

УДК 343.533.63

Destruction or Property Damage as a Qualifying Sign of Non-Admission, Restriction or Elimination of Competition

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Received 4.02.2011, received in revised form 11.02.2011, accepted 18.02.2011

Summarising stated above it should be noted, that a crime provided by the Criminal code item «b» p. 2 art. 178 (by the sign «connected with destruction or damage of another's property») is compound. Not all of the ways of non-admission, restriction or competition elimination can be connected with destruction or property damage, but only conclusion of limiting agreements co-ordinated actions and numerous abuse of a leading position made by restriction of access to the commodity market can be.

Keywords: complete norms of criminal law.

Point

Item «b» p. 2 art. 178 of the Criminal code provides liability for a crime uniting several acts: namely, non-admission, restriction or competition elimination (p. 1 art. 178 of the Criminal code) and deliberate destruction or damage of another's property (art. 167 of the Criminal code).

The article investigates differentiation of crimes provided by the Criminal code art. 167 and crimes provided by the Criminal code item «b», p.2, art.178 (where destruction (damage) of another's property is named a qualifying sign). In this connection the issue under consideration is whether the crime provided by the Criminal code item «b», p.2, art.178 is compound.

Example. By a compound norm criminal-legal literature understands the norm of Especial part of the Criminal code fixed within the limits

of one article or a part of the law article including two or more other norms of Especial part of the Criminal code, where each taken separately provides independent corpus delicti of a crime. (Pitetsky, 2004).

To define, whether the norm is compound A.S.Gorelik suggests using the following method: if to imagine that a compound corpus delicti is wanting in legislation then the act provided by it should «split» into a set of several norms (Gorelik, 2001).

If a specified rule is to be applied to a crime provided by the Criminal code item «b», p. 2, art. 178 then under absence of this norm in the Criminal code non-admission, restriction or elimination of competition committed with destruction or damage of property should be qualified under the set of the Criminal code p. 1 art. 178 and p.1 or 2 art.167.

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Hence, a crime provided by the Criminal code item «b» p.2 art.178 (under the sign «conjugated with destruction or damage of another's property») is compound. In this connection it is necessary to solve a question whether additional qualification in the aggregate of article 167 of the Criminal code is required in case of real destruction or damage of another's property.

Under the Criminal code p.1 art. 17 a commission of two or more crimes makes up the aggregate of crimes except cases where a commission of two or more crimes is provided by articles of the Especial part of the Criminal code as a circumstance entailing a stricter punishment.

Therefore, we will consider sanctions of the given norms. Maximum penalty for the crimes provided by p. 1 article 167 of the Criminal code is two years of imprisonment and for the same action committed by arson, explosion or another general dangerous way or entailed death of a person or other heavy consequences by negligence (p. 2 art. 167 of the Criminal code) – five years of imprisonment. As to a maximum penalty for crimes provided by the item «b» p. 2 article 178 of the Criminal code it considerably exceeds maximum penalty of both parts of article 167 of the Criminal code and equals 6 years of imprisonment.

Here it is possible to draw a conclusion, that deliberate destruction or property damage is completely covered by item «b» p.2 art. 178 of the Criminal code and additional qualification under p. 1 or p. 2 is required.

Proceeding from disposition of p.1 article 178 of the Criminal code non- admission, restriction or competition elimination are possible by conclusion of agreements restricting competition or implementation of co-ordinated actions restricting competition, numerous abuse of a leading position expressed in establishment or maintenance of exclusively high or exclusively

low price of the goods, unreasonable refusal or evasion of contract conclusion, restriction of access to the market.

However, not all of the specified ways of non-admission, restriction or competition elimination can be connected with destruction or property damage. In our opinion, they can only be matched with *conclusion of limiting agreements and co-ordinated actions* as well as numerous abuse of a leading position committed by *restriction of access to the commodity market*.

Thus, we will note, that agreements and co-ordinated actions concern not only actions of economic entities but authorities as well.

To define concepts «agreement» and «co-ordinated actions» among economic entities we will turn to regulatory legislation, i.e. Federal law «On competition protection».

Agreements restricting competition is an agreement made in writing, contained in a document or several documents as well as an oral agreement. It is necessary to emphasise that the agreement in the sense of competition law, unlike the contract in its civil-law understanding cannot establish rights or duties of the parties but only express the parties' intentions concerning the future actions (omissions) of each of them (Sushkevich, 2007).

