

THE RELATION SUPPLIER – DISTRIBUTOR, STABILIZING FACTOR IN FOOD SAFETY

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Abstract

The need for a uniform legal framework for food safety at European level was always a concern of the Romanian legislator. Competent authorities have considered the activities of food processing and also the development of contractual relations with distributors, in order to assure the compliance with the general principles of food law, set out in Regulation (EC) no 178/2002 of the European Parliament and Council of January 28, 2002. The efforts aimed to achieve a normal competitive business environment, the annihilation of anti-competitive practices and arrangements, which may adversely affect the chain supplier - distributor - consumer. Actions taken by national authorities are in line with existing EU concerns, investigating food market imperfections, while proposing a set of measures to remove them, but by proactive measures to promote a direct relationship between consumers and producers. It envisages a greater transparency of actions, a better form of market regulation, but also the existence of a more effective monitoring system of costs and prices.

Keywords: food safety, supplier, distributor, consumer

1. INTRODUCTION

In general, in any market economy, fair competition between operators should have the beneficial effect on the market, as the phenomenon of falling prices and improving consumer choice.

There are several factors which may influence this competition causing distortions in the free market: customs barriers, tariff and non-tariff, a trader which obtained a dominant position in a specialized area of the market, the existence of monopoly, economic concentration, pricing policy etc. (Mihai E., [1])

The negative effects of these distortions are reflected directly onto the consumer. Thus, the phenomena of imbalance of the relationship between merchants and consumers have imposed the necessity of statutory consumer rights. At the same time, the need for protection of consumer rights has arisen due to the increase competition abusive practices and the use of aggressive or shocking forms of sale, which in the most times equals with pressure exerted on consumers. (Cotutiu A., [2])

Starting from this goal, market analysis should be conducted in terms of a three-dimensional structure of participants in the relevant market

of food, namely supplier (manufacturer), distributor (dealer) and the consumer.

2. PAPER OBJECTIVES

Through this study we did not proposed a general analysis of the market but to consider only the relevant segment, such as food market, examining the contractual relationship that is established between suppliers and distributors and its role for food safety.

3. FOOD SAFETY, BENEFICIAL ELEMENT FOR CONSUMER

Right to consumer safety is not a new right (Sarbulescu I., [3]). It is held by the United Nations (by resolution no 39-248 of April 1985), who produced a set of principles and fundamental measures to protect consumers against products, services or processes that may endanger their health and also to promote the interests of consumers. Also, the right to safety was proclaimed by the International Organization of Consumers Unions - IOCU and the Council of Europe through Charter for Consumer Rights (Patriche D., [4]).

Also the European Parliament and European Council, through the Regulation (EC) no.

178/2002 ([5]) states that "the free movement of safe and wholesome food is an essential aspect of the market and contributes significantly to the health and well-being of citizens, and to their social and economic interests".

Starting from the basic consumer right to safety, in modern times it came out the concept of food security, which is a concept specifying that food will not harm the consumer if prepared and consumed according to intended use. Obviously, food safety is closely related to another concept, concept of quality.

In a more general framework we can define quality as a set of properties and characteristics of a product or service, which gives the ability to satisfy the explicit and implicit user's requirements.

Quality represents the correspondence with customer requirements for functionality, price, delivery time, safety, reliability, environmental compatibility, service, etc. (Morar R., [6])

For food, the concepts considered in defining quality are more complex, due to the structure and composition and their effect on human health.

Quality of food or service is the degree of utility of the products offered, so far as all its sensory and nutritional characteristics are satisfying the need for which was created without affecting the health, safety of human and animal life without affecting the environment.

Evaluating the quality of food or services is made taking into account a set of defining characteristics: harmless (hygienic quality), quality as the matter of nutrient issues, sensory quality and presentation quality (the aesthetic).

