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# Belarus

Alexey Anischenko, Marina Golovnitskaya and Natalia Yurieva

Sorainen

## General

- 1 How can the government's attitude and approach to internet issues best be described?

The Belarusian government acknowledges the growing role of IT in general and the internet in particular. At present, Belarusian IT legislation is not very developed or detailed; there is not much enforcement practice and sometimes no official clarifications or established court practice on many critical issues. Realising that this may impede the development of IT, the government has struggled to fill the gaps in the legislation and endeavours to develop the regulatory and legislative framework in the IT sector. New laws are being enacted on various levels and new regulatory bodies are being established (eg, the National Centre of the Traffic Exchange). Programmes for the development of the information society are being regularly adopted.

Also, in recognising the importance of the internet, the government has retained some state control over some areas of IT. For example, legislation has established a state monopoly for a national telecommunications operator to transfer traffic in and out of the country (currently the state enterprise Beltelecom). Moreover, Belarusian entities have certain obligations to host websites on Belarusian resources (ie, the '.by' domain) and locate servers in Belarus once these entities render services or sell goods in Belarus using the internet.

## Legislation

- 2 What legislation governs business on the internet?

The main legal acts governing internet-related issues specifically are the following:

- the Edict of the President No. 60 dated 2 February 2010 'On Measures on Improvement of the Use of the National Segment of the Internet Network';
- Law No. 45-3 dated 19 July 2005 'On Telecommunication';
- Law No. 455-3 dated 10 November 2008 'On Information, Informatisation and Protection of Information';
- Law No. 113-3 dated 28 December 2009 'On Electronic Document and Electronic Digital Signature';
- Instruction 'On Some Issues of Registration of Domain Names in the Hierarchical Name Space of the National Segment of the Internet Network' approved by the Order of the Operational and Analytical Centre under the President No. 47 dated 18 June 2010; and
- the Regulation 'On the State System of Management of Public Keys for Verification of Electronic Digital Signature of the Republic of Belarus' approved by the Order of the Operational and Analytical Centre under the President No. 79 dated 16 October 2012.

The general legal acts that apply to relations arising out of business on the internet include:

- the Civil Code No. 218-3 dated 7 December 1998;
- the Tax Code No. 71-3 dated 29 December 2009;
- the Edict of the President No. 450 dated 1 September 2010 'On Licensing of Certain Types of Activities';
- the Edict of the President No. 9 dated 10 January 2005 'On Approving of Regulation on Conduct of Activities in Gambling Business in the Republic of Belarus';
- Law No. 2181-XII dated 5 February 1993 'On Trademarks and Service Marks';
- Law No. 225-3 dated 10 May 2007 'On Advertising';
- Law 'On Copyright and Related Rights' No. 262-3 dated 17 May 2011; and
- Resolution of the Council of Ministers No. 31 dated 15 January 2009 'On Approval of the Rules of Retail Trade in Samples'.

## Regulatory bodies

- 3 Which regulatory bodies are responsible for the regulation of e-commerce and internet access tariffs and charges?

There are no specialised government organs that specifically regulate e-commerce or internet access tariffs and charges. These issues are regulated by laws and by legal acts (eg, issued by the president or the council of ministers) and are addressed by regulatory bodies with broader competence. Such bodies and authorities include:

- the Ministry of Trade;
- the Ministry of Communication and Informatisation;
- the State Inspection on Telecommunication of the Ministry of Communication and Informatisation; and
- the Operational and Analytical Centre under the President.

## Jurisdiction

- 4 What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions (or disputes) in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

The general rules contained in the Civil Procedural Code and Commercial Procedural Code will be applied by the courts to determine the jurisdiction for internet-related transactions in such cases. These rules, inter alia, stipulate that the Belarusian court may be competent to consider the case if:

- the defendant resides, is located or has property in Belarus;
- the governing body, branch or representative office of a foreign entity is located in Belarus;
- the dispute arises from a contract that should have been performed in Belarus;
- in cases of protection of professional reputation, the plaintiff is in Belarus;

- the place of infliction of damages is Belarus; and
- the parties to a transaction have agreed to choose a Belarusian court as a competent forum.

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### Contracting on the internet

- 5 Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

Yes, it is possible to form and conclude contracts electronically. Contracts may be formed on the internet by an exchange of electronic documents provided that the issuance of such an electronic document by a party can be authentically established with an electronic digital signature. Upon the agreement of the parties, contracts may also be formed with use of another analogue of a hand-written signature (eg, electronic signature); however, enforcement of such a contract may be problematic.

There is no established practice in Belarus with regard to 'click wrap' contracts. We consider that 'click wrap' contracts will be enforceable provided that the offer contains all essential terms and assumes that it is possible to conclude the agreement by clicking an 'I agree' or 'I accept' button.

