"THE UNDERTAKING" AND "THE RELEVANT MARKET": KEY CONCEPTS IN THE ANALYSIS OF ANTICOMPETITIVE PRACTICES

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Abstract

The desire to maintain themselves on a particular market, at a higher level of profitability or at a reasonable level at least, can lead the undertakings to adopt an anticompetitive behaviour more easily. This may result from either the existence of anticompetitive agreements and concerted practices, or the tendency to abuse its dominant position which the undertaking has on a certain market.

"The undertaking" and "the relevant market" are the key concepts in the analysis of anticompetitive practices.

The active subject of anticompetitive practices is "the undertaking". This concept has a particular significance in the competition law, different from the common law. Competition rules apply to the conduct of undertakings and associations of undertakings so that the concept of undertaking makes it possible to determine the categories of actors to which the competition rules apply. However, the term undertaking is nowhere defined in the EU Treaties; as such, the concept has generated a complex body of jurisprudence.

"The market" is a term with pronounced economic resonances; synthetically, the market is the place where supply meets demand. In the context of the competition law, "the market" means "relevant market". The relevant market is the market of product/service in terms of demand and supply, and then superimposed on the geographic market.

The analysis of these key concepts necessarily entails the conceptual delimitation of the notions. On this purpose, the relevant legal provisions will be identified in the Romanian and EU law, together with the decisions of the European Court of Justice in this matter.

***Keywords**: competition law, undertaking, relevant market, the market of the product, the geographic market.*

Introduction.

The purpose of this paper is the analysis of the notions "undertaking" and "relevant market" which represent key concepts in the analysis of the anti-competitive practices which can distort the competition. The undertaking is the active subject of the anticompetitive practices to which the competition law address, and the relevant market is the market on which the potential restriction of competition is analysed.

The study of these notions is important because the anticompetitive practices, which restrict natural competition, are practised, in most of the cases, by undertakings. As concerns the competition, the notion "undertaking" has a specific meaning, different from the common law.

The competition rules apply to the conduct of undertakings and associations of undertakings, so that the concept of undertaking makes it possible to determine the categories of actors to which the competition rules apply. However, the term "undertaking" is nowhere defined in the EU Treaties; as such, the concept has generated a complex body of jurisprudence, which has to be identified. "The market" is a term with pronounced economic resonances; synthetically, the market is the place where supply meets demand. In the context of the competition law, "the market" means "relevant market". The relevant market is the market of product/service in terms of demand and supply, and which is then superimposed on the geographic market.

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On this purpose, we will analyse the special significance of each of these two notions, "the undertaking" and "the relevant market", we will identify and analyse the main normative dispositions with regard to these aspects, both at national and European levels, and we will present more jurisprudential solutions of the European Law Court, from which are resulted the criteria that have to be taken into consideration for both the identification of un undertaking and the determination of the relevant market.

In comparison with other already existent specialty literature on competition law, the present paper intends to present the conceptual evolution of the analysed notions, paying special attention to the entities (including the ones without juridical personality or members of liberal professions) which can be qualified as undertakings as defined by the Romanian competition law.

Content.

I. Introductory aspects

The existence of a competitive and undistorted milieu is a fundamental condition for the existence of a functional market economy. Thus, it is necessary to protect the market against acts or facts that could lead to the restriction, distortion or even removal of the competition. Among these, the anticompetitive practices of undertakings are especially harmful, irrespective of the way in which they take place: anticompetitive agreements or the abuse of dominant position on a certain market.

The analysis of any anticompetitive practices begins necessarily with the identification of the active subject(s) of such practices and the verification whether or not the entities at hand represent an "undertaking" to which the competition rules address. In addition, due to the fact that undertakings act within a certain market, it is necessary to analyse the market in which competition takes place (the relevant market), in order to establish a potential competitive illicit.

II. The undertaking – active subject of anticompetitive practices.

II. 1. The settlement of the notion "undertaking".

In the European Union Law, The Treaty on the functioning of the European Union (EU Treaties/TFEU)[1], contains the primary legal regulation with regard to competition, which applies to undertakings and "associations of undertakings".

According to article 101 TFEU, "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". Moreover, any abuse of one or more undertakings of dominant positions within the internal market or in a substantial part of it should be prohibited as incompatible with the internal market in so far as it may affect the trade between the Member States (art. 102 TFEU).

However, EU Treaties does not define the concept "undertaking". This task was attributed to the European Commission and european courts, which have established a wider meaning of the concept of "undertaking", as it will be mentioned later.

In the Romanian Law, the common law regulations[2] define the undertaking as an activity organised in order to provide goods and services, not as a subject of right. In the context of the New Civil Code (NCC)[3], the undertaking is also regulated as an organised activity, and not as a subject of right, as it results from the dispositions in art. 3 NCC, because it is "exploited by a professional", and the "exploitation of an undertaking" is "the systematic exertion of an organised activity...".

