EUROPEAN POLICY IN THE FIELD OF UNFAIR COMPETITION AND TRADEMARKS

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Abstract:

Both domestically and at the European or global levels, there is a tendency to counteract the characteristic elements of unfair competition, such as the abuse of dominance, anti-competitive agreements, unfair practices, and so on, activities conducted by increasingly more companies in order to attract customers and to remove current and prospective competitors. Trademark protection is a way to fight unfair competition for goods and services, to protect the consumer, and due importance must be given to industrial property in the smooth running of society. It is necessary that efficiency measures should be implemented in the domestic and international economy by circumscribing to the criminal act and punishing severely unfair competition activities in the field of trademarks.

Key words: unfair competition, trademark, trade, goods, sanctions

1. Introduction

History of mankind and religions is also a history of trademarks. People have marked their property, personal belongings (monogram), animals, works, products, that is, they have applied a characteristic sign of recognition or, as they say in modern times, they have marked their property or products. Trademark is a symbol of modern economy and, as it is manmade, it belongs to the objects of intellectual property. Intellectual property, WIPO briefly showed, "*means creations of the mind: inventions, literary and artistic works, as well as symbols, names, images, and designs used in commerce*". (Costinescu P. and Lazăr R., 2010)

Romania became a founding member of the World Intellectual Property Organization (WIPO); the Convention for the establishment of this organization was signed in 1967.

Trademarks serve to individualize the products of a manufacturer from those of another manufacturer, with a dual purpose: they help the owners promote their products by stimulating brand loyalty; they help consumers in the decision, prompting producers to maintain and improve the quality of the products sold under a particular brand.

On the usefulness of the trademark one can say it provides protection for its owner by ensuring the exclusive right to use it to designate goods and services, or to authorize a

third party to use it against payment. The protection of rights over trademarks is granted by courts, which, in most legal systems, hold the authority to stop trademark infringement. In a broader sense, trademarks encourage the initiative and entrepreneurship around the world, providing holders of trademarks with recognition and financial profit. Trademark protection also hinders unfair competition, for example counterfeiting which would use identical or similar distinctive signs to market different or lower-quality products or services. The system allows individuals endowed with entrepreneurial spirit to manufacture and market products and services in the most equitable terms, thus facilitating international trade. (Săvescu D. and Budală A., 2008)

The international regulations on the registration and protection of trademarks are contained in the ***Paris Convention for the Protection of Industrial Property of March 20, 1883***. The issue of unfair competition and anti-competitive practices was raised for the first time in Brussels on December 14, 1900 with the introduction in Article 10bis to the Paris Convention of 1883 for the protection of industrial property, article which stated that all countries of the Union shall enjoy the protection granted against unfair competition. This article was amended on the occasion of The Hague review of November 6, 1925 when it provided the incumbency of contracting countries to provide the Union citizens protection against anticompetitive acts.

Art. 10bis section 3 of the Paris Convention for the protection of industrial property prohibits: *all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.*

Romania ratified the Paris Convention by the ***Law of 13.03.1924***, subsequently ratifying the revisions of this Convention as well. Currently, the form in which it is applied is the one revised in Stockholm in 1967.

Based on this Convention, the ***Nice Agreement*** of June 15, 1957 was adopted, concerning the international classification of goods and services for the purposes of the registration of marks. The Nice classification comprises, as of January 1, 2002, 34 classes of goods and 11 classes of services. Each class is designated by one or several general indications commonly referred to as "class title", indication the fields in which each product or service of that class falls. The alphabetical list of products and services comprises about 12,000 positions.

As a result of membership of the Union, Romanian companies are entitled to national and unionist treatment throughout the Union. The same treatment is applied to foreigners, Union Members, on the Romanian territory.

2. Development of unfair competition in the field of trademarks

Ever since the Middle Ages, marks have represented elements of identification and differentiation of products and services, guaranteeing their quality. In order to identify it, to express its individuality, the craftsman used the individual mark; instead, in order to guarantee the product quality, the guild used the collective mark. The evolution of trademarks has a special significance from the marketing perspective, because the mark

has been, and still is the most conveyed communicational capital component within an organisation. A hostile environment arises, dominated by competition and mistrust, each seeking to maximize what they get and minimize what they offer. (Popescu I., 2007)

During industrialisation, one no longer encounters a society in which trade relations are based on trust and in which product quality is sought by manufacturers as a priority.

