

Regulation of unfair competition and unfair advertising in CIS

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Unfair competition is one of the most common violations of antimonopoly regulation in most of the CIS countries. Often linked to infringement of intellectual property rights, unfair competition can create a significant threat not only to the reputation of companies, but can also negatively affect their business. Deceptive advertising represent a similar violation. Relevant violations are usually examined by the same competent state authority.

The articles in this brochure contain more detailed information about regulation of unfair competition and deceptive advertising at the national level in a number of post-Soviet countries. The articles were prepared by lawyers from Dentons' offices in the various CIS countries and by our partner, the K&P law firm (Armenia).

Information is presented in the brochure for the following jurisdictions:

Russia
Ukraine
Kazakhstan
Belarus
Azerbaijan
Uzbekistan
Armenia
Kyrgyzstan



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Russia

Protection against unfair competition and deceptive advertising has been and remains one of the overriding priorities of the business community and the state.

The concept of unfair competition is enshrined in Article 4(9) of the Federal Law on Protection of Competition (No. 135-FZ of July 26 2006; hereinafter, the Competition Law,) according to which it is defined as “any actions by business entities (a group of persons) that are aimed at obtaining advantages in the conduct of business activities, or that are contrary to the laws of the Russian Federation, usual and customary business practices and requirements of integrity, reasonability and fairness and have inflicted or could inflict damages on competing business entities or have harmed or could harm the goodwill thereof.”

The competent and authorized agency for the protection of rights of competitive entities in administrative proceedings in the Russian Federation is the Federal Antimonopoly Service of Russia (hereinafter, FAS Russia.) A decision rendered by FAS Russia in administrative proceedings is not final in nature and may be appealed to a court. That being said, in the settlement of disputes, parties often turn to the administrative procedural form of protection (i.e., to FAS Russia) owing to minimal costs for the claimant.

The Competition Law contains five forms of unfair competition, although given the contemporary environment, as a matter of practice the forms of unfair competition are far more varied than those contemplated by the lawmaker. Clearly, therefore, the list of forms of unfair competition remains open-ended.

Furthermore, RF Supreme Commercial Court Plenum Ruling No. 11 of 17 February 2011 “On various matters of the application of the Special Part of the Code of Administrative Offenses of the Russian Federation” (hereinafter, “RF Supreme Commercial Court Plenum Ruling No. 11”), has indicated that, apart from the Russian

legislation, account should also be given to Article 10bis of the Paris Convention for the Protection of Industrial Property,¹ by virtue of which any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

It should be noted that the package of amendments² to the Competition Law (hereinafter, the 4th Antitrust Package) coming into effect on 10 January 2016, contain provisions designed to clamp down on unfair competition. In accordance therewith, FAS Russia may adopt decisions on antitrust regulatory matters more expeditiously, and, in addition, certain clauses define the various forms of unfair competition in greater detail. The amendments identify seven types of unacceptable unfair competitive practices and specify which actions relate to each of them, although, in essence, these changes are not substantive and are more of a formal reflection of the accepted practice.

The Russian legislation imposes administrative and criminal liability for unfair competition. Administrative liability is imposed by Article 14.33 of the Code of Administrative Offenses of the Russian Federation (No. 195-FZ of December 30, 2001; hereinafter, the “RF Administrative Code”). The provisions of Article 14.33, part 1 of the RF Administrative Code limit the fine amount to 500,000 rubles. Part 2 provides for the possibility of the fine being charged in proportion to the proceeds which the violator has received from the sale of goods. In addition, with the entry into force of the 4th Antitrust Package, the fine for officers will be increased to 50,000 rubles in place of the current 20,000 rubles (Art. 14.33, part 2 of the RF Administrative Code).

It should be noted that, in the event that a business entity’s actions are classified on the basis of Article 14 of the Competition Law and subsequently on the basis of Article 14.33, part 1 of the RF Administrative Code, there does not need to be any actual consequences for competition or for third parties. In order to impose

administrative sanctions on a person, it is sufficient for the latter to have actually engaged in unfair competition. A specific example of this is the position of the RF Supreme Commercial Court, as set out in RF Supreme Commercial Court Ruling No. 3255/11 of July 19, 2011. The court indicated that, if the illegal use of the Olympic symbols is classified as a violation in accordance with Article 14.33 of the RF Administrative Code, no adverse consequences for competition need to occur. The provisions of Articles 7(3) and 8(1) of the Federal Law on Organizing and Holding the XXII Winter Olympic Games and the XI Winter Paralympic Games in 2014 in the City of Sochi, the Development of the City of Sochi as an Alpine Resort and Amending Certain Legislative Acts of the Russian Federation (No. 310-FZ of December 1, 2007), which are special provisions vis-à-vis Article 4(9) of the Competition Law, do not presume a need for consequences to occur.

One of the forms of unfair competition is illegal use of a trademark, for which criminal liability is imposed under Article 180 of the Criminal Code of the Russian Federation (No. 63-FZ of June 13, 1996; hereinafter, the RF Criminal Code”) (a fine in an amount up to 300,000 rubles, compulsory, corrective or forced labor and/or imprisonment for a term of up to two years).

The practice in unfair competition cases is quite varied. Most common are cases in connection with the misuse of the intellectual properties and equivalent means of identification of a legal entity or means of identification of products, work or services. This notwithstanding, one also sees other, no less contradictory and interesting cases, such as, for example, the Second Commercial Court of Appeals Ruling No. 02AP-562/2015 of March 27, 2015, in case No. A82-7354/2014, where, in the court’s opinion, based on the construction of the offense provided for by Article 14.33, part 1 of the RF Administrative Code, in order to impose administrative sanctions it is sufficient for there to be, among other things, the possibility of infliction of damages on a business entity or harm to its goodwill, not the actual presence of such.

In summarizing the established practice in applying the law in unfair competition cases, it is important to note that, in general, the lawmaker’s reference to value judgments leaves open the possibility of differing interpretations of the actions of business entities both by their competitors and by FAS Russia, which are free to define independently the concepts of integrity, reasonability and fairness.

It should be kept in mind that the 4th Antitrust Package clarifies that the Competition Law will not apply to relationships with respect to monitoring compliance with the uniform rules for competition in cross-border

markets, which is handled by the Eurasian Economic Commission, although at present there is no practice in such cases.

Unfair competition and improper advertising

Article 3 of the Federal Law on Advertising (No. 38-FZ of March 13, 2006; hereinafter, the Advertising Law) states that improper advertising is advertising that does not conform to legislative requirements. This includes both advertising not conforming to the general requirements (e.g., Arts. 5 and 7 of the Advertising Law), and advertising not conforming to the special requirements for the advertising of particular products or services (Arts. 21–30 of the Advertising Law). Recognized as improper (deceptive) advertising is, among others, advertising that constitutes an act of unfair competition (Art. 5(1)(4) of the Advertising Law).

As has already been noted, administrative liability for unfair competition is imposed by Article 14.33 of the RF Administrative Code. However, the commission of the respective actions comprising a violation of the laws on advertising, by virtue of part 1 of the given article, entails the administrative liability provided for by Article 14.3 of the RF Administrative Code (an administrative fine in an amount up to 500,000 rubles).

In practice, the delineation between the concepts of unfair competition and improper advertising is not always clear. The regulatory body in both cases is FAS Russia, and the court judgments resulting from the hearing of the respective cases contain various (but not consistent) grounds for the recognition of particular actions as acts of unfair competition and improper advertising. Notably, false comparisons of products, the dissemination of information harming goodwill and misleading as to product features may be classified as either unfair competition or improper advertising. In most cases in practice, the courts and the antitrust authorities are not unanimous on the matter of the conflict in question. Certain courts generally do not see any distinction in the application of the two laws, believing that one action may violate the provisions of both of them.

In some of its decisions, FAS Russia avoids giving reasons for the choice between the advertising and antitrust legislation in cases of unfair competition. If a complainant’s claim contains references to both laws, then the antitrust authority first chooses one of them and then reviews the case on the merits. As a rule, the Advertising Law is applied as a special regulatory act (and, consequently, is given preference in the absence of other relevant circumstances).

Returning to the relationship between the concepts of unfair competition and deceptive advertising, it should

be noted that this issue was examined back in 2012. At that time, the RF Supreme Commercial Court Plenum rendered RF Supreme Commercial Court Plenum Ruling No. 58 of October 8, 2012, "On various matters of the commercial courts' practical application of the Federal Law on Advertising" (hereinafter, RF Supreme Commercial Court Plenum Ruling No. 58,) which is dedicated to the consideration of disputes involving a violation of the Advertising Law.

According to section 7 of RF Supreme Commercial Court Plenum Ruling No. 58, when delineating the scope of application of the Advertising Law and the Competition Law, the courts should proceed on the basis that, if advertising contains false, inaccurate, or distorted information that could inflict damages on a business entity or harm its goodwill, a false comparison by a business entity of the products made or sold by it with products made or sold by other business entities that are in competition with such entity, as well as other information whose dissemination meets the criteria for unfair competition, then the administrative sanctions imposed by Article 14.3, rather than Article 14.33 of the RF Administrative Code (unfair competition), are applied.

This concept was elaborated upon in FAS Russia Letter No. AK/25319/14 of June 25, 2014 (hereinafter, the "FAS Russia Letter"): if information contains misrepresentations or a false comparison, misleads consumers and is being disseminated solely in advertising, then it should be evaluated for conformity to the laws on advertising; if it is being disseminated both in advertising and by other means in the process of product marketing, it should be evaluated for conformity to the antitrust laws (with respect to unfair competition).

In other words, in order to eliminate the conflict, it is suggested to apply the provisions of the Advertising Law as special provisions vis-à-vis the general provisions of the Competition Law.

Owing to the fact that a significant number of violations of the competition laws are committed through the dissemination of improper advertising, the regulatory targets of the competition laws and the advertising laws are largely similar. The criteria for deceptive advertising, and the actions that are cited by the Competition Law as examples of acts of unfair competition, are practically identical, all the way up to one of the grounds for the recognition of advertising as deceptive being that such advertising is deemed to be an act of unfair competition.

