

CONTRAVENTION AND CRIMINAL LIABILITY FOR PRACTICE OF UNFAIR COMPETITION

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Summary:

The commercial activity primarily presumes the compliance with the legal provisions relating to the acts and deeds of commerce. The commercial activity is, from a legal perspective, a correct exercise of the ownership and free initiative by the legal person in the commercial activities, the business conduct being necessary to circumscribe the legal rules that govern the commercial market.

This article has as starting point on the one hand the need for legal provisions ensuring a real protection to the Romanian consumers exposed to unfair trade practices, and on the other hand of some comprehensive legal stipulations on tradesmen's contravention and criminal liability that show an unfair competitive conduct. The general regulatory framework regarding the unfair competition consists of the Law no. 11/1991 on combating the unfair competition, the legal stipulations which relate to the European provisions on the matter, namely the Directive 2005/29/EC of the European Parliament and of the Council from May 11th 2005 concerning unfair commercial practices of enterprises in the internal market to consumers and amending the Directive 84/450/EEC of the Council, of the Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) no. 2006/2004 of the European Parliament and of the Council. The European legislation includes the stipulations regarding the unfair commercial practices prohibited in the E.U. space, as well as the stipulations relating to the economic interests of consumers who enter into transactions with tradesmen. In this respect, the European regulations deem unfair trade practices those acts or actions that violate the principles of professional diligence and which may influence the commercial decisions of consumers, being categorized as misleading practices and aggressive commercial practices. In accordance with the provisions of the Law no. 11/1991 on combating the unfair competition, with the ulterior amendments and supplements, unfair competition represents the commercial practices of the enterprise that contravenes the fair usages and the general principle of good faith and which cause or may cause damage to any market participants. According to art. 301 of the old Criminal Code, the unfair competition consists in the manufacture or circulation of goods bearing a false designation of origin or false indications of origin and application on the products put in circulation of false mentions regarding the patents or the use of certain commercial names or of the denominations of industrial or trade organizations, in order to mislead the beneficiaries.

In the new context of the European trading market where our country is a party and which involves certain rigors of expression and the development of online commercial transactions, the specific legislation requires an adaptation to the new conditions and a serious and sustained involvement of the competent bodies in combating and punishing the unfair competition practices.

Key words: commerce, unfair competition, contravention liability, criminal liability.

JEL Classification: K14, K21

I. Introduction

In a market economy competition is the essential element of economic adjustment, the determining factor of the equilibrium between supply and demand, the vector of influence in establishing the prices, the way to efficiently place the strategic management and marketing policies of the economic agents and, not least, is index of sustainable economic development.

In the legal sense, the rivalry means the competition between the economic agents performing economic labor conscriptions with the same activity, exercised in the fields regulated for the free, unrestricted market, in order to economically optimize the company, applying certain loyalty and increase policies to the existing customer.

Specialized legal literature distinguishes between two forms of competition: *pure* and *perfect*. The pure competition is characterized by elements such as the predominance of small and medium-sized agents, the homogeneity of products and services, given by the similar qualitative aspect and the diversity of choices offered by the market. Another form of competition specific to the pioneering period of capitalism was the perfect competition, on which the state did not intervene with limitation or adjustment stipulations. The state resumes insuring the legal frame to develop the commercial activity, without putting pressure and exercise an authority control on the market and commercial competition.

A real commercial competition is characterized by many defining characteristics, namely: the openness character of the market, freedom of offer, of management and marketing policy of the economic agents, and consumers' freedom to make choices in relation to their own beliefs. The free economic market and the loyal competition are positioned opposite of monopoly policies that are considered illegal and against which legal protection measures must be generated. Therefore, preventing and combating an abnormal and illicit competitive environment, i.e.

certain facts that lead to the restriction, prevention or distortion of the competition, was regulated by the entry into force of the Law no. 11/1991 on combating the unfair competition.

Certain opinions outlined in the legal doctrine according to which there are two types of rivalry infringing the legal stipulations: prohibited competition, defined as that rivalry conducted by an act or fact unsubstantiated on a right provided by law and unfair competition, which involves the abusive and harmful exercise of a legally established right.

According to the stipulations of the Law no. 11/1991 on combating the unfair competition, with the subsequent amendments and supplementations, the unfair competition represents the commercial practices of the enterprise contravening the fair usages and the general principle of good faith and which cause or may cause damage to any market participants. In other words, by unfair competition means any act or deed contrary to the fair usages in the industrial and marketing activity of products, execution of the works and performance of the provision of services.

