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VARIABLES OF QUANTIFYING REPUTATIONAL DAMAGES RESULTING FROM UNFAIR COMPETITION ACTIONS

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Abstract: *The problem of quantifying the reputational damage resulting from unfair competition actions derives mainly from the lack of contextually established criteria. In the same sense, the lack of relevant judicial precedents amplifies the precarious state of the system of indicative benchmarks in order to assess the damage to reputation as a result of affecting the rights and legitimate interests of the victims of unfair competition actions. Foreign methodological systems for quantifying damages caused by unfair competition actions could represent points of reference for the domestic legislator in the idea of solving practical difficulties in the process of assessing damages caused by unfair competition actions. An eloquent example could be considered the French model for evaluating the economic damage resulting from actions of unfair competition, developed by notorious practitioners in the field in question. The methodological sheets are generically called „La réparation du préjudice économique. Fiches méthodologiques et glossaire - 3e édition (2024)".*

Keywords: *quantification, assessment, harm, damage, unfair competition, criteria, methodology.*

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Introduction

At the current stage, in the Republic of Moldova, there doesn't exist a solid theoretical or practical basis in terms of harm assessment (regardless of its form). In the same sense, it is worth mentioning the fact that in France, for example, there have been developed methodological sheets for the reparation of economic damage, the group of authors of the sheets in question being composed of local practitioners and theorists.

By reporting the given aspect to the subject of the research, the reason for its approach resides in the lack of a theoretical and practical framework in the matter of evaluating reputational damages in the context of unfair competition, and the purpose of the research derives from the necessity of the existence of such a framework to the extent that there is a sufficient normative spectrum in this regard.

The practical importance of the subject in question is determined by the creation of guidelines in terms of assessing the damage resulting from the harm to the undertaking's reputation in the context of unfair competition.

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Thus, through this paper, it is proposed to approach the issue derived from the subject in question, the pertinent French jurisprudence, the domestic normative framework in the matter, as well as the configuration of the criteria and variables for quantifying reputational damages in the matter of unfair competition.

Literature review

The relevant literature in the matter is not a rich one in the quantitative aspect, ~~or~~ a small number of authors have written by the moment on the subject in question. Among the mentioned sources it is worth specifying the following ones:

- Gorincioi, C. (2019). Cercetarea instrumentelor juridice de contracarare a actelor de concurență neloială. Teză de doctor în drept. [Research of legal instruments of counteracting the unfair competition acts. Doctoral thesis in law] This source is an integrated synthesis of the specifics of the system of unfair competition actions, as well as of the available legal mechanisms to counteract these actions. The theoretical significance of the thesis lies in the fact that the author approaches the topic from the perspective of the main issues arising from the particular subject.
- Castraveț, D. (2019). Răspunderea civilă delictuală pentru actele de concurență neloială. Teză de doctor în drept. [Tortious civil liability for acts of unfair competition. Doctoral thesis in law]. This paper is a bibliographical reference for consultation in the sense of defining the main criteria for quantifying damages as a result of unfair competition actions.
- Karsenti, C. (2022). L'évaluation du préjudice d'atteinte à l'image. [Image damage assessment]. This paper is the main foreign source for the present research, considering that it provides the main theoretical points that sustain the given results.
- Prieto, C. (2022). Le préjudice moral résultant des pratiques anticoncurrentielles. [The moral damage resulting from anticompetitive practices]. The named article is used for creating a parallel perspective on the subject of quantifying damages arising from anti-competitive practices.
- Nussenbaum, M. (2010). L'appréciation du préjudice d'atteinte à la marque et à son image. [Appreciation of the damages caused to the trademark and its image]. This paper is used to define the theoretical nuances of the approached subject.

Data and Methodology

The methodological arsenal used in the context of the elaboration of this paper consists in particular of:

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- Logical-formal method. The benefit of using this method lies in the possibility of a proper analysis of theoretical ideas, as well as previous practical findings through deduction and induction operations in order to identify the compliance of those findings with the related jurisprudential trends;
- Legal-comparative method. In view of the application of this research method, the necessary conditions are created in order to contrast the theoretical-practical and legislative aspects, as a result of which relevant conclusions can be drawn in order to improve the existing conceptual framework and unify current practice.

Apart from that, during the research there will be also used the content analysis method and the analysis of social, official, public, numerical and nonnumerical documents.

All the methods listed and analyzed above will be used alternatively and as a whole.

