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APPLYING ADMINISTRATIVE RESPONSIBILITY FOR UNFAIR COMPETITION IN THE FIELD OF USE OLYMPIC AND PARALYMPIC SYMBOLICS

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The article deals with the problem of bringing to administrative responsibility for the illegal use of Olympic and Paralympic symbols. Identified and justified the necessity of changing the norms of substantive law, providing for a special truncated concept of unfair competition in relation to offences related to the illegal use of Olympic and Paralympic symbolics. As a solution the author suggests to exclude this norm of law.

Keywords: administrative responsibility, unfair competition, use of Olympic and Paralympic symbolics, the ratio of an administrative offence and penalties.

In this article, we will continue to explore the issue of administrative responsibility for illegal use of the Olympic and Paralympic symbols and criticism of provisions of the Federal Law No. 310-FL from December 01, 2007 "On the Organization and Hosting of the XXII Olympic Winter Games and XI Paralympic Winter Games of 2014 in Sochi, the Development of Sochi as a Mountain Resort and Amendments to Certain Legislative Acts of the Russian Federation" [3] (hereinafter - the Law No. 310-FL) on ensuring fair competition in connection with the Olympic and Paralympic games. If in the previous article [7] we studied the issue of legal protection the interests of victims and the Russian Federation providing protection of the rights and freedoms of an individual, in this paper we study the issues of fairness and

reasonableness of statutory regulations (regarding proportionality of punishment to committed offense) in relation to persons subjected to punishment for committing offenses in this area.

The reason for this kind of thinking was the high-profile court case No. A40-105222/11 on a petition of LLC "Dzheneral Motorz Deu Avto and Tekhnolodzhi SNG" (hereinafter – the Company, the Claimant) to the Federal Antimonopoly Service with participation of third parties: autonomous noncommercial organization "Organizing Committee of the XXII Olympic games, XI Paralympic games of 2014 in Sochi", LLC "Volkswagen Group Rus" on the invalidation of the decision, prescriptions and resolution on violating antitrust legislation made by the Federal Antimonopoly Service [5]. This case was considered in three instances, each of which supported the decision of the Federal Antimonopoly Service, in which LLC "Dzheneral Motorz Deu Avto and Tekhnolodzhi SNG" was found guilty of an administrative offense under part 2 of article 14.33 of the Code on Administrative Offences of the RF expressed in presence in the actions of LLC "Dzheneral Motorz Deu Avto and Tekhnolodzhi SNG" unfair competition, expressed in the introduction into circulation of goods with illegal use of intellectual property and equivalent means of individualization of a legal person, means of differentiation of products, works and services, and the Company was imposed an administrative penalty of a fine in the amount of 23,270,115 RUR in accordance with part 2 of article 14.33 of the CAO RF.

According to the circumstances of the case the Company has carried out an initial introduction to the circulation in the Russian Federation cars "CHEVROLET", in particular models of "EPICA" and "CRUZE", with the body color "Olympic White". The Company used this verbal designation in booklets on cars «CHEVROLET», and on the websites of car dealers of the brand «CHEVROLET» in the Russian Federation. Verbal designation "OLYMPIC" is a protected word element of a combined trademark belonging to the International Olympic Committee the rights to the use of which must be settled in a contract between the Company and the International Olympic Committee or the ANO "Organizing Committee of the XXII Olympic games, XI Paralympic games of 2014 in Sochi". But the question is why the Company was imposed such a high fine – in the amount of 23,270,115 RUR, and can actions of the offender be considered as an unfair competition?

According to paragraph 9 of article 4 of the Federal Law No. 135-FL from July 26, 2006 "On Protection of Competition" [2] (hereinafter – the Law "On Protection of Competition") by unfair competition is understood any actions of economic entities (groups of persons) that are intended to receiving benefits in entrepreneurial

activity, contrary to the legislation of the Russian Federation, usual and customary business practices, requirements of fairness, reasonableness and justice and have caused or may cause damage to other economic entities –competitors, or have been or may be harmful to their business reputation.

