

EVOLUTIONS IN THE FIELD OF UNFAIR COMPETITION

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Abstract

The rules governing competition have a rather recent character. The conventional approach (especially the one of the liberal school of the 19th century) shows the fact that any public intervention within the mechanism of the market triggers almost automatically a negative economic effect. Simultaneously it has been accredited the idea that the total freedom of action of the market forces can lead to the formation of powerful monopolies, over which the competition has no more influence. The pioneers in the legislative regulation of the competition were the United States of America, through the law titled the Sherman Act in 1890. The purpose of the Sherman Act was to prevent the formation of cartels and monopolies.

Keywords: *private law, Competition, unfair competition, theoretical aspects, Romanian legislation.*

1. General aspects

The European Competition Law benefited greatly from the American experience.¹

But, along the similarities there are also differences as well. We refer here mainly at the name (antitrust law, in the American acceptance).

Historically speaking, the European countries regarded with skepticism the idea of competition.

The cooperation policies and the governmental intervention in industry have been regarded as the best method of reaching the economic and social objectives. The alternative policies differed from country to country.

It should also be noticed the fact that the total freedom of competition is a mechanism whose progress is too slow to ensure the best allocation of resources. More than that, this mechanism is susceptible to lead on short-term to social costs which are too important to allow the development of a stable society, which can ensure the dynamics of the market.

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¹ W. Cairns, *Introducere în legislația Uniunii Europene*, Ed. Universal Dalsi, 2001, București, p. 229.

Due to its origin, the concept of competition is used in any type of social relationship.

It was taken from the usual vocabulary and inserted into the legal regulations, with some differences, in order to adapt it to the specificity of the economic life.

Generally, by competition we understand a confrontation between diverse tendencies which have a common goal (aim).²

On a social level, there can be distinguished two very diverse forms (variants) of competition (emulation).

There is vital competition (interpersonal conflict within which every individual aims at self preservation and self development), and competition opposition (emulative) between the individual interests and the social interests, between rights and obligations, or between manifestations of selfishness and altruism.

At the beginning, competition was taken into consideration, within the framework of the market relations, as a decisive factor ensuring spontaneously the division of work between the economic agents, as well as the normal conditions for the production, exchange and consumption of goods.³

It is admitted the fact that, in a competition environment, the behavior of the economic agents presents an individualistic character, each of them following its own interest, within this context, the purpose (aim) of the rivalry is the maximum profit, reached by capturing (attracting) and maintaining (keeping) the customers.

The instruments which are used can display an honest appearance, economically speaking, such as reducing the sale price and of the production costs, the quality of the goods is increased, the sales activities become more efficient, new products are launched, the publicity.⁴

Of course, there can be seen a contrary situation (opposite), when dishonest means are employed, outside the economic ground.

It is about the theft of information (economic espionage), the launch of insinuations against the rivals (reaching up to defamation), buying off the competitor's employees, attracting illegal sources of financing, and also aggressive steps (actions) (having as sole purpose the bankruptcy or a temporary or definitive elimination of the competitors).⁵

2. Theoretical aspects of unfair competition

The competition (the true competition) behavior (conduct) cannot reconcile with the pathologic means of manifestation of the competition (primarily with the forms of monopoly and with the dishonest means).

² O. Căpățână, *Dreptul concurenței comerciale. Partea generală*, Ed. Lumina Lex, 1998, București p. 267.

³ O. Căpățână, *op. cit.*, p. 268.

⁴ O. Căpățână, *op. cit.*, p. 269.

⁵ O. Căpățână, *op. cit.*, p. 269.

The activity of organizing the market following a competitive system requires especially the independence and the decentralization of the production, distribution and of the consumption. The administrative constraints (limitations) should not interfere with the private individual initiative.

