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The procedural competition law as distinct branch of law

Abstract. The article looks into the findings of research concerning law procedures in cases of competition protection litigation. We are trying to argue that there exist all the conditions to treat the procedural competition law as a distinct branch of law. Competition is the field where law overlaps economics. The distinction of legal practice in competition protection litigations from other fields lies in the fact that the argumentation of the positions requires economic analysis of the litigation situations under consideration. The efficiency of the arguments in supporting the participants' positions depends on the competent expert combination of the economic and the legal approaches.

Key words: competition law, branch of law, procedural law.

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Процессуальное законодательство о защите конкуренции как особый раздел права

Аннотация. В статье приводятся результаты рассмотрения судопроизводства при судебном разбирательстве, касающемся защиты конкуренции. Сделана попытка показать, что есть все основания рассматривать процессуальное законодательство о защите конкуренции как отдельную область права. Конкуренция — это место где право пересекается с экономикой. Особенность процессуального права в области конкуренции состоит в необходимости привлечения экономического анализа. Успех в деле представления интересов сторон процесса определяется эффективной комбинацией правового и экономического подходов.

Ключевые слова: законодательство о защите конкуренции; область права

Introduction

The correlation between the complexity of human needs and their impact on motivation seems particularly interesting. Human needs grow from the physiological essential ones, such as survival, food, shelter, rest, physical security and physical protection, to the social ones, such as needs of belonging to a group, social interaction, affection, support. And only after satisfying those listed above, one can proceed to the last 2 steps esteem, respect and self-realization, the need to achieve one's own potential and personality development, as Maslow's theory claims [1].

Through this classic concept, we can explain the emergence of the procedural competition legal relationships. Human needs represent the foundation and motivation for regulating procedural competition relationships.

One cannot speak of rights regulating specific relations, e.g. the competitive relations between undertakings, only in situations when basic rights, ensuring legal protection of basic needs (the right to life, security, etc.), are satisfied primarily.

Approaching the legal system as a totality of independent parts, branches of law and legal institutions, we find the existence of a complex, open system, where interactions occur not only with the social environment, but also among each of its

component parts, thus both with external and internal factors have to be taken into consideration.

In this way, the rules of law, including competition law, are grouped according to the basic relationships versus the anticompetitive practices, subjects of competition relationships, etc.

The structure of the legislation, as a whole or outside the branches of law, corresponding to the branches of the law system, encompasses also other law branches.

In competition disputes, regulation of procedural relationships are found in many legal acts and leads to the idea of separation of a distinct public law branch. The existence and delimitation of the procedural competition law is the actual reality and necessity. We cannot talk in depth about the procedural competition law, without providing specifications about the competition concept [2].

As a process, competition has always existed, still, only after reaching certain stages of human evolution, some regulation of this process started to appear. Scientific movements and schools have emerged, which have developed this concept, both in dynamic and static terms.

Premises for delimitation of procedural competition law

Delimitation of procedural competition law from other law branches can be carried out by analyzing the correspondence of the structuring criteria of the legal system. One of the basic criteria for delimiting a law branch is the object of regulation.

I. *The object of regulation* of a law branch represents a certain group of social relations, which have specific features of the concerned branch.

Social relations arising in the process of examining infringements of competition law are characterized by their occurrence at the same time with the regulations of the procedural competition law. Although procedural competition law does not correspond to a normative act with the same profile, the regulation of the examination process of competition law infringements is contained in the antitrust legislation, being separated from the substantive rules. In this way, the object of regulation represents the procedural relations that arise in the examination of cases of competition law infringements.

Stating the establishment of a distinct branch of law, based only on its own object of regulation is insufficient; therefore, it is necessary to further analyze the procedural competition law in the light of the structuring criteria of the legal system: the regulatory method, common principles, social interest, legal sanctions, and legal status of the subjects.

II. **The regulatory method** represents the means used by the lawmaker, in order to exercise a degree of influence on different social relations. Depending on the given criteria, we can distinguish methods based on the principle of equality of parties, the authoritarian method, the autonomist method, the recommendations method.

Regulation of procedural relations arising between the competition authorities, the parties and other participants in the process of examining infringements of the competition law, describes the procedural competition law through relations of subordination, the method used being the authoritarian.

