DE BERTI ■ JACCHIA

De Berti Jacchia Franchini Forlani
studio legale

IPR immunities in Russian antimonopoly law in the light of recent developments

Olesya Nalimova

Introduction. The draft law "On amendments to the RF Competition Law and other legislative acts", so-called "fifth antimonopoly draft" ("Draft"), was published for a public consultation that came to an end on April 24, 2018. The Draft is aimed at improving the antimonopoly governance in the context of digital economy. Among other innovations, the Draft seeks to eliminate the immunities provided by Russian antimonopoly law in the area of intellectual property. We consider below this particular provision of the Draft in the light of the existing antimonopoly legislation, the recent RF Constitutional Court ruling on parallel imports and prevailing legal thinking on the subject.

Immunities from antimonopoly law for IPR holders. The RF Competition Law envisages immunities for IPR holders from certain antimonopoly prohibitions provided for in articles 10 and 11 of the Law.

Article 10 of the Competition Law prohibits actions and omissions of dominant undertakings that can result in the prevention, restriction or elimination of competition or impairment of the interests of other undertakings in commerce or relations with consumers, including: determination of monopolistically high or low predatory prices; withdrawal of goods from circulation, if the price of goods increases as a result of such withdrawal; imposition of unfavorable conditions of agreement on a counterparty; establishment of different prices for the same goods that are not economically, technically or otherwise justified; imposing discriminatory conditions; and others. The list is open, i.e. other kinds of actions or omissions that fall under the general definition of article 10 could be found unlawful and therefore prohibited. Meanwhile, the same article expressly states that such requirements shall not extend to the exercise of intellectual property rights (article 10 para 4).

Article 11 of the Law prohibits cartels, i.e. agreements between competing undertakings, if such agreements result or may result in determination or maintenance of prices, discounts or price increases; increase, decrease or maintenance of prices in trading; partitioning of product market based on territory, volume of sales or purchases of goods, assortment of goods or type of sellers or buyers; reduction or termination of product manufacture; or refusal from entering into agreements with certain sellers or buyers. This article furthermore prohibits vertical agreements, if they can result in resale price maintenance (except for the case where the seller establishes a maximum resale price for the buyer), or if such agreements oblige a buyer to refrain from selling goods of a competitor. This article also prohibits other agreements that may lead to a restriction of competition and provides examples of the same. The same article also expressly exempts intellectual property rights assignments and licenses from the above prohibitions (article 11 para 9).

The new Draft foresees deleting article 10 para 4 and article 11 para 9 of the Law; in other words, both antimonopoly immunities for intellectual property right holders would in the future cease to apply if the Draft becomes law.

Antimonopoly law and parallel import. The recent and much debated judgment of the RF Constitutional Court dated February 13, 2018 assessed the constitutionality of the application of the exhaustion principle and certain legal consequences of parallel imports in the OOO "PAG" case [see our article "The Principle of exhaustion un Russia in the light of the recent Sony v PAG Constitutional Court Judgement", https://www.lexology.com/library/detail.aspx?g=20afd280-fe94-4150-bbab-1dd4617e50bf]. The antimonopoly law provisions were not contested and were not the subject of the Constitutional Court's decision at the case and, therefore, the same did not oblige the federal legislator to amend the antimonopoly legislation in consequence. However, the Constitutional Court held that the existing prohibition on parallel imports does not mean that the unfair use of the exhaustion rule – in particular consisting in restricting importation of specific goods in Russia or exercising an overpricing policy in the Russian market – could withstand security from the standpoint of the protected constitutional values. As a result, the judgement allows the Courts to deny the common consequences of parallel imports in cases where the unfair behavior of the trademark holder may threaten the public interest. In this way, the Constitutional Court designed the logical pathway to apply antimonopoly law, and indirectly article 10 of the Competition Law, as a legal instrument for assessing the fairness (and permissibility) of the IPR holder's behavior.

Discussion. There is consensus among the Russian commentators that competition as a constitutional value should be upheld also as concerns intellectual property, and so, a balance should be stricken between these two constitutional interests of the same rank. However, opinions on how this conflict should be resolved differ. The first position, which is reflected in the Draft, consists of the withdrawal of immunities for intellectual property from the antimonopoly legislation, i.e. deleting article 10 para 4 and article 11 para 9 of the Competition Law. At the same time, most commentators add that if such immunities are withdrawn, then this should be done by establishing an exhaustive list of unfair actions and omissions of the IPR holder. The second school of thought, however, notes that, in order to secure protection in the general interest and for the sake of consumers from IPR holders' unfair behavior, it would not be necessary to withdraw the antimonopoly immunities, because the existing civil law prohibition of the abuse of right is sufficient to give protection from the unlawful conduct of an IPR holder.

This is not the first time the question of IPRs immunities becomes the object of debate, and the new Draft represents the latest attempt of withdrawing the immunities. Whatever the destiny of the Draft, the increasing interest in the subject, along with the recent position taken by the Constitutional Court, will inevitably result in a more comprehensive legal approach bound to curtail

to some extent the privileges that thus far surrounded the exercise of IPRs placing the right holders in a unique and “untouchable” position.

The new Draft also marks a tendency in the direction of approaching the Russian analysis of IPRs in the competition law perspective to that of the European Union. The EU case-law (and that of the Member States) has since long concerned itself with the balance that needs to be found between the absolute nature of IPRs, which by rewarding the holder with the monopoly encourage investments, research and innovation in the interests of technical and scientific advance and society and large, and that of other undertakings and, ultimately, consumers in seeing limits and corrections attached to the IP monopolies for the sake of the freedom of competition. The European solution, which is invariably complex to develop, is that both values need to co-exist and that, in the end, the public interest and that of consumers must prevail. If the Draft becomes law, the way will be paved for the case-law of the Russian courts to provide a key-contribution to the progress of legal thinking.

We will monitor closely, and report to our readers on, the subsequent evolution of the Draft.