

Attracting, Maintaining and Expanding the Customers – Fundamental Purpose of Goodwill

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Abstract: This article is intended to be an analysis, in terms of theory, jurisprudence and norms, of the essence and contents of interdependent concepts of “customers” and “goodwill”. The approach is dictated, on the one hand, by the modernity, interest and complexity of the issues in question, considering the modern business relations, and, on the other hand, by the intention of perceiving it from a new, conclusive and comprehensive angle, meant to constitute the premise of a genuine scientific contribution, fundamental reason of all and any research demarche. The concept, the types and the characteristics of customers and good custom, their relation to goodwill and their correspondents in electronic trade are thoroughly and eloquently analyzed, as well as in terms of multidisciplinary. In addition, the study includes the significant controversies in this field and offers solutions. The detailed analysis of the theme lays a methodological basis of investigation framed by a system of methods, procedures and means of scientific knowledge, both of maximum generality and specific to law science. The results of this research represent an instrument of efficient study for the students of the Law and Economical Sciences Faculties. At the same time, the real practical importance of the theme can attract the interest of the traders and any other person interested in the goodwill's bearings.

Keywords: business; intangible elements; good custom; e-commerce

1. Introduction

Current civilization is based on production and circulation of goods, on exploitation of capitals, on continuous evolution of business environment in the context of globalization and high tech. The main target of all traders is making profit which may be obtained only by attracting stable customers. Keeping and developing them represent the fundamental purpose of goodwill, distinct juridical and economic entity.

With a view to carry out a business commercial spaces, furniture, machinery, materials and raw materials are required. In addition, the trader runs the business under a name or benefits from the results of experiments protected by patents. All these elements are reunited under goodwill, a concept defined by interwar doctrine as “ensemble of goods which the trader (the owner) groups and sets apart, within his own enterprise, with the purpose of carrying out his specific activity (statutory), in

competitive and profitable conditions” (Stoceanovici, 1924, p. 3) (Poruțiu, 1946, p. 354) (Georgescu, Romanian Commercial Law, vol. I., 2002, p. 516).

Contemporary literature has chosen a definition highlighting the structure and the key role of goodwill: “ensemble of goods (movable, immovable, tangible, intangible) which the trader sets apart and uses to carry out his activity with the purpose of attracting customers and, implicitly, making profit” (Cărpenaru, 2009, p. 132).

According to the dominant opinion on juridical nature of goodwill, the latter represents *an intangible movable asset*, as well as *an actual universality* created by the will of its holder. The constitutive elements – tangible and intangible – though different from one another, in their materiality, acquire unity inside the goodwill and form a homogenous mass, as a consequence of the trader’s will, trader who used them exclusively to this purpose (Căpățînă, 1998, pp. 412-413). Goodwill as a “whole” is however subject to its own juridical regime, specific to intangible movable goods and different from that applicable to each of its elements.

As indicated, goodwill includes, in terms of structure, tangible elements and intangible elements. Some are declaratively enumerated in art. 1¹, letter c) Law no. 11/1991 regarding fighting disloyal competition, amended and supplemented by Law no. 298/2001¹, the mission of identifying and adding those omitted devolving them upon the doctrine and the jurisprudence.

a) Tangible elements are goods set apart and used by trader in exploiting goodwill (materials, machinery, equipment, office supplies and merchandise). Despite the fact that their position is controversial, goods on stock in the store owned by the goodwill’s holder as well as immovable assets are also tangible elements.

b) Intangible elements. In addition to tangible elements, goodwill also includes intangible assets, without a material, palpable existence, yet an ideal, abstract one, and which can be perceived only with “the mind eye”. (Beleiu, 2000, p. 97) They give an identity to the trader (name and emblem), or his products (brand), or represent new creations (inventions, drawings and industrial models, copyrights). Jurisprudence also includes in goodwill the right of use over the space where goodwill is exploited, adhering therefore to French legal provisions regarding right of lease².

Though governed by norms belonging to some distinct law branches (commercial law, intellectual property law or competition law), intangible elements are reunited by the holder’s will so as to fulfill a common mission, i.e. to polarize the customers and to make profit. Unlike goodwill as a whole, the Romanian legislator has focused on detailed definitions of standards³. Moreover, some benefit from regulations at both community and international level.

