

CONSIDERATIONS ON COMBATING UNFAIR COMPETITION AT NATIONAL AND EUROPEAN LEVEL

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Abstract

To prevent the use of competitive practices in the global market by strong economic agents, states have tried to take a series of legislative measures, rules that are true AD or codes. The most important international convention for the suppression of unfair competition in the international market have been developed under the auspices of GATT and include a number of anti-dumping duties and countervailing duties designed to counteract the effects of practicing dumping prices.

Keywords: the suppression of unfair competition, the international market, GATT, anti-dumping duties, countervailing duties

1. The notion of unfair competition

The notion of unfair competition designates the economic competition between traders and/or any other persons performing economic activities with the use of dishonest means. According to Article 2 of Law no. 11/1991 on combating unfair competition¹ "it is any act or fact unfair competition contrary to fair practices in industry and product marketing, execution of the works and services". This definition is characterized in the literature as insufficiently precise and analytical to describe certain acts of unfair competition, for which there has been proposed a new definition. Thus, unfair competition, as an act of unlawful competition, considers those acts or legal acts (human action) incriminated as criminal offenses, misdemeanors or civil offenses, as appropriate, or other subjects (employees or civil servants as appropriate) violate intentionally or negligently legal provisions governing the competition and/or regulations (customs) related of business ethics, taken and considered as sources of the positive law in order to attract a large number of customers from competitors².

Articles 4 and 5 of Law no. 11/1991 define unfair competition as main criminal and administrative acts, but this list is not exhaustive and cannot be on anti-competitive practices. As stated by the World Intellectual Property Organization experts, there are always new acts of unfair competition, since apparently there are no limits for competition inventiveness. Any attempt to cover all current and future competition provisions in a comprehensive definition – at the same time, provides all the behaviors prohibited and is flexible enough to adapt to new business practices – has failed so far.

2. Types of documents and acts of unfair competition

Regarding the classification of documents and facts of unfair competition in the literature there are forward different criteria resulting different categories of works.

¹ Published in the Official Gazette no.24 din 30 ianuarie 1990, anotated.

² See Octavian Căpîină, *Dreptul concurenței neloiale. Concurența neloială pe piața internă și internațională*, Lumina Lex Publishing House, Bucharest, 1994, p. 15; Laura Maiercan, *Dreptul concurenței comerciale*, Cernaprint Publishing House, Bucharest, 2008, p. 302.

According to European literature reviews³ undertaken in our doctrine⁴, unfair competition can occur in three forms: imitation, disorganization and denigration. In another classification, minor offenses covered by Law no. 11/1991 can be grouped into the following categories⁵:

- a) acts of disruption of rival firms through various means and methods (corruption of staff, dismissal of employees etc.)
- b) acts of misappropriation of clients;
- c) acts of denigration of rival company (the goods or the trader)
- d) acts of infidelity;
- e) acts breaking in equal competition (pyramid selling);
- f) acts of violation of trade secrets.

Law no. 11/1991 criminalizes and penalizes a series of acts and facts that can be committed by employees or by natural or legal traders through their legal representatives, during action in a particular market (art. 4 par. 1 letter a-h).

a) **"the offering of services by the employee to a competitor or acceptance of such offer"** (art. 4 letter a). Regarding "offering exclusive services by an employee of a competitor" in our specialized literature expressed different opinions regarding the qualifications of the "facts". Thus, according to some authors⁶, the provisions of art. 4 letter a) establishes, in law, not an act of unfair competition, but a legal prohibition of competition between the employer – economic operator, natural or legal person and its employee. Regarding the issue of exclusivity to an employee is not given only by the existence of a non-compete clause, but only the fact that that person is not employed, even with limited time and limited duration to a trader, competitor or not . According to other authors, the facts incriminated by the provisions of art. 4 letter a) are acts of unfair competition and "infidelity attitudes of employees with consequences often very serious on the operation of a particular business"⁷.

b) "disclosure, acquisition or use of a trade secret by a dealer or employee thereof, without the consent of the legitimate owner and in a manner contrary to honest commercial practice" (article 4, letter b). These acts of unfair competition fall into the category of the violation of trade secrets, according to some authors, and according to others in the category of acts of disruption by rival firm through economic espionage⁸.

