SECTION: EUROPEAN LAW AND PUBLIC POLICIES

CODE OF GOOD PRACTICES - DEVELOPMENT MEASURE OF LOIAL PARTNERSHIP BETWEEN MARKET ACTORS

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Abstract
The activity and development of market actors is conditioned by their interaction with downstream and upstream market players. Signing of long-term cooperation contracts ensures the stable activity of economic agents. In most cases, the economic agent with a higher market power tends to express his superiority and consolidate his position on the market. He claims contractual conditions, which the other party has to accept from the necessity to survive on the market. Anticompetitive contractual conditions are likely to take the form of abuse of a dominant position. This way, networks directly push suppliers to sell at a certain price or quantity, as well as requiring customer selection. At the same time, they can take the form of a cartel agreement, which leads to the creation of entry barriers for other suppliers.
An effective measure to prevent and remove breaches in contractual relationships between retailers and suppliers is to undertake commitments to correct and avoid anti-competitive practices by market actors. As a consolidation of good practices, The Code of Good Practice is the agreement of loyal relations with market players, ensuring a free competition market.

Keywords: *Loial practices; Commitment policy; Code of good practices; Cartel agreement; Abuse of dominant position.*

JEL Classification: K2, K4

1. The commitment policy

One of the Competition Authorities's concerns in the regulatory activity to ensure competitive appearance of the market participants actions on the market, presents the violations occurring in the relationship between market players.

The control mechanism of the market in terms of competition law is complex, and identifying and punishing their violation requires effort and material costs. In this context, in recent years are increasing practices of alternative instruments, such as negotiation, successfully used by competition authorities, to achieve a quick result correcting and maintaining competitive market environment.

The perfectation of competition law in recent decades it has undergone changes through regulatory models. This is reflected in the changes that have taken place in competition enforcement strategies by the competition authorities, namely the focus on finding appropriate and rapid solutions to anti-competitive behaviors rather than punishment. The position of the Competition Authorities is found in market regulation, with the role of establishing forward-looking behavioral conditions for market players, and commitment decisions have become the alternative enforcement tool to the legal framework for dealing with cases of abuse of a dominant position[1,2,3].

The Commitment Decision is an instrument introduced in the European context, in Article 9 of the European Commission Regulation no. 1/2003. This instrument is a negotiating procedure for competition authorities through competition rules. This mechanism allows termination of an investigation without a finding of infringement, based on appropriate concessions offered by the undertaking (s) controlled.

Nearly 2 decades of practice have demonstrated both the efficiency and the privilege of this procedure for European competition authorities (both at EU and national level) as they provide for a faster resolution of a case and, in some cases, has made it possible to obtain more effective remedies than in the case of investigations and litigation[1].

The commitment policy is a measure addressed to economic agents, designed to correct anti-competitive actions. This method is a possibility for economic agents to correct their violations by avoiding sanctions, and also has the role of educating loyal behavior on the market. Companies that have committed to correct infringements in contracts, automatically take responsibility not to break the law the second time, otherwise sanctions will be much severe.

Through this, the Competition Authorities can remove mass violations on a particular market and ensure that they do not reappear, maintaining monitoring of the commitments.

A formal decision by the competition authorities to accept the commitments would mean the conclusion of the investigation into a possible breach of the competition law. Commitments are offered voluntarily by the companies involved in the investigation. And the decision to accept the commitments makes them binding on the companies that have assumed them. Such a decision concludes that there are no longer grounds for action by the Authority. Decisions on commitments do not make a finding of an infringement, nor do they conclude that a violation would be terminated.

Advantages of accepting commitments:

- Quick and effective recovery of the competitive environment on the market, for the benefit of market players and final consumers;
- Effectiveness of solving competitive issues, due to the lack of necessity to investigate the case and to issue law enforcement decisions;
- Reduce procedural steps in relation to the investigation process, which makes it possible to make more efficient use of the Authority's resources;
- Lack of a decision on the infringement case, and avoidance of fines, is an attractive asset for the companies involved;
- Education of competitive behavior, as a result of companie's duty, by assuming commitments and the need to report on their achievement[4].

According to the Rules for Acceptance of Commitments established by the Competition Authority of the Republic of Moldova, they must fulfill certain conditions:

- The commitment initiative must belong to the companies involved in the investigation. They must decide the type, content and duration of the proposed commitments in order to remove the situation that determined the initiation of the investigation.

