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Mechanism of protection of business entities from unfair competition

Механізм захисту суб'єктів господарювання від недобросовісної конкуренції

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Abstract

The purpose of the article is to clarify the mechanisms of protection of economic entities from unfair competition in Ukraine. The subject of the study is measures to combat unfair competition. The research methodology includes the following methods of scientific knowledge: dialectical, logical, formal and logical, system and structural, method of analysis, legal forecasting method. Research results. The definition of unfair competition and its features provided in the works of domestic and foreign scientists are analyzed. The concepts of "economic competition" and "unfair competition" are considered, the manifestations of the latter are studied. Practical implementation. The mechanisms of protection of the rights of entrepreneurs are considered in detail with reference to the legal instruments, which regulate the order of their realization. Value / originality. The author's definition of the concept of "economic competition" is formulated.

Keywords: economic competition, economic entity, mechanism, protection, unfair competition.

Анотація

Метою статті є з'ясування механізмів захисту суб'єктів господарювання від недобросовісної конкуренції в Україні. Предметом дослідження є заходи протидії недобросовісній конкуренції. Методологія дослідження включає такі методи наукового пізнання: діалектичний, логічний, формально-логічний, системно-структурний, метод аналізу, метод прогнозування. Результати дослідження. Проаналізовано визначення недобросовісної конкуренції та її особливості, надані у роботах вітчизняних та зарубіжних вчених. Розглянуто поняття «економічна конкуренція» та «недобросовісна конкуренція», досліджено прояви останньої. Практичне значення. Детально розглянуто механізми захисту прав підприємців із посиланням на нормативно-правові акти, які регламентують порядок їх реалізації. Цінність / оригінальність. Сформульовано авторське визначення поняття «економічна конкуренція».

Ключові слова: економічна конкуренція, суб'єкт господарювання, механізм, захист, недобросовісна конкуренція.

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Introduction

The right of citizens to entrepreneurial activity is enshrined at the highest legislative level. Thus, in accordance with the provisions of the Basic Law of Ukraine (Law of Ukraine No. 254k/96-VR, 1996), everyone has the right to entrepreneurial activity, which is not prohibited by law. This right is undoubtedly a mandatory and necessary element in the structure of socio-economic rights of citizens. It ensures not only the functioning of a market economy, but also the optimal combination of market self-regulation of economic relations between economic entities and state regulation of macroeconomic processes, pursuant to the constitutional requirement of responsibility of the state before an individual for its activity, and declaration of Ukraine as a sovereign, independent, democratic, social and constitutional State, defined by the Commercial Code of Ukraine.

At the same time, the State, granting its citizens the right to entrepreneurial activity and in every way supporting and ensuring it, prohibits certain actions aimed at restricting competition, which is a necessary condition for the functioning of a market economy. Thus, the Basic Law of Ukraine and a number of other regulations enshrine a list of offenses in this area (abuse of monopoly position in the market; illegal restriction of competition; unfair competition, etc.), for which there is legal liability. At the same time, it is not the monopoly position as an element of world economic competition that is outlawed, but the abuse of the latter. So, as one can see, the State, by giving certain rights to entrepreneurs, imposes the corresponding obligations on them.

However, unfortunately, the cases of unfair competition are not isolated; its most common manifestations are: misuse of symbols, discrediting of the business entity, dissemination of misleading information, inducement to boycott a business entity, etc. Therefore, the purpose of our article is to study the mechanisms of protection of economic entities from this negative phenomenon.

Methodology

The methodological basis for the research is the set of general scientific and special legal methods of scientific knowledge, the use of which is due to the peculiarities of combating unfair competition in Ukraine.

Dialectical method is used for the general characteristics of economic competition and unfair competition in Ukraine. This method, as well as logical method is applied for considering the mechanism of protection of business entities from unfair competition and examining their features.

The method of analysis is applied when considering the works of scientists on the topic of the research.

Using formal and logical method, the conceptual and categorical apparatus of the Article is formulated; in particular, the concepts of “economic competition” and “unfair competition” are defined, the Authors’ definition of the term of “economic competition” is proposed.

System and structural method makes it possible to identify the forms of unfair competition, as well as the acts, which are considered unfair competition.

Legal forecasting is helpful in determining the areas of improvement of the activities of authorized entities in the field of administrative and legal support of economic competition (subsection 3.2).

