

Unfair competition in the form of misleading the public



Introduction

At the end of October 2022, the Competition Protection Commission (hereinafter referred to as the **Commission**) adopted decisions on applying a measure of responsibility against three companies operating in the field of gambling¹. All three decisions refer to unfair competition in the form of misleading the public. Within the framework of this article we consider some provisions of the Law of the Republic of Armenia “On Protection of Economic Competition” from November 6, 2000 (hereinafter referred to as the **Law**) regarding unfair competition in the form of misleading the public in the context of the decisions adopted by the Commission.

The concept of unfair competition and its features

The legal definition of unfair competition is laid down in Article 16 of the Law. According to part 1 of the mentioned Article, “any action or conduct of an economic entity contradicting this Law, other laws, regulatory legal acts or customary business practices, violating the principles of fairness, i.e. integrity, equity, truthfulness and/or impartiality among economic entities, or among economic entities and consumers or acquirers, shall be deemed to be unfair competition”.

Considering that unfair competition is a type of competition, the concept of unfair competition should be interpreted in the context of competition. According to part 1(1) of Article 3 of the Law, economic competition or competition is “competitiveness of economic entities in which case the ability to unilaterally affect the general conditions of circulation of goods in the relevant product market becomes objectively excluded or restricted by the independent actions of each of them”. Taking into account the abovementioned definition of competition, it should be noted that unfair competition may only occur when an action or conduct of an economic entity affects the competition, i.e. an economic entity attains influence on the general conditions of circulation of goods in the relevant product market.

When interpreting the concept of unfair competition the norms of international agreements ratified by the Republic of Armenia should be taken into account. In particular,

the Republic of Armenia has ratified the Paris Convention for the Protection of Industrial Property (March 20, 1883), according to part 2 of Article 10-bis of which, “any act of competition contrary to honest practices in industrial or commercial matters constitutes an **act of unfair competition**”. Consequently, an unfair competition is not any act contrary to honest practices, but “**any act of competition**”. From this, it can be assumed that only the **act that has an impact on competition** (act of competition) can be recognized as an act of unfair competition.

The conclusion regarding the need to interpret the concept of unfair competition in the context of competition also derives from judicial practice. The Court of Cassation of the Republic of Armenia in its decision of May 10, 2022 (case No. VD/12665/05/18) noted the following: “as a result of any misleading action or conduct, the public is not provided with real information about the qualitative, quantitative and other characteristics of the products, which may lead to the creation of a wrong impression (disorientation) about the product among the members of the public. Such activity, as a form of unfair competition, has been prohibited by the legislator, given that the policy of free economic activity pursued by the rule of law is aimed at ensuring a fair balance of interests of economic entities”.

Taking the above into account, below we present the conditions that, in our opinion, should be met for the recognition of an offense as unfair competition:

- existence of an action or conduct of an economic entity;
- contradiction of an action or conduct to the Law, other laws, regulatory legal acts or customary business practices;
- violation of the principles of fairness, i.e. integrity, equity, truthfulness and/or impartiality among economic entities, or among economic entities and consumers or acquirers through an action or conduct;
- the ability of an economic entity to unilaterally affect the general conditions of circulation of goods in the relevant product market.

To recognize the fact of unfair competition the simultaneous presence of these conditions is necessary.

After determining the concept and the features of unfair competition, we now refer to the issues that were considered by the Commission when adopting decisions at the end of October 2022, in particular, the need to consider the features provided for in part 1 of Article 16 of the Law (the features of unfair competition) when examining each form of unfair competition, as well as the advantage over competitors.

The need to consider the features provided for in part 1 of Article 16 of the Law

In one of its decisions the Commission noted that “the legislator has defined two ways to qualify a conduct as unfair: first of all, this is the definition of forms of unfair competition in Articles 16-24 of the Law; secondly, this is the definition of unfair competition as an action or conduct corresponding to the features of part 1 of Article 16 of the Law if it:

- contradicts the Law, other laws, regulatory legal acts or customary business practices;
- violates the principles of fairness, i.e. integrity, equity, truthfulness and/or impartiality among economic entities, or among economic entities and consumers.

In other words, the definition of the forms of unfair competition is, in fact, the objectification of private cases of Article 16 of the Law and, therefore, there is no need to consider the features of part 1 of Article 16 of the Law for each form of unfair competition, including in the case of unfair competition in the form of misleading the public².

With regard to the abovementioned it should be noted that according to part 3 of Article 16 of the Law “the cases provided for by Articles 17-24 of this Law, as well as other actions corresponding to the features of part 1 of this Article, shall be deemed to be unfair competition”. It follows from this provision that correspondence of the cases provided for in Articles 17-24 of the Law to the features of part 1 of Article 16 is assumed.

To answer the question about the need to consider the features of part 1 of Article 16 of the Law, it is necessary to consider whether all the grounds provided for in Article 21 (misleading the public) meet the conditions of part 1 of Article 16, and in particular, the condition of an economic entity’s ability to unilaterally affect the general conditions of circulation of goods in the relevant product market.

