

GENERAL ASPECTS ON COMPETITION AND THE FIGHT AGAINST UNFAIR COMPETITION

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Abstract

In its first part, this paper analyzes the different aspects regarding the introduction of the first rules in the area of competition, both at European and national level. Further, the paper presents the purpose of competition law which is to prevent and combat certain market participant behavior which in itself distorts competition. There are also highlighted examples of abusive behavior and anti-competitive practices which have as their main object or effect the prevention, restriction or distortion of competition on the Romanian market or a certain part of it. This paper also touches upon the subject of sector inquiries conducted by the Competition Council on certain sectors of the economy and the various categories of agreements in different sectors, with illustrations of measures or penalties that can be disposed / applied. Furthermore, this paper aims to analyze from the perspective of competition, the life insurance sector in Romania, sector included by the Competition Council among the seven economic sectors with particular importance to the national economy.

Keywords: *competition, upgrading, standardization, socio-political implication, sector inquiries, sanctions, life insurance.*

1. Introduction

The business environment and more specifically its improvement, was one of the key components of economic reform in Romania. In these conditions, the rules regarding the competition field and ensure a uniform level for all companies on the market, has its place increasingly more evident as market mechanisms start functioning under normal parameters.

For a specific perspective, the legislation concerning the competition field could be seen as an affront to free commerce and to contractual freedom, mining the defining elements of the free market. From the other side, is invoked that sometimes the market mechanisms are unable to reach the best result only through their functioning. That would require a moderated intervention. This is the purpose of the competition legislation.

Introducing a set of rules on competition field was always subject to time evolution of such varied factors. The socio-political which took place at the end of XIX century regarding the agreements between railways, oil and banks field, which were growing up, were threatening the stability of the economical and the political system. In various European country, from the beginning of the XX century, the rules concerning competition tried to maintain a balance between the benefits of the economical cooperation of the companies- cartels- and the economical and political risks implied. Such an approach on the competition field, often, was leading to unwanted political results of unfair competition.

In the European Community, the rules regarding competition have been introduced in 1957 by the EEC Treaty, rules that ensured that the restrictions – tariff

and non tariff – existing in international trade, that the member States agreed to eliminate them by signing the Treaty, wouldn't be replaced by the creation of cartels between companies in different countries.

Initially, the rules concerning competition in the European Union, complemented the inter-state policies to reduce barriers to international trade and market unification. From that point, the market has become one of the main objectives of competition field by maintaining fair competition.

The legal framework in the competition field in Romania is given by the Law no. 21/1996 on Competition and Law no. 11/1991 on fighting against unfair competition. These regulations aim at the protection, maintenance and stimulation of competition and of a normal and competitive environment, indented to promote the consumers interests.

2. Content

2.1. Purpose of the competition law

The purpose of the competition law is to prevent and combat a particular behavior of the participants in market mechanisms, behavior indented to distort competition.

In this consideration, it was absolutely necessary to modernize and standardize competition law by adopting a legal framework to address the new reality.

Therefore, by the law in force any agreements between companies, shareholders' resolutions of companies and concerted practices which have as object or effect the prevention, restriction or distortion of the competition on the Romanian market or a part thereof shall be prohibited, especially those which are:

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- fixing, directly or indirectly, selling or purchasing prices or any other trading terms;
- limiting or controlling the production, commercializing, technical development or investments;
- sharing markets or supply sources;
- applying, in the relationships with the trade partners, unequal conditions to equivalent services, causing in this way a competitive disadvantage to some of them;
- conditioning the conclusion of contracts by imposing upon partners the acceptance of certain clauses stipulating additional services which, by their nature or by commercial usage, are not related to the object of such contracts;
- participating, in a concerted manner, with rigged bids in actions or any other forms of competitive tendering;
- eliminating other competitors from the market, limiting or preventing access to the market and the free exercise of competition between other companies, as well as agreements not to buy from or to sell to certain parties without reasonable justification.

The exchange of future prices, future sales, future market shares and future territories may result in the prevention, restriction or distortion of the competition.

The exchange of other categories of sensitive trade information:

- Trade and marketing policies and strategies;
- Confidential information and trade secrets;
- Lists of clients, delivery terms;
- Quality, variety, quantity of products;
- Production volume, discounts, production costs, turnover.

On the volatile markets characterized by short-term agreements, the frequent exchanges of information may hardly cause anti-competition effects.

On the very concentrated markets, a single exchange of information may be qualified as an anti-competition agreement.

According to the relevant applicable legislation, any abuse of a dominant position held by one or more companies on the Romanian market or on a substantial part of it is prohibited. Such abusive practices may consist mainly in:

- a) imposing, directly or indirectly, inequitable sale or purchase prices or of other inequitable trade terms and the refuse to deal with certain suppliers or clients/beneficiaries;
- b) limiting production, commercialization or technological development to the consumers' disadvantage;
- c) applying, in the relationships with the trade partners, unequal terms to equivalent services, in this way causing to some of them a competition disadvantages;
- d) conditioning the conclusion of contracts by imposing upon partners the acceptance of additional services which, by their nature or in compliance with

the commercial usage, are not related to the object of such contracts;

e) charging excessive or predatory prices, on the purpose to eliminate to competitors, or selling to export under the production cost, recovering the differences by imposing increased prices to the domestic consumers;

f) taking advantage of the state of dependence of another company towards such a company or companies and which does not have an alternative solution under equivalent conditions, as well as breaking the contractual relations for the sole reason that the partner is refusing to submit to certain unjustified commercial conditions.