A.Sulashkina understands by an agreement restricting competition, contradicting competition law a guilty, stipulated by mutual will of the parties agreement reached in any form by economic entities (group of persons) on coordination (concurrence) of activity in the commodity market which result is or may be non-admission or restriction, elimination of competition or aimed at infringement of interests of other economic entities or consumers (A.Sulashkina, 2007). In judiciary practice the agreement is defined as the arrangement reached by economic entities on coordination of those or other aspects of entrepreneurial activity which result is (can

be) restriction or competition elimination in a corresponding commodity market or restriction of consumers' rights.

In addition to the above-stated, we will add, that among economic entities the agreement will take place, if an arrangement is reached on *all* key parametres necessary for entire control over the market from firms, having an essential cumulative share of the market. In case of the arrangement on *separate* parametres insignificant competition on not co-ordinated parametres can theoretically be observed. For example, by the arrangement on price level firms can (at market conditions favorable for them) compete on volumes of supplied production, and a firm with big capacities can increase the market share by means of sharp increase in goods supply. According to article 8 of Federal Law «On competition protection» *co-ordinated actions* of economic entities are their actions in the commodity market, satisfying a set of following conditions: 1) the result of such actions corresponds interests of each of the specified economic entities only provided that their actions are known to each of them in advance (under Criminal code terms – there is a preliminary collusion); 2) actions of each of the specified economic entities are caused by actions of other economic entities and are not a consequence of circumstances equally influencing all of them in the corresponding commodity market.

Change of adjustable tariffs, change of prices on raw materials used for manufacture of the goods, change of prices on the goods in the world commodity markets, essential change of demand for goods within not less than one year or during a corresponding commodity market term of existence if such a term makes less than one year can be such circumstances, for example.

As I.V.Knyazeva correctly notes, co-ordinated actions are actions (omissions) of economic entities putting their behaviour in dependence on behaviour of other participants

of the market deliberately which results in (may result) competition restriction in a corresponding commodity market (Knyazeva, 2006).

There are also other definitions of the similar actions aimed at restriction of competition as a result of arrangements among firms. In the economic literature these actions are characterised by such terms as *conscious parallelism*, *co-ordinated actions*, *cartel*, and *collusion* as well.

It should be noted, that present-day judicial practice demands an antimonopoly authority at establishing infringements of article 11 of Federal Law «On competition protection» to specify what actions have been made -an agreement restricting competition or co-ordinated actions restricting competition. Competition actions of economic entities often have a long, continuous character. The result of a preliminary oral arrangement (the first action) can be co-ordinated actions (the second action). In consideration of a competition case there is a question what is necessary to recognise by infringement – the first action or the second one. It is also necessary to consider, that sometimes an antimonopoly authority has only indirect signs of presence of preliminary conversation, a meeting and so forth. A judicial instance obliges to prove the given fact with acknowledgement of time, a place, a group of participants. Hence, is it possible to qualify co-ordinated actions (the second action) if the essence of the case suggests a logic assumption of presence of preliminary arrangement and if there are no proofs of agreement? We believe that co-ordinated actions exactly are subject to prove as long as (no paper, audio, video records) the agreement between participants is not bound formally.

Proceeding from judiciary practice, the antimonopoly authority at making a decision can establish presence of neither agreements, nor co-ordinated actions (as one following of another) with one group of participants. One action – either

an agreement or co-ordinated actions is specified in the decision accordingly.

There are difficulties in the definition of such a consequence as competition restriction. It is connected with absence of «non-admission» signs and competition «elimination» concept.

Certainly, difficulties arising at application of competition law also concern applications of article 178 of the Criminal code of Russian Federation.

According to FL «On competition protection» agreements and (or) co-ordinated actions of economic entities restricting competition, can be either horizontal or vertical.

These are agreements between competitors who limit possibility of their independent activity by taking certain obligations. The fact of existence of horizontal agreements or co-ordinated actions, as a rule, is connected with a certain oligopoly structure of the market which is characterised by presence of rather a small number of sellers of differentiated or homogeneous goods as well as considerable barriers to enter the market¹.

The concept of horizontal agreements and co-ordinated actions covers a wide range of models of behaviour, from creation of joint ventures, uniform technology of advertisement placing, carrying out joint marketing research, activity of branch associations to fixing prices and exhibiting rogish orders. The vertical agreement is an agreement between economic entities who do not compete among themselves, one of which gets the goods or is its potential purchaser, and the other gives the goods or is its potential seller.