During the capitalism, the monopoly policy of various businesses developed something that was not in the interest of the consumer. Gradually, the consumer became more attentive to the quality of products and services offered, and in this selection it is increasingly important to choose a trademark and to be consistent in this choice.

Empowering consumers against those who sell goods and services is both cause and effect of a major sensitivity to quality, brand loyalty - strongly resized, and with a greater sensitivity to price, which is not seen as an independent variable, but as an element which consumer pressure can influence. (Bostan I. et al., 2010)

In this context, there is a direct and active involvement of European institutions to protect the competitive environment, particularly in the field of trade and factory trademarks.

2.1. Institutions involved in preventing and fighting unfair competition in the field of trademarks

At Community level, the institution responsible for how competition policy is implemented is the ***European Commission***. The latter takes formal decisions by simple majority, like a collective body. The decisions are prepared by the Directorate General for Competition which reports to the Commissary in charge of competition policy. ***Directorate General for Competition (DG Competition)*** establishes in fact the competition policy in the EU, working with the consumer protection organisations and associations in the EU.

Directorate General for Competition has led an intense activity to explain the benefits of competition policy to European citizens, because, in fact, it is the consumers who ultimately benefit from this policy. This is essential to bring European institutions closer to the citizens and to have them better understand the beneficial role of Community institutions. (*Consumer Policy*, available at http://www.ier.ro/documente/formare/Protectia_consumatorilor.pdf)

Upon the request of a Member State or on its own initiative, the Commission investigates the application of Community rules in certain specific circumstances and even in an entire economic sector. When it finds violations, it suggests measures for them to stop. Pending the entry into force of the implementing rules (in the form of Council regulations and directives), Member States have their own powers in the field of competition.

Any violation of rules regarding concerted practices is sanctioned by the Commission which may apply fines of up to 10 % of turnover. It may also request periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per each day of delay and calculated as of the date set by the decision until the violation ceases.

Domestic courts, not the Commission, may grant damages to businesses that have been affected. However, national courts must withdraw from a case once the Commission has started proceedings.

The institution authorized to decide whether the Commission's action was within the limits of the legally established powers is the ***European Court of Justice (ECJ),*** and the latter may request from the Commission both legal and economic arguments.

The European Parliament examines the work of the Commission based on an annual report, making observations on developments in this area, while the ***Council of Ministers'*** interventions are limited mainly to allow block exemptions.

In addition to the Commission, ***national authorities*** are also entrusted with powers of acting in the field of competition.

EU Competition policy aims primarily at integrating the markets by streamlining trade across borders and by allotting resources based on the best conditions; the protection of small and medium-sized enterprises; consumer protection; economic and social cohesion; development of optimal-sized enterprises to face global competition.

2.2. Manifestations of unfair competition and countermeasures

The competition acquis covers both anti-trust and control policies of state aid, it includes rules and procedures to fight anti-competitive behaviour of businesses such as restrictive agreements between them and the abuse of dominant position and preventing governments from granting state aid which distorts competition on the Internal Market.

Competition rules are directly applicable in the entire Union, and Member States shall cooperate with the Commission in their implementation, adopting an economic policy in line with the principles of open market economy based on fair competition.

Antitrust policy covers all the regulations, steps that can be taken by governments and public institutions, as well as procedures they can use to limit and control the formation of trusts, increasing the capacity of different companies or groups of companies to exercise market restrictive practices and to impose a monopoly behaviour by unlawful means.

Anti-competitive practices are business practices used by a firm or group of firms seeking to maintain or strengthen its market position, to increase profits without effort to reduce costs or enhance the quality of a product.

The Common Competition Policy is the first supranational policy in which Community institutions have mapped firm obligations for the countries that have recently joined the EU, including Romania, also involving federalization measures for member countries.

In the Treaty of Amsterdam on European Union establishment, competition policy is governed in particular by Articles concerning competitive mechanisms in the Single Market (goods, services, capital and labour) with a special focus on the goods, namely: protection against anticompetitive practices.

In Romania, the creation of a legal framework for the protection of industrial property has been successfully initiated on April 15, 1879 when the first law was passed in our country on trademarks and trade. (Iancu Șt., 2009)

By the Convention between Romania and France concluded on March 31/April 12, 1889, the two countries guaranteed to each other, protection of factory marks and trademarks. (Iancu Șt., 2009)

After the events of 1989, it was necessary that competition in Romania should be regulated by an organic law, Competition Law no. 21/1996, in order to create discipline specific to the free market that determines the balance and normal development of the

economy and ensures consumer protection. For the application of the law, two institutions were established in Romania: ***Competition Council*** and ***Competition Office***.

