

# Interview with Jacques Steenbergen, President of the Belgian Competition Authority

Speaker Key:

**MR** Michael Reynolds

**JS** Jacques Steenbergen

**MR** Ladies and gentlemen, we now come to a regular spot we introduced at this conference, which is the nearest thing the IBA in Florence ever gets to the Christiane Amanpour Hour or Stephen Sackur's Hard Talk on BBC World. This is the IBA's version of that, where we interview former officials, practitioners, who in their career have made a major contribution to the development of competition policy and enforcement.

Some of the icons of the competition world in the past we've interviewed include Mario Monti, Guiseppa Tesauro from the Italian autorità. Fred Jenny from the OECD, Bill Kovacic, Gary Spratling, Debbie Majoras and Edith Ramirez, to name but a few.

And, today, we are delighted to have Professor Jacques Steenbergen, the President of the Belgian Competition Authority. Now, we were planning of course to have this interview last year. But we postponed it to this year, because really these interviews don't work online in the same way.

And Jacques is actually still in office. He will explain all this to you. It's something to do with the Belgian political system. I'm sure it's because he's indispensable – that is the real reason. But he is still in office. He said I could describe him as a 'future former official.'

Jacques, we are absolutely delighted that you're here. He is known to many of you. He's had a fantastic career. He began as a legal secretary to President Mertens de Wilmars, the President of the CJEU [Court of Justice of the European Union] at that time in Luxemburg. He then was in private practice with Loeff Claeys Verbeke.

Because of the movement of certain tectonic plates in the legal world in Brussels, when Allen and Overy, my firm, did a merger with his firm, I ended up being his partner. Which was a great pleasure for us. And we have missed him and his wise counsel. He had a fantastic practice when he left the firm.

In 2007, he became the Director General of the Directorate General, of the Belgian Ministry of Economic Affairs. In 2013, that of course, became an independent antitrust authority. The Belgian Independent Competition Authority, which is now in place.

He of course, is also a very, very noted academic.

He has taught throughout his career I think, in the past at the University Libre in Brussels. And he's on the nomination board and the PhD board of a whole list of universities around the world. His interests are not confined to competition law. He is also a past president of the Advisory Board of the Royal Music Academy in Brussels, which as a resident of Brussels I would say has greatly contributed to the musical life of Brussels. So all round, a fantastic career.

Now Jacques, my first question, which is one I always ask. When you made the transition from private practice to being a senior competition agency official, how did you handle the change? How easy, or difficult was it? And what were the main challenges? Did you miss having to fill in timesheets, recording every six minutes of your day? How was the change?

**JS** First on the timesheets, no. I missed the timesheets. I tried to introduce them in the Authority. I didn't succeed, even though I called them a proactive capacity measurement to see when people would be available, I wanted to know what they were doing. I didn't succeed. So no timesheets; I was so used to them, and I missed them.

But now, more seriously, guessing what an authority should decide. It's not very different from guessing what it will decide. In private practice you try to know what an authority will decide. And now I have to find out

what we should decide. Intellectually it's very similar, but you do it in a very different environment.

For me the main challenge from that point of view, was to get used to a civil service environment.

Thinking in a matrix structure was difficult. That's a problem I underestimated in the past. Later reforms of the authority have solved that issue.

**MR** So you were Director General of the Belgium Ministry from 2007. That coincided with the global financial crisis. So you were immediately faced with what we are going to talk later about the effects of the [Covid-19] pandemic. But when you came into that position, what were the immediate challenges that the 2007 Financial Crisis raised?

**JS** I started in March, and in August we saw an alarming increase of inflation. And it has been said yesterday also. The stakeholders in the street judge you by the impact you have and what they pay in the supermarket for their weekly shopping. And that's also, certainly in our case, politically true.

Because the Competition Authority was the result of a political deal between the different political parties, it was decided that would be competition law and price regulation would be abundant.

