THE USV ANNALS OF ECONOMICS AND PUBLIC ADMINISTRATION | VOLUME 15, ISSUE 1(21), 2015

PARADIGMS REGARDING CONCERTED PRACTICES OF COMPETITION POLICY

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Abstract:
The process of completing the single market requires the application of appropriate measures also in competition field. Rather, it is a truism that, once are removed the non-tariff barriers (physical, technical, fiscal) of hindering trade, companies and governments will seek new ways to limit the restrictions so that competition laws to protect domestic industries.
This study is a reflection on competitive practices regarding the theoretical and practical aspects in the phenomenon of economic competition.

Keywords: concerted practices, competitive market, economic relations, abuse of dominant power

JEL classification: K39, K40

1. INTRODUCTION

According to EU rules, the competition policy is not perceived as an end in itself, but as a necessary condition for the internal market. Thus, Article 3 of TCE emphasizes that the aim is to allow setting of a "system ensuring that, in the single market, competition is not distorted.

In this regard, we emphasize the idea that Community rules from competition domain prohibit only those conducts and acts, which may adversely affect trade between Member States, without regard to situations where negative effects are visible only within a single Member State (such situations are the competence of national authorities in the field).

On the other hand, as competition in the market economy is essential in ensuring the economic success, are considered acceptable some practices, which generate positive effects on the economy.

Competition policy has been and continues to be a policy complementary to concerns related to completing the single market, since it provides a mechanism for removing trade barriers between Member States, creating favourable premises the most complete market integration.

European competition policy is based on a Community legislative framework provided essentially by the EC Treaty art. 81-90. Also, additional regulations are assured by decisions issued by the Council. Based on these competition policy focuses on the four areas of action.

Agreements and arrangements concluded between businesses in order to increase production, promoting scientific research and technology in order to ensure economic progress, can have positive effects on the market and influence the best way the competition in the internal market.

Thus, it should be understood that economic integration is not a goal in itself, but a means, a path toward achieving objectives. One of the objectives to be achieved is to have a perfect competition, ideally, if is not achieved this goal then is trying by any means to reduce the factors that lead to unfair competition.

Competition is seen as a reference situation in which there is a complete free confrontation between all operators in the supply and the demand for goods and capital and production services and goods (Michelle Cini, Lee Mc Gowan, 1998).

Analysing from this perspective the general provisions of the Treaty, may be noted that competition principles are based on the achievement of a common commercial policy for the purposes of creating an internal market in Member States and to remove barriers that may appear in circuit of goods, persons, services and capital, by implementing a legal framework that does not allow distortion of competition.

Competition protection presents a particular interest to the national economy, but also in Europe, which has faced and is facing the abuse of dominance, anti-competitive agreements and mergers, unfair practices that result in worsening competitive environment.

Competition is the essence of the market economy. It means the choice between several alternative products or services.

In the battle for market conquest, bidders apply a number of principles, such as sophisticated concepts concerning business strategies and marketing, concepts to gain dominant market share in the segments concerned, a simultaneous commitment to high quality and strong productivity, without compromising on strategy of high performance requirement or an orientation to economic sectors involving high technologies and gradual reduction of activities in the declining areas.

Often, from the desire to achieve a dominant market position, to attract more customers and eliminate current and potential competitors, companies resort to a series of actions and illegal acts that have an adverse effect on competition.

As the 60s were dominated by the interventions made under Article 85 (81) (regarding restrictive practices), the 70s were characterized by attention to the abuse of the existence of dominant positions, toward possibilities of mergers and merger control (see the case of Continental Can, 6/72, ECR 21 5). The objective was to "introduce an institutionalized system of preventive control" (Bernini, G, 1983)

It should be underlined, however, that in those years, within the Council, had failed to find a compromise between anti-supranational general attitude and the desire of some Member States to maintain absolute control of national industrial policies, the attitude remained until the mid 80s. As such, neither at the Commission's level was not obvious an unified opinion regarding this issue.

It should be pointed out that competition policy is not an end in itself but a means to achieve a goal, which, most often, is defined as meeting consumers' interests.

Amid natural concerns inscribed on the path to progress, development and modernization of production and distribution, as well as the creation of a specific case regarding contractual relationships between companies, the need for creating the competition environment and compliance with fair behaviours of those facing the fight for winning some favourable market position is becoming more acute and real.

One of the essential conditions for the creation and consolidation of a market economy is the existence of a functioning competitive environment.

2. COMPETITION POLICY AND ANTI-COMPETITIVE PRACTICES

Competition can be defined as the ensemble of relations of economic agents generated by their desire to achieve a better market place and a more advantageous price. (Birsan, Maria , 1999; Căpăţână, Octavian, 1992)

From the economic point of view, the competition is always linked to transactions on the market, supply and demand and the exchange process. It is known that "the most important regulators of the market economy is competition" (4)

Exercise of competition is a right of all economic operators. As any right recognized and protected by law, competition law must be exercised in good faith and according to fair practices without violating the right and freedoms of citizens and economic operators.

