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UNFAIR COMPETITION BY MISREPRESENTATION AND THE LEGAL PROTECTION AGAINST IT IN BELARUS

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The author of the article analyses provisions against unfair competition by misrepresentation contained in the Paris convention for the protection of industrial property of 20 March 1883, the Treaty on the Eurasian Economic Union of 29 May 2014, and the domestic legislation of the Republic of Belarus. It is shown that the Republic of Belarus has duly implemented its obligations under these treaties. Changes are proposed to art. 26 of the Law of the Republic of Belarus of 12 December 2013 No. 94-3 "On counteracting monopolistic activitity and promoting of competition" to cover actual and potential misrepresentation, as that would strengthen the preventative function of domestic legislation on unfair competition. It is also suggested that a complete list of remedies be included in art. 1030 of the Civil Code of the Republic of Belarus of 7 December 1998, to enhance legal certainty and the balance of public and private interests. Furthermore, it is argued that in establishing a fact of misrepresentation, the relevant authorities should determine that at least 20–25 % of consumer respondents in sample polls find a statement or representation actually or potentially misleading. Relevant changes are suggested to the Recommended practices for determining violations of anti-monopoly legislation concerning unfair competition and a prospective Resolution of the Plenum of the Supreme Court of the Republic of Belarus on adjudication of Belarusian courts in unfair competition.

Keywords: art. 10-bis of the Paris convention for the protection of industrial property; common rules and principles of competition; unfair competition; unfair competition by misrepresentation; violation of anti-monopoly legislation.

НЕДОБРОСОВЕСТНАЯ КОНКУРЕНЦИЯ ПУТЕМ ВВЕДЕНИЯ В ЗАБЛУЖДЕНИЕ И ЗАЩИТА ОТ НЕЕ В РЕСПУБЛИКЕ БЕЛАРУСЬ

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Проведен анализ норм Парижской конвенции по охране промышленной собственности от 20 марта 1883 г., Договора о Евразийском экономическом союзе от 29 мая 2014 г. и национального законодательства Республики Беларусь о недобросовестной конкуренции путем введения в заблуждение. Установлено, что Республика Беларусь выполнила в этой сфере свои обязательства, принятые в соответствии с данными международными документами, надлежащим образом. В целях усиления превентивной функции законодательства о недобросовестной конкуренции предложено изменить формулировку ст. 26 Закона Республики Беларусь от 12 декабря 2013 г. № 94-З «О противодействии монополистической деятельности и развитии конкуренции», чтобы в ней охватывалось как реальное, так и потенциальное введение в заблуждение. Для повышения правовой определенности и обеспечения справедливого баланса между публичными и частными интересами необходимо перечислить в ст. 1030 Гражданского кодекса Республики

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Беларусь от 7 декабря 1998 г. все способы гражданско-правовой защиты, доступные в случае осуществления недобросовестной конкуренции, а также закрепить в методических рекомендациях по установлению факта наличия (отсутствия) нарушения антимонопольного законодательства в части недобросовестной конкуренции и в постановлении Пленума Верховного суда Республики Беларусь о некоторых вопросах рассмотрения белорусскими судами дел о недобросовестной конкуренции (которое могут принять в будущем) положение, согласно которому для установления введения в заблуждение необходимо, чтобы как минимум 20–25 % опрашиваемых потребителей считали соответствующие утверждения вводящими в заблуждение или способными ввести в заблуждение.

Ключевые слова: ст. 10-bis Парижской конвенции по охране промышленной собственности; общие правила и принципы конкуренции; недобросовестная конкуренция; недобросовестная конкуренция путем введения в заблуждение; нарушение антимонопольного законодательства.

Introduction

Misrepresentation is a common form of unfair competition often bringing losses to domestic and foreign economic entities. Successful struggle against this practice depends on progressive, well-developed norms at the international and domestic levels and effective enforcement.

The Republic of Belarus is a party to two treaties regulating certain questions of protection against unfair competition, including by misrepresentation: the Paris convention for the protection of industrial property of 20 March 1883 (hereinafter the Paris convention) and the Treaty on the Eurasian Economic Union of 29 May 2014 (hereinafter the Treaty on the EAEU).

In domestic legislation, unfair competition by misrepresentation is addressed in art. 26 of the Law of the Republic of Belarus of 12 December 2013 No. 94-3 "On counteracting monopolistic activitity and promoting of competition", amended as of 8 January 2018 (hereinafter the Law on competition) and art. 1029(3) of the Civil Code of the Republic of Belarus of 7 December 1998 (hereinafter the Belarusian CC).

