

WHICH ARE THE WELFARE LIMITS? COMPETITION POLICY IN THE CONTEXT OF CORPORATE SOCIAL RESPONSIBILITY

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ABSTRACT

This paper aims to analyze the relationship between corporate social responsibility (CSR) and the European competition policy. The main purpose of our research paper consists in investigating whether the current competition regulation could allow certain types of behaviors which, on a long term, seem able to assure the achievement of the objectives derived from CSR principles. In the present study, we argue that although the Competition Law does not refer explicitly to consumers non-pecuniary interests, Article 1 of the mentioned act involves the principle of promoting consumer's general interest. We highlight the argument according to it the promotion of measures with immediate implications for consumer's welfare (environmental protection, corporate governance or social measures) might be a criterion to be taken into consideration within the implementation process of the competition policy.

KEY WORDS: *corporate social responsibility, competition policy, concerted practices*

JEL: D02, K21, L78

1. INTRODUCTION

The European Union set by the Lisbon Agenda its main objective of transforming its economy into the most competitive, sustainable and dynamic knowledge-based economy in the world. In such a context, the concept of corporate social responsibility is seen as the success key of such a transformation. This means that enterprises should not only be interested in financial earnings, but also have in view purposes able to contribute decisively to the transformation of the society in which they act.

Competition policy represents a fundamental pillar in the development of the industrial strategy at the level of the European Union. The principles of the competition policy are developed in the articles 101 and 102 from the Treaty on the Functioning of the European Union (TFUE) as well as in article 107 belonging to the same act. Romanian regulation assumed those principles and makes explicit reference to the implementation of competition principles aiming to "protect, maintain and stimulate the competition and a normal competitive environment in order to promote consumers' interests".¹

The collocation "consumers' interests" refers to all the issues affecting consumers' welfare. The most obvious consumer interest is that of the access to set prices in competitive conditions, prices assuring the consumers' welfare maximization. At the same time, processes which could not be quantified directly, but having a significant impact on consumers' welfare, do concern the promotion of technical or economic progress, as it is stipulated in Art. 5 paragraph 2 (a) from the Competition Law.

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Technical progress or the economic one are concepts covering a wide range of values, from technical innovation up to the launching of new products or services offering an increased protection of the environment.

Naturally, given that competition principles specifically relate to business activity as entities engaged in production processes or that of commercialization of goods and services, we could think about the measure in which the principles and objectives of corporate social responsibility could extend to those stipulated by the Competition Law as being relevant to consumers' interest and welfare.

In the literature in the field, there is a limited number of studies treating possible interferences between competition policy and corporate social responsibility, but we could remember Dubbink and Van der Putten (2008) addressing the possible link between CSR and the new competition rules. These authors identify that the Dutch competition authority accepts the principles of corporate social responsibility as the foundation of exceptions covered by the competition act, but it will not accept exemptions based only on CSR principles, as long as it is impossible to identify a reasonable transfer for consumers' benefit. Moreover, the authors identify several cases where arguments concerning the environment protection have been accepted, which means a key element of CSR principles². Quairrel-Lanoizelée (2011) realizes a census of the scientific articles treating the theme of CSR in order to identify the way by which this concept is positioned in relation to the competitiveness notion, respectively to that of competitive market and of companies' market force. The author sustains that, although a great number of studies deals with the relationship between companies' competitiveness and CSR, it does not frequently happen to analyze the relationship between competition and CSR. We found an empirical research (Fernandez-Kranz and Santalo, 2010) that analyzes the relationship between corporate social responsibility and competition, a relationship measured by means of indicators such as: the Herfindahl- Hirschman concentration index, the number of firms in the industry and also the import penetration rate. The authors find out that there is a positive relationship between CSR and competition. They notice also that the firms on a market with a high degree of competition are more engaged in taking measures from the field of CSR.

2. ARGUMENTS IN FAVOR OF INTEGRATING CSR PRINCIPLES IN COMPETITION POLICY

The stipulations of the Treaty on the Functioning of the European Union are sufficiently opened in order to allow a broad interpretation framework. They should be interpreted so they could correlate each other. These stipulations should also support the other objectives pursued by the European Union, including the industrial and environmental policies, as well as those referring to corporate governance.

Article 11 from TFUE stipulates:

"Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development."

In such a context, the jurisprudence of European Court of Justice sustains the integration of article 11 from the Treaty on the Functioning of the European Union as general principle of Community Law³. In favor of this principle, we could invoke even the stipulations of a number of Member States Constitutions cited as source of general principles in the Court decisions⁴.