If certain agreements, agreements between companies may have beneficial effects on the market, others may adversely affect competition (Jacques Neme, Colette Neme, 1995). Article 81 (formerly Article 85) of the EU Treaty (TEU) introduces the principle of *prohibiting agreements between companies, decisions and concerted practices,* which have as their object or effect the

prevention, restriction or distortion of competition within the Community space, and who are likely to "affect trade between Member States".

A restrictive agreement is an agreement between two or more firms, which the parties undertake to adopt a certain behaviour, by which are bypassed the rules and effects of free market competition. The prohibitions to which Art. 81/1 (formerly 85/1) applies to both *horizontal agreements* (which are covered by shares of firms in the same stage of production, processing and marketing) and *vertical agreements* (are covered actions of firms placed in different stages of production and marketing, not competing with each other).

Understanding is an agreement between two or more firms in which one or more partners are forced to act in a definite way.

The concerted practice is at a lower level to agreements and a process of coordination is achieved between different companies but not reflected in an agreement itself (does not require a clearly expressed will manifestation, but only a coordination at the level of commercial strategies).

3. THE DIFFERENCE BETWEEN UNFAIR COMPETITION AND MONOPOLISTIC PRACTICES

The first of the issues concerned is that of finalities: unfair competition involves capturing the customers of the injured contestant, while monopolistic practices involve capturing market as such, which alternatively leads also to gaining the customers of harmed competitors.

The second aspect is the results: unfair competition leads to distortion of competition while monopolistic practices result in suppression of competition.

Unfair competition is a violation of ethical norms, while monopolistic practices lead to socio-economic imbalances. Unfair competition revolves around the concept of "customer", while monopolistic practices take into consideration the concept of "market". The certain trend is that both practices have as main pillar the consumer.

The common denominator of both practices is that both require the existence of a competitive relationship between aggressor and aggressed economic operators, learned on the same relevant market. In comparative law, such a concept already enshrined in Swiss law, by the entry into force in March 1988 of the new Law against Unfair Competition (Bundesgesetz gegen den unlauteren Wettbewerb). (6)

The reason for extending the scope of the rules regarding unfair competition is as follows: These regulations not only protect the interests of individual competitors to take part in trade relations based on morality, but also the interests of all market participants and finally to the whole community to exist a functional competition. Unfair competition law is not only impregnated by individualism, but also by the concept of social justice.

The enlargement of the concept of competition allows taking into account the actions of third parties that are important for competition, but do not fall directly into competitive play (such as media bodies, institutes of comparative tests). The mere risk that these actions will produce an anti-competitive outcome is sufficiently, independent of the use or not of specific means.

Also, fall within the economic domain economic the performances of economic nature of public communities, to the extent they influence the market, irrespective of the existence of a competitive relationship. As for the unfair nature of the action, he is in violation of rules of economic behaviour, regardless of the existence of a form of guilt. However, guilt plays a role in the prosecution and claims for compensation for damage.

The act of unfair competition likely to injure a competitor, several competitors or even an entire economic sector, the customers (they are the recipients of the efforts of competitors and have the interest to freely choose between offered services, those which meet better to their needs). Protection of clients' interests, especially when they are consumers, responds to a requirement of social policy, namely the protection of the weaker economic party.

The facts provided by the Law no.21 / 1996 as monopolistic acts can also be classified as acts of unfair competition, if their impact on the market is reduced. This is because both types of

acts are contrary to fair practices. As a result, the main criterion for distinguishing between acts of unfair competition and monopoly is given by the magnitude of the economic power of the infringer fair usage.

Thus, there was a tendency within the legislature to include in consumers sphere also the small businesses, small traders.

As a result, also businesses seek to apply consumer protection laws because in this way achieve suppression of unfair practices.

On the other hand, consumer protection standards are not purely local, they should be seen in the international context.

This legislation also seeks to promote full and timely information to consumers, especially in relation to complex property and intervene in the balance of power between consumers and traders, in case the first is deprived of the effective power of negotiating contractual terms.

There is no exclusive right over their merchant clientele. To attract this clientele by another trader is lawful as long as it is not accompanied by acts of unfair competition. Hijacking customers is, to a point, a game result of supply and demand, but freedom of competition cannot be without limits. Freedom of competition is a corollary of freedom of trade. Trade freedom is a fundamental freedom, which is to be exercised with respect for the freedom of others.

In the absence of any control, could occur and develop practices contrary to honest commercial practice, the winner of the competition battle is not the best one, but certainly being unscrupulous. In other words, the competitive harm (transfer of customers from one trader to another) is lawful, but only if the relevant trade usages freedom includes freedom of fair trade price. Thus, a trader does not commit an act of unfair competition as long as it sells its products at a price below that of competitors, as long as this price is not ridiculous or contrary to customary trade.