The transition from centralized economy to a market economy has generated no doubt the need to restructure productive industries, designed under communism according to arbitrary criteria, generating economic inefficiency. Unfortunately, the tendency to produce and sell under its own brand for export and the domestic market is rather low. The companies had to reorient to the production under their own brand for years, because it takes time to get a position on the market. Moreover, the problem of branding is general for Romania. We have lost our own brands and now we are striving to create new ones and we no longer succeed. Unfortunately, employers have been more interested in recovering short-term investments rather than shaping medium-and long-term strategies. (Folcuţ O. et al., 2009)

Clear strategies are required in this field, based on extensive market studies and accompanied by important investments and an adequate marketing policy.

Competition legislation in Romania identifies several types of anticompetitive behaviour, such as:

- ***horizontal agreements*** (agreements between manufacturers, agreements between distributors, etc.) or ***vertical*** (agreements between manufacturers and distributors of the same product, etc.) between businesses. Agreements between businesses are prohibited by Article 5 of the Competition Law when they are likely to have a substantial negative impact on forms of market competition, such as competition regarding the price, the quality and quantity of products, the innovation, the diversity and novelty of the supply.

- ***abuse of dominant position.*** Article 6 of Law no. 21/1996 stipulates: "*it is prohibited to use a dominant position abusively by one or more undertakings on the Romanian market or on a substantial part of it, resorting to anti-competitive practices aiming at or resulting in the influence of trade or prejudice of consumers*."

- ***mergers***, which, by creating or strengthening a dominant position, lead or may lead to the significant restriction, prevention or distortion of competition on the Romanian market or a part thereof.

The ***Council Resolution on the EU Customs Action Plan to combat IPR infringements for the years 2013 to 2017*** was adopted as a result of massive infringements of intellectual property rights in the trade of goods.

Among the strategic objectives of the Action Plan there are: effectively implementing and monitoring the new EU legislation on customs enforcement of IPR; tackling trade of IPR infringing goods throughout the international supply chain; strengthening cooperation with the European Observatory on infringements of IPRs, with the European Anti-Fraud Office and law enforcement authorities, including customs authorities.

In Romania, intellectual property protection is ensured in particular through two specialized institutions: ***State Office for Inventions and Trademarks*** - in industrial property matters - and the ***Romanian Copyright Office*** - in the field of copyright and related rights. Protection of industrial property right on trademarks is governed mainly by the following ***special laws***: Law no. 84/1998 R on trademarks and geographical indications, Law no. 11/1991 on fighting unfair competition, Government Ordinance no. 21/1992 R on consumer protection, Article 301 of the Criminal Code, the Government Emergency Ordinance no. 100/2005 ensuring compliance with the industrial property

rights, Law no. 344/2005 regarding measures to enforce intellectual property rights in customs operations, Law no. 26/1990 R on Trade Register.

The above-mentioned documents have ***implemented in full or partially:*** Directive 89/104/EEC on trademarks, EC Regulation no. 40/1994 on the Community trademark, EC Regulation no. 3295/1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods, and EC Regulation no. 1367/1995 which lays down provisions for the implementation of EC Regulation 3295/1994, EC Regulation no. 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights; Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights; Council Resolution on a comprehensive European anti-counterfeiting and anti-piracy plan; EC Regulation no. 207/2009 on Community trademark.

Treaty on the Functioning of the European Union (TFEU) regulates competition policy, article 101 prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition.

In the field of ***concerted practices, or in the abuse of dominant position and state aid***, the prohibition is limited to practices that have an impact on trade between Member States and excludes those that only affect trade within a state. Nevertheless, TFEU allows anticompetitive practices in exceptional cases where they benefit the economy, that is, if the pro-competitive effects of these practices exceed the anticompetitive effects.

Competition regulations in the European Union currently aim at a policy based on market-centred economic considerations rather than merely focusing on the administrative "legal form".

Art. 101 TFEU stipulates that are all agreements are prohibited and null and void between undertakings which may affect trade between Member States, particularly those fixing, directly or indirectly, purchase or selling prices, which limit/control production, marketing, technical development or investments, which share markets or sources of supply, which apply in the relation with trading partners dissimilar conditions to equivalent transactions, which make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Agreements for improving the production or distribution of goods or the promotion of technical or economic progress may be exempted provided that consumers are given a fair share of the resulting benefit, and not concerned to eliminate competition for a substantial part of the products concerned.

