



# ASSESSMENT OF THE COMPETITION LAW OF **BELARUS**

*Law No. 94-3 dated December 12, 2013 “on the counteraction to monopolistic activities and promotion of competition”*



UNITED NATIONS  
UNCTAD



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UNCTAD  
Geneva, 2020

## NOTE

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to competition law and policy. UNCTAD promotes the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the General Assembly Resolution 35/63 on 5 December 1980. The work of UNCTAD is carried out through intergovernmental deliberations, technical cooperation activities, policy advice, and research and analysis on the interface between competition law and policy and development, as well as for consumer protection law and policy.

UNCTAD assists developing countries and countries with economies in transition in adopting or revising competition and consumer protection legislation and policies, to align with international best practices, as well as supports the establishment of regional frameworks in these areas.

UNCTAD has considerable expertise in competition and consumer protection policies and has been working in the field of competition since the 1980s. Competition and consumer policies are crucial for inclusive and sustainable development and for the achievement of the Sustainable Development Goals.

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## INTRODUCTION

In 2018, the Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus (MART) requested the UNCTAD Secretariat to undertake a legal assessment of Belarus' competition law dated 12 December 2013 (*i.e.* comments of its law provision-by-provision) based on the UNCTAD Model Law on Competition and international best practices on competition law and policy from jurisdictions of developed countries and advanced economies.

## OBJECTIVE AND SCOPE

Bearing in mind the above, the objective of this assessment is to comment on the existing provisions of the Competition Law in Belarus, that is to say, Law No. 94-3 dated December 12, 2013 entitled "on the counteraction to monopolistic activities and promotion of competition" of the Republic of Belarus, and, if possible, to contribute to its improvement. As such, the current assessment has the following parts: (1) Objective and scope; (2) Presentation of the Competition Law in Belarus; (3) Analysis of the key provisions of the law; (4) Conclusions; and (5) Recommendations.

## PRESENTATION OF THE COMPETITION LAW IN BELARUS

According to previous UNCTAD research, the design of competition policy and law and the institutional framework in countries with economies in transition, such as the case of Belarus, should be adjusted to the distinctive features of their economic, social and cultural environment.<sup>1</sup> For instance, during the 90s and based on the specific structure of Belarussian markets, the country undertook several "demonopolization programmes"<sup>2</sup> that resulted in the restructuring of its largest enterprises and in the promotion of competition. These efforts have been critical for the successful implementation of competition rules in the Republic of Belarus.

UNCTAD research<sup>3</sup> suggests that there are critical issues in this area for most developing countries and countries with economies in transition. These issues are as follows:<sup>4</sup>

### **Legal framework:**

- i) Judicial review of competition cases
- ii) Exemptions and authorizations
- iii) Public interest and competition law issues

### **Policy issues:**

- i) Competition advocacy
- ii) Privatization, concessions and competition law
- iii) Informal sectors
- iv) Regional organizations' competition rules

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<sup>1</sup> UNCTAD, *The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy*, TD/RBP/CONF.7/3 (2010), available at [http://unctad.org/en/Docs/tdrbpconf7d3\\_en.pdf](http://unctad.org/en/Docs/tdrbpconf7d3_en.pdf), at P. 4.

<sup>2</sup> Natalya Yacheistova (UNCTAD Consultant), *Competition Policy in Countries in Transition - Legal Basis and Practical Experience*, UNCTAD/ITCD/CLP/Misc.16 (2000) 53, available at <https://unctad.org/en/Docs/poitcdclpm16.en.pdf> (last visited 11 March 2019), at 37.

<sup>3</sup> See Natalya Yacheistova (UNCTAD Consultant), *supra* note 2.

<sup>4</sup> UNCTAD, *supra* note 1.

### **Institutional framework:**

- v) Independence of the competition authority
- vi) Staffing and financial resources of the competition authority
- vii) Relationship with sector regulators

The Republic of Belarus adopted its first competition law in 1992 which was amended in 2000, 2003 and 2010.<sup>5</sup> Under this law, the following Government entities oversaw the implementation of competition rules:<sup>6</sup>

- 1991 - Antimonopoly Policy Committee at the Council of Ministers of the Republic of Belarus;
- 1992–1996 - State Committee on Antimonopoly Policy of the Republic of Belarus;
- 1996 - Ministry of Antimonopoly Policy of the Republic of Belarus;
- 1997–2001 - Ministry of Entrepreneurship and Investments of the Republic of Belarus (had no departments in its composition);
- 2001–2016 - Department on Antimonopoly and Pricing Policy of the Ministry of Economy of the Republic of Belarus, the authority in charge of competition before the creation of MART in 2016.

But it was not until 3 August 2018 that the new Competition law of the Republic of Belarus No. 94-3 of 12.12.2013 (hereinafter – the “Law”) came into force as part of a comprehensive change in the Belarusian legal sphere.

The Law encompasses a more extensive set of rules than previous legislation (51 articles as opposed of 27 articles) and has the following chapters:

Chapter I: “General provisions”

Chapter II: “Anti-monopoly body”

Chapter III: “Monopolistic activity”

Chapter IV: “Unfair competition”

Chapter V: “Requirements to economic concentration, reorganization of economic entities that hold a dominant position”

Chapter VI: “Procedure for establishing the existence (absence) of a violation of anti-monopoly legislation.

Chapter VII: “Responsibility for violation of anti-monopoly legislation, obligation on implementation of the anti-monopoly body requirements”.

The Law defines the institutional and legal frameworks for the prevention, restriction and suppression of monopolistic activity and unfair competition in order to ensure the necessary conditions for the establishment and effective functioning of domestic markets, the promotion and development of fair competition, protection of the rights and legitimate interests of consumers in line with the structure of most competition laws across the world.<sup>7</sup>

The law includes the following substantive concepts:

- The definition of a dominant position of economic entities;
- The rules of State antimonopoly control over transactions of economic entities.

In addition, the law covers several procedural norms in detail:

- The procedure of formation and maintenance of the State register of economic entities,
- The procedure of coordination of conditions;
- The procedure to inspect compliance of dominant economic entities;
- The procedure to identify and prevent anticompetitive prices agreements (concerted actions);
- The procedure to identify monopoly prices;

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<sup>5</sup> *Law of the Republic of Belarus No. 2034-XII of December 10, 1992: On Counteraction to Monopolistic Activities and Promotion of Competition*, 1992, available at <https://www.wipo.int/edocs/lexdocs/laws/en/by/by021en.pdf> (last visited 11 March 2019).

<sup>6</sup> Natalya Yacheistova (UNCTAD Consultant), *supra* note 2, at P. 8.

<sup>7</sup> MART Website, *State Antimonopoly Policy in the Republic of Belarus | Ministry of Economy of the Republic of Belarus*, available at <https://www.economy.gov.by/en/national-competition-policy-in-the-rb-en/> (last visited 6 June 2019).

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- The procedure of requests (applications), consideration of establishing the appropriate provisions of the agreements, restricting competition;
- The procedure of applications (appeals) consideration on violation of antimonopoly legislation in terms of unfair competition;
- The procedure of taking measures, aimed at the elimination of violations of antitrust laws.<sup>8</sup>

An important feature in terms of comparison with preceding laws is that the Law incorporates a clear *per se* prohibition of cartels. In fact, a detailed chapter on anticompetitive agreements and concerted actions (hard-core cartels) was adopted whereby agreements (with or without impact on competition) leading to four consequences specified in part 1 of article 20 of the Law, are prohibited *per se*.<sup>9</sup>

## ANALYSIS OF THE KEY PROVISIONS OF THE LAW

The following section includes specific comments on each provision of the Law by chapter.

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<sup>8</sup> *Ibid.*

<sup>9</sup> P. & Partners, *CEE Legal Matters - New Law on Competition: What Has Changed for Foreign Companies in the Belarusian Market?*, 22 November 2018, CEE Legal Matters, available at <https://ceelegalmatters.com/belarus/9649-new-law-on-competition-what-has-changed-for-foreign-companies-in-the-belarusian-market> (last visited 11 March 2019).

# CHAPTER I

## "GENERAL PROVISIONS"

### Comments on Article 1 related to basic terms used in this law and their definitions

#### **Article 1**

#### **Basic terms used in this Law and their definitions**

*The following basic terms and their definitions are used for the purposes of this Law:*

*vertical agreement – an agreement between economic entities, one of which acquires a good or intends to acquire it, and the other provides the good or is its potential seller;*

*purchase of goods – acquisition of goods on a competitive basis, when two or more participants take part or can take part, including purchase of goods in the course of public procurement (with the exception of the procurement procedure from a single source), purchases from own funds (with the exception of the procurement procedure from one source), procurement during construction;*

*competitors – economic entities which sell and (or) purchase goods in the same commodity market;*

*agreement – an agreement in writing or in electronic form, contained in a document or several documents, as well as oral agreement;*

## INTRODUCTION

Belarus is a member State of the Eurasian Economic Union. The Eurasian Treaty encompasses competition rules (articles 74 to 77). Article 75 of the Eurasian Treaty sets out a framework for harmonizing national competition laws with reference to substantive law that all national competition laws in the EAEU area must observe.

Annex 19 related to Competition of the Eurasian Treaty provides more details on the matter of harmonization through the cooperation between member States at the horizontal level - Section V<sup>10</sup> "Cooperation between authorized authorities of the member States" - and under Section VI - "Cooperation between the Commission and the Authorized Authorities of the Member States for Monitoring Compliance with the General Rules of Competition"<sup>11</sup>. In fact, the latter framework would be most suitable to address this issue and address harmonizing procedural efforts and implementing guidelines as the section in question deals with the investigation process that the EEC undertakes with the assistance of the NCAs. However, if the harmonization of rules on substantive issues or common substantive rules have been adopted by regional economic organizations<sup>12</sup>, the harmonization of procedural law as well as harmonized implementing guidelines may require additional efforts as member States may have different legal systems that will affect the enforcement of competition law. In any case, harmonizing these rules and guidelines often requires continuous work and close monitoring after an agreed decision to pursue it.

<sup>10</sup> Eurasian Economic Commission, Annex 19 to the Treaty on the Eurasian Economic Union - Protocol on General Principles and Rules of Competition, 2014, p. 18.

<sup>11</sup> *Ibid.*, at P. 28.

<sup>12</sup> The European competition rules, articles 101 and 102 of the Treaty on the Functioning of the European Union are applied by the European Commission and by the EU national competition authorities when anticompetitive practices significantly affect trade member States, even though the European Competition Network established a system of division of work, providing for a consistent application of the rules. See Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p.1-25, and the Commission Notice on cooperation within the Network of Competition Authorities, Official Journal C 101, 27.04.2004, p. 43-53.



The national competition law of Belarus follows the provisions of the EAEU Treaty, despite its enactment before the adoption of the EAEU treaty in 2014. For instance, the Law includes a concept of vertical restraints and includes generally the minimum substantive provisions prescribed in Article 76 of the Treaty that relates to the general rules of competition. Indeed, Article 76 of the EAEU Treaty addresses general rules of competition regarding five substantive categories: (i) unilateral conduct (dominant positions); (ii) unfair competition; (iii) horizontal agreements; (iv) vertical agreements; and (v) other agreements between economic entities.<sup>13</sup>

In accordance to the harmonization provisions of the EAEU Treaty, horizontal and vertical agreements should be differentiated in the national competition law of Belarus. Albeit, the differentiation of both types of agreements could eventually make the law more complex to follow, horizontal agreements<sup>14</sup> are different from vertical agreements in strict sense and therefore, RPM should be stipulated in a separate article. In any event, the term "anti-competitive agreement" could cover both, vertical and horizontal agreements and therefore add clarity to the reading and interpretation of the law.