General considerations regarding compensation awarded for economic damage

Generally speaking, it is believed that: (i) The general principle of assessing the economic damage consists in comparing the generated situation (the real scenario) with the situation in which the plaintiff would have been in the absence of an event that has led to liability (the normal situation); (ii) The main question in assessing the damage lies in the determination of what would have occurred in the absence of the harmful event. The respective situation cannot be observed directly, a fact which generates the need to formulate some hypotheses for the reconstruction of the given situation. Subsequently, damages are determined by comparing the observed situation (harmful event that occurred) with this normal situation (the unobservable situation generated if the harmful event had not occurred); (iii) Once the normal situation is determined, the economic damage can be quantified by realizing the difference between what would have been in the absence of the damaging event and the actual generated situation. For example, the estimated profit in the normal situation is compared with the actual profit made by the victim and allows the deduction, through the difference, of the economic damage corresponding to the loss of profit suffered by the victim. [FICHE n°3 a Comment évaluer un préjudice économique?, p.1]

Specific aspects regarding the assessment of damage in the context of unfair competition

In the existing doctrine (in particular, the recent one), it has been raised the issue of the difficulty of assessing the damage following unfair competition actions. Moreover, in particular situations, it was stated that the damage caused as a result of unfair competition actions is, in fact, impossible to quantify. [Gorincioi, p. 140]

Initially, it is required to mention the clarification made by some authors [Nussenbaum, p. 18], according to which a theoretical and practical distinction must be made between the

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following aspects: (i) the damage caused by the violation of the victim's trademark rights, which involves the damage caused by the violation of intellectual property rights and which is likely to consist of a.) lost profit (if the infringement of intellectual property rights has caused loss of sales to the victim of the author's actions) or, alternatively, b.) an increased royalty that would take into account the unauthorized nature of the use of the rights of intellectual property; (ii) the damage caused to the reputation of the trademark, which, in theory, represents a separate type of damage, a consequence of the previous type and which can be repaired by a.) estimating the possible subsequent loss of income due to the reduction of the distinctive and attractive character of the trademark or, alternatively, b.) the costs of rebuilding the reputation of the trademark, damaged by reprehensible actions. Indeed, from an economic point of view, trademark reputation has all the elements of an asset (good): it is created by investment and disappears by oblivion, if investment is stopped; (iii) moral damage, in cases where the violations concern trademark values and needs. Such type of damage is estimated by the court through a lump sum and can later be associated with the type of damage addressed previously.

Those distinctions were perfectly illustrated by the decision of the Paris Court of Appeal of 03.09.2010 in the case of Louis Vuitton and Christian Dior Couture v. eBay Inc. and eBay AG [CA Paris, ch. 5-2, September 3, 2010, RG 08/12821] regarding the sale of the contested products on eBay's web pages.

The trial court accepted the reasoning invoked by the victims (even though the Paris Court of Appeal reduced the amount awarded due to the reduction of the geographical scope and the infringement rate used as the basis of calculation), which sought to distinguish between: (i) the damage to trademark infringement related to the unauthorized use of the Louis Vuitton and Christian Dior Couture trademarks: the infringement of those trademarks was compensated based on the right of indemnity approach; (ii) the damage related to the infringement of the reputational regime of the respective trademarks, because eBay gave high visibility to the illegal sales of the given products: that category of damage, estimated on the basis of the cost of restoring the damaged reputation of the trademark, was determined on the basis of the revenue obtained by eBay from the publication on its sites of advertising of the products infringing the rights in question, by multiplying it by the coefficient 4, taking into account the increased difficulty and cost of countering the infringement of the reputational right in relation to the difficulty and cost of challenging that infringement.

The court retained that the wide distribution of the given advertising and the significant reputation of the signs Christian Dior Couture and Louis Vuitton, which are the subject of significant and constant communication campaigns, must be taken into account. This coefficient (4) is also justified by the "viral" character of the dissemination of messages on the Internet, in particular by trademark-damaging advertisements and the much higher costs by reference to advertisements placed on eBay, as well as by the counter-campaigns that right holders on the targeted trademarks will have to deploy them on more traditional media channels

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to be consistent with their image and which are more expensive than advertisements placed on the Internet; (iii) moral damages based on the harm caused to the right holders in the context of their efforts and the values (which the trademarks in question carry) of creativity, originality, quality and refinement.

The same approach was applied in more recent cases (2013). In the case between Bouygues Telecom and Iliad (Free Mobile) concerning the defamation of the undertaking's reputation following the exchange of comments between the directors of the two telecommunications groups. [T. com. Paris, 15th ch., February 22, 2013, RG 2012076280.] The Commercial Court of Paris ordered Iliad to pay 10 million euros to Bouygues Telecom in relation to the loss of customers as compensation, as well as for the damage to its trademark reputation.

