EXISTENCE CONDITIONS OF MONOPOLIST AGREEMENTS

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Article 5 of the Competition Law number 21/1996[1] is conceived, like article 81 of the Treaty establishing the European Community (TEC)[2] on the principle of prohibition of competition restrictive agreements. Thus, article 5 paragraph (1) of the Competition Law number 21/1996 declares that the agreements that are "express or tacit between economic agents or association of economic agents, through decisions on association or concerted practices between the same, that have or that may have as subject matter the limiting, preclusion or distortion of competition on the Romanian market or on part thereof" are prohibited and further it enumerates as examples a series of such agreements. Article 5 paragraph (2) of the Competition Law number 21/1996 indicates the possibility to grant exemption from the application of prohibition, specifying the conditions that need to be cumulatively met and then paragraphs (3)-(8) set forth within the main coordinates thereof the legal framework of individual exemptions and of some categories of agreements.

Key words: Competition Law, European Community, prohibition, economic agents, agreements.

Article 5 paragraph (1) of the Competition Law number 21/1996 declares that the agreements that are "express or tacit between economic agents or association of economic agents, through decisions on association or concerted practices between the same, that have or that may have as subject matter the limiting, preclusion or distortion of competition on the Romanian market or on part thereof".These application conditions of article 5 paragraph 1 of Law number 21/1996 are:

Premise-condition: an entente must express a *minimum of coordination* between two or several economic agents, coordination that may take the most various forms. The identification criterion will, thus, be the ascertainment of a *conscious and willing loss of autonomy* of the participating economic agents.

Main condition: the entente is not prohibited, unless it is carried out for the purpose of a certain effect on competition – limiting, precluding or distorting the same -, or unless it produces such an effect even if the same it not explicitly pursued. Therefore, in order to apply article 5 of Law number 21/1996 the *prejudice to competition* must be proved, even if it is carried out *in potentia*.

Loss of autonomy of the participants

[1] Published in the Official Gazette number 88/30.04.1996, amended and completed by the Government Emergency Ordinance number 121/2003, Official Gazette number 875/10.12.2003, approved by Law number 184/2004, Official Gazette number 461/24.05.2004. The Law was amended and completed several times and then republished in the Official Gazette number 742/16.08.2005.

[2] Treaty establishing the European Community (TEC), published in the Official Journal of the European Communities number C 325/24.12.2002, subsequently amended and completed by the Nice Treaty, O.J. number C 80/10.03.2001. Generally, for normative deeds and European policies, see the official internet address of the European Union www.europa.eu.int. European documents published in the Official Journal of the European Communities are available at the following address: http://europa.eu.int/eur-lex.

Capacity to be part of an entente. Due to the fact that according to article 5 of Law number 21/1996 the entente connects two or several economic agents, there is obviously no entente if the partners are independent, moreover, defining the entente as "*agreement," "covenant" or "concerted practices"* brings within the sphere of analysis the issue of the parties' *consent*.

One may put forward the idea that an entente, in order to be characterised as such and sanctioned, entails the proving of a conjunction of free wills. The syntagm is familiar because it describes the known process of formation of the contract. Traditionally, the term of consent has two meanings: it designates at the same time the manifestation of will of each of the parties, but also the meeting, the intertwining of the participants' wills.

The application of these rules to the matter of ententes will surprise us when ascertaining the existence of deviations from the classical rules of law.

These particularities that contribute to shaping the originality of the competition law derive from its economic vocation: competition law is called upon in order to organise the competitive process, by eliminating its dysfunctionalities. Consequently, from a pragmatic standpoint, it will use the enshrined legal guidelines only to the extent to which these are useful for the purpose of achieving its declared objective and will sacrifice them whenever they become obstacles that preclude the performance of the action undertaken.

Consents of the parties to an entente. To consent means to will, and this is the reason why the entire theory of the contract is built upon the principle of the *autonomy of will.*

In order to be able to "bind" the party, to "enchain" it within the web of reciprocal rights and obligations, the will must not be rendered defect through violence, deceit or error. Consequently a question comes into being – in connection with the definition of the entente – whether with respect to it too, the alteration of the participants' will by one of the defects in consent produces the effects that are produced in the matter of contracts. In principle, the issue refers to all defects in consent, but it arises concretely in the case of citing the economic violence, under the form of threats either by boycott, or by terminating the contractual relations.

