COMPETITION ON GLOBAL MARKET – LEGAL CONCERNS

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Abstract

Competition policy is a field where economists and lawyers have to work hand by hand to achieve overall welfare. Unfortunately, competition policy is under strong influence of other policies what gives her very national or supranational nature. As a consequence, there is not possible to speak about competition but merely about various national laws that in their specific way address competition cases with an international element. Overlapping of jurisdictions, conflicts between substantive and procedural laws are unavoidable. Considering, that fully simultaneous compliance with all those laws is hard task to fulfil, it makes cross-border transaction much more risky, time consuming, and costly than is necessary. By setting up an autonomous international court for global competition cases not only we would get rid off obstacles for efficient enforcement of competition but we could flourish global welfare without depriving developing countries of their economic growth.

Key words: Global competition, global market, international court, enforcement.

1 Introduction

In the era when ideas, goods, services flow without any difficulties through all around the World, when information about producers, products or services they offer is easy accessible, when there is less and less dangerous and risky to move the production at the countries where production costs are lower, the question that rise out is can we really speak about global competition?

With the difference to the regulation of international trade, there does not exist neither a set of international competition rules nor an international institution which would deal with problems and solve competition cases with an international element. This lead us to the conclusion that at least for now we cannot, from the legal point of view, talk about global competition law or global competition policy. Having regulated international trade without considering or better, without having the necessary framework to consider, competition issues that arise from such a trade cause serious problems in legitimising any state’s policy trying to preserve as higher welfare as possible for its citizens.

2 Why the Global Competition is needed?
Despite the fact that we cannot talk about global competition\(^1\) yet, it does not mean that competition on global market does not exist. Before we look closer at the way in which international competition cases are dealt, we should pose to ourselves the question about justification to make competition legally regulated. Considering that the US antitrust law was originally enacted not for preserving but stopping benefits deriving from competitive behaviour\(^2\) and that perfect competition and so perfect efficiency can never exist, someone could even think that competition law is something that can cause more evil than good. Further on we would see that there is a bit of truth in this, in the case, if there eventually happens that competition authorities or courts when dealing with competition issues legitimise as competition policy those practices, or better those aims undertakings try to achieve, that have nothing to do with competition.

The pure competition would certainly not need any regulation. Everyone would be able to compete with his rivals in any way it would found efficient to won the primary position over his rivals. Where this kind of practice can lead it is not difficult to imagine. Concentration of wealth, power and ability to deciding about quality of live of other people in hands of some winners of the struggle is something that should not be allowed. On the other hand, too much restriction of freedom of action and much higher protection of competitors than it is necessary can cause the stagnation of progress and reducing the welfare in general. At what point of the scale between these two extremes is the competition policy of the relevant market going to be at the certain period of time, it is hard to predict well in advance. Competition policy which could be fully recognised only through decisions of competition authorities or court judgments has never as its legitimate object merely allocative efficiency. Through competition policy there are pursued also policies like social, environmental, employment and even political (e.g. achieving single market in EU)\(^3\). And as soon as there is a clash between various in general allowed, recognisable policies there is hard to predict which one is going to prevail and so dictate the decision of the case, except there where the main objective of the sovereign institution which either makes or decides upon implementing various policies can be realised directly from the hierarchyly highest legal act that is binding on it (e.g. achieving common market in the EC Treaty).

But what about deciding competition case in which there is present also an international element? This could happen in the following cases:

a.) national undertaking is acting and causing anticompetitive effects wholly outside national or supranational (e.g. the EU) territorial borders\(^4\) of the institution hearing the case

b.) foreign undertaking is acting and causing (anti)competitive effects within the national or supranational territorial borders of the institution hearing the case

c.) national or/and foreign undertaking is/are acting outside the national or supranational territorial borders of the institution hearing the case but causing the anticompetitive effects within it

d.) national and foreign undertaking are acting and causing (anti)competitive effects within and outside the national or supranational territorial borders of the institution hearing the case (international merger)

e.) national or foreign undertakings, each of them located and performing within different national or supranational territory and offering different product but at
the same time enabling their customers the access to all their products at once, what gives to this network monopoly position (new-one network product)