The Law defines agreement as in writing or electronic form: a broader and more detailed definition would be preferable, wording such as "any form of contract, arrangement or understanding regardless of form or whether it is legally enforceable" being recommended. For greater certainty, this includes, but is not limited to, written, verbal or implicit agreements."<sup>15</sup>

### **Article 3** **Scope of application of the Law**

*1. The provisions of this Law shall apply to relations related to protection and development of competition, including prevention and suppression of monopolistic activities and unfair competition involving legal entities of the Republic of Belarus, foreign and international legal entities (organizations which are not legal entities), state bodies, their officials, as well as individuals, including individual entrepreneurs.*

## Comments on Article 3 related to the scope of the competition law

Article 3 establishes the extraterritoriality of the Law by referring to the possible law enforcement against economic entities which may not have their headquarters nor a physical presence in Belarus but whose activities impact Belarus markets. However, while important for the effectiveness of Belarus competition law enforcement, this provision is inconsistent with clause 7 of article 76 of the EAEU Treaty. In this regard, the Eurasian Commission is limited to act against economic entities registered (legal domicile and local representation) within the Eurasian member States.<sup>16</sup> The extraterritorial application of the Belarus competition Law appears to be in line with other jurisdictions' legislations: the EU and the US extraterritoriality doctrine are set out in<sup>17</sup> the European wood pulp cartel case ruling of 1988<sup>18</sup> (which established the "implementation principle") and the American Hartford Fire Ins. Co. v. California of 1993<sup>19</sup> ruling (which established a more expansive approach of the effects doctrine).

<sup>13</sup> Eurasian Economic Commission, *Treaty on the Eurasian Economic Union*, 29 May 2014, available at [http://www.un.org/en/ga/sixth/70/docs/treaty\\_on\\_eeu.pdf](http://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf) (last visited 6 February 2019).

<sup>14</sup> (price-fixing schemes and such as cartels) between competitors in the commodity market are prohibited "per se" as opposed to Resale Price Maintenance (RPM),

<sup>15</sup> URL: <https://globalcompetitionreview.com/jurisdiction/1003168/european-union>.

<sup>16</sup> Eurasian Economic Commission, *supra* note 13, at P. 83.

<sup>17</sup> For a comprehensive study of this principle, See: Griffin, 'EXTRATERRITORIALITY IN U.S. AND EU ANTITRUST ENFORCEMENT', 67 *Antitrust Law Journal* (1999) 159.

<sup>18</sup> ECR, *Ahlstrom v Commission*, 27 September 1988 5233, available at [http://eur-lex.europa.eu/resource.html?uri=cellar:5ed612ae-790c-4091-bf05-0a6d7cbd9142.0002.06/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:5ed612ae-790c-4091-bf05-0a6d7cbd9142.0002.06/DOC_1&format=PDF) (last visited 6 April 2017).

<sup>19</sup> US, US Court of Appeals for the Ninth Circuit, *Hartford Fire Ins. Co. v. California* 509 U.S. 764 (1993), 28 June 1993, available at <https://supreme.justia.com/cases/federal/us/509/764/case.html> (last visited 6 April 2017).

Since no analysis of law enforcement has been conducted for this report, it is not currently possible to assess the concrete application of this provision in Belarus, but this is an interesting issue to explore if and when Belarus wishes to submit to an UNCTAD Voluntary Peer Review of Competition law and policy.

## Comments on Article 6 related to dominant position

### **Article 6** **Dominant position**

2. *Dominant position is the position of the economic entity, whose share in the commodity market is thirty-five percent or more, or less than thirty-five percent, if the dominant position of such an economic entity is established by the anti-monopoly body, based on the ability of the economic entity to unilaterally determine the price (tariff) level and provide decisive influence on the general conditions of circulation of goods in the relevant product market, the availability of economic, technological, administrative or other boundedness for access to the commodity market, and (or) withdrawal from the commodity market, the period of the existence of the possibility of an economic entity to exert a decisive influence on the general conditions of the commodity market, except in the case referred to in clause 4 of this Article.*

At the outset, article 6.1 provides a very detailed definition of a dominant position, offering several elements to clarify the complex nature of this concept, while it facilitates the assessment of such a position by undertakings.

This concept is part of the analysis to determine whether an abuse of that particular dominant position has been exercised by an economic entity. In fact, the commentaries of the Chapter IV of the UNCTAD Model Law on Competition<sup>20</sup> have established that abuse of dominance is one of the most controversial issues in competition law because of the assessment of when is a company dominant, as well as the spectrum of conducts that might constitute abuse of dominance. Furthermore, this specific assessment varies from country to country as it may depend on the goals of each competition regime (consumer welfare, economic efficiency, protecting the competitive process) and on the inclusion or exclusion of other values – such as fairness<sup>21</sup> – in the competition analysis.<sup>22</sup>

Considering the inherent complexity of the concept and despite the relevance of providing several important elements of the concept, it would be relevant to assess the enforcement of this provision. A simpler and more and general definition of dominance (e.g. enables an entity or entities to operate independently of competitive forces in relevant market) could prove to facilitate its application by MART.

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<sup>20</sup> UNCTAD *Model Law on Competition, Part 2 - Commentaries, Revised Chapter IV: Acts or Behaviour Constituting an Abuse of a Dominant Position of Market Power*, TD/RBP/CONF.8/L.2 (2015) 30, available at [https://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8l2\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8l2_en.pdf) (last visited 11 January 2019).

<sup>21</sup> The concept of "fairness" is subjective. However there are at least 3 ways that this concept is generally brought into competition law: 1] procedural fairness 2) unfair trade practices 3] introduction of forms of fairness standards in determination of anti-competitive conduct and harm. Each jurisdiction that incorporates fairness would do so based on its national standards. In the first example, there are international standards on "fair" procedures in competition law. In the second, competition laws that incorporate UTP may provide specific examples of types of conduct that would be deemed unfair but generally maintain some subjective elements. In the third example, there is a growing debate in competition law on the inclusion of non-economic values but many laws have included issued of allocation in their economic evaluation of competitive harm – particularly in the consideration of exemptions. For example, the extent to which efficiencies generated by otherwise anti-competitive behaviour are passed on to consumer. See more at: *Fairness in EU Competition Law Enforcement*, 20 June 2018, available at [http://ec.europa.eu/competition/speeches/text/sp2018\\_10\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2018_10_en.pdf) (last visited 2 May 2019).

<sup>22</sup> UNCTAD Secretariat, *supra* note 20, at P. 3.

Article 6.2 establishes a market share threshold presumption of 35%, which is a fairly low threshold to establish dominance compared to other jurisdictions.<sup>23</sup> In view of the latter, should this threshold be retained, additional wording should explain that this is an indicative threshold, that when reached should require undertakings to provide evidence to the contrary to rebut it.

## Comments on Article 8 related to group of persons

### **Article 8** **Group of persons**

1. *Group of persons includes individuals and (or) legal entities that correspond to one or several of the following characteristics:*
  - 1.1. *an economic company and an individual or legal entity, if such an individual or legal entity by virtue of their participation in this business or in accordance with the authority received from other persons, including by an agreement, has more than fifty percent of the total number of votes on voting shares (stakes in the authorized capital) of this economic company;*
  - 1.4. *economic entities are legal entities in which more than fifty percent of the number of the collegial executive body and (or) the board of directors (supervisory board) are the same individuals;*

This article indicates the basic elements to determine the existence of a single economic entity under the scope of the Law. One of the elements is related to the voting shares within the equity of a company. Indeed, it refers that a group of persons would be regarded as such when more than fifty percent of the total number of votes that are "voting shares" are related to one individual. However, the claim is made that this sole element may not be sufficient to fully capture situations of control.

In fact, other aspects of control might be more relevant than just the "percentage" of voting shares. This refers to, for instance, the power to appoint or remove members of the Board. Hence, one could suggest including the power to appoint or remove a significant number of the entities' Board of Directors as a crucial element of control. Another feature could be having the ability to effectively exercise control over the target entity as additional tests for control in Clause 1.1. Several examples of these forms of control can be found in corporate governance formulas during pre-merger transactions in order to secure control over future companies after the merger is concluded.

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<sup>23</sup> Government of Canada, *Abuse of Dominance Enforcement Guidelines*, 7 March 2019, available at <https://www.competition-bureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html> (last visited 7 June 2019) & Rules for a business operator with power over the market, B.E. 2561 under Trade Competition Act B.E. 2560, Singapore, CCS Guidelines on the Section 47 Prohibition. *Competition Act - Singapore Statutes Online*, available at <https://sso.agc.gov.sg/Act/CA2004> (last visited 27 February 2019).

## Comments to Article 9 related to monopolistically high price (tariff)

### **Article 9. Monopolistically high price (tariff)**

1. *Monopolistically high price (tariff) is the price (tariff) established by an economic entity that holds a dominant position, if this price (tariff) exceeds the amount of costs and profits necessary for manufacturing (producing) and (or) selling goods, and also exceeds the price (tariff) that was formed in the conditions of competition in the commodity market, comparable in terms of the composition of sellers or consumers of the goods, the conditions for the circulation of goods in the commodity market, the conditions for access to the commodity market, state regulation, including taxation and customs tariff regulation (hereinafter referred to as the "comparable commodity market"), in the presence of such a market in the Republic of Belarus or abroad, including the price (tariff) established:*

While it is clear that MART as any other competition authority is not a price regulator, this legal provision may lead to such interpretation which is not considered adequate in the view of the UNCTAD Secretariat for the purpose of the present legal assessment. UNCTAD's experience of countries with economies in transition suggests that regulators intervene against unreasonably low prices set by a dominant entity or monopoly whereas it creates an artificial barrier to entry as demonstrated by the case of Armenia.<sup>24,25</sup>

Article 9.1 seems to imply that MART may influence price regulation by setting the price (tariff) of an economic entity that holds a dominant position, if this price (tariff) exceeds the amount of costs and profits necessary for manufacturing (producing) and (or) selling goods. It is well known that most competition laws do not foresee the regulation of price levels because these are determined by the supply and demand forces in market economies, even if prices set by dominant entities are not usually driven by market forces. Indeed, the absence of a price regulator in the Republic of Belarus as of yet and the price regulation section of MART combined with several streamlining legislations to regulate prices through a general pricing management scheme<sup>26</sup> may question MART's involvement in general pricing. An improvement of this legislative point is required to clarify this question because UNCTAD advocates for clear competition rules distinct from price regulation issues, apart from exceptional cases (as for instance the current global pandemic COVID 19).

## Comments on Article 10 related to monopolistically low price (tariff)

### **Article 10**

#### **Monopolistically low price (tariff)**

1. *Monopolistically low price (tariff) is the price (tariff) established by an economic entity that holds a dominant position, if this price (tariff) is lower than the amount necessary for manufacture (production) and (or) selling the product of costs and profits, and also below the price (tariff) that was formed in the conditions of competition on a comparable commodity market, in the presence of such a market in the Republic of Belarus or abroad, including the price (tariff) established:*

<sup>24</sup> Armenia provides an example where high levels of market concentration were found to be significantly influenced by the limited points of entry and exit for the import and export of goods. This led UNCTAD to recommend that the Government considers economic policy measures to alter the markets' structure, facilitating new entries and improving the overall competitive situation in Armenia.

<sup>25</sup> UNCTAD, *Voluntary Peer Review of Competition Policy: Armenia*, 2010, available at [https://unctad.org/en/Docs/ditccp20101overview\\_en.pdf](https://unctad.org/en/Docs/ditccp20101overview_en.pdf) (last visited 31 May 2019).

<sup>26</sup> (Article 9 of the Law of 10.05.1999 N° 255-3 "On Pricing"; Resolution of the Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus No. 52 of October 2, 2017 "On Establishment of Limit Minimum Prices for Alcoholic Products with Fortress over 28%" (ed. 28.03.2018); Annex 1 to Presidential Decree No. 72 "On some issues related to regulation of prices (tariffs) in the Republic of Belarus" of 25 February 2011; further - Decree No. 72; solution of the Council of Ministers of the Republic of Belarus of January 17, 2014 No. 35 "On Approval of Lists of Socially Significant Goods (Services)

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Government intervention can be justified when market dominant players abuse their monopoly power to consolidate their dominant position in the market. For example, it is well known that the regulation of excessively low prices is justified in a predatory pricing case. Thus, MART should consider intervening only when dominant entities lower their prices to exclude or drive competitors out of a market. One possible standard to follow is when such entities price below average variable cost.<sup>27</sup> In any event, this type of prohibited conduct should evolve through decisional practice and case-law, and not as a result of formally defined concepts under articles 10 and 11 of the Law, which should be considered for revision.