In practice, if a violator's actions contain both elements (unfair competition and improper advertising), it is prosecuted for deceptive advertising. This is primarily related to the fact that prosecution for unfair competition requires (i) the presence of a competitive relationship between the business entities (the complainant/claimant and the respondent) and (ii) the presence of actually inflicted or potential damages attributable to the violator's actions. Actually proving concrete damages is not always possible from a practical perspective.

Contact

Marat Mouradov

Partner, Head of Dentons' Russian Competition practice
T +7 495 644 05 00
marat.mouradov@dentons.com



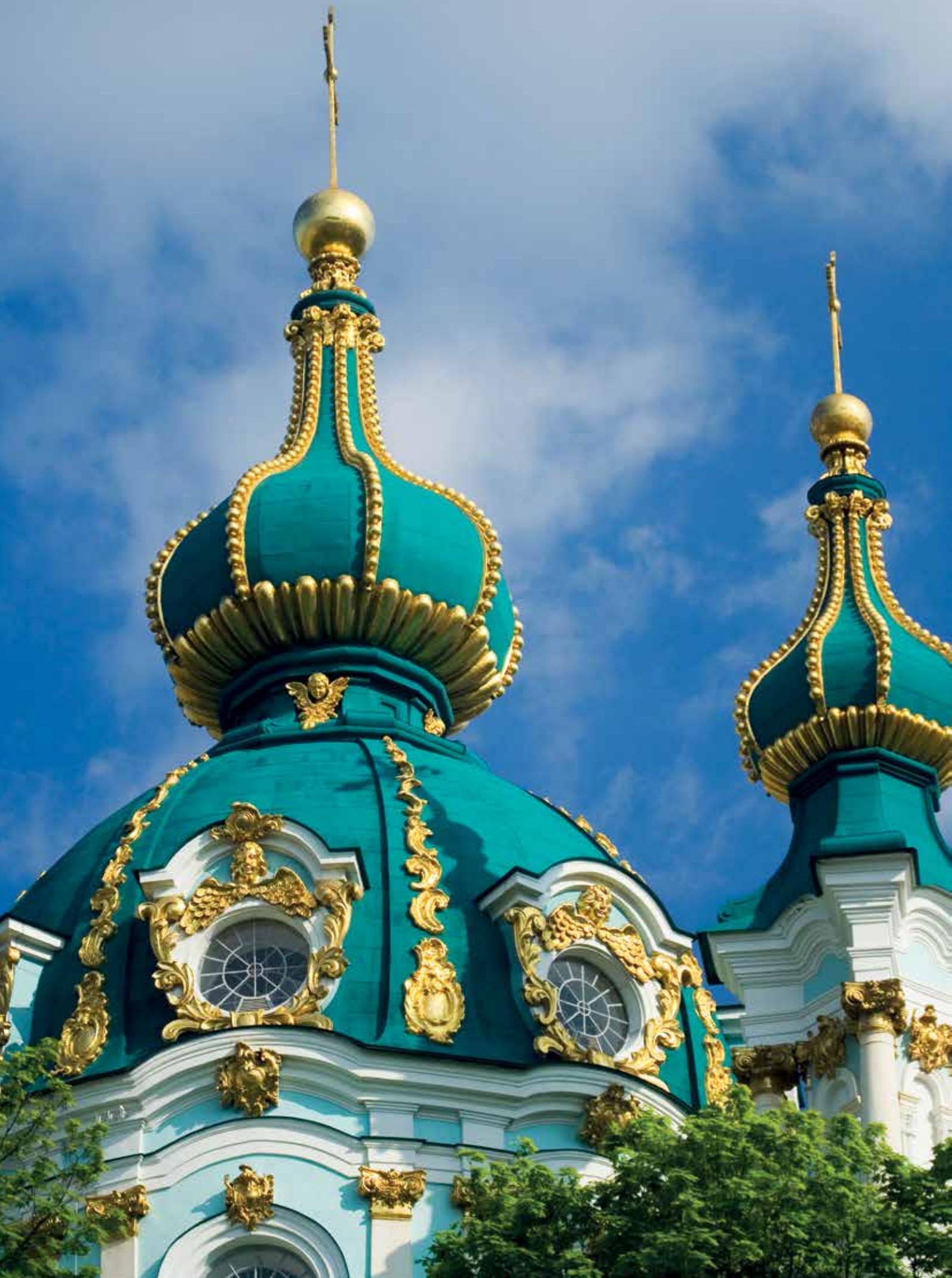
Contact

Snezhana Sharova

Associate
T +7 495 644 05 00
snezhana.sharova@dentons.com



¹ Convention for the Protection of Industrial Property (Paris, March 20, 1883)
² The Federal Law on Amending the Federal Law on Protection of Competition and Certain Legislative Acts of the Russian Federation (No. 250-FZ of July 13, 2015)



Ukraine

The main source of legal regulation for protection against unfair competition in Ukraine is the Law of Ukraine "On Protection Against Unfair Competition."

According to that law, unfair competition is considered to be any actions in competition that are contrary to commercial and other honest customs in business. The law sets forth a sample list of actions that meet the criteria for unfair competition. Such actions are:

- The illegal use of designations (a name, corporate name, trademark), promotional materials, design of packaging for products and periodicals or other designations without the consent of the business entity that started to use those or similar designations in its business earlier, if such illegal use led or could lead to confusion with the activities of that business entity
- The illegal use of another manufacturer's product
- Copying the visual appearance of a product
- Comparative advertising (advertising containing a comparison with products, work or services or the activities of another business entity)
- Discrediting a business entity (any form of dissemination of false, inaccurate or incomplete information related to a person or activities of a business entity)
- Inciting the boycott of a business entity by its competitor
- Inciting a supplier to discriminate against a customer by its competitor
- Bribing an employee or officer of a supplier by a competitor of its customer to keep them from performing or concluding a contract with that customer

- Bribing an employee or officer of a customer by a competitor of its supplier to keep them from performing or concluding a contract with that supplier
- Achieving inappropriate advantages in competition by violating effective legislation, if the violation is confirmed by a decision of a governmental authority
- Dissemination of misleading information
- Inappropriate collection, disclosure and use of a trade secret, if this has inflicted or could inflict damages on the holder of the secret.

The Antimonopoly Committee of Ukraine (the ACU) is the governmental authority assigned functions to protect against unfair competition. The ACU is entitled to impose a fine for unfair competition of up to five percent of the violator's income for the year preceding the year in which the fine is imposed. The ACU may also file a claim in court to confiscate illegally copied or labeled goods, demand a retraction of false, inaccurate or incomplete information, and demand the cessation of activities that meet the criteria for unfair competition. Persons who have been affected by unfair competition are entitled to demand compensation of inflicted damages in court.

According to the ACU's annual reports, unfair competition accounted for 10-15 percent of the total number of violations of competition law identified by the Antimonopoly Committee of Ukraine in 2010-2015, and up to eight percent of the fine amounts imposed. The largest fine imposed by the ACU for unfair competition was UAH 7.62 million.

80-90 percent of cases of unfair competition identified by the ACU in 2010-2015 involved dissemination of misleading information (Article 151 of the Law on Protection Against Unfair Competition). It can be noted that this type of unfair competition appeared in the

law only in 2009 and immediately became the most “popular” offense of all types of unfair competition.

The Law on Protection Against Unfair Competition defines dissemination of misleading information as communication by a business entity, either directly or through another person, to one or more persons or to the general public (including in advertising) of incomplete, inaccurate or false information as a consequence of the method chosen to present it, suppression of certain facts or unclear wording, if such information influenced or could influence the intentions of such persons to acquire or sell goods (work, services) of that business entity.

Article 15¹ of the Law on Protection Against Unfair Competition contains a sample list of misleading information. This includes information that:

- Contains incomplete, inaccurate or false information about the origin of a product, the manufacturer, seller, manufacturing process, source and method of purchase, sale, quantity, consumer properties, quality, configuration, suitability, standards, characteristics, specifics of selling the goods, work or services, price and discounts, and the essential terms of the contract
- Contains incomplete, inaccurate or false information about a business entity’s financial standing or business activities

- Ascribes authority and rights that it does not have, or a relationship that does not exist
- Contains a reference to volumes of production, acquisition, sale or supply of products, performance of work or provision of services that did not actually exist on the date the information was disseminated.

The largest fine for unfair competition, in the amount of UAH 7.62 million, was imposed precisely for dissemination of misleading information (in the form of false advertising). That fine was imposed in 2013 on the pharmaceutical company PJSC Farmak for television advertising of the Amizon drug that used the statement “nine out of ten Ukrainians choose Amizon.” The ACU decided that viewers could form the false impression that 90 percent was the percentage of all Ukrainians who are users of the Amizon drug. Actually, as the ACU found, according to the market research cited by PJSC Farmak, 90 percent was the percentage of people suffering from the flu, cold and cough who, at the same time, used the Amizon drug. According to the same market study, the percentage of all consumers who took Amizon was only 6.2 percent of their total number. The ACU also determined that during the advertising campaign, sales of Amizon increased significantly, and the dissemination of false advertising of the drug could have been a contributing factor.



The most widespread form of dissemination of misleading information is precisely advertising containing incomplete, inaccurate or false information (false advertising). It should be noted that Ukrainian law also has the concept of “deceptive advertising,” which is prohibited by the Law of Ukraine on Advertising. That law defines deceptive advertising as advertising that misleads or could mislead consumers of advertising, harm individuals, the state or society as a consequence of inaccuracy, unreliability, ambiguity, exaggeration, suppression or violation of the requirements as to the time, place and method of dissemination.

The legal classification of deceptive advertising differs somewhat from the classification of unfair competition in the form of misleading (false) advertising. In particular, in order to declare advertising deceptive it is not necessary to prove that it influenced or could influence the intentions of the consumers of that advertising regarding acquisition of the products being advertised. What is more, advertising may be deemed deceptive due to a violation of the requirements as to the time, place and method of dissemination.

Dissemination of deceptive advertising may be punishable by a fine of five times the cost of the advertising. If the deceptive advertising infringes consumer rights, then a fine is imposed by the State Inspectorate for Consumer Protection of Ukraine (Gospotrebinspektsiya). In 2012 Gospotrebinspektsiya fined the PJSC Darnitsa pharmaceutical company UAH 16 million for deceptive advertising of the Miramistin dermatological product. The claims were made not against the product as such, but exclusively to the format and contents of the advertising, as it misled consumers and also violated certain requirements of the advertising legislation.