Regarding the evolution of the legal regulations in the field of unfair competition, it should be underlined that an incident and indirect stipulation applicable in the field was represented by the institution of torts, established by art. 998 of the previous Civil Code. Subsequently, a series of specific regulatory acts was adopted, such as: the Law on itinerant trade of 1884, the unfair competition law of 1932 and the Decree to regulate and control the cartels of 1937, supplemented by the Law of 1939. After the settlement on a natural legal basis and oriented towards the economic development, an involution took place in the communist period, meaning that the property belonged to the majority of state and the economy based on state monopoly, without existing a free trade market. The rivalry in the economic field has recovered the legal acknowledgement after 1989, by the adoption of the Constitution of 1991, revised in the year 2003, that "*... the Romanian economy is a market economy, and the state must ensure the freedom of commerce, the protection of fair rivalry ...*"

On the grounds of the constitutional provisions, a series of regulatory documents was adopted which outlined a comprehensive approach of the competitive economic regime, harmonized with the principles of trade established in the European Union and related to the international commercial usages.

The Law no. 11/1991 constitutes the legal regulatory document framework, where the legal reports are circumscribed regarding the fair competition and the contravention or criminal liability in the event of noncompliance. This regulatory document was successively amended by the Law no. 21/1996, the Law nr. 298/2001 regarding the amendment and supplement of the Law no. 11/1991, the Law no. 187/2012 implementing the Law no. 286/2009 regarding the Criminal Code, the Law no. 255/2013 for the implementation of Law no. 135/2010 concerning the Code of Criminal Procedure and for the amendment and supplement of certain regulatory acts which contain the stipulations of the criminal procedure. The last amendment and supplement of the Law no. 11/1991 on combating the unfair competition was conducted by the Government Ordinance no. 12/2014, which reestablishes the semantic and structural legal standards prescribed by law and clarifies the meanings of certain terms or phrases.

The changes and supplements brought to the Law no. 11/1991 by G.O. no. 12/2014 primarily aims to the regulatory act, in the sense that this consists in ensuring a fair rivalry, involving the compliance with the fair usages and general principle of good faith, in the interests of those involved, including compliance with the interests of consumers.

Regarding the principle of good faith, there should be noted that this concept is very complex as it has its origin in some psychological facts, circumscribes within the moral rules and acts in the social relations, constituting the legal relations that produce effects. [D. Gherasim, 1981]. Similarly, to show that this concept is extremely unclear and yet comprehensive because it includes both the honesty, loyalty, probity and prudence, the French professor Louis Josserand noticed in 1928 that "*the justificatory motives of the regulatory documents resumes to this general notion of good faith where they melt until losing the individuality*". The first definition of the term of good faith was performed by Cicero himself, who said that this is "*honesty in words and fidelity to commitments*", so we can consider that the psychological features of good faith generate two psychological conditions of agreement between mental resolution and expressing thoughts, on the one hand, and between words and performed acts or deeds.

Regarding the concept of fair usages, the Law no. 11/1991, with the subsequent amendments and supplements, stated that these are a set of generally recognized practices or rules that apply to the commercial relations between enterprises in order to prevent the violation of their legitimate rights. For an increased rigor, the legislator clarified many concepts such as: *loyal rivalry*, which is the situation of market rivalry, where each firm tries to simultaneously get sales, profits and/or market share, by offering the best practice combination of prices, quality and related services, in compliance with the fair usages and the general principle of good faith; *the commercial practices*, which consist in any behavior, namely action, omission, approach or commercial communication including advertising and marketing, performed by a company, directly connected with the promotion, sale or supply of a product; *commercial secret* - any information that, in whole or in part, is not generally known or is not easily accessible to the persons within the environment which normally deals with this kind of information and which acquires a commercial value by the fact that it is secret, for which the legitimate holder took reasonable measures taking into account the circumstances, to be kept under secrecy; *legitimate holder of a commercial secret* - any natural or legal person holding the legal control on a commercial secret.

2. Contravention liability for unfair competition

Committing certain activities that are considered unfair competition practices involves the contravention liability if such action does not meet the conditions required by the law to be an offense. Thus, according to art. 2 par. 2 of the Law no. 11/1991 concerning the unfair competition, amended and supplemented by G.O. no. 12/2014, the unfair competition practices are prohibited as follows:

- the denigration of a competitor or of his products/services, performed by the communication or spreading by a company or its representative/employee of untrue information about the activity of a competitor or about his products, which would harm his interests (art. 2, par. (2), letter a);
- the misappropriation of the customers of a company by a former or current employee/ its representative or by any other person through the use of certain commercial secrets, for which that company has taken reasonable measures to ensure their protection and whose disclosure may harm the interests of that company (art. 2, par. (2), letter b);
- any other commercial practices which contravene the fair usages and the general principle of good faith and that produce or cause damage to any participants in the market (art. 2, par. (2), letter c).

