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EUROPEAN MODEL OF LEGAL REGULATION OF COMPETITION: IMPACT OF ORDOLIBERALISM

ЄВРОПЕЙСЬКА МОДЕЛЬ ПРАВОВОГО РЕГУЛЮВАННЯ КОНКУРЕНЦІЇ: ВПЛИВ ОРДОЛІБЕРАЛІЗМУ

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Abstract. *Article is devoted to the analysis of theoretically and practical aspects of human rights protection mechanisms in cases of violations of competition into the EU. It was determined that the right to fair competition has economic as well as social aspect. The basics of competition protection on the EU level (covered in Articles 101 and 102 TFEU) were rooted from the doctrine of ordoliberalism. The social aspect of the right to fair competition shows consumers the right to receive fair benefits to the domestic market by staying in the equal access to the goods and / or services. The Charter of Fundamental Rights, which, according to the Treaty of Lisbon, is one of the fundamental documents of the EU, confirms this social dimension of the right to fair competition. Article 38 of the Charter states that "the Union's policies ensured a high level of consumer protection." This means that one of the objectives of EU competition policy is to protect consumer rights. It should be noted that in almost all cases concerning violations committed by the subjects of competition law, the EU Court of Justice deviated from the issue of the protection of human rights.*

CJEU jurisprudence in the field of human right violations in competition sphere & the ECHR practice in cases concerning violations of competition (specifically Menarini case) was researched. This case demonstrates the immediate relevance of fundamental rights to EU competition law enforcement.

Keywords: *ordoliberalism, competition law, EU, human rights, European Court of Human Rights, Menarini case.*

Анотація. *Стаття присвячена аналізу теоретичних і практичних аспектів механізмів захисту прав людини у справах про порушення конкуренції в ЄС. Визначено, що право на добросовісну конкуренцію має економічний, а також соціальний аспект. Основи захисту конкуренції на рівні ЄС (викладено у статтях 101 і 102 ДФЄС) ґрунтуються на доктрині ордолібералізму. Соціальний аспект права на добросовісну конкуренцію свідчить про право споживачів отримувати справедливі переваги на внутрішньому ринку, і мати рівний доступ до товарів та/або послуг. Хартія основоположних прав, яка, відповідно до Лісабонського*

договору, є одним із основоположних документів ЄС, підтверджує цей соціальний вимір права на добросовісну конкуренцію. У статті 38 Хартії зазначено, що «політика Союзу забезпечила високий рівень захисту споживачів». Це означає, що однією з цілей конкурентної політики ЄС є захист прав споживачів. Слід зазначити, що майже у всіх справах щодо порушень, які скоїли суб'єкти конкурентного права, Суд ЄС відхилявся від питання захисту прав людини.
Було досліджено судову практику Суду ЄС у сфері порушень прав людини у сфері конкуренції та практику ЄСПЛ у справах щодо порушень конкуренції (зокрема у справі Менаріні). Ця справа свідчить про безпосередню актуальність основоположних прав для правозастосування конкуренційного законодавства ЄС.
Ключові слова: *ордолібералізм, конкуренційне право, ЄС, права людини, Європейський суд з прав людини, справа Менаріні.*

Statement of the problem. The notion of "freedom to compete" was established in ordoliberalism theories. It was introduced through the main goal of competition – to increase social welfare. When defining competition as a necessary element of a functioning market economy, it is worth noting that it should be premised on the basic principles, values and freedoms. Especially it must be determined by the protection of human rights. This very issue will be the core element of this research.

The purpose of the article is to explore the correlation of fair competition mechanisms through the human rights protection given that in the Treaty on European Union (TEU), there is introduced a new category of "values" among which we should pay attention to equality and human rights. In course of the analysis, special attention will be paid to the fact that basic principles of EU law were formed and developed by the CJEU jurisprudence which is focused on the principle of the protection of human rights and freedoms in accordance with Art. 6 TEU and Art. 16 TFEU.

