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BAKALINSKA Olga,
Doctor of Juridical Science, associate professor,
head of the Department of International Commercial and Civil Law at KNUTE

PROTECTION FROM UNFAIR COMPETITION: LEGAL REGULATION PROSPECTS

The problems of improvement of the rules of competition legislation have been researched. It has been determined that creation of a comprehensive model of systematization and unification of Ukraine's competition legislation has the main importance for its development. It should be done through the analysis of the results of monitoring and assessment of efficiency both of individual rules, and institutions of competition legislation in general. It has been suggested to base monitoring and assessment of the current legislation on the Instrumentarium developed by OECD for assessment of impact of the relevant rules and regulations on competition.

Keywords: systematization, competition legislation, assessment of the impact on competition, protection against unfair competition.

Бакалинская О. Защита от недобросовестной конкуренции: перспективы правового регулирования. *Исследованы проблемы совершенствования норм конкурентного законодательства. Определено, что первостепенное значение для развития конкурентного законодательства Украины имеет создание комплексной модели его систематизации и унификации. Данная модель должна осуществляться на основе анализа результатов мониторинга и оценки действенности как отдельных норм, так и институтов конкурентного законодательства в целом. В основу мониторинга и оценки действующего законодательства предлагается положить разработанный ОЭСР Инструментарий для оценки воздействия на конкуренцию соответствующих норм и предписаний.*

Ключевые слова: систематизация, конкурентное законодательство, оценка влияния на конкуренцию, защита от недобросовестной конкуренции.

Problem statement. Systematization and unification of the rules of competition legislation should become an important area of ensuring

development of fair competition in Ukraine as a requirement for arrangement that characterizes all the spheres of society, economy, politics, law, differently affecting their content, structure and prospects for the development.

Analysis of recent researches and publications. O. V. Bezukh, S. S. Valitov, A. I. Hratsianov, Yu. V. Zhuryk, T. V. Kashanina, D. A. Kerimov, O. L. Chernelevska [1–7] dedicated their works to the research of the problems of systematization of legislation, and competition legislation in particular.

The objective of the article is to study the problems of implementation of systematization of competition legislation and determination of the areas for its further improvement.

Materials and methods. General (dialectical) and special methods of cognition of legal phenomena were used: analysis and synthesis, systematic approach, interpretation of the rules, formal and logical methods, systematic and functional, comparative legal and generalization methods.

Research results. The complexity and multi-vector nature of competition legislation do not allow choosing only one type of systematization of its rules. The main task of systematization and unification of competition legislation is to create clear and effective system of regulatory support of competitive relations. At the same time, rules aimed at ensuring the development and protection of economic competition, are included into the Constitution of Ukraine, codified regulations, numerous laws of Ukraine, subordinate acts, rules contained in international treaties and obligations of Ukraine. Also, advisory clarifications and decisions of higher administrative and judicial authorities of Ukraine are essential for the development of competition law and legislation.

In determining the model of systematization and unification of the rules of competitive legislation it is worth keeping in mind that although most of the rules of competition legislation have economic and legal nature with regard to the relations by which they are regulated, functionality of competition legislation stipulates the need for regulation of competitive relations by the rules of civil, administrative and even criminal law, and under such conditions systematization and unification of the rules of competition legislation cannot be separated from the respective processes that take place in these areas of legislation. By the experts' rough estimates, the rules of competition legislation contain more than 2,500 normative acts of different legal force, among which more than 200 are Ukraine's laws. Recognizing systematization and unification of existing competition law as promising areas for its improvement, one should keep in mind that these processes cannot take place separately and deal exclusively with normative regulation of competitive relations. In modern conditions the process of systematization and standardization should cover almost all the spheres of legal regulation of economic and civil relations. More than ten years have passed since the Civil and Commercial Codes of Ukraine entered into force, and more than twenty years since the introduction of statutory and legal regulation of competitive relations, but still today, normative acts have

drawbacks and contradictions for the most part, regulating social relations in various spheres of economic activity in their own way, until now the issues of state aid, public procurement, adhering to the principles of fair competition in the implementation of trade and foreign economic activity are not entirely resolved.

