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Advertisement in the EAEU Countries: Law Harmonization Issues

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Abstract:

The rapprochement of economic laws, set forth in the Treaty on the Eurasian Economic Union (EAEU), provides for the unitary standards of disseminating economic information. In the mid-1990s, Russia became a model in regulating advertising activities for the majority of the FSU (Former Soviet Union) republics. Nevertheless, the article presents substantial differences in advertisement understanding in the EAEU that can slow down the turnover expansion. It is demonstrated that even the same words can have different meaning. The paper analyzes the drawbacks in different approaches. In particular, it concludes that lawmakers do not pay enough attention to the regulation of advertisement in the new communication media. The author outlines some opportunities to eliminate the drawbacks in the process of bringing together the laws.

Keywords: Eurasian Economic Union; advertisement, information; public, promotion.

JEL Classification: O10; M31; M37.

Introduction

On May 29, 2014, the leaders of Belarus, Kazakhstan and Russia signed the EAEU Treaty in Astana. The treaties on the accession of the Republic of Armenia and the Kyrgyz Republic to the Eurasian Economic Union were signed on October 10, 2014 and May 8, 2015, respectively. According to p. 3 of Art. 5 of the EAEU Treaty, the member states seek to implement the concerted or coordinated policy in all spheres of the economy, excluding the ones,

where they implement the concerted or coordinated policy in the frames of this document. The advertising activity as such is not named in the Treaty. So, on this stage the question is to refer to commitment to coordination of the policy in this sphere. We think that processes occurring in the advertising sectors of the EAEU countries indicate the relevance of the rapprochement of advertising laws taking into account the development of economic cooperation.

Thus, for example, in October 2016 mass media informed on the new advertising campaign of the Yerevan Brandy Company, including TV and outdoor advertising and creative materials for points of sale. The campaign is to take place in Armenia, Kazakhstan, Ukraine, Russia, Belarus, Lithuania, Estonia, Latvia, Slovakia, and the Czech Republic (The Legendary Armenian Cognac). But, if in Armenia all the above-mentioned types of alcohol advertising are allowed, in Russia cognac TV and outdoor advertising is impossible. So, the development of an advertising campaign with regard to the law of only one country can result in great financial losses of the advertiser. Therein, the key role belongs to the advertisement legal concept, because according to this concept regulatory requirements will be either applied or not applied to company sites, product package, references to product in media content, etc.

1. Methods

The research was performed by means of the comparative legal analysis. The method, which has been used since ancient times to understand and to improve the local (polis, regional, national) legislation, today becomes more topical due to the development of the international and national law (for example: Twining 2013; Morgera 2015). Tikhomirov (1996, 54-55) underlines the typical mistakes of applying the comparative method in jurisprudence, based on which we can form the main rules for applying the comparative analysis:

- to select similar comparison objects (to compare an institute with an institute, a standard with a standard, etc.);
- to take into account the conditions of appearance and functioning of the comparison objects;
- to take into account the peculiarities of the legal culture and traditions;
- to use legal notions precisely.

One of the simplest ways to choose similar comparison objects is their terminological identity (Stalev 1978). Obviously, this criterion can be applied when comparing knowingly identical legal systems. Otherwise, the lack of the same terminology or definition of different phenomena by the same term is possible (Reimann and Zimmermann 2006).

We intend to compare the legal definitions of advertisement in Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia. All five countries have special advertising laws, and we will use their official texts in Russian. Thus, we comply with the first comparison rule, referring to the identification of similar objects, to the fullest extent. As for the conditions of appearance and functioning of the comparison objects and legal traditions, it should be noted that all five countries are former Soviet Union republics.

Y.A. Tikhomirov offers the comparison criteria and says that not all of them are obligatory for specific situations (Tikhomirov 1996, 58): based on the subject authorized to act; based on the volume and nature of rules of conduct; based on provision of norms with sanctions, incentives, etc.; based on relations with the other norms; based on position of the act in the system of the industry-specific or general legislation; based on the terms and period of adoption; based on the efficiency, that is, the attitude of citizens and agencies, and the level of implementation.