- 6 Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

No, there are no particular laws governing contracting on the internet that in particular would distinguish between business-to-consumer and business-to-business contracts.

- 7 How does the law recognise or define digital or e-signatures?

Under the Law on Electronic Document and Electronic Digital Signature an electronic digital signature is a sequence of signs that is a requirement of an electronic document and is intended to confirm its integrity and authenticity. The electronic digital signature is an analogue of a handwritten signature and can be used as an analogue of a seal or a stamp. A foreign electronic digital signature is recognised only if such recognition is provided by an international treaty or if a foreign public key certificate is accredited at a state system of management of public keys.

- 8 Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

In relation to the formation of electronic contracts, general data retention requirements are applicable; in particular, the general term for the retention of commercial contracts comprises three years. However, in cases of retail trade in samples (which includes retail trade via an online store), a seller must retain information about the contract concluded (such as the name of the customer, goods sold, price paid) for two years from the date of the sale. No software legacy requirements apply in Belarus.

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### Security

- 9 What measures must be taken by companies or ISPs to guarantee the security of internet transactions?

Under Belarusian law if unlawful activities against the information may damage its owner, user or another person, such information will be protected. The Law on Information, Informatisation and Protection of Information establishes a general obligation to protect information (eg, obliging the owner of information resources to

do so). Also, the legislation provides for three types of information protection measures that may be applied: legal (eg, inclusion of data protection provisions to the contract), organisational (eg, ensuring a special access regime to the information) and technical (eg, use of cryptographic means of data protection). However, the legislation does not specify the measures that would be obligatory for companies or ISPs to guarantee the security of internet transactions.

- 10 As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

There is no special requirement for users to make private keys to encrypted communications available. Organisations providing services on the distribution of public keys (certification authorities) are permitted. Certification authorities can operate upon the obtaining of a licence and may be accredited under a state system of management of public keys. There are no special laws as to their liability; therefore, general criminal and administrative rules may be applicable to the employees of such authorities (eg, administrative liability for breach of professional secrecy by negligence).

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### Domain names

- 11 What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

Procedures in place to regulate the licensing of domain names provide that in order to obtain a domain name an applicant concludes a contract with a registrar and pays a registration fee. The registration is valid for one year and is subject to prolongation. It is possible to register a country-specific domain without being a resident in that country.

- 12 Do domain names confer any additional rights (for instance in relation to trademarks or passing off) beyond the rights that naturally vest in the domain name?

No, domain names do not confer any additional rights beyond the rights that naturally vest in domain names.

- 13 Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

Yes. The owner of a trademark has the exclusive right to use a trademark and prevent anyone from using it, including in a domain name. A 'pirate' registration is seen as an infringement of a trademark owner's rights and a trademark owner is entitled to challenge such registration.

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### Advertising

- 14 What rules govern advertising on the internet?

The general rules on advertising shall be applied to advertising on the internet (in particular, Law No. 225-3 'On Advertising').

- 15 Are there any products or services that may not be advertised or types of content that are not permitted on the internet?

Yes, there are certain products and services which, according to the general rules of advertising, may not be advertised (eg, drugs, transplantation organs, pornography, goods prohibited from manufacturing). Also, certain types of content are not permitted on the

internet (eg, calling for cruelty and violence, unveiling state secrets, and promising future effectiveness of the advertised activity).

### Financial services

- 16** Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and, if so, by whom and how?

The advertising of financial services products is subject to general regulations on advertising (see questions 14 and 15). The selling of financial services products may be subject to special regulation defined on a case-by-case basis (eg, licensing of bank activity by the National Bank).

### Defamation

- 17** Are ISPs liable for content displayed on their sites?

The legislation does not directly provide for the liability of ISPs. According to the Decree on the Internet, persons who place (transfer) information to the internet are responsible for its content. An ISP may be regarded as such a person. In practice there have been no cases regarding this; however, the ISP will probably only bear liability if the author of the information cannot be established. Also the factors that may be considered for the purposes of establishing liability are the existence of pre-moderation, whether the ISP was involved in actively spreading or amending the information, whether the ISP received notification that the information had been placed on a website, etc.

- 18** Can an ISP shut down a web page containing defamatory material without court authorisation?

Belarusian legislation does not directly address this issue. It is our opinion that, in general, an ISP can shut down a website containing defamatory material either at its own discretion or based on a court decision or other competent authority authorisation (order, decision, etc). The ISP, by shutting down a website at its own discretion, may be held liable for a breach of its contract obligations to provide internet services. On the other hand, ignoring a notification that a website contains defamatory content may be a factor that contributes to the liability of the ISP in case of court proceedings.

### Intellectual property

- 19** Can a website owner link to third-party websites without permission?

Yes. A website owner may link to third-party websites without permission.

- 20** Can a website owner use third-party content on its website without permission from the third-party content provider?

