

LEGAL PROBLEMS OF PROTECTION AGAINST UNFAIR COMPETITION IN THE SPHERE OF HOUSING AND COMMUNAL SERVICES

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Abstract. The article is devoted to the analysis of legal problems of protection against unfair competition in the sphere of housing and communal services. The article examines the specifics of business relations in the market of housing and communal services. We studied the Russian and foreign experience of legal protection against unfair competition. We proposed the ways to build an effective mechanism for the legal regulation of entrepreneurial activity in the sphere of housing and communal services. Izmailov R.R. believes that the formation of an effective mechanism for the legal regulation of entrepreneurial activity in the sphere of housing and communal services is impossible without creating a competitive environment for all subjects of this activity. The authors conclude that unfair competition, as a type of activity prohibited by law, can manifest itself in relations connected with the sphere of housing and communal services in various forms. According to Baryshev S.A., the main types of the acts of unfair competition committed in the sphere of housing and communal services include: 1) deception of homeowners and tenants regarding the organization providing housing maintenance services; 2) deception of homeowners and tenants regarding prices and tariffs for the housing maintenance services; 3) actions that are not explicitly indicated in Chapter 2.1 of the Law on Competition Protection, including actions that are expressed in non-provision of technical documentation on the premises served by the competitors. Baryshev S.A. proposed to develop a legislative mechanism to ensure the transfer of documentation from one management company to another, as well as simplify the procedure for determining tariff regulation in the sphere of housing and communal services as one of the ways to prevent the acts of unfair competition.

Key words: unfair competition, housing and communal services, management of apartment houses, suppliers of communal resources, business law.

1 INTRODUCTION

The relations in the sphere of housing and communal services (hereinafter - HCS) are governed by various branches of Russian law, for example, civil, business, administrative law. These relationships include both public and private law elements. Despite the significant imperativeness of the rules governing the sphere of HCS, the managing organizations, as well as other service organizations, enter into business relations regarding the provision of services and are subject to unfair competition law. In accordance with the above, it seems necessary to study the peculiarities of business relations in the considered sphere, to determine the types of acts of unfair competition and the peculiarities of proving their presence in the sphere of HCS.

2 METHODS

The methodological basis of this paper is a set of scientific techniques and methods for studying phenomena and processes, including methods of analysis, synthesis, comparative law, and the formal legal method. The use of the proposed methods seems appropriate for several reasons. The formal legal method allows forming the conceptual apparatus applicable in the study, identifying the features and characteristics of the institution under consideration on the basis of legislation. The comparative legal method has a significant place in the paper and allows us exploring the possibility of implementing foreign experience in legal regulation.

3 RESULTS AND DISCUSSION

The modern science of civil and business law distinguishes various acts of unfair competition, which mean every "competition act contrary to honest customs in industrial and commercial affairs" [1, p. 14]. In most European countries (Germany, Italy, Switzerland, etc.), special laws on unfair competition use a similar approach to defining the acts of unfair competition [2, P. 23–28]. According to Ershova I.V., the emergence of a legal institution of unfair competition was initially developed under the influence of the jurisprudence of French courts, which began to be used to protect the interests of entrepreneurs [3, P. 511–512]. The French judicial practice to address gaps in the legislation developed the theory of unfair competition [4, P. 590], with the help of which the violator of the rules of conducting business activity could be brought to civil liability [5, P. 531 – 537]. In the United States, the prohibition of these actions is also provided for by the antitrust laws [6, P. 113-119]. In the Russian Federation, Chapter 2.1 of the Law on Competition Protection contains a list of acts of unfair competition, which can be classified for various reasons.

The unfair competition can manifest itself in various sectors of the economy. It is interesting to study the legal problems of protection against unfair competition in the sphere of housing and communal services. In recent years, the state pays great attention to creation of a competitive environment in this area. The effectiveness of legal regulation of business relations in any field depends on the effectiveness of legal norms aimed at achieving certain goals and meeting certain requirements [7, P. 87-89]. The peculiarity of entrepreneurial activity in the sphere of HCS is the high social significance of activities related to the provision of housing and communal services for the citizens and final consumers, which, combined with a large number of natural monopolies in this area, necessitates a special study of business relations in this area. It seems that the construction of an effective mechanism for the legal regulation of entrepreneurial activity in the area under consideration is impossible without creating a competitive environment for all subjects of this activity.

Unfair competition, as a type of activity prohibited by law, can manifest itself in relations connected with the sphere of housing and communal services in various forms.