In the litigation between Christian Dior Couture and Cheyenne Freedom (John Galliano), following John Galliano's reprehensible behaviour and remarks [CA Paris, ch. 5-5, May 7, 2015, RG 14/01588], stated in public and quickly disseminated on social networks, during which he proclaimed his identity and activity of designer, thus placing himself in the position of being known throughout the world, his actions having a significant impact on the trademark of which he was a representative. In the given context, the trial court established a compensation of 1 million euros as reputational damage and 150,000 euros as moral damages, although the court of appeal annulled the previously specified decisional act which concerned the Cheyenne company, but which referred in fact to the personal behaviour of its director.

Returning to the methodological sheets developed by the Paris Court of Appeal in 2017, noting that none of the respective methodological sheets is dedicated to damage caused to the undertaking's reputation, the last type of damage is addressed in sheet no. 5 entitled "How to repair moral (extra-patrimonial) damages?" The damage caused to the reputation is therefore seen as an aspect of the moral damage detached from the trademark and its reputation, being connected to the undertaking as a whole.

According to the doctrine, the moral damage of an undertaking has two aspects: (i) the external aspect, the context in which the damage, for example, due to discredit to the reputation of the undertaking is approached, under the conditions that it carries values (professional, spiritual, philosophical or political) that constitute his identity; (ii) the internal aspect, the damage caused resulting in a diffuse deterioration of morale within the undertaking and a loss of confidence in its future, by increasing the number of resignations or the disinterest of candidates for employment.

As Professor Catherine Prieto has rightly pointed out, “Recently, the concept of moral damage has been progressively renewed and expanded both conceptually and in areas of law where it was not yet very present; a very bold jurisprudence on compensation for damages resulting from unfair competition already appears to be influencing the jurisprudence on compensation owed to victims of cartels and abuse of dominant position; thus, the concept of

non-pecuniary damage could not only be imposed, but also renewed, and go beyond damage to the undertaking's reputation to cover damage to its inner spirit. [Prieto, p. 91]

This evolution, which centralizes the undertaking's reputation, honour or even its inner spirit, now takes a considerable extent beyond the traditional problems related to intellectual property or even those of unfair competition. Any damaging act, whatever it may be, can cause reputational damage not only to the trademark but also to the undertaking as a whole. [Karsenti, p. 196]

In this field, which varies from trademark reputation (in the eyes of customers) to an institutional reputation, in the eyes of all stakeholders (government, suppliers, financial partners, employees, etc.), it is important to define the practical approach to be adopted to assess more precisely the damage to the undertaking's reputation by combining the appropriate means of proof.

Indeed, it could be anticipated with regard to the methodological contribution of the informational sheets of the Paris Court of Appeal that they would have led to an improvement in the justification of claims for compensation for reputational damage. However, it should be noted that a reading of recent decisions indicating the existence of a claim for damages in relation to reputational damage continues to show that: (i) most decisions rejecting claims for such damages are explained by the lack of evidence provided by the victim in support of his/her position [CA Paris, ch. 5-4, March 16, 2022, RG 21/00684; CA Paris, ch. 5, February 10, 2022, RG 19/03034; CA Paris, ch. 5-4, January 5, 2022, RG 19/19600]; (ii) however, when the existence of a violation is proven, very often the amount awarded is lump sum and symbolic due to the lack of definite proof of the quantum of damage caused. Thus, for example, in a litigation it was retained: "It is necessarily inferred that there is a damage, even if only moral, from an act of economic parasitism. Through the lens of the communicated elements, the Court is in a position to assess the damage suffered by the company DCF, as the successor of the company Pressimmo, as a result of the committed acts of parasitism, at a global amount and fixed by the court at 10,000 euros as damages for damage to its reputation in the context of a communication that creates confusion in the undertaking's "success story". [CA Paris, ch. 5-4, January 5, 2022, RG 17/02924]

On the other hand, successful claims are those that developed the original methodology for trademark infringement.

In the case of SA Christian Dior Couture SA vs. INDITEX [CA Paris, ch. 5-1, February 1, 2022, RG 20/03318], we find the notion of damage to the reputation of the Dior trademark resulting from a campaign to discredit Zara France and Inditex in relation to acts of parasitism: "These acts also had harmful consequences on the trademark reputation of the undertaking [D], associated with luxury, offering rare and unique models, thus damaging its commercial reputation, aggravated by the marketing and communication campaign orchestrated by the appellants to follow it. However, the damage caused must be put into perspective in the light of

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the actions, which were limited in time and which, according to [D]'s findings, only related to nine items marketed by ZARA and which were the subject of two editorials placed in the online environment at the same time. The appreciation of all these elements, in addition to the figures already mentioned, cannot, therefore, lead the appellants to denounce an arbitrary assessment disconnected from any objective financial reality. Therefore, the position of the commercial court must be considered when it recognized that the parasitic actions of the respondent companies caused moral damage to the undertaking [D], which was rightly assessed at €200,000."