Under such conditions, it is necessary to do monitoring of current legislation first of all, identifying statutory and regulatory acts that regulate directly the competitive relations and the rules which have impact on the development and protection of honest and fair competition. In addition, numerous regulatory legal acts regulating economic activities in the country, eventually negatively affect the development of competition in the market, and in some cases restrict its development. Some provisions of the regulatory, legal and statutory acts stipulate a more significant state's intervention into economic relations than it is required by the goals and objectives of the state competition policy. With this in mind before the beginning of the process of systematization and harmonization of competition legislation, it is necessary to assess the current state of competition legislation in order to identify unnecessary restrictions and repetitions, conflicts between the existing normative acts and gaps in regulation. For this purpose the Instrumentarium for assessment of impact on competition [8] developed by Organization for Economic Co-operation and Development (OECD) is to be used. This Instrumentarium includes general methodology for identifying unnecessary restrictions of competition in the rules of current legislation and for the development of alternative, less restrictive measures which, however, reach goals set by the state. One of the main elements of the Instrumentarium is a Checklist for assessment of the impact on competition, which allows revealing legislative and other normative acts that may unreasonably restrict competition, on the ground of the analysis of answers to a series of simple questions. This analysis allows focusing the limited resources of the public authorities in the areas where the assessment of impact on competition is needed first and utmost. These methodological materials may be used by public authorities in the following ways:

- In assessment of drafts of new normative acts (for example, in the framework of programs for assessment of impact of regulation).
- In assessment of existing regulatory legal acts (in the economy generally or in specific sectors).
- In the development and review of public policy in certain areas of the economy, in determining the efficiency of public regulation by competitive agency that makes an assessment of the impact of regulation rules on competition [9, p. 16].

The purpose of the Instrumentarium is the possibility to assess the positive and the negative effects of competition restriction both nationally and at the regional and local levels. One of the most successful examples of reforms that promote the development of honest and fair competition is the reform of the Australian federal competition regulation system, held

in early 90s of the XX-th century. In particular, after the completion of Hilmer Committee's report in 1993, which called for greater microeconomic transparency with the focus of attention on reforms to support competition, in 1995 the Australian Government agreed a program of review and amendment of the legislation which limited competition and was not consistent with the public interests. As a result of this reform program 1700 acts of legislation that required revision were revealed. Legislation was reviewed at the national level and at the level of states and territories, provided that the major part of the review had been completed by 2001. The national government allocated funds to help the state and territorial governments to cover the cost of changes connected with introduction of amendments and additions to the legislation during its revision. A particular feature of the program was that during its implementation a systematic detection of normative acts requiring review and revision was carried out. Since then Australia has been showing striking economic indicators, high and stable growth rates, due to which the Australian economy has become one of the best in the OECD [9, p. 32].

Although most normative acts, according to OECD experts, are not aimed at causing significant damage to competition, the process of assessment of the impact on competition, the initial step of which is to question a Checklist, provides the limits of the research that are required by antitrust authorities and lawmakers to reduce the potential danger for competition or to avoid them. This is achieved by providing aid in the search of possible alternatives that can reduce or eliminate potential losses from the restrictions of competition, ensuring the achievement of desired policy objectives in this or that field.

The depth of assessment of competition impact should be proportional to the degree of potential negative consequences of this or that legal measure in terms of competition. The Checklist of the questions about the impact on competition enables a fast review of such measures to single out quickly those ones that can have potentially negative effects on competition for further assessment, out of a large number of rules. In the research of the current legislation s for its impact on competition it is necessary to analyze all the rules that could affect the conditions of competition development on the market in any way. Further, such assessment should be done mainly to assess the impact of rules of a «new» legislation on competition and only in the cases when a relevant rule of law has a potential danger for the development of honest and fair competition in the market.

In addition, an important step aimed at improvement of legal groundwork for fair competition in Ukraine, is to perfect the Law of Ukraine «On Protection Against Unfair Competition» in terms of clarifying its provisions. In particular, Article 1 of the Law of Ukraine «On Protection Against Unfair Competition» should be stated as follows: «Unfair competition is any act of competition contrary to trade and other honest

practices in the economic activities, requirements of good faith, reasonableness and fairness».

I believe that the law is applied to all types of relationships, which involve economic entities, particularly in industry, trade and foreign economic investment activities, in the sphere of free professions and crafts through unfair competition, including actions made by them outside Ukraine, if these actions have or may have a negative effect on competition on its territory or harm the reputation of a bona fide economic entity or Ukrainian state as a result of unethical practices of its economic entities if otherwise stipulated by international treaties of Ukraine, and the consent to their obligatoriness is provided by the Verkhovna Rada of Ukraine.