On the whole, it can be noted that Gospotrebinspektsiya is far less active in fighting deceptive advertising than the ACU. The ACU reacts extremely negatively to advertising containing categorical statements that a product is unique, that it has special properties, and to advertising with such words as “the most,” “the best,” “the only,” “unique” and so forth.

An interesting and to some extent illustrative case in this context is that of LLC GlaxoSmithKline Healthcare Ukraine T.O.V., a member of the GlaxoSmithKline group. In 2014 that company was fined by the Volyn regional department of the ACU for dissemination of misleading information in the form of printing on toothpaste packaging and advertising, and using in television ads statements such as “dentists recommend Sensodyne,” “dentists of Ukraine recommend Sensodyne” and “recommended by dentists” using the image of a person

in a doctor’s coat. The dispute made it all the way to the Supreme Economic Court of Ukraine, which upheld the validity of the ACU’s decision (case No. 903/26/14 in the Unified State Register of Court Decisions). It should be noted that Ukrainian legislation expressly prohibits doctors from participating in and their images from being used in advertising for medicines and medical devices, which clearly does not include toothpaste. One of the findings of that case is the assertion that any exaggeration or suppression of facts, or their loose interpretation in product advertising may be construed as dissemination of misleading information.

Contact

Vladimir Monastyrskyy

Dentons Partner, Kyiv

T +380 44 494 4774

volodymyr.monastyrskyy@dentons.com



Borys Schwarzer

Associate

T +380 44 494 4774

borys.schwarzer@dentons.com





Kazakhstan

Unfair competition and deceptive advertising in Kazakhstan

In modern conditions, the existence of competition is one indicator of the normal development of a market economy and the most important means of regulating basic economic processes, including consumer satisfaction and protection. As a way of influencing the consumer using information in order to promote certain goods (work, services) on the market, advertising helps to support competition.

However, where there is effective competition, unfair competition can also occur, although it is prohibited by the Entrepreneurial Code of the Republic of Kazakhstan (the **Entrepreneurial Code**). Moreover, a certain number of violations of the Entrepreneurial Code are committed by the dissemination of misleading, deceptive and inaccurate advertising (hereinafter **Improper Advertising**). Signs of such advertising are established in accordance with the Law of the Republic of Kazakhstan on Advertising (the **Advertising Law**).

Unfair competition

According to the Entrepreneurial Code, unfair competition means any action in competition aimed at achieving or giving undue advantages. Unfair competition includes the following actions:

1. Unlawful use of means of identification of goods, work, services and copyrighted items
2. Unlawful use of another manufacturer's product
3. Copying the visual appearance of a product
4. Discrediting a market participant
5. Misleading, deceptive and inaccurate advertising
6. Sale (acquisition) of goods with a tie-in

7. Calling for a boycott of the seller (supplier)
8. Calling for discrimination of the buyer (supplier)
9. Calling on a market participant to break a contract with a competitor
10. Bribing an employee of the seller (supplier)
11. Bribing an employee of the buyer
12. Unlawful use of information that constitutes a trade secret
13. Sale of goods with the provision of inaccurate information to the consumer as to the nature, method and place of production, consumer properties, quality and quantity of goods and/or their manufacturers
14. False comparison by a market participant of goods produced and/or sold by it with goods produced and/or sold by other market participants.

Unlawful use of means of identification of goods, work, services and copyrighted items means the illegal use of somebody else's trademark, service mark, trade name, appellation of origin or similar designations for homogeneous goods or use of the titles of literary or artistic works, or periodicals without the permission of the copyright owner or authorized person, or use of packaging in a form which may mislead the consumer as to the nature, method and place of production, consumer properties, quality and quantity of goods, or with regard to their producers.

Unlawful use of another manufacturer's product means dealing in goods of another manufacturer under its own designation by changing or removing the manufacturer's designation without the permission of the copyright owner or authorized person.

Copying the visual appearance of a product means reproducing the visual appearance of a product of another market participant and dealing in it, which can mislead the consumer as to the manufacturer of the product. However, copying the visual appearance of a product or parts thereof is not recognized as illegal if such copying is due solely to its functional use.

Discrediting a market participant means dissemination of misleading, inaccurate information in any form related to the activities of a market participant.

Sale (acquisition) of goods with a tie-in means any actions of the seller (supplier) or the buyer to establish additional requirements or conditions of the sale (acquisition) of goods that infringe upon the rights of the seller (supplier) and the consumer, and which by their nature or according to business practice do not relate to the subject of the transaction.

Calling for a boycott of the seller (supplier) or its product means actions organized by a competitor, either directly or through an intermediary, aimed at getting buyers to refuse to enter into contractual relations with the seller (supplier), or to purchase its products.

Calling for discrimination of the buyer (supplier) means actions by a competitor of the buyer (the supplier), either directly or through an intermediary, aimed at forcing the supplier (the buyer) to refuse to sign an agreement or at the application of discriminatory conditions to other customers (suppliers) under equivalent contracts.

Calling on a market participant to break a contract with a competitor means actions of a market participant aimed at non-performance or improper performance of the contractual obligations of another market participant that is a party to a contract with a competitor by giving or offering, directly or through an intermediary, material consideration or other advantages or taking unjustified actions to prevent a market participant from performing its activities.

Bribing an employee of the seller (supplier) means a competitor of the buyer giving him, directly or through an intermediary, property or non-property benefits for improper performance or non-performance by the seller's (supplier's) employee of his official duties, which results or may result in the buyer's competitor receiving certain advantages over the buyer and/or losses of the buyer.

Bribing an employee of the buyer means a competitor of the seller (supplier) giving him, either directly or through an intermediary, property or non-property benefits for improper performance or non-performance by an employee of the buyer of his official duties, which results or may result in the seller's (supplier's) competitor

receiving certain advantages over the seller (supplier) and/or losses of the seller (supplier).

Unlawful use of information that constitutes a trade secret means using information that in accordance with the legislation of the Republic of Kazakhstan constitutes a trade secret, in entrepreneurial activity without the permission of the right holder.

Misleading, deceptive and inaccurate advertising—as stated above, the signs of such advertising are established in accordance with the Advertising Law. Accordingly, in order to establish a fact of violation of the legislation on unfair competition, it is necessary to prove a violation of the legislation on advertising which is the basis of the relevant provision of the Entrepreneurial Code. The signs of such advertising will be discussed below.

Misleading, deceptive and inaccurate advertising

The Advertising Law provides for the concept of "improper advertising," which means advertising which violates the legislative requirements with regard to its content, time, place and method of dissemination and placement. Improper advertising includes the following kinds of advertising:

- Deceptive advertising
- Inaccurate advertising
- Unethical advertising
- Misleading advertising
- Hidden advertising

Deceptive advertising is advertising which:

- Contains a comparison of the advertised goods (work, services) with the goods (work, services) of other individuals or legal entities, as well as statements or images discrediting their honor, dignity and goodwill
- Misleads consumers regarding the advertised product by copying the trade name, trademark, brand packaging, visual appearance of goods, formulas, images and other commercial designations used in the advertising of other products or by abuse of consumers' trust
- Contains indications or statements the use of which in entrepreneurial activity may be misleading as to the nature, manufacturing process, properties, suitability for use or quantity of the goods (work, services)
- Discredits, humiliates or ridicules individuals or legal entities who do not use the advertised goods (work, services)

- Advertises goods prohibited from advertising by the legislation of the Republic of Kazakhstan, if such advertising is carried out under the guise of advertising another product, the trademark or service mark of which is identical or confusingly similar to the trademark or service mark of goods prohibited from advertising, as well as under the guise of advertising of the manufacturer or seller of such goods.

Inaccurate advertising is advertising which contains false information in respect of:

- Such product characteristics as the nature, content, method and date of manufacture, the purpose, consumer properties, conditions of use, existence of a certificate of conformity, certification marks and marks of conformity with national standards, quantity, origin
- Availability of products in the market, the possibility of acquiring them at a certain place
- The cost (price) of products and additional terms of payment as of the time of the dissemination and placement of the advertisement

- Delivery, exchange, return, repair and maintenance of the products
- The warranty liabilities, service life, expiry date
- The expected results of use
- The exclusive rights to intellectual properties and equivalent means of identification of a legal entity, products, work or services
- The rights to use state symbols (emblem, flag, anthem) as well as symbols of international organizations
- Official recognition, receipt of medals, prizes, diplomas and other awards
- Provision of information on how to acquire a complete batch of products, if it is part of a batch
- The results of studies and tests, scientific terms, quotations from technical, scientific and other publications



- Allegations about the goods (work, services) or business activity which discredit an individual or legal entity, industrial or commercial activity of other persons
- Statistical information which may not be provided in a form exaggerating its validity
- The status or level of competence of the manufacturer or the seller of goods (work, services) or persons advertising the same.

Unethical advertising is advertising, which:

- Contains textual, visual and audio information that violates generally accepted standards of humanity and morality by the use of insulting words, comparisons and images with respect to race, nationality, language, occupation, social status, age, gender, religious and political beliefs of individuals
- Discredits items of art, culture or historical monuments, which are national or world heritage
- Discredits state symbols, the national currency of the Republic of Kazakhstan or foreign currency or religious symbols.

Misleading advertising is advertising by means of which the advertiser (advertising producer, advertising distributor) deliberately misleads the consumer of the advertising.

Hidden advertising is advertising which has an unconscious effect on the consumer's perception and instincts in radio, television, video, audio productions and films, and in other products, including through the use of video inserts, double sound recording and other means.

Competent state authorities

The state authority of the Republic of Kazakhstan carrying out management in the areas of protection of competition is the Committee for Regulation of Natural Monopolies and Protection of Competition of the Ministry of National Economy of the Republic of Kazakhstan and its territorial bodies (hereinafter the antitrust authority.)

State regulation in the area of advertising is carried out by local executive bodies (akimats of the provinces, cities, districts and rural districts) and the Committee for Communication, Informatization and Information of the Ministry of Investment and Development of the Republic of Kazakhstan within its statutory competence.

Please note, however, that in respect of false, deceptive and inaccurate advertising as violations of the legislation on unfair competition control is carried out by the antitrust authority. It imposes administrative penalties, issues binding orders to eliminate violations of antitrust laws, etc.