The facts may be committed by an employee of a dealer, employee who discloses to a competitor a trade secret without consent, as well as a person or entity that acquires or uses (after disclosure) a certain trade secret obtained in a manner contrary to fair practices in trade – from a competitor dealer. Law no. 11/1991 defines trade secret as "information which as a whole or in its exact elements is not generally known or is not readily accessible to persons within the circles that normally deal with the kind of

³ See P. Roubier, *Teorie generale du droit*, 2nd edition, 1951, p. 504.

⁴ Emilia Mihai, *Dreptul concurenței*, All Beck Publishing House, Bucharest, 2004, p. 268.

⁵ I. Turcu, *Dreptul afacerilor*, „Chemarea” Fundation Publishing House, Iași, 1992, p. 247-261.

⁶ O. Căpățînă, *op. cit.*, p. 18.

⁷ I. Turcu, *op. cit.*, p. 251; T. Prescure, *op. cit.*, p. 105.

⁸ O. Căpățînă, *op. cit.*, p. 17.

information and acquiring a commercial value because it is secret, and the owner took reasonable measures under the circumstances, to be held under a secret"⁹. French jurisprudence included in under the concept of secrecy any process that provides an industrial or commercial interest used by a trader and kept hidden from his competitors. Not just any patentable invention, but registered can be a secret, but technological innovations as well.

a) "aggressive grabbing of customers: contracts that a trader undertakes to deliver goods or performance of the great benefits provided that the customer brings other buyers to sign contracts with the trader" (article 4 c). In essence, this method of closing and execution of commercial contracts is prohibited by law because it is "a way of exploiting own unlawful trade or fair practices in trade or business, under conditions that prevent free competition." The process is both dishonest and damaging to other retailers as well as consumers, instilling them the illusion that acquiring such goods or other services on favorable terms. The act may be committed by contracts with certain customers in more favorable conditions, usually related to the price, subject to the obligation undertaken and executed by them to bring more customers with whom in turn the abusive trader enters other such contracts. It can be committed only by a retailer or wholesale, who, in a dishonest way, offers some of its customers a number of advantages in price, provided that they, in turn, bring other clients with whom to contract¹⁰.

b) false advertising: "communication or dissemination by a trader of claims over his business or activity meant to mislead and create a situation in favor of competitors" (article 4 letter d). Publicity or false advertising is the act of an industrialist or merchant, who, in order to improve the competitive position, makes statements contrary to the truth about the person, company, products or services. It is considered "a means of general market disruption, with the invocation of false titles and rewards, and various special methods of sale"¹¹.

Under Article 5 of Law no. 148/2000, advertising must be decent, fair and developed in the spirit of social responsibility. Moreover, the law expressly prohibits the following types of advertising: misleading¹²; subliminal¹³; brings prejudice to respect for human dignity of harms public morals; advertising which includes discrimination based on race, sex, language, social origin, ethnic identity or nationality; violates religious or political beliefs; harms the image, honor, dignity and privacy of individuals; exploit superstition, credulity or fear of people; prejudicial to the safety of persons or incite to violence; encourages conduct that affects the environment; promotes the marketing of goods or services produced or distributed contrary to the law. Under Article 8, although

⁹ Protection of commercial secret functions as long as these conditions are fulfilled.

¹⁰ In this situation the intention is to attract clients, deceiving buyers regarding the true aims of using such a trade method.

¹¹ P. Roubier, *op. cit.*, p. 125.

¹² False advertising means any type of publicity which, including the presentation, may mislead the person or may affect the trade behavior, affecting the consumer or the competitor.

