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THE CAPACITY OF CHANGING THE COMPETITION REGIME IN ROMANIA

Lucia Irinescu*

Abstract: *The policy in the competition field represents the engine of a market. The competition on the internal market improves the competition capacity on the international markets and meets consumers' expectations that shall have the possibility to choose among a larger and cheaper range in terms of price of products and services. The competition freedom is not an absolute one, but it is limited by legal provisions determined by the need to ensure an honest competition.*

Keywords: competence; evolution in international plan; policy in the competition field; tools to fight against the anti-competition effects.

JEL Classification: L40.

1. INTRODUCTION

The competition environment in Romania was born with the passing of the Competition Law no. 11/1991 and was modernised through the Competition Law no. 21/1996, as amended. The Romanian law with respect to the prevention of unfair competition is considered in doctrine (Czika and Sasu, 2009) an original law with respect to European regulations. The adherence of Romania to European Union represented a benefit from the competition policy as well, as the legal framework was completed by European laws that should ensure the adapting of the Romanian competition policy to the statute of member country and European Union requirements. Upon the adherence date, articles 101 and 102 of the Treaty regarding the functioning of the European Union (former art. 81 and 82 of the EC Treaty) and the European Regulations in the competition matter became directly and immediately enforceable in Romania (The Council Regulation no. 597/2009/EC of June 11, 2009 with respect to the fight against the imports that are subject to some grants coming from countries that are European Community members; The Council Regulation no 1225/2009/EC of November 30, 2009 with respect to the fight against imports that are subject to a dumping coming from countries that are not European Community members). At the same time, the Competition Council (the national body of competition in Romania) became member with full rights in the European Competition Network (ECN), founded based on the (EC) Regulation no. 1/2003. The national legislative framework was equally modernised and aligned to the European legislative standards through the adoption of a legislative package (Act no. 158/2008 with respect to deceptive and comparative advertising; Act no. 363/2007 with respect to the fight against traders'

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incorrect practices in their relationship with consumers and the harmonisation of regulations with European laws on consumers' protection; Act 148/2000 with respect to advertising; Act no. 296/2004 with respect to the Code of consumption), transposing the European directives in the competition matter (the Directive of the European Parliament and Council no. 2006/114/EC of December 12, 2006 with respect to deceptive and comparative advertising; the Directive of the European Parliament and Council no. 84/450/EEC of September 10, 1984 of rapprochement of the deeds with power of law and administrative deeds in the member states with respect to deceptive advertising; the Directive of the European Parliament and Council no. 2005/29/CE of May 11, 2005 with respect to the unfair commercial practices of enterprises on the internal market in their relationship with consumers). Considering the complexity of the competition field, as well as the European Sole Market is characterised by a certain dynamics with respect to development and diversification, the European Union officials were reserved when it comes to the adoption of a uniform regulation with respect to unfair competition. Therefore, until now, the European Union does not have a general regulation with respect to loyalty in trade transactions, but instead we do have sector texts. These ones may be found in field such as comparative and deceptive advertising, consumers' protection, dumping and grants. If we consider the interference between loyalty and commercial transactions, we have to make reference especially to the most important decisions in this field. As for the unfair practices that may be found in international trade, dumping and grants, at the European Union level it was considered necessary to adopt the two distinct regulations, that, on one hand should establish, in a sufficiently detailed form, the requirements regarding the enforcement of the two commercial protection tools, and on the other hand, should increase the efficiency and transparency in the enforcement by the Community of the norms established in the Antidumping Agreement of 1994 and in the Agreement on grants. In its investigations the Competition Council took into account the recommendations of the Organisation for Cooperation and Economical Development, this way ensuring the protection, keeping and stimulation of competition and of a normal competition environment and contributing to uniform law at European level. The decisions taken by the Competition Council are controlled by courts. An expanded guarantee of the competition environment in Romania is achieved by means of the constitution control. As per art. 135 of Constitution „the Romanian economy is a market economy, based on free initiative and competition”, the state has to ensure „the protection of loyal competition”. In this respect, the Constitutional Court defined the notion of loyal competition, this one representing the trader's behaviour as per the trade rules, as stipulating that the provisions of art. 135 of Constitution

established the obligation of the state to ensure the protection of loyal competition, an obligation that represents the constitutional guarantee of the competition freedom.

2. THE ANALYSIS OF THE CURRENT COMPETITION REGIME IN ROMANIA

2.1. General rules regarding the anti-competition practices

Starting with the economic status of Romania that has recorded an increase in the past years (according to The National Institute of Statistics), the international reports that analyse and compare the competitiveness of national economies show that Romania „is in a development stage”, but in order to leap towards a „high stage of development based on innovation” it needs a competition culture at the level of private environment, as well as at the level of public environment. The specialised doctrine of Romania analyses the current status of policy in the competition field, but the coverage area is critical based on at least two facts: first of all, the analysis of the directions of changing the competition policy presents lacunas, and secondly, the modification of the legislative and institutional framework lacks the identification of some improvement suggestions.

