

Business law

Prepared by Dr. Galal Elmasry

MGM412

Lecture 10





مجموعة جامعة
الجميع الذكية
للتعليم القابضة

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The most important main themes of the lecture:

- 1- Definition of Competition law .
- 2- Institutes of Competition law.
- 3- Market Restriction and Unfair Competition.
- 4- Liability in Competition law.

1-Definition of Competition law:

1- Economic definition of competition:

- The Bosnian term “konkurencija” (English: competition) is of Latin origin (concurrentia) and represents competing, rivalry and contest. In economy, it refers to the competition of business subjects in order to achieve the same or similar business goals.
- Several types of competition have been identified in economic theory. They all have the characteristics of a model. Hence we shall focus on three basic types:
 - 1- Complete or perfect competition.
 - 2- Incomplete or imperfect competition.
 - 3- Monopolistic competition.

1-Definition of Competition law:

1- Economic definition of competition:

-The legal definition of “competition” does not exist either in comparative law or our law. That is why the legal term of competition is a work of theory. Its content depends on the aim for which the defining is conducted. However, some common traits can be identified. The first is that the essence of competition is always respected in the way in which it is determined by economic theory. Secondly, definitions are of a different scope and can be classified into wider (systemic), and narrower (legal technical). Finally, all definitions are predetermined by numerous explanations and limitations. In law, competition is understood as an event, an action and a relation. If nothing specific is pointed out in the text below, the term “competition” shall imply a competitive relation in the market.

1-Definition of Competition law:

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2-Competition law in European Union law:

-The Commission, along with the national authorities for market competition, directly enforces the EU rules of market competition, pursuant to Articles 101-109 of the Treaty on the Functioning of the European Union (TFEU), in order for EU markets to function better, ensuring that all companies compete equally and fairly in accordance with legal regulations. This benefits consumers and businesses as well as the European economy as a whole. Within the Commission, the Directorate-General for Competition is the primary responsible authority that applies its authorities directly.

-However, there are strict limitations. The Directorate-General for Competition may only intervene if it has the evidence of the breach of competition rules and its decisions may be a subject of appeal before the Court of Justice of the European Union.

1-Definition of Competition law:

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3-Subject matter of competition law:

-Subject matter of competition law includes social and business relations of economic-political and property character that represent a method of economic game in the field of transfer of goods and services in a unique market. Within such broadly determined area of relations and norms, the following basic institutes i.e. prohibited activities can be distinguished:

- 1) Monopolistic behaviour, which includes prohibited agreements and the abuse of a dominant position,
- 2) Prohibited concentrations,
- 3) Distortion of the unity of the market, and
- 4) Unfair competition/game.

1-Definition of Competition law:

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4-Method of competition law:

-The method of competition law represents the way in which the relations in this field are regulated. The characteristics of the method of competition law are expressed in all institutes of competition law, albeit not in the identical form and the same intensity. The first characteristic concerns the particularity of sources of law. Their number and complexity approach the system of sources of business law, industrial property rights and administrative law. To a larger extent than before, the laws dominate in it. Thanks to the authorizations that the Law on Competition transferred to the Council of Competition, its regulations as bylaws have become an extremely important source of law for antitrust law. Secondly, the interpretative role of customs, both those qualified as good ones and those “business” ones has been increased. Thanks to the definition of illegal trade, the system of trade customs is directly involved in the sources of regulation of competition.

1-Definition of Competition law:

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4-Method of competition law:

- Competition as a separate social value and a protected object of the first order has caused the second characteristic of the method of this branch: the majority of coercive (imperative) norms. Thirdly, competition law is marked by a specific unity of prohibitive (“negative”) and enforcement (“positive”) norms. The entity laws on trade as sectoral acts lose the primacy before the general Law on Competition of Bosnia and Herzegovina.
- Economic and political significance of competition has determined the fourth characteristic of the method of legal regulation; a unique treatment of all subjects that operate towards a market and in it. This principle has been emphasised in the provisions of the LIT which ban governmental authorities, at least at the level of declaration, from distorting the unique market of the Federation.