According to art. 4 par. (1) of the Law no. 11/1991 on unfair competition, with the subsequent amendments and supplements, constitute contraventions, to the extent that they are not committed in such conditions as to be considered offenses according to the criminal law, culpable infringement of the provisions of art. 2 par. (2) letter a) and b), previously presented. The sanctions applied for the contraventions provided in article 4 par. (1) are:

- fine from 5000 lei to 50000 lei for the contraventions committed by legal persons;
- fine from 1000 lei to 5000 lei for the contraventions committed by natural persons.

The judicial precedents established that persons holding capacity of traders are obliged to discharge his duties in good faith, according to fair practices with the interests of consumers and the requirements of fair competition. In this context, unfair competition is defined as any act or deed contrary to fair practices in industry and commercialization of products, execution of works and the making of the services. In this regard, the courts have held that not only the use of unfair trade secrets of a trader is an act of unfair competition, which is one of the facts contrary to fair practices, but any other acts or acts contrary to fair practices in business trade are compatible with unfair competition. It is considered an act of unfair competition by a former employee use - the marketing of products - the name of a registered mark OSIM by the trader who has worked it knowing that the proprietor manufactures and markets a long time produced under that name (the High Court of Cassation and Justice - Civil Section, Decision no. 240/2012).

In accordance with the provisions of art. 4 par. (3) it constitutes contravention, unless they meet the constitutive elements of a offense, the following acts committed with guilt by natural or legal persons, in case of performance of research of the unfair competition practices:

- provision of inaccurate, incomplete or misleading information or incomplete documents or failure to provide information and documents required under art. 3 ind.4 by the competition inspectors;
- unjustified refusal of companies to submit to an inspection conducted under the provisions of art. 3 ind.4;
- failure to comply with the measures imposed by the Competition Council under the provisions of art. 3 index 1 par. (2) letter a) and b).

The contraventions provided by art. 4 par. (3) are sanctioned with fine, as follows:

- fine from 1000 lei to 10000 lei for the legal persons - companies, authorities and public institutions;
- fine from 500 lei to 2000 lei for the natural persons.

Finding and contravention sanctioning of natural or legal persons for unfair competition practices is achieved by the Competition Council, which may be informed by any injured person, by the chamber of commerce and industry or it may act ex officio, according to the Law of competition no.21/1996, republished.

Competition Council realizes the finding of competitive situations at the request of any interested person or harmed by unfair practices or is detected automatically and sanctioning is decided by a decision issued in accordance with the laws laid down by the following acts or administrative acts normative: competition Law no.21 / 1996, republished, as amended by Ordinance no.75 / 2010, Regulation of 26 March 2004 on the organization, functioning and procedure of the Competition Council, as amended and supplemented, Regulation of 15 October 2010 recording the offenses and penalties by the Competition Council, Guidelines of 2 September 2010 on the individualisation of penalties for the offenses referred to in art. 51 of the Competition Law no. 21/1996. In exemplification of such administrative procedures for ascertaining and sanctioning of offenses relating to unfair competition practices mentioned Decision no. 52 of the. 16.12.2010 by the Romanian Post National Company was fined £ 103,373,320 and was ordered cease anticompetitive practices identified and refrain from any further acts and deeds of discriminatory treatment identical or similar to those, which would cause a competitive disadvantage some of its trading partners. In this case, the Romanian Post SA a dominant position on the market for direct mail sending, which directly led to the increase of tariffs and the imposition of new discounts schemes.

The individualization of the sanction for committing one of the mentioned contraventions is made taking into account the seriousness of the deed, its effects, and the sanctions received in the past 2 years by the concerned natural or legal person. Notwithstanding the provisions of art. 13 of the Government Ordinance no. 2/2001 regarding the legal regime of contraventions, approved with amendments and completions by the Law no. 180/2002, with the subsequent amendments and supplements, the application of the contravention sanctions stipulated in art. 4 par. (1) shall be prescribed within 3 years from the date of committing the contraventions.