¹³ *Subliminal publicity* uses weak stimuli so that they cannot be perceived but they may influence the economic behavior.

comparative advertising¹⁴ is permitted, under certain circumstances and conditions, it is expressly prohibited: when is misleading when comparing goods or services that have different purposes and destinations, when creating confusion in the market between the one who makes advertiser and a competitor or between brands, trade names or other distinguishing marks, when they discredit or denigrate the brand, trade names, while taking advantage of the reputation of brands or other distinguishing marks, when present to goods or services as imitations or replicas of goods or services bearing a trademark or trade name protected.

a) denigration: "communication, even made confidential or dissemination of false statements by a trader about a competitor or about goods or services, statements detrimental to the functioning of the company" (Article 4 e). Such acts of unfair competition are qualified by the doctrine as part of the category denigration facts. The denigration means an act directed against the good name of a competitor of the company, its products or services¹⁵. Means to denigrate the competitor may be directed against a person or against the company, its products or services. From the definition of denigration emerges a prerequisite, namely: the act of defamation is committed to the detriment of a competitor in order to foster economic activity of the author.

Denigration should not be confused with the right to criticize, nor with consumer information made through publicity or official testing of goods. Dishonest nature of denigration is determined and limited the extent to which the economic operator denigrating means to promote their products through such a process. Denigration can be done both through public statements and the confidential communications¹⁶. Denigrator statements made by a dealer, publicly, may be those which clearly show contestant denigrated or like those who, although not nominated victim of denigration their content can easily achieve such identification .

b) destabilization of the rival firm can be achieved either by "offering, promising or giving – directly or indirectly – incentives or other benefits to the employee of a dealer or his representatives that through this unfair behavior to be able to know industrial processes or use his clients to get another benefit for himself or another person at the expense of a competitor" (Article 4 f), or by "misappropriation of clients using the links established with the customer in the position previously held by the trader" (art. 4 letter g) or "dismissal or attracting employees for the establishment of companies competing to capture customers that trader or a trader engaging employees in order to its disorganization" (article 4 letter h). This act of unfair competition is to destabilize the rival company. Arrangements which may be used by the aggressive trader are actually multiple, among which economic espionage and corruption of staff¹⁷.

¹⁴ *Comparative publicity* identifies explicitly and implicitly a competitor or the goods or services offered.

¹⁵ P. Roubier, *op. cit.*, p. 506.

¹⁶ In this situation the person must know that the facts are not according to the reality.

¹⁷ See art. 2 alin. 2 Law no. 21/1996 (Published in the Official Gazzette, no. 742 of 16 August 2005, anotated.

c) economic espionage

This activity can be materialized in disclosure and exploitation of secrets about production or management of market competition. The notion of "secret" includes first material content consisting of a fact related to enterprise functionality injured and having a legitimate economic interest for the industrial or commercial. However, the secret involves intellectual content in that fact is ignored by the public showed stole disclosure by law or internal rules of the company in question. Espionage can be achieved by disclosure spontaneous or provoked. In the first case, the employee on his own initiative dealer reveals secret information on its activities, and in the second case, the aggressive trader offers, promises or gives gifts or other benefits to the employee of a dealer or his agent to find industrial processes, to know or to use its customers or to gain any benefit for himself or another person at the expense of competitor spying¹⁸.

d) corruption of staff

Here we take into account the best and experienced technicians, managers, accountants, IT experts. Unfair competition that can be consumed by offering the employee's exclusive dealer of a competitor or acceptance of such an offer by hiring a competitor's employees in order to disruption of its business and challenge the dismissal of employees dealer for the establishment of a company to capture customers that merchant.

The doctrine provides some examples of misappropriation of clients in the manner referred to by the provisions of article 4 letter g sale by the employee (servant) of a commodity in its own name to his principal client (the same kind as the goods belonging to the principal); continuation of the former employee of a business to which his former principal customers, manifesting itself as such retains old as the representative of that trader; performance by a merchant, knowingly, an order addressed to another merchant competitor if it was received on previously established relationships with the author order, from the unfair competition offender was injured merchant service; deed of the senior management of a company, possessing information on the company and its work which, after resigned, took advantage of the knowledge available and the authority they had forsaken society to frustrate its customers, making use the relationships we have established with the customer in the past¹⁹.