As of May 1, 2004, all national competition authorities, including courts of law, can apply directly relevant Community provisions to ensure undistorted and unrestricted competition.

The Commission has sought an amendment of the competition regulations given the economic disadvantages of the obligation to notify it of any agreement, case in which the Commission had to examine a series of files that often raised no problems about the applicable rules, but involving time and effort. In these cases the Commission has resorted to "administrative letters" to close the case on the basis of a presumption of compliance, but had no legal effect. Moreover, the Commission could not adequately investigate the most serious infringements, for which no notice would presumably be given.

Based on this analysis, the Commission proposed radical changes, which, after consultation with the European Parliament were adopted on 12/16/2002 by the Council in the form of ***EC Regulation no. 1/2003***, replacing Regulation no. 17/62. The Regulation entered into force on May 1, 2004. Basically, at present, competition policy and concerted practices are governed by this Regulation.

Some agreements are deemed by the Commission as harmful to competition and therefore are prohibited without exception. They are usually presented on ***public blacklists.*** They include:

- for horizontal agreements: pricing; joint sales offices; manufacturing or delivery quotas; sharing markets or sources of supply;
- for vertical agreements: resale pricing; absolute territorial protection clause.

Bordering predatory practices, low prices can be justified by efficiency gains of different types. All discounted selling practices (not only predatory practice) have something in common: if it is a practice that seeks to eliminate competitors, it means that the company "invested" in removing rivals. The classical structure of a predatory strategy is the following: a dominant company on its market which may incur losses sacrifices profits proposing very low prices. Current or prospective competitors exit the market or do not enter this market because they cannot conduct their business profitably in such competitive conditions. (Perrot A., 2008)

European rules have been developed so as to ensure fair and equal economic competition. Enterprises are not allowed: to set prices or to distribute among themselves market shares, to abuse a dominant position so as to eliminate smaller competitors, to merge if this way they would get a position that can control the market. Large companies which carry a high volume of activities in the EU cannot merge without the approval of the European Commission, even if they are not established in the EU.

However, the Commission may agree that a company should hold a monopoly if it is a matter of very expensive infrastructure or where monopoly is important in order to provide a public service. Still, companies holding the monopoly must be able to prove that they treat other companies fairly and profits resulting from the provision of public service cannot be used to subsidize commercial operations - thus they avoid undermining competitors' prices by charging lower prices.

Theory and practice in the field of competition have become necessary due to the existence in the economy now and always, of markets with imperfect competition. Among them, the limiting case is the monopolistic market, meaning that there is only one producer of a particular good or service, and this service or good has no substitutes, not even close. In economic terms, this means that the monopolist can change the selling price or the quantity it produces, without being worried about the reaction of other firms; in other words, the changes that other firms make on the prices or quantities of their products (in response to the changes made by the monopoly) have no effect on the demand for this product. (Oprescu Gh., 2008)

In the commercial relations between large and small entrepreneurs, the latter cannot use their bargaining power to impose conditions to suppliers or customers that may hinder the negotiation of commercial agreements with competitors. The Commission may fine (and it really fines) enterprises that use these practices.

The Commission accused the American company Microsoft of ***unfair competition*** and fined it because it imposed European consumers to buy several types of software in a single IT package. The Commission considered that through this commercial practice,

Microsoft limited consumers' right to choose, maintaining artificially high prices and hindering innovation in the software industry.

EU investigates not only trade in goods but also liberal professions and services, including financial services such as retail banking and credit cards.

The Commission monitors the help that governments of Member States grant to businesses in the form of ***state aid***, such as: loans and subsidies, tax relief, the supply of products and services at preferential prices, state guarantees that could significantly improve their credit rating in relation to their competitors.

Governments may not grant state aid to businesses that have no chance to recover from the economic viewpoint. However, companies may be allowed to cooperate in developing a single technical standard applicable to the market as a whole; small companies may be allowed to work together, to the extent that it could strengthen their ability to compete with larger firms; governments may be allowed to grant State aid where there is a real chance that businesses in difficulty - or newly-created companies - could become cost effective and as long as it is the EU interest that they be profitable, an example of which is that this would preserve or create jobs.