Analysis of recent research and publications. The study of economic stability for the internal market through the prism of the right to fair competition in the EU is relatively new, but the doctrine is characterized by a diversity of views in this area. Among Western scholars, the issue of interaction of human rights and the consumer was researched by various lawyers, such as A. Andreangeli [1; 262] who is the author of a monograph devoted to compliance with competition rules and at the same time human rights. We can also isolate single special research of the relationship of competition law and human rights, such as M.Ramsden's [2; 61-68], E.Ameye's , A.Brawn's, A.Rileya's, W.Wils [3] works.

Study of the right to fair competition requires the definition of "unfair" competition and "freedom" to compete. At the core of this concept there are such fundamental characteristics as integrity, fairness and justice. The concept of free competition was founded in theories of liberalism, especially reflected in the current ordoliberalism. The idea ordoliberalism was founded in Germany by scientists such as W. Eucken and F. Böhm. They advocated the main idea of the movement – free competition and protection. This idea was supported and spread within the Member States of the European Union [4].

The core of the research.

1. Ordoliberalism as an inspiring basis for European model of Competition Law

Ideas of competition in a liberal market are borrowed from the works of ordoliberalists who recognize this form of market economy in which the competition framework is created by the state in order to achieve the highest possible intensity of competition and, at the same time, to limit factors that distort competitive conditions. Ordoliberalists believe that the regulation of monopolies and competition automatically facilitates social justice.

German school of neoliberalism represented by W. Eucken, L. Erhard, A. Müller-Armack is becoming the most influential one among European neoliberalism movements. Representatives of this school focused on combining economic freedom and non-interference of the state in the economy with the principles of social justice, without limiting the role of the state to being a guardian of market relations, determining that it has the right to arrange of public life. In the post-war period, Germany was directly faced with the acute social effects of the self-destruction of the market economy. However, against the background of the total collapse of the centrally controlled forced economy, German economic thought gave no support to the idea of pure liberalism; it asserted the ideas of a

strong state. The functions of such a state were to perform institutional and organizational functions, as well as aims to consciously create a strong competitive economy. These ideas confirm that Germany drew on centralized US antitrust law, thus supporting the ideas of Keynesianism, but paying proper heed to its own national interests as to the limited functions of the state.

The founder of the German neoliberal school is considered to be Walter Eucken, who formed his own Freiburg school in the post-war period. In 1948, the scientist, together with his supporters, including lawyer F. Böhm, founded "Ordo", a yearbook that served as a platform for German neoliberalism idea. "Ordo" means the order of the economic system, the natural structure of the free market economy. That is why the ideas put forward by W. Eucken and his followers were called *ordoliberalism* in the doctrine.

The essence of ordoliberal doctrine comes down to the fact that the role of the state is limited to shaping economic order, while regulation as such and the specifics of the economic process take place in a spontaneous manner. Central to the concept of ordoliberals was setting up a viable price system of perfect competition, which, in their opinion, should be made an important criterion for introducing any economic policy measure. Competition was characterized as a state institution constantly protected from monopolies' encroachment.

W. Eucken described the correlation of the "centrally governed economy" (or forced economy) and the "mining economy" (i.e., a market economy) [5]. The scholar presented three main principles of the market structure theory: 1) the principle of individual freedom which was sought in post-war Germany, which is ensured by private property and economic independence of economic entities; 2) the principle of a strong state which is traditional for Germany, yet the state does not interfere in economic processes, but only establishes the requisite legal framework for the economic processes to operate; 3) the principle of consistency in economic policy. W. Eucken considered the basic principles of competition (inviolability of private property, competitive open markets, freedom and protection of economic agreements, freedom of entrepreneur's actions and his/her responsibility, consistency of economic policy) to be the prerequisites for the emergence of a market economy. Ordoliberals understood the competitive order to be a kind of market economy in which the competition framework is actively established by the state so that to achieve the maximum possible competition intensity and at the same time limit its factors that distort the competitive environment. Thus, they believed the most important task of the state to be prevention and limitation of economic monopoly power.

