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THE IMPORTANCE OF ANALYZING THE MAIN ANTI-COMPETITIVE PRACTICES IN VIEW OF CREATING AN UNDISTORTED COMPETITIVE ENVIRONMENT

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ABSTRACT

Protecting fair competition by suppressing anti-competitive practices is a topical issue and a priority in the context of a functional market economy, the final stated goal in competition matters being to protect the interests of consumers by creating and developing a normal competitive environment.

KEYWORDS: *competition, anti-competitive practices, restrictive agreements, competitive environment.*

INTRODUCTION

The main regulation in the field of anti-competitive practices is, internally, the Competition Law, harmonized with the European acquis in the field of competition.

By anti-competitive practices we mean "any agreements between enterprises, decisions of enterprise associations and concerted practices, which have as their object or have the effect of preventing, restricting or distorting competition on the Romanian market or on a part of it".

Competition policy aims to apply the rules to ensure a fair development policy. They encourage both development and increased efficiency, give the consumer the opportunity to choose from a wider range of products and services, help reduce prices and support quality improvement.

General considerations regarding the creation of an undistorted competitive environment within a market economy

An essential feature of the market economy, the modern form of organizing economic activity, is free competition, competition between enterprises.

Competition is seen in the specialized literature as "the confrontation between professionals with similar or similar activities, exercised in the fields open to the market, to win and preserve the clientele, in order to make the company profitable"[1].

The almost unanimous point of view is that "the most important regulatory force of the market economy is competition"[2], this representing the engine of operation and the energy of the development of economic activity.

Between the companies that produce the same goods or offer the same services, there is a constant battle to attract customers for the goods and services offered on the market.[3]

[1] G. Boroi, *Dreptul concurenței*, București, 1996, p. 5; O. Căpâțână, *Dreptul concurenței comerciale (concurența onestă)*, Ed. Lumina Lex, București, 1992, p. 86; I. Băcanu, „*Libera concurență în perioada de tranziție spre economia de piață*", în Dreptul, nr.9-12. P. 50;
[2] T. Moșteanu, *Concurența – abordări teoretice și practice*, Ed. Economică, București, 2000, p. 13;

Considering the need to create a competitive environment, the Constitution stipulates that Romania's economy is a market economy, based on free initiative and competition. [4] Also, the state is obliged to ensure the freedom of trade, the protection of fair competition, the creation of a favorable framework for the exploitation of all production factors.[5]

The concretization of these constitutional requirements was achieved on a legislative level through the adoption of Law no. 11/1991 on combating unfair competition[6], which provides for sanctioning the use of illegal means of attracting customers, and the Competition Law no. 21/1996[7], which represses anti-competitive, monopolistic agreements and practices that endanger the existence of competition.

One of the important obligations of the merchant is to carry on the trade "in good faith and according to honest custom" and not to compete unfairly with other merchants.[8] Only if the exercise of competition between professionals takes place within these limits, the competition is lawful or fair and, therefore, it is protected by law.

In the case of the abusive exercise of the right to competition, the use of means not permitted by law to attract customers, the competition is illegal and, consequently, it is prohibited.

The Competition Council represents the national administrative authority in the field of competition that aims to comply with the legislation in the field of competition, and in the event that they are violated, the sanctions provided for by law will be applied, thus exercising the coercive force of the state[9].

The legal norms provided by the Competition Law aim to protect, maintain and stimulate competition and a normal competitive environment, in order to promote the interests of consumers. These rules refer to the acts and facts that restrict, prevent or distort competition, being harmonized with the regulations of European law in the matter, generated by the adoption of Regulation (EC) no. 1/2003 on the implementation of the competition rules provided for in articles 81 and 82 of the Treaty establishing the European Community[10] (currently art. 101 and 102 of the Treaty on the Functioning of the European Union [11]).

The undistorted competitive environment is a basic condition for the existence of a functioning market economy, where professionals must interact freely without negative influences from companies in a dominant position, their associations or the state.

Competition law regulations aim to create such a competitive environment, in which objectives such as: economic progress, stimulation of entrepreneurship and efficiency, promotion of consumer interests, competitiveness of products and services, etc. are pursued.[12]

On economic development, competition exerts a positive influence, thus:

- it stimulates the achievement of progress, leading to the emergence of innovations that, after being implemented, favor the increase of economic efficiency, the economy of resources and a better satisfaction of consumer needs;
- favors the most creative and skilled entrepreneurs, eliminating the weakest traders;
- differentiates and diversifies the offer, as well as reducing the production cost and the price for the respective good or service;

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[3] S.D. Cărpenaru, *Drept comercial rom*ân, Ediția a VII-a, revăzută și adăugită, Ed. Universul Juridic, București, 2007, p. 112;