III. *Common principles* are general basic rules, common to the most rules of law that make the law branch.

The procedural competition law is characterized by the following principles:

the principle of proportionality; the principle of presumption of innocence; the principle of legality; the principle of protection of confidential information; the principle of

independence; the principle of truth; the principle of officiality; the principle of equality of the parties; the principle of publicity; the principle of orality; the principle of contradictoriness; the principle of the right of defense; the principle of availability; the principle of free evaluation of evidence; the principle of continuity, etc. Examination of procedural competition law principles shows us that, in addition to the principles common to several branches of law, there are principles specific only to the procedural competition law, such as the principle of proportionality, the principle of protecting confidential information, etc.

IV. The *social interest* can determine detachment of certain legal relations from a law branch and migration to some related branches, which make part of another one or towards an emerging branch, as a result of the importance, in society, of a certain social reality at some point [3].

Analyzing the procedural competition law, we can see that this law branch can be regarded as a mixed, complex law branch, that was created in response to the social interest to regulate relations that arise in the process of enforcement of competition law, and their separation from the group of rules that was previously directing these relations in other areas of law, such as: competition law, administrative law, procedural civil law, etc. The procedural competition law is aimed at protecting both values in which the whole society is interested (genuine market economy, fair competition) and values, whose protection interests only the damaged party (trade secret or confidential information of the undertaking).

V. *Legal sanctions* applied in the procedural competition law can be set out in two groups: sanctions targeting the legality of acts and pecuniary sanctions. So, as in other branches of procedural law, procedural documents, produced violating the legislation, are void. Pecuniary sanctions (fines) have a distinct character in terms of application and their size.

VI. *The status of legal relationships subjects* represents an auxiliary criterion for the delimitation of the law branch. Thus, the subjects of the procedural competition law relations have special statuses: one of the subjects is the antitrust authority – the Competition Council, another mandatory subject is the undertaking, as a participant in competition relations on the market.

In conclusion, after analyzing the procedural competition law in the light of the structuring criteria of the law system, we can ascertain that we find ourselves in the presence of a genuine branch of law, with its own object of regulation, its own regulatory method, common principles, social interest, legal sanctions and status of subjects.

As a distinct law branch, the procedural competition law is characterized as:

1. A public law branch, because: a) it protects an interest, common for all the individuals of society, mainly the enforcement of the competition legislation, in order to establish a true market economy with a fair competition; b) by its nature, the procedural competition law is an imperative law; c) it manifests itself mainly through the authoritative action of the Competition Council, in this way, regulations of the procedural competition law are governing the activity of the Competition Council, as well as its relations with other subjects (undertakings, public authorities, etc.);

2. A mixed law branch of a complex nature, because it meets legal institutions of several law branches and, although apparently, it is a branch of domestic law, it includes multiple rules of international law, which the signatory states are obliged to apply, including by harmonizing their national legislations;

3. A sanctioning law, regulating the use of the person's right before the competition authority and before the courts;

4. A procedural law, regulating relationships between the subjects of law and the state authorities, able to resolve the disputes, emerged as a failure to comply with the competition rules.

Each branch of law regulates a specific domain of social relations. Thus, the procedural competition law consists of all the legal rules that feature procedural norms, necessary for carrying out the examination of competition law infringements.

The procedural competition law encompasses the totality of all the legal norms governing the work of all the state authorities and parties, as well as the relationships that are established in the process of stating the facts that represent infringements of the competition legislation and in the application of sanctions and measures provided by the competition legislation in relation to those who committed the infringements [2].

Alongside the definition of the procedural competition law, another novelty in the research is the *procedural division matrix* [2] of the application of the competition law provisions. Since the enforcement of the procedural competition legislation is a complex activity, targeting more legislative areas and more bodies, among the characteristics of the procedural competition law, it is required to divide this into several main elements, called procedural phases.

Not every element of procedural competition legislation enforcement can be regarded as a procedural phase, so in this regard there are smaller partitions. Thus, procedural application of competition law can be divided into *phases, steps, stages, moments*.

Phases correspond to the most important groups, where the main procedural activities are the criteria: examination of the competition infringement, judgment enforcement. Phases and activities are carried out in a successive, progressive and coordinated way. In some situations, certain phases may be missing from the application process of the competition law. Thus, in cases of unfair competition acts, if the undertaking, whose interests were harmed, has exceeded the limitation period, it may appeal directly to the court. The voluntary enforcement of the Competition Council Decision excludes the judgment stage.

Further we describe and compare the elements and principles of procedural competition law with principles of the civil procedural law.

