ANTI-COMPETITIVE AGREEMENTS. FORMS AND IMPACT ON THE COMPETITIVE ENVIRONMENT ON THE MARKET

Victor LAȘCOV [1], Ion MAXIM [2], Constanța TIUHTII [3]

Lucian Blaga University of Sibiu

Abstract

Anti-competitive agreements are a form of collaboration between companies, aiming to reduce existing competitive pressures on the market that lead economic operators to innovate and improve their offers in terms of asking price and quality of offered goods and services that result in harming the consumers' interests. This practice can take various forms and effects as alliances, anti-competitive arrangements, monopolistic agreements, cartel, and others.

The paper contains an analysis of the forms of anti-competitive agreements, their impact on the market relations and the form of their regulation. The article 101 TFEU contains the main regulation providing for the interdiction and sanctioning of anti-competitive agreements at the European level.

Keywords: *anti-competitive agreements, market competition, market relationship*

JEL classification: *K2, K21, L4, L41*

1. Introduction

Anti-competitive agreements manifest in restricting competition agreements between enterprises, concentrated practices or decisions of companies' associations. These are often difficult to separate from each other,

[1]*Ph.D. Lucian Blaga University of Sibiu, Faculty of Economic Sciences, Sibiu, Romania, e-mail: lascovvictor@gmail.com*

[2] *Assoc. Prof., PhD, Competition Council, Chisinau, Republic of Moldova, ionmaxim@yandex.com*

[3]*Ph.D. Lucian Blaga University of Sibiu, Faculty of Economic Sciences, Sibiu, Romania, e-mail: connsta@gmail.com*

but in terms of legal consequences, it does not matter which of the three forms is found in a given case.

Concerted practice does not necessarily imply a clearly expressed manifestation of the will, but rather a coordination of commercial strategies. The object of the concerted practice is a weaker form of the contest of wills, which materializes through a certain concordance of behaviors. From a subjective point of view (the notions of agreement and concerted practice), include forms of collusion of the same nature, but differ in their intensity and in the forms that manifest (EC, 1999).

The meeting of wills in the case of concerted practices is less obvious than in the case of agreements because there is no real exchange of consents as in the matter of contracts, but their juxtaposition achieved by disseminating information, revealing its attitude on the market, by reducing the level of uncertainty. Because concerted practice is often not preceded by a formal agreement, which can be directly proven, it could be done by presumptions and indications.

According to the jurisprudence of the CJEU, the evidence of a concerted practise must result from a series of elements assessed not in isolation but as a whole, taking into account the characteristics of the market in question (EC, 2004). The existence of a concerted practice between competing undertakings is presumed if they have come into contact or through the exchange of information. This can take different forms, through discussions between representatives, by telephone, by fax, by e-mail, even by the professional press, or by attending meetings, the volume and quality of the information provided to each other not being mandatory equal.

Decisions of the business association represent the coordination of companies' activities in some industries by an organization that carries out and protects their interests (an association, a union or, for example, a chamber). These organizations - along with several useful functions - provide fertile ground for companies' anti-competitive agreements.

The association of enterprises is an association, a union, an economic interest group, a federation, a professional organization. To ascertain the existence of the business association, the way it is organized is irrelevant, and it is not necessary to have a formal registration of its activity (Jephcott, 2005). The decision can be manifested both in verbal and written form, as well as can be both mandatory and optional. Thus, the decision of the business association does not require an act generating legal obligations. Even a recommendation could be considered as a decision in the sense discussed since "it is a faithful expression of the will of an association to coordinate the behaviour of its members in the market" (EC, 1987). Thus, all the acts adopted by the members of the association are considered decisions, regardless of the name they assign: directive, circular, recommendation, and others.

We understand **the anti-competitive agreement** at least as a bilateral legal transaction that reflects the unity of will of the concerned enterprises. The concept of an agreement, applied by competition law, has a particular meaning, which does not always coincide with the concept that exists in commercial law. The anti-competitive agreement means any form (verbal or written) of the expression of the common will regarding the behavior on the market, expressed by two or more independent undertakings. These may take the form of verbal agreement, unsigned written agreement, tacitly accepted or written circular, deontological rule, gentlemen's agreements, simple agreement, distribution contract, and others. From the legal definition, we observe that the essential element is the expression of a common will of behaviour on the market, formed by the free and autonomous wills of the enterprises, parties to the agreement (Mihai, 2004). An undertaking party to an agreement cannot defend itself by participating under the coercion of other participants. Rather than participating in this agreement, it could disclose presences to which the competent authorities are presumed.

