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Abstract:

The European policy in the competition domain is based on the principle that it must be conducted in a way so that the competition will not be distorted at the common market level. The role of achieving this rule belongs, on one hand, to the European Commission that monitors and punishes the cartels, among other responsibilities, and on the other hand, to the national authorities invested with competencies and roles that are considerable in the area.

The cartels are agreements between enterprises that have a negative influence on the competitive process, being punished by the law both at communitarian level and in the national legislations of the member states. Being not easy to identify, the clemency policy is applied both at communitarian market level and on the national markets, being put to practice in our country by the Competition Council, the authority with competencies in commercial competition area.

Keywords:

cartel, clemency policy, enterprises, penalties.

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INTRODUCTION

The competition is an indispensable factor in a market economy and it has an important contribution to the development of economy and social life. From economical point of view, it facilitates the interest for increasing and diversifying the quality of the offer for services and goods, for adjusting this offer to the requirements existing on the market. At the same time, the competition stimulates the enterprises to establish the aspects that are defining as against the other competitors and to decide to use rationally the resources for obtaining benefits adequate to their actual participation to the activity of production and distribution of goods.

At present, the theoreticians advocate that the competition defines a certain type of behaviour from the enterprises, on one hand and a specific way of organizing the activity on the market, on the other hand.

In what concerns the behaviour of enterprises in competition conditions, they present an individual character, every one of them being preoccupied by its own interest. In order to achieve it, the enterprises use "weapons" that can be honest, of economical nature, but they also can be dishonest, of extra economical nature, like those facts of unfair competition or anti-competitive practices and agreements. Such a practice in conflict with competition is the agreement between two or more competitive enterprises, which has as result competition's distortion; we practically speak about those anti-competitive agreements named „cartels".

These anti-competitive agreements are forbidden both at European Union (E.U.) level, according to the provisions of art. 101 paragraph 1 of The Treaty on the Functioning of the European Union, as well as in our internal law where, in Competition Law no. 21/1996 republished, there are expressly forbidden such agreements through art. 5 paragraph 1 of the law. Actually, both E.U. and Romanian legislation do not allow concluding any agreements between enterprises that have as object or effect limitations of the competition on the market. Talking about the "market", the provisions of the Treaty regarding the Functioning of the U.E. have in view the unique market, while Romanian law deals with those facts and deeds that limit, encumber or distort the competition, committed either on the territory of Romania, or abroad, but which produce effects on the territory of our country.

In the concept of the market economy, it is encouraged and protected the competition honestly manifested by those which produce goods, perform works, provide services and ensure their circulation and distribution to the consumers.

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At E.U. level and at the level of every member state, it is desired to exist and to be manifested an efficient competition that is characterised by three factors:

1. Free access on the market of the economic agents or enterprises;
2. Freedom of action on the market of the competitive economic agents;
3. Consumers' freedom to choose their supplier and the goods desired, as much as possible.

Practically, the cartels are secret agreements or conventions of the group of economic agents –producers or distributors of goods – which are in competition, through which they fix certain prices or they split between them the market, or they decide to limit the production, or they give to each other the territories or the clientele and through which they endanger practically the competition. They have as negative consequences: unnatural, studied limitation of the competition, price increase, as well as limiting the chances of employment. This way they bring serious prejudices to the economy and to the consumers that do no longer have the possibility to choose the producers or distributors of goods. The cartels deteriorate the competition through their effect, which consists in the artificial increase of the prices used on the market for a certain product or service and, for a long period of time, producing undesired consequences as against the competitors contest in that domain of the market where they exist, since the participant enterprises are no longer pressurized by the competition when, actually, it is desired its existence for impelling them to innovate and to develop activities as efficiently as possible on the market. These agreements produce positive effects only for those that conclude them, since they do not desire to bring benefits to these sectors of the economy where they activate, or to protect the interests of the consumers.

These are the reasons for which the cartels are considered as being the most dangerous breaches of the legislation regarding the commercial competition, being practically punished in all states with a market economy. In Romania, in the actual regulating in this area, Competition Council is the authority entitled to punish these anti-competitive practices, being able to apply the penalty of civil fine in percentage of up to 10% from the total turnover obtained from the practicing enterprises in the financial year previous to applying the penalty, as it is provided by art. 5 paragraph (1) in reference to art. 5 from Competition Law no. 21/1996 republished. Also, according to the same law, there will be applied penalties with civil fines also for the facts of encumbering the Competition Council in performing the

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responsibilities in fighting against the cartels, as it is provided by art. 50 letter a-e of the above mentioned Law, according to which there can be civilly penalised with fine from 0,1% to 1% from the total turnover from the financial year previous to penalising those enterprises or associations of enterprises that recourse to the actions presented in the same text of the law and which are meant to make difficult the Competition Council's activity of tracking down the cartels.

