Protection against Unfair Competition in the Russian Federation and Cooperation within BRICS*

Anna Lapteva

Associate Professor, Financial Law Department, St. Petersburg branch of the National Research University Higher School of Economics. Candidate of Juridical Sciences. Adress: 17 Promyshlennaya Str., St. Petersburg, 198099, Russian Federation. E-mail: laptevaan@rambler.ru

Abstract

BRICS is one of the most significant geopolitical events of the early XXI century. It plays a significant and ever-growing role in world politics and international relations. BRICS member countries have decided to use conjoint approaches to solve the most important problems in the development of medium-sized enterprises and competition policy.

For this reason this article is devoted to the questions relevant to the notions "unfair competition," "competition" and its correlation, distinguish with the contiguous notions. In the literature are deduced the different characteristics of unfair competition such as acts aiming to obtain advantages through entrepreneurial activity, incursion and potential losses for entities — (competitors), arising as a result of said acts.

It is set out special features of the legal regulation the competition and the struggle against unfair competition by the laws of the Russian Federation. For instance, it includes some provisions common for both institutions of protection against unfair competition and protection against monopoly activity.

It also describes different patterns of the competition law, for example, American and European, which are traditionally distinguished in the scientific legal literature. Russian lawmakers on the whole have adopted the European system of antitrust regulation (the restriction and control of monopoly activity). However, the Russian legal regulatory system against unfair competition has its specific features. In particular, it is based on the plurality of resources that have different legal validity and are linked to different branches of law

Moreover, this article is considered the problems of protection against acts of unfair competition are widely covered in the legal practice, classification of legal protection forms (factual and juridical, jurisdictional and not jurisdictional, public and private, etc.).

Keywords

BRICS, competition, unfair competition, Russian Federation, legal protection

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Scholarly literature describes the creation of BRICS is one of the most significant geopolitical events of the early XXI century. The BRICS countries (Brazil, Russia, India, China, and the Republic of South Africa) play a significant and ever-growing role in world politics and inter-

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national relations.[1] Their collaboration is aimed at the search for solutions of global financial and economic problems.

The 5th BRICS summit, held in March 2013 in Durban, produced the eThekwini Declaration(hereinafter the Declaration) and eThekwini Action Plan,[2]which stated the BRICS countries' shared approach to actual issues of multilateral cooperation.

One of the areas of cooperation for BRICS member countries, outlined in the Declaration, is their collaboration in the area of small and medium-sized enterprises (hereinafter SMEs). For example, page 19 of the Declaration states that BRICS member countries "recognize the fundamental role played by SMEs in the economies of our countries. SMEs are major creators of jobs and wealth".[3]

Points A and C in section 18 of the Concept of the Participation of the Russian Federation in BRICS, approved by the President of the Russian Federation,[4] point out the necessity of creating» more favorable conditions for the promotion of mutual trade ... [and the] development of cooperation on competition policy».

Thus, BRICS member countries have decided to use conjoint approaches to solve the most important problems in the development of SMEs and competition policy.

One of the pillars of sustainable development is a competitive environment, where competition plays a crucial part in quality improvement of services, cost reduction, and implementation of technical innovation and inventions.[5] The latter aspect arises from the fact that owners of the most effective production factors and more attractive products win in competition. Hence, it becomes necessary to improve their factors of production: employees should improve their skills, and owners of material factors should renew them, replacing the old manufacturing facilities with new ones.[6]

Meanwhile, one of the concomitants of competition is unfair competition which, contrary to the ethos of competition, reduces the levels of business activity and the quality of goods, labourand services. Therefore, modern countries have the incentive to prevent and control such phenomena. For this reason, laws which regulate competition exist in the majority of countries.

However, in order to develop relationships while over coming unfair competition it is necessary to understand the regulatory environment of partner countries, due to the fact that any cooperation at the international level will depend on the specific legal environments of partner countries. The comparative law approach can be useful in understanding the regulatory environment. In the context of legal research, it compares legal regulations, as well as legal institutions, branches and systems.[7]

The above-noted comparative law method contributes to optimal cooperation on the one hand, while on the other hand, it helps improve existing laws and legislative and regulatory compliance practices.

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[1] Buharin, V.V. O BRIKS. Fakultet gosudarstvennogo upravleniia MGU.http://www.spa.msu.ru/page_303.html.

[2] Yetekvinskaja deklaratsiyai Yetekvinskii plan deistvi, dated 27 March 2013. Prezident Rossii. http://news.kremlin.ru/ref_notes/1430.

[3] http://news.kremlin.ru/ref_notes/1430.

