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COMPETITION POLICY IN COUNTRIES IN TRANSITION—LEGAL BASIS AND PRACTICAL EXPERIENCE

by

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Executive summary

Over the past decade, competition policy—an essential element of economic reforms—has been introduced by most countries of the Commonwealth of Independent States (CIS). CIS Governments have undertaken significant steps with a view to demonopolizing State enterprises and breaking up the highly concentrated economic powers by promoting competition. Over a short period of time (since the 1990s) almost all CIS countries have adopted antimonopoly legislation and established enforcement competition agencies.

In this paper, the author investigates the legal aspects and practical measures undertaken by the CIS countries in the framework of competition law and policy and assesses the experience gained so far in the process of implementation and enforcement of competition laws and related legislation. In particular, she focuses on the efforts of CIS competition authorities to prohibit restrictive business practices of enterprises and anticompetitive actions of government agencies.

The paper contains four chapters. Chapter I looks at issues related to the cooperation process among CIS competition authorities and shows the results achieved over the last decade. Chapter II is devoted to the main provisions of CIS national competition laws and provides examples of prevention and elimination of restrictive business practices. Chapter III looks at the legal basis and practical activities of CIS antimonopoly authorities to prevent anticompetitive behaviour by government agencies. Chapter IV discusses the related areas of regulation: unfair competition, demonopolization and liberalization of trade and investment regimes. In light of the above, the author offers some conclusions and recommendations for future work in the area of competition in CIS countries, emphasizing the importance of transparency of competition regulation in those countries as well as the need for technical assistance programmes and related activities to assist them in creating a homogeneous competitive environment and their integration into the world economy.

INTRODUCTION

Competition policy nowadays is playing an important role in economic developments in CIS countries. Within a short period of time (beginning in the early 1990s) all CIS countries have adopted antimonopoly laws and established corresponding regulatory bodies. During the past decade competition policy has been conducted in the majority of CIS countries within the framework of broad economic reforms, together with privatization and demonopolization policy, protection of intellectual property rights, consumer rights protection, and liberalization of foreign trade and investment regimes. This broad approach ensures fair competition not only between domestic companies but also between domestic and foreign firms, thus promoting effective production and distribution and safeguarding the interests of consumers.

During the past decade the Governments of CIS countries have taken significant steps to enhance the role of the private sector in economic activity and to promote competition. The abolition of administrative regimes has led to the disengagement of the State from the production and distribution processes. The new economic conditions required the establishment of the institutions and legal basis appropriate to the functioning of a market economy.

These processes are especially important for CIS countries, given the highly monopolized nature of the Soviet economy and the major role of central planning in economic development at that time. Since the beginning of the 1990s, the transitional countries have been undertaking radical economic reforms, with competition and private initiative considered essential elements of successful economic policy. Today, in the context of global integration among CIS countries, competition policy is playing an extremely important role. The removal of barriers to the free movement of goods and services, and the creation of a homogeneous competitive environment, are considered a basis for further integration among these countries, aimed at the growth of regional trade and investments.

Competition laws adopted in CIS countries have much in common. They determine the organizational and legal foundations for the prevention

and elimination of monopolistic activity and unfair competition. All of them contain universal competition principles and rules, including control over restrictive business practices and anticompetitive behaviour of government agencies. The high degree of similarity among the antimonopoly laws in CIS countries may be explained by the similarity of initial economic conditions in these countries and close cooperation activities among their Governments in the field of antimonopoly regulation.

The competition policy conducted by CIS Governments is directed at ensuring conditions for effective functioning of markets and promoting private initiative. The appropriate regulatory bodies created in CIS countries exercise State antimonopoly control and promote the development of market relations on the basis of effective competition and entrepreneurship.

In the 1990s CIS countries started actively to develop international cooperation in the field of competition. They participated in events organized by international organizations (including UNCTAD, OECD and the World Bank) and concluded a number of bilateral agreements on competition. International cooperation is now viewed by these countries not only as an important component of competition policy but also as an effective instrument of improving this policy in accordance with international principles, enabling their more rapid integration into the world economy.

I. Cooperation processes among CIS countries n the field of competition policy

A. *Legal basis*

The main principles of coordination and cooperation among CIS countries in the competition sphere are outlined in the Intergovernmental Treaty on the Implementation of a Coordinated Competition Policy, signed on 24 December 1993 in Ashkhabad (Turkmenistan).

This treaty was signed by the prime ministers of twelve CIS countries: Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Republic of Moldova, the Russian Federation, Tajikistan, Turkmenistan, Uzbekistan and Ukraine.

The provisions and tasks of the treaty correspond to the general tasks of economic integration among CIS countries, as stipulated in the major economic inter-State agreements. Accordingly, one of the most important CIS treaties—the Treaty on the Creation of the Economic Union of CIS Countries – mandates the tasks of the creation of a free trade area, formation of a customs union, and creation of a common market of goods, services, capital and labour. It is quite obvious that these tasks can be achieved only if an effective competition policy is conducted in these countries and the common competition principles are observed.

The main purpose of the Treaty on the Implementation of a Coordinated Competition Policy is to create a le gal basis for the prevention, limitation and elimination of monopolistic activities and unfair competition among companies in the common CIS economic area.

The treaty provides for close cooperation among CIS antimonopoly authorities, with the following goals:

- Coordination of joint activities;
- Rapprochement of the antimonopoly laws of the Parties to the extent needed for the implementation of the Treaty;

- Creation of favourable conditions for the development of competition, effective functioning of the goods markets and consumer rights protection;
- Elaboration of common procedures for the investigation and evaluation of monopolistic activities of economic entities and executive/governing bodies; and
- Creation of a mechanism for cooperation.

The treaty contains the general rules of the competition policy, based on universally applied principles, *inter alia*, those contained in the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

The treaty provides the most important definitions and general competition rules regarding:

- Abuse of a dominant position;
- Mergers between economic entities;
- Restrictive agreements; and
- Unfair competition.

The Treaty prohibits the *abuse of a dominant position* by one or several economic entities in the whole or a part of the common market or if such activities lead to the restriction of competition or to the impairment of the interests of other economic entities or consumers.

Amalgamations of economic entities, agreements between them or other types of coordinated activity which may restrict competition on the common market are also prohibited by the treaty. But these activities may be permitted if the economic entities prove that they promote technical or economic progress, satiation of goods markets, improvement of the quality of goods or an increase in their competitiveness.

The treaty also prohibits *unfair competition*, *inter alia*, in the form of dissemination of false information; misleading consumers as to the character, method and place of production; and the illegal use of trademarks.

The definitions and rules fixed in the treaty were later used in a different context by CIS countries while drafting their national antimonopoly laws. This resulted in many common provisions in CIS antimonopoly laws

at the initial stage of their drafting, thus facilitating the further process of harmonizing competition laws.

For the purposes of implementing these tasks, the creation of the Inter-State Council on Competition Policy had been foreseen by the treaty. Later, a special document (Statute) on the Inter-State Council was adopted and now constitutes the legal basis for its activity.

The Parties to the treaty are obliged to undertake all necessary measures for fulfilment of the goals stipulated in the treaty and to support the activity of the Inter-State Council.

The general principles stipulated in the treaty have been confirmed and strengthened in the bilateral agreements concluded among CIS countries. For example, the agreement signed in 1996 by the President of the Russian Federation and Belarus on the creation of a union between two countries contains provisions of their respective antimonopoly laws. The provisions of this Agreement have been later outlined in detail in the bilateral programme of cooperation between the antimonopoly authorities of the Russian Federation and Belarus.

The agreement between the Russian Federation, Belarus, Kazakhstan and Kyrgyzstan on Promotion of Integration in Economic and Humanitarian Areas also contains provisions on the harmonization of their competition policies.

The bilateral programme of economic cooperation concluded recently between the Governments of the Russian Federation and Ukraine for the middle term contains provisions on promotion of cooperation in the antimonopoly field. Now, a special bilateral agreement in the competition area is being prepared by them.

Common activities in the field of competition undertaken on the basis of the agreed principles are playing an important role in the integration processes of CIS countries. At the same time it should be noted that these common activities do not present a single competition policy for the countries concerned. The Treaty on the Implementation of a Coordinated Competition Policy deals mostly with the coordination of activities of national antimonopoly bodies and rapprochement of their national antimonopoly laws. Despite the fact that the treaty contains “general competition rules” and provisions on the illegality of prohibited actions, the absence of any mechanism of control and decision-making resulted at first in the

stipulated provisions being declarative in nature. Until recently, cooperation among the CIS antimonopoly authorities has been limited to the exchange of experiences and elaboration of non-binding methodological guidelines for implementation of competition legislation.