The contravention liability of the person for unfair competition practices does not exclude the activation of a civil liability for damage caused to competitors in the market. However, it should be noted that in the case of intimation of the Competition Council for unfair competition practices, this body may find the existence of a deed which involves the contravention liability and disposes immediate compliance measures of commercial conduct to the offender.

3. Criminal liability for unfair competition practices

The text of art. 5 of the Law no. 11/1991, with the amendments and supplements brought by GO no. 12/2014, contains the stipulations regarding the offense of unfair competition under art. 5, which alternately consists of:

- a) the use a sign, logo or package likely to cause confusion with those legitimately used by another tradesman;
- b) the commercial use of the results of experiments or of other confidential information related to them, sent to the competent authorities to obtain marketing authorizations for pharmaceutical products or agricultural chemical products containing new chemical compounds;
- c) the disclosure, acquisition or use of the commercial secrets by third parties, as a result of an industrial or commercial espionage action, if the interests or the activity of a legal person are affected by this;
- d) the disclosure or use of the commercial secrets by persons authorized by the legitimate holders of these secrets to represent them in front of the public authorities or public institutions, if the interests or the activity of a legal person are affected by this;
- e) the use by a person of those referred to in art. 175 par. (1) of the Criminal Code of commercial secrets that was informed in the line of duty, if the interests or the activity of a legal person are affected by this;
- f) the manufacture in any way, import, export, storage, offering for sale or sale of goods or services bearing false mentions on patents, patents for varieties of plants, trademarks, geographical indications, industrial designs or models, topographies of semiconductor products, other types of intellectual property, such as the exterior appearance of the company, the design of shop windows or the clothing of the personnel, the means of advertising and others alike, the origin and characteristics of the goods, and also in regard with the name of the manufacturer or tradesman in order to mislead the other tradesmen and consumers.

The legal object of the crime of unfair competition consists in the social relations regarding the development of the economic activity based on good faith and honesty, keeping the commercial secrecy, and the social relations aiming the protection of consumers. Regarding the material object, it can be when it consists of a product, but there are instances when the subject material is missing, as is the case of an action for disclosure or use of a commercial secret.

The active subject of the unfair competition offence is a natural or legal person who is a tradesman, a person empowered by the legitimate holders of the commercial secret to represent them in front of the public authorities or institutions or even employees of these public entities, to the extent that they disclose or use those commercial secrets.

The passive subject of the crime is any natural or legal person holding the quality of tradesman or customer of the product for which the act was committed and suffered a prejudice through the criminal activity. It can be seen that both the active subject and the passive subject are circumstantial to a certain quality required by law. The criminal participation is possible in all its forms: incitement, complicity and accomplice.

In terms of the objective side, we distinguish that the material element of the offense can be achieved in alternative variants, each involving a separate action, as follows:

- the use a sign, logo or package likely to cause confusion with those legitimately used by another tradesman; Referring to achieve material element in this way, the High Court of Cassation and Justice has ruled that the offense of unfair competition are real competition with deception on the quality of the goods if the act consists of making products that do not meet quality standards, marketing their packaging and labels using similar packaging of other companies, creating convinced buyers that the products manufactured by this company (Î.CCJ, criminal Section, Decision no. 5241/2005).
- the commercial use of the results of experiments or of other confidential information related to them, sent to the competent authorities to obtain marketing authorizations for pharmaceutical products or agricultural chemical products containing new chemical compounds;
- the disclosure, acquisition or use of the commercial secrets by third parties, as a result of an industrial or commercial espionage action, if the interests or the activity of a legal person are affected by this;
- the disclosure or use of the commercial secrets by persons authorized by the legitimate holders of these secrets to represent them in front of the public authorities or public institutions, if the interests or the activity of a legal person are affected by this;
- the use by a person of those referred to in art. 175 par. (1) of the Criminal Code of commercial secrets that was informed in the line of duty, if the interests or the activity of a legal person are affected by this;
- the manufacture in any way, import, export, storage, offering for sale or sale of goods or services bearing false mentions on patents, patents for varieties of plants, trademarks, geographical indications, industrial designs or models, topographies of semiconductor products, other types of intellectual property, such as the exterior appearance of the company, the design of shop windows or the clothing of the personnel, the means of advertising and others alike, the origin and characteristics of the goods, and also in regard with the name of the manufacturer or tradesman in order to mislead the other tradesmen and consumers.

By *false mentions regarding the origin of goods*, under par. 1 letter f), it is understood any indication likely to make one believe that the goods were manufactured in a particular locality, in a particular territory or a particular state.

