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THE OBJECTIVE SIDE OF THE CRIME OF UNFAIR COMPETITION: THEORETICAL AND PRACTICAL ASPECTS

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Ursu V., Mustața E. The objective side of the crime of unfair competition: theoretical and practical aspects.

Market relations assume the coordinated operation of three basic mechanisms: competition, supply and demand, and prices that set the entire economic system in motion. Economic agents are forced to enter into competitive relations with each other, but economic entities are not always conscientious and honest, respecting the rights and interests of both bona fide competitors and operating according to honest customs, as well as the clientele/consumers. Protection against unfair competition stands out as an independent legal institution that deserves a detailed study due to its importance for the development of competition and business relations. The Moldovan legislator adopted a series of normative acts aimed at regulating the legal relations that arise between the subjects of economic activity in the process of carrying out this activity, including, to ensure their normal realization, the protection of fair competition, the rights and interests of competitors and citizens. For the violation of the "rules of the game", state reaction measures are provided by establishing legal liability, including criminal. A good understanding of the essence and legal nature of the crime of unfair competition provides us with the legal-criminal analysis of the composition of the crime provided for in art. 246¹ of the Criminal Code.

The article is dedicated to the analysis of the objective side of the crime of unfair competition, the authors focusing on the theoretical and practical aspects of this constitutive element of the crime.

Based on the provisions of art. 246¹ of the Criminal Code, the authors undertook a study of the five normative methods under which the crime of unfair competition is presented, relating them

to the methods provided for in Law no. 183/2012 on competition, but also to the provisions of the Paris Convention for the protection of intellectual property, thus trying to highlight the factual manifestations of the analyzed crime, including elucidating the nature and legal essence of these modalities.

The study undertaken allowed the authors to draw certain conclusions which, in turn, suggested certain ideas of legislative proposals that would improve the quality of the legal-penal norm contained in art. 246¹ of the Criminal Code of the Republic of Moldova.

Key words: unfair competition, confusion, misleading consumers, discrediting the enterprise, the act of unfair competition, competitor, consumer, clientele, diversion of clientele.

Урсу В., Мустяца Е. Об'єктивна сторона злочину щодо недобросовісної конкуренції: теоретичні та практичні аспекти.

Ринкові відносини передбачають злагоджену роботу трьох основних механізмів: конкуренції, попиту та пропозиції та цін, які приводять у рух всю економічну систему. Суб'єкти господарювання змушені вступати між собою в конкурентні відносини, але суб'єкти господарювання не завжди є сумлінними та чесними, поважаючи права та інтереси як сумлінних конкурентів і діючи за чесними звичаями, так і клієнтури/споживачів. Захист від недобросовісної конкуренції виділяється як самостійний правовий інститут, який заслуговує на детальне дослідження через його значення для розвитку конкуренції та ділових відносин. Законодавець Молдови прийняв низку нормативних актів, спрямованих на регулювання правовідносин, що виникають між суб'єктами господарської діяльності в процесі здійснення цієї діяльності, у тому числі щодо забезпечення їх нормальної діяльності,

захисту добросовісної конкуренції, прав та інтересів конкурентів і громадян. За порушення «правил гри» передбачені заходи державного реагування шляхом встановлення юридичної відповідальності, в тому числі кримінальної. Добре зрозуміти сутність та правову природу злочину недобросовісної конкуренції дає право-кримінальний аналіз складу злочину, передбаченого ст. 246¹ КК.

Стаття присвячена аналізу об'єктивної сторони складу злочину недобросовісної конкуренції, автори зосередили увагу на теоретичних і практичних аспектах цього складу злочину.

Спираючись на положення статті 246¹ Кримінального кодексу, автори провели дослідження п'яти нормативних методів, за якими представлено злочин недобросовісної конкуренції, пов'язуючи їх із методами, передбаченими в Законі № 183/20212 про конкуренцію, а й до положень Паризької конвенції про захист інтелектуальної власності, таким чином намагаючись висвітлити фактичні прояви аналізованого злочину, у тому числі з'ясувати природу та правову сутність цих модальностей.

Проведене дослідження дозволило авторам зробити певні висновки, які, у свою чергу, запропонували певні ідеї законодавчих пропозицій, які б покращили якість кримінально-правової норми, що міститься у статті 246¹ Кримінального кодексу Республіки Молдова.