4. SUPPLIER-DISTRIBUTOR RELATIONSHIP AND FOOD SAFETY STABILITY

To ensure food safety is necessary to consider all aspects of food production chain as a continuous process, starting from and including primary production and feed production, up to

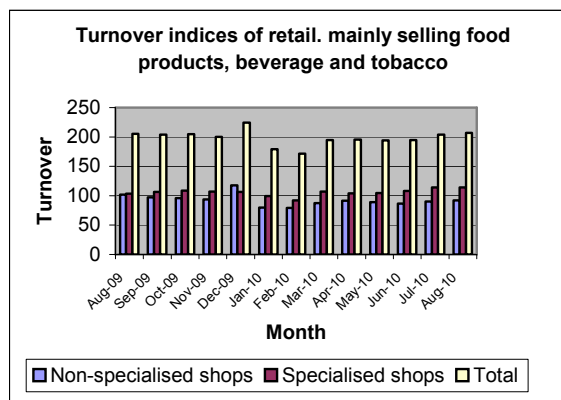
and including sale or supply of food to consumers, because each element may have a potential impact on food safety.

The initiators of Regulation (EC) no 178/2002, notes that legal requirements on food safety varies widely from one Member State to another, differences that may impede the free movement of food, creates unequal conditions of competition and, therefore, may directly affect the functioning of internal market. It is therefore necessary to approximate these concepts, principles and procedures in such a way as to form a common basis for food safety measures.

Romania legal framework is in line with EU legislation by adopting a set of measures to meet European standards. We will submit to an analysis a recent legislation adopted by Parliament - Law no. 321/2009 on food marketing. ([7])

In the European area have been recorded numerous signals that triggered a state of concern of authorities about the fact that food prices could rise a lot, which would affect the economic recovery of several states, as supermarkets increase prices, while farmers complain that they can not cover their costs (associations of livestock farmers and milk farmers have protested against current price of specific products that do not cover anymore the production costs).

Thus, the European Commission prepared a list of measures for European shops chains selling food to avoid such a situation that would widen existing global economic crisis.



Faced with these problems, which can be found also in Romania, the authorities have initiated a law 's draft, finalised by adoption of the Law 321/2009 on food marketing. The main issues, which are regulated by the text of the law, are referring to the conditions of the contractual activity of marketing of food, protection against anti-competitive agreements and practices and payment obligations between the trader and supplier of food.

This law sparked strong controversy, being sustained by producers in the food industry but strongly criticized by the Association of large commercial network in Romania since the planning stages. The latter view, regarding of one of the measures that reduce the time of payment of invoices to suppliers, is that will lead to many traders unable to meet it, with the consequence of producing delays and bottlenecks, which are likely to end in financial bankruptcy, for both retailers and food suppliers. Another consequence is assessed to be job losses of employees from involved companies.

The project of law 321/2009 known also as the Code of Good Practice for trade with food products, was subject to analysis of the Competition Council to express a point of view (in order to prevent possible anti-competitive practices, in March 2008, Ministry of Agriculture, Forestry and Rural Development requested the point of view of the Competition Council on the code, drawn up following discussions between retailers and suppliers).

Competition Council have examined the vulnerable area of food retail sector, namely the bargaining power in relation producers-retailers, how is established the pricing policy and discount products, the potential agreement between large retailers and manufacturers, having possible anticompetitive effects. Its conclusion was that the retail sector requires a constant monitoring not only from the competition authority, but also from other decisional factors in order to prevent the occurrence of any distortion, with direct impact on final consumer.

After examining the Code, the Competition Council has not identified any express

provisions contrary to competition law. However, the Romanian competition authority has warned that it is essential that, the enforcement of this Code does not create an information exchange platform that facilitates the transfer of data commercially sensitive in horizontal relationships between suppliers, traders respectively, or vertically relationships. Thus it is estimated that in certain circumstances, exchange of information between competing firms could lead to mutual understanding of business strategies, which will facilitate tacit coordination of market behavior of those companies, which on long term could contribute to limitation of competition.

In this way exchange of information between competitors would affect the market mechanism and even the initiative of such a code, an initiative started from the best intentions, can turn into anti-competitive premise if based on this document a part or another would planned an orchestrated actions. Competition Authority reiterates the role of competition policy, namely to protect competition, not competitors, as protecting competition leads to benefits for consumers and efficient firms. Such code is at risk to make from an initiative favorable to consumers, its opposite.