1-Definition of Competition law:

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4-Method of competition law:

- The fifth characteristic of the method is the establishment of a special complex system of authorities of control. Its first segment is the Council of Competition. In the most important part of competition law, in antitrust law, the Council of Competition has a regulatory, control function, as well as the authority to perform administrative proceedings and impose fines.
- The sixth characteristic is the use of a general clause and designated cases. A general clause implies giving a general definition of a prohibited act or action that distorts competition. It contains relevant elements, the essence of each individual institute. Designated cases represent listing the most typical and most frequent manifestations of each type of a prohibited act in competition. In theory and comparative legislative, there are two approaches to the relation of a general clause and designated cases.

1-Definition of monopolistic behaviour:

-Etymologically, the term “monopoly” is of Greek origin, comprising of monos – the only and polion – sale, or poleo – by sale. In the broadest sense of the word, monopoly represents a stage in the development of capitalism characterised by a paramount influence of major concentrations in economy and the society, first at the national level and then globally as well. The second meaning of monopoly implies market relations in which there is an exclusive authority or an undisputable dominance of a single business subject or a homogenous group of business subjects over supply or demand of goods and services in a relevant market. Monopoly defined this way can appear as a monoemporium i.e. as different variants of monopoly/monopsony, duopoly/duopsony, and oligopoly/oligopsony.

1-Definition of monopolistic behaviour:

- The third meaning of the term monopoly is aimed at the determination of participants in a monopolistic market relation.
- Two elements are critical for its classification: the existence or non-existence of a formal-legal transaction by which a monopolistic relation is established, and the preservation or loss of a legal identity of participants in this agreement and in a relation created by it. The most relevant permanent monopolies are cartels, unions and trusts. Temporary monopolies are short-term monopolistic agreements (corner, ring, pull, etc.) which are formed in order to conduct specific tasks in a market performance and are generally dispersed as soon as such tasks are finalised.

2-Prohibited agreements:

-The introductory part of the provision of Article 101 of the Treaty on the Functioning of the European Union contains a general prohibition of cartel behaviour. It encompasses: all agreements between business subjects, decisions by associations of business subjects and concerted practices which may affect trade between member states and which have as their object or affect the prevention, restriction or distortion of competition within the internal market.⁷⁰⁸ The above and similar agreements are null and void (Art. 101, par. 2 of the TFEU). In accordance with the stance that some agreements, even though restrictive from the point of competition, still may be a support to a more efficient economy, the Treaty explicitly establishes a possibility of their exemption from the general prohibition. Pursuant to Article 101, paragraph 3 of the TFEU, some agreements or groups of agreements are treated as allowed, if they:

2-Prohibited agreements:

- 1)contribute to the improvement of production or distribution of goods or promote technical or economic progress,
- 2)while allowing consumers a “fair share” of the resulting benefit,
- 3)do not impose on companies any restrictions which are not necessary for the achievement of such goals, and
- 4-do not give the participants a possibility of eliminating from competition a significant portion of the products in question.

-Pursuant to Article 4 of the Law on Competition, the following are prohibited: all agreements, contracts, single provision of agreements or contracts, concerted practices, explicit and tacit agreements between the companies, as well as other acts of companies the object or effect of which is to prevent, restrict or distort market competition in the relevant market.