With regard to the competition right, the Competition Law no. 21/1996[4] 2nd article, 1st paragraph defines the undertaking as a "private individual or a legal entity, of citizenship,

[1] Official Journal of the European Union C 83/1, 30.3.2010.
[2] O.U.G. nr. 44/2008.
[3] Law no. 287/17.07.2009.
[4] M.Of. no. 88/30.04.1996.

respectively nationality, Romanian or foreign", and in the 2nd art., 2nd paragraph, as representing " any economic operator who offers goods/services on market, as it is defined in the European Union jurisprudence". From the legal definition of the notion "undertaking" the following conclusions can be drawn:

- In the competition law, the notion of "undertaking" has a specific meaning, different from the one in the common Law.

- The conception of the notion in the definition is the subjective one, different from the objective one in the Romanian Law, because it regulates the undertaking as a legal entity/ subject of right and not as an organised activity, in the conditions in which the legal text stipulates purposely that the undertaking is a "private individual", "a legal entity" or an "economic operator".

- the way in which "undertaking" is defined is at least unusual in the Romanian law, because a concept is defined by means of jurisprudence

- in the conditions in which the legal definition from the national law refers expressis verbis to the European Union jurisprudence, the full understanding of the notion of undertaking imposes the presentation and the analysis of this jurisprudence.

II. 2. The European Union jurisprudence with regard to competition. A few defining notes of the concept of "undertaking".

At the level of the European Union, the first definition of the undertaking is to be found in Mannesmann Case[5]: the existence of an undertaking is given by the unitary organisation of personal, material and immaterial elements, attributed to a subject of autonomous right, and pursuing, in a lasting way, a given economic goal.

In the Polypropylene Case,[6] the Comission concluded that the "subjects of the European law of the rules of competitions are the undertakings, concept which is not identical with the problem of juridical personality in the sense of the commercial enterprises law or of the fiscal policy, however it refers to any entity engaged in commercial activities". In the same case, The Law Court regulated that "the subject of the competition rules is the undertaking, a concept that is not identical with the matter of the juridical personality used for the commercial or fiscal law. It can refer to any entity that performs commercial activities".

The sphere of the notion of undertaking was enlarged in the Hofner Case[7]: in the context of the competition law, the term "undertaking" covers any "entity that performs an economic activity, regardless of the juridical status and the way in which it is financed".

This is the decision which crystalised the concept of undertaking, the Court's jurisprudence being then constant, through the reconfirmation of the concept thus delineated in numerous subsequent causes, such as: Case Poucet and Pistre vs. Assurences Generales de France, C- 159-160/91; Case Sat Fluggesellschaft vs. Eurocontrol C-364/92; C-244/94, Federation Francaise des Societes dAssurence vs. Ministere de lAgriculture et de la Peche ; Case Pavlov, C- 180-184/98; Case Fenin vs. Comisia, T – 319/99; Case Cisal di Battistello, C-218/00; Case Aok Bundesverband, C-264/01; Decision of 11.07.2006, FENIN/Comisia, C-205/03; Case Cassa di Risparmio di Firenze SpA C-224/04; T-155/04, Selex Sistemi Integrati SpA vs. Comisia, decision of 12.12.2006.

Last but not least, it is worth mentioning that, in order to constitute an undertaking, the Court has regulated that it is necessary for the respective eentity to have decisional autonomy, to be able to establish freely the behaviour on a market, problem which arises especially in the case of the entities which belong to the same group (Case Begelin, C-22/71; Case Viho Europe BV vs. Comisia, C-73/95; Case Akzo Nobel, C-97/08).

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[5] Case Mannesman, C-19/61, decision of 13.07.1962. This case, like the other to which we refer throughout this paperwork are published on the website of the European Union Court of Justice, *www.curia.eu.int*.

[6] Case Polypropylene, 1986 , JO nr. L 230, 1988.

[7] Case C-41/90 Hofner and Elser vs. Macroton GmbH.

From the presented jurisprudence, we *draw the main defining notes of the concept of "undertaking"*: it will constitute an undertaking in the sense of the competition law any entity which: i) performs an economic activity, ii) the juridical status having no relevance, iii) the way of financing, whether public or private, having no relevance, and which iv) has an autonomous behaviour on the market.

i) Entity that perfoms an economic activity

Perfoming an economic activity represents the essential element that leads to the inclusion of the entity in the sphere of the "undertaking" concept.

But what precisely does an economic activity represent? In a jurisprudence that is remarkably constant, the economic activity was definied as being that activity consisting in offering goods and services on a market (e.g., Cases: Comisia vs. Italia C-118/85; Ambulanz Glockner C-475/99; Comisia v. Italia C-35/96; Penin v. Comisia C-205/03; Pavlov C-180-184/98), susceptible, at least in principle, to be done by an undertaking in order to make profit (C-67/96 Albany International; C-180-184/98, Pavlov), being irrelevant whether the entity, in fact, does not make profit or whether the entity is not configured for an economic purpose (C-155/73, Italia vs. Saachi).

Thus, the economic activity represents the essential criteria for qualifying the entity that perfoms it as being an undertaking.

The exertion of an activity that, in its nature, by means of the rules that it obeys and by means of its object, is different from the sphere of the economic activities, hinders the qualification of the entity that does it as an undertaking in the sense of the competition rules.