Literature Review

In the 12th century Smith (1904) established the riverly clause as a competition, defined the conditions for effective competition, and proved that competition by equating the rate of return, leads to the optimal distribution of capital and labor between industries and theoretically developed the model of perfect competition.

According to Porter (1990) – the author of the concepts of competitive strategy and international competitiveness – competition is a complex process determined by the interaction of five main forces: the rivalry of existing competitors in the market; appearance of new competitors; introduction of new competitive goods (substitutes); competitive ability of suppliers (sellers); opportunities for buyers.

In his scientific work, Schumpeter (1934) notes that true competition is competition born of a new product, new technology, new type of organization, new source of supply. It determines the final cost of goods and is a source of

innovation, implementation of new technological solutions.

Mill (1848) developed the equation of international demand, highlighted non-competitive groups in the market, proved the existence of several types of elasticity of demand (price, income, cross), substantiated the nature of alternative costs and economies of scale.

These ideas were later developed by Chamberlain (1949). He laid the foundation for modern Western theory of 4 main types of markets: perfect competition; monopolistic competition; oligopolies; monopolies. The scientist proposed to use two criteria for the classification of markets – interchangeability of products offered by different enterprises and the interdependence of these companies.

According to Fatkhutdinov (2000), competition is the process of managing the subject with its competitive advantages to win or achieve other goals in the fight against competitors to meet objective or subjective needs within the limits of the law or under natural conditions.

Honcharuk (2004) notes that competition has a subject-object structure. Subject-object structure is a system of relationships between its entities that have unidirectional goals and interests. It reflects the nature and forms of their interaction with the competition. Competitors are natural or legal persons (or a group of persons) whose interests are directed to the same object. These are individual buyers and sellers of goods, services, labor, and the economy, the State, the national economy as a whole, entering into competitive relations with each other. The objects of competition are the conditions of production and sales, consumer preferences, labor, loans, government benefits, preferences – that is, everything that gives rise to competitive relations.

Mokhnenko, Riznyk, Khomliak (2014) argue that competition is an economic process of interaction and struggle of producers for the most favorable conditions of production and sale of goods, obtaining the highest profits. It reflects the relationship between production and sale of the product, which is causal, essential, necessary and repetitive objective economic law. Competition law establishes a causal link between the possibility to create a product that consumers need and the opportunity to sell it to the benefit of the customer.

Results and Discussion

Competition (from the Latin "concurro" – confronted) means competition between market participants for the most favorable conditions of production, sale and purchase of goods. This type of economic relationship takes place when producers of goods act as independent entities; their dependence is related only to market conditions, a desire to win a competitive position in the production and sale of their products. In market relations, competition – natural and objectively existing phenomenon – can be considered as the law of the commercial economy (Samuliak and Terekhov, 2019, p. 337).

Despite the large number of scientific papers on the problem of competition, to date there is no single definition of this concept. However, essential characteristics of the latter, according to Hredzheva (2009), are:

- 1) market nature of competition (interaction of enterprises, firms in the market);
- 2) limited amount of effective demand, for which there is a fierce struggle;
- 3) competition develops only in real market segments.

Thus, based on the definitions provided by foreign and domestic scientists, we can conclude that economic competition is a struggle of economic entities using their own achievements in real market segments in order to win or obtain other advantages under conditions of limited solvent demand and as a result of which consumers and economic entities can choose between several sellers (buyers).

At the legislative level, the concepts of protection of economic competition are regulated by the Constitution of Ukraine (Law of Ukraine No. 254k/96-VR, 1996), the Laws of Ukraine "On protection of economic competition" (Law of Ukraine No. 2210-III, 2001); "On the Antimonopoly Committee" (Law of Ukraine No. 3659-XII, 1993); "On protection against unfair competition" (Law of Ukraine No. 236/96-VR, 1996) and others.

Thus, according to Article 42 of the Constitution of Ukraine (Law of Ukraine No. 254k/96-VR, 1996), the abuse of a monopolistic position in the market, the unlawful restriction of competition, and unfair competition, shall not be permitted. The types and limits of monopolies are determined by law. Article 92 of the Basic Law stipulates that exclusively the laws of Ukraine

determine the rules of competition and the norms of antimonopoly regulation.

The Law of Ukraine “On Protection of Economic Competition” (Law of Ukraine No. 2210-III, 2001) provides the following definition of this phenomenon: it is competition between business entities in order to gain advantages over other ones due to their own achievements, as the result of which consumers, economic agents can decide between several retailers, purchasers, and a separate entrepreneur cannot determine the terms and conditions for the circulation of goods on the market.

