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EXEMPTIONS FROM EUROPEAN POLICY COMPETITION RULES FOR RESEARCH AND DEVELOPMENT-INNOVATION

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Abstract

Handling the legal basis of European Union policy of research, development, innovation must be seen in the context of the European Union's strong awareness of the gap with the U.S. and Japan. Principled basis to ensure compliance with this policy is "unity in diversity" of the European Union. It is well known that the most substantial provisions on competition can be found in Title VI of the Treaty of Maastricht. The provisions outlined above emphasizes the link between competition policy and common EU policy in the joint research, development, innovation, and the importance of the latter in the context of the exceptions specifically designed for this. Cooperation and agreements on research, development, innovation is the exception to the prohibitions imposed by common EU competition policy.

Keywords:

competition, cooperation agreements, exceptions, research, development, innovation

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1. Motivation

Research, development, innovation has a great importance, motivated by the fact that a number of ambitious research projects are beyond the limited possibilities of a nation-state and requiere inter-state cooperation. Thus it is explained the idea of a common policy at European level.

Common European policy on research, development, innovation is not based on purely technical or economic reasons, but are required negotiations at institutional and political level. Massive funding of this common framework by the seven programs of structural changes explaines the structural changes occurring in the most sensitive sector - agriculture, but also the beginning of the new movement for integration. It marks the transition from traditional industries - in the coal, steel, agriculture industries – at new industries from the contemporary period: information technology, telecomunication and biotechnology.

To highlight the interdependence of the common European policy in research, development, innovation and competition, we resort to a series of conceptual clarification.

Thus, about the competitiveness, it is employability chances of success in competition. We understand competitiveness in terms of price and quality aims, getting the best quality product at a very low price. So the important role of innovation and research derives from the fact that, in fact, the cost of production is the cost pendent from the cost of technologies used in the mechanism of production. Consequently, research, development, innovation is a key determinant of competitiveness, of understanding it in sense of employment capacity with real chances of success in competition - but there are a number of factors which explaine its specificity: to obtain relevant results in research, development, innovation involves, most of the time, new efforts, individual efforts supplemented by the team's efforts, which makes appear necessary cooperation between researchers and institutions.

Cooperation takes the form of agreements and arrangements, in fact the legal provisions of the competition. Competition policy - which has the motto to ensure free competition - aims to limit any agreements or arrangements which enter into contradiction with the principle of free competition. Exemptions provided for research, development and innovation sector is explained by the beneficial effects that might induce into the whole economy and society. For this reason the research, development, innovation is encouraged, falling within the exemption specifically designed for this area of competition policy.

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2. Legislation

In this field, also, the principle in force is "unity in diversity". The analysis of art. 130F of the Treaty of Maastricht is particularly important because *"The Community shall have the objective of strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level, while promoting all the research activities deemed necessary by virtue of other Chapters of this Treaty.. For this purpose the Community shall, throughout the Community, encourage undertakings, including small and medium-sized undertakings, research centres and universities in their research and technological development activities of high quality".* The European Community has the obligation to implement programs of research, technological development and demonstration activities at enterprise level (preference is for small and medium enterprises), research centers and universities, to promote cooperation in research and technological development community with other states and nations, and international organizations to disseminate and exploit results of research and community development and to stimulate research training and mobility community.

Handling the legal basis of EU policy research, development, innovation must be seen in the context of the European Union's strong awareness of the gap with the U.S. and Japan.

From a legal perspective, in terms of competition at Community level, the Treaty of Rome established *ab initio* guiding principles of competition policy: the abolition of import duties and export of products, a ban on discriminatory measures and practices among producers, buyers and consumers, a ban on aid , taxes and subsidies granted by any state, a ban on restrictive practices and market sharing. They come to emphasize the purpose of establishing the European Community, as defined in art. 2, namely to promote the community at a highly competitive and support the guiding principle of an open market economy, where competition is free, as is stated in art. 4 of the Treaty of Rome.