2-Prohibited agreements:

- For further harmonisation of competition law in BiH and in the EU, it would be necessary to determine as monopolistic all those agreements whose goals or results are affects harmful for competition in the relevant market. Such agreements are null and void. They are agreements that refer to:

- 1-direct or indirect determination of purchase and selling prices or other commercial conditions;
- 2) limitation or control of production, markets, technical development or investment;
- 3) fragmentation of the market or of sources of supply;
- 4) application of dissimilar conditions to equivalent or similar transactions with other parties, thereby placing them at a competitive disadvantage;

3-Dominant position and abuse of dominant position:

-The section on competition of the original contract on the EEC incorporates a provision which regulates the cases of a governing, i.e. a dominant position of a company in the internal market – Article 102 of the TFEU. Possessing a dominant position in the market is not prohibited. However, the abuse of such a position is prohibited.⁷¹⁵ According to Article 102, paragraph 2 of the TFEU, the abuse can be reflected in the following types of practices:

- 1- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- 2) limiting production, markets or technical development to the prejudice of consumers;
- 3) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

3-Dominant position and abuse of dominant position:

4)making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

-The provision regarding the prohibition incorporated in the Article 102 of the TFEU stipulates the following elements: one or more enterprises, a dominant, i.e. a governing position; a dominant position in the internal market or a significant part of it; an abuse; and the effect on trade, i.e. the exchange of goods and services between member states.

- A business subject has a dominant position in the relevant market of goods or services, when due to its market power it can operate considerably independently from its actual or potential competitors, buyers, consumers or suppliers, taking into account the market share of that company in the relevant market, market shares of its competitors, as well as the legal and other barriers to the entry of other business subjects in the market.

3-Dominant position and abuse of dominant position:

-According to the resolutions of the LC, any abuse of a dominant position of one or more companies in a relevant market is prohibited. The abuse of a dominant position occurs in the following cases:

- 1) direct or indirect imposition of unfair purchase and selling prices or other trading conditions which restrict competition;
- 2) limitation of production, markets or technical development to the prejudice of consumers;
- 3) application of dissimilar conditions to equivalent or similar transactions with other parties, thereby placing them at a competitive disadvantage;
- 4) making the conclusions of the contracts subject to acceptance by the other party of supplementary obligations, which by their nature and according to the commercial usage, have no connection with the subject of such contract.

4-Concentrations and prohibited concentrations:

-The control of concentration is directed towards the prevention of power concentration in the market. Based on Article 352 of the TFEU, in 1989 the legislator implemented the Council Regulation on the Control of Concentrations between Companies (CRCC)⁷¹⁸, and it was significantly revised in 2004. Pursuant to Article 3, paragraph 1 of the CRCC, a concentration implies a permanent change of control over a company which results from:

- 1) a merger of two or more previously independent companies or their parts, or
- 2) an acquirement, by one or more persons already controlling at least one company, or by one or more companies, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other companies.

4-Concentrations and prohibited concentrations:

- The listed types of concentration can occur in three forms. Namely, companies or companies can be: **1)** at the same level of economic operations (e.g. production level): horizontal merger, acquisition and cooperation; **2)** at different levels (e.g. production and distribution): vertical merger, acquisition or cooperation; and **3)** companies which do not operate at the same production market or geographical market, i.e. if their merger does not have vertical or horizontal effects: conglomerate mergers, associations, concentrations.

-Any concentration which restricts effective competition in the internal market or in its significant part, particularly by creating or strengthening a dominant position in the market, is contrary to the internal market of the EU and hence, it is prohibited by the CRCC. A preventive control system has been arranged in a procedural manner, and it stipulates that the Commission must be notified of the intended concentration (fusion).

1-Market restriction:

- Market restriction is a legal term that refers to a considered institute of competition law. As there are other forms of market violation along with market division, we have opted for the theoretical term “violation of market unity”. A united market is an important requirement and a system framework for a regular existence and operation of competition. Antitrust law is not sufficient for the suppression of all the forms of violation of the internal market’s unity. Consequently, modern states use other legal means of disabling this type of socially dangerous acts, regardless of who the perpetrator of these acts is. These instruments should suppress prohibited competition operations which are not covered by anti-monopoly law, i.e. which cannot be suppressed effectively. The stated need is met differently in comparative law.