As I mentioned before, the cartels are hard to find and to prove. An agreement between two or more enterprises, in order to be considered anti-competitive and illicit, must have the following comprising elements: **a.** to exist an agreement between two or more enterprises through their common will; **b.** the agreement to have as object or effect the limitation of competition; **c.** the agreement to have the capacity to influence the trade between states or to limit the competition on a national market or on a substantial part of it.

It is considered that there are some agreements between enterprises that do not have as effect limiting the competition in a significant way, although they negatively affect the trade between the member states of the Union, as it is deduced from the provisions of art. 101 paragraph 1 of The Treaty on the Functioning of the European Union. It is about those agreements where the cumulated market quota held by the enterprises involved is no more than 10% on any relevant market affected by their agreement, where they are competitors, as well as about the agreements where the market quota held by every participant enterprise does not exceed 15% on any relevant market influenced by the agreement, when this agreements takes places between non-competitors. When it is hard to establish the quality of being a competitor or a non-competitor, it is taken into consideration the limit of 10%.

There are also agreements that restrict the competition but, at the same time, produce favourable effects through diminishing the production cost for goods, through increasing the quality or producing a new product.

An assent or an agreement whose anti-competitive consequences are smaller as compared to the beneficial effects brought to the competition is considered as being favourable to it and not penalised, as it has as effect attracting the consumers through launching products on the market which are better than the ones of the competitors, aspects that practically constitute the basis of the competition on the market. This fact is evidenced at communitarian level through the provisions of art.101 paragraph 1 and 3 of The Treaty on the Functioning of the European Union and at national

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level, through the provision of art. 5, paragraph 1 and 2 of Competition Law no. 21/1996, republished.

Due to this, it was provided granting exceptions in such cases, if there are fulfilled certain conditions expressly provided by the legislation in the domain.

Discovering and punishing the cartels is on first place as compared to applying civil penalties to the participants to them, which give the possibility to identify and punish these anti-competitive practices by cooperating with the national authority in the domain. Accordingly, at the level of our country, the Competition Council practices a clemency policy, meaning that it applies a favourable treatment to those enterprises involved in a cartel, which supports the competition authority in identifying those anti-competitive practices. Since 2009, the clemency policy has been applied in our country also in the case of those very serious agreements that take place on the vertical, of the type that deal with fixing the prices up or splitting the markets that leads to absolute territorial control.

Through this clemency policy, the Competition Council pursues to encourage those enterprises that concluded agreements forbidden by law to cooperate with the competition authority. By applying this policy, it follows taking one of the next two measures: 1) immunity from fines, and 2) reduction of the value of the fine.

1) The immunity from fines constitutes exemption from applying the fine for the economic agent's breach of the provisions of art. 5 paragraph 1 of Law no. 21/1996 republished and of art. 81 paragraph (1) of The Treaty on the Functioning of the European Union, in the following cases: a) the economic agent is the first that presents to the Competition Council evidences which this authority considers that they allow starting the procedure of investigation and performance of unplanned inspections; b) at the date of supplying the evidences to the Competition Council, did not have sufficient elements for starting the investigation procedure or for performing the unplanned inspections; c) there are fulfilled those general conditions in order to be granted clemency, expressly provided by the Order no. 300/2009 regarding applying the clemency policy, in chapter IV, point 20.

2.) Of reduction of the value of the fine will benefit from those economic operators which will reveal the participation to an agreement that affects the territory of Romania, but which do not fulfil the conditions for obtaining immunity from the fine.

