

UNFAIR COMPETITION IN ONLINE COMMERCE

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Abstract:

E-commerce represents a new area of interest in South – East Europe, that still needs a clear legislation, as phenomena such as unfair competition are common for this type of transactions, on an ever-expanding market. E.U. legislation regarding unfair competition comes as a complex system of legal measurements, that need to be transposed in the internal provisions in a broad and efficient manner.

Key words: e-commerce, E.U. legislation, competition law, sale – purchase industry.

JEL Classification: K20.

Introduction

By definition, e-commerce (electronic commerce or EC) is the buying and selling of goods and services, or the transmitting of funds or data, over an electronic network, primarily the Internet. These business transactions occur either business-to-business, business-to-consumer, consumer-to-consumer or consumer-to-business. The terms *e-commerce* and e-business are often used interchangeably. The term *e-tail* is also sometimes used in reference to transactional processes around online retail. ¹

E-commerce represents a growing part of the sale – purchase industry world wide, with changing features, as the technological part of it evolves. Also, from the human component point of view, the number of consumers/ buyers is growing and so, the competition between producers and distributors becomes an important aspect. Thus, the need for a proper legislation package.

Unfair competition regards the situation in which the competitors compete on unequal terms, because favorable or disadvantageous conditions are applied to some competitors but not to others; or that the actions of some competitors actively harm the position of others with respect to their ability to compete on equal and fair terms. It contrasts with fair, legal competition in which the same rules and conditions are applied to all participants, and the competitive action of some does not harm the ability of others to compete.

¹ <http://searchcio.techtarget.com/definition/e-commerce>

Often, unfair competition means that the gains of some participants are conditional on the losses of others, when the gains are made in ways which are illegitimate or unjust.²

A fair competition law is found in every state within European Union. All the regulations that exist in this matter serve five purposes. First, the law seeks to protect the economic, intellectual, and creative investments made by businesses in distinguishing themselves and their products. Second, the laws seek to preserve the good will that businesses have established with consumers. Third, the laws seek to deter businesses from appropriating the good will of their competitors. Fourth, the laws seek to promote clarity and stability by encouraging consumers to rely on a merchant's good will and reputation when evaluating the quality of rival products. Fifth, the laws seek to increase competition by providing businesses with incentives to offer better goods and services than others in the same field.

Although the laws of unfair competition help to protect consumers from injuries caused by deceptive trade practices, the remedies provided to redress such injuries are available only to business entities and proprietors. Consumers who are injured by deceptive trade practices must avail themselves of the remedies provided by other types of legislation.

1. Legal remedies for unfair competition in E.U.

In general, businesses and proprietors injured by unfair competition have two remedies: injunctive relief (a court order restraining a competitor from engaging in a particular fraudulent or deceptive practice) and money damages (compensation for any losses suffered by an injured business).

At European level, The European Parliament issued Directive 2000/31/EC³. Just looking at the Preamble of the Directive we find that The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress. According to European Union Function Treaty, in E.U., the internal market comprises an area without internal frontiers in which the free movements of goods, services and the freedom of establishment are ensured; the development of information

² F.Sandu, A.E. Bălăsoiu – Present legal aspects regarding unfair competition, *Instituții Juridice Contemporane în contextul integrării României în Uniunea Europeană/Contemporary Legal Institutions within the Context of EU Integration*, Bucharest, 7th Edition, 2013, p. 44

³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), published in *Official Journal L 178* , 17/07/2000 P. 0001 - 0016

society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.

The development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet.

Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; this Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services.

It is important to ensure that electronic commerce could fully benefit from the internal market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, a high level of Community integration is achieved.

The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State⁴.

According to European legislation, Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means. Still, Member States may lay down that this shall not apply to all or certain contracts falling into one of the following categories:

⁴ Preamble 2.nd- 4.th paragraph of Directive 2000/31/EC

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

Member States shall indicate to the Commission the categories that not refer to e-commerce and every five years a report must be submitted in order to give explanations of the reasons why they consider it necessary to maintain restriction on some e-commerce domains. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

Member States have the obligation to ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

- the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,

- the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

The acts of transmission and of provision of access include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;
- (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement⁵.

Regarding practical cases on unfair competition in online commerce, the recent case of Google being investigated for such acts is highly notorious, as E.U. sets to file antitrust lawsuit against Google for unfair practices.

If the Commission finds Google guilty, it can order the company to change its business practices and impose fines of up to 10 percent of the company's global proceeds – more than \$6 billion based on its annual revenue.

⁵ For more details, see art.6-13 of Directive 2000/31/EC

The E.U. has been investigating Google since 2010 over complaints by some 20 European and US companies, including Microsoft and Yelp. They want the EU to compel Google to stop favoring its own services with search algorithms – an issue they also raised with US regulators.

A 2012 Federal Trade Commission investigation found that the California-based company had tampered with search algorithms to favor its own services, but the FTC declined to press charges after Google explained it was seeking to improve user experience by ensuring overall result diversity.

Although there have been several antitrust investigations into Google in recent years, this is the first time formal charges will be brought against the company. Under EU rules, Google will have 10 weeks to respond to the allegations and call a hearing to present a defense. ⁶

2. Romanian E-Commerce Market

According to the statements given by the main players of the Romanian e-commerce market at the 8th edition of eCommerce Awards Gala (GPeC), which took place in November 2013 in Bucharest, the local online retail market reached approximately 600 million Euros in the recently concluded year.

This number only refers to products sold online (whatever their nature) and not services, bills, air tickets, tickets to shows, vacations and trips etc.