To date, the topic of unfair competition by misrepresentation has received limited attention from Belarusian scholars. Yu. A. Amelchenya and O. A. Bakinovskaya[1], E. V. Ganakova[2], T. V. Ignatovskaya [1], S. S. Losev[3], N. G. Maskayeva (Tykotskaya) [2–4], I. V. Popova [5], E. A. Svadkovskaya, V. F. Chigir[4], among others, address it as one of a multitude of uncompetitive practices. These and other works on competition law, including of the Eurasian Economic Union and its member states [6–13], provide no comprehensive or comparative analysis of the treaties and legal acts of the Republic of Belarus concerning misrepresentation. Most scholars discuss protection against unfair competition in general[5] [14–21], or its specific forms [22; 23], without specifically addressing misrepresentation[6].

The aim of this article is to consider misrepresentation as a form of unfair competition with reference to international treaties, legal acts of the Republic of Belarus and legal protection against it available in Belarus.

Results and discussion

The Paris convention is a universal treaty that "primarily deals with patent, trademark and design law, as well as trade names and indications of origin" [25, p. 53]. The initial text of the Paris convention contained no provisions expressly dealing with unfair competition, although the preamble referred to the desire of the contracting states to guarantee fair trade [26, p. 12].

Presumably, at the adoption of the Paris convention "protection against unfair competition was at best only weakly developed in most of the contracting states" [27, p. 16]. Provisions on unfair competition appeared in the convention due to the revision conferences held in Brussels (1900), Washington (1911), the Hague (1925) and Lisbon (1958) [25, p. 62–63].

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[1]*Amelchenya Yu. A.*, *Bakinovskaya O. A.* Commentary "Novelties of the Law of the Republic of Belarus of 12 December 2013 No. 94-3 "On counteracting monopolistic activity and development of competition" (part 3)" (as of 27 March 2014) [Electronic resource] // ConsultantPlus: Belarus / LCC "Yurspectr". Minsk, 2022 (in Russ.).

[2]*Ganakova E. V.* On unfair competition (as of 18 August 2017) [Electronic resource] // ConsultantPlus: Belarus / LCC "Yurspectr". Minsk, 2022 (in Russ.).

[3]*Losev S. S.* Unfair competition (as of 15 January 2005) [Electronic resource] // ConsultantPlus: Belarus / LCC "Yurspectr". Minsk, 2022 (in Russ.) ; *Losev S. S.* Unfair competition (part 2) (as of 15 September 2015) [Electronic resource] // ConsultantPlus: Belarus / LCC "Yurspectr". Minsk, 2022 (in Russ.) ; *Losev S. S.* Institute of protection against unfair competition: new in the legislation [Electronic resource]. URL: https://etalonline.by/document/?regnum=u01801197&q_id=0 (date of access: 16.03.2022).

[4]*Popova I. V.*, *Svadkovskaya E. A.*, *Chigir V. F.* Article-by-article commentary on the Civil Code of the Republic of Belarus. Sect. V. Exclusive rights to the results of intellectual activity (intellectual property) (art. 979–1030) (as of 1 November 2007) [Electronic resource] // ConsultantPlus: Belarus / LCC "Yurspectr". Minsk, 2022 (in Russ.) ; *Chigir V. F.* Industrial property law. Manual (as of 22 April 2009) [Electronic resource] // ConsultantPlus: Belarus / LCC "Yurspectr". Minsk, 2022 (in Russ.).

[5]*Filippovskii V. V.* Protection against unfair competition (as of 13 June 2011) [Electronic resource] // ConsultantPlus: Belarus / LCC "Yurspectr". Minsk, 2022 (in Russ.).

[6]The only published work dealing with protection against unfair competition by misrepresentation is the article by A. S. Valevko [24].

As stated in art. 1(2) of the Paris convention, the repression of unfair competition is an object of the protection of industrial property. "The inclusion of unfair competition in the sphere of industrial property by the Paris convention is understandable if one examines more closely the torts already[7] recognised as unfair competition. They mainly concerned cases like passing off, exploitation of another's reputation, disparagement, betrayal of secrets etc…" [27, p. 18].

For Belarus, the obligations under the Paris convention are as follows.

Firstly to assure to nationals of the countries of the Union[8] as well as nationals of countries outside the union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the union effective protection against unfair competition and appropriate legal remedies effectively to repress unfair competition in the meaning of the convention (art. 10-bis(1); 10-ter(1); 10-ter(3)). The implementation of this obligation does not require the enactment of specific legislation [25, p. 63] – that can be achieved by the norms of any branch of law (criminal, administrative, civil or other) and (or) by judicial precedents. The contracting states are also free to decide on the mechanisms, remedies, sanctions and procedures concerning such protection.

The Paris convention does not oblige its member states to grant the above protection to its nationals. As C. Wadlow rightly points out, except for the conventions on human rights, states typically enter into international conventions primarily to protect their interests abroad, and this includes the interests of their nationals. Where states wish to protect their nationals at home, the normal and appropriate route is by domestic legislation [28, p. 52]. Thus, the nationals of the Republic of Belarus cannot invoke the provisions of the Paris convention to seek protection against unfair competition.