2-Unfair competition:

- The Bosnian term “nelojalna konkurencija” (unfair competition) originates from the French phrase concurrence deloyal, which was created in the 19th century by the case-law in this country.
- Deloyal can also be translated as: unfair, dishonest, disloyal, and unfaithful. Taking legal terminology into consideration, we will use the variant “unfair”. It is very difficult to give a general theoretical definition of this institute due to differences between comparative law and a great number of current emerging variants present in practice. We consider that an unfair game can be defined as an initiation of any kind of action by a trader or any other subject of business law, which is contrary to the usual recognized mode of action towards the market from the social economic or constitutional order and which has real or potential adverse effects.

2-Unfair competition:

- The outspread of The Paris Convention for the Protection of Industrial Property (Paris Convention) has greatly contributed to the unification of legal suppression of unfair competition between two great groups of legal systems and also within each one of them. Considering the fact that Bosnia and Herzegovina has become a member of the Paris Convention by succession, we present its resolutions below.

4- Liability in Competition law:

1- Supervision authorities and the procedure:

- Pursuant to the provisions of the Law on Competition, a special authority is formed: the Council of Competition of Bosnia and Herzegovina⁷²⁵, with the offices in charge of competition in the Federation of Bosnia and Herzegovina and the Republic of Srpska.

The Council of Competition is an independent authority obliged to ensure a consistent enforcement of the Law on Competition in the territory of Bosnia and Herzegovina and it has an exclusive authority in deciding whether there are particular types of unlawful competitive activities.

- In performing its authority, the Council of Competition: passes by-laws required for the enforcement of the Law on Competition;

4- Liability in Competition law:

1- Supervision authorities and the procedure:

-enacts definitions and calculation methods for certain operations; enacts and provides the interpretation of general and special definitions of terms regarding competition, along with the calculation methods for fundamental terms in competition; makes decisions regarding requests for the enforcement of proceedings and conducts proceedings; passes legal acts for the finalization of proceedings before the Council of Competition; gives opinions and recommendations regarding any aspect of competition, exofficio or upon a request of a state authority, a business entity or an association; passes internal acts regarding the organization of the Council of Competition; takes the initiative to make amendments or additions to the LC, etc.

4- Liability in Competition law:

2- System of liability:

-It has already been emphasised that combining more types of sanctions represents a characteristic of the methods of competition law. If reviewed on its own, the system of liability in competition law represents a far more complicated and complex picture. Such a picture has the following characteristics:

- 1) the inclusion of social and legal sanctions,
- 2) the possibility of cumulative implementation of certain types of sanctions for the same committed unmet competition offence,
- 3) a predominantly repressive character, and
- 4) the existence of specific features in the sub-system of sanctions for every institute of competition law.

4- Liability in Competition law:

2- System of liability:

-Social sanctions are incorporated in the system of liability due to a general importance of competition as a synonym of a free market. Good business custom represents a legal-technical basis for their affiliation with legal. Social sanctions can be classified according to whether they are implemented by a disorganized, diffuse company or non-governmental social institutions are established for the purpose of their implementation. In the first group, sanctions implemented by the members of the same industry and by consumers are particularly relevant. In the second group, the sanctions of the courts of honour and the assemblies of chambers of commerce are relevant. The development of the market strengthens the role of extralegal sanctions. In situations where it applies, the possibility to request an announcement of the convictions in the media serves its realization.

4- Liability in Competition law:

2- System of liability:

-The sanctions can be property-legal sanctions and criminal legal sanctions. The Law on Competition differentiates serious and other infringements of competition law. In accordance with that, Article 48 stipulates a fine for any serious infringement of up to 10% of the value of the total annual income of a company earned in the financial year preceding the year when the infringements is committed, if a company or an individual: **a)** concludes a prohibited agreement or in any other way participate in an agreement that caused prevention, restriction or distortion of competition **b)** abuses a dominant position; **c)** participates in a prohibited concentration of companies; **d)** fails to comply with the decisions made by the Council of Competition; **e)** implements a concentration without a prior decision on the concentration.



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