In the case of Monoprix vs. Galec [CA Paris, ch. 5-2, April 15, 2022, RG 20/15209], we find the analysis of the defamatory campaign carried out by the author of the harmful act: "On the moral damage caused to the reputation by means of the advertising campaign presenting the Monoprix company by a pigeon (which lasted from September 4-24, 2018 and was limited to territorial (geographical) zone of the city of Paris). In this context, the position of the first judges must be approved who, in the justification of their decision, set the amount of moral damage suffered by the Monoprix undertaking at the amount of 100,000 euros (...)".

In order to be fairly compensated, it is therefore necessary to avoid that the damage caused to someone's reputation also suffers this tendency to "forfeit" the amount of moral damage, as mentioned by Professor Catherine Prieto [Prieto, p. 106], as a kind of "compensation, or even a second solution, for an insufficient assessment of the economic damage". Even when placed at the center of a broader moral reparation, reputational damage retains its specificity.

From another perspective, in the relevant French jurisprudence it is shown that the object of an action in unfair and parasitic competition is most often twofold: (i) on the one hand, an order to stop the infringement is requested and, (ii) on the other party, compensations are requested, regardless of their nature (economic or moral). In this sense, the French Court of Cassation has established a presumption by virtue of which the inevitable existence of a damage, even if only moral, following the commission of an act of unfair competition is deduced (Cour de cassation, civil, Chambre civile 1, 21 March 2018 , 17-14.582, Unpublished [Cour de cassation, civile, Chambre civile 1, 21 mars 2018, 17-14.582, Inédit]).

Current framework in the Republic of Moldova

Referring that principle to the specifics of the legislation in force of the Republic of Moldova, it has been sustained that the damage is a *sine qua non* condition only for the civil liability for unfair competition actions [Gorincioi, p. 139]. For that reason, we disagree with the given presumption, in the context in which the damage is a mandatory element only in the case of tortious civil liability applicable for unfair competition actions, while in the case of administrative liability and criminal liability for unfair competition actions, the damage is an optional element, due to the formality of most unfair competition actions enshrined in the text

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of Law on competition no. 183 of 11.07.2012 and the forms of expression of unfair competition crime through the provisions of the Criminal Code of the Republic of Moldova.

Contextually, we will illustrate five distinct situations corresponding to the five types of unfair competition actions in order to confirm the hypothesis of the lack of obligation of the existence of damage following the commission of the respective unfair competition actions.

Illustration 1. Undertaking X spreads certain disparaging false information about a competing product of undertaking Y within a certain group of loyal consumers. Those consumers, for reasons of knowledge of the fact that the given statements are false, did not undertake any migration action against the competitor who was author of the defamation action. Therefore, there is no patrimonial damage caused in that situation. However, a possible moral damage can be discussed. But, for the same reasons of knowledge of the actual state of affairs, Y was not affected in any way. It is obvious that in the case of tortious civil liability, the causing of damage (whether patrimonial, moral or granted in connection with the loss of chance) constitutes a mandatory aspect in the sense of applying this type of liability. However, Competition Law no. 183 of 11.07.2012, which provides for administrative liability for discrediting competitors, uses terms and phrases such as "endangering" or "intended," a fact that gives a formal character to the unfair competition action in question, the mere commission of the unfair competition action of discrediting competitors being sufficient in the sense of applying administrative liability for such a violation. Moreover, the provisions of art. 10 bis point 3 sbpct. 2 of the Paris Convention on the Protection of Industrial Property of 20.03.1883 provides that "false statements, in the exercise of trade, which are likely to discredit the enterprise, products or industrial or commercial activity of a competitor" are prohibited.

Illustration 2. Undertaking X instigated a good part of the clientele of undertaking Y to terminate their contracts with the latter by offering certain pecuniary advantages to the concerned clients. For reasons independent of the will of the instigating subject, the clientele of undertaking Y did not react in any way to the respective actions of instigation. Therefore, the damage did not occur. Accordingly, in the case, only administrative liability can be applied for the unfair competition action of instigating the termination of the contract with the competitor.

Illustration 3. Undertaking X has illegally obtained the trade secret of competitor Y but does not use the information in any way. Accordingly, it does not cause damage to undertaking Y. Theoretically, it can be discussed with reference to causing a possible moral damage, but not using the trade secret obtained illegally most of the time "can harm the legitimate interests of the competitor". Accordingly, in such situations there is only the risk of affecting the legitimate interests of the competitor at the expense of which the trade secret was obtained, and the damage would occur only in the case of a possible aggravated form of the respective unfair competition action, manifested through its use.

