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Jacques STEENBERGEN: A Counsel at the head of the Belgium NCA

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Jacques STEENBERGEN: A Counsel at the head of the Belgium NCA

Since April 2007, you are the Director General of the Belgian Service for Competition. Prior to this, you were a Partner in a major international law firm, as well as a Professor at the Katholieke Universiteit Leuven. Could you please come back on the reasons which induced you to join the public sector?

There is no mystery. I approached the age limit in my firm. And after having had the opportunity to contribute to the reform of the Belgian competition act, the challenge was very tempting.

Could you please describe the institutional framework for the enforcement of the Belgian competition law and, in particular, the missions of the Directorate General?

The Belgian Competition Authority consists of the Competition Council and the Directorate General for Competition.

The Council is an administrative tribunal. It consists of the tribunal itself with six full-time and six part-time councillors (references to the 'Council' usually refer only to the tribunal itself), and the College of Competition prosecutors (six prosecutors). The competition prosecutors head and organise investigations. They take the decisions to close investigations without further action and to authorise concentrations in simplified procedures. In all other cases the prosecutor files his report to the Council (tribunal).

The Directorate General has three key tasks:

- It executes the investigations,
- It represents Belgium in meetings of the EU, the ICN, the OECD, and other competition policy organisations,
- It is in charge of general competition policy issues.

There are three flows of cases:

- Formal procedures under the Belgian Competition Act: Priorities are defined and the decisions to take or not to take on a case are taken together by the College of Competition Prosecutors and the director general for competition under his chairmanship. When an investigation is opened, the director general and the prosecutor general designate a case team. Case teams may only take instructions from the prosecutor handling the case.
- The EU cases (advisory committees and hearings) : only the Directorate General can have access to files and represent Belgium;
- The (multiple) informal complaints and questions, parliamentary questions etc.: it has been decided in 2007 that the Directorate General will handle these files. When it is established that the issues justify further action, the director general decides together with the College of Competition Prosecutors whether or not to open a formal investigation under the Belgian Act. If no formal case is opened, the director general may try to find an informal solution.

Interview by Nicolas PETIT

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In the past, many have criticized the relatively weak enforcement record of the Belgian competition authorities. How do you intend to reinvigorate Belgian competition policy?

The new legislation has significantly reduced the number of merger notifications by raising the thresholds and facilitating decision making in simplified merger control procedures. Even in a year that has seen a boom on M&A markets, we only received 20 notifications. Most could be cleared in simplified procedures. That has enabled us to use approx. 80% of our resources for investigations in respect of restrictive practices (in stead of less than 20%). This and a few other measures have given a new drive to a team that is eager to do a job that is seen to be useful and interesting.

The weak enforcement record of the Belgian competition authorities has often been attributed to insufficient administrative resources. Could you please clarify the resources now made available to the Service for competition (human resources, budget, etc.)?

The resources were indeed very insufficient, especially when taking into account that up to 90% of all resources needed to be used for the control of mergers that were mostly not significant from a competition policy perspective.

As explained, the present legislation allows for a more efficient use of resources. Our budget for 2007 was also increased by approx. 30% and we have started a prudent recruitment policy (of which I am a product). But our resources remain modest.

Compared to our Dutch friends, we are poor. But compared to our German friends, taking into account that Belgium is smaller than the greater London area, we are back on track.

The Directorate General for competition is officially placed under the authority of the Minister for Economy. In practice, is the Minister able to influence the activities of the Service for competition?

First a major qualification: the Directorate General reports to the Minister for the Economy, but subject to the rules on confidentiality. Once an investigation is opened, our agents may as I said only accept instructions from the competition prosecutor handling the case at the risk of criminal penalties. We are under Belgian law also bound at the risk of criminal penalties by the confidentiality rules of the European network.

Moreover, priorities are determined and the decisions to open a case are taken by the College of Competition Prosecutors under my chairmanship. But even if the Minister gives me instructions, I will never be able to impose these instructions in case they prove unacceptable to the prosecutors.

The Minister can intervene in various ways, but he can usually not determine the outcome of his interventions:

→ He can file a complaint in case of infringements or the rules of competition. His complaint will of course be examined carefully, but the final decision will be taken by the Council (tribunal);

→ He can suggest priorities;

→ He can file an appeal against a decision of the Council or intervene in cases concerning Council decisions, but the decision will be taken by the Court;

→ He can give instructions for Belgian or EU legislative initiatives or for interventions in cases before the CoJ or the CFI.

