The Confusion – A Perfect Interference Between Competition and Industrial Property

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Abstract

Industrial property and competition are indissoluble in terms of the legal manner in which the unfair competition act of confusion is committed. The regulation of confusion within the competition legislation of the Republic of Moldova (Law no. 183/2012 on Competition) is in an explicit connection relationship with industrial property, given the fact that the trademarks, industrial designs and other industrial property objects are protected through the provisions of the Law no. 183/2012 on Competition as well. Thus, there is a double protection of industrial property objects: through the rules of industrial property and, at the same time, through those of unfair competition. In the same context, it is important to specify that under competition law are protected even industrial property objects that are not protected under industrial property division law. At the same time, in order to benefit from effective legal protection in accordance with the rules of unfair competition, there is a stringent need for a complex and effective bilateral evidentiary process. In order to validate the theoretical aspects stated above, the practice of the national competition authority of the Republic of Moldova (Competition Council) is essential.

Keywords: object, unfair competition, industrial property, confusion, protection.

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1. Introduction

The main reason for the present research lies in the need to outline some theoretical and practical aspects regarding the qualifying elements of the action of unfair competition of confusion, as well as the way of investigating the cases of confusion from a probationary perspective.

The importance of such research is explained by the frequency with which this kind of unfair competition action is used in the process of economic activity of enterprises, or the numerical quantity of confusion cases is higher than that of other types of unfair competition actions.

The practical relevance of the researched subject consists of creating a consolidated vision regarding the doctrinal, legal and institutional approaches tangent to the researched field.

In the context of this research, it is proposed to reach the following proposed objectives:

- To determine origin and historical course of the unfair competition of confusion;
- To understand the need for the existence of this unfair competition action within the current competition law of the Republic of Moldova;
- To expose the difference in approach between the legal protection mechanism under industrial property rules and under unfair competition rules;
- To estimate the statistical weight of the cases of confusion examined by the national competition authority of the Republic of Moldova;
- To identify the most important qualification elements of unfair competition action of confusion;
- To elucidate the probative alternatives for the unfair competition action of confusion;

In order to reach the above-mentioned objects, we propose the consecutive approach of the following aspects:

- The evocation of the historical origin and of the historical course of the unfair competition action of confusion until the stage of the legislative consecration of the respective concept in the Law on competition no. 183 of 11.07.2012;

- Drawing the problem of qualification of the confusion at the current stage;
- Revealing the relevant probationary aspects of the unfair competition action of confusion through the examples from the practice of the Competition Council of the Republic of Moldova.

2. Literature review

Within the territorial limits of the Romanian space, the relevant literature in the matter is not a rich one in the quantitative aspect, or a limited number of authors have written by the moment on the subject in question.

The paper of Căpățână, O. (1996) is a general source related to theoretical approaches to the system of unfair competition actions. That source is to be used in order to crystallize the meaning and content of the unfair competition action of confusion.

Also, the research of Gorincioi, C. (2019) represents an integrated synthesis of the specifics of the system of unfair competition actions, as well as of the available legal mechanisms to counteract these actions. The most important theoretical landmark identified in this paper lies in the extensive approach of the qualifying elements of the unfair competition action of confusion. On the other hand, the paper of Castraveț, D. (2019), represents a bibliographical reference for consultation in the sense of diversifying the views expressed by various researchers in the field of approach.

3. Methodology

The methodological arsenal used in the context of the elaboration of this paper consists in particular of:

- *The historical method.* The use of that method contributes, in particular, to the identification of the historical origin from the normative point of view of the concept of confusion in the system of unfair competition actions, as well as the evolutionary course of the given concept, until its introduction in competition and related legislation at national level;
- *Logical-formal method.* The benefit of using this method lies in the possibility of a proper analysis of theoretical ideas, as well as previous

practical findings through deduction and induction operations in order to identify the compliance of those findings with the related regulatory trends;

- *Legal-comparative method.* In view of the application of this research method, the necessary conditions are created in order to contrast the theoretical-practical and legislative aspects, as a result of which relevant conclusions can be drawn in order to improve the existing conceptual framework and unify current practice.

All the methods listed and analyzed above will be used alternatively and as a whole.

4. Interference Between Competition and Industrial Property

The concept of confusion was first regulated in the context of the provisions of the Paris Convention for the Protection of Industrial Property of 1883 by means of amendments to the text of the Convention on 06.11.1925 in The Hague, with subsequent amendments made on 02.06.1934 in London.