At the same time, it is interesting also the fact that the policy of the state related to the redistributing of the income according to criteria which are independent of the actual contribution of each trader, can positively influence the social balance.⁶

According to a comprehensive characterization, the competition is the fight lead at a national and international level, between the companies (firms, enterprises) of production, services, banking, commercial, transports etc. in order to obtain even higher returns, as an effect of capturing even higher shares of the market and, as consequence, of increasing the business volume.⁷

The definition comprises both the confrontation between the rightful subjects, and the common tendency of obtaining benefits.

A Romanian author considered that "by competition it is understood the fight for obtaining and maintaining the customers."⁸

Another Romanian author stated about competition that "it is a struggle, often a bitter one, between the economic agents, which pursue the same activity or a similar activity, in order to acquire, maintain and to expand the clientele."⁹

A very well known French author formulated a seemingly definition, according to which the competition is "the rivalry between the economic agents searching and trying to maintain their customers."¹⁰

In the opinion of OCDE, the competition is "the situation on a market, in which the companies or the sellers are struggling independently in order to gain the clients, in order to achieve an economic objective, for example, profits, sales, or market sharing. In this context, the competition is often equivalent to rivalry.

This rivalry can relate to price, quality, services or a combination of these, or other factors, which the clients value."

As a conclusion, it can be stated that by competition can be understood the confrontation between the traders (economic agents) having similar activities or seemingly, exercised within open areas of the market, in the purpose of winning (attracting) and conserving (maintaining) the clientele, as well as in the purpose of capitalization (making efficient) the activity of his own enterprise.¹¹

⁶ O. Căpățână, *op. cit.*, p 271.

⁷ O. Căpățână, *op. cit.*, p 271.

⁸ I. L. Georgescu, *Drept comercial român*, vol. I, , Ed. CH Beck, 2002, București p. 585.

⁹ I. Băcanu, *Libera concurență în perioada de tranziție spre economia de piață*, "Revista Dreptul", nr. 9-12/1990, p. 50.

¹⁰ J. Azema, *Le droit français de la concurrence*, Ed. 2, ED. PUF, 1989, Paris, p. 17.

¹¹ O. Căpățână, *op. cit.*, p. 273.

This latter definition highlights several basic elements of the concept of competition.

First of all, this notion implies the confrontation (the conflict) on the market between natural or juridical persons carrying out business activities more or less similar.¹²

Secondly, it is of interest the demarcation of the area of activity within which the rivalry (adversity) between the traders (economic agents) can act, but only within those sectors of the accessible market, excluding those areas in which the competition cannot manifest itself, as effect of the law or of the contract.¹³

Third and finally, it is granted the necessary attention to the notion of clientele, whose increase is the major goal towards which the manifestation of the rivalry aims.¹⁴

Of course, it is to be made a delineation (difference) between the licit competition (permitted) and illicit (forbidden) competition.

The licit (permitted) competition represents the common right on the matter.

The progress of the commercial competition usually enjoys freedom, and within the market economy, the honest (fair) competition between the producers of goods, the providers of services and other participants it is sustained and promoted by the law.

This does not mean the arbitrary exercitation (use) of competition, the abuse in this sense, it is not tolerated and it is subjected to sanctions.¹⁵

The abuse can manifest itself under the form of monopolistic practices or of the acts of unfair competition.

The traders (economic agents) can confront freely in the fields which are open to competition, but respecting the principle of good faith and the rules of the professional good conduct (ethics).

In the field of the licit competition, it can be noticed an evolution and an expansion of the ideas.

Traditionally, the economic thinking (theory) confers to the competition a limited role in influencing the price of the goods, determining its increase in case of shortage, or the decrease in case the volume of goods is increased.¹⁶

Within this context, it cannot be denied the vocation of the competition to contribute in a characteristic manner to establishing and to the oscillation of the prices, within the established report between supply and demand.

According to the economic realities, the sphere of activity of the competition comprises, except for the prices, the quality of goods as well.

¹² O. Căpățână, *op. cit.*, p. 273.

¹³ O. Căpățână, *op. cit.*, p. 273.