The Paris convention defines unfair competition as "any act of competition contrary to honest practices in industrial or commercial matters" (art. 10-bis(2)). It provides an open list of examples that constitute such an act (art. 10-bis(3)). This definition and the list should be treated as a minimal standard of protection which must be provided to all the contracting parties[9]. States may expand this list and modify the examples set forth in it, in their domestic law to be able to qualify a wider range of acts or omissions as unfair competition. Importantly, art. 2 of the Paris convention proclaims national treatment as its fundamental principle, meaning that "nationals of other member states must be treated like a country's own nationals" [25, p. 54]. Thus, "…whatever rights and remedies a country confers on its nationals in the field of unfair competition must equally be made available, without discrimination or any requirement of reciprocity, to nationals of the other countries of the union and other ressortissants subject to the reservation of art. 1(3) in respect of matters of jurisdiction and judicial procedure…"[10] [28, p. 53]. The member state in which protection against unfair competition is claimed cannot impose on the mentioned persons any requirement as to their domicile or establishment in this state (art. 2(2) of the Paris convention).

Secondly to provide measures to permit federations and associations representing interested industrialists, producers, or merchants existing in other member states, to take action in its courts or before its administrative authorities, with a view to the repression of unfair competition, if two conditions are cumulatively met:

- the existence of such federations and associations is not contrary to the laws of their countries;
- the said actions are allowed by Belarusian law (art. 10-ter(2) of the Paris convention).

Article 10-bis(3(ii)) of the Paris convention assigns to unfair competition and obliges the member states to prohibit any indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods. In academic literature, those are often referred to as misrepresentation [28] or misleading the public [26, p. 14]. This example of acts of unfair competition was incorporated in the text of the Paris convention at the 1958 Lisbon conference.

The operation of the Eurasian Economic Union is grounded on the principles of a market economy and fair competition (art. 3 of the Treaty on the EAEU), realised by three types of policies:

- common policies as to protection against unfair competition in cross-border markets through uniform legal regulation – the Common rules of competition (art. 76 of the Treaty on the EAEU, and Protocol on common principles and rules of competition (annex 19 to the Treaty on the EAEU));
- agreed policies, in relation to the protection of competition in the national markets, by providing common principles and rules of competition (art. 75, 76

[7] In 1911 this provision was included in the Paris convention at the Washington conference.

[8] The Union for the protection of industrial property, comprising all the countries to which the Paris convention applies (art. 1(1) of the Paris convention).

[9] Protection against unfair competition. Analysis of the present world situation: WIPO publication No. 725. Geneva, 1994. P. 18 (in Russ.).

[10] A reservation of this kind is outlined in art. 2 of the Paris convention, which is correct. According to art. 2(3) of the Paris convention, the provisions of the laws of each of the countries of the union relating to judicial and administrative procedure and to jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property are expressly reserved.

of the Treaty on the EAEU), which may be developed in the domestic legislation of the member states;

• coordinated policies, in relation to the actions of economic entities (market participants) from third countries, where such actions may have a negative impact on the competition in the commodity markets of member states (art. 74(4) of the Treaty on the EAEU)[11].

Subparagraph 14 of the Protocol on the common principles and rules of competition defines unfair competition as follows: any act of an economic entity (a market participant), or a group of persons or several economic entities (market participants) or groups of persons aimed at obtaining a business advantage, that is inconsistent with the law of the member states, customary business practices, the principles of decency, reasonableness and fairness, and causes or may cause damage to other competing economic entities (market participants) or damage or may cause damage to their business reputation.

Article 76(2) of the Treaty on the EAEU contains a non-exhaustive list of the forms of unfair competition, including misrepresentation as to the character, method and place of production, consumer properties, quality and quantity of goods or as to the producer (para 2).

This definition and list must be applied for the realisation of common policies (executed by the Eurasian Economic Commission through prosecution of unfair competition from the economic entities (market participants) of member states and from their natural persons and non-commercial organisations not engaged in entrepreneurial activity, where such unfair competition affects or may affect competition in the cross-border markets of two and more member states, except for financial markets) (para 10–21 of the Protocol on common principles and rules of competition) and agreed policies (executed by national bodies of member states through prosecution of "other" unfair competition). Under these policies the mentioned definition and list serve as a "minimum standard": based on art. 74(3) of the Treaty on the EAEU the member states may "expand" them in their national legislation to qualify as unfair competition and, accordingly, suppress more acts and (or) omissions.