I therefore think that the Belgian model guarantees functional independence without the overheads of an autonomous institution, be it at the cost of a certain complexity that is not always easy to explain.

In the current economic context, some claim that where possible, competition laws should be enforced more intrusively, to enhance the purchasing power of consumers (through, e.g., the control of dominant firms' pricing policies, etc.). What do you think of such proposals? Given that inflation is mostly a parameter exogenous to market players, don't you think that competition law is hardly capable of correcting that market failure?

Indeed. We follow closely the various indicators, and we need to examine carefully when and how an intervention of the competition authority can create real added value. For many years people have been told about all the benefits a properly functioning market can bring without much expectation management. Now we need to explain that the market can not avoid price increases when demand explodes and resources risk becoming scarce. The message does not pass well. Public opinion has a tendency to focus on problems and to ignore opportunities and achievements, like e.g. the fact that prices for a list of products have decreased by 10 to 30% in 2007. We also need to explain that even though competition policy can only fight abuses by some market operators, the old approaches such as price regulation offer no alternative but are on the contrary likely to result in time in an even higher inflation.

You have said that merger control was not a necessity for small economies. Shall that be interpreted – that point has been made in Scandinavian countries – that merger control systems prevent firms from small economies to achieve the critical mass required to compete on global markets?

First, we were discussing really small economies like Luxembourg, Iceland (with less than one million inhabitants) or Liechtenstein. I have added that some economies with the size of a metropolis like Belgium, Switzerland and most of the Scandinavian countries might be in a grey zone.

This being said, I am convinced that countries like Belgium should first make sure that they have the means to fight cartels and abuses of dominant positions. I have therefore not said that merger control is a *superfluous* luxury for countries with 5 to 10 million inhabitants, but it is perhaps a luxury.

To what extent does the Directorate General combat public distortions of competition (i.e. anticompetitive regulations) as well as restrictions in the field of professional services, which are notoriously pervasive in western European countries?

We have no power to examine legislation. But we participated actively in the Commission's enquiry concerning the regulated professions. The Belgian competition authority took in 2007 some 7 decisions concerning various liberal professions.

Some consider that administrative agencies are ill-equipped to delve into complex economic assessments. More importantly, economic theory often brings about ambiguous conclusions and its added-value is not always clear-cut when it comes to decision-making. What is your opinion regarding the role of economic theory into decision-making processes?

Administrative authorities are not necessarily less well equipped than other actors.

One of the advantages of being part of the ministry of economic affairs (the Federal Public Service for the Economy in the Belgian terminology) is that we can ask inspectors of the Directorate General for market surveillance to supplement our teams for dawn raids (we did 15 in 2007), and also on the team of economists for pro-active market studies. And we are institutionally close to the Central Bank, the Institute for National Accounts and other respected data providers.

The in my opinion positive, if not indispensable, evolution from a form based to a more effects based analysis of the economic impact of our interventions as well as of the market behaviour of companies is also challenging lawyers on their own turf. Legal concepts like proportionality, equal treatment and legal certainty remain just as relevant in case of an effect based analysis, but they need to be re-interpreted and they are more difficult to apply. For instance, the concept of substantive discrimination is not new, but substantive discrimination is more difficult to assess than formal discrimination. And a substantive proportionality test with several variables changes the nature of judicial control compared to a formal comparison of standardised clauses.

I am by the way afraid that a more economics based approach risks to prove incompatible with a decentralised application of the rules of competition unless we can offer guidance to judges and authorities by offering them 'pre-cooked' analyses or models for analysing frequently occurring practices.

The present political context in Belgium is characterized by strong regionalization dynamics. In Belgium, competition law and policy have so far been a federal matter. What is your opinion regarding proposals for the regionalization of competition policy? Alternatively, what is your opinion with respect to the creation of a transnational Benelux competition authority?

Regionalisation has to my knowledge only been discussed in respect of some very specific areas for which the market regulation is already regionalised. You are not the first to suggest a Benelux authority. In case one would abandon the Belgian dimension, this idea deserves a serious examination. The formula seems to me to be more rational than two or three authorities for the territory of Belgium.

Under Belgian competition law, the Competition Council may refer questions for preliminary rulings to the Supreme court, in much the same vein as the procedure set out at Article 234 of the EC Treaty. Lately, the Competition Council has sparked controversy, by referring questions to the Supreme court in the context of merger proceedings. Indeed, the decision to request a preliminary ruling from the Supreme court suspends the time limits for the review of merger transactions. Isn't there a risk here that, indirectly, concentrations may be de facto prohibited?