Furthermore, any actions or inactions of the central or local public administrative authorities and institutions and of the entities to which such bodies delegate their powers, that restrict, prevent or distort competition are prohibited, such as:

a) limiting the freedom of trade or the companies' autonomy, exercised with the observance of the legal provisions;

b) setting discriminatory conditions for the companies' business.

Shall be presumed, until is proven otherwise, that one or more companies are in a dominant position, in case that the share or aggregated shares on the relevant market, recorded during the period subject to analysis, exceed 40%.

General Recommendations:

- No not exchange, directly or by means of third parties, classified information that is rated as sensitive information from the competition point of view;
- Make sure that at the professional associations' meetings shall be discussed legal and permitted subjects.
- The exchange of public information does not represent an anti competition agreement.

2.2. Methods to exchange information:

- Bilateral exchanges:
Both parties exchange information actively by: e-mails, telephone calls, Romanian postal services, attending to meetings.
- Unilateral exchanges:
A party discloses actively sensitive trade information to a passive party.

The simple presence to a meeting where are disclosed sensitive trade information may be construed an involvement in an information exchange.

2.3. Sector inquiries

Are inquiries conducted by the Competition Council on certain areas of the economy and on various categories of agreements in various sectors.

Role of the sector inquiries are to prevent, to sanction and to monitor the market proactively.

Goal of the sector inquiries:

- To obtain information relating to the operating manner of certain markets;

- To analyze and understand various markets and economic sectors;
- To identify the malfunctions related to anti competition.

The unannounced inspections are intended to collect evidences on the alleged breaches of the competition law.

Prerogatives of the Competition Council in the framework of the sector inquiry:

- the legal right to request from the economic operators any information and documents deemed necessary;
- the inspectors shall indicate the legal ground, the object, the information providing term and the sanctions for the failure to respond to the requests;
- the legal right to inform other competent authorities;
- the right to obtain declarations from any person that consents in this respect.
- The competition inspectors shall be allowed to:
 - enter the premises, lands or means of transportation belonging to the companies or the residences of head executives, managers, directors and of other employees;
 - examine and/or to pick up and/or to copy any documents, registers, accounting, financial and commercial documents and other records related to the company's activity, regardless of the location in which they are stored and the physical or electronic media on which they are;
 - request explanations to a representative or to a member of the company's personnel on the facts or documents related to the object and to the purpose of the inspection and to record or the register their answers;
 - seal any premise assigned to the company's activities and any documents, registers, accounting, financial and commercial documents and other records related to the company's activity during the inspection and to the extent necessary for the inspection.

How we should behave in case of a sector inquiry?

- Ask politely the competition inspectors to wait in a room, for a short period of time, until you organize yourselves at the internal level of the company;
- Warn the personnel to avoid showing a hostile behavior, obstructing the investigation, destroying documents and communicating to anyone outside the company on the performance of the unannounced inquiry;
- Do not provide voluntarily information or documents that are not requested;
- The answers to the inspectors' questions shall be precise and at the point;
- In case that the questions asked by the inspectors are not clear, request additional clarifications - do not speculate and do not extend the answer more than necessary;
- Make sure that no one is breaking the seals applied by the inspectors – fines;

- Make visible signs indicating that the door or the box may not be opened;
- Provide the requested documents or information on due time.

2.4. Sanctions

For providing inexact, incomplete or misleading information, as well as for incomplete documents or for the failure to provide the requested information and documents, shall be applied the sanction with fine, from 0.1% to 1% out of the turnover corresponding to the financial year previous to the sanctioning. The sanctions shall be individualized by taking into consideration the seriousness and duration of the act.

The companies have the obligation to act in observance of the fair usances, in compliance with the general principle of good faith and with the legal provisions. In case of failure to observe the above, shall be entailed the civil, contravention or penal liability.

Fighting against unfair competition is regulated by Law no. 11/1991, with the subsequent amendments and additions, and aims to secure the fair competition, with due observance of the fair usances and of the general principle of good faith, in the interest of the involved parties, including the observance of the consumers' interests. This regulatory document shall apply to natural or legal persons, Romanian or foreign, that conduct practices of unfair competition.

The trade practices of a company that violate the fair usances and to the general principle of good faith and that cause or may cause damages to any market participant constitutes unfair competition.

Practices of unfair competition shall be prohibited, regarding:

- denigration of a competitor or denigration of its products/ services, made by communication or spreading by a company or by its representative/employee of information that do not correspond to reality regarding the activity of a competitor or regarding his products, likely to injure his interests;
- deviation of a company's clientage by a former or current employee/representative or by any other person by using trade secrets, for which such company has taken reasonable measures to ensure their protection and their disclosure may damage the interests of such company;
- any other trade practices that conflict with the fair usances and with the general principle of good faith and that cause or may cause damages to any market participant.