To create an appropriate framework for achieving the goals of cooperation and thus to ensure progress in the practical integration among CIS countries in the field of competition, members of the Inter-State Council on Competition Policy agreed in April 1999 to Regulations on the Mechanism of Cooperation for Elimination of Monopolistic Activity and Unfair Competition in the States Parties to the Treaty.

These regulations apply to the actions of economic entities which restrict competition (in the form of abuse of dominant position, restrictive agreements, unfair competition, etc.) if these actions are undertaken by two or more economic entities in the territory of the States members and if these actions have a transborder impact on competition.

Also in accordance with the regulations, cooperation among CIS antimonopoly authorities will proceed in four possible forms: notification, request for information, application for case investigation and consultation.

Notification will be sent in advance by the investigating Party to another Party whose interests may be affected by the investigation. The notification is to include the names of the economic entities in question, a short summary of the case, description of the legal basis for investigation, and any other information. The informed Party may also consider applying appropriate measures in accordance with its domestic law.

A request for information may be sent by the investigating Party to other antimonopoly authorities concerning economic activities of companies operating on its territory, except in cases where such information is of a confidential nature. The request should identify the legal basis and the goal of seeking such information and present a brief summary of the case. The information requested is to be provided by the Party within three months.

The next mode of cooperation – application for case consideration – is rather similar to the principle of positive comity, which was first incorporated in the United States-European Community Agreement on Implementation of Competition Policy. Under the regulations, CIS antimono-

poly authorities are entitled to exchange applications for considering a case and taking measures in accordance with their respective antimonopoly law. (The application is submitted together with documents testifying to the facts of the anticompetitive practice on the territory of the other country.) The other antimonopoly authority considers the facts stipulated in the application and takes a decision in accordance with its domestic antimonopoly law.

To avoid conflicts among antimonopoly bodies in the process of case investigation, consultations may be used. The Party interested in consultations sends a written request to the other Party together with all necessary documents and reasons for the requested consultations. The consultations are to be held within three months, or on other terms stipulated by the Parties.

In April 1999, important amendments were introduced to the treaty reflecting the experience gained by CIS competition authorities, the growing role of competition policy in safeguarding economic interests and the impact of transnational corporations' activities on economic development in the CIS countries.

In the revised text, the main goal of the treaty is stipulated as the "creation of a legal and organizational framework for cooperation among the Parties, aimed at conducting agreed antimonopoly policy and promoting competition, as well as eliminating negative factors which result from monopolistic activity and unfair competition".

The amended treaty goes into greater detail on the main definitions used in the antimonopoly legislation, such as "goods markets", "competition", "dominant position", "antimonopoly legislation", "antimonopoly authority", "investigation", etc.

The actions resulting in restriction of competition and infringement of legal interests of other economic entities or consumers are now considered inadmissible and treated with reference to the Parties' national antimonopoly laws.

Such prohibited actions as abuse of dominant position, restrictive agreements and unfair competition are defined in detail in the treaty.

The amended version stipulates that, when considering restrictive agreements, the antimonopoly authority should take into consideration their impact on promoting technical and economic progress, the safety of

goods markets, and improving the quality of goods and their competitiveness.

B. *Organizational structures*

All cooperation activities among CIS countries in the competition area are conducted in the framework of the Inter-State Council on Competition Policy, established in 1993 for the purposes of coordinating activities among member countries in the competition area, rapprochement of their national laws and creation of the legal basis for elimination of monopolistic activities and unfair competition in the CIS common economic area.

In accordance with the Council's Statute, each CIS country is entitled to appoint two authorized representatives to it. (Thus, for example, in the Russian Federation the representatives to the Council are appointed by the Prime Minister by governmental decree.)

At present the following structures in CIS countries are responsible for competition policy at the national level:

Azerbaijan	State Committee on Antimonopoly Policy and Support for Entrepreneurship	Independent executive body
Armenia	Legal Department	In the Ministry of Industry and Trade
Belarus	Department for Antimonopoly Regulation and Development of Competition	In the Ministry of Entrepreneurship and Investments
Georgia	State Antimonopoly Service	Administered by the Ministry of Economy
Kazakhstan	Agency for Regulation of Natural Monopolies, Protection of Competition and Support of Small Business	Administered by the Agency for Strategic Planning and Reforms
Kyrgyzstan	National Commission for Defence of Competition	Administered by the President

Republic of Moldova	Department for Antimonopoly Policy and Competition	In the Ministry of Economics and Reforms
The Russian Federation	The Ministry for Antimonopoly Policy and Support of Entrepreneurship	Independent executive body
Tajikistan	Department for Antimonopoly Policy	In the Ministry of Economics and Foreign Economic Relations
Uzbekistan	Committee on Demonopolization and Promotion of Competition	In the Ministry of Finance
Ukraine	Antimonopoly Committee	Independent executive body

Currently representatives from eleven CIS countries (mostly high-level officials from the antimonopoly authorities) are members of the Council and participate in its activities on a regular basis.

Each country has one vote in the Council.

The Council elects its Chairman and two Deputy Chairmen for two-year mandates.

During the first session of the Council in February 1994, the Chairman of the Russian Antimonopoly Committee was elected as its first Chairman. Subsequently his mandate was extended for two more years. Today the Council is headed by the Vice-Minister of the Russian Ministry for Antimonopoly Policy and Support of Entrepreneurship, Ms. N. Fonareva.

The Inter-State Council carries out its activities in accordance with its own Statute, as well as with the Statute of the Commonwealth of Independent States, other CIS agreements, and decisions of the Council of the Heads of CIS States (Presidents) and of the Council of the Heads of CIS Governments.

The Council's activities are undertaken in close cooperation with the Executive Committee of CIS countries, which constitutes an official structure for global economic cooperation among those nations. The special antimonopoly unit within the Executive Committee deals with the integra-

tion processes among CIS countries in the field of competition. This unit fulfils the functions of secretariat for the Council.

In accordance with its Statute, the Council has the following main functions:

- Assistance to the Parties in the elaboration and modification of national competition laws in the field of competition;
- Elaboration of recommendations for the Parties on rules and tools of implementation of concrete activities on the prevention and limitation of monopolistic activities and unfair competition;
- Assistance to the Parties in the exchange of legal, methodological and other kinds of information in the sphere of antimonopoly policy and competition;
- Investigation and consideration of disputes between economic entities of the Parties in the antimonopoly area;
- Investigation, elaboration and proposal-making for the consideration of certain disputes among the Parties at the sessions of the Council of the Heads of the Governments; and
- Other functions related to the subject of the treaty.

The 1996 session of the Presidium of the CIS Inter-State Economic Committee approved amendments to the Statute of the Council concerning the character of its decisions. The Inter-State Council on Competition Policy is now entitled to take two kinds of decisions:

- Decisions of an obligatory nature, which require confirmation of the corresponding decisions by CIS Governments; and
- Decisions in the nature of recommendations.

Each country may declare that it is not interested in considering certain problems, but that should not prevent other interested Parties from doing so. The decisions taken are not applicable to those Parties that did not participate in their consideration.

As can be seen from the text of the Council's Statute, the provisions concerning its responsibility are rather contradictory. On the one hand, its power to give binding instructions to the economic entities is declared, and on the other hand, its responsibilities are limited to decisions in the nature of recommendations, while obligatory decisions can be taken only at the

higher level. The activities of the Council have accordingly been limited for a number of years to making recommendatory guidelines in the competition area. After approval in 1999 of the regulations, it may be expected that cooperation among CIS countries will have a more practical character. The agreed mechanism may be used by the members for joint investigations of antimonopoly cases with transborder effect. As a result, the Council will pay more attention to practical aspects of cooperation.

The Council usually holds its sessions twice a year in the various CIS capitals. In the period of time since its creation, the Council has held the following sessions:

- 16-17 February 1994, Minsk (Belarus);
- 24-26 May 1994, Kiev (Ukraine);
- 5-8 October 1994, Bishkek (Kyrgyzstan);
- 17-18 April 1995, Moscow (the Russian Federation);
- 6-7 November 1995, Kishinev (Republic of Moldova);
- 20-25 May 1996, Alma-Ata (Kazakhstan);
- 2-4 October 1996, Baku (Azerbaijan);
- 14-15 October 1998, Moscow (the Russian Federation);
- 21-22 April 1999, Dushanbe (Tajikistan) and Moscow (the Russian Federation).

In 1997 there was a break in CIS inter-State activity due to a change in leadership of the Russian Antimonopoly Committee and to organizational changes in a number of CIS antimonopoly bodies.

