**Mihaela Tofan • Irina Bilan • Elena Cigu**
(editors)

# European Union Financial Regulation and Administrative Area

---

**EUFIRE 2019**

EDITURA UNIVERSITĂŢII "ALEXANDRU IOAN CUZA" DIN IAŞI
2019

# MODERN TRENDS OF UNFAIR COMPETITION ON THE INTERNET SPACE

**CORNELIA GORINCIOI**
*Moldova State University*
*Chişinău, Republic of Moldova*
*kornelia_78@yahoo.com*

**IULIAN MORARU**
*Moldova State University*
*Chişinău, Republic of Moldova*
*iulian.moraru94@gmail.com*

**VIOLETA COJOCARU**
*Moldova State University*
*Chişinău, Republic of Moldova*
*violetacojocaru@yahoo.fr*

**Abstract**
*The article approaches world trends of reorientation of TV and outdoor advertising towards Internet. However, in the process of on-line space occupation, unfair competitors continue to commit unfair competition acts, which are often manifested by inadequate advertising. At the same time, in the article there are elucidated the particularities of unfair competition acts identified in the on-line space, being presented as well the case law of the competition authority from Republic of Moldova. The article contains as well the argumentation of the necessity of the on-line advertising regulation, analyzing the existing law and presenting the data of the World Intellectual Property Organization (2004), which denote a numeric growth of cases of infringement of trademarks right holders in the on-line domain.*
**Keywords:** *advertising; unfair competition; on-line space; trademark; case.*
**JEL Classification:** K29

## 1. INTRODUCTION

Every year, the internet space is used more and more for the purpose of promoting goods and services. Thousands of companies try to attract the multimillionaire on-line public.

Thus, in the Western Europe the internet space has a medium marlet share of 34.9 % on the advertising market, registering a significant growth in the last 5 years (from 21 % in 2011). The highest market share detained by the digital market is registered in Great Britain – 52.7 % followed by Denmark – 50.8 %.

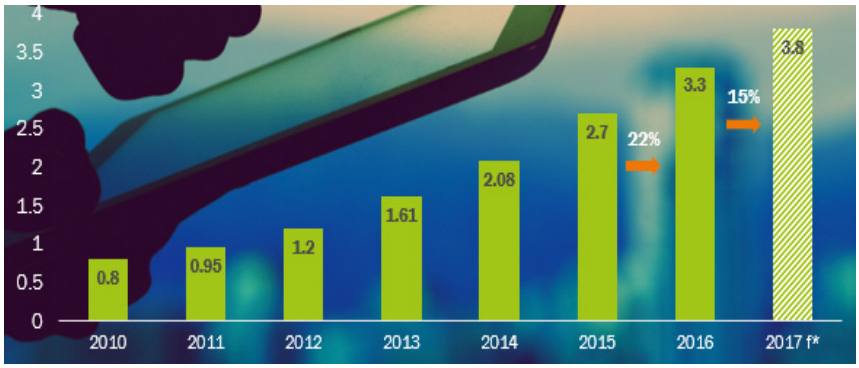
Countries from Middle and Eastern Europe have a lower market share, the highest one being registered in Russia (37.8 %), Poland (33.3 %) and Hungary (32.1%).

In Romania, the market share of the digital market is similar to the one of Moldova, representing 15 % of the advertising market, while in the Ukraine it raised to 27 %.

In Romania, in the last years, Internet advertising has risen by approximately 20 % each year. In the developed countries, the annual rise of the income from internet is considerably smaller (12 % in the Western Europe, 9 % in the North America), the digital advertising market being already mature and having a considerable market share on the advertising market.

The level of costs on the online advertising 2010-2017 (Figure 1), according to the data of the Association of Advertising Agencies from Moldova.

**Figure 1. Level of costs on the online advertising for 2010-2017**




Source: Association of Advertising Agencies from Moldova study

In the Republic of Moldova, as it happened in many other developing countries, the rise of budgets is motivated by the rise of Internet coverage and, at the same time, it is a result of the migration of audience from TV to Internet.

The segment of digital market, which encountered the biggest growth in the last year is represented by social networks, which have risen continously from 38 % internet users in 2013 to 48 % in 2017. The advertising by means of social networks offers the opportunity to get closer to the advertising consumer by applying certain criteria dealing with region, gender, age and preferences, a fact which represents a great advantage in comparison to other types of advertising.