The European laws are transposed in our law through the Competition Law no. 21/1996. The ways to enforce these provisions are established through the regulations and instructions issued by the Competition Council, constituting the secondary laws in the field. The provisions of art. 101 of the Treaty regarding the functioning of the European Union (former art. 81 of the European Communities Treaty) forbid and declare as incompatible with the common market any agreements among enterprises, decisions of association by enterprises and all the concerted practices that may damage the trade between the member states and have as subject or effect the prevention, restriction or distortion of the competition within the internal market. Art. 102 of the Treaty with respect to the functioning of the European Union (former art. 82 of the European Communities Treaty) stipulates that it is incompatible with the internal market and forbidden, to the extent that the trade between the European Union state members may have harmed the behaviour of one or several enterprises to abusively use a dominant position on the internal market or a substantial share of it. The control of the compliance with the dispositions of art. 101 and 102 of the Treaty regarding the functioning of the European Union is achieved by the European Commission. The control procedure is carried out as per the (EC) Regulation no. 1/2003 of the Council of December 16, 2002 with respect to the enforcement of the competition rules stipulated in art. 81 and 82 of the Treaty.

The treaty regarding the functioning of the European Union does not contain clauses with respect to the economical concentrations that may distort competition. With a view to covering this legislative gap, the European Union Council adopted the Regulation on the economical concentrations. The competition restrictions apply not only to enterprises, but as well as to governments that provide economic operators with grants. The treaty on the functioning of the European Union forbids, in principle, through art. 107- art. 109, all the grants offered by states or by means of state resources, granted in either form, that distort or threaten to distort competition by favouring certain enterprises or productions to the extent that these ones have an effect on the trades between member states.

2.2. Unfair competition

Act no. 11/1991 with respect to the fight against unfair competition has as an inspiration source the regulations of the Paris Union Convention. The act contains in art. 1 a general clause, according to which traders are obliged to practice their activity in good faith, as per fair habits, in compliance with consumers' interests and loyal competition requirements.

The legislator groups the unfair deeds or facts according to how serious they are, into civilian offences, infringements and breaching of law. Therefore, art. 4 establishes contravention liability, and art. 5, establishes criminal liability. The trader that does an unfair competition action has the obligation to cease or remove unfair action, to return the confidential documents illegally taken from their legal owner and, as the case may be, to pay damages for the caused damage, according to the laws in force.

According to an opinion (Eminescu, 1993) expressed in Romanian legal literature, the unfair competition actions and deeds may be grouped into: confusion means; the exploit of labour and organization of the other; denigration; deceitful, undesirable and chocking advertising; boycott and discrimination; various forms of sale, such as the sale with bonus, at low price or under the imposed price. According another opinion (Mihai, 2008), unfair competition may take three forms, that is: imitation, disorganization and denigration. Other authors (Cotutiu and Sabau, 2001) used larger classifications, by grouping these abusive devices into: unfair competition deeds made against another trader, such as comparative, parasitical and superlative advertising, confusion, denigration, disorganization or destabilization of the rival enterprise and unfair competition deeds made against competitors, such as the sale by forbidden methods, dumping of goods and services.

The Competition Council, as of 2011, gives an answer by enforcing Article 4 of the Act on unfair competition that makes reference to practices such as that of denigrating a company, unfair allurements of customers and breaking the structure of companies. The sanctions enforced are of administrative nature, and certain breaches, such as the industrial espionage fall within the incidence of criminal code.

3. CHANGING OPTIONS

The competition policy of Romania represented the analysis object of OECD, that, in the report entitled “The analysis of the competition policy and law of Romania”, drawn up within the Global Competition Forum OECD of February 27, 2014, drew some guiding lines for the competition body of Romania, the Competition Council respectively. Therefore, generally speaking, the conclusion drawn by the report was that “Romania has a competition regime that is well in line with the standards and practices recognized at international level”, and the Competition Council of Romania used to be and still is the main engine that generated a large part of the changes that turned the regime of enforcing the competition law into an efficient one.

The recommendations of the OECS Report focus on:

- sanctions given to cartels
- economical concentrations and modification of the notification thresholds
- unfair competition

With respect to cartels, an increase of the awareness degree in the business environment with respect to their effects is imposed. The requests of clemency, as well as the number of investigations initiated by the Competition Council every year is not overwhelming. In terms of sanctions, a better cooperation between the competition body and DIICOT, that is liable only for certain forms of cartels is imposed.

In the matter of economic concentrations, there is currently a request for the review of notification thresholds. Another problem that may receive a fair solution in the future concerns the situation of purchasing minority share packages that do not confer the direct or indirect control de facto or de jure upon the purchased economic agent, that may raise competition issues, if the minority shareholders form an entente. Therefore, a possible instrument through which the anti-competition effects of the minority share packages that do not confer control may be fought against is the ex-post enforcement of the provisions regarding the horizontal agreements and dominant abuse of position.

The Competition Council drew up a draft Act of law on unfair competition, according to which the following actions represent unfair competition actions:

a) the denigration of a competitor or its products/services, achieved through the communication or public spreading by an enterprise of false statements with respect to the activity of a competitor or its products, that may cause damage to the competing enterprise.

b) the disorganisation of the activity of an enterprise by instigating or determining some employees, suppliers, customers or other involved parties, by another enterprise, to comply with their contractual obligations.

c) the misappropriation of the customers of an enterprise by a former or current employee/representative, by using data of confidential nature, for which the respective enterprise took reasonable steps in order to ensure their protection.

The regulations of this Draft constitutes a step forward in this respect, as it joins in one single normative deed anti-competition practices, as well as the unfair competition deeds, and confers upon the Competition Council the competition to analyse, find and sanction the unfair competition action, upon receiving a notification from natural persons and legal entities that have a grounded or ex officio interest.

CONCLUSIONS

Romania has a relatively young competition regime. The capacity of changing it, together with the economic, political and administrative development, through the implementation on the national plan of the European regulations, may be noted from the perspective of the activity carried out by the Competition Council, as well as from consumers' perspective, that have more and more often the possibility to enjoy the benefits of a healthy competition environment.

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