¹⁴ O. Căpățână, *op. cit.*, p. 274.

¹⁵ O. Căpățână, *Caracteristici ale libertății de a exercita concurența comercială*, "Revista Dreptul", nr. 5/1998, p. 105-111.

¹⁶ O. Căpățână, *op. cit.*, p. 275.

Of an equal importance has the manner of presenting the goods as well, the spreading of the publicity, the distribution networks etc.¹⁷

Some of the fields of the market activity are not open to the struggle between the traders (economic agents).

These prohibitions are derogations (exceptions) from the principle of the freedom of the commercial competition and they must be based on explicit legal regulations or on agreed upon clauses (established) in a viable manner.¹⁸

These interdictions (prohibitions), having as source the will of the legislator or the clauses of the contracts, have as effect the removal of the competition within that area of the market.

The presence of some sectors which are closed for the commercial competition draws the theoretic necessity of undertaking a dissociation (discrimination) between the notion of forbidden competition and the concept of permitted competition (but excessive or abnormal).¹⁹

The forbidden competition means a sector of activity within which the exercise of the rivalry on an economic level (be it even honest and in accordance to the professional ethics and good conduct) it is excluded (forbidden). Any act of competition committed within this context, determines the responsibility and the sanctioning of the author.

In the situation of the permitted competition, the actions of commercial competition are free in theory and permitted by the law, due to the fact that they have a beneficial and incentive character for the consumers.

A very well known Romanian author highlighted the fact that “in the case of the forbidden competition, we are in front of an act committed with no right, while in the case of the disloyal competition we are talking about an excessive exercise of a right or a freedom, as well as in the hypothesis of using the monopoly practices.”²⁰

In terms of the fields which are closed by law to the commercial competition, we refer mainly to the to the area of the work force, the one of the reports between the traders and intermediaries and other paid workers (employees), as well as the companies with the activity registered on stock exchange markets.

The sector of the work force became an open domain within an environment which is closed to competition.²¹

3. Romanian legislation in the field of unfair competition

The Romanian legislation, through the Law of Competition no. 21/1996 (modified by the Government Emergency Ordinance no. 121/2003) shows that the legal dispositions in the field of competition do not apply to the workforce market and to the work relations, to the money market and the bonds market.

¹⁷ O. Căpățână, *op. cit.*, p. 275.

¹⁸ O. Căpățână, *op. cit.*, p. 276.

¹⁹ O. Căpățână, *op. cit.*, p. 276.

²⁰ Y. Eminescu, *Tratat de proprietate industrială*, vol. III, Ed. Academiei, 1984, București, p. 19.

²¹ Căpățână, *op. cit.*, p 279.

The unfair competition is defined by the Law no. 11/1991 regarding the control of the disloyal competition (modified and completed on its own turn by the Law no. 298/2001).

According to the law (in its initial form) it is considered to be unfair competition any act or action which is contrary to good faith and to fair practices in the commercial and industrial activity (art. 2 of the law).

This type of practice manifests itself more specifically especially by creating confusion with the distinctive marks of the rival trader (economic agent) on the market, by denigrating him, by corrupting his personnel (employees, staff), by economic espionage or by other means of disorganizing an enterprise. In 2001, it has been added along the commercial and industrial activity, the execution of works or service providing activities.

The Law no. 298/2001 added to art. 1, according to fair usage, the interests of the consumers and the requirements of the loyal competition. Article 1 of the law undergone completions as well.

Thus it is considered as contrary (opposite) to the fair commercial usage, the disloyal use of the commercial secrets of a trader by practices such as the unilateral non execution of a contract or the usage of disloyal procedures, the abuse of confidence, incitement to delinquency and the acquisition of commercial secrets by third parties which knew that those acquisition implied these practices, which could lead to affecting the position of the traders which are competitors on the market.

It is also provided the definition of the commercial secret as being the information which, in its full form or by an exact connection to its elements, is not generally known or it is not easily accessible to the persons belonging to the environment in which this type of information is usually used, gaining a commercial value through its secret, and the holder has adopted reasonable measures, taking into account the circumstances, to be maintained as a secret.