An essential condition for assuming the existence of an anti-competitive agreement is the companies' independence. Thus, acquiescence between enterprises belonging to the same group and having the status of a parent company and a subsidiary cannot be classified as anti-competitive, if the undertakings form an economic unit in which the subsidiary does not enjoy real autonomy in determining its market share and whether the agreements or practices concern only an internal division of tasks between undertakings. The same presumption applies to the case where two or more distinct legal entities will be considered as forming a single economic unit. This legal status could have the groups of companies in which the components, although they may have a distinct legal identity, they do not possess the economic one because the property right implies control. Thus, several separate legal entities may form a single economic unit to apply the competition rules. Therefore, an anti-competitive agreement will not be considered a situation in which subsidiaries, although independent legal entities, do not have the right to make decisions on its market practice, but to act based on orders issued directly or indirectly by the parent company, which in this way it exercises full control over its subsidiaries.

Similarly, an anti-competitive agreement is not found in the case of the principal-agent relationship, as the agent, due to lack of entrepreneurial freedom and risk-taking, should be considered not as an independent market participant, but as part of the principal (similar with an employee).

Anti-competitive agreements can take different forms but also have a different impact on the market, through the direction of application, purpose or expected results, the coverage area and the number of companies involved. In this direction, international competition law has established certain classifications of agreements depending on the type of business relations, the forms they take in practice and the effects they have on the competitive environment. Some anti-competitive agreements may be exempted from sanctions, depending on the size of the market impact.

2. Forms and types of anti-competitive agreements

2.1. Forms of anti-competitive agreements

In terms of competition law, anti-competitive agreements can take many forms in practice. Article 101 TFEU, following the declaration of a general ban, lists several typical cases in which the arrangement is incompatible. This list can only be considered as a list of examples, which is intended to show the nature of the transaction which the legislator considers being typically anti-competitive and therefore subjected to sanctions. If an agreement or concerted practice corresponds to one of the examples listed, it is easy to qualify as an anti-competitive agreement. At the same time, this list is not exhaustive. Other actions can be qualified as anti-competitive agreements in the practical activity.

Anti-competitive agreements referred in Article 101 (1) TFEU are those which:

- <u>Establish directly or indirectly purchase or sale prices, or any other trading conditions</u>.

Direct setting means the unequivocal, unavoidable setting of prices. One can achieve an indirect establishment by fixing other elements that contribute to their formation (margins, rebates, and others) or by imposing various constraints, which lead to the same result (Mihai, 2004).

Pricing actions may relate to the setting of minimum, target, or prices determined jointly by the undertakings participating in the agreement. There may also be agreements on part of the price or additional prices. Pricing can only target one item of the final selling price.

- Limit or control production, marketing, technical development or investments;

Market-sharing agreements may provide, in addition to the distribution of territory and customers, for a quantitative distribution. This type of limitation is specific to sectors where a surplus of the product is found, or a rise in prices is desired. This anti-competitive practice can take the following forms: setting quotas for production or delivery; limiting the sales market; concluding agreements called self-limitation; concluding agreements designed to reduce or freeze production capacity; limiting technology transfer, to prevent the entry of a third party into the market, for example, the main producers agree to jointly purchase the equipment of the one that will go bankrupt, to avoid the entry of other producers into the market; mutual denial of the manufacture and marketing of a certain type of product; elaboration of mutual standardization norms. Limiting or controlling technical development or investment involves reducing or directing human and material efforts to introduce new, more efficient production methods or the placement of funds so that they are in line with the interests of companies participating in anti-competitive practice.

- Share markets or sources of supply;

This anti-competitive practice has the features of a non-violent trade agreement. Horizontal market - sharing agreements between competitors involve sharing of one or another market of goods or services to one or another company. They intend to consolidate certain trade schemes, with competing companies giving up disputing customers or markets. The term "market" has not only the meaning of territory but also the meaning of "product". In this sense, two economic agents, producers of the same type of products, agree to sell different products on the same markets, thus eliminating inter-brand competition (Butacu, 2005).

- Applies unequal conditions to equivalent services in the relations with the commercial partners, thus creating a competitive disadvantage;

This prohibition is conditioned by the meeting of two premises:

1. Applying unequal conditions to equivalent services of trading partners. By unequal conditions we mean the practice of different treatments towards trading partners. By equivalent benefits we mean the same type of benefits, of the same nature and value.

2. Creating through this practice a competitive disadvantage to the trading partners, compared to the others.

This anti-competitive practice aims to eliminate an undertaking from the market through discrimination, in particular, if one of the companies participating in the practice is its competition. However, there are also situations in which the companies involved are downstream or upstream of the relevant market, respectively the market in which the company affected by the practice operates, their purpose is to prepare to enter that market by eliminating one or more of the future competitors.

This practice violates the principle of applying equal treatment in equivalent situations, an assumption on which any honest commercial activity must be built, discriminated enterprises, positive or negative, operating on the market with unequal opportunities (Butacu, 2005).

➢ <u>Condition the conclusion of the contracts, accepting some additional services which, by their nature or by the commercial customs, are not related to the object of these contracts</u>.

