An analysis of the sources of competition disipline in the European Union and in Albania

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Abstract

Competition discipline in the European Union is a substantial component of the EU's institutional framework. The Lisbon Treaty made the "internal market" a shared competence, while necessary competition rules for the internal market are an exclusive competence of the Union. This paper aims to analyse the sources of the competition discipline in the EU and in Albania focusing more on constitutional sources. From this analyses will emerge that sources of competition discipline are numerous and each of them plays an important role in the development of the competition policy. But arises the question if these sources are all equally important or not? This paper will focus also n the importance of each source in both levels: European Union and Albanian discipline of competition.

Keywords: competition; protection of competition; sources of competition discipline; European Union; Albanian discipline

Introduction

Competition law in the European Union plays a central role for the construction of the internal market and for the creation of a context in which trade policies of undertakings are a result of free and independent choices of each enterprise. This discipline has been created with the European Coal and Steel Community Treaty. In this Treaty, were foreseen for the first time in the European area, two antitrust provisions which regulated the three typical anti-competitive conducts such as: prohibited agreements, the abuse of a dominant position and concentrations. Subsequent treaties: European Economic Community (EEC) Treaty, European Community (EC) Treaty and Treaty on the functioning of the EU (TFEU) regulate prohibited agreements and the practice of the abuse of a dominant position. Concentrations have been regulated in the EU area only in year 1989 by merger regulation No 4064/89[1] which has been replaced by Regulation No 139/2004[2]. Although the EU has been enlarged reaching the number of 28 state

[1] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31989R4064.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Official Journal of EC L 24/1, 29/01/2004.

members competition law continues to be substantial component of the European Union institutional framework. The Lisbon Treaty made the "internal market" a shared competence (Art. 4 TFEU) while necessary competition rules for the functioning of the internal market are an exclusive competence of the Union (Art. 3 TFEU) and therefore member states may not legislate. The internal market is now regulated by Arts. 27-37 TFEU and Protocol number 27. This paper aims to analyse sources of competition discipline in the European Union and in Albania focusing on constitutional sources. The system of sources of competition discipline is complicated. In the EU it includes constitutional sources involved in the founding treaties and protocols and other rules contained in a large number of acts issued by the Council and the Commission. Also we can consider as sources of competition discipline rules contained in international agreements and Court of Justice decisions. When we talk about national sources the system is quite clear. The sources include at first constitutional sources and national competition law. Other sources are contained in acts of Albanian competition authority and Tirana's court decisions.

Constitutional sources of the European competition discipline

Analysis of Constitutional sources of the European competition law should start from the EC Treaty which has ranked among the goals of the Community in article 2 "*the establishment of a common market*"[3]. Article 3, for the purpose set out in article 2, defined the scope and the activities of the Community and stated the general principles of a common market. It regulated, with paragraph 1, letter g), among the actions of the Community "*a system ensuring that competition in the internal market is not distorted*". Referring to the jurisprudence of the European Court of Justice, Article 3, letter g) represented a general goal of the Treaty by becoming part of the common market general principles[4]. Article 4 should also be mentioned, the latter, with regard to the objectives expressed in Article 2, required "the adoption of an economic policy in compliance with the principle of an open market economy with free competition"[5]. With the introduction of this article in the Treaty, the competition was transformed from an instrument with auxiliary role in the establishmet of the free market into an *inspiring principle of the free market*, a real constitutional basis of state intervention program to realize the unification of the market. Referring to this Treaty we can assert that Article 2 and Article 3, 4 along with Articles from 81 to 86 of the EC Treaty can be defined as the primary sources of the European law on competition[6],

[3] Text of article 2, EC Treaty: *"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities....."*

[4] The decision of the Court dated 10 January 1985, case 229/83, Summary 1985, pg. 1. See also decision of Court dated 29 January 1985 case 231/83.

[5] Aurelio Pappalardo, *Il Diritto comunitario della concorrenza*, 2007, Milano, Utet Giuridica, pg. 2.

