

UNFAIR COMPETITION LAW APPROXIMATION - A NECESSITY FOR COMPETITIVE ENVIRONMENT

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ABSTRACT: *On 8th April 2014, the Organization for Economic Cooperation and Development published, based on a peer review analysis made in the OECD Global Forum on Competition from 27th February 2014, a report entitled "Analysis of competition policy and law in Romania" dedicated to the analysis of the evolution and competition law enforcement and competition policy in Romania. One of the relevant themes of the report was the Romanian law on unfair competition, which currently represents one of the weaknesses of the competition regime in Romania. The need for a competitive regime aligned standards developed by the international community leads inevitably to modernize legislation in this sector. Thus, a modern legal framework can ensure continuity and systematic implementation of the competition regime's reforms.*

KEY WORDS: *unfair competition, legislation, competition policy, aquis, competitive policy reform.*

JEL CLASSIFICATIONS: *K20, K 21.*

1. INTRODUCTION

If we commute the competition to a legal and economic area, we can see that a trader will have to constantly refer to other competitors in the market. The competitive game should be, however, maintained within the limits of loyalty. Most often the desire to occupy a more advantageous position in the market traders resort to unfair practices that have a negative impact on the competitive environment and consumer welfare. It is not sufficient for a market to operate by the rules of competition, it is necessary that the competition does not escalate and become abusive. The need for an undistorted competitive environment was a prerequisite for the efficient functioning of the internal market. Domestic competition improves competitive international markets, on the one hand, and on the other hand, it serves the needs of consumers, who

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will have the opportunity to choose from a wider and cheaper range of products and services. As long as consumers make choices in a market which is reflected in the activities of firms, we can say that the market is one that operates on the basis of competitiveness.

The competition policy is essentially a feature of Community law, the rules of competition being entered for the first time in art. 3 paragraphs (1) g) of the EC Treaty. Its main objective - to ensure fair competition, remained unchanged over time, although the European Union treaties have seen significant changes.

The fight against unfair competition only makes sense in a market economy characterized by free trade, which offers traders the opportunity to compete one another. The freedom of competition is not absolute and it is limited by legal provisions, due to the need to ensure fair competition. The competition itself is not illegal by nature, but when aimed at distorting competition by unlawful attracting customer and thus, creating damage to competitors in the relevant market, it is outside the law. Therefore, the development of abusive commercial or industrial activity should be sanctioned.

Regarding the unfair competition at Community level, there has not been a full harmonization until now. There are only a few European provisions that create points of connection between the laws of the Member States. Regulations against unfair competition are still based on multiple origins, which often overlap with consumer protection laws or intellectual property. These recent years, many Member States have developed and modernized its laws against unfair competition.

The repression of unfair competition has been one of the main objectives of the Paris Convention on the protection of industrial property. Although the Paris Convention was considered an object of industrial property, competition is, however, a distinct phenomenon, whose purpose is to combat any acts contrary to fair practices in trade and industry.

Romania acceded to the Paris Convention and adopted ahead of other European countries, the repression of unfair competition law of 18 May 1932. The development of trade relations imposed a disciplinary of competitive interactions and this is the reason why Law. 11/1991 was adopted on combating unfair competition.

Retailers are free to compete in order to attract, maintain and extend customers by providing products, services or works in a high quality at the lowest prices. The only limitations to competition law concern the observance of "fair practices", of "consumer interests" and "the requirements of fair competition." In other words, the methods used in the battle to win customers must be honest.

The evolution of the concept of "competition" has established the need to protect the institution itself. From a historical perspective, the interests of competitors were the first protected. But every rule imposed on competitors protects equally the interests of consumers. To consider that a behaviour is unfair we must equally take into consideration the interests of the competitors and their customers. Buyers must form an opinion freely and choose between goods and services, those that best fit their needs. Their protection meets the considerations of social policy which seeks to protect the weaker party in trade.

The legislature could not ignore the fact that, unfortunately, traders resort to unfair means to attract and keep customers, thus creating facts which may take the form of felonies, misdemeanors or even crimes. Among these there are facts that undermine business or a competitor's internal organization.

2. LEGAL FRAMEWORK FOR THE PROTECTION OF UNFAIR COMPETITION

2.1. General considerations

The protection of unfair competition has three categories of sources: international, European and domestic. The sources of unfair competition include material and conflicting rules.

Internationally, the rules of unfair competition have been included in Conventions on industrial property and commercial agreements. These regulations ensure a competitive, undistorted environment.

