Scenarios regarding the role of the Competition Council and its influence to the economic environment

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Abstract

The present article offers a series of scenarios which can appear as a result of different decisions that are being taken and applied by the Competition Council with implications in the national economy. The scope of the article is for best practices examples to be showcased in order for the procedures of competition law in business to be smoothened out. With this occasion, our aim is to offer a parallel with the Competition Law from Czech Republic and Singapore to have a better understanding of the differences but also its effects which could appear in the Romanian and international business environment once the decisions are being taken by the Council of Competition. Several scenarios are being conducted and analysed from the juridical-commercial perspective and certain recommendations are being formulated for a better development of European Law, in this case the international business law in the context of a broader framework in the European Union, but in Asian and Central American countries as well.

Keywords: *transparency, best practices, scenarios, competition.*

JEL Classification: K23, K33

1. Introduction

The Competition Council has the role to protect the consumers' interests against the anticompetitive policies, that different economic agents nationally and internationally exert them in order to obtain unduly profits through the monopoly that is exerted over that specific market influencing at one's will the price and the quantity of sold goods to the end users. In this regard, one can notice that certain „players" on the international market can influence in a negative manner the products and selling of those products to the end users, based on the decisions that are being taken at local level by the Competition Council.

On the one hand the Council's role is to protect consumers, but on the other hand it may adversely affect the strategy development and the penetration of certain manufacturers in various markets, and their influence on local and international Stock Exchanges, due to lower stock prices of companies subject to acquisition / merger, and consequently the cash-flow.

We also consider time as a negative factor, namely delaying the decision of the Competition Council as a negative influence on the market and the business environment. In this case, the merger may create a state of uncertainty affecting

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business productivity and therefore profitability. This state of uncertainty with which mergers are such often faced, is fuelled by a disagreement between some shareholders who can support the merger, while others will oppose it. This threatens the market share of the company and the stock price of the shares goes down. The merger may also be influenced by the ruling authorities and policies toward business.

In this respect, we decided to analyse the legal terms, and economic implications of the Competition Council in countries such as Romania (country which with the entry into the European Union and national and international geopolitical context in recent years, has registered large variations in inflation rate, the lowest standard of living in the EU), Czech Republic (country which due to the economic and geopolitical position in the last 10 years recorded average values in the inflation rate and the standard of living) and Singapore (country which due to geopolitical position has not felt the effects of the global crisis in 2008, registering positive growth yearly).

The purpose of the analysis is to create a platform for academic discussions on the role and the different scenarios that can occur in various decisions of the Competitive Council. The authors analyse the legal status of the Council in three countries and provide in the last part of the article, certain development directions that will help the development of legally competition law, which leads to optimization of the Council to positively and constructively influence Romanian and international business in case of an investment in the Romanian economy.

2. Competition Council in international framework

Competition Council must act in accordance with the laws of the country or region but on the other hand must take into account the implications of its decisions in the international framework. We recall in this case Oracle vs. European Commission when Oracle Company bought Sun Microsystems Company and on the market appeared the fear of how this merger would affect IT best practices from other companies on the market like: IBM, Microsoft, etc. At that time, Oracle was specialized in the production and marketing of software (programs, databases, etc.), but it didn't have experience regarding hardware products (computers, servers, etc.), that were the ones from Sun. There was a "fear" on the stock exchange regarding the future of Oracle, if this is the best decision given the fact that they were entering a domain that didn't know anything about. On the other hand, Sun shares rose from $ 6 to $ 8, because a "joy" appeared on the market, that Sun will not disappear from the IT industry, allying with a major player in the IT market segment, namely Oracle.

Some Research Questions arise, which are the scope of this article and are part of the study the authors have undertaken from that time on, namely:

- What would have happened in the world, if the decision of acquisition of Sun by Oracle had not accepted by the European Commission?
- What would be the macroeconomic impact on thousands of Oracle and Sun employees worldwide and the businessmen who owned shares of

the two companies and what consequences such a decision would have on the price of the shares owned by them?

- How decisions of the Competition Council influence the business environment?

Starting from the premise of this case, we try to see the differences but also similarities in countries like Romania, Czech Republic and Singapore and propose certain directions regarding the strategic role of the Competition Council decisions in developing scenarios for economic growth of these economies.