The analysis of jurisprudence reveals that although the bodies that supervise the competition are not called upon in order to pass judgments with respect to contracts, by guaranteeing the protection of the contractors' will, they are still not completely insensitive to the legal consequences of economic pressures exerted upon one of the parties to the entente.

Thus, the Court of Justice of the European Communities rejected the defence of some distributors who resorted to the argument of the lack of decision-making autonomy that derived from the economic dependence relationships between them and the head of the distribution network. But the Court justified its decision by specifying that the concrete situation of the relationships between the parties would have given the possibility to the dealers to resist in the face of the moral violence they had been subjected to. Consequently, through a *per a contrario* interpretation, if it had ascertained the *irresistibility* of the threats exerted by the supplier, the Court would have acknowledged the incidence of the cited defect in consent.

It is therefore admitted that the theory of defects in consent can, of course, find its place in the legal regime of the ententes as well, by bearing a specific mark. Further, the issue of the modality of sanctioning the defect of will is raised once it has been identified.

If the solution corresponding to the theory of contracts is transposed, then obviously the decision should be that the agreement concluded under pressure is struck with nullity and that, given the fact that not all the parties have autonomy of will, the entente is never even constituted. But it is not the legal rigour that is the most important characteristic of the competition law. By permanently subordinating to a principle of effectiveness, the adoption of the compromise solution that allows the rectification of market dysfunctionalities is preferred: the entente is deemed to be born, but the undertaking that makes up the victim of economic violence is not sanctioned or is indulgently treated.

Conjunction of will of the parties to an entente. In order for a contract to come into being it is necessary that the wills of the parties meet with a view to giving birth to a *joint* will.

Similarly, the competition law doctrine admits that the entente is not a mere juxtaposition of individual parallel wills, given that they need to "intertwine" and to form a single will. The difficulties relative to appraisal occur in situations in which there is no formal agreement that expresses the clearly defined intents of the parties.Therefore, in the case of the distribution networks, when the manufacturers communicate to distributors certain general sales conditions that display an anti-competitive character, even if the distributors do not explicitly accept them, the entente still comes into being as effect of their implicit agreement, resulted from the execution of the clauses concerned. The mere *de facto* adhesion leads to the performance of the conjunction of wills, as it happens in the case of common law contracts.

But a much more delicate issue is the determination of completely non-formalised ententes, also known as "concerted practices", while the producing of evidences thereof raises, more often than not, obstacles impossible to overcome. This is the reason why the bodies that supervise the competition resort to a series of presumptions that are difficult to conciliate with the classical principle of the conjunction of wills, but that perfectly fit the internal logic of competition law, thus guaranteeing its effectiveness.Of reference in this field is the so-called "polypropylene affair." The undertakings in this sector, faced with a major crisis, decided to "bury the hatchet." Consequently, they organised a series of meetings during which they communicated to each other information that would normally be considered as confidential, regarding the prices practiced by each of them and regarding the production volume.

Despite the fact that over the course of these meetings there were never discussions and decisions made with respect to a common strategy, all the participants were sanctioned. It was considered that, although the information exchange does not constitute itself an entente under the form of concerted practice, the subsequent action carried out on the market by the undertakings concerned was subject to article 85 of the Treaty of Rome (currently article 81), given that the action in question was planned by each of them according to the information received. The sanctions were equally applied to the undertakings that were not in solidarity with the group and that adopted an independent behaviour on the market.The analysis of the case previously presented reveals that no agreement of wills was concluded between the parties; such an agreement would entail the existence of at least one common project, around which revolved the "intertwined" express or tacit consent of the parties.

This model of appraisal was subsequently constantly applied in the European law. An entente must, therefore, be sanctioned due to its harmful economic

potential, even if it is present in a "larval" state, identifiable through the application of one criterion: *conscious and accepted loss of autonomy* of action on the market.

