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Giovanni PITRUZZELLA, AGCM
The Great Transformation: challenges for competition authorities

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Interview

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Giovanni Pitruzzella, AGCM: The Great Transformation – challenges for competition authorities

2018
Appointed advocate general of the Court of Justice of the European Union

2006-2011
Board member and, since 2009, Chairman of the Italian Authority regulating strike actions in essential public services

Since 1994
Full professor of constitutional law

Professor Pitruzzella, you were appointed president of the Italian Competition Authority in October 2011 and your mandate will terminate at the end of this year. What are the main challenges you met as the chief of an independent authority in charge of competition policy in Italy?

During these seven years, I have been fortunate enough to enjoy a particularly stimulating professional and personal experience, because the beginning of my term of office as chairman coincided with a great transformation that involved the economy, politics, institutions, and launched entirely unprecedented challenges to antitrust authorities all over the world and especially in Europe.

This great transformation was fuelled by three developments, each of which involves disruptive innovation. Firstly, the economic-financial crisis, which started in the USA, moved to Europe, where it has manifested itself as a crisis of sovereign debts, banks and then of the real economy, and was followed by the transformation of the Eurozone's economic governance. Secondly, the fourth industrial revolution based on digital technologies expanded at a speed unknown to previous industrial revolutions (the smartphone, for example, was only introduced in 2007, less than five years before the start of my term in office), creating new markets, new business models and new monopolists, with consequent profound structural changes not only in the internet ecosystem and related industrial sectors (in particular the TLC), but also in traditional industries and services (from hotels to urban transport and manufacturing, with the application of artificial intelligence and the transformation in Industry 4.0). Finally, the unprecedented development of globalization, together with its beneficial effects, has spurred an increase of inequalities in Western societies feeding, as a reaction, new protectionist pressures that have affected, especially after the election of Donald Trump, international trade and also the European internal market and the national economies themselves.

Historical processes of this magnitude have broken the constitutional balance between democracy, the market and social cohesion built from the second post-war period thanks to interaction between international order, European integration and national constitutions. The European model had succeeded, to use the words of Ralf Dahrendorf, in "squaring the circle," that is achieving a harmonious balance between the institutions and the values of these three areas. In recent

years, however, a feeling of anguish and insecurity has spread among European citizens, which has driven to the fore the security question that underlies the social contract. Therefore, the times we live are characterized by a "return to Hobbes," that is, by the search for those security services that characterized the modern Leviathan.

These processes have affected competition authorities, also because, right since the beginning of antitrust law with the Sherman Act of 1890, they are placed right at the crossroads between the market, democracy and social cohesion.

> "A great transformation involving the economy, politics and institutions has launched entirely unprecedented challenges to authorities all over the world, and especially in Europe"

In the face of such radical changes, it was natural for us enforcers to return to the fundamental issues, and in particular to the question of what are the goals of competition law, and to the basic concepts such as market power. In my opinion, and certainly in the Italian experience, antitrust enforcement has taken on multiple objectives. The traditional focus on consumer welfare and price reduction has been expanded to include the fostering of innovation, the drive towards the structural modernization of the Italian economy to make it more competitive, savings for public budgets and, in line with the studies by Baker and Salop, the fight against inequalities through the fight against position rents.

In short, currently vigorous antitrust enforcement can be seen both as a means to relaunch economic growth and as a way to achieve the objective summarized by Eleanor Fox when she said "*making markets work for the people*."

In this context, the last seven years have been characterized by the strengthening of the antitrust enforcement and its sanctions, marking an important difference between the approaches followed in Europe and on the other side of the Atlantic. From Almunia to Vestager, the central role of sanctions in antitrust enforcement has been maintained. In Italy, each year of my term as chairman was characterized by an increase in the total penalties issued, as compared to the previous year. During the period considered, we imposed sanctions for around €1.5 billion and opened more than 130 cases. Decisions with commitments, which exclude the penalty and which had featured strongly in the previous period, decreased from 45% for the previous seven-year term to about 26% of the total number of cases decided. Beyond the theoretical debate on the optimal level of sanctions, the Authority has insisted on the importance of their deterrent function, even in times of economic crisis. Likewise, efforts have been made to strengthen the predictability of these sanctions, adopting, along the lines of those issued by the Commission, guidelines for the calculation of penalties.

