INTERNATIONAL DIMENSIONS OF EUROPEAN COMPETITION LAW

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Abstract in original language

The recent trend in competition law has been towards its internationalization for a number of reasons. This paper explores the various possibilities of how globalization has affected the competition policy in the EU and how the EU has been aiming to achieve the internationalization of competition law as well as the reasoning behind the internationalization policy. Two possibilities, or approaches to the internationalization of competition law as a whole emerge throughout this paper. On one hand, we can observe said internationalization via cooperation agreements between the EU and other countries with an established competition law system. On the other hand, a number of countries with a developing market economy have a habit of emulating the competition policy of the EU, and as such, Turkey is exemplified.

Key words in original language

EU, competition law, international law, cooperation agreement

Abstract

Najnovším trendom posledných rokov v oblasti súťažného práva je jeho internacionalizácia, ktorá je nevyhnutná z viacerých dôvodov. Tento príspevok skúma rôzne možnosti, ako globalizácia vplýva na politiku hospodárskej súťaže v EÚ a ako sa EÚ snaží dosiahnuť internacionalizáciu práva hospodárskej súťaže, popri predstavení dôvodov na internacionalizáciu politiky práva hospodárskej súťaže EÚ. Sú dva varianty, alebo prístupy k internacionalizácii súťažného práva ako celku, ktoré sú preskúmané v tomto príspevku. Na jednej strane môžeme pozorovať internacionalizáciu prostredníctvom dohôd o spolupráci medzi EÚ a ďalšími krajinami, ktoré majú zavedený systém práva hospodárskej súťaže. Na druhej strane, mnoho krajín s rozvíjajúcou sa trhovou ekonomikou má vo zvyku napodobňovať politiku hospodárskej súťaže EÚ. Ako príklad tohoto prístupu je Turecko.

Key words

EÚ, právo hospodárskej súťaže, medzinárodné právo, dohoda o spolupráci

INTRODUCTION

Although competition law is regulated in each country individually, or on a more multi-national scale, when we focus on European competition law, the globalization of economy has brought the need

for a system of international regulation. The anti-competitive conduct of an undertaking or multiple undertakings can have its effect on a different geographical relevant market or a number of various markets around the globe. International competition law is a phenomenon, which has come to exist, although it is not regulated in a global scale by any organization with international authority.

I. INTERNATIONALIZATION OF COMPETITION LAW VIA COOPERATION

The current economic situation calls for cooperation between competition authorities worldwide. Currently, anti-competitive conduct is regulated on a national level as well as on the EU level. Also, bilateral or multilateral trade agreements exist between EU and third countries. Within this bundle of regulations, an effective detection of anti-competitive behavior is very difficult, and the control and constriction of such conduct has become even more intricate. Among the problems with the application of various competition rules is the under regulation or, on the other hand, overregulation in particular cases.

At this time, EU has "concluded agreements with the United States, Canada, Japan and Korea on cooperation between their respective competition agencies. These agreements include provisions on the notification of enforcement activities to the other side, coordination of investigations (for example coordinating the timing of dawn raids), positive and negative comity, and the establishment of a dialogue on policy issues. These agreements also specify that the competition agencies cannot exchange confidential information, which is protected under their respective laws. The inability to exchange confidential information severely limits the scope of cooperation between the European Commission and foreign competition authorities. This limitation can undermine the effectiveness of the Commission's competition enforcement activities, especially in investigations of competition cases that have an international dimension, such as international cartels.

This is why the Commission is trying to move beyond these "first generation" agreements and negotiate cooperation agreements, which would also include provisions allowing the parties' competition agencies to exchange, under certain conditions, information which is protected under their respective rules on confidentiality. It is currently negotiating two such "second generation" agreements, one with Switzerland and one with Canada. If these negotiations were concluded successfully, these agreements would enhance further the efficiency and effectiveness of enforcement cooperation activities."[1]

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[1]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on Competition Policy 2011 p. 22 [online] [cit.