[6] Aurelio Pappalardo, *Il Diritto comunitario della concorrenza*, 2007, Milano, Utet Giuridica, pg. 4.

since it is precisely within them that the value of competition "rises to a constitutional level" among the basic principles of the community system and law[7]. An important question we arise at this point is: what happened with the constitutional sources after Lisbon Treaty? Have they changed losing their importance or they remain unchanged? There are different opinions by commentators on these questions. Our opinion is that the constitutional level of policies and provisions for the protection of competition has remained unchanged. This phrase is not quite correct, because there is a change in the Treaty, since the provision foreseen in Article 3, letter g) has been abrogated. However, we assert that this abrogation does not play any role in the importance of the competition law in EU, and this because 1) the framework of the policies under the exclusive competence of the European Union provides for "the establishing of the competition rules necessary for the functioning of the internal market (article 3, b TFEU) and this provision can be translated into the *verbis re-proposal* of the provisions protecting the competition in the EC Treaty. The acquis communautaire in the field of competition consists of these provisions. Moreover, another reason for asserting that the constitutional level of policies and provisions for the protection of competition has remained unchanged is the content of Protocol 27 on internal market and competition, attached to TFEU, defines that "the internal market, pertaining to article 2 of TFEU, includes a system ensuring that competition is not distorted". Thus, the elimination of the provision of article 3, letter g) of the EC Treaty does not modify the constitutional position of the competition rules, which are useful for a social market economy with a competitive character. (Article 3.3 TFEU). Article 101 – 106 (ex article 81- 86 ECT) have remained unchanged. They are the fundamental provisions "for the fulfillment of the tasks entrusted to the Community and in particular, for the functioning of the internal market" [8] They are norms, which determine "*the rules applying to undertakings"* (as the title of the respective section states) to define whether and how the undertakings could conclude any agreement with each other without affecting the trade between member states and which are the admissible limitations of behavior imposed on undertakings with hold a dominant position in the relevant market. Key provisions regulating agreements and abuses of a dominant position are articles 101 and 102. In particular article 101 states that: "*The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market…"* and continues aligning five categories of

[7] See also E. Katro & K. Katro, "The protection of Competition according to the European Economic Constitution and the Albanian Constitution", paper presented at Fourth International Scientific Conference on "Economic & Social Challenges 2011, Globalization and Sustainable Development", organized by Economic Faculty, Tirana University, 9 – 10 december 2011. Published in proceedings book.

[8] For this meaning refer to Lorenzo Pace, *Diritto Europeo della Concorrenza*, CEDAM, Padova 2007. Refer to the decision of the Court, dated 1 June 1999, case C-126/97, Ecco Swiss China Time Ltd c. Benetton International NV;

behaviors that may constitute a prohibited agreement[9]. Article 102 states that: "*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*" and in line with article 101 continues aligning four categories of behaviors that may constitute a an abuse of a dominant position. Concentrations are not regulated in the TFEU but continue to be regulated by special Regulation No. 139/2004.

Other EU sources: Council and Commission Regulations, Commission communications and decisions, jurisprudential sources.

Council and Commission Regulations constitute the skeleton of competition discipline in the European level. Article 103, point 1, TFEU states that: "*The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament*". They are directly applicable in all Member States and have priority over internal norms. As highlights article 103 the power to issue regulations in competition fields belongs only to the Council, but the Commission can be authorized by the Council to adopt some kind of regulations. Article 103 refers to both regulations and directives, but Council and Commission have preferred to concentrate their work on the adoption of regulations, by not using the instrument of directives. And in fact there are only few directives in competition field. We think that there is no doubt that this the best choice because it ensures a uniform application of competition rules in member states. The European Commission frequently uses the instrument of communication (guideliness) to show its orientation in relation of subfields of competition law. Communications are indicative and do not bind the Commission in the valuation of a single case. Commission decisions which are obligatory are directed primarily to undertakings and through them, the Commission applies the provisions of the Treaty (article 101 and 102). The decisions can be appealed before the General Court. In fact, according to article 256 "The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice". But we can say that the most important role in the development of competition discipline has been performed by the Court of Justice of the European Union that has jurisdiction to give preliminary rulings concerning the interpretation of the provisions of the Treaty. In fact, competition discipline in the EU has been mainly for many years an jurisprudential area.

[9] The third paragraph of this provision provides for the possibility of exemption from the prohibition stated in paragraph 1 for all agreements that meet the conditions set in same the provision.

Constitutional sources of Albanian competition discipline.

