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THE ANALYSIS OF NATIONAL LEGAL PROVISIONS' COMPLIANCE IN THE DOMAIN OF COMPETITION FOR THE DEVELOPMENT OF AN EFFICIENT MARKET ECONOMY

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Abstract

The legislation of the Republic of Moldova on competition is fairly recent, unlike the EU legislation, which is acting for over five decades. The adoption of the new law on competition nr.183 / 2012 triggered the competition's reform process in the Republic of Moldova and, implicitly, of the takeover of the Community Acquis. The implementation of commitments made by the Republic of Moldova on the harmonization of legislation with the EU as well as the need to remove shortcomings, led to the development of a new Law on Competition, a process that ended with the adoption of law on July 11th 2012. Thus, the Law on competition nr. 183 of 11.07.2012 expressly states in its preamble the implementation of art. 101-106 of the Treaty on the Function of the European Union of March 25, 1957, the provisions of EC Regulation nr. 1/2003 of December16. 2002 on the implementation of the rules on competition provided in Articles 81 and 82 of the Treaty, published in the Official Journal of the European Union nr. L 1 of 4th January 2003.

Keywords*: law, market behavior, agreements, protection of competition, anti-competitive practices, regulation.*

1. Introduction

Resulting from the fact that the applicability of the competition rules of Community law is related to the economic nature of the activity and not to the quality of the operator or in the form in which it occurs on the market, it is stated that there can be considered as entities companies, cooperatives and groups of economic interest, members of liberal professions, associations, foundations and trade unions as well as central and local public administration authorities in cases when they directly involve in market operations, without thereby exercising prerogatives of public authority.

2. The degree of investigating the problem

Competition occurs as a stimulus and regulator of the activity of enterprises. It requires companies to further development of the production process, to raising production quality and reducing its price and, ultimately, to raise the level of social welfare. As a result, protection of competition is one of the basic tasks of legal regulation of business activity. The aim of the research is the analysis of the provisions relating to competition, finding gaps and uncertainties related to legal anticompetitive practices and legal and organizational measures as well as of the incompatibilities of national regulations with Community competition law.

3. Applied methods and material

In the research we relied on the study of doctrinal, legislative and practical materials. The complexity of the problem led to the application of general and legal scientific methods. The comparative method is for the given research an essential element.

4. Results and discussions

The analysis of national regulations on competition shows that the latter is in permanent improvement. In terms of regulations' evolution on international competition there operate two models. The American model, which formally prohibits any monopolies, having a punitive and deterrent behavior in the future. This model, however, together with the promotion of efficiency criteria and the application of the rule „rule of reason" at assessing the compatibility of trade practices, of the competitive legislation's objectives, reduces from the exactness, the practices being considered anticompetitive by their form.

The second model is the European one, the basic role of which is played by the *ex ante* notification of possible anticompetitive practices. The first rules on competition within the European Community were introduced in the Rome Treaty in 1957, which provided the basic principles in art. 3 (f), according to which „competition at the level of Common Market should not be distorted" [9]. The implementation of this principle was found in art.85-89 of the Treaty, which provided any prohibitions of agreements between businesses, any decisions of enterprises' associations and any concentrated practices which may affect the trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and, as well as, the prohibition of abusive use by one or more companies of a dominant position on internal market or on a substantial part of it. These provisions remained in force up to present, the only change being the number of the article. In the consolidated version of the European Union's Operation Treaty of 2012, the norms on competition are provided by art. 101-106. For the application of competition norms there were adopted several regulations by the EU Council and the European Parliament as well as by European Commission's Communications.

The legislation of the Republic of Moldova in the domain of competition, taking into account the preamble of Law nr. 183/2012, can be assigned to the European model. Despite the reduced time of national law on competition, it has been constantly perfecting and is now the Law nr. 183/2012 which is in force, being the third one.

The first legal rules which regulated the field of competition were provided by the Government's Decision of Moldova SSR nr. 2 of 04.01.1991 on urgent measures of demonopolization of the national economy of Moldova SSR [2], condemning the monopoly activity and supporting the development of the competition spirit.

According to point 2 of the Decision nr. 2 of 04.01.1991 [2], to achieve the measures aimed to prevent, limit and suppress monopoly activities, the following basic principles should be taken into account:

1. The prohibition of economic subjects with a dominant position on the market:

- limitation or suspension of goods, as well as their removal from the circuit to keep the deficit or to cause high prices;
- rejection of some contracts on carrying out works and services, when they have real possibilities of production and selling;
- constraint of partners to include in the contract the adverse conditions which are not the subject of this transaction (request for submission of raw materials, materials, items, houses, apartments, including in the contract some goods which are difficult at selling; groundless demands on the transmission of some resources, including foreign currency; abuse of some beneficiary workforces, etc.).