In this category are included, for instance: the activities which join the exertion of the prerogatives of the public power (in this sense, in Case Selex Sistemi Integrati SpA vs. Comisia[8], the European organisation regarding the control of the aerial navigation (Eurocontrol) was not qualified as undertaking, retaining that its activity, through its nature and objective, represents a prerogative of public power and it does not present an economic character which justifies the application of the competition rules) or activities which regard the administration of the public service of social security, together with those that aim at the system of health insurances or old age pensions (because they have an exclusively social character and are built on the principle of national solidarity, it does not represent an economic activity, and the organism commissioned to administrate them – the health insurance fund or the pension fund – cannot be qualified as undertaking, as they cannot influence the amount of the dues or the use of funds[9]).

ii)The legal status or form of the entity is immaterial.

The preoccupation regarding the activities of the entity, in consensus with the pragmatic vision and the economic objectives of the TUFE deprives of relevance the juridical status of the undertaking: the exertion of the economic activity can be performed both by a private individual and a legal entity, even by state organisms.

iii) The lack of relevance of the financing way, public or private.

The competition right does not contain special derogations in the benefit of the public undertakings, for the only reason that they are under the control of the state.

The different allotment, private or of the state, to the constitution of the capital of an undertaking cannot represent a criterion to lead to the inapplicability of the competition rules for a certain category of undertakings. In this sense, the article 106 TUFE establishes undoubtedly the application of the competition rules and the public undertakings, and the European law courts did not hesitate to declare them, having a character of principle, applicable[10].

iv) An autonomous behaviour on the market.

[8] Case Selex Sistemi Integrati SpA vs. Comisia, T-155/04, decision of 12.12.2006.

[9] Case Poucet et Pistre, C-159/91.

[10] Case C-41/90 Hofner şi Elser c. Macroton GmbH.

In order to be able to be qualified as an undertaking to which the competition rules address, the entity at hand has to have decisional autonomy, the ability to establish freely its behaviour on the market. In the absence of the decisional autonomy, situation which appears especially in the case of the enterprises that belong to the same group[11], the entity cannot be qualified as undertaking.

II. 3. The definition of the undertaking. Bearing in mind what has been exposed, we will define the undertaking as being any entity with decisional autonomy, irrespective of its juridical status and the way in which it finances, engaged in an economic activity (consisting in offering goods or services on a market), susceptible of making profit, even if the goal of the entity is not lucrative.

II. 4. Determining the sphere of the concept of "undertaking" in the Romanian Law.

In order to determine the categories of active subjects of the anticompetitive practices in the plan of the national legislation, we will distinguish between: private individuals (A), legal entities (B) and entities without juridical personality (C), following to establish concretely which entity precisely can be qualified as undertaking in the Romanian law of competition.

A. Natural persons.

i) In the old Commercial Code, a private individual acquired the quality of trader in the conditions of the 7th article, respectively if they fulfilled cumulatively the following conditions: to do objective acts of commerce; these acts to be done in behalf of its own; the performance of the acts of commerce are to have a character of profession[12]. As a consequence of the adoption of the New Civil Code (NCC), the Commercial Code is abrogated, and the notion of trader is not longer defined as such. The New Civil Code has radically modified the the overall conception of the subject, opting for a monist conception of regulating the rapports of private right, according to which the regulations regarding the commercial relations have been embodied in the Civil Code, the traditional division between civil rapports and commercial rapports was no longer maintained and there were consecrated differentiations of the legal system according to the quality of the professional, respectively non-professional of those involved in the compulsory juridical rapport.

In these conditions, the institution of the commerce acts and the institution of traders are to be reconsidered, having as basis the concepts of undertaking and professional.

According to the 3rd article, 2nd and 3rd paragraphs of the NCC, those who exploit an undertaking are not considered professionals; it constitutes the exploitation of an undertaking the systematic exertion, by one or more people, of an organised activity that consists in the production, administration or alienation of goods or in providing services, irrespective of its lucrative or non-lucrative goal. The notion of "professional" stated in the Civil Code includes the categories of trader, entrepreneur, economic operator, together with any other people authorised to engage in economic or professional activities, in the way in which these notions are declared in the law, on the date when the Civil Code was brought into force[13].

In the conditions of the competition right, because the competition rules apply only to the entitites with autonomy of decision that perform economic activities, as it has been shown, we will conclude that the private individual can be an active subject if they represent a private-individual professional who perfoms an economic activity.

In this context we can identify as "undertaking" in the sense of the competition rules: *the authorised private individual, the appointed person of the individual undertaking and the members of the familial undertaking*. The conclusion results from the provisions of the OUG nr. 44/2008, which stipulate that the private individuals can perform economic activities on the Romanian territory, in all domanins, professions, occupations or professions which the law does not forbid purposely for the free initiative, on the condition of registration and authorization, in the conditions of this normative act. The private individuals can take part in the economic activities as follows: i) individually and

[11] It will be analised *infra*, II. 4.

[12] St. Cărpenaru, *Tratat de drept comercial,* Ed. Universul Juridic, Bucureşti, 2009, p. 77-82.