Subsequently, through the Model Provisions on Protection Against Unfair Competition (1996), WIPO (World Intellectual Property Organization) developed a set of framework provisions on the system of unfair competition actions, which included confusion.

At national level, through the provisions of art. 8 para. (1) letter d) of Law no. 1103 of 30.06.2000 on the protection of competition (currently repealed), there have been only the ways of creating confusion, without expressly indicating the name of the respective action of unfair competition. At the current stage, the unfair competition action of confusion is enshrined in the text of art. 19 of the Law on competition no. 183 of 11.07.2012.

4.1. The current stage

According to the Explanatory Dictionary of the Romanian language, the confusion (from the Latin “confusio”) derives from the verb “to confuse”, which is explained as “the action of taking one person as another or one thing as another, to resemble, to form one whole, to merge”.

In the context of defining confusion as an action of unfair competition, the doctrine provides a relevant answer. Thus, "Confusionis the act of unfair competition, which consists from the credible concealment of the author's own market activity under the guise of the distinctive signs of the injured competitor or a group of competitors". (Căpățână, 1996).

At legislative level, art. 19 para. (1) of the Law on competition no. 183 of 11.07.2012 provides: “Any actions or facts that are likely to create, by any means, a confusion with the enterprise, products or economic activity of a competitor, carried out by:

a) illegal, in whole or in part use of a trademark, service emblem, company names, an industrial design or other objects of industrial property likely to create confusion with those legally used by another enterprise;

b) unlawful copying of the shape, packaging and / or external appearance of an undertaking's product and placing that product on the market, unlawful copying of an undertaking's advertising, if it has harmed or is likely to harm the legitimate interests of the competitor. "

4.2. Reason for being

The need for express and distinct regulation of confusion as an unfair competition act is explained by the possibility for protected and / or unprotected industrial property rights holders to receive protection through unfair competition rules as well, for situations where an industrial property right is infringed by the non-holder competitor of the respective infringed right.

4.3. Different approaches

The double protection that holders of protected and / or unprotected industrial property rights may enjoy is, however, conditional (with reference to protection through unfair competition rules).

Thus, if, according to the rules of industrial property, the protected industrial property object is susceptible to protection even if the field of activity (market on which it operates) of the usurper of the rights of the

rightful owner is different from the latter, then in case of unfair competition, the essential condition is the existence of the legal relationship of competition between the holder of industrial property rights and the usurper of these rights. In other words, they must operate on the same market, or the Law on competition, through the provisions of art. 4, defines unfair competition as “any action taken by undertakings in the competition process that is contrary to honest practices in economic activity”, and competition is defined in the same context as existing or potential economic rivalry between two or more independent undertakings on a relevant market, when their actions effectively limit the possibilities of each of them to unilaterally influence the general conditions of movement of the products on that market, stimulate technical-scientific progress and increase consumer welfare”.

By contrast, as an example, the corresponding norms of Law no. 38 of 29.02.2008 on the protection of trademarks (in this case, the provisions of art. 9 paragraph (1) letter c) of the specified legislative act), indicates the following: “The trademark owner is entitled to prohibit third parties from using in their activity without its consent:…a sign identical or similar to the trademark for products and / or services other than those for which the trademark is registered when the latter has acquired a reputation in the Republic of Moldova, and the third party, following the use of the sign, without justified reasons, takes advantage of the distinctive character or the reputation of the trademark or harms them.".

We note that even in this case, the protection of the registered trademark for products and / or services other than those for which the usurping mark was registered is conditioned by the circumstance of acquiring a national reputation of the first.

4.4. Statistical aspects

In the practice of the national competition authority, the numeric weight of confusion cases, in the period May 2017 - May 2020, is more significant than the numeric weight of other types of infringements of unfair competition rules (discrediting the competitor, misleading the competitor’s clients, instigation to terminate the contract with the competitor, obtaining and / or illegally using the competitor's trade secret).Thus, during the nominated

period, within the Competition Council, there were / are under preliminary examination / investigation over 20 complaints which have as object the alleged violation manifested by the unfair competition action of confusion.

4.5. Qualifying issues

From the practice of the Competition Council, the following ways of qualifying the confusion action can be deduced according to the criterion of the existence of a registered industrial property right. Thus, the action for unfair competition is qualified, in accordance with the order of arrangement of alternative ways of confusion realizing:
- the existence of a protected intellectual property right;
- unprotected intellectual property right;
- mixed (combined) version.