As dominant outlets on the market there were classified enterprises which share is over 70 percent of the goods on the market. The economic agents, which share of sales constitute from 35 to 70 percent, are treated differentially, depending on their possibilities to influence, in each case separately, upon the general conditions of selling the goods, works or rendering services on the market from concrete zones (in the republic, district, town etc.);

2. Preventing the illegal agreements of economic agents that would prevent normal functioning of the market, the development of the competition which would harm the interests of the society and those of the citizens.

There were deemed illegal the agreements and unilateral actions of economic subjects oriented towards the market's division in order to limit competition, to exclude or to limit on the market other economic agents as scorers and buyers, in order to limit or suspend the production, growth, decrease or maintenance of prices artificially to get high unfounded profits or remove competitors. Such agreements were admitted only with the approval of the Ministry of National Economy of the Moldova SSR in case when they contribute substantially to lower the production costs and goods' circulation, introducing scientific-technical achievements, bringing more efficiently the goods on external markets or optimizing the purchases from abroad, taking into account the measures to protect the internal market of Moldova SSR;

3. Preventing the monopolization in the operation process with securities, by prohibiting:

- purchasing (ownership) by the enterprise, which production (works, services) accounts for over 20 percent of the entire sales of a particular product (work, service), of the shares of other companies that carry out a similar activity;
- purchasing (ownership) by any legal entity or individual in possession of controlling share of the company and its products (works, services) account for over 20 percent of the entire sales of a particular product (work, service), the control package of shares of another company that carries out similar activity.

The ambiguous content of provisions of the Decision nr. 2 of 04.01.1991 [2], in terms of anti-competitive practices, has been exposed more clearly with the adoption on January 29, 1992, of the Law of the Republic of Moldova on Limitation of the Monopoly Activity and developing the competition nr. 906 - XII [7].

So, the Law nr. 906 - XII of 29.01.1992 [7] expressively indicates in art. 3 the prohibition of abuses of dominant market's situation, supplying their list, exposed in Decision nr. 2 of 04.01.1991 [2], with the following:

- Including in the contract some discriminatory conditions against the agent who puts in a disadvantageous situation other businesses;
- Constraining a contractor to sign a contract with certain clauses regarding the goods, in which the contractor (consumer) is not interested;
- Creating obstacles to enter the market for other economic agents;
- Violating the formation of goods'prices, established by the legislation.

The Law nr. 906 - XII of 29.01.1992 [7] considers as dominant the situation of the operator, if its share exceeded 35 percent on the market, unlike the previous regulation, which called for holding 70 percent of the volume of goods on market, in other cases the situation of the economic agent was assessed differently, depending on its possibility to influence the general conditions of selling goods.

The regulation of anticompetitive agreements in the Law nr. 906 - XII of 29.01.1992 [7] held by splitting them into: agreements concluded between competitive and non-competitive businesses. The coordinated actions were also individualized by a variety of anticompetitive agreements.

Unlike the decision nr. 2 of 04.01.1991 [2], the law forbids and considers invalid as a whole or partially only agreements (coordinated actions) between businesses which have together a dominant place on the market and do not admit their excluding by the Ministry of Economy.
Also, art. 4 of the Law nr. 906 - XII of 29.01.1992 [7] considers, in addition that except the division of the market as illegal and agreements which:

- eliminate from the market or limit the market's access of other businesses as a seller of certain goods or their buyers;
- stabilize (maintain) prices, tariffs, discounts, supplements for the infringement interests of competitors.

Along with preventing the abuse of dominant entity on the market and the prohibition of anti-competitive agreements, the Law nr. 906 - XII of 29.01.1992 [7] provides for measures to prevent anti-competitive practices and control over the creation and economic transformation of economic agents, and control over the observance of antimonopoly legislation at purchasing shares, contributions, shares in the social capital of economic agents. It should be noted that the only measure of limiting the monopoly activity under the Law nr. 906 - XII of 29.01.1992 [7] was attributed to the Government, namely, to force separation of those businesses involved in the monopoly activity and limits the competition, if any one or more of the following conditions are present:

- The ability to isolate the structural subdivisions from the organizational and territorial points of view;
- Lack of a tight technological interaction between structural subdivisions (especially if the internal circulation in total global production's entity is less than 30 percent);

- The possibility of delimitating spheres of activity of the structural subdivisions within a narrow specialization in the production of certain goods.

