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Grey importers v. right holders: new decisions on parallel import and unfair competition in Russia

Ilya Khodakov, Vera Glonina (ALRUD Law Firm) · Monday, October 12th, 2020

At the end of August 2020, the Russian competition authority (the “FAS”) issued two important decisions aimed at allowing a non-authorized import of trademarked products into Russia (so-called “parallel import”). Specifically, the FAS said that two major automotive producers violated competition law by restricting the parallel import of their parts from outside Russia. These decisions are rather controversial and are considered by many as a deprivation of the right holders of the protection against parallel import. No doubt further cases will be required to clarify the position.

Currently according to Russian law and applicable laws of the EAEU, parallel importation is considered an infringement of trademark rights and, therefore, can be prohibited by a right holder. In the meantime, the FAS has criticized this legislative approach for years as constituting a risk for the development of competition. At the end of August 2020, the FAS delivered two decisions on Daimler AG, KYB Corporation cases establishing a violation of Russian competition law.

The FAS stated that where a right holder sells its products in Russia through certain importers, unjustified restrictions on the importation of goods by independent importers of the same products could constitute unfair competition.

Moreover, according to the words of Andrei Kashevarov, the Deputy Head of the FAS, the decision is supported by the following argumentation: *“Right holders abuse their exclusive rights allowing certain importers to import original goods but prohibiting the others. Therefore, the discriminatory conditions for conducting business are established”*.

In the meantime, this argumentation seems to be controversial from the perspective of Russian intellectual property law due to the following reasons:

- According to Russian trademark law, it is directly provided for that the right holder is entitled to exercise its exclusive rights on its discretion (including, by the way of import of trademarked goods). The regional principle of trademark exhaustion rather than an international principle is directly indicated in Russian law and is supported by the Constitutional Court of Russia.
- There are no specific criteria for determining unfair restrictions of the parallel import under Russian law. Moreover, the FAS did not establish such criteria or state what actions should be committed by the right holder in order to protect its trademark rights and avoid unfair competition claims at the same time (e.g. how to control the quality of imported goods, how to

allocate the burden of proof of originality and quality of trademarked goods and by what specific procedural means it should be done).

- The notion of unfair competition is rather broad (i.e. prohibitions to any acts committed by competitors that are “contrary to honest practices.”). However, generally, the prohibition of unfair competition is used to protect the right holders from the unfair behavior of its competitors and avoid the harm to the right holder’s reputation.

Despite these points the FAS considers these decisions as landmark cases and affirms that they are to be used for establishing other violations. It is likely that the right holders will try to challenge this decision.

The FAS considers that for the sake of development of the competition parallel importation should be legalized. Recent decisions on parallel imports formalize this position and confirm the readiness of the FAS to support independent importers. However, such approach is quite controversial and does not mean that parallel import is considered legal in Russia or that trademark rights cannot be protected in case of parallel import in the Courts. Formally, the law has not changed.

As for the moment, in order to protect trademark rights and avoid unfair competition claims by the FAS, the following actions can be taken by foreign right holders:

- Establish criteria for selecting importers based on the objective factors (e.g. specifying conditions and guarantees of quality of goods);
- Consider all requests for import of trademarked goods in Russia and in case of rejection provide certain arguments justifying such rejection;
- Protect trademark rights against specific infringements in courts based on the IP law;
- Include trademarks in the Customs IP register in order to detect and prevent an unauthorized import of trademarked goods into Russia.

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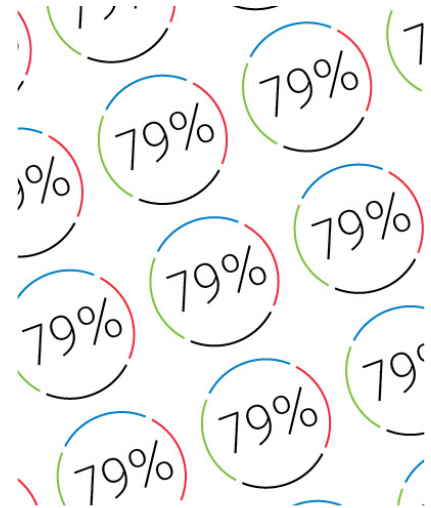
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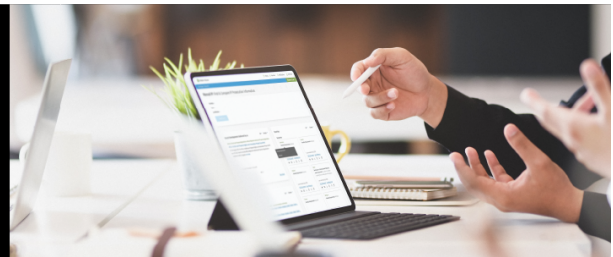
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