Big advertising agents transfer the budgets from TV to the digital environment, this one being as profitable as TV advertising, for certain segments (mostly for youth) more profitable, the cost for a contact being smaller.

In the Republic of Moldova, the highest market share of advertising budgets is detained by the international provider Google – 33 % of the market.

Despite the success of the on-line advertising market, this domain is not sufficiently regulated. The market players, using the legislative gaps and tending to rise their sales begin to resort to unfair actions. In the on-line domain, the unfair competitors undertake such actions as: illegal use of other's trademarks in their own advertising, discrediting of the competitors and hijacking of clientele. These actions have been qualified as unfair competitions acts since signing the Paris Convention in 1883, in the redaction of 1900. Respectively, these actions can be found in national law of all the signatory countries of this Convention.

## 2. THE DISCREDITING OF THE COMPETITOR IN THE ON-LINE DOMAIN

According to the explanatory dictionary, to discredit means to cause to lose or to lose credit, consideration, other's trust, to compromise and it comes from the french word "discréditer". In literature (The explanatory dictionary of the Romanian language), "discrediting" is also called "disparagement". The law (Competition Law of the Republic of Moldova no. 183/2012) itself presents the word of discrediting as defamation, endangering of reputation or credibility. Defamation means the action of unjust telling something bad about someone, to tell false things about someone. Reputation is an opinion, a public appreciation, favorable or unfavorable about someone or something; the way in which somebody is known or appreciated; recognition, fame, celebrity.

The law no. 64 from 23rd of April 2010 concerning the freedom of expression operates with the word "defamation", defining it as the action of spreading false information that harms the honor, dignity and/or professional reputation of the person.

According to the opinion of the doctrinaire Octavian Căpățână, disparagement, as an unfair competition act, means the act which supposes the communication or spreading of deprecatory or comparative statements made be an interested person (the aggresive economic agent) against a competitor from the market, with the purpose of reducing it's reputation or discrediting it's undertaking or products (Căpățână, 1996). WIPO defines discrediting (disparagement) as a spread of any false information regarding the competitor which can affect its goodwill. As well as deception, discrediting tries to attract clients with false information. But unlike deception, this is not done by false statements about own product, but about the competitor, it's good or services. Therefore, discrediting always implies a direct attack on an undertaking, but its consequences overcome this objective. Considering that the information about the competitor or its products are false, the consumer is susceptible to suffer as well. According to the opinion of some authors, disparagement (discrediting) consists in affirmation or spread in any form, for a competition purpose, of data concerning another undertaking, susceptible of bringing a harm to its reputation (Eminescu, 1995). By disparagement is also understood the committing of an act, pointing to the good

reputation of a competitor, of its undertaking, products and/or services (Copețchi and Martin, 2015). The French legislation specifies that disparagement includes all the actions with the purpose of depreciation or discrediting of the industry, commerce or products of a certain competitor; disparagement can result as well from a simple comparison or from a simple hint (Cotuțuiu and Sabău, 2008).

In our opinion, by disparagement should be understood the unfair competition act of spreading false information, fact which endangers the activity of the competitor.

In the Republic of Moldova, discrediting can be realized in two ways, according to the provisions of art. 15 from Competition Law no. 183/2012:

- Indirectly – spreading by an undertaking of false information concerning its activity and/or it's products;
- Directly- spreading by an undertaking of false information concerning the activity and/or products of a competitor.

Both ways suppose an active and intentional conduct of spreading false information by the author of this act. The spreading consists of certain actions that imply the result of delivering to the public or to determined persons of some information. This action can be realized by means of advertising, methods, bearers and means of audiovisual communication and other types used for transmission of information.

As an eloquent example of indirect discrediting can be used unfair competition acts, qualified by Decision of Competition Council Plenary no. 49 from 22nd of October 2016. Thus, there was ascertained that 10 undertakings have spread false information (mostly by means of web pages, social networks or www.booking.com platform) concerning the services that they provide – they have assigned a majored number of stars to their accommodation unit and/or have given themselves the title of hotels. This fact was giving them advantage in relation to other competitors and has misled the consumers, hijacking the competitors in this way. At the same time, by these actions, the competitors have been discredited. By means of an arbitrary assigning to their structures a certain type (hotel, botel, motel, villa and/or a number of stars, there is produced a distortion in perception and distinction between these levels of classification. As a consequence, by effect of the comparison realized by consumers, it could be questioned the quality of services provided by the hotels of 4 authentic stars and not only of these.