Illustration 4. Undertaking X carries out certain actions to mislead the clientele of competing undertaking Y regarding the place of manufacture of a certain product in order to

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attract them. For reasons independent of the will of X, however, the consumer does not migrate to the author of the misleading actions. Accordingly, the damage does not occur. Such actions are likely to mislead consumers, but they do not actually mislead the clientele of undertaking Y. Such an approach is also consistent with the provisions of art. 10 bis point 3 sbpct. 3 of the Paris Convention for the Protection of Industrial Property, provisions according to which there are prohibited indications or statements the use of which, in the course of trade, is likely to mislead the public as to the nature, method of manufacture, characteristics, fitness for use or quantity of the goods."

illustration 5. Undertaking X illegally uses partially the industrial design belonging to undertaking Y by placing the former's product on the domestic market. Those actions are likely to create confusion in consumers' perception of undertaking Y and the latter's products. For reasons beyond the control of the two undertakings, however, consumers distinguish between the products in question and remain loyal to undertaking Y and the products placed on the market by it. Accordingly, the confusion is not actually produced. Thus, due to the formal nature of the actions of undertaking X, the damage does not occur.

Contextually, in the recent jurisprudence of France, through a decision of the Court of Cassation of the respective state from 12.02.2020, the following aspects were observed: "When the harmful effects, from the point of view of economic disruption, of acts of unfair competition are particularly difficult to quantify, which is the case of those that consist in the interference with the efforts and investments, intellectual, material or promotional of a competitor...all the acts that, by allowing the author of the practices to absolve himself of an expense that is , in principle, mandatory and grants a competitive advantage to the latter, it must be accepted that the damage can be assessed taking into account the unjustified advantage obtained by the author of the acts of unfair competition at the expense of his competitors, modulated in proportion to the volumes of the respective businesses of the parties affected by such actions."[Cour de cassation, civile, Chambre commerciale, 12 février 2020, 17-31.614, Publié au bulletin]

Therefore, the decision of the court must be approved to the extent to which, when called upon to rule on compensation for damages resulting from a commercial practice misleading the consumer, giving its author an unfair competitive advantage over his competitors, takes into account, in order to evaluate the compensation to be allocated to the given competitors, of the savings unjustifiably achieved by him, which he modulated by taking into account the respective business volumes of the parties affected by the said actions.

The national legal basis for awarding compensation. Although a non-existent practice was found in terms of granting compensation for unfair competition actions, the legal basis for granting such compensation can be found even in the Competition Law no. 183 of 11.07.2012. Thus, according to the provisions of art. 80 para. (1) of the specified normative act, "The court shall oblige the person who commits an unfair competition action to cease the action

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or remove the consequences, to return the confidential documents illegally appropriated from their legitimate holder and, as the case may be, to pay compensation for the damages caused, according to the legislation in force".

In the same sense, art. 80 para. (3) of the aforementioned normative act provides: "If any of the unfair competition actions cause patrimonial or moral damages, the injured party has the right to address the competent court with an appropriate civil liability action."

At the same time, in accordance with the provisions of art. 77 para. (2) from the same normative act, "The damage caused as a result of actions found to be unfair competition is to be repaired, in accordance with the provisions of the Civil Code, by the company that caused it".

Although apparently repetitive, we believe that the above-mentioned rules apply in different contexts. Thus, (i) the provisions of art. 80 of the Competition Law no. 183 of 11.07.2012 are applicable in the case of tortious civil liability for unfair competition actions, and (ii) the provisions of art. 77 para. (2) are applicable if the actions of unfair competition were ascertained by means of the administrative act of the Competition Council (decision of the Plenary of the Competition Council).

Therefore, the relevant legislation allows the aggrieved subject to request the granting of patrimonial and/or moral damages for the unfair competition action of its competitor.

Criteria for awarding damages for unfair competition actions

In the domestic doctrine, it was proposed as a recommendation to consider the following criteria in the sense of quantifying the damage caused by unfair competition actions: (i) The difference between the undertaking's income before the occurrence of the unfair competition action and the income after its occurrence (lost income); (ii) Reflecting the unfair competition action on turnover; (iii) The nature and severity of the damage; (iv) Bad faith of the competitor who resorted to unfair practices; (v) Duration of the unfair competition action; (vi) Adverse economic consequences; (vii) Undue benefits obtained by the author of the unfair competition action; (viii) The impact of the unfair competition action on consumers and loyal customers; (ix) The expenses incurred by the claimant to restore his situation in accordance with the one prior to the occurrence of the injury; (x) Causing moral damage; (xi) Deteriorating the competitor's reputation/image; (xii) Degree of confusion and misleading to consumers" [Castraveț, p. 133]

We consider that such an enumeration of the possible criteria for assessing the damage caused is generic and not adapted to the categories of damage that can be collected as a result of the finding of unfair competition actions.