Incidence of law – liability exempting cause. The autonomy of will of the parties to an entente may be annihilated as effect of the incidence of legal regulations. The competition law recognizes within this impact a liability exempting cause, legislatively enshrined into various national law systems or at least jurisprudentially acknowledged.

The matter of concern is the possibility that the undertakings have of citing the provisions of a normative document as justification of the anti-competitive practices carried out, if the normative document in question imposes cooperation or certain forms of collaboration. The admissibility of this liability exempting cause is nevertheless subordinated to a series of conditions:

The entente must be the ineluctable consequence of the legislator's will and it must not merely allowed, encouraged and authorised. Thus, the Court of Justice of the European Communities retained in the famous "European sugar industry" affair that the Italian regulations relative to sugar sale and purchase for the population determined "the centralisation of both offer and of demand," thus having a "determining incidence on the essential elements of the incriminated behaviour adopted by the undertakings concerned." The Court concluded that "in the absence of the regulation indicated and its execution, the litigious cooperation would either not have taken place or would have taken place under a different form."

The legal regulation must exclude the marginal freedom of the participants in the entente. In order for the liability to be removed, it is further necessary that the parties have no competitive space at their disposal, in other words, it is necessary that the dependence of their agreement on the legal or statutory regulation be absolute and integral or at least that the residual competitive domain be so limited that the decrease of competition may not be imputed to the entente. Thus, the Court of First Instance ascertained with respect to an affair regarding the import of Japanese vehicles that the will of the importers was not autonomous, given that certain quotas were imposed on them by the public administration bodies, which they were obliged to materialise through an agreement. Romanian law does not explicitly acknowledge such a liability exempting cause, but there is nothing to prevent the Competition Council to admit in its practice as cause of impunity for the economic agents the ineluctable incidence of some legal regulations, when the same would impose certain cooperation, without the reserve of any marginal freedom.

Prejudice brought to competition

Law number 21/1996 prohibits ententes only if they "have or may have as subject matter the limitation, preclusion or distortion of competition on the Romanian market or on a part thereof." As shown within the legal literature, there is only a literal difference between the three terms that designate the modalities of affecting competition[3]. The discrimination between the three ways of bringing prejudice to competition has no practical interest, since they do not involve any legal regime differentiation.The formulation of the law indicates that only the "bad" ententes are restrainable, those ententes that are able to produce competition distortions, either because they have an anti-competitive objective, or because they produce such an effect, condition which has an alternative character.

Anti-competitive objective. Article 5 of Law number 21/1996 does not impose, according to this version, the actual generation of any consequence upon competition on the market. Whether the agreement was not followed by the execution of the obligations undertaken or the execution thereof was only partial has no importance whatsoever in order to

[3] Ionel Didea, Dreptul concurenței (Competition Law), Universul Juridic Publishing House, Bucharest, 2005, p.70.

apply the legal qualification, suffice it to ascertain that the subject matter of the entente was *likely to affect the market.*

Anti-competitive effect. "The game of competition must be understood within the real framework where it would take place in the absence of the litigious agreement..."[4]. This is the assertion of the Court of Justice of the European Communities that launched the model of appraisal of the effects corresponding to ententes, subsequently followed with perseverance by the European jurisprudence and assimilated by the internal competition law. It is marked by two fundamental features:

- achievement of the economic policy objective; achievement of a *practicable competition*[5];

- *in concreto* appraisal of ententes.

From this approach a series of consequences result and they are analysed as follows:

- the prejudice brought to competition may be not only actual, but also virtual;
- the prejudice brought to competition must be significant;
- the prejudice brought to competition may be "internal," but also "external;"
- the prejudice brought to competition must be appraised not in connection with the nature of the agreement or the incriminated practice, but within its real context.

The prejudice brought to competition may be actual or virtual

The behaviours repressed by law may affect competition not only *in actu*[6], but also *in potentia,* for they may be "likely" to being prejudice to economic competition[7]. This non-manifested (so far) anti-competitive potential must be discriminated from the possibility of producing prejudices to competition. In other words, the anti-competitive load must exist as a seed within the analysed agreement, even if the latter is not openly in pursue of an anti-competitive purpose, given its apparently neutral nature, the load concerned cannot be merely hypothetical[8].