The ordoliberals conceive of the free economy in conventional terms: free markets are governed by the principles of scarcity, private property, freedom of contract, exchange between equal legal subjects, each pursuing their own self-interested ends. Free markets allow social cooperation between autonomous individuals that communicate with each other by means of a „signalling system" that is, the price mechanism. They thus require monetary stability to permit its effective operation as a „calculating machine" that informs consumers and producers of the degree of scarcity in the whole economy.

According to F. Lassalle, the essence of German ordoliberalism comes down to the role of "night-watchman", which is traditional for the entire constitutional system of Germany. In this role, the state ensures compliance with the rules of the game (i.e., legal norms) in economic life. Under these prerequisites, the state plays an active role in maintaining the capacity of a market economy, ensuring free competition environment. Representatives of British neoliberalism, who, on the contrary, put forward the idea of a "minimal state intervention" meaning that the state only monitors market forces' actions, clearly could not agree with this. Whereas ordoliberals built on the constant, systematic stimulation of competition by the state and the expansion of competitive environment, the British neoliberals limited the functions of the state to a natural, spontaneous response to deteriorating competition or economic downturn.

Theorists of ordoliberalism came up with the idea of combining free market principle with "social equalization" principle. In 1947, A. Müller-Armack for the first time used the term "social market economy" [6] , which aims to achieve a high level of well-being for the vast majority of society in the modalities of economic freedom based on competition. In his writings, he abandoned the idea of reviving the modalities of perfect competition by "curbing monopolies." Although antitrust idea was a part of the doctrine, it gave way to social policy. Ordoliberals believed that regulating monopoly and competition automatically contributes to establishing social justice. A.

Müller-Armak declared, on the contrary, that active social policy is a distinctive feature of the social market economy, which distinguishes it from the capitalist economy.

Starting from 1948, the ideas of ordoliberalism and the social market economy became the official ideological doctrine of the German government, and already in 1965 L. Erhard, who held the position of Chancellor of Germany, announced the that the country is no longer building a social market economy and that Germany will be transformed into a "formed society" .

The main structural elements of the social market economy are: competitive system based on private ownership of the means of production; market as a coordinating mechanism and regulator of economic activity; undertakings; and the state which ensures and controls the general framework for the functioning of the market system through policies to strengthen competition and promote social equalization. The role of the state, according to L. Erhard [7], is similar to the position of the referee on the football field who strictly monitors the teams' actions, but has no right to participate directly in the game. In other words, in order to maintain the framework for the "social market economy" as an ideal type of free market economy, the state must make sure that the rules of free competition are complied with, it must control pricing and suppress attempts to establish monopoly prices. To some extent, the long-awaited ideas were in tune with the social and economic processes that were at the same time taking place in France, where the policy of "dirigisme" aimed to solve social problems. However, in France, economic planning and dirigisme aimed mainly to overcome unemployment, whereas in Germany, the social market economy supposed that competition is a benefit to the consumer, thus bringing social benefits to the population.

Ordoliberals' theoretical views were actively supported immediately after World War II by business community in West Germany. In the 1950's, the social market economy ideas were specified and supplemented by the thesis of "welfare for all". It is due to translating into life of the synthesized ideas of ordoliberalism and social market economy that L. Erhard is called the "'father' of the German economic miracle".

The ordo-liberals defined their stance as neo-liberal in character. They criticised laissez faire liberalism because of its perceived inability to facilitate and sustain a competitive free market economy. For the ordoliberals, things are at a standstill because the state did not discharge its responsible for maintaining the economic competitiveness and enterprise with requisite authority. When things are at a stand, this manifests a failure on the part of the state to act as effective „market police".

The starting point for supranational regulation of competition in the post war period war inspired by national experience mainly in Germany and France. And national ordoliberal doctrine laid down the basic nature of competition rules provisions in the first founding treaties of the European Communities and thus described in the Lisbon Treaty (Treaty of Functioning of the EU)

2. Main issues on legal regulation of the competition in the EU

The EU competition policy serving as protection of fair competition from illegal restrictions and distortions is an important factor in creating and effective functioning of an integrated internal market in the EU. The principle of an open market economy with free competition is one of the foundations of the economic system of the European Union due to the special Protocol the TFEU and other provisions of TFEU. Thus, the implementation of the principle of respect for EU supranational institutions endowed with exceptional powers in this area. In particular, Art. 3 TFEU defines the exclusive competence of the EU in establishing of the competition rules necessary for the effective functioning of its internal market of the European Union. It should again be emphasized that the meaning of the Treaties implies that competition policy plays a key role in establishing and functioning of the internal market in accordance with the principle of an open market economy with free competition, which is directly reflected in Art. 119 TFEU. The basis of the EU internal market is the ability of undertakings to compete on equal terms. Competition policy ensures competitive behaviour of enterprises and protects the interests of consumers, enabling the production of quality goods and services.