In 1999 important amendments were introduced to the Statute of the Inter-State Council, specifying its main functions. Bearing in mind its task of promoting economic welfare and safeguarding consumers' interest, the Council has also been empowered to provide "agreed policy on consumer rights protection" (in addition to the coordination of competition policy). In taking this decision, the fact that in most of the CIS countries the same authorities are dealing both with competition policy and with consumer rights protection received special attention.

Thus, it may be expected that in the coming decade cooperation among CIS countries will enter a new phase—along with continuing elaboration of model laws and guidelines it will also cover practical activity in

prevention of monopolistic transborder practice as well as common measures in the sphere of consumer rights protection.

C. *Main activities*

In the mid-1990s the Inter-State Council drafted two model laws: *on the Protection of Economic Competition, and on General Principles for the Regulation of Consumer Rights Protection.*

Both model laws were unanimously approved by the Inter-Parliamentary Assembly of CIS member States and recommended as a model for drafting and improving national competition and consumer laws.

The model laws contain provisions on antimonopoly control over cartels, abuse of dominant position, economic concentration and protection of consumers' rights, thus expanding on the general rules of the Treaty on the Implementation of a Coordinated Competition Policy.

With the adoption of these model laws the CIS countries have developed appropriate legal texts for the rapprochement of their laws on the basis of the agreed principles and rules. However, the significant differences in economic developments in these countries, together with the national peculiarities of economic reforms, made the full harmonization of national legislation difficult. Nevertheless, the rapprochement of CIS national laws on competition is evident, and most of them do contain similar basic provisions.

The most significant part of the work undertaken by the Inter-State Council in recent years has been devoted to the elaboration of agreed methodological guidelines for different aspects of competition regulation. The following guidelines were considered and approved *inter alia* during past sessions of the Inter-State Council:

- "On Analysis of Competition Conditions on Goods Markets" (drafted by the Russian Federation, Belarus and Kazakhstan);
- "On Abuse of Dominant Position through Application of Monopoly High Prices" (drafted by Kazakhstan, Ukraine and Georgia); and,
- "On Elimination of Unfair Competition" (drafted by Ukraine and the Russian Federation).

At their meetings the members of the Council considered and approved a number of documents dealing with exchange of information, *inter alia* in cases of the creation of transnational groups and in cases dealing with unfair competition. One of the sessions of the Council was devoted to the exchange of experiences on demonopolization processes in CIS countries.

As a rule, the agenda of the Council's session includes presentations by members on recent trends in the national antimonopoly policy and the economic situation in general, followed by an exchange of information on the most interesting cases from the antimonopoly laws' enforcement practice. Drafts of the prepared documents are then considered and approved.

At the Council's VIth session, in 1996, the conceptual approaches for the promotion of the integration processes in the competition area were approved. This document envisioned further progress in cooperation among member countries—from exchange of experiences to common measures for the prevention of competition infringements. After a number of meetings of the working groups on this subject, the final version of the new cooperative mechanism was considered and approved at the Council's IXth session, in 1999.

At its last session, in 1999, the Inter-State Council approved on first reading the draft of the Agreement on Cooperation among CIS Countries in the Area of Consumer Rights Protection, elaborated by the Confederation of Consumer Societies (CONFOP). The draft of the Agreement was presented by the Head of the Confederation, who took part in the work of the Council.

The modified version of the Agreement will be presented at the next session of the Council for final approval. The following items are due to be considered at coming sessions:

exchange of experiences among member countries on regulation of competition in financial markets, consideration of the draft Form for Notification of Antimonopoly Bodies about cases with transborder effect, and international cooperation, among others.

It should be emphasized that since the mid-1990s CIS countries have begun to participate actively in the work of international organizations in the competition area. The Russian Federation, Ukraine and Georgia take part in most of the activities organized by UNCTAD, OECD and the World

Bank on competition issues, using international experience in the development of their national regulation. A number of CIS countries currently have bilateral agreements on economic cooperation with the European Communities, which contain special provisions on competition policy. The technical cooperation programmes are usually provided by the Communities to CIS countries with the aim of achieving the results stipulated in the agreements.

So far, only a limited number of CIS countries have been able to participate in competition forums abroad, mainly due to financial difficulties and accordingly the importance of regional measures undertaken by international organizations for CIS countries can hardly be overestimated. In this respect seminars organized by the OECD on an annual basis in Moscow for specialists from the CIS antimonopoly bodies may be mentioned. The seminars provide an opportunity for professional discussions of the most important case studies, thus promoting the rapprochement of enforcement policy in CIS countries. A similar positive role is played by the regional seminars organized by the OECD in its training centres in Vienna, Istanbul and Seoul. The participation in these seminars of specialists from other regions, as well as high-level representation from international organizations, makes them extremely useful from the point of view of developing an international competition culture. The same could be said of the regional training in the competition area organized by the Asia-Pacific Economic Cooperation forum (CIS countries are usually invited to participate in these events). The representatives of international organizations (including UNCTAD) often take part in the sessions of the CIS Inter State Council on competition policy, thus enabling a lively dialogue with most of the CIS antimonopoly authorities.

These activities play an important role in the development of the market economy in CIS countries and serve as a powerful instrument for their integration into the world economy.

At the same time, the accelerating integration processes at the regional and subregional levels lead to a need for special approaches to competition regulation in different groups of countries at different levels of development. In this regard a special long-term regional programme of technical assistance for CIS countries in the fields of competition and consumer rights protection could be extremely useful. Such a programme would contribute to the creation of an homogeneous competitive environment in the CIS region, taking into account the peculiarities of competition

policy and of the economic situation in these countries, as well as general economic development trends in the region. Bearing in mind that all CIS countries are member States of UNCTAD, the regional technical assistance programme is likely to be developed within the framework of this organization.

II. Antimonopoly control on restrictive business practices

Strengthening competition is now considered by CIS Governments as a key element in ensuring the success of deregulatory economic reforms. In the beginning of the 1990s almost all CIS countries adopted competition laws for the purpose of creating appropriate rules of play for enterprises under new market conditions. In elaborating these laws the basic universally valid principles of competition regulation were taken into account. To ensure free market entry and the efficient functioning of market forces, provisions concerning restrictive agreements, abuse of market power and mergers were introduced into competition laws. There has been a common understanding in CIS countries that the competition authorities will not only control restrictive business practices by private firms but also prohibit anticompetitive actions of the governing bodies. While undertaking the transition from central planning to a market economy it was extremely important to prevent the distortion of competition through the intervention of State bodies in the business activities of certain enterprises. For these purposes special provisions have been included in the CIS antimonopoly laws prohibiting anticompetitive acts by governing bodies.

Over the last five years many CIS competition laws have been modernized, establishing more detailed and transparent rules required by the rapidly changing economic environment in these reforming countries.

Existing CIS competition laws have much in common, mainly as a result of the close cooperation among CIS countries in the competition area. In reforming their laws, CIS countries used the provisions of the CIS model law on the Protection of Economic Competition, which in turn had incorporated many of the approaches recommended in the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and in the Model Law on Restrictive Business Practices.

A. *Restrictive agreements or arrangements*

All the competition laws of CIS countries contain provisions concerning restrictive agreements (arrangements) between enterprises. As a rule the laws prohibit horizontal agreements per se (between rival or potentially rival firms) and apply a rule-of-reason approach to vertical agreements (between enterprises at different stages of the manufacturing and distribution processes).

The following kinds of horizontal agreements are usually prohibited by CIS antimonopoly legislation:

- Agreements fixing or maintaining prices or tariffs (or discounts) (Azerbaijan, Kazakhstan, Kyrgyzstan, the Russian Federation);
- Collusive tendering (in the form of collusive pricing) (Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, the Russian Federation, Ukraine);
- Market allocation on the criterion of territory, volumes of sales or purchases, types of goods being sold, groups of sellers or purchasers (Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, the Russian Federation, Ukraine);
- Creating market access barriers for other enterprises (Azerbaijan, Belarus, Kazakhstan, the Russian Federation); and
- Concerted refusal to purchase or to supply (Azerbaijan, Kyrgyzstan, the Russian Federation).

It may be noted that the legal provisions stipulated in CIS antimonopoly legislation regarding agreements between rival firms are rather close to universally used principles, *inter alia* to those recommended by the UNCTAD Model Law on Restrictive Business Practice in the chapter "Restrictive Agreements or Arrangements".

The list of prohibited horizontal agreements stipulated in CIS laws is as a rule not definitive, which means that other kinds of agreements between rivals may also be prohibited by the antimonopoly authorities.

The antimonopoly legislation of some CIS countries provides for an additional criterion for the prohibition of horizontal agreements. In Azerbaijan agreements between rival firms are considered illegal if at least one of these firms occupies a dominant position in the market and if these

agreements lead to monopolization of the markets. Under the Russian antimonopoly law, horizontal agreements may be prohibited only if the enterprises in question account for more than 35 per cent of the corresponding market. In Kazakhstan, Kyrgyzstan and the Republic of Moldova, an aggregate market dominance of the rival firms, coupled with a negative impact of the agreement on competition, are needed for the prohibition of horizontal agreements.