Ключові слова: недобросовісна конкуренція, плутанина, введення споживачів в оману, дискредитація підприємства, акт недобросовісної конкуренції, конкурент, споживач, клієнтура, відведення клієнтури.

Introduction. The subjects of the economic activity, whether they are natural persons or legal persons, are obliged to exercise their activity in good faith, according to honest usages, respecting the interests of consumers and the requirements of fair competition.

Based on the principles of freedom of trade and freedom of competition, any merchant has the right to attract the customers of its competitors. Thus, the act of competition, even if it causes damage to some economic agents, is not illegal by itself, but only if the means, acts, or facts used to attract customers are unfair.

Starting from these provisions, the local legislator instituted liability and criminal punishment for the act of unfair competition by formulating the provision of art. 246¹ of the Criminal Code of the Republic of Moldova.

For an appropriation of the legal essence of the act provided for in art. 246¹ of the Criminal Code of the Republic of Moldova, the criminal doctrine elaborated the notion of the composition of the crime by legislating it in art. 50 of the Criminal

Code and offers the juridical-criminal analysis of the composition of the crime within which the characterization of the constitutive elements of the crime, namely, the object, the objective side, the subjective side, and the subject of the crime.

The **purpose** of our analysis is to achieve a characterization of the objective side of the offense provided for in art. 246¹ of the Criminal Code as the main element, in our opinion, of the composition of the given crime.

As can be deduced from the provisions of art. 246¹, the objective side of the offense of unfair competition consists of the prejudicial act that is expressed through action.

This action knows, among others, the following five alternative normative ways:

a) creating, by any means, confusion with the enterprise, with the products, or with the industrial or commercial activity of a competitor.

b) spreading, in the trade process, false statements that discredit the enterprise, products or entrepreneurial activity of a competitor.

c) misleading the consumer regarding the nature, manufacturing method, characteristics, suitability for use or quantity of the competitor's goods;

d) using the company name or trademark in a manner that causes confusion with those used legitimately by another economic agent.

e) comparing for advertising purposes the goods produced or sold by an economic agent with the goods of other economic agents.

Next, we propose to carry out a characterization of the ways of committing the act of unfair competition in the variants formulated by the legislator in art. 246¹.

To achieve the proposed goal, we will use a research strategy consisting of the tools provided by the scientific research methodology, using the following scientific methods: logical, comparative, interpretative, etc.

Basic content and discussions. It is imperative to mention that the legislator adopted, through the criminal law, an open system of counteracting, by way of criminal liability, unfair competition. Thus, the Criminal Code, in art. 246¹, criminalizes "**any act of unfair competition**".

Through the introduction by the Moldovan legislator in art. 246¹ of the phrase "any act of unfair competition, including" leaves room for interpretations, and we consider, along with other local authors, that the methods specified in letters a) – e) of this article are brought as an example, and that apart from these methods, there are others, namely those provided by the Competition Law that fulfill the list of methods of the prejudicial act specified in art. 246¹ of the Criminal Code. [1. Page 172]

At the same time, once certain factual ways by which unfair competition could be committed

(for example, through actions described in the competition law) are not expressly provided for in the provision of the rule from art. 246¹ of the Criminal Code, whatever these may be, they will never fall under the criminal law, and as a result, they will not incur liability and criminal punishment, the sanctioning of these actions being provided for in the competition law.

Therefore, we consider it appropriate to recommend the reformulation of the provision of art. 246¹ CP by excluding the phrase "Any act of unfair competition, including", mentioning only that "unfair competition committed through one of the following actions: ", after which the modalities provided for in the provision will be listed (either in the current wording, or by completing with others, for example from those provided in the competition law). In this way, we will give the rule greater clarity and predictability.

From the wording of the text of art. 246¹, it shows that a single offense was regulated with five alternative normative methods. Five offenses were not regulated (one for each of the five letters of the text). This is because in the text of the criminal law, the term *act* is used in the singular – "act", not in the plural – "acts". The legislator's deficiency consists in the fact that in the sanction from art. 246 Criminal Code RM should have used the words "punishes", not "punish", because the crime as a whole is punished, not its methods. [2, page 26]

In this sense, we submit the proposal to the Moldovan legislator to remedy this gap, by replacing the phrase "they are punished" with the phrase "they are punished". Moreover, the criminal law of the Republic of Moldova knows similar situations, the legislator not being consistent in such cases.