These criteria will be taken into consideration. But, to our opinion, first of all we should compare the content of definitions under review. For this purpose, we will use the structural analysis as a way of fixing the invariant of the comparison objects (Philosophical Encyclopedia 1970, 140; Popovich 1989, 39). At that, emphasizing structural elements is stipulated by the genre of the analyzed text (Townley and Jones 2016). The primary comparison materials include the texts of laws containing the definition of advertisement, thus, the structural elements are features, contained in these definitions. Some studies underline the importance of literal interpretation that is defined as an exact understanding of language structures (Corrigan and Thomas 2003). But sometimes textualism is insufficient as it is needed to find out the meaning of words and constructions appealing to external sources, the case law inclusive (Skoczeń 2016). So, the structural elements of a definition are words or word combinations, the meaning of which is determined by both the internal context, i.e. the definitions and logical connections in the text of the advertising law under survey, and the external context, i.e. the general understanding of a word, the definitions in other regulations, the logical connections among different regulations, the official interpretation and administration of law. The right to legal interpretation belongs to courts and agencies controlling the compliance with the advertising law. In Russia, it is the Federal Antimonopoly Service, in Belarus – the Ministry of Trade, in Kazakhstan – state agencies controlling the advertised industry, in Armenia – the State Commission for the

Protection of Economic Competition and the State TV and Radio Committee (in relevant spheres), in Kyrgyzstan – the State Agency of Antimonopoly Regulation at the Government of the Kyrgyz Republic. The statistical and contextual analysis of the law enforcement practice of these agencies has been performed.

2. Results

2.1. Definitions of Advertisement in Laws of the EAEU Member States

The first advertising law in the territory of the former Soviet Union was the Federal Law of Russia 'On advertising' dd. July 18, 1995. The definition of advertisement in this Law was a reference point for lawmakers of the other EAEU states. That's why it is feasible to give this definition at the beginning of our analysis. According to Art. 2, advertisement means information on a person or entity, products, ideas and initiatives (advertising information) disseminated in any form by any media to the public aimed at forming and keeping up interest to this person or entity, products, ideas and initiatives and promoting products, ideas and initiatives. In the effective Federal Law No. 38-FZ 'On advertising' dd. March 13, 2006 (hereinafter referred to as the Law of the RF), the definition of advertisement is amended in a way.

Art. 3 of the Law of the RF defines advertisement as information disseminated in any way and form and by any media to the public aiming at attracting attention to the advertised object, forming and keeping up interest to it and its marketing. The features contained in this definition are binding on advertisement, and the lack of any feature means that such term as 'advertisement' cannot be applied to this phenomenon, and the advertising law is ineffective in this case. Here is the list of such features, which amount to six. Their content will be analyzed a bit later. First, information is disseminated in any way and form by any media. Second, it is intended for the public. Third, it is aimed at attracting attention. Fourth, it is aimed at forming and keeping up interest. Fifth, it is aimed at marketing. Sixth, it is advertised object. The lawmaker informs what it means: a product, its brand, manufacturer or seller, intellectual deliverables or an event, the attention to which is drawn by the advertisement (Art. 3 of the Law of the RF).

According to the Law of the Republic of Belarus No. 225-Z 'On advertising' (hereinafter referred to as the Law of the RB) dd. May 10, 2007, advertisement means information on the advertised object disseminated in any form by any media aiming at attracting attention to the advertised object, forming and keeping up interest to it and (or) its marketing (Art. 2 of the Law of the RB). Its features are: (1) information is disseminated in any form by any media, (2) it is aimed at attracting attention, (3) it is aimed at forming and keeping up interest, (4) it is aimed at marketing, (5) it is advertised object.

The Law of the Republic of Kazakhstan No. 508-II 'On advertising' dd. December 19, 2003 (hereinafter referred to as the Law of the RK) defines advertisement as information disseminated and published in any form by any media to the public aiming at forming and keeping up interest to a person or entity, products, trade names, works, services and their promotion (Art. 3). Its features are: (1) disseminated and published in any form by any media, (2) intended for the public, (3) aimed at forming or keeping up interest, (4) aimed at marketing, (5) a person or entity, products, trade names, works, services.