The EU competition law is applied, when the anti-competitive conduct has an effect on trade between member states (MS). This is the diction of both Article 101 and 102 of TFEU, as well as Directive 2004/139 on merger control. Therefore, even undertakings, which are not based within the EU, are capable of infringing competition regulation under TFEU. The EC has been given the authority to review all concentrations that have any impact on the internal market of the EU.

II. COPY AND PASTE POLICY

Another significant factor in the internationalization of competition law is the fact that a number of countries with a lower degree of economic development have had to incorporate and regulate the area of competition law in recent past. Having not developed in a natural and gradual fashion, the legal provisions concerned with competition law may simply be copied from a functioning competition law system, such as the one in the EU[2]. This development may assist the future internationalization of competition law. However, could this happening be still considered internationalization, if most legal systems of competition law in a significant number of countries would have been modeled after one or two already existing, albeit effective legal frameworks?

Primarily, we have to address the issue of an effective legal framework. The various systems of law, which have "survived" in the world, differ from each other, generally because of a historical and equally importantly geographical factor. When different legal systems successfully operate in certain parts of the world, why should the legal framework within these diverse systems be almost identical, when it comes to the area of competition law? One answer that comes to mind almost instantly is that, in the light of globalization of the market economy, it would require less effort on the level of regional and international competition authorities in market regulation and prevention of anti-competitive behavior, as well as detection of this behavior and its consequent punishment.

Alternatively, as previously mentioned, a legal competition framework utilized i.e. in the EU, might not operate well in a legal system, which differs greatly from the system exercised in the EU, or in any EU member state. Therefore, this copy and paste of competition policy may in fact hinder an effective regulation of competition on an international level due to the future existence of a

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22.11.2012] Available at: http://ec.europa.eu/competition/publications/annual_report/2011/part1_en.pdf

[2]Dabbah, M.M. : International and Comparative Competition Law, New York: Cambridge University Press, 2010, 594, ISBN 978-0-521-51641-9.p.3

legal competition framework, which will not correspond with all legal systems to an equal degree.

Having stated the positive as well as negative aspects of the copying and pasting competition policy into the legal system of countries with emerging market economies, we have established that various legal systems cannot share the same legal framework in a specific field of law. However, with the globalization of the market, a uniform competition framework is highly desirable. We know that there are a number of similarities between diverse competition law regimes today. We can enlist prohibition of certain types of behavior among the similar characteristics of different competition law regimes.[3] Usually, anti-competitive conduct, such as collusions between undertakings on both horizontal and vertical level, is one of the most commonly prohibited behaviors within the relevant market.

III. EU, TURKEY AND COMPETITION LAW

It is understandable and required, that competition policy and competition law of MS of the EU is in accordance with EU competition framework. If it is not the case, EU competition law always prevails. When we look at the history of accession of new MS to the EU, we can see how their competition law framework has been modeled after the EU framework for a vast amount of time ahead of their accession. A similar, but quite unique case of such actions is the case of Turkey.

Turkey has been aspiring to join the EU for an extensive period of time. When we look back to the 1990s, we can notice Turkey's efforts to emulate the framework of the EU and its competition policy. In 1994, the parliament passed Law No. 4054 on Protection of Competition and in 1997, a communiqué on Mergers and Acquisitions was issued by the government.[4] The aim of these two acts was not exactly to emulate EU framework, but to bring Turkish legal framework closer to the legal framework of the EU in the manner of future anticipation of accession to the supranational entity. Doleys provides evidence of alignment of provisions of the EU and Turkish legal documents in Articles 4, 6 and 7 of Law No. 4054. The diction of Article 4 is very similar to the wording of Article 101 of the Treaty on functioning of the EU (TFEU), as can be seen in the subtext. [5]Again, Article 6[6] emulates Article 102 TFEU, which is concerned

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[3]Dabbah, M.M. : International and Comparative Competition Law, New York: Cambridge University Press, 2010, 594, ISBN 978-0-521-51641-9.p.13