The prejudice brought to competition must be significant

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[4] The Court of Justice of the European Communities, *Societe Technique Miniere v Muschinenbau Ulm GmbH,* af. 56/1965, jRec. 1966, p. 337-360.

[5] 1. The explanation of the notion may be found in the *Metro Saba* / affair, 26/76, Rec. I, 1977, p. 1905-1906. This is the European version of the American concept of *workable competition,* created by J. M. Clark, in 1940. The American economist, on the basis of the premise that the hypotheses of the perfect competition are ideal, but impossible to achieve, proposes as the target of a realistic competitive policy the obtaining of a practicable competition, mainly characterised by the following features: barriers upon entry that are sufficiently low, that allow the entry of new companies, drawn by the prospect of over-normal profits of undertakings that are already active on the market; a number of undertakings that manufacture the product/provide the service concerned that is high enough, in order to be able to achieve both economies of scale, as well as an independent behaviour thereof in the relationships between them; correct and complete information of consumers and undertakings regarding the products on the market; reasonable promotion expenditure and honest and moderate publicity; long-term evolution of profits, determined by the degree of risk of the industry in question.

[6] The prejudice brought to competition was, for instance, deemed to be actual in the case of incorporation of a joint research and development undertaking between actual competitors, since it prevented partners from fighting for the purpose of obtaining advantages against each other (Com., *Henkel-Colgate,* OJEC, L. 14 of 18 January 1972).

[7] CJEC, *ACF Chemiefarma v Com.,* affair C. 41, Rec. I 1970, p. 661-701: The Court considered that the obligation imposed on a group of undertakings to refrain from manufacturing a certain product aimed at limiting competition, even if the undertakings concerned were not able to manufacture the respective product, upon agreeing on the clause in question.

[8] The Commission considered that bringing prejudice to competition was merely hypothetical in the case of creating a joint branch by *Olivetti* and *Cannon,* because the entry of the Olivetti company on the laser printer market was very unlikely, due to its lack of technical competence, to the absence of the necessary technology, to considerable investments required by a possible adjustment of technology and to the fast evolving technology in this sector (Court of Justice of the European Communities, L. 52 of 26 February 1988).

The European law does not sanction ententes, unless their bringing prejudice to competition reach a certain sensitivity "threshold." This principle was enshrined through the Commission Notice under the name of *de minimis*[9], the last form thereof being adopted in 2001[10].Competition Law number 21/1996 encompasses *de minimis* regulations similar to those contained in the European law. Therefore, article 8 stipulates that the provisions of article 5 of the law do not apply to economic agents or to groups of economic agents whose turnover[11] does not exceed the limit annually established by the Competition Council and whose total market share does not exceed 5 % on any of the relevant markets affected, when the parties involved are competitors, or does not exceed 10 %, when the parties are not competitors.

Therefore, arguments of the non-intervention of the "guardian" of the market are both the criterion of an increased percentage on the market held by an economic agent, as well as the criterion that expresses the policy of favouring the small and medium-sized undertakings. The specific of the Romanian opinion lies with the fact that the two conditions – of the market power and of the turnover – must be cumulatively met.But these value thresholds are not operative in the case of prohibited anti-competitive acts *per se:* agreements regarding the imposition of prices or tariffs, agreements of division of markets and rigged bids.

Beyond the restrictions that, by placing themselves under the *de minimis* thresholds, are presumed to be lacking a major anti-competitive impact, there are ententes; they, by reaching the legal sensitivity limits, must be separately appraised in order to assess the degree to which they affect competition. The principle followed is, as stated before, the appraisal thereof within their own context.

In other words, each agreement or practice must be considered according to their interconnection or according to the competitive behaviours of the other parties involved on the market. If, for example, the contract that is suspected and that actually has a decreased importance, fits as a small, but indispensable puzzle piece within a unit that ossifies the market, making impossible or difficult the entry of new undertakings, then it must be viewed as competition-restrictive and must be treated as such[12].

