



Competition and Industrial Policy Considerations – the ICN Steering Group’s Town Hall Conference Series

*By Andreas Mundt¹
(Bundeskartellamt)*



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On 8 March 2016 the ICN Steering Group (SG) continued the second of its Town Hall series calls dealing with the interaction of competition policy and other government policies. In this teleconference the speakers addressed competition and industrial policy considerations.

Henk Don, Member of the Board of the Netherlands Authority for Consumers and Markets, Francis Kariuki, Director General of the Competition Authority of Kenya, and Randolph Tritell, Director of the US FTC's Office of International Affairs, discussed practical experiences and cases, offering valuable insights. This call built on the first town hall teleconference on public interest considerations in merger cases. (See CPI article [here](#).)

Germany – Competition as a market organising principle, but...

The approach followed in Germany basically is to let market forces work freely and minimize state intervention. Competition is considered a market organising principle and the Bundeskartellamt's role is to protect competition. However, there are examples of state intervention, for instance the promotion of renewable energy, which had a significant impact on competition in the market for electricity production.

The Netherlands – A problem-solving approach

Henk Don pointed out that, generally speaking, the Netherlands see fairly limited market interventions by the State. There is an increasing tendency for the State to look to managing issues through self-regulation at the firm or sector level, particularly when the State wants to encourage “corporate social responsibility”. This movement towards self regulation effectively moves some public interests to the private domain. ACM acknowledges the value of such initiatives but has to assess them for anticompetitive risks, since such self-regulation may lead to competition problems in some instances. One example Henk Don offered concerned the promotion of sustainable energy where, in 2013, ACM issued an opinion on an agreement between energy companies which was part of the Dutch Energy Agreement for Sustainable Growth. The agreement involved the collective closure of old coal-fired power plants. The ACM prepared an assessment that was neither an encompassing social cost-benefit analysis nor an opinion on the desirability of the planned closures. Instead, ACM's assessment addressed the questions whether the restriction of competition resulting from the agreement was

necessary to realize the associated desired benefits, and whether those benefits sufficiently compensate the consumers who will be paying a higher electricity price because of the restriction of competition.

The ACM generally follows a problem-solving approach. In the case of industrial policy issues, this approach often starts with advocacy, i.e. engaging with the parties or the government and talking with them about what they can do, rather than what they cannot do.

Kenya – Advice and advocacy

In Kenya the share of the industrial sector in the GDP has increased very little over the past two decades. Kenya's government is endeavoring to make the industrial sector an "engine for growth". Some of the guiding principles of Kenyan industrial policy are productivity and competitiveness; market development; high value addition and diversification; regional dispersion; technology and innovation; and employment creation. This leads to the question how the Competition Authority of Kenya (CAK) acts when it comes to these principles. The CAK advises the government and does advocacy work. One example concerns the Product Market Regulatory Report "Unlocking Growth Potential in Kenya: Dismantling regulatory obstacles to competition to unlock growth in Kenya" launched in December 2015. Other examples Francis Kariuki highlighted was CAK's role dealt with exclusive mining rights (Cemtech case) and the removal of regulatory obstacles in the pyrethrum sector and tea processing sector.

USA – Stand your ground especially in times of crises

Randy Tritell started his presentation looking back to the early years of the Sherman Act, when the U.S. antitrust agencies and the courts considered a range of goals in applying and interpreting the law. At times of crises, for example the Great Depression in the 1930s, a direct intrusion of industrial policy in competition policy occurred. At that time, in an effort to promote economic stability, antitrust laws were suspended and industries were allowed to create "codes of fair competition". Competition was relegated to the sidelines, and the welfare of firms took priority over the welfare of consumers. But subsequent analysis has widely concluded that not only did these measures not help the United States recover from the Depression, but likely prolonged it. One of the lessons learned from this experience is that

there is no substitute for a competitive market, including, and perhaps particularly, in times of economic distress. Today the United States does not have an industrial policy, at least one that affects the primacy of our antitrust laws. The implementation of the U.S. antitrust laws must be based only on competition considerations and not other economic, social, or political objectives, however laudatory. Randy Tritell listed several potential drawbacks of mixing industrial policy with competition policy, including among others that it can diminish consumer welfare, impede entry, decrease predictability, risk “capture” by vested interests, and undermine the ICN’s goals of cooperation and convergence. Citing the US FTC’s Chairwoman Ramirez, Randy Tritell explained that “Experience has taught us that consumers and economic development are best served when competition law and policy focus on an analysis of competitive effects and consumer welfare.”

What ICN can do

The speakers briefly discussed the steps the ICN can take to strengthen the role of competition policy. The first suggestion was to have this issue on our future agenda. Also, the ICN could think about how competition agencies’ processes and analyses can be firmly grounded in competition policy to create a solid culture of competition-based enforcement. Another suggestion was that to deal with governmental pressures, the ICN could build on the work already produced by the Advocacy Working Group. Finally, the ICN could also consider how to make the ICN a stronger voice for competition internationally. The ICN SG will have a closer look at these ideas.

Enforcers are not sitting in an “ivory tower”

The discussion illustrated that competition agencies, regardless of their location around the world, can encounter difficulties arising from tensions between competition and industrial policy. Competition enforcers are well aware of the importance of competition, but Henk Don rightly pointed out that they are not sitting in an ivory tower. The town hall meeting suggested that competition enforcers should work constructively with their respective governments and stand up for their cause.

¹ ICN Chair and President of the Bundeskartellamt