

COMPETITION LAW & HUMAN RIGHTS PROTECTION: CONTROVERSIAL NEW DIMENSIONS

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Abstract

Article is devoted to the analysis of theoretically and practical aspects of human rights protection mechanisms in cases of violations of competition into the EU. It was determined that the right to fair competition has economic as well as social aspect. From an economic perspective, the right to not distorted (fair) competition has entities & undertakings. It follows the basic prohibition of antitrust behavior covered in Articles 101 and 102 TFEU. The social aspect of the right to fair competition shows consumers the right to receive fair benefits to the domestic market by staying in the equal access to the goods and/ or services. It was researched the EU Court practice in the field of human right violations in competition sphere & the ECHR practice in cases concerning violations of competition. The judgment of a chamber of the European Court of Human Rights of 27 September 2011 in Menarini has examined the impact of Article 6(1) of the ECHR in competition cases.

Keywords: human rights, European Union, competition law, European Court of Human Rights, Menarini case

1. Introduction

The notion of "freedom to compete" was established in ordoliberalism theories, that was introduced through the main goal of competition – to increase social welfare. Defining competition as a necessary element of a functioning market economy is worth noting that it should be based on the basic principles, values and freedoms. Especially it must be determined by the protection of human rights. Now we just try to explain the correlation of mechanisms of fair competition through the human rights protection. In the Treaty on European Union (TEU), a new category of "values" among which we should pay attention to equality and human rights. Then there was formed and developed by the EU Court practice the basic principles of EU law, the focus of which is the principle of the protection of human rights and freedoms in accordance with Art. 6 TEU and Art. 16 TFEU.

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The study of economic stability for the internal market through the prism of the right to fair competition in the EU is relatively new, but the doctrine is characterized by a diversity of views in this area. Among Western scholars, lawyer's interaction of human rights and the consumer, such as A. Andreangeli [Andreangeli A., 2008] who is the author of a monograph devoted to compliance with competition rules and at the same time human rights. We can also isolate single special research of the relationship of competition law and human rights, such as M. Ramsden's [Ramsden M., 2008], E. Ameye's, A. Brawn's, A. Riley's, W. Wils [Wils W., 2011] works.

Study of the right to fair competition requires the definition of "unfair" competition and "freedom" to compete. At the core of this concept there are such fundamental characteristics as integrity, wisdom and justice. The concept of free competition was founded in theories of liberalism, especially reflected in the current ordoliberalism. The idea ordoliberalism was founded in Germany by scientists such as V. Oyken and F. Böhm. They advocated the main idea of the flow – free competition and protection. This idea was supported and spread within the Member States of the European Union [Quack S., Djelic M-L., 2005].

2. Main issues on legal regulation of the competition in the EU

The EU competition policy serves as protection of fair competition from illegal restrictions and distortions is an important factor in the creation and effective functioning of an integrated internal market in the EU. The principle of an open market economy with free competition is one of the foundations of the economic system of the European Union due to the special Protocol the TFEU and other items of TFEU. Thus the implementation of the principle of respect for EU supranational institutions endowed with exceptional powers in this area. In particular, Art. 3 TFEU defines the exclusive competence of the EU in establishing of the competition rules necessary for the effective functioning of its internal market of the European Union. It should again be emphasized that the meaning of the Treaties implies that competition policy plays a key role in the establishment and functioning of the internal market in accordance with the principle of an open market economy with free competition, which is directly reflected in Art. 119 TFEU. The basis of the EU internal market is the ability of business entities to compete on equal terms. Competition policy provides competitive behavior of enterprises and protects the interests of consumers, making possible the production of goods and services at a qualitative level.

3. The right of fair competition

The right of fair competition has both economic and social aspects.

From an economic perspective, the right to not distorted (fair) competition has entities & undertakings. It follows the basic prohibition of antitrust behavior covered in Articles 101 and 102 TFEU. The right to fair competition and endowed states that in its legal regulation refrain from giving undue advantage to certain subjects or industries, which distorts or threatens to distort competition. Such actions of the Member States recognized incompatible with the internal market under art. 107 TFEU. Another aspect relates to the obligation of national monopolies in the provision eliminating any discrimination expressly provided for in Art. 37 TFEU.

The social aspect of the right to fair competition shows consumers the right to receive fair benefits to the domestic market by staying in the equal access to the goods and/ or services. To ensure fair competition entities have to make legitimate fair measures to attract consumers, and consumers have the right to benefit from fair competition. This approach was supported by the sociological jurisprudence. Court of Justice in its judgment in the case of GlaxoSmithKline¹ pointed out that the purpose of Art. 101 (paragr. 1) TFEU is to prevent companies from actions that would reduce the welfare of the final consumer.

The Charter of Fundamental Rights, which according to the Treaty of Lisbon, is one of the fundamental documents of the EU confirms this social dimension of the right to fair competition. Article 38 of the Charter states that "the Union's policies ensured a high level of consumer protection." This means that one of the objectives of EU competition policy is to protect consumer rights.

For the purpose of the right to fair competition the EU has exclusive competence. The Commission under Regulation 1/2003² has broad powers to obtain information, to investigate and take an appropriate binding decisions. However, the Commission applies its right in quite active character, by imposing fines in the millions and billions of euros³. However, any decision by the Commission may be subject to review by judicial review under Art. 263 TFEU.