The prejudice brought to competition may be "internal" or "external"

The limitation or the exemption of competitive autonomy of the parties to an entente, as effect of the agreement of the practice adopted by the same, constitutes an *"internal" prejudice* brought to competition. This is what happens in the case of horizontal ententes, concluded between economic agents that are active at the same economic level on the market, mainly encountered in the case of producer cartels. But the same ententes are all the more pernicious as they usually affect third competitors, thus producing *"external" prejudices* to competition[13]. It may happen that the ententes impose no competition restriction on participating undertakings for the only reason that their relationships are not competitive.

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[9] Abbreviation of the Latin saying *De minimis non curat praetor* (A praetor does not concern himself with petty matters).

[10] Commission Notice 200l/C 368/07 on agreements of minor importance, Court of Justice of the European Communities, C. 368/13, 22 December 2001.

[11] The calculation of the turnover is carried out according to the Instructions of 29 April 2004 on the calculation of the turnover in cases of anti-competitive behaviour, laid down by article 5 paragraph (1) of the Competition Law number 21/1996 and in the cases of economic concentration (Official Gazette number 440/17.5.2004).

[12] The issue was raised especially regarding the distribution networks, in connection with which the theory of the "cumulative effect" was developed, first asserted by the Court of Justice of the European Communities in the *Brasseries de Haecht* ruling, of 12 December 1967 (affair 23-67, Rec. I, p. 526).

[13] Constituted within horizontal networks, undertakings may conclude an agreement regarding their prices or may establish production *quotas*, as well they may aim at dividing the markets or the supply sources; also, they may resort to

d).The prejudice brought to competition must be appraised within its own real context

The reference element of any appraisal of an entente must be represented by the practicable competition: the competition which must result from the own structures of any market, which would characterise the market in the absence of the agreement or the practice in question. Due to the fact that it does not aim at modifying the structures of the market – that, in principle, are irreversible -, the regulations regarding ententes have as objective merely to impose, when necessary, the reversibility of competitive behaviours that are not induced by the structure of the market and that, consequently, are abnormal. Therefore, ententes will be analysed according to cases, in order to be able to reach an *in concreta* ascertainment regarding the fact that their effects are harmful or not.The Romanian Competition Council rigorously applied hits principle in the affairs it faced and sometimes performed a very tight delimitation of the relevant markets for the purpose of delineating as exact as possible the anti-competitive practices. Thus, the attention is drawn by a ruling passed in the matter of auction organisation[14]: "within the context of this case, each competitive tendering constitutes an actual relevant market, on which competition (obviously, *practicable* competition, our note) must manifest itself from the time the demands for tender submission are made until the bid is awarded, by ensuring the access to the tendering of as many bidders as possible. In the case analysed, another economic agent, potential competitor, had no longer access to the market concerned, to threaten the position held by the economic agents participating on this market."[15]

The results of such an appraisal are more often than not paradoxical, not only because agreements that are apparently innocent may prove to be anti-competitive, but also because, on the contrary, contracts or practices that display all the characteristic of a competition-restrictive entente may in fact positively influence the competitive relationships between undertakings.

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other elements of the competitive behaviour, such as limiting the technological development and the qualitative evolution of products. Often they agree on the management of "essential means" for the purpose of exemption or preclusion of access of other economic agents to the use of the "facility" concerned. This is the point where the theory of "essential facilities," is specific to the abuse of dominant position is incident in the case of ententes as well. In all these hypotheses, in addition to precluding a competitive behaviour inside the collusive group, an evident adulteration of exterior competition is performed, by affecting third undertakings.

This is the case of vertical agreements, concluded between economic agents placed at different levels of the economic process, and typical are the distribution networks with a "star-shaped" structure: a fascicle of bilateral ententes connect the head of the network (usually the manufacturer) to each of their distributors. Under such circumstances it is possible that the multiplicity of similar networks produce a blocking effect, thus entailing a genuine sclerosis of the market.

[14] Competition Council, *MI-DENTAL PARTNER'S SRL,* ruling number 197 of 17 September. 1999, Rap. 1999, p. 111.

[15] Without explicitly asserting it, the Competition Council applied the principle of market contestability (or of offer substituability), in order to determine the obstruction brought about to competition through the illicit practice analysed.