UNFAIR COMPETITION IN COMPARATIVE LAW. ANTITRUST LAWS, SPECIFIC TO AMERICAN LAW

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Abstract

The paper aims to show how unfair competition is presented in the American law. In this approach we will refer to the constitutional and legal consecration of unfair competition in America. We also want to highlight the benefits and obligations that have an effect on the US-funded mechanisms. Using the comparison method, we have concluded that the concept of "trust" represents an arrangement by which the shareholders of commercial companies in a certain field merged under the patronage of an administrator in order to benefit from a share of the consolidated profits of the jointly managed companies.

Keywords: *trade, competition, America, antitrust law.*

JEL Classification: K21, K33

1. Preliminary considerations

On the American continent, we meet the concept of "antitrust law", which forbids the formation of monopolies that affect competition. The "trust" concept is an arrangement by which the shareholders of some companies in a certain field, merged under the patronage of an administrator in order to benefit from a share of the consolidated earnings of the jointly managed companies. In short time, the trusts monopolized the industry and destroyed the competition[2].

2. Antitrust laws, specific to American law

The first legislative act of this kind is the "Sherman Antitrust Act", adopted on July 2, 1890, by the United States Congress. According to this legislative document, "Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce, is declared to be illegal" [3]. It also established that „Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce, shall be deemed guilty of a felony"[4].

The Sherman antitrust law aimed at inter-state trade and allowed federal institutions to dissolve the trusts and establish the illegality of any obstacles to trade or hindering trade with third countries. The offence committed was punishable by both pecuniary and imprisonment for up to one year, and the natural or legal persons who had suffered from the trusts' activity had the possibility of recovering their losses and claiming multiple damages ("treble damages"), to the federal court[5]. In the literature it was appreciated that the Sherman Act provided a legal framework under which the courts of justice could have the prerogative to judge the activities of traders, regardless of the lack of clarity and direction of the law (...) creating an unprecedented government policy and opposite the Anglo-Saxon anti-monopolistic tradition"[6].

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[2] Refer to Standard Oil Trust, created on January 2, 1882. It was run by a Board of Directors and each shareholder received 20 certificates for each share in Standard Oil stock. All the profits of the component companies were sent to the nine directors who settled the dividends. The nine administrators chose the directors and officers of all the component companies. This allowed Standard Oil to act as a monopoly, as the nine directors led all the component companies.

[3] The National Archives, Our Documents: *100 Milestone Documents from the National Archives*, Oxford University Press, USA, 2006, p. 124.

[4] *Ibidem*.

[5] Refer to the case *Hanover Shoe v United Shoe Machinery Corp din* 1968.

[6] E. Duhnea, *The Sherman Act - codification of common law or radical legislative reform?*, „Revista Concurența" no. 1-2/2016, p. 49.

However, in 1895, the Supreme Court of the United States of America appreciated that the Sherman Act can not be legally upheld in the case of States v. EC Knight Company ("Sugar Trust Case"),[7]. In this situation, the Supreme Court ruled that "American Sugar Refining Company", one of the defendants concerned, did not violate the law even though the company controlled about 98% of all sugar refining in the United States. The Supreme Court's opinion showed that although the company controlled the sugar production, this is not also a trade control. However, the Sherman Antitrust Act also ticked a series of achievements: The Minnesota v. Northern Securities Company case in 1904, Standard Oil of 1911, Microsoft in 2011, and others.

In 1911, the US legislation banned manufacturers from imposing a distributor's pricing strategy to protect their independence. Thus, aggressive competition has been encouraged through prices, even in the case of companies in dominant positions.

In 1914, the Clayton Act[8] has increased the power of the federal government against anticompetitive practices through the legal consecration of the concept of "economic concentration". According to Section 7 of the Clayton Act, we can talk about economic concentrations in situations involving the acquisition of any share of the share capital of a competing or non-competing company. The legal provisions prohibited such purchases when they have the effect of substantially restricting competition on the market[9]. Regulations on economic concentration do not apply if individuals buy such holdings to safeguard an investment provided that they do not use minority interests to exercise the right to vote or to restrict competition on the market[10]. The doctrine considered that it is "irrelevant to US competition authorities if the acquisition of a minority stake in the capital of a competing company gives its holder control over the competitor for applying the economic concentrations control regulations"[11].