The digital transformation raises new challenges for the enforcement of competition rules. In particular, enforcers have to balance the protection of the competitive process, in the ultimate interest of consumers, with the need to safeguard incentives to innovate. What is your approach to these challenges?

To answer the question, I will take a step back. Competition is a driver of innovation and innovation is the engine of economic growth. The problem in Italy is the absence of growth that has characterized the last two decades of our economic history. Per capita income in Italy has remained unchanged since the beginning of the last decade. Today, thanks to the recovery of economic growth in the last two years, it has returned to the level of 1999. The consequence of this long stagnation is that we have become poorer than the rest of Europe. In 1999, per capita income in Spain was lower than in Italy; now Spain has overtaken us and is growing at twice the rate of our economy, i.e., at a yearly growth rate of 3%. Even Ireland and Portugal have come out of the great recession better than us, despite having had to endure austerity programs, decided by the troika, far stricter than those that were adopted in Italy. If we do not continue on the path of economic growth, it will be difficult to reduce the debt/GDP ratio and it will be even more difficult to find the resources necessary to deal with those redistribution policies that are rightly invoked to respond to the need for security that comes from those affected by the economic and financial crisis, the disruptive effects of the fourth industrial revolution and the worsening of inequality.

Innovation is the result of a combination of different factors, including appropriate public policies for this purpose. The competition authorities also have a role to play in this area. First of all, in the choice of the sectors in which to intervene, then in making sure that intervention fosters and does not obstruct innovation.

> "The role of competition authorities is crucial to guaranteeing the innovation process against all attempts to prevent it"

This challenge is particularly difficult when we are confronted with innovation tied to the digital revolution. Today innovation is almost synonymous with digital economy. Certainly in the face of waves of disruptive innovation, which redefine the markets and, so far, have been able to replace quasi-monopolist incumbents rapidly with new entities, there is the risk that antitrust enforcement may have the unwanted effect of hindering innova-

tion. However, if the risk of over-enforcement must be kept in mind, we must likewise avoid the opposite danger of under-enforcement.

The role of competition authorities, in my opinion, is crucial to guaranteeing the innovation process, against all attempts to prevent it. In this regard, in my experience, some aspects have assumed particular importance.

The first is that, in the new economy, access to digital services is an essential component of competitiveness and therefore to express their growth potential, all sectors need a network infrastructure with high bandwidth availability. The creation of broadband and ultra-broadband in Italy has been hampered by the absence of cable television, which in other countries has allowed the use of the relative infrastructure to create broadband connections, but also by the conduct of the incumbent, Telecom Italia, which has a monopoly of the copper network. Telecom was motivated to exploit the position rent derived from ownership of the network infrastructure, which is difficult to reproduce, rather than investing in the fiber-optic network. Competitors were systematically prevented from accessing the essential facility of the network and therefore from offering broadband internet services to customers. In 2013 Telecom was sanctioned for abuse of a dominant position with a fine of €104 million, which was followed by compensation claims for damages suffered by direct competitors. This intervention was followed by others always aimed at guaranteeing access to the network on non-discriminatory terms. The result was a change in incentives for the incumbent. When the possibility of obtaining position rent thanks to the ownership of the copper network was ended, the focus of competition shifted to innovation. Telecom launched an important plan for the construction of a fiber-optic network; moreover, a new non-vertically integrated operator (Open Fiber) was founded, which has started implementing its own plan of investment in ultra-broadband infrastructure.

> "To express their growth potential, all sectors need a network infrastructure with high bandwidth availability"

A second crucial feature of the digital transformation is the fact that it blurs the boundaries between the material and immaterial dimensions of the economy. In fact, in order to undertake business in the material dimension, it is increasingly necessary to use online platforms, which become real gatekeepers, able to control access to the market. In this regard, I can mention the case involving Booking.com, with particular reference to a clause—the so-called most-favoured-nation clause—that was included in contracts with hoteliers, creating a binding obligation that prevented competition and innovation from other online platforms, as well as from other channels that could be activated by the hotels themselves. The case was closed quickly and simultaneously in Italy, Sweden and France, accepting the commitments offered by Booking.com, which included the amendment of the most-favoured-nation clause. After this amendment, the market displayed dynamism and innovation. In addition to Booking and Expedia, new and qualified competitors entered the market and offers were developed from the channels activated by the hotels themselves.