3. Unfair competition in the international market

To prevent the use by operators of strong competitive practices in the global market, states have tried to take a series of legislative measures, rules that are true AD or codes. The most important international convention for the suppression of unfair competition in the international market have been developed under the auspices of GATT and include a number of anti-dumping duties and countervailing duties designed to counteract the effects by exporters practicing dumping prices. Also agreed measures to punish acts of subsidy grants²⁰. These measures proved to be imperfect and insufficient, since they were binding only if compatible with internal anti-dumping regulations of each Member State,

¹⁸ O. Căpățînă, *op. cit.*, p. 443.

¹⁹ I. Turcu, *op. cit.*, p. 247.

²⁰ T. Prescure, *op. cit.*, p. 130.

as well as an imprecise definition of the concept of dumping²¹. So after some negotiations (1963-1967 Kennedy round) were drafted new regulations: anti-dumping code, code anti-subsidy and countervailing measures.

Anti-dumping Code was developed under the auspices of GATT, signed in Geneva and revised during the Tokyo Round on 12 April 1979, Romania ratifying it by Decree no. 183 of 16 June 1980 established a code of anti-dumping regulations complying by the signatory States²². The purpose of anti-dumping laws to protect national producers from the effect of imports at prices below normal value. Anti-dumping regulations aim to eliminate such danger establishing an additional levy on imports dumping regime, the price difference between the export price and the normal value of the product.

Anti-dumping measures imposed by the EU on imports from third countries²³

From geographical point of view, the regulation is applicable in the Member States and aims to imports from third countries of the European Community. Community may adopt specific provisions on imports from non-market economy countries and those with economies in transition. The regulation also specifies that the provisions do not prevent the application of specific rules laid down in agreements between the Community and third countries. From the physical point of view, the rules apply to all products. However, with regard to agricultural products, the regulation may be applied about complementary and notwithstanding any provisions excluding anti-dumping charges. For the application of anti-dumping duties is necessary to meet two conditions: proof of dumping and injury to the Community industry as a result of dumping.

Dumping must be distinguished from simple practices of sellers at low prices resulting from lower costs and higher productivity. In this respect, the key criterion is the relationship between the price of the exported product and its price in the market of the importing country, but the relationship between the price of the exported product and its normal value. A product is considered to be dumped if its export price in the Community is less than the comparable price, in the ordinary course of trade, for the like product in the exporting country. Normal value that follows to be taken into account to determine whether dumping exists is based on prices paid or to be paid in the ordinary course of trade, by independent customers in the exporting country. If the exporter does not produce or sell a similar product in the exporting country, the normal value may be determined based on the prices of other producers or traders, or the result of the cost of production in the country of origin.

The damage is determined by means of positive evidence involving an objective examination of the following requirements:

a) the volume of dumped imports, particularly where there has been a significant increase in the production or consumption of their community;

²¹ O. Căpățână, *op. cit.*, p. 24.

²² In România, the normative act that regulated the aspects related to dumping in the Government Decision no. 228/1992 regarding the protection of the national producers (published in the Official Gazette no. 133 of 17.06.1992, repealed by Government Decision no. 1900/2006.

²³ See European Council Regulation nr.384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community Regulation on the implementation of the new agreement on implementation of Article VI of the General Agreement Tariffs and Trade 1994 in Community law to ensure proper application of the new rules and transparent anti-dumping.

b) the price of dumped imports, in particular to determine whether there was a significantly undercut the price compared to similar product prices of the Community industry, or whether the effect was price depression or prevent price increases;

c) the impact on the Community industry concerned, particularly about production capacity and utilization, stocks, sales, market share, price changes, profits, return on investment, financial and labor lchidități.

The Regulation provides that there must be a causal link between the dumped imports and the injury to the Community industry²⁴. Also known factors other than dumped imports which at the same time without injury to the Community industry must be analyzed. In addition, the effect of the dumped imports shall be assessed in relation to the Community production of the like product to the nearest given production sector.

Initiation of proceedings is due to the submission of a written complaint by a natural or legal person or any association not having legal personality acting on behalf of the Community industry. When, in the absence of a complaint, a Member State is in possession of sufficient evidence with regard to dumping and injury caused to the Community industry, they must notify the Commission immediately.