This shows how important the issue of impact of the crisis has always been in the minds of our stakeholders. So, an increase in inflation was very, very worrying. That's when we started to develop better monitoring. We were then still part of the Ministry, with which we now continue to deal as an independent authority, very constructively. And you follow that from trimester to trimester. We try to open cases where the issues seem to be the most vulnerable. That was a mistake I made, or that we made. But I was certainly part of the one to make it.

It led to too many complaints, which we could not deal with, with the resources we had. So we lacked, at the beginning, good expectation management. We've learnt since that we may even now have exaggerated it in the other way around. We communicate I think, very often, I think effectively, with the professional stakeholders. Not so much with the broader public.

And we heard yesterday, also how important that is the present climate. But at the same time, creating expectations which you will really not be able to meet, is also not doing anything for your legitimacy and credibility. That was that. You had inflation and you had at the same time, in agriculture, a milk crisis. One was followed by others.

We were able to build up, which for the competition authority was not usual, a very constructive relationship with the main farmers association, who did nothing anymore without coming to see us first, when it was relevant to the market. I must say that has changed.

Because with all the exemptions they got at the EU level, they are clearly less inclined to fear our interventions.

**MR** So, in 2013 the Belgian Competition Authority became an independent agency. And you became its President. What were the main changes in the functioning of the agency, that change of status, as you experienced it?

**JS** Well, we had this problem with people who found it very difficult to accept functional authority from somebody who did not have hierarchical authority. The fact that we merged with the Investigation and Prosecution Service, and the decision-making process became part of a really integrated body, solved that problem. The relationship between what had become Director General and was now the authority and the college, and the old council had often been very difficult. That has already changed I think.

The relationship was much, much better and we had a monthly lunch. That had already improved. But still, to be in an integrated authority, maintaining the clear distinction in tasks, between the investigation and prosecution on the one side, and the decision, in major cases, on the other, that has been, I think, a very significant and successful improvement.

To others, transactions, settlements. We would never have been able to conclude the number of infringement cases we did, without the settlement procedure. This is perhaps the single most important change we managed to get into the Act. And then also a complete review of the interim measures procedures.

**MR** We've had many agency heads here, over the last two days. And I know a number of us have been asking them, how their agencies have dealt with the current crisis. The pandemic. How has the Belgian Competition Authority dealt with the pandemic? And is there anything you've learnt from it which you'd like to share with us?

**JS** First, we were lucky that we had always been, even in the old former authority, part of the pilot teams for home-working, for tele-working. So, when suddenly we had to close the doors, everybody was equipped. So, there was, in our case, no rush for the IT service, which was also working at home, to get the necessary equipment and software. That went well.

I think the impact was on output, on merger control, as you depend on the notifications. And there was a dip. And then now, out of the dip. I think that on infringement cases, the productivity increased. Quite markedly. First, people at home do work. Two, we had no dawn raids.

And a dawn raid in a smaller authority makes that you take people for about a week, from one case team on the dawn raid team. That disrupts investigations. That didn't happen anymore. Now, this may have a negative impact on our pipeline in the coming let's say six months, or a year, but in the short-term it has had a positive impact. So that's all positive. What is negative, like it has been said so often here, in the last two days, we miss each other's physical presence. And recruiting people to invite them to the office to give them a laptop and say goodbye, it's surrealistic.

And you cannot expect the same sense of belonging, the same team spirit of people who do not see each other anymore, except on a screen. So now we really have to use every opportunity to have a drink, or whatever. And meetings also of course, with the people working together, seeing each other.

At the EU and international level, I think the impact was also negative, for exactly the same reasons. We are all so glad to be here and thanks very much to the IBA for this opportunity. And we now have opportunity after opportunity. We really missed that. Meetings at ECN [the European Competition Network] or also at Organisation for Economic Co-operation and Development (OECD) tended to become briefings.

You can very well exchange information, but you miss the think tank interaction between people. Which you have in the corridors, in the coffee breaks, and all that. And that is not just socially pleasant. It is also professionally important. And that we miss.

**MR** Well actually the success of this conference, I must say, will lead the way I'm sure to the IBA now being able to put on more in person conferences.