It is not considered false indication regarding the origin of goods the denomination of a product whose name has become generic and indicates only its nature in commerce, unless the denomination is accompanied by a mention which would make one believe that it has that origin.

By using a sign, logo or package to mislead the consumers, it means the fraudulent use of these elements in order to replace the true seller of the original product or to cause confusion in the retail market.

The notion of *commercial secret* means any information which, in whole or in part, is not generally known or easily accessible to persons within the environment that normally deals with this kind of information and which acquires a commercial value because it is secret, for which the legitimate holder took reasonable measures taking into account the circumstances, to be kept under secrecy; the protection of the commercial secret operates as long as the previous set out conditions are cumulatively fulfilled. *The legitimate holder of a commercial secret* can be any natural or legal person holding the legal control on a commercial secret.

The immediate result of the criminal activity consists either to create a state of confusion in regard with the sign or emblem of the tradesman, on the package of the marketing product, situation that causes double prejudice, both to the competitor in the market to whom it replaces or which it copies by creating the appearance of own commercial identification elements and also to the misled consumers, or in generating a damage to the tradesman whose commercial secret has been used or disclosed. The causal link between the action of the perpetrator and the immediate consequence results from the very materiality of the deed.

In terms of subjective aspect, the unfair competition offense is committed with direct intent, namely the perpetrator foresees the result of his act and seeks its performance. The purpose aimed by the person committing the act is that to increase his own wealth through fraudulent methods by reducing the heritage of other competitors that sell products from the same category.

The sanction imposed for committing the unfair competition offense is imprisonment from 3 months to 2 years or with fine.

Regarding the material jurisdiction of the court to judge the acts of unfair competition, this belongs to the court-room, and in terms of territorial jurisdiction, we state that it is an alternative in the sense that the actions arising from an act of unfair competition are within the competence of the court from the place where the deed was committed or in whose territorial range is the headquarters of the respondent. In the absence of a headquarters of the respondent, court of the respondent's domicile is competent.

At the request of the legitimate holder of commercial secret, the court may order measures to prohibit the industrial and/or commercial exploitation of the products resulting from the unlawful appropriation of the commercial secret or the destruction of these products. Prohibition ends when the protected information became public. Criminal proceedings in cases referred to in art. 5 of the Law no. 11/1991, with subsequent amendments and supplements, shall be initiated upon prior complaint from the injured person, at the intimation of the Chamber of Commerce and Industry or of other professional organization or at the intimation of the persons authorized by the Competition Council.

4. Conclusions

It requires a thorough observation of the commercial market for detecting and sanctioning the tradesmen carrying in bad faith practices of unfair competition, in the current European conjuncture of free movement of goods and services in the territorial area of the European Union, and restricting or overcharging of goods from the extra community space, which increases the percentage of tradesmen willing to mislead consumers.

In terms of juridical aspect, it may be noted that the legislator has not kept the offense of unfair competition in the new Criminal Code, considering that its existence in a special law is sufficient, especially since the structural offense under the Law no. 11/1991 is more comprehensive and harmonized with the European legislation within the field. Likewise, it must be specified the fact that this act has a unique specificity, with a strong economic content, in tight conjunction with other regulatory acts to which, in fact, is made reference in the text of art. 4 and art. 5 of the Law no. 11/1991.

Regarding the contraventions provided for by the Law on fighting the unfair competition, it is to be specified, in the critical sense, the fact that the legal text does not make any delimitation in the degree of guilt in relation to the quality of natural or legal person and, however the sanctions are differently set as the offender is a natural or legal person. We believe that in the future the amount of the fine should be the same whether the unfair competition practices belong to a tradesman natural person or a tradesman legal person.

A new element is the exception established by the Law no. 11/1991 from the provisions of art. 13 of the Government Ordinance no. 2/2001 regarding the legal regime of contraventions, approved with amendments and completions by the Law no. 180/2002, with the subsequent amendments and supplements, in the sense that the application of the sanctions stipulated in art. 4 par. (1) is prescribed within 3 years from the date of committing the contraventions.

Finally, we consider that it is necessary for the future as the legislator to unify the legislation applicable in the competition field, eventually in a code of competition, in order to ensure, on the one hand, the consumer's easy access to the material applicable legislation and on the other hand, reveling to the legal institutions currently covered in the two main regulatory documents: the Law no. 11/1991 regarding the unfair competition and the Competition law no. 21/1996 to be achieved in a unique and consolidated, clear and logical structure.

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