[4] I. Didea, *Dreptul european al concurenței*, Editura Universul Juridic, București, 2009, p. 5;

[5] Art. 135 din Constituția României, republicată în M. Of. Nr. 767/31.10.2003;

[6] Legea nr. 11/1991 privind combaterea concurenţei neloiale, publicată în M. Of. Nr. 24 din 30 ianuarie 1991;

[7] Legea nr. 21/1996, Legea concurenţei, publicată în M. Of. Nr. 88 din 30 aprilie 1996 (republicată în M. Of. Nr. 153 din 29 februarie 2016);

[8] S. Angheni, *Drept comercial. Profesioniştii-comercianţi*, Editura C.H. Beck, București, 2013, p. 31;

[9] M. M. Dumitru, *Dreptul concurenței*, Ed. Institutul European Iași, Iași, 2011, p. 97;

[10] Publicat în J. Of. nr. L1/1 din 4.1.2003;

[11] Publicat în J. Of. nr. C 115/1 din 9.5.2008;

[12] L. Maierean, *Dreptul concurenței comerciale*. Curs universitar, Ed. Cermaprint, București, 2009, p.21;

- gives the consumer the opportunity to choose the product with the best quality-price ratio thanks to the more varied offer and lower prices.

Anti-competitive agreements in the activity of enterprises

Anti-competitive practices or anti-trust law traditionally designates two types of business behavior likely to harm competition: anti-competitive agreements (antitrust or cartels) and abuse of a dominant position.[13]

Anti-competitive agreements are concentrations or collusions between two or more enterprises that have as their object or have the effect of preventing, restricting or distorting competition on the Romanian market or on a part of it, while the abuse of a dominant position is the act of an enterprise using of its position of economic power in a market to limit or exclude any competition.

As the doctrine stated, by preventing competition we should understand the creation of an "integral obstacle capable of paralyzing it. The restriction denotes the destruction in part of the freedom of the economic agents in the threatened sector, preventing them from adopting certain convenient decisions, without, however, excluding all of them. Finally, the distortion of competition means, according to the generally shared opinion, the fact of making changes to the exchange conditions, as they result from the market structure and the conjuncture".

These manifestations of pathological competition aim at the seizure of the market or a determined segment of the market by the most powerful companies in a certain field of goods production or service provision, a fact for which, in the specialized literature, it is also found under the name of monopoly[14] or antitrust law.[15]

The competition law enumerates, for example, in art. 5, cases in which prohibited monopolistic understandings are concentrated due to their illicit purpose and the impacts they can bring to free competition.

Monopolistic agreements are those that aim, in particular: to establish, directly or indirectly, purchase or sale prices or any other trading conditions; limitation or control of production, marketing, technical development or investments; the division of markets or sources of supply; the application, in relations with commercial partners, of unequal conditions for equivalent services, thus causing them a competitive disadvantage; conditioning the conclusion of some contracts on the acceptance by the partners of some clauses, stipulating additional services which, neither by their nature nor according to commercial customs, are related to the object of these contracts; participating, in a concerted manner, with rigged offers, in auctions or in any other form of tender competition; eliminating other competitors from the market, limiting or preventing market access and the freedom to exercise competition by other economic agents, as well as agreements not to buy from or not to sell to certain economic agents without reasonable justification.

Restrictive agreements or understandings between enterprises or associations of enterprises

The term "agreement" has a very broad scope, being able to take on the most different forms, leading first of all to a convention, a contract (for example, franchise, selective distribution, concession, etc.), but to it can just as easily be embodied in an anti-competitive clause contained in a certain contract.

The agreement between enterprises involves a contest of wills, with or without binding legal commitment, emanating from autonomous enterprises. They can materialize in different commitments, conventions or contractual clauses, concluded in writing or not,

[13] G. Coman, *Concurența în dreptul intern și european*, Editura Hamangiu, București, 2011, p. 173;
[14] O. Căpăţână, *Dreptul concurenţei comerciale*, ed. a II-a, Editura Lumina Lex, Bucureşti, 1998, p. 438;
[15] G. Coman, *Concurența în dreptul intern și european*, Editura Hamangiu, București, 2011, p. 174;

express or tacit, public or secret.[16] Also, the title of the act or its nature is also irrelevant, for example, the articles of association, shareholders' agreements can be characterized as anti-competitive.

The specificity and complexity of the relationships between professionals have shown that even some unilateral acts can be characterized as "anti-competitive agreements" which, due to their form, materialize in an "agreement". This can be the case of circular letters or invoices sent by the head of a network to its distributors. Most often, the provisions contained in these documents are tacitly accepted by their recipients.[17]

Moreover, anti-competitive agreements can also be made through the so-called "gentleman's agreement". It is a distinct kind of manifestations of will, which are taken into account at the legal level in order to suppress their potentially anti-competitive effects.