Being well known that the most substantial provisions on competition can be found in Title VI of the Treaty, entitled "Common rules on competition, taxation and approximation of laws", we mention the articles most important from the perspective of this study: art. 81, art. 82 and art. 87. Summary, we remember that:

- art 101 (ex-article 81) of the Treaty establishing the European Community refers to the prohibition of agreements between undertakings which may affect trade between Member States through the prevention, restriction or distortion of competition within the common market. Assuming the perfection of such agreements, the penalty applicable is the automatically void of any agreements or decisions which are prohibited;

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- article 102 (ex-article 82) of the Treaty establishing the European Community introduces a prohibition of abuse of dominant position by one or more companies;
- art. 107 (ex-article 87) of the Treaty establishing the European Community declares incompatible state aid that distorts or is likely to distort competition, insofar as it affects trade between Member States.

The provisions outlined above underlines the link between European competition policy and the European policy in the research, development, innovation, and the importance of the latter in the context of the exemptions specifically designed for this policy.

3. The interrelation between research, development, innovation and competition policy

Observing the article101, we see that, *per a contrario*, the decisions and agreements that contribute to technological progress are not affected by absolute nullity.

So the Treaty establishes an exception to the rule established by article 101 alin. 1.

Article 102 of the Treaty establishing the incompatibility with the common market and prohibiting any abuse by one or more companies, provides an example of abuse – "limiting development to the prejudice of consumers."

So it is understandable the regulation and creating of joint enterprises, projects and programs of cooperation in research and technological development through the Framework Programmes.

As a general rule, agreements between firms should be notified to the Commission; the agreements in research, development, innovation between companies are exempt from notification.

Any notification made in this respect is intended only for the purposes of safety as to whether the exemption established by the Treaty refers to them or areexempt.

In terms of policy of research, development, innovation and the policy of state aid, we mention that article 107 of the Treaty stipulates that public subsidies for research and industrial development have been an integral part of science and technology policies of the Member States. Economic and social benefits from research, development and innovation legitimate state aid schemes in this sector. An important role has "Community Framework for State aid for research and development"[3], adopted by the European Commission to

[3] *Community framework for state aid for research and development,* available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996Y0217(01):EN:HTML (accesed on 30 november 2010)

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make known its policy of granting state aid[4]. The favorable attitude of the European Commission regarding state aid granted in this area (expressed in its jurisprudence) is explained by: the objective of granting state aid, the major risks involved in this activity with reduced risk of distorting the competition and trade. The distinction drawn between basic research, industrial research, prototypes, pre-competitive development, ensure understanding distinction in terms of state aid which is legal for industrial prototypes and pilot projects.

In the relationship between research, development, innovation and European competition policy, focusing on state aid, we note that they may be granted by the European Commission, on the basis of its decisions.The exempted state aid must meet the cumulative conditions: transparency, accurate quantification, the beneficiaries should be known, as well as implementing processes and intended purpose. State aid allowed as exemptions in the research sector takes the form of sector aid. They are regarding companies, sectors and economic areas, interest is assessed only in the context and interest of Community. It is well known that, in fact, the European Commission grants exemptions for modernization or restructuring programs for research and technology.

4. The cooperation and the agreements on research, development, innovation - exceptions to the prohibitions imposed by common EU competition policy

Seen as a process or as a matter of fact, competition leads to different conclusions, at least in the United States of America, where the existence of a state monopoly explaines the effect of stimulating economic development. As an example we consider the case of Microsoft's monopoly on the U.S. software market. In the EU, this issue is viewed differently. Thus, the issue of research and technological development is the "heart "of cooperation between Member States of the European Union, its role is the improving the competitiveness of EU industry[5].

In fact, the cooperation in research, development, innovation often takes the form of joint projects.Thus, the question: joint projects in research, development, innovation are, in fact, a violation of the rules on free competition? The question is whether the creation of a consortium in this field does not contradict the principle of free market competition; but the optimal solutions are found precisely where there is a plurality of entities.

[4] Cotuţiu A., Sabău G.V., *Drept român şi comunitar al concurenţei,* Ed. C.H. Beck, Bucureşti, 2008, p. 234.

[5] Yannis Caloghirou, Stavros Ioannides, *op.cit.,* Ed. Edward Edgar Publishing Limited, UK, 2003, p. 155.

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Joint undertakings established in this sector fall under the exemptions set by European regulations. To be incidental to the foregoing statutory provisions is imperative the fulfillment of two conditions: the research to be well defined and all parties have access to the results obtaineditura So the results of joint research projects should be exploited independently.