Responsibility for violation of the legislation on unfair competition

In accordance with Article 163(2) of the Code of the Republic of Kazakhstan on Administrative Offenses (hereinafter **RK CoAO**), administrative liability is provided for violation of the legislation on unfair competition in the form of a fine in the following amounts:

- On small businesses¹ – 200 MC² (approximately US\$1,175³)
- On medium-sized businesses⁴ – 300 MCI (approximately US\$1,765)
- On large business⁵ – 1,500 MCI (approximately US\$8,815)

The antitrust authority is the state body authorized to make up administrative protocols and consider cases on facts of administrative violations of the legislation on unfair competition.

Please note that the RK CoAO also provides for separate responsibility for: violation of the Republic of Kazakhstan Advertising Law; misleading advertising; deceptive advertising of activities in the securities market; inaccurate advertising in the area of healthcare, etc.

Criminal liability for violation of competition law generally applies to monopolistic activity (anti-competitive agreements/concerted actions, abuse of dominance). With respect to a violation of unfair competition, responsibility for illegal use of a trademark is provided in the form of a fine in the maximum amount of up to 300 MCI (approximately US\$1,760) or correctional labor in the same amount, or engagement in public works for a period of up to two hundred forty hours, or imprisonment for up to 75 days.⁶

Criminal liability may arise for illegal use of a trademark when there is evidence of repeated or major damage:

- To an individual – in excess of 100 MCI (approximately US\$588)
- To an entity or the state – amounting to more than 1,000 MCI (approximately US\$5,875)

The antitrust authority rather actively investigates facts of violations of the legislation on unfair competition. For example, if during 2013, 51 market participants were brought to administrative responsibility, in the 1st quarter of 2014, 33 administrative cases were considered for various types of offenses related to the violation of the legislation on unfair competition.

The most common cases are cases in respect of market participants which sell (acquire) goods with a tie-in. These facts were revealed, for example, in the activities of a

number of construction companies in Astana. They were expressed through forcing buyers of apartments to buy parking places, conclude contracts with the management company and prepay utility services; and in the activities of a bank that imposed a condition on clients that they transfer all cash turnover and conduct all of their cash transactions only through its branches. Another example is the prosecution of a businessman providing services of installing entry phone systems maintained by only one company. Prohibiting entrance to a cinema house with food and drinks purchased outside of the cinema house was also deemed unfair competition.

In our practice, there are also cases related to unlawful use by competitors of trademarks and packages, when the guilty persons were brought to administrative responsibility.

With regard to the facts of inaccurate and misleading advertising, the number of detected violations is much smaller. Violations relate, for example, to a yogurt advertising clip, advertising of non-alcoholic beer by brewing companies, advertising on the website of a supermarket of product prices which did not correspond to the prices on the shelves and in the cash receipts and advertising of a cellular operator's services in which rates of competitors were compared.

Proposed changes in the legislation

Kazakhstan adopted the Entrepreneurial Code, which structurally included the previous law on Competition. In turn, the rules governing unfair competition were included in the Entrepreneurial Code without any changes or additions. The Code came into force on January 1, 2016, and the Competition Law was repealed.

Work is currently being done (including with the participation of Dentons representatives) on proposals related to changes in the legislative regulation of unfair competition. The basic aim of such changes is to establish a non-exhaustive list of actions relating to unfair competition by changing the concept of unfair competition to allow market participants to defend their rights against any unscrupulous actions of competitors.

Contact

Aigoul Kenjebayeva

Managing Partner, Dentons Almaty

T +7 727 258 2380

aigoul.kenjebayeva@dentons.com



Akylbek Kussainov

Associate, Head of Dentons'

Kazakhstan Competition Practice

T +7 727 258 2380

akylbek.kussainov@dentons.com



Elena Maksimenko

Associate

T +7 727 258 2380

elena.maksimenko@dentons.com



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- 1 Small businesses are unincorporated sole proprietors and legal entities that engage in private business, have not more than one hundred employees on average in a year and average annual revenue of not more than three hundred thousand monthly calculation indices set by the law on the budget of the Republic of Kazakhstan and in effect on January 1 of the financial year in question (Article 24(3) of the Entrepreneurial Code).
 - 2 1 monthly calculation index (MCI) = 2,121 Tenge
 - 3 The rate of the National Bank of Kazakhstan as of February 1, 2016
 - 4 Medium-sized businesses are sole proprietors and legal entities that engage in private business and are not classified as small or large businesses (Article 24(5) of the Entrepreneurial Code).
 - 5 Large businesses are unincorporated sole proprietors and legal entities that engage in private business and meet one or both of the following criteria: they have more than 250 employees on average in a year and/or average annual revenue greater than three million monthly calculation indices set by the law on the budget of the Republic of Kazakhstan and in effect on January 1 of the financial year in question (Article 24(6) of the Entrepreneurial Code).
 - 6 Article 222 of the Criminal Code of the Republic of Kazakhstan.



Belarus

Concept and forms of unfair competition

The concept of unfair competition is enshrined in the new Law on Combating Monopolistic Practices and Promoting Competition¹ (hereinafter – **Competition Law**,) which came into effect a little more than a year ago and is the main piece of legislation defining the organizational and legal framework for combating monopolistic practices and unfair competition in the Republic of Belarus.

In accordance with Article 1 of the Competition Law, *unfair competition* is understood as any actions by one or more business entities that are aimed at gaining advantages in the conduct of business activities, are contrary to the antitrust laws or the requirements of good faith and reasonability, and which could inflict or have inflicted damages on other competitors or could harm the goodwill thereof.

The principal sources of law defining the forms of unfair competition are the Civil Code of the Republic of Belarus² (the **Civil Code**) and the Competition Law. The list of forms of unfair competition given in the Civil Code and elaborated on in the Competition Law is not exhaustive.

The forms of unfair competition enshrined in the Civil Code largely coincide with the list given in Article 10bis of the Paris Convention.³ Inter alia, the Civil Code includes the following among the said forms of unfair competition: 1) all acts capable of *creating confusion* by any means whatsoever with respect to the establishments, goods, work, services or business activities of competitors; 2) *false allegations* in the conduct of business activities that are capable of discrediting the establishment, goods, work, services or business activities of a competitor; 3) *indications or allegations* the use of which in the conduct of business activities could be *misleading* as to the nature, characteristics, suitability for their purpose or quantity of the goods, work or services of a competitor.

The Competition Law elaborates on each of these three forms. In particular, the Competition Law includes the following among acts that are capable of creating confusion with respect to the establishments, goods, work, services or business activities of competitors:

- A business entity's illegal use of means of identification not belonging thereto on goods, the packaging thereof, signs, when demonstrating exhibits at exhibitions and trade fairs, in advertising materials, print media and other documentation, including the commercialization of goods with the illegal use of intellectual properties and means of identification of parties to business transactions or with the products thereof
- Illegal copying of the appearance of another business entity's product, except in cases where the copying of the product or parts (elements, details) thereof is due solely to the technical application thereof
- Unauthorized commercialization of another business entity's products using its own means of identification on the product.

The Competition Law includes the following among false allegations that are capable of discrediting the establishment, goods, work, services or business activities of a competitor:

- actions in the conduct of business activities that are capable of discrediting the establishment, goods, or business activities of a competitor, including as a result of a business entity disseminating, directly or through other entities, in any form and by any means, false, unreliable, inaccurate, or distorted information, including information that contains details impairing the goodwill of a business entity or a founder or employee thereof, and/or which could undermine the credibility of the business entity as a manufacturer of goods

- Appeals or calls to other business entities, other actions or threatened actions by a business entity, directly or through other entities, aimed at preventing a competitor from forming business relations, interfering with or terminating the same, impeding the business activities of a competitor that is active on the given market or is seeking to enter it, including for the purposes of entering into a business relationship with a business partner thereof.

The Competition Law includes the following among indications or allegations the use of which could be misleading as to the nature, characteristics, suitability for their purpose, or quantity of the goods, work, or services of a competitor:

- Actions in the conduct of business activities that could be misleading as to the manufacturer, nature, consumer attributes, quality, manufacturing process and location, suitability for their purpose, or quantity of a competitor's goods, including those being carried out by way of a *false comparison* of a product manufactured by a business entity with a competitor's product and the dissemination by a business entity, in any form and by any means, of information containing false or inaccurate comparative characteristics of its own product and a competitor's product that are capable of affecting the consumer's freedom of choice in the purchase of goods or conclusion of a transaction
- The dissemination by a business entity, in any form and by any means, of false assertions and information about its own product for the purposes of concealing the unsuitability thereof for its purpose or a discrepancy with the specified requirements therefor with respect to the quality or consumer and other attributes.

The Competition Law also regards as unfair competition and prohibits actions by a business entity, directly or through other entities, aimed at the *internal disruption of the business activities* of a competitor, including providing a competitor's employees with various material and other benefits in order to induce those employees not to perform employment duties or to switch to a job assuming such benefits, as well as actions intended to create a situation on the product market in which the business activities of a competitor that is active on the given market or is seeking to enter it will become unprofitable or will be carried out on terms that are extremely disadvantageous for it.

A completely new form of unfair competition that has been introduced by the Competition Law is unfair competition relating to *the acquisition and use of the exclusive right* to means of identification of parties to business transactions or products. In the context of this form of unfair competition, cases where the technically

legitimate use of trademarks (service marks) is for the sole purpose of limiting the rights of competitors that are selling similar products may be regarded as an act of unfair competition.

Concept and forms of deceptive advertising

The Republic of Belarus Law on Advertising⁴ (the **Advertising Law**) views deceptive advertising as one of the forms of inappropriate advertising. In accordance with the Advertising Law, deceptive advertising is understood as advertising containing false and other inaccurate information about the advertiser's product or line of business, the dissemination of which could lead to infringement of or does infringe the rights and legally protected interests of an organization or individual, including with regard to:

- The composition, manufacturing process and date, purpose, consumer attributes, conditions of use, availability of a conformity assessment document and conformity marks, quantity and place of origin, and other characteristics of a product
- The availability of a product on the market, the possibility of acquiring it in a certain quantity, or at a certain time and place
- The price and terms of payment for a product as of the placement (dissemination) of the advertisement
- The delivery, exchange, return, repair, and servicing of a product
- Warranty obligations, service life, expiration date, and/or shelf life of a product
- The official or public recognition of a product, the medals, prizes, certificates, and other decorations awarded thereto
- The provision of information on how to acquire a complete set of products, if it is part of a set
- The use of superlatives or other words creating the impression that a product has advantages over other products, if these are impossible to document
- The exclusivity of the rights to sell and/or service any product.

