Similarly to Article 101 (3) TFEU, the EAEU Treaty states that anticompetitive conducts may be justified if they do not impose unnecessary restrictions the market participants and they do not eliminate competition in the respective commodity market. Moreover, the infringement has to result in: «1) improved production (sale) of goods or promotion of technical (economic) progress or improved competitiveness of goods manufactured in the Member States in the world commodity market; 2) receiving by consumers of a proportionate part of the benefits (advantages) acquired by the relevant persons through such actions». ³³ The EAEU Treaty seems to be a far reaching instrument in the opening recitals, where wider objectives related to growth, fairness, and innovation are mentioned. But it empowers the EAEU Commission which narrower powers limited to the pursuit of economic objectives.

3. Antitrust law in developing and small jurisdictions

Some antitrust jurisdictions have decided, at least to some extent, to conflate the enforcement of competition law with the broader constitutional framework. ³⁴ In this vein, some have asserted that competition law should pursue, or at least should not violate, the attainment of a number of objectives, including equality, poverty reduction, growth, innovation, and sustainability. ³⁵ For instance, the Namibian competition law allows the Competition Commission to examine the impact of a merger on SMEs and in particular on those owned by historically disadvantaged persons. ³⁶ While competition law usually has redistributive effects, as it remedies market failures negatively affecting consumers, its enforcement is generally based on the principle of allocative efficiency. This means that distributive justice is not generally considered, if the domestic law does not prescribe it. It is, however, a moot point whether competition law should consider such 'non-economic' objectives in setting its policies and in the enforcement. While the consumer welfare standard is said to better reflect societies' judgement about the appropriate distribution of

³²Treaty on the Eurasian Economic Union Recitals: “driven by the urge to strengthen the economies of the Member States of the Eurasian Economic Union and to ensure their balanced development, convergence, steady growth in business activity, balanced trade and fair competition”, recitals to the EAEU Treaty.

³³Article 5(1) of Annex 19 to Treaty on the Eurasian Economic Union of 29 May, 2014 // URL: http://consultant.ru/document/cons_doc_LAW_163855/fb5a3b34bcd16abfc4df4e0f0c26c9d184a3b34d.

³⁴On the relation between constitutional law and competition, see: Pitruzzella G. *Diritto Costituzionale e Diritto Della Concorrenza: C'è Dell'altro Oltre l'efficienza Economica?* // *Quaderni costituzionali*. N 39, 2013. P. 597.

³⁵Plessis du L., Lurie J., Buuren van A. *Competition Law in the Developing World: A Fish out of Water?* // *The Fifth Annual Competition Law, Economics and Policy Conference* (Oct 4-5, 2011). P. 14 / URL: <http://www.compcom.co.za/wp-content/uploads/2014/09/FINAL-PAPER-2011.pdf>.

³⁶*Ibid.*

resources,³⁷ it does not ensure a fair distribution of the same resources. Thus, society sometimes deems more appropriate to consider distributional justice effects, especially in those markets affecting the more disadvantaged classes.³⁸

Other objectives are equally important for developing and transition countries, in particular, innovation and growth. Economic theory attributes a central role to innovation for the development of a country. Innovation is the engine of growth for Paul Romer³⁹ and Joseph Schumpeter,⁴⁰ and is crucial for the development of an economy for most of the other economic theorists.⁴¹

It is therefore undisputed that innovation boosts growth. We also know that the two regulatory systems that try to maximize dynamic competition and innovation in an economy are competition law and intellectual property law.

However, it is not completely clear the relationship between competition and growth, especially through innovation. The Romer and Schumpeterian models, for instance, attribute a mixed role to competition for innovation. Even more so in developing countries, where it is believed that companies rely on capital accumulation to invest in R&D and spur innovation. Here, excessive competition may impede such accumulation, thus preventing innovation.

Moreover, while developed countries generally aim at cutting-edge innovation to compete in global markets, developing countries mainly focus on «implementation innovation» (Aghion and Howitt) for the domestic market. Imitation and knowledge transfer often facilitate 'process innovation', generally applied to product manufacturing.

