

Economic and Legal Analysis of Unfair Competition Structures

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Abstract: In this report, a comprehensive analysis of the structure and the concept of such a complex and controversial phenomenon as unfair competition, its legal and economic entity was performed. This was conditioned by the fact that there is no general concept of unfair competition today. It cannot be produced due to a striking difference between the legal regulation of this institution in different countries, depending on the socio-economic and historical situation. Thus, a comprehensive definition of unfair competition on the legislative level is not enough, the definition specified in the Federal Law “On competition protection” is not enough because it defines this concept only fragmentary. And for a more complete analysis of the acts qualified as the acts of unfair competition, the provisions of the Paris Convention for the Protection of Industrial Property should be considered in addition to federal legislation. Legally stated acts of unfair competition are very broad and abstract and therefore, it was suggested in addition to general formulae (general delicts) to apply a detailed list of unfair competition specific acts to prevent this during operations. The study also pays attention to the fact that unfair competition includes the actions in the form of abuse of rights and the breach of the objective right standards.

Key words: Unfair competition, the concept of unfair competition, the nature of unfair competition, the acts of unfair competition, the Paris Convention for the Protection of Industrial Property issued on 1883

INTRODUCTION

The main mechanism of the modern market economy is competition a special kind of economic competition between market participants for a market share and the most favorable conditions for the production and exchange of such material goods as commodities and services. Often, however, the market participants fighting for the most favorable conditions apply the methods that may be in conflict with the law and the adopted customs and norms which ultimately lead to the inefficiency of market economy. Consequently, an unfair competition is determined in theory. Such competition does contribute to economic growth, the development of production and does not meet the needs of society and leads to the monopolization of the market. With the development of economic relations the methods of unfair competition were improved from year to year and evolving, attained even more sophisticated forms, which differ depending on a legal system. This evolution of unfair competition methods continues at the present time.

Today, the problem of protection against such negative and constantly evolving phenomenon as an unfair competition is a relevant one. Unfair competition undermines the foundations of economy, causing damage to producers, consumers and society as a whole.

The study of such unfair competition contributes to the agreement of competition and Civil Law rules, smoothes out the differences between them and may facilitate the most effective protection of human rights. Such studies are one of the priority development trends of Russian and Foreign legislation today and due to this the study of theoretical and practical problems in this area is of great interest for a scientific research.

Integrated studies of the subject allow us to make general conclusions about the state of right protection from unfair competition acts, to fill up the theoretical basis for further research and improvement of competitor right legal protection and the prevention of unfair competition by the means of Civil Law as well as to contribute to the solution of rule-making and law enforcement issues at the national and supranational level.

MATERIALS AND METHODS

An unfair competition is commonly understood as any act of competition contrary to honest practices, good morals in the commercial and industrial sector. These honest practices are defined differently, depending on the current historical and court practice in countries and regions.

Unfair competition is a complex phenomenon with social and historic significance of the changing

competitive and Business Law which is manifested with the evolution during the interaction of market relation subjects. Unfair competition as a historical phenomenon appeared in the middle ages. Schroeter (2005) noted that “already in the middle ages, in the era of the guild system and feudal regalia, in the narrow limits of permitted competition, with relatively few competitors, the pursuit of customer caused sometimes very unfair methods both in terms of public and competitors”.

This phenomenon is often discussed in scientific papers on various issues of unfair competition act suppression in domestic and Foreign science. The general issues about the nature of unfair competition were considered by the researches of Eremenko (2002), Schroeter (2005), Gorodov (2011) and Parashchuk (1996). The acts of unfair competition were considered in the comparative and legal aspect by such scholars as Pirogov (2006) and Chudinov (2007). It is worth mentioning the researches of the following Foreign scientists: Roubier (1948) and Bodenhausen (1977).

Current scientific views and conclusions with respect to certain aspects of unfair competition prevention expressed in the above mentioned works, are of great importance for the development of a holistic study concerning this problem. And as the part of this research the existing features, problems and gaps in the legal regulation of unfair competition acts protection were studied, taking into account the theoretical foundations, the current state of legislation and law practice. The goal of a comprehensive analysis performance was set to do this concerning unfair competition structure, its individual acts, the legal ways against this offense and the related problems in law enforcement practice at national and international level.

Based on the things mentioned above, a comprehensive analysis of the scientific literature, the doctrine and the legislation in different countries during different historical stages of state development was performed in this study. Thus, the study object of this research is the acts of unfair competition and social relations concerning the protection of rights against the acts of unfair competition and the suppression of relevant violations.