The vertical agreements are treated under CIS antimonopoly legislation in a more flexible way. The laws do not provide any list of prohibited vertical agreements, and the regulations do not operate with the system of block exemptions for certain types of agreements. Thus, they are considered by the antimonopoly authorities on a case-by-case basis. As a rule, a vertical agreement may be prohibited only if one of the enterprises-parties to the agreement occupies a dominant position and the other is its supplier or purchaser, and if such an agreement restricts competition (Azerbaijan, Belarus, Georgia, Kyrgyzstan, the Republic of Moldova, the Russian Federation).

Unlike horizontal agreements prohibited per se, the vertical agreements, which are generally prohibited under certain conditions stipulated in the law, may be authorized by the antimonopoly authorities in exceptional cases. In the Russian Federation, for example, enterprises involved in a vertical agreement are required to prove to the antimonopoly authority that the positive effect of their actions, including in the socio-economic sphere, will outweigh the negative consequences for the market. In Kyrgyzstan the entities must prove that their agreements promote or will promote satiation of goods markets, raising the quality of goods and their competitiveness.

It may be concluded that the absence of the block exemptions system in the CIS antimonopoly legislation creates elements of uncertainty for regulation of agreements connected with franchising, patent and licensing, know-how, exclusive distribution and others where some restrictions of competition arise from the very nature of these agreements and the objective economic reality. A preliminary notification system for such kinds of agreements does not exist. This leads to difficulties for antimonopoly authorities in considering such types of agreements and makes the results of their investigations unpredictable for the companies involved.

The lack of developed legal provisions and methodological guidelines, and the limited possibilities of the antimonopoly authorities in discovering collusive practices, result in insignificant enforcement actions in this area. Thus, for example, in the Russian Federation the share of cases on restrictive agreements constitutes less than 5 per cent of the total number of cases investigated by the Antimonopoly Ministry in recent years.

Among the various types of agreements investigated in recent years by CIS antimonopoly authorities, the horizontal price fixing and allocation of markets are the most numerous. For example, in the Russian Federation collusive practices undertaken by a number of enterprises on the varnish-painting market have been stopped by the antimonopoly authorities. The anticompetitive practices were carried out in the form of market division and agreement on retail prices.

In 1998 the Antimonopoly Ministry investigated a case of restrictive vertical arrangements undertaken by a number of enterprises in the energy equipment market. The claim was filed by the company Technopromexport, which presented the Antimonopoly Ministry with facts of collusive practice between Energomashinen Corporation (a trading company) and a number of the biggest producers of this equipment. The producers refused to supply the equipment to Technopromexport and coordinated their activity with the Corporation. As a result of the investigation, the Antimonopoly Ministry determined that the law had been violated and issued an order to the companies requiring cessation of violations.

In Ukraine the Antimonopoly Committee considered in 1997 a number of cases on restrictive agreements and arrangements. As a result, seventeen anticompetitive agreements between enterprises were abolished. One of the most important cases concerned the elimination of a price cartel in the photo services market. The number of cases investigated by the Antimonopoly Committee on restrictive agreements is growing: in 1998 the Committee took decisions of a prohibitive character three times more often than in 1997.

It may be assumed that in future, special attention will be paid by CIS antimonopoly authorities to strengthening enforcement practices and to the development of legal provisions and guidelines dealing with vertical agreements. Such actions will be needed to ensure free entry to the mar-

kets, to attract investments in the productive sector of economy and to promote technical and scientific progress in these countries.

B. *Dominant position of market power*

In accordance with international principles, CIS antimonopoly legislation does not deal negatively with the dominant position of market power per se. Only abuse of a dominant position is prohibited by the law.

The antimonopoly laws of CIS countries usually define *dominant position* as an exclusive position of a company (or several companies – under the law of the Russian Federation) enabling it to exert decisive influence on goods circulation on a given market or to limit access to a relevant market for other companies.

A feature common to all CIS competition legislation is the use of an additional criterion—*market share*—for determination of the dominant position. This criterion is stipulated differently in CIS laws. In some countries (Azerbaijan, Kazakhstan, Kyrgyzstan), dominance is defined as a market share in excess of 35 per cent or by maximum rate established by the law or by the antimonopoly authorities. The Moldavian law does not contain any strict criterion of dominance, but indicates that with a market share less than 35 per cent a company may not be regarded as dominant. In other cases (Belarus, Georgia, Uzbekistan) the right to establish the fact of dominance is granted exclusively to the antimonopoly authorities without indicating market share of a company in the law. Under the Russian law a company will be considered as dominant if its market share constitutes 65 per cent or more, except in cases when the economic entity proves that despite exceeding the said proportion its position on the market is not dominant. A company with a market share from 35 per cent to 65 per cent may also be considered as dominant if that is determined by the Antimonopoly Ministry. In Ukraine a company is regarded as dominant if its market share exceeds 35 per cent. But the Antimonopoly Committee of Ukraine has the right to determine existence of a dominance of a company even if its market share is less than 35 per cent. In certain countries a position of a company with a market share less than 35 per cent may not be defined as a dominant position (the Russian Federation, Republic of Moldova, Kazakhstan).

The following acts or behaviour are usually considered by CIS legislation as abusive:

- Creation of market access barriers for other companies (Azerbaijan, Belarus, Georgia, the Republic of Moldova, Kazakhstan, Kyrgyzstan, the Russian Federation, Ukraine, Uzbekistan);
- Fixing monopoly high or low prices (Georgia, the Russian Federation, Ukraine);
- Maintaining or raising prices for the purpose of obtaining monopolistically high profits (or additional preferences on the market) (Azerbaijan, Belarus, Uzbekistan);
- Discriminatory (i.e. unjustifiably differentiated) pricing or terms of conditions for the supply or purchase of goods (Azerbaijan, Georgia, the Republic of Moldova, Kyrgyzstan, the Russian Federation, Ukraine, Uzbekistan);
- Making the supply of particular goods dependent upon the acceptance of conditions in which a contractor is not interested or which do not relate to the subject of the contract (Azerbaijan, Belarus, Georgia, the Republic of Moldova, Kazakhstan, Kyrgyzstan, the Russian Federation); and
- Withdrawing goods from circulation to create a scarcity or to increase prices (Azerbaijan, Belarus, Georgia, the Republic of Moldova, Kazakhstan, Kyrgyzstan, Uzbekistan).

Some of the CIS antimonopoly laws contain an additional list of actions which are considered in these countries as abuses of a dominant position but which are quite disputable from the point of view of the market economy. There are, for example, such actions as:

- Refusing to conclude a contract with a particular buyer (customer) in the absence of alternative sellers/buyers (Azerbaijan, Ukraine) or where production or delivery is generally possible (the Russian Federation);
- Violation of existing business relations with the contractors without preliminary notification and consent of the contractor (Azerbaijan);
- Violating the procedure of price-setting, established by governmental legal acts (the Republic of Moldova, Kazakhstan, Kyrgyzstan, the Russian Federation, Uzbekistan) (it should be noted that at the present time price-setting is usually used by the Governments only when establishing tariffs for the natural monopolies);

- Reducing or stopping production of goods in demand (provided they can be produced without incurring losses) (Azerbaijan, the Russian Federation).

It may be expected that these provisions will be changed in the process of further modernization of the law.

The lists of actions defined by the laws as abuse of a dominant position are usually not exhaustive, thus enabling antimonopoly authorities to include other kinds of abuse in the enforcement process.

The abuse of a dominant position is prohibited by all CIS antimonopoly laws. Usually the law prohibits or declares unlawful any actions of economic entities in a dominant position which lead to restriction of competition, or to infringement upon the interests of other economic entities (or physical persons) and consumers (Azerbaijan, Belarus, the Republic of Moldova, the Russian Federation). In Georgia the antimonopoly law prohibits abuse of a dominant position (defined as actions resulting in impairment of the interests of other economic entities or consumers) with a goal of discriminating against other economic entities.

In certain countries (the Russian Federation, Kyrgyzstan) the generally prohibited actions may be deemed in exceptional cases as lawful if the economic entity proves that the positive effect of its actions, including in the socio-economic sphere, will outweigh the negative consequences for the corresponding goods market.

