

ЛЕГАЛИЗАЦИЯ ПАРАЛЛЕЛЬНОГО ИМПОРТА В РОССИЙСКОЙ ФЕДЕРАЦИИ

LEGALIZATION OF PARALLEL IMPORT IN THE RUSSIAN FEDERATION

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Аннотация. В 2022 г. российский рынок покинуло более 1000 зарубежных компаний. Ответным шагом на беспрецедентное давление стран Запада стала легализация параллельного импорта товаров. Пойдя на такой шаг, государство стремилось поддержать отечественного предпринимателя, а также сохранить прежний уровень жизни потребителей, ассортимент товаров на российском рынке.

Если в теории параллельный импорт обладает широким кругом преимуществ, то на практике уже сейчас возникает ряд проблем, к которым должны приспособливаться и импортеры, и потребители. В новой реальности эта тема требует глубокого анализа и тщательной проработки, поскольку параллельный импорт затрагивает не только экономическую сферу, но и сферу интеллектуальных прав, связанных с исключительными правами на товарные знаки. Начало разработки правовой основы для параллельного импорта, ежемесячное совершенствование этой основы и подстраивание имеющегося законодательства под возрастающее санкционное давление обосновывают актуальность данной темы. В статье исследованы проблемы, связанные с легализацией параллельного импорта, выявлены преимущества и основные риски его легализации, проанализировано значение законодательных новелл последних лет.

Ключевые слова: параллельный импорт, исключительные права, товар, ответственность, злоупотребление, правообладатель, потребитель

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- **Abstract.** In 2022, more than 1,000 foreign companies left the Russian market. In March 2022, the Russian government legalized parallel import. This was a response to the discriminatory policy of Western countries towards the Russian Federation. Such a decision by the Government was due to its desire to support the national entrepreneurs, as well as to preserve the former standard of living of Russian consumers and to maintain the range of items on the domestic market.

While in concept parallel import has a wide range of advantages, in practice there are several issues to which entrepreneurs and consumers must adapt. Adjusting to new realities, this topic requires in-depth analysis and elaboration because parallel import is already an integral part of modern development, not only in the economic sector but also in the sphere of intellectual rights for the means of individualization. The development of a legal framework for parallel import, improving its every month and adjusting the existing legislation to the increasing sanctions pressure, justify the relevance of the chosen topic. The research aims to identify existing problems, explore advantages and disadvantages, and uncover risks and consequences associated with parallel import.

Keywords: parallel import, exclusive rights, goods, liability, abuse of rights, trademark owner, consumer

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In the context of unprecedented sanctions pressure on the Russian Federation, the Government of the Russian Federation began a large-scale legislative effort to legalize parallel import. The Government of the Russian Federation expands the list of products allowed for parallel import every month. Based on the statistics, Russia imported goods for more than \$20 billion in December, up from \$17 billion in November [1]. This statistical data shows a gradual increase in goods imported by parallel import. As a result, parallel import is developing and strengthening in the domestic market. If some years ago the legal community faced the question of parallel import and the lack of a legal basis for its implementation, now it is quite difficult to challenge the legality of parallel import. There are legal acts, laying the bases of parallel import.

In the current international environment, the legalization of parallel import is an important step, providing national consumers with the opportunity to enjoy the same goods and benefits. The main aim of parallel import is “to meet the demand for products containing the results of intellectual activity” [2]. However, it is impossible to discuss only the positive side of parallel import. As things stand now, Russian legislation lacks a comprehensive definition of parallel import, so to work out the issue of parallel import in practice, the legislator should develop a strong legal basis for parallel import.

The practice of legalization of parallel import already existed in Russia: until 2022, parallel import was allowed in Russia and any seller could go abroad, purchase goods and dispose of them in the domestic market. Since 2022, after the amendments made by the Supreme Arbitration Court to the law “On Trademarks” parallel import was prohibited [3] what was also preserved in the Civil Code. Until recently, the parallel import was beyond the law. The trademark owner was the only entity that could import and distribute the product in the territory of the state, or give permission to distribute its products.