[4]Doleys, T.J.: Promoting competition policy abroad: European Union efforts in the developing world, The Antitrust Bulletin Vol. 57, No. 2: Federal Legal Publications, 2012. 337-366 p., p. 338

[5] The Act on the Protection of Competition No. 4054 [online] [cit. 24.11.2012] Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=245123 Article 4- Agreements and concerted practices between undertakings, and decisions and

with the abuse of a dominant position on the relevant market by one or more undertakings. Both Article 4 and 6 strongly and closely follow the provision of TFEU under Articles 101 and 102 respectively, which are the two main pillars of EU competition law. The third similarity with EU legal framework and Turkish legal framework regarding competition law is slightly varied from the first two, due to the fact, that Article 7 mimics the diction of a secondary source of law. The

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practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. Such cases are, in particular, as follows:a)Fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale,b)Partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements,c)Controlling the amount of supply or demand in relation to goods or services, or determining them outside the market,d)Complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behavior, or preventing potential new entrants to the market,e)Except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts,f) Contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied. In cases where the existence of an agreement cannot be proved, that the price changes in the market or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice. Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.

[6]Ibid. Article 6- The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited. Abusive cases are, in particular, as follows:a)Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,b)Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,c)Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price, d)Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,e)Restricting production, marketing or technical development to the prejudice of consumers.

diction of Article 7[7] is very analogous to the diction of the EU Merger Regulation, which demonstrates the aim to harmonize competition law.Turkey serves as a highly significant example for the globalizing impact of EU competition law due to a number of reasons. First of all, it is one of the countries attempting to be granted the right to access to the EU, albeit it is a very controversial candidate. Most of its territory does not lie on the European continent, although it's capital and hence most industry and business do, which is a significant factor for the case of competition law. On the other hand, the historical and religious background of the country varies vastly from the historical, but mostly religious background of the rest of the MS of the EU. One can argue that religion does not have any influence on the competition policy of a country, but this argument may be false, or not completely true in some cases. One of the cases may be the case of Turkey.

The Islamic law of Sharia differs from most continental legal systems, which are exercised within the EU and by the EU as a whole. This is one of the core reasons, which may be listed as a basis for a legal challenge, when it comes to Turkey's accession to the EU. However, one must bear in mind, that although it might seem unachievable for a country with such major legal diversities to by accessed to the EU, nonetheless, the same country may adopt EU"s competition law regime. The remaining question is whether and to what degree, could the adopted regime fault when applied in the same manner as it would be applied in the original environment, where it was established.

IV. ADOPTION VERSUS COOPERATION

Coming back to the original thesis, one may argue, that the adoption of EU competition law framework by i.e. the Turkish government has lead to further the internationalization of EU competition law. Still, we are faced with the same dilemma. Is it possible, and in the case that it is, to what extent, that the adoption of similar or even identical competition policies around the globe will ensure an effortless enforcement of such policies?

The current approach seems to highlight the fact, that such adoption and following adaptation of various legal regimes around the world, is in fact a suitable means to resolve the present issue of an increasingly global need for competition regulation. The approach seems

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[7] Ibid. Article 7- Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited.The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order them to become legally valid.

straightforward, due to the fact, that a number of countries with developing economies are only establishing their competition policy.

Historically, the EU has attempted to globalize and internationalize its competition policy since the mid 1990s, about the same time as Turkey's adoption, or copy-paste technique conclusion, of provision of EU competition law. In 1995, a report by a group of experts on the strengthening of international cooperation and competition rules was released by the EC. The report, which is currently 18 years old, recommended a formation of international competition rules[8], justifying its approach on the following:

-Economy globalization[9]-Lack of rules at international level[10]-Distortion between actions against anticompetitive behavior[11]-Countries extending territorial scope of competition rules[12]-Situation in developing countries[13].