Joint undertakings involving, as apparent from their name, two or more participants from at least two Member States, known as partners or contractors. Typically, one of them is responsible for the management, but all partners are responsible for performing the activities. Participants in these joint ventures may be, based on the non-discrimination principle, companies, universities and independent research centers, consultants or any other legal entity, including subsidiaries of companies outside the European Union. Joint projects are financed by the European Commission, so each partner will contract with the European Commission. For example, we consider the situation created by the Sixth Framework Programme, which required that partners to be part of a consortium.

Joint projects or agreements concluded between the various partners aim, at first sight, only to obtain competitive advantages. In addition, the benefits of partners may include the advantages from the exploitation of others intellectual property rights of contractors involved, ranging from commercial development of new products by new methods of design or production processes, software, hardware or data collection.

The specialized literature[6] has questioned whether firms or joint research projects and technological progress diminishes the number of projects in research, innovation, by reducing the number, diversity and new solutions to problems that arise market, as a consequence *sine qua non*. We think that these projects are designed to reduce duplication in research and the efforts of researchers to be better channeled towards achieving efficiency in research.

Competition must be seen in its broadest sense. It is the opinion of the Nobel laureate for economics, Friedrich Hayek. Illustrative is the following passage from "The constitution of liberty", which we fully repeat: competition is a "competition between organized groups and unorganized groups, but also a competition between individuals. To consider it the opposite of cooperation or organization would demonstrate ignorance of the pure nature of competition. Striving to achieve certain results through cooperation and organization is a component of the competition, as well as the individual effort. Group relations are proving their effectiveness in competition between organized groups in different ways. The relevant difference is not between individual and group action, but that between the conditions under which alternative strategies can be tested, based on different concepts and practices - on the one hand - and the

[6] Kerber W., *Competition, innovation and maintaining diversity through competition law,* 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1543725 (accesed on 01.12.2010).

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conditions under which an agent has the exclusive right and power to prevent others to try - on the other hand. Only when such exclusive rights conferred upon the assumption that some individuals or some groups possess a superior knowledge, the process ceased to be an experimental one, and beliefs, that happens to dominate at some point, become an obstacle to knowledge."[7]

The cooperation in research, innovation is not in a conflictual relationship with the competition; these two fields come to get the complete sense of excellence in research, innovation.

Agreements on licensing and know-how shall also be subject to the same exemptions. Thus, agreements covering license agreements are possible if there is a possibility of restricting the transfer of the license in some parts of the EU, a restriction on the operation of a license in territories reserved for other licensees, a licensee operating restrictions as the license agreement ceases to have effect, but is still protected by patent law and the licensee must use a distinctive mark or other product that is manufactured under license agreement[8].

It is important the link between competition law applied by companies and incentives for research and development sector. Usual, competition policy is seen as an instrument to increase incentives mentioned above. Basically, though at first sight, the competition law and intellectual property rights (strictly related to the research, development and innovation) should lead to increased incentives in the sector, they are often in a conflictual relationship[9]. Graevenitz explains the phenomenon by dynamic relationship between European competition policy - directed to a "static efficiency" in the products sold in the market, and incentives for innovation, which, for products sold in the market, are characterized by a static effect, but this time characterized by inefficiency.

Competition policy is central to antitrust policy. The relationship between these two types of European policy must be highlighten again, because the core element of antitrust policy is the intellectual property rights. For example if we refer to Radio Telefis Eirean (RTE) and Independent Televisions Publications vs. European Commission, known as Magill Case, settled by the European Court of Justice in 1995. The object of this case was the refusal of a copyright holder to license a potential competitor on a secondary market, interpreted as an abuse of dominant position: the refusal of many television broadcasters to provide their programs to an independent publisher, whose aiming was to publish a guide containing all the tv programs. In the early 90s, was available for Irish network television program: Radio Telefis Eirean (RTE), British Broadcasting Corporation (BBC), Independent Television (ITV) and

[7] Hayek F., *Constituția libertății,* Ed. Institutul European, 1998, p. 60

[8] *European Colaboration in research and development Business Strategy and Public Policy,* edited by Yannis Caloghirou, Stavros Ioannides, Ed. Edward Edgar Publishing Limited, UK, 2003, p.159.

[9] Graevenitz G., *Integrating competition policy and innovation policy: The case of R&D cooperation,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=686343 (accesed on 01.12.2010).