Any distortion of this association affects the general image of the accommodation services provision market, such that the absence of certainty in the authenticity of the information spread concerning the accommodation structures can raise doubts concerning the level of classification and, respectively, concerning the quality of the services provided by them. As a consequence, there can be endangered the reputation and credibility of all the participants on this

market in face of both national and foreign consumers, fact which can affect the image of the Republic of Moldova on the international touristic arena.

In the practice of the national authority for competition, there have been investigated several cases of unfair competition actions, manifested by spread of denigrating information (direct discrediting) about the competitor. Thus, we specify the cases Bilargo, Student Travel and STM Acord.

In case of "Bilargo-Prim" Limited Liability Company, solved by Decision no. CN-07 from the 18th of February 2016, there has been placed in the internet space a video material by which is realized a comparison with the competing undertaking product concerning the content of polyurethane foam sold by Comarsini-Grup Limited Liability Company. The fals character couldn't be tested, reason from which the investigation has stopped and the action of the plaintiff have been qualified as dishonest advertising.

Speaking about Student Travel Limited Liability Company and STM Acord Limited Liability Company cases, solved by Decisions no. 24/17-77 from 25th of October 2018 and no. 25/17-78 from the same date, respectively, the information has been spread by the complained undertaking Center for American Exchange Programs Limited Liability Company as regards the activity of the first ones. The spreading of information has taken place by means of the web page administered by the complained. In case of Student Travel LLC, the investigation was stopped due to the fact that there was not found enough evidence in sense of determination of the false character of the statements of Center for American Exchange Programs LLC, and in the case of STM Acord LLC, the investigation was stopped because of the fact that the last one has retracted its complaint.

## 3. MISAPPROPRIATION OF CUSTOMERS IN INTERNET

Art. 18 from the Competition Law no. 183/2012 regulates the unfair competition act named "Misappropriation of competitor's customers". In this sense, it is mentioned the fact that the misappropriation of competitor's customers realized by undertakings by misleading the customers concerning the nature, mode and place of manufacture, the main characteristics, including use, the quantity of products, price or mode of calculation of the price is forbidden. This unfair competition act is regulated by the Romanian and Russian law as well, but with some differences.

***Romania***

According to the provisions of art. 2 par. (2), letter b) from the Law on combating unfair competition of Romania no. 11 from 29th of January 1991, there are forbidden the following unfair competition acts: b) misappropriation of customers of an undertaking by a former or a current employee/representative or by another person by use of certain trade secrets, for the protection of which this undertaking has taken reasonable measures and the disclosure of which can

affect the interests of that undertaking. Thus, we observe that the regulations of Republic of Moldova differ from those of Romania. The first indicator is the subject that misappropriates the customers: competing undertakings in Republic of Moldova and the employee or any other person in Romania. Decision no. 1430/2003 from the 6th of March 2003, the Supreme Court of Justice of Romania ascertained the misappropriation of customers in the following situation: the defendants, natural persons, have been employees of the society that was the plaintiff. Their main task was the distribution of abrasive products Hermes, but, starting with september 1999, they quitted and continued to sell the same products to the same beneficiaries, exploiting the commercial realations of the undertaking they have been employed at by misappropriating the customers. In this way, the fiscal value of the plaintiff has decreased in comparison to the one of the defendants, which has increased significantly. In the Republic of Moldova, such a qualification would be possbile if only there existed the factor of misleading the customer concerning the product, an error generated by the author of the misappropriation.

