

# Insight

February 2013

## Special Alert

### Court Practice on Advertising

#### *Clarifications Regarding Application of Federal Law No. 38-FZ "On Advertising."*

**On 8 October 2012 the Plenum of the Supreme Commercial Court adopted Resolution No. 58 "On Certain Issues in Connection with the Application of the Federal Law "On Advertising" by Commercial Courts."**

In its resolution, the Plenum generalized and clarified court practice on certain important and vexing issues regarding regulation of advertising and liability for improper advertising.

The clarifications, in particular, touch upon: (i) the problem of acknowledgement of information as advertising and advertising matter, as improper advertising; (ii) practical issues of legal regulation of inadequate and unfair advertising; (iii) problems of administrative liability for a breach of advertising laws (including the distinction between liability for unfair advertising and for unfair competition); and (iv) special regulation of certain types of advertising (including advertising of financial and medical services and advertising distributed using means of communication). The Resolution also clarifies some other issues of application of advertising laws (e.g., provisions regulating installation and dismantling of advertising frames and grounds for initiation of administrative proceedings due to a breach of advertising laws).

In this overview, we cover the most important issues clarified by the Court.

#### **Acknowledging certain information as advertising and certain advertising as improper advertising**

The Plenum clarified that any information published (distributed) according to statutory requirements or by virtue of custom may not be declared advertising even if it meets the formal criteria of advertising (e.g., information about goods and their producer, a report on a raffle). The mere fact that such information has not been published in full, as it is prescribed by the law, does not mean that such information is an advertisement.

Publication of consumer information at a place where goods are sold or services are rendered (the company's name, working schedule, etc.) should not be deemed to constitute advertising because it does not meet advertising purposes. However, the Plenum pointed out that distribution or representation of certain information, if consumers associate it with particular goods (e.g., a trademark), is to be deemed to constitute advertising because it is enough to distribute only some information to attract and keep consumers' interest in the goods.



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The Plenum also clarified certain practical situations where information displayed on road signs may be considered to be advertising.

Further the Plenum pointed out that relevant information is considered to be missing and corresponding advertising improper if it is impossible or difficult for a consumer to perceive the advertising information (in particular, due to a specific font or color scheme), and this distorts the meaning of the information or misleads consumers. According to the Resolution, a court may order an expert analysis to ascertain whether the relevant information is easily perceptible.

### **Inadequate and Unfair Advertising**

As for inadequate advertising, the Plenum confirmed the prohibition of inaccurate comparison of goods advertised with competitors' goods, i.e., comparison based on disparate criteria, or partial comparison of goods. It is worth noting that in such cases the advertiser is liable for the incompleteness and falsity of the information about its goods or activities as well as the goods (activities) of its competitors.

The Plenum also clarified that the use of such words as "the best," "the first," "number one" with respect to goods advertised is to be accompanied by a specific comparative criterion based on which the goods advertised have proven advantages over similar goods of other producers.

Further, the Plenum clarified that the advertiser may use a trademark identifying the goods of another producer to advertise its own commercial activities related to the sale of such goods and its own services related to such goods provided that the consumer perceives such advertising as advertising of an independent service provider.

In addition, the Plenum pointed out that, if the antitrust authority claims in court that an advertiser publish a refutation regarding inadequate advertising, the antitrust authority does not have to prove that such inadequate advertising has infringed on the rights and interests of third parties because such advertising is detrimental to their rights as such.

### **Administrative liability for a breach of advertising laws**

One of the important issues clarified by the Plenum is the problem of delimitating circumstances between those calling for an administrative penalty prescribed for a breach of advertising laws (Article 14.3 of the Russian Administrative Offences Code) and those calling for a penalty for unfair competition (Article 14.33 of the Code). If a person distributes information displaying indicia of unfair competition (e.g., false or inaccurate information which may cause damage to its competitor or be detrimental to its competitor's business reputation) *by means of advertising*, such person is liable for a breach of advertising laws. However, if such information is distributed *other than by way of advertising* (e.g., on a label or in correspondence with contractors), the person is liable for unfair competition.

Among other things, the Plenum stressed that the statute of limitations period for administrative liability for a breach of advertising laws starts running when the breach actually occurs but not when the antitrust authority ascertains the fact of the breach. Also, the Plenum clarified certain issues regarding the running of the statute of limitations period where contested advertising has been placed in the mass media (including mass circulation media).

The Plenum pointed out that if a person is an advertiser, a distributor and a producer of particular advertising, such person may be liable for a breach of advertising laws *only once*. However, if such person later breaches advertising laws in a different capacity (e.g., in the capacity of an advertisement distributor even though such person was previously liable as an advertiser), such breach should be considered repeated. This is an aggravating circumstance for the purposes of identifying the severity of administrative penalty.

In relation to the liability of an advertisement distributor, the Plenum clarified that it may only arise if the advertisement distributor failed to take reasonable measures to prevent the distribution of unfair and/or inadequate advertising. In particular, if it: (i) failed to request from the advertiser confirmation that the advertising complies with the Law on Advertising or (ii) distributed advertising without having obtained the information requested from the advertiser.

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As to liability for a breach of the requirements to the installation of advertising frames, the Plenum clarified that the contractor installing an advertising frame may be liable for a breach of such requirements together with his client who ordered the installation because the contractor is to make sure that its client has obtained a permit to install such frame.

### **Specific regulation of certain types of advertising**

A large set of the Plenum's clarifications covers issues of application of advertising laws to specific types of advertising.

#### *Advertising via telecommunication networks*

The Law on Advertising envisages that where advertising is distributed via telecommunication networks, the advertisement distributor is to obtain the consent of the relevant recipient or addressee. Accordingly, the Plenum clarified that: (i) recipient or addressee means the person to whose e-mail address or telephone number such advertising was sent and (ii) their consent may be expressed in any form provided that it contains a declaration of the addressee's intent to receive advertisements from a particular distributor and makes it possible to identify the recipient (addressee). However, the recipient's consent to receive any background information (e.g., weather forecast, exchange rate) *does not mean* its consent to receive advertisements.

#### *Advertising of financial services*

Advertising of financial services (banking, insurance and other similar services) is to list all the terms affecting the cost of a service if the advertisement mentions at least one of such terms (e.g., in case of advertising of lending services such terms may include the interest rate, the amount and term of the principal, fees, commissions and other expenses of the borrower related to the loan). This rule applies even if the advertisement contains a note that more information about such terms may be obtained from a relevant contact person.

#### *Advertising of dietary and food supplements*

According to the Law on Advertising, advertising of dietary and food supplements should not create an impression that they are medicines. Now the Plenum has clarified that advertising may be deemed to create such impression if the advertisement, among other things, mentions together a disease (or its symptoms) and the supplement as a relevant remedy.

The Resolution also clarifies regulation of other types of advertising, in particular, advertising of medical services and medicines, advertising to raise financing for shared construction projects, sponsor advertising and advertising of promotional activities.

### **Other**

The Resolution clarifies certain other issues regarding application of advertising laws, in particular: (i) installation and dismantling of advertising frames (unauthorized installation of an advertising frame, compulsory dismantling of an advertising frame in whole or in part, transfer of rights to an advertising frame to third parties), (ii) grounds for initiating administrative proceedings in case of a breach of advertising laws, (iii) issues arising from liability for using swearwords and abusive images.

*The Resolution is binding on lower commercial courts when considering similar issues. Also, according to the Resolution, commercial court rulings that have taken legal effect and contain interpretations different from the Plenum's interpretation may be revised if there are no other obstacles to such revision.*