Work on the legalization of parallel import began a long time before March 2022. Back in 2014, the Federal Antimonopoly Service drafted a bill that proposes the removal of restrictions and prohibitions by rights holders in the importation into Russia of goods put into circulation with their consent abroad. Thus, it was proposed to legalize parallel import 9 years ago. Nowadays parallel im-

port is a response to price policy, quality and assortment discrimination of the Russian market and its consumers.

In March 2022, the Government of the Russian Federation issued Decree No. 506 “On goods (groups of goods) concerning which certain provisions of the Civil Code of the Russian Federation on the protection of exclusive rights to results of intellectual activity expressed in such goods and means of individualization with which such goods are marked” (hereinafter — the Decree No 506) [4] which legalizes parallel import. The Government expands the list of products allowed for parallel import every month. Nevertheless, despite the rather fierce dispute over the parallel import, it is still impossible to find a unified definition of the term “parallel import”. To analyze the effectiveness and actual need for parallel import, it is worth clarifying what is meant by parallel import.

Earlier there were only official importers in Russia. They were carried out by the foreign right holder independently through a dealer network. Consequently, the absence of the consent of the right holder indicated a violation of his intellectual rights. Such a violation allowed the right holder to protect his rights and interests through all legal means, including recourse to the court. In May 2022 the Federal Law 08.03.2022 No 46-FZ “On Amendments to Certain Legislative Acts of the Russian Federation” was supplemented by the provision, which establishes that the use of the results of intellectual activity, as well as means of individualization of those goods, the list of which is established by the Government of the Russian Federation, is not a violation of the exclusive rights of the right holder [5].

Parallel import is the legal delivery and further sale of goods, not through official distributors, but through any suppliers who have purchased goods abroad from official dealers [3]. It is a simple definition, the essence of which boils down to this: any seller can go abroad, buy goods, and sell them in Russia. It is not necessary, as before, to have the consent of the rights holder to distribute his products. Parallel import can also be defined as “the introduction into civil circulation of goods protected by a trademark through importation without the permission of the right holder into a country not intended for its distribution” [6].

Khusainov (2019) defines parallel import as a situation where the original product, officially marked with a trademark, is imported into the territory of another state without the permission of the right holder [7]. Pirogova (2008) gives a slightly different definition of parallel import. From her point of view, parallel import refers to goods legally produced, imported and sold in the territory of another state, and then “reimported to the country of origin” [8]. However, it is difficult to agree with this

interpretation of parallel import: it is inadmissible to reduce parallel import only to the final process of re-importation of goods. It is quite possible that the seller in general does not give a thought to the re-importation of products, i.e. carries out the usual import for sale in the market.

Often parallel import is meant the importation of fake, counterfeit products. The import of infringing goods has nothing in common with parallel import, while it involves the import of original products, but by passing the consent of the original right holder.

According to Article 1229 of the Civil Code of the Russian Federation, the use of the results of intellectual activity and means of individualization without the consent of the right holder is illegal and entails liability. Within the meaning of article 1515 of the Civil Code of the Russian Federation, counterfeit are goods on which the trademark is illegally placed [9].

In our opinion, it is not quite clear what the legislator means by the illegal placement of a trademark. Does it mean that the sign is placed without the consent of the right holder in general, or that the trademark is placed without the consent of the right holder when importing goods into a particular country? Is it always possible to confirm that the illegal placement of a trademark is a sign of infringing items?

Yaroslavtsev (2020) notes that fakes are only those products that are made “without the knowledge and control” of the right holder of the trademark [10]. The concept of parallel import, on the other hand, includes the import of genuine articles, distributed without the control of the right holder. The sale of counterfeit goods is a public offence, thus its sale restrains by criminal liability. Parallel import is a commercial issue, which includes not a violation of public interests, but a violation of the distribution scheme [11]. The criterion for distinguishing between counterfeit goods and products imported by parallel import is an attempt to change the original brand (the so-called “Abibas rule”).