Under the Treaty on the EAEU, each member state has to provide existence of the national authority of the government whose competence includes implementation and (or) carrying out competition (antimonopoly policy), which means, *inter alia*, vesting such authority with the power to control observance over prohibition of anti-competitive acts and prohibition of unfair competition, over economic concentration, and to prevent and detect violations of the competition (antimonopoly) legislation and take measures on their termination and bringing the perpetrators to liability (art. 75(5) of the Treaty on the EAEU). Belarus has fulfilled this obligation by establishing the Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus (hereinafter MART), mandated to perform all of the above functions (see Edict of the President of the Republic of Belarus of 3 June 2016 No. 188 "On the bodies of anti-monopoly regulation and trade", Art. 4, 13–17, 33, 49–51 of the Law on competition, subpara 5.1–5.2 of para 5 of the Regulation on the MART).

Other issues of protections against unfair competition are subject to the discretion of the member states. At the same time, the Treaty on the EAEU demands that member states enforce their competition (antimonopoly) legislation similarly and equitably without regard for the legal form and place of registration of an economic entity (a market participant) of other member states (art. 75(1) of the Treaty on the EAEU).

From the analysis of the text of the Paris convention and the Treaty on the EAEU, the following conclusions may be drawn.

Several differences are found in the language of art. 10-bis(3(ii)) of the Paris convention and art. 76(2(2)) of the Treaty on the EAEU:

• the Paris convention specifies which actions may constitute misrepresentation (e. g. indications or allegations), but the Treaty on the EAEU does not;

• it is sufficient for the "indications" or "allegations" to be liable to mislead the public in the language of the Paris convention, while in the Treaty on the EAEU, the misrepresentation must have already occurred and this document does not specify who must be misled;

• the instruments differ in the product features that may be the object of misrepresentation; furthermore, unlike the Paris convention, the EAEU provides that "misleading" also applies to information about producers.

Both instruments also share several similarities:

• neither treaty provides for the assessment of the defendant's state of mind or the finding of the information as false as a condition for establishing misrepresentation: in a comment on a provision of the Paris convention, WIPO correctly observes that "even a statement that is literally correct can be deceptive if gives the misleading impression… The omission of information may also be potentially misleading"[12];

• misrepresentation cannot be claimed in relation to "merely private, social or political communications, particularly communications that are considered "free speech" [29, p. 21], because, according to art. 10-bis(3(ii)) of the Paris convention the relevant indications or

[11] Such policy presupposes the establishment of common approaches, including those approved within the bodies of the union, which are necessary for achieving the objectives of the union (para 1 of the Advisory opinion of the Court of the Eurasian Economic Union of 4 April 2017). See: The Advisory opinion of the Court of the Eurasian Economic Union of 4 April 2017 [Electronic resource]. URL: https://docs.eaeunion.org/docs/ru-ru/01314091/ac_05062017 (date of access: 16.03.2022) (in Russ.).

[12] Model provisions on protection against unfair competition. Articles and notes. WIPO publication No. 832(E). Geneva, 1996. P. 30.

allegations must be made in the course of trade, and, according to the definition of unfair competition[13] provided in subpara 14 of the Protocol on the common principles and rules of competition, the latter covers only acts aimed at obtaining advantages in entrepreneurial activity;

• both instruments neither notion the ways and forms of misrepresentation, nor specify the subjects whose opinion must be consulted to establish misrepresentation and their minimum number (states have the freedom of discretion on those matters, the Paris convention refers to "the public", but does not define that term)[14];

• the member states are given full discretion in evaluating the reactions of the addressees of misleading;

• both instruments set a "minimum standard" of protection against misrepresentation, allowing the member states to assign more acts and (or) omissions to unfair competition by national legal acts or judicial precedents.

Paragraph 10 of Art. 1 of the Law on competition defines unfair competition as "any act of one or several economic entities aimed at obtaining advantages (benefits) in entrepreneurial activity, that contradicts this law, other legislative acts, acts of antimonopoly legislation or principles of good faith and reasonableness and cause or may cause losses to competitors or cause or may cause damage to their business reputation".

The acts directly assigned to unfair competition are enumerated in art. 25–30 of this law and art. 1029 of the Belarusian CC. These lists are open and both include those covered by art. 10-bis of the Paris convention and art. 76(2) of the Treaty on the EAEU, *inter alia* misrepresentation. The Law on competition also mentions incorrect comparison (art. 27), unfair competition involving the acquisition and (or) use of intellectual property (art. 28), unfair competition through unlawful acquisition, use, or disclosure of a commercial, official, and other secret information protected by law (art. 30). At present, no other legal instrument directly assigns certain acts or omissions to unfair competition. However, the umbrella character of the definition of unfair competition allows to recognise as such any act meeting the criteria enshrined in it. Having such a definition in the law is absolutely necessary: J. Kohler once compared unfair competition to Proteus, the son of Poseidon and Tethys, who was very difficult to catch as he changed into all possible forms [26, p. 3].

As stated in art. 1029(3) of the Belarusian CC, indications or allegations, the use of which in the course of entrepreneurial activity may mislead as to the nature, properties, suitability for use or quantity of goods, works, services of a competitor shall be recognised as unfair competition. The article puts forth an exhaustive list of the objects of misrepresentation.