Relationship between the concepts of unfair competition and deceptive advertising

Owing to the fact that the Competition Law provisions do not contain an exhaustive list of acts of unfair competition, allowing for a discretion that is unusual in Belarusian law enforcement practice, it may be concluded that *any advertising may be regarded as an act of unfair competition* if it is aimed at gaining advantages in the conduct of business activities, is



contrary to the antitrust laws or the requirements of good faith and reasonability, or could inflict or has inflicted damages on competitors or has harmed the goodwill thereof. However, *not all of the forms of unfair competition specifically enumerated in the Competition Law are specifically forms of deceptive advertising*. Inter alia, for example, advertising that is untrue with respect to intellectual properties or a comparison of the rights or status of organizations with the rights or status of other organizations is regarded as *inaccurate advertising*, and advertising that disparages any organization or product, contains a comparison of the product being advertised with another organization's product or the organization being advertised with another organization, misleads the consumers of advertising, including by imitating the general composition or other elements used in the advertisement of another advertiser, is regarded as *unethical advertising*. Thus, advertising by which an act of unfair competition is carried out is covered by the term inappropriate advertising, of which deceptive advertising is one of the subspecies.

Competent government authorities

According to the Competition Law, the Department of Pricing Policy of the Ministry of the Economy of the Republic of Belarus (Office of Antitrust and Pricing Policy of the regional executive committees and the Minsk City Executive Committee) is the special authority empowered to review communications regarding violation of the competition legislation, to establish whether or not there is a violation of the competition legislation, to put a stop to such violations, to give binding orders, and to impose administrative sanctions for the violation of the competition legislation.

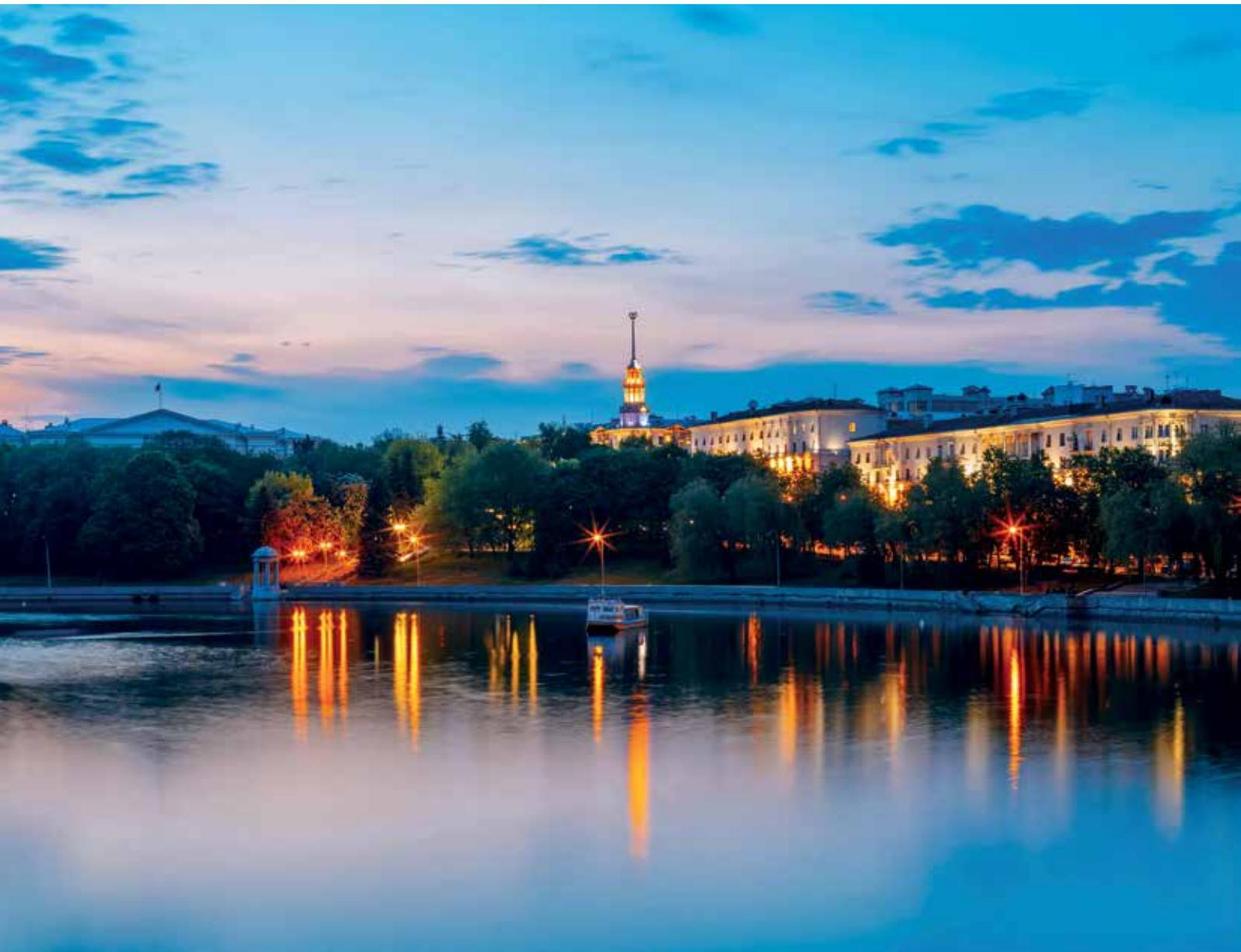
When deciding on the recognition of an agreement among legal entities as interfering with competition, the antitrust authority of the Republic of Belarus analyzes the following criteria as a whole:

- The presence of competitive relationships in the product market under consideration

- Evidence of unfair competition in a business entity's actions, contravention of the requirements of good faith and reasonability
- A business entity's actions being aimed at gaining advantages in the conduct of business activities
- The capability of a business entity's actions to inflict damages on other, competing business entities or to harm the goodwill thereof (or the actual infliction of such damages/harm).

In accordance with the Advertising Law and the Code of Enforcement Procedure for Administrative Offenses,⁵ the authority empowered to review communications (complaints) regarding violation of the advertising legislation is the Ministry of Commerce of the Republic of Belarus, which gives binding orders to eliminate violations of the advertising legislation and/or imposes administrative sanctions on the offender in the prescribed manner.

In this context, we deem it necessary to note that the Belarusian competition legislation does not contain clear instructions as to what constitutes adequate evidence of unfair competition that is sufficient for the antitrust authority to initiate proceedings in a case. Therefore, for an overwhelming number of complaints regarding violation of the antitrust legislation with regard to engaging in unfair competition, the antitrust authority closes the case owing to the failure to establish violations of the antitrust legislation, which in most cases is related to the complainant providing insufficient evidence required for examination of the matter of the violation of the legislation with regard to engaging in unfair competition.⁶ This circumstance, along with the lengthy and bureaucratic procedure for the consideration of cases on unfair competition by the antitrust authority, leads to business entities appealing to other government authorities (e.g., to the Ministry of Commerce) or the courts for protection of their rights that have been infringed by the unfair actions of third parties, with the third parties' actions being positioned as inappropriate advertising, infringement of the intellectual property rights or non-proprietary rights of the complainant, violation of the consumer protection legislation, etc.



Liability for unfair competition and deceptive advertising

Liability for the commission of actions constituting unfair competition under the antitrust legislation is imposed by Decree of the President of the Republic of Belarus No. 114.⁷ The commission of such actions restricting competition entails the imposition of a fine on an officer in an amount from 20 to 100 basic units,⁸ and on a legal entity – up to 10 percent of the proceeds from the sale of goods in the market for which the offense is committed for the calendar year preceding that in which the administrative offense was detected, or else for the portion of the calendar year in which the administrative offense was detected prior to the date of detection of the administrative offense if the offender did not conduct business for the sale of the given product (work, service) in the previous calendar year, but not less than 400 basic units.

An economic entity defending itself against the actions of an unscrupulous competitor may also petition a court to put a stop to the actions constituting unfair competition and for compensation of the damages inflicted on it under Article 1030 of the Civil Code.

The laws of the Republic of Belarus provide for, inter alia, criminal liability for violation of the antitrust legislation, although we are not aware of a single instance of the criminal prosecution of business entities on this ground.

Liability for the dissemination of deceptive advertising is provided for by the Advertising Law and the Code of Administrative Offenses.⁹ Namely, violation of the advertising legislation by an advertiser, advertising producer, or advertising distributor entails the imposition of a fine in an amount from 10 to 40 basic units on a sole proprietor, and from 20 to 50 basic units on a legal entity.

We note that the Belarusian advertising legislation does not contain a clear delineation of the areas of responsibility of the advertiser, advertising producer, and advertising distributor in connection with a violation of the advertising legislation. The Code of Administrative Offenses provides for the possibility of sanctioning all three of these entities for inappropriate advertising. The decision as to which of the entities involved in disseminating the advertising will be sanctioned is made in most cases based on whether each such entity has guilt in the commission of the offense.

However, it should be kept in mind that the commerce legislation provides for the responsibility of the owners of information resources providing services to commercial entities pertaining to those commercial entities' conducting of retail trade through an online store (e.g., owners of online store offering aggregator sites) to provide for the vendors' compliance with the requirements of the consumer protection legislation of the Republic of Belarus. In accordance with Resolution of the Council of Ministers No. 1207,¹⁰ noncompliance with the commerce legislation when selling products through an online store (e.g., indicating false information as to the composition, manufacturing process and date, and other characteristics of a product) is deemed to be a gross violation of the rules of commerce and entails suspension of the operation of online stores.

The Advertising Law also provides for the right of a person whose interests have been violated as a result of the production and/or placement (dissemination) of inappropriate advertising to file claims in court, including claims for financial compensation of the emotional damages caused by such violation.