In that regard, Kazakhstan, and to a certain extent also the rest of the Eurasian continent, has unusually developed bypassing the manufacturing stage, as its economy mainly relies on the exportation of commodities. Here, Japan and South Korea are exceptionally good examples of how to combine competition for innovation and growth with strong industrial policies.⁴² Here, the governments have encouraged fierce domestic competition at the same time intervening to ensure considerations such as economies of scale to compete internationally, efficiency, optimal use of resources, productivity, price stabilization, and economic security.⁴³

³⁷Farrell J., Katz M.L. The Economics of Welfare Standards in Antitrust // UC Berkeley: Competition Policy Center, 2006 / URL: <https://escholarship.org/uc/item/1tw2d426>.

³⁸For instance, the market for water is highly regulated to guarantee everyone equal access to this essential good.

³⁹Romer P.M. Endogenous Technological Change // Journal of Political Economy. N 98, 1997. P. 250.

⁴⁰Schumpeter J.A. Capitalism, Socialism and Democracy. Harper and Row, 1942.

⁴¹For example, the eg. Aghion and Howitt's model. Aghion Ph., Howitt P. A Model of Growth through Creative Destruction. National Bureau of Economic Research, 1990.

⁴²Cheng T.K. Competition Law in Developing Countries. Oxford University Press, 2020; Waked D.I. Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices // Seattle UL Rev. 38, 2014. – Pp. 945, 972 ff.; Amsden A.H., Singh A. The Optimal Degree of Competition and Dynamic Efficiency in Japan and Korea // European Economic Review. 38, 1994. P. 941.

⁴³Amsden A.H., Singh A. The Optimal Degree of Competition and Dynamic Efficiency in Japan and Korea // European Economic Review. 38, 1994. P. 944.

In general, the advantage of aiming antitrust enforcement at growth and innovation is that it avoids the typical static orientation of the consumer welfare objective. This latter objective can fit well developed economies while generally failing to serve the interest of developing countries.⁴⁴ In this vein, the recent position embraced by the Kazakh Government, focused on triggering competitive processes conducive to economic growth seems to be well backed by economic and legal theory, although still in need of tweaking.

Growth and innovation are economic concepts that can hardly be captured by precise legal concepts. This situation may divert the limited enforcement powers of competition authorities to matters falling outside their expertise.⁴⁵ Moreover, broad objectives may create incentives to interpret competition laws to the benefit of businesses having entrenched interests with the government, thus augmenting cronyism. For this reason, the goal of dynamic efficiency and growth should be combined with the attainment of distributional justice and fairness.

Conclusion

Clear objectives guide the enforcement of competition law, help prioritizing cases, and lead to an overall more consistent competition policy agenda. Developing and small jurisdictions may follow the example of developed economies, and the recommendations of international organizations such as the OECD, and adopt the consumer welfare standard.⁴⁶ However, this standard focuses on static efficiency mechanisms, prioritizing the analysis of price effects. This standard has proven to be a relatively good benchmark for maintaining competition, but not to create the necessary conditions to generate it.⁴⁷ Developing economies, on the other hand, need to focus on internal growth, which is possible, in the modern, globalized economy, only if they encourage sustainable innovation. Here, competition law can play a fundamental role in serving this purpose. As Kazakhstan has pledged to the attainment of the UN Sustainable Development Goals (SDGs), its competition law enforcement should aim at the same developmental objectives.

The competition policy and enforcement agenda should be therefore guided by the pursuit of innovation and sustainable growth through competition. This would allow to consider antitrust cases from a dynamic perspective, thus avoiding the price-centered approach of the neo-classical economic theories. Moreover, this approach would allow to consider aims such as poverty alleviation and distributive justice, otherwise neglected by

⁴⁴Waked D.I. Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices // Seattle UL Rev. 38, 2014. P. 996.

⁴⁵Plessis du L., Lurie J., Buuren van A. Competition Law in the Developing World: A Fish out of Water? // The Fifth Annual Competition Law, Economics and Policy Conference (Oct 4-5, 2011). P. 24 / URL: <http://www.compcom.co.za/wp-content/uploads/2014/09/FINAL-PAPER-2011.pdf>.

⁴⁶The Objectives of competition law and policy and optimal design of a competition agency. Note by the Secretariat. OECD Global Forum on Competition of 2003. Pp. 1, 3 // URL: <http://www.oecd.org/daf/competition/2486329.pdf> (26.02.2020).