Article 26 of the Law on competition, prohibits unfair competition by misrepresentation by an economic entity, *inter alia* concerning the following points:

• the quality and consumer properties of its product offered for sale, the purpose of such product, the methods and conditions of its (manufacture) production or use, the results expected from the use of such product, its suitability for specific purposes;

• the quantity of its goods offered for sale, the availability of such goods in the market, the possibility of acquiring them under certain conditions, the actual size of demand for such goods;

• the place of manufacture (production) of its goods offered for sale, the manufacturer (producer) of such goods, the warranty obligations of the seller or the manufacturer (manufacturer) of the goods;

• the conditions under which its goods are offered for sale, in particular the price (tariff).

As seen from the above, art. 26 of the Law on competition and art. 1029(3) of the Belarusian CC allow assigning to misrepresentation more acts and omissions than corresponding articles of the Paris convention and the Treaty on the EAEU which, as already shown, is allowed by both treaties. However, the provisions of art. 26 of the Law on competition and art. 1029 of the Belarusian CC also differ in some respects. The list of the objects of misrepresentation contained in art. 26 of the Law on competition, is non-exhaustive and broader than in art. 1020 of the Belarusian CC. This creates uncertainty over which provisions will be applied in a specific case involving misrepresentation.

In the Republic of Belarus administrative and judicial protections against misrepresentation can be sought. Parties can recourse to an arbitration court as well[15].

Administrative protection is provided by the MART, through the exercise of its powers to launch an investigation proceeding *ex officio* or upon a complaint. There are no restrictions in the Belarusian law on competition as to which person may lodge the latter. To determine whether a misleading statement constitutes unfair competition, the ministry applies provisions of the Law on competition and the Recommended practices for determining violations of antimonopoly legislation concerning unfair compe-

[13]To our mind, it shall be applied cumulatively with art. 76(2(2)) of the Treaty on the EAEU. Otherwise, it would be impossible to identify the sphere in which unfair competition is possible, the subjects whose actions can be recognised as unfair competition etc. See: *Losev S. S.* Unfair competition (part 2) (as of 15 September 2015) [Electronic resource] // ConsultantPlus: Belarus / LCC "Yurspectr". Minsk, 2022 (in Russ.).

[14]As M. Senftleben suggests, the use of the latter in art. 10-bis(3) of the Paris convention "implies that the prohibition is intended to cover situations where deceptive indications or allegations are directed at the consumer". See: Status report on the protection against unfair competition in the WIPO member states [Electronic resource]. URL: https://www.wipo.int/export/sites/www/sct/en/meetings/pdf/wipo-strad-inf-8-prov.pdf (date of access: 16.03.2022).

[15]For more details see [30].

tition (approved by the Order of the Minister of antimonopoly regulation and trade of the Republic of Belarus of 18 September 2017 No. 154) (hereinafter the Recommended practices) except for its provisions contradicting the indicated law.

In the MART's decisions on misrepresentation available for this analysis this body invokes the provisions of the domestic legislation of the Republic of Belarus only. Aside from the debate on whether the norms of the Paris convention and the Treaty on the EAEU are directly applicable, we believe that the absence of references thereto in MART's decisions has no detrimental effect on any injured party because Belarusian domestic legislation defines misrepresentation more broadly than the aforementioned treaties.

For an act to be recognised by MART as a misrepresentation, it must be perpetrated by one or several economic entities, i. e. a commercial, or a non-commercial organisation engaged in an income-generating activity, or one or several entrepreneurs, or individuals not registered as entrepreneurs but practicing an income-generating professional activity for which a license is required (subpara 16 of para 1 of art. 1 of the Law on competition).

The terms "commercial (non-commercial) organisation", the organisational-legal forms thereof and the mentioned professional activities are put forth in domestic legal acts (see, respectively, para 1 of art. 46, para 1, 2 of art. 36 of the Belarusian CC, subpara 24.4 of para 24 of the List of the types of activity requiring possession of a special permit (license) and the state bodies and state organisations with mandates to issue licenses (annex 1 to the Regulation on the licensing of certain activities, approved by the Edict of the President of the Republic of Belarus of 1 September 2010 No. 450 "On licensing of select activities").

The Law on competition does not define an "income-generating" activity. As the meaning of the term "income" in Russian [3, p. 95] suggests, an income-generating activity results in the receipt of cash or other material assets. As T.V . Soyfer rightly observes, the income-generating nature of an activity does not necessarily mean profit as its goal [32, p. 28].

Similarly, a non-commercial organisation should be understood as an economic (or market) entity when it is engaged in an activity that does not bring a profit and also when it is unprofitable. Similarly, the systematic receipt of an income is not necessary for an activity to be "income-generating": even a single receipt of an income – as a transaction or donation – is sufficient [33, p. 42].