The legal provisions concerning abuse of dominance apply to all kinds of economic entities, including natural monopoly ones. (According to CIS legislation, natural monopoly entities are usually understood to mean the entities operating in the transmission of oil, oil products, transportation of gas by pipeline, transmission of electric power and heat energy, railroad transport, airport services, public telecommunications and post services.) At the initial stage of competition law implementation a number of claims had been submitted by natural monopoly entities to the courts, arguing that the cases involving natural monopoly entities should be investigated not by antimonopoly authorities but by special regulatory agencies. But the courts' solutions made it clear that the cases involving natural monopoly entities are to be investigated not on the basis of the type of entity but of the type of infringement. This means that investigations on

abusing dominant position by the natural monopoly entities fall within the competence of the antimonopoly authorities.

The CIS antimonopoly laws provide for liability for violation of the stipulated rules. If the antimonopoly authorities establish the fact of abuse of dominant position by an economic entity they will require this entity to cease the infringement. Under the legislation of some countries (Kyrgyzstan, the Russian Federation) a compulsory break-up of an economic entity may be undertaken by a decision of the antimonopoly authority if the monopolistic activity of this entity results in a significant restriction of competition.

Enforcement practice statistics show a growing number of cases on abuse of dominant position considered annually by CIS antimonopoly authorities. The infringements connected with abuse of dominance constitute the majority of cases investigated by antimonopoly authorities in CIS countries. In the Russian Federation the share of such cases constitutes about 45 per cent of the total, and in Ukraine about 40 per cent. In all CIS countries the discovered infringements have taken place mostly in the area of natural monopolies. As to the form of the infringements, they are mainly concerned with the setting of contractual conditions, making the supply of particular goods dependent upon the acceptance of another condition in which a contractor is not interested.

In the Russian Federation the Antimonopoly Ministry recently stopped the abuse of a dominant position by the company Sybirgasservice, which made the supply of gas to its contractor dependent upon partial financing of pipeline construction works by the contractor. The Ministry issued the order to Sybirgasservice to cease the anticompetitive practices. The order was carried out in due time.

Another widespread form of abuse is the creation of market access barriers. In 1998 the Russian Antimonopoly Ministry qualified as abuse of a dominant position the behaviour of the company Mordovenergo, which occupied a dominant position in the regional market for energy supply. The company created barriers for market access for other suppliers, prohibiting the issuance of technical documentation for consumers. The Ministry ordered the elimination of the anticompetitive conduct, but Mordovenergo submitted an appeal to the court of arbitration. The court supported the decision taken by the Ministry, and the infringements have been stopped.

The Antimonopoly Committee of Ukraine investigated a case of abuse of a dominant position by the company Chernigovmolprom, which had a 46 per cent share of the regional market for milk. The company inserted unfavourable conditions into contracts with its suppliers, including monopolistically low purchasing prices. The Antimonopoly Committee qualified the behaviour of the company as abuse of a dominant position on the market and issued an order obliging it to cease its anticompetitive behaviour.

As enforcement practices in CIS countries show, the main difficulties facing the antimonopoly authorities relate to the determination of monopolistically high prices. The share of corresponding cases in CIS enforcement practices remains rather low due to the complexity of verifying such kinds of abuse under conditions of permanent inflation. To make the enforcement policy more effective, the CIS countries have elaborated model guidelines on the identification of monopolistically high prices, which are now used by national competition authorities in their enforcement activity.

C. *Market concentration*

In all CIS countries the competition regulation provides for antimonopoly control over operations of a concentrative character (mergers, takeovers and other acquisitions of control, whether of a horizontal, vertical or conglomerate nature). In some countries the control applies also to the creation of new companies and to acquisition of ownership.

The main goal of State control over economic concentration is to prevent the acquisition of a monopoly position or strengthening of a dominant position and to avoid any possible monopolistic activity.

While elaborating the merger regulations, most CIS countries have established a system of notification prior to consummation of the merger. But the notification is mandatory only in cases where the enterprises concerned already have (or are likely to acquire) a certain level of market power.

The parties to a transaction are obliged to notify the antimonopoly authorities in advance, submitting all the necessary information in due time. The information required may include a description of the main types

of activities, the volumes of goods annually produced and sold, the market shares of the parties, the goals of the merger/acquisition, and so forth.

Without a positive decision by the antimonopoly authority, newly created entities will not be officially registered as legal persons (Kazakhstan, the Russian Federation, Belarus, Georgia, Kyrgyzstan, the Republic of Moldova).

The kinds of operations which require preliminary notification are defined in different ways in CIS antimonopoly laws. The main indicators used for examining such operations of economic concentration are market shares and total assets of the companies concerned. (The indicator of the total annual turnover, usual for many developed countries, is not used in CIS antimonopoly laws due to the assumption that not all transactions are officially registered.)

In the Russian Federation the merging entities have to notify the Antimonopoly Ministry in advance if the total value of their assets exceeds the level stipulated in the law, or if one of them has a market share of more than 35 per cent. In some countries (Georgia) the parties to the transaction have to notify the antimonopoly authorities in advance only if one of them occupies a dominant (or monopoly) market position or if (Azerbaijan) the total market share of the companies exceeds 35 per cent. In Belarus the new draft of the antimonopoly law provides for the preliminary notification of acquisitions of more than 25 per cent in the capital of another company.

The antimonopoly authorities are to submit their conclusions on the notified transactions within the period stipulated in the law. The main grounds for rejecting the notified transactions is the possible creation or strengthening of a dominant market position as a result of the transaction.

In the Russian Federation the antimonopoly authorities have the right to reject the application where its approval might lead to the creation or strengthening of a dominant position by the organization concerned and/or to the restriction of competition, or when, during consideration of the documents submitted, it is discovered that the main information is inaccurate.

In Azerbaijan mergers and acquisitions of economic entities are considered illegal if they lead to the creation or strengthening of these compa-

nies' dominant positions. In Belarus the antimonopoly authority may reject an operation of a concentrative character if it results in restriction of competition or (Kyrgyzstan) in the creation of a dominant position.

Antimonopoly legislation of some countries (the Russian Federation, Belarus) stipulates that, even where the possibility of negative consequences for competition is expected as a result of the transaction, the antimonopoly authorities may approve the transaction if its positive effect, including in the socio-economic sphere, outweighs the negative effects. To make the decision-making process more transparent, the methodological guidelines have been drawn up based on an evaluation of the positive and negative effects of the transactions. In Kyrgyzstan the transaction may be authorized by the antimonopoly authorities (even if negative consequences for competition are expected) if it will substantially contribute to the satiation of goods markets and to improvement of the quality of goods and their competitiveness.

The antimonopoly laws usually provide for liability for violation of the stipulated rules. Thus, for example, according to the Russian antimonopoly law economic entities are liable for a fine (of up to 8,000 times the minimum wage) for failure to submit to the federal antimonopoly authority applications on transactions of a concentrative character. In some cases, where operations of a concentrative character may create or strengthen a dominant position of an economic entity or restrict competition, the persons performing such actions are obliged, upon the demand of the federal antimonopoly authority, to take measures to restore competition. Transactions concluded in violation of the procedure established by the law may be nullified in a general court based on a suit filed by the antimonopoly authority.

The number of notifications considered by antimonopoly authorities is growing. In the Russian Federation the Antimonopoly Ministry considered in 1998 more than 7,000 notifications on mergers and acquisitions, including about 600 notifications on transactions involving participation by foreign companies. In 98 cases the Ministry turned down the requested transactions, basing its decisions on the potential negative effect of the transaction for competition.

In Ukraine the Antimonopoly Committee takes preliminary control over mergers and acquisitions. In 1998 it considered 45 requests, three of which have been denied. The Committee also gave its opinion on the creation of big holding companies in the fields of communication, machinery

and others. After the introduction of amendments to the transaction plans, the Committee gave its approval to the requested transactions.

III. Competition policy as regards the behaviour of government agencies

The existing antimonopoly laws in CIS countries include special provisions dealing with antimonopoly control over activities of executive bodies and government agencies which are restricting competition. The reason for the inclusion of such provisions in the antimonopoly laws is mostly of an economical-political nature: antimonopoly control over activities of all kinds of executive bodies ensures the pro-competitive development of the economy at national, regional and local levels and prevents potential attempts by executive bodies, especially at regional and local levels, to introduce different barriers to the free movement of goods or to establish conditions favourable to the activity of specific enterprises.

Taking into consideration the formally supermonopolistic nature of the economy in most CIS countries and the significant dependence of economic entities on the decisions of regional and local authorities, it is quite important to safeguard—through the new basic law provisions—normal competition and avoid competition infringements through the acts of government agencies.

There has been a common understanding in CIS countries that in drafting competition laws they should take into account all kinds of possible restrictions on competition, resulting from the actions of both economic entities and government agencies.