I said at the beginning, it's been very important that this conference was seen as achieving its goals, and having a great attendance. Very high quality debates. And thank you also, all of the agency heads, for coming and contributing to that.

At the BCA you put in place a very good working procedure for interim measures. It's fast, it had checks and balances. How has that worked in practice?

**JS** You should ask the audience.

**MR** They can't reply.

**JS** No, seriously. It was a complete review, from a regime where the Investigation Service has had to do a kind of an investigation, and it went only to the President for written and oral procedure. When the Investigation Service thought that there was reason to grant interim measures. That took time.

Now we copied the rules from the Code of Civil Procedure, so there could not be much discussion on the rights of the defendant. Because if it conformed with the Code of Civil Procedure, the Bar of course is familiar with the rules. We added time limits. Time limits which are not shorter than what the practice is before the Civil Court.

But you need a hearing within one month after filing the request. And you need a decision within one month after the hearing. They are usually faster. That means that the tool has become much more relevant I think, to the parties. We've heard over and over again, also in this conference, that speed is of the essence.

And we also heard there are limits what you can do while still, and that is of course essential, respecting the rights of the defendants etc. Now, if you cannot compress a case below 18 months or even below 24 months, that is too long for stakeholders.

So, we do whatever we can, use whatever tools we have, to bring forward the useful effect of cases. Interim measures can be one thing. And there I think interim cases where you refuse the interim measure are I think just as important as the ones where you grant them.

Because it makes the parties feel which way the wind is blowing. And there are new procedures, it's the President who decides. It's a college, as in main cases. So, they really get a sense on how the authority will look at a main case. But interim measures are not the only possibility. For instance, there are also press releases.

To my surprise, I must admit, it was the Association of Belgian Competition Lawyers who asked us to issue press releases when we did. And they asked so, in order to have a level playing field for potential leniency applicants. But when the whole market knows that you are at dawn raid, you give a signal as to what can be a problem.

That's one way. And we must do whatever we can. There is no one solution that will solve the problem. And the problem will also, I'm afraid, never be completely solved. But that's not a reason not to try.

**MR** The Belgian Agencies got new powers relating to the abuse of economic dependency. How does it plan to use those powers, and when can we expect, if you can tell us, a first decision on using those powers?

**JS** Our first cases must be opened by the Prosecutor General, the Auditor, after hearing the Chief Economist. So, they are at the entrance. Also for interim measures. Because one can only have an interim measure procedure when a main case has been opened. So, there is certain degree of filtering.

That will be also the case with the abuse of economic dependency. I'm not allowed to know the complaints, but I know there are enough complaints, and they try to prioritise with the still very limited resources we have what cases should go forward without jeopardising the enforcement and the equivalence of Articles 101 and 102.

But yes, there will be cases. But also we have expected, certainly I expected, the main enforcement of these new rules will not be by the Competition Authority, but by the courts. Where they can have, under the accelerated procedure, similar to interim measures cases, much quicker results.

And they have already been court decisions. Because under the law we must conduct an economic dependency case under the same rules of procedure. So, it's the same investigation, same rights of defendants, as in other cases. So it will take some time.

**MR** Over the past two days, we've heard quite a lot about the major ongoing policy reviews at the European Commission (EC) level. Vertical restraints, horizontal restraints, market definition, the Digital Markets Act. How engaged is your agency, the BCA, in that review process?

**JS** I think we are rather active in these EC processes and also in the go-between between the ministry and the authority and the ambassador and the authority and we have excellent relationship with them.

So I think we are as active as possible. Now what do we try to promote and to achieve? For us the review of the verticals is extremely difficult. And the reason is mainly that our economy consists to a very large extent of small and medium size enterprises. They are the most difficult to reach.

They are the most difficult to convince that rules of competition are also relevant to them, even when they are really small. You cannot, in a country like Belgium have a competition culture, if the small and medium-sized enterprises (SMEs) think it doesn't apply to them. Not even when the SMEs do think it applies to them.