As it was specified, one of the objectives proposed by the Law 321/2009 (Code of Good Practices) is the protection against anti-competitive agreements and practices. The first article that regulates this issue is art. 3 stating "can not compel parties to each other directly or indirectly, to buy or sell products or services from or to a third party". It is undeniable such conduct of the parties, this being also the subject of regulation in Competition Law no. 21/1996 which states as anti-competitive practice, the closure of contracts subject to acceptance of foreign terms from the nature of the contract or inconsistent with commercial practice. (Tercinet A., [8])

For the same purposes, there is article 4 of the same law which stipulate that is banned to any dealer to solicit and collect payment from the provider of services not directly related to the

sale and not included in acquisition cost. It is also prohibited to any dealer to solicit and collect payment from the supplier for services related to extending the distribution network of the operator, refurbishment of the dealer's sales areas or for operations and events to promote business and dealer image.

We believe that this approach is fully justified because the responsibility for conducting the sales operation is of the seller (dealer-retailer) who must assume these costs when purchasing a product. To make responsible the supplier-seller for guarantee fee of selling products by the trader, we consider that it is an undue burden, the seller-trader being the one who must assume the risk of future sales contract. Vendor-supplier is required to deliver the goods on time, in the conditions and quality specifications of the contract. It can not assume further obligations in respect of sale for a future sale of an asset that is not its asset anymore. The same reasoning is for so-called "duty stands" that is not justified to be in charge of the seller-supplier. The supplier must provide shelf space without discrimination and to organize the space so that does not create areas where access is easier for purchaser or certain products stand out due to presentation by the dealer. The consumer has to choose without being influenced by external factors. Its choice should be based on his beliefs on the quality and characteristics of the product (the attractive presentation of the product is considered). The consumer can be influenced, directed, induced to a particular product by creating preferential sales areas.

Given the arguments outlined here, we support the decision of the legislature to eliminate the payment of services not directly related to the sale and not included in acquisition cost.

Also, it must be mentioned the point of view expressed by the Competition Council which shows that taxation stands by big chain stores in the area of food retail is a general mechanism used worldwide, so has not to be blamed as principle. This can be understood as payment for a service: the creation by the retailer, through its investment, of a high traffic commercial from which benefits the

preferential products displayed, in the most visible areas. On the contrary, if no such differential charge fees stands it can be considered as suspect that some retailers favors some suppliers over others, by the way of exposure of the goods.

The fee stands, applied non-discriminatory, represents a transparent payment of this service. But from the analysis made it can be concluded that there are a number of fees charged by retailers for which no one can see a direct and immediate connection with the counterpart. This category includes charges for expansion/modernization of the stores, those that are used to support actions to promote the shop/networks and products covering the risk of not selling the products. These issues are now closely monitored by the Competition Council to prevent anti-competitive practices.

Another problem of supplier-distributor relationship is governed by Article 5 of the law, which stipulate that is forbidden to any trader to offer or sell products with a loss, except as provided by Law no. 650/2002 ([9]) to approve Government Ordinance no. 99/2000 on marketing and market services" ([10]).

Regarding this text, we share the point of view expressed by the Competition Council, authority which also expressed its point of view regarding GO no 99/2000, that must distinguish between the practice of predatory pricing by a trader that was in a dominant market position, acts that are prohibited under Competition Law no. 21/1996 (Article 6) and the Treaty establishing the European Union (Article 82) and the need of traders to remain competitive in the market taking such a measure as to sale below cost of acquisition.

Imposing the condition to not allow to offer or to sell at a loss, may result in blocking any cheaper sell, even if it has an economic sense and does not affect anyone.

In its report, Competition Council states that "legislation of a minimum level of final prices can not be a solution to existing problems in the sector but, instead, may lead to distortions of competition and to add an artificial pressure on final prices". Its arguments are sustained by The European Commission Communication to

the European Parliament, EU Council, the Economic and Social Committee and the Regions Committ, regarding food prices in Europe (restrictions on sale under costs tend to set a starting price that is restricting price competition and increase the costs of managing the stocks, even if such legislation was primarily designed to discourage predatory behavior at the expense of smaller actors on the market).