4.5.1. The existence of a protected industrial property right

The trademark. With reference to the trademark, the provisions of art. 3 of Law no. 38 of 29.02.2008 on trademark protection are relevant. Thus, according to the provisions given in the specified normative act, the rights over the trademark are acquired and protected on the territory of the Republic of Moldova by:
a) registration under the respective law;
b) international registration under the Madrid Agreement Concerning the International Registration of Marks of April 14, 1891 or according to the Protocol to the Madrid Agreement Concerning the International Registration of Marks of June 27, 1989;
c) recognition of the trademark as notorious.

Therefore, the proprietor's right to the trademark is protected, alternatively, by:
- national or international registration;
- recognition of the trademark as notorious.

The procedure for recognizing the trademark as notorious is regulated through the provisions of Section 11 of the nominated normative act. The basis of recognition is the provisions of art. 32^1. Thus, according to par. (1)

of the specified article, “The trademark may be recognized as notorious following a request for notoriety, filed in the court in whose jurisdiction is the seat of AGEPI, or a counterclaim in an action for protection of rights, filed in the same court”.

Industrial design. Concerning the industrial designs, the provisions of art. 4 of Law no. 161 of 12.07.2007 on the protection of industrial designs are relevant. Thus, according to the provisions of par. (2) of the art. specified above, on the territory of the Republic of Moldova are recognized and protected, under the conditions of the respective law:

a) the industrial designs registered and confirmed by the registration certificate of the industrial design;

b) international industrial designs registered under the Hague Agreement Concerning the International Registration of Industrial Designs, adopted on November 6, 1925;

c) unregistered industrial designs if they have been made public in accordance with the respective law.

Therefore, industrial designs are protected, alternatively:

- in case they are registered at national or international level;
- they have been made public in the established manner.

In the sense of the second way of benefiting from legal protection, the provisions of art. 10 of the same normative act are relevant, provisions according to which “… an industrial design is considered to have been made public if it has been exhibited or published, used, marketed or otherwise disclosed, unless such actions do not could become reasonably known in the normal course of business of natural or legal persons of the Republic of Moldova, specialized in the respective field:

a) in the case of the registered industrial design, before the filing date or, if priority is invoked, before the priority date;

b) in the case of an unregistered industrial design, before the date on which it was first disclosed."

At the same time, in accordance with the provisions of par. (2) of the same article, "A design shall not be considered made public if it has been disclosed to a third party under explicit or implicit conditions of confidentiality."

In the same context, in accordance with the provisions of art. 4 para. (4) of Law no. 161/2007, the recognition of the rights provided by the respective law does not prejudice and does not exclude the protection granted to the same person or, with his consent, to another person by other legal provisions regarding intellectual property, especially those regarding trademarks, geographical indications, patents, utility models, typographic characters, topographies of integrated circuits and unfair competition.

This means that the holder of rights over an industrial design enjoys the legal protection offered by the legislation related to the concept of unfair competition, regardless of the existence of protection in accordance with the provisions of the nominated normative act. It is in this way that the holder of rights over an unprotected industrial design can be protected in accordance with the provisions of art. 19 para. (1) letter b) of the Law on competition no. 183 of 11.07.2012.

Service emblem. Regarding the service emblem, we specify that the relevant local legislation does not contain any regulations. Therefore, the service emblem can be qualified as an object of industrial property only in the context of the provisions of the Law on competition no. 183 of 11.07.2012. By way of comparison, in the Romanian legislation, art. 15 letter a) of the Law on the trade register no. 26 of 1990 provides that: "The matriculation of an autonomous direction, national company or national society in the trade register will include: establishment, name, registered office and, where appropriate, its emblem… ".

Thus, the emblem is an optional identification attribute in addition to the company name, which is registered in the trade register to the detriment of its registration in a certain industrial property register. (Gorincioi, 2019, p.120)

In the light of local legislation and doctrine, the legal regime for the protection of trademarks is considered to apply to the service emblem. In other words, the right holder will enjoy protection if that emblem is protected as a trademark. At the same time, we also share the opinion that the service emblem could possibly be protected to the extent that it is protected as an industrial design. Moreover, the protection criteria offered by the legislation on the protection of industrial designs extend the number of cases in which

such an object of industrial property can be protected, which, taking into account the specific use of emblem, can significantly facilitate the task of the holder of rights.

Company name. Regarding the company name, according to the provisions of art. 182 para. (1) of the Civil Code of the Republic of Moldova, "The legal person participates in legal relations only under its own name, established by the articles of incorporation and registered in the appropriate manner." Thus, the law, along with the relevant doctrine, considers the name of the company as one of the identifying attributes of the legal person.