- Commitments are accepted in situations where it is obvious that the intervention of companies, by assuming commitments and by applying them in practice, leads to the rapid and sustainable restoration of the competitive environment, or in a more efficient manner than would have been achieved through the intervention of the authorities, by issuing a decision, imposing a fine and / or imposing remedies. In cases where sanctions are better suited to the objectives of the competition policy, commitments will not be accepted.

- Only engagements that eliminate the situation under which an investigation has been initiated and which contribute to the protection of competition are accepted. Commitments must completely eliminate competition concerns and must be complete, effective and effectively enforceable. The effectiveness of the commitments will be assessed in terms of their capacity to resolve the identified competition issues. Commitments must provide a degree of certainty as to their implementation. The implementation and / or monitoring of commitments must not be difficult. Commitments must be relevant and proportionate to resolve the identified competition issues. Relevant are also those commitments whose fulfillment facilitates the fulfillment of other proposed commitments. In its assessment, the Competition Authority takes into account the legitimate interests of third parties.

- When analyzing the acceptance of commitments, it will be considered all relevant factors related to the respective commitment: the type, scope and scope of the proposed commitment, using as reference terms the structure and distinctive features of the market, including the position of the involved enterprises and other undertakings on the market.

From executive point of view, commitments can be behavioral or structural, which can be combined to achieve a more efficient result.

Behavioral commitments are the obligation to adopt certain behavior on the market with respect to third parties. They are positive when they are an obligation to behave in a certain way and negative when they imply a restriction. At the same time, behavioral commitments have a low level of certainty and can not be accepted as independent commitments unless the parties submit in written form the unconditional agreement of that third party.

Structural commitments produce immediate and permanent change in the market structure and does not require a medium or long-term monitoring.

No commitments are accepted for high gravity acts, such as harsh cartels and types of dominant position abuse that have particularly serious consequences for the market, producing effects in large areas, where the importance of punishment and discouragement prevails[5].

At the same time, according to the European action plan on retail trade, are set successor measures to improve the competitive relationship on the market.

In the food sector, European good practice principles for vertical relations were adopted in 2011 by key members of the High Level Forum for a Better Functioning Food Supply Chain Expert Platform on Business to Business Contractual Relations of the Food Supply Chain.

These principles have been considered a good basis for developing a voluntary code of conduct for fair business practices between food sector companies.

As a result of the research carried out by this platform at the request of the European Commision, a set of voluntary good practice principles and a list of examples of unfair and incorrect practices in vertical trade relations were developed. This voluntary initiative provides that the parties accepting the contract act in strict accordance with the applicable laws, including competition law. In addition, the general principles suggest consumer protection, loyal contract and transactions; whereas more detailed principles specify the importance of written contracts, the predictability of rules and behaviors, respect for confidentiality, etc[6].

As a result, a code of good practice exemplifies the professional values and behaviors that underpin the most ethical considerations and meet legislative regulations.

2. The problems in the competitive relations of market actors in the retail sector

The clauses of unfair relationships between actors in the food supply chain stipulated in the Green Paper on Unfair Commercial Practices in the European Commission's Food Supply and Non-Food Supply Chain are set out in the following categories:

- Ambiguous contractual terms that make possible the impose of additional obligations on the weaker contracting parties.
- Lack of written contracts. Ineligible clauses are easier to enforce when they are not submitted in writing.
- Retroactive contractual changes. Retrospective changes, such as deduction of the billed amount to cover promotion fees, unilateral discounts based on sold quantities, enrollment fees, etc.
- Unfair transfer of commercial risk, e.g. counterparty fees, trade loss compensation obligations, long-term delays, "reverse margin" practices, etc.
- Incorrect use of information, including when one party requests information to the other and then uses them to develop a competitive product; or non-respect of confidentiality.

- Inappropriate end of a commercial relationship and, in particular, sudden and unjustified termination without a reasonable period of notice.
- Territorial supply constraints imposed by certain multinational suppliers that prevent retailers from supplying identical goods and distribute them to other members[6].

Some of these clauses are found in the practices of the retail networks of the Republic of Moldova, which are imposing conditions on suppliers and distributors of products, making unfair collaboration contracts.

Violations occurring in contracts contain points that characterize abuse of a dominant position, where networks directly press suppliers; or cartel understanding, where suppliers voluntarily accept constraining conditions, creating entry barriers for new suppliers on the market.