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<sup>27</sup> John Vickers, "Abuse of market power", *The Economic Journal*, 2004, p.5.

## CHAPTER II

### "ANTI-MONOPOLY BODY"

#### **Article 13**

##### **Main functions of the anti-monopoly body**

The anti-monopoly body performs the following main functions:

**carries out control over compliance** with the anti-monopoly legislation by economic entities, officials of economic entities - legal entities, state bodies, their officials, legal entities that are not related to economic entities, their officials, individuals not related to economic entities;

**reveals violations** of the anti-monopoly legislation, takes measures to counteract monopolistic activities, unfair competition, other violations of the anti-monopoly legislation by business entities, officials of economic entities - legal entities, state bodies, their officials, legal entities that are not related to economic entities, their officials, by individuals not related to economic entities;

**promotes the development** of competition.

#### **Article 14**

##### **Powers of the anti-monopoly body**

In the sphere of counteraction to monopolistic activity and development of competition, the anti-monopoly body:

considers appeals (proposals, applications, complaints), including appeals on:

(...)

issues warnings about the need of:

(...)

issues to the economic entities, officials of economic entities - legal entities, legal entities that are not related to economic entities, their officials, individuals who are not related to economic entities, the requirements for:

(...)

issues to the state bodies, their officials the requirements for:

(...)

applies in due course to the court with lawsuits, applications on a violation of anti-monopoly legislation, including claims, statements on:

(...)

exercises other powers established by this Law and other legislative acts

The Law separates the functions and powers of the Competition Authority in two different articles. Article 13 addresses three different types of main functions: (1) control over compliance (monitoring compliance); (2) reveal of violations (related to issuing compulsory instructions to infringers to restore competition); and (3) the promotion of competition. On the other hand, article 14 describes the specific powers of the Authority organized in 6 categories: (1) consideration of appeals; (2) issuance of warnings; (3) issuance of requirements to private actors; (4) issuance of requirements to public entities; (5) participation in lawsuits before courts; and (6) other powers as established by the law or other legislative acts.

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Most competition legislations establish a list of the functions and powers that the authority is granted for carrying out its tasks and provide a general framework for its operations. Chapter X of the UNCTAD Model Law on Competition recommends that competition authorities have the power to *inter alia* (i) *make inquiries and investigations...*; and (ii) *take the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister.*<sup>28</sup> In the light of these recommendations, it is noteworthy that the Belarus Competition system in accordance to article 36 of the Law, in conjunction with the Presidential Decree No. 114 of 2012,<sup>29</sup> seems to entrust decision-making responsibilities to administrative and judicial authorities<sup>30</sup>, not entrusting them to the Authority according to articles 13 and 14. Therefore, the possible integration of investigative and adjudicative functions in the law enforcement authority should be considered in line with international best practices. Indeed, although the institutional design<sup>31</sup> greatly depends on the specific country's context and therefore and there is no single model that is optimal for all countries; it is important that a Competition Authority can carry out its functions effectively (e.g. carrying out investigations) and create the necessary deterrence vis-à-vis the economic actors.<sup>32</sup>

A point that merits significant concern is whether MART has appropriate investigation powers to promote an effective enforcement of the law. In this regard, it is extremely important that MART has all the necessary means and tools to gather all relevant information on the investigated anticompetitive practices to build sound legal and economic assessment cases against alleged infringers to allow them the full exercise of their rights of defense. UNCTAD research supports enforcement authorities disclosing as many facts as possible to the respondent to enable it a full defense and to allow for comprehensive evidence-gathering.<sup>33</sup>

In this regard, many jurisdictions have specifically conferred wide investigation powers and instruments to allow Competition Authorities the gathering of all relevant evidence necessary for an effective law enforcement. Under the European Competition rules, the European Commission as well as member States' Competition Authorities have been granted, amongst others, powers to enter business premises or any other relevant premises to investigate; to request subjects of an investigation to disclose relevant information; to examine, take or copy relevant business documents, to seize and detain the relevant evidence.<sup>34</sup>

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<sup>28</sup> UNCTAD Secretariat, *Model Law Competition. Chapter X. Functions and Powers of the Administering Authority*, TD/B/C.I/CLP/L.3 (2011), available at [http://unctad.org/en/Docs/ciclpL3\\_en.pdf](http://unctad.org/en/Docs/ciclpL3_en.pdf) (last visited 17 January 2019), at 2. Chapters IX and X of the UNCTAD Model Law on Competition recommend that competition legislation follow certain key principles related to (i) due process of law, (ii) fairness, (iii) non-discrimination; and (iv) accountability and transparency. These principles should govern the main functions of the authority in particular when the entity undertakes investigations as well as imposing sanctions. UNCTAD *Model Law on Competition, Part 2 - Commentaries. Chapter IX. The Competition Authority and Its Organisation*, TD/B/C.I/CLP/L.2 (2011), available at [http://unctad.org/en/Docs/ciclpL2\\_en.pdf](http://unctad.org/en/Docs/ciclpL2_en.pdf) and *Chapter X. Functions and Powers of the Administering Authority*, TD/B/C.I/CLP/L.3 (2011), available at [http://unctad.org/en/Docs/ciclpL3\\_en.pdf](http://unctad.org/en/Docs/ciclpL3_en.pdf).

<sup>29</sup> President's Decree of the Republic of Belarus No. 114 "On some measures to strengthen the State Antimonopoly Regulation and control" of 27 February 2012.

<sup>30</sup> The MART Commission (14 members chaired by the Minister) can decide the existence of a violation of the law by an entity as per article 36 but does not have sanctioning powers as fines are imposed by the courts.

<sup>31</sup> The UNCTAD Model Law provides 3 structural models that normally jurisdictions follow. These are: (a) The bifurcated judicial model – the Authority has investigative powers, and must bring enforcement actions before courts of general jurisdiction, with rights of appeal to general appellate courts; (b) The bifurcated agency model – the Authority has investigative powers, and must bring enforcement actions before specialized competition adjudicative authorities, with rights of appeal to further specialized appellate bodies or to general appellate courts; (c) The integrated agency model – the Authority is empowered with both investigative and adjudicative functions, with rights of appeal to general or specialized appellate bodies. See at UNCTAD, "Model Law Competition. Chapter IX. The Competition Authority and Its Organisation," P. 3.

<sup>32</sup> *Ibid.*, at P. 4.

<sup>33</sup> UNCTAD Secretariat, *supra* note 26, at P. 3.

<sup>34</sup> See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, articles 17 to 22, *OJ L 1, 4.1.2003, p. 1–25*.

# CHAPTER III

## “MONOPOLISTIC ACTIVITY”

Chapter III on monopolistic activity of the Law addresses the behavioral anticompetitive practice of “Abuse of dominance”. Previous research of the UNCTAD Secretariat has ascertained that abuse of dominance is a difficult area of competition law and policy as assessing the effects of conduct can be difficult and time-consuming, largely because the same form of conduct can either aid or hinder progress towards competition objectives, depending on the circumstances.<sup>35</sup>

It is also important to take into account the importance of a predictable business environment, especially in countries with economies in transition. It may be difficult for enterprises to understand which conduct might prompt intervention by competition authorities in this context. In this regard, in some cases, excessive or unpredictable intervention can discourage enterprises from actively competing in the market, which could undermine competition policy objectives. Despite the differences in competition law objectives and approaches to assess dominance, despite the specificities of what constitutes abusive practices, and which sectors may be temporarily excluded or exempted from the law, some objectives are common, and definitions of dominance and of abuse can be grouped into a handful of fairly similar groups.<sup>36</sup>

Countries with economies in transition such as the Republic of Belarus may be particularly vulnerable to private anticompetitive conduct of undertakings with market power due to the economic structural changes taking place. In some other Commonwealth of Independent States (CIS) countries, structural challenges had to be faced when privatizations and deregulation of key economic sectors came into play; leading to collapse heavily concentrated markets.<sup>37</sup> The following factors are likely to have a negative impact on competitive pressure: (a) greater proportion of local markets insulated from trade liberalization measures; (b) limited access to essential inputs; (c) more limited distribution channels; (d) more dependence on import (basic industrial inputs) and/or exports (for growth) (e) greater incidence of administrative/institutional barriers to imports; (f) weak capital market.”<sup>38</sup>

Transition from State monopolies to competitive markets may generate further scope for exclusionary abuses of dominance. “A former monopolist being challenged by new entrants may have ‘inherited’ advantages from the former position, like a strong financial position, control of certain network facilities, connections and political support, or established relations to suppliers and customers. Such a dominant firm or ‘incumbent operator’ may find many ways to make life difficult for new entrants and in the end exclude competitors effectively. In many countries that have liberalized markets, the competition law enforcer finds itself inundated by endless cases of alleged abuse of dominance resulting from the imbalance between a former monopolist and new entrants.”<sup>39</sup>

With the foregoing in mind, the following specific comments to the articles of the Law are presented as follows:

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<sup>35</sup> UNCTAD Secretariat, *Abuse of Dominance*, TD/B/COM.2/CLP/66 (2008), available at [https://unctad.org/en/Docs/c2clpd66\\_en.pdf](https://unctad.org/en/Docs/c2clpd66_en.pdf) (last visited 14 March 2019), at P. 3.

<sup>36</sup> *Ibid.*, at P. 3-4.

<sup>37</sup> For example, Armenia was an important supplier of manufactured inputs to the rest of the soviet block and this market banished overnight as it was unable to compete in suddenly liberalised markets. See UNCTAD Secretariat, “Voluntary Peer Review of Competition Policy: Armenia - Overview,” 2000, P. 2, [https://unctad.org/en/Docs/ditcclp20101overview\\_en.pdf](https://unctad.org/en/Docs/ditcclp20101overview_en.pdf).

<sup>38</sup> Source derived from How enforcement against private anticompetitive conduct has contributed to economic development. CCNM/GF/COMP(2003)OECD (2003) para. 19]. UNCTAD Secretariat, *supra* note 33, at P.13-14.

<sup>39</sup> The Indian competition law, article 19 (4)(g) indicates awareness of this issue, a factor that may be considered in determining whether an enterprise that enjoys a dominant position is “monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise”. See *Ibid.*, at P. 14.



## Comments on Article 18. Prohibition of abuse of a dominant position by an economic entity

### **Article 18**

#### **Prohibition of abuse of a dominant position by an economic entity**

1. Action (inaction) of an economic entity that holds a dominant position, which lead or may lead to the prevention, restriction or elimination of competition, harm to the rights, freedoms and legal interests of legal or natural persons, including the following actions (inaction) are prohibited:
  - 1.1. creation of obstacles to access to the commodity market or withdrawal from the commodity market to other economic entities;
  - 1.2. establishing, maintaining a monopolistically high or monopolistically low price (tariff), establishing a monopsonically low price (tariff);
  - 1.3. withdrawal of goods from circulation, if the result of such withdrawal was an increase in the price (tariff);
  - 1.4. economically or technologically unjustified reduction or termination of the manufacture (production) of the goods, if there is a demand for this product or orders for its supply are placed if it is possible to manufacture (produce) it profitably;
  - 1.5. economically or technologically unjustified refusal or evasion from entering into an agreement with individual consumers if there is a possibility of manufacturing (producing) and (or) delivering the corresponding goods;
  - 1.6. economically, technologically or otherwise, unjustified establishment of various prices (tariffs) for the same goods;
  - 1.7. imposing on a seller or consumer economically or technologically unjustified terms of a contract that are unprofitable for them or not relevant to the subject matter of the contract, including consent to the conclusion of a contract only if the provisions are made in it regarding goods in which the seller or consumer is not interested;
  - 1.8. conclusion of agreements restricting the freedom of participants in these agreements to determine the prices (tariffs) and (or) the conditions for the supply of goods in agreements with third parties, as well as the imposition of such conditions or the refusal to conclude contracts because of the refusal to accept the conditions specified by the consumer;
  - 1.9. conclusion of agreements with sellers or consumers entailing the restriction or establishment of control over the manufacture (production) of goods, the establishment of control over the markets for the sale of goods, the restriction of the market for the sale of goods;
  - 1.10. creation of discriminatory conditions, including application of unequal treatment to sellers or consumers under equal conditions.