In this context, similar to the situation of service emblem, the company name can be registered as a trademark under the provisions of art. 24 point 5 of Law no. 845 of 1992 on entrepreneurship and enterprises, provisions according to which “The company name may also be used as a trademark, provided that it is registered according to Law no. 38-XVI of February 29, 2008 on trademark protection. "

With regard to other objects of industrial property, it is considered that such objects may constitute geographical indications, designations of origin, guaranteed traditional specialties, plant varieties, topographies of integrated circuits. (Gorincioi, 2019, p.122)

Geographical indications, designations of origin and guaranteed traditional specialties. The regime of the mentioned industrial property objects is determined through the provisions of Law no. 66 of 27.03.2008 on the protection of geographical indications, designations of origin and guaranteed traditional specialties. Thus, according to the provisions of art. 4 of the nominated act, the legal protection of geographical indications, designations of origin and guaranteed traditional specialties on the territory of the Republic of Moldova is ensured based on their registration at AGEPI, in the manner established by law or based on international treaties, including bilateral agreements, to which the Republic of Moldova is a party. Therefore, the industrial property objects specified above are protected following a proper registration at AGEPI.

Plant variety. In accordance with the provisions of art. 4 para. (1) of Law no. 39 of 29.02.2008 on the protection of plant varieties, the rights over a variety are obtained and protected on the territory of the Republic of

Moldova by granting a patent for plant variety by the State Agency for Intellectual Property in accordance with the law and normative acts subject to law, as well as with the international treaties to which the Republic of Moldova is a party. Therefore, the criterion for the protection of plant varieties is related to their registration at AGEPI.

Topographies of the integrated circuits. In this context, the provisions of art. 1, para. (3) of Law no. 655 of 29.10.1999 on the protection of topographies of integrated circuits are relevant, provisions according to which the right on topography is recognized and protected on the territory of the Republic of Moldova by registration, under the law, at State Agency for Intellectual Property and issuance of registration certificate.

Therefore, it is found that, regardless of the type of object of industrial property, the holder of rights over that object enjoys legal protection, as a general rule, in case of state registration at AGEPI of the given object of industrial property. Namely in the situation of the existence of a legal protection offered by the necessary normative provisions, an enterprise is liable to administrative liability in case of full or partial illegal use of a certain industrial property object expressly or implicitly stated at the disposal of the norm from art. 19 para. (1) letter a) of the Law on competition no. 183 of 11.07.2012.

It should also be noted that the illegal, full or partial use of a protected industrial property object can also be realized in the case of the use of industrial property objects other than those legally used by another enterprise. In other words, it is possible, for example, to use a company name illegally, in full or in part in the context in which the competing undertaking uses a similar or identical trademark.

An eloquent example in this regard can be considered the case "Totul pentru copii" S.R.L. against “Daybegin” S.R.L. Thus, through the Decision of the Plenum of the Competition Council no. CN-46 of 02.07.2015, the enterprise “Daybegin” S.R.L. was fined in a total amount of 8142.68 lei for violating the provisions of art. 19 para. (1) letter a) of the Law on competition no. 183 of 11.07.2012. According to those alleged in the complaint, the alleged unfair competition actions realized by Daybegin S.R.L. are manifested by the latter's partial use of the trademark "BABY-BOOM"

(which belongs to the complainant) as a means of redirection on the website www.bimbo.md, through which the products of the complainant are promoted and marketed.

As a consequence of the preliminary examination of the complaint in accordance with the relevant provisions of the Law on competition no. 183 of 11.07.2012, the Plenum of the Competition Council ordered the initiation of the investigation through Disposition no. 10 of 20.03.2015 regarding the alleged violation of the provisions of art. 19 para. (1) letter a) of the Law on competition.

In the course of the preliminary examination and investigation, the following was found:

- The trademark 'BABY-BOOM', which belongs to the complainant, is registered at AGEPI;
- The complained company uses the respective trademark as a domain name with the title www.babyboom.md, without having adequate protection through the industrial property norms;
- The complained party undertook actions likely to create confusion with the complainant undertaking, in particular the trademark owned by the latter;
- These actions are manifested by the use of the domain name www.babyboom.md to the detriment of the complainant, who has protection in so far as he registered the 'BABY-BOOM' trademark at AGEPI;
- These actions are likely to harm the legitimate interests of the complainant.

In the operative part of the Decision of the Plenum of the Competition Council no. CN-46 of 02.07.2015, the qualifying approach considered at the time of the adoption of the Disposition for initiating the investigation no. 10 of 20.03.2015 regarding the alleged violation of the provisions of art. 19 para. (1) letter a) of the Law on competition no. 183 of 11.07.2012 was maintained.