Anticompetitive contractual clauses typically include conditions such as:

- Parties agreements on dividing the territory of the product delivery and offering exclusive sales on it, which is an anti-competitive agreement.
- The condition to distribute only from that company
- Conditions for restricting the territory of distribution, and training of new clients without the company's permission.
- The condition not to distribute products to other similar companies.
- The Company reserves the right to form the territory of distribution during the term of the contract.
- The Company reserves the right to create a list of customers for whom distribution is prohibited.
- Collecting the penalties and canceling the bonuses for the breach of the distribution territory, stipulated in the contract.
- Right to cancel the customer from the distribution territory in the case of incomplete supply.
- Terms of termination of the contract if the distributor sells similar products of other companies.
- Conditions for the formation and modification of prices, with penalties for breaching these conditions.

The use of these clauses distorts the competitive environment on the market, leading to the strengthening of dominant positions and the creation of entry barriers. Which affect the economic relations of market players, and ultimately, the consumer.

Distorting the competitive environment in prohibited practices among networks in their dealings with suppliers have a negative impact on the economic environment.

Typically, unfair practices arising from imbalances in the power of the parties. This may be the case when weak parties have no real alternative in the business to business relationship, when one party depends on its counterparts due to other factors, such as technology and know-how, or when one of the parties can exploit the information advantages to the detriment of the other party.

Unfair practices among food retail market players is a special case, and is discussed in detail, including the so-called "fear factor", which apparently inhibits the weaker party from filing a lawsuit against their stronger partners. The fear factor appears more likely when the products are perishable and the supplier does not have a real alternative to the commercial relationship with the stronger part, the retail networks that impose unfair contractual terms, and legislative processes are costly and risky[7].

3. Applying of non-regulatory measures to remedy the competitive market in the food retail sector

Assuming commitments to remedy the competitive environment in the food retail sector by adjusting contractual conditions to the legislative framework is able to remove the competition authorities' concerns about possible law breaches and anti-competitive practices among market actors.

The successor to the engagement policy, in order to ensure compliance with commitments by companies that have taken them is the Code of Good Practices. The Code of Good Practices ensures loyalty policy among market players. This code clearly and discreetly expresses the obligations or responsibilities of economic operators on the market. Moreover, the Code contains the conditions that both suppliers and retailers must observe in order to maintain the market with free competition.

The content of the Code of Practice, developed to ensure fair relationships between distributors and retail networks, is presented below.

3.1. Code of Good Practices

Purpose and scope of the Code

Code of Practice on the relationship between retail networks and suppliers of consumer goods (hereinafter - the "Code" or "Code of Practice") is a set of recommendations on the interaction between retail networks and suppliers of consumer goods.

Practices not included in this code can not be considered contrary to the principles of reasonableness, fairness and justice simply because such practices are not included in the Code or not fully meet the standards of the Code.

The main objectives of the Code are:

- developing interaction practices based on the principle of good faith, negotiating and executing contracts between suppliers and retail networks, and balancing the commercial interests of retail networks and suppliers;
- increasing the efficiency of the interaction between retail networks and suppliers and optimizing costs throughout the supply chain;
- create the conditions for ethical compliance by all market actors with the use of negotiating power and the promotion of competition on the market;
- helping to meet consumer needs for high-quality consumer goods.

The rules contained in this Code may be applied by suppliers and retail networks within the territory of the Republic of Moldova, as used in pre-contractual and contractual relationships in the context of contracts for the delivery of goods and services, and do not apply in their relations within the territory of other countries.

The provisions of this Code are not mandatory for retail networks and / or suppliers, unless the enterprise expresses written consent to accept the provisions of this Code.

General principles applied to the relationships between retail networks and suppliers

1. This Code is based on the fundamental principles of civil law, namely the principles of recognition of equality of participants in the commercial circuit, the inviolability of property, contractual freedom, the inadmissibility of arbitrary interference by any person in private affairs, the unrestricted application of civil rights, violated rights and their legal protection. The code is based on the principles of reasonableness and good faith of retail networks and suppliers, The Code is based on the principles of the reasonable and bona fide nature of retail networks and suppliers, regardless of the application or non-application of the provisions of this Code.