The protection of the commercial secret takes place as long as the conditions mentioned previously are maintained.

It is also defined the commerce fund as the assembly of the real or movable goods, tangible or intangible (brands, companies, logos, patents, commercial, good commercial location), used by a trader to conduct business.²²

The competition of this type has as purpose usually the attraction and the capture by disloyal means (dishonest) of the clientele belonging to the harmed trader (economic agent). Of course, it is not excluded the apparition of competitive behaviors (conducts) on a larger scale, which determines prejudices to companies from abroad.

²² O. Căpățână, *Dreptul concurenței comerciale. Concurența neloială pe piața internă și internațională*, Ed. Lumina Lex, 1996, București, p. 15.

However, the presence of foreign elements is less often encountered, in the proportion in which the traders (the economic agents) aggressively commits acts of confusion, staff corruption, denigrations or economic espionage. Within the international economic relations the disloyal competition has specific forms, such as the dumping or subsidies on export.

Confusion can be understood as being that act of unfair competition consisting in the credible dissimulation of the market activity of the author (perpetrator) under the appearance of the distinctive markings of the competitor which has been harmed or of a group of competitors.²³

The confusion to the rival enterprise can be determined especially by creating similitude (resemblances) with that company, logo, packing or other identification markings. The confusion can appear by the production with any means, the import, the export, storage, selling or selling goods displaying false claims regarding patents, origin and characteristics of the goods, in order to mislead other traders and the beneficiaries. The confusion can be determined as well by the parasitic exploitation signifying the exploitation by the one who committed the disloyal competition activity of the popularity enjoyed by the competitor, through the abusive referral to the activity, popularity or to his products.²⁴

Denigration is that unfair competition act consisting of communicating or spreading comparative or depreciative assertions committed by the author (the aggressive trader or economic agent) for the disadvantage of another competitor on the market, in order to diminish his reputation or to discredit his enterprise or products.

Denigration should not be mistaken with the right of formulating criticisms, which is made through public official testing of goods. The unfair character of the denigration means to favor the interests of the aggressive trader (economic agent), a sufficient degree of individualization of the prejudiced party, as well as the credibility of the pejorative assertions.²⁵

Confusion and denigration can be considered to be disloyal only if they fulfill the credibility requirement for the viewed customers.

Credibility means, first of all, various material elements, such as creating artificially an apparent similitude with the distinctive signs of the prejudiced trader (economic agent), as well as the communication or spreading through any means (mass-media, brochures, commercials etc.) of comparative affirmations or depreciative in the disadvantage of the prejudiced trader (economic agent). Credibility implies the presence of a psychological element.

In the mind of the client should be able to occur an error of assessment (judgment) regarding the prejudiced trader (economic agent), an error determined by the act of disloyal competition.

²³ O. Căpățână, *op. cit.*, p. 16.

²⁴ O. Căpățână, *op. cit.*, p. 16.

²⁵ O. Căpățână, *op. cit.*, p. 17.

The analysis of the credibility from a psychological point of view necessarily implies the use of specific criteria, according to the reference standard of the average consumer.²⁶

By disorganizing the rival enterprise (competitor) we mean that disloyal competition act consisting of the functional destabilization of the prejudiced rival's enterprise. The aggressive trader (economic agent) can employ in this regard multiple modes of action. One of the most dangerous in this sense is the economic espionage. The economic espionage can divulge itself by the disclosure and the exploitation of the production or management secrets of the competitor (rival) by the aggressive trader (economic agent).

The notion of secret comprises, first, a material content, which means that it is a fact connected to the functioning of the prejudiced enterprise, presenting a legitimate interest for that enterprise.

Simultaneously, the secret means also an intellectual content, namely that the presented fact it is publicly ignored and subtracted from being disclosed through legal regulations or by internal rules of that enterprise. Similar consequences can present as well the boycott, which is not regulated by the Romanian justice.