Contact

Yana Chirko

Dentons associate, St. Peterburg

T +7 812 325 84 44

yana.chirko@dentons.com



- 1 Article 16 of the Republic of Belarus Law on Combating Monopolistic Practices and Promoting Competition (No. 94-Z of Dec. 12, 2013)
- 2 Chapter 68, Article 1029, clause 2 of the Civil Code of the Republic of Belarus (No. 218-Z of Dec. 7, 1998; amended on Dec. 31, 2014)
- 3 Paris Convention for the Protection of Industrial Property of March 20, 1883 (signed in Paris on Mar. 20, 1883)
- 4 Article 1 and Article 26, clause 1 of the Republic of Belarus Law on Advertising (No. 225-Z of May 10, 2007; amended on July 10, 2015)
- 5 Article 3.30, clause 64 of the Code of Enforcement Procedure for Administrative Offenses of the Republic of Belarus (No. 194-Z of Dec. 20, 2006; as amended and revised, effective as from July 23, 2015)
- 6 Inter alia, for example, based on the official information posted on the antitrust authority's website, in 2014 three cases were considered regarding violation of the antitrust legislation with respect to engaging in unfair competition: <http://www.economy.gov.by/ru/antitrust/result2014>
- 7 Section 1.4 of Decree of the President of the Republic of Belarus No. 114 of Feb. 27, 2012, "On various measures to strengthen state antitrust regulation and control"
- 8 As at Nov. 1, 2015, the amount of the basic unit is 180,000 Belarusian rubles (approximately US\$10 at the current official exchange rate of the National Bank of the Republic of Belarus).
- 9 Article 12.15 of the Code of Administrative Offenses of the Republic of Belarus (No. 194-Z of Apr. 21, 2003; amended on Apr. 28, 2015)
- 10 Resolution of the Council of Ministers of the Republic of Belarus No. 1207 of Dec. 19, 2014, "On certain issues of the consumer market"



Azerbaijan

Currently, the regulation of unfair competition in Azerbaijan is mainly carried out based on the Law of the Republic of Azerbaijan “*On Unfair Competition*” and to the lesser extent by the Law of the Republic of Azerbaijan “*On Advertising*.”ⁱⁱ

Among the stated objectives of the Unfair Competition Law are establishing the legal and institutional frameworks for preventing and eliminating unfair competition, creating legal grounds for fair business practice, and holding market players engaged in unfair competition responsible for their actions.

Definition and forms of unfair competition

The Unfair Competition Law provides the following definition of unfair competition – actions of market players aimed at achieving advantage in their entrepreneurial activities by engaging in illegal and unscrupulous methods, which may prejudice other market players (competitors) or worsen their business reputation.ⁱⁱⁱ

The following are the actions that were deemed by the legislator to be forms of unfair competition:

- Copying business activities of a competitor
- Discrediting economic activity of a competitor
- Interference with economic activity of a competitor
- Unfair trade practices
- Unscrupulous business behavior
- Actions aimed at deceiving or misleading consumers.^{iv}

Azerbaijani law lists a wide range of impermissible actions of market players aimed at deceiving or misleading consumers. These include:

- Dissemination of any information that might mislead consumers as to the origin, method of manufacturing, usage, quality and other properties of the product, the individual producer or characteristic of his commercial activities
- Use of unlawful advertising forms which influence the consumers’ choice
- Inaccurate comparison of goods, which can mislead consumer and publication of such information
- Supplying goods without appropriate distinctive signs or markings with the aim to mislead consumers about important properties of the product
- Concealing the fact that a product does not conform to its purpose or requirements applicable to it.^v

Deceptive and misleading advertising

The law considers an advertisement to be deceptive in the following cases:

- Making comparisons between qualitative and (or) quantitative indicators of goods of other manufacturers or vendors performing or capable of performing functions similar to those of the advertised product, mentioning the name and (or) specifying the goods of other market players
- Discrediting the honor, dignity and business reputation of the competitors by various means and methods

- Deliberately placing false advertisement for the goods
- Attempting to form a negative opinion about consumers who do not use the advertised product or who use competitors' products
- Illegal use of copyright and related rights, plagiarism of promotional materials for other goods
- Where the advertised product is likened to products of other manufacturers and vendors to the extent of misleading consumers
- Where there is a deliberate concealment of information about adverse effects of the advertised product on human health and the environment
- Dissemination of advertising by prohibited means and (or) methods, outside of places set by the relevant executive authority, or before or after the period established by the law in relation to certain products
- Using the product or a trademark, advertising of which in a specific manner or at a particular time and (or) a place is prohibited.

Because the Advertising Law was adopted a few months ago, there is not a sufficient number of examples of its application in practice, making spotting any enforcement trends impossible at this time. Nevertheless, the analysis of various press releases issued by the State Service for Antimonopoly Policy and Consumer Protection under the Ministry of Economy and Industry of the Republic of Azerbaijan, which is the competent governmental authority in charge of carrying out the regulatory oversight over compliance with the legislation on unfair competition and advertising,^{vi} permits making some tentative conclusions. Namely, it seems that the State Service for Antimonopoly Policy focuses its enforcement efforts mainly in the sphere of prevention of placement of deliberately false or misleading advertising, e.g. claims related to false discounts (practice of inflating retail prices before discounting them), claims related to 0 percent interest on sales by installments, using non-financial terms to demonstrate the alleged low cost of borrowing (e.g. "a loan for a price of one egg" campaign), etc.

The State Service for Antimonopoly Policy has broad powers in relation to the prevention of violations of the Law on Unfair Competition and the Law on Advertising and has the right to issue mandatory instructions to the market subjects and their officials demanding ceasing and desisting illegal actions and elimination of consequences of such illegal actions, application of financial sanctions and fines, as well as initiating court cases demanding forfeiture of ill-gotten gains obtained from engaging in unfair competition into the state budget and compensation of damages.^{vii}

Financial sanctions for violating the Unfair Competition Law in the form of misleading consumers applicable to market subjects, which includes deceptive and misleading advertising, is in the amount of up to 10 percent (and in case of recurrence during the subsequent years of this action - up to 20 percent) of total revenue (net of value added tax, excise tax and the simplified tax) generated from the sale of goods (performance of works and rendering of services) while engaged in unfair competition.^{viii}

Additional financial sanctions are stipulated for the failure or delay in complying with the mandatory instructions of the State Service for Antimonopoly Policy in the amount of up to 10 percent of total revenue (net of value added tax, excise tax and the simplified tax), generated from all kinds of activities during the past three months.^{ix}

The issue of compensation for damages caused as a result of engaging in unfair competition is resolved in accordance with the Azerbaijan civil law by the courts.^x

Contact

Kamal Mamadzade

Dentons Partner, Baku

T +994 12 4 90 75 65

kamal.mammadzada@dentons.com



Ulvia Zeynalova-Bockin

Senior Associate

T +994 12 4 90 75 65

ulvia.zeynalova-bockin@dentons.com



i Law of the Republic of Azerbaijan "On Unfair Competition" No. 1049, dated 2 June 1995 (the "Unfair Competition Law").

Additionally it is expected that once adopted the new Competition Code, which already passed two readings in the Azerbaijani Parliament, would consolidated various pieces of legislation in the area of anti-monopoly activities and competition, including the Unfair Competition Law. Nevertheless, according to information available to us, the draft of the Competition Code has not yet been introduced into the agenda of the Azerbaijani Parliament. Therefore it is not clear at this moment if and when the new Code will become the law.

ii Law of the Republic of Azerbaijan "On Advertising" No. 1281-IVQ, dated 2 June 1995 (the "Advertising Law").

iii Unfair Competition Law, Article 2.

iv Unfair Competition Law, Article 4.

v Unfair Competition Law, Article 9.

vi Unfair Competition Law, Article 2; Advertising Law, Article 34.2.

vii Unfair Competition Law, Article 11.

viii Unfair Competition Law, Article 12.

ix Unfair Competition Law, Article 12.1.

x Unfair Competition Law, Article 13.





Uzbekistan

Unfair competition

The regulation of competition related issues is governed by the Law of the Republic of Uzbekistan "On Competition" (**Competition Law**) and other legislative acts.

Unfair competition, as defined by article 4 of the Competition Law, is the actions of a business entity or a group of persons, which are aimed at receiving an advantage when conducting business activity and contradict legislation or business practices, and which cause, or may cause, losses to other business entities (competitors) or damage, or may damage, their business reputation.

Any actions of business entities that are actions of unfair competition, including the following actions, are prohibited:

- Inappropriate comparisons which may cause losses to another business entity or damage its business reputation
- Sale of goods with the illegal use of intellectual property rights, in particular, trademarks or trade names of a legal entity, brands of goods, etc.
- Misleading customers as to the nature, method and place of manufacture, consumer characteristics of the products, price, quality of the goods, product warranty liabilities of the producer (manufacturer), imitation of goods produced by a business entity (competitor) by reproduction of its package, its name, marks, trademark and other intellectual property rights of a legal entity, copying advertising materials, branded pack and shape of goods
- Obtaining, using, disclosing research and development, production or commercial information, including commercial secrets without owners' consent

- Restricting access of other business entities to the commodities or financial market
- Unfair competition connected with the acquisition of exclusive intellectual property rights

The State Committee of the Republic of Uzbekistan for Privatization, Demonopolization and Development of Competition and its regional bodies (the **Antimonopoly Authority**) control and ensure compliance with the Uzbek antimonopoly legislation and, in particular, regulation related to unfair competition.

The Antimonopoly Authority is a body of the state management in the area of protection of consumers' rights and advertising activity. One of the functions of the Antimonopoly Authority is regulating the advertising market and taking measures for the prevention of unfair competition in the area of advertising and preclusion of unfair advertising.

Performing actions of unfair competition may entail administrative, criminal and civil responsibility. The fact of unfair competition is established by the Antimonopoly Authority.

In cases when the facts of unfair competition are confirmed, the Antimonopoly Authority gives a prescription demanding that the unfair competition be terminated and specifying actions that must be performed by the violator, such as, for instance, the return to consumers of illegally received income and the reinstatement of original position.

The Antimonopoly Authority may decide to confiscate the income (profit) illegally received by business entities as a result of unfair competition and may apply to the court to recover the amount of illegally received income.

The competence of the Antimonopoly Authority also includes taking a decision on the establishment of the facts of unfair competition related to the acquisition of exclusive trademark rights. In such cases the decision of the Antimonopoly Authority is the basis for invalidating legal protection to a trade mark. The decision to invalidate the certificate on legal protection to a trade mark is taken by an intellectual property authority or by a court upon application of an interested person.