¹ Published in the Official Monitor no. 313 dated June 12 2001.

² Right to lease is defined as the right of the trader to rent the space he uses to exploit goodwill. It may have as subject matter main spaces used in exploitations, accessory spaces which may be used as dwelling, land where they have been built on, with the owner’s permission, industrial, commercial, artisan and professional buildings. With a view to preserve the goodwill, the lease contract is subject matter of some protective regulations to the benefit of the goodwill’s holder. The trader has the right to renew the contract expired, or else he is entitled to remedies of the damages caused (an eviction indemnity).

³ Definition of goodwill as offered in art. 1¹, letter c) Law no. 11/1991 regarding fight against disloyal competition, amended and supplemented by Law no. 298/2001, indicates some of the tangible elements: trademarks, names, emblems, patents, good custom. However, we can state that the enumeration is incomplete and should be updated so as to be in line with the evolution of the commercial practice. In addition, the Law of Trade Registrar states the intangible elements which are to be registered for purposes of publicity and opposability to third parties: patents, factory trademarks, commercial and work related trademarks, origin indications, name, emblem and other significant signs which the company, autonomous institution, cooperative organization or trader – certified individual - or individual enterprise or family enterprise has a right over.

Taking into consideration the criterion of the economic importance and that of the difficulty in their examination from a juridical point of view, a classification of the goodwill elements into *vital* (name, emblem, customers, good custom) and *accessories* (raw materials, materials, machinery, equipment) can be also outlined. Furthermore and depending on their relation with the goodwill, they can be grouped into *elements which may be disposed off only along with goodwill*, since they are an integrant and interdependent part of the latter (customers, good custom, name), and *elements which may be disposed off separately as well* (name, tangible assets) (de Juglart & Ippolito, 1998, pp. 550-555).

2. Related Work

In the Romanian literature, customers do not represent subject matter of special studies, despite the fact that the concepts are not normatively substantiated. The dissertations, the university courses or textbooks on Commercial Law, Business Law or Competition Law assign this subject either a limited space or partial or selective approaches. The articles and studies published in specialized magazines focus mainly on some aspects of the theme.

Nevertheless, there are several thorough analyses of these two concepts in the Romanian law doctrine as well. A detailed and fascinating debate on customers as concept, with business philosophical implications, followed by short considerations on goodwill, is given in *Commercial Competition Law* by Octavian Căpățină. Similarly, a highly interesting study of customers and good custom, including strong accents of compared law, is elaborated by Monna-Lisa Belu Magdo in her course *Commercial Law*. Romul Petru Vonica's vast and innovative investigation is also worth mentioning. This work concretizes in a complex definition of good custom presented in *Commercial Law. General Aspects*. Conclusive examinations, with permanent references to doctrine and jurisprudence, though less detailed, are also present in *Romanian Commercial Law Dissertation* by professor Stanciu D. Cârpenaru.

Unlike Romanian doctrine, French juridical literature focuses and takes great interest in analyzing customers and good custom, one reason may also be the key elements of goodwill under consideration. The most famous dissertations of Commercial Law or Business Law (Georges Ripert, René Roblot – *Traité de droit commercial*, Michel de Juglart, Benjamin Ippolito – *Traité de droit commercial*, Yves Guyon – *Droit des affaires*) allot an extremely generous space to examination of this domain, under all its aspects.

3. Customers as a Concept

The dynamism, the competition and the polyvalence of trade activity stand for guarantees of performance in a full developing market economy. The main concern of the traders resides in creating and developing the group of customers as well as turning them into loyal ones, using all other elements, both tangible and intangible, assigned to operating a business. As resultant of their contribution, the customers become the key concept, the main component of the goodwill. They also represent a junction point of juridical and economic sciences and a common denominator for law and business environment.

Numerous definitions trying to get a precise, complete and eloquent meaning of this concept have been formulated. To the same end, a dissociation of customers as a concept has been called for, one being of human and the other of material nature (Căpățînă, 1998, p. 5).

A first approach defines customers as “the group of persons in the habit of purchasing or resorting to the services of a trader” (Guyon, 1998, p. 715). In other words, they represent “all individuals and companies commonly using goodwill of the same trader, so as to procure some products and services” (Cărpenaru, 2009, p. 142). The dimension, amount and frequency of customers are influenced by a series of factors: placing goodwill, professional competences, training and behavior of trader and relating personnel, quality and variety of products or services, economic circumstances (goodwill may depend on the country’s economic situation), competition, consumers’ psychology, etc.