Thus, from all those proposed, we retain the following possible criteria (factors) for assessing the damage (which influence the way in which the damage is assessed): (i) the duration and severity of the violation; (ii) the attitude of the unfair competitor in relation to the violation committed; (iii) the impact on consumers and clientele; (iv) the value of the object of

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attack: (v) causing mental suffering to the passive subject of the unfair competition actions; (v) damage to the reputation and/or credibility of the damaged competitor; (vi) the proportions of the advantage not obtained by the rights holder by missing the chance; (vii) the importance of the missed opportunity for the injured rights holder.

Given the fact of interdependence between the various types of damage likely to be caused through unfair competition actions, we believe that the criteria (factors) that can influence the amount of damage can be addressed interchangeably. In other words, the mutual impact between the different criteria for quantifying patrimonial, moral or loss of opportunity damages cannot be excluded.

In the same context, the solutions offered by the national legislation in this regard should also be mentioned. Thus, in the case of moral damage, according to the provisions of art. 2037 para. (1) of the Civil Code of the Republic of Moldova, "The amount of compensation for moral damage is determined by the court depending on the nature and severity of the moral damage caused to the injured person, the degree of guilt of the perpetrator of the damage, if guilt is a condition of liability, and the extent to which this compensation can bring fair satisfaction to the injured person.". Therefore, the civil legislation indicates the following criteria for variation in the amount of moral damage awarded: (i) the nature and severity of the moral damage caused to the injured person; (ii) the degree of guilt of the author of the damage; (iii) whether guilt is a condition of liability; (iv) the extent to which such compensation can bring just satisfaction to the injured person. Thus, it can be inferred the fact that the civil legislation does not offer a comprehensive set of criteria for the purpose of quantifying moral damages, considering the fact that the configuration and the structure of unfair competition actions and their consequences are much more diverse and should be approached globally.

Varieties of damage in the context of private unfair competition actions. Discrediting competitors. (i) As regards the assessment of damages for the harm caused as a result of discrediting competitors, the following criteria could be considered: (i) the expenses incurred by the injured party in order to restore the previous situation (for example, in the case of direct discrediting, there could be necessary expenses to restore the reputation of the product that was the object of discredit in terms of combating false statements spread by the unfair competitor in the process of economic activity - additional advertising, additional marketing actions; in the event of indirect discredit, the affected competitor/competitors could bear expenses for the purpose of recovery the reputational situation generated by the same unplanned additional investments in advertising and marketing activity); (ii) the lost profit (for example, in the case of direct discrediting, it would be necessary to recover the income made by the defamatory undertaking as a result of the migration of the clientele from the discredited competitor to the denigrating one and in the case of indirect discrediting, as a result of the migration of the clientele to the undertaking that launched the fasle information about their own activity and/or products from their competitor(s); (iii) regarding the duration and severity of the

violation, it is normal that the amount of compensation should be proportional to the time interval in which the discrediting information was accessible to the public and depending on the susceptibility of the rapid remedy of the generated situation; in other words, the size of the damage must increase proportionally to the increase of the accessibility period and the increase of the severity of the discrediting false information; (iv) in the situation where the dissemination of false information was done in bad faith, the proportions of the damage must increase accordingly. On the contrary, if no bad faith is found in the conduct of the active subject of the discredit, the proportions of the damage are likely to decrease; (v) depending on whether the consumer/clientele reorients and migrates massively or not as a result of the discrediting actions, the damage is variable. Thus, if the migration is massive, the damage increases accordingly, and in the case of an insignificant migration - the damage decreases proportionally; (vi) contextually, the damage is likely to decrease or become a considerable one depending on whether the value of the object of attack is reduced or increased.