Thus, this type of act of unfair competition is quite often used as deception regarding legal identity of the manufacturer or the seller of goods. These actions are expressly prohibited by Art. 14.2 of the Law "On Competition Protection", as well as sub-clause 3 of clause 3 of Art. 10 of the Paris Convention for the Protection of Industrial Property. It should be noted that the entrepreneurial relations with the intellectual property items and the individualization means arise in the process of their commercial use and are aimed at achieving the economic interests of a legal entity [8, P. 648]. The analysis of the practice of case consideration involving violation of the rules of competition in the field of intellectual property suggests that an essential condition for the recognition of actions of the economic entity as an act of unfair competition is a violation of legislation in the field of intellectual property by the economic entity [9, P. 123]. In the case of committing such an act of unfair competition, a necessary sign is to deceive consumers and thereby influence their choice of goods or services of an unfair business entity to the detriment of its other competitors. The most important role in competition protection cases is assigned to such a regulator [10, P. 481] as the Federal Antimonopoly Service of Russia (FAS), which establishes the presence of all signs of unfair competition during inspections.

One of the most common forms of deception in the sphere of HCS is the registration of several legal entities with similarly confusing company names engaged in the same types of housing and communal services. In this case, the very mechanism of deceiving consumers is based on the fact that the newly created legal entity participates in tenders for servicing the apartment residential buildings instead of another legal entity with a similar name that has previously served these buildings, but has discontinued its activity.

An example is the case No. 1 dated March 27, 2018 considered by the Lipetsk FAS of the Russian Federation, initiated due to violation of the competition law by the company LUK LLC. In this case, it was recognized that LUK LLC was deceiving its consumers - the residents of an apartment building, using the firm name of a legal entity that had previously served this building. It was recognized that such a coincidence gives the residents of the serviced building the impression that not a newly created legal entity with a similar name, but a legal entity that has previously existed, participates in the competition. This confusion could potentially result in tenants having an unreasonable preference for the newly created legal entity. In this regard, the rights of other competing legal entities that also expressed a desire to participate in the competition will be infringed due to the emerging unequal conditions for choosing the winner. At the same time, the analysis of this case shows that in the actions of LUK LLC have had also the signs of an act of unfair competition stipulated by Art. 14.6 of the Law on the Competition Protection, namely the creation of confusion with the activities of a competitor's entity through the use of the designation identical to the brand name. The choice of Art. 14.2 of the Law on the Competition Protection to recognize the actions of LUK LLC as unfair competition is caused by the absence of claims to it from the part of the legal entity with whose company name the confusion has arisen. Also, this was affected by the absence of a previously existing legal entity in the number of competing companies participating in the competition.

The next type of acts of unfair competition in the sphere of HCS is a deception regarding the price of goods offered for sale stipulated in clause 4 of Art. 14.2 of the Law on the Competition Protection. Within the HCS, these actions are expressed in deceiving residents of the serviced buildings regarding the prices of housing and communal services provided by the management companies. The bodies of the FAS of the Russian Federation have identified the principal mechanism for performing these actions, an example of which is the Decision in the case No. 30-14.33 P. 1/2017 regarding MC ZHK Yubileyny LLC considered by the Chelyabinsk FAS. According to the case files, MC ZHK Yubileyny LLC entered into an agreement of intent with the building tenants, in which it guaranteed the provision of home maintenance services at certain prices in case of choosing the organization as the management company. According to Art. 156, 158 of the Housing Code of the Russian Federation, the authority to decide on tariff establishment for the maintenance of residential premises is vested in either the local government body or the general meeting of the owners of the premises in an apartment building. In this case, the general meeting of residents on the issue of tariff settlement was not held. Accordingly, the decision on the tariff establishment should have been taken by the local government body. Thus, the organization violated the law, did not have the right to disseminate information and enter into agreements on tariff establishment that differ from those established by local authorities.

The above violations of the law gave MC ZHK Yubileyny LLC unjustified advantages in carrying out the entrepreneurial activities related to building maintenance. They caused the refusal of the owners of residential premises to enter into service agreements with other organizations-competitors, which indicated higher tariffs in accordance with the law. In this regard, the organizations-competitors suffered damage, resulting in their shortfall in income.

The specific nature of entrepreneurial relations in the sphere of housing and communal services leads to the fact that not all possible unfair actions of competitors are subject to the signs of unfair competition acts specified in the Law. At the same time, the presence of Art. 14.8 allows recognizing such acts as other actions that correspond in their features to the general concept of unfair competition. The administrative practice shows that this approach is actively used by the FAS in the housing sector.

