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COMPENSATION OF THE LOSSES CAUSED BY UNFAIR COMPETITION: NATIONAL AND FOREIGN LEGAL APPROACHES

N. G. MASKAYEVA^a

^aBelarusian State University, Nezavisimosti avenue, 4, 220030, Minsk, Republic of Belarus

The article is devoted to the approaches to regulation in the Republic of Belarus and foreign countries of the compensation of the losses caused by unfair competition. The author considers, in particular, such issues as the kinds of the recoverable losses, the range of the persons entitled to their compensation, and the persons against whom the corresponding claim may be brought, the conditions of the compensation of the mentioned losses etc. Based on the analysis made the need for the Regulation of the Plenum of the Supreme Court of the Republic of Belarus concerning the recognition and enforcement in the Republic of Belarus of foreign judgments and arbitration awards on recovery of punitive damages, as well as the amendment of the national legislation, allowing compensation of the losses caused by unfair competition, in case of failure to prove their exact size, is substantiated.

Key words: unfair competition; measures of civil liability; compensation of losses; real damage; lost advantage; punitive damages.

ВОЗМЕЩЕНИЕ УБЫТКОВ, ПРИЧИНЕННЫХ НЕДОБРОСОВЕСТНОЙ КОНКУРЕНЦИЕЙ: ОТЕЧЕСТВЕННЫЙ И ЗАРУБЕЖНЫЕ ПРАВОВЫЕ ПОДХОДЫ

Н. Г. МАСКАЕВА¹⁾

¹⁾Белорусский государственный университет,
пр. Независимости, 4, 220030, г. Минск, Республика Беларусь

Посвящена подходам к регулированию возмещения убытков, причиненных недобросовестной конкуренцией, в Республике Беларусь и зарубежных государствах. Рассматриваются виды убытков, подлежащих возмещению, круг лиц, имеющих право на их возмещение, и круг лиц, которым может быть предъявлено соответствующее требование, условия возмещения данных убытков и др. На основании проведенного анализа обосновывается необходимость принятия постановления Пленума Верховного Суда Республики Беларусь, касающегося признания и приведения в исполнение в Республике Беларусь иностранных судебных и арбитражных решений о присуждении штрафных убытков, а также внесение в отечественное законодательство изменений, позволяющих возмещение убытков, причиненных недобросовестной конкуренцией, в случае недоказанности их точного размера.

Ключевые слова: недобросовестная конкуренция; меры гражданско-правовой ответственности; возмещение убытков; реальный ущерб; упущенная выгода; «штрафные убытки».

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Автор:

Наталья Геннадьевна Маскаева – кандидат юридических наук; доцент кафедры международного частного и европейского права факультета международных отношений.

Author:

Natallia Maskayeva, PhD (law); associate professor at the department of private international and European law, faculty of international relations.
maskayeva_nat@mail.ru

The development of international trade, expansion and deepening of the economic integration and other factors has contributed to the intensification of competitive struggle on the internal and external market, including the one which is carried out with unfair methods and means. Special importance for the persons suffered from unfair competition represents compensation of the losses caused by it.

For the time being all the existing scientific works [1; 2; 3; 4; 5] deal only with foreign legal regulation of the compensation of the losses caused by violations of antimonopoly legislation. Due to this fact the current article seems to be relevant.

The aim of the article is to analyze the existing national legal approaches in the mentioned field in comparison with foreign ones, to consider certain theoretical and practical problems and to propose the ways of their solving.

It bears noting that the questions of compensation of the losses caused by unfair competition, have not been tackled on the international legal level. Thus, they are regulated in the Republic of Belarus, as well as in foreign countries, by acts of national law.

The right of the person, suffered from unfair competition, to demand compensation of the losses caused by it is directly provided in par. 2 of Article 1030 of the Civil Code of the Republic of Belarus of 7 December, 1998 (hereinafter – Civil Code) [6]. In the Belarusian legislation there are no other special rules dealing with the indicated losses, thus on this issue it is necessary to be guided by, first and foremost, general provisions of the Civil Code for compensation of losses, provided for in Article 14.

Pursuant to par. 1 of this Article a person whose right has been violated may demand full compensation of losses caused to him unless otherwise is provided for by the legislation or a contract complying to it. According to par. 2 of Article 14 of the Civil Code within the losses 2 elements may be divided:

- real damage – the expenses which the person whose right has been violated made or must make in order to restore the violated right, loss or damage of his property;
- lost advantage – revenues not received which this person would have received under ordinary conditions of civil turnover if his right had not been violated.

From the analysis of this provision follows that the losses represent a cost estimate of the adverse effects of the wrongful conduct of the debtor to the creditor's property sphere [7].

Real damage can be both existing and future costs of the creditor. In case of unfair competition they may include, for example, marketing expenses needed for the attraction of new customers, expenses for the widening of the assortment and improvement of quality of the goods produced, for the finding and training of new employees (in the case of "poaching" of the staff of an entrepreneur by his competitor), and others.