Boycott is an element of economic coercion taken against a prejudiced trader and which consists of the refuse of sustaining market relations (commercial) with them.²⁷

The main legal regulation in the field of disloyal competition is the Law no. 11 of January 30th 1991 regarding the prevention of the disloyal competition (published in the Official Journal no. 24 of January 30th 1991) modified and completed by Law no. 298 of June 7th 2001 (published in the Official Journal no. 313 of June 12th 2001), the law of 2001 is a progress in comparison to the law of 1991.

The anti-competition acts are comprised in art. 4 as well (one of the main articles of the law, along with art. 5). The facts listed in art. 4 are considered contraventions, while those mentioned in article 5, are considered to be felony.

Article 4 considers the following acts as being contraventions:

- offering services by an exclusive employee of a trader to a competitor or the acceptance of such an offer;
- the disclosure, the purchase or the use (revealing in it former use) of a commercial secret by a trader or by one of his employees, without the agreement of the legitimate holder of that commercial secret and in a contrary manner to fair commerce rules.
- closing contracts through which a trader ensures the delivery of a merchandise or the performance of a service in an advantageous manner, conditioning the customer to bring other buyers with whom the trader will close similar contracts;

²⁶ O. Căpățână, *op. cit.*, p. 17.

²⁷ O. Căpățână, *op. cit.*, p. 18.

- communicating or publicly spreading by a trader of affirmations regarding his enterprise or its activity, in the purpose of misleading or in order to create an advantageous situation bringing thus prejudice to the competitors;

- the communication (even confidential) or spreading by a trader of false affirmations regarding a competitor or the his goods and services, affirmations which can damage the activity of the competitor's enterprise (according to the former text, the communication in confidence was considered an act of disloyal competition only when the author of the communication knew that the facts are not in accordance to the truth);

- offering, promising or granting (directly or mediated) of gifts or other advantages to the employee of a trader or of his representatives, in order to disclose his industrial processes, in order to disclose or to use his clients or in order to obtain another benefit for himself or for another person in the detriment of another competitor;

- the diversion of the customers of another trader using the connections that he has established with his customers during the position previously held when he was an employee of that trader;

- the dismissal or attracting the staff of a trader in order to establish a new company with the same type of activity in order to capture the clients of that trader or the employment of another trader's staff in order to disorganize its activity.

There were eliminated from the previous text two types of contraventions. We refer here to the non compliance by individuals of the interdictions included in the Law no. 15/1990 regarding the reorganization of the economic units belonging to the state as autonomous companies and commercial societies, as well as closing contracts through which the buyer would win an award (the award depending exclusively on a selection by chance, or on hazard).

Article 5 considers the following acts as being felonies:

- using a company name, a patent, registered trademark, geographic specification, drawing or industrial models, a topography of an integrated circuit, a logo or a packing meant to create confusion with those legitimately used by another trader;

- the production in any manner, import, export, storage, offering for sale or the sale of some goods and services bearing false mentions regarding the patents, trademarks, geographic specifications, drawings or industrial models, topographies of integrated circuits, other types of intellectual property such as the exterior design of the company, the design of the showcases or of the staff's uniforms, publicity means or others alike, the origin and the characteristics of the goods, as well as the name of the manufacturer or of the trader, in the purpose of misleading the other traders or the beneficiaries. The 1991 text referred only to the patents, and the origin and the characteristics of the goods.