Thus, the competition law regulations provide the possibility of prohibiting the anti-competitive convention disguised in the form of simple promises, declarations of intentions, moral commitments. Even behaviors that continue an understanding or an agreement after the latter have been abrogated are prohibited and constitute anti-competitive precedents. Thus, in order to fall within the scope of the prohibitive regulations, it is sufficient for the parties to consider themselves bound, even if the respective act does not, from the point of view of civil law, have the binding effect of the "pacta sunt servanda" rule. The Romanian legislator understood to expressly regulate this aspect, mentioning, in art. 54 of Law 21/1996, that are sanctioned with absolute nullity any type of "commitments, conventions or contractual clauses" that refer to any anti-competitive practice prohibited in art. 5 of the law.

Restrictive agreements can be classified, from an economic point of view, into horizontal agreements - which concern companies located at the same stage of the economic process (e.g. agreements between producers, between distributors, limiting production), being involved companies that are competitors within the same market and vertical agreements – concerning enterprises located at different levels of the same economic process (e.g. agreements between producers and distributors of the same type of product, exclusive commercial agreements, maintenance of resale prices), involving enterprises located on different markets.

Horizontal cooperation agreements can lead to substantial economic advantages, especially if they combine complementary activities, skills or assets. Horizontal cooperation can be a means of sharing risks, saving costs, increasing investment, improving the quality and variety of products and launching innovation more quickly. On the other hand, horizontal agreements can lead to competition problems. This is, for example, the case where the parties agree to fix certain prices or a scale of production, share markets, gain or increase market power, and may therefore give rise to adverse market effects in terms of prices, production, product quality, product variety or innovation.

Vertical agreements are concluded between undertakings operating at different levels of the market. Businesses operating at different levels of the production or distribution chain often work together through "vertical agreements" to achieve results that they could not achieve individually. As part of these arrangements, the parties may include certain contractual restrictions or obligations deemed necessary to protect an investment or simply to facilitate day-to-day activities (such as distribution, supply or purchase arrangements). Vertical agreements may attract competition law risk, particularly when they may have the potential to raise barriers to entry, to foreclose markets, to facilitate horizontal collusion. For most vertical agreements, competition concerns will only arise if there is insufficient competition at one or more levels of trade - that is, if there is some level of market power at the level of the supplier or the buyer, or at both levels.

[16] G. Coman, *Concurența în dreptul intern și european*, Editura Hamangiu, București, 2011, p. 187;
[17] A. Fuerea, *Drept comunitar al afacerilor*, Editura Universul Juridic, Bucuresti, 2003, p. 239;

Horizontal agreements are usually more harmful to the competitive environment than vertical agreements, having the effect of restricting competition between normally competing undertakings. However, vertical agreements can have positive effects on the respective market, for example reducing the final price; at the same time, as a rule, the parties to such an agreement are not in a competitive position.

Decisions of business associations

The second category of anti-competitive agreements is represented by "decisions of business associations". Initially, the Romanian law by art. 36 paragraph 1 of law no. 15/1990, as well as art. 5 of law no. 21/1996 (in its initial form), declares that "association decisions" are prohibited, taking over and translating the community text in an unfortunate manner.

The doctrine[18] criticized at that time the formulation of the Romanian legislator, and this ultimately led to the modification of the text of art. 5, in the sense that "decisions of business associations" are prohibited.

The decisions prohibited in this form of manifestation of the precedents (regardless of the name: directives, internal regulations, circulars, etc.) are acts of collective will, emanating from the competent body of a professional group (decisions of their statutory management bodies) , which may or may not have legal personality. They are reprehensible to the extent that they have the vocation to impose a certain behavior on the market to its members, even if, apparently, they do not leave this impression.[19]

It is possible that the establishment of a professional group does not harm competition, but the decision taken by the governing body of such an association (general meeting or board of directors), to the extent that it obliges its members to adopt collective anti-competitive behavior, to have this effect.[20]

Among the most frequently encountered decisions of professional associations susceptible to violation of competition rules are those whose effect or object is the harmonization of the behavior of their members on the market, calling for boycotts or refusing membership applications.[21]

Concerted practices

Concerted practices, as specified by the European Commission, are those ways of coordination between enterprises that knowingly replace the risks of competition with a practical cooperation between them, thus leading to conditions of competition that do not correspond to normal market conditions.

In other words, they are forms of coordination between enterprises that lead to the disappearance or diminution of the competitive uncertainties characteristic of a market, without being able to prove the conclusion of any agreement.