Considering new provisions of FL «On competition protection» concretising consequences of horizontal and vertical agreements, *horizontal agreements or co-ordinated actions* can lead to the following consequences: to establishment or maintenance of prices (tariffs), discounts, markups (surcharges),

price markups; to increase, decrease or maintenance of prices at the auctions; division of the commodity market by a territorial principle, volume of sale or purchase of the goods, assortment of products sold or sellers or buyers (customers) composition; economically or technologically unreasonable refusal of contracts conclusion with certain sellers or buyers (customers) if such refusal is not directly provided by federal laws, normative legal acts of the President of Russian Federation, normative legal acts of the Government of Russian Federation, normative legal acts of the authorised federal executive authorities or judicial acts; imposition of contract provisions to a counterpart unprofitable for him or irrelevant to the subject of the contract (unreasonable requirements on financial assets, other property, including property rights transfer as well as consent to conclude the contract under condition of introducing provisions concerning the goods in which the counterpart is not interested, and other requirements); economically, technologically and otherwise unreasonable establishment of the various prices (tariffs) on the same goods; to reduction or termination of the goods production being in demand for or under placed orders for delivery with a view of their profitable production; to creation of obstacles to access to the commodity market or to an exit from the commodity market for other economic entities; to establishment of conditions of membership (participation) in professional and other associations if such conditions result or can result in non-admission, restriction or competition elimination, and also to establishment of unreasonable criteria of membership which are obstacles for participation in payment or other systems, without participation in which the financial organisations competing among themselves cannot render necessary financial services. According to the article both agreements and the co-ordinated actions can lead to the above-named consequences.

As article 178 of the Criminal code disposition does not specify ways of performing agreements or the co-ordinated actions hence, all consequences set forth above can be qualified (where there harm) as a criminal offence.

Taking into account that an agreement or co-ordinated action is originally defined followed by its consequences set forth above then it is quite probable that the former can always be connected with destruction or damage of another's property.

It should be emphasised that abuse a leading position expressed in restriction of access to the market can also be made with destruction or damage of another's property.

So, in Krasnoyarsk criminal proceeding was instituted under the Criminal code p. 3. art. 178 on the grounds of the buses owner statement concerning the competitor's actions aimed at restriction of bus passengers' transportations competition. The applicant during investigation testified that there were adverse conditions on the bus route because of the competitor the owner of 20 buses guilt also engaged in transportations on the given route. The entrepreneur referred regular infringement of the co-ordinated schedule, threat of destruction of buses and provocation of road and transport accidents to restriction of access to the market. Thus, obstacles to perform entrepreneurial activity were created by him. However, during the investigation proofs confirming the competitor's guilt has not been found. At carrying out commission technical and economic examination it was established, that the competing entrepreneur did not occupy a leading position in the commodity market of transport services, therefore his actions cannot be qualified under article 178 of the Criminal code.

As we have highlighted, threat of destruction or damage of another's property is not an independent punishable act. Therefore, a leading position of an economic entity in the commodity market or the fact of non-admission, restriction or elimination of a competition, etc. is not established in the case then the very threat of destruction or damage of property has no criminal-legal ground. However, if there was *real* destruction (damage) of another's property and for example, a leading position of the economic entity was not established then act of commission should be qualified under article 167 of the Criminal code.

Establishment of *corpus delicti* signs provided by article 178 of the Criminal code is connected with big difficulties and requires a person conducting investigation to have special knowledge in the field of competition law. In this connection a number of cases are initially instituted under article 167 of the Criminal code and consider competitive struggle between economic entities as one of versions in the course of investigation.

It is necessary to emphasise that (damage) property which is destroyed with a view of elimination of the competitor from the commodity market, can be both products sold by the competitor, and means of production belonging to him. For example, in Krasnoyarsk entrepreneurs rendering entertaining services in the sphere of horse riding eliminated the competitor by means of a trespass to his industrial property (horse).

In our opinion, damage of property entailing even *temporary non-admission* restriction or competition elimination is enough to incriminate restriction of access to the market.

¹ Oligopoly is one of market structures types of imperfect competition at which the supply of goods in the market is provided with a small number of relatively large firms. Thus, each seller's share in the general sales is so great that change in quantity of supplied production of each of sellers leads to price change.

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Уничтожение или повреждение имущества как квалифицирующий признак недопущения, ограничения или устранения конкуренции

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В статье исследуется разграничение преступлений, предусмотренных ст. 167 УК, и преступлений, предусмотренных п. «б» ч. 2 ст. 178 УК (в которой уничтожение (повреждение) чужого имущества названо в качестве квалифицирующего признака). В связи с этим рассматривается вопрос: является ли преступление, предусмотренное п. «б» ч. 2 ст. 178 УК, составным.

Ключевые слова: составные нормы уголовного права.