Considerations that are generally considered are the benefits for consumers or potential damage that could be brought to other businesses. The Commission often approves granting the aid for research and innovation, regional development and small enterprises, because it serves the general interests of the EU.

The investigation and the interdiction to violate European competition rules by the Commission are subject to the legal control of the European Court of Justice. Constantly, businesses and Member States' governments appeal against the decisions of the Commission and sometimes the court rules in their favour.

In Romania investigation services have recently emerged, a business that provides checking and inspection services, which developed as a result of customer requests for leaks of information, intellectual property theft and economic fraud with important prejudice caused to companies.

To protect consumers and right holders, the Council adopted a new regulation on combating counterfeiting and piracy that clarifies the terms and conditions under which the customs authorities may intervene in the case of goods which are suspected of infringing intellectual property rights.

Council Regulation (EC) no. 1383/2003 of 22 July 2003, concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights enables customs authorities, in cooperation with the right holders to improve control at the external borders. The Regulation is applicable as of 07/01/2004 and repealed EC Regulation no. 3295/94 starting from this date.

The Regulation applies to counterfeit goods, pirated goods, trademarks, patterns or moulds designed or adapted for the manufacture of goods infringing intellectual property rights, simplifying customs procedures, especially for small and medium enterprises (SMEs) and the destruction of fraudulent products. Thus, if there is suspicion that the goods are infringing intellectual property rights, the right holder may submit a written request to the competent customs authority whereby it should provide a technical and detailed description of the goods in question and information on the nature of the fraud, requiring the intervention of the customs authorities of one or several Member States in

case of a trademark, for example, so that the necessary steps should be taken in order to destruct the goods in question.

The infringement of intellectual property rights is subject to the law in force in the Member State where the goods suspected have been found. If the infringement of an intellectual property right has not been determined within the prescribed period, the release of the goods shall be granted and the extent of retention will be suspended after the necessary customs formalities have been carried out. This period is shorter in case of perishable goods.

Goods infringing an intellectual property right cannot be brought into the Community customs territory; they cannot be removed from the Community customs territory; they cannot be released for free circulation; they cannot be exported, re-exported or placed under a suspensive procedure, in a free zone or free warehouse.

Commission Regulation (EC) no. 1891/2004 of October 21, 2004 laying down provisions for the implementation of Council Regulation (EC) no. 1383/2003 defines the persons that can represent the right holders or other persons authorized to use this right. The Regulation establishes means of achieving the exchange of information between Member States and the Commission, so that the latter could monitor the effective application of the procedure and try to quantify and describe patterns of fraud, and, for the Member States to introduce appropriate risk analysis.

Regarding the Romanian legislation, ***Law no. 344/2005*** on measures to enforce intellectual property rights in the clearance procedures regulates both a simplified procedure for the destruction of goods suspected of infringing an intellectual property right and the fact that the person responsible for placing or removing from the Romanian territory the goods infringing an intellectual property right shall constitute an offence and is sanctioned by a fine. These goods can also be seized.

The ***Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)***, which is Annex 1C of the Agreement Establishing the World Trade Organization (WTO), signed in Marrakesh, Morocco on April 15, 1994, complements these rules with the definition of the trademark, the exclusive rights of trademark owners, prohibiting the imposition of special requirements for the use of trademarks, licensing and assignment of trademarks, cancelling trademarks.

TRIPS Agreement stipulates that *any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a factory mark or a trademark.*

The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed.

All these provisions shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

The TRIPS Agreement provides that the legislation of the Member States should contain procedures enabling effective action against any act which infringes intellectual

property rights, procedures to be applied in a manner that avoids the creation of barriers to legitimate trade and to provide protection against their abusive use. The procedures designed to ensure compliance with intellectual property rights *shall be fair and equitable, not unnecessarily complex or expensive, substantive decisions should be based solely on evidence on which the parties have had an opportunity to be heard. However, there will be no obligation to provide the opportunity for review of acquittals in criminal cases.*

To discourage activities affecting industrial property rights, domestic judicial authorities shall have the authority to order that goods infringing a right of a holder, the materials and implements used primarily for the production or manufacture of such goods be without any compensation, removed from commercial channels without causing harm to the right holder and minimizing the risk of further infringement, or they should be destroyed.

With regard to ***counterfeit trademark goods***, *the mere fact of withdrawal of a factory mark or a trademark unlawfully affixed shall not be sufficient, except in extraordinary circumstances, to allow the introduction of the goods into the channels of commerce*. The person infringing the trademark right may be requested, provided that such measures are not disproportionate to the seriousness of the touch, to inform the right holder and the State on the identity of third parties involved in the production and distribution of goods or services in question, as well as their distribution circuits.