The notion of "concerted practices" has its origin in American anti-trust law, under the name "conspiracy", which later became "concerted actions", found in section I of the US Sherman Antitrust Act, which includes forms of cooperation that do not is based on traditional conventions and other forms that may affect competition. A term with a similar meaning, under the name "arrangements", can also be found in English law, in the UK Restrictive Trade Practice Act.[22]

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[18] O. Căpăţână, *Dreptul concurenţei comerciale*, Editura Lumina Lex, Bucureşti, 1993, p. 43-44, E. Mihai, *Concurenţa Economică. Libertate şi constrângere juridică*, Editura Lumina Lex, Bucureşti, 2004, p. 88. În sens contrar, C. Butacu, *Analiza dispoziţiilor art. 5 din Legea concurenţei nr. 21/1996*, în Revista Profil: Concurenţa, nr. 2/1998, p. 23;

[19] G. Coman, *Concurența în dreptul intern și european*, Editura Hamangiu, București, 2011, p. 188;

[20] I. Didea, *Dreptul european al concurenței*, Editura Universul Juridic, București, 2009, p. 146;

[21] G. Coman, *Concurența în dreptul intern și european*, Editura Hamangiu, București, 2011, p. 189;

[22] I. Didea, *Dreptul european al concurenței*, Editura Universul Juridic, București, 2009, p. 150;

The incrimination of this modality of the ententes is difficult from the point of view of the rigor of classical law, but it is perfectly molded on the realities of the competitive market, giving the possibility to the competition supervisory bodies to ascertain the production of the effect on the market of such an agreement, even in the situation when there is no can prove a formal agreement.

The determining criterion for identifying a concerted practice is the conscious and voluntary acceptance of a loss of autonomy by the undertaking concerned.

In this way, a series of presumptions are created that ease the probation, it being enough to prove a collusive behavior and its effects on the market so that the companies that took part in it can be sanctioned. Thus, even "larvare" ententes, completely informal, the proof of which was almost impossible, can be sanctioned.

Conclusions

Competition encourages businesses to offer consumers goods and services on the most favorable terms. It encourages efficiency and innovation and lowers prices. To be effective, competition requires businesses to act independently of each other, but subject to competitive pressure from others.

For an agreement between two or more undertakings to be treated as an anti-competitive practice, it must meet the essential condition of affecting competition, namely the agreements, decisions or concerted practices must have as their object or effect the prevention, restriction or distortion of competition on the market in question and to affect trade between Member States or competition on a national market, respectively on a part of it.

Where a particular understanding is necessary to improve products or services, to create new products or to find new, better ways of making those products available to consumers and does not give businesses the ability to eliminate competition from a substantial part of the market of the products in question, the respective agreement is considered lawful and, therefore, it is not sanctioned.

Competition is an essential factor in terms of the positive evolution of the economy as a whole and the increase of well-being for consumers, generating a series of beneficial effects such as: restructuring and optimization of processes within enterprises, more efficient use of production factors, stimulation of innovations, attracting and encouraging investments, consumers thus benefiting from lower prices, a more varied and better offer of goods and services.

The most common form of anti-competitive agreement in practice is price-fixing agreements. They concern the concerted fixing, directly or indirectly, of sales or purchase prices, as well as any other contractually regulated discriminatory commercial conditions. These monopolistic agreements, including participating in a concerted manner, with rigged bids, in auctions or other forms of bidding contests, are considered serious violations of the competition rules, as they prevent the function of self-regulation of the market through supply and demand, being prohibited by law regardless of the market shares of the parties involved.

The most serious forms of anti-competitive agreements that can affect the competitive environment to a greater extent are the secret horizontal agreements, cartel-type, aimed at fixing prices, dividing markets and customers, limiting production and distribution, the evidence of their existence being difficult to find found precisely because of the secret nature of the agreement.

Among the main negative effects of anti-competitive agreements, we mention: limiting competition, increasing prices, decreasing the quality of products or services offered to consumers, reducing the offer, avoiding constraints that generate innovation.

In relation to anti-competitive agreements and/or concerted practices prohibited by art. 5 para. (1) from the law and art. 101 para. (1) of the TFEU, the Competition Council applies a policy of leniency, in which a participant in such an anti-competitive practice, independently

of the other companies involved, cooperates in an investigation carried out by the Competition Council or with a view to its initiation of an investigation, voluntarily providing the information he has about the anti-competitive practice and his role in it and receiving in return, immunity from fines or a reduction of the amount of fines that would be imposed for his involvement in that anti-competitive practice . Starting from 2019, the leniency policy applies to all anti-competitive agreements.

The leniency policy therefore represents a favorable treatment granted by the Competition Council to companies involved in an anti-competitive practice, which wish to renounce these understandings and cooperate with the competition authority in order to discover and investigate the respective practice, with the aim of facilitating the detection, destabilization and elimination anti-competitive practices, especially secret cartel-type ones, thus restoring a normal competitive environment.

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