⁴⁷Ferrando T., Lombardi C. EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links // URL: http://www.responsibleglobalvaluechains.org/images/PDF/FTAO_-_EU_Competition_Law_and_Sustainability_in_Food_Systems_Addressing_the_Broken_Links_2019.pdf.

the consumer welfare standard. However, this needs to be based on a precise legal framework ensuring the predictability of this law and preventing abuses favoring entrenched economic interests.

**Доктор Клаудио Ломбарди, КИМЭП Университеті (Алматы қ., Қазақстан):
Қазақстандағы монополияға қарсы құқықтың мақсаттары.**

Мақалада Қазақстанның монополияға қарсы заңнамасының қазіргі заманғы міндеттері талданады және оларды басқа юрисдикциялардың, оның ішінде ЕО мен ЕАЭО міндеттерімен салыстыру жүргізіледі. Еуропа мен АҚШ-та монополияға қарсы заңнаманың мақсаттары туралы дискурс ұзақ уақыт бойы жалғасып келеді. Нормативтік тұрғыдан алғанда ЕО шарттары монополияға қарсы заңнаманы нақты мақсатқа ұмтылумен шектемейді, бірақ оның объектісін де тікелей анықтамайды. Сондықтан ғалымдар, мемлекеттік қызметкерлер мен практиктер бұл түсіндірме жұмбақ төңірегінде ұзақ уақыт бойы бас қатырып келеді.

Өзінің құрылған сәтінен бастап ЕО монополияға қарсы заңнамасының негізгі мақсаты ішкі нарықты интеграциялау болды. Бұдан басқа, Еуропалық одақтың прецеденттік құқығы мен шарттарына сәйкес бәсекелестік туралы заңнама экономикалық еркіндікті, экономикалық тиімділікті, әділеттік және бейтараптықты қоса алғанда бірқатар басқа мақсаттарды көздейді. Алайда, осы мақсаттардың бір бөлігі ретінде жіктеуге болатын әртүрлі мәселелердің кең спектрі тар теорияларды тұжырымдауға әкелді. Атап айтқанда, олардың «тұтынушылардың әл-ауқат теориясы» деп аталатын бірі соңғы онжылдықта басқалардан басым болды. 2010 жылы сөйлеген сөзінде Вице-президент Альмуниа бәсекелестік саласындағы саясат тұтынушыларға қызмет ететін құрал екенін және осы саясаттың өзегінде тұтынушылардың әл-ауқаты жатқанын және оған қол жеткізу комиссияның басымдықтарын және олардың шешімдерін анықтайтынын айтты. Сонымен қатар, комиссия өзінің «жалпылама жетекші қағидаттарында» (міндетті емес жетекші құжаттарында) TFEU 101-бабының мақсаты тұтынушылардың әл-ауқатын жақсарту және ресурстарды тиімді үлестіруді қамтамасыз ету құралы ретінде нарықтағы бәсекелестікті қорғау болып табылады деп мәлімдеді. Керісінше, Қазақстанда бәсекелестік саясатының мақсаттарына дәл осындай көңіл бөлінбейді және оларды ғалымдар мен судьялар сирек талқылайды.

Бұл мақалада бәсекелестік саласындағы заңнама мен саясаттың сақталуын қамтамасыз ету үшін нақты мақсаттар қоюдың маңыздылығы түсіндіріледі. Соңында автор Қазақстанның монополияға қарсы заңнамасының мақсаттары ЕО мен АҚШ-та белгіленген, атап айтқанда, орнықты дамуға, өсуге, инновацияларға және қайта бөлуге бағытталған мақсаттардан өзгеше болуға тиіс деп пайымдайды.

Тірек сөздер: бәсекелестік құқығы; монополияға қарсы құқық; монополияға қарсы заңнама; мақсаттар; қоғамдық мүдде; экономикалық мақсаттар; бәсекелестікті сақтауды қамтамасыз ету; даму; өсу; инновациялар; таралу.