As demonstrated, only an individual engaged in legal entrepreneurial activity (e. g. registered as an entrepreneur) can be found a violator of unfair competition ban in general, or misrepresentation, in particular.

The act also can be recognised by MART as a misrepresentation if it is aimed at obtaining a business advantage or benefit, i. e. the act may be able to result in it. The perpetrator's intent is not taken into account.

Entrepreneurial activity is defined in part 2 of para 1 of art. 1 of the Belarusian CC[16]. Part 3 of the latter paragraph lists the activities excluded from this notion: crafts, agricultural and ecotourism services, production of goods in the household farms by citizens of the Republic of Belarus, processing and marketing of such goods, advocacy activity, services of a notary, services of an arbitrator, services of a mediator, work within a research team, etc. Therefore, no misleading statements made in the context of any such activity may constitute unfair competition.

The term "advantage (benefit) in entrepreneurial activity" is not defined in domestic legislation. However, part 2 of art. 5 of the Law of the Republic of Belarus of 5 January 2013 No. 16-3 "On commercial secrets" provides a comparable term "commercial benefit" that refers, in particular, to the receipt of extra revenue, cost savings, maintaining a market position.

Paragraph 11 of the Recommended practices states an advantage in entrepreneurial activity gained by an economic entity (economic entities) as a result of unfair competition may amount to extra profit, resulting, *inter alia*, from lowering production and marketing costs, as well as from increasing own sales due to lowering competitor's sales; increased demand, not resulting from own investments, but from prominence of competing brands, trademarks or goods.

MART recognises the act as a misrepresentation if it causes actual or potential loss to competitors or damage to their business reputation.

Competitors are economic entities selling and (or) buying goods[17] in the same commodity market[18] (para 7 of art. 1 of the Law on competition).

The Recommended practices refer to the nature of the losses or damages. The proof of loss and damage and problems in their estimation have already been addressed in earlier publications [19; 21], so they do not need to be covered in this article.

[16]According to it, entrepreneurial activity is an independent activity of a legal or natural person pursued in the civil-law transactions in their own name, at their own risk and subject to material liability, intending to generate systematic profit from the use of property, sale of the goods produced, processed or otherwise acquired by the said persons for resale, as well as from performing works or offering services where such works or services are intended for sale to other persons and are not applied for own use.

[17]Goods are all kinds of objects of civil rights, as well as works and services, including financial ones, that are intended for selling, exchange or other introduction into civil-law transactions (para 14 of art. 1 of the Law on competition).

[18]A commodity market is a sphere for the circulation of a good having no substitutes or interchangeable (analogous) goods on the territory of the Republic of Belarus or its part, as determined from consumers' economic, technical and other feasibility or expediency to purchase the good in a certain territory, or the lack of such feasibility or expediency outside its territory (para 15 of art. 1 of the Law on competition).

Unlike the Paris convention, art. 26 of the Law on competition "… speaks of misrepresentation as a completed act"[19]. Therefore, misrepresentation can only be established if the act has taken place. In our opinion, the text of the above article should be changed to include both actual and potential misrepresentation, to increase the preventative function of the legislation on unfair competition.

It is not specified in art. 1029(3) of the Belarusian CC or art. 26 of the Law on competition who the recipients of misleading statements can be, or how their views could be assessed. Nor are these questions addressed in the Recommended practices. Under such provisions, as in the Federal Law of the Russian Federation of 26 July 2006 No. 135-ФЗ "On protection of competition" (art. 14.2), "…misleading acts are based on a subjective and not objective criteria, what makes it possible to find anyone to be misled to some degree, including consumers, competitors, contractors of the perpetrator of an illegal act that meets the features of misrepresentation" [34, p. 34]. This observation seems reasonable, as misrepresentation may target – and reach – different subjects. Conversely, a literal interpretation of the above norms gives grounds for establishing misrepresentation even when only a small number of persons, if any, have been misled. In our view, this is an untenable situation, because it obliges producers to anticipate the reactions of every buyer, including the naive, sufferering from mental or physical disabilities and those with other limitations who could be more inclined than most others to misperceive commercial communications. Following such an interpretation, an unreasonable and unrealistic demand will be imposed on a trader. In practice, MART uses sample polling of consumers or competitors[20] – which it conducts itself or commissions a third party to aid it in establishing whether an act of misrepresentation has taken place. In some cases of suspected misrepresentation, MART bases its findings on potentially misleading statements exclusively on the professional judgement of its own experts[21]. In our view, the Recommended practices, and, a possible future resolution of the Supreme Court of the Republic of Belarus on adjudication of Belarusian courts in unfair competition[22] should establish a threshold of at least 20–25 % of consumer[23] respondents in sample polls who find an indication or statement to be actually or potentially misleading.