In other words, the right to fair competition from both positions (both economically and from the social aspect) provided not only the power of the Commission, but also judicial mechanisms. Decisive for the right to fair competition in the light of the prohibition of antitrust behavior in the market are the powers of the Commission (in accordance with Regulation 1/2003) and the distribution of jurisdiction of the Court in the European Union claims from individuals and businesses with regard to acts in which they are recipients or directly and immediately affect them (according to paragr. 4 Art. 263. TFEU). It should be noted that in almost all cases the EU Court of Justice, concerning violations of the subjects of competition, the protection of human rights deviated (such as in the case of Pioneer⁴).

4. ECHR's point of view

But since the 2000's, the role of human rights in the implementation by the Commission of its powers increased, and in 2011 the European Court of Human Rights considered the case in the field of violation of competition rules.

Due to the fact that the EU defines and includes its legal system rights under the European Convention on Human Rights, the question arises as to the mechanisms of their implementation. In other words, there is the practical question of value competition in the market and human rights. This also applies to the issue of human rights during the

¹ See Case T-168/01 GlaxoSmithKline Services Unlimited v Commission // European Court Review. – 2006. – II-2969.

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty // Official Journal. – 2003. – L 1. – p.1-25.

³ For example, see decisions: Commission Decision 13 May 2009 Intel D // COMP. – 2009. – 37/990 – 3726.; Case T-201/04 Microsoft v. Commission // European Court Review. – 2007 – II -3619.

⁴ Case 100/80 Musique Diffusion Francaise v Commissione // European Court Review. – 1983. – 1825.

Commission powers to enforcement of the competition rules, in particular during the investigation by the Commission. The main provisions of the Convention relevant in the context of EU antitrust enforcement are Article 6 (right to a fair trial), Article 7 (no punishment without law), Article 8 (right to respect for private life), Article 13 (right to an effective remedy) and Article 4 of Protocol No 7 to the Convention (right not to be tried or punished twice).

In other words, there is the practical question of the relation of competition in the market and human rights. This also applies to the issue of human rights during the Commission authority to monitor compliance with competition rules, in particular during the investigation by the Commission.

Thus, the question is whether fall under the jurisdiction of the ECHR case of violation of competition rules. Thus, Art. 6 of the European Convention on Human Rights defines the right to a fair and public hearing within a reasonable time whether civil or criminal implemented. Furthermore, this paper corresponds to Article 47 (paragr. 2) EU Charter of Fundamental Rights, which defines the right to an effective remedy and access to impartial courts.

Despite the fact that Regulation 1/2003 has established that sanctions are not criminal liability, litigation is somewhat different position on this issue. The decision of the ECHR in the case of *Société Stenuit v. France*⁵ was analyzed the fines imposed under national competition law. Here the court considered in the light of a criminal nature in connection with the nature of national competition law of France, whose goal is to protect free competition in the French market, i.e. the general interests of society, which is usually protected by criminal law. In the judgment in the case of the EU *KME Germany and others v. Commission* found that the Commission's decision to impose a fine of competition associated with "criminal charge" for the purposes of Article 6 (1)⁶. Furthermore, it is well known that in the light of Art. 6 (1) of the European Convention, the definition of "criminal charge" the Court must not only be independent and impartial, but must also have full jurisdiction to hear and decide all questions of fact and law relevant to the dispute, which he considers⁷.

5. Conclusion

Case ECHR in the case *Menarini*⁸ reaffirmed the applicability of Art. 6 of the European Convention on Human Rights to cases involving the protection of competition in Europe. The very bright example of such correlation is the *Menarini* case. The decision of the ECHR of September 27, 2011, confirmed that the procedure against *Menarini* in the Italian jurisdiction had a "criminal nature" for the purpose of Article 6 of the Convention. This case demonstrates the immediate relevance of fundamental rights to EU competition law enforcement.

⁵ ECHR decision dated 24 February 1992 – *Société Stenuit v. France*, case no. 67/1991/319/391.

⁶ Case C-272/09 P *KME Germany and others v. Commission*, judgment of 8 December 2011.

⁷ *Le Compte, Van Leuven and De Meyer v. Belgium*, 23 June 1981, Series A, number 43 p.23 §51(b); *Schmautzer v. Austria* 1996 21 ECHR e1, 536; *Chevrol v. France*, 13 February 2003, CEDH 2003-III, §77.

⁸ European Court of Human Rights, *A. Menarini Diagnostics S.R.L. c. Italie* (Requête no. 43509/08), judgment of 27 September 2011.

This western doctrine confidently declares that this case has given rise to possible further appeals to the ECHR in cases involving violations of competition [Bronckers M., Valery V., 2012; Bellamy C., 2012]. The "Menarini" ruling of the European Court of Human Rights paves the road to a material and significant enhancement of a company's rights of defense in antitrust cases based on Article 6 of the Convention and on the respective seminal case-law of the European Court of Human Rights which materializes in a detailed manner the principles associated with the due process of law.

However, in the future there is another rhetorical question of the appropriateness of trial states in accordance with Art. 6 of the European Convention on Human Rights. In accordance with Art. 6 TEU Union will join European Convention on Human Rights. This affiliation will allow for anyone who claims that his rights under the European Convention on Human Rights have been violated by the European Commission or the European Union Court during its review of decisions of the Commission to apply the mechanism of the ECHR. The process of joining the European Union to the European Convention continues with the accession agreement should put an end to the many possible appeals on violation of Art. 6 of the European Convention to the ECHR.

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