In Armenia, the law of the 1990s is still in effect. The Law of the Republic of Armenia 'On advertising' (hereinafter referred to as the Law of the RA) was adopted on April 30, 1996. We will identify the features directly in the definition. As per Art. 2, advertisement is (1) dissemination by different media of information (2) on a person or entity, products, ideas or initiatives (3) to the public (4) aiming at forming and keeping up interest (5) to this person or entity, products or initiatives. That is, dissemination of information rather than information is called advertisement. But the comprehensive interpretation of the text of the law makes it clear that it is an incorrect construction, in fact it means the same as in other laws of the EAEU member states.

The effective Law of the Kyrgyz Republic 'On advertising' was also passed in the 1990s. The Law No. 155 dd. December 24, 1998 (hereinafter referred to as the Law of the KR) came into force on January 06, 1999. But the local lawmaker turned attention to the necessity to bring together the national legislation and the laws of other EAEU member states. The latest amendments to the Law of the KR came into effect simultaneously with the Treaty on Accession of the Kyrgyz Republic to the EAEU. Nevertheless, it is impossible to recognize these amendments as sufficient for the harmonization of laws of the member states, because, first of all, advertising laws in these countries differ markedly. The Law of the KR reproduces textually the Russian Law of 1995: advertisement means (1) information (advertising information) disseminated in any form by any media (2) on a person or entity, products, ideas and initiatives (3) to the public (4) aimed at forming and keeping up interest (5) to this person and entity, products, ideas and initiatives and (6) promoting products, ideas and initiatives. Thus, one can see that all the definitions of advertisement are based on the same scheme; some terms coincide, but they have some differences.

2.2. Concurring Features

The formulations of only two features concur completely or almost completely.

The generic term of advertisement used in all laws is the term of information. The Federal Law of the Russian Federation No. 149-FZ 'On information, information technologies and information protection' dd. July 27, 2006 (Federal Law of the RF 'On information') defines information as a notice (messages, data) irrespective of the form of its presentation (Art. 2). The Law of the Republic of Belarus 'On information, IT (information technologies) development and information protection' dd. November 10, 2008 (the Law of the RB 'On information, IT development') repeats the same: information means data on persons, items, facts, events, phenomena and processes irrespective of their form of presentation (Art. 1). The Law of the Kyrgyz Republic No. 107 'On IT development' dd. October 8, 1999 (the Law of the KR 'On IT development') has the same definition: information means data on persons, items, objects, facts, events, phenomena and processes irrespective of their form of presentation. With such an approach, information is to be distinguished from subjective assessments, opinions, as well as questions, requests, appeals, etc. Consequently, value judgments are excluded from the purview of the advertising legislation. Thus, the Expert Council on Applying the Advertising Legislation of the Ministry of the Russian Federation on Antimonopoly Policy and Business Support (today – the Federal Antimonopoly Service) at the meeting of February 2, 2004 determined that the slogan 'Carlsberg. Probably the best beer in the world' is not an advertisement. The word 'probably' manifests the personal evaluative rather than informative nature of this slogan.

But we cannot affirm that the approaches to information in the EAEU member states coincide in whole. The problem is that, on the one hand, in Armenia and Kazakhstan there is no legal definition of this term and, on the other hand, there is a wording of the Model Law No. 23-14 'On the right to information' passed by the decision of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States dd. April 17, 2004 (the Model Law). It states that 'information is data on persons, items, facts, events, phenomena, processes and opinions on them irrespective of their presentation form'. Therefore, this definition, recommended for all the CIS countries, the EAEU inclusive, contains both data and opinions on them, which is outside the frames of the term in Russia, Belarus, and Kyrgyzstan. Unfortunately, it was difficult to check how the authorized state bodies in Armenia and Kazakhstan understand information. In Kazakhstan there is no single body controlling the advertising activity, and the law enforcement practice is very poor. According to the statistics, in 2009 the Law of the RK was applied twice, and in 2011 – nine times (The Overview of Advertising Activities in the CIS Countries 2013, 35). At the moment of writing the article, the draft law establishing the coordinating body (advertising sector) was under discussion. But public sources contain the statistics on applying the Law of the RA. The websites of the relevant Armenian state offices contain no decisions with regard to advertisement – contrary to the decisions on other jurisdictional issues (The State Commission for the Protection of Economic Competition of the Republic of Armenia, n.d.; The National TV and Radio Committee, n.d.). All these facts alongside with others show that the Law of the RA today is not an effective instrument controlling economic relations in the Republic.