If MART finds that a specific act constitutes misrepresentation in the meaning of the Law on competition, it shall take the decision on the establishment of a fact of violation of antimonopoly legislation and may issue a prescription, obliging a violator to take certain actions or to refrain from it, e. g. to discontinue the dissemination of the information found to be misleading or delete misleading statements or indications. It may also take further action to end and (or) prevent the breach of antimonopoly law, including referring the case materials to law enforcement agencies, filing a lawsuit with a court etc. (subpara 4.4 of para 4 of art. 40 of the Law on competition). If MART finds that the antimonopoly law has not been breached, it indicates it in a formal decision and takes no further action. Decisions of MART may be appealed in the Supreme Court of the Republic of Belarus (art. 48, 100, 229 of the Code of Economic Procedure of the Republic of Belarus of 15 December 1998).

Article 48 of the Law on competition states that any violation of the anti-monopoly legislation entails liability in accordance with legislative acts. Administrative sanctions are established by the Code of the Republic of Belarus on Administrative Offences of 6 January 2021. Article 13.33 provides an open list of actions, all covered by the Law on competition, which may be qualified as unfair competition: intentional misuse by an entrepreneur or legal entity of others company name, trademark (service mark), or geographical indication, *inter alia* by commercialisation of goods with illegal use of the results of intellectual activity, means of individualisation of participants of civil turnover or of their goods. Because the code does not define unfair competition, and art. 48 of the Law on competition is referential, examples of unfair competition – including by misrepresentation – should be drawn from the Law on competition.

Article 13.33 of the Code of Administrative Offences provides that acts of unfair competition are punishable by fines. The amounts and the procedures for estimating them depend on the status of the offender: for individuals – fines vary from 20 to 100 base amounts, for entrepreneurs, from 100 to 200 base amounts. The fine for a legal entity is up to 10 % of the annual sales during the calendar year preceding the detection of the breach in the market where the breach occurred, or during the part of that year if the offender did not sell the goods (works, services) for the whole year. In all cases, the amount of

[19]Article 1029(3) of the Belarusian CC uses language similar to art. 10-bis(3(ii)) of the Paris convention. Also see: *Losev S. S.* Institute of protection against unfair competition: new in the legislation [Electronic resource]. URL: https://etalonline.by/document/?regnum=u01801197&q_id=0 (date of access:16.03.2022) (in Russ.).

[20]The decision of the Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus No. 227/79-2019 [Electronic resource]. URL: https://mart.gov.by/files/live/sites/mart/files/documents/Комиссия%20МАРТ/Решение%20от%2029.08.2019_Шлык%203.Л.%2C%20Иванченко%20Н.А..pdf (date of access: 16.03.2022)(in Russ.) ; the decision of the Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus No. 169/20-2019 [Electronic resource]. URL: https://mart.gov.by/files/live/sites/mart/files/ documents/Комиссия%20МАРТ/04.03.2019%20ООО%20КроносСтройИнвеста-М%20(%20169-20-2019).pdf (date of access: 16.03.2022).

[21]Ibid.

[22]For the time being there is no such a resolution.

[23]According to para 11 of art. 1 of the Law on competition, a consumer is the physical person or legal entity intending to order, acquire or use goods or ordering, acquiring or using goods if in the latter case goods, including the component of other goods, is subject of the made or being made civil-law transactions.

the fine may not be lower than 400 base amounts. Under para 2 of art. 4.6 of the code, the imposition of an administrative penalty on a legal entity for a breach of antimonopoly law, including misrepresentation, does not exclude the liability of an officer of that entity responsible for the breach. However, it also follows from this provision that an entity will not be held liable if it has adopted and implemented an antimonopoly compliance management system (defined as a set of legal, organisational and management measures to ensure compliance with anti-monopoly law and prevent breaches, including a corporate antitrust compliance programme or policy[24]).

The right to draw up protocols on the mentioned administrative offense rests with the officers of MART (subpara 35 of para 1 of Art. 3.30 of the Procedural and Executive Code of the Republic of Belarus on Administrative Offenses of 6 January 2021). In general, the administrative process is launched at the request of the injured party or a legal representative thereof. The request for bringing an offender to administrative liability may be submitted to the MART either together with the complaint on violation of anti-monopoly legislation concerning unfair competition or separately[25].

Independent of the injured party, an administrative proceeding may be initiated by the prosecutor or, on his written instruction, by MART, if the suspected breach has resulted in significant harm to the interests of the state or society or if the injured party is materially dependent on the alleged perpetrator or subordinate to it, and therefore cannot bring the case itself (art. 4.4 of the Code of the Republic of Belarus on Administrative Offences). However, the perpetrator may be relieved from administrative liability if it has reached an amicable settlement with the injured party or a legal representative thereof (art. 8.5 of the Code of the Republic of Belarus on Administrative Offences).