At the same time, we consider doubtful the position of the Moldovan legislator to criminalize any act of unfair competition in the situation where it has not even defined in the criminal law the meaning of unfair competition and the concrete indicators that a behavior must accumulate in order to be qualified as a crime of unfair competition.

Given that the Criminal Code criminalizes the most prejudicial acts, respectively, the criminal law must have perfect clarity for all the elements of the composition of the crime in the case of the rules from the special part of the criminal law, to be able to correctly classify the acts that would constitute unfair competition offenses.

Thus, we believe that it would be appropriate for the legislator to define unfair competition, taking into account the definition in art. 4 of the Competition Law, as well as in the spirit of the criminal law.

Corroborating the provisions of art. 246¹ of the Criminal Code with the provisions of art. 15–19 of

the Competition Law, we note that practically all the methods of the offense of unfair competition are contained in the Competition Law (or vice versa, the criminal legislator being inspired by the text of the competition law), except for one of them. The exception is contained in art. 246¹ lit. e) from the Criminal Code, which criminalizes as an act of unfair competition "the comparison for advertising purposes of the goods produced or sold by an economic agent with the goods of other economic agents". Such an unfair competition action is not regulated by the Competition Law. In certain situations, this could be included in the act of defamation provided for in art. 15 of the Competition Law, but only in the situation when in the process of comparing the goods or as a result of the comparison, false information is spread. [1, page 174]

Considering how the provision of art. 246¹ of the Criminal Code is formulated, in other words, the objective side of the crime of unfair competition, it should be mentioned that this crime is a formal crime, which assumes that it is considered to be consumed from the moment of committing the prejudicial action provided for in art. 246¹ of the Criminal Code of the Republic of Moldova, in one of the five ways described by the legislator. For the existence of the crime, it is sufficient to establish that the subject has committed one of the actions listed in the provision of the article, it is not necessary to establish any damages caused to bona fide competitors or consumers (however, it is obvious that both bona fide competitors who practice activity under customs suffer, as well as consumers who are deceived, misled, or confusion is created, etc.). The prejudicial degree of the crime analyzed resides in the very manner in which the unfair competitor operates on the market.

We conclude that the objective side of the offense is specified in art. 246¹ of the Criminal Code consists of the prejudicial act expressed in the action, as the native criminalist V. Stati also opines. [3, page 436]

To analyze the techniques and procedures for manifesting unfair competition, we will subject to analysis, the ways of committing the crime of unfair competition that are exhaustively listed by the legislator in art. 246¹ of the Criminal Code.

The first method of unfair competition is provided for in letter a) art. 246¹ Criminal Code of the Republic of Moldova, is expressed in *the creation, by any means, of confusion with the enterprise, with the products or with the industrial or commercial activity of a competitor*. We can observe that this modality has its counterpart in the one from subpt. 1) point 3 art. 10 of the Paris Convention for the protection of industrial property. It has no direct correspondent in the acts of unfair competition, specified in the Competition Law. [2, page 27]

This method of committing the offense of unfair competition involves the use of an invention, geographical indications, designations of origin, guaranteed traditional specialties, a utility model, drawing or industrial model, a topography of the integral circuit, another means of individualization of the products or the person of the perpetrator in a way that confuses with those used legitimately by another economic agent, as a victim of the crime

But there is still a difference between the methods provided for in letters a) and d) of art. 246¹ of the Criminal Code of the Republic of Moldova: in the case of the method specified in letter d) art. 246¹ of the Criminal Code of the Republic of Moldova, confusing is the purpose pursued by the perpetrator; in opposition, in the case of the modality provided for in letter a) art. 246¹ of the Criminal Code of the Republic of Moldova, the confusion must have materialized, it must be created in the process of committing the crime. Apart from this, the object of direct criminal influence differs: the enterprise, the products or the industrial or commercial activity of the victim, entities with which confusion is created (in the case of the modality recorded in letter a) art. 246¹ CP of the Republic of Moldova); the name of the company or trade mark, used by the perpetrator in a way that confuses with the one used legitimately by the victim (in the case of the modality specified in letter d) art. 246¹ of the Criminal Code of the Republic of Moldova).

At lit. a) of art. 246¹ CP RM the legislator uses the phrase "by any means". We consider any objects of the industrial property belonging to the perpetrator, likely to create confusion, in such a way as to create the impression that they designate the enterprise, products or industrial or commercial activity of the victim. As such objects of industrial property, we understand, as mentioned in the text above: inventions, designations of origin, geographical indications, utility models, guaranteed traditional specialties, industrial designs or models, topographies of integrated circuits, new plant varieties, etc. It is through such means that confusion is created within the meaning of the regulation from letter a) art. 246¹ HP RM.