Through this anti-competitive practice, the commercial partners must perform other services than the usual ones regarding the object of the contract or the commercial customs.

Such services may take different forms, but anti-competitive practice can be committed in two ways:

- The attempt of concluding a contract by the introduction of such clauses;
- Concluding the contract containing such clauses, when the contractor is in a position of economic dependence and cannot freely express his will.

Conditioning contracts of acceptance by the partners of additional services that, by their nature or by commercial usage, do not relate to the object of these contracts and concern "coupled", "chaining" or "linked" contracts.

Anti-competitive agreements identified by EU case law are:

➢ <u>participation with rigged bids in tenders or in any other form of tender</u>;

Although paragraph 1, art. 101 of the TFEU does not expressly provide for such an anti-competitive practice, it is established by Community case law. If the offers made by the participants in the auction are not the result of the individual economic calculation, but it results from knowing other participants' content of the actions and from its concertation, the competition must be prevented, or at least distorted and limited.

Cheating/fraud of the auction occurs when companies, which in other situations are expected to be competitors, secretly agree to increase prices or decrease the quality of products or services for customers wishing to purchase products or services through an auction (OECD, 2009).

Participation with rigged bids may take place in the auction or other forms of competition. The auction can take many forms, including:

- **Closed bidding**, also called complementary bidding, courtesy, fiduciary or symbolic bidding, is the most common way in which one can implement bidding fraud strategies. It occurs when economic operators decide to submit tenders involving at least one of the following situations:
1) A competitor agrees to submit a higher bid than the bid of the designated winner, 2) a competitor submits an offer that is known to be much larger to be accepted or 3) a competitor puts in a bid of exceptional terms that are known not to be accepted by the customer. The closed bid gives the impression of real competition.
- **Withholding from bidding**. Bid retention schemes involve agreements between competitors in which one or more companies agree to withdraw from the bid or withdraw a previously submitted offer so that the tender of the designated winner is accepted. In essence, withholding from tender means that the company does not submit a tender for the final award.
- **Alternation of the offer**. Within the offer alternation scheme, the conspiracy companies continue to bid but agree to be the winning bidder. The way in which supply-side agreements are implemented may vary. For example, conspirators could choose to allocate the same amount of money from a certain group of contracts to each company or to allocate volumes corresponding to the size of each company.
- **Market allocation**. Competitors share the market and decide not to compete for specific customers or in a certain geographical area.

For example, competing firms may assign specific companies or types of customers to various companies, so that they are offered (or only offer coverage) for contracts offered by a certain class of potential customers that are assigned to a particular company. In turn, that competitor will not bid competitively against a designated group of customers assigned to other companies under the agreement.

One of the general objectives of a secret agreement is to increase the profits of the tender and in this way to increase the amount that the bidders will earn. Plans for secret agreements often include mechanisms for the distribution and trading, among those who conspire, of the additional profit obtained because of the increase in the final contracted price. For example, competitors who decide not to bid or bid lower may obtain subcontracts or supply contracts from the bidder designated to win in order to share the profit resulting from the high price obtained illegally by auction.

The Romanian Competition Council, for example, in order to outline as accurately as possible the anti-competitive practices, performs an extremely narrow delimitation of the relevant markets. Thus, the decision pronounced in the matter of organizing auctions is noteworthy: "In the context of this case, each tender is a relevant market itself, on which competition must manifest itself from the moment of launching the applications to submit tenders until the time of the award of the tender, by ensuring access to the tender as many as possible of bidders.” (Mihai, 2004).

At the same time, it should be mentioned that the concertation within the auctions could be not only about the price but also on other conditions of the offer: the quality of the products, after-sales services, etc.

- Restricting or impeding access to the market and the freedom to exercise competition by other companies, as well as agreements not to buy or sell to certain undertakings without reasonable justification, and others.

There are two ways of limiting or preventing access to the market: by "horizontal" and "vertical" agreements.

An agreement can impede the market access by establishing conditions that limit the possibilities for companies potentially competing for entering the market on which the parties of the agreement are already operating. In this way, limiting the manifestation of potential rivalry in the sense of transformation into an existing competition restricts the development of existing clash.

The occurrence of the effects of limiting market access depends on a large extent on the degree of concentration of the relevant market. If the market is poorly concentrated, any potential competitor will be able to enter it without problems, if it has the minimum resources to start an activity similar to that of the undertakings parties to the agreement.

Market access also depends on the existence of barriers to market entry. Barriers to entry represent situations, conditions and other elements that obstruct access to a particular market for a product or service.

The existence of market-sharing agreements, the fixing of sale or purchase prices, the division of customers, for example, concluded between competing undertakings, with significant market shares and financial resources can be barriers of entry.

2.2. Types of anti-competitive agreements

At the theoretical and normative level, agreements between undertakings that prevent, restrict or distort competition are divided into horizontal agreements and vertical agreements. In this case, the classification criterion is the type of business relationship.