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Channel 4, the latter two forming the Independent Broadcasting Authority. Each of them publish their own tv guide, but not a global one, comprehensive of all those TV programs. Consider this opportunity, Magill proposed himself to publish a comprehensive TV guide. At this time, RTE, BBC and Independent Broadcasting Authority sued Magill for copyright infringement. Local courts have prohibited publication of such TV guide. Magill addressed a complaint to the European Commission, which found the abuse of a dominant position for the tv service providers to refuse Magill's licensing. European Comission ordered that all tv service providers must license Magill at a reasonable tariff. Commission's decision was maintained by the Court of First Instance and the Court of Justice. In this particular case it is interesting the width of protection for intellectual property rights, which is giving the legal possibility for an abuse of the holder of such rights.

How to develop the link between innovation and research, on the one hand, and competition policy, on the other hand, in the manner shown above for Magill Case, must be framed in a spirit existing in the wider European Union, as opposed to the one existing in the United States of America.

The European model for innovation and research is oriented to an economic interest group, a common one, unlike the U.S.' model, designed in an individualistic way.

We have seen how it is conceived therefore the cooperation in research, development, innovation sector within the common European competition policy. Next, we focus on how cooperation is conceived in the same sector in the United States of America.

Basics of Antitrust Policy in the United States of America consist of the Sherman Act of 1980, an act that relies almost on a century of case law on monopolies, cartels and oligopolies. Basically, competition policy in the United States of America is conceived by economists: cartels, various forms of cooperation between firms, the abuse of dominant firms and mergers. The prohibition of any agreement that would restrict trade led the distinction between forms of cooperation affecting competition and those pursuing an economic development[10]. However the decisions of the courts in the United States have not made any distinction between the two forms of cooperation, prohibiting and sanctioning any form which affect free trade agreement. A milestone in this regard shall be recorded in 1995, by regulation guidelines for licensing intellectual property rights. The difficulty consists in assessing the the distinction between pro-competitive effects or anti-competitive effects.

[10] Kowacic W., Shapiro C., *Antitrust policy: a century of economic and legal thinking,* 1999, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=506284 (accesed on 04.12.2010).

5. The case of Romania

Romania is actively involved in an interdependent relationship between a common European policy on research, development, innovation and european competition policy. The internal regulations highlight this aspect.

The competition law no. 21/1996, and the establishment of the Competition Council, the autonomous authority, of an administratively nature, are good examples in this regard. Among its duties, it shall investigate possible anticompetitive practices, merger and illegal decisions granting individual exemption of economic evidence.

Also important is the role of the Competition Council in Romania's relations with international organizations and institutions in the field of competition and EU authorities with responsibilities in this area, such as the Competition Council of the European Union Council.

The egal basis for cooperation between European Commission and competition authorities of Member States, including Romania, is the EC Council Regulation no. 1 / 2003, and two Communications Commission (2004 / C 101/03 and 2004 / C 101/04) on its cooperation with national courts of Member States to implement legal rules laid down by treaties in terms of competition, but also the cooperation between national competition authorities.

Between the four aid schemes adopted by the Romanian Government, with relevance to the subject matter, is very important the second scheme, for regional development by encouraging direct investment, 2007-2011. This refers to companies which create new units, expanding existing facilities, diversifing the result of a unit by adding additional new products or by a fundamental change in the production process, so that it is contributing to economic growth through an innovative effort.

6. Conclusions

European policy on research, development, innovation goes beyond the boundaries of the European Union. Cooperation is the core around which is concentrated common European innovation and research policy.

Seen as a group relationship, enlarged cooperation is not in a conflictual relationship with the rules of free market's competition in the European Union. Cooperation in research, development, innovation is based on the idea of individual freedom and individual innovation effort.

Cooperation means avoiding duplication of research work, admited by the exemptions allowed by European competition policy, motivated by the surplus of created value by research, by the global earning of the nation as a whole. Joint undertakings and collective projects financed over time through the Seventh Framework Programmes have particular importance in this regard.

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The way we see the european policy in research, development and innovation, by comparison with the United States of America, shows two distinct models: the European model of innovation and research - oriented through the economic interest group, a common one, and U.S.A. model - conceived in an individualistic way.

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