Administrative cases of unfair competition (including misrepresentation) are heard by a judge of economic courts of regions or Economic court of Minsk City (para 2 of art. 3.2 of the Procedural and Executive Code of the Republic of Belarus on Administrative Offenses).

Article 1030 of the Belarusian CC, titled "Civil liability for unfair competition" provides the following civil remedies to the injured parties: ordering the perpetrator to cease illegal acts, refute the disseminated information and acts of unfair competition and pay damages[26]. In our view, this provision cannot be considered in isolation, to the exclusion of other civil remedies (while taking into account the non-contractual nature of unfair competition) such as self-defence, or compensation of moral harm (see art. 11 of the Belarusian CC). A different reading would contradict the principle of equality among civil-law subjects (para 5 of part 2 of art. 2 of the Belarusian CC). To enhance legal certainty, we suggest that art. 1030 of the Belarusian CC should be supplemented with the full list of the civil remedies available in cases of unfair competition.

MART has no mandate to apply civil liability measures in cases of unfair competition. A party injured by misrepresentation (art. 1030 of the Belarusian CC does not specify who can seek civil remedies for unfair competition) may file a suit in a state court or a court of arbitration. Where the parties to a dispute over the alleged misrepresentation are legal persons and (or) entrepreneurs, a pre-trial settlement procedure must be completed before going to court (part 2 of para 2 of art. 10 of the Belarusian CC). This includes sending a letter of complaint (with a formal proposal to settle the dispute amicably), waiting for a response (or the expiry of the period allowed for the response, whichever comes earlier). It is fixed in annex to the Code on the Economic Procedure of the Republic of Belarus, part 1 of para 12 of the Resolution of the Plenum of the Supreme Economic Court of the Republic of Belarus of 27 May 2011 No. 6 "On certain issues of adjudicating cases in an economic court of first instance". The court will leave the case without consideration unless the plaintiff has complied with this procedure (para 5 of art. 151 of the Code on Economic Procedure of the Republic of Belarus). The fact of misrepresentation does not need to be established by MART ahead of time: "stand-alone" actions are permitted. However, even where this authority finds that misrepresentation has occurred, the fact still has to be proven in court, because the findings of MART have no prejudicial character (art. 182 of the Code on Civil Procedure of the Republic of Belarus of 11 January 1999, art. 106 of the Code on Economic Procedure of the Republic of Belarus). Still, the injured parties seeking to restore the rights and legitimate interests infringed upon by misrepresentation are advised to first approach MART, as that "… can greatly facilitate the proving process in a court…" [19, p. 87].

Similar to MART, courts must also apply the definition of unfair competition and misrepresentation, as provided in art. 48 of the Law on competition. It should also be remembered that the available jurisprudence on misrepresentation numbers only a handful of court

[24] *Abramov V. Yu*. Guidance on the application of compliance control in various areas of economic activity: a practical guide [Electronic resource].URL: https://login.consultant.ru/?returnUrl=req%3Ddoc%26base%3DPBI%26n%3D266264%26dst%3D100671&cameFromForkPage=1&demo=1 (date of access: 16.03.2022) (in Russ.).

[25] On the beginning of the administrative process under art. 13.33 "Unfair competition" of the Code of the Republic of Belarus on Administrative Offences [Electronic resource]. URL: http://mart.gov.by/activity/antimonopolnoe-regulirovanie-i-konkurentsiya/razyasneniya-deystvuyushchego-zakonodatelstva/o-nachale-administrativnogo-protsessa-po-state-13-33-nedobrosovestnaya-konkurentsiya-kodeksa-respubl/ (date of access: 16.03.2022) (in Russ.).

[26] A detailed analysis of problems of application of these civil remedies is already provided in certain publications [19; 21; 35].

decisions[27]. There are no published decisions of arbitration courts on these cases. This allows to suggest that, for whatever reason, seeking redress with state or arbitration courts is not a common mechanism for economic subjects to protect their rights from unfair competition, including by misrepresentation.

Conclusions

From the analysis above, the following conclusions may be drawn.

1. The Republic of Belarus has fully implemented its international obligations concerning legal protection against unfair competition by misrepresentation. There is no need to align any further provisions of its domestic legislation prohibiting misrepresentation with those of the Treaty on the EAEU and the Paris convention.

2. To strengthen the preventative function of the legislation on unfair competition, art. 26 of the Law on competition shall be changed to cover both actual and potential misrepresentation.

3. To balance public and private interests, the Recommended practices for determining violations of antimonopoly legislation concerning unfair competition and the forthcoming Resolution of the Plenum of the Supreme Court of the Republic of Belarus on adjudication of Belarusian courts in unfair competition should institute a 20–25 % threshold for the number of consumer respondents in sample polls judging commercial allegations and statements to be actually or potentially misleading.

4. To enhance legal certainty, art. 1030 of the Belarusian CC should contain a full list of civil remedies available in unfair competition cases.

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