If the content of another website is regarded as intellectual property, then the general rule of necessity for obtaining permission from the owner of such content applies. Belarusian legislation provides for cases when free use of such content is allowed (eg, quoting for educational or critique purposes). The placement and distribution of content provided by information resources of information agency or other mass media distributed via the internet is allowed only upon the placement of a link (hyperlink) to the primary source of the content, which has distributed this content earlier, unless other terms are provided by such information resource or mass media.

- 21** Can a website owner exploit the software used for a website by licensing the software to third parties?

Software is IP and is thus protected by copyright law from unauthorised use. If the website owner is a copyright holder of the software or is entitled by a licence agreement to sub-license the software, the website owner may license the software to third parties.

- 22** Are any liabilities incurred by links to third-party websites?

The issue of liabilities incurred by links to third-party websites is not regulated by Belarusian legislation. There is also no court practice on this issue.

### Data protection and privacy

- 23** How does the law in your jurisdiction define 'personal data'?

There is no general definition of personal data under Belarusian law. According to the Law on the Population Census, personal data is primary statistical data about a specific respondent, gathered during a population census. The law on the State Population Register, which enters into force in July 2013, defines personal data as a set of basic (eg, name, date of birth, citizenship) and additional personal information (eg, education, tax and military obligations), as well as data on details of documents confirming basic and additional personal information of specific individuals.

- 24** Does a website owner have to register with any controlling body to process personal data? May a website provider sell personal data about website users to third parties?

No special registration with any controlling body for processing personal data is required. However, if personal data is processed on an information system, the latter should be equipped with a data protection system. Such data protection system should have a certificate of compliance issued by the National System of Certification or a positive expert opinion based on the results of a state expert examination.

With regard to selling personal data about website users to third parties, the general rule, which stipulates that collection, processing, storage and transfer of personal data related to an individual may be performed only upon obtaining consent from such an individual, is applicable.

- 25** If a website owner is intending to profile its customer base to target advertising on its website, is this regulated in your jurisdiction? In particular, is there an opt-out or opt-in approach to the use of cookies or similar technologies?

If a website owner is intending to profile its customer base to target advertising on its website, it is not specifically regulated by Belarusian law and the general rules on advertising shall apply. With regard to the use of cookies or similar technologies, Belarusian law generally provides for an opt-out approach to spreading information. The Law on Information, Informatisation and Protection of Information stipulates that if technical means allowing for targeted spreading of information are used, the provider of information must allow the recipients the choice to opt out from receiving such information.

- 26** If an internet company's server is located outside the jurisdiction, are any legal problems created when transferring and processing personal data?

The placing of an internet company's server outside Belarus does not create problems related to transferring and processing personal data.

### Update and trends

Changes to the Law on Electronic Document and Electronic Digital Signature have recently been adopted. Certain provisions have been in force since June 2013 and the remainder will take effect in December 2013. The new edition of the law broadens the scope of competence of the Operational and Analytical Centre under the president. In particular, the issues of recognition of foreign public keys shall now be addressed by this centre.

Another hot topic in the sphere of IT regulation is the creation of a Single Republican Network of Data Transfer (ERSPD) and the National Centre of Traffic Exchange (the Centre). The ERSPD will include networks of data transfer of state authorities and companies. The connection of networks of data transfer of private companies to the ERSPD is voluntary; however, all newly created networks of data transfer should be connected to the ERSPD. The Centre, which has already been created and will now begin operations, will be responsible for the transfer of traffic via the ERSPD, as well as its management, development and protection from unauthorised access. Also, the Centre will monitor the transfer of international traffic and connection to the telecommunications networks of foreign states.

Thus, the monopoly of Beltelecom for transferring traffic in and out of the country (see question 1) will be eliminated.

Changes to the regulation of trade in samples have also recently been adopted by the Council of Ministers. Now, legal entities and individual entrepreneurs trading in samples (which includes retail trade via an online store) are obliged to use cash register equipment or payment terminals.

Finally, a concept of development of a state system of management for public keys was introduced in late 2012 by the Operational and Analytical Centre under the president and is currently being implemented. It provides for the development of a single state system, allowing all interested physical persons and legal entities to obtain information about public keys and their owners in Belarus. The state system itself will consist of interconnected and certified organisations providing services on the distribution of public keys. The implementation of the concept will contribute to the formation of the electronic government, which is one of the goals of IT development in Belarus.

If a Belarusian company or a representative office of a foreign company located in Belarus sells goods, performs work or renders services in the territory of Belarus, the servers of such a company or a representative office must be located in Belarus and the website must be registered with a '.by' domain name.

**27** Does your jurisdiction have data breach notification laws?

No, there are no data breach notification laws in Belarus.