Unfair competition, in accordance with the provisions of the Commercial Code of Ukraine (Law of Ukraine No. 436-IV, 2003), shall be deemed any actions in competition that contradict the rules, trade and other honest practices in business activity. Unfair competition is the unlawful use of business reputation of an economic entity, creating impediments to economic entities in the process of competition, and gaining unlawful advantages in competition, unlawful collecting, disclosure and use of the trade secret, or other actions classified under Part 1 of this Article. (Article 32).

The Law of Ukraine “On Protection against Unfair Competition” (Law of Ukraine No. 236/96-VR, 1996), in turn, defines unfair competition as any action in competition that is contrary to trade and other fair practices in economic activity. These include:

- 1) illegal use of the business reputation of the business entity (illegal use of symbols, illegal use of goods from another manufacturer, copying the appearance of the product, comparative advertising);
- 2) creation of obstacles to business entities in the process of competition and achievement of illegal advantages in competition (discredit of the subject, inducement to boycott the business entity, inducing the supplier to discriminate against the buyer (customer), bribing the employee, official of the supplier, bribery of an employee, buyer’s (customer’s) official, the official of the buyer (customer), achieving undue illegal advantages in competition, dissemination of misleading information);
- 3) illegal collection, disclosure and use of trade secrets (illegal collection of trade secrets, disclosure of trade secrets, inclination to disclose trade secrets, illegal use of trade secrets).

Slobodyaniuk (2006) further points out that forms of unfair competition are:

- illegal actions aimed at gaining certain advantages over a competitor due to its intellectual activity and business reputation;
- illegal actions connected with disruption of production process of competitor, creating obstacles during the competition and achieving illegal advantages in competition;
- actions related to the illegal collection, disclosure and use of trade secrets.

There are two ways to protect against unfair competition – administrative and judicial ones. The first is to address to the Antimonopoly Committee of Ukraine to protect violated rights. This agency is the State body with a special status, the purpose of which is to ensure State protection of competition in business and public procurement. The main task of the Antimonopoly Committee of Ukraine is to participate in the formation and implementation of competition policy in terms of:

- 1) exercising State control over compliance with the legislation on protection of economic competition on the basis of equality of business entities before the law and the priority of consumer rights, prevention, detection and termination of violations of legislation on protection of economic competition;
- 2) control over concentration, coordinated actions of economic entities in the course of the regulation of prices (tariffs) for goods produced (sold) by natural monopolies;
- 3) promoting the development of fair competition;
- 4) methodological support for the application of legislation on the protection of economic competition;
- 5) control over the creation of a competitive environment and protection of competition in the area of public procurement;
- 6) monitoring of State aid to economic entities and control over the admissibility of such aid for competition (Law of Ukraine No. 3659-XII, 1993).

To fulfil the above objectives, the Committee is authorized to consider applications and cases of violations of legislation on protection of economic competition and to investigate these applications and cases, as well as to adopt orders and decisions on applications and cases, review decisions on the cases, provide conclusions on the qualification of actions in accordance with

the legislation on protection of economic competition.

All applications and cases submitted to the Antimonopoly Committee are considered under the Regulation of the Antimonopoly Committee of Ukraine No. 5 (Order No. 5, 1994). This legal act determines certain features of the procedure for consideration of applications, cases of contravention of the law on protection of economic competition by the Antimonopoly Committee of Ukraine and establish the procedure for reviewing decisions by the Committee in these cases.

An application for violation of the legislation on protection of economic competition (including violations of the legislation on protection against unfair competition) may be submitted by economic entities – competitors, suppliers or buyers of the defendant and other individuals and legal entities who can confirm that actions or omissions by the defendant may have negative impact on their rights.

The complaint is submitted exclusively in writing and is considered within 30 calendar days. If it is necessary to obtain additional information that cannot be provided by the applicant, the term for consideration of the application may be extended by 60 calendar days (the applicant shall receive a written notification from the body of the Committee authorized to consider it). If the person withdraws an application, the statement is remained without examining, which shall not be an obstacle for the Committee to continue to investigate the issues raised therein.

The submission of the application is free of charge. The application should indicate the signs of violation (according to the applicant); name, known details (address, telephone number, etc.) of business entities, public authorities or local governments. If the applicant withdraws the application or fails to comply with the requirements within the prescribed period (which, however, does not deprive him/her of the right to apply to the Committee with a repeated application), the latter remains without consideration.