In these cases, the institution dealing with the case, would not after deciding to have a jurisdiction to hear a case immediately apply its competition law, but would primarily balancing if and till what extent national interests, or better the interests of its customers and undertakings are affected compared with the interests of foreign ones. Taking into account that no institution would act against the national interests or in the way to reduce the welfare of its citizens, in practice this means that in the case a. above, institution is in general not going to prohibit the anticompetitive behaviour of its national undertaking if the anticompetitive effects of such behaviour are going to rise and remain only and wholly outside its national or supranational territorial borders without at the same time causing its home customers and consumers to be worse off. In this case foreign customers’ and consumers’ welfare is not considered what can cause that on the global level, allocative efficiency is below the level at which it could eventually be.

The same could happen with foreign customers’ and consumers’ welfare and overall allocative efficiency in the case b. above, regardless the legality of undertaking’s action and its effects. In a case where there is found obvious breach of competition law which would at the end result in obvious worse off, the case raises no concern. Such an undertaking would be found guilty for breaching competition law. But what if foreign undertaking is behaving in conformity with the competition law and at the same time there exist a risk that other producers within importing country would run out of business? If eventually happens that competent authorities of importing state as a reaction to such a situation take antidumping measures or either limit or completely prohibit the import of such goods or services and so causing customers and consumers worse off, this kind of practice is, under our opinion, not really in conformity with competition law, despite the fact that could be in conformity with international trade law.

We are going to talk about other reasons that require enactment of international competition rules in the next chapter for so avoiding unnecessary repetition of some problems that have to be dealt together.

At this point, we could conclude only that until when there we would not have uniform global competition rules, we could not talk about global competition because deciding competition case with an international element by using or being subjectively influenced by national interests cannot contribute to global allocative efficiency and to global welfare.

3 How to deal with Global Competition Case?

3.1 Present situation
The first thing the institution dealing with competition case is pending has to assess under its own private international law is the question of having jurisdiction to hear and decide the case (enforcement jurisdiction). Without going too deep into this issue we can in general say that this issue is dealt either under incorporation test\textsuperscript{11}, place of conduct test\textsuperscript{12}, purposely availment tests\textsuperscript{13} or, as regards mergers, threshold test\textsuperscript{14}.

After concluding that it has such a right the next step is to determine relevant market. This is nothing more that determining what exactly are the products that compete between them (relevant product market); on which exact territories undertaking in question is in competition with the other undertaking producing the competitive products (relevant territorial market); taking into account that present situation can reasonably change in determined period of time making so present anticompetitive behaviour allowed under competition law and vice versa.

The test to determine the relevant market can vary from country to country or supranational legal entity\textsuperscript{15} and its application is limited to the relevant market located within its territorial jurisdiction\textsuperscript{16}.

When dealing with global competition case, the relevant market can extend even beyond national or supranational territorial borders. The case would be if some countries would promote research and development in the way that for others would be hard to determine well in advance the characteristics and time when new competitive product would enter the market, or capability of the products produced beyond the territorial borders of the present relevant market that could enter it far more easier and far more faster\textsuperscript{17} than we could consider at the moment dealing with the case in issue. In addition, there could also be a case when considering the behaviour of undertakings on their nationally or supranationally territorially limited relevant market would cause no anticompetitive concern, but as soon as we take into account their global network and so the ability to jointly offer the customers completely new, worldwide product (case e. above), the case could be right the opposite\textsuperscript{18}. For such cases, present approach by trying to deal with competition cases with international element by application of national competition laws is all than appropriate. This is another argument why the global competition law is needed.

