ENTREVISTA

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Many competition lawyers and economists in Europe support that the sole objective of Article 81 EC is consumer welfare. Others believe that public policy considerations, as environmental and cultural, are still relevant in that provision. Could you tell us about your views on this subject?

During the 1990s there has been an international convergence on the definition of the proper objective of competition law. This movement is part of what has been described as "soft convergence". The consensus which has emerged is that the goal of competition law is to protect consumer welfare and there has been a move in a number of jurisdictions away from the broader "public interest" standards which used to be used in competition laws. The recognized objective of EC law is to protect consumer surplus. Governments may want to promote socio-political objectives but competition law is not the right vehicle for the promotion of such interests. Exemptions from competition laws may be used when there is contradiction between the protection of consumer surplus and the achievement of socio-political goals but those exemptions should be transparent limited to what is strictly necessary to achieve the non –economic goals and periodically reviewed.

Do you believe that the EU Competition Law in Europe , that is valid for a conglomerate of countries, can also allow countries to consider their specific lawS?

In the area of competition law there is no one size fits all. National competition laws must be designed taking into consideration the legal environment of the country as well as the socio-political environment. In Europe national laws may differ (although not contradict) European law. For example France where there are very powerful supermarket chains has adopted a prohibition of abuse of buying power which has no equivalent in European law. But there are also important features of the European law system which can be of interest in non European countries. For example like the Brazilian system the European system is based on an administrative process with court reviews. Like what is true in Europe, in Brazil there is a high level of public involvement in various markets so that there may be lessons to be learned from comparing both competition systems (in areas such as the relationship between the competition authority and sectoral regulators etc….). What is important is not to consider that competition laws in Europe or in other jurisdictions are models to be followed but to consider the experience of these countries to see what is relevant for Brazil.

Brazil has adopted other competition law systems. Why is it important for the Brazilian legal and economic fields to know the EU competition law more profoundly?

Competition law is relatively new in many countries. So a number of countries have experimented. I would say that it is important to study the competition regime of countries in which competition law and policy is an important element of public policy, if for no other reason because we can learn some lessons from their achievements and avoid some of the difficulties they have faced. Europe is a set of countries where competition law enforcement

and competition policy are an important element of overall economic policy. But there are also other countries which have a long established tradition of competition law enforcement and competition policy. One should not import wholesale the competition law system of another country.

In Brazil, competition law has only been more active since the end of the 1980´s with the market opening. Nowadays, Brazil is trying to take on a more important worldwide role. Could you comment on the advances in this legal field in Brazil ?

Brazil has not only had a more active competition policy in the recent past but it has also been a very active participant in the international debate on competition. In terms of domestic achievement the most remarkable development in Brazil has been the fight against cartels which has been very successful, one of the most successful in the world. At the international level, Brazil has for example, participated very actively in the OECD discussions of the competition committee where it is one of the most important observers. It is crucial that a country like Brazil which is confronted with a number of problems common to many developing countries (such as for example the existence of a large informal economy or a skewed distribution of income or wealth) but also has a highly developed part of its economy help similar countries (for example for India where competition law is less developed , China were it is stil in its infancy etc….) by sharing its experience about the potential benefits, the difficulties or the weaknesses of competition law enforcement .. But developed countries also have a lot to learn from the Brazilian experience. For example I find the advocacy work done by the SEAE with other ministries through the work of interministerial comities quite remarkable (and quite advanced)..

As part of this new role that Brazil is playing we are opening more space for the debate in the legal field with the foundation of CEDES – Centro de Estudos de Direito Econômico Social, whose seminary you participated last week. Could you comment on this initiative?

I have founded at ESSEC (the university where I teach in France) a European Center for Law and Economics. I am also an economist who has become a judge . Thus it is easy to understand that I personally believe that bringing together law and economics is extremely important. There is no economic development unless there is an appropriate and well developed legal framework. Competition law is a good example of an area were law and economics are intimately mixed together. But it is also true that competition, to the extent that it contributes to the welfare consumer , and in particular the most vulnerable consumers or the most vulnerable firms, has a social impact which should not be overlooked particularly in developing countries (although it may have been overlooked in the past). I think that it is high time to bring to the fore the interactions between law, economics and the social dimension and that the initiative you have taken is extremely interesting. So this initiative is very important and I am support it strongly.