In a different set of cases, innovation developed on the internet is hindered by conduct or by rules aimed at protecting operators of more traditional markets. In many European countries, and certainly in Italy, there is great resistance against sharing economy platforms. Certainly, we must not underestimate their disruptive impact on traditional services and therefore on all those who earned their living from them. But we also cannot ignore the benefits offered by these platforms: they widen the possibilities of consumer choice, offer innovative services different from those of traditional markets, allow the use of resources that would otherwise be underutilized, bring down prices, and enable access to new services for consumer groups who do not use the traditional services that they tend to replace. With regard to the sharing economy, the Italian Authority recently intervened using both its advocacy powers, to request regulation that does not block the development of platforms such as Uber, and the extensive legal instrumentation available to obtain the removal of anti-competitive regulations. For example, the Authority challenged before the Administrative Law Judge the regulation of the Lazio Region, which, in practice, made the operation of platforms such as Airbnb impossible. The judge accepted the reasons put forward by the Authority, declaring the regulation null.

> "There is great resistance against sharing economy platforms, but we cannot ignore the benefits they offer"

Finally, there is the broad issue of the immense market power of the giants of the web, such as Google, Amazon, Facebook and Apple, the drive to create new monopolies that derive from the combination of network effects, economies of scale, lock-in practices, and Big Data economy. Here, the powers of the European Commission play a crucial role because of the size, scope and potential impact of the events in consideration. But there is also room for national authorities within the European Competition Network. We need go no further than the case pending before the Bundeskartellamt on the use of user data following the concentration of Facebook and WhatsApp; or the numerous cases opened by the Italian Authority, employing its powers of consumer protection against unfair commercial practices, which have concerned almost all the giants of the network and which, by affecting the way in which they must make their commercial offer, have indirect repercussions on competitive dynamics. Recently, the Authority launched a case against Facebook for unfair commercial practices

precisely with regard to the use made of user data, against a very clear commercial message stating that the service is completely free forever.

One of the main features of your presidency has been a renewed focus on fighting cartels in Italy, both in public procurement and in the private sector. On the other hand, you have intervened against dominant companies, with notable decisions involving, inter alia, the abuse of IP rights and excessive pricing. What are the main elements of the Italian Competition Authority's strategy with respect to these issues?

Whereas the cases of abuse had been predominant in the preceding period, partly because it was a question of preventing the former monopolists from hindering the process of opening the markets, in the most recent years, there has been focus on the difficult task of fighting cartels, which block innovation and, in some sectors, also translate into higher expenditure for public budgets and thus into a greater burden for taxpayers, or have particularly serious consequences in terms of social equity. I remember that, from December 2011 to 31 March 2018, 60 cases of agreement were decided against 39 cases concerning the abuse of a dominant position.

Particular attention was paid to the phenomena of bid rigging in public contracts, with numerous cases involving the Italian Public Administration Procurement Centre (CONSIP). Among the various decisions, I quote that of 2015 concerning the tender, for a total of around €1.6 billion, for cleaning services in schools, in relation to which certain companies had reached an agreement to divide the different lots between them.

With regard to the private sector, there was the notable decision to impose the sanction of €180 million for the agreement between two pharmaceutical companies (Roche and Novartis) involving the promotion of a much more expensive drug (Lucentis) for the treatment of a serious ophthalmic disease (degenerative maculopathy), to the detriment of the much cheaper one (Avastin). In particular, the agreement involved the dissemination of deliberately exaggerated information on the lower safety of the use of the cheaper drug, in order to push patients and physicians to use the most expensive drug.

> "Cartels in some sectors translate into higher expenditure for public budgets and may have particularly serious consequences in terms of social equity"

The agreement resulted in significant economic gains for the two companies, due to the complex licensing and shareholding relationships existing between them, with increased costs for patients and for the health system. In fact, the difference in cost between the two drugs was exorbitant: whereas the cost of a dose of Avastin could vary from €15 to €80, the equivalent dosage of Lucentis cost over €900.