Inside European Union, the need to ensure fair competition conditions constituted the reason itself for creating the single internal market. Competition rules are a prerequisite for the efficient functioning of the single market. The competitive markets provide consumers with goods or services of better quality at lower prices, and give the economic operators an appropriate development and progress. Diversity of national laws was the main cause that led to the development of uniform regulations.

2.2. International legal regulations

a) Union Convention of Paris, March 20th, 1883 for the Protection of Industrial Property

More than 100 years ago, the unfair competition was regulated under the Paris Convention for the Protection of Industrial Property on March 26th 1883. In its original form, the Convention did not contain provisions relating to unfair competition. On June 2th, 1911, the text of the Paris Convention was expanded in Washington, by introducing art. 10 bis to oblige Member States to ensure effective protection against unfair competition and create the necessary remedies to combat it.

The legislative process on the repression of unfair competition was completed in 1925, during the Review Conference in Hague. On French proposal the unfair competition was defined in art. 10 bis para. (2) as "any act of competition contrary to honest practices in industrial or commercial matters". This definition was the starting point for the regulation of different countries in repression of unfair competition. At the Review Conference in Lisbon in 1958 was developed text art. 10 bis para. (3) which prohibits a number of acts considered to be unfair practices. On this occasion the text of the Paris Convention concerning the international legal framework of unfair competition was finalized.

b) The Convention for establishing the World Intellectual Property Organization

This Convention has an important place in the evolution of intellectual property law, and unfair competition law. Unlike the art. 10 bis of the Paris Convention, the scope of acts of unfair competition is extended to five situations. Besides the risk of confusion, defamation and misleading statements, WIPO also considered as unfair competition the regulations affecting the reputation or goodwill of a business (art. 3) and disclosure of trade secrets (Article 6). The novelty brought by WIPO Model Provisions (art. 1 b) is that unfair competition is sanctioned even when the relationship between parties is not competitive. Any individual or organisation injured or likely to be harmed by an act of competition can benefit from legal protection.

c) General Agreement on Tariffs and Trade (GATT)

General Agreement aims to create a legal framework for international economic exchanges by removing barriers, providing equality between its members in terms of using fair trade practices (Toba, 2004). The purpose of the Agreement is to protect national economies from foreign competition with tariffs, which must not be prohibitive (Aldea et al., 1987).

d) The Marrakesh Agreement establishing the World Trade

On the promotion of fair and open competition it is assessed in general that the WTO has created a system of rules aimed at ensuring fair and open competition. Provisions designed to ensure fair competition is focused on compensatory measures for export subsidies and anti-dumping measures, for the situations where they can identify different types of dumping. Promote fair competition is the aim of many of the WTO agreements, such as the intellectual property or services. They define the unfair character and give solutions to compensate for damages caused by unfair practices.

e) TRIPS Agreement

The agreement was reached due to the need of developing new rules for effective implementation of the principles established in international agreements and conventions on intellectual property and the enforcement of trade-related intellectual property by creating an efficient means (Macovei, 2006). In addition to the provisions of the Paris Convention, it aims to prevent any acts of unfair competition that would undermine intellectual property rights.

2.3. European legal regulations**a) European Parliament and Council Directive no. 2006/114 / EC of 12 December 2006 concerning misleading and comparative advertising**

In terms of advertising, we should mention that the work of the European Union member countries to align national regulations resulted in the adoption of the Council Directive of September 10th 1984 on the approximation of laws, regulations and administrative provisions of the Member States concerning misleading advertising. Directive 84/450 / EEC has been, for a long time, the main European regulations on unfair competition. If we refer to the evolution of the law of unfair competition, we realize that, in fact, Directive 84/450 / EEC established minimum criteria and objectives by which to determine whether advertising is misleading. Directive 84/450 / EEC was replaced by Directive 2006/114 / EC which highlights in particular that the distortion of competition is a consequence of misleading advertising and unlawful comparative. However, illegal advertising can affect the economic situation of traders.

b) European Parliament and Council Directive no. 2005/29 / EC of 11 May 2005 concerning unfair business practices in the internal market for consumers

Directive. 2005/29 / EC complements the Community acquis in the field of commercial practices harming consumers' economic interests. Designed to protect consumer rights, this directive support indirectly operators against competitors who do not follow the rules. However, in the preamble to the Directive on unfair commercial practices it is announced that the Commission will launch a legislative proposal for creating unfair competition and injury to customers of competitors.

c) Council Regulation no. 1225/2009 / EC of 30 November 2009 on protection against dumped imports from countries not members of the European Community

The new Regulation aims to transpose into Community law the terms of dumping Agreement, namely the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement 1994) established rules relating in particular to the calculation of dumping, procedures opening and conduct of the investigation, including the establishment and treatment of the facts, the imposition of provisional measures, the imposition and collection of anti-dumping duties, the duration and review of anti-dumping measures and the disclosure of information relating to anti-dumping investigations.

d) Council Regulation no. 597/2009 / EC of 11 June 2009 on protection against subsidized imports from countries not members of the European Community

The regulation establishes in details, the terms that determine the existence of a subsidy, the principles underlying the application of countervailing duties (especially if the subsidy was granted specifically) and the criteria used in calculating the subsidy subject to countervailing measures.