Horizontal agreements are between two or more enterprises operating in the market at the same level. Depending on the effects on competition, horizontal agreements classify into two categories prohibited per se and non-per se (Faull, 2007). The term "hard cartels" is also used to refer to horizontal agreements per se. In the 1998 Recommendation, the Council of the Organization for Economic Co-operation and Development (OECD) defined the cartel as an anti-competitive agreement, a concerted anti-competitive practice or an anti-competitive agreement between competitors on auction, setting exit restrictions or quotas, sharing or dividing markets by allocating buyers, sellers, territories or lines of trade (OECD, 1998).

The "non-per se" group includes cooperation agreements, which are considered less harmful to competition. Their effect on rivalry depends, among other things, on the nature of the agreement and market conditions. First, their evaluation is carried out on a case-by-case basis.

As a rule, one considers horizontal agreements more harmful to the competitive environment than vertical ones, because they can have positive effects on the market, sometimes reducing the final price, while the parties to such an agreement are not in competition.

A vertical agreement means an agreement or concerted practice agreed between two or more undertakings that each operates at different levels of the production and distribution process, within the meaning of the agreement or concerted practice, and which refers to the conditions under which the parties may purchase, sells or resells certain goods or services (EC, 2010).

Competition law is usually much more tolerant of vertical restrictions of competition. This is because such agreements can contribute to the emergence of new products, increased competition between brands (even to the detriment of competition within the same brand), accompanied by competition-limiting side effects. It should be noted that in some countries, such as the United States, there is no vertical ban equivalent to a horizontal one, and the pursuit of vertical restraints depends on the presence of market power.

The vertical agreement takes place between non-competing undertakings, which means that they each operate, for the purposes of the agreement, at a different level of the production or distribution chain. This means, for example, that one undertaking produces a raw material which the other undertaking uses as an intermediary good or that the first is a producer, the second a wholesaler and the third a retailer. This does not exclude the case where an enterprise is present at several levels of the production or distribution chain. Because the company can be present at several levels of the economic chain, assigning it several roles, it is sometimes clear the ambivalent position of the company, hardly drawing the boundaries between the qualification of competitors and non-competitors.

3. The impact of anti-competitive agreements on the market and their regulation

Depending on the effects of the agreements, they are delimited in anti-competitive agreements with clear negative effects for the economy and consumers and in anti-competitive arrangements that do not significantly limit competition and can be excused from sanctions, and in some cases can have a positive economic impact. Thereat, the competition authorities' role is to analyze the market, the participants of the agreement. In addition, it must identify all the circumstances; determine the impact's extent and the need for their removal or admission, as well as their sanctioning. Although all anti-competitive agreements are analyzed for the effects on the market, the prohibited arrangements "per se" are determined to have a considerable negative impact on the competitive environment. At the same time, for anti-competitive agreements, which do not create a significant negative impact on the market, it is necessary to analyze the possibility of exemption from sanctions. Therefore, given the size of the impact they have on the market, the agreements can be: with a clear negative impact and prohibited, respectively sanctioned; and which meet several conditions by which one can demonstrate the absence of a negative impact or the prevalence of a resulting benefit, which are subject to exemptions, and which may be permitted or not sanctioned.

3.1. Anti-competitive agreements with obvious negative impact (prohibited "per se")

The cartel is one of the forbidden horizontal agreements "per se". It is one of the most severe infringements of competition law recognized by all jurisdictions. Detecting and combating the cartel has become one of the top priorities of competition authorities in Europe and around the world. In recent years, many measures have been taken to increase the effectiveness of countering cartels.

The European Council found that the cartel means an agreement or concerted practice between two or more competitors that seek to coordinate their competitive behavior on the market or to influence the relevant parameters of competition through some methods. They include, among others, fixing or coordinating purchase prices; sale or other trading conditions, including intellectual property rights, allocation of production or sales quotas, market and customer sharing, including manipulation of tendering procedures, restrictions on imports or exports or anti-competitive actions against other competitors (Official Journal EU, 2009).

From the above definition, it follows that a cartel may be created by competitors or by independent undertakings. Competitors are market participants operating in the same market: undertakings offering the same substitutable products or services from the consumer's point of view.

Depending on the objectives of the agreement between the competitors, there are mainly (Tot, 2014):

- Price cartel,
- Cartel for market division;
- Cartel by cheating offers
- Cartel regarding the limitation of production or the establishment of quotas;
- Cartel based on the exchange of information

Cartels were often complex in nature, combining the influence of prices, the division of markets and the limitation of production with the establishment of various control mechanisms, in which ones can exchange confidential business information.

"Per se" prohibited vertical agreements refer to the division of the market by territory and group of customers or to the limitation of the consumer's ability to determine his resale price. The first category divides further into restrictions delimiting the sale freedom of the consumer and supplier.