According to part 1(4) of Article 21 of the Law “misleading the public is considered unfair competition, including advertisements in breach of the law, including unfair or illegal advertisements, or those violating the principles of reliability or expedience, which may prevent, restrict or prohibit economic competition or harm the consumer interests”.

From the literal interpretation of this provision, it follows that every advertisement that is contrary to the law, which may at least harm the interests of consumers, should be recognized as unfair competition in the form of misleading the public.

In other words, part 1(4) of Article 21 of the Law does not define one of the key features of unfair competition, that is, the context of competition, more specifically, “the ability of an economic entity to unilaterally affect the general conditions of circulation of goods in the relevant product market”.

The need to consider an offense in the context of competition is obvious if the offense provided for in part 1(4) of Article 21 is subjected to a systematic analysis. In particular, according to part 1(b) of Article 1 of the Law of the Republic of Armenia “On Advertising”, “this Law defines the legal basis of creating and disseminating advertisements in the territory of the Republic of Armenia and aims at preventing spread of unreliable information through advertising that may cause damage to legal entities and individuals, to their honor, dignity, business reputation and the interests of citizens”. This raises the following question - if we deal with an advertisement that contradicts the law and may cause damage to the interests of legal entities and individuals, under which legal act should an offense be established, the Law of the RA “On the Protection of Economic Competition” or the Law of the RA “On Advertising”?

Considering the fact that the interests of consumers are the subject matter of various laws (the Law of the RA “On Advertising”, the Law of the RA “On Consumer Rights Protection”), from the perspective of competition legislation they should be interpreted in the context of the impact on competition. In our opinion, the Commission also comes to a similar conclusion, noting that “in order to qualify a conduct of an economic entity as an offense in the field of economic competition, the Commission considers its impact on economic competition and damage caused to the interests of consumers or such possibility³”.

Therefore, when defining an offense in the field of competition, the interests of consumers are not considered separately, but in the context of the impact on competition. The same conclusion can be reached if we analyze other articles on unfair competition (Articles 17-24 of the Law). For each form of unfair competition, it is necessary to take into account the subject matter of the Law and assess the impact of that possible offense on economic competition. Otherwise, it will turn out that the same situation is regulated by several legal acts, which in turn can lead to confusion and legal uncertainty.

²P. 23 of the Commission decision No. 412-Ս dated 28.10.2022

³Pp. 30-31 of the Commission decision No. 412-Ս dated 28.10.2022

Summing up, in the cases provided for in Articles 17-24 of the Law, in order to qualify an offense as unfair competition, not only the features provided for in the said articles, but also the features of part 1 of Article 16 of the Law, including the economic entity's ability to unilaterally affect the general conditions of circulation of goods in the relevant product market, should be considered.

Getting the advantage over competitors

In one of the decisions adopted by the Commission, it is stipulated that according to the company's position, "the draw games described in the decision are organized exclusively by the companies [A], [B] and [C] – organizers of online winning games and totalizers, the company [D] operating in the market has no similar draws. Therefore, in this respect, competition exists exclusively between the companies [A], [B] and [C], and the Commission has initiated proceedings against these three companies on the grounds of unfair competition. Under such conditions, there can be no question of unfair competition, at least in the context of getting the competitive advantage"⁴.

Regarding this statement, the Commission noted that "in any field, even the commission of the similar offenses by all competitors does not exclude the occurrence of competitive advantages, as it may at least affect an economic entity planning to enter the relevant market, and on the other hand, it violates the balance between existing competitors, because the circumstances of the offenses are different in each case"⁵.

It is considered that the ability of an economic entity to unilaterally affect the general conditions of circulation of goods in the relevant product market allows an economic entity to get the competitive advantage. Here the question stands - what is the scope of economic entities over which one economic entity might get a competitive advantage. Is the scope limited to existing competitors or potential ones might also be considered? To answer that question, we refer to the concept of competition once again.

According to part 1(1) of Article 3 of the Law economic competition or competition is "competitiveness of economic entities in which case the ability to unilaterally affect the general conditions of circulation of goods in the relevant product market becomes objectively excluded or restricted by the independent actions of each of them". It follows from this concept that as a result of unfair actions, an economic entity has the possibility to get advantages over competitors operating in the relevant product market. An economic entity planning to enter the relevant product market cannot be a competitor of an economic entity already operating in that market, because there is no competitive relationship between them. Therefore, creating obstacles to an economic entity planning to enter the relevant product market can be considered within the framework of other competition infringements, but not within the framework of unfair competition.

Conclusion

Summarizing the above-mentioned analysis, we come to the following conclusions:

1. one of the key features of unfair competition is the ability of an economic entity to unilaterally affect the general conditions of circulation of goods in the relevant product market;
2. when examining each form of unfair competition it is necessary to consider the features of part 1 of Article 16 of the Law, and in particular, the ability to unilaterally affect the general conditions of circulation of goods in the relevant product market;
3. an economic entity planning to enter the relevant product market cannot be a competitor of an economic entity already operating in that market within the meaning of the provisions regarding unfair competition.

The information presented in this article expresses solely the opinion of the authors that might differ from the official position of the competent authority. This article is for informational purposes only and does not constitute a legal advice.

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