2.4. Domestic legal regulations

In Romania, the regulations relating to unfair competition were strongly influenced by the Paris Union Convention of 1883. The free competition premise of a functioning market economy, required the adoption of a legal framework to meet all requirements imposed by fair competition between economic operators. Law. 11/1991 on unfair competition is inspired by the regulations of the Paris Union Convention. The adoption of Law. 11/1991 coincides with the beginning of democracy in Romania. Once Romania joined the European Union, it imposed a number of changes to unfair competition.

The Law no. 11/1991 was amended by Law no. 298/2001, in order to fill gaps resulting from commercial practice of the period 1991 - 2001, to more clearly define acts and acts of unfair competition and to stipulate stricter sanctioning measures to discourage and restrict the scope of unfair competition. The Legislative package on unfair competition is complex and includes a number of legislative measures transposing provisions in our legislation adopted at European level in the field of unfair competition such as Law. 21/1996 (Competition Law), Law no. 148/2000 Advertising, Law no. 296/2004 the Consumer Code, Law no. 363/2007 on combating unfair practices of traders with customers and regulatory harmonization with European law on Consumer Protection Law. 158/2008 concerning misleading and comparative advertising, broadcasting code, intellectual property laws, the Code of Civil Procedure, Criminal Procedure Code.

Recently, Law no. 11/1991 was amended by Government Ordinance no. 12 of July 31st, 2014. This change was necessitated by the current economic situation, which is in a state of flux. Meanwhile, the World Organisation for Economic Cooperation and Development observed, in general, in the report entitled "Analysis of competition policy and law in Romania" the low level of competitiveness of the Romanian economy, considering this a concern. This is supported by the fact that in the latest edition of the Global Competitiveness Report, Romania is ranked 76, behind most CEEC and behind other EU Member States (<http://www.oecd.org/daf/competition/Romania-Competition-Law-Policy-2014-EN.pdf>).

Analyzing provisions of O.G. No. 12/2014, we summarize the main changes to the Law no. 11/1991 as follows:

- the provisions of the Act apply individuals and organisations, Romanian or foreign, committing unfair competition practices;
- also, the provisions of the Act apply to businesses, thus expanding the scope of the legal issues of unfair competition. The term "business" refers to any economic operator engaged in an activity consisting in offering goods or services on a given market, regardless of its legal status and the way of financing, as defined in the case law of the European Union;
- unlike the old regulations defining unfair competition only, it is explained the concept of "fair competition" as "market rivalry situation where every company is trying to simultaneously achieve sales, profits

and/or market share, providing the best practical combination of price, quality, and related services with respect to fair practices and the general principle of good faith";

- if the previous form of the law is clear that it is regarded as contrary to honest commercial practice using unfair trade secrets of a merchant, the new rules are explicitly defined "fair usage" as "the set of practices or rules generally recognized that apply in trade between businesses in order to prevent abuse of their legitimate rights";
- a series of definitions such as business practices, consumer are taken from the Law no. 363/2007;
- all business practices constitute unfair competition contrary to fair practices and the general principle of good faith, as far as production or cause damage to any market participants (in businesses and consumers), thus extending the scope of the report passive subjects unfair competition;
- particularly, there are described two practices of unfair competition: the denigration of a competitor or goods or services and diversion of business customers;
- penalties are higher than those of the old regulation. For organizations, the fine is now £ 5,000 to £ 50,000 (previously was from 1,000 to 10,000 USD);
- it has been set up an inter-ministerial council for unfair competition, without detailing responsibilities, composed of Ministry of Finance, the National Audiovisual Council, the National Authority for Consumer Protection, State Office for Inventions and Trademarks and the Romanian Office for Copyright.

3. CONCLUSION

Changing the law on unfair competition targets the practices considered unfair within the sphere of the sanctions imposed. Legislative intervention in this sector of the market economy is welcomed because it manages for the first time, to harmonize and unify the interests of all market players: businesses and consumers, under the umbrella of good faith and fair practices. However, these legislative provisions recognize the complexity and actual character of competition, which has branches in various sectors such as consumer protection, intellectual property rights, audiovisual.

4. ACKNOWLEDGEMENT

This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources' Development 2007-2013.

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