Therefore, the unfair competition action was found to be confusing in the context of the existence of a protected industrial property right in accordance with the rules of industrial property law and the appropriate legal qualification was realized.

Another significant feature of the given way of manifesting the confusion lies in the realization of the implicit negative condition of non-

benefit of legal protection of the holder of the object of industrial property. In other words, the illegal user, in whole or in part, of the object of industrial property must not benefit from legal protection within the meaning of the provisions of the law's tangent to the field of industrial property.

However, there is a possibility of generating the situation in which the registration of the object of industrial property is made in bad faith and the use of this object in full or in part, provided that the latter reproduces in whole or in part the object of industrial property legally used by to the usurper's competitor. In such a case, it is debatable the qualification of such facts according to the provisions of art. 19 para. (1) letter a) or the registered the object of industrial property by the usurper establishes a presumption of legality. However, we consider that depending on all the relevant circumstances of the case (including the existence or lack of good faith in the process of registration of the object of industrial property), the existence or absence of the constitutive signs of the stated infringement is to be determined.

4.5.2. Unprotected intellectual property right

As indicated above, the object of protection for the confusion is a legitimate interest which is not protected by industrial property law. Namely the phrase "legitimate interest" generates the conclusion according to which the object of protection is an unprotected industrial property right according to the special law tangential to the field of industrial property, or the legitimate interest in such contexts lies in the fact that the potential holder of protection of rights over industrial property objects is interested in obtaining effective legal protection in the sense that the special domain law grants such a prerogative. In principle, by giving the correct meaning to all the terms of the provision of that rule, it can be concluded that the object of protection may be an unprotected trademark or design by means of the Law on Trademark Protection and the Law on the Protection of Industrial Designs, given the fact that the shape, packaging and / or appearance of the product of an undertaking may alternatively or at the same time constitute unprotected trademarks or designs.

In the same context, we consider that an unprotected guaranteed traditional specialty may be subject to protection within the meaning of the provisions of art. 19 para. (1) letter b) of the Law on competition no. 183 of 11.07.2012. It is true that according to the provisions of art. 6 para. (2) of Law no. 66 of 27.03.2008 on the protection of geographical indications, designations of origin and guaranteed traditional specialties, "The characteristic or set of characteristics that determine the specificity of the product must be related to its intrinsic properties, such as its physical, chemical, microbiological or organoleptic properties, the production method or the specific conditions prevailing during production. The external appearance of an agricultural or food product is not considered to be a characteristic of its specificity.".

We emphasize that in the context of the external aspect of the unprotected guaranteed traditional specialty, the latter cannot be the object of protection within the meaning of the provisions of art. 19 para. (1) letter b) of the Law on competition, but may, per a contrario, constitute an object of protection in terms of its form, because the law does not contain a prohibition in this regard. At the same time, the illegal copying of a company name or service emblem is not excluded as they can be registered as a trademark or industrial design.

Regarding the illegal copying of advertising, the provisions of art. 1 of Law no. 1227 of 27.06.1997 on advertising are relevant. These provisions define advertising as public information about persons, goods (works, services), ideas or initiatives (advertising information, advertising material) meant to arouse and support the public interest compared to them, to contribute to their commercialization and to raise the prestige of the producer. The definition of the above-mentioned term shows its defining elements:
- advertising is a public information;
- this public information is about people, goods (works or services), ideas or initiatives;
- this public information is intended, cumulatively, to arouse and support the public interest in the object of advertising, to contribute to their marketing and to increase the prestige of the manufacturer.

Therefore, there is a need to meet 3 positive conditions in order to qualify certain information as advertising.

In the context of the same way of realizing the respective unfair competition act, we mention that the provision of the respective norm establishes the condition of illegality of copying the object of unprotected industrial property and of the advertising. But we consider that in addition to the condition of illegality, the copying can be both complete or partial. Therefore, it is sufficient a partial copy of an unprotected industrial property or of an advertisement in the sense of qualifying the respective unfair competition act according to the provisions of art. 19 para. (1) letter b) of the Law on competition no. 183 of 11.07.2012.

In this sense, the circumstances of the case “Bucuria” S.A. against “Nefis” S.R.L. are relevant. By the Decision of the Plenum of the Competition Council no. CN-48 / 18-74 of 31.10.2019, the enterprise “Nefis” S.R.L. was fined in total amount of 152,100, 24 lei for violating the provisions of art. 19 para. (1) letter b) of the Law on competition no. 183 of 11.07.2012.