After deciding about jurisdiction issue and determining the relevant market, there remain nothing else then application of substantive\textsuperscript{19} competition law of the forum. What kind of policies competition law can embrace we have already seen here above in this article. The issue that has raised the most international concerns was the issue of legal permissibility and legitimacy to enact the law\textsuperscript{20} to regulate the conduct that occurs wholly outside the territory of the forum but which effects occurs within it. This is so called problem of extraterritoriality, i.e. extraterritorial application of the national law.

The problem was caused by the US court judgment in Alcoa case\textsuperscript{21} and it has not been solved yet. We agree that we should not allow that intended conspiracies to cause an anticompetitive effect or behaviours causing an anticompetitive effect are safe merely because were agreed or managed wholly outside of the forum. But on the other hand, there should not be considered just a national interest of the forum where anticompetitive effects occurred but also the national interests and competition policy of
the country the undertakings in question are nationals and national interests and competition policy of the country where action de facto occurred.

The cases in which, apart from considering the effect, the court took into account also the intention of the parties, national interest of other countries are for example the US cases Timberlane\textsuperscript{22}, Uranium cartel\textsuperscript{23}, and Hartford Fire\textsuperscript{24}, but the main problems still remains. There is hard to imagine that the institution dealing with the case would objectively and impartially balance the national interests of the forum and national interests of the other states\textsuperscript{25}. It is also hard to accept the decision taken in Hartford fire case that there is no “true conflict”\textsuperscript{26} between competition laws if competition law of one country does not regulate one kind of behaviour or merely allow it (but not require it) and competition law of the other country explicitly prohibit it what allows the institution\textsuperscript{27} of the forum. This is evident interference with the competition policy as a part of economic policy of another sovereign state especially, if the state chooses the policy neither to order nor to regulate the competition within its territory\textsuperscript{28}.

The same concern would occur if there would be allowed for the undertakings when concluding the agreement which could raise some anticompetitive issues to stipulate the submission clause about which state’s competition law is going to apply when assessing their behaviour. That is why this kind of contract clause is not permissible\textsuperscript{29}.

As there is obvious that each single sovereign state has its own right to decide over its economic policy\textsuperscript{30}, on the other hand, it can abuse such a right for pursuing aims that are in clearly breach of competition law and policy of other sovereign states without facing any legal consequences. This can happen either if a state acts in its own authoritative power\textsuperscript{31} or if it enacts a law that compel\textsuperscript{32} private parties to behave in exactly determined way causing so the anticompetitive effects within others’ national or supranational territorial borders.

3.2 What should be done in/for the future?

We have seen here above that determination of competition policy and its implementation is in complete power of each sovereign state. This mean that there are states that have not yet enacted their competition law statutes, states that have enacted them but their substance is right the opposite or interfere with the competition policy of other states and there are states which competition law and policy is in conformity with the competition law and policy of other states. Comparing merely the letters of the articles or decisive sentences in the judgments or administrative decisions is not enough. What should be done is comparing the real values and national interests that crucially dictate the final solution of the case. Only on the point when these kinds of values and national interests are going to be shared all around the World we are going to be able to say that we have legitimate, uniform and completely effective global competition law.

At least for the present, it is irrationally to expect that such a common values and national interests are going to be shared all around the World. Requiring from the undertakings from the poor and undeveloped countries to respect the same rules when acting and competing with the undertaking from developed countries is something that
really cannot be seen as fair especially if, with such an expectation, we hinder the economic progress within those countries. But this does not mean that there is nothing that could be done to foster the progress towards global competition law.

Under OECD recommendations, some countries with almost the same level of development and quite common sharing of the competition policy values concluded bilateral agreements for cooperation and coordination in dealing with global antitrust cases. Personally, we do not believe that global competition law can be regulated in such a way. Mergers like Boeing/McDonnell Douglas or Gencor/Lornor can clearly show that despite such agreements there are always national interests affected in the concrete case to dictate the final solution. Apart from this, such agreement can hardly be fully invoked in front of judicial authorities because it is always in the hand of the court to decide if acting in conformity with all the provision of such an agreement is allowed under national or supranational law. The only real positive contribution towards the global competition law that could be found in such bilateral agreements is the positive comity provision, under which affected state is obliged to ask the affecting state to take the action against its undertaking causing anticompetitive damages in the territory of affected state before the latter is allowed to start enforcement under its own national law.