This case is still pending in court and I can therefore not comment.

The European Commission just adopted a white paper which aims at promoting private enforcement in the field of competition law. What is your opinion on the issue of private enforcement? Isn't there a risk of imposing excessive constraints on market players?

Personally, I believe that the business community is mostly interested in efficient interim relief in order to stop infringements before the damage occurs – and when we look not only at damages cases but also at interim relief cases, there is more private enforcement than is often suggested.

I also see that many are very much opposed to punitive damages and American style disclosure procedures (of which the US also tries to limit the cost).

I therefore think that in respect of private enforcement we should focus on the availability of efficient interim relief and that we should facilitate procedures that enable the victims of competition law infringements to obtain damages after the infringement has been established by competition authorities.

We must e.g. facilitate the calculation of damage and assist national judges who need to establish the causal link between an infringement and the damage suffered by direct and indirect clients of the infringing companies. Belgium has suggested examining whether we could not give more useful indications in the infringement decisions. We also think about formulas that allow taking into account the compensation of victims when determining sanctions.

A vigorous controversy has surrounded the June decision by the Heads of State, to remove Article 3(1)(g) EC from the Lisbon Treaty. In your opinion, what are the likely consequences of that Treaty modification?

The deletion of the old article 3(1) g EC has had a destabilising psychological effect. But the text has been reintroduced in a different form that is equally binding (a move that is not likely to strengthen the credibility of political discussions in the Union).

To the extent that the autonomy of competition policy has ever been restricted, the restriction follows from the introduction of article 127(2) EC by the Amsterdam Treaty. And the least we can say is that that provision, retained in the Lisbon Treaty (and also figured in the draft constitution) has not jeopardised the coherence and efficiency of competition policy. I must

confess that, provided the arbitration between goals of Community action is done in a way that allows competition policy to contribute efficiently to social welfare, I feel comfortable with a provision that requires competition authorities to take into account the impact of their actions on society.

The European Commission is adamant on the promotion of alternative enforcement techniques: commitments, settlements, leniency, private enforcement, and so on. A number of scholars consider, however, that the Commission's initiatives curtail the EC judicial review system. Others view these measures as a driver for efficiency in decision-making. Is the Service also interested in promoting alternative enforcement techniques?

Certainly. Because our resources are limited we always need to look for approaches that allow us to improve efficiency and increase the leverage of our interventions.

Commitments and leniency have become indispensable tools for all competition authorities. We think about Belgian guidelines, but I think that we should in the first place support the European Commission's initiatives.

It also follows from our dual system that it is difficult to envisage direct settlements which provide for fines. Only the Competition Council can impose fines. The College of Competition Prosecutors can only close a case (i.e. without sanctions), or bring the case before the Council. The Council could envisage a settlement with fines, but that would not produce any additional efficiency for the Directorate General or the College of Competition Prosecutors because the case will by then have followed its normal course. The College of Competition Prosecutors and I are therefore thinking more about a further development of the informal competition policy.

Competition law is sometimes a means of competition in itself: occasionally, firms bring actions on the basis of competition rules in order to harm those of their rivals who have prevailed – through competitive means – on the market place. Should competition agencies enforce such claims? Don't you think it would make sense to punish inefficient firms who seek to curb competition rules to their own economic advantage?

When there is an abuse of dominance, yes. But we need to be prudent before qualifying the market behaviour of a more efficient or dominant competitor as abusive.

Too often, society misunderstands competition policy. As a university Professor, what part of your activities in the public service do you intend to dedicate to advocacy in the field of competition law?

I teach two hours a week in the second semester, plus some tutorials. With my colleagues in the Directorate General, I attach great importance to contacts with stakeholders. I speak at conferences, answer your questions, I receive or visit industry and consumer organisations, receive companies or their counsel, continue to publish etc. It seems to me to be normal that a director general spends some 20% of his time on advocacy.

As a scholar and the Director of a competition authority, what topics and issues would you put on top of a research agenda?

We have a clear need for independent analysis. I think that national competition authorities and especially the European Commission are very transparent about the topics on their agenda: private enforcement, the economic assessment of market behaviour, the reform of the article 82 EC policy, etc.. Your questions already provide the outline for a research programme! And we also look to academia to tell us what problems should be added to the agenda. ■

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