The areas where competition is more difficult to balance are those in which estate enterprises participate. To meet other giant private, Petrobras is obligated, within Brazil, to fight in court to break down barriers that impose limits, as, being controlled by the state, Petrobras can only buy and hire through bidding. Whenever Petrobras has to choose suppliers, its decision is brought to justice. As an output, it uses a special law that eases the processing of their business, but has not been clear enough to resolve the problem. Is it possible for a company that operates in an industry as competitive to continue to take such a rule and remain competitive? How to handle the situation, as

some suppliers of Petrobras also claim to be harmed competitively when the choice is not made by following stricter criteria bidding?

The question of competition between state owned enterprises and the private sector is a very complex one and a problem which has been extensively studied in the context of the Eurpean Union which is one of the very regions where state aid control is an integral part of competition law. One of the possible justifications for state owned enterprises is the fact that they fulfil a special function deemed of national interest (whether one thinks about the delivery of public service of the fulfilment of a strategic goal). But when a state owned enterprise also competes with private firms, the market players face different constraints and benefits. For example a state owned enterprise may face stricter regulations limiting its ability to operate freely than its private competitors but it may also enjoy better access to credit than its competitors as it is less likely to default. I think that there are two dimensions of the problem which are important: first, analyse the set of constraints or benefits of the public sector firms and ask one whether some of the constraints imposed on public firms are strictly necessary for the state owned entrerpises to achieve the social goals they are assigned , so as to limit the inequalities between market actors. Second examine if the public sector firms are fairly compensated for the extra costs they incur because of the constraints they have to face to fulfil their social obligations. For example in the EU, the state aid regime controls strictly the kind of state aid that can be granted by government and the state aids which they are prohibited from granting because such state aids would undermine competition.

Can mergers of companies into conglomerates, natural movement that responds to economic turbulence, push disadvantaged competitors to develop new products in different veins of the market? Should mergers be viewed as a natural movement of free enterprise and free markets?

All forms of mergers are indeed a natural development in the life of firms. They may have efficiency reasons (such as spreading out fixed costs or allowing a more productive research and development ; they can also allow for the orderly exit off unsuccessful firms etc…..). But when they lead to a decrease in competition (whether horizontally or vertically or whether directly or indirectly) they may impose a cost on society which has to be assessed against the potential benefits that they may bring. Usually conglomerate mergers have fewer anticompetitive consequences than horizontal or vertical mergers. But one has to examine mergers on a case by case basis. Some of the issues raised by conglomerate mergers are linked to the possibility of cross subsidisations of economic activities or lack of transparence of costs.

China is the fastest growing consumer market, but its obtuse political rules still hinder the performance of foreign companies in their territory, as the episode showed the output of Google. Is what happened emblematic or just an isolated incident? What is still missing from China to be fertile to the free market?

As you know China joined the WTO in 2001 and is moving at a very impressive pace from a command economy to a market economy. The problems of transition are severe and complex. China has had to adopt a large number of laws to sustain a market economy (such as intellectual property law or competition law) and to upgrade its public sector (in particular eliminate inefficient public firms or consolidate its state owned enterprise which raises unemployment issues). What we see are considerable progresses and markets openings in areas such as the automobile sector , the machine tool sector, the agro-food sector etc…..But "Rome was not built in one day" so it is not surprising that progresses in market opening which is very impressive occasionally faces difficulties. For example there were a couple of years ago questions raised about whether the merger laws would in fact be used to control

foreign direct investment and discriminate between domestic and foreign firms. But this fear has been alleviated. This being said you must also remember that market competition results from the regulatory environment of markets but also of the legal sociological and political context of the economy.