According to those alleged in the complaint, the alleged unfair competition actions realized by the company "Nefis" S.R.L. are manifested by copying the packaging and placing on the market the products of boxed candies "Meteorit 320 g", "Meteorit 400 g", "Chișinăul de seară" and "Pasărea Măiastră" for the products "5 minute", "Fortuna", " Prună Delicioasă ”and “Lapte de vis”.

As a consequence of the preliminary examination of the complaint in accordance with the relevant provisions of the Law on competition no. 183 of 11.07.2012, the Plenum of the Competition Council ordered the initiation of the investigation through Disposition no. 48 of 20.12.2018 regarding the alleged violation of the provisions of art. 19 para. (1) letter b) of the Law on competition.

In the course of the preliminary examination and investigation, the following were found:

- There is no evidence of a record of the packaging of the products marketed by the complainant and complained undertaking claimed as a design;

- The complained undertaking took steps to create confusion with the complainant, in particular the products of the latter;

- These actions are manifested by the fact of copying the packaging and placing on the market the boxed candies"Meteorit 320 g", "Meteorit 400 g", "Chișinăul de seară" and "Pasărea Măiastră" for the products "5 minute", "Fortuna", " Prună Delicioasă" and "Lapte de vis".

- These actions are likely to harm the legitimate interests of the complainant.

In the operative part of the Decision of the Plenum of the Competition Council no. CN-48 / 18-74 of 31.10.2019, the qualifying approach considered at the time of the adoption of the Disposition to initiate the investigation no. 48 of 20.12.2018 regarding the alleged violation of the provisions of art. 19 para. (1) letter b) of the Law on competition no. 183 of 11.07.2012 was maintained

Therefore, the unfair competition action was found to be confusing in the absence of a protected industrial property right in accordance with the rules of industrial property law and the appropriate legal qualification was realized.

4.5.3. Mixed version (combined)

In the practice of the national competition authority (Competition Council, Republic of Moldova), there are cases that were finalized with decisions to sanction the authors of unfair competition actions of confusion, decision acts through which the anti-competitive conduct of active subjects was qualified in accordance with the provisions of both alternative ways of realizing the confusion (generic or general qualification). Such qualifications are likely to be operated in contexts such as:

- the existence of an uncertain situation generated by the impossibility of determining the degree of similarity between protected and unprotected industrial property rights;

- the existence of a pending application for registration at AGEPI regarding the unprotected industrial property object;

- the actions of the same undertaking show signs of both alternative ways of realizing the act of unfair competition;

- the need to match the final qualification solution with the possible qualification solution considered at the stage of initiating the investigation.

In this sense, the case of “Sevex-Prim” S.R.L. against “Buelo” S.R.L. is relevant.

By the Decision of the Plenum of the Competition Council no. CN-56 of 02.11.2017, the enterprise “Buelo” S.R.L. was fined in a total amount of 77,197, 29 lei for violating the provisions of art. 19 para. (1) letter a) and) b of the Law on competition no. 183 of 11.07.2012 in relation to the company “Sevex-Prim” S.R.L.

Thus, according to those invoked in the complaint, the alleged unfair competition actions realized by the enterprise “Buelo” SRL are manifested by the fact of the partial illegal use of the trademark with no. 17829, copying the packaging and placing on the market the products of corn sticks 'CRISTINUȚA', 'CRISTINEL' for the products 'SĂNDUȚA', 'SĂNDEL', which could create confusion with the complainant’s products.

As a consequence of the preliminary examination of the complaint in accordance with the relevant rules of the Law on competition no. 183 of 11.07.2012, the Plenum of the Competition Council ordered the initiation of the investigation by Disposition no. 20 of 16.11.2016 regarding the alleged violation of the provisions of art. 19 para. (1) letter a) and b) of the Law on competition. In the context of the preliminary examination of the complaint and the investigation, the following were found:

- The trademarks belonging to the complainant 'CRISTINUȚA' and 'CRISTINEL' are registered at AGEPI;

- The packaging of the products 'CRISTINUȚA' and 'CRISTINEL' are registered at AGEPI as industrial designs;

- The complained undertaking registered only the trademark 'SĂNDUȚA'; - The complained enterprise undertook actions likely to create confusion with the complainant, in particular with the economic activity and the products of the latter;

- These actions are manifested by the partial illegal copying of the packaging of the corn sticks product 'CRISTINUȚA', 'CRISTINEL' for the products 'SĂNDUȚA', 'SĂNDEL' and their placing on the market;

- These actions are likely to harm the legitimate interests of the complainant.