In the process of developing a market economy in CIS countries, the role of the executive bodies is shifting, from direct, administrative intervention in business relations to economic regulation in the framework of the existing legal system. But as long as the executive bodies preserve certain rights which they might use in an unlawful way, and thus restrict competition, antimonopoly control over their activities is needed. The executive bodies could significantly harm the development of market relations while creating different kinds of market access barriers, engendering discriminatory or favourable working conditions for certain companies, granting unjustified exclusive rights or supporting ineffective entities.

Such interventions result in distortions, affecting the allocation of resources and restricting competition. That is why control over unlawful activities of executive/governing bodies forms an important part of the antimonopoly laws and enforcement practices in CIS countries. Antimonopoly policy today constitutes an important tool for the prevention and elimination of regional and branch monopolism which results from unlawful acts by executive and governing bodies and prevents the free movement of goods and services within a single market.

The inclusion of corresponding provisions in the CIS antimonopoly laws and the law enforcement practices pursued are safeguarding the procompetitive character of the national economies in these countries. The activities of the antimonopoly authorities guarantee equal business opportunities for economic entities, absence of discrimination and the development of competition in goods markets. These processes are playing a highly significant role from the standpoint of the transition of these countries to a market-based economy.

The importance of antimonopoly control over the activities of executive bodies should be especially noted in the current period, when CIS countries (except Kyrgyzstan) are not members of the WTO and thus do not have strong international obligations in the area of granting State subsidies to certain economic entities, creating access barriers to internal markets, distributing contracts for government procurement, and so forth. In these circumstances such infringements are prevented by the antimonopoly authorities on the basis of competition legislation.

The absence of special laws on, or regulation of, the activities of "state enterprises" or "enterprises with exclusive rights" in CIS countries may also be explained by the existence of provisions concerning activities of executive bodies in the CIS antimonopoly laws. The antimonopoly legislation provides a legal basis for the prevention of different kinds of infringements in this area.

The provisions of the various CIS antimonopoly laws concerning government agencies have much in common. This fact may be explained by the similar economic situation prevailing when the laws were adopted, and the common tasks of the State antimonopoly authorities concerning control over the actions of executive bodies. It should be also noted that in adopting their national antimonopoly laws, CIS countries followed the provisions of the Treaty on the Implementation of a Coordinated Competition Policy.

Special articles dealing with the anticompetitive actions of government agencies are included in all the CIS antimonopoly laws, stipulating the objects and subjects of such regulation, the main tools of antimonopoly control, and liability for infringements of the antimonopoly legislation.

In most CIS countries the antimonopoly control applies to all levels of executive bodies and local authorities. In some countries the object of regulation is even broader, covering the managing bodies of different kinds of unions and associations.

All the CIS antimonopoly laws prohibit the activities of executive/governing bodies if they infringe competition.

Thus, for example, the Russian law stipulates that executive/governing bodies may not adopt acts or perform actions which limit the independence of economic entities or which create discriminatory conditions or conditions favouring the activity of individual economic entities if such acts or actions have or may have as their result a restriction of competition and/or impairment of the interests of economic entities or citizens.

The definitions of *executive bodies* and *executive and governing bodies* are not the same in different CIS antimonopoly laws.

In some countries (Republic of Moldova, Uzbekistan), "executive bodies" are understood as national and regional executive bodies; in the Russian Federation and Georgia, the law applies also to the activities of local administrations (which do not constitute a part of the State executive power). In other countries (Azerbaijan, Belarus, Kyrgystan, Ukraine) the definitions of "executive bodies", "executive and governing bodies" and "bodies of power and administration" also include managing bodies of different kinds of business unions when they are engaged in fulfilling government functions.

Generally it is important to note that the application of the antimonopoly laws to the actions of both national and regional executive bodies prevents and eliminates market entry barriers at the regional and sectoral levels.

The tools most used for prevention of infringements of competition resulting from the acts of executive bodies are the prescriptions of CIS antimonopoly authorities concerning prohibition of certain acts, actions and agreements (between executive bodies or between an executive body and an economic entity).

The following acts and actions of executive/governing bodies are usually prohibited, *inter alia* by CIS antimonopoly legislation:

- Introducing restrictions on the creation of new economic entities and imposing bans on certain types of activity or production of specific types of goods (except for cases provided by the legislation);
- Imposing bans or otherwise restricting the rights of economic entities in the sale (or purchase, exchange or acquisition) of goods from one region of the country to another;
- Giving economic entities instructions on the priority delivery of goods/services to specific groups of purchasers or on the priority of concluding contracts with them;
- Obstructing, without grounds, the creation of new economic entities; and
- Granting ungrounded privileges to an individual economic entity or several economic entities, thereby placing them in a preferential position with regard to other economic entities operating in the market for the same goods.

In some CIS countries, agreements (or concerted actions) concluded in any form between executive bodies or between an executive body and an economic entity are prohibited and deemed null and void if they have or may have as a result the restriction of competition and/or impairment of the interests of economic entities or citizens. Prohibited, *inter alia*, are agreements directed at:

- The raising, lowering or maintenance of prices;
- The division of the market; and
- The restriction of access to the market or elimination of economic entities therefrom.

In some CIS countries (the Russian Federation, Uzbekistan), the antimonopoly laws also contain provisions on the inadmissibility of participation of officials of executive bodies in entrepreneurial activity. Some antimonopoly laws (in the Russian Federation, Kyrgystan, Georgia) include the right—and some (in Kazakhstan, for example) even the duty—of the antimonopoly bodies to make recommendations and/or issue binding instructions to the executive bodies on the promotion of competition.

In all CIS countries the antimonopoly bodies have the right to issue binding instructions to the executive bodies on the repeal or modification of unlawful acts taken by them.

In the event of violation of the antimonopoly law the executive bodies and their officials are liable under the law. In most cases civil and administrative liability is stipulated for violations of the antimonopoly legislation. In some antimonopoly laws (the Russian Federation, Georgia), liability under criminal law is also provided for. Most CIS antimonopoly laws prescribe fines for executive bodies and their officials. The rate of fines is usually established on the basis of the minimum monthly wage and differs from that established for economic entities.

The provisions of the antimonopoly laws concerning acts and actions of executive bodies are successfully applied in practice. The number of cases connected with this kind of violation filed by the antimonopoly bodies constitutes a significant proportion of all cases filed under the antimonopoly law.

Most of the recommendations and instructions issued by the antimonopoly authorities to the executive bodies as a result of the investigations are carried out by these bodies in full and in due time. Following the orders issued by the antimonopoly authorities, the executive bodies modify or nullify the acts which infringe the antimonopoly legislation and eliminate other restrictions of competition. The disputes brought to the courts on decisions taken by the antimonopoly bodies usually result in verdicts supporting those decisions.

The number of cases filed annually by the competition authorities under the corresponding law is growing constantly. Thus, in 1998 the Russian Antimonopoly Ministry considered more than 1,500 applications under this law, and as a result about 1,000 cases were filed, as compared with 1,159 applications and 872 cases in 1996.

The cases involving anticompetitive actions of government structures constitute a rather high percentage of all cases considered by the Ministry concerning infringements of the antimonopoly law: in 1996 they represented 32 per cent; in 1997, 44 per cent; and in 1998, about 40 per cent.

The most common type of unlawful action of executive bodies investigated by the CIS antimonopoly authorities is the groundless obstruction of the activity of economic entities.

Frequently the violations of antimonopoly legislation are committed by the regulatory agencies in the sphere of natural monopolies. The following violations are the most typical:

- Groundless granting of favourable tariffs for services of natural monopolies;
- Establishing tariffs on services not covered by current regulations;
- Adoption by the ministries of different acts granting conditions favourable to the activity of natural monopoly entities;
- Vesting the natural monopoly entities with functions and rights of the State executive bodies, *inter alia* functions of control and supervision;
- Improper regulation of natural monopolies by executive bodies; and
- Inclusion in tariffs of expenditures not stipulated by the current tariff scheme.

Some examples of CIS enforcement practice in this area are given below.

In the Russian Federation a regional office of the Antimonopoly Ministry filed a case against the local administration concerning adoption of a decree on the regulation of trade in bread and bread products, which contained ungrounded prohibitions against entities selling bread from vending trailers. The antimonopoly authorities ordered the local administration to cease the violation, and accordingly the administration abolished the prohibitions.

In Georgia the Antimonopoly Service considered a complaint submitted by a group of movie theatres concerning the creation and activity of the company Gruzia Film, registered as a State enterprise by the local authorities. The movie theatres claimed that the managers of Gruzia Film had forced all the movie theatres within the company to unite and had later ignored the rights and interests of economic entities in the process of reorganizing the company as a joint-stock company.

The Antimonopoly Service concluded that all the reorganizations of the company conducted constituted a significant violation of the Antimonopoly Law and issued an order for cessation of the corresponding decision by the local authorities.