Article 18 prohibits abusive behaviors of dominant players in the relevant markets. This provision is generally reasonable and timely. The provision may be improved by adding a qualification element requiring that the prevention, restriction or elimination of competition be substantial or material. This would ensure that the prohibition is focused on truly problematic anti-competitive conduct (as opposed to competitively neutral or beneficial conduct) which may have some immaterial anticompetitive effects.

However, since article 6 might be too complicated and detailed to be effective and would benefit from a revision, this may impact article 18: articles 6 and 18 should be easily related as article 6 applies to the notion of a dominant position whereas article 18 deals with that entity's behaviour. The qualification element recommended would ensure that the prohibition would apply only where the actual anticompetitive effects dominant entity's conduct can be ascertained.

## Comments on Article 19. Measures aimed at ensuring non-discriminatory access to goods

### **Article 19**

#### **Measures aimed at ensuring non-discriminatory access to goods**

1. In case of revealing the fact that an economic entity has abused the dominant position established by the decision of the anti-monopoly body in order to prevent the creation of discriminatory conditions, the Council of Ministers of the Republic of Belarus has the right to establish rules for non-discriminatory access to goods manufactured (produced) and (or) sold by an economic entity which holds a dominant position and is not a subject of natural monopoly, whose share in the relevant commodity market is more than seventy percent.

Addressing anticompetitive behavior by dominant entities is best accomplished under article 18. Even though the measures at stake are related to the regulation of essential facilities, article 19 essentially imposes a regulatory regime for dominant enterprises and provides MART with special powers to control the behavior of dominant entities outside of the regular adjudicative process and without having found that the conduct of this entity was anti-competitive. This regime allows for an invasive intervention that may prevent dominant entities from competing properly with other enterprises which are not subject to this demanding framework.

Furthermore, even though article 19 is a positive improvement over price regulation, international best practices would limit interventions from Competition Authorities over merely dominant entities (i.e. apart from specific sectoral regulation) targeting only specific anti-competitive conducts that restrain effectively competition. It is worth noting that these comments are not meant to suggest that MART could not intervene when identifying an alleged abuse of dominant position. Indeed, once an infringement has been found, the decision may include terms for fair access. This can also be done in the framework of settlements decisions. As it is shown in the law, article 19 has a potential to overlap with article 18, numbers 4-6 as these clauses could be more specific to target the anticompetitive behavior.

## Comments on Article 20. Prohibition of restrictive competition agreements of economic entities

### **Article 20**

#### **Prohibition of restrictive competition agreements of economic entities**

6. The norms of this Article do not apply to:

*agreements between economic entities belonging to the same group of persons if one of such economic entities with respect to another economic entity has been established or if such economic entities are under the control of one person;*

Articles 20 (3) and 21 should include additional wording regarding definitions such as a “substantial”, “material” or “undue” prevention, restriction or elimination of competition to prevent the overly broad application of the law. Such an approach is taken in a variety of competition legislations.<sup>40</sup> Without such qualification, potential restrictions which are clearly pro-competitive overall or at least not demonstrably anti-competitive, may be prohibited unless they can be proven to qualify for an exemption – for example, under article 22.

<sup>40</sup> See for example the UNCTAD Model Law, Part 2 - Commentaries, which uses an “unduly” threshold (see Commentary 6 to Chapter I) and a “substantial” threshold in Chapter VI. UNCTAD, ‘Model Law Competition . Chapter VI Mergers & Acquisitions’ (2010) TD/RBP/CONF.7/L.6 <[http://unctad.org/en/Docs/trdbpconf7L6\\_en.pdf](http://unctad.org/en/Docs/trdbpconf7L6_en.pdf)>.

The materiality aspects suggested would be directly applicable to the nature of the anti-competitive harms arising from the relevant conduct, the market share threshold alluded to does not directly correlate to this. For example, conduct by an entity that exceed the 20% threshold may still not have, in principle, any material impact and may not require an upright investigation or alleged sanction. Taking an example from the Republic of Korea's legislation<sup>41</sup>, a company (excluding the company whose annual amount of sales or purchase in a particular business area is less than 4 billion won) whose market share in a particular business area falls under any of the following subparagraphs shall be presumed a market-dominating company: 1. Market share of one company is 50% or more; 2. The total market share of not more than three companies is 75% or more: Provided, In this case companies that have market share below 10% shall be excluded.

However, even though those criteria were met, the company is not regarded as a market dominant player in the market, and the Korean Competition Authority (Korea Fair Trade Commission) considers the following elements: i) existence and degree of barrier to entry; ii) relative size of competitors; iii) possibility of concerted practices among competitors; iv) existence of similar goods or services, adjacent market; v) power to exercise market foreclosure; vi) financial resources.

Article 20(6) creates an exemption for entities under common control. Further to the suggestions above for amending the group of persons definition in article 8 to include *de jure* and *de facto* control, it is suggested that the exemption is applied to entities falling within the same "group of persons" rather than creating two separate standards.

### Comments to Article 22. Admissibility of actions (inaction), agreements, coordinated actions of economic entities

#### **Article 22**

#### **Admissibility of actions (inaction), agreements, coordinated actions of economic entities**

1. *Actions (inaction), agreements, coordinated actions of economic entities specified in sub-clauses 1.4 and 1.10 of clause 1 of Article 18 , clauses 2 and 3 of Article 20, clause 1 of Article 21 of the Law, with the exception of vertical agreements that are permissible in accordance with clause 2 of this Article, as well as actions (inaction) to establish, maintain a monopolistically high price (tariff) of goods in which the invention protected in the territory of the Republic of Belarus is applied, as well as goods manufactured (produced) directly in the manner protected by the patent of the Republic of Belarus for the invention, during the validity period of the relevant patent, can be recognized as an admissible by the anti-monopoly body if they do not impose restrictions on economic entities that are not necessary to achieve the objectives of these actions (inaction), agreements, coordinated actions, and do not or cannot lead to the prevention, restriction or elimination of competition in the relevant product market , and if the business entities prove that such actions (inaction), agreements, coordinated actions have or may have the effect of:*

1.1. *assistance in improving the manufacture (production), selling goods or stimulating technical (economic) progress, or increasing the competitiveness of goods manufactured (produced) in the Republic of Belarus on the world commodity market;*

1.2. *receipt by consumers of a commensurate part of the advantages (benefits) acquired by the relevant persons as a result of such actions.*

2. *Vertical agreements are allowed if:*

2.1. *vertical agreements are agreements of an integrated entrepreneurial license (franchising);*

<sup>41</sup> Monopoly Regulation and Fair-Trade Act, Article 3-2, Republic of Korea, available at...

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- 2.2. the share of each economic entity that is a party to the vertical agreement in the commodity market of the goods being the subject of a vertical agreement, does not exceed twenty percent.*
- 3. Economic entities that have an intention to conclude an agreement that can be recognized as admissible in accordance with clause 1 of this Article shall have the right to apply to the anti-monopoly body with a written application for the issuance of a document on the compliance of the draft agreement with the requirements of anti-monopoly legislation.*
- 4. The procedure for applying and reviewing of an application for the issuance of a document on the compliance of the draft agreement with the requirements of anti-monopoly legislation, documents and (or) information, forms and other requirements for the submitted application, documents and (or) information shall be determined by the anti-monopoly body in the part not regulated by the Law, other legislative acts, the Council of Ministers of the Republic of Belarus.*

The exemption provided by article 22 could benefit from further clarity as to why some forms of abuse of dominance would benefit from this exemption and others not. As currently worded, the exemption is only available if the relevant actions "do not or cannot lead to the prevention, restriction or elimination of competition in the relevant product market ". However, the prohibitions under articles 18, 20(3) and 21 only apply to conduct that has or may lead to such effect. As a result of this selected targeted situations to trigger the exemption, it appears that the exemption would not serve its intended purpose as it would never be available to any conduct prohibited under those sections.

In view of the foregoing, it is suggested to foresee a balance that leads to the granting of the exemption where pro-competitive effects identified in clause 1.1 offset any identified potential or actual anti-competitive effects that are considered in articles 18, 20 or 21.

# CHAPTER IV

## “UNFAIR COMPETITION”

Similar to clause 2 of article 76 of the EAEU Treaty<sup>42</sup>, Chapter IV refers to Unfair Competition. While there has been substantive literature to suggest that unfair competition provisions should be outside the scope of competition rules when it is only to protect competitors in the market<sup>43</sup>, some competition laws have included unfair competition considerations when business practices affect the general interest.<sup>44</sup> This is exemplified in the case of the Spanish competition law of 2007 in Article 3 of the Competition Act of Spain which states as follows:

*“...Distortion of free competition by unfair acts*

*Article 3: The National Competition Commission or the competent bodies of the Autonomous Communities shall hear under the terms that this Act establishes for prohibited conduct the acts of unfair competition which affect the public interest by the distortion of free competition.”*<sup>45</sup>

As can be seen above, Spain includes a provision within its competition law provided that the distortion of competition affects public interest considerations. In contrast, Article 26 related to the prohibition of unfair competition by misleading, does not seem to encompass any consideration to the public interest or in this case, to the overall principles of the state policy as described in Article 5 of the Law. Therefore, it is recommended to Belarus to consider including “public interest” criterion for the assessment of unfair competition practices within competition law provisions.

### Comments on Article 31. Prohibition of other forms of unfair competition

#### **Article 31** **Prohibition of other forms of unfair competition**

*Other forms of unfair competition are prohibited, along with those provided for in Articles 25 to 30 of the Law.*

Other forms of unfair competition can be included in the competition law assessment if public interest criterion is part of the analysis as explained above of this section. This prohibition is extremely broad and does not encompass clear standards to guide the interpreter. Hence, this provision should be subject to details in implementing regulations in order to provide guidance to economic entities (undertakings): it is suggested adding a qualification referring to prohibitions recognized by law, regulations or international conventions to which Belarus is a signatory.<sup>46</sup> Indeed, UNCTAD strongly advocates for legal provisions that enable transparent and predictable ways of addressing unfair competition assumptions. Based on the example of Korea, UNCTAD recommends listing forms of unfair competition under Article 31 to this avail, and emphasizes the importance of the public interest element for the assessment of unfair competition practices, as outlined in the Spanish law above, while giving due respect to the mandate established under Article 76 .

<sup>42</sup> Eurasian Economic Commission, *supra* note 13.

<sup>43</sup> For more information see at : Ullrich, 'Anti-Unfair Competition Law and Anti-Trust Law: A Continental Conundrum?', *SSRN Electronic Journal* (2005) , available at <http://www.ssrn.com/abstract=837086> (last visited 7 February 2019).

<sup>44</sup> This is not also not uncommon across ASEAN jurisdictions.

<sup>45</sup> Kingdom of Spain, *Competition Act No. 15/2007*, 3 July 2007, available at <https://www.cnmec.es/file/64176/download> (last visited 7 February 2019).

<sup>46</sup> The incorporation to the law can enhance predictability of competition law enforcement to the stakeholders. If MART is willing to regulate the other forms such as treaty or convention, the suggestion would be that such forms should be included into the provisions of the competition law.

For reference, the Korean competition law stipulates very clearly the types of unfair business practice which can be regulated by the Korean Competition Authority.