- *Sale restrictions for consumers*
- *Sale restrictions for licensees*

In the case of technology transfer agreements, the restrictions prohibited and which are generally considered to be object restrictions are only restrictions on the licensee's passive sales (and do not include its active sales) in a particular territory or to a group of customers.

- *Sale restrictions for the supplier*. Restrictions agreed between a component supplier and a buyer incorporating these components, on the supplier's ability to sell the pieces as spare parts to end-users, or repairers, or other service providers who have not been authorized by the buyer to repair or maintain the goods, are prohibited restrictions by object.
- *Maintaining the resale price.* Restrictions on a buyer's ability to determine his minimum selling price generally constitute restrictions by object. Restrictions that impose maximum selling prices or recommend selling prices are not restrictions by object, as long as they do not become fixed or minimum selling prices due to pressure or incentives offered by either party.

Severe restrictions on supply and distribution agreements between non-competitors are established in Article 4 of Regulation (EU) No 182/2011 of Commission Regulation (EC) No 330/2010 of 20 April 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to the categories of vertical agreements and concerted practices, and for licensing agreements between non-competitors, in Article 4 (2) of Regulation (EU) Commission Regulation (EC) No 316/2014 of 21 March 2014 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

For agreements between competitors, the severe restrictions are described in Article 5 of Regulation (EU) No 182/2011. Commission Regulation (EC) No 1217/2010 of 14 December 2010 on the application of

Article 101 (3) of the Treaty on the Functioning of the Treaty European Union specific categories of research and development agreements (OJ L 335, 18.12.2010, p. 36) and Article 4 of Regulation (EU) No 1095/2010. Commission Regulation (EC) No 1218/2010 of 14 December 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to specific categories of specialization agreements (OJ L 335, 18.12.2010, p. 43) and Article 4 (1)) of Regulation (EU) no. 316/2014 (CE, 2014).

3.2. Anti-competitive agreements with insignificant impact (non-sanctionable)

Anti-competitive agreements that are not sanctionable have in common the impact on the market, the justification from the prevalence of the economic perception on the competition law over the legal vision. The positive preponderance on the economic environment, which constitute causes of exoneration from liability, can be grouped in exemptions regarding minor agreements; individual exemptions; block exemptions.

➢ <u>Exceptions regarding minor agreements</u>

The legal criteria for the composition of the infringement, the economic position of the participants in the agreement, in the market context must guide the fight against anti-competitive agreements. If their importance is insignificant in the market segment in which they operate, the arrangement has little potential to distort efficient competition; based on the de minimis doctrine these agreements are exempt from liability.

As regards the determination of the scope of agreements which do not significantly restrict competition and which do not need to be fined, the Commission considers two situations:

• In case of arrangements between competing undertakings, it will check whether the cumulative market share held by the parties exceeds 10% in any of the relevant affected markets;

• In case of arrangements between non-competitors, the Commission will verify whether the market share held of the parties exceeds 15% in any of the relevant affected markets.

When it is difficult to determine whether it is an agreement concluded between competing undertakings or non-competitors, it will apply 10% thresholds. When the cumulative effect of arrangements concluded with different suppliers and distributors (cumulative blocking effect) restricts competition, the limit will drop by 5%.

- Individual exemptions and block exemptions

There is a large number of agreements, decisions and concerted practices, which fall within the prohibition specified in Article 101 (1) TFEU, but which, together with the restriction of competition, ensure or at least strive to provide significant positive effects to offset the negative ones. Each system of competition regulation contains provisions whereby the competition authority accepts certain agreements, which restrict competition. In US law, it is possible by applying the rule of reason, and EU competition law uses a system of block exemptions and individual exemptions. These facts show that competition is not an aim in itself, but a mean.

An agreement recognized as prohibited, together with the indisputable restriction of competition, may improve market conditions, create new products or may accompany such economic, social and other benefits as to justify the waiver of sanctions.

Individual and block exemptions are granted following the provisions of Article 101 (3) TFEU. According to it, the provisions of the first paragraph may be declared inapplicable in case of:

- Any agreements or categories of agreements between undertakings;
- Any decisions or categories of decisions of associations of undertakings;
- any concerted practices or divisions of concerted practices which contribute to the improvement of the production or distribution of products, or the promotion of technical or economic progress, while ensuring consumers a fair share of the benefit obtained and which:

(a) Do not impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives;

(b) It does not allow undertakings to eliminate competition in respect of a significant part of the products concerned.

The agreement (accord, decision or concerted practice) should contribute to improving the production and distribution of products, to the development of technical and economic progress. Thus, economic advantages must accompany the restriction of competition.

To recognize agreements as contributing to the improvement of production or distribution and technical or economic progress, they must provide an objective development concerning the existing situation. The basic principle formulated in the creation of a common market is that the best guarantee of a systematic supply in the most favorable conditions is fair and undistorted competition. Thus, the issue of a contribution to economic progress within the meaning of Article 85 (3) (currently Article 101 (3) TFEU) can arise only in those exceptional cases where free competition cannot produce the best result in an economic sense (EC, 1975).