[4] Kontseptsiiuchastiya Rossiiskoi Federatsii v obedinenii BRIKS. Prezident Rossii. http://news.kremlin.ru/media/events/files/41d452a8a232b2f6f8a5.pdf.

[5] Yanova V.V. Ekonomika. Kurs lektsii: Uchebnoe posobie dlua vuzov. Moscow. Examen. 2005. 110.

[6] Sedov V.V. Ekonomicheskayaa teoriyaa: Vvedenie v ekonomicheskuu teoriu: Ucheb. posobie. Chelyabinsk. 2002. 55–56.

[7] The literature on the subject compares both state and law of different countries broadly and narrowly, focusing on special features of legal systems. Perevalov V.D. Teoriia gosudarstva i prava. Moscow. Yurayt. 2005. 274.

Two types of competition law (American and European) are traditionally acknowledged in the scholarly legal literature.[8]

The American approach(here, I imply the use of American law) is aimed at the prohibition of monopoly, which includes unfair competition (there are several legal rules concerning unfair competition). Such a prohibition means that, as set out by the law, monopoly acts are considered to be illegal per se, regardless of the degree of impact on competition. The European approach (West European) is based on the principles of regulation and control of monopoly activity, i.e. monopoly activity is allowed unless it affects the freedom of competition. Along with the laws providing control over monopolies, there are special laws on unfair competition.[9]

Russian lawmakers on the whole have adopted the European system of antitrust regulation (the restriction and control of monopoly activity). For example, Federal Act no 135-FZ *The Competition Protection Act*,[10] dated 26 July 2006(hereinafter The Competition Protection Act), covers regulation related to competition protection, including the prevention and suppression of monopoly activity and unfair competition.[11]

However, the Russian legal regulatory system against unfair competition has its specific features. First, it is based on the plurality of resources that have different legal validity and are linked to different branches of law. Second, it includes some provisions which are common to both the institution of protection against unfair competition and the protection against monopoly activity.[12]

The latter — the coexistence of two institutions of competition law within one statutory act: the institution of protection against unfair competition and the protection against monopoly activity — is extensively discussed in scholarly literature. In particular, authors referring to international practices consider this «coexistence» to be ineffective, suggesting that such overlap actually contributes to the confusion of antitrust law regulation spheres with protection against unfair competition law (essentially, the concepts of unfair competition and monopoly activity are equated).[13] Other authors, however, write about the necessity of following the path of addition of existing kinds of unfair competition with a new «broadened set of offense elements».[14]

From our point of view, Paraschuk's position is closer to the truth as, on the one hand, the phenomena of monopoly activity and unfair competition are interrelated,[15]and, on the other, such interrelation does not automatically necessitate regulation within one legal act. To be included into one act, these institutions must have a uniform legal nature and, consequently, similar legal regulation.

[8] Note that the institution of unfair competition comprises the integrated branch of legislation — Competition Law.

[9] For further information, see Gorodov, O.A. Pravo promyshlennoi sobstvennosti. Moscow. Statut. 2011. 664; Kleijn, N.I., and N.E. Fonareva (editors). Konkurentnoe pravo Rossiiskoi Federatsii: uchebnoe posobie dlia vuzov. Moscow. Logos. 1999. 81–82; Popondopulo, V.F. (ed.). Kommercheskoe (predprinimatelskoe) pravo. Moscow: Norma. 2009. Vol. 1: 354.

[10] Federalny zakon no 135-FZ "O zashite konkurentsii", dated 26.07.2006. 2006. no 162. St. 3434.

[11] Popondopulo V.F. Ukaz. soch. 357.

[12] Eremenko V.I. Pravovoe regulirovanie konkurentnyh otnoshenii v Rossii i za rubezhom. Master's dissertation. Moscow. 2001. 9.

[13] Parashhuk S.A. Nedobrosovestnaia konkurentsiya: soderzhanie i pravovye sredstva ee presecheniia. Master's dissertation. 1995. 80–81.

[14] Eremenko V.I. Ukaz. soch. 23.

[15] The existence and development of unfair competition resulted in another phenomenon, namely monopoly. See Parashhuk, S.A. Ukaz. soch. 42.

Hence, the institution of unfair competition is part of the integrated branch of legislation — competition law, which includes civil and administrative laws as consistent statutory acts.[16]

Point 9 of Article 4 of the Russian Competition Protection Act provides a legal definition for the concept of "unfair competition".

According to this definition, any actions by entities (or groups of persons) aiming to obtain advantages through entrepreneurial activity, which contravenes the laws of the Russian Federation, customary business practices, ethical requirements, the requirements of reasonableness and equitableness, and have inflicted or are able to inflict a loss to other entities (competitors), or can discredit or are able to discredit their business reputation, are considered to be unfair competition.