In particular, it is considered to be leading to confusion in usage of the designation if its introduction into the economic use does not allow contractors and consumers of goods, works and services to indicate clearly the manufacturer or owner of the designation.

In establishing the fact of confusion it is necessary to consider such factors as the degree of expressive significance of the designation that is protected; the scope of activity; the owner's business reputation; consumers' extent of awareness, as well as the similarity of designations.

Article 8 should be moved to Chapter II of the Law, because the object of direct attacks in the committing of such disorders is namely business reputation and its elements. It is worth providing a definition to the notion of business reputation and its elements either in Part Two of the mentioned article, or in a footnote to it. Also it is worth noting that information is considered untruthful if it deliberately distorts the true state of a competitor; inaccurate is the information that selectively determines these or those facts; incomplete is the information that does not fully reflect the competitor's state of business. However, if this information albeit negatively characterizes an entrepreneur, but it corresponds to the reality, except the cases of excessive distortion of the information in which true information creates a misconception among competitors and consumers, it cannot be considered defamation.

The provisions of Articles 10 and 11 are to be supplemented by notes which would state that incitement should be understood as a competitor's various measures of prompting of another person who is in contractual ties or tries to acquire such ties with a competitor, to refuse from establishing such ties (incitement to a boycott) or to break already-existing relationships (incitement to discrimination of a buyer (customer).

Articles 13 and 14 should be revised in order to harmonize their provisions in view of the provisions of the Framework Decision of the Council of Europe «On combating corruption in the private sector» [10], whereby a criminal offense is considered to be commitment of the acts that are performed deliberately within professional activities:

- acts that lie in promising, offering or giving, directly or through third parties, to the person who carries out a guiding function or a work for

the organization's benefit on any ground, belonging to the private sector, of an undue benefit of any kind, designed to that person or to a third party, who through breaking his obligations would commit an act or refrain from a certain act;

- acts carried out in the course of implementation by a person of guiding function or a work for an organization's benefit on any ground that belongs to the private sector, a person requires or receives directly or through third parties undue benefit of any kind, designed to that person or to the third party or receives a promise of such benefit, for breaking his obligations he would commit an act or refrain from an act in favor of another entity.

In Article 15 it is worth determining the general notion of «misrepresentation», establishing that the information is misleading if, irrespective of the manner of presentation, it deceives or intends to mislead (deceive) the persons it is addressed to, or creates a false idea (impression) as a result of use in advertising of fraudulent activities that may impact the economic behavior of consumers and competitors, or otherwise cause damage or traumatize a competitor.

In the Law of Ukraine «On Unfair Competition» special prohibitions in the field of advertising should be additionally consolidated. For more than twenty years, the current legislation have always caused disputes about worthwhileness of consolidation of the rules aimed at ensuring fair competition in advertising in the Law of Ukraine «On Advertising» or in the Law of Ukraine «On Protection Against Unfair Competition».

In modern conditions many economic entities implement competitive struggle strategies through fair and unfair methods of advertising. Considering this very thing, a ban of hidden, obtrusive and other forms of unfair advertising, which affect the competitive relationships of the participants of competition and consumers, should be introduced into competition legislation. In addition, this law requires introduction of a ban on the abuse of trust of consumers and competitors in the implementation of clearance sales and other promotional sales, providing by the legislation, that only two sales a year are seasonal, which are performed annually at the same time. Final sales and sales with lowering prices by more than 60 % can be held only in case of liquidation of the institution, its reorganization with the change of its business profile. In advertising of promotional conditions the period and conditions of the promotion must be clearly defined. In the case of advertising of discounts, at least 30 %, and in some cases even 50 % of the products should be covered be the promotional event.

At the same time, it is necessary to establish a rule in the legislation, according to which customers and competitors are not allowed to accept knowingly unreasonable favored conditions in the acquisition and sale of goods, i.e, parity must be established in the realization of rights and legitimate interests of all the participants of competitive relationships, because in competition process individual economic entities could be forced

to cut prices and offer additional benefits because of unscrupulous actions of consumers and contractors. Unfair, and therefore prohibited, should be considered the sale of goods which in terms of their production or supply are to be provided free of charge. Also, gratuitous provision of goods and services is considered the one that does not involve any payment, works or service in return [11, c. 320].