In the criminal doctrine, "confusion" means any act by which a trader uses a company, an emblem, a special designation or a packaging in such a way as to create the belief that the activity is carried out by the legitimate owner of the company, emblem, special designation or the respective packaging, without this corresponding to reality. [4, pg. 29]

Paraphrasing and adapting this definition to the rigors of the provision from letter a) art. 246¹ of the Criminal Code of the Republic of Moldova, we can mention that "confusion" must be understood as the use by the perpetrator of an object of

industrial property (except for the company name and the trademark) of such a nature as to create the belief that the activity is carried out by the victim economic agent, that is, the legitimate owner of that object of industrial property, without this corresponding to reality. [2, page 28]

Therefore, the first method of committing the crime of unfair competition, stipulated in letter a), is embodied in the use of an invention, geographical indication, appellation of origin, guaranteed traditional specialty, a utility model, design or industrial model, a means of individualizing the products or the person of the perpetrator in a manner that produces confusion with those used legitimately by another economic agent, as a victim of the crime. [3, page 437]

The second method of unfair competition, provided for in letter b) art. 246¹ of the Criminal Code of the Republic of Moldova involves *spreading, in the course of trade, false statements that discredit a competitor's company, products or entrepreneurial activity.*

From the start we can mention that this modality is similar to the unfair competition modality specified in subsection 2) point 3 art. 10 of the Paris Convention for the Protection of Unfair Competition. At the same time, this modality is similar to the norm provided for in art. 15 of the Competition Law, according to which: "*It is forbidden to discredit competitors, i.e. to defame or endanger their reputation or credibility by:*

a) *the spreading by an enterprise of false information about its activity, about its products, intended to create a favorable situation for it in relation to some competitors;*

b) *the spreading by an enterprise of false statements about the activity of a competitor or about its products, statements that harm the activity of the competitor."*

We note that the article cited above provides a detailed description of how competitors can be discredited.

From the provision from letter b) art. 246¹ of the Criminal Code of the Republic of Moldova, we deduce that to qualify an act as a crime of unfair competition in the manner examined, it is necessary to fulfill the following conditions:

a) there is a discredit contained in the message spreading false statements;

b) the spread of false statements to be made in the process of trade;

c) the target of discrediting is the enterprise, products or entrepreneurial activity of a competitor.

To analyze the first condition, it is necessary to clarify the term "discredit". According to the explanatory dictionary of the Romanian language, discredit means: the action of discrediting, loss of reputation, loss of influence, consideration, defamation, or compromise [14].

In the specialized literature it is shown that discrediting is done through the following statements:

- statements that harm the victim's honor, commercial reputation or economic situation (that the opponent uses dubious business methods, that he can no longer honor his commitments, that he is on the verge of bankruptcy, etc.);
- statements that present the competing company as carrying out a dangerous activity and that its products are capable of causing serious accidents;
- statements that dispute any professional aptitude of a competitor;
- statements regarding the religion or race of the competitor or its consumers, etc. [5, page 284].

The statements given must be false, that is, they have no real content, and their author is aware that they do not correspond to reality. Likewise, the statements must be "meant to", that is, they must be made to obtain a certain result: the creation of a favorable situation, to the detriment of the competitor. Under this aspect, V. Stati is right when he states: "Discrediting the enterprise, products or entrepreneurial activity of a competitor can have the following harmful effects: the disruption of certain management processes and traditions, of relations with business partners; disorganization of the structure, of the organizational climate, of strategic planning; diverting from the intended goals and tasks; reducing investment attractiveness, etc." [6, page 29]

Discredit must be distinguished from criticism. In this plan, criticism is allowed if it is objective and neutral and if it is not done to promote the interests of the perpetrator at the expense of the interests of the criticized competitor.

In another respect, discrediting must be distinguished from information, as an expression of the right to information, provided by art. 34 of the Constitution.

We will take the example given by Sorin Timofei, according to which: the information must be objective, to ensure the transparency of the market. Information is mainly provided in the form of commodity testing. In order not to be assimilated to discredit, the testing of goods must be done by independent, impartial, highly qualified experts. And the published methods and results must be accurate. [2, page 29]

The second condition, necessary for meeting the composition of the offense of unfair competition in the manner specified in letter b) art. 246¹, resides in the fact that the spread of false statements is made in the course of trade.