So to have limited clear lists of hard-core restrictions is absolutely essential. I'm not even sure I could justify the advocacy efforts if that would be dropped. Because they can all claim that their action as such, individually, has no significant impact on the market. But collectively they have a very significant impact.

So we must continue to have a legal framework, clear-cut hard-core restrictions that are infringements by object. So that you do not have to calculate the effect of the single infringement, being probably unable to have a reliable calculation of the relevant conduct in the aggregate.

That for us is very important and I know, and you can read it, in the feedback given to the Commission's services. We are not the only one. That is also clear in the guidelines that are fully consistent with the block exemption. That was not the case. And I can, if you wish, also explain how that happened. But that's a footnote and anecdotal. We should have clear consistency. Because every new difference in nuance is used to argue that, no, no, in this case, it has no impact. That is very important.

The horizontal block exemption, yes, we are actively involved. But we don't have issues there of really particularly urgent interest that are different from all our other colleagues.

Regarding the DMA, it depends very much on who will be in the advisory committee. And I'm not going to go into that and complicate the political discussions even more than they already are. But let's just put it like this: if you have a committee that only consists of Competition Authorities, the coordination between competition law enforcement and the enforcement of the DMA does not present any significant problem, or any new problem. But if that is not the case, there must be an agreement. Now we have proposed ... an Agreement where the ECN members are informed of every opening of a case under the DMA. And of every decision that is going to be taken and are also consulted on these decisions. Why do we insist so much that we are fully informed? Because the concepts are so similar.

It has also been said here today, we should absolutely avoid diverging interpretations of similar concepts. That is one. Why it is also so important that we do that within a context where only the ECN members are present, is because we can otherwise not talk about our own cases. This is because of the confidentiality rules. And changing the text of the DMA to allow these discussions in a broader context, is not enough. You will have to change the laws of, I guess 27 Member States. And certainly in our case, because if I share, or any person in our staff shares any information obtained in the framework of a case, this relates to the only prohibition in our Competition Act with



criminal sanctions. And it is a prison sentence. So that is not something you can solve in the DMA regulation.

We prefer the solution of course to be as simple as possible. We can only give full and relevant advice if we can mention our own cases. Is that an answer to your question?

**MR** Yes. You've actually answered two more questions that I was going to put to you. But you've dealt with them all in one, so that's great. Now moving to the wider international level, you've been very involved in the International Competition Network. I see you in various parts of the world at ICN meetings, when they were taking place.

How useful has the work of the ICN been to your agency? And what has your experience been, because you said you were going to mention that, of the functioning of the ICN during the Covid-19 emergency? And what long-term impact will that have on, the way as you see it, on the way the ICN operates?

And how generally do you see the ICN evolving over the next few years?

**JS** First, we should not forget that in the early days of Belgian Competition Authority, and the preparation of the then Competition Act, so in the early 90s, we were guided by ICN Best Practices. It is thanks to ICN Best Practices that we moved from a completely unworkable set of merger thresholds, to turnover thresholds.

And then we increased the level year by year, and we have to review it every five years. And that has really changed, not only the work of the Authority, but the especially the work of the Bar. I was, at that time, I was a colleague of yours. And I can tell you that we spent more time, and more client money, on finding out whether we had to notify than on the notification process itself.

That was a major change, and we could convince parliament, government first, then parliament. That was thanks to the ICN. Once you had a Competition Act and a Competition Authority that has evolved and developed within the mould of the ICN.

Second it is, for us, as much as for everybody else, important that there is convergence and consistency in the application of competition rules in a world with ever more competition authorities. But I can also not deny that as an ECN member state, our cross-border contacts are largely within the EU.

We do have direct contacts with colleagues as well, especially in the United States and Switzerland. But most of the contacts are part of the ICN International Cooperation Network, yes it is important. But we benefit mainly via the development of EU law.

**MR** What about the pandemic? How have you observed the way that has affected the ICN and is that going to have any long-term effects?