### Taxation

**28** Is the sale of online products subject to taxation?

Belarusian tax law does not contain specific regulations on the sale of online products; therefore, general taxation rules will be applicable, which may differ depending on the sides involved in an online sale (eg, VAT may be payable and the income of the online seller may be subject to income tax).

**29** What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

If an operator that is registered as a taxpayer in Belarus places servers outside its home jurisdiction, it will still be subject to Belarusian tax law. A relevant double taxation treaty may establish a special taxation regime and provide for an exemption from an obligation to pay taxes in certain jurisdictions.

With regard to a foreign company placing its servers in Belarus, the general rule is that income gained by a foreign company from the provision of disk space or a telecommunications channel for the placement of information on a server and income gained from services of maintenance of such a server are both subject to an income withholding tax. Also, the placing of a foreign company's server in Belarus may be considered a permanent establishment, thus subjecting the company to Belarusian income tax.

**30** When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

There is no special regulation regarding when and where companies should register for VAT or other sales taxes. Companies are subject to registration with local tax inspectors. Apart from the legal entity itself, its branches and representative offices will also be registered.

There is no specific regulation of the domestic internet sales; general taxation rules apply.

**31** If an offshore company is used to supply goods over the internet, how will returns be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

Generally, goods imported by an offshore company will be subject to VAT and customs duties. Such VAT and customs duties are payable by a buyer. The buyer may be exempt from an obligation to pay taxes and customs duties if such a buyer is a physical person, if the goods are of a value not exceeding €120 and if the goods are sent by post no more than once per month.

In cases of return of goods to a foreign supplier, re-export regulations will apply. They provide that taxes and custom duties paid by a buyer may be returned to him or her if three conditions are observed. First, such goods are returned within six months of importation. Secondly, it can be proven that the goods are the same goods that were imported. Thirdly, the goods will be in basically the same condition as they were at the moment of importation.

With regard to potential transfer pricing problems, no special regulation of this matter exists in Belarus. An onshore retail outlet company set up to supply goods will be registered for tax purposes and will pay taxes according to general taxation rules.

### Gambling

**32** Is it permissible to operate an online betting or gaming business from the jurisdiction?

There are two types of betting or gaming businesses permitted: online totalisators and online bookmaking. In both cases an operator will obtain a licence, which in particular will require the possession of physical premises. All other online betting or gaming business are not allowed.

**33** Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

There is no regulation regarding residents' rights to use online casinos and betting websites. Persons under 18 years of age cannot participate in online totalisator or online bookmaking provided by Belarusian operators. Persons who have restricted their access to online totalisators or online bookmaking are also prevented from accessing these websites. Such limitations are facilitated by

registration on the operator's website, which requires the person to state their age, name and certain other personal data.

### Outsourcing

- 34** What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

The provision of services on an outsourced basis is not subject to specific regulation under Belarusian law; therefore, regular legal and tax issues relevant for concluding a contract on provision of services will be considered. Such issues will include the scope and quality of services to be provided, liability and IP issues. If the outsourcing is planned to take place from abroad, currency regulations, migration laws and the existence of double taxation treaties between the relevant jurisdictions may be considered.

- 35** What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, do the rules apply to all employees within the jurisdiction?

The IP rights of employees who previously carried out services that have been outsourced will be observed. The employee retains author's rights for works for hire (whereas the exclusive rights for works for hire are the property of the employer). If the employee does not finish the works for hire, then the employee and any outsourced contractor who completes the work are regarded as the authors possessing author's rights for the works for hire.

Yes, there is a right to compensation in the event of redundancies due to outsourcing: the employee is entitled to receive compensation amounting to three monthly salaries. Apart from this, the employer must notify the employee and the trade union no later than two months in advance. Some categories of employees cannot be dismissed (eg, pregnant women or employees with limited abilities).

### Online publishing

- 36** When would a website provider be liable for mistakes in information that it provides online? Can it avoid liability?

According to Belarusian law, persons who place (transfer) information on the internet are responsible for its content. Therefore, if information provided online by a website provider contains mistakes, the latter may bear liability. Potential liability may result in cases where a mistake caused damages. The particular form of liability will be defined on a case-by-case basis. While deciding on liability, the court may consider whether the provider was acting in good faith, the type of mistake, etc. Also, if advertising provided online by a website provider misleads consumers, such website provider may be held liable.

- 37** If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

A website provider, even if it is the owner of the database, cannot prohibit other people from using or reproducing data as it is from such a database. According to Belarusian copyright laws, a database is IP and is thus subject to copyright protection. However, the copyright of an author of a database covers only compilation (ie, a certain way of selecting and arranging materials). The protection of the data itself is subject to different regulation: if the data is IP, the copyright belongs to its authors; if it is not regarded as IP, no IP protection applies.

- 38** Are there marketing and advertising regulations affecting website providers?

Website providers are subject to the same regulations regarding marketing and advertising as specified in questions 14 and 15.



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