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A complaint must include evidence of dumping, injury and a causal link between the two. It also must contain the following information: the identity of the applicant and a description of the volume and value of production of the Community, a complete description of the allegedly subject to a dumpig, the country of origin, the identity of each producer/exporter and importer known, the prices at which the product in question is sold when destined for consumption in the domestic market of the country of origin or export, the export price of the product, the volume of imports of the products concerned and their effect on prices of the like product. It is considered that the complaint was made by or on behalf of the Community industry if it is supported by the Community producers whose collective output constitutes more than 50% of the total Community. The complaint is examined by the Advisory Committee composed of representatives of each Member State and one representative of the Commission as chairman. If the review shows that the complaint does not contain sufficient evidence to justify the initiation of the complaint is rejected and the applicant is informed accordingly. Where, after consultation, the Committee finds that there is sufficient evidence to justify the initiation of proceedings, the Commission must initiate within 40 days. Publish in the "Official Journal of the European Communities", a notice of initiation of the investigation, as well as data on the product and countries concerned, a summary of the information received and specify the period within which interested parties may make known their views may²⁵.

²⁴ "Community industry" means all Community producers as a whole or those whose production represents a major proportion of the Community industry. However, if the producers are themselves importers of the product in dumping the term 'Community industry' may be interpreted as referring to other producers in this sector.

²⁵ The complaint may be withdrawn before the investigation is launched.

Following the initiation of the investigation, the Commission, in cooperation with Member States begin investigating both dumping and injury. A period of investigation is chosen which normally covers a period of at least six months immediately prior to the initiation of the procedure. The Commission sent questionnaires parties who provide at least 30 days to respond.

The Commission may request Member States to provide information, carry out checks and controls, especially on importers, traders and Community producers to conduct investigations in third countries, provided that the firms in question and that country's government raises no objection. Commission officials may be authorized to assist the officials of Member States in office. Typically, the Commission may carry out visits to examine the records of the parties concerned; can also carry out investigations in third countries involved. Upon request, the Commission may hold meetings with stakeholders and between them, giving them the opportunity to present the views and confronting opposing theses. Interested parties may review all information submitted to the Commission, with the exception of confidential documents. An investigation is concluded with the end of the procedure or the adoption of definitive measures.

The result of a proceeding can be negative if, after consultation, it is considered that there is no need of protective measures were not raised objections to the Advisory Committee. A procedure is completed when the dumping and injury are considered negligible. Also, a procedure can be completed without the imposition of provisional or final when signed commitments and are considered acceptable by the Commission. These commitments take the form of revisions to freeze prices or export as needed to be eliminated negative effects of dumping.

Provisional duties may be imposed if upon a provisional affirmative determination of dumping and injury and if the Community interest requires immediate action to prevent such injury. The amount of anti-dumping duty shall not exceed the margin of dumping and may be lower than this if a lesser duty would be adequate to remove the injury. Provisional anti-dumping duties may be imposed for a period of 9 months from the initiation of the procedure. Normally, the provisional duties imposed for a period of six months. They are available by the Commission after consulting the emergency or after informing the Member States. Shall inform the Council and the Member States of such provisional measures. Council may take a different decision on how to act.

In the event that the final finding shows that there is dumping and injury and Community interest calls for intervention, the Council imposed a definitive anti-dumping duty. As in the case of anti-dumping interim final tax amount can not exceed the margin of dumping, but may be less than the margin if it is sufficient to remove the injury. Imports of dumped and causing injury, it imposes an anti-dumping appropriate to each case and is determined without discrimination. Regulation imposing specific duty imposed its value for each supplier or, where this is not possible in the supplying country concerned. Provisional and definitive duties can not be applied retroactively. However, a fee may be imposed definitive anti-dumping duties on products that have been released for consumption not more than 90 days before the date of application of provisional measures. Anti-dumping measures can not be applied to do is find that their imposition is not in the Community interest. To this end, all interests are taken into account as a whole, including those of the Community industry, users and consumers. All interested parties

are able to make their views known. An anti-dumping measure shall expire five years from its establishment or 5 years after the conclusion of the review (review). A review of measures takes place either at the initiative of the Commission or at the request of the Community producers. Fees remain in effect during the review anti-dumping measure.