All lawmakers agree that one of the aims of advertisement is to form and keep up interest. Efremova's Modern Russian Explanatory Dictionary contains, probably, the largest spectrum of meanings of the word 'interest': 'I. (1) Real reason for social activities forming the basis of direct incentives – motives, ideas, etc. – of individuals, social groups participating therein (in sociology). (2) Attitude of a person to the object as if it is something valuable, attractive (in psychology). (3) Attention to somebody or something important, useful; diverting, thrill. II. *Colloquial*. Profit, benefit, good, use' (Interest). The first three variants correspond to the context of definition of advertisement to a greater or lesser degree. Advertisement is to attract attention (the third meaning), to form a positive attitude of a person to the advertised object (the second meaning), to stimulate particular actions (the first meaning). These meanings are put behind the AIDA (Attention, Interest, Desire, Action) oldest formula of advertising impact. Moreover, all the definitions, excluding the definition in the Law of the RA, have a specific reference to incentives to act – the third aim, and the Law of the RF emphasizes attraction of attention. So, despite the similarity of the attitude to such a term as interest, the details differ, and the common thing for all legal definitions of advertisement is the interpretation of interest as the attitude of a person to the object as to something valuable, attractive.

2.3. Differing Features

2.3.1. Public Accessibility

First, let us analyze a feature absent in the definition of the Law of the RB – 'public accessibility'. In spite of the long-term practical application and a number of special explanations and comments, it is still causing arguments. There are two radically different views, although in some documents we can find their combination. The first view:

the public means people, who cannot be defined as recipients of advertising information beforehand (The Federal Antimonopoly Service Letter No.AC/4624 2007). The certainty in terms of recipients can be in two cases: when you specify a certain person – a recipient of information - in the message, or when you provide information only to the persons, who have already entered in legal relations with the information source (usually – labor or sales relations). For example, distribution of souvenirs with the company logo among employees of the same company cannot be considered as advertisement (Decision of the Federal Arbitration Court for the North-Western District No. A21-3239/03-C1 2004). The second view is rather recent: the public means persons, who cannot be defined beforehand as a party interested in the products or services. The Arbitration Court for the Moscow Circuit during the Home Credit and Finance Bank messaging proceedings ordered that 'advertising messages were addressed to the public, that is, to people, who cannot be defined beforehand as a party interested in legal relations resulting from realizing the advertised object, as it is not known, which recipient will come to the bank for services under the influence of advertisement' (Decision of the Arbitration Court for the Moscow District on the Case No. A40-104035/14 2015). The Federal Antimonopoly Service explains the same hearings in a somewhat different way: 'advertisement means specific non-personified information focused on promotion of a specific advertised object, even if it is sent to a specific mailing list. Thus, for example, in case of messaging information on products, services, events of a definite person or a person himself (data on the advertised object), such information can be considered as advertisement, if it has generalized nature and can form interest to this advertised object both of the recipient and another person. Such data are not of personified nature; in spite of a personal address in the message (the recipient's name and patronymic), they are of interest for the public and are considered as advertisement' (On Qualifying Information with Personal Address as Advertisement. Explanations of the Federal Antimonopoly Service of Russia No. AD/43482/16, 2016). Obviously, the explanations of 2007 and 2016 are conflicting. The target of this article is not to define a 'better' position. That's why we will only confine to the statement of appeared legal uncertainty.