The principles of procedural competition law, common to other law branches are: the principle of legality, the principle of independence, the principle of truth, the principle of officiality, the principle of availability, the principle of equality, the principle of the right to defense, the principle of publicity, the principle of orality, the principle of contradictoriness, the principle of free evaluation of evidence, the principle carrying out the case in Romanian language.

We analyze, in parallel, the characteristics of procedural competition law.

Based on the analysis carried out in this chapter, we can conclude that the procedural competition law is a distinct branch of law, with its own elements and principles and the need of its delimitation is obvious and real.

The specific characteristics of the procedural competition legal relationship

In order to define the procedural competition legal relationship it is necessary to emphasize the characteristics of such relationships, with their peculiarities. So, we consider appropriate to start from the approach through which the legal relationship is governed by the legal norm, hence a relation between certain determined participants, linked by a system of rights and obligations that can be defended by the coercive power of the state.

The procedural competition legal relationship has a *volitional character*. As such, the procedural legal relationship is the ground where the two wills meet: the will of the state, stipulated in the norms of competition law and the will of subjects participating in

procedural competition relationships. In the procedural competitive relationship, the correlation between individual will and the general will is determined by the imperative character of procedural competition rules.

Procedural competition legal relations *promote, encourage and protect* social values. Market economy, private property, fair competition, the right to defense, etc. are social values enshrined in the Constitution and protected by the competition legislation. Violation of the social values aimed at ensuring a functioning market economy is sanctioned.

Another feature of the procedural competition legal relationships is that they are *an expression of the historical evolution of social relations*. Only with the transition to a market economy we can talk about competition. Under the centralized economy, the rivalry between undertakings was missing because there were no prerequisites for economic competition. The establishment of market economy mechanism imposed the adoption of competition legislation and the creation of a competition authority, able to enforce competition rules. Relations between competition authorities and the subjects participating in anticompetitive practices are based on the principles of legality, the principle of the right to defense, on the independence of the competition authority, etc., and were materialized in the procedural rules of competition. In this way, we can conclude that the procedural competition legal relationship is a *relationship, governed by the rules of procedural competition law*. These rules establish the legal capacity of undertakings and public authorities and the competence of the competition authority.

In the light of the conducted analysis, we can conclude that the procedural competition law is a social relation of superstructure, that emerges based on the rules of procedural competition norms arising between the state authority and the participants in anticompetitive actions, which are holders of rights and legal obligations, the realization of which is provided by the coercive power of the state.

The specific characteristics of the procedural competition legal relationship are:

a) The antitrust authority, empowered to enforce the competition legislation, is a mandatory subject of the procedural competition legal relationship. Other subjects of the procedural competition legal relationship include the participants in anticompetitive practices. In this case, we distinguish the *complainant* - usually is the undertaking that has suffered as a result of competition restrictions actions / inactions, and the *defendant* - an undertaking or public administration authority which has restricted competition.

b) Subjects of the procedural competition legal relationship are not equal in rights and obligations. So, two categories of relationships are required: 1) between the competition authority and the participants in anticompetitive actions and 2) between the participants in anticompetitive actions. In the case of relations between participants in anticompetitive actions, we consider that the principle of equality before the law is respected.

c) The procedural competition legal relations emerge, change or become terminated based on the unilateral manifestation of will, and this unilateral will is manifested ex officio or upon request.

d) Another feature of the procedural competition legal relationship is that it contributes to resolving legal conflicts arising from non-compliance with the antitrust legislation on a relevant market.

e) At last, one more feature of the procedural legal competition relationship is the nature of liability for the subject of the relationship that does not respect his

obligations deriving from the legal relationship in which it is part. Failure to comply with the obligations arising from the procedural competition legal relationship determines the application of sanctions for violation of procedural rules of the Competition Law.

The procedural competition legal relationship is a distinct element of the general mechanism of legal regulation, representing a dynamic system of legal means through which the activity of law enforcement is regulated by state authorities, in order to dispense justice and to establish a sound competition.

Every procedural competition legal relationship has three characteristic elements: the subject, the object and the content.

The subject represents a distinct and important element for identifying any procedural competition legal relationship.

Procedural legal relationships are based on the principle of subordination. And so, in procedural legal relationships there are always subjects with decision making power. In procedural legal relations, one and the same subject, having decisional power at various stages of a case with different subjects, may have different a different status. For example, in the phase of case examination by the Court, the Competition Council is subordinated in the relations with the Court, whereas in the preliminary phase, the Competition Council is an independent body [4].