At the same time it should be mentioned that both the declarative nature of the Law nr. 906 - XII dated 29.01.1992 [7], as well as the lack delimitating the basic concepts: competition, dominant situation, economic agents, and market of goods, led to the adoption of Government's Decision nr. 619 of 05.10.1993 on some legislative acts concerning the implementation of the mechanism of accomplishing the Law „On limitation of the monopoly activities and development of competition" [3], by which there was approved the Regulation on considering the procedures for creating and transforming unions of enterprises, enterprises with considerable foreign investments, procurement of activities, contributions of securities and allowances under the legislation in force, the Regulation in the State Register of economic –monopolist agents operating on the market of the Republic of Moldova, Regulations on the examination of cases concerning violations of the antimonopoly legislation. However, according to the authors E. Stuart and A. Mateus [8], there is little public information that would indicate any significant achievements or coercive practices during this early legislation on competition.

With the entry into force on July 1, 1998, of the Partnership and Cooperation Agreement between the European Community and its Member States, on the one hand, and the Republic of Moldova, on the other hand [1], it was necessary to modernize the law on competition, which materialized in the adoption on June 30, 2000, of the Law on protecting the competition nr.1103-XIV [5]. Although, it came into force on 31.12.2000, the Law on protecting the competition nr.1103- XIV has found the application *de facto* consequently with the organization of National Agency on Protecting the Competition by adopting the Parliament Decision nr. 21-XVI of February 16, 2007 [4].

It is saluted that some issues that didn't exist in the Law nr. 906 - XII of 29.01.1992 [7], are now present in Law nr. 1103-XIV of 30.06.2000 [5], regarding the delimitation of basic categories: competition, economic agent, and trader, market of goods, merchandise, and dominant position on the market.

The Law on protecting the competition nr. 1103-XIV of 30.06.2000 [5], as well as the previous law, is based on the principle of prohibition of anticompetitive practices by prohibiting the abuse of dominant position (art. 6) and anti-competitive agreements (art. 7). However the Law 1103/2000 has a broader content, art. 6, for example, prohibiting abuses both on behalf of the entity holding a dominant position individually, as well as abuses of economic agents who maintain a collective dominant location. There have also been introduced in the art. 6, in addition to the existing ones prohibited manifestations of abuse of a dominant position, such as: setting restrictions on resale prices of goods; establishing low monopoly prices (dumping); establishing high monopoly prices; giving up unjustified refusal to conclude contracts with some buyers (beneficiaries) when there is the possibility of producing or delivering the goods.

Regarding the anti-competitive agreements, Law nr. 1103/2000 [5] highlights three categories: horizontal agreements, vertical agreements and conglomerates. Besides the considered anti-competitive agreements mentioned by the Law nr. 906 - XII of 29.01.1992 [7], art. 7 of the Law nr. 1103/2000 [5] also provides the following: increase, decrease or maintenance of prices at auctions; conducting auctions in collusion; limiting production, delivery, including established quotas; offering unjustified refusal to conclude contracts with certain vendors or buyers

(beneficiaries); establishing restrictions at reselling prices of sold goods to the buyer; prohibition of economic agents to loosen the goods produced by competitors.

An innovative point that should be mentioned is applying the rule of reason, in case of accepting conglomerates. Ex-ante authorization of horizontal and vertical agreements was left to the National Agency for Competition Protection, not mentioning other circumstances (paragraph (4), (5), art. 7 of Law nr. 1103/2000 [5]).

Law nr. 1103/2000 on the competition protection initiated, for the first time, the creation of a protection authority, namely the National Agency for Competition Protection, which was empowered to prevent, constrain and suppress anti-competitive activity, manifested by: state control over commodity markets; state control over the creation, expansion, reorganization, liquidation of economic entities, their associations, holdings, transnational corporations and financial industrial groups; state control on purchasing shares (shares in social capital) of economic agents; forced division of businesses; issue provisions for businesses to cease the violation of law on competition protection and/or liquidation of its consequences, termination or modification of contracts that contradict the legislation on competition protection; collection of income from businesses obtained by violation of legislation on protecting the competition.

Although the Law nr. 1103/2000 [5] regulates broader relationships that has influenced the competition in the goods' markets compared to its predecessor, it also contains a number of gaps that hinder the process of application.

Thus, there emerged the need to define the notion of an economic agent, by supplementing it with legal entities which don't have a commercial aim, but which unfolds economic activities, and members of liberal professions; unification of terminology of the legislation by replacing connection with the dominant situation and defining the latter; determine the procedure for authorizing agreements in accordance with art. 7, paragraph (4) and (5); detailed regulations of merger control; concrete determining of income's share limits, which is to be charged for violating the law on protecting the competition etc.

And more, the inexistence in the text of the Law nr. 1103/2000 [5] of the express repeal of the Law nr. 906 - XII of 29.01.1992 [7] created a situation of confusion in its application. Thus, although both had the same object regulatory laws, there comes naturally the conclusion that in the absence of an express repeal, we are in the presence of the silent repeal. But this has a questionable character, allegedly the last amendment to Law nr. 906 - XII of 29.01.1992 [7] dated February 23, 2007, the date when the Law nr. 1103/2000 [5] has been in force for six years.