[13] Art. 8 of Law no. 71/2011 (M. Of. nr. 409/10.06.2011).

independently, private authorised individuals; ii) as appointed entrepreneurs of an individual undertaking; iii) as members of a familial undertaking. In the conditions in which these people have as a declared purpose taking part in an economic activity, they represent undertakings in the sense of the competition right.

ii) *Other private individuals.* From those exposed in part i), it results that it represents an undertaking in the sense of the competition right the private individuals who perform economic activities, but who, at the same time, are subject to a legal regime of authorisation and registration. In the European Union jurisprudence, the sphere of the concept of "undertaking" has been extended beyond these limits, underlining that an inventor, private individual, constitutes an undertaking in the sense of the competition rules when, holding a patent license, commercialises his invention (Commision's decision from 2.12.1975 in Case 76/29/CEE AOIP vs. Beyrard).

Besides, an artist (opera singer) is assimilated to the undertaking, if he exploits commercially his performance (Comission's decision 516/78/516/CEE in Case Radioetelevisone Italian vs. Unitel Film und Fernesh Produktionsgessellchaft GmbH).

I appreciate that, in the hypothesis in which a private individual, even unauthorised and unregistered, could exert economic activities in an apt mannaer to restrict competition, he could be qualified as an undertaking being subject to the competition rules. Even if it is more likely that such situations may arise in connection with aspects that are related to the intellectual property, we cannot exclude them *de plano*, because, on the one hand, it would contravene the interpretation from the EU jurisprudence, and on the other hand, the conclusion is founded on the dispositions of the 2nd article from Law no 21/1996, which sends generally to "private individuals", without instituting the requirement of its authorization/registration.

iii) The members of the liberal professions. The directive 2005/36/CE of the European Parlament and of the Council from 7th September 2005 regarding the recognition of the professional qualifications defines the liberal profession as being any profession exercised on the basis of some corresponding professional qualifications, with personal title, on one's own liability and independent from the professional point of view, offering intellectual and conceptual services in the interest of the customer and public. In Romania, the liberal and conceptual professions enjoy special and distinct regulations, without the existence of a general definition and a regulation of them. The domamain is a vast one, comprising of one of the most varied professions/qualifications, such as: juridical (lawyers, notaries, bailiffs), economic (authorised accountants, chartered accountants, auditors, tax consultant, management consultants), medical (doctors, dentists, chemists, dental technician, nurses, midwives, psychologists, veterinarians) and technical (architects, technical experts, surveyors).

In the European law, the members of the liberal professions have been considered as representing undertakings in the sense of the competition law, because they perform an economic activity, offering services on the market for remuneration. The complex and technical nature of the services provided and the regulated character of the profession are not enough in orderer to exclude the qualification as undertakings[14]. In Wouters case, related to the profession of lawyer, the Court underlined that lawyers offer, for a remuneration, services of legal assistance, which consisted in the preparation of the notices, contracts and other documents, together with the representation and defence. In addition, they take financial risks afferent to the engagement in these activities, because, in case of an imbalance between income and expenses, the lawyer himself covers the deficit appeared. In these conditions, the lawyers engage in economic activity and consequently, establish undertakings, without having the complex and technical nature of the services that they provide and the fact they their profession is such regulated so that it can affect this conclusion. The conclusion has also been confirmed in the case of the liberal profession of architects[15].

[14] Case Wouters (J.C.J. Wouters, J. W. Savelbergh and PRICE Waterhouse), C- 309/99.
[15] Decision of 24.06.2004, JO L4, 06.01.2005, in the case of the liberal profession of architects from Belgium.

In the Romanian doctrine, the problem that the members of the liberal professions may be considered as undertskings in the sense of the competition right has not received unitary responses. Thus, it has been appreciated that it represents undertakings because they engage in an activity of an economic character, resulted from: the nature of the operations undertaken (offering the knowledge from different specialisations instead of some amounts of money), the nature of the goal (making profit), keeping minimal accountancy[16]. On the contrary, it has been considered that the lawyers, notaries, bailiffs, cannot represent an "undertaking", even if their activity is economic (providing services), because it is of civil and not commercial nature, conclusion presumed from the tax law, which in the case if these people, establishes the direct taxation and not the profit tax[17].

As far as i am concerned, I consider that the members of the liberal professions have to be considered as undertakings in the sense of the competition right, because all the conditions resulted from the European Union jurisprudence that qualify them as undertakings are fulfilled (it should not be forgotten that, in the legal definition of the notion of undertaking, the Romanian legislator refers purposely to the EU jurisprudence): they engage in economic activities, with an autonomous character of decision; the economic character of the activity done (in his special sense related to the competition) it results clearly from these circumstances that receiving a remuneration, an amount of money, is sought, for the specific pprovision offered on the market, and the economic activity the financial risk is taken.