Such violations include actions related to the delay or refusal to transfer technical documentation to an apartment building and other related documents from a previously operating management organization to the newly selected one. Clause 10 of Art. 162 of the Housing Code enshrines the responsibility of the management organization to transfer technical documentation and other documents related to the building management to the newly selected organization within three business days from the date of termination of the apartment building management agreement.

The timely non-transfer of such documents makes it difficult to provide quality housing and communal services to the consumers. The lack of an in-house network scheme makes it difficult to maintain such a network and can lead to a shortage of utility resources. The lack of a passport for a residential building, a cadastral passport for a land plot makes it difficult to maintain these facilities. In addition, the lack of complete and reliable information about the entrepreneur's assets makes it impossible to carry out business activities in some cases.

An example is the decision of the Penza FAS of the Russian Federation in case No. 2-03/07-2017 dated November 20, 2017. When considering this case, it was proved that Perspektiva+ Management Company that had previously serviced the building had no grounds for retaining the technical documentation for the building after it received the appropriate decision of the tenants. The specific nature of this case lies in the fact that the actions of Perspektiva+ do not fall under the signs of unfair competition acts specified in the law. In this regard, the FAS of the Russian Federation collected evidence to confirm the fact that this action was an act of unfair competition not specified in the Law. The evidence was based on the study of the state of competition in the commodity market for the provision of apartment residential building management services. The number of circumstances to be established included:

- product boundaries of the market, that is, a set of apartment residential building management services;
- geographic boundaries, that is, the boundaries of a particular municipality;
- time interval for the study of the relevant product market.

As a result of this study, a complete coincidence of the product, geographical boundaries of the market within a specified time interval was established. In this regard, Perspektiva+ LLC and MC Milana LLC were recognized to be the competitors.

The actions of Perspektiva+ LLC violate the law, since, in accordance with clause 10 of Art. 162, it has the responsibility of transferring the relevant technical documentation to the new management company MC Milana LLC. By refusing to transfer the technical documentation, Perspektiva+ LLC thereby creates illegal obstacles to the implementation by the competitor of entrepreneurial activity in the commodity market for the provision of residential building management services. At the same time, Perspektiva+ LLC receives illegal advantages in doing business.

From the point of view of proof, the main problem was the establishment of the fact of causing or possible causing of losses to the competitor. In this case, it was acknowledged that the losses of MC Milana LLC resulted in the inability to provide residential building management services due to the lack of relevant documentation. This circumstance leads to the impossibility of extracting income and the possibility of loss occurrence, both in the amount of real damage and lost profits. The possibility of damages is aggravated by the fact that the apartment building management services are a licensable type of activity. The licensee has to bear the costs of ensuring that its activities comply with the licensing requirements established by law. The inability to receive income from the licensed activity with the simultaneous costs for its implementation also leads to an increase in the amount of potential losses.

Thus, the actions of Perspektiva+LLC were recognized as actions falling under the signs of unfair competition that are not specified in the Law on the Competition Protection.

4 SUMMARY

Our study of theoretical problems and administrative practices in the Russian Federation on the issues of protection against unfair competition in the sphere of housing and communal services allows making the following conclusions:

1. The formation of an effective mechanism for the legal regulation of entrepreneurial activity in the sphere of housing and communal services is impossible without creating a competitive environment for all subjects of this activity.

2. Unfair competition, as a type of activity prohibited by law, can manifest itself in relations connected with the sphere of housing and communal services in various forms.

3. The main types of the acts of unfair competition committed in the sphere of housing and communal services include: 1) deception of homeowners and tenants regarding the organization providing housing maintenance services; 2) deception of homeowners and tenants regarding prices and tariffs for the housing maintenance services; 3) actions that are not explicitly indicated in Chapter 2.1 of the Law on Competition Protection, including actions that are expressed in non-provision of technical documentation on the premises served by the competitors.

4. Losses incurred by the competitors are expressed in the form of lost profits for the following reasons: 1) the impossibility of actual implementation of their activities for the maintenance of housing and communal services; 2) the refusal of the owners of residential premises from the conclusion of service agreements.

5. The main direction of preventing the above acts of unfair competition are as follows: to ensure the transfer of documentation from one management company to another, as well as to simplify the procedure for determining tariff regulation in the sphere of housing and communal services as one of the ways to prevent the acts of unfair competition.

5 CONCLUSIONS

Our study allows systematizing knowledge regarding the counteraction to the commission of acts of unfair competition and working out the ways to improve the effectiveness of preventing these actions.

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