Parallel import combines both private and public interests. As noted by Pirogova (2011), the essence of the concept of parallel import hides the entrepreneurial interests of right holders, distribution companies, as well as the interests of consumers. In addition to the private law side of parallel import Pirogova (2011) notes public interest, which consists of the growth of economic indicators of the state as a whole [12].

In connection with the analysis of parallel import, it is necessary to address the issue of importing goods for personal use. If a person imports goods for personal use into the territory of another country without the permission of the right holder, will such a person be considered to have violated the norm of the Civil Code of the Rus-

sian Federation? Can we conclude that the provisions on parallel import also apply to products that are imported for personal use?

Article 1359 of the Civil Code of the Russian Federation states that the use of objects of patent law (invention/utility model) for “personal, family, household purposes” is not a violation of the exclusive right to an invention, utility model or industrial design.

Similarly, according to Article 1273 of the Civil Code of the Russian Federation, the free reproduction of a “lawfully disclosed work” is allowed without the consent of the right holder and appropriate remuneration payment. Thus, if a person intends to use the goods only for personal advantage, and not to derive income and profit, then such a person will not be considered to have violated the norms of the Civil Code of the Russian Federation. The essence of parallel import includes not only the import of goods into another country without the direct permission and consent of the right holder but also the further **introduction of goods into civil circulation**.

According to Article 129 of the Civil Code of the Russian Federation, civil commerce is the alienation, and transfer in the order of universal succession of objects of civil rights from one person to another. At the same time, as was noted in the decision of the Arbitration Court of Moscow of 24 April 2012, the introduction into civil circulation is a process of a compensatory nature [13]. Personal use does not presume deriving income or profit, it is not a question of compensation, therefore, when a person imports goods into another country without the permission of the right holder just for personal needs, there is no violation of the law. Moreover, importing products for personal use only is not a parallel import.

Articles 1359 and 1273 of the Civil Code of the Russian Federation are included in Part IV of the Civil Code of the Russian Federation but do not refer specifically to the means of individualization. The author believes that in light of the conversation about the exhaustion of rights to a trademark, it is also essential to refer to Chapter 76 of the Civil Code of the Russian Federation, which is fully dedicated to the rights to means of individualization. Chapter 76 of the Civil Code does not contain a norm similar to articles 1359, 1273 of the Civil Code. The purpose — personal use, profit-making, entrepreneurial activity — are the criteria for copyright and patent law. Speaking about trademarks, about the permission or prohibition of their use, the main criterion will be exactly the introduction of goods into civil circulation [14].

Subparagraphs 1 Clause 1 of Article 328 of the Customs Union (now invalid) contained a provision stating that measures to protect intellectual property rights are not applied to goods transported by individuals for personal use [15]. There is no such provision in the current

Customs Code of the Eurasian Economic Union. Consequently, the question of whether the import of goods for personal use is parallel import remains unresolved at the legislative level.

In our opinion, the import of goods by an individual for personal use cannot be considered a parallel import, since the individual does not intend to introduce the goods into civil circulation and then derive profit and income from it. Accordingly, the importance of goods for personal use does not violate the exclusive rights to the trademark of the right holder.

LEGISLATIVE INNOVATIONS ON PARALLEL IMPORTS 2022: THEIR IMPACT AND SIGNIFICANCE

In Russia, the parallel import was fully legalized in June 2022 by Federal Law No 213-FZ [16]. P. 3 of Art. 18 of the Federal Law “On Amendments to Certain Legislative Acts of the Russian Federation” from 2022 provides that the use of results of intellectual activity (goods/groups of goods) which were included in the list established by the Russian Government, as well as the use of trademarks — is not a violation of the exclusive rights to results of intellectual activity or means of individualization [17].

By issuing the Decree No 506 the Russian Government gave the Ministry of Industrial Trade (hereinafter — the Ministry of Industry and Trade) the right to determine the list of goods available for parallel import. Later, the Ministry of Industry and Trade approved the list of goods allowed for parallel import [18], which is edited every month. It is important to note that the list of goods is exhaustive, so if any product is not on the list, it is not subject to parallel import. Accordingly, if the importer resorts to the import of goods that are not allowed for parallel import, he bears responsibility for the illegal import of products without the right holder’s permission.