In practice, the Romanian national authority, The Competition Council, has retained that the members of the liberal professions are considered undertakings as related to the competition right, retaining as principal argument the EU jurisprudence: "the complex and technical nature of the members of the liberal professions and the fact that their profession is regulated are not calculated to exclude their qualification as undertakings". Thus, the chartered accountant[18] or the dental technicians[19] have been assimilated to the notion of undertaking.

iv) The Wage Earners (employees). Many times, they perform, in fact, economic activities. Because the activity is performed by wage earners according to their employers' indications, without taking the financial risk of the business, we conclude that they cannot be qualified as an undertaking, because they lack the autonomous and decisional behaviour on the market[20].

v) The Intermediaries. There may be qualified as undertakings in the sense of the competitive rules only the *independent* intermediaries, because only they can freely determine their behaviour in the activities performed on the market, the typical example being represented by the agent in the case of signing an agency deal.

B. Legal Entities.

- *Commercial enterprises*; in the conditions in which they are started on the declared purpose of performing activities with lucrative goals[21], therefore they do an economic activity, oriented towards making profit, the commercial enterprises (irrespective of the juridical form in which it organises: enterprises with collective name, partnerships en commandite, enterprises with limited liability, joint stock companies) represent an undertaking in the sense of the competition rules.

- *The national companies, the national enterprises and the autonomous administrations* because they are subjects of autonomous right, which exert an economic activity, represent undertakings in the sense of the competition rules, because, as it has been shown, the way they finance is of no relevance, and the public undertakings are subject to the competition rules.

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[16] E. Mihai, *Competition Law*, Ed. All Beck, Bucureşti, 2004, p. 32.
[17] T. Prescure, *Curs de dreptul concurenţei comerciale*, Ed. Rosetti, Bucureşti, 2004, p. 183.
[18] Decision of The Competition Council, no. 47 of 02.11.2010, www.competition.ro.
[19] Decision of The Competition Council, no. 19 of 26.03.2018, www.competition.ro.
[20] Employees are not undertakings (Case Becu C-22/98 and Case Albany C-67/96).
[21] Art. 1 of Law no. 31/1990 (Republished in the Official Gazette no 1066/17.11.2004).

- *Economic interest groups and the European economics interest groups*[22], because they are constituded on the purpose of easing and developing the economic activities of their members and they pursue a patrimony goal, represent undertakings in the sense of the competition rules.

- *Corporations and the corporatist organisations* represent undertakings in the sense of the competition rules, because they do economic activities.

- *Credit institutions* have the quality of undertakings, because the economic character is the essence of their activities.

- *Non-profit organisations,* in principle*,* do not engage in economic activities, thus they cannot constitute undertakings. We take into consideration the patronal and *syndicate organisations*, together with the *associations, foundations and federations*. However, in the hypothesis in which the non-profit organisations perform economic activities, the European instances have qualified them as undertakings[23], conclusion to which we acquiesce. In addition, the conclusion is based on the Romanian law relating to the legal dispositions which regulate such organisations and allow them to perform certain economic activities.

Thus, the associations, foundations and federations[24] may start commercial enterprises and may perform economic activities, and the syndical and patronal organisations can set up commercial enterprises, insurance enterprises, together with their own bank[25]. In situations such as these, the economic character of the activity that is performed is obvious and it attracts the incidence of the competition rules. Behind the commercial enterprise there is the organisation at hand, which thus becomes apt for being qualified as subject of the competition right.

- *The authorities and the institutions of the public central and local administration* can be subjects in the rapports of the competition right in two situations: a) in the hypothesis in which, by means of the emitted decisions or by means of the adopted regulations, they intervene in the market operations, influencing directly or indirectly the competition[26]; in such a situation, they cannot be qualified as undertakings, because they act in exerting their prerogatives of public power, but represent the second big category of active subjects of the anti-competitive practices; b) in the situations in which they interneve directly in operations of market, as any undertaking, without exerting prerogatives of public power; in such a case, they can be qualified as undertakings. Such a hyphothesis exists in the case in which such authorities engage in an economic activity, as if the activity had been done by a private undertaking (e.g. building a football field, an ice rink etc., the access being allowd in return of a price).

- *Subsidiaries*. Because the subsidiary has a distinct juridical personality as compared with that of the parental company and it is a commercial enterprise which perfoms economic activities, they represent an undertaking in the sense of the competition rules.

The situation is not as simple as in the case in which the behavioral authonomy of the subsidiary on the market is affected. The problem may appear in the case of some existing anticompetitive agreements in the same group of enterprises, respectively between the mother enterprise and its filial/filiale, respectively if "the relationships between them are so close that it would be realistic to be regarded as a single undertaking"[27]. The European instances treated the problem from the perspective of the concept "a single economic unity". The Court has stated that the notion of undertaking, placed in the context of the competition, has to be understood in the sense that it designated an economic unity, even if from a juridical point of view this economic unity is

[22] Law no. 161/2003 (M. Of. no. 279/21.04.2003).
[23] Cases C-209/1978 – C-216/1978 and C-218/1978 Heintz Van Landewyck SARL ş.a vs. Comisia.
[24] According art. 47-48 of OG no. 26/2000 (M. Of. no 39/31.01.2000).
[25] Art. 25 and 62 of Law no. 62/2011 (M. Of. no. 322/10.05.2011).
[26] Art. 2 and 9 of Law no. 21/1996.
[27] Wish, Richard, *Competition Law*, ed. 4, Ed. Butterworths, London, 2001, p. 72.