Referring to trade activity, this is explained by the Law on internal trade, no. 231 of 23.09.2010 [7], where in art. 3 we also find the notion of trade activity: *trader activity based on one or more forms of trade,*

exercised separately or combined, participating in the commercial circuit, through commercial units, including by providing complementary commercial services.

Thus, only within a commercial activity is it possible to commit unfair competition in the manner analyzed.

The third condition, necessary to restrain the unfair competition in the manner recorded in letter b) art. 246¹ of the Criminal Code of the Republic of Moldova, assumes that the target of discrediting is the enterprise, products or entrepreneurial activity of a competitor.

As for the discrediting of the enterprise, its designation doesn't need to be expressed. It can be implicit, but sufficiently clear and transparent. In this sense, the Romanian doctrinaire E. Mihai presents the following example: during the period when there was only one company that manufactured front-wheel drive cars, it was considered that another car manufacturer had discredited it, without naming it, attracting potential buyers' attention to the danger of this type of traction [5, page 284].

Most of the time, the discrediting of the company is inseparable from the discrediting of its products and/or the entrepreneurial activity of the competitor. In the given hypothesis, the data used for discrediting refers to the professional training of the staff, the managerial capacity of the company's management, the material situation of the company, its reputation in the business environment, the quality of the company's products, etc. In all these cases, it is necessary to be able to identify the victim of the crime using the enterprise, the products or the entrepreneurial activity that is being discredited. A discredit of a general nature, addressed to economic agents who cannot be identified, has no relevance in terms of the application of liability based on letter b) art. 246¹ HP RM.

At the same time, it is required that this information, i.e. the message through which the discredit is brought, be brought to the attention of the general public, this public being in fact the consumers, either the existing ones or the potential ones, through the use of mass communication means, such as television, radio, print media, newspapers, internet, street advertisements and other information distribution channels.

The discredited message can be received by an unlimited number of consumers. But, it is enough to be addressed to a single person, having the quality of a consumer. It will not be possible to apply the liability based on letter b) art. 246¹ CP RM, if the message is addressed to persons who do not have this quality, for example, when an economic agent addresses it only to sellers in its own distribution network [2, page 30-31]/

In another context, **the third method** of unfair competition, specified in letter c) art. 246¹ Criminal

Code of the Republic of Moldova, namely, *misleading the consumer regarding the nature, manufacturing method, characteristics, suitability for use or quantity of the competitor's goods*.

This modality shows affinities with the one provided for in subsection 3) point 3 art.10 of the Paris Convention for the protection of industrial property.

At the same time, we see obvious similarities with the provisions of art. 18 of the Competition Law, which regulates the diversion of the competitor's clientele. According to this article: *"it is prohibited to divert the competitor's clientele by enterprises by misleading the consumer regarding the nature, method and place of manufacture, the main characteristics, including the use, the quantity of the products, the price or the method of calculating the price of the product."*

It should be mentioned that, before the entry into force of art. 246¹, art. 255 was applicable in the case of misleading the consumer regarding the nature, the manufacturing method, the characteristics, the suitability for use or the quantity of the competitor's goods. In that situation, the following assertion was valid: "Art. 255 "Deceiving customers" of the Criminal Code can be applied in the case of misleading regarding the consumer qualities and the quality of the goods sold; thus, the client (aka the consumer) is not informed (although it can and must be communicated) that a product with other consumer qualities or a different quality compared to consumer qualities or the quality that are inherent in the traded goods". Moreover, not only misleading the buyer regarding the consumer properties or the quality of the goods qualifies according to art. 255 Criminal Code of the RM. By extrapolation, the same qualification operated in the hypothesis of misleading the buyer regarding the character, manner and place of manufacture, the utility of consumption, and the quantity of the goods. The misrepresentation needed to involve causing damage in essential or considerable proportions (According to the criminal law in force, it is required to cause damage in large proportions) [2, page 31].

The current version of art. 255 of the Criminal Code criminalizes only the deception of customers in the part related to prices, and tariffs.

The means of misleading the consumer can be very varied, depending on the characteristics of the perpetrator. The ability of a means to mislead the consumer depends on the concrete circumstances in which it is used, as well as on the particularities of the consumers. In any case, to qualify the act based on letter c) art. 246¹ of the Criminal Code of the Republic of Moldova, it is enough to mislead a single consumer.