3. The right to fair competition

The right to fair competition has both economic and social aspects.

From an economic perspective, entities & undertakings have the right to not distorted (fair) competition. It follows the basic prohibition of antitrust behaviour covered in Articles 101 and 102 TFEU. The right to fair competition is endowed by states through legal regulation that ensures refraining from giving undue advantage to certain subjects or industries which distorts or threatens to distort competition. Such actions of the Member States are rendered incompatible with the internal market under Art.107 TFEU. Another aspect relates to the obligation of national monopolies in the provision eliminating any discrimination expressly provided for in Art. 37 TFEU.

The social aspect of the right to fair competition shows consumers the right to receive fair benefits in the domestic market by having equal access to the goods and / or services. To ensure fair competition, entities have to make legitimate fair measures to attract consumers and consumers have the right to benefit from fair competition. This approach was supported by the sociological jurisprudence. Court of Justice of the EU in its judgment in the case of GlaxoSmithKline [8] pointed out that the purpose of Art. 101 (p.1) TFEU is to prevent companies from actions that would reduce the welfare of the final consumer.

The Charter of Fundamental Rights, which, according to the Treaty of Lisbon, is one of the fundamental documents of the EU, confirms this social dimension of the right to fair competition. Article 38 of the Charter states that "the Union's policies ensured a high level of consumer protection." This means that one of the objectives of EU competition policy is to protect consumer rights.

The EU has exclusive competence as regards the right to fair competition. Under Regulation 1/2003 [9], the Commission has broad powers to obtain information, to investigate and take an appropriate binding decisions. However, the Commission applies its right in quite active manner by imposing fines in the millions and billions of euros [10]. However, any decision by the Commission may be subject to judicial review under Art. 263 TFEU.

In other words, the right to fair competition from both positions (both economically and from the social aspect) is ensured not only the power of the Commission, but by judicial mechanisms as well. Decisive for the right to fair competition in the light of the prohibition of antitrust behaviour in the market are the powers of the Commission (in accordance with Regulation 1/2003) and the distribution of jurisdiction of the Court of Justice of the EU claims from individuals and businesses with regard to acts in which they are recipients or directly and immediately affected by them (according to para 4 Art. 263. TFEU). It should be noted that in almost all cases concerning violations committed by the subjects of competition, the EU Court of Justice deviated from the issue of protection of human rights (such as in the case of Pioneer [11]).

4. ECHR's point of view

But since the 2000s, the role of human rights in Commission's implementation of its powers increased, and in 2011 the European Court of Human Rights considered the case in the field of violation of competition rules.

Due to the fact that the EU and the Council of Europe share common values of human rights protection and include its legal system rights under the European Convention on Human Rights, the question arises as to the mechanisms of their implementation specifically in the sphere of competition protection. In other words, there is the practical question of the value of competition in the market and human rights. This also applies to the issue of human rights while the Commission exercises its powers to enforce of the competition rules, in particular during the investigation by the Commission. The main provisions of the Convention relevant in the context of EU antitrust enforcement are Article 6 (right to a fair trial), Article 7 (no punishment without law), Article 8 (right to respect for private life), Article 13 (right to an effective remedy) and Article 4 of Protocol No 7 to the Convention (right not to be tried or punished twice).

In other words, there is the practical question of the relation of competition in the market and human rights. This also applies to the issue of human rights when the Commission exercises its authority to monitor compliance with competition rules, in particular during the investigation by the Commission.