The decision was confirmed by the Administrative Judge of first instance; subsequently, following appeal before the Council of State, a question referred for preliminary ruling was raised before the Court of Justice. This question, with a ruling in 2017, confirmed the interpretation of Art. 101 TFEU proposed by the Authority, pointing out, among other things, that, for the purposes of defining the relevant market, the fact that the company had applied for authorization to place the less expensive drug on the market only for the treatment of certain forms of cancer not requiring authorization for ophthalmic use did not count. The central point is the widespread off-label use of this drug, based on consolidated medical practice, for the treatment of eye diseases, with the consequence that the two drugs formed part of a single market.

The judgement is very interesting not only for the aspects concerning the relations between competition, on the one hand, and regulation and intellectual property rights, on the other, but also because, by endorsing the choices of the Italian Antitrust Authority, it appears to outline a new aspect of hard core illegality. That is to say that involving information so alarming and misleading that it alters the perception of risks and manipulates the competitive process, steering medical prescriptions towards the most expensive product. This is an approach that can go beyond the pharmaceutical sector, focusing on the issue of the legitimacy of the information flows of companies, and one that intersects with the rules on consumer protection against misleading advertising.

> "Misleading information which alters the perception of risk and manipulates the competitive process is a new aspect of hardcore illegality"

In the pharmaceutical sector, moreover, the Authority has also intervened in a number of cases to sanction abuses of a dominant position, which were particularly odious because they affected very vulnerable consumers. In this perspective, I would like to mention very briefly the case of a dominant undertaking (Pfizer) that was considered guilty of an abuse of intellectual property for a certain drug aiming to achieve an undue extension of its exclusive rights, delaying entry into the market of generic drugs, which are significantly less expensive for consumers. In another case in 2017, we sanctioned a South African multinational (Aspen) using the rarely applied profile of abuse due to excessive prices, which was applied on the basis of an increase in the price of certain anticancer drugs of over 1500% and without any justification in relation to the cost structure. It is very interesting to observe how this profile of the prohibition of abuse of dominance is once again being considered in Europe. At the same time as the ruling of the Italian Authority, there was another

ruling, still in the pharmaceutical sector, adopted by the UK Competition Authority, whilst, following the Italian ruling, the Commission also opened an investigation against Aspen.

The protection of rights and freedoms in the digital environment involves not only competition law, but also the protection of personal data and consumer protection. There may also be an overlap with sectoral regulation. How can the authorities in charge of these tasks cooperate so as to ensure an effective enforcement of the rules whilst avoiding duplications?

Many of the cases I have referred to concern regulated sectors and reaffirm the principle, well established in European case law, according to which regulation does not exclude antitrust enforcement. However, it must be recognized that there is always the risk of overlapping and also of conflict between the competition authorities and the regulatory authorities. These risks are destined to increase in the Big Data economy, because the profiles of competition and consumer protection are closely intertwined with those of the protection of personal data, entrusted to data protection authorities, and those concerning regulation. I have tried to tackle these problems, promoting cooperation agreements between the Competition Authority and the other independent authorities, so as to facilitate the exchange of information and mutual consultation, thus preventing conflicts of jurisdiction. So far this approach has worked very well. The spirit of collaboration has also extended to the performance of fact-finding investigations conducted jointly by several authorities. In this regard, I recall the general fact-finding investigation on ultra-broadband conducted by the Competition Authority and the Communication Regulatory Authority, or the most recent (not yet completed) survey on Big Data in Italy, conducted together by these same two authorities and the Data Protection Authority.

Public restrictions of competition have traditionally been a relevant issue in the Italian economy. During your mandate, the Italian Competition Authority has made an extensive use of its advocacy powers. How do you evaluate the impact of your efforts?

Advocacy is an important part of the activity of a competition authority. And it is even more so in a country, like Italy, where, on the one hand, there is a competitive economic structure involving manufacturing companies with leading positions at the global level, especially in certain sectors such as precision mechanics, and, on the other hand, there is an economic structure still lagging behind, with very low productivity levels. One of the causes of this dualism in the Italian economy is public regulation that protects certain markets from competition, promotes perverse ties between the public and private sectors creating a kind of crony capitalism, protects position rents, and burdens businesses with excessive red tape. In short, on the one hand, there are companies perfectly integrated in the global value chain and in international markets and, on the other, there are protected companies with poor levels of productivity seeking position rents.