The object of misleading the consumer must be represented by nothing else than the nature, the manufacturing method, the characteristics, the suitability for use or the quantity of the competitor's

goods.

Referring to **the fourth** method of unfair competition, which is provided for in letter d) art. 246¹ of the Criminal Code of the Republic of Moldova, this involves *the use of the company name or trademark in a manner that confuses with those used legitimately by another economic agent*.

We have not identified a prototype of this modality in point 3 art. 10 of the Paris Convention for the protection of industrial property, instead, this form of committing the crime of unfair competition is analogous to the provisions of art. 19 of the Competition Law, according to which: *"any actions or facts are prohibited that are likely to create, by any means, a confusion with the enterprise, products or economic activity of a competitor, carried out by:*

a) *the illegal, full or partial use of a trademark, service emblems, company names, an industrial design or model or other objects of industrial property likely to create confusion with those used legally by another enterprise;*

b) *illegal copying of the shape, packaging and/or external appearance of a company's product and placing the respective product on the market, illegal copying of a company's advertising, if this has or may harm the legitimate interests of the competitor"*.

First of all, the method specified in letter d) art. 246¹ of the Criminal Code of the Republic of Moldova requires the use of the company name or trademark. In this sense, it is useful to reproduce the following definition from the specialized literature: "use" means the use, the fraudulent use of an identification element of a product that belongs to or is marketed by another trader under the law [8, page 560].

As for the use of the company name, it is considered its use in the documents, invoices or announcements emanating from the economic agent, in advertising or prospectuses, on the trucks that deliver the goods, etc. The reproduction of the company name can be complete or partial. If the reproduction of the company name is partial, then it is mandatory to reproduce the essential part of the company name.

We will subject to analysis the Decision of the Plenary of the Competition Council no. CN-56 of 02.11.2017, which was based on the complaint of the enterprise "Sevex-Prim" SRL, regarding the alleged actions of unfair competition, carried out by the enterprise "Buelo" LLC, in a form that indicates signs of violation of the provisions of art. 19 para. (1) lit. a) and lit. b) from the Competition Law. The actions of unfair competition carried out by the enterprise "Buelo" LCC are manifested by the fact of the partial illegal use of the trademark with no. 17829, copying the packaging and placing on the market corn stick products, likely to create confusion with the plaintiff's products, as can be seen in the images below.



In fact, the company "Buelo" SRL copied the packaging of the corn stick products "CRISTINUȚA" and "CRISTINEL" for its corn stick products "SĂNDUȚA" and "SÂNDEL", and placed these products on the market. In this case, the Competition Council found a violation of the provisions of art. 19 para. (1) lit. a) and lit. b) from the Competition Law no. 183 of July 11, 2012 by "Buelo" LLC, namely: "the company "Buelo" LLC took actions likely to create confusion with "Sevex-Prim" LLC, with its products and economic activity by partially illegally copying the packaging for the product "CRISTINUȚA", "CRISTINEL" corn sticks for the products "SĂNDUȚA", "SÂNDEL" and placing them on the market, these actions being able to harm the legitimate interests of the plaintiff" [9].

Regarding the use of the trademark, in the specialized literature it is claimed that it refers to "the application of the trademark on products, on packaging and/or as packaging, in advertising, in printed matter, on official blankets, companies, on the exhibits of exhibitions and fairs". However, through the lens of the corresponding regulations, the notion of "use of the trademark" has a more nuanced meaning. Thus, from para. (2) art. 9 of the Law on the Protection of Trademarks, it follows that the analyzed notion presupposes two assumptions:

1) application of the brand on products or packaging, its use as packaging in the case of three-dimensional brands;

2) use of the brand on business documents and in advertising. [2, page 32]

Both of these hypotheses refer to the following case from domestic practice initiated at the request submitted by the economic agent "Aquaphor" from the Russian Federation, the case was investigated under the aspect of committing unfair competition by the economic agent "Licaon-Lux" from the Republic of Moldova, through unauthorized use of the registered trademark and company name "Aquaphor" on the packaging of its products, as well as on the WEB page. As a result of the examination of the respective case, it was established that the economic agents "Aquaphor" and "Licaon-Lux" are competitors on the market of removable cartridges for water purification filters. In order to market its products, the economic agent "Licaon-Lux" uses its own packaging, different from that of the competitor. At the same time, the

name "Aquaphor" is applied to the packaging in question, to indicate that the cartridges produced by "Licaon-Lux" are compatible with the filters produced by "Aquaphor". As a result of the analysis of the case, the Administrative Council of the ANPC (currently the Plenary of the Competition Council) decided: the use of company names and brands on products of the nature of being removable parts, in order to indicate the destination of the respective parts, their compatibility with the basic products, not can be qualified as acts of unfair competition.[10]