The subject of the study are the norms of Russian, Foreign and International Law, establishing the legal framework regulating unfair competition and their enforcement practices, the scientific papers devoted to the study of unfair competition acts and the problems and peculiarities of their protection and the prevention of violations associated with them.

To carry out this study the methodological basis was such fundamental scientific research methods as the

dialectical method which allowed to study the problems of this research from different points of view. From the used general scientific methods one should reveal the method of system analysis, formal and logic one, used in the definition of unfair competition concept and the formulation of its symptoms, the concrete historical, which contributed to the study of unfair competition dependence. Among other things, this study applied special method of the legal science such as comparative legal method which allowed to study the legal regulation of unfair competition in various legal systems. Also, a special legal method of system interpretation was used which allowed to determine the features of individual acts concerning unfair competition.

RESULTS AND DISCUSSION

Unfair competition as a phenomenon appeared at the end of XVIII the beginning of XIX century, when the principle of free enterprise was used actively and competition was not limited. Over time, there was a need for legal regulation of competition, its classification and the creation of conceptual apparatus to maintain respectable market relations. Depending on the socio-economic and historical situation specific methods and approaches were developed in different countries for the protection against unfair competition behavior.

The concept originated in the middle of the XIX century in France, then was spread to other countries in different forms (shadow, illegal, total competition; concurrence déloyale, unlauternwettbewerb, unfair competition) and developed in the economic and legal category (Anonymous, 2008a).

The concept of unfair competition: At present, the international jurisprudence did not develop a single concept of unfair competition, every country and legal system defines unfair competition differently.

The law of Russia determine unfair competition as follows: “any activity of business entities (group of persons) which are aimed at the obtaining of benefits during a business activity, contrary to Russian Law, the customs of the business turnover, the requirements of fairness, reasonableness and justice and caused or may cause losses to other economic competitive actors or harmed or may harm their business reputation”. According to Art. 10 bis of the Paris Convention any act contrary to honest practices in industrial and commercial matters may be considered as an act of unfair competition (Pirogova, 2006). This was reflected in the definition of the Russian Federation Constitutional Court dated on April 1, 2008 N 450-O-O (Anonymous, 2008b). The Russian rule of

law points to a contradiction in legislation and practices, along with the ethical requirements that allows us to conclude that the concept of unfair competition did not reflect fully the conventional approach where only the contradiction to ethical requirements is stated. Thus, the definition of unfair competition stated in Paris Convention is greater than in the National Russian Law.

Often the law to describe the concept of unfair competition uses the listing of actions that make an unfair competition such as the law of Italy, the Civil Code of which has no actual definition of unfair competition but it is revealed by listing specific unfair competitive actions.

However, this type of unfair competition definition disclosure would be too narrow and uncomfortable with current volatile business environment and the rapid emergence of more sophisticated methods of unfair competition, in the absence of common rules or prohibitions referred to in the Paris Convention.

The legislation of different countries has the definition of unfair competition seldom. Among industrialized countries, the definition of unfair competition is presented only in Swiss Law (Anonymous, 1986). The availability of a legal concept is peculiar to the countries where such acts appeared recently or were resumed after a certain break of legal regulation concerning unfair competition prevention. For example, the Polish Law against Unfair Competition issued on 16 April 1993 recognizing an illegal or violating good practices act, if it violates the right of another entrepreneur or a customer or threatens by such a violation as the act of unfair competition.

In some countries, there is only a general prohibition on unfair competition acts, the so-called general torts, without a specific definition of unfair competition. And in countries where the legal definition exists, it plays the role of an offense general prohibition (general tort). This is due to the fact that it is impossible to provide an exhaustive list of actions today that would be unfair due to the constant change and the increasing complexity of economic relations and, consequently, the emergence of new types of fraud.

Acts of unfair competition: Defining the concept of unfair competition, it is necessary to specify the list of unfair competition actions, from which an integral and general definition of unfair competition is developed in a number of countries. In the Article 14 of the Law N 135-FL, the list of prohibited activities that represent an unfair competition is open. In practice, business entities as well as antitrust authorities as well as arbitration courts are faced with other forms of unfair competition. During

the analysis of the issue whether a particular action is an act of unfair competition not only the provisions of competition law but also the provisions of Article 10 bis of Paris Convention for the Protection of Industrial Property are taken into account. However, in practice, the possibility of other acts of unfair competition is not taken into account often and is often limited only to those actions that are listed in a normative legal act.