Given the particularities of procedural legal relationships, several classifications of these subjects are suggested: according to the legal interest of subjects:

persons with legal interest in the proceedings, in their turn, can be persons who have their own interests (material) in the settlement of the case and parties who have a public interest (procedural) in the settlement.

Persons who have no interest in the case: depending on the importance of participation in the proceedings, subjects can be divided into two categories: mandatory subjects: the public authority and subjects who have committed infringements, optional subjects: other subjects of procedural competition relations which do not have an interest in the case settlement (witnesses, experts, interpreters, etc.). Depending on the status of procedural legal relationships subjects: subordinated subjects include persons who have a private interest in the case settlement; superior subjects are state authorities that have certain powers in the organization process of case examination.

The object of procedural competition legal relationship is the result of activity of the participants in the examination process of the antitrust case, which meets the procedural interest of the persons, interested in the examination of the case. This can be regarded as a general object, specific for all the procedural competition legal relationships. At the same time, there is a particular object, specific for every procedural competition relationship. For example: the special object of the relations between the competition authority and representative is formed by the rights and interests of the representative, protected by law; the special object of the procedural relations between the competition authority and witness is the information about the facts that are important for the case.

Given the definition of the procedural legal relationships content set above and the particularities of the procedural competition law, *the content of the procedural competition legal relationship* can be presented as the relation of the procedural competition legal relationship subjects, determined by subjective rights and obligations, the competition authority competence, the legal liability for breach of procedural rules and the appropriate conduct for the examination process of competition law infringements.

Analyzing the object of procedural legal relationship, we determined that the competition relationship is the result of activity of the participants in the examination of antitrust cases that meets the interest in the examination of the concerned cases. And, consequently, the content of the procedural competition legal relationship represents

the relation of subjects of procedural competition legal relationship, determined by subjective rights and obligations, the power of the competition authority, the liability for the procedural competition law infringement, as well as the examination procedures of competition law infringement.

Conclusions

Society development has led to the awareness of the need to develop the regulation of economic and legal relationships, including competitive ones, specific to undertakings.

Law, as a complex social phenomenon, incorporates the essential features of society, including economic life, social and political aspects, such as the collective will.

We explained the emergence of procedural competition relations through Maslow's theory.

The motivation for regulating procedural competition relations is determined by the needs of the people. After providing the legal protection of needs at the bottom of the pyramid (e.g. the right to life), satisfaction of the other needs, located towards the top of the pyramid is desired.

Being in close connection with the social practice, legislation is more responsive to changes in social life than the legal system. Often, the legislative process exceeds the scope of the law branch. This also refers to the regulation of procedural relations in antitrust litigations, which is a situation found in several branches of law.

Separation of the procedural competition law as a distinct public law branch of the legal system is a necessity determined by modern realities.

Antitrust legislation has undergone a long evolution, from Zeno, 483 AD, who wrote the first anti-monopoly act "Constitution on pricing" until today [3].

The contemporary antitrust legislation appeared in the US in the early XX century, and it is manifested through the support and promotion of monopolies, as one of the few opportunities for the development of science, innovation and advanced technologies.

European antimonopoly legislation, which appeared later than the US legislation, puts more emphasis on protecting free competition and limiting monopolization of areas of activity.

International and national competition regulations aim to create conditions and rules necessary for economies to efficiently develop, respecting the interests of consumers.

Antitrust regulatory developments in Moldova evolved over the last 20 years and now are governed by the Competition Law No.183/2012, corresponding to the most advanced European practices [6].

We have analyzed the distinctive branch of the procedural competition law with its own object of regulation, regulatory method, common principles, social interest and legal sanctions.

We identified a distinct branch of law - the procedural competition law as a totality of the legal norms governing the work of state authorities and parties, as well as the relationships that are established in the process of stating the facts that represent infringements of the competition legislation and in the application of sanctions and measures provided by the competition legislation in relation to those who committed the infringements.

We developed the procedural division matrix which includes 3 phases, several stages, steps and moments of the procedures in the investigation of competition infringements.

The procedural elements and principles of the procedural competition law were established, including through the analysis in different law systems, as well as in various branches of law.

Analyzing the procedures of the procedural competition law, it was found that there was a lack and complexity of procedures that would allow the efficient implementation of the competition law, which led to the necessity to develop new procedures.

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