

Fair competition is a form for implementation of the fairness principle in the economic activity

Добросовісна конкуренція – форма реалізації принципу справедливості в економічній діяльності

Olga Bakalinska

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Introduction. Competition freedom and good faith are socio-economic development values recognized at the constitutional level, the protection of which is guaranteed by the state. At the same time, today there are no priorities of fair competition in the public consciousness provided by historical experience as well as recognition and support of competition in all areas of public life. Having developed on the basis of foreign legislation analysis and generalization of developed countries practice, Ukrainian competition law does not take into account the specifics of Ukrainian business mentality. Based on the practice analysis of applying the provisions of Law of Ukraine "On Protection against Unfair Competition" it is possible to state that the overwhelming number of applications for protection is carried out by representatives of foreign business entities or in their behalf (except for investigations carried out on the basis of application of Article 15¹ of the Law). This way, the necessity to ensure the development of fair competition, remains, in many cases, a beautiful but unjustified slogan in economic activity.

The issues of legal regulation of the protection of fair competition were paid attention by such researchers as O.O. Bakalinska, S.S. Valitov, O.V. Bezukh, Z.M. Borisenko, N.M. Bugaenko, V. I. Eremenko, O.M. Zimenkova, V.S. Shcherbyna.

Main part. The fundamental problem of the economic relation development is the general distrust of business entities and consumers to the authorities, in particular, to law enforcement bodies and the court. Attempting to win in a competitive struggle, business entities use unfair practices and various forms of competitive behavior agreement, abuse of market powers in order to counteract the dangers of competition and state regulation. As a result of this behavior, self-regulation mechanisms, laid down in competition, fail and competition gradually turns into oligopoly or monopoly, and fair competition – in the unfair one. The lack of real interaction between business and the state leads to the refusal of business entities to use legal ways to protect their rights and increases offense latency level in the field of competition. Under such conditions, the state loses control over the socio-economic situation in the country that finally leads to crises in the economy and social life.

All above determines the necessity of the awareness of issues and trends of competition development current conditions on the market and creation of analysis of comprehensive model for support and development of fair competition in Ukraine on their basis, using which economic competition and fair competition will turn from general ideas of socio-economic development into economic activity objective reality, which under certain conditions will provide an opportunity to ensure the implementation of strategic tasks of the state on the way to the EU, protection of rights and legal interests of economic activity participants, establishing cooperation between business and the state, and formation of a civilized dialogue between the state and society.

The theoretical substantiation and awareness of the influence of moral and ethical ideals on the social consciousness development and law in general can be a real mechanism for achieving the set goals and their further implementation in legislative and enforcement processes. As A. S. Dovgert rightly emphasizes, "through the prism of natural principles of fairness, good faith and reasonableness, all positive and natural law, as well as the consequences of its application, should be evaluated and interpreted"¹.

¹ The Civil Code of Ukraine: Scientific and Practical Annotation /ed. developers of the draft of the Civil Code of Ukraine. – K.: Istyna, 2004. – P. 12.

The concept of fair competition is the central moral and ethical concept of competition law with its existence and development being the basis of the development of economic relations. It is worth noting that the current legislation does not contain a definition of this concept, but only a reference to the necessity to adhere to fair competition principles in the economic activity. In particular, Article 6 of the Commercial Code of Ukraine, among the basic principles of economic management, determines the restrictions for economic process state regulation in connection with the necessity to ensure the social orientation of the economy, fair competition in entrepreneurship, environmental protection of the public, consumer right protection and the security of society and the state². However, the vast majority of current legislation norms, aimed at protecting fair competition, use the antonym of this concept – “unfair competition”. Determining the essence of a certain phenomenon using its opposition is a generally accepted way of legislative and enforcement technique when using concepts with an “open structure”, which is the concept of “fair competition”. At the same time, the use of “fair” and “unfair competition” concepts in competition law is a moral and ethical dimension of economic activity further development.

The moral contradiction common to economic relations generates different evaluations of the phenomena of fair and unfair competition in modern Western and Ukrainian society. The discussion on the moral aspects of market relations is immediately exacerbated as soon as the market no longer demonstrates unconditional efficiency, which inevitably occurs during periods of economic recession, political transformations of society, wars, resource “famine” and other social disruptions. Many attempts have been made in science to make the economy as the basis of historical progress. Therefore, it is not surprising that relations around commodity exchange are attributed, firstly, to the ability to substantially modify all social relations, and secondly, they bear moral responsibility for any social problems. This discourse acquires a new connotation in the context of globalization – the process of erasing national borders, free flow of capital, a unified information space. In this case, the competition occurs not only among compatriots, but also representatives of countries with advanced experience in various fields, and therefore, large human population, representatives of various cultures different in value priorities as well as the level of material well-being are involved in the market relations as consumers or active participants, consciously or involuntarily³. In view of this, theoretical and legal studies on the issues of consolidation and implementation of basic moral and ethical dimensions of modern law, such as freedom, good faith, reasonableness and fairness, deserve special attention in the commercial law of Ukraine.