Analyzing the legal provisions of Romania discussed aboved , we can observe that a qualifying element of misappropriation of customers is the use of the trade secret. In case this element is not present, we can not talk about the misappropriation of customers. In the Republic of Moldova, the misappropriation of customers doesn't suppose the use of the trade secret, because there exists another separate unfair comoetition act – the illegal obtaining and/or use of the trade secret of the competitor. In the light of these specifications , we consider the national legal provisions more efficient than those from Romania, because in the Republic of Moldova, it is followed as well the purpose of consumer protection against erroneous information offered by undertakings. In Romania, the misappropiation of customers supposes as well the situation when the clients consciously and voluntary migrate from one undertaking to another having as a point of reference a certain employee who in spite of his/her personal and professional qualities can maintain a circle of consumers around him/her. In the Republic of Moldova, however, migration of the clientele is not a qualifying element of unfair competition, because of the fact that the consumers is free to decide the undertaking with which he/she establishes relations. Only the migration of the consumers from one competitor to another, as a consequence of misleading, can be qualifid as a misappropriation of the consumers.

***Russia***

Art. 14 par. (1) pt. 2) from the Law on the protection of competition from the Russian Federation no. 135-F3 from 26th of July 2006, regulates the action of misappropriation of consumers as it follows: the misleading regarding to nature, mode and place of production, consuming properties, quality and quantity of products or regarding to the producers of products. This ensemble of qualifying elements has a larger sphere of application, and, therefore, in

comparison to the regulations of Republic of Moldova and Romania, more actions of the subjects can be qualified as misappropriation of consumers, because of the fact that in Russian Federation there is not a established the necessity of existence or the possibility of occurrence of the effect of misappropriation of consumers which supposes the migration of consumers from one competitor to another.

The gravity of the misappropriation of consumers flows from the fact that the clientele to which the competitor addresses is affected. The use of methods of misappropriation of satisfied consumers denotes the incapacity of an economic subject to affirm itself on a certain market of products/services, to attract a certain segment of consumers, to be able to enjoy trust and loyalty from the client. These can not be obtained immediately, but only by a putting efforts a certain period of time. The legal obtaining of the clients and their trust can be realised only by a strong endeavor of the economic agent manifested by: quality and characteristics of the product/service, price, the way in which it is delivered to the public, advertising, pack, efficiency.

Competitions law doesn't define the notion of misappropriation of consumers. It only presents the methods of realisation of this unfair competition act. The notion of clientele includes the consumers as well. According to the provisions of art. 4 from the Competition law, the consumer is the direct or indirect user of products, inclusively a producer who uses products for processing, wholesaler, retailer or final consumer. At the same time, according to the provisions of art. 1 from Law on the protection of consumers no. 105 from 13th of March 2003, the consumers is any natural person who plans to order or to buy, or effectively orders, buys or uses products, services for necessities that don't deal with the entrepreneurial or professional acitivity. Highlighting these elements, we observe that Competition law provides a larger spectrum of subjects that can be consumers. In this way, both natural and legal persons can be consumers. The Law on the protections of consumers, however, restrains this spectrum only to natural persons. In this case, we consider necessary to retain the larger definition offered by the Competition law, because of the fact that it is specific to competition law.

A case of misappropriation of consumers by means of social networks and by on-line booking platforms has been recently investigated by Competition and Markets Authority from Great Britain. Thus, the mentioned authority has imposed provisional measures to those 6 platform that activate in the domain of on-line booking. These measures consists in: removal of all the unfair acts practised by these platforms: erroneous informations regarding to the number of places available in accomodation structures, regarding to the booking price and regarding to the quality of certain structures in comparison to other ones.

## 4. CONFUSION CREATION IN THE ON-LINE DOMAIN

According to the explanatory dictionnary of the romanian language (Romanian Academy, Institute of Linguistics "Iorgu Iordan", 2009), confusion (from the latin confusio) derives from the verb to confuse. The verb to confuse is explained as to consider a person or an object as other one, to resemble, to form one whole, to merge.

The regulation of confusion is very rigorous. Thus, any acts, made by any means, which are likely to create confusion and prejudice the legitimate interests of the owner, shall be prohibited. It is clear the legislator's intention to create a rule that is applicable to the present and the future, and the actions and means by which confusion can be created evolve rapidly, from simple advertising texts to the setting of certain online programs. In the light of the rule cited, it appears that confusion is a component of formal unfair competition. It is present from the moment of putting into practice actions that are likely to create confusion. In order to qualify as confusion, it is not necessary to produce certain concrete damages; it is sufficient that the action taken presupposes a confusion effect and may prejudice the legitimate interests of the holders of intellectual property. The detrimental consequences of confusion will be taken into account in setting the fine (Gorincioi and Creciun, 2016).