***Korean Fair Trade and Monopoly Regulation Law -***

*Article 23 (Prohibition of Unfair Trade Practices) (1) No enterpriser shall commit any act which falls under any of the following subparagraphs, and which is likely to impede fair trade (hereinafter referred to as "unfair trade practices"), or make an affiliated company or other enterprisers perform such act:*

- 1. Unfairly refusing any transaction, or discriminating against a certain transacting partner;*
- 2. Unfairly excluding competitors;*
- 3. Unfairly coercing or inducing customers of competitors to deal with oneself;*
- 4. Trading with a certain transacting partner by unfairly taking advantage of his/her position in trade;*
- 5. Trading under the terms and conditions which unfairly restrict business activities of a transacting party or disrupting business activities of another enterpriser;*
- 6. Deleted;*
- 7. Assisting a person with special interest, or any other companies by conducting any of the following acts:*
  - (a) Providing the person with special interest, or an other company with advanced payment, loans, human resources, immovable assets, securities, goods, services, right on intangible properties, etc. or conducting a transaction under substantially favourable terms;*
  - (b) Transacting with the person with special interest, or another company that does not perform a practical role in the transaction, despite that transacting with another enterpriser is substantially favourable;*

# CHAPTER V

## “REQUIREMENTS TO ECONOMIC CONCENTRATION, REORGANIZATION OF ECONOMIC ENTITIES THAT HOLD A DOMINANT POSITION”

The revised Part 2 - Commentaries of UNCTAD Model Law on Competition chapter VI discusses the issue of economic concentrations. As such, the definition of “economic concentrations”<sup>47</sup> is the first issue to address. Indeed, an essential element of merger review legislation is the definition of the transactions that will be subject to the control of competition authorities. The underlying idea is to catch all transactions that alter the structure of a market, possibly to the detriment of competition. Nevertheless, the terminology used for the definition of transactions subject to economic concentrations varies significantly across jurisdictions.<sup>48</sup>

### **Article 32**

#### **Economic concentration**

1. *Economic concentration is recognized as:*

1.1. *reorganization of economic entities - legal entities in the form of mergers or acquisitions;*

1.2. *creation of a commercial organization, (...)*

1.3. *creation of holdings, associations, unions, state associations, inclusion of an economic entity - a legal entity in the composition of the holding's participants;*

1.4. *Acquisition by an economic entity that holds a dominant position, (...)*

1.5. *acquisition by an economic entity or an individual not belonging to economic entities of persons belonging to the same group of persons, in the aggregate of twenty-five or more percent of voting shares (...)*

1.6. *acquisition by an economic entity or an individual not belonging to economic entities, by persons belonging to the same group of persons, including on the basis of a trust management agreement, a simple partnership (...)*

1.7. *acquisition by an economic entity or an individual, not belonging to economic entities, by persons belonging to the same group of persons, including on the basis of a trust management agreement, a simple partnership agreement (a joint activity agreement) or a commission agreement, of rights allowing to give instructions mandatory for the execution by another economic entity - an individual entrepreneur or a commercial organization when carrying out entrepreneurial activities, or to carry out functions of an executive body;*

1.8. *conclusion of simple partnership agreements (joint activity agreements) between business entities - individual entrepreneurs, commercial organizations that are competitors, on the territory of the Republic of Belarus;*

1.9. *acquisition of property in the ownership, use or possession of an economic entity located in the Republic of Belarus, which is the fixed assets and (or) intangible assets of a commercial organization, (...)*

1.10. *acquisition of the right of participation of the same economic entities, individuals not belonging to economic entities, executive bodies, boards of directors (...)*

<sup>47</sup> UNCTAD Model Law on Competition, Part 2 - Commentaries: Revised Chapter VI, TD/B/C.I/CLP/L.10 (2018) 17, available at [https://unctad.org/meetings/en/SessionalDocuments/ciclpL10\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/ciclpL10_en.pdf).

<sup>48</sup> *Ibid.*, at P. 4.

2. The function of the anti-monopoly body for the control of economic concentration is carried out through the implementation of the procedure for issuing consent to economic concentration, as well as subsequent monitoring when receiving notifications of economic concentration.

The consent of the anti-monopoly body to economic concentration is obtained prior to the commission of actions for economic concentration specified in clause 1 of this Article.

3. The following actions are not recognized as economic concentration:

(...)

4. The acquisition of shares (stakes in the authorized capital) of business entities in the Law means the purchase of shares (stakes in the authorized capital), as well as obtaining the opportunity to exercise the right to vote granted by shares (stakes in the authorized capital), including on the basis of an agreement on trust management of property, a simple partnership agreement (a joint activity agreement), a commission agreement or on other grounds.).

### Comment:

In this regard, the 10 numbers of clause 1 of article 32 above suggest a very wide and detailed recognition of the term "Concentration" activities that two undertakings (economic entities) could establish between them and their management relations when negotiating a merger transaction between two separate entities. Overall, the term "concentration" may be used to describe the acquisition of control by an undertaking over another undertaking (economic entity whether it is related or not) through a merger and acquisition activity or otherwise.<sup>49</sup>

The 6 numbers of clause 3 of article 32 refer to the different situations where economic concentration is not recognized under the competition law. These relate to company and corporate governance laws and measures, including the participation of the founders of the legal entity, among others. In this regard, it is worth noting the latest amendment of the Korean Competition Law in 2016 whereby the Korean legislator introduced a chapter 3 entitled "Restriction on combination of enterprises and repression of economic power concentration".<sup>50</sup> The chapter regulates conglomerates matters under the different ways and means companies may wish to concentrate economic power. As article 32 under assessment, the provisions in the Korean Act of 2016 are technical and detailed, leading to a great number of enforcement cases dealt with by the Korean Competition Authority.<sup>51</sup>

### **Article 33**

#### ***Reorganization of economic entities - legal entities, the establishment of a commercial organization and association of economic entities, the conclusion of a simple partnership agreement (a joint activity agreement) with the consent of the anti-monopoly body***

1. *With the consent of the anti-monopoly body, unless otherwise stipulated by the acts of the President of the Republic of Belarus, the following shall be carried out:*

(...)

<sup>49</sup> UNCTAD *Model Law on Competition, Part 2 - Commentaries: Revised Chapter V*, TD/B/C.I/CLP/L.9 (2018) 10, available at [https://unctad.org/meetings/en/SessionalDocuments/ciclpL9\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/ciclpL9_en.pdf).

<sup>50</sup> Korean Parliament, MONOPOLY REGULATION AND FAIR TRADE ACT, Act. No. 14137-Partial Amendment, 29 March 2016, p. P. 5.

<sup>51</sup> Korean Fair Trade Commission Website, *Organization - Fair Trade Commission*, available at <http://www.ftc.go.kr/eng/contents.do?key=496> (last visited 3 May 2019).



2. In order to obtain the consent of the anti-monopoly body specified in part one of Article 1 of this Article:

(...)

3. The procedure for applying and reviewing of an application, documents and/or information specified in clause 2 of this Article, forms and other requirements for the submitted application, documents and (or) information are determined by the anti-monopoly body in the part not regulated by the Law, other legislative acts, the Council of Ministers of the Republic of Belarus.

4. Within ten working days from the day of receipt of the application specified in clause 2 of this Article, the anti-monopoly body shall decide not to accept it if the documents and/or information specified in clause 2 of this Article are not presented or do not meet the requirements.

5. Within thirty calendar days from the day of receipt of the application specified in clause 2 of this Article, the anti-monopoly body upon the results of its consideration shall take:

(...)

6. The anti-monopoly body has the right to take a decision on the consent for the reorganization of economic entities - legal entities, establishment of a commercial organization and association of economic entities, inclusion of an economic entity - a legal entity in the holding company, conclusion of a simple partnership agreement (a joint activity agreement) strengthening the dominant position of economic entities and (or) preventing, restricting or eliminating competition in the event that the reorganized economic entities - legal entities, founders of the commercial organization, merging economic entities, parties to a simple partnership agreement (a joint activity agreement) prove that their actions have or may have the effect of:

(...)

7. The decision of the anti-monopoly body to accept reorganization of economic entities - legal entities, establishment of a commercial organization and association of economic entities, inclusion of an economic entity - a legal entity in the participants of the holding, conclusion of a simple partnership agreement (a joint activity agreement) is valid within one year from the date of the decision making.

8. The requirements for obtaining the consent of the anti-monopoly body established by this Article shall not apply, if the reorganization of economic entities - legal entities, the establishment of a commercial organization and association of economic entities, conclusion of a simple partnership agreement (joint activity agreement) in the cases specified in part one of clause 1 of this Article, are carried out by:

(...)

9. The reorganization of economic entities - legal entities, establishment of a commercial organization and the association of economic entities in the cases specified in paragraphs two, three, five to eight of part one of clause 1 of this Article carried out by persons listed in clause 8 of this Article shall be carried out with obligatory notification of the anti-monopoly body in writing no later than one month from the date of their implementation.

Another very detailed provision is article 33 of the Law that includes a great amount of information on how to issue the consent of the Competition Authority (MART) in authorizing economic concentrations based on the provisions of clause 1 of article 32.

Clause 2 of article 32 clearly stipulates that "*The consent of the anti-monopoly body to economic concentration is obtained prior to the commission of actions for economic concentration specified in clause 1 of this Article*"<sup>52</sup>. Consequently, it is undoubtedly clear that the Belarusian merger control system has an **ex-ante nature** as most merger control regimes which prefer to monitor and if necessary, prevent market structure modifications that may negatively affect competition. Furthermore, ex-post control regimes increase the risk of non-compliance by

<sup>52</sup> House of Representatives of the Republic of Belarus, Law on Counteraction to Monopolistic Activities and Promotion of Competition, Law of the Republic of Belarus December 12, 2013 No 94-Z, 12 December 2013.

enterprises since they do not need authorization from competition authorities but rely on their own assessments of the impacts of their practices.

While there are advantages and disadvantages of the *ex-ante* control regime (see table below), this regime may deter anti-competitive practices as it prevents them, while *ex post* controls only analyses mergers after they have been concluded. In the case of an economy in transition, it is undoubtedly more appropriate to maintain an *ex-ante* merger control regime, despite any possible improvements that may be envisaged to focus the assessment on significant concentrations and to facilitate mergers that would not raise competition concerns.

**Table**

**Notification regimes: Overview of advantages and disadvantages**

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Helps young competition authorities during institutional building phase to gather relevant information and build useful and resourceful databases, with continuous flows of information to the authority.</li> <li>• Filing of notifications often brings to the attention of competition authorities horizontal agreements that are anti-competitive and that would otherwise not necessarily have been revealed owing to the similar interests of parties.</li> <li>• Builds legal certainty in an environment where the competition law is new in the legal framework and local jurists have little knowledge about the principles underpinning the law.</li> <li>• Helps establish a competition culture at a time when competition law concepts are still little known.</li> </ul>	<ul style="list-style-type: none"> <li>• Can place a heavy burden on a competition authority's resources and therefore prove counterproductive if insufficient resources remain available to deal with other matters, in particular if pernicious offenses cannot be properly investigated and prohibited.</li> <li>• If many filings are made with the authority, it is difficult to give adequate consideration to each agreement.</li> </ul>

Source: UNCTAD Model Law, Part 2 – Commentaries, revised Chapter V (2018)

Notwithstanding the above, it is worth mentioning the experience of Korea in terms of shifting their *ex-ante* control regime to a more flexible and pro-business control regime under the continuous amendments of the its competition law. Indeed, few decades ago, the Korean competition system relied on a heavily *ex-ante* control system. As the market evolved, the laws and regulations including the enforcement experience revealed the importance of relaxing the *ex-ante* control regime to a more flexible one. Nowadays, the system is based on *ex-post* control but exceptionally it can function *ex-ante*.