2.1. Competition Council in APAC area: Singapore

In the case of the APAC countries such as Singapore, our study is based largely on concepts of the professor in law R. Ian McEwin, from the National University of Singapore, who held the position of Chief Economist in the Competition Council of Singapore.

In one of his works[3], he refers to the Competition Law in Singapore with its similarities and differences. This law is based on the UK Competition Act of 1998, but has some differences, as follows:

- Section 47, which prohibits the exercise of domination and abuse that explicitly says that businesses that are dominant anywhere in the world can violate section if their behaviour have an anti-competitive effect in Singapore;
- Vertical agreements are also excluded from Section 34 of the Act (as long as a dominant company is not involved), reflects the view that "vertical restraints are normally procompetitive and those that are not are often limited by international competition or are difficult and costly to assess", reflecting the decreasing level of bureaucracy by limiting administrative resources that otherwise would have been involved in the assessment;
- Competitive Law does not apply if there is a so-called "net economic benefit" (BEN).
- Elimination of the article on the abuse of dominant position, the subsection which refers to "the asserting of purchase or selling prices or unfair trading conditions" and replace with "aggressive behaviour towards competitors". This replacement clearly shows that the abuse is limited to exclusionary and not price regulation or consumer protection, making the ban to be different from most Asian competition laws that prohibit unfair behaviour.

In this sense, just as the author refers in his article, Singapore makes a clear distinction between consumer's protection and competitiveness Law.

While restrictions on competition generally reduce production, product quality and consumer choice option, some agreements between companies that

[3] McEwin, R. Jan *Competition law in Singapore*, document available online at http://www.globaleconomicsgroup.com/publication/competition-law-in-singapore/, accessed 01.10.2013

reduce competition may also promote economic efficiency. For example, agreements may reduce production costs, improve product quality and even the innovation of a product on the market or creation of a new one. When benefits are greater in detriment to competition, by the reduction of costs and introduction of better products, the company is doing well. The criteria to be used in evaluating BEN is set out in section 41 of the law, which is similar to Article 81 (3) of EU legislation - except that there is no requirement that the parties must demonstrate that consumers will receive a "fair share of the resulting benefit ". An agreement can have a BEN if it contributes to improving the production or distribution or promoting technical or economic progress, if it is done in the least restrictive way and does not eliminate competition in a substantial part of the market. Worth mentioning is the fact that Singapore has retained a notification system to allow greater certainty in business development in the early stages of implementation of the law, but also allows self-assessment by the way BEN can be applied as a method of defence if the company's behaviour would have otherwise violated the law.

According to the Guide of the Competition Commission of Singapore[4], functions and duties of the Commission under section 6 of the Competition Law in Singapore are as follows:

- to maintain and improve market behaviour efficiently and to promote overall productivity, innovation and competitiveness of markets in Singapore;
- to eliminate or control practices that have adverse effect on competition in Singapore;
- to promote and sustain competition in markets in Singapore;
- to promote a strong competitive culture and environment throughout the economy of Singapore;
- to act internationally as the national representative body of Singapore on competition issues;
- to advise the government or other public authority on the needs and national policies regarding competition issues in general and
- to perform any other functions or exercise any other powers conferred to the Commission by law or by any other written law.

But in order for a company to be able to increase their productivity and competitiveness, to innovate, we have to change their business model and the technology. And access to new technology for radical innovation involves some high initial acquisition costs that few companies allow them nationally and globally, because of the risk of a financial disaster regarding the launch of the new product on the specified market segment.

[4] „*CCS GUIDELINES ON THE MAJOR PROVISIONS*“, document available online at http://www.ccs.gov.sg/content/dam/ccs/ PDFs/CCSGuidelines/majorprovisions_Jul07FINAL.pdf accessed 1.10.2013

So the issue "to promote overall productivity, innovation and competitiveness of markets in Singapore" and not just those in Singapore is quite difficult to quantify in economic and social terms, as well as legal ones.

2.2. Competition Council in Romania

In Romania, the Competition Council, an autonomous body, manages and implements the Competition Law (no. 21/1996), which aims to protect, maintain and stimulate competition and a competitive environment, in order to promote consumer interests.

Competition Council was established by the Competition Law no. 21 of 10 April 1996, with subsequent amendments. Romanian competition authority has started its work on September 6, 1996 by drafting regulations for the application of the Competition Act (no.21/1996), which entered into force on 1 February 1997.