4. Anti-subsidy measures imposed by the EU on imports from third countries²⁶

International rules on subsidies have been significantly strengthened with the entry into force on 1 January 1995 WTO Agreement on Subsidies and Countervailing Measure negotiated in the Uruguay Round. The provisions of this Agreement are included in the European Community Regulation (EC) on protection against subsidized imports, which came into force on the same date. European Community Regulation refers only to imports from outside the EU, enabling the imposition of countervailing measures on goods that have been subsidized by governments outside the EU and whose import in causing or threatening to cause injury to the producers of the same product in the EC. The following three conditions must be met before it can be imposed countervailing measures:

a) subsidy must be specific, ie, it must be an export subsidy or a subsidy limited to a particular company, industry or group of enterprises or industries;

b) there is material injury for CE industry: sales of imported products have caused or threaten to cause injury to an important part of the economic sector concerned to the EC, such as loss of market share, reduced producer prices and increased pressure on production, sales profits, productivity etc.

c) impaired community interests: Community costs by applying these measures should not be disproportionate to the benefits.

As in the case of anti-dumping measures, the European Commission is the one who leads the investigation and imposes provisional measures. Definitive measures can only be imposed by the Council of Ministers. Responsibility for implementing the provisions of the WTO Agreement on Subsidies and Countervailing Measures in the European Community in Brussels lies within authorities applying Community law properly with Member States. Regulation offers the possibility of imposing countervailing duty order offsetting any subsidy granted, directly or indirectly, on the manufacture, production, export or transport of any product from a third country whose release for free circulation in the Community causes injury. A subsidy is deemed to be granted in the first place if it finds that a financial contribution by a government or if there is any form of income or price support in the sense of the meaning of Article XVI of GATT in 1994, and secondly, if gives such a benefit.

There is a financial contribution if:

a) a government practice involves a direct transfer of funds (grants, loans, equity infusion), potential direct transfers of funds or liabilities (loan guarantees);

b) government revenues due are collected (tax credits);

²⁶ Council Regulation no. 2026/97 of 6 October 1997 on protection against subsidized imports from countries not members of the European Community Regulation to transpose the provisions of the Agreement on Subsidies established under the World Trade Organization in order to ensure proper implementation and transparent rules anti-subsidy.

c) a government provides goods or services other than general infrastructure, or purchases goods;

d) a government makes payments to a funding mechanism or appoints a private body to carry out one or more functions that normally is responsible.

European Commission Communication 1998/C 394/04 of December 15, 1998²⁷ is to determine the method used by the Commission in investigations in this area. It explained the methodology used in calculating the subsidy (depending if the grants, loans, loan guarantees or supply of goods and services by public authorities), the investigation period for calculating the grant (which normally corresponds to the most recent financial year the recipient firm) and items that can be deducted from the grant.

Bibliography:

1. Law no.11/1991 for combating unfair competition.
2. Law no.21/1996.
3. Government Decision no.228/1992 for protecting national producers and internal market of unfair competition as a result on import of products at dumping prices.
4. Council Regulation no.2026/97 of 6 October 1997.
5. Rules for transposition of the Agreement on Subsidies established under the World Trade Organization in order to ensure proper implementation and transparent anti-subsidy rules.
6. European Council Regulation no.384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community.
7. Rules for the implementation of the new agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 in Community law to ensure proper application of the new rules and transparent anti-dumping.
8. Titus Prescure, *Curs de dreptul concurenței comerciale*, Rosetti Publishing House, Bucharest, 2004.
9. Octavian Căptână, *Dreptul concurenței neloiale. Concurența neloială pe piața internă și internațională*, Lumina Lex Publishing House, Bucharest, 1994.
10. Laura Maieran, *Dreptul concurenței comerciale*, Cernaprint Publishing House, Bucharest, 2008.
11. P. Roubier, *Teorie generale du droit*, 2^e éd., 1951.
12. Gabriel Ungureanu, *Dreptul European al Concurenței*, Cernaprint Publishing House, Bucharest 2009.

²⁷ Official Journal C 394, 17.12.1998 (Guide to calculate subsidy in case of investigations regarding compensatory measures).