

Parallel imports in Russia: expected changes in regulation and practice in the light of a breakthrough decision of the Constitutional Court

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Exhaustion doctrine and parallel imports

Parallel imports, Intellectual Property ("IP") protection and its correlation with antimonopoly regulation is one of the most discussed topics in the Russian Federation for the past 15 years.

In general, the issue of parallel imports is closely associated with the exhaustion doctrine (that is, once a product protected by IP has been marketed either by a right holder, or with the consent of a right holder, IP protection over the products is exhausted and can no longer be exercised).

From 2003, further to the entrenchment of the national exhaustion principle, distribution of a product in Russia was only allowed upon consent of a right holder (regardless of the introduction of a product into sale in other countries) Parallel imports constituted a breach of IP in the form of counterfeit and led to civil liability (including forfeiture and destruction, as a general rule).

Ruling of the Constitutional Court

On February 13, 2018, the Russian Constitutional Courts issued the Ruling No. 8-П, addressing some debated questions of parallel import in Russia and setting criteria for differentiating between importing counterfeit product and parallel imports. Further, the Court established that different legal remedies shall be applied to counterfeit and defective products on the one hand, and to the import of legally-obtained products to Russia without consent of a right holder, on the other. For instance, forfeiture and destruction of illegally-imported original products may only be applied in extraordinary cases (bad quality of a product, unsafe nature, etc.). The other example is damages, which should include significant reputational losses in case of counterfeit import. However, such damages should not be calculated similarly for that for parallel imports.

Such an approach is based on the difference between threats of counterfeit and parallel imports for the sale of products and consumer protection.

In addition, the Constitutional Court expressed its opinion regarding addressing parallel imports as a legal remedy, from the competition legislation perspective. In the application of PAG LLC, which initiated the case, it was mentioned that rules of Civil Code and their interpretation might lead to situations where infringement of IP is beneficial to right holders. In particular, claims for compensation and forfeiture of a product might be significantly more effective from the economic perspective than using IP, by way of selling of a product, or issuing licenses. The Court emphasized that when a trademark holder restricts import of original products into Russia, it might be considered as unfair/abusive behavior.

Changes in court and administrative practice

The court and administrative practice has not yet reflected the Constitutional Court Ruling. For instance, the same remedies (forfeiture, destruction and claims for compensation) are still applied for both counterfeit and parallel imports in a number of cases. Although it might take some time to change the course of practice, the principles enshrined in Constitutional Court Ruling will obviously map out the decisions to come.

Expected changes in regulation

The Ruling also revived debates among governmental authorities in respect of recognition of parallel imports as legal.

Although there are still some opponents to the introduction of parallel imports in Russia, such as the Ministry of Industry and Trade, that asserts that introduction of parallel imports may reduce investments in industry and manufacture of products in Russia, the initiative to make parallel imports legal is backed by business communities and governmental authorities.

The Federal Antimonopoly Service ("FAS Russia") prepared amendments to the Civil Code on the legalization of imports without the permission of trademark holder. The amendments will allow the Government to allow parallel imports of certain products, starting from 2021, for a period of up to five years.

The draft law provides for four cases in which the government might resort to such a measure:

- (1) a product is not available,
- (2) there is a lack of such a product in the market,
- (3) a product is overpriced,
- (4) qualitative characteristics of a product are different from those sold in other countries.

Herewith, there is an exception for products, the production of which is localized in Russia.

Moreover, it is currently suggested to introduce parallel imports into the territory of Kaliningrad Region, as a testing site. The governor of the Region notes that the Russian market is becoming super-premium priced from the point of view of consumers. For example, prices for medicines for end-consumers might differ ten times from those established in the producing country. That leads to the question, of who are beneficiaries of the ban on parallel imports and who are protected by it.