**JS** I don't think so. It has affected the ICN, but I don't think it has long-term effects. It has been affected for the same reason as ECN and others, as we lacked direct interaction with the colleagues. But at one stage, it was a concern, at least for me, if there was too much of an overlap between the ICN and OECD Competition Committee?

Because we cannot afford to go to two meetings dealing with the same issues, and to some extent, between the same people. And then we saw a very significant improvement in the coordination of the activities of the two forums.

And the former Mexican president, she made very significant contribution to that. So does the Portuguese President, Margarita from the ECN side. So now I think, there is not a clear division of labour. But then that doesn't seem to exist between the United States Department of Justice and the Federal Trade Commission either. And that's worked for many years.

There is not a clear division of labour, but the emphasis, at least on point by point basis is clear. There tends to be an emphasis on procedure in the ECN. And the OECD Competition Committee has certainly, also for me, always been the main think tank for policy.

**MR** Now, we're getting dangerously close to the hour for the Florentine luncheon. So I'm just going to end with two short questions, which I always ask. What's been your greatest achievement as the President of the Agency? And what have been your greatest frustrations as President of the Agency?

**JS** It's always difficult to talk about your own achievements. Again, I would prefer you to ask the question to the audience. No, I think that when you look at it person by person, euro by euro, as a small under resourced authority, we have made an improvement. But being an under-resourced authority, that is not very different from some other authorities.

Then, I think I may say that I have helped to put the BCA on the map, internationally and in Europe.

And that with regard to interim measures we were also in a bit of a league together with our French colleagues. Now frustrations, oh we could have done so much more if we had more resources. We never had, at least never for long, the problem with the pipeline.

I'm not allowed to know the cases, because otherwise I could not chair the college afterwards. But I know that there are really nice cases waiting

to be dealt with. By the way, it's fascinating and not easy to know how we get them. Because like everybody else, we saw a very significant drop in the leniency applications.

And we came from a time where about 80 per cent of the new cases came from leniency applications. But while we saw a drop in the applications, we saw no drop in the new cases. And there's not a single explanation, but of course we are allowed to discuss the general theory.

There is not a single reason – whistleblowers, tips, things you read yourself in the press. It's amazing what people admit to in the press. And all these things together, yes they have made that there is a rather stable number of new cases. But we could have had more.

And then, not as a frustration but as a concern, and a challenge, I think there is an underestimated reconsideration of the new economic approach. No don't misunderstand me. I don't want to come back on the new economic approach.

People sometimes think that when we're so interested in verticals, and in resale price maintenance, that that is an attempt to come back to our old comfort zone. No. Verticals, Resale Price Maintenance, the hard-core restrictions we mentioned earlier, they came back on the agenda on the basis of what I think was robust economic analysis.

The momentum with which we started in the crisis in 2008, led to, for instance, the supermarket study. And the supermarket study led to the conclusion that we still had a problem notwithstanding the internal market. So, I'm certainly not tracking back. But what we now see is that if you are consistent in merger control, especially in merger control, you have to look at local markets.

But local markets can be very small. And there can be many. Even in a small country. If you want to dig into every possibility of every restriction in every relevant market, plus trying to find out what the relevant local markets are, you need such an amount of data that pre-notification procedures have become much, much heavier than they were.

Now in important cases, which have a real impact on the national or even regional [?] market, that must be done. That is important. That is relevant.

[...] So I hope that we will find not only ways to further develop the simplified procedures, as we heard also, the Commission is doing.

It is important that we also develop a more streamlined approach to the pre-notification phase of what is going to be a simplified procedure. Because there are borderline cases, of course there are, but there are many where, I'm afraid, an old style government sense approach would allow you to cut corners, without reducing the positive impact of merger control.

**MR** Thank you very much. Really, thank you for a lot of very clear, very interesting answers. I have many more questions, but we've run out of time. You very modestly said that the Belgian Competition Authority had been put on the map. I think, for those of us who observe these things.

It's been very influential under your leadership in the ECN, the ICN and I think that's a great achievement. You are too modest really. Thank you very much for being our interviewee.

**JS** Thank you.