Benefits for the participants - including economic benefits - always accompany restriction of competition. Otherwise, it would not have concluded such an agreement. Exempting anti-competitive practice from legal sanction implies higher requirements: economic gains must manifest on the scale of society as a whole.

The first condition “contributes to the improvement of the production or distribution of products or the promotion of technical or economic progress” refers to two categories of positive features: on the one hand, costs can be made more efficient; on the other hand, new products can appear. Synergistic effects can determine the costs decrease: two existing technologies complement each other better; economies of scale: as total production, increases, the cost-share per unit of production decreases; and the economy offered by the assortment.

To give efficient competition-friendly competences under an agreement, they must offset the anti-competitive effects. The issue makes it necessary to verify: 1) the nature of the claimed efficiency increases, 2) the causality links between the agreement and the efficiency increase; 3) the probability and importance of each claimed increase in efficiency; 4) the moment of achieving the development in probable efficiency (Lazăr, 2016).

The second condition - to provide consumers with a fair share of the benefit. In addition to promoting economic development, the consumers should benefit from the agreement: a precondition is that economic progress should not be limited to the participants in the anti-competitive agreement, but should also be felt by buyers and contribute to consumer welfare. This condition closely links to the rest of the elements: the transfer of benefits is likely to happen if competition in the market remains strong.

The advantage coincides with the results of economic development: improved services, a wider range of goods, lower prices, higher reliability, regular supply, and others. Thus, it is recognized that consumers should also feel a positive effect of the restriction of competition.

The third condition for granting the exemption is the indispensability of the restrictions. Under this condition, the individual constraints of competition arising from the agreement must be reasonably necessary to achieve efficiency gains. The main issue to check is whether the arrangement in question and the competitive constraints, which it gives rise, allows the activity in question to be carried out more efficiently than in the absence of the agreement or restriction in question. Thus, the problem is not whether the agreement was concluded in the absence of competition restriction, but whether one can achieve significant increases in efficiency by signing the arrangement, than in its absence. (Lazăr, 2016).

The fourth condition - avoiding the elimination of competition. Economic progress should not be made at any cost. The parties should not assume unnecessary restrictions on competition, and the elimination of competition should not accompany agreement implementation. The analysis performed for each specific case is based on the established objective and the given market situation. The cessation of competition in a large part of the market for the product concerned should not accompany an anti-competitive agreement that has positive effects.

Thus, the existence of competition is a more important value than the benefits of its elimination. The determination of the competitive situation depends on the definition of the product market and the geographical boundaries of the market - after taking these two criteria into account, it is possible to determine the market position of competitors and assess the impact of the agreement on the market.

<u>The exemption is granted individually</u> to those agreements that, meeting the conditions provided by law, allow a level of compatibility with the functioning market. This exemption is based on the idea that legal rules are an instrument made available to protect the market from aggression and the application of sanctions must take into account the real market effect of the facts. In exceptional cases, one can tolerate anti-competitive agreements based on national interest.

Agreements in this category in which companies are exempt from sanctions remain legally unlawful, but their economic impact justifies the forgiveness of repressive measures. The verification of the conditions and the granting of the exemption happens ex-post, on the agreements operating the control exercised by the competition authority under investigation (Almășan, 2018). Thus, one can grant the examination of the conditions and an individual discharge if the competition authority investigates the cartel.

The block exemption refers to the exemption from the application of competitive sanctions to business relationships by relating them to an exemption standard.

Anti-competitive agreements exempted by positive effects, which are indispensable for the development of a specific type of business relationship, have been grouped into categories that receive the uniform exemption insofar as they meet the conditions corresponding to the class.

Applying the block exemption increases the predictability of relationships, the transparency of exemption situations and allows the competition authorities to focus only on agreements that have a potentially harmful real effect on the market. Standardization reduces the difficulties of assessing the block exemption, being dominated by economic considerations.

Block exemptions are allowed in the case of horizontal agreements, called competition agreements of competitors, and vertical agreements.

<u>Cooperation of competitors</u>. Agreements between competitors, called horizontal arrangements, depending on the purpose of the parties and its nature, can be divided into two broad groups: cartels that are anti-competitive by object and cooperation agreements designed to support more successful and effective market participation, to increase competition.

Based on these cooperation agreements, the participating companies integrate part of their activities, which they carry out together. Because of these agreements, a new product appears on the market, reduced or costs for an existing product, improved quality, or sales are more efficient. All countries have a positive view about cooperation agreements that increase economic efficiency, accepting the restriction of competition to achieve a positive result or in general, restrictions aimed at increasing efficiency are considered not to limit competition.