Completely separate question is about how to solve international merger (case d. above) when under the national law of one country it is allowed but not under the national law of the other one. Deciding on the merit, international merger should not be distinguished radically from other global competition cases, but there is one thing that could be done for avoiding well in advance that conflict of jurisdiction for hearing international merger case arise. This could be achieved by harmonising the thresholds, the precondition of what mostly would be the decrease in hegemony and reduction in state’s budget monetary funds dedicated to deal with so many (non important?) international mergers.

The only solution that could properly deal with global competition cases is by setting up the new, completely autonomous international court for global competition cases. Embodied with the power to decide not only on hard core anticompetitive practices but on all kind of activities performed by either states or private entities which can raise competition concerns and by considering some private international law issues, considering objectively and impartially various national interests involved in each single case without forgiving to pursue the aim of moving towards uniform global competition law that is necessary if we like to achieve the real international - global – trade and worldwide welfare.

4 Some of procedural problems in enforcing competition case

Everyone would agree that it would be worthless to have right balanced competition law that mirrors the competition policy perfectly without being able to enforce it. As we have seen above, until the time when there would be an international institution that would have a power to primarily deal with global competition issues there would be national courts and national competition authorities dealing with such cases.
Being competitor or merely a consumer you should be aware which authority can decide on competition issues, for what purposes the authority is dealing with the case, who has a right to start and conduct the procedure till the final decision is taken, who has to provide the evidences of anticompetitive harm, and who pays the cost of procedure\textsuperscript{40}.

We are not going to discuss all those issues in depth but what everyone should know is, that if you like to obtain damages for anticompetitive harm you have occurred, it is on you to start the civil procedure in front of the court that has a right, under the private international law of the forum, to hear the case and to provide all the evidence necessary to prove your allegations.

In addition to all these concerns, from time to time we could expect that obtaining evidence located within the jurisdiction outside the forum could not be possible or that we could be deprived from full enforcement of the final judgment if defendant would not have any assets within the jurisdiction of the forum. We should also hope there are no blocking statutes enacted by states to protect their citizens from extraterritorial enforcement of other states' competition law\textsuperscript{41}.

5 Conclusion

There is not possible to speak about global competition law yet. With the competition cases having international element there are dealing (supra)national competition authorities or (supra)national courts, deciding on jurisdiction and merit by applying its own laws and giving a bit of priority to its national interests\textsuperscript{42}.

Objective and impartial dealing with such international cases would be possible only by completely autonomous international court for global competition cases that could contribute to the expansion of those kinds of values and interests that would enable global competition law to be formed and enforced all around the World and so making international trade fully beneficial for our common welfare.

Notes

1 I.e. in the sense to have international – global - competition code which rules would be binding all around the World.
2 See DiLorenzo, 6.
3 Competition law has potent historical, economic, political, and social roots that make it a market nation's ultimate forum of public law. Short of reading a written constitution, a nation's competition law will tell you the most about its economic and political system and whether it puts its faith in the commands of the government or the operation of the market (Waller 1997, 395).
4 At this point, we intentionally avoid to use the appropriate form of the term jurisdiction for so avoiding the confusion with the explanation here after.
5 As a legal act through which the State is implementing its competition policy at the concrete behavior.
6 Subject to the positive comity provision in the eventually existing international bilateral agreement on cooperation in the competition matters. Concretely, we are going to discuss this provision here after.
The ECJ case that confirmed as legal such a behaviour of undertakings national of the EU member states is Javico case (Javico International and Javico AG v. Yves Saint Laurent Parfums SA (Case C-306/96)). The EU Commission decision about allowance of export cartels be found in Cobelaz case, 6 Nov. 1968, J.O. 1968, L 276/13, 19 and 29 – See Bellis 1979, 661.