The Ukrainian Antimonopoly Committee considered an application submitted by a number of sugar-beet plants against the association Kievsachar. The association, which includes thirteen plants, had constantly influenced the activity of its members, coordinated their pricing policy, intervened in their production and distribution activity, and introduced a centralized distribution system for the goods produced. In some cases the association had given binding instructions to its members on the delivery of goods to certain customers. The Antimonopoly Committee concluded that Kievsachar had restricted competition and thus violated the antimonopoly law. For the violation of the law it was fined 2 per cent of the income of the previous year. The violations of the antimonopoly law have since been abolished.

Another case considered by the regional branch of the Ukrainian Antimonopoly Committee was submitted by the Joint Motor Transport Enterprise (JMTE) company. In 1996 JMTE obtained a licence for trade in foodstuffs. On the basis of contracts it was selling the products of Kiev bakeries in regional shops. In 1997 the local administration sent a letter to JMTE prohibiting the sale of bread baked at Kiev bakery plants. The Antimonopoly Committee concluded that the local administration had violated the antimonopoly law, restricted competition and facilitated monopolization of the bread market. The actions of the local administration were qualified as infringements of the antimonopoly law insofar as they prohibited trade in goods between regions, restriction of entrepreneurs' rights to produce goods and setting prohibitions with regard to certain businesses.

In 1996 the Russian antimonopoly authorities considered a case against the Ministry of Railway Transport (MRT), the federal executive body. While examining the activities of MRT entities which, together with the private entities, provide the transit and international transportation of goods, infringements of the antimonopoly law were discovered to have been committed both by the railways and by MRT. Some railway transport companies were granted unjustified exclusive rights and thus were favourably positioned as compared with other companies of the same kind. There were also cases of granting different discounts to particular economic entities and of introducing bans on their activity. The Antimonopoly Ministry

ordered MRT to cease its violations of the law and to restore normal competition to the market.

In evaluating the legal provisions dealing with executive bodies' activity and conducting the corresponding law enforcement, the antimonopoly authorities have been promoting competition advocacy in CIS countries and ensuring the pro-competitive nature of economic regulation.

In this respect the meetings held by the antimonopoly authorities with other executive bodies for the purpose of explaining the corresponding provisions of the antimonopoly law and the importance of developing competition are particularly noteworthy. A positive role is also being played by the agreements concluded between antimonopoly bodies and executive/governing bodies, the reports prepared by the antimonopoly bodies for submission to the Governments, and the publications of the corresponding materials in mass media. For the purposes of harmonizing antimonopoly requirements in different regions, the methodological guidelines elaborated by the staff of the antimonopoly authorities for their regional branches are very useful.

It may be noted that antimonopoly control over activities of government structures is conducted quite effectively in CIS countries, promoting free circulation of goods and services and a competitive business environment. Nevertheless, in most of those countries the antimonopoly authorities do not have the power to abolish acts of an anti-competitive character adopted by the Government. Accordingly, the antimonopoly authorities in some CIS countries are now initiating the drafting of special laws on State aid, which will regulate processes surrounding the provision of government financial assistance.

Finally, it should be noted that the activity of the antimonopoly bodies undertaken in this area promotes transparency in State economic regulation, prevents corruption and increases the attractiveness of these countries to foreign investors.

IV. Related laws and regulations

A. *Demonopolization programmes*

Fundamental economic reforms adopted in CIS countries over the past ten years have been accompanied by significant changes to the regulatory mechanism, based on growing recognition of the private sector and of the role of the market in the effective functioning of the economy. In recent years the number of private enterprises in CIS countries has risen sharply. Thus, for example, in the Russian Federation the share of State enterprises now constitutes only 5 per cent of the total number of economic entities.

The broad processes of privatization have been accompanied by demonopolization programmes to ensure that public monopolies are not transformed into private monopolies.

Bearing in mind that it is difficult to undertake demonopolization measures during the privatization process because of adverse reactions by potential buyers, some CIS countries started demonopolization before privatization. In other countries demonopolization has been pursued in parallel with privatization.

The special State programmes on demonopolization adopted in CIS countries specify the tasks, methods, terms, and regional and sectoral aspects of the process. The main tasks of the competition authorities in the processes of demonopolization were to advise the appropriate authorities on the privatization projects, elaborate and coordinate demonopolization programmes and exercise antimonopoly control over privatized firms, particularly in cases where they retained a dominant market position.

In many CIS countries the antimonopoly authorities have been authorized to give their legal opinion on drafts of privatization projects to ensure that the proposed privatization will enhance competition.

In the Russian Federation demonopolization began in the mid-1990s on the basis of the Federal Programme, complemented by 17 sectoral and

73 regional programmes. The elaboration and coordination of the demonopolization programmes were undertaken by the antimonopoly authorities, but their implementation came under the responsibility of the branch ministries and regional authorities. In 1998 the governmental decree on Measures for State Antimonopoly Policy, Demonopolization of Economy and Promotion of Competition in 1998-2000 in the Russian Federation was adopted, specifying the main tasks of State authorities and new methods of demonopolization.

The main methods of creating a competitive environment provided for by the demonopolization programmes include promotion of new enterprise creation, particularly in the highly concentrated markets, reduction and elimination of market entry barriers, reorganization of enterprises, creation of the appropriate financial and organizational infrastructure and promotion of competition advocacy.

The demonopolization programmes have had the following results, among others:

- In the construction sector: the number of economic entities has grown significantly, up to 156,000, including 140,000 small and medium-sized enterprises;
- In machine-building: the concentration ratio has been reduced and effective competition developed;
- In the timber industry: the demonopolization of the wood, sawtimber and veneer markets has been fully completed; nevertheless, the markets for typographical and other kinds of paper remain highly concentrated, which poses the task of promoting imports of competing goods.

In Belarus a third demonopolization programme was recently adopted, containing goals, priorities and concrete measures for the midterm perspective. Implementation of the previous demonopolization programmes resulted in the restructuring of the largest entities in the field of trade and communications and in promotion of competition. In the period 1996-1998 the number of trading entities with a dominant position on the market dropped from 55 to 16. In the telecommunications sector one of the biggest producers of services—the company Belsvjazstroy - has been divided into several independent entities with the goal of promoting competition on the market.

The Antimonopoly Service in Georgia participates actively in the development and implementation of the demonopolization programmes in different sectors of the economy, *inter alia* in the fuel-energy industry, and in railroad, automobile and sea transport. The proposals made by the Antimonopoly Service to the Government have been taken into account in the process of restructuring the energy sector, and the Antimonopoly Service is currently participating in the restructuring of the metallurgical sector.

In Kazakhstan the Antimonopoly Committee participates directly in the demonopolization process, particularly in the telecommunications sector and in housing and community services. The former biggest company in the telecommunications sector, Kazakhtelecom, has been divided into several entities for purposes of demonopolization and the elimination of market entry barriers. In housing and community services, demonopolization activities brought about radical changes in the form of ownership; up to 94 per cent of housing now belongs to cooperatives. In Kyrgystan the antimonopoly authorities in recent years have taken a number of measures to reorganize the railroad, energy and housing sectors, as called for by the State programme for demonopolization of the economy and promotion of competition.

The antimonopoly authorities of other CIS countries participate in a similar way in the demonopolization processes undertaken during the last decade. In most cases these activities are undertaken in the framework of State demonopolization programmes elaborated with the active participation of the antimonopoly authorities. Demonopolization results in the promotion of competition in the markets for goods and services, the reduction of prices and tariffs and improvements in the quality of the goods produced.

B. *Unfair competition*

Almost all CIS antimonopoly laws contain provisions on unfair competition, prohibiting it per se. In some countries special laws have been adopted on counteracting unfair competition and misleading advertising.

Unfair competition is usually defined in CIS legislation as actions by economic entities designed to gain advantages in the course of entrepreneurial activity which contravene the provisions of the law, usage and practices of doing business, as well as the requirements of respectability and fairness, and which may cause (or have already caused) damage or

losses to other economic entities (competitors), or which may damage their business reputation.

In many CIS countries the suppression of unfair competition comes under the responsibility of the antimonopoly authorities and constitutes a significant part of their activities. As the courts in CIS countries usually lack resources and sufficient experience in this area, the suppression of unfair competition through administrative measures taken by the antimonopoly authorities seems to be the most effective way to safeguard competition in this area, closely related to the protection of intellectual property rights.

The following types of activity are usually regarded in CIS countries as unfair competition:

- The dissemination of false, inaccurate or distorted information capable of causing losses to another economic entity or causing damage to its business reputation;
- Misleading consumers as to the character, method (means) and place of production, properties and quality of goods;
- Making an incorrect comparison of goods produced or sold by an economic entity with the goods of other economic entities;
- The sale of goods involving illegal use of the results of intellectual property;
- The receipt, use or disclosure of research and technical information, including trade secrets, without the consent of their owner.