From a strong juridical angle, customers mean “the series of business relations, regular or occasional, existing or which are likely to exist between the public and the possessor of a professional quality, resulting in a conjugated attraction of material and personal factors” (Cornu, 2003). Insisting on the trader’s competences and skills, the French authors identify customers as a possibility of concluding future contracts with unidentified persons (Ripert & Roblot, 1991, pp. 430-435) or an ability to attract and capitalize a certain number of customers (de Juglart & Ippolito, 1998, p. 551).

Contemporary trade has a significant evolution towards reducing the factor of subjective nature, inherent to the trader’s personality, as a requirement to attract and maintain customers while developing the sale system within department stores with anonymous owners or associates of a corporate group (Belu Magdo, 2002, p. 65).

In an abstract way, independent of the persons framing them as a group, customers may be introduced as a unit of measurement, a volume or a turnover, having also a material significance. While an unorganized variable mass of persons, customers constitute an economic value, due to relations established between goodwill and persons procuring goods and services from the trader in question (Cărpenaru, 2009, p. 142).

Despite the fact that it includes no such provision, French jurisprudence considers customers as an essential element of goodwill¹, a *sine qua non* requirement for it to exist as well as a genuine patrimony value. Furthermore, this statement is also supported by French authors who judge goodwill as nothing else but the right over customers, their absence meaning absence of the entire goodwill (Ripert & Roblot, 1991, p. 429).

This idea has been strongly criticized, since customers are, in modern vision, a quality yet not an essential element of goodwill. They represent a purpose which may be achieved with the help of a number of “material supports” constituting as many elements as required (the right to lease, emblem, materials) or working instruments. In this thesis, goodwill would exist as soon as its elements are reunited, even in the absence of customers, and would subsist, even if customers disappeared, until it has been liquidated (de Juglart & Ippolito, 1998, p. 571).

Due to the complexity of the term and the absence of a normative basis, customers are subject matter of some current intense debates in our literature as well. With regard to the relation between customers and goodwill, the thesis according to which customers do not integrate into goodwill structure has been outlined and thus the controversy in the French doctrine regarding continuance as a core element has been amplified (Turcu, 1993, p. 237) (Belu Magdo M.-L. , 2003, p. 107). In the sense of a human

¹ In the Resolution 673/15 June 1970, the Court of Cassation in France has established the principle of customers’ necessity as an essential element of goodwill.

group, customers may not be assimilated to an asset, since they belong to nobody and are actually attracted by the trader who offers them the products and the services they want. Goodwill is only a means of creating and maintaining customers, an argument deemed obvious in this sense being the fact that changing them does not trigger correlative change of goodwill as well.

4. Types of Customers

Several types of customers may be distinguished:

1. Committed customers or the so called “organic customers” integrate the persons who have concluded a procurement contract with a trader. In this case, there is a stable juridical relation which attaches the customers to the supplier.

2. Attracted Customers designate the consumers addressing the trader on a constant basis, as an appreciation of his qualities, and independent of any obligations arising from legal documents. In fact, they are loyal customers, attached to the trader by an emotional relation.

3. Derivative Customers represent the effect of occurrence and expansion of big shopping centers. The multitude and the variety of businesses under the same roof (stores, cinema multiplexes, restaurants, beauty saloons) captivate the public. A precise determination of customers attached to each place is however impossible. Some traders benefit from consumers due more to the place where they run their business and less to their own qualities or qualities of their products (for example, the persons who want to watch a movie will buy soft drinks from a store next to the cinema hall, even if they do not usually buy such products from the store in question, the store customers deriving therefore from those of the cinema’s).

Calling down the personal character of customers, interwar French jurisprudence has refused to acknowledge customers typical of pubs located in train stations and they proclaimed them as owned by the railways. This reasoning has been also applied to bars or restaurants placed inside a golf club, a cinema hall, an airport, a sports field or a race track. Additionally, the same went for trading inside art galleries or shopping centers. In case of collective stores, there has been however an acknowledgement of customers equally belonging to all traders running their businesses in the respective location (Angheni & al., 2008, p. 58).