All manifestations of umbrella advertising should be prohibited as unfair. Umbrella advertising is considered to be advertising of a product, which promotion is strictly limited by a certain law, with the help of another product using identical or similar trademark. Umbrella brands have become the most widespread in alcohol advertising, because advertising of this very production deals with most restrictions. Almost all the companies that produce or import alcohol products under well-known brands, were noticed in advertising of goods, services, contests, lotteries or other measures that have a similar or the same name with alcohol brands. Restrictions imposed on alcohol advertising, deprive it of the most powerful ways of spreading advertising: television, radio, print media (with some exceptions), means of external advertising. Manufacturers of spirits, who want a consumer to remember the appearance of their products, are forced to contrive and use umbrella advertising to promote their products. Soda water advertising can be recognized as an example of such advertising. It (advertising) holds the image (written, schematic, etc.) of an alcohol drink (advertising of which is inadmissible in a television broadcast) [12, p. 42].

Special attention should be paid to protection of the rights and interests of economic entities and consumers against manifestations of unfair competition in carrying out economic activity on the Internet. For example, French jurisprudence defines as an act of unfair competition, among the others, a multicast spam that contains information that misleads consumers [10]. Some articles of the Law of Ukraine «On Unfair Competition» should be devoted to legal regulation of certain manifestations of unfair competition in foreign economic activities, in particular in such as dumping or subsidized or growing imports, etc. It is worth noting that the proposed changes to the content of Chapters I-III of the Law of Ukraine «On Unfair Competition» are aimed at improvement of the already-existing competition rules and are advisory in nature. Procedural principles of detecting and termination of unfair competition, as well as measures of responsibility for violation of competition law also deserve fundamental revision.

Conclusions. Final definition of the notion and kinds of unfair competitive practices is not possible to make because of the constant variability of competitive relations and economic ties of their participants. Exactly because of this, the main task of systematization and unification of competition legislation should become a perfection of the institutional and legal framework for ensuring protection of fair competition in Ukraine and raising efficiency of the application of the rules of competition legislation by enforcement authorities.

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Бакалінська О. Захист від недобросовісної конкуренції: перспективи правового регулювання.

Постановка проблеми. *Важливим напрямом забезпечення розвитку добросовісної конкуренції в Україні має стати систематизація та уніфікація норм конкурентного законодавства як вимоги упорядкування, що характеризують усі сфери суспільства: економіку, політику, право, по-різному впливаючи на їх зміст, структуру та перспективи розвитку.*

Аналіз останніх досліджень і публікацій. *Дослідженню проблем систематизації законодавства, зокрема конкурентного, присвячено праці: О. В. Безуха, С. С. Валітова, А. І. Граціанова, Ю. В. Журика, Т. В. Кашаніної, Д. А. Керімова, О. Л. Чернелевської [1–7].*

Метою *статті є вивчення проблем здійснення систематизації конкурентного законодавства і визначення напрямів його подальшого вдосконалення.*

Матеріали та методи. *Використано загальнонаукові (діалектичний) та спеціальні методи пізнання правових явищ: аналізу та синтезу, системного підходу, тлумачення норм, формально-логічний, системно-функціональний, порівняльно-правовий та узагальнення.*

Результати дослідження. *У статті досліджено проблеми удосконалення норм конкурентного законодавства. Визначено, що головне значення для розвитку конкурентного законодавства України має створення комплексної моделі його систематизації та уніфікації. Її мають здійснювати на основі аналізу результатів моніторингу та оцінки дієвості як окремих норм, так і інститутів конкурентного законодавства загалом. Запропоновано покласти в основу моніторингу та оцінки чинного законодавства розроблений ОЕСР Інструментарій для оцінки впливу на конкуренцію відповідних норм і приписів.*

Висновки. *У сучасних умовах процес систематизації та уніфікації конкурентного законодавства має охопити майже всі сфери нормативно-правового регулювання господарських та цивільно-правових відносин.*

Остаточно визначити поняття і види недобросовісної конкурентної практики не є можливим через постійну мінливість конкурентних відносин та господарських зв'язків їх учасників. Саме з огляду на це головним завданням систематизації та уніфікації конкурентного законодавства має стати вдосконалення організаційно-правових засад забезпечення захисту добросовісної конкуренції в Україні та підвищення ефективності застосування норм конкурентного законодавства органами правозастосування.

Ключові слова: систематизація, конкурентне законодавство, оцінка впливу на конкуренцію, захист від недобросовісної конкуренції.