The law of Member states in competition field does not excel, an example is French law where there is no special legal basis of unfair competition. There is no special regulation acts of unfair competition. Therefore, it is considered that unfair competition action - as a tool to ensure that competition is fair - is an action based on tort for his own deed (art. 1382-1383 of French Civil Cod). The foundation of action for unfair competition, even if only allows retrospective punishment (the court intervention) of unfair behaviour, is seen as an advantage due to its suppleness, the articles of the Civil Code, regarding the tort liability for its own act can be used to sanction such a wide variety of behaviours. (7)

Yet, French doctrine and jurisprudence established in time that unfair competition action has a wider scope than the action in tort, because the penalties for committing acts of unfair competition aimed not only to repair the damage, they are equally preventive (may as object the termination of a fact that distorts artificially the fair competition), protecting the victim against possible diversion of their clientele. In addition, injurious of unfair competition has a certain specificity, being considered less rigorous than in civil matters. Recent developments in French jurisprudence was with the purpose of recognizing the existence of injury in this matter without any loss of clientele.

Such an approach exists in the German, Dutch and Belgian systems, combining the ethical functions of action in unfair competition with the consumers and end-users law (general interest) to make use of unfair competition action to compel traders to comply with their ethic obligations. Therefore, may thus be sanctioned acts, which would not be indictable between competitors.

Some authors (Gavrilă Ilie, Gavrilă Tatiana, Popescu Anisia, 2006), starting from the observation that the action for unfair competition is mainly repressive and not indemnitar, consider however, that the purpose of action is not disciplinary, in the sense of punishing the infringement of professional practice of operators, but a repressive action by taking into account a broader range of interests, both interest of economic actors to have a normal competitive environment, and also the consumer interests.

Italian authors have proposed another cornerstone of unfair competition action, namely the protection of a right, namely the right of ownership on the customers. The consequence of this approach is that was claimed that the action in unfair competition recognizes a privative right over a competitive value that is not protected by a special law. As regards the foundation of action on a

deprivation right, even this might not support, because law requires the prohibition of any competing deprivation, while action in unfair competition exists precisely because there are no free competition, in certain limits. (Moşteanu, Tatiana, 2000)

Italian case law has stipulated the view that action is the basis for sanctioning an illegal act. This orientation of action is considered as the best, being consistent with her action character in tort liability.

Unlawful act consists in the abuse of freedom of trade that comes from business and not in violation of a general obligation not to harm others, because the competition by definition implies a 'damage' caused to competitors. It is a case of unlawful conduct for whose existence requires an intentional element.

According to art. 6 of Law 11/1991 updated, who commits an act of unfair competition, will be forced to cease or to remove it and pay compensation for the damages caused, as appropriate. If by facts of unfair competition was caused patrimonial or moral damage, the injured will be able to act against the author liability claims.

The action for unfair competition is an action with special tort liability. The basis of this action is the violation of a social obligation to respect certain moral rules in the relations of competition, which means an excessive exercise of freedom of competition.

The action for unfair competition seeks primarily the cessation or prohibition of acts of unfair competition and then repair the damage. It tends mainly "to suppress the facts whose perpetuation would certainly lead to injury", and the compensation will be paid in addition, if it proves that the applicant suffered a damage.

Due to the specific of competition relationships, unfair competition action is a action in special civil liability.

The following are its peculiarities:

- The existence of an act of unfair competition and character of this competitor;
- The existence of a created and present interest, condition of any action;
- Evidence of harm is necessary not only to obtain compensation and to allow the action;
- The repair pursued will be mainly a repair in such in order to restore the previous situation, the prohibition of committing future acts of unfair competition and suppression or destruction of material used to commit acts of unfair competition (distinctive signs, advertising);
- If damage was caused, the action may have as object the payment of compensations, the specific action in unfair competition allowing cancellation of the two forms of reparation;
- Unfair competition action is an action in achieving a right taking mainly the form of prohibition;
- The action belongs to both individuals and legal persons exercising a right or industry, with the condition that between them and the author is competition, meaning to exercise a trade or identical or similar industry;
- Liability of the trader and his employee, who has committed the act of unfair competition in the exercise of its powers, and persons, who caused the injury shall be joint together.

The action of unfair competition is limited by a legal framework, very real, the fact itself arguing the presence of a rich jurisprudence.

Therefore, we can say that competitive practice places in the centre a vulnerable representative namely the consumer, and he has as a regulatory and sanctioning tool a series of institutions devoted to the protection of consumer rights.

4. CONCLUSIONS

In conclusion, the only way of effective control of restrictive business practices is compliance with the legislation on competition, because only compliance with competition legislation ensures protection, maintenance and competition in order to promote fair competition.

Solutions aimed the competitive loyalty between economic partners is based on establishing a unitary market unit, in promoting fair partnership techniques.

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