By false references regarding the origin of the goods is meant any indication which by nature can induce someone to believe that the goods have been produced

in a certain location, a certain territory or in a certain state. It is not considered to be a false claim on the origin of the merchandise the name of a product whose name became general and indicates for commerce only its nature, except from the case in which the name is accompanied by a mention which can lead someone to believe that it has that specific origin. The following categories of felonies have been added in 2001:

- placing into circulation counterfeit or pirated goods, whose use on the market brings prejudices to the holder of the brand and misleads the consumer regarding the quality of the product or service;

- the usage for commercial purpose of the results of an experiment which required a considerable effort or of other secret information related to these, transmitted to the competent authorities in order to obtain the authorizations for trade for the pharmaceutical products or of the chemical products destined to agriculture, which contain new chemical substances;

- disclosure of information mentioned on the previous paragraph, excepting the situations in which the disclosure of that information is necessary for the protection of the public or excepting the case in which there were taken measures in order to ensure the fact that the information is protected against the disloyal exploitation in commerce, if these information come from the competent authorities;

- disclosure, acquisition and the use of the commercial secret by third parties, without the consent of its legitimate owner, as a result of the commercial or industrial espionage;

- the disclosure or the use of the commercial secrets by persons belonging to the public authorities and by persons empowered by the legitimate holders of these secrets to represent them in front of the public authorities. On article 6, for the trader who has committed an act of disloyal competition, it has been imposed also the obligation to restitute the confidential documents which have been illicitly obtained from their legitimate owner.

According to the additions made to article 7, on the request of the legitimate holder of the commercial secret, the Court may order measures for forbidding the industrial or commercial exploitation of the products resulted after the illicit use of the commercial secret or the destruction of these products. The prohibition ends when the protected information becomes public.

Article 8 gives power of referral of complaints in order to initiate criminal proceedings in the case of the felonies registered on article 5, to the local Chamber of Commerce and Industry, to a professional organization or upon notification by persons authorized by the Council of Competition (the Council of Competition has jurisdiction in this field since 2001). The Council of Competition has exclusive jurisdiction for finding the contraventions.

Of course, the Law no. 298/2001 increases the quantum of the sanctions applied in the case of committing felonies and contraventions.

This law also was modified by Government Ordinance nr. 12/2014.

Certain facts are not regarded as having the character of unfair competition, such as attracting employees of a competitor. Competition Council will prioritize investigations and may waive minor cases considered.

It prohibits denigration of competitors by any means and diversion of the costumers by using trade secrets.

Defaming (denigration) of competitors and diversion of the costumers by using trade secrets as far as they are not committed under such circumstances as to be regarded as criminal offenses are misdemeanors and are punishable by a fine of 5,000 RON to 50,000 RON for offenses committed by legal persons and a fine of 1,000 RON to 5,000 RON for offenses committed by individuals (natural persons).

The Competition Council is the competent institution to find and order the cessation of unfair competition practices during settlement notification, prohibit unfair competition practices, the application of fines, whether the practice constitutes unfair competition offense. The deadline for resolving complaints is 60 days from the date the notification is complete.

It is considered an offense too the providing incorrect, incomplete or misleading or incomplete documents or failure to provide information and documents requested by an inspector of the Competition Council, unjustified refusal of companies to submit to an inspection or failure of the measures imposed by the Competition Council, if not committed to such conditions as are criminal offenses and are punishable by a fine of 1,000 RON to 10,000 RON for enterprises, public authorities and institutions and for individuals with a fine from 500 RON to 2,000 RON.

It is created too the Interinstitutional Council to combat unfair competition as permanent body, which includes the Ministry of Finance, who is also coordinator of the council, the national competition authority and other institutions.

4. Conclusion

Within a free market economy, the competition has five main functions.

First, it facilitates the automatic adjustment between supply and demand, in any field of the economic activity. In the situation of a market dominated by the supply, the competition strategy has as result the particularization of an enterprise in comparison to its rivals.

Second, the exercise of the competition prevents the monopoly profit by certain traders (economic agents).

Third, innovations are stimulated, the creation of new goods and of more and more sophisticated production techniques, the optimal (most recommended) ways of reaching an advantageous position on the market.

Forth, the competition allows the rational allocation of the resources between the various usages requested on the market.

Finally, it is established a distribution of the benefits proportional to the actual intake of the traders (economic agents) in the process of producing and distributing the goods.

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