As the national competition authority, this institution implements and ensures compliance with national provisions, as well as with the Community competition' provisions.

Thus Community laws are valid in the EU member states, but enforcement methodologies may differ from country to country. Here we elaborate discussion on the basis of Article 101 (3) of the Treaty on the Functioning of the European Union (formerly Article 81 (3) of the European Commission) on the exemption from the provisions of the current Article 101 (1), (formerly Article 81 (1) of the Treaty) , which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the European Union (EU) which have as their object or effect the prevention, restriction or distortion of competition. Notwithstanding this rule, Article 101 (3) TFEU (formerly Article 81 (3) TEC) provides that the prohibition contained in Article 101 (1) may be declared inapplicable to all agreements which contribute to improving the production or distribution of goods or to promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in a substantial part of the market with the products in question.

Assessment under Article 101 TFEU is made in two phases.

At the first step, an assessment is made whether an agreement between undertakings, which may affect trade between EU countries, has an anticompetitive purpose or actual or potential anticompetitive effects. Article 101 (3) TFEU becomes relevant only when an agreement between undertakings restricts competition under Article 101 (1) TFEU. When dealing with restrictive agreements, it is necessary to consider the benefits achieved by agreement. Guidelines of the Commission on vertical restraints, horizontal cooperation agreements and technology transfer agreements contain important guidance on the application of Article 101 (1) TFEU on the different types of agreements.

In the second stage, which becomes relevant only when an agreement is deemed to restrict competition, are the pro-competitive benefits produced by this agreement evaluated and assessed whether these pro-competitive effects are beyond anticompetitive effects. Comparison of anti-competitive and pro-competitive effects are exclusively in the framework of Article 101 (3) TFEU. These guidelines consider the four conditions laid down in Article 101 (3) TFEU[5], as:

- efficiencies;
- fair share of benefits reserved for consumers;
- indispensability of the restrictions;
- lack of elimination of competition.

Since the four conditions are cumulative, if it appears that one of them is not satisfied, there is no need to consider the other three.

In the study we relied on these four conditions, namely how they are evaluated, what is the result of this assessment and implications of an error in the evaluation methodology of a single condition that can eliminate the other ones. Another approach to the same problem involves reversing the order assessing the four conditions, namely, the second condition and then the third, thus addressing the issue of indispensability before transmission to consumers, or the second to the first, with a special emphasis in this final consumer and benefits. But this approach requires assessing the positive and negative effects of the agreement on consumers. This analysis should not include the effects of the restrictions that still do not meet the essential criterion and, therefore are prohibited by Article 101 TFEU.

2.3. Office for the Protection of Competition from Czech Republic

In case of the Czech Republic, the authors analysed several official documents of the Office for the Protection of Competition in the Czech Republic, and we recall as relevant to this article, the official position in response to questions raised in the Commission report on problems in Resale Price Maintenance & Resale restrictions (MPR) of the meeting of the working group on the review of the vertical restraints from the Exemption Regulation[6]:

"The Czech Republic is among the countries with the highest retail prices in Central Europe. Office concluded in this regard, to this date, research on retail outdoor equipment, selective cosmetics and books. One of the most important cases of MPR was closed following the procedure of solving the problem of the Office: Office fined producer of soft drinks to enter into a long term agreement

[5] Communication from the Commission "Orientări privind aplicarea articolului 81 alineatul (3) din tratat (2004/C 101/08)", *Official Journal C 101*, 27/04/2004 p. 0097 - 0118, document available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do? uri=CELEX:52004XC0427(07): RO:HTML accessed 1.10.2013

[6] Rafaj, Petr: *Position of the Czech Office for the Protection of Competition to the questions raised in the Commission's Issues Paper on Resale Price Maintenance & Resale Restrictions*, document available online at http://www.uohs.cz/cs/hospodarska-soutez/metodiky-a-dokumenty.html, accessed 1.10.2013.