4. Devoid of stability, **Occasional Customers** are made up of persons who go to some traders occasionally only (restaurants, gas stations).

5. Characteristics of Customers

In order to make trading activities profitable, customers must be permanent (real and reliable), instead of potential and hypothetical. Besides these requirements, the doctrine states other characteristics of customers: customers shall be legal, commercial and personal.

a) Liceity is the natural consequence of the identical requirement in the domain of acts of commerce. In order to protect the general best interests of the company, no activities deemed as crimes or violations of public order, good manners or imperative legal provisions (for example, production and

sale of drugs) shall be carried out on the basis of free enterprise. Infringement of such norms shall have repercussions on customers as well and they shall not be able to benefit from juridical protection.

b) Merchantability. In order to have a commercial character, customers shall reflect the common effort of a goodwill which the trader sets apart for carrying out his activity. To the same end, it is required that the relations between customers and traders arise from concluding some transactions legally considered as acts of commerce.

These requirements differentiate commercial customers from civil customers, polarized by persons exercising liberal professions (lawyers, doctors). In this case, what prevail are the skills, the expertise, the professional talent which make consultations, services, provisions of services valuable, all these being offered under the unique and exclusive touch of the author (Căpățină, 1998, p. 8). Unlike commercial customers, civil customers are therefore unlikely to be assessed in money¹. They may be however assigned using a technical artifice, i.e. the person carrying out a liberal profession is remunerated for introducing his successor to the customers (Mercadal & Macqueron, 1997, p. 364).

c) Autonomy. In accordance with the classical view on juridical uniqueness of the customers' belonging, goodwill may not actually have more than one holder. The customers shall be personal and shall belong to the trader who administers the goodwill. This requirement is difficult to meet more from a practical than from a legal point of view, since, in some cases, despite the fact that the existence of the customers is incontestable, their attachment is doubtful. The common customers occur inside distribution channels, as well as assignment or franchise distributions. With a view to determine the customers' holder, identification of the latter's ground shall be first required.

In case of franchise, there are two points of view. The first is based on the criterion of the element prevailing in attracting customers and claims that, from the perspective of actual circumstances, neither location nor trader's qualities may play this role. The brand under which the franchise is exploited represents however the main polarizing factor and, due to this reasoning, the owner of the goodwill shall be deemed to be the franchisor. The contrary point of view admits that, nationally, customers are attached to the notoriety of the franchisor's brand, while locally, customers exist only due to the activities of the franchisee to whom they belong.

The distribution network is a new form of trade, a major result of the advertising impact which a brand may create within the mass consumption society. Ensuring some customers from the very beginning of the activity makes the traders deposit a significant right of admission and a substantial annual royalty in favor of the company organizing the network. Yet, there has also been an opinion according to which customers belong to the organizer, since he created them prior to organizing the network.

6. Juridical Nature of Right over Customers

Individual freedom being prevalent, the holder of goodwill has no legal way of preserving customers against their volition. Unlike the other intangible elements, the trader has no exclusive proprietary interest ("right over customers"), since he does not have the monopoly over the customers and is permanently exposed to the risk of being abandoned by them. Existence of an incorporeal right and, correlatively, occurrence of a double liability are however acknowledged. On the one hand, there is

¹ In an important resolution dated November 7 2000, the French Supreme Court ruled in favor of acknowledging the patrimony character in case of civil customers as well, validating thus their assignment.

confirmation on the trader's option to defend the customer against his competitors whose liability is to not absorb customers aggressively but only through legal and loyal methods (advertising or marketing techniques). The second liability is that of not competing with the buyer, devolves the seller upon the goodwill.

As customers are closely related to goodwill, they can be transferred only along with the latter (Georgescu, 1994, p. 166). Nevertheless, a context where they can be disposed off separately may also be envisaged. Therefore, should there be sale of the location only and should the buyer keep its initial destination, the seller's customers, ignorant of the change, may continue to go to this location, even if it currently belongs to the buyer's goodwill.

7. Good Custom

Customers are interdependently related to good custom and they are the effect of attracting the latter. Starting from this recital, a part of the doctrine is opposed to differentiating between the two terms.