> "In Italy a massive advocacy effort was undertaken to fight public regulation that protects certain markets from competition and promotes perverse ties between the public and private sectors"

The Competition Authority has undertaken a massive advocacy operation to open up the protected sectors to competition and modernize the structures of the Italian economy. During my term in office, 414 advocacy interventions were implemented. Two thirds of these interventions were directed towards Parliament or central administrations, while the remaining third was directed towards regional or local administrations. In 156 cases, the Authority employed an instrument that is unique in Europe, namely the possibility of referring an opinion to a central or local administration aimed at obtaining the removal of an anti-competitive act or regulation, accompanied, in the case of non-compliance with the opinion, by the power of the Authority to challenge the act before an administrative court. Furthermore, in 76 cases, we sent an opinion to the Italian Government proposing to raise a question of constitutional legitimacy against specific regional laws harmful to competition before the Constitutional Court. The Authority monitors continuously the follow-up of its advocacy interventions, whose rate of success stands at around 50%.

The Italian Competition Authority is competent for the enforcement of both competition law and consumer protection law. On the basis of your experience, do you believe that this two-fold competence has improved the effectiveness of your action?

Protection of competition and consumer protection are strictly interdependent and I believe that, in Europe, models like the Italian one, which entrusts the two tasks to the same institution, are working very effectively. In Italy, this model was consolidated by Legislative Decree No. 21 of 2014, which, overcoming previous doubts, entrusted the Italian Antitrust Authority with general jurisdiction regarding the repression of unfair commercial practices and misleading advertising, which also extends to regulated sectors (such as communications or energy).

> "Protection of competition and consumer protection are strictly interdependent: Models like the Italian one, which entrusts the two tasks to the same institution, are working very effectively"

The protection of competition intervenes on the supply side, guaranteeing an open market structure. The protection against unfair commercial practices intervenes on the demand side, helping to increase consumer confidence, encouraging business competition based on actual merits and not on deception, and thus also promoting innovation. I would add that the combination of the two tasks allows the Authority to increase its knowledge on the dynamics of the markets and their transformations.

As I have already said, in the new digital markets, the use of consumer protection tools has been extended significantly in recent years. The associated resolutions have been adopted much faster than those required by antitrust procedures and involve changes to the behaviour adopted by the companies that can indirectly strengthen competition in the markets.

At the end of your mandate as president of the Italian Competition Authority you will become advocate general at the European Court of Justice. As a former professor of constitutional law, how do you feel when looking at your future task?

I am particularly happy with my new role as advocate general at the Court of Justice, which will allow me to deal with questions of European law that I have studied for many years. I hope to have the opportunity to continue, in this new role but also as a scholar, to analyse further the traditional problems of competition law as well as new issues arising from the great transformation I mentioned at the beginning. Certainly, in the coming years, the EU and also European judges will have to face formidable challenges, but I think that in the end the European structure will come out stronger.

In the interpretation of Articles 101 and 102 TFEU, one of the most debated issues in the last twenty years is how to combine legal predictability with an impact-based approach to the protection of competition. What is the relevance, in this perspective, of the judgements of the ECJ in Cartes Bancaires and Intel in indicating how to combine the use of presumptions with consideration of economic context?

Even in the Italian experience, especially most recently, two core aspects of competition law have come into conflict: that which places at the fore the need for legal certainty and predictability, which fuels a more formalistic approach to cases, and that which instead is concerned about false positives and fears that over-enforcement may jeopardize economic efficiency in dynamic markets under increasing transformation. Of course, since the European Commission has introduced a more economic approach, initially in the application of Art. 101 and more recently in the application of Art. 102 TFEU, we have gone a long time without the unequivocal definition of the correct balance between these two needs.

> "A correct balance is needed between predictability and an impact-based approach"

In Italy I have tried to promote, more strongly than has been done in the past an impact-based approach, even in cases involving a prima facie unlawful conduct. An important aspect of this attempt was the establishment of the figure of the chief economist, which did not previously exist in the Italian Competition Authority. But I think that there is still a lot to