The legal authorities are authorised to adopt ***provisional measures*** without the other party being present and heard if necessary, especially when any delay is meant to cause irreparable harm to the right holder or when there is a provable risk that the evidence has been destroyed.

Member States shall provide for ***criminal procedures and penalties*** for deliberate acts of infringement of factory marks or trademarks or piracy infringing copyrights. Penalties include imprisonment and / or fines sufficient to provide a deterrent and will be equivalent to those laid down in the case of serious similar crimes. In some cases, sanctions will include the seizure, forfeiture and destruction of the goods in question, and all materials and tools that were used directly in the offence.

However, the agreement has many shortcomings. The most important differences between TRIPS provisions and the conditions of an effective protection of intellectual property rights involves the ability of state institutions to facilitate effective and lasting strengthening of private intellectual property rights. A large number of countries in transition and developing do not have the appropriate legal systems adequate to the difficult task of strengthening intellectual property rights and do not satisfy other conditions required to implement the agreement. Another problem refers to public administration, to the institutions providing and guaranteeing the protection of intellectual property rights. These agencies, in many developing countries, do not have sufficient funds, which leads to the holding of incompetent staff, to the lack of performance of the computer system and to deformed results. The third problem involves the reduction in the value of intellectual property rights. Once created, intellectual property rights are diminished by the provisions of TRIPS, using measures such as compulsory licenses, limiting the scope for strengthening the rights and exceptions to the exercise of rights in favour of third parties. A last important problem is that regarding new technologies. Out of necessity, the protection cannot precede new technologies. It may lead to the trailing of the latest discoveries, which TRIPS is already doing. (Florescu O., 2006)

By the ***Directive no. 2008/95/EC of the European Parliament and the Council of October 22, 2008*** to approximate the laws of the Member States relating to trademarks, it was provided that, in order to facilitate the free circulation of goods and freedom to provide services, trademarks should receive the same protection under the law of the Member States. However, this does not preclude the Member States from providing greater protection for well-known trademarks. The protection conferred by the trademark, the purpose of which is to guarantee the trademark function of indicating origin, should be absolute in the case of identity between the trademark and the sign and between the goods or the services.

Article 2 of the Directive provides that a trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.

The main functions of trademarks in commercial activity are the *differentiation function of products or services,* with a role of indicating their origin, that they come from a certain goodwill; *quality guarantee function,* with the role of ensuring standard quality of that trademark products on the market; *the advertising function,* with the role of attracting customers to products of that particular trademark and to traders providing those products to the consumers.

In Romania, by ***Law no. 148/2000*** on advertising, applying the principles laid down at Community level, comparative advertising is prohibited if it creates confusion on the market between the advertiser and a competitor or between the trademarks, trade names or other distinguishing marks, goods or services of the advertiser and those of a competitor.

It must be held that the profit gained by the advertiser through such unlawful comparative advertising is obtained as "unfair advantage" from the reputation of the trademark.

With the advent of concerns for product improvement resulted in a new understanding of the management of marketing a new trend is felt: emphasizing the objective performance of the product promoted, its superiority in terms of quality. (Popescu I., 2007)

Following accusations from consumers, the State responded by adopting laws to prevent and combat unfair competition and misleading advertising.

Moreover, on 11/15/2010 the ***Anti-Counterfeiting Trade Agreement*** was concluded between the European Union and its Member States, Australia, Canada, Japan, Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, Republic of Singapore, the Swiss Confederation and the United States of America. This agreement to combat counterfeiting (or ***ACCC***, in English *Anti-Counterfeiting Trade Agreement,* abbreviated ***ACTA***) is a proposed plurilateral trade treaty in response to increasing global trade in counterfeit goods and copyright protected works. The scope of ACTA is broad, and it includes counterfeit of physical goods and distributing via the Internet and information technology.

In the explanatory memorandum, the Commission pointed out that ACTA seeks to effectively combat the infringement of intellectual property rights (IPR), infringement that undermines legitimate trade and EU competitiveness, with negative repercussions on economic growth and jobs.

The Commission also noted that, although ACTA does not change the EU acquis, it will introduce the standard based on the TRIPS Agreement of the World Trade Organization, providing advantages for EU exporters having rights, operating on the global market and which are subject to systematic and multiple infringements of copyright, of trademarks, patents, etc.