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This clemency policy is in conformity with the clemency program adopted at E.U. level where the European Commission, the competent authority in competition domain is the one that puts to practice this program. Accordingly, for example, in 2011, the European Commission penalised Procter & Gamble, Unilever and Henkel companies for setting up a cartel on the detergents market, with a total fine of 315.2 million euro. Henkel received full immunity from the fine within the clemency program of the Commission, being the first that gave information about the cartel. P&G was forced to pay 211,2 million euro, the American group benefiting through the clemency policy from a reduction of 50%, and the English-Dutch group Unilever was penalised with a fine amounting to 104 million euro, benefiting from a reduction of 25%. The Commission found guilty these companies due to the fact that they fixed up the prices at detergents in 2002 when they started a program of improving the quality of detergents with the scope of environment protection. The activities of fixing up prices were performed in Belgium, Germany, Greece, Italy, Portugal, Spain and Netherlands.

Also, the European Commission penalised also with a fine of 649 million euro in 2010, six companies which produced LCD screens for setting up a cartel, finding them guilty due to the fact that for a period of four years, since October 2001 and up to February 2006, they had reached an agreement regarding the sale price, they had exchanged information regarding the production plan, regarding using the capacities and other commercial aspects, within some multiannual and bilateral meetings. The Commission considered that this agreement has directly influenced the consumers, due to the fact that most of the television sets, desktops and notebooks sold in the European space have included LCD screens coming from Asia. It is about the companies: Samsung Electronics and LG Display from Korea and AU Optronics, Chimei InnoLux Corporation, Chunghwa Picture Tubes and Hann Star Display Corporation companies, all from Taiwan. Out of them, Samsung Electronics benefited from immunity from fine because it was the first which supplied information about the cartel to the Commission, LG Display benefited from fine reduction of 50%, AU Optronics benefited from fine reduction of 20%, Chunghwa Picture Tubes benefited from fine reduction of 5%, while the other two did not benefit from any reduction of the fine.

In our country, the Competition Council applied the first immunity from fine within the clemency program from 2011 to Radio Taxi company, following to the investigations performed on the market of services for

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persons transport in taxi regime in Timişoara municipality. The Competition Council identified the fact that, 11 companies with activity of dispatch and operators exclusively for taxi had an agreement regarding increasing the tariffs for the services of persons transport in taxi regime, starting with December 2007. The total fine amounted to 348.710 lei, and Radio Taxi, since it was the first company that applied for clemency policy, denouncing the anti-competitive practices to the Council, has benefited from total immunity to the fine. Power Up, being the second company that gave information about the cartel, has benefited from a reduction of the fine applied of 50%, within the same clemency policy.

CONCLUSIONS

In conclusion, these anti-competitive agreements named „cartels" bring important prejudices to the economy. This is due to the fact that, in a market economy based on competition, the enterprises that are included in the cartels are no longer subjected to the same constraints determined by the commercial confrontation, this way not being constrained to launch onto the market new products or to present to consumers an offer of better quality and at competitive prices. Due to this reason, the consumers are affected, being forced to pay a higher price for an inferior quality.

At European Union level, the cartels are illegal, not being in conformity with the EU law. That is why the European Commission applies fines to those enterprises that are part of very large cartels.

Having an illegal character, usually these agreements are generally confidential, and proving their existence is not easy, as there is no written proof for these agreements. This is the reason why the Commission puts into application a "clemency policy", in the desire to encourage those enterprises involved to come with proofs in this respect. The EU member states revert to the same clemency policy also and implicitly, our country, bringing the national legislations in agreement with the European one. The proof is the activity of the Competition Council, the authority in the domain in our country, activity that highlights putting to practice a clemency program as against the ones that expose the existence of such anti-competitive agreements. At the same time, the law punishes these agreements from civil and penal point of view, the Competition Council being able to apply, following to the investigations performed, not only civil penalties consisting in fines which represent a certain percentage out of the total turnover performed by the enterprises involved, but also it can initiate the criminal proceedings and punish by penal sanction of imprisonment

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from 6 months to 4 years or by penal fine to the physical persons that participate with fraudulent intent and in an important measure to the conception, organization or creation of a cartel.

By proceeding this way, Romania puts to practice the European competitive policy which is based on the European legislative framework represented mainly by The Treaty of constituting the European Communities, to which there are brought additions through supplementary provisions represented by a decision of the Council of Europe that is named "mergers' regulation" and we have in view the EU Council's Regulation no. 4064/1989, amended by Regulation 1310/1997. Having as basis this legal text, the European competitive policies are centred on four main sectors of action, respectively:

1. Removing the agreements that limit the competition (as well as dominant power abuses);
2. Monitoring companies' merger;
3. Extending the economic sectors in monopole form;
4. Controlling the subventions granted by the state.

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