constituted from more private individuals or legal entities[28]. The different undertakings which belong to the same group constitute an economic entity and thus a single undertaking, unless the enterprises at hand establish autonomously their behaviour on the market[29]. The behaviour of a subsidiary can be imputed to the mother- enterprise especially when, although it has distinct juridical personality, this subsidiary does not decide autonomously the behaviour on the market, but applies, basically, the instructions that it is given by the mother-enterprise, taking into consideration, especially, the organisational, economic and juridical boundaries that unite the two entities[30]. In the particular case in which a mother-enterprise possesses 100 % of the capital of its subsidiary, there is a relative presumption according to which the respective mother-enterprise exerts effectively a decisive influence over the behaviour of its subsidiary[31].

Thus, it results that, according to the "a single economic unity" theory, in order to qualify the subsidiary as undertaking, we have to relate to the degree of economic-financial and decisional autonomy of the subsidiary compared to its founder: it will represent an undertaking if the subsidiary could exert an autonomous, independent behaviour on the market; on the contrary, in the case in which the subsidiary has an absolute economic dependence on the mother, its existence within the group of enterises representing a mere internal organisation of the tasks, it is obvious that it cannot be characterised as an undertaking to which the competition rules address, because it does not have decisional autonomy.

In the hypothesis in which the mother-entersprise does not have the totality of the allotments of the subsidiary, then it has to be demonstrated that the first is able to influence tha attitude of the second one. I consider that an affirmative response results from the collaboration of more factors such as: the mother-enterprise controls the leading of the subsidiary the profit is taken by the mother-enterprise, the subsidiary acts accoding to the instructions of the first.

The "one single economic entity" theory has an important juridical consequence, in the aspect of the liability: in the absence of the decisional autonomy of the subsidiary the liability of the breaking of the competition rules will entail the mother-enterprise[32].

C. The Entities without juridical personality.

The French doctrine recognises the qualification as undertaking to which the competition rules[33] address of the entities without juridical personality, if they meet the essential requirement of the economic activity by means of offering goods and services on a market.

On a national scale, the doctrinal opinions are divergent as regards the branch. In an opinion, it has been appreciated that such entities are undertakingss, to the extent to which it would be ascertained that, de facto, they have benefitted from sufficient economic and functional autonomy in order to adopt an anticompetitive behaviour of their own[34]. On the contrary, in different opinions it has been appreciated that the sucursale cannot be qualified as undertakings in the competition law, because "they do not have a will distinct from that of the primary undertaking that created them,

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[28] Decision of 14.12.2006, Confederación Española de Empresarios de Estaciones de Servicio, C-217/05; Decision of Case Akzo Nobel vs. Comisia, C-97/08; Decision of 1.07.2010, in Case Knauf Gips vs.Comisia, C-407/08.

[29] Decision of 30.09.2003, Michelin/Comisia, T-203/01.

[30] Decision in Case Imperial Chemical Industries/Comisia C-48/69; decision Geigy/Comisia; decision of. 21.02.1973, Europemballage and Continental Can/Comisia, 6/72; Case Centrafarm C-15/74; Case Bodson v. Pompes Funebres C-30/87; Case Armando Alvarez SA vs. Comisia, T-78/06, decision of 16.11.2011.

[31] Decision of Case AEG-Telefunken/Comisia; Case Armando Alvarez SA vs. Comisia, T-78/06, decision of 16.11.2011.

[32] Case Akzo Nobel, C-97/08; Case Armando Alvarez SA vs. Comisia, T-78/06, decision of 16.11.2011.

[33] Riplet, G.; Roblot, R., Vogel , L., *Traite de droit commercial*, Ed. 18, L.G.D.J; Paris, 2001, vol. I, p. 690; Gavalda, Christian; Parleani, Gilbert, *Droit des affaires de l'Union Européenne*, ed. 4, Litec, Paris, 2002, p. 285; Boutard-Labarde M. – Ch., Canivet G., *Droit francais de la concurrence*, LGDJ, Paris, 1994, p. 230; Vogel, Louis, *Droit europeen de la concurrence*, LawLex, Paris, 2006, p. 129.

[34] E. Mihai, *op.cit.*, p. 35.

being mere doers of the mandatory directives for the subordinated unity from the system"[35] or because "it cannot have its own liability nor a competitive position distinct from that of the enterprise to which it belongs".[36]

As far as I am concerned, i appreciate that the analysis has to be conducted distinguishing between the two hypotheses in which the branch can act: a) the branch acts as an entity *within* the group of enterprises, and the activity of the group is susceptible to enter the sphere of the competitive illicit. In such a hypothesis, the double subordination, economic and juridical, of the subsidiary to the parent enterprise in the Romanian law demonstrates the lack of decisional autonomy of the subsidiary in the economic activity that is performed, conditions in which we cannot classify it as representing, distinctly, an undertaking to which the competition rules address. In the same sense another argument *a fortiori* pleads, detached from the "one single economic entity" theory, exposed previously: if a subsidiary –legal entity apt to exercise, by its own, dinstincly, economic activities autonomously – it will not be qualified as undertaking in the condition in which it does not have autonomy from the parent enterprise, all the more reason why this conclusion is imposed in the case of the subsidiary, totally dependent, economically and juridically, on the enterprise that created it; b) the subsidiary acts *without* the group of undertakings, analysis to which the circumstance obliges me, although in isolation, however the Commission has established as addressee of its decision a subsidiary (the Commission's decision from 9th June 1972, in Raymond-Nagoya Cause, 72/238/CEE; in this case, the subsidiary had signed a licence contract).