ACTA includes several provisions on the implementation of **criminal sanctions** as part of the scope of Article 103 paragraph 2 of the Treaty on the Functioning of the European Union.

Articles 23 and 24 of the Agreement text provide that each Party shall treat wilful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale as unlawful activities subject to criminal penalties, penalties that include imprisonment, and fines sufficiently high to deter future infringements.

Article 25 stipulated that in case of offences for which a Party provides criminal procedures and penalties, that Party shall provide that its competent authorities have the authority to order the seizure of suspected counterfeit trademark goods or pirated copyright goods, any related materials and instruments used in the commission of the alleged offence, documentary evidence relevant to the alleged offence, and the assets derived from, or obtained directly or indirectly, through the alleged infringing activity.

It also mentioned that the offences for which a Party provides criminal procedures and penalties, its authorities should have the power to order the forfeiture and destruction of all counterfeit trademark goods or pirated goods. In cases where counterfeit trademark goods and pirated goods are not destroyed, the competent authorities shall ensure that, except in extraordinary circumstances, such goods are removed from the channels of commerce, so as to avoid any damage that could be brought on the right holder. Each Party shall ensure that the forfeiture or destruction of such goods shall occur without compensation of any sort to the infringer.

Article 26 provided that each Party shall provide that its competent authorities may act upon their own initiative to initiate investigation or legal action with respect to the intellectual property criminal offences.

It is well known that the existence of Section no. 5 of this Agreement, section that governed the application of intellectual property rights in the digital environment, on 07/04/2012, in Strasbourg, the European Parliament finally rejected the ACTA treaty which, according to its critics, threatened individual liberties, especially those related to the Internet, although on 11/24/2010, the European Parliament adopted a resolution in favour of ACTA. The vote in the EP means that ACTA cannot enter into force in the European Union in its current form although almost all EU countries including Romania, have signed ACTA.

It is the first time that the Parliament has exercised its powers, conferred by the Treaty of Lisbon, to reject an international trade agreement. The rejection of ACTA also relied on the ***decision of February 16, 2012 by the European Union Court of Justice in Case C-360/10***, whereby it was held that a network administrator cannot impose online user supervision to prevent unlawful use of musical and audiovisual works.

ECJ based its ruling on the Charter of Fundamental Rights of the European Union, showing that such an obligation on the provider does not comply with the requirement to ensure a fair balance between copyright protection and the freedom to conduct a business, between right to personal data protection and the freedom to receive and impart information.

ECJ decision was taken after the Belgian court addressed a question that asked whether EU law prohibits the issuance of an injunction by a national court to an Internet provider, whereby it will hold an information filtration system on the server incoming from users. The Belgian court's question arose in the national trial between the association of authors, composers and publishers of musical works SABAM and Netlog NV, which exploited an online social networking platform.

We consider that the European Parliament wrongly rejected this agreement, taking into account the arguments without substance of Internet consumers, without taking into account the more accurate interests of those who continue to be tax-free without investing, using the intellectual property of others. The danger in the lack of adequate protection of EU intellectual property was not considered, given that intellectual property is the raw material of EU economy.

3. Conclusions

Given the scale of the phenomena of counterfeiting / piracy of goods and the multiple modes of operation for this purpose of businesses and not only, with important negative consequences both on the domestic economy and the European and world market of goods and services, it is essential that the importance of intellectual property in economic development and the effective implementation of the rights stipulated in the relevant legislation are understood.

As the proliferation of counterfeit and pirated goods undermines legitimate trade and causes significant financial losses for right holders and, in some cases, provides a source of income for organized crime, it is necessary to fight these economic imbalances through enhanced international cooperation.

In this regard, appropriate means must be given, complementing the TRIPS Agreement, for the application of intellectual property rights, taking into account differences in those legal systems and practices, while avoiding that measures and procedures aimed at enforcing those rights themselves become barriers to legitimate trade.

One aspect not to be neglected is that of increasing the protection granted by trademark holders by the harmonization of trademark registration in all Member States, the reference point is the Community trade mark system and by facilitating cooperation between Member States and the EU agency for trademarks - the Office for Harmonisation in the Internal Market - in order to promote the convergence of their practices and the development of common tools.