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[8] Competition Policy in the new Trade Order: Strenghthening International Cooperation and Rules, Report of the Group of Experts [online] [cit. 24.11.2012] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1995:0359:FIN:EN:PDF, p.3

[9]Ibid.p.4 Given the globalization of the economy, there are more and more competition problems which transcend national boundaries: international cartels, export cartels, restrictive practices in fields, which are international by nature (e.g. air or sea transport, etc.), mergers on a world scale, or even the abuse of a dominant position on several major markets (e.g. Microsoft case). Competition authorities therefore have a prime interest in cooperating to solve these problems together in order to enhance the effective enforcement of competition rules.

[10]Ibid. As a result of lack of rules at international level, firms which are present in several countries are sometimes subject to different national competition rules. Procedures, time limits and the criteria for taking decisions can vary considerably. It is even possible for a merger or a concerted practice to be authorized in one country and prohibited in another. These differences push up costs (more procedures, higher legal costs, etc.) and increase uncertainties and may therefore constitute barriers (sometimes major ones) to the expansion of trade and of international investment.

[11]Ibid. In some countries action against anticompetitive practices is less rigorous than in others and distortions may result. Also the anticompetitive practices tolerated by one competition authority sometimes result in access to the market concerned being closed, even though foreign forms could provide additional competition which would be beneficial to the consumers of that country.

[12]Ibid. Some countries have sought to remedy such problems by extending the territorial scope of their competition rules. However, this approach can lead to conflicts between competition authorities. In the absence of international cooperation, there are also legal and practical obstacles to seeking on foreign territory the information necessary to establish the existence of infringements. There is then a risk of a competition authority

All reasons, as are extensively described in the subtext, can be seen from today's point of view as foreshadowing the reality we live in today. The globalization of the economy has been climbing in a very fast pace, promoted by the lack of barriers in the online world. Still, after almost two decades, we are aware of the lack of rules at an international level, which had resulted in the two forms of compensation for such unmet requirement, i.e. globalization of EU rules or cooperation between established competition authorities in various part of the world.

Cooperation has somewhat limited, or has been aiming to limit the procedural costs stemming from different competition rules in different jurisdictions of countries, which have signed a cooperation agreement with the EU. As a form of internationalization of competition law, it does not globalize EU competition law framework, but it approaches the internationalization of competition law as a whole, i.e. such agreements aim to create a new set of competition rules, which have the potential to become customary competition rules for enforcing competition law mechanism on a global scale. Here, one has to ask, whether the aims of the EU are to internationalize, or globalize, enforcement of its own competition law framework, or to aid the development of a common global competition law framework, which would be a set of common rules found in the various competition law framework families around the world.

It is necessary to state another relevant factor in this discussion. Many independent countries, which have been recently establishing their competition law framework, were colonies of European countries, and hence have adapted themselves to similar lifestyle as was common in the invading countries. Therefore, it can be argued, that it is far more effortless and straightforward for these countries to simply adopt or emulate the competition law framework of the EU.

CONCLUSION

As we have established, the enforcement mechanisms of competition law in general have become increasingly more difficult to carry out, due to the ongoing globalization of the economy. This trend has been addressed by the EU almost twenty years ago, yet competition authorities have been struggling with this dilemma ever since then.

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having to abandon prosecution of the alleged infringements for lack of sufficient proof.

[13]Ibid. Developing countries in particular have an interest in ensuring effective controls on anti-competitive behavior. The worldwide lowering, in the context of the Uruguay Round, of governmental market access barriers for trade in goods and services, trade-related investment measures and intellectual property rights may leave them more exposed to the risk of anticompetitive practices. In the absence of appropriate domestic rules, they may also risk being subjected to the extraterritorial application of other countries" competition laws.

The question of internationalizing the rules of competition law has been attempted to be answered by many supranational and international authorities. Overall, we have established that currently, there are two different approaches to internationalization of competition law from the point of view of the EU. Neither one is necessarily the correct, or the most efficient way to do so, but both have aided the path to globalization of competition rules.

The significantly sophisticated labyrinth of existing competition law frameworks and developing competition law frameworks is swelling and expanding by the minute. Since there are also many possible approaches and methods to shrink and minimize the labyrinth, the main objective of all of them should be the straightening of the path to international competition law.

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