Thus, for example, in the situation where the discrediting information refers to a single product, the prejudicial degree of the act is much lower than it would be if the information was attributed to a wide range of products marketed under the same trademark; (vii) the amount of damage for mental suffering caused to the discredited person varies depending on the importance of the business for the passive subject of the discrediting action, and the importance of the business may vary depending on the investments made in its development. Thus, the amount of the moral damage will be likely to vary depending on whether the founder/manager of the enterprise has made considerable investments in the development of the business; (viii) as regards damage to the company's reputation, we note that this is an inherent aspect of defamation and can be achieved immediately by recourse to the respective unfair competition action. The evaluation of the amount of such damage is possible by determining the degree of decrease of the RQ index (Reputation Quotient) which is estimated by means of sociological methods (questionnaire evaluation); (ix)additionally, in case in which it was expected to conclude a series of contracts with certain suppliers or consumers that would have generated considerable income and this fact was not realized due to the consideration of the defamation action, the proportions of the quantified damages are likely to increase (x) the importance of the missed opportunity is probably the most subjective criterion for evaluating the damage, or this (the importance of the missed opportunity for the damaged undertaking), unlike the proportions of the missed opportunity, can result from certain internal aspects of the company at the level of goals, objectives , ideas of the administrative system and there is little probability of disclosing such kind of information to the court, even with the risk of not granting the appropriate compensations.

Instigating the termination of the contract with the competitor. (i) Regarding the assessment of the damage resulting from the instigation to the termination of the contract or the non-execution/improper execution of the contractual obligations in relation to the competitor of

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the instigating undertaking, the following findings can be inferred: (i) the proportions of the awarded compensation is likely to increase simultaneously with the increase of the interval of time of instigation to the respective facts and with the proportions of the losses borne by the passive subject of the instigation (for example, in the case of instigation to the non-execution of contractual obligations in relation to the competing undertaking, the size of the damage can increase depending on the time period within which the given obligations were not executed and depending on the amount of unexecuted obligations); (ii) regarding the attitude of the unfair competitor in relation to the committed act, in the case of the instigation to terminate the contract with the competitor, the existence of bad faith cannot be questioned, but rather the degree of its manifestation. However, the degree of bad faith is to be determined according to the length of time and the value of the contract object of the instigation. Respectively, the degree of bad faith is determined depending on the criterion addressed above. So, it is not an independent criterion, but a subordinate one; (iii) with regard to the impact on the consumer/customer, we specify that the susceptibility of using this criterion to assess the damage is carried out according to the dimensions of the instigating action (for example, in the hypothesis that the undertaking X realises instigating actions of the clientele of undertaking Y in full, the damage is to be quantified on a higher scale in relation to the situation in which undertaking X carries out actions to instigate a specific customer or a group of customers of undertaking Y); (iv) depending on the revenues achieved by the victim undertaking of the unfair competition action in the context of the development of contractual relations with the instigated clientele, the proportions of the damage caused may also vary; (v) in the case of instigating to the termination of the contract with the competitor, the diminishment of the undertaking's reputation may constitute a mediated effect of the instigating action to the extent that the instigator spreads certain false information among consumers in the context of the unfair competition action addressed. Therefore, the susceptibility of causing moral damage by diminishing the undertaking's reputation is dependent on the fact of the existence of defamatory actions within the instigation to terminate the contract with the competitor; (vi) if the undertaking against which the instigation was committed obtained or was likely to obtain considerable income in the context of the respective contractual relationship, the latter is liable to be damaged by losing the chance to obtain or continue to obtain the considerable income from the respective client; (vii) the importance of the chance, again, may result from the internal strategy of the enterprise against which the instigation has been committed.

Illegal obtaining and/or use of competitor's trade secret. (i) The size of the patrimonial damage caused by obtaining and/or illegal use of the competitor's trade secret varies depending on the duration of the illegal use of the competitor's trade secret and depending on the income obtained specifically in the context of the use of the trade secret in question; (ii) it is obvious that in the majority of cases, obtaining and/or illegally using the competitor's trade secret will be done in bad faith, or to the extent that the illegal competitor

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knows about the origin or how is used a trade secret (illegally), there can be no question of an attitude of good faith. However, in some situations, it is possible that the illegal user of the trade secret is not actually aware of the secret nature of the trade information in question and, respectively, is not aware of the fact that he is using it illegally; (iii) the impact on the consumer in case of obtaining and/or using the competitor's trade secret can be estimated by the degree of reorientation of the clientele from the owner undertaking to the undertaking that illegally obtained and/or uses the owner undertakings's trade secret. Respectively, the situation of a massive reorientation will generate greater damage for the latter; (iv) depending on the circumstances in which the trade secret is used (its destination), the size of the damage is also likely to vary. Thus, for example, in the situation where the trade secret is used to produce a range of products under a certain nationally or internationally renowned trademark, the amount of compensation can increase significantly; (v) diminishing the reputation of the undertaking to the detriment of which the trade secret is illegally obtained and/or used may result from how the respective trade secret is used by the unfair competitor. Thus, by way of example, in the case of the use of trade secrets in a context in which the image of the affected undertakings's products is damaged, the amount of compensation is likely to increase.