The unfair competition means the situation of market rivalry, in which every company tries to obtain simultaneously sales, profit and/or market share, offering the best business-like combination of prices, quality and connected services, with due observance of the fair usances and of the general principle of good faith.

Within the meaning of the law, "fair usances" mean the generally known set of the practices or rules that apply in the trade relations between companies, with a view to prevent the violation of their legal rights.

Competition Council, as autonomous administrative authority in the competition field, ensures the companies' protection against the practices of unfair competition within the limits of the powers granted under law.

The Competition Council may decide, as the case may be:

- the cessation of the practices of unfair competition, during a claim settlement;
- forbidding the practices of unfair competition;
- applying the civil/contravention fines, if the unfair competition was construed as contravention.

The evidences that may be produced in order to prove that certain facts are practices of unfair competition may consist in experts' reports, documents, correspondence, that vary depending on the particularities of each case.

As an example, in case of a clientage diversion, I consider that the evidences should result both from the clientage deviation, as a factual situation, and from the causality relation between the clientage deviation and the use in this respect of certain trade secrets by the actor of such practice, for which have been taken protection measures and their disclosure may damage the interests of the company at issue.

2.5. Life insurance in Romania as seen from the perspective of market competition

Recently, life insurances in Romania were the subject of a study made by the Competition Council, on which the analysis focused on the period between January 2011 and June 2014.

Through it the life insurance market was seen in the light of two structures that describe the market characteristics, i.e. monopolistic competition (it resembles the perfect competition market in terms of the large number of active firms and ease of entry; products offered for sale in this market are differentiated) and oligopoly (it involves a small number of sellers, protected from other competitors entering the market; active companies in this market offer for sell similar products.).

In terms of market entry barriers, it is considered to have several different types. Firstly, we are talking about regulatory and capital barriers imposed by the Authority of Financial Supervision, such barriers are absolutely justified, due to the sensitive character of the contracts existing in the life insurance market. In short, regulatory barriers are dependent on to the way society itself is organized, including its name, and on certain opinions which it is required to obtain and certain taxes incurred, and the conditions imposed to significant shareholders of the or founders company. In addition, the Authority of Financial Supervision requires the life insurance companies for a minimum

paid-up capital. Competition Council considers that the recent trend of tighter market access conditions for life insurance market generates concern.

In terms of the number of firms active on the market, it is considered that there is a trend in which the life insurance market Romania is relatively concentrated, tendency especially highlighted in recent years. Even if the current number of active insurance market is moderate, it is considered that it is still relatively small compared to other countries in the region.

Regarding the homogeneity of the product offered by insurers in the report made by the Competition Council, it is considered that there is a significant difference between the life insurance contracts offered by various market participants, both in terms of basic risks covered and the additional risk that may be incurred by the same insurance.

Concluding on the 3 aspects shown above, it is considered that the life insurance market in Romania borrows both oligopolistic market structure characteristics (entry barriers and a relatively small number of competitors) and those of the monopolistic market competition (likely product differentiation). Competition Council's concerns on this market are the result of concentration trend observed in recent years, a trend that seems to be complemented by an apparent tightening of barriers to entry. Therefore, one of the concerns of the competition authority refers to the relative proximity of the life insurance market oligopoly model, with all the risks that this approach posed for consumers.

3. Conclusions

As a corollary of the entire thesis, I understand to highlight the guidelines of the fair competition, representing the same principles that may be found in the other fields of the law and, in a general manner, in the essence of the legal practice itself as an art of good and equity or "Law is the science of what is good and just" (*jus est ars bonu et aequi*).

For modernization and consistency in the application of competition policy to be successful, it is necessary that the law should apply to a much greater rigor and competition to become the dominant culture.

In the current context of improving the states economic situations as a result of reduced effects of economic crisis, we believe that competition policy should use this momentum. In Romania, the concern for the implementation of pro-competitive reforms is currently high, strongly anchored in implementing Community standards. As a consequence, in the interest of improving the institutional framework and enforcement, we note a number of actions taken by the Competition Council related to the modification of the analysis and legal framework (laws, secondary legislation, procedures etc.).

For example, the modification of Law no. 11/1991 regarding unfair competition by Government

Ordinance no. 12/2014 which had its main purpose to as to modernize the law and strengthen the role of the Competition Council in combating unfair competition. Through the same ordinance, there were introduced a number of changes to the Competition Law no. 21/1996, which aimed to improve the processes, procedures and human resource of the competition authority.

All these efforts are aimed at ensuring consistency of competition policy. This is the key to

achieving a competitive fair environment for all businesses. Such an environment makes the companies to strengthen their effectiveness and therefore be better prepared to compete in domestic and international markets. A dynamic business environment that ensures competition induces the necessary motivation to innovate and to promote increase productivity. It also creates a competitive benefit for consumers and society**.

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