**Доктор Клаудио Ломбарди, Университет КИМЭП (г. Алматы, Казахстан):
Цели антимонопольного права в Казахстане.**

В статье анализируются современные задачи антимонопольного законодательства Казахстана и проводится их сравнение с задачами других юрисдикций, в том числе ЕС и ЕАЭС. Дискурс вокруг целей антимонопольного законодательства в Европе и США продолжается уже давно. С нормативной точки зрения договоры ЕС не ограничивают антимонопольное законодательство преследованием конкретной цели, но и не прямо определяют его объект. Поэтому ученые, государственные чиновники и практики уже давно бьются над этой интерпретационной головоломкой.

С момента своего создания, основной целью антимонопольного законодательства ЕС была интеграция внутреннего рынка. Кроме того, согласно прецедентному праву Европейского союза и договорам, законодательство о конкуренции преследует ряд других целей, включая экономическую свободу, экономическую эффективность, справедливость и беспристрастность. Однако широкий спектр различных вопросов, которые могут быть классифицированы как часть этих целей, привел к формулированию более узких теорий. В частности, одна из них превалировала над другими в последнее десятилетие, которая называется теорией благосостояния потребителей. В своем выступлении в 2010 году, будучи назначенным уполномоченным по вопросам конкурентной политики, Вице-президент Альмуния сказал, что политика в области конкуренции является инструментом, служащим потребителям, и что благополучие потребителей лежит в основе этой политики, и ее достижение определяет приоритеты Комиссии и определяет их решения. Кроме того, в своих «общих руководящих принципах» (не имеющих обязательной силы руководящих документах) комиссия заявила, что цель Статья 101 TFEU заключается в защите конкуренции на рынке как средства повышения благосостояния потребителей и обеспечения эффективного распределения ресурсов. В отличие от этого, в Казахстане целям конкурентной политики не уделялось такого же внимания, и они редко обсуждались учеными и судьями.

В этой статье объясняется важность постановки четких целей для обеспечения соблюдения законодательства и политики в области конкуренции. Наконец, автор утверждает, что цели антимонопольного законодательства Казахстана должны отличаться от целей, установленных в ЕС и США, в частности, направленных на устойчивое развитие, рост, инновации и перераспределение.

Ключевые слова: конкурентное право; антимонопольное право; антимонопольное законодательство; цели; общественный интерес; экономические цели; обеспечение соблюдения конкуренции; развитие; рост; инновации; распространение.

References (transliterated):

1. Aghion Ph., Howitt P. A Model of Growth through Creative Destruction. National Bureau of Economic Research, 1990.
2. Albaek S. Consumer Welfare in EU Competition Policy // In: Aims and Values in Competition Law. DJØF Publishing, 2013.

3. Almunia J. Competition and consumers: the future of EU competition policy, speech at European Competition Day. Madrid, 12 May 2010 // URL: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_233 (26.02.2020).

4. Amsden A.H., Singh A. The Optimal Degree of Competition and Dynamic Efficiency in Japan and Korea // *European Economic Review*. 38, 1994.

5. Bork R.H. *Antitrust Paradox*. Simon & Schuster, 1993.

6. Cheng T.K. *Competition Law in Developing Countries*. Oxford University Press, 2020.

7. Competition Law and Policy in Kazakhstan-2016 // URL: <https://www.oecd.org/competition/competitionlawandpolicyinkazakhstan2016.htm> (26.02.2020).

8. Crane D.A. The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy // *Antitrust Law Journal*. 79, 2013.

9. Dorsey E., Rybnicek J., Wright J.D. Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking. *Competition Policy International Antitrust Chronicle* (April 2018). George Mason Law & Economics Research Paper. 18-20 // URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165192# (26.02.2020).

10. Ezrachi A. *Sponge* // *Journal of Antitrust Enforcement*. 5, 2016.

11. Farrell J., Katz M.L. The Economics of Welfare Standards in Antitrust // UC Berkeley: Competition Policy Center, 2006 / URL: <https://escholarship.org/uc/item/1tw2d426> (26.02.2020).

12. Ferrando T., Lombardi C. EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links // URL: http://www.responsibleglobalvaluechains.org/images/PDF/FTAO_-_EU_Competition_Law_and_Sustainability_in_Food_Systems_Addressing_the_Broken_Links_2019.pdf (26.02.2020).

13. Foer A.A. The Goals of Antitrust: Thoughts on Consumer Welfare in the US // In: *Handbook of Research in Trans-Atlantic Antitrust* / Ed. by Marsden Ph. Edward Elgar Publishing, 2006. URL: https://ideas.repec.org/h/elg/eechap/3692_21.html (29.07.2017).