If the applicant believes that his / her application may have negative consequences for him / her, the Antimonopoly Committee of Ukraine may investigate on its own initiative. To this end, the applicant must submit a reasoned request to initiate proceedings on the Committee's own initiative.

Based on the results of consideration of cases on violation of the legislation on protection of economic competition, the bodies of the Antimonopoly Committee of Ukraine make decisions, including on:

- recognition of the violation of the legislation on protection of economic competition;
- termination of violations of the legislation on protection of economic competition;
- obligations of the authority, local government, administrative and economic management and control body to revoke or modify the decision or terminate agreements recognized as anti-competitive actions of public authorities, local governments, administrative and economic management and control bodies;
- recognition of a business entity occupying a monopoly (dominant) position in the market;
- forced division of an economic entity occupying a monopoly (dominant) position in the market;
- imposition of a fine;
- blocking of securities;
- elimination of the consequences of violations of the legislation on protection of economic competition, in particular elimination or mitigation of the negative impact of concerted actions, concentration of economic entities on competition;
- cancellation of the authorization for the agreed actions;
- end of the proceedings (Art. 48 of the Law of Ukraine No. 2210-III, 2001).

As for the court procedure, then, pursuant to Par. 7, Part 1, Art. 20 of the Commercial and Procedure Code of Ukraine (Law of Ukraine No. 1798-XII, 1991) the jurisdiction of commercial courts extends to disputes arising from relations related to the protection of economic competition, restriction of monopoly in economic activities, protection against unfair competition, including in disputes related to appeals against the judgments of the Anti-Monopoly Committee of Ukraine, as well as cases filed by the bodies of the Anti-Monopoly Committee of Ukraine on issues referred by law to their competence, except for disputes referred to the jurisdiction of the High Intellectual Property Court.

Thus, legal relations related to the restriction of monopoly and protection of economic entities from unfair competition are subject to regulation of economic law, and therefore cases arising from the relevant legal relations are considered by commercial courts.

According to Art. 176 of the Commercial Procedure Code of Ukraine (Law of Ukraine No. 1798-XII, 1991), if there are no grounds for leaving the statement of claim without motion, return of the statement of claim or refusal to initiate proceedings, the court shall open proceedings within five days from the date of receipt of the statement of claim or statement on elimination of deficiencies filed under Article 174 of this Code.

Par. 2, Part 3, Art. 12 of this Code (Law of Ukraine No. 1798-XII, 1991) stipulates that the general action proceedings are intended for consideration of cases, the consideration of which is inexpedient in the simplified action proceedings due to complexity or other circumstances.

In accordance with Part 3, Art. 247 of the specified regulatory legal act in resolving the issue on consideration of the case in the simplified or general action proceedings, the court shall take into account: 1) the cost of claim; 2) the significance of the case for the parties; 3) the remedy chosen by the plaintiff; 4) category and complexity of the case; 5) the amount and nature of evidence in the case, including whether it is necessary to appoint an expert in the case, call witnesses, etc.; 6) the number of parties and other case parties; 7) whether the consideration of the case is of significant public interest; 8) the opinion of the parties on the need to consider the case under the rules of simplified action proceedings.

Par. 5, Part 4, Art. 247 of the same Code enshrines that the cases in disputes arising from relations that are related to the protection of economic competition, restriction of monopoly in economic activities, protection against unfair competition may not be considered by way of simplified action proceedings.

In view of the above imperative requirements, such cases are subject to general action proceedings.

Conclusion

Based on the above, the following conclusions can be drawn. Economic competition is a struggle of economic entities using their own achievements in real market segments in order to win or obtain other advantages under conditions of limited solvent demand and as a result of which consumers and economic entities can choose between several sellers (buyers).

Unfair competition is any action in competition that contradicts the rules, trade and other fair practices in business (improper use of the business reputation of the entity, creating obstacles to economic subject in competition and achieving undue advantage in competition, illegal collection, disclosure and use of trade secrets, as well as other actions specified by law).

There are two ways to protect against unfair competition – administrative and judicial ones. The first is to apply for protection of violated rights to the Antimonopoly Committee of Ukraine, which is the state body with a special status, the purpose of which is to ensure State protection of competition in business and public procurement. The second one is filing a claim in the relevant commercial court, as legal relations related to the restriction of monopoly and protection of economic entities from unfair competition are regulated by economic legislation. We have considered in detail these mechanisms for the protection of the rights of entrepreneurs with reference to legal instruments governing their implementation.

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