Other regulations worth mentioning in this regard are the *Federal Trade Commission* (FTC) Act of 1914 and the Robinson-Patman Act of 1936[12].

With regard to measures against cartels, a leniency procedure was launched in 1978, whereby companies were motivated to reveal the cartel agreements they were part of in order to reduce the sanctions they were receiving.

The recent US legislation has restored the ability of manufacturers to renounce distribution contracts or *dealership* contracts at any time. Antitrust policy focuses on investigating and sanctioning horizontal agreements between competitors, as well as controlling mergers between competing firms.

In US law, we can not talk about state intervention with public money in state-owned enterprises, because this concept is non-existent on the American continent. Even since 1943-1944, the US Courts of Justice have accepted the principle that actions by public authorities cannot be subject to anti-trust legislation, regardless of their intention ("state action immunity"). Under certain circumstances, even private companies can put their argument in defence that their anti-competitive practices are a result of action by public authorities or regulations in place. On the other hand, companies operating in industries regulated by public authorities enjoy anti-trust immunity for actions falling under such statutes.

In the last 3 years, the Supreme Court of Justice of the United States has no longer admitted the lower courts' complaints about the existence of antitrust violations. In fact, Amex - a bidirectional platform - brings together a cardholder and a trader in a single credit card transaction, offering both the cardholder an instant credit and rewards, as well as a fast, risk-free service and guaranteed payment to the trader.

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[7] Refer to the case States v. EC Knight Company in K.L. Hall and J.W. Ely Jr., *The Oxford Guide to United States Supreme Court Decisions*, 2 ed., Oxford University Press, 2009.

[8] For this document, refer to P. Moles, N.Terry, *The Handbook of International Financial Terms*, Oxford University Press, 1997.

[9] D. Eleodor, *Possible anti-competitive effects of the structural and financial relationships that may arise between competing companies*, „Revista Concurența", no. 1/2009, p. 64.

[10] *Ibidem*.

[11] *Ibidem*.

[12] The motivation for adopting the Sherman Law was predominantly political - the aversion to the economic power of "big business" and the desire of the political factor to protect small businesses in competition with big trusts.

The Supreme Court has found that "Amex"-type credit card networks require the existence of a concurrent platform, creating indirect simultaneous network effects, where the value of the platform depends on the number of members on the other side. In fact, cardholders place a higher value on a credit card accepted by multiple traders, and traders also place a higher value on a network with access to multiple cardholders. Consequently, in the Court's view, a price balance is perceived by each party to maximize value for both parties.

The Court found that Amex had balanced the two sides of the platform, allowing traders higher commissions, on the one hand, to finance their investment in rewards for cardholders, on the other hand. Amex prevented traders from benefiting from their access to Amex cardholders by discouraging the use of cards at the point of sale. The provisions prohibit traders from a number of "direction" practices such as restrictions or fees on Amex cards or uneven promotion of other cards but do not prevent payments without credit cards, such as cash or debit cards. In applying the "rule of reason" in order to analyze the competitive effects of the "vertical" countermeasure in the Amex contracts with traders, the Court applied a three-step burden-sharing framework agreed by the parties: First, the applicants bear the initial burden of proving that the antithetical provision has an anticompetitive effect, that is to say, harms the consumers in a relevant antitrust market. Secondly, if the applicants satisfy this initial burden, the defendant Amex must demonstrate a pro-competitive justification of the antithetical provisions. Third, if Amex is in charge of this burden, the complainants must demonstrate that Amex could reasonably have obtained the same pro-competitive efficiencies by less anti-competitive means.

In this case, the Supreme Court found that the applicants had not fulfilled their initial obligation to demonstrate the necessary anti-competitive effect in a relevant market, ie did not show that the credit card prices, the transactions for both traders and cardholders were higher than they were in a competitive market. Instead, the Court observed the "robust inter-brand competition" carried out by Amex and other credit card companies, during which time credit card transactions increased not only in number but also as a higher owner of rewards cards.