Lost advantage may be the result of deprivation of the inflicted subject of reasonably expected turnover (including due to the planned increase in the volume of his products or the expansion of sales market), of price erosion (including resulting from the need for reduction of prices because of the offer of cheaper imitations of his goods), of the loss of all or a portion of the anticipated licensing fees, etc. [8, p. 1015].

Belarusian legislation does not contain the norms which may be considered as derogation from the set forth in Article 14 of the Civil Code rule of full compensation of losses relating to the losses caused by unfair competition. The inclusion of corresponding provisions in an agreement is not prohibited, but seems unlikely given the legal nature of unfair competition.

It is important to keep in mind that the losses caused by unfair competition, are considered by Belarusian law as a measure of civil liability. In literature it is stated that liability in the form of compensation of losses most fully express its compensatory nature [9, p. 173]. In accordance with the principle of the inadmissibility of unjust enrichment by compensation of losses the creditor should not get anything superfluous that goes beyond the necessary allowing restoring his violated rights [10]. This approach has been traditionally inherent to the countries of the Continental system of law.

In this regard it is necessary to note that law of a number of countries of the Anglo-Saxon system (Australia, Great Britain, Canada, New Zealand, USA, South Africa) permits recovering in cases of torts, including unfair competition, of so-called "punitive damages" [11, p. 321]. They are awarded in addition to compensatory damages and the purpose of their award is the achievement of general prevention and due punishment of the tortfeasor for the harm caused to the whole of society [12; 13, p. 30]. According to a famous American scientist J. Y. Gotanda courts and commentators have asserted that these damages also serve other functions. Specifically, they "vent the indignation of the victimized", discourage the injured party from engaging in self-help remedies, compensate victims for otherwise uncompensable losses, and reimburse the plaintiff for litigation expenses that are not otherwise recoverable [14, p. 395–396]. An example of the norm providing for punitive damages is § 1D-1 of Chapter 1D of the North Carolina General Statutes setting forth that these damages may be awarded, in an appropriate case and subject to the provisions of this Chapter, to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts [15].

The mentioned difference in legal approaches raise the question whether the foreign court or arbitration decision awarding punitive damages will be recognized and enforced in the Republic of Belarus. It bears noting, that in some countries, which law, like Belarusian one, does not provide for the punitive damages, the highest

instances in civil matters have already expressed their position on the corresponding issue. Thus, the Supreme Court of Japan, considering the case about the enforcement of the judgment of the Court of the State of California awarding punitive damages, indicated the following: «Article 200 of the Code of Civil Procedure requires that the foreign judgment should not contradict public policy and good morals of Japan. It is evident that the system of punitive damages as provided by the Civil Code of the State of California (hereinafter, “punitive damages”) is designed to impose sanctions on the culprit and prevent similar acts in the future by ordering the culprit who had effected malicious acts to pay additional damages on top of the damages for the actual loss, and judging from the purposes, is similar to criminal sanctions such as fines in Japan. In contrast, the system of damages based upon tort in Japan assesses the actual loss in a pecuniary manner, forces the culprit to compensate this amount, and thus enables the recovery of the disadvantage suffered by the victim and restores the status quo ante and is not intended for sanctions on the culprit or prevention of similar acts in the future, i. e. general prevention. Therefore, the part of the foreign judgment in the present case which ordered the appellee company to pay punitive damages for the purpose of deterrence and sanction in addition to compensatory damages and the cost is against public order of Japan and therefore, has no effect” [16].

To our mind, the adoption by the Supreme Court of the Republic of Belarus of the Regulation, containing some clarifications on the recognition and enforcement in the Republic of Belarus of foreign judgments and arbitration awards on punitive damages would undoubtedly contribute to legal certainty in this field.

From par. 2 of Article 1030 of the Civil Code follows that to demand compensation of the losses caused by unfair competition may any person suffered from it. Thus, the corresponding right is granted not only to the economic entities, but also, for example, consumers in the sense of par. 14 of Article 1 of the Law of the Republic of Belarus of 9 January, 2002 “On protection of consumers’ rights” (individuals who intend to order or purchase or ordering, purchasing goods (works, services) or using the goods (result of work, service) solely for personal, family, household and other needs not related to entrepreneurial activities [17]), which is in conformity with such a progressive tendency of development of foreign legislation aimed at combatting unfair competition as spreading civil protection against unfair competition to consumers.

Based the definition of unfair competition, contained in subp. 1.15 of par. 1 of Article 1 of the Law of the Republic of Belarus of 12 December, 2013 “On counteraction to monopolistic activities and promotion of competition” only the actions of one or several economic entities (under subp. 1.22 of the mentioned paragraph they include legal persons and individual entrepreneurs carrying out entrepreneurial activity

and (or) having the right to carry it out [18]) may be recognized as unfair competition in the Republic of Belarus. Consequently, the lawsuit for compensation of the losses caused by unfair competition may only be filed against the persons concerned.

