

ICN Town Hall on Industrial Policy
March 8, 2016
Speaking notes of Randy Tritell

Thank you, Andreas, for focusing the ICN on this important topic and for inviting me to participate in this panel.

A recent article by ICN NGA and Professor of Law Danny Sokol, entitled “Tensions Between Antitrust and Industrial Policy,” begins: “Sound antitrust law and policy is in tension with industrial policy. Antitrust promotes consumer welfare whereas industrial policy promotes government intervention for privileged groups or industries.” I would like to explore this paradigm, bearing in mind that the views I express are my own and not necessarily those of the US FTC or its Commissioners.

I will discuss a U.S. experience with the use of industrial policy over competition policy and explain how industrial policy is no longer an aspect of competition enforcement in the United States. I will then discuss why I believe that the mix of industrial policy and competition policy poses serious challenges to the establishment of sound, consumer welfare-based competition policy internationally and to the ICN’s goals of international cooperation and convergence toward best practices in competition enforcement.

Industrial policy is a broad term. One definition I came across is “Government policy to influence which industries expand and, perhaps implicitly, which contract, via subsidies, tax breaks, and other aids for favored industries.” Another, by antitrust economist Lawrence White, is “the promotion of specific industrial sectors rather than industrialization overall...., [a]n attempt by government to influence the decision-making of companies or alter market signals, sometimes to support the losers, in other cases to succor or catalyze maturing sectors or stimulate advancing sectors.”

These definitions can encompass a wide range of policies from tax breaks to direct government funding and there is a wide debate about the wisdom of industrial policy generally as well as specific uses of it. This is an interesting topic but I think our focus should be on the more limited intersection between industrial policy and competition policy and enforcement, so that is where I will focus my remarks.

Looking at the United States experience, going back to 1791, a report called “A Report on the Subject of Manufacturers” contained arguments for selective protection of industries – its author: Alexander Hamilton. And in the early years of the Sherman Act, the U.S. antitrust agencies and the courts considered a range of goals in applying and interpreting the law. Andreas has asked that we try to focus on specific examples from our jurisdictions, so I will do that but I will have to go back into our history.

The main direct intrusion of industrial policy into competition policy occurred during the Great Depression with the passage of the National Industrial Recovery Act in 1933. President Roosevelt, advocating for the Act in a fireside chat, explained that antitrust laws led to competition that in turn led to “long hours, starvation wages, and overproduction.” In an effort to promote economic stability, the Act suspended the antitrust laws for two years and allowed industries to create “codes of fair competition” that set industries’ prices and wages, established production quotas, and imposed restrictions on entry. Competition was relegated to the sidelines, and the welfare of firms took priority over the welfare of consumers. Output was restricted, prices increased, and consumer purchasing power was reduced.

The Act became unpopular even at the time and was declared unconstitutional by our Supreme Court. 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

we learned from this experience is that there is no substitute for a competitive market, including and perhaps particularly in times of economic distress.

Our Supreme Court has since made clear that 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. I think it is fair to say that, under the definitions I mentioned earlier, the United States does not have an industrial policy, at least one that affects the primacy of our antitrust laws.

Thus, when our former Chair, Debbie Majoras was asked to speak at an EU Competition Day panel entitled, “National Champions: Sounds good but....,” she entitled her talk, “National Champions: I Don’t Even Think It Sounds Good.” And we have continued with this message through the present, as Chairwoman Ramirez explained in a speech in Beijing, “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.”

We thus lack recent U.S. experience with industrial policy interfering with antitrust, but we do look at proposals to implement other policies that intersect with antitrust. For example, the FTC and DOJ have worked with the government agency that handles the Affordable Care Act, which encourages collaboration among health care providers, to ensure that the Act is implemented in a manner consistent with competition principles.

I would now like to offer some observations on the international landscape, where we see many, and I believe increasing, instances of industrial policy affecting the application of competition law. This can arise explicitly, for example by statute, or implicitly. An example of the former is the Chinese Anti-Monopoly Law, article 1 of which sets forth a myriad of goals that include “ensuring the healthy development of the socialist market economy.” Industrial

policy can also be implemented through suspensions of competition laws as in the NIRA example I mentioned earlier or exemptions of particular sectors of the economy. The second, implicit, category is harder to identify with certainty but I think we have all seen actions or inactions of competition authorities that, regardless what the law says, seem designed to advance the interests of particular domestic competitors or industries over foreign competition.

In my view, industrial policy, whether within competition law or imposed by governments, law presents potentially serious challenges to the proper goals of competition policy and of our shared aspirations in the ICN. Let me briefly list my top ten reasons:

First, industrial policy values producer over consumer welfare, which a consensus of the ICN has endorsed as a principal objective of competition policy and enforcement. This distorts competition in domestic and international markets, and leads to reduced output and higher prices to consumers.

Second, it shifts rents from innovative and efficient firms and from local and foreign consumers to less efficient companies.

Third, it deters entry, particularly of foreign firms, that could have brought new goods and services, lower prices, and innovation.

Fourth, trade flows are distorted, which can lead other countries to respond in kind, further depressing trade, investment, and ultimately consumer welfare.

Fifth, introducing various industrial policy factors into the mix defeats the goal of legal predictability that economically based competition enforcement can provide.

Sixth, it undermines the credibility of competition enforcement. As Assistant Attorney General Bill Baer has said, “If competition enforcers stretch to advance non-competition goals, we risk losing our hard-earned legitimacy.”

Seventh, industrial policy entails the intrusion of politics into competition enforcement and with it, the risk of capture by well-connected firms and industries, usually incumbents, against the interests of new entrants and innovators.

Eighth, competition agencies and courts are ill-equipped and poor forums to evaluate non-competition factors such as industrial policy. We all know how hard it is to analyze the facts, law, and economics of competition cases. Asking competition officials to weigh this analysis against perceived effects on various other policies such as competitiveness, employment, and fairness demands more than we are generally equipped to handle, and can also raise accountability issues.

Ninth, industrial policy works against the ICN's goals of cooperation. Cooperation works best when the cooperating agencies evaluate a case under the same general criteria. While cooperation can still work when the market conditions or even legal standards are somewhat different, it is much more difficult to cooperate when one agency's evaluation is based on an economic analysis of competitive effects in a relevant market and the other is considering effects on national competitiveness, local employment, or other non-competition factors.

Finally, the application of these different objectives significantly increases the risk of divergent outcomes in cross-border matters that present the same facts, undermining a key ICN goal of international convergence.

As we can explore further in our question and answer period, I think the ICN should think about what we can do to confront the challenge that industrial policy raises for our shared competition policy goals.