In the context of the analysis of legislative innovations on parallel import, it is necessary to analyze the theoretical component related to the principles of exhaustion of the exclusive right to trademarks and then pay attention to the main conclusions of judicial practice after 2022.

Before the introduction of the above-mentioned legislative innovations, the regional and national principles of exhaustion of the exclusive right to trademarks were in force in Russia. According to the first principle, the permission of the right holder to sell his products in any country entails the permission to sell the same goods in the territory of the union or association, to which that country belongs. For example, the regional principle of exhaustion of the exclusive right to the trademark is established for the EAEU member states. The regional principle is laid down in clause 16 of annexe No 26 to the

Treaty on the EEU [19], and in Russia, it is valid under part 4 of Article 15 of the Constitution. Therefore, when applying Art. 1487 of the Civil Code of the Russian Federation should be considered in connection with the international legal principle of the exhaustion of exclusive rights to trademarks [20].

According to the national principle, which is enshrined in article 1487 of the Civil Code of the Russian Federation, it is possible to introduce goods into civil circulation only after the right holder has started selling these goods in the territory of the country where the further sale of products is supposed. Earlier it was expected that the import of goods with the right holder's trademark into Russia to introduce it into a civil transaction is one of the ways of using the trademark, allowed only with the consent of the right holder [21]. Accordingly, the import of goods without the permission of the right holder is a violation of the exclusive rights to trademarks [22].

Due to the adoption of Decree No 506 in Russia, there is a transition from the regional and national principles of exhaustion of exclusive rights to trademarks to the international principle. According to the international principle, if a product has started to be marketed in one country, it can be freely sold in any other state without the permission of the right holder. Such principle of exhaustion of rights to trademarks is the least advantageous for the right holder, as he loses absolute control over the movement and sale of the goods marked with his trademark.

Thus, it can be stated that in the current political and economic conditions the establishment of exceptions and exemptions to the national principle of exhaustion of rights to trademarks, on the one hand, is economically justified and forced. On the other hand, on the legal side, such exceptions are not quite correct in the legal field. Some scholars confirm that the Government of the Russian Federation does not have the proper authority to cancel the regional principle of the exhaustion of exclusive rights without making amendments to the Treaty on the EAEU [23]. Moreover, the problem of the innovations on the legalization of parallel import lies in the uncertainty of the duration of the introduced exceptions, therefore, it is difficult to predict how the legalization of parallel import will affect the economic and legal field [24].

Immediately after the adoption of Decree No 506, judicial practice on the application of the innovations began to take shape. Courts made a "group" of conclusions concerning the impact of the legalization of parallel import on social relations.

For example, a month after the adoption of Decree No 506, the foreign company Guangdong Funway Food Co. argued that the contested document violated both the provisions of the Constitution of the Russian Federation and the provisions of laws prohibiting the Russian

Government from adopting acts contradicting federal laws. The court denied the foreign company's application, noting that its claims fell within the competence of the Constitutional Court since they required an examination of the constitutionality of the provisions of the contested Decree No 506 [25]. It can be assumed that the foreign company is unlikely to challenge the act adopted by the Government: it is enough to recall the Decision of the Constitutional Court No 8-P of February 13, 2018, in which parallel imports were found to be legal.

In another case, the Court of Intellectual Rights explained that Decree No 506 does not have retroactive force, so it cannot be applied to disputes that arose before its adoption [26].

An important conclusion about the inadmissibility of suspending the execution of a court decision in conditions of legalization of parallel imports was made by the Fourteenth Arbitration Court of Appeal, which left unchanged the decision of the Arbitration Court of the Vologda region from 2021. Let us turn to the circumstances of the case. The foreign company "Chanel Sarl" (hereinafter — the plaintiff) appealed to individual entrepreneur N.M. Ablisimova (hereinafter — the defendant) to recover compensatory damages for illegal use of trademarks. The defendant, disagreeing with the decisions of two instances, appealed to the Court of Intellectual Rights. The case was considered in a cassation instance in May 2022.