Administrative responsibility for unfair competition is applied, if a business entity eludes to execute, or untimely or improperly executes the prescriptions of the Antimonopoly Authority on termination of violations, reinstatement of original position and on the rectification of the breach of consumers' rights.

In this case, in accordance with article 178 of the Administrative Code of the Republic of Uzbekistan, a fine in the amount of five to ten minimum wages shall be imposed on the violator.¹

Criminal responsibility for unfair competition may be applied in case a violator does not follow Antimonopoly Authority's prescription on termination of antimonopoly violation and restitution. In accordance with article 183 of the Criminal Code of the Republic of Uzbekistan the responsibility is established in the form of a fine from twenty-five to fifty minimum wages, or deprivation of a certain right for a period from three to five years, or correctional labor for up to three years.

In addition, criminal responsibility is established for unfair competition in the form of deliberately false, inaccurate or distorted information in a printed or otherwise distributed text, or in mass media in order to damage the business reputation of a business entity. Discrediting the competitor entails criminal responsibility under article 192 of the Criminal Code of the Republic of Uzbekistan and shall be punished by a fine from fifty to one hundred minimum wages or correctional labor for up to three years or by arrest for up to six months.

Improper advertising

Relations related to the advertising production are governed by the Law of the Republic of Uzbekistan "On Advertising" (**Advertising Law**) and other legislative acts.

One of the main tasks of the Advertising Law is prevention of distribution by way of advertising false or inaccurate information that may mislead the consumers as to the nature, method and place of production, consumer characteristics of the products, quality and conditions of its sale.

The main requirements for the advertising are legality, accuracy, credibility, use of forms and means that do not cause losses and moral harm to the consumer. Discrediting the products of other producers in advertising is prohibited.

The Advertising Law defines three types of improper advertising:

- Unreliable advertising – deliberately false advertising, which as a result of inaccuracy, ambiguity, exaggeration, concealment, violation of requirements in relation to time, place and method of distribution and other requirements envisaged by the legislation, misleads or may mislead the consumers of advertising, causes losses and moral harm to persons and to the state. Such form of advertising is prohibited.
- Hidden advertising – advertising which makes unconscious effect on consumer's perception, including by way of using special video inserts (double sound recording) and otherwise. This form of advertising is also prohibited.
- Comparative advertising – advertising which directly or indirectly identifies the competitor or products of one and the same type proposed by the competitor.

Comparative advertising is permissible, if it objectively and reliably compares material, significant and true properties of the products; if it, however, does not or may not mislead and does not result in confusion of the identity of advertiser and competitor or trademarks, brand name, products of advertiser and competitor, and does not discredit, or impair business reputation of the competitor or its trademark, brand name, products or activity.

Decisions on recognition of advertising to be unreliable or hidden and also recognition of comparative advertising to be improper are made by the Antimonopoly Authority.

Administrative responsibility is established for unreliable advertising in accordance with article 178-1 of the Administrative Code of the Republic of Uzbekistan and is punished by a fine in the amount from five to fifteen minimum wages.



Correlation Of The Notions Of Improper Advertising And Unfair Competition

The notions “unfair advertising” and “unfair competition” defined in the Competition Law and Advertising Law have similar characteristics, which may create certain difficulties when differentiating these notions. For example, inappropriate comparison which may cause losses to other business entity or damage its business reputation, misleading it in relation to the properties of the products, price, quality of the goods, warranty liabilities of the producer (manufacturer) of the products may be qualified both as unfair competition and as unfair advertising.

In practice, actions of business entities violating the legislation on advertising (improper advertising) and aimed at gaining advantages over other persons are recognized as unfair competition. To qualify improper advertising as an act of “unfair competition,” there should be taken into account the fact of causing or possibly causing losses to other business entities – competitors, or damaging or possibly damaging their business reputation.

If improper advertising is recognized by the Antimonopoly Authority as unfair competition, in such case the responsibility envisaged for unfair competition shall be applied to the violator.

Contact

Mouborak Kambarova

Dentons Managing Associate, Tashkent
T +998 71 120 69 46
mouborak.kambarova@dentons.com



Natalya Apukhtina

Senior Attorney
T +998 71 120 69 46
natalya.apukhtina@dentons.com



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- 1 The current minimum monthly wage is 130,240 Uzbek Soums (UZS), which makes this equivalent to about US\$48.12 at the exchange rate set by the Central Bank of Uzbekistan on 11 November 2015 (US\$1 = UZS 2706.59).



Armenia

The intersection between unfair competition and unfair advertising is recognized and regulated under Armenian legislation on protection of competition, and it has been the subject of a number of cases before the State Commission for the Protection of Economic Competition (hereinafter the Commission).

Unfair competition practices are prohibited under Armenian Law on Protection of Economic Competition (adopted on 15 December 2000 with the most recent amendments as of 29 October 2014, hereinafter referred to as the Law) which also provides for the definition of unfair competition.

Pursuant to the Law, any entrepreneurial activity or conduct which breaks the Law or the traditions of business practice or infringes upon the principles of fairness, i.e. honesty, equity, verity and impartiality among competitors or between the latter and consumers, shall be deemed unfair competition. The following practices are considered unfair competition for the purposes of the Law:

- **Creating confusion** with respect to the economic entity or its activity. The Law describes any entrepreneurial activity or conduct, which causes or may cause confusion with respect to another economic entity, its activity or offered products as an act of unfair competition. The actions or conduct which qualify as causing confusion refer vastly to the use of trademark (whether registered or not), firm name, appearance of products, for instance, industrial design (whether registered or not), packaging, color or any other non-functional features. The Law, *inter alia*, refers to types of product presentation, including advertisement, uniform and product delivery style, among such practices.
- **Discrediting the economic entity or its activity** - Any false or unjustified statement concerning entrepreneurial activity, which discredits or may discredit an economic entity, its activity or offered products, shall be deemed as an act of unfair competition. Discrediting may occur while implementing measures to facilitate the promotion or dissemination of products, in particular with respect to production process, suitability of products for certain purpose, quality, quantity or other features, offer and delivery conditions, price or the method of its accounting.
- **Public misleading** - Any entrepreneurial activity or conduct that misleads or may mislead the public with respect to an economic entity or its activities or its offered products shall be deemed as an act of unfair competition. Misleading may be caused while implementing measures to facilitate the promotion or advertisement of products, in particular it may be caused with respect to geographic origin of a product as well as the production process, suitability of products for certain purpose, quality, quantity or other features, offer and delivery conditions, price or the method of its accounting. Any unjustified exaggeration of the product quality, the failure to provide relevant information regarding the quality, quantity or other features of the product, which may lead to a false impression (misinformation), forgery with regard to the personality of an advertiser, shall be deemed as misleading. Public misleading practices also include the failure to indicate product production or expiry dates, name and address as well as other information required by legislation with respect to the producer/importer of the respective goods or making markings which are prohibited by the law, either indication of false, partial or incomplete information (data) during the advertising or sale of the product

or the absence of such information, which does not allow the consumer to form complete information about the advertised product or any advertising which is in breach of the law.

- **Damage to reputation or the goodwill of the economic entity** - Any entrepreneurial activity or conduct which, irrespective of creating confusion, causes or may cause damage to reputation or goodwill (non-tangible assets) of an economic entity, shall be deemed an act of unfair competition.
- **Unfair competition with respect to undisclosed information.** Any entrepreneurial activity or conduct which may lead to acquisition, use and disclosure of undisclosed information without the consent of its lawful owner or in violation of traditions of business practice shall be deemed an act of unfair competition. Technical, organizational or commercial data, including production secrets (know-how), shall be deemed undisclosed, if:
 - a. they, as a whole or by accurate inter-arrangement and integrity of their parts, are completely unknown or not easily accessible to persons usually dealing with such information;
 - b. they have certain actual or possible commercial value due to being unknown to third persons, but legitimate grounds for their easy accessibility are lacking;
 - c. their legitimate owner, whether a natural person or legal entity, has undertaken reasonable steps to retain the confidentiality of information under existing circumstances, such steps being expressed in the form of signing a relevant contract and (or) ensuring its conditions, initiating other preventive steps, maintaining them on identification information-carriers in the form of documents, electronic files, video and audio records, items embodying such data, etc. The subject matter of undisclosed information may be production methods, chemical formulas, drawings, test samples, product sale and distribution methods, contract types, business plans, details of contractual prices, professional activity fields (profiles) of consumers, advertising strategy, lists of suppliers or clients, computer software, databases, etc.

Unfair competition practices can be challenged at the Courts of Armenia by any interested person, including a consumer, who has incurred damage due to unfair competition. This right shall also be reserved for organizations empowered to defend the interested persons' economic interests.

Unfair advertising

RA Law on Advertising prohibits the publication of unfair advertising practices. Pursuant to the RA Law on Advertising, an advertisement which has been ordered produced or disseminated contrary to the prohibitions and restrictions specified by acting legislation qualifies as unfair advertising. Premeditated false advertising is considered a form of unfair advertising applied by advertisers, producers or holders, by means of which the consumers of such advertising deliberately mislead.

In order to recognize an advertisement as unfaithful, the presence of facts of misleading or public danger shall be identified. By the term "misleading" the law implies the actual ability of advertisement to mislead legal or natural persons in the consequence of complete or partial untruthfulness, omissions and distortions of information about goods' features, quantity, quality, peculiarities, prices, etc., as well as about the advertisers of those goods. By the expression "public danger" is meant the actual ability of the advertisement to cause prejudice to the competitor, urge to violence or to induce to take actions hazardous for consumers' health, property and/or for the environment.

Responsibility for unfaithful advertising and refusal to apply anti-advertising shall be borne by the advertiser, advertisement producer and bearer. Advertiser shall bear responsibility for lawfulness, propriety of advertisement order, truthfulness of data presented in the latter, if advertiser fails to prove that breach of advertising legislation requirements has occurred through advertisement producer's or bearer's fault. The producer or such advertising material shall bear responsibility for propriety and lawfulness of advertising information. Advertisement producer shall bear responsibility for means of advertisement placing, time and place of publicizing.