<u>Non-cartel cooperation</u> between competitors generally referres to a joint venture, regardless of the legal form or organizational framework in which it operates. The parties may set up a joint venture, an organization for this purpose, but their cooperation may lay exclusively on a contractual basis. Unlike cartels, the cooperation is open, embodied in a well-designed contract or package of contracts.

Cooperation should be separated not only from cartels but also from economic concentrations. Under EU competition law, setting up a company is considered an economic concentration if it is operational, is an independent market participant. If, for example, the parent undertakings integrate only part of their activities into a joint venture (say they only carry out joint research or joint procurement of raw materials), that undertaking is not an economic concentration but cooperation.

According to EU standards (EC, 2011), the following types of cooperation agreements qualify as beneficial: research and development agreements; production agreements; procurement agreements; marketing agreements; standardization agreements, and others.

Allowed vertical arrangements. The group exemption from vertical restraints lays on the "economy-oriented approach". Thus, only the restrictions imposed by companies with significant market power deserve to be analyzed under competition law, in this respect a threshold of 30% (EC, 2010) of market share was introduced. Below this threshold, all restrictions are exempt from the prohibition, while agreements between undertakings with a market share above this value are subject to an individual assessment.

Vertical agreements are not concluded by competitors, but by undertakings located at different levels of the value chain and considered less harmful to competition. Due to the distinct perception of the degree of danger of the agreements, their treatment is also different. In essence, the competition policy is more severe in terms of horizontal agreements.

Some supporters of the Chicago School believe that agreements that reached different stages of the vertical chain contribute to increasing the efficiency of the production and distribution of goods and services. As a counterpoint to this positive image, post-Chicago current analyzes have highlighted the detrimental effects of vertical agreements, believing that they systematically distort competition and reduce welfare. Specifically, they would allow producers and distributors to apply barriers to entry for competing products and thus raise the profit margin to the detriment of consumers and society. Thus, for most vertical restraints, competition problems can arise only when competition between brands is insufficient, especially when there is a specific market power at the level of the supplier, the buyer or both (EC, 2010).

In the case of competition between brands, manufacturers and distributors of similar products compete with each other on the market. Competition within the same brand (intra-brand rivalry) means that the buyer, who has already chosen the product, can decide from which distributor, where and under what conditions he can buy this product. Thus, in the case of competition between brands, we have rivalry between producers, and in competition within the same brand, the rivalry is between distributors.

The competition manifests in different aspects, the price is the most obvious one. A wide range of products can offer an important competitive advantage, a complete collection, guaranteed quality and professional customer service. With a dynamic image of competition, the resulting role in the field of innovation becomes more important.

Trade between states is of particular importance for consumer welfare. Often through vertical agreements, the movement of products between states can be restricted, excluding by agreement the import of products by several traders. Limiting the number of importers is a limitation of "parallel imports", and therefore of competition.

The assessment of vertical restraints of competition is based on a system of comparative factors, so the post-agreement competitive situation compares with the competition formed in the absence of the restrictive elements provided in the agreement. Also, it offers a wider opportunity to intervene, in comparison with the competitive situation before and after the conclusion of the agreement. Respectively, the evaluation of the economic effects of business conduct has an immense role.

Vertical restrictions on competition are more likely to be accompanied by positive economic impacts than coordination between competitors. Some of the benefits of vertical agreements:

- can facilitate entry into new markets;
- can promote forms of competition that go beyond price competition;
- can serve as an effective means of tackling the problem of "free-riding",
- ensure the marketing economy resulting from economies of scale,
- contribute to increasing quality and sales.

If a manufacturer wishes to enter a new geographic market, for example, intends to export to another country for the first time, it must persuade the distributor to make certain investments to bring the brand to market. To persuade the local trader to make this investment, the producer may have to offer territorial protection so that the trader can recover his investment by temporarily charging a higher price. Thus, traders selling in other markets should then refrain from trying to sell in the new market for a while.

4. Conclusions

The agreement, concerted practise or decision of the association of undertakings may be illegal only if their purpose or effect adversely affects competition. Of course, existing obligations between companies inevitably limit the freedom of business of at least one of them, but not all agreements or decisions are a restriction of competition. When analysing an agreement, the main question is whether the arrangement has an impact on the market rivalry. For business, behaviour to restrict competition there must be an actual or potential competitive situation, a competitive environment.

In the case of anti-competitive agreements, the finding of an infringement does not require conclusive evidence of the market impact of the agreed practice, if one can establish that the purpose of coordinating the behaviour was to restrict competition. The anti-competitive agreement is an infringement by object, so establishing the anti-competitive purpose of the arrangement is sufficient to qualify the infraction. In the absence of a clear objective aimed to restrict competition, it is necessary to analyse the anti-competitive impact of the agreement. So it is crucial to determine the relevant market and then, taking into account the legal and economic context, to assess the anti-competitive effects of the arrangement.