Those hostile to the dualistic vision refuse to acknowledge a structure specific to the notion of good custom by reference to that of customers and deem it redundant. According to this perception and from a juridical standpoint, there has been stated that their scission implies no specific consequence, since good custom is only a form of customers (de Juglart & Ippolito, 1998, p. 552). In factual terms, there is a sign of equality between the notion of good custom and the notion of occasional customers (Guyon, 1998, p. 715). From this point of view, the persons occasionally or accidentally going into a store due to its convenient location and not to the trader's qualities represent the good custom. Location does not represent a mandatory requirement, since a walking trader may also frame his occasional customers along his itinerary.

The opinion of the divergent vision is in favor of a distinction between customers, who represent a group of persons attracted to the qualities of a trader (hospitality, competence, accuracy), and good custom, which constitutes the group of persons attracted to the location of the goodwill (situated on their usual ways or on a trading boulevard). According to this acceptance, good custom is related to objective factors of enterprise location, while customers relate to subjective factors of the trader's activity.

In our literature, good custom is defined as the ability, the capacity of the goodwill to attract customers, due to a series of factors which customize the activity of each and every trader. (Vonica, 2000, p. 871) This orientation illustrates the fundamental purpose of goodwill, the polarization and consolidation of stable customers, good custom being one of the tools used in fulfilling this objective.

The attractive potential of good custom is determined by a series of circumstances:

- when deciding on location of goodwill, it is mandatory to bear in mind the pedestrian traffic¹, proximity² and specific³ of the area, its fame, as well as furniture and equipment for the space in question;

¹ Existence of a public transport stop nearby represents an additional advantage and increases the number of persons going by the space in question.

² Stores selling materials for construction and interior design are usually located next to those selling sanitation equipment or other products and accessories useful in a home.

³ A deluxe perfume store shall never be located in a store in the suburbs, where the buying power is low; the same goes for a household retailer who shall avoid the main roads.

- in terms of products and services offered, the quality, price, range¹, presentation/package style shall meet the customers' needs and expectations;
- competence, hospitality, probity, condescence are only a few qualities the trader's staff shall possess.

8. Virtual Customers and Electronic Good Custom

Requirements of modern selling techniques have rightfully imposed uniformity of rules applicable within enterprises (in a physical sense), and virtual/electronic stores. These are similar to a showroom: the persons interested access them, visualize images and get information on the products offered. Should they decide to purchase, there is a "virtual basket" where they "deposit" the products they want to buy. Completion of order and conclusion of transaction between store and customer come next, while payment shall be processed according to terms they agree upon.

In case of online stores, there is no doubt about the existing customers. Their amount may be more precisely and easily related to a classic commercial activity. In practice, all virtual stores have a statistics website meant to keep records of persons having visited them, so that exact number of customers may be determined.

Good custom is actually unlimited, as long as the virtual store may conveniently be accessed from anywhere in the world, only an internet connection being therefore required.

9. Conclusions

Despite the diversity and the variability, the elements of goodwill share an aspect, being reunited by a unique purpose: attracting, maintaining and expanding the customers, and implicitly, making a profit. Unity is the result of the volition of the trader who exploits, in conditions of competitiveness and profitability, their characteristic of homogeneous asset of goodwill, without affecting therefore the individuality of their components. It is true that some elements may be disposed off only alongside goodwill, this requirement cannot however confer them the status of determinant for the continuity of goodwill itself. Under these circumstances, a double quality of customers is outlined, i.e. of fundamental element and purpose of goodwill.

In principle, customers are personal; they belong to the trader who exploits the goodwill. In case of distribution networks, there arise difficulties, in the sense that doctrine and jurisprudence do not lack arguments in favor of or against the franchisee or the grantee, by comparison to franchisor or grantor. This is the reason for which examination of customers and their implications in the technique of distribution networks involve a major interest, potential acknowledgement of any common belonging leading to further questions.

Over the past few years the internet and electronic trading have been significantly developing and they represent the most dynamic and finest form of product and service distribution. In addition, they stand for an excellent instrument placed at the disposal of traders who may find an interesting palliative to day-to-day contracts, difficult to conclude at times. Consequently, a new category of trader has occurred, i.e. the "e-traders", who, beside the virtual customers and the electronic good custom, embody the source of new and interesting analyses.

¹ Opening a greengrocer's store in a farming community shall never be profitable.

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