

## PRESENT LEGAL ASPECTS REGARDING UNFAIR COMPETITION

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### **Abstract:**

Unfair competition represents a legal challenge both for the legislators and for the economic market. As new ideas of breaking the legal texts arrive, more legal work has to be done in order to keep up with the illegal actions taken by companies in their attempt to earn more for less.

**Keywords:** competition, unfair competition, leniency, cartels, the European Union.

### **1. Introduction**

**Unfair competition** in a sense means that the competitors compete on unequal terms, because favorable or disadvantageous conditions are applied to some competitors but not to others; or that the actions of some competitors actively harm the position of others with respect to their ability to compete on equal and fair terms. It contrasts with fair, legal competition in which the same rules and conditions are applied to all participants, and the competitive action of some does not harm the ability of others to compete.

Often, unfair competition means that the gains of some participants are conditional on the losses of others, when the gains are made in ways which are illegitimate or unjust.

**Unfair competition** in commercial law area refers to a number of areas of law involving acts by one competitor or group of competitors which harm another in the field, and which may give rise to criminal offences and civil causes of action. The most common actions falling under the banner of unfair competition include, among others, various unfair business practices such as fraud, misinterpretation, and unconscionable contracts may be considered unfair competition, if they give one competitor an advantage over others. In the European Union, each member state must regulate unfair business practices in accordance with the principles laid down in the Unfair Commercial Practices Directive, subject to transitional periods<sup>1</sup>.

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<sup>1</sup> [http://en.wikipedia.org/wiki/Unfair\\_competition](http://en.wikipedia.org/wiki/Unfair_competition)

## 2. Aspects regarding Unfair Competition from EU's point of view

From the European Union's point of view, **competition** is a basic mechanism of the market economy which encourages companies to offer consumers goods and services at the most favorable terms. It encourages efficiency and innovation and reduces prices. In order to be effective, competition requires companies to act independently of each other, but subject to the competitive pressure exerted by the others.

European antitrust policy was developed from the **two central rules** set out in the Treaty on the Functioning of the European Union.

- First, **agreements between two or more independent market operators which restrict competition** are prohibited by Article 101 of the Treaty. This provision covers both **horizontal** agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at different levels, i.e. agreement between a manufacturer and its distributor). Only limited exceptions are foreseen in the general prohibition. The most flagrant example of illegal conduct infringing Article 101 is the creation of a cartel between competitors (which may involve price-fixing and/or market sharing).

- Second, Article 102 of the same legal act prohibits **firms holding a dominant position on a determined market to abuse that position**, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.

The European Commission is empowered by the Treaty to apply these prohibition rules and holds a number of **investigative powers** to that end (e.g. inspection at business and non-business premises, written requests for information, etc.). It may also impose fines on undertakings which violate the EU antitrust rules. The main rules on procedures are set out in Council Regulation 2003.

Since 1 May 2004 all National Competition Authorities have also been empowered to fully apply Articles 101 and 102 of the Treaty in order to ensure that competition is not distorted or restricted. **National courts** may also apply these provisions in order to protect the individual rights conferred on citizens by the Treaty.

As part of the overall enforcement of EU competition law, the Commission has also developed and implemented a policy on the application of EU competition law to actions for damages before national courts. It also cooperates with national courts in order to ensure the coherent application of the EU competition rules within the Member States<sup>2</sup>.

## 3. Procedural aspects regarding anticompetitive practices

Article 101 to which we refer here is part of **Consolidated version of the Treaty on the Functioning of the European Union – PART THREE: UNION POLICIES AND INTERNAL ACTIONS – TITLE VII: COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS – Chapter 1: Rules on competition – Section 1: Rules applying to undertakings and has the following content:** "1. 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

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<sup>2</sup> [http://ec.europa.eu/competition/antitrust/overview\\_en.html](http://ec.europa.eu/competition/antitrust/overview_en.html)

their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragr. 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question"<sup>3</sup>.

In other words, Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between Member States (anti-competitive agreements). These include, price-fixing or market-sharing cartels. Anti-competitive agreements are prohibited regardless of whether they are concluded between companies that operate at the same level of the supply chain (horizontal agreements) or at different levels (vertical agreements).

Article 101 can be applied by the European Commission or by the competition authorities in the EU member states. For Romania, this means Competition Council.

Article 101 cases can originate in: 1) a complaint, 2) opening of an own-initiative investigation, or 3) a leniency application from one of the participants to a cartel. Under the Commission's **Leniency programme**, the first firm to submit evidence that is sufficient for the Commission to either launch an inspection or enable it to find an infringement receives full exemption from its fine (total immunity).

The Leniency programme refers to a legal provision that allows the European Commission to apply fines to firms involved in Cartels or which in any other way choose to breach the competition rules.

In order to benefit from the Notice, companies can approach the Commission directly or through a legal adviser.

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<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>

However, companies that have participated in illegal cartels have a limited opportunity to avoid or reduce a fine. The Commission operates a leniency policy whereby companies that provide information about a cartel in which they participated might receive full or partial immunity from fines<sup>4</sup>.

When it applies for immunity, the firm must also end its participation in the infringement. Firms that approach the Commission later and that contribute a real added value to the investigation are eligible for a fine reduction, subject to the same on-going cooperation as for immunity applicants.

The **Commission's investigative powers** to enforce Article 101 are detailed in the Antitrust Regulation. The Commission is empowered, for example, to:

- Send information requests to companies;
- In the context of an inspection:
  - enter the premises of companies;
  - examine the records related to the business;
  - take copies of those records;
  - seal the business premises and records during an inspection;
  - ask members of staff or company representatives questions relating to the subject-matter and purpose of the inspection and record the answers.