The lists of activities identified by the law as unfair competition are usually not definitive, thus enabling the antimonopoly authorities to consider other types of incorrect behaviour as also constituting unfair competition.

The number of cases on unfair competition investigated by the antimonopoly authorities is growing every year. Thus, for example, the Russian Antimonopoly Ministry in 1998 had undertaken 235 proceedings on unfair competition, as compared with 213 proceedings in 1997. The percentage of such cases considered by the Ministry rose in this period from 7 to 10 per cent. The Ministry's investigations concerned mostly such forms of unfair competition as illegal use of intellectual property rights (the cases of the trademarks Paclan and Lipton), and misleading consumers as to the character, method and place of production (the case of

Jana-print. Regular antimonopoly control is also provided by the Ministry over advertising activity on the basis of the advertising act.

In Georgia the suppression of unfair competition is one of the top priorities of the Antimonopoly Service. In recent years many abuses connected with the illegal use of intellectual property rights (mostly in the form of the unfair use of trademarks) have been eliminated as a result of antimonopoly investigations. A large proportion of these cases deals with the use of the trademarks for Georgian wines and mineral water. The investigations are conducted by the Georgian Antimonopoly Service in close cooperation with other CIS antimonopoly authorities, using exchange of information and joint investigation activities. As a result of this cooperation the false use of the trademarks for famous Georgian wines and mineral water has been established and eliminated in the Russian Federation, Ukraine, Belarus, Kazakhstan and the Republic of Moldova.

In Kazakhstan the control over unfair competition is undertaken on the basis of the law "On Unfair Competition". In 1998 the Antimonopoly Committee of Kazakhstan investigated 17 cases on unfair competition. In Ukraine the antimonopoly control over unfair competition is provided on the basis of the law "On Suppression of Unfair Competition", which took force in 1997. The Antimonopoly Committee of Ukraine stopped, in 1998, 97 cases of unfair competition as compared with 76 cases in 1997. Similar activities are also pursued by other CIS antimonopoly authorities, resulting in improvement of business environment in these countries.

C. *Liberalization of foreign trade and investment regimes*

In recent years an extensive liberalization of the trade and foreign investment regimes has taken place in CIS countries, resulting largely from negotiations with international financial organizations. Many CIS countries are now in the process of accession to the WTO (Kyrgystan is already a member), and these negotiations also contribute to the liberalization of foreign economic regimes.

Usually the liberalization process results in increased flows of foreign direct investment and goods and in the reduction of industrial concentration, thus promoting competition on the domestic markets. On the other hand, the sources of export and foreign direct investment in CIS countries are often highly concentrated, which can affect their domestic industry. Bearing these observations in mind, CIS Governments often tend to intro-

duce different kinds of barriers for foreign suppliers and investors, supported in these actions by their national industry lobby. The participation of the antimonopoly authorities in the elaboration of national trade and investment policy therefore plays an extremely important role.

In a number of CIS countries the antimonopoly authorities are involved in the process of decision-making on changes in import/export tariffs and on the introduction of safeguards and antidumping measures. In some CIS countries those authorities are authorized to present their opinions to the Government on drafts of laws and other legal documents. In so doing the antimonopoly authorities pursue the goal of using trade and investment policy as an instrument of competition and to prevent ungrounded protective barriers.

In the Russian Federation the Antimonopoly Ministry participated in the drafting of basic trade legislation adopted in recent years. Following the Ministry's suggestion, an antimonopoly clause was written into the law on Measures for Protection of Economic Interests of the Russian Federation by Foreign Trade in Goods, which provides for the obligatory opinion of the antimonopoly authorities in certain cases. The Antimonopoly Ministry presented its legal opinion on the draft law on Foreign Investments in the Russian Federation (which entered into force in July 1999) and on the draft laws on Prohibitions and Restrictions in Foreign Investment Activities in the Russian Federation and on Promotion of Foreign Investments. The new law on Foreign Investments in the Russian Federation contains antimonopoly provisions prohibiting anticompetitive practices by foreign investors, including through the acquisition of competing companies with the goal of their liquidation. The law also prohibits agreements on prices and market division as well as collusive tendering with participation by foreign investors.

In the Russian Federation and Ukraine the antimonopoly authorities participate on a permanent basis in the activity of the governmental commissions on trade policy, presenting their opinions on suggested trade measures and instruments. In 1998 the Russian Antimonopoly Ministry presented its opinions on 42 inquiries about changes in import tariffs. In most cases the opinion of the Ministry prevailed.

In Kazakhstan the Antimonopoly Committee participates in conducting foreign economic policy. In 1998 it presented its opinion on the abolition of import duties on raw materials used for the production of medicine, with the purpose of promoting competition on the domestic

market and developing national production. The Committee has also stopped the dumped export of phosphorus from Kazakhstan, which prevented the development of national industry. In another case it supported the introduction of an import quota for cement aimed at protecting the national market from destructive import.

The involvement of CIS antimonopoly authorities in foreign economic policy, usually undertaken on the basis of special legislation, prevents distortions in international competition and ensures the optimal balance of the interests of national producers and consumers. The experience gained is very useful in terms of broadly discussed interaction between trade and competition policy, providing examples of how competition authorities may promote foreign economic policy which is pro-competitive in nature.

Conclusions

Competition policy now constitutes a central element in the economic reform programmes of CIS countries. The change of regime in these countries in the early 1990s has required the disengagement of the State from the production and distribution processes and the establishment of the legal and institutional frameworks appropriate to the functioning of a market economy. The CIS Governments have taken significant steps to demonopolize highly concentrated economies, to expand the role of the private sector in economic activity and to ensure competition on the market. These efforts contribute substantially to the positive changes in economic life in these countries.

The appropriate regulatory authorities have been created in almost all CIS countries and for a number of years have been pursuing State control over restrictive business practices and unfair competition. Special attention is paid to the development of enforcement practices: the number of cases investigated by competition authorities is growing every year, and in most cases the antimonopoly investigations result in the elimination of restrictive business practices. Nevertheless, the lack of resources, and in some countries also the lack of powers, means that the antimonopoly authorities are powerless to prevent especially complicated kinds of anti-competitive practices, in particular cartels, which continue to account for an unjustifiably low proportion of all cases investigated.

The competition legislation adopted in CIS countries is based on universal principles of competition regulation used around the world. In drafting their competition laws, CIS countries took into consideration the recommendations of UNCTAD, OECD and other economic organizations, as well as the provisions of the CIS model law on Protection of Economic Competition. Competition policy in CIS countries is concerned not only with private practices but also with regulatory restraints that restrict competition. The competition laws contain special provisions prohibiting actions by government agencies which lead to restriction of competition.

Moreover, the competition authorities advocate measures to prevent the distortion of competition in implementing other government policies,

thus ensuring the general pro-competitive character of economic regulation. In many CIS countries competition authorities are involved in designing and conducting policy in related areas, above all in trade and investment. This makes it possible to avoid unjustified protective measures and to promote imports and foreign investment. The activities undertaken by antimonopoly authorities in this respect help to raise the competitiveness of domestic goods on world markets and thus to promote economic welfare in CIS countries.

To make the competition rules more predictable, special guidelines have been adopted by CIS competition authorities in different areas of competition regulation. At the same time it should be noted that the degree of transparency of competition regulation in CIS countries remains rather low: only laws and (in some countries) guidelines are officially published, while annual reports and descriptions of enforcement practices are as a rule not published. The development of transparency in competition policy and the promotion of competition advocacy in these countries depends to a great extent on the financial resources provided for implementing this policy and on their respective competition culture.

CIS countries carry out activities in the competition area on the basis of the Intergovernmental Treaty on the Implementation of a Coordinated Competition Policy, signed in 1993. In the framework of the Inter-State Council on Competition Policy, CIS antimonopoly authorities undertake the harmonization of national competition laws, draft model laws and guidelines, coordinate their joint activities, exchange information and organize consultations on cases with a transborder effect for competition. These activities lead to the creation of a harmonized business environment in CIS countries, promoting the free movement of goods and services and reducing market entry barriers.

CIS countries are now actively involved in international cooperation in the competition area. Representatives of the antimonopoly authorities participate in many activities conducted by UNCTAD, OECD, the European Union and other organizations in the framework of their technical assistance programmes to CIS countries. At the same time, given the accelerating integration processes in the region, a special programme for CIS countries in the competition area would be very useful. Such a programme would contribute to the creation of a homogeneous competitive environment in the CIS countries and promote their integration into the world economy.

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