14. Fox E.M. The Battle for the Soul of Antitrust // *California Law Review*. Vol. 75 (3), 1987.

15. ICN Recommended Practices for Merger Analysis, the Legal Framework for Competition Merger Analysis // URL: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf (26.02.2020).

16. Monti G. *EC Competition Law*. Cambridge University Press, 2007.

17. Patel K.K., Schweitzer H. *The Historical Foundations of EU Competition Law*. Oxford: OUP, 2014 // URL: <http://public.ebookcentral.proquest.com/choice/publicful-irecord.aspx?p=4700321> (26.02.2020).

18. Pitruzzella G. Diritto Costituzionale e Diritto Della Concorrenza: C'è Dell'altro Oltre l'efficienza Economica? // *Quaderni costituzionali*. N 39, 2013.

19. Plessis du L., Lurie J., Buuren van A. Competition Law in the Developing World: A Fish out of Water? // *The Fifth Annual Competition Law, Economics and Policy Conference* (Oct 4-5, 2011). / URL: <http://www.compcom.co.za/wp-content/uploads/2014/09/FINAL-PAPER-2011.pdf> (26.02.2020).

20. Romer P.M. Endogenous Technological Change // *Journal of Political Economy*. N 98, 1997.

21. Schumpeter J.A. Capitalism, Socialism and Democracy. Harper and Row, 1942.
22. Schwab K. The Global Competitiveness Report 2013-2014. World Economic Forum Geneva 2015 // URL: http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf (26.02.2020).
23. Schwab K. The Global Competitiveness Report 2018-2019. World Economic Forum Geneva 2019 // URL: http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf (26.02.2020).
24. Simmons B.A., Dobbin F., Garrett G. The Global Diffusion of Markets and Democracy. Cambridge University Press, 2008.
25. Speech (in Russian) by Azat Peruashev at the international forum «Antitrust Legislation of the Republic of Kazakhstan and the Eurasian Economic Union» = Выступление Азата Перуашева на международном форуме «Антимонопольное законодательство Республики Казахстан И Евразийского Экономического Союза» // URL: <http://www.parlam.kz/ru/blogs/peruashev/Details/4/27614> (26.02.2020).
26. The law of the Republic of Kazakhstan «On Competition» dated 25 December, 2008 N 112 – IV. Became null and void by the Code of the Republic of Kazakhstan dated 29.10.2015 N. 375-V // URL: http://adilet.zan.kz/eng/docs/Z080000112_ (26.02.2020).
27. The Objectives of competition law and policy and optimal design of a competition agency. Note by the Secretariat. OECD Global Forum on Competition of 2003. // URL: <http://www.oecd.org/daf/competition/2486329.pdf> (26.02.2020).
28. Treaty on the Eurasian Economic Union of 29 May, 2014 // URL: https://www.wto.org/english/thewto_e/acc_e/kaz_e/WTACCKAZ85_LEG_1.pdf (26.02.2020).
29. Waked D.I. Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices // Seattle UL Rev. 38, 2014.
30. Weintraub R.E. Neoclassical Economics // URL: <https://www.econlib.org/library/Enc1/NeoclassicalEconomics.html> (05.11.2020).
31. Whish R., Bailey D. Competition Law. Oxford University Press, 2015.
32. Zimmer D. The Goals of Competition Law. Edward Elgar Publishing, 2012.
33. Konkurentnoe pravo Respubliki Kazahstan. Astana: Centr razvitiya i zashchity konkurentnoj politiki, 2015. – 297 s.
34. Protokol 19 ob obshchih principah i pravilah konkurencii = Annex 19 to Treaty on the Eurasian Economic Union of 29 May, 2014 // URL: http://consultant.ru/document/cons_doc_LAW_163855/fb5a3b34bcd16abfc4df4e0f0c26c9d184a3b34d (26.02.2020).

Для цитирования и библиографии: Claudio Lombardi. Competition Law Objectives in Kazakhstan // Право и государство. 2020. № 3-4. – С. 46-59. DOI: 10.51634/2307-5201_2020_34_46

Материал поступил в редакцию 15.09.2020.