In the sense of Competition Law 183/2012, the act which which is susceptible to create confusion is punishable. In this context, it is necessary for the qualification only to be justified and to find that the competitor's actions are of such nature as they may create confusion. This finding is made by the Plenum of the Competition Council. Whether confusion has occurred or not can only be ascertained by questioning consumers of products that claim to be mistaken. The probation of confusion can be done both by the Competition Council and by the complainant. This finding, however, will have an impact not only on the qualification but on the amount of the sanction.

With regard to the qualification of the concept of "confusing facts" and those circumstances that are likely to create confusion, in practice, unobtrusive approaches are found.

According to the Competition Council Plenum Decision no. CN-16 of April 14, 2016, violated art. 19 par. (1) lit. a) of the Competition Law by the "Online Broker of Insurance" LLC as a result of the wholly and partly illegal, use of the "rapidasig" trademark owned by MGP Broker LLC, in advertising, through the online advertising program "AdWords" and the Google search engine. "Use of the "rapidasig "trademark by the "Online Broker de Asigurare" LLC is illegal, wholly and in part and is liable to create confusion with the "rapidasig" trademark lawfully used by the rightholder, "MGP Broker" LLC".

Another case of unfair competition in the online field was found by the Decision of the Plenum of the Competition Council no. CN-57 of 03.09.2015. The company "Eurolumina" LLC claimed that on 04.07.2014 it was found that

"Volta" LLC registered the domain name www.1000kv.md, which is similar to the trademark "1000kw centru comercial", the name of the shopping center "1000kw" and the name of the domain name www.1000kw.md, which he owns. As a result of the investigation, the competition authority established that "VOLTA" LLC, by creating the web page www.1000kv.md, partially used the trademark "1000kw centru comercial", creating confusion with the trademark registered and used legally by the company "EUROLUMINA" LLC. At the same time, "Eurolumina" LLC had a domain name similar to its own brand, namely: www.1000kw.md. As a consequence, there has been ascertained the violation of the provisions of art. 19 par. (1) letter. a) of the Competition Law by the company "Volta" LLC through the illegal use of the trademark "1000 KW shopping center", belonging to "Eurolumina" LLC, and imposed a fine in the amount of 905252.91 lei.

The decision was appealed to the Chisinau Court of Appeal, which dismissed civil action as groundless. The court held that the claimant puts forward contradictory arguments by claiming that the applicant complains of the wrongful act, alleging that the contested decision is unlawful in that regard, and, on the other hand, claims that the breach is minor and would not be sanctioned, also due to the low visitation of www.1000kv.md and the lack of evidence regarding the damage caused to the petitioner – a situation which indicates that the applicant himself admits committing a violation of the Competition Law imputed to him and for whom the sanction was applied. The decision of the Chisinau Court of Appeal remained irrevocable by unattainability. This leads us to the idea of an enterprising awareness of unfair behavior.

Another relevant case in this regard is the case of "Daybegin" LLC Thus, the last violation of the provisions of art. 19 par. (1) letter. a) of the Competition Law through the partial use of the domain name "www.babyboom.md", a trademark belonging to the company " Everything for children", used also as a domain name in the form www.baby-boom.md.

Thus, in the abovementioned cases ("Volta" Joint-Stock Company to "Daybegin" LLC), the so-called "squatting" phenomenon – the illegal capture of vacant spaces or territories – took place. In the domain name or trademark name, often notorious, a write-up is expected to be admitted.

From the point of view of the phenomenon of unfair competition, one of the greatest dangers is cyber-squatting (capturing domain names). The essence of this type of squatting is the registration of signs, phrases, etc., which are not currently registered as trademarks or domain names in a country, but are already objects of intellectual property in another country. The purpose of these actions is the subsequent sale of those intellectual property objects already registered as trademarks or domain names to the persons concerned. As a rule, interested persons are trademark or domain owners well-known in other states, or those

who categorically want to acquire a trademark or domain already registered for their business.

In 2016, trademark owners filed a record 3,036 applications for dispute settlement with the WIPO with the alleged bad faith through the Uniform Dispute Resolution Policy Uniform Domain Name Dispute Resolution Policy (UDRP), which represents a 10% increase over 2015 (Government of the Republic of Moldova, 2016). This phenomenon, known as cybersquatting, is due to the emergence of over 1200 generic top-level domains (gTLDs) operational at present.