The first constitutional source of competition law is article 11, point 1, which states that "*the economic system of the Republic of Albania is based on private and public property, as well as on the market economy and on the freedom of economic activity". This provision, like other constitutional provisions, does not refer directly to competition.* The first thing we notice in this provision is that it does not refer to competition, but only to freedom of economic activity in a system of market economy recognizing that this kind of freedom belongs to every subject of law. We strongly believe that this article recognizes indirectly the freedom of competition. The freedom of economic activity, for which the lawmaker provides, can not be effectively applied without ensuring the existence of a certain degree of competition in market operation. This conclusion is confirmed also by the Albanian law on competition protection[10] which states that the law was adopted "in pursuance of article 11, point 1, 78, 81, point 1 and 83, point 1 of the Constitution". The other constitutional provisions mentioned by the lawmaker are provisions on the procedure of adoption of a new law. The only material and guarantee provision and is Article 11. Many commentators at this point, may arise a question: if the lawmaker was aware of the inevitable relation between the freedom of the economic activity and the freedom of competition along with its benefits in the market, why was not this right expressly guaranteed, following some other countries of the Balkans which have classified some of the basic principles on the regulation of competition as constitutional principles[11]. As a matter of fact, almost all countries of the Western Balkans are developing a constitutional model, which includes the most recent evolutionary effects of the European economic Constitution. The Albanian Constitution provides also another provision - article 41 - which presents interest to better comprehend the freedom of competition. It guarantees the right of private property. Private property should be seen as a necessary prerequisite to make real the freedom of exercising economic activity and freedom of competition. It is clear that the freedom of economic activity cannot be applied without the recognition of property right.

Other Albanian sources: domestic law on protection of competition, acts of the Albanian competition Authority and decisions of the Tirana Court.

Albanian law on protection of competition contains the most important regulations in competition fields. This law represents the second normative in this field. This first normative was the law no.8044, year 1995 "on competition" which was abrogated

[10] Law no. 9121, dated 28.07.2003 "*On competition protection*", www.qpz.gov.al

[11] For example, some fundamental charters recognize an "*equal legal status*" for all the operators of the market (article 84, paragraph 1, of the Serbian Constitution, article 49, paragraph 2 of the Croatian Constitution, article 55, paragraph 2 of the Macedonian Constitution), sanction the prohibition of monopolies and practices in contradiction with the free competition (article 84, paragraph 2 of the Serbian Constitution) etc.

because non in line with the EU discipline and not anymore suitable for market conditions. To fill the gaps of the first law, law no. 9121 "On Competition Protection" was compiled with the main idea to fulfill the duties of a country in the integration process to the European Union. The law was drafted based mainly on EU sources of competition law and also on competition discipline in other Member States. So, if we make an analysis of this law, we may say with no doubt that it is almost entirely in line with EU discipline in the field. The law deals with all three anticompetitive conducts. The legislator dedicates to prohibited agreements Article 4 through Article 7. Specifically Article 4, in line with Article 101, paragraph 1 and 2 of the TFEU, prohibits all agreements which have as their object or effect the prevention, restriction or distortion of competition within the Albanian market, aligning five types of prohibited agreements. Article 5, (in line with Article 101, paragraph 3) continues defining the conditions for individual exemption, from the prohibition stated in article 4 in all those cases when the agreement in its complexity brings benefits to the economic welfare, this way compensating for competition restriction[12]. The Albanian legislator has dedicated two provisions to the abuse of dominant position, Articles 8 and 9. The Albanian legislator defines in Article 8 the criteria for the assessment of dominant position. Differently happens in the EU area where this kind of criteria are the product of the jurisprudence of the Court of Justice. The provision that represents the center of regulation of abuse of dominant position is article no. 9, which is a photocopy of article 102 TFEU.

This article defines the cases that may constitute abuse of dominant position by an enterprise which holds that dominant position on the relevant market. The regulation for concentrations is provided in Articles 10 through 17 of Law. These provisions are in line with the Community Regulation no. 139/2004[13].

At this point of the study we have to mention also the acts of Albanian competition authority and Tirana's court decisions and qualify them as secondary sources of competition discipline.

A short explanation about the Competition Authority is necessary. The law no.9121 established the first independent administrative structure, guaranteeing the implementation of the normative.[14] The Authority is composed of Commission vested with the decision-making power and Secretariat vested simply with administrative functions. The Authority carries out its activity in conformity with the legislation: it uses legitimate means to protect and promote free and effective competition for a more functional market and with its ultimate goal that is the realization of greater benefits

[12] Article 6 recognizes the right of the Competition Authority to adopt exemption regulations for certain categories of agreements and article 7 establishes the possibility of exclusion from the prohibition of *de minimis* (of little importance) agreements.