From the mentioned it appears that, for the attestation of unfair competition in the manner specified in letter d) art. 246¹ CP RM, it is not enough to use a company name or a trademark. It is also necessary to fulfill another condition: the respective use must be in a manner that confuses with those used by another economic agent.

The immaterial object of the unfair competition offense can also be deduced from this.

In the context of the procedure provided for in letter d), the provisions of art. 25 point 1 lit. a) of the Law on Entrepreneurship and Enterprises, no. 845 from 03.01.1992 [11], which regulates that *the company cannot use the company name that: coincides or, as the state registration body finds, resembles the company name of another company, which is already registered.*

The fifth way of committing the criminal act of unfair competition counts in: *comparing for advertising purposes the goods produced or sold by an economic agent with the goods of other economic agents.*

There is no counterpart of this method among the methods specified in point 3 art. 10 of the Paris Convention for the protection of industrial property, just as we have not identified an analog in the Competition Law either.

In the opinion of E. Cojocari, the basic principles of advertising activity are: the principle of loyalty, honesty, authenticity and decency of advertising; the principle of using forms, methods and means that do not cause spiritual, moral or psychological damage to advertising consumers; the principle of fair competition; the principle of responsibility towards consumers, society and the state [12, page 45–55].

Thus, we consider that the principles enunciated above are violated in the manner of committing the crime of unfair competition provided for in

letter e) of art. 246¹ of the Criminal Code of the Republic of Moldova.

It is relevant to mention here the provisions of art. 9, paragraph (1) letter b) of the Law on advertising, no. 1227 of 27.06.1997 [13], which regulates that dishonest advertising "*contains incorrect comparisons of the advertised goods with similar goods of another economic agent, as well as statements or images that harm the honor, dignity or professional reputation of the competitor or the reputation professional of the competitor*"

Comparative advertising, as an expression of unfair competition in the manner specified in letter e) art. 246¹ of the Criminal Code of the Republic of Moldova, always involves a comparison of: the prices of competitors' goods; the quality of competitors' goods; of the form of distribution of competitors' goods; of after-sales services offered by competitors, etc.

Apart from the ways of committing the crime of unfair competition expressly provided for in letter a) – e) art. 246¹, others complete the content of the prejudicial act provided for in art. 246¹, these being the modalities provided in art. 16 and art. 17 of the Competition Law.

Thus, according to art. 16 of the Competition Law: " it is prohibited to instigate, in the interest or in the interest of third parties, the unjustified termination of the contract with the competitor of another company, the failure to fulfill or the improper fulfillment of the contractual obligations towards the respective competitor by granting or offering, mediated or directly, of material rewards, compensations or other advantages to the company party to the contract."

According to art. 17 of the Competition Law, it prohibits *the obtaining and/or use by an enterprise of the information that constitutes the competitor's trade secret, without his consent, if they have brought or may harm the legitimate interests of the competitor*. These facts are criminalized under art. 245¹⁰ of the Criminal Code RM. Art. 107 para. (1) of the Contravention Code provides for liability for obtaining without the owner's consent the information that constitutes a trade secret for the purpose of their illegal disclosure or use.

Therefore, as the criminalist V. Stati mentions, in the situation of obtaining and/or using by an enterprise the information that constitutes the competitor's trade secret, without his consent, if they have brought or may harm the competitor's legitimate interests, art. 246¹ can be applied only if neither art. 245¹⁰, nor para. (1) art. 107 or para. (5) art. 304² of the Criminal Code.

In conclusion, 1) the legislation in the field of competition was inspired by the provisions of the international acts to which the Republic of Moldova is a party, thus the Moldovan legislator connected the national domestic legislation to the

international legislation pursuing several goals, among which:

- First of all, to ensure compliance with the constitutional principles that govern the conduct of economic activity under the conditions of the market economy;

- Secondly, to ensure the protection of fair competition in its capacity as an instrument or means of increasing economic efficiency and development of the national economy. In this context, the legislator adopted both competition legislation and instituted legal liability, including criminal liability, for acts that threaten the development and promotion of fair competition in the economic activity of economic subjects, the rights of bona fide competitors and consumers.