Article 101 (3) from TFUE which corresponds to the stipulations of Article 5 (2) from the Competition Law in Romanian regulation, provides that:

„The prohibition stipulated in paragraph 1 may, however, be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, whenever they achieve cumulatively the following conditions:

- (a) *They contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit from the agreement, decision or concerted practice;*
- (b) *They impose to the companies concerned restrictions which are not indispensable to the attainment of these objectives;*
- (c) *They do not offer undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

Thus, from the point of view of competition law enforcement, we can identify the following procedural issues:

- (a) Whenever environmental considerations could be relevant to the resolution of a case, they should be taken into consideration for making decisions.
- (b) Whenever the application of competition principles does not involve issues referring to environmental protection, the integration principle does not have any effect. A consequence of this statement is that, whenever we notice actions affecting the environment, they could not be sanctioned by competition rules unless they affect directly the competitive environment.
- (c) Whenever the stipulations of competition law could be interpreted in favor of environmental requirements and when this interpretation does not favor anti-competitive practices, then those interpretations will be preferred.
- (d) Whenever the competition rules could be interpreted in favor of environment protection but a conflict arises with competition policy's purposes, the proportionality principle should be applied⁵. This means that, whenever it is necessary to establish a certain measure for achieving the objectives of environmental protection, as emerges from Community policy, then this measure should be adopted. It is not possible for these objectives to be achieved without implementing the measure which has an impact on competition.

3. ECONOMIC ARGUMENTS FOR INTEGRATING THE REQUIREMENTS OF ENVIRONMENTAL PROTECTION IN COMPETITION POLICY

Economic theory has rapidly developed in the direction of integration of concepts related to natural environment within the working tools of science. Thus, we outline two directions involving the natural environment: environmental economics focusing on the issues referring to different types of externalities having impact on the environment and resulted from the economic activities and green economy which treats the relation between the economic activity and environment in a boarder context. Environmental economy proposes a series of solutions to the problem of negative externalities, with impact on the natural environment, the framework used being that of neo-classical economic theory. Oppositely, green economy rejects the majority of hypotheses and concepts used in neo-classical economic theory, the investigative tools utilized borrowing techniques from management science or even from the engineering ones.

Pigou⁶ argued that government should intervene by imposing taxes to externalities having a negative effect on environment so that they are internalized within the price mechanism. In contrast, Coase⁷ argued that the state intervention (by means of taxation) does not represent the correct solution, but that of strengthening the protection of property rights so that individuals negotiate tariffs forcing those creating externalities to adjust their behavior. The declared objective of competition policy consists in establishing a competitive climate on markets, to consumers' benefit or, in other words, maximizing consumers' welfare.

For the welfare or for maximizing consumers' welfare, a number of conditions should be fulfilled such as:

- (a) Allocative efficiency which could be got under perfect competition: This is a situation showing that goods and services desired by the consumers are offered to them at prices they

are willing to pay for. This implies the fact that resources are delivered optimally in accordance to consumers' needs.

- (b) Productive efficiency that occurs when the transformation of raw materials into final products is done in the most economical manner permitted by current technology.
- (c) Dynamic efficiency: This is the efficiency assuring even a certain level of technological progress sustained by a certain rate of technological innovation and by the emergence of new products aiming to achieve consumers' needs.

Within the neo-classical economic theory, consumers' welfare is quantified by means of consumers' surplus concept. Although there is an equivalent of this concept in manufacturing activity, respectively producer's surplus, which is nothing else than manufacturer's operating profit, competition policy does not show great interest to this concept, or in any case it postulates the priority of consumer surplus despites that of manufacturer.

It should be noted that measuring consumer's surplus in the context of neo-classical approach, apart from the fact that this is carried out in a static manner, it has the disadvantage that it is not possible to introduce environmental variables or to take into consideration different types of externalities. Green economy is founded on the argument that the hypotheses of neo-classical approach concerning exogenous and egocentric preferences, respectively the axioms of choosing the rational consumer seen as a selfish individual basing its decisions exclusively on the observed prices (*homo economicus*) and even the axiom of utility maximization at an optimal Pareto equilibrium, respectively the production theory based on the model of perfect competition and on profit maximization, are not adequate hypotheses in order to meet the challenges of ecologic issues. The proposal advanced by this paradigm consists in replacing them by modern behavioral models which have been rapidly developed lately. A strong argument states that there is no opportunity for effective allocations on markets when taking into account environmental variables. There is not an optimal level of pollution for the consumers. In addition, we notice the rejection of the hypothesis or of the demarche of neo-classical approach according to that it can be used a discount factor for the future value of environmental resources⁸.