In the Romanian law, from this perspective, the subsidiary cannot be qualified as representing an undertaking, because it does not have juridical personality, thus it does not have capacity for use, and, consequently, it cannot issue juridical documents in behalf of its own.

De lege lata, I consider that, in the Romanian law of competition, the entities without juridical personality cannot be qualified as undertakings, because, as i have shown, the Law no. 21/1996 regulates the undertaking as subject of right, and not as an organised activity, considering as undertakings only the private individuals or the legal entities.

III. Relevant market.

III. 1. Notion. **The importance of defining the relevant market.**

"The market" is a term with pronounced economic resonances; synthetic, the market is the place where supply meets demand. In the context of competition law, *"the market"* means *"relevant market"*.

In competition law, concept of the market has a specific meaning, justified by the premise of competition: rivalry of undertakings can exist only in a given market. The existence of any distortion of competition can not be analyzed abstract or at a global level, but by reference to a determined market, because in the game of competition, rivalry implies undertakings with similar activities (the competition between a bookseller and a seller of cosmetics is not possible, because products are offered to different customers). As such, in the context of competition law, "the market" has a specific significance: it means "relevant market". Equally, the specialized literature uses the terms as"marche concernee", marche en cause", or "relevant market"[37].

The determination/the defining of relevant market is very important in analysis of anticompetitive practices.

Sanctioning the anticompetitive agreements refers to those agreements, decisions and concerted practices which have as their object or effect the prevention, restriction or distortion of the competition. Assessing these anticompetitive effects usually involves defining the relevant market

[35] Căpățînă, Octavian, *Dreptul concurentei comerciale. Concurența patologică. Monopolismul, op.cit.,*p. 60.

[36] T. Prescure, *op.cit.,*p. 183.

[37] Jones, Alison; Sufrin, Brenda, *EC Competition Law, Text, Cases & Materials*, Oxford University Press, 2008, p.350; Gavalda, Christian; Parleani, Gilbert, *Droit des affaires de l'Union Européenne*, Litec, Paris, 2002, p. 289

and proving the fact that the agreement would have a negative effect on competition. Agreements which have as their object the prevention, restriction or distortion of competition, are not subject of this rule. In their case, defining the relevant market is not a precondition for finding the infringement of competition rules. Defining the relevant market will be required later to determine the turnover of the undertaking concerned, in order to implement the fine prescribed by law.

Sanctioning an abuse of dominant position occurs only in the case of dominant undertakings. An undertaking can be considered as dominant if it has a significant market power, if its market position enables it to behave independently of its competitors, of its customers and ultimately of its consumers. To determine the market power of the undertaking and whether or not it has a dominant position, firstly, the relevant market in which it holds a dominant position must be defined.

Also, defining the relevant market provides for the competition authority the information necessary that allows to close an investigation at an early stage. In this way, there can be identified those agreements which don't have a significant impact on competition or those situations in which the undertakings will not have substantial market power. Defining the relevant market is also important to determine whether the market share of an undertaking is lower or higher than the thresholds set for certain block exemptions.

Defining of relevant market is important, because undertakings claim the existence of a larger market and thus to reduce their market share.

In 1997, stressing that such aims to ensure greater transparency to understand how to interpret and apply the rules of competition, the European Commission published *Commission Notice on the definition of relevant market*[38]. Commission stresses that the relevant market is determined by analysis of two aspects: the product market and geographic market. In our national law, The Competition Council issued *Instructions on the relevant market definition*[39], which have similar prescriptions.

The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. *The relevant geographic market* comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.

III.2. The criteria for defining the relevant market.

a. The relevant product market.

The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use

The keyword is *substitutability*: to be included in the same relevant market, products must be sufficiently similar to constitute a real choice for consumers.

Substitutability of products must be determined from a double perspective: demand substitution and supply substitution.

Demand substitution.

The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. From this point of view, the relevant market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. Products must be sufficiently similar to constitute a real choice for consumers.

[38] J.O. no. C 372 /1997, http://eur-lex.europa.eu/.
[39] M.Of. no. 553/05.08.2010.

Products considered interchangeable between them not must be identical; it is sufficient to constitute a real alternative, satisfying consumer needs and desires. The degree of substitutability between products should be a reasonable. In the case Continental Can[40], the Court stated that it is sufficient a reasonable substitutability, without difficulty, from products to achieve the same purpose. To assess the degree of substitutability between products may be considered as criteria: characteristics, price and use of products.