In the operative part (resolutive) of the Decision of the Plenum of the Competition Council no. CN-56 of 02.11.2017, the qualifying approach considered at the time of the adoption of the Disposition to initiate the investigation no. 20 of 16.11.2016 regarding the alleged violation of the provisions of art. 19 para. (1) letter a) and letter b) of the Law on competition no. 183 of 11.07.2012 was maintained.

4.6. General aspects of the probationary procedure

In the course of the activity, within the competition authority, depending on certain varieties of the elements of the unfair competition system, certain implicit standards of probation have been created, standards that are inherent to one or another type of violation of the concept of fair competition. Those standards are determined on the basis of certain criteria:
- the stages of the administrative proceedings;
- the type (species) of the alleged unfair competition action;
- the object of the alleged unfair competition action or its effect.

4.6.1. The specifics of the probation according to the stages of the administrative procedures

The administrative procedures involve a special specificity in terms of establishing special procedural provisions through the respective norms of the Law on competition no. 183 of 11.07.2012.

Thus, depending on the concrete stages of the concrete proceedings, certain evidence could be presented on the initiative of the complainant and / or the complained undertaking or at the request of the Competition Council which would confirm / deny the existence of signs of alleged unfair competition.

4.6.2. Specificity of the probation according to the species (type) of the alleged unfair competition action

In the context of the current way of regulating unfair competition actions to the text of art. 15-19 of the Law on competition (rigid system,

which does not allow the finding of other types of unfair competition actions than those expressly regulated) (Gorincioi, 2019, p.50), each category of unfair competition action has a certain probative specificity, which is assessed in each case separately depending on a multitude of factors, such as the subject matter of the legitimate interest alleged to be affected, the subject matter of the alleged unfair competition action, its effect or other circumstances relevant to the case.

The specifics of the probation depending on the object of the alleged violation or its effect. We find that this criterion is one derived from the one analyzed above and is a reference point of the variation of probation that is based on the characteristic of the object of attack and, as the case may be, the characteristic of effects (assuming such effects).

4.6.3. General Evidence of Confusion

In case of confusion, the practice of the Competition Council derives a triple standard of probation (three levels):

- primary level: assessment of the investigative body of the risk of creating confusion among consumers by placing the product on the market or by another form of illegal use of the object of industrial property protected or unprotected by means of industrial property rules;
- secondary level: presentation to the investigative body of information attesting the actual creation of confusion among consumers;
- tertiary level: the existence of injurious consequences as a result of the effect of the unfair competition action.

4.6.3.1. Primary level of probation

We consider that such a level is mainly specific to the administrative procedure of preliminary examination, or this is typical to the incipient time interval of accumulation of evidence by the Competition Council.

Taking into accound the relevant legal provisions from the Law on competition no. 183 of 11.07.2012, we conclude that the law does not limit the range of evidence that may contribute to a more effective examination of the alleged unfair competition actions claimed through the complaint.

For the purposes of the above, by reference to the specifics of the unfair competition action, the Competition Council may, for example, access the AGEPI database, request the presentation of information which concerns the existence of certain complaints from the complainant's customers which would suggest confusion or other relevant information.

As an example, we mention the findings from the Decisions of the Plenum of the Competition Council that were analyzed above:

- Decision of the Plenum of the Competition Council no. CN-56 of 02.11.2017: "The database of the State Intellectual Property Agency was also accessed, as a result of which it was found that the logos of both companies are registered as trademarks, which indicates on the legality of using them."; in the same context: „According to the data of the State Agency for Intellectual Property, the packaging of the products "CRISTINUȚA" and "CRISTINEL" are registered in the Register of designs with no. 1370 of January 6, 2012.".
- Decision of the Plenum of the Competition Council no. CN-48 / 18-74 of 31.10.2019: "The database of the State Agency for Intellectual Property was also accessed, as a result of which it was found that the logos of both companies are registered as trademarks, which denotes the legality of their use. "; in the same context: "According to the same letter, the company "Bucuria"S.A. mentioned that there are 2 complaints from consumers and many phone calls from them regarding possible collaboration with the company "Nefis" S.R.L.".

4.6.3.2. Secondary level of probation

As progress is made within the stages of administrative procedures, by reference to the provisions of art. 19 applicable to both ways of creating confusion, provisions according to which "Any actions or facts that are likely to create, by any means, confusion with the enterprise, products or economic activity of a competitor ..." (emphasis added)), we find that the unfair competition action of confusion has a legal character of formal-material infringement (the infringement is harmful by its object and does not require the actual occurrence of the injurious consequence; the existence of the risk of confusion is sufficient).