In the cassation appeal, the defendant first asked to suspend the proceedings "until the cancellation of the restrictive measures against unfriendly countries following the established procedure", and then, in a clarified cassation appeal, asked to deny the rights holder claim as a whole. Also, the defendant, referring to Resolution No 506, indicated that in March 2022 the Western countries took restrictive measures against the Russian Federation. In this regard, the actions of the plaintiff, who is located in Switzerland, which joined these restrictive measures, "should be regarded as an abuse of right, which is an independent ground for refusal to satisfy the claim" [27].

In our opinion, this court case demonstrates the abuse of rights, not on the part of the right holder, but on the part of the domestic entrepreneur. The defendant committed the offence before the legalization of parallel import but wanted to benefit himself in a difficult foreign economic situation.

ADVANTAGES OF THE LEGALIZATION OF PARALLEL IMPORTS

The legalization of parallel import is a forced response to the withdrawal of foreign companies from the Russian market. Parallel import does allow consumers to enjoy all

the benefits that were freely available before the sanctions. Nevertheless, the researchers on this topic are debating how justified is the legalization of parallel import in the Russian Federation. We suggest that we first turn to the arguments presented by supporters of parallel import.

Firstly, the supporters of parallel import believe that its legalization will lead to saturation of the market with all the goods that consumers need. Almost every month the list of goods for parallel imports is supplemented. Initially, the list included such goods as perfumes, clothes, shoes, watches, appliances, vehicles, electronics, metals, and fuel. The list included products from Apple, Samsung, Mitsubishi, Renault, Tesla and Toyota. Thus, since February 2, 2023, the list was supplemented by many brands of toys, games, as well as sports equipment. It is such brands as Adidas, Manchester United, Real Madrid, Disney, DC Comics and Marvel [28]. BMW products were also added to the list. However, although on November 2, 2023, the Ministry of Industry and Trade added Marvel, Disney, Pixar and DC Comics to the list of products allowed for parallel import, Russian consumers will not be able to watch foreign films in cinemas. The thing is that in terms of Art. 1263 of the Civil Code, cinematographic works, as well as TV and video films — are audiovisual works. According to the Commodity Nomenclature of Foreign Economic Activity of the EAEU, audiovisual works are not recognized as goods [29]. Therefore, they cannot be included in the list of goods for parallel import.

Secondly, the legalization of parallel import contributes to the development of a competitive environment in the market. In the case of parallel import, the importer's actions in coordinating the importation of goods are considerably reduced: he does not need to obtain the consent of the official right holder. Consequently, there is an opportunity to import a huge list of goods and even those which previously were impossible to deliver to the Russian Federation. The expansion of the range on the consumer market will lead to increased competition among manufacturers, marketplaces, and retailers. It is known that increased competition leads to an improvement in the quality of goods, to offer more favourable conditions to the buyer.

Third, the legalization of parallel import can reduce the number of counterfeit products on the market. Often, infringing goods are sold at a lower price than the original, which is attractive to the consumer. With parallel import, firstly, one can import original goods without a long chain of approval with the right holder, and secondly, the consumer will more often choose the original product than the counterfeit, because there will not be a strong cost gap. Moreover, sellers are not profitable to sell counterfeit goods anymore — article 16.1 of the Code of Adminis-

trative Offenses of the Russian Federation still provides responsibility for the illegal movement of goods across the border of the Customs Union [30]. In the case of legalized parallel import, there is no such risk for the seller.

Fourth, the introduction of the international regime of exhaustion of rights to means of individualization can have an impact on the price factor of the products offered. Large foreign brands have different pricing policies depending on the country where the goods are imported. The pricing policy depends on the economic situation in the country as a whole, the development of the market segment, and consumer demand for a particular product [31].