For the comparison look at Guzman 2000, 6 and Tuttle 2003, 322-327.

Also when acting through its agents, sub-agents, branches or even through its subsidiaries that does not have their real autonomy (the EC Commission case: Dyestaffs case (Aniline Dyes Cartel (1969) C.M.L.R. D 23; the ECJ Case: I.C.I. v. Commission case 48/69, (1972) E.C.R. 619) or by direct, active sales to the purchasers located within importing territory (the ECJ case: Woodpulps case (Ahlström OY v. Commission Case 89/85, (1988) E.C.R. 1593).

Consider the ban the EU posed to the import of the Chinese textile.

Assessing the place where undertaking was incorporated, i.e. either has its seat or board of directors.

Here we consider if the undertaking in question was actively conducting business within the territory above which the institution hearing the case has jurisdiction.

The test under which we have to assess if the undertaking in question has an intention or was aware that its products can enter into the territory above which the institution hearing the case has jurisdiction.

Legal acts that regulate mergers clearly state in which cases the competent institution is going to hear and decide upon merger.

E.g. within the EU the test used is SSNIP and the percentage in price changing that is stated to cause switching of consumers is range between 5% and 10%, (See Wish 2001, 27-28).

Jurisdiction – right – to hear and decide the case determined by the territory over which this right extends.

E.g. through information technology network.

See Soma and Weingarten 2000, where they present such a multinational network effect on the case of Broadcast-Media and News corporation.

Some of procedural law issues we are going to analyze closer in the chapter of this article.

So called prescriptive jurisdiction, i.e. the right of States to make their laws applicable to persons, territory, or situations (Jones and Surfin 2001, 1039, Wish 2001, 392, Maier 1983, 582).

United States v. Aluminium Company of America, 148 F. 2nd (Second Circuit, 1945).


In Re Westinghouse Uranium, 563 F. 2d 992 (10th Circuit) 1977 and In Re Uranium Antitrust Litigation, 617 F. 2d 1248 (Seventh Circuit) 1980.


Which only would require, under the principle of international comity, the necessary ballancing of national interests that would be harmed by application of law of the forum on the foreigners’ conduct occurred abroad.

This means either competition authority or a court.

See Lowe 1981, 265.

About the right of the people that live on the territory to decide on the basis of self determination about their public order that economic policy makes part in and as following, about the lack of State's power to enforce the foreign competition policy as part of wider foreign economic policy see Lowe 1984, 519, 522, 524, and 525, Rosen 1981, 217 and 222, Lowe 1981, 277.

It derives from the right of the citizens to decide about the conditions and the quality of the life they like to live as politically and legally organized society within clearly determined territorial borders. About the rule of noninterference in the field of competition look at Meessen 1984, 804.

Act of state doctrine (Sornarajah, 1982, 143. E.g. countries, members of the OPEC can decide about exploitation of their national resources without being under supervision of any other supranational or international organization that would be able to assess on the merit the OPEC's decisions with regard to the anticompetitive effects such decisions can cause (see Sornarajah 1982, 142).

For the i.e. compulsion defense see Jones and Surfin 2001, 1043, Sornarajah 1982, 144, Bellis 1979, 677.

For the necessity to take into account also the socio-cultural and environmental criteria see Jones and Surfin 2001, 1073, Bushman 1980, 253, 255, and 256.

See Waller 1997, 361-362.

See Peck 1998, 1169.
36 There could be different levels of protection of privacy and important commercial information that will not allow institutions having jurisdiction of hearing the case to exchange such information. This was evident also in Microsoft case.

37 Except the former has no jurisdiction or is not prepared to deal actively with the case or not expeditiously enough (see Jones and Surfin. 2001, 169).


39 The same way in which the ECJ ruled about understanding of Rome convention in the contract and tort matters these being a consequence of diversity of law of contracts and torts among various member states.

40 For the reason why private enforcement of competition law in the US is much more frequent that in the EU see Baudenbacher 2002, 365.


References