The Commission has adopted an official clarification with respect to the provisions on unfair competition of the Law, which clarifies the applicability of certain practices and their qualification as unfair competition. Under this clarification the Commission rejects the position of the applicant according to which the placement and display of products which use unregistered trademark or industrial design which is similar with a degree of confusion to the same registered trademark or industrial design next to the latter shall be deemed as unfair competition practice. The Commission's substantiation for rejection focuses on the fact that the production of goods with similarity to the registered IP rights already constitutes an infringement of the Law, therefore the mere fact of placement and display cannot qualify as unfair competition practice.

Generally, the most frequent cases that the Commission considers with respect to unfair competition practices and unfair advertising refer to the misuse of intellectual property rights.

To summarize briefly on the regulation and practice of unfair competition and advertising in Armenia, we would like to refer to the Overview Report drafted by the UNCTAD secretariat according to which “The prohibition of unfair competition under the Law incorporates an

extremely wide-ranging and vaguely defined array of practices for which the law received criticism.” Although significant clarifications were incorporated into some offences in 2011, the chapter on unfair competition practices still remains extensive. In particular, the argument is that certain of these offences incorporate what are conventionally understood as “consumer protection” issues. There is still an active debate regarding whether consumer protection and competition rules should be enforced by one body or two.

1 *Voluntary peer review of competition policy: Armenia, Overview Report* by the UNCTAD secretariat, UNITED NATIONS New York and Geneva, 2010.

Contact

Vardan Stepanian

Managing Partner,
K&P Law Firm LLC
T +374 10 529 539
vardan@kp.am





Kyrgyzstan

The concept and forms of unfair competition

The Competition Law¹ is a principal legal act determining the organizational and legal bases for the protection and development of competition in the Kyrgyz Republic (the **KR**). The Competition Law is aimed at preventing, restricting and suppressing monopolistic activity and unfair competition, as well as at ensuring the conditions for the creation and effective functioning of the KR markets.

According to the Competition Law, “unfair competition” means any actions of market participants aimed at acquiring business advantages conflicting with provisions of the KR legislation, customary business practices, requirements of good faith, reasonableness and justice, and may inflict or have inflicted losses on other competing market participants, or damage their business reputation.²

The Competition Law forbids unfair competition, including:³

1. Unauthorized copying of a commodity of another market participant, as well as its packaging and appearance, except when the copying of the commodity or parts thereof is reasoned solely by their technical application.
2. Outright re-creation of the products of another market participant in violation of its patent and licensing rights.
3. Illegal use of another's trademark, service mark, name of a commodity's place of origin, or firm-name that can lead to confusion with the activities of other market participant.
4. Dissemination of false and distorted information about the business authority and financial condition of another market participant that can inflict losses or damage its business reputation.
5. Production, sale or any other introduction of commodities of another market participant in the market by course of infringement of his rights to results of intellectual activity or other equaled means of individualization, goods, works and services (misuse).
6. Disclosure of data on the scientific, technical and production capabilities of a competitor in distorted form.
7. Deliberate disruption, frustration and termination of a competitor's business by illegal means.
8. Illegal pressuring of a competitor's employees with the purpose of persuading them to dereliction of duty.
9. Unlawful acquisition, use, and disclosure of information on scientific, technical, production, or trading activity of a market participant, including its trade secrets.
10. Illegal influence upon adoption and execution of business decisions of a competitor with the goal of obtaining a groundless advantage over the competitor.
11. Groundless appeals (applications) to other market participants having the goal of breaking a competitor's business connections or impeding establishment of such connections.
12. Dissemination of any information that may mislead consumers regarding the origin, means of manufacture, fitness for use, quality, and other properties of a market participant's commodity, or the personality of a businessperson or the characteristics of his/her business activities.

13. Supply of a commodity with inconsistent distinguishing mark with the goal of misleading the consumers regarding the commodity's consumer and other important properties.
14. Concealment of a commodity's inconsistency with its stated purpose or with requirements imposed thereon.
15. Deliberate sale of a particular kind of commodity at a relevant market at prices lower than in a competitive environment, or below cost, which is aimed at restricting competition.
16. Inappropriate comparison by a market participant of commodities being produced or sold by it with commodities produced or sold by other market participants.

This list is not exhaustive. Accordingly, should the question arise as to whether a particular action constitutes unfair competition, one should be guided by the definition of unfair competition given in the Competition Law.

In addition to the above, the Competition Law also forbids unfair competition coupled with acquisition and exercise of exclusive rights of the market participants' means of individualization, goods, works and services.⁴

The concept and forms of unfair advertising

In accordance with the Advertising Law⁵ the unfair advertising is a form of improper advertising, which is in turn defined as "unfair, unreliable, unethical, knowingly false or other information in which the requirements for its content, time, place and method of distribution, established by the legislation of the Kyrgyz Republic, are breached."

Advertising shall be considered unfair if it:⁶

- Discredits individuals and/or legal entities which do not use the commodities being advertised
- Contains inappropriate comparison of the advertised commodities with a commodity or commodities of other individuals and legal entities, and also contains statements, images, false and inaccurate information or misrepresented accurate information that can damage another market participant's business reputation
- Misleads or may mislead consumers with respect to the advertised commodity by imitation / copying of the overall project, slogans, images, music or sound effects used in the advertising of other commodities,

or by abusing the trust of individuals or lack of their experience, as well as in case of absence of significant information in advertisement

- Contains signs of unfair competition as defined in the Competition Law.

The Advertising Law forbids unfair advertising.

According to the Advertising Law, any advertisement containing signs of unfair competition, as defined in the Competition Law, shall be considered unfair.

The Competition Act does not contain any provisions specifically touching upon the issues of advertising. However, based on analysis of the concept of unfair competition, it can be concluded that any advertising could be regarded as a form of unfair competition if it is aimed at acquiring illegal business advantages and may inflict or have inflicted losses on other competing market participants, or damage their business reputation.

Liability

Administrative liability

The commission of acts constituting unfair competition (except for the cases captured by Article 315-1 of the KAO⁷) entails imposition of an administrative fine on officials in the amount of up to 100 calculation indices (currently 10 000 soms or approx. US\$140⁸), and on legal entities - up to 1,000 calculation indices (currently 100,000 soms or approx. US\$1,400).⁹

The exception concerning Article 315-1 of the KAO relates to the issues of advertising. According to this Article, the maximum fine for violating of the advertising legislation by advertisers, advertisement producers and distributors is the same as for unfair competition.

The KAO provides separate liability for improper or misleading advertising. For example, the dissemination by an advertiser of improper advertisement, or the use in advertising of knowingly false information on the production or sale of goods or the provision of services¹⁰, which misleads consumers and contains false information, as well as advertising of products subject to mandatory certification, but without having a certificate of conformity, - shall be punishable by a fine of up to 20 calculation indices (currently 2,000 soms or approx. US\$28).

The State Antimonopoly Agency has the right to impose on producers and distributors of advertisement an administrative fine of up to 5,000 calculation indices (currently 500,000 soms or approx. US\$7,000) for failure to fulfill its request to cease in a timely manner any violations of the advertising legislation.¹¹



Civil law liability

Pursuant to Article 16 of the Competition Law, if a market participant's action or inaction, which breaches the competition law, has caused losses to another market participant or any other person, these losses shall be subject to compensation by the market participant breaching the law. The compensation shall be made in accordance with the KR civil legislation.

In accordance with Article 31 of the Advertising Law, a person, whose rights and interests have been infringed as a result of improper advertising, has the right to bring a claim to the court for compensation for damages, including lost profits, compensation for the harm caused to health and property, and moral damage, as well as for public refutation of improper advertising.

Criminal liability

According to the Advertising Law, an improper advertising, committed repeatedly within a year after the imposition of an administrative penalty for the same actions, shall entail a criminal liability in accordance with the KR legislation.¹² However, the application of the criminal liability is questionable in this case, because the KR Criminal Code itself does not provide for criminal liability for the repeated improper advertising.

Imposition of liability does not release a perpetrator from the obligation to remedy the violations of the antimonopoly legislation in the field of unfair competition and advertising.¹³

Competent state authorities

The State Antimonopoly Agency under the KR Government (the "**Agency**") is the authorized state antimonopoly body implementing the state antimonopoly policy, exercising the state antimonopoly regulation in all sectors of economy (except for the energy sector), protecting and developing competition.¹⁴

Within its competence the Agency is also responsible for the state control over observance of the KR legislation on advertising. The Agency has the right to bring to the court claims for the benefit of an indefinite number of consumers of advertising in connection with violation of the KR legislation on advertising by advertisers, advertisement producers and distributors, as well as claims for invalidation of transactions associated with improper advertising.¹⁵

Contact

Aigoul Kenjebayeva

Managing Partner, Dentons Almaty
T +7 727 258 2380
aigoul.kenjebayeva@dentons.com



Nurzhan Albanov

Senior Associate
T +7 727 258 23 80
nurzhan.albanov@dentons.com



- 1 The Law of the Kyrgyz Republic "On Competition" dated 22 July 2011 (the "Competition Law").
- 2 Article 3 of the Competition Law.
- 3 Article 8.1 of the Competition Law.
- 4 Article 8.2 of the Competition Law.
- 5 The KR Law "On Advertising" dated 24 December 1998 ("Advertising Law").
- 6 Article 6 of the Advertising Law.
- 7 The KR Code on Administrative Liability dated 4 August 1998 (the "KAO").
- 8 In the present article all currency conversions are calculated based on the official exchange rate of USD 1 - KGS 71.54 established by the KR National Bank on 11 November 2015.
- 9 Article 314 of the KAO.
- 10 In this case, the services, which mislead consumers of advertisement containing false information, shall mean information aimed at involving potential victims of human trafficking or providing services of a sexual nature, including under the guise of psychological aid, communication, relaxation, massage or good pastime under the guise of legitimate activity to further explore entry into a sexual relationship (note to Article 315-1 of the KAO).
- 11 Article 31.3 of the Advertising Law.
- 12 Article 31.2 of the Advertising Law.
- 13 Article 17 of the Competition Law; Article 31.3 of the Advertising Law.
- 14 Please refer to the Regulations of the State Antimonopoly Agency under the KR Government, approved by the KR Governmental Decree No. 271 dated 17 May 2013.
- 15 Article 26.2 of the Advertising Law.

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