The Belarus lawmaker dismissed the term 'the public'. Thus, in the Republic of Belarus, advertisement can be a message addressed to a specific person, when the addresser's aims coincide with advertising aims set in the Law of the RB. We checked if it is put into practice. We have analyzed the failures to comply with the advertising law in 2010-2016, which were reported on the website of the Ministry of Trade of the Republic of Belarus and totaled to 151. But there was no one, when a message to a specific person was qualified as advertisement. So, as far as this part of practical activity is concerned, the Ministry of Trade of the Republic of Belarus follows the same concepts of advertising as the Federal Antimonopoly Service of the Russian Federation. We think that such a feature as 'public accessibility' is excluded from the definition of advertisement due to intent to avoid difficulties, which were faced by Russian law enforcement officials when qualifying mass text messaging and spamming.

2.3.2. Advertised Object Promotion and Marketing

In 2006, a feature of the first aim – attraction of attention – appeared in the Russian definition of advertisement. The Belarus lawmaker followed suit, but the other countries did not find it necessary. Although, due to such term as attention, the definition in the Law of the RF became associated with the famous in marketing formula of advertising impact, it can be said that this novelty passed unnoticed for law enforcement.

Belarus is the only country in the EAEU that does not use the term 'the public', and Armenia is the only country, in which the lawmaker decided to confine to one advertising aim – to form and keep up interest, but it did not set the purpose of this interest. But the Belarus lawmaker connected a feature 'marketing' with the other features defining advertising aims by conjunctions 'and (or)'. We have already seen that the word 'interest' itself implicitly means a motive to act. In this regard, we can say that 'sales' and 'marketing' are extra features. But two last terms refer to the market sales relations, while interest can induce any actions other than purchase. That is, for Russia, Kazakhstan and Kyrgyzstan advertisement can be only commercial, while for Belarus and Armenia advertisement includes two types – commercial and social. (In all laws of the EAEU member states, political advertisement is out of purview of the Law 'On advertising')

The term 'an advertised object' is especially extensive in the Law of the RB. The definition of this term proves the validity of the conclusion: social advertisement in Belarus is legally considered as a type of advertisement. Only two countries have opted for the two-stage definition of the advertised object; in fact, in the Law of the RF and the Law of the RB the term 'advertisement' is a blanket standard. A new term 'an advertised object' really complicates the perception. One can understand the intentions of lawmakers of the other countries to simplify the construction. The list set in Armenian, Kazakhstan and Kyrgyz laws does not seem to be all-inclusive. For example, can we classify a promotional event among services, works, products, ideas or initiatives? The inclusion of citizens into the advertised object list stands out in Belarus, Armenia and Kazakhstan. To understand this fact one should take into account that advertisements of physical bodies, which are not related to business, are

out of purview of all advertising laws in the EAEU member states. Thus, marriage advertisements, public birthday greetings, etc. do not belong to advertising. As for mentioning physical bodies in the context of market activities, then the wording of Laws RB and RA are correct enough, and allows qualifying the formation of interest to a private entrepreneur, company representative, etc. as advertisement. At that, a phrase of the Law of the RK 'realization of a physical body' seems to be unsatisfactory. If we do not think that in Kazakhstan a slave trade is legalized, there is only one explanation to such word combination: crude violation of legal writing due to the desire to simplify the phrase at most.

3. Discussion

Modern European and American science does not study the general issues of legislative regulation of advertising as topical ones. Although, there is no telling about complete ignoring of the legal aspect of advertising activities. Researchers address to particular cases, sometimes the history (Petty 2015), but usually to the regulation of advertisement of specified types of goods. First of all, they study advertising of medical and food products and services (Lankinen *et al*. 2004; Hüttl *et al*. 2007; Westrich *et al*. 2012; Ehlers and Rybak 2013; Wanner 2015). Less attention is given to advertising of securities (Wilcox 2001), gender issues (Cerchia 2012; Cambronero-Saiz 2013), etc.