- ”characteristics”: Similarity of products’ characteristics (such as physical nature, form, structure / composition, technical properties), usually, justifies the presumption that mutual substitution is possible and that so the products are substitutes (e.g. wooden furniture and plywood).

- ”price”: The price is very important in the analysis of products’ substitutability. Commission adopted SSNIP test - "Small But Significant Increase in prices and no transitory"-, also known as the "hypothetical monopolist test”. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable.

-”use”: If products can be used for the same purpose, they are interchangeable.The Court decided that glass packaging and metal packaging are interchangeable[41].

In case law, were considered non-substitutable, for example, bananas[42] with other fresh fruit, fixed and mobile telephony[43].

Supply substitution.

Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

[40] Case C- 6/72.
[41] Case United Brands, C- 27/76.
[42] Case United Brands, C- 27/76.
[43] The Competition Council, decision no. 27/11.03.1999

b. The relevant geographic market.

The keyword for defining the relevant geographic market is *homogeneity*.

According to *Commission Notice on the definition of relevant market* and *Instructions on the relevant market definition* of The Roumanian Competition Council, *t*he relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.

The approach in geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

The actual pattern and evolution of trade flows offers useful supplementary indications as to the economic importance of each demand or supply factor mentioned above, and the extent to which they may or may not constitute actual barriers creating different geographic markets. The analysis of trade flows will generally address the question of transport costs and the extent to which these may hinder trade between different areas, having regard to plant location, costs of production and relative price levels.

c. Other criteria.

- *Potential competition*. Undertakings are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market

definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view[44].

- *Temporal aspect.* In specialised literature, temporal aspect is considered by some authors as criterion to defining the relevant market. Thus, it is stressed that: " a market can evolve a cyclic manner, according to time periods"[45], or " the markets have a temporal element, meaning that a firm may have market power at a certain time of year, when competition from other products is reduced, as these products are only available seasonally"[46].

In my opinion, temporal aspect is related to product/services and, consequently, it leads to defining the relevant market of product (for example, the fact that certain fruits or vegetables are available only in certain periods of the year), thus it is not a criterion what must be considered separately to determine the relevant market.

Conclusions.

"The undertaking" and "the relevant market" are the key concepts in the analysis of anticompetitive practices.

The active subject of anticompetitive practices is "the undertaking". This concept has a particular significance in the competition law, different from the common law. In the context of the competition law, the term "undertaking" covers any entity that performs an economic activity, regardless of the juridical status and the way in which it is financed. Different from the common law, In Roumanian Competition Law, undertaking is a legal entity/ subject of right and not an organised activity.

"The market" is a term with pronounced economic resonances; synthetically, the market is the place where supply meets demand. In the context of the competition law, "the market" means "relevant market". The relevant market is the market of product/service in terms of demand and supply, and then superimposed on the geographic market. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic market.

Future research would involve: identifying difficulties in establishing the autonomous behaviour on the market, the cases in which the behavioral authonomy of the subsidiary on the market is affected; identifying the relevant market in special cases (captive markets and market infrastructure).

[44] *Commission Notice on the definition of relevant market* and *Instructions on the relevant market definition of The Roumanian Competition Council*, *cit. supra.*

[45] Fuerea, Augustin, *Business Community Law*, Universul Juridic, Bucharest, 2006, p. 272.

[46] Craig, Paul; Grainne de Burca, *EU Law*, Oxford University Press, 2003, p. 1261.

References

- Stanciu Cărpenaru, *Tratat de drept comercial,* Universul Juridic, Bucharest, 2009.
- Stanciu Cărpenaru, *Dreptul comercial în condițiile Noului Cod civil*, Curierul Judiciar nr. 10/2010.
- Octavian Căpățînă, *Dreptul concurentei comerciale. Concurența patologică. Monopolismul,* Lumina Lex, Bucharest, 1993.
- Octavian Căpățână, *Dreptul concurenței comerciale. Partea generală,* Lumina Lex, Bucharest, 1998.
- Emilia Mihai, *Dreptul concurenței*, All Beck, Bucharest, 2004.
- Prescure Titus, *Curs de dreptul concurenței comerciale*, Rosetti, Bucharest, 2004
- Augustin Fuerea, *Business Community Law*, Universul Juridic, Bucharest, 2006
- G. Riplet, R. Roblot and L. Vogel, *Traite de droit commercial*, L.G.D.J., Paris, 2001.
- Christian Gavalda and Gilbert Parleani, *Droit des affaires de l'Union Européenne*, Litec, Paris, 2002.
- Boutard-Labarde M. – Ch., Canivet G., *Dreptul francez al concurentei*, LGDJ, Paris, 1994.
- Louis Vogel, *Droit europeen de la concurrence*, LawLex, Paris, 2006.
- Paul Craig and Grainne de Burca, *EU Law*, Oxford University Press, 2003.
- Richard Wish, *Competition Law*, Butterworths, London, 2001.
- Alison Jones and Brenda Sufrin, *EC Competition Law, Text, Cases & Materials*, Oxford University Press, 2008.
- Decisions of the European Court of Justice, *www.curia.eu.int.*
- Decisions of the Competition Council, www.competition.ro.