The following characteristics of unfair competition are deduced from this definition in scholarly legal literature:[17]

- acts by entities or groups of persons;[18]
- acts aiming to obtain advantages through entrepreneurial activity;[19]
- contravention of the laws of the Russian Federation, customary business practices, ethical requirements, requirements of reasonableness and equitableness;
- incursion and potential losses for entities –(competitors), arising as a result of said acts;
- loss or potential loss of business reputation by an entity (competitor) due to said acts.

In legal literature, the Russian legal definition is inconsistent with the concept of "unfair competition", as contained in the Paris Convention for the Protection of Industrial Property.[20]

This inconsistency derives from the fact that, in accordance with Russian law, this is not unfair competition, but a separate fragment thereof, and only on condition that the actions of economic entities are aimed at obtaining advantages for business. In other words, the Russian definition of "unfair competition" is considerably narrower than its broad European counter part because Russian lawmakers give a number of additional features to the actions of entities.[21]

The issues of protection against acts of unfair competition are widely covered in the legal literature.[22] The above-mentioned comes from imperfect legislation, which doesn't contain clear instructions about forms and ways to overcome unfair competition.

Evidently, any impact on a law-breaker should be made within the framework of the existing measures of law enforcement, which can not only repress any unfair competition act, but also reinstate (recognize) the infringed (disputed) right of a complainant. As described by Gorodov, unfair competition means the «coincidence» of methods of repression of inequitable

[16] Eremenko V.I. Ukaz. soch. 9.

[17] Gorodov O.A. Ukaz. soch. 642.

[18] I.e. an omission of an act cannot be taken into account in qualifying competition as unfair, active actions are necessary. Gorodov O.A. Ukaz. soch. 643; Tikin V.S. O kriterii nedobrosovestnoi konkurentsii.Pravo i ekonomika. 2009. no 5. 27–32.

[19] In this case, it means only unjustified advantages which should touch upon only entrepreneurial activity. Gorodov O.A. Ukaz. soch. 645.

[20] According to p.2 art.10 of the Convention, an unfair competition act is any competition act contradicting customs of honesty in industry and trade. Paris Convention for Protection of Industrial Property, dated 02.10.1979. no 201(R).Geneva: World Intellectual Property Organization, 1990.

[21] Gorodov O.A. Ukaz. soch. 655–666.

[22] For example, see Gavrilov D.A. Presechenie aktov nedobrosovestnoi konkurentsii v sfere isklyuchitelnyh prav. Predprinimatelskoe pravo. 2010. no 4; Gorodov O.A. Ukaz. soch. 655; Shevchenko A.I. Zashhita ot nedobrosovestnoi konkurentsii kak obekt intellektualnoi sobstvennosti. Rossiiskii sledovatel. 2005. no 12.

conduct and methods of civil rights' defense, outlined in Article 12 of the Russian Federation Civil Code 51-FZ, dated 30 November 1994 (hereinafter RF CC).[23]

From this perspective, it seems appropriate to agree with the authors who propose to classify the methods of protection according to the forms of defense.[24]

Scholarly legal literature provides different grounds for the classification of legal protection forms (factual and juridical, jurisdictional and non-jurisdictional, public and private, etc.). However, within the scope of this article we focus on the classification of protection forms on the basis of procedural order of the exercise of the right to defense. According to this criterion, jurisdictional and non-jurisdictional forms of protection of citizens' rights are defined in legal literature.[25] This classification is widespread in the Russian legal doctrine.

The defense of civil rights in administrative or judicial proceedings (it is implemented by persons, authorized for this purpose by state authorities, each of them using their own procedural order) is a jurisdictional type of defense (it is a jurisdictional remedy). Self-defense and retaliation (carried out by an authorized person applying legal remedies) are non-jurisdictional methods of defense.[26]

We can define general and special procedures within jurisdictional types. General procedure includes judicial protection which outlines appealing to a court by the interested entity. The court, depending on the object of defense, uses different rules of proceedings.