Misleading of the competitor's customers. (i) Regarding the duration of the infringement, to determine the amount of damage caused, the period of time during which the competitor's clientele was misled will be taken into account. Under the aspect of the seriousness of the violation, we specify the need to determine the extent to which the consumer was misled regarding the product of the misappropriating undertaking; (ii) under the aspect of the attitude shown by the misleading undertaking, we specify that both good faith and bad faith are possible. Depending on whether the author of the unfair competition action of misappropriation of the competitor's clientele was in good faith or in bad faith, the damage will be assessed accordingly; (iii) the damage will be determined in terms of the impact of the unfair competition action on the consumers to the extent that the latter were induced to migrate from one undertaking to another as a result of misleading actions; (iv) depending on the degree of determination of the clientele (the intensity aspect) of migration from one undertaking to another, the damage is likely to vary in the direction of growth in the case of a more intensive migration of the clientele; (v) the damage to the reputation of the competitor's undertaking is indirect in the case of diverting the competitor's clientele, or the extent to which the reputation is damaged depends on no. of customers migrating from the affected undertaking to the one carrying out the illegal actions; (vi) the amount of the damage increases proportionally to the increase in the size of the lost opportunity, or, for example, in the event of contracting some important customers, the affected undertaking loses that opportunity and, likewise, the corresponding compensations are likely to be requested; (vii) the importance of the lost opportunity, again, depends on the strategic vision of the undertaking and the respective objectives that correspond to certain real opportunities.

Confusion. Probably, the method of assessing the damage in the case of confusion constitutes an increased degree of complexity on the grounds that the object of attack will always be an object of industrial property or advertising belonging to the competitor. Thus, (i) regarding the duration of the infringement, in order to determine the amount of the damage caused, the period of time during which the product in question was placed on the market will be taken into account; in the case of confusion in the online domain, the time frame in which the term has been used that directly creates confusion among consumers will be taken into account; (ii) under the aspect of the attitude shown by the undertaking that creates confusion among consumers, we specify that in most cases, the respective attitude is one of bad faith considering that the undertaking that creates confusion is aware of the fact that it is taking over the industrial activity of the competing undertaking. However, there are situations in which the unfair competitor does not know about the existence of a protected or unprotected object of industrial property of another undertaking; (iii) the damage will be estimated in terms of the impact of the unfair competition action on consumers to the extent that the latter were induced to migrate from one undertaking to another as a result of the actions generating confusion among them; (iv) depending on the value of the object of attack (the value of the trademark, the resonance of the firm name), the damage proportions will be liable to vary accordingly; (v) in case of confusion, every time there will be a risk of affecting the reputation of the undertaking to the detriment of which the confusion is realised to the extent that the object of protection has a significant value; (vi) the value dimensions of any contracts that could be concluded will be taken into account; (vii) the undertaking's internal strategy will be taken into account regarding its further development.

Conclusions

Following the investigation of the subject under discussion, there should be revealed the following aspects: (i) it was determined that the damage to the undertaking's reputation through unfair competition actions constitutes a distinct side in relation to the violation of industrial property rights, as well as in relation to causing moral damage to the undertaking in the context of the assessment of the respective damage, although it is considerably closer to the latter, considering the addressed jurisprudence; (ii) by reference to the system of unfair competition actions established by means of Competition Law no. 183 of 11.07.2012, reputational damage is an archetypal hypothesis, considering the operating mechanism of actions contrary to the law and honest customs in the economic activity of undertakings; (iii) there is attested the existence of a quantitatively limited spectrum of the criteria for assessing the damage resulting from the harm caused to the undertaking's reputation in the context of unfair competition, as well as a relatively distinct configuration of the manifestation of the respective criteria, depending on the concrete type of the action unfair competition.

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In the sense of the above mentioned facts, we conclude on the examined subject by highlighting the following: (i) Although there is a practically non-existent jurisprudence in the judicial practice of the Republic of Moldova regarding the granting of possible compensation (regardless of the type of damage suffered) to the victim undertaking the actions of unfair competition, the legal framework is sufficiently well defined in this regard; (ii) in France, where the normative regime regarding the granting of compensation for the economic damage caused is developed in the methodological benchmarks nominated in this work and in the rigorous jurisprudence, there does not exist a totally unified approach regarding the addressed aspect; (iii) At a prospective level, there should be considered the opportunity to implement the possibilities conferred by law on the victims of unfair competition actions in order to obtain the appropriate compensations as a result of affecting their rights and legitimate interests in the context of unfair competition.

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