RISKS OF LEGALIZATION OF PARALLEL IMPORT

The legalization of parallel import does not contain any risks for the consumer. For the average buyer, nothing will change from whether the goods are sold by an official distributor or by an entrepreneur who imports goods through parallel import. After all, parallel import, exactly as it is presented by the legislator and the scientific community, is the import of original goods. It does not matter to the consumer whether the goods were imported through parallel import or an official distributor, while what matters to the consumer is the result — the originality of the product.

The other side of parallel import is related to the buyer's servicing guarantees. Previously, when products were imported into the territory of the Russian Federation through an official representative, it was he who undertook the obligation to provide repair services for the products. In the case of official import, the manufacturer itself established the period of warranty service of the product, in the event of its breakdown. The manufacturer formed a fund for devices and spare parts that may be needed for repairs and then brought them to the country where the goods were sold. The official distributor worked directly with the manufacturer of the goods and did not incur any additional costs for repair services [6]. With the legalization of parallel import, the chain of interaction between the consumer, the seller and the service provider has significantly changed. Now in the territory of the Russian Federation, the official manufacturer "does not plan" to service the repair of the product in case of its breakdown, since the manufacturer has left the country and it is no longer profitable to invest in the economy.

In this regard, entrepreneurs who sell products imported through parallel import have to assign a warranty period and enter into contracts with service centres for the products themselves. Thus if the consumer discovers a defect in the goods, the retailer is responsible for it with its funds.

In respect thereof, it is incorrect to affirm that parallel import will significantly reduce the prices of imported goods. Many marketplaces and retailers can leave prices at the same level, as their personal warranty costs for devices will increase.

This position is confirmed by statistical data. In practice, price differences are not as significant as they are represented in theory. It is noted that the decrease in prices for such categories of goods as clothes, shoes, and TV sets can be from 3 to 5 %, which is insignificant. Concerning the reduction of prices for premium goods — it can range from 8 to 10 %, but as Radaev (2011) points out, it will have practically no effect on consumer activity, because the share of global brands in Russia is generally low [32].

Among the advantages of the legalization of parallel import is often referred to as an increase in the range of goods in the market, since entrepreneurs will be able to supply products that were previously banned for import into Russia by the rights holder. However, Russian society can already observe the opposite effect of this thesis. In April 2023 news that Russian stores faced a shortage of board games “Monopoly” and also there is a shortage of games UNO and “Scrabble” [33]. The issue with the supply of board games is quite challenging, as they all have to be translated into Russian. If technology is arranged so that in any country users can choose any language of the interface, then with board games, unfortunately, such a setting is impossible. Thus, the legalization of parallel import will not work, because it requires additional localization of the product, in the case of board games — a trivial translation into Russian. As a result, the goods will not appear, but disappear from the Russian market.

The next risk of the legalization of parallel import is related to secondary sanctions. If it turns out that shipments of sanctioned goods are sent to Russia, even if not directly, manufacturers can be subjected to personal sanctions [34]. For example, in March 2023, Turkey stopped the transit of sanctioned goods through its territory to Russia. Turkey’s customs system blocked the clearance of sanctioned goods. Many experts believe that the suspension of parallel imports through Turkey was due to pressure from Western countries. So far, this problem is not acute and there has been no precedent for a complete suspension of the transit of sanctioned goods to Russia. However, it is impossible to predict how much pressure will affect parallel imports in the future.

CONCLUSION

The issue of parallel import has become even more crucial in the context of international sanctions imposed on Russia. Parallel import implies the import of original

products introduced into civil circulation by the rights holder in the territory of his state. In this connection, the consumer should not be concerned about the deterioration of the quality of the goods, the risk can only be associated with the quality of warranty service.

If in the beginning, the positive effect of the legalization of parallel import was visible, namely the increase in the number of young entrepreneurs, the entry of new goods into the Russian market, and the reduction in the cost of these goods, now consumers can observe the manifestation of its negative aspects. More and more experts are voicing the opinion that the prices of products of parallel import will soon increase or return to their previous levels. The supply of those goods for which localization is required, for example, trivial translations into Russian, is beginning to be disrupted. As for the emerging practice, the courts are trying to maintain a balance of interests and not to “give in” to domestic entrepreneurs who abuse the law.

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