At the end of the initial investigative phase, the Commission can take the decision to pursue the case as a matter of priority and to conduct an in-depth investigation, or to close it. In cartel cases, if the case is to be pursued, the Commission decides whether or not the case is suitable for the Settlement procedure.

This procedure refers to the fact that in **cartel cases**, the Commission or the parties may propose a settlement. The Commission may reject the settlement route for cases that are not suitable. In settlement cases, the parties acknowledge upfront their participation in the cartel, resulting in a speedier procedure and an up to 10% reduction in the fines. The Commission presents parties with the evidence and notifies them of its conclusions as to duration, seriousness, liability and likely fine. The parties must make an oral or written submission acknowledging their liability and stating that they accept the Commission's statement of objections. The settlement procedure allows the Commission to adopt a faster, more streamlined decision and to allocate resources to other cases.

If the in-depth investigation confirms the Commission's competition concerns, a statement of objections (SO) detailing the Commission's concerns is sent to the companies concerned.

To ensure an objective outcome, the parties are given certain rights of defence. They are entitled to have access to the file – this means they can see all non-confidential documents from the Commission's investigation. The parties may then reply to the SO in writing within a certain delay. They may also request an **oral hearing**, which is conducted by an independent hearing officer. After examining the parties' arguments, the Commission reviews and sometimes abandons (part of) its initial objections and may decide to close the case.

If the Commission's concerns are not – or only partly dispelled – it drafts a decision prohibiting the identified infringement (according to Article 7 of the Antitrust

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<sup>4</sup> <http://ec.europa.eu/competition/cartels/leniency/leniency.html>

Regulation). The draft is then submitted to the Advisory Committee composed of representatives of the Member States' competition authorities.

This provides a final check of the draft decision. If fines are proposed in the draft decision, the Advisory Committee meets a second time to specifically discuss them. Finally, the draft is submitted to the College of Commissioners which adopts the decision.

Alternatively to a prohibition decision the Commission may take a commitment decision under Article 9 of Regulation 1/2003. This is a quick way of restoring effective competition to the market. Under commitment decisions, the Commission does not have to conclude on the existence of an infringement of the antitrust rules and imposes no fines. It voices its competition concerns and parties can come forward with commitments to address these concerns. If the Commission, after consulting market participants, finds these commitments sufficient, it takes a **decision to make them legally binding**.

The commitments are usually in place for a specific period of time, and if the companies breach them they can be fined.

A company that has participated in an anti-competitive agreement and so infringed competition law may have to pay a fine. The Commission's fining policy is aimed at **punishment and deterrence**. The fines reflect the gravity and duration of the infringement. They are calculated under the framework of a set of Guidelines that have been last revised in 2006.

The starting point for the fine is the percentage of a company's annual sales of the product concerned in the infringement (up to 30%). This is then multiplied by the number of years and months the infringement lasted. Certain aggravating circumstances (e.g. repeat offender) or attenuating circumstances (e.g. limited involvement) may increase or decrease the fine. In **cartel cases**, the fine is increased by a one-time amount equivalent to 15-25% of the value of one year's sales as an additional **deterrent**. The **maximum** level of fine is capped at 10% of the overall annual turnover of a company.

The 10% limit may be based on the turnover of the group to which the company belongs if the parent of that group exercised decisive influence over the operations of the subsidiary during the infringement period. There is also a limitation period of five years from the end of the infringement until the beginning of the Commission's investigation.

The Commission encourages companies that are involved in a cartel to come forward with evidence to help the Commission to detect cartels and build its case. The first company to provide sufficient evidence of a cartel to allow the Commission to pursue the case can receive full immunity from fines; subsequent companies can receive reductions of up to 50% on the fine that would otherwise be imposed<sup>5</sup>.

In cartel cases, the Commission also offers a reduction of 10% in the fine if the Commission reaches a settlement with the company. Settlements reduce the administrative costs of cartel decisions, including before the court, and help the Commission deal more quickly with cartel cases, freeing up resources to devote to new investigations.

In exceptional circumstances, the Commission may reduce the fine if the company provides sufficiently clear and objective evidence that the fine is likely to affect seriously

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<sup>5</sup> [http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf)

the economic viability of the undertaking. The analysis looks in detail at various company specific factors, and aims to be as objective and quantifiable as possible to ensure equal treatment and maintain deterrence, as mentioned above<sup>6</sup>.

The addressees of a Commission decision have the right to appeal to the EU General Court to amend or annul the decision. The Court can cancel, increase or reduce the fine imposed by the Commission.

Judgments of the General Court can be appealed before the European Court of Justice (ECJ) by the unsuccessful party (so the Commission can also be an appellant). However, these appeals to the ECJ are limited to questions of law only.

Any citizen or business which suffers harm as a result of a breach of the EU competition rules is entitled to claim compensation from the party who caused it. This means that the victims of competition law infringements can bring an action for damages before the national courts. If the Commission has taken a prohibition decision regarding the infringement, this decision can be used before national courts to prove that the behavior took place and was illegal<sup>7</sup>.

#### **4. Conclusions**

The European Union has developed a clear procedure regarding cases of unfair competition, as in ways to signal this phenomenon, to have an objective rule over such a case and even ways to get to a settlement. The Leniency programme will hopefully act as a preventive measure in fighting with illegal actions taken by the majority of the significant companies in order to ensure their spot on the relevant market.

In our opinion, at national level, a better popularizing of the mentioned provisions would be a positive method in fighting with the problem in discussion.

#### **REFERENCES**

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<sup>6</sup> [http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf)

<sup>7</sup> [http://ec.europa.eu/competition/antitrust/procedures\\_101\\_en.html#settlement](http://ec.europa.eu/competition/antitrust/procedures_101_en.html#settlement)