In this regard, we are of the opinion that the secondary level of probation would come to finalize the formal-material character of the respective unfair competition action and to attribute to it a material character. Therefore, for example, the complainant (on its own initiative or at the request of the Competition Council) may submit a possible consumer opinion poll, which would confirm the actual realization of the confusion. In the same context, the defendant has the possibility to present a counter-survey which would refute the hypothesis of actually creating confusion among consumers. In terms of the stages of the administrative procedure, such a means of proof could be used both in the preliminary examination stage of the complaint and in the investigation where the investigation was initiated on the basis of the information available at the time of the adoption of the relevant provision.

From a practical perspective, the following findings made by means of the same decision-making acts addressed above can be mentioned:

- Decision of the Plenum of the Competition Council no. CN-56 of 02.11.2017: “Sevex-Prim” SRL by letter no ... presented: “National survey - stick trademark testing”, conducted by “IMAS INVEST” S.R.L .; "Consumer Perception Study", carried out at the request of the Chamber of Commerce and Industry of the Republic of Moldova and the State Agency for Intellectual Property by the National Marketing Association, between April 27 and May 15, 2017 ".
- Decision of the Plenum of the Competition Council no. CN-48 / 18-74 of 31.10.2019: “At the same time, at the complaint of the enterprise „Bucuria” S.A. the result of the opinion poll conducted by the Independent Sociology and Information Service "Opinia" was also attached, poll which indicates the existence of a certain degree of confusion among consumers regarding the commercial affiliation of the specified packaging "; in the same context: “Thus, through the new study, the company “Nefis” S.R.L. refutes the results of the survey carried out at the request of “Bucuria” S.A., claiming the non-existence of the confusion of the packaging under which the confectionery products are sold, a fact found in the Technical-Scientific Research Report no. 1-03 / 19 regarding the similarity / difference of the packaging of boxed candies products of the producers „Nefis” S.R.L. and “Bucuria” S.A. ”.

4.6.3.3. Tertiary level of probation

We suggest that from the point of view of substantive law, the most advanced degree of probation in terms of confusion could be the provision of information that would confirm the existence of the effect or result of the confusion among consumers. One way of achieving the most advanced degree of probation could be, for example, the presentation of information on the evolution of the company's sales whose legitimate interests were potentially harmed by the alleged unfair competition of claimed undertaking. We suggest that a negative evolution of sales may accentuate the existence of a causal link between the alleged unfair competition actions and its consequences. The same finding could be made in the event of a positive development of the complained undertaking’s sales. At the same time, we note that such a means of proof could ideally be the subject of correspondence between the complainant and the Competition Council following the adoption of the provision of initiation of the investigation of the alleged unfair competition actions of the claimed undertaking.

In this regard, the findings extracted from the Decision of the Plenum of the Competition Council no. CN-48 / 18-74 of 31.10.2019 are relevant: Therefore, there is a positive evolution of sales of its products by the company "Nefis" S.R.L., which is in contrast with the negative evolution of sales of the company "Bucuria" S.A. in the same time frame. Such a circumstance denotes a possible causal relationship between the fact of placing on the market of its products by the complained party and the effect of the diminished sales of the complainant or, it is attested that the sales of the company “Bucuria” S.A. have registered a decrease in the context in which the process of selling boxed candies by its competitor increased

4.7. Specific trends

From the above-mentioned facts, the following essential trends are outlined in the cases of examination of the alleged violations of the provisions of art. 19 of the Law on competition no. 183 of 11.07.2012:

- In terms of quantity, the numerical weight of the complaints through which is claimed the violation of the provisions of art. 19 of the Law on competition

is superior to the situations in which the unfair competition actions regulated by means of the provisions of art. 15-18 of the same legislative act are claimed;
- In terms of qualification, most of the times at the stage of adoption of the final Decision by the Plenum of the Competition Council, the qualifying hypothesis considered at the adoption of the Provision to initiate the corresponding investigation is maintained;
- In terms of probation, following the initiation of the investigation, as a rule, the tertiary level of probation is used.

5. Conclusion

In conclusion, we specify that unfair competition act of confusion has, overall, an increased degree of complexity in relation to other acts of unfair competition both in terms of quantity (weight of qualifying elements) and in terms of quality (probationary procedure), or the respective unfair competition action implies a polyvalent nature, given the interference between the concept of unfair competition and that of industrial property. Thus, there is a need for a complex and multi-aspectual research of each case viewed separately.

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