The implementation of commitments made by the Republic of Moldova on the harmonization of legislation with the EU as well as the need to remove shortcomings, led to the development of a new Law on Competition, a process that ended with the adoption of law on July 11, 2012. Thus, the Law on competition nr. 183 of 11.07.2012 [6] expressly states in its preamble the implementation of art. 101-106 of the Treaty on the Function of the European Union of March 25, 1957, the provisions of EC Regulation nr. 1/2003 of December 16, 2002, on the implementation of the rules on competition provided in Articles 81 and 82 of the Treaty, published in the Official Journal of the European Union nr. L I of January 4, 2003, and partly provisions of EC Regulation nr. 139/2004 of January 20, 2004, on the control of concentrations between businesses, published in the Official Journal of the European Union nr. L 24 of January 29, 2004.

The main innovations of the Law on Competition nr. 183 of 11.07.2012 [6] are:

- a comprehensive conceptual framework defining the notions: agreement and its varieties: horizontal and vertical, competition, enterprise, market relevance, concentrated practice, rigging of offers etc.;
- a specification of anticompetitive agreements'types, determining the agreements of minor importance as well as the introduction of exemption procedure; -highlighting factors to be considered in determining the dominant position, completing the list of abusive practices, individualization criteria to justify abusive practices;
- an assessment of the evaluation of economic concentrations; highlighting the criteria for determining the relevant market;
- a regulation of the preliminary examination procedure, investigation and decision making; determining and individualization of sanctions of breaking the law on competition;
- introduction of interim measures, commitments and leniency policy.

The analysis of the Law on competition nr. 183 of 11.07.2012 [6] corresponds to the effective development of market economy and avoiding anticompetitive practices and its correspondence to the Community Acquis which constitutes an objective of our research.

5. Conclusions

As a guarantor of effective competition and as a backlash against anti-competitive practices there was stated the need to apply legal and organizational measures to protect competition, by which it is understood the rules, tools, methods and levers of influence the market relations under the laws of competition which are applied by competent authorities to protect the competition, these being prevention, restriction and suppression measures.

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Rezumat

Legislaţia Republicii Moldova în domeniul concurenţei este destul de recentă, spre deosebire de legislaţia Uniunii Europene, care acţionează de peste cinci decenii. Adoptarea noii Legi a concurenţei nr. 183/2012 a declanşat în Republica Moldova procesul de reforme în domeniul concurenţei şi, implicit, de preluare a acquis-ului comunitar. Punerea în aplicare a angajamentelor asumate de către Republica Moldova privind armonizarea legislaţiei concurenţiale cu cea a Uniunii Europene, precum şi necesitatea înlăturării lacunelor constatate, au determinat elaborarea unei noi Legi a concurenţei, proces finalizat cu adoptarea acesteia la 11 iulie 2012. Astfel, Legea concurenţei nr. 183 din 11.07.2012 prevede, în mod expres, în preambulul său transpunerea prevederilor art. 101-106 din Tratatul privind funcţionarea Uniunii Europene din 25 martie 1957, prevederilor Regulamentului (CE) nr. 1/2003 al Consiliului din 16 decembrie 2002 privind punerea în aplicare a normelor de concurenţă prevăzute la articolele 81 şi 82 din Tratat, publicat în Jurnalul Oficial al Uniunii Europene nr. L 1 din 4 ianuarie 2003.

***Cuvinte-cheie**: legislaţie, piaţă, comportamentul entităţilor, protecţia concurenţei, practici anticoncurenţiale, reglementare.*

Аннотация

В Республике Молдова законодательство в области конкуренции создано относительно недавно, в отличие от законодательства Европейского Союза, действующего на протяжении более пяти десятилетий. Принятие нового Закона о конкуренции № 183/2012 обусловило начало процесса реформ в Республике Молдова в области конкуренции, а также взаимствование европейских практик. Выполнение данных Республикой Молдова обязательств по гармонизации законодательства о конкуренции с законодательством Европейского Союза и необходимость устранения выявленных недостатков законодательных актов, предопределили разработку нового Закона о конкуренции и его утверждение 11 июля 2012 года. Так, в преамбуле данного нормативного акта предусмотрено транспонирование положений ст. 101-106 Договора о функционировании Европейского Союза от 25 марта 1957, положений Регламента Совета Европы (ЕС) № 1/2003 от 16 декабря 2002 года о применении правил конкуренции, установленных статьями 81 и 82 Договора, опубликованного в Официальном Журнале Европейского Союза № L 1 от 4 января 2003 года.

***Ключевые слова:** законодательство, рынок, поведение предприятий, защита конкуренции, антиконкурентные практики, регламентирование.*

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