The Court reasoned that vertical restraints "often do not present any risk to competition, unless the entity requiring them has market power, which can only be assessed when the Court first defines the relevant market". In the relevant market analysis, both parts of platform traders and cardholders are included - in the definition of the credit card market that the complainants "wrongly focus only on one part of the two-sided credit card market" or on the commissions received by the traders. However, the Court has quickly qualified that "it is not always necessary to consider both sides" for all bidirectional platforms, such as if the platform has weak "indirect network effects" and relative prices. Two-sided trading platforms, such as Amex, have, on the other hand, strong "indirect network effects" requiring simultaneous participation of both parties in a single transaction and should, therefore, be considered a single market for both parties.

Consequently, the Supreme Court, by its Decision no. 16–1454[13] of June 25, 2018 did not find any violation of antitrust law under Section 1 of the Sherman Act. The Court stated that: (A) the relevant antitrust market for a credit card market must include both "parties" of the market (i.e. traders and cardholders); and (B) the complainants, the United States and several states have not demonstrated that Amex caused anti-competitive effects on the market.

3. Conclusions

Between economic freedom and commercial freedom, competition rules acquire a legal force that influences the market.

In contemporary society, the market has gained transnational valences, where price, demand, supply and the relationship between the company and the consumer affect global production and consumption.

[13] Ohio Et Al. V. American Express Co. Et Al. Certiorari to the United States Court of Appeals for the Second Circuit no. 16–1454. Argued February 26, 2018—Decided June 25, 2018.

Nowadays, competition rules are trying to keep competition within fair and equal limits in the dynamic context of international, European or national economic affairs.

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RULE OF LAW AND THE NEW REGULATIONS CONCERNING THE DISCIPLINARY LIABILITY OF THE MAGISTRATES

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Abstract

The paper address the functioning of the rule of law, starting from the separation of powers, but also it offers a brief perspective over several theories that were developed as this principle evolved from one period of time to another. Closely linked to the principle stating the rule of law there is another one, proclaiming the imperative of an independent judicial authority and which, in performing its duties according to the rules that govern a fair trial, contributes to the implementation of the separation of powers but also of the checks and balances system and loyal cooperation between these authorities. We also presented an anlysis of the new regulation regarding the disciplinary liability of the magistrates, following the legislative changes adopted at the end of last year, and their eventual impact on the principles mentioned above. The research methods used in order to achieve this aim are the comparative method, the analytic and historical methods.

Keywords: *rule of law, disciplinary liability, magistrates, judiciary.*

JEL Classification: K10, K23, K31

1. Separation of powers – characteristic of the democratic government

Starting from the ancient philosophy of the Greeks, that offers the first examples of distributing authority (either to one individual – the monarch, or to a small group – the artistocracy or even to the entire people – democracy), it has been stated that legitimate power is only one and can be exercised either by a person or by the people.

Although unique, political power has always been exercised through various categories of structures of power, each having specific leading prerogatives and specific functions[2].

The exercise of the unique power by distributing it among specialised instituions was a common practice in Greek cities but also in the times of the Roman Republic, these states being organized upon a model that had as a foundament the assembly of the people, various magistratures and also judiciary instituions.[3]

English philosopher John Locke first brought forward the idea of what nowadays is commonly referred to the theory of separation of powers; he distinguished between the legislative power, the executive and the confederative ones (the latter was attributed to each person that was not yet a member of the body of the society, before adhering to the social contract, and it was formed by the right to peace and to declare war, the right to negotiate and other similar ones). Although Locke did not clearly mention a judicial power, he used to represent the State as having four functions, thus including the judicial one[4].

European states, lead by various types of monarchic (and often absolute) governments did not get to know, in theory or in practice, the separation of powers, until the XVIII th century, when Montesquieu made public his work *The Spirit of the Laws*. Affirming the right of the people not to be governed in a despotic manner, he stated that political liberty exists only if power is not used in an abusive manner; but since experience taught us that the one who has power tends to increase it more and more, until meeting an element that stops this tendency, the Fench philosopher enounced what later would be known as the theory of separation of powers, because, in order fot the abuse to be prevented, power must be limited by power.[5]

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