[13] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal of EC L 24/1, 29/01/2004.

[14] One of the novelties of this law, in comparison with the previous one, except the independent character of the Authority, is recognizing the competence of the Authority to initiate an investigation *ex officio*.

for consumers. Regarding administrative procedures, the law defines the general rule under which "*the provisions of the Code of administrative procedures will be applied only in cases where the law no. 9121 does not determine the contrary.*" The duties and competences of the Commission include the power: 1) to approve the regulation related to the internal functioning of the Authority; 2) to take decisions on the basis of this law; 3) to issue regulation and guidelines necessary for the implementation of this Law; 4) to give opinions upon Parliament's Commission request on issues related to the competition and the legislation regarding this field; 5) to give evaluations and recommendations to central and local administration and other public institutions, trade associations, labor unions, consumer associations, commercial and industrial chambers on issues related with competition[15]. All the acts adopted by the Commission on the basis of the competences mentioned in this paragraph can be considered as sources of competition discipline, but only some of them are required to be applied by all undertakings like the regulation and guidelines necessary for the implementation of competition Law. Decisions adopted from the Commission are obligatory only for the undertaking/undertakings that are involved in the anticompetitive conduct. The Regulation of the internal functioning of the Authority is obligatory for the same Authority. Opinions, evaluations and recommendations to the different subjects mentioned above in the text are not obligatory. All the decisions of the Commission are published in the official site online and in a special journal of the Authority. The site and the journal constitute sources of knowledge.

In relation to the decisions of the Court, article 68, named "Jurisdiction" states that "*Challenges based on the application of this Law must be brought before the District Court of Tirana*".

"A person impeded in its activity, by a prohibited agreement or by an abusive practice as referred in article 9, may challenge this action in court and request: a) removal or prevention of the practices restricting competition which risks to be carried out or are carried out in contradiction of these articles; b) reparation or compensation from damages caused by these practices, in accordance with relevant provisions of the Albanian Civil Code. The challenge may be undertaken despite the existence of proceeding before the Competition Authority"[16]. The decisions taken by the Court of Tirana are obligatory only for the parties of the dispute.

[15] Article 24, law no.9121, year 2003 "*On competition protection*", www.qpz.gov.al.

[16] Article 65, law no.9121, year 2003.

Conclusions

The purpose of this paper was to align and analyze sources of competition discipline both at EU and Albanian level.

As it emerges from this research sources are numerous and each of them has its own importance playing a determining role for the development of competition policy. But they are not they are not all equally important. Which are the most important sources? Referring to the European discipline the most important sources are the provisions of the Treaty on the functioning of the European Union (constitutional sources), Council regulations and Court of Justice decisions. Referring to the Albanian discipline the most important sources are the provisions of the Constitution of the Republic of Albania (constitutional sources) and the domestic competition law.

Bibliography

1. A. Pappalardo, *Il Diritto comunitario della concorrenza*, Milano, Utet Giuridica, 2007.
2. E. Katro & K. Katro, "*The protection of Competition according to the European Economic Constitution and the Albanian Constitution*", paper presented at Fourth International Scientific Conference on "Economic & Social Challenges 2011, Globalization and Sustainable Development", organized by Economic Faculty, Tirana University, 9 – 10 december 2011. Published in proceedings book.
3. L.Pace, *Diritto Europeo della Concorrenza*, Padova, CEDAM, 2007.
4. Treaty on the functioning of the European Union, OJ C 115, 9.05.2008.
5. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31989R4064.
6. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Official Journal of EC L 24/1, 29/01/2004.
7. Decision of the European Court of Justice dated 10 January 1985, case 229/83.
8. Konomi Perolla, Rezana, and Zhaklina Peto. "The anti-competitive agreements in the prospective of the law on competition protection. An inside in the Albanian practices and legal framework." *Academicus International Scientific Journal* 12 (2015): 59-72.
9. Decision of the European Court of Justice dated 29 January 1985 case 231/83.
10. Decision of the European Court of Justice, dated 1 June 1999, case C-126/97.
11. Albanian Law no. 9121, dated 28.07.2003 "*On competition protection*", www.qpz.gov.al