The data was published at the beginning of 2014. According to these, the number of Internet users reached 10 million in 2013 (1 million more than in 2012 – source: Eurostat). 27% of the Romanian people connect to the Internet, meaning that approximately 1 in 4 Internet users buy online (source: Daedalus Millward Brown) and most online buyers (84%) live in urban areas, while 16% live in rural areas.

The average age of online buyers is between 25 and 35 years, but 2013 brought an increase of 5% in the 45 to 55 age segment, which now accounts for 15% of eCommerce users (compared to 10% in 2012).

Regarding online card payment, the number of transactions increased by approx. 35% YoY in 2013, according to the statements of the VISA, MasterCard and RomCard officials from the eCommerce Awards Gala. However, the preferred payment method of the Romanian people remains cash on delivery, being used in over 90% of transactions.

The total value of online credit card transactions processed in the RomCard's 3D Secure System is approx. 220 million Euros in 2013 (a figure similar to the value recorded in 2012).

⁶ <http://rt.com/news/249733-eu-google-antitrust-case/>

According to VISA Europe, the average value of transactions was around 37 Euros (paid in RON), compared to the higher value in 2012 when the average value of transactions was 45 million (paid in RON).

A very interesting fact is that the majority of online credit card transactions are international (60%), while only 40% are domestic transactions, according to the MasterCard statistics. In other words, Romanian people spend more money on websites abroad than on Romanian websites.

In Romania there are currently over 12 million cards enrolled in the 3D Secure system (compared to 11.3 million in 2012) and the number of active cards (actually used in online trading) increased from 410,000 in 2012 to over 600,000 in 2013.

Towards the end of the last year, over 17,000 online credit card transactions were taking place in the RomCard 3D Secure system each day, resulting in more than 500,000 transactions each month.

The Romanian e-commerce market consists now of approx. 4,500 online stores, according to the estimates given by the main players. Of the total number of e-shops, over 1,000 are enrolled in and certified by the RomCard 3D Secure standard, a raise from the total of 781 stores in 2012.

The figures published by GPeC are based on statistics and estimates made by VISA, MasterCard, RomCard, GPeC, Daedalus Millward Brown and the main players of the eCommerce market (representatives of top online shops).⁷

3.Unfair competition in online commerce in Romania.

In Romania, The Romanian Competition Authority started its activity on the 6th of September 1996 by drafting the necessary secondary legislation necessary for enforcing the Competition Law (no.21/1996), which entered into force on the 1st of February 1997.

As national competition authority, the institution enforces and ensures the application of the national and Community rules on competition.

At the same time, the Competition Council has the role of national contact authority on State aid between the European Commission, on one hand, and the public institutions State aid suppliers and beneficiaries, on the other hand.

Therefore, the mission of the Romanian Competition Authority can be synthetically defined as to protect and to stimulate the competition on the Romanian market so as to develop a normal competitive environment, finally ensuring a better promotion of consumers' interests.⁸

Regarding the international cooperation activity of this Authority, it is part of the European Competition Network (ECN), that represents a forum for

⁷ <http://www.gpec.ro/blog/romanian-e-commerce-market-reached-eur-600-million-in-2013>

⁸ <http://www.consiliulconcurrentei.ro/en/about-us/description/role.html>

cooperation constituted from the national competition authorities and the European Commission in order to exchange information and cooperate in cases where Articles 101 and 102 of the Treaty on the Functioning of the European Union apply.

The main objective of setting up the European Competition Network regards the unitary application of the EU competition rules to create a competitive environment and foster competition in the internal market, according to the provisions of the Treaty on the Functioning of the European Union.⁹

At national level, still, this Authority has a limited activity regarding online area, since so far, no case involving unfair competition in online commerce has been brought to the public attention.

One of the moments in which the Authority has taken a stand was in 2013, when The Competition Council opened a sector inquiry on electronic communication services offered as bundled services (known as Multiplay) and separately.

The inquiry included an assessment of the impact of Multiplay package over the development of markets afferent to each service. Also, the inquiry aimed at identification of potential competition problems caused by marketing the Multiplay services packages.

The "Multiplay" concept refers to different services packages that combine two or more electronic communications services. For instance, *triple play* refers generally to a package consisting in telephony, television and Internet.

The result of this inquiry was not brought to the public attention so far.

Still, according to The Romanian Competition Authority's Annual Report for 2014, there is a project aimig to adapt the legislation to unfair competition situations regarding electronic communication.¹⁰

Regarding legal remedies, also in Romania, as well as at European level, the private law legislation provides two remedies: injunctive relief (a court order restraining a competitor from engaging in a particular fraudulent or deceptive practice) and money damages (compensation for any losses suffered by an injured business).

Courts are rulling in more and more cases involving unfair competition in online commerce, therefore this kind or remedy is more popular among the companies that just adressing to the Romanian Competition Authority with a complaint.¹¹

In **conclusion**, unfair competition in online commerce represents a real problem, present up until the highest level of what Internet means for

⁹ <http://www.consiliulconcurrentei.ro/en/international-relations/ecn-en.html>

¹⁰ <http://www.consiliulconcurrentei.ro/ro/despre-noi.html>

¹¹ http://www.euroavocatura.ro/jurisprudenta/2609/Acte_de_concurrenta_neloiala

consumers. Either big or small, national or foreign, any company may become a subject of unfair competition practices, as good reputation may hide technological aspects that can mislead the consumers.

In Romania, e-commerce is a growing area in sale – purchase industry, but also an area in which unfair competition activities are still possible and sometimes, difficult to perceive or prove.

An internal legislation more adapted to particular situations is to be desired, as well as a consumer's guide regarding all the above aspects.

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