At the same time, Russian and Russian-speaking scientists devote their works to the general matters of legal regulation of advertisement (Kobersy *et al*. 2015; Kobersy *et al*. 2015), and in particular to the legal term of advertisement (Rak 2005; Baskina 2009; Kuznetsov 2015). Such a conspicuous difference of attitudes is obviously connected with the availability/deficiency of a special law governing advertising activities. Such a law exists in Russia, and only six EU countries out of 28 have the advertising laws. Hungary, Latvia, Slovenia, Estonia adopted these laws after Russia. The Czech Republic and Russia passed them almost simultaneously: on February 9, 1995 and July 18, 1995, respectively. In most cases, the influence of Russian experience is obvious. Thus, in Estonia the lawmaker observed even a chronology adopting the advertising laws in two years after Russia: first in 1997 and second in 2008. And Spain was the first mover, where the General Advertising Law was signed on November 11, 1988. The availability of the law, on the one hand, makes it possible to comment it, and on the other hand, makes the basis for its improvement, that is, stimulates scientific inquiry in relevant sphere.

On the other hand, the harmonization of the legislation of the EAEU member states usually is continuously studied by scientists from the same countries. Both general issues (Ispolinov 2013; Galiakberov and Abdullin 2014; Sokolovskaya 2014; Kembayev 2016) and the issues in separate sectors (Smorgunova *et al*. 2015; Umarov and Bulueva 2016) have been studied. But the scientific society has not paid special attention to advertising issues so far (Bykov *et al*. 2015). All the EAEU member states are at the same time the CIS members. In 2013, the Interstate Council of Antimonopoly Policy of the CIS Executive Committee published the overview of advertising activities in the CIS countries (The Overview of Advertising Activities in the CIS Countries 2013). Nevertheless, the overview does not include any analysis of legal definitions of advertisement. Thus, it is the first time when the comparative study in this sphere takes place.

Conclusion

We can draw the following conclusions from the analysis.

(1) All definitions of advertisement have similar construction. The other countries took the Russian definition as a model. The Belarus lawmaker focused on the Russian Law of 2006, and for Armenia, Kazakhstan and Kyrgyzstan the Russian Law of 1995 is still setting the pattern. Alongside with that, the differences are significant.

(2) None of definitions of advertisement in laws of the EAEU member states can be considered as a perfect one. Some features contained therein are excessive, and others are missing. There is also a problem with their understanding.

(3) The development of advertising technologies increasingly shifting to generation of messages addressed to a specific potential client rather than to some consumer groups requires new legal instruments to identify advertisement. Instead of it, we can see that the EAEU lawmaker or law enforcement body tries to ignore these problems either paying no regard to technological challenges (Armenia, Kazakhstan, Kyrgyzstan) or falling into logical contradictions (Russia), or leaving gaps in regulatory standards (Belarus).

(4) While comparing the term 'advertisement' in different countries, one should take into account the restrictions in operation of laws (Art. 2 of the Law of the RF, Art. 1 of the Law of the RB, Art. 2 of the Law of the RK, Art. 1 of the Law of the KR, Art. 1 of the Law of the RA). Advertisements of physical bodies

that are not related to business activity and political advertisements are excluded from the purview of the advertising law in all countries. Beside these phenomena, Russia has eight more else. Thus, for example, product style (labels, package), signs and markings, etc. are not governed by the advertising law. The law enforcement practice is also important. The Federal Antimonopoly Service of Russia thinks that information on the company and its products (services) hosted on its website is not considered as advertisement (On Online Advertising 2015), and the Ministry of Trade of the Republic of Belarus holds contrary opinions (Analysis of Advertising Law, Peculiarities and Problems of the Law Enforcement Practice, n.d.). In view of the above differences in the term 'advertisement', it is fair to say that one and the same text can be considered as an advertisement and can be not, when crossing borders within the EAEU. It complicates business activity of both the advertiser and the advertising distributor.

Thus, a slight uncertainty and to a greater degree the mismatch of definitions of advertisement in the EAEU member states form a potential obstacle for developing economic relations between the countries. The importance of bringing together the laws governing the relations in the advertising sector is to be taken into consideration at implementing the EAEU Treaty.

The research conducted by us does not cover the entire declared topic. In order to do further research into the topic, one should focus on the expansion of the methods and empirical basis. So, expert interviews of public officials from the EAEU member states in order to know the concept of advertisement that forms the basis for its law enforcement practice seem to be promising.

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