All Member States of the European Union but also third countries must update the existing legal provisions in relation to the rapid evolution of anti-competitive behaviour and ensure greater legal certainty by amending obsolete provisions, by eliminating ambiguity, by clarifying the scope of trademark rights and limitations of these rights.

An important role in improving the means of fighting counterfeit goods in transit through the EU is played by the incorporation of the comprehensive European Court of Justice case law into the domestic law and practice and the effective implementation of harsh penalties designed to deter and prevent such illicit activities.

References

[1]. Bostan Ionel, Burciu Aurel, Grosu Veronica - *The Consumerism and Consumer Protection Policies in the European Community*, Theoretical and Applied Economics no. 4/2010, Bucharest, pp. 17-32;
[2]. Costinescu Petru, Lazăr Ruxandra - *Noutăţi în evoluţia şi optimizarea mărcilor de produse şi servicii*, Revista Română de Proprietate Industrială no. 3/2010, Bucharest, pp. 32-38;
[3]. Florescu Oana-Maria - *Acordul TRIPs, acord multilateral important al OMC*, Theoretical and Applied Economics no. 6/2006, Bucharest, pp. 61-68;
[4]. Folcuţ Ovidiu, Pociovălişteanu Diana-Mihaela, Despa Radu, Mustea Răzvan, Ivănescu Iuliu, Ivănescu Mona Maria - *Romanian textiles and clothing industry - present and perspectives*, Annals of the "Constantin Brâncuşi" University of Târgu Jiu, Economy Series, no. 3/2009, pp. 239-256;
[5]. Iancu Ştefan - *Premisele dezvoltării protecţiei proprietăţii industriale în ţara noastră*, Revista Română de Proprietate Industrială no. 4/2009, Bucharest, pp. 53-62;
[6]. Oprescu Gheorghe - *Teoria cererii, elasticităţii şi practica în domeniul protecţiei concurenţei*, Competition survey - studies and researches relating to economic competition, Journal of territorial survey Directorate Competition Council - Romania no.1-2(5-6)/ September 2008, Bucharest, pp.9-18;
[7]. Perrot Anne - *O analiză economică a practicilor de ruinare şi de vânzare cu preţ redus*, Competition survey - studies and researches relating to economic competition, Journal of territorial survey Directorate Competition Council - Romania no.1-2(5-6)/September 2008, Bucharest, pp. 77-84;
[8]. Popescu Ioana - *Marketing Communications: A Marketing Evolution Historical Perspective*, Journal of Online Marketing no. 2/April 2007, Bucharest, pp. 17-28;
[9]. Săvescu Dan, Budală Adrian - *Proprietatea intelectuală în România şi unele ţări din UE*, Lux Libris publishing house, Braşov, 2008;
[10]. European Institute of Romania - *Politica privind protecţia consumatorilor*, available at http://www.ier.ro/documente/formare/Protectia_consumatorilor.pdf, 2005;
[11]. *Competition Law no. 21/10.04.1996* (Official Gazette no. 88/30.04.1996);
[12]. *Law no. 148/26.07.2000 on advertising* (Official Gazette no. 359/02.08.2000);
[13]. *EC Council Regulation no. 1/2003 of December 16, 2002* (Official Journal of the European Union L 1/04.01.2003);
[14]. *Government Decision no. 1424/04.12.2003 approving the national strategy on intellectual property (2003-2007)* (Official Gazette no. 905/18.12.2003);
[15]. *Commission Regulation (EC) no. 1891/2004 of October 21, 2004 laying down provisions for the implementation of Council Regulation (EC) no. 1383/2003* (Official Journal L 328 of 30.10.2004);
[16]. *Law no. 344/29.11.2005 on measures to enforce intellectual property rights in customs operations* (Official Gazette no. 1093/05.12.2005);
[17]. *Directive 2008/95/EC of the European Parliament and the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks* (Official Journal of the European Union L 299/25 of 08.11.2008);
[18]. *Treaty on the Functioning of the European Union* (Official Journal of the European Union C 83/47 of 30.03.2010);
[19]. *The Council Resolution on the EU Customs Action Plan to combat IPR infringements for the years 2013 to 2017* (Official Journal of the European Union, series C 80/1 of 19.03.2013);
[20]. http://circa.europa.eu;
[21]. http://curia.europa.eu;
[22]. http://ec.europa.eu;
[23]. http://eur-lex.europa.eu;
[24]. http://europa.eu;
[25]. www.dce.gov.ro;
[26]. www.juspedia.ro;
[27]. www.osim.ro.