**Article 35**

**Reorganization of economic entities that hold a dominant position**

1. The reorganization of economic entities that hold a dominant position in the form of transformation into joint-stock companies shall be carried out with the consent of the anti-monopoly body, which shall be obtained in advance.
2. In order to obtain the consent of the anti-monopoly body specified in clause 1 of this Article, economic entities that hold a dominant position shall submit an application to the anti-monopoly body, as well as documents and (or) information according to the list established by the President of the Republic of Belarus.

3. *The procedure for applying and reviewing of an application, documents and/or information specified in clause 2 of this Article, forms and other requirements for the submitted application, documents and (or) information are determined by the anti-monopoly body in the part not regulated by the Law, other legislative acts, the Council of Ministers of the Republic of Belarus.*
4. *Within ten working days from the day of receipt of the application specified in clause 2 of this Article, the anti-monopoly body shall decide not to accept it if the documents and/or information specified in clause 2 of this Article are not presented or do not meet the requirements.*
5. *Within thirty calendar days from the day of receipt of the application specified in clause 2 of this Article, the anti-monopoly body upon the results of its consideration shall take:*  
(...)
6. *In order to develop competition, the decision of the anti-monopoly body on consent specified in sub-clause 5.1 of clause 5 of this Article may also contain:*  
(...)
7. *The decision of the anti-monopoly body to accept reorganization of economic entities that hold a dominant position is valid for one year from the date of its adoption.*

### **Comment:**

Article 35 might be going beyond the scope of what a competition law should be concerned about. In fact, given that the above does not necessarily result in a change of control or may in fact result in a reduction of a controlling interest, it is not clear why there should be a competition concern over the re-organization of a dominant entity into a joint-stock company. If such re-organization results in a change of control, it should be addressed under the generally applicable merger regime. If the concern is with respect to future changes of control, this should be addressed under the merger regime. Therefore, it is recommended to revise this provision and delete it as it appears to create a separate review regime for incorporations of dominant entities.

# CHAPTER VI

## “PROCEDURE FOR ESTABLISHING THE EXISTENCE (ABSENCE) OF A VIOLATION OF ANTI-MONOPOLY LEGISLATION”

Procedural provisions are critical for the effective enforcement of the competition system. Due process ensures transparency and legal certainty for the parties involved. Naturally, the approach to law enforcement is different under different jurisdictions, but there are generally agreed principles followed by competition authorities across the world.

Therefore, the basis for establishing the existence or absence of a violation of competition legislation should be established by the law to frame the enforcement powers and ensure respect for the rights of undertakings under investigation. Most competition authorities initiate investigation either due to complaints filed by allegedly harmed undertakings or other stakeholders or through *ex-officio* investigations.

### **Article 36**

#### ***Basis for establishing the existence (absence) of a violation of anti-monopoly legislation***

*The existence (absence) of a violation of anti-monopoly legislation is established by the anti-monopoly body on the basis of:*

*documents, information, other evidence indicating the presence of **signs of violation** of anti-monopoly legislation (hereinafter referred to as "evidence") coming from state bodies;*

*application on a violation;*

*evidence obtained as a part of exercise of the powers of the anti-monopoly body established by law;*

*evidence obtained from media reports.*

### **Comment:**

Article 36 combines different elements of administrative procedures in the same provision. As such, the existence or absence of a violation is determined by MART and it is based on different elements such as (1) evidence coming from State bodies; (2) application on a violation; (3) evidence obtained by the competition authority; (4) evidence obtained from media reports. The basis for establishing the existence or absence of a violation should not be confused with the possible “sources” of the evidence. Therefore, it seems that there is a misunderstanding in the provision as it might confuse the term “sources” and “elements to prove the violation”.

Indeed, an infringement usually consists of several elements, being necessary to identify every one that could be characterized as ‘general’ and ‘specific’ to establish the existence of an infringement. Generally, there are 3 “general elements” to every type of offence as follows: (1) identity; (2) time; and (3) jurisdiction.<sup>53</sup> Hence, MART may wish to consider clarifying this apparent misunderstanding between the term “sources” and the elements to prove the infringement so as to avoid confusion and misinterpretation by the parties.

It is also essential to specify when (the date) the alleged offence occurred and its duration. In the investigation stages, it is necessary to ensure that a possible infringement is not time-barred (that is, that statutes of limitations do not apply) but it also follows from the need to place conducts in their true context if the investigation seeks to establish a breach of the Belorussian law. Jurisdiction is a matter for the earliest consideration in any investigation

<sup>53</sup> A. C. I. I. R. D. and C. Treasury, *Competition and Consumer Act 2010*, available at [https://www.legislation.gov.au/Details/C2019C00149/Html/Volume\\_1](https://www.legislation.gov.au/Details/C2019C00149/Html/Volume_1), <http://www.legislation.gov.au/Details/C2019C00149> (last visited 6 June 2019).

as well. For law enforcement purposes generally, it means establishing where the infringement took place and where did its effects impact.

Another important suggestion is to include a benchmark to the term "signs of violation" as indicated in article 36. Indeed, the same issue has been identified regarding the Eurasian competition-related laws and regulations:

The UNCTAD Secretariat suggests the introduction of a legal benchmark to define the term "signs of violation" for the sake of transparency and legal certainty, when establishing the standard of proof in the Belarus as in the Eurasian competition law systems. Indeed, previous UNCTAD research has defined that the standard of proof as the ways and means to instruct the factfinder concerning the degree of confidence our society thinks he/she should have in the correctness of factual conclusions for a particular type of adjudication".<sup>54</sup> As such, the purpose of a standard of proof is to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision.

### **Article 38** **Requirements for an application on a violation**

*1. An application on a violation shall be submitted to the anti-monopoly body in written or electronic form and shall contain:*

*(...)*

*2. In case of impossibility of presenting evidence, the reason for the impossibility of submitting them, as well as the alleged person, from whom such evidence can be obtained, are indicated.*

*3. The evidence indicated in the application on a violation must be reliable.*

*4. The documents attached as evidence must be originals or copies of originals certified by the signature of the head of a legal entity (authorized person) or the signature of an individual (authorized person).*

*5. The evidence stated in a foreign language shall be submitted with a certified translation into Russian or Belarusian.*

*6. The commercial secret contained in the evidence cannot serve as a ground for refusing to present them to the anti-monopoly body.*

### **Comment:**

Article 38 might be better placed under implementing regulations of the law rather than being as part of the law itself. The requirements for an application on a violation, that is to say, to a complaint to be presented and received, are normally included in such piece of legislation so as to give the Competition Authority the necessary flexibility to introduce adjustments regarding the submissions of applications and other similar administrative issues.

### **Article 43** **Warning of the anti-monopoly body**

*1. In order to prevent actions (inaction) that lead or may lead to the prevention, restriction or elimination of competition, harm to the rights, freedoms and legitimate interests of legal entities or individuals in case of revealing signs of violation of anti-monopoly legislation specified in sub-clauses 1.5 to 1.8, 1.10 of clause 1 of Article 18 and Article 23 of the Law, before the issuance of a decision to establish the fact of existence (absence) of a violation of the anti-monopoly legislation, the anti-monopoly body*

<sup>54</sup> UNCTAD, *Appropriate Sanctions and Remedies*, TD/RBP/CONF.7/5 (2010), available at [http://unctad.org/en/Docs/trbpcnf7d5\\_en.pdf](http://unctad.org/en/Docs/trbpcnf7d5_en.pdf) (last visited 21 February 2017).

issues a warning in written form to economic entities, officials of economic entities - legal entities, state bodies, their officials .

2. A warning should contain:

2.1. grounds for its issuance;

2.2. norms of anti-monopoly legislation, the signs of violation of which have been identified by the anti-monopoly body;

2.3. a list of actions aimed at cessation of actions (inaction), which contain signs of violation of the anti-monopoly body, other actions aimed at ensuring and developing competition, as well as a reasonable period for their implementation.

3. A warning is subject to mandatory review by the person in respect of which it was issued, within the period specified in the warning. At the request of the person in respect of which a warning has been issued, and if there are sufficient grounds to believe that within the prescribed period a warning cannot be executed, the specified period may be extended by the anti-monopoly body.

The calculation of the period specified in the warning starts from the day when the person in respect of which the warning was issued has learned or should have learned about its issuance.

4. The anti-monopoly body must be notified in writing of the implementation of the warning within three working days from the date of the end of the period established for its implementation.

5. If all the conditions of prevention are met, the application on a violation is considered, a separate fact of the violation is terminated in connection with the elimination of such violation.

6. In case of failure to comply with a warning or if not all of its conditions are fulfilled, the anti-monopoly body reviews the application on a violation, a separate fact of violation and decides whether to establish the fact of existence (absence) of a violation of anti-monopoly legislation.

### Comment:

As noted earlier, interventions and prohibitions should be limited according to criteria such as the reference to a "substantial prevention, restriction or prevention" to avoid overly broad application of the law. Such an approach is taken in a variety of competition legislations. The Part 2 – Commentaries of UNCTAD Model Law Chapters I and VI refer to an "unduly" threshold (see commentary 6 to Chapter I and a "substantial" threshold in Chapter VI (II)).

### Article 44

#### **Decision on establishing existence (absence) of a violation of anti-monopoly legislation**

1. Based on the results of consideration of an application on a violation, a separate fact of the violation, evidence received within the framework of the anti-monopoly body's exercise of the powers established by law, the anti-monopoly body makes a decision to establish existence (absence) of a violation of anti-monopoly legislation, except for the cases specified in clause 1 of Article 42 of the Law.

The decision on establishing existence (absence) of a violation of anti-monopoly legislation consists of an introductory, descriptive-motivational and substantive parts.

2. In the introductory part of the decision on establishing existence (absence) of a violation of anti-monopoly legislation, the time and place of its adoption, the subject of consideration, shall be indicated.

3. In the descriptive-motivational part of the decision on establishing existence (absence) of a violation of anti-monopoly legislation, the following shall be indicated:

(...)

4. In the substantive part of the decision on establishing existence (absence) of a violation of anti-monopoly legislation, the following shall be indicated:

(...)

5. *The applicant, the person against which the application on a violation was filed, the person in respect of which the decision has been taken to consider a separate fact of violation, the person, in actions (inaction) of which the anti-monopoly body has discovered signs of violation of anti-monopoly legislation, are notified on the decision on establishing existence (absence) of a violation of anti-monopoly legislation within five working days.*
6. *The decision on establishing existence (absence) of a violation of anti-monopoly legislation may be appealed to the court within thirty calendar days from the date of its adoption.*

**Comment:**

Article 44 addresses procedural fairness, a very important principle that binds MART regarding its law enforcement and that clarifies rights and requirements of relevant stakeholders. Notwithstanding the importance of these provision, some of its clauses, clauses 1 to 4, could be moved to implementing guidelines.

## CHAPTER VII

### “RESPONSIBILITY FOR VIOLATION OF ANTI-MONOPOLY LEGISLATION, OBLIGATION ON IMPLEMENTATION OF THE ANTI-MONOPOLY BODY REQUIREMENTS”

To restore competition in the market, competition authorities may decide on infringements using two kinds of remedies: behavioral and structural.<sup>55</sup> Anti-competitive agreements will often be subject to cease and desist orders and of behavioural remedies, besides monetary sanctions. While structural remedies, such as the divestiture of assets, are common in merger cases, they tend to be seldom used in anticompetitive cases. In fact, the use of structural remedies only takes place when other corrective measures are deemed insufficient to tackle the competition concerns.

#### **Article 50**

#### **Compulsory division of economic entities, compulsory separation of one or more economic entities from the structure of an economic entity**

1. In case of violation of the prohibitions established by Articles 18, 20, 21, 23 to 31 of the Law by an economic entity that has a dominant position, the court, on the basis of a claim of the anti-monopoly body, has the right to decide on compulsory separation of such an economic entity or on compulsory separation from its composition of one or several economic entities.

A claim referred to in part one of this clause may be filed by the anti-monopoly body if, in respect of an economic entity that has a dominant position, a decision has been made twice within two years on establishing the existence of a violation of the prohibitions established by Articles 18, 20, 21, 23 to 31 of the Law .