In such a context and given the current development level of green economy, it could not be easy to find out a connection with competitive policy. On the other hand, environmental economics approaches based on neo-classical analyzing tools, allow the evaluation of the effects of transactions on consumers' welfare. For example, we could integrate environmental objectives within the utility function in assessing consumers' welfare. When developing a temporal analysis, we could integrate objectives related to environment protection.

In essence, competition policy principles refer to the prohibition or elimination of practices limiting competition. Due to this reason, the circumstances in which certain transactions or behaviors affect the environment but do not have anti-competitive effects, could not be taken under the competencies of competition authority. However, the circumstance in which a behavior has a potential to affect the competition not in a fundamental way, but in addition to the promotion of several concrete measures for environment protection, should receive a treatment circumscribed to the exemption situations.

As an example, we have the European jurisprudence which admits the exemption of agreements limiting the production and commercialization of goods and services within the European Union whenever they bring benefits to consumers, to economic development and to the environment in accordance to Article 101 (3) from the Treaty on the Functioning of the EU.

Thus, in the cause IV.F.1/36.718 of CECED, the Commission exempted an agreement which included almost all manufacturers and importers of washing machines operating on the European market. This agreement restricted the freedom to produce and import the least energy efficient washing machines. At that moment, the production and commercialization of goods covered by the named agreement was allowed by the regulation and there was no evidence anticipating an eventual prohibition in the near future. Even if a certain agreement had as a result a reduction of consumers' choice because of the fact that it would have been a smaller number of cheap washing machines on

the market together with a prices increase up to 14% (all methods for increasing energetic efficiency imposing supplementary production costs), the Commission exempted this agreement considering that it reduced the energy potential consumption of new cars. As a consequence, it could have determined lesser pollution, created more technical efficient cars and concerted research and development in the direction to improve the energetic efficiency in the future. The Commission took also into consideration the collective environmental benefits by reducing CO₂ emissions.

The arguments for the incidence of article 81* (3) TCE were founded on the contribution of agreements to the economic and technologic progress and on addressing benefits to final consumers, although competition restrictions were obvious (higher prices for consumers and a narrower range of goods).

4. CONCLUSIONS

This paper investigates the legal and economic fundaments according to which corporate social responsibilities could be included within the competition policy principles. We analyze especially the measures for environment protection which are considered a significant dimension of CSR paradigm. We show that, according to the integration principle and related to stipulations of Article 11 from the Treaty on the Functioning of the European Union highlighting the importance of environment protection within EU policies and actions, competition policy should favor those environment objectives especially in the circumstances in which competition is not seriously affected on certain markets. Moreover, if we incorporate environment quality variables in consumer's utility function and if we evaluate consumers' welfare according to those variables, it will be possible to meet some situations in which behaviors considered currently anti-competitive, could be held compatible to companies long-term objectives.

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- ¹ Law no 21/1996 republished, with subsequent modifications and completions, under the name of Competition Law.
- ² Case 12/FKS (July 23, 1999), decision in the case 492/VBN (July 9, 1999) and decision in the case 2495 (April 18, 2001). In addition, the authors mention even the case Stibat in which there were allowed taxes for the collection of used batteries by an association of producers and distributors.
- ³ Dhondt, *Integration of Environmental Protection into other EC policies* (Groningen, Europa Law Publishing, 2003), Wasmeier, “The integration of environmental protection as a general rule for interpreting Community law” (2001) CML Rev 159.
- ⁴ AG Léger opinion in the case C-227/02 Wood Trading [2004] ECR I-11957, which involves Belgium, Greece, Spain, Finland and Hungary; Environment Protection Chart recently added to France Constitution.
- ⁵ Proportionality principle refers to the circumstance in which legal actions are adjusted in accordance to the impact of incremented action. For example, in a competition case, the measures for environment protection are decided unless the competition is fundamentally affected on a certain market.
- ⁶ Baumol and Oates, *The Theory of Environmental Policy: Externalities, Public Outlays and the Quality of Life* (2nd ed., Englewood Cliffs, NJ, Prentice-Hall 1988).
- ⁷ Oates: “From Research to Policy: The Case of Environmental Economics” University of Illinois Law Review (2000) 135.
- ⁸ Heinzerling appreciates that the empirical researches do not indicate the fact that people perceive that current life is more valuable than lives of future populations (107 Yale L J (1998) 1981 “Regulatory Cost of Mythic Proportions”).

* Actual art.101 (3) from TFUE.

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