which contains fixed prices to be complied with by its distributors. Because businesses have not claimed benefits of the appropriate behaviour (with the exception of the mentioned above issue with non - alcoholic drinks, when the undertakings concerned acknowledged, however the breach), the Office has never had the opportunity to perform in depth analysis to verify if the conditions laid down in Article 81 (3) of the Treaty were fulfilled. Despite this, the Office has decided that enterprises wishing to benefit from Article 81 (3) of the Treaty are responsible for claiming and proving that the conditions of Article are fulfilled and therefore the efficiency to overcome the negative effects of MPR. Legal and economic analysis should include several steps, in particular the assessment of the causal link between MMR and efficiency, no other (except anti - competitive) alternatives that have the same objective, efficient passing on to consumers and that the positive effects are in majority from the negative ones. Office is convinced that the difference between active and passive sales is still usable and qualifying for the Internet as an active sales in all cases, could be detrimental to consumers". The only case in which the Office resolved a case regarding internet sales was agreed in the settlement procedure of the Office, without issuing a formal decision.

Selective distribution system used by an importer of chainsaws and other power tools garden has raised the issue of restricting competition as a result of internet sales of such products. In order to solve the problem of competition, the importer allowed promoting and selling their products on the internet, provided specific requirements to be fulfilled in order to ensure end consumer safety.

"Office believes that businesses should be free to configure their selective distribution system based on qualitative state of a "brick and mortar" store. But in terms of the quantitative status of minimum threshold sales through brick and mortar store as a percentage of total sales, the Office would like to point out that such a provision would go beyond its intended purpose, namely to ensure quality sales and may, on the contrary, de facto lead to exclusion / removal of Internet sales, so the minimum sales through brick and mortar store may be reached or even exceed the total sales volume of a particular vendor".

To sum up, here Office made a decision in favour of the market segment consisting of consumers who buy online and are not using the so called shops of "brick and mortar". So a decision to ban Internet distribution system in theory would have provided a higher number of sales in terms of quality but less quantity because the segment of consumers who buy online was not included in this sale.

3. Scenarios considering the output of the Competition Council's decisions

Scenarios are used not only in the field of management, where they respond to different possible situations in which a company may be in the development of commercial activity. But what happens when the scenarios are part of the policy of promoting national business environment to attract investors?

Same as in a company, also in the state, the scenario can be used as a tool in perception of the business, in which the state operates its import-export

activities. But for this there must be the ability to see the environment as a common skill in the state, for it to be able to act accordingly. This means that there must be institutional and governmental common point of view that should be initially discussed and voted to reach a consensus.

The scenario can be used as the so-called "memories for the future", in order to observe and react in time to the environment in which our company or state develop their economic activity. When we talk about scenarios, we refer to the future, but with the scenario should differentiate what is happening today.

The planning and the establishment of the Competition Council's activity, based on scenarios taken from socio-economic point of view can help to understand the time evolution of the international market and consumer demand, and communication within the Council can help him in his training of becoming an expert observer of the business. Thus the council can see changes in the market in time, in order to react to them effectively.

Scenarios don't produce a new strategy in the Council's activity, but help it to understand current ideas effectively, which may change in beneficial actions for the Romanian society.

The authors wish through this article to formulate a scenario open to the academic discussion on legal-economic aspect of the Competition's Council, based on the cases of the Czech Republic and Singapore, as stated above. This scenario can be described in detail by answering the question below, namely:

How does the legal status and decisions of the Competition's Council, affect the business and national economy, especially the final consumer, if there were some scenarios in place at government level on the activity level of large international companies with direct or indirect effect in Romania?

Conclusions

This article presented the case of Romania, the Czech Republic and Singapore in terms of the relating activities of the Competition Council. In Romania as in the case of the Czech Republic, both being European Union Member States, Community law is valid and applied in compliance, but finding and quantifying the efficiency and equitable benefits to consumers can be applied in today's economy, after the financial crisis, only with the development and implementation of community-level scenarios.

Singapore has in the law the so-called net economic benefit that can waive the applicability of the Competition Act, but if we make a purely economic analysis, it can be seen as „benefit" of Singapore state and from economy we know that profit is achieved to the detriment of some costs. The answer to the question: What kind of costs are and how they can affect the final consumer? is part of the scenarios the authors enunciate in their study.

The authors consider that the Community scenario is the legal solution that meets the market requirements at EU level and urges an academic discussion on this. The authors have developed a number of possible legal scenarios with

macroeconomic implications, mainly based on international law, but the requirements of article writing can only provide an overview on how the role and work of the Council can be made more efficient by establishing strategic points for the development of the nation, as well as national economic growth and living standards.

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