2. A court decision on compulsory separation of an economic entity or a court decision on the compulsory separation of one or more economic entities from its membership shall be taken with a view to ensure and develop competition, if the following conditions are met in aggregate:

(...)

3. A court decision on compulsory separation of an economic entity or a court decision on the compulsory separation of one or more economic entities from its membership shall be executed by the owner of the property (founders, participants) of the legal entity, the body of the economic entity authorized by it or a body of the economic entity authorized to reorganize it by its constituent documents, and, in cases established by law, also by an external manager, taking into account the requirements provided for by the specified decisions, and within the time period established by them, which is not less than six months.

4. In case the dominant position of an economic entity arose as a result of the organization of the release of goods, the quality and technical characteristics of which exceed the corresponding characteristics of interchangeable (similar) goods, the anti-monopoly body's claim for compulsory division of the economic entity or the anti-monopoly body's claim for compulsory separation from its membership of one or several economic entities, may be submitted not earlier than one year from the date of introduction of the goods into civil circulation, unless otherwise established by legislative acts.

<sup>55</sup> Sofia Competition Forum and UNCTAD, *Comparative Overview of the Balkan Competition Regimes*, 2012, available at [https://unctad.org/meetings/en/Contribution/ccpb\\_SCF\\_BalkanCompetitionRegimes\\_en.pdf](https://unctad.org/meetings/en/Contribution/ccpb_SCF_BalkanCompetitionRegimes_en.pdf) (last visited 30 January 2019).



**Comment:**

Considering the introductory remarks, it is recommended that article 50 provisions under are carefully and exceptionally considered, as this type of remedies should be a last resort solution as they could be very detrimental to the consolidation of a market economy in Belarus.

Since the judiciary play a critical role in a competition system, reviewing the Competition Authority's decisions, it is of the utmost importance that courts are fully equipped to understand the complexity of competition cases and able to fully grasp the exceptional remedies foreseen by article 50.

**Article 51****Consequences of implementation of economic concentration, reorganization of economic entities that hold a dominant position, without obtaining the consent of the anti-monopoly body**

1. Failure to obtain the consent of the anti-monopoly body specified in part one of clause 1 of Article 33 and clause 1 of Article 35 of the Law, as well as failure to comply with the conditions contained in the decision on the consent of the anti-monopoly body specified in sub-clause 5.1 of clause 5 of Article 33 and sub-clause 5.1 of clause 5 of Article 35 of the Law, if actions requiring the consent of the anti-monopoly body have actually been committed and this has led to the emergence or strengthening of the dominant position of the economic entity and (or) to prevent, restrict or eliminate the competition are grounds for the court to recognize such actions as invalid on the basis of the anti-monopoly body's claim.
2. Failure to obtain the consent of the anti-monopoly body specified in part one of clause 1 of Article 34 of the Law, as well as failure to comply with the requirements contained in the resolution on the consent of the anti-monopoly body specified in sub-clause 5.1 of clause 5 of Article 34 of the Law, if the relevant transactions were actually committed and this led to the emergence or strengthening of the dominant position of the economic entity, and (or) to prevent, restrict or eliminate competition, are grounds for the court to recognize such transactions as invalid on the claim of the anti-monopoly body

**Comment:**

UNCTAD's assessment suggests a clear separation between between courts and administrative authorities to safeguard the strict interpretation of competition law and policy. Prerequisites mentioned under Article 51 should be constrained to the independent and specific scrutiny of a technical authority, such as MART when consenting or not the merger transaction, to ensure strict application and analysis of competition law applied to merger law.

The absence of MART's consent regarding economic concentration leads to sanctions. This is similar to the provisions referring to the consequences of non-compliance with the notification obligation in a merger control regime. In this regard, the Part 2 - Commentaries of UNCTAD Model Law on Competition in its chapter V - Notifications says as follows: "All agreements or arrangements not notified could be made subject to the full sanctions of the law, rather than mere revision, if later discovered and deemed illegal."(paragraph 1.7)<sup>56</sup> The provision suggests that non-compliance may entail the automatic nullity of an agreement as the imposition of fines, even if the agreement could qualify for an exemption upon notification.

As previously suggested, it could be considered to amend this article 51 as the current threshold for action by the court to deem actions or transactions invalid is that there is actual harm in the form of " *the emergence or strengthening of the dominant position of the economic entity, and (or) to prevent, restrict or eliminate competition*". Considering this reasoning, and the level of proof required and the time which may elapse before such harm is

<sup>56</sup> UNCTAD Secretariat, *supra* note 48.

identified and demonstrable, it is recommended that this article be redrafted as: "any action or transaction that is undertaken without required consent or compliance with required conditions be automatically deemed invalid by a court". Such measure would encourage compliance with the merger regime. Alternatively, and depending on the overall legal system of Belarus, it might be advantageous for such actions or transactions to be deemed invalid by express provision of the competition law without recourse to a formal court order.

## CONCLUSIONS

Upon request of MART from Belarus, the UNCTAD Secretariat assessed the Law No. 94-3 dated December 12, 2013 entitled "on the counteraction to monopolistic activities and promotion of competition" of the Republic of Belarus. The scope of the assessment is limited to the mere provisions of the law and not to the law enforcement by MART. If MART wishes to undertake such assessment, the Republic of Belarus should request the UNCTAD Secretariat the conduction of a Voluntary Peer Review on Competition Law and Policy.

The Republic of Belarus, a country with an economy in transition, has undertaken several "demonopolization programmes" since the 90s aiming at reforming the specific structures of the national markets based on goals, priorities and concrete measures, one which was the adoption of the first competition law in the country back in 1992. This competition legislation has been amended several times in 2000, 2003, 2010 and 2013 (in force since 3 August 2018) leading to the creation of several types of antimonopolies bodies until the creation of MART in 2016.

The new law of 2013, in force since 2018, incorporates several improvements from the previous law such as specific chapters on anticompetitive agreements and concerted actions as well as an important clear-cut *per se* rule for cartels. Despite these improvements, other sections of the Law are extremely detailed such as Chapter V: "Requirements to economic concentration, reorganization of economic entities that hold a dominant position." In this regard, the overall conclusion of this report is that the Republic of Belarus may wish to consider the possibility of amending certain provisions of the law to allow for a more flexible interpretation. These possible modifications to certain articles can be implemented in the short, medium and long run.<sup>57</sup>

Several sections of this report provided comments, suggesting further guidance through the enactment of regulations but most importantly when case law exists. In this case, the report in some instances (e.g. the comment made at the instance where government intervention may be justified when market dominant players abuse their monopoly power to solidify their dominant position in the market) recognized the exclusion of case law from the current legal assessment and the overall need to develop further guidance (e.g. suggest that MART make a guidance with the reference of international cases and standards) on specific matters based on its interpretation which will eventually be tested through case law. The report deems that enforcement is crucial for the law to evolve. As an example of this, in the Republic of Korea, the Korean Competition Law gives flexibility to the Korean Competition Authority in implementing the competition law and most details, except the rights of stakeholders and the obligations of the Competition authority, are stipulated in guidelines<sup>58</sup> in order to promote the understanding of the competition law.

Finally, the Law is extremely detailed. Possible modifications of certain articles could be envisaged such as regarding article 14 within Chapter II related to the Anti-monopoly Body. In this case, the aim would be to provide for a mixed approach with general powers established in the Law and more detailed specific provisions set out in regulation.

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<sup>57</sup> Another example of more flexibility needed for the evolution and development of the competition regime, is the suggestion made in article 14 within Chapter II related to the Anti-monopoly Body. In this case, the aim would be to provide for a mixed approach with general heads of power fixed in the Law and more detailed specifics set out in regulation.

<sup>58</sup> See [http://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=529&bbsId=BBSMSTR\\_00000002414&bbsTyCode=BBST11](http://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=529&bbsId=BBSMSTR_00000002414&bbsTyCode=BBST11)

## RECOMMENDATIONS

This report provides overall recommendations with a very important caveat: this assessment did not consider Belarus Competition case law, only the mere interpretation of the legal provisions of the Competition Act of Belarus. In any event, the recommendations focus on reducing the complexity of some provisions to allow for a more flexible interpretation of the law.

The specific recommendations are organized in accordance to the specific chapters of the Competition Law of Belarus. As such the first chapter related to "General Provisions" provides specific recommendations on:

- Horizontal vs. vertical constraints/agreements;
- Scope of the definition of "agreement";
- Extraterritorial application;
- Definition of dominance;
- Group of persons;
- Definition of the monopolistically high price (tariff).

As for the second chapter of the Competition Law that relates to the "Anti-monopoly Body", the report provides key recommendations on:

- Powers by the Authority;
- *Ex-officio* investigations.

The third chapter entitled "Monopolistic Activity" raised detailed recommendations on the following provisions:

- Refinement of definitions under articles 6 and 18;
- Measures aimed at ensuring non-discriminatory access to goods;
- Prohibition of restrictive competition agreements of economic entities;
- Admissibility of actions (inaction), agreements, coordinated actions of economic entities.

The chapter on "Unfair competition" led to comments on:

- The chapter on unfair competition;
- Prohibition of other forms of unfair competition.

The Chapter on the "Requirements to economic concentration, reorganization of economic entities that hold a dominant position" is subject to specific recommendations on:

- Economic concentration;
- Reorganization of economic entities;
- Reorganization of economic entities that hold a dominant position.

The chapter on "Procedure for establishing the existence (absence) of a violation of anti-monopoly legislation" being critical for an effective enforcement of the law by MART, raised recommendations on the following issues:

- Basis for establishing the existence (absence) of a violation of anti-monopoly legislation;
- Requirements for an application on a violation;
- Warning of the Anti-monopoly body;
- Decision on establishing existence (absence) of a violation of anti-monopoly legislation.

## ASSESSMENT OF THE COMPETITION LAW OF BELARUS

*Law No. 94-3 dated December 12, 2013 "on the counteraction to monopolistic activities and promotion of competition"*

The final chapter of the law on the "Responsibility for violation of anti-monopoly legislation, obligation on implementation of the anti-monopoly body requirements" is also critical for deterrence, being subject to comments on the following issues:

- Compulsory division of economic entities, compulsory separation of one or more economic entities from the structure of an economic entity;
- Consequences of implementation of economic concentration without the consent of the anti-monopoly body.

The specific recommendations to improve the future enforcement of the Law in the Republic of Belarus are summarized in the following table.