The attempts to compare the theoretical classification of unfair competition acts with the regulatory provided list in the literature were not successful as it was not able to take into account the diversity of unfair competition actions. Unfair competition delimited from each other on a regulatory basis, depending on various circumstances, could be attributed to the same kind of acts. During that period, statutory classified actions in the acts of unfair competition may be closely related in theory and subject to a single definition.

During the description of general terms and some most interesting acts of unfair competition, it was determined that the Russian Federation legislation and above all, the Federal Law issued on 26 July 2006 No. 135-FL "On Protection of Competition", in general, takes the list of anti-competitive behavior which is contained in the main international legal instruments. So unfair competitive acts listed in Article 14 of the Law "About the protection of competition", repeat mainly the Article 10 bis of the Paris Convention which is the main international treaty governing the issue of unfair competition.

However, it seems that the current work on Russian legislation improvement in the field of competition protection is far from complete. Currently, Russian antimonopoly legislation contains only a few species of unfair competition acts which are extremely vague and imprecise. Therefore, the proposal of the Federal Antimonopoly Service for the improvement of the antimonopoly legislation by the creation of a separate chapter on unfair competition, which would describe to the list of unfair competition acts more fully, which examined in detail every kind of unfair actions is assumed to be reasonable. It would be useful to learn from the experience of the European Union for the legal regulation of unfair competition in Russia. For example, the Directive 2005/29/EC contains a list of unfair competition acts (31 position) but if a case is beyond the scope of the list, the general clause applies. At that the decisive factor for the qualification of actions will be the rule stated in Art. 10-bis of the Paris Convention concerning the respectability and reasonableness (Chudinov, 2007).

The concept of unfair competition implies that the relevant acts include not only a requirement of fairness,

reasonableness and justice of actions as well as the manifestations, contrary to Russian legislation and business turnover traditions and, among other things, the Article 14 of the Law concerning the Protection of Competition provides for an open list of unfair competitive acts. At that, we should not discard the possibility of right abuse structure against the unfair competition, as according to the p. 9 of the Article 4 of the Law on protection of competition the definition of unfair competition provides such an attribute of a defined phenomenon as the contradiction to the requirements of fairness, reasonableness and justice of action. The subject of the right abuse, responsible at the same time by the sign of unfair competition, may specify a different subjective right to a specific object, such as the exclusive right to the means of individualization (Roubier, 1948).

Summary: Now a days, the legal regulation of such complex phenomenon as unfair competition, needs to be improved due to the development and complexity of economic relations.

On the basis of these studies some recommendations for improving the legal regulation of this phenomenon were revealed. Thus, we may talk about the need for Russian fragmented definition of unfair competition in conjunction with the provisions of the Paris Convention for the Protection of Industrial Property. Also, Russian legislation together with the use of general torts, shall specify the legislatively stated acts of unfair competition. Moreover, it is worth noting that an unfair competition includes both the actions in the form right abuse of rights and the breach of objective right. And the limit of unfair competition only by violation of objective law would reduce the efficiency of this phenomenon legal regulation.

CONCLUSION

Of course, such a complex and ambiguous phenomenon as unfair competition needs a legal regulation and the methods of this regulation should be improved due to the development and the complexity of economic relations. Legal regulation in different countries and legal systems is very different depending on the socio-economic and historical situation in the country. Today, there is no single general concept of unfair competition and it can not be produced due to differences in the law and also because of the constant change and increasing complexity of economic relations and thus, the emergence of new types of unfair competition actions. Due to this, there is no full definition of unfair competition in a number of countries and there is only a general prohibition, called the general tort. For a comprehensive definition of unfair competition at the legislative level, the

definition specified in the Federal Law "On Protection of Competition" is not enough because it defines the concept only in fragments. And, a more complete analysis of unfair competition acts should consider in addition to Federal legislation, the provisions of the Paris Convention for the Protection of Industrial Property.

We should also pay attention to the fact that the legislative acts of unfair competition are excessively broad and abstract. To avoid this and at the same time, an excessive narrowing of unfair competition definition that would deprive it of adequate application possibility, you must specify in the law the specific formulations on unfair competition actions and general tort. And in this case, it is reasonably supposed to be guided by the example of the Directive 2005/29/EC, containing a detailed description of the individual acts of unfair competition and the references to general tort stated in the Paris Convention.

Among other things, it should be pointed out that unfair competition includes the actions in the form of abuse of rights and the breach of the objective right laws. However, it is impossible to limit unfair competition only as the violation of objective law norms because it is difficult to observe all kinds of unfair competition acts manifestations and it would reduce the efficiency of its regulatory framework.

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