2) The analysis of the provisions of art. 246¹ and the provisions of art. 15–19 of the competition law, it is easy to deduce that practically all the normative ways of the crime of unfair competition are contained in the competition law, except for the provision from letter e) art. 246¹, most of the normative modalities having correspondence with the provisions of the Paris Convention for the protection of industrial property. And vice versa, certain provisions of the aforementioned Convention were not reflected in the competition legislation of the Republic of Moldova.

3) Another conclusion drawn is the one regarding confusion: the production/creation of confusion constitutes the purpose pursued by the perpetrator in the case of the modality from letter d) art. 246¹ CP (**creating, by any means, confusion with the enterprise, with the products or with the industrial or commercial activity of a competitor**), while, in the case of letter a) art. 246¹ of the Criminal Code - confusion is created in the process of committing the crime (**use of the company name or trademark in a way that confuses with those used legitimately by another economic agent**).

4) The offense of unfair competition targets both natural persons (consumers/customers) and legal persons (economic agents: producers, traders, etc.) as passive subjects.

The general conclusion that emerges from our analysis is that the norm from art. 246¹ of the Criminal Code of the Republic of Moldova is not without some shortcomings such as the clarity of the norm, predictability, the lack of consistency of the legislator in terms of the use of terms and expressions (to which I have drawn the attention in the text above), as well as the need to operate some legislative changes and adjustments.

Certain proposals in the sense of reshaping the created situation will be the subject of further research. Using the company name or trademark in a manner that confuses with those used legitimately by another economic agent.

REFERENCE:

1. Gorincioi Cornelia, Research on legal instruments to counteract acts of unfair competition, (doctoral thesis in law, CZU: 347.776 (043.3)), http://www.cnaa.md/files/theses/2019/54682/cornelia_gorincioi_thesis.pdf.
2. Timofei Sorin, The objective side of the crime of unfair competition, in: Revista națională de drept, no. 2, from 2011, https://ibn.idsi.md/sites/default/files/imag_file/Latura%20obiectiva%20a%20infractiunii%20de%20concurenta%20neloiala.pdf.
3. Vital Statistics, Economic Crimes, Course Notes, Second Edition, Chisinau 2016, CEP USM.
4. Ungureanu, A. Ciopraga. Penal provisions from special Romanian laws. Vol.II. Lumina Lex, Bucharest 1996.
5. E. Mihai. Competition law. – Bucharest: ALL Beck, 2004.
6. V. Stati, Criminal liability for the crime of unfair competition (art. 246¹ Penal Code of the Republic of Moldova) in: National Law Review, 2008, no. 12, https://ibn.idsi.md/sites/default/files/imag_file/29-38_10.pdf.
7. Law on internal trade, no. 231 of 23.09.2010, Published in the Official Gazette of the Republic of Moldova No. 230–237, from 01-10-2021.
8. Al. Boroi, M. Gorunescu, M. Popescu. Dictionary of criminal law. – Bucharest: ALL Beck, 2004, p. 560.
9. Decision of the Plenary of the Competition Council no. CN-56 of 02.11.2017, available online: <https://competition.md/public/files/Decizia-CN-56-din-02112017-neconfid5c221.pdf>.
10. Activity report of the National Agency for the Protection of Competition (the current Competition Council) for the period 2007–2011, available online: <https://old.competition.md/reports/Raport2011.pdf>.
11. Law on entrepreneurship and enterprises, no. 845 diin 03.01.1992, Published in Monitorul Parlamentului No. 2 of 28.02.1994. /_Amended LP181 of 07.07.23, MO272-273/27.07.23 art. 470; in force 01.03.24); https://www.legis.md/cautare/getResults?doc_id=138560&lang=ro#
12. E. Cojocari. Advertising and its role in the development of the market economy // National Law Review, 2010, no. 5-6, p. 46–55.
13. Law on advertising, no. 1227 of 27.06.1997, Published in the Official Gazette No. 67-68, from 16.10.1997.
14. <https://dexonline.ro/definitie/discreditare>.
15. Law no. 183 of 11.07.2012 on competition // Published: 15-09-2023 in Official Gazette No. 351–354 art. 620 (https://www.legis.md/cautare/getResults?doc_id=139070&lang=ro#).