Before filing the mentioned lawsuit into a court it is advisable for the suffered person to apply to the Belarusian anti-monopoly body (the Ministry of antimonopoly regulation and trade of the Republic of Belarus) for establishing the fact of existence of unfair competition (such authority is assigned to the said body by subp. 1.2 of par. 1 of Article 9 of the Law “On counteraction to monopolistic activities and promotion of competition” and by subp. 6.9 of par. 6 of the Regulation on the Ministry of antimonopoly regulation and trade of the Republic of Belarus, approved by the Council of Ministers of the Republic of Belarus of 6 September, 2016, No. 702 [19]). This can greatly facilitate the proving process in a court (the facts established by the administrative acts are not prejudicial) due to the evidences obtained by the mentioned Ministry within the implementation of the said authority.

It is important to note that if a dispute about the losses caused by unfair competition takes place between legal persons and/or individual entrepreneurs, before reference to a court with a corresponding complaint it is obligatory to observe pre-trial procedure (part 2 of par. 2 of Article 10 of the Civil Code), consisting in the sending of the pre-trial complaint (a written proposal on voluntary settlement of the dispute) and receiving response to it or expiry of the period set forth for the response (part 1 of par. 12 of the Resolution of the Plenum of the Supreme Economic Court of the Republic of Belarus of 27 May, 2011, No. 6 “On certain issues of consideration of cases in an economic court of first instance” [20]).

Since, as it has been already stated, compensation of the losses caused by unfair competition, is under Belarusian law, a measure of civil liability, its conditions are the following:

- 1) carrying out of unfair competition by a certain person (hereinafter – the debtor);
- 2) losses;
- 3) a causal link between the losses born by the suffered person (hereinafter – the creditor) and the debtor’s actions;
- 4) the creditor’s fault in causing losses to the debtor.

Pursuant to part 1 of Article 179 of the Code of Civil Procedure of the Republic of Belarus of 11 January, 1999 [21] and part 2 of Article 100 of the Code of Economic Procedure of the Republic of Belarus of 15 December, 1998 [22] the burden of proof of that conditions is levied on the person, filing a relative claim. Thus, in the case of failure of proof of any of them, a Belarusian court has no right to take a decision awarding losses.

However, it should be borne in mind that the amount of the losses caused by unfair competition, is often objectively difficult to be proved. As correctly noted the

Supreme Court of the Republic of Poland in its Decision of 26 November, 2004, I CK 300/04, it is connected, among others, with the variety and intensity of the effects of an unfair competition act, which may not be always identified and evaluated; in addition, they are poorly palpable, as they concern the reaction of a wide range of clientele, reasons for decrease in interest in the goods, the costs required to restore the market position of the victim, expanded advertisements and damaged, if not undermined reputation of the carried out business and other interests of the suffered entrepreneur, exposed to the risk of their violation [23].

In this regard, in some countries plaintiffs are provided with the possibility to recover the corresponding losses even if their amount is not proved. For example according to French unfair competition case law the harm necessarily stems from the breach of the competitive balance [24, p. 229]. This approach is reflected, in particular, in the judgment of the Commercial Tribunal of Paris of July 26, 2011 on the "Referencement.com v. Zlio". In this case even though the quantum of the damage to the image of the plaintiff caused by dissemination by the defendant of discrediting statements had not been proven, the Tribunal evaluated it in the sum of 10 thousand euros, stating that it was inevitably engendered by the mentioned acts of unfair competition [25]. According to Article 13 of the Commercial torts Law of Israel of 1999 (under this law unfair

competition pertains to commercial torts) the court may, at the plaintiff's request, award damages for every wrong, without proof of actual damage, in an amount of not more than NIS 100 thousand [26]. In par. 5 of Article 393 of the Civil Code of the Russian Federation (Part 1) of 30 November, 1994 it is stated that if the amount of the losses caused by the failure or improper performance of the obligation cannot be determined with a reasonable degree of certainty, the amount of losses to be recovered shall be determined by the court taking into account all the circumstances of the case based on the principles of fairness and proportionality of the liability to the violation of the obligation [27].

To our mind, such approaches to the question under consideration better, than the national one, serve the full realization of the principle of the restoration of the violated rights and enhance the effectiveness of combating unfair competition by civil law means.

On the basis of the analyses carried out in this article it is proposed:

- to adopt the Regulation of the Plenum of the Supreme Court of the Republic on the recognition and enforcement in the Republic of Belarus of foreign judgments and arbitration awards on punitive damages;
- to amend the legislation of the Republic of Belarus for the purpose of elimination of the impossibility of compensation of the losses caused by unfair competition in cases when their exact amount is unproven.

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