In part 1 of article 8 of the Law No. 310-FL is given a different interpretation of the concept of unfair competition in the application area of the mentioned Law. By unfair competition is understood the sale, exchange or other introduction of goods involving unlawful use of Olympic and/or Paralympic symbols, and misrepresentation, including by creating a false impression that a manufacturer or an advertiser of goods is associated with the Olympic Games and/or the Paralympic Games, including in the capacity of a sponsor.

As pointed out by the Higher Arbitration Court of the RF in paragraph 16.2 of the Resolution of the HAC RF Plenum "On some Application Issues of the Special Part of the Code on Administrative Offences of the Russian Federation" [4] (hereinafter – the Resolution of the HAC RF Plenum) the norm of the Law No. 310-FL "is special with respect to paragraph 9 of article 4 of the Law "On Protection of Competition". Given this, such acts are recognized as unfair competition also in the event that they do not lead and cannot lead to the consequences referred to in paragraph 9 of article 4 of the Law on Protection of Competition". Thus, in order to bring a person to administrative responsibility under part 1 or part 2 of article 14.33 of the CAO RF, the law enforcer is not obliged to prove either (1) a presence of action (or inaction) tendency of a person to receive benefits in carrying out entrepreneurial activities, or (2) the fact of infliction or possibility to inflict damage to other economic entities –competitors, or the fact of infliction or possibility to hurt their business reputation, which are mandatory elements. Is such interpretation of the concept of unfair competition and, consequently, truncation up to formal offenses under part 1 and part 2 of article 14.33 of the CAO RF justified? According to the author, it was possible to avoid prosecution exactly under part 2 of article 14.33 of the CAO RF and the imposing of such disproportionate in relation to the deed punishment in the form of a fine in the amount of 23,270,115 RUR, if the necessity in proving the above circumstances still had the place to be.

Were the actions of the Company aimed to receiving benefit in entrepreneurial activity? In considering the case before the Commission of the Federal Antimonopoly Service on the consideration of the violation of antitrust law the Company said that "the name of the color of a car is unable to provide the Company with the benefits of the product market, because it is not a significant factor for wholesale and retail customers in choosing car model, the manufacturer or seller of a car, as

opposed to the price factor, technical characteristics, reputation of the manufacturer, the quality of service and warranty service. This argument, in the opinion of the Company, is confirmed by sociological survey on the topic "Identification of the most important, according to respondents, characteristics of a car", conducted by JSC "All-Russian Public Opinion Research Center" (hereinafter - the ARPORC), commissioned by the Company" [6]. The counter-evidence of the anti-monopoly authority was the fact that in our case the "orientation to receive the benefits of entrepreneurial activity is expressed in the use by the Company as a means of individualization for color of cars introduced into circulation in the Russian Federation the Olympic symbols, the use of which is allowed only on the grounds of contracts with International Olympic Committee and / or the ANO "Organizing Committee "Sochi 2014", in order to attract consumer interest in products offered for sale, given the known fact of hosting in the Russian Federation of the XXII Olympic winter games 2014 in Sochi" [6].

Frankly, it is difficult to imagine a situation where the name of the color would affect the consumer's decision to buy a particular car, even with the undeniable popularity of the Olympic Games. It should be noted that the Arbitration Court of Moscow in its decision did not use the counter-evidence of the anti-monopoly authority regarding the specified argument of the Company, but merely pointed out that it was needed to install only the fact of illegal use by the economic entity of Olympic and / or Paralympic symbolism.

Could the actions of the Company lead to the infliction of damages to a competitor or causing harm to its business reputation? Anti-monopoly authority identified that the only economic entity with the right to use Olympic symbols when introducing into circulation in the Russian Federation vehicles was LLC "Volkswagen Group Rus", which was involved by the court to participate in the proceedings as a third party, not declaring independent claims on the subject of the dispute. LLC "Volkswagen Group Rus" in the hearing by words of mouth supported defendant's position, pointing to the legality and validity of the contested decision and prescriptions of the Russian FAS; however, it focused attention of the Court on the fact that LLC "Volkswagen Group Rus" had not suffered any losses from illegal, according to the anti-monopoly authority, actions. Hence, "Volkswagen Group RUS" would hardly suffer any losses in the future. It is also seen that business reputation of LLC "Volkswagen Group Rus" was not affected.