The study of competition legislation development peculiarities makes it possible to conclude that the basis of the whole system of competitive relations is the good faith and fairness as the eternal moral and legal values laid down in the basis of modern legal consciousness. This is also confirmed by the results of the study on the reception of bona fides principle in competition law.

Recognizing the important role of fairness in society and person’s life, one can not overestimate, overemphasize it, since even the achievement of absolute fairness itself in legal relations and personal relationships will not make people happy. If a person does not realize himself, having a great deal of power, fairness is nothing for him. There is no fairness without person’s spiritual comprehension and perception of fairness. Fairness acquires true essence and significance only in the process of its realization in public relations, namely, in the legal ones⁴. Conscious pursuit of fairness, the search for a balance between private and public interests of business entities, between good and evil, good faith and unfairness in economic relations provide an opportunity not only to achieve the goal of law enforcement, but also to ensure the implementation of the fairness principle in economic relations. In other cases, fairness remains only one of facets of society and personality ideal. Fairness, in general, is the primary quality of a person as a moral human being in his attitude to other people⁵. The guarantee of support and protection of fair competition is one of the displays of the fairness principle in the competition law. Studying the issues of competition law development, most researchers tend to consider the good faith of competition as an ideal or the aim of legal regulation, but they do not attempt to cover the essence and causes of the occurrence of this moral and ethical category in the competition law. Some researchers point out the false use of moral and ethical categories when regulating economic relations, especially in the field of

² Commercial Code of Ukraine dated January 16, 2003 No. 436 // Bulletin of the Verkhovna Rada of Ukraine. – No. 18/22. – 2003. – Article 144 – (amended).

³ Tuysk I.I. (2003). Antimonopoly law enforcement means: author’s abstract: diss Candidate of Judicial Sciences / I.I. Tuysk – Donetsk – P. 7-9.

⁴ Bakalinska O.O. (2003) Protection of Economic Competition: Certain Issues of Legal /O.O. Bakalinska// Legal journal. – No. 11. [Electronic resource]. – Access mode : <http://www.justinian.com.ua>

⁵ Demchenko S.F. (2010). Theoretical and Methodological Principles of Efficiency of Economic Legal Proceedings: Diss. ... Dr. Of Judicial Sciences: 12.00.04 / S.F. Demchenko National Academy of Legal Sciences of Ukraine, Research Institute of Private Law and Entrepreneurship. – K. – P. 289.

the competition. In particular, O. M. Zimenkova states that European legislator and law enforcers have never been interested in the moral component of the competition⁶, although legal acts of national and international nature refer to “good practices”, “honesty” and the same moral categories necessary to adhere for the conduct of trade and industrial activities. The purpose of fair competition protection, especially at the first stage of the competition law development, has been to protect competitors’ interests and support competition development as the basis of economic and social development. It is no secret that the main aim of the competition is to win. The unlimited endeavor for victory leads to the constant and merciless destruction of economically weaker competitors. That is why the concept of morality in the competition is rather limited and has somewhat relative nature. At the same time, unfair techniques of competitive struggle are constantly being modified, creating a new set of components of offenses; it is extremely difficult for courts and administrative bodies not only to stop such actions, but also to respond adequately to such behavior, especially in those cases where such practices have not been applied yet. Recognition of good faith, reasonableness and fairness as the general principles of civil law is of decisive importance (Part 6, Article 3 of the Civil Code of Ukraine)⁷ for the development of honest and fair competition in Ukraine. The recognition of these moral and ethical ideas as general grounds, but not the principles of law, expels them beyond the general regulatory system of legal regulation of not only civil but also economic legal relations, and due to this fact they acquire the law-making and regulatory significance governing all positive law. The general social axiomatic postulates create the essence of such ideas that make it possible to take a look at the essence of the legal relationship not only through the prism of state will, but also from the point of view of universal human positions as well as moral values. In the legislation, they act as the basis of humanity, good faith and reasonableness, or the moral principles of society. In the theoretical sources, they are moral and ethical or moral principles of law. So far, these standards are not a mandatory attribute of all codified normative acts. However, it seems that this is the same case when legal ideas acquire a special status and become “rules of the application of all other rules”, that is, the initial postulates for the whole process of legal regulation. There is a widespread view among scholars that the moral grounds of good faith, reasonableness and fairness are not principles or requirements of economic legislation and under such circumstances it makes no sense to consider them as the appropriate regulator of economic, in particular, competitive relations⁸. However, in our opinion, the consolidation of the necessity to ensure the social orientation of the economy, fair competition in entrepreneurship in Article 6 of the Commercial Code of Ukraine creates the basis for taking into account the requirements of good faith, reasonableness, and fairness in economic activity planning and conduct. These norms are characterized by fundamentalism, becoming obligatory not only for the law enforcer, but also to the legislator, acting as the sole criterion for constructing all other legal norms belonging to a certain field of legislation.