2. Predictability for contragent (potential contragent) to define the conditions for trading in contracts (transparency criteria for selecting counterparties dependence trading conditions of efficiency of joint proportionality of penalties, if any, damage suffered following the breach of the party). Promoting competition and forming partnerships in the

relationship between suppliers and retail networks, which would optimize costs and minimize losses at the stages of co-ordination of the terms of collaboration and the fulfillment of the parties' obligations. At the same time, both suppliers and retail networks can take any measures provided by the legislation in force to restrict the access of its competitors to the individual conditions of commercial contracts and other confidential information.

3. Each supplier and retail network independently supports business risks and determines its sources of income. At the same time, one of the main sources of network retail and suppliers is commercial additions, and other conditions may vary depending on the sales volume targets, brand development (brand awareness), increasing of customer loyalty and other economically justified criteria. The parties do not have the right to transfer to the contragent costs on: attracting new suppliers, marketing research, opening / refurbishing the business unit. Parties have the right to transfer the contragent costs of: attracting new suppliers, marketing research, opening / renovation business unit. Suppliers and retail networks are making every effort to ensure fair competition and do not interfere with the business activities of partners and their competitors.

4. The exchange of information between the supplier and the retail network takes place on a voluntary basis, without breaching the competition laws of the Republic of Moldova, and other normative acts that ensure the confidentiality of the information received from the partners.

5. All agreements, including the agreement of intent, are made in written form (including the use of electronic means of communication), it is mandatory to record all agreements and trading conditions in the contract between the parties and their strict observance, simulated and fictitious transactions are not allowed

6. Suppliers and retail networks joint efforts to increase predictability for part of the volume of orders and delivery schedule of goods, provision of services, in order to optimize the costs of production, storage, delivery and sale of goods.

7. Suppliers and retail networks are working together to identify low-quality consumer goods and consumer goods whose compositional information is not true.

Principles applied to the relationships between retail networks and suppliers regarding the quality of consumer goods

Implementation of the principles of relations between networks and retail suppliers on product quality is achieved by combining the efforts of suppliers and network retail to identify goods that do not meet the standards, counterfeit goods, and goods whose information about composition on its packaging does not correspond to the truth and does not reflect their actual composition. Also, it includes informing consumers on the composition of consumer goods and the promotion of the use of high-quality consumer goods, including goods which, according to consumer properties and its characteristics exceed the minimum requirements set by technical regulations and national standards.

Choosing the counterpart

When selecting the contragent and concluding the contract, equal conditions of competition between suppliers should be ensured for a contract with the retail network (similarly between retail networks for the conclusion of the contract with suppliers), also and equal access to information on selection conditions of the contragent for the conclusion of the delivery contract.

Determination of the commercial terms of interaction between the parties in the context of contracts for the delivery of consumer goods and contracts for the provision of consumer goods promotion services should be clear to the parties.

Contractors should apply a non-discriminatory approach when determining the terms of payment of the goods, the amount of remuneration, the size and the application of sanctions and the cost of services (if these services are provided under a separate service contract).

Retail networks and suppliers are committed to informing the other part about corrupted behavior of staff and helping to prevent such cases.

Conclusions

An assessment by competition authorities of each breach of competition law by setting anti-competitive contractual conditions requires resources and time. And the main objective of the competition authorities' activity is to maintain and restore rapidly the competitive environment on the market.

The application of non-regulatory measures to remedy the concerns of the Competition Authorities on the consumer goods supply chain is beneficial both to the parties involved and to the Competition Authorities. The lack of a regulatory decision and the enforcement of punishments in line with it determines the companies involved to collaborate, and the Competition Authorities manage to achieve results, saving resources.

The practice of non-regulatory instruments applied to competition law, used for almost two decades, has contributed to the development of relationships to maintain a loyal competitive environment. Currently, almost one third of cases of abuse of dominant position are elucidated by methods involving the negotiation and collaboration of the Authorities with the parties involved. No commitments are accepted in serious cases, which considerably affect the competitive environment.

At the same time, the application of non-regulatory methods, involving the collaboration of market players with competition authorities, contributes to informing and educating good behavior. And when certain limits in action are explained and understood, they tend to be respected.

Assuming commitments, as well as accepting a Code of Good Practices, offers the opportunity to remedy the competition environment voluntarily, which contributes to the long-lasting preservation of loyal relations accepted by the parties. In a particular view, the role of the Competition Authorities in remedying the competitive environment through the implementation of the engagement tool and the Code of Good Practices is to mediate and adjust policy actions in the relations between market actors so that they are acceptable to the parties and respected.

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