Thus, the question is whether cases related to competition rules violations fall under the jurisdiction of the ECHR. Thus, Art. 6 of the European Convention on Human Rights defines the

right to a fair and public hearing within a reasonable time whether civil or criminal proceedings are concerned. Furthermore, this paper corresponds to Article 47 (para 2) EU Charter of Fundamental Rights, which defines the right to an effective remedy and access to impartial courts.

Despite the fact that Regulation 1/2003 has established that sanctions are not criminal liability, litigation is somewhat of a different position on this issue. The the ECHR judgment in the case of Société Stenuit v. France [12] analysed the fines imposed under national competition law. Here the court considered the issue in the light of a criminal nature in connection with the nature of national competition law of France, whose goal is to protect free competition in the French market, i.e., the general interests of society, which is usually protected by criminal law. In the judgment in the case of the EU KME Germany and others v. Commission the Court found that the Commission's decision to impose a fine relating to competition is associated with "criminal charge" for the purposes of Article 6 (1) [13]. Furthermore, it is well known that in the light of Art. 6 (1) of the European Convention, in defining "criminal charge", the Court must not only be independent and impartial, but must also have full jurisdiction to hear and decide all questions of fact and law relevant to the dispute which it considers [14].

ECHR judgement in the case Menarini [15] reaffirmed the applicability of Art. 6 of the European Convention on Human Rights to cases involving the protection of competition in Europe. The very bright example of such correlation is the Menarini case. The decision of the ECHR of September 27, 2011, confirmed that the procedure against Menarini in the Italian jurisdiction had a "criminal nature" for the purpose of Article 6 of the Convention. This case demonstrates the immediate relevance of fundamental rights to EU competition law enforcement.

This Western doctrine confidently declares that this case has given rise to possible further appeals to the ECHR in cases involving violations of competition [16]. The "Menarini" ruling of the European Court of Human Rights paves the road to a material and significant enhancement of a company's rights of defence in antitrust cases based on Article 6 of the Convention and on the respective seminal case-law of the European Court of Human Rights which materializes the principles associated with the due process of law in a detailed manner.

However, in the future there is another rhetorical question of the appropriateness of trial states in accordance with Art. 6 of the European Convention on Human Rights. In accordance with Art. 6 of TEU, Union will accede European Convention on Human Rights. This affiliation will allow to apply the ECHR mechanism to anyone who claims that his rights under the European Convention on Human Rights have been violated by the European Commission or the European Union Court during its review of decisions of the Commission .

5.Conclusions

The concept of competition is so ambiguous that it is not covered by any universal definition. This is an economic category, and a set of legal tools that are designed to market regulation on compliance with competition. The competition has not only purely economic function regulator of market mechanisms, but also the social function shown in getting positive benefits of competition and consumer welfare achievements by receiving fair pricing and quality products. developed the idea of neoliberalism (F. von Hayek, L. von Mises, M. Allais, M. Fridman), whose substantiate the idea of freedom of competition in the market without the active participation of the state. Neoliberalism admits the possibility of partial, limited government influence on the economy as opposed to Keynesian active government intervention.

Much of the idea of competition in a liberal market were in the works ordoliberalists (V. Oyken, A. Müller-Armak, L. Erhar) who recognized under competitive procedures this form of market economy in which competition framework actively created state in order to achieve the highest possible intensity of competition and at the same time limiting its factors that distort competitive conditions. Antitrust orientation although it remained part of the doctrine, but ceded its leadership role a matter of social policy. Ordoliberalists believed that regulation of monopoly and competition automatically facilitates social justice.

The presence of competition in the market leads to an increase in economic efficiency so that consumers receive the appropriate share of wealth. Thus, we can conditionally display concept

«antitrust welfare», which comes also to economic efficiency and well-being of consumers and competition in the market. Described influence of theoretical doctrine of ordoliberalism showed its practical development of supranational regulation in the EU. More current practice showed that the legal mechanisms of human rights protection within the European Convention of Human Rights also shared experience in cases with competition rules protection (Menarini case). Nevertheless of the terminating of negotiations of the EU's acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the question of competition law protection through the prism of human rights protection will remain in the focus.

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