Legal literature points out that since acts of unfair competition are enacted as a rule in the sphere of entrepreneurial activity, the protection of rights is mainly carried out through the system of arbitration (commercial) courts.[27]

The system of arbitration (commercial) courts is defined by the Federal Constitutional Act *Commercial Courts in the Russian Federation Act* no 1-FZ, dated April 28.[28] The elements of this system include:

- federal district arbitration (commercial) courts (cassation arbitration courts);
- arbitration (commercial) courts of appeal;
- first instance arbitration (commercial) court in republics, krays, regions, federal cities, autonomous regions, autonomous districts (arbitration courts of the constituent entities of the Russian Federation);
- specialized arbitration (commercial) courts (intellectual property courts).[29]

According to Article 27 of the Arbitration Procedure Code of the Russian Federation no 95-FZ, dated 24 July 2002 (hereinafter APC of RF),[30] as a general rule, arbitration (commercial) courts can consider cases of commercial dispute and other cases, related to business or other economic activity with the participants of organizations, who are considered juridical persons and citizens who have the status of individual entrepreneurs.[31]

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[23] SZRF. 1994. no 32. St. 3301.

[24] Tolstoy Yu.K, Sergeeva A.P. (ed.). Grazhdanskoe pravo. Moscow. 2008. V. 1. 542–543.

[25] Gorodov O.A. Ukaz. soch. S.817-818.

[26] Ibid.

[27] Ibid.

[28] SZ RF.1995. no 18. St. 1589.

[29] Note that the development of the Russian judiciary development has to be the way of the establishment of specialized judicial bodies and the Intellectual Property Court is one of those bodies. It was the first specialized court in the system of commercial courts.

[30] SZ RF. 2002. no 30. St. 3012.

[31] As provided by the APC of the RF and other federal laws, commercial (arbitration) courts can arbitrate disputes with the participation of the Russian Federation, Russian Federation constituent entities, municipal

A special defense procedure (administrative) is also carried out by applying to specially authorized authorities; however, it differs from judicial procedure, as it is not applied as a general rule, but only in cases expressly provided by the law. In cases of unfair competition, it comprises an application to the antimonopoly authority, which commences proceedings and judges cases concerning antitrust infringements, delivering judgments based on the outcome of the proceedings and issuing orders which can be appealed in court.[32]

Cases of antitrust law offense are reviewed according to the procedures set by Chapter 9 of the Competition Protection Law[33] and the Administrative Provision of the Federal Antimonopoly Service on Execution of the State Function of Initiation of Proceedings in Cases of Antitrust Law Offense, approved by FAS Order no 339, dated 25 May 2012.[34] This procedure is administrative and is widely applied in civil law cases.

Non-jurisdictional defense is used in cases of civil rights' self-defense and in instances where retaliation is applied.

From a theoretical perspective, the self-defense of civil rights is a defense which is permitted when a complainant is able to legally retaliate against the inflictor without having to involve courts or other authorities. The complainant can use various coherent protective devices against the offense which must not exceed the necessary bounds to repress the offense.[35]Gorodov mentions that, as a rule, unfair competition acts deal with information. As a consequence, only a limited number of legal instruments, which are not multi-purpose and suitable for all possible kinds of unfair competition acts, can be used. As an example, Gorodov cites actual measures taken by an entity in order to improve data protection, comprising confidential information.[36]

In the literature, retaliation implies law enforcement legal tools, which are applied to the person or entity which directly impinges on the civil rights and responsibilities of an authorized person without applying for permission from the relevant state authorities.[37] Retaliation can comprise, for instance, the publication of a retraction of untrue information which had discredited the reputation of a citizen or organization, or the ability to exercise the right of reply (Articles 43 and 46 of the *Mass Media Law* of the Russian Federation no 2124-1, dated 27 December 1991).[38]

Hence, unfair competition is a specially constructed institution, designed to protect the participants of civil commerce against the actions of entities, which aim to gain certain advantages.

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entities, state agencies, local authorities, other bodies, officers, entities, which are non-legal entities and citizens who are not individual entrepreneurs.

[32] Glava 6 Federalnogo zakona, dated 26.07.2006,no 135-FZ «O zashhite konkurencii». SZ RF. 2006. no 162. St. 3434; Postanovlenie Pravitelstva Rossiisko Federatsii, dated 30.06.2004,no 331 «Ob utverzhdenii Polozheniya o Federalnoi antimonopolnoi sluzhbe». SZRF. 2004. No 31. St. 3259.

[33] SZ RF. 2006. No 162. St. 3434.

[34] Bulleten normativnyh aktov federalnyh organov ispolnitelnoi vlasti. 2013. no 8.

[35] Sergeev A.P (ed.). Kommentarii k Grazhdanskomu kodeksu Rossiiskoi Federatsii. Chast pervaya.Moscow. 2010.72.

[36] Gorodov O.A. Ukaz. soch. 825.

[37] Sukhanov E.A. (ed.). Grazhdanskoe pravo: uchebnik. Moscow. 1999. T. 1. 123.

[38] SND i VS RF.1992.no 7. 300.

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