Recommendation	Short to Medium Term	Medium to Long Term
<b>Overall recommendation: subject to a deeper assessment of the enforcement work of MART, less details that will allow for more flexibility</b>		
<b>General Provisions</b>		
Horizontal vs. Vertical constraints/agreements	Differentiation between these types of agreements would yield more clarity when interpreting the law.	
Scope of the definition of "agreement"	For greater certainty, a wider definition must include to written, verbal or implied agreements.	
Extraterritorial application		It should be expressly limited to situations where extra-jurisdictional conduct has a substantial or material anti-competitive effect in a Belarus market
Definition of dominance	Adoption of a simple and general approach in the definition of dominant enterprises	
Group of persons	Inclusion of the power to appoint or remove a majority of the target's entities Board of Directors or otherwise having the ability to effectively exercise control over the target entity	
Definition of the monopolistically high price (tariff)	Removal of provision as price regulation is not an appropriate measure in the competition law: this type of prohibited conduct should evolve through case law and guidance, and not as a result of inflexible and static defined terms	
<b>Anti-monopoly Body</b>		
Powers by the Authority	Inclusion of two additional powers related to (i) make inquiries and investigations...; and (ii) take the necessary decisions, including the imposition of sanctions, or recommending same to a responsible minister	Integration of the investigative and adjudicative functions within an enforcement agency
Ex-officio investigations	Grant MART the appropriate investigative powers to undertake actions ex-officio, including searches and the seizure of documentation in business' premises	

## ASSESSMENT OF THE COMPETITION LAW OF BELARUS

*Law No. 94-3 dated December 12, 2013 "on the counteraction to monopolistic activities and promotion of competition"*

<b>Monopolistic Activity</b>		
Refinement of definitions under articles 6 and 18	Article 6 applies to the existence of a dominant position whereas Article 18 deals with that entity's behaviour	
Measures aimed at ensuring non-discriminatory access to goods	Article 19 could be replaced, since the regulator only takes steps where it identifies anti-competitive conduct under article 18	
Prohibition of restrictive competition agreements of economic entities	Articles 20 (3) and 21 should include additional wording to identify notions such as a "substantial", "material" or "undue" prevention, restriction or elimination of competition to prevent the overly broad application of the law.	
Admissibility of actions (inaction), agreements, coordinated actions of economic entities	To strike a balance between the exemption of Article 22 where pro-competitive effects are identified in clause 1.1 and any identified potential or actual anti-competitive effects that are considered in Articles 18, 20 or 21	
<b>Unfair competition</b>		
Reservation regarding the chapter on unfair competition	Consideration of including a reference to the public interest or in this case, to the overall principles of the State policy as described in Article 5 of the Law.	
Prohibition of other forms of unfair competition	This provision could be removed or alternatively include a reference that the other prohibited forms of unfair competition are those which are identified by law, regulation or treaty or convention to which Belarus is a signatory.	
<b>Requirements to economic concentration, reorganization of economic entities that hold a dominant position</b>		
Economic concentration		MART to assess the need to have a more specific chapter that regulates conglomerate matters under the different ways and means companies may wish to concentrate economic power.
Reorganization of economic entities		Assess the experience gathered with the ex-ante control regime, taking into consideration a possible gradual shift in the future to a combination with an ex-post regime

## ASSESSMENT OF THE COMPETITION LAW OF BELARUS

*Law No. 94-3 dated December 12, 2013 "on the counteraction to monopolistic activities and promotion of competition"*

Reorganization of economic entities that hold a dominant position	Deletion of this provision and related articles that appear to create a separate review regime for incorporations of dominant entities	
<b>Procedure for establishing the existence (absence) of a violation of anti-monopoly legislation</b>		
Basis for establishing the existence (absence) of a violation of anti-monopoly legislation	Need to address the apparent misunderstanding between "sources" and "elements to prove the violation".	Inclusion of a benchmark to the term "signs of violation" as indicated in article 36
Requirements for an application on a violation	Need to consider moving the provision to the implementing regulations of the law to allow more flexibility in making further amendments	
Warning of the anti-monopoly body	Should be limited to criteria such as a "substantial prevention, restriction or prevention" to avoid overly broad application of the law	
Decision on establishing existence (absence) of a violation of anti-monopoly legislation	Clauses 1 to 4 of Article 44 should be moved to implementing regulations	
<b>Responsibility for violation of anti-monopoly legislation, obligation on implementation of the anti-monopoly body requirements</b>		
Compulsory division of economic entities, compulsory separation of one or more economic entities from the structure of an economic entity		Should be triggered with caution and exceptionality as the last resort
Consequences of implementation of economic concentration without the consent of the anti-monopoly body	Article to be redrafted as: "any action or transaction that is undertaken without required consent or compliance with required conditions be automatically deemed invalid by a court" or " depending on the overall legal system of Belarus, it might be advantageous for such actions or transactions to be deemed invalid by express provision of the competition law without recourse to a formal court order should they occur in these circumstances."	

## REFERENCES

- Chen J., *What Corporate Governance Means for the Bottom Line*, Investopedia, available at <https://www.investopedia.com/terms/c/corporategovernance.asp> (last visited 13 September 2019).
- Council of the Eurasian Economic Commission, Decision 98 on the Procedure for Investigating Violations of the General Rules of Competition in Transboundary Markets, 23 November 2012.
- Eurasian Economic Commission, Annex 19 to the Treaty on the Eurasian Economic Union - Protocol on General Principles and Rules of Competition, 2014.
- Eurasian Economic Commission, *Treaty on the Eurasian Economic Union*, 29 May 2014, available at [http://www.un.org/en/ga/sixth/70/docs/treaty\\_on\\_eeu.pdf](http://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf) (last visited 6 February 2019).
- Government of Canada I., *Abuse of Dominance Enforcement Guidelines*, 7 March 2019, available at <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html> (last visited 7 June 2019).
- Griffin, 'EXTRATERRITORIALITY IN U.S. AND EU ANTITRUST ENFORCEMENT', 67 *Antitrust Law Journal* (1999) 159.
- House of Representatives of the Republic of Belarus, Law on Counteraction to Monopolistic Activities and Promotion of Competition, Law of the Republic of Belarus December 12, 2013 No 94-Z, 12 December 2013.
- Kingdom of Spain, *Competition Act No. 15/2007*, 3 July 2007, available at <https://www.cnmc.es/file/64176/download> (last visited 7 February 2019).
- Korean Fair Trade Commission Website, *Organization - Fair Trade Commission*, available at <http://www.ftc.go.kr/eng/contents.do?key=496> (last visited 3 May 2019).
- Korean Parliament, MONOPOLY REGULATION AND FAIR TRADE ACT, Act. No. 14137-Partial Amendment, 29 March 2016.
- MART Website, *State Antimonopoly Policy in the Republic of Belarus | Ministry of Economy of the Republic of Belarus*, available at <https://www.economy.gov.by/en/national-competition-policy-in-the-rb-en/> (last visited 6 June 2019).
- Natalya Yacheistova (UNCTAD Consultant), *Competition Policy in Countries in Transition - Legal Basis and Practical Experience*, UNCTAD/ITCD/CLP/Misc.16 (2000) 53, available at <https://unctad.org/en/Docs/poitcdclpm16.en.pdf> (last visited 11 March 2019).
- Partners P.&, *CEE Legal Matters - New Law on Competition: What Has Changed for Foreign Companies in the Belarusian Market?*, 22 November 2018, CEE Legal Matters, available at <https://ceelegalmatters.com/belarus/9649-new-law-on-competition-what-has-changed-for-foreign-companies-in-the-belarusian-market> (last visited 11 March 2019).
- Sofia Competition Forum and UNCTAD, *Comparative Overview of the Balkan Competition Regimes*, 2012, available at [https://unctad.org/meetings/en/Contribution/ccpb\\_SCF\\_BalkanCompetitionRegimes\\_en.pdf](https://unctad.org/meetings/en/Contribution/ccpb_SCF_BalkanCompetitionRegimes_en.pdf) (last visited 30 January 2019).
- Treasury A.C.I.I.R.D. and C., *Competition and Consumer Act 2010*, available at [https://www.legislation.gov.au/Details/C2019C00149/Html/Volume\\_1](https://www.legislation.gov.au/Details/C2019C00149/Html/Volume_1), <http://www.legislation.gov.au/Details/C2019C00149> (last visited 6 June 2019).
- Ullrich, 'Anti-Unfair Competition Law and Anti-Trust Law: A Continental Conundrum?', *SSRN Electronic Journal* (2005) , available at <http://www.ssrn.com/abstract=837086> (last visited 7 February 2019).
- UNCTAD, *Appropriate Sanctions and Remedies*, TD/RBP/CONF.7/5 (2010), available at [http://unctad.org/en/Docs/trbpconf7d5\\_en.pdf](http://unctad.org/en/Docs/trbpconf7d5_en.pdf) (last visited 21 February 2017).
- UNCTAD, *Model Law Competition . Chapter VI Mergers & Acquisitions*, TD/RBP/CONF.7/L.6 (2010), available at [http://unctad.org/en/Docs/trbpconf7L6\\_en.pdf](http://unctad.org/en/Docs/trbpconf7L6_en.pdf).
- UNCTAD, *The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy*, TD/RBP/CONF.7/3 (2010), available at [http://unctad.org/en/Docs/trbpconf7d3\\_en.pdf](http://unctad.org/en/Docs/trbpconf7d3_en.pdf).
- UNCTAD, *Voluntary Peer Review of Competition Policy: Armenia*, 2010, available at [https://unctad.org/en/Docs/ditcclp20101overview\\_en.pdf](https://unctad.org/en/Docs/ditcclp20101overview_en.pdf) (last visited 31 May 2019).
- UNCTAD Secretariat, *Abuse of Dominance*, TD/B/COM.2/CLP/66 (2008), available at [https://unctad.org/en/Docs/c2clpd66\\_en.pdf](https://unctad.org/en/Docs/c2clpd66_en.pdf) (last visited 14 March 2019).
- UNCTAD Secretariat, *Model Law Competition. Chapter IX. The Competition Authority and Its Organisation*, TD/B/C.I/CLP/L.2 (2011), available at [http://unctad.org/en/Docs/ciclpL2\\_en.pdf](http://unctad.org/en/Docs/ciclpL2_en.pdf) (last visited 17 January 2019).

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*Law No. 94-3 dated December 12, 2013 "on the counteraction to monopolistic activities and promotion of competition"*

- UNCTAD Secretariat, *Model Law Competition. Chapter X. Functions and Powers of the Administering Authority*, TD/B/C.I/CLP/L.3 (2011), available at [http://unctad.org/en/Docs/ciclpL3\\_en.pdf](http://unctad.org/en/Docs/ciclpL3_en.pdf) (last visited 17 January 2019).
- UNCTAD Secretariat, *Model Law on Competition (2018): Revised Chapter V*, TD/B/C.I/CLP/L.9 (2018) 10, available at [https://unctad.org/meetings/en/SessionalDocuments/ciclpL9\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/ciclpL9_en.pdf) (last visited 2 March 2019).
- UNCTAD Secretariat, *Model Law on Competition (2018): Revised Chapter VI*, TD/B/C.I/CLP/L.10 (2018) 17, available at [https://unctad.org/meetings/en/SessionalDocuments/ciclpL10\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/ciclpL10_en.pdf) (last visited 1 March 2019).
- UNCTAD Secretariat, *Model Law on Competition. Revised Chapter IV: Acts or Behaviour Constituting an Abuse of a Dominant Position of Market Power*, TD/RBP/CONF.8/L.2 (2015) 30, available at [https://unctad.org/meetings/en/SessionalDocuments/trbpconf8l2\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/trbpconf8l2_en.pdf) (last visited 11 January 2019).
- UNCTAD Secretariat, *Voluntary Peer Review of Competition Policy: Armenia - Overview*, UNCTAD/DITC/CLP/2010/1 (overview) (2000), available at [https://unctad.org/en/Docs/ditccp20101overview\\_en.pdf](https://unctad.org/en/Docs/ditccp20101overview_en.pdf) (last visited 14 March 2019).
- US Court of Appeals for the Ninth Circuit, US, *Hartford Fire Ins. Co. v. California* 509 U.S. 764 (1993), 28 June 1993, available at <https://supreme.justia.com/cases/federal/us/509/764/case.html> (last visited 6 April 2017).
- ECR, *Ahlstrom v Commission*, 27 September 1988 5233, available at [http://eur-lex.europa.eu/resource.html?uri=cellar:5ed612ae-790c-4091-bf05-0a6d7cbd9142.0002.06/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:5ed612ae-790c-4091-bf05-0a6d7cbd9142.0002.06/DOC_1&format=PDF) (last visited 6 April 2017).
- Competition Act - Singapore Statutes Online*, available at <https://sso.agc.gov.sg/Act/CA2004> (last visited 27 February 2019).
- Fairness in EU Competition Law Enforcement*, 20 June 2018, available at [http://ec.europa.eu/competition/speeches/text/sp2018\\_10\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2018_10_en.pdf) (last visited 2 May 2019).
- Law of the Republic of Belarus No. 2034-XII of December 10, 1992: On Counteraction to Monopolistic Activities and Promotion of Competition*, 1992, available at <https://www.wipo.int/edocs/lexdocs/laws/en/by/by021en.pdf> (last visited 11 March 2019).