The stated intention of undertakings, which are party to a cartel, may differ from the anti-competitive effect. Recognizing an agreement between companies that restricts competition can be a difficult issue. There are, of course, types of restrictions in which the answer to the question is self-evident, such as traditional pricing agreements or market-sharing agreements. However, concerning non-cartel cooperation and vertical agreements, opinions on the issue of competition restrictions are divergent.

The size and shape of the impact on the market determine the decision on the admissibility of anti-competitive agreements. Restriction of the competition after analysis of the dangerous effects on competition may be allowed if the positive effects prevail and if the result obtained is favourable for the welfare of consumers. However, it should be noted that an unambiguous assessment of the negative and positive aspects is impossible. It is not easy to determine which party dominates.

5. References

- Almășan A.(2018) Competition Law. ISBN 978-606-18-0829-8 Bucharest: C.H Beck Publishing House

- Arrêt de la CJCE aff. 45/85 Verband der Sachversicherere.V. contre Commission (1987). Recueil de jurisprudence 1987 page 00405
- Butacu C. (2005) Competition legislation. Comments and explanations. Bucharest: All Beck.
- Judgment of the ECJ aff. 45/85 Verband der Sachversicherere.V. v Commission (1987). European Court reports 1987 Page 00405
- Commission Decision 76/172/EEC of 15 December 1975 relating to a proceeding under Article 85 of the Treaty (IV/27.073 - Bayer/Gist-Brocades) OJ L 30, 5.2.1976, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31976D0172&from=en
- Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements OJ C 11, 14.1.2011
- Commission Decision 76/172 / EEC of 15 December 1975 relating to a proceeding under Article 85 of the Treaty (IV / 27.073 - Bayer / Gist-Brocades) OJ L 30, 5.2.1976, https: //eur-lex.europa .eu / legal-content / eN / TXT / PDF /? uri = CELEX: 31976D0172 & from = en
- Communication from the Commission - Communication on agreements of minor importance which do not significantly restrict competition within the meaning of Article 101 (1) of the Treaty on the Functioning of the European Union (De minimis Communication) OJ C 291, 30.8.2014
- Directive (Eu) 2019/1 Of The European Parliament And Of The Council Of 11 December 2018 on providing the means for competition authorities in the Member States to be more effective in enforcing the law and on ensuring the proper functioning of the internal market Official Journal L 11/3 14.1.2019
- Faull J., Nikpay A. (2007) The EC law of competition, Oxford University Press.
- Guidelines for combating bidding in tenders. OECD, 2009. http://www.consiliulconcurentei.ro/documente/Liniii%20directoare%20OCDE%20privind%20combaterea%20trucarii%20oferetelor%20in%20cadrul%20licitatiilor%20publice_18086ro.pdf
- Judgment of the Court (Fifth Chamber) of 7 January 2004. Aalborg Portland A/S (C-204/00 P), Irish Cement Ltd (C-205/00 P), Ciments

français SA (C-211/00 P), Italcementi - Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir - Cementerie del Tirreno SpA (C-219/00 P) v Commission of the European Communities. Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P. Reports of Cases 2004 I-00123

- Judgment of the Court (Sixth Chamber) of 8 July 1999. Commission of the European Communities v Anic Partecipazioni SpA. Case C-49/92 P.
- Jephcott Mark. (2005) Horizontal agreements and EU Competition law. Oxford University Press. ISBN 978-1-904-50159-6
- Lazăr Ioan (2016) European Union Law in the Field of Competition, Bucharest: Universul Juridic. ISBN 978-606-673-787-6
- Linii directoare pentru combaterea trucării ofertelor în cadrul licitaţiilor. OCDE, 2009. http://www.consiliulconcurentei.ro/documente/Liniii%20directoare%20OCDE%20privind%20combaterea%20trucarii%20oferetelor%20in%20cadrul%20licitatiilor%20publice_18086ro.pdf
- Mihai E. (2004) Dreptul concurenţei. Bucureşti: All Beck.
- Orientări privind restricţiile verticale. J.O. C 130 din 19.05.2010.
- Recommendation of the OECD Council concerning Effective Action against Hard Core Cartels. OECD, 1998
- Regulamentul (UE) nr. 330/2010 al Comisiei din 20 aprilie 2010 privind aplicarea articolului 101 alineatul (3) din Tratatul privind funcționarea Uniunii Europene categoriilor de acorduri verticale și practici concertate JO L 102, 23.4.2010
- Regulamentul (UE) nr. 330/2010 al Comisiei din 20 aprilie 2010 privind aplicarea articolului 101 alineatul (3) din Tratatul privind funcționarea Uniunii Europene categoriilor de acorduri verticale și practici concertate. JO L 102, 23.4.2010
- Тот Т., Антимонопольное право Европейского Союза. Издатель: Венгерское Антимонопольное Ведомство, Будапешт, 2014, ISBN 978 963 12 0388 2