In the process of investigating cases of breach of competition law, the competition authority faces a number of issues, such as: the failure to obtain information from external search engines (such as Google), often – the impossibility of identifying the person holding the page web site even on .md Domain Nowadays, the acquisition of domains in the Republic of Moldova can be done on-line, on the Moldata site, without the need to submit any information regarding the owner, be it a person physical or legal person.

## 5. CONCLUSIONS

The main purpose of unfair competition acts is to obtain the clientele, which is mostly captured through advertising campaigns. The low price per contact and the variety of creative concepts available result in the online advertising market.

More and more businesses are choosing the online environment to the detriment of the TV market and out of home. Thus, the on-line advertising market is continuously growing, both in terms of market access and in terms of financial amounts.

An important issue in the Moldovan Internet advertising market is the lack of verification of the content distributed through local websites, which creates the prerequisites for emerging competitive issues in the specific market.

Immediate adoption of the Advertising Law of the Republic of Moldova in the field of Internet advertising is necessary to protect and stimulate competition within the country.

Per a contrario, the lack of such regulation would contribute to the numerical increase of the cases of unfair competition identified in the Internet.

### References

1) Căpățînă, O. (1996). *Dreptul concurenței comerciale. Concurența neloială pe piața internă și internațională.* Bucharest: Lumina Lex, Publishing House.
2) Copețchi, S. and Martin, D. (2015). Discreditarea concurentului – formă de exprimare a infracțiunii de concurență neloială. *Revista Intellectus*, 4, pp. 15-20.
3) Cotuțuiu, A. and Sabău, G. (2008). *Drept român și comunitar al concurenței.* București: Ch. Beck Publishing House.

4) Decision of the Supreme Court of Justice of Romania no. 1430 from the 6th of March 2003.
5) Decision of the Plenum of the Competition Council no. CN-57 of 03.09.2015.
6) Decision of the Plenum of the Competition Council no. CN-07 of 18th of February 2016.
7) Decision of the Plenum of the Competition Council no. CN-16 of 14.04.2016. [online] Available at: https://competition.md/public/files/Decizia-Plenului-Consiliului-Concurentei-nr-CN-16-din-1404201651e75.pdf [Accessed 02.12.2017].
8) Decision of the Plenum of the Competition Council no. CN-49 of 22.10.2016. [online] Available at: https://competition.md/public/files/Decizia-CN-49-din-22102016neconfid7331f.pdf [Accessed 02.12.2017].
9) Decisions of the Plenum of the Competition Council no. 24/17-77 from 25th of October 2018 and no. 25/17-78/2018.
10) Eminescu Y. (1995). *Concurenţa neleală: drept român şi comparat.* Bucureşti: Lumina Lex Publishing House.
11) Gorincioi C. and Creciun I. (2016). Combaterea acțiunilor de concurență neloială în domeniul proprietății intelectuale. *Revista Intellectus*, 2, pp. 12-18.
12) Government of the Republic of Moldova, (2016). *Record de cazuri de cybersquatting înregistrate la OMPI în anul 2016.* [online] Available at: http://agepi.gov.md/ro/news/record-de-cazuri-de-cybersquatting-%C3%A Enregistrate-la-ompi-%C3%AEn-anul-2016 [Accessed 18.11.2017].
13) Law no. 11 from 29/1991 on combating unfair competition of Romania.
14) Law no. 105 from 13th of March 2003 on the protection of consumers.
15) Law no. 135-F3 from 26th of July 2006 on the protection of competition from the Russian Federation.
16) Law no. 64 /2010 on the freedom of expression.
17) Law no. 183/2012 on Competition.
18) Romanian Academy, Institute of Linguistics "Iorgu Iordan", (2009). *Dicționarul explicativ al limbii române*. Univers Enciclopedic Gold Publishing House. [online] Available at: www.dexonline.ro [Accessed 28.08.2017].
19) World Intellectual Property Organization, (2004). *WIPO Intellectual Property Handbook.* 2nd ed. WIPO Publishing House. [online] Available at: http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf [Accessed 18.11.2017].