Regarding inserting in the text of the law of Article 6, according to which "it is forbidden to ask any merchant supplier to not sell to other retailers the same products at a cost of purchase less than or equal to that of acquiring those products", we believe this provision is appropriate, the final purpose being to protect the final consumer and also to maintain a healthy competition environment based on market economy principles.

We believe that such a clause should not be confused with an especially encountered another clause in international trade that is most favored customer clause. This last clause is optional for parts and it aims to restore the balance of benefits broke, this being the result of market developments. Most favored customer clause is a provision for adjusting the contract market taking into account the event that during long-term contract performance it will be concluded a similar contract with a third party that will provide more favorable conditions than those specified in the contract being enforced. Party undertakes to apply these conditions and the beneficiary clause (Sitaru D., [11]).

Thus, we consider useful the rule stipulated in Article 6 from the law, but is has to be mentioned that this is not a clause type most favored customer clause.

Another provision that has drawn strong criticism from the large chains of stores is the payment obligations between the trader and supplier of food. Article 8 of the Act sets deadlines for payment of products, differentiated by product type as follows: fresh food, time to pay - maximum 12 days, frozen food, time to pay - maximum 20 days and for

food other than the above, time to pay - maximum for 35 days.

It is true that the legislature does not intervene by imposing price, but we consider that setting maximum periods (some of them short in our opinion) for payments to suppliers will directly affect the dealer (retailer).

We believe that the parties should agree these terms by negotiating contract terms that will govern their contractual rappsorts. Thus, the parties will establish a free and unconstrained payment deadlines by their agreement. To impose these terms will have as main effect the impossibility of many traders to meet them, creating financial bottlenecks. This will affect not only the retailers that can go bankrupt, but in the same time the food providers will not be able to collect their debts.

Legislature sought to encourage and protect food suppliers, but these measures must be established taking into consideration the current economic conditions and in the same time rules regarding closure of a contract, freedom of contract. We understand the intention of the legislature but the measures will not have a beneficial effect on the market for either party.

5. CONCLUSIONS

The conclusions that results from the analysis can be summarized as:

- We believe that recent legislation adopted by the Romanian Parliament - Law no. 321/2009 on food marketing, also known as the Code of Good Practices for food trading, it was a necessary document, even after its application may be improved and meet certain objective requirements related to relationships vendor-distributor-consumer, raised repeatedly in the mass-media by the associations of farmers and food industries and small traders;
- Certainly, the existence of contractual rappsorts based on the provisions of this Code of Good Practice will lead to real stability of food safety, because the sequence of activities from manufacturers, then distributors to consumers will happen

on a clear basis, continuous, with "more speed", which will contribute to increasing product quality and hence food security;

- Cooperation is required for all policy makers to assure compliance with legal framework, as a guarantor of good activities to meet consumer requirements.

6. REFERENCES

- [1] Mihai E., Competition law, ed. CH Beck, Bucharest, 2006
- [2] Cotuțiu A., Sabău G. V., Competition romanian and community law ed. CH Beck, Bucharest, 2008
- [3] Sârbulescu I., Petre V., Constantinescu D., Consumer protection and market competition: Radiography, analysis, diagnose, Ed. Tipo-Radical, Drobeta Turnu Severin, 2003
- [4] Patriche D., Pistol Gh., Consumer protection, Autonomous administration "Official Journal", Bucharest, 2000
- [5] Regulation (CE) no 178/2002 from 28 january 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, published in Official Journal L 031, 01/02/2002
- [6] Morar R., Consumer protection system, Ed. Lumina Lex, Bucharest, 2000
- [7] Law no 321/2009 regarding food marketing, published in Official Journal no 705/ 20.10.2009
- [8] Tercinet A., Droit européen de la concurrence. Oportunités et menaces, ed. Montchrestien, Paris, 2000
- [9] Law no 650 from 7 december 2002 for approval of Government Ordinance no 99/2000 regarding marketing of products and market services, published in M. Of. no 914/16.12.2002
- [10] Government Ordinance no 99/2000 regarding marketing of products and market services, published in M. Of. no 603/3.08. 2007
- [11] Sitaru D., International commerce law, vol.II, ed. Actami, Bucharest, 1996