Conclusions. The peculiarities of the development of competitive relations in Ukraine and globalization processes taking place in the global economy require the development of new approaches to ensure the functioning of relations in the field of economic competition.

The formation of a socially-oriented economy provides the involvement of the whole spectrum of social regulation (economic, legal, moral and ethical) in order to achieve the set goals – the domination of honest and fair competition in economic activity on the market in economic process regulation in the state. The legal framework for fair competition covers the entire process of developing legal regulation instruments for the formation and development of economic competition and their use in the practical activities of business entities and authorities in order to provide benefits which honest and fair competition ensures. The most important elements of the legal framework for fair competition, under such conditions, are: firstly, law-making, that is, the direct activity of authorized state bodies as for developing, adopting, amending and cancelling competition law norms. As a result, the public interests and the laws within which they will operate are the most fully reflected in the legal norms. Secondly, law enforcement is a comprehensive authority activity with regard to implementation of competition law norms. This form of exercise of right is determined by laws and by-laws in those fields of social relations, where precise definition of the rights and obligations of the parties (in the course of procurement of goods, works and services for public funds or government aid) is extremely necessary, as well as state control over the development of relations (in carrying out actions agreed and economic concen-

⁶ Zimenkova O. N. (1987). Legal Means for Suppressing Unfair Competition /O. N. Zimenkova // Civil, commercial and family law of capitalist countries. – M.: UDN. – T.2. – p. 206-211. (Russian); V. I. Eremenko (1991). Legislation on the Suppression of Unfair Competition of Capitalist Countries / V.I. Eremenko. – M.: VINITI. – 318 p. (Russian)

⁷ The Civil Code of Ukraine on January 16, 2003 p. №435 // Official Bulletin of Ukraine. No. 11.

⁸ Bezukh O.V. (2014). Legal Framework of Fair Competition in Ukraine: Private and Public aspects / O. V. Bezukh // Correlation of private and public interests in the field of entrepreneurial activity: Collection of scientific papers/ editorial: V. S. Shcherbyna (head), T. V. Bodnar, et al. – K.: SRI of private law and entrepreneurship named after acad. F.G. Burchak, NALS of Ukraine, 2014 – P. 68.

tration), introducing elements of constancy, stability, certainty in this development (counteracting the displays of monopoly and unfair competition). Thirdly, the legal culture of law subjects, concerning the individuality of each citizen, means the combination of knowledge and understanding of right with the conscious fulfillment of its provisions (observance of fair business customs and practices in economic activity, conscious and responsible attitude of consumers to their own rights and obligations).

Summary

Bona fide and fair competition is a form for implementation of the fairness principle in the economic activity as well as the natural right and the leading idea being the basis of socio-economic development of both the state and an individual business entity. Fair competition in the modern economic turnover allows taking into account and coordinating diverse interests of market participants, consumers, and the state, as well as achieving a necessary compromise in their implementation. Providing the legal framework for free and easy implementation of fair competition is one of the leading directions in the state legal policy implementation.

Анотація

Чесна і добросовісна конкуренція є формою реалізації принципу справедливості в господарській діяльності, природним правом та провідною ідеєю, що закладена в основу соціально-економічного розвитку як держави, так і окремого суб'єкта господарювання. Добросовісна конкуренція в сучасному господарському обороті дозволяє врахувати та узгодити різноспрямовані інтереси учасників ринку, споживачів, держави та досягти необхідного компромісу під час їх реалізації. Забезпечення правових засад для вільного і безперешкодного здійснення добросовісного конкурентного змагання є одним із провідних напрямів реалізації правової політики держави.

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Olga Bakalinska,

*Doctor of Juridical Science (S.J.D.), Assistant Professor,
Academician F. H. Burchak Scientific Research Institute
of Private Law and Entrepreneurship of NALS of Ukraine*