Thus, in author's opinion, the above arguments sound convincing enough, and the anti-monopoly authority could not prove the presence in actions of the Company of unfair competition within the understanding of the Law "On Protection

of Competition". In this case, the Company could be subject to administrative responsibility for unlawful use of someone else's trademark, service mark, appellation of origin or similar designations for homogeneous goods, which is provided for by article 14.10 of the CAO RF. The signs of the offense indeed have been proven because the Company used the registered trademark without the conclusion of an appropriate agreement with the copyright holder. Consequently, the punishment would have been much less – up to forty thousand rubles with confiscation of items containing illegal reproduction of the trademark, that is, brochures and leaflets, in which was stated the name of the color "Olympic White".

The Higher Arbitration Court in an attempt to somehow legally justify the use of a special concept of unfair competition under the Law No. 310-FL, in paragraph 16.1 of the Resolution of the HAC RF Plenum stated that "when considering of the question of whether was the particular action committed by a person an act of unfair competition, shall be subjected to accounting not only the mentioned legal provisions, but also the provisions of article 10bis of the Paris Convention for the protection of Industrial Property [1], according to which the act of unfair competition is any act of competition contrary to honest practices in industrial or commercial matters" [4]. But then the question arises about what Russian practices in industrial and commercial matters is in question? In many European countries such practices are anyway supported by a common repute, the use in business turnover or reference to in judicial practice. There is no such a practice in the Russian Federation, and the direct application of article 10bis of the Paris Convention would not be entirely justified.

We also consider it necessary and interesting to apply for example of the normative-legal acts of other countries in the sphere of protection Olympic symbols, in particular, to the normative-legal acts of the UK, as a state with a longer history of protection Olympic symbols and, of course, because it is in the UK most recently in 2012 were held Summer Olympics.

Act of 1995 on the protection Olympic symbols [8] regulates in more detail the provisions about what is meant by illegal "controlled use" and how such use is expressed. But we note only that, according to article 8 of the specified Act, a person may be convicted for illegal use of Olympic symbols only if its actions are aimed at extracting benefits for themselves or another person or the person has the intention to cause damage to someone else. These signs actually bear the same meaning as the common signs of unfair competition in Russia.

Thus, the author sees no prerequisites to the application in relation to the use of Olympic symbols special truncated concept of unfair competition under the Law

No. 310-FL, and the example described in this article shows injustice of application sanctions provided for by part 2 of article 14.33 of the CAO RF for actions, which in fact are not an unfair competition.

The solution seems simple – delete part 1 of article 8 of the Law No. 310-FL, which provides for the special concept of unfair competition. In this case, a person may be held administratively liable for unfair competition only at presence of all its signs and upon the occurrence of the circumstances specified in the law "On Unfair Competition". As a result, depending on the actual circumstances, a person can be brought to administrative responsibility for an offense related to the illegal use of the Olympic and Paralympic symbols:

1. Under article 14.10 of the CAO RF for unlawful use of someone else's trademark, service mark, appellation of origin or similar designations for homogeneous goods; or

2. Under part 1 of article 14.33 of the CAO RF for unfair competition if these actions are not a criminal offense, excepting cases provided for in article 14.3 of the CAO RF and part 2 of article 14.33 of the CAO RF, the more so, that part 2 of article 14 of the Federal Law "On Protection of Competition" expressly provides for the inadmissibility of unfair competition related to the acquisition and use of exclusive rights to the means of individualization of a legal person, means of differentiation of products, works and services; or

3. Under part 2 of article 14.33 of the CAO RF for unfair competition, expressed in the introduction into circulation of goods with illegal use of intellectual property and equivalent means of individualization of a legal person, means of differentiation of products, works and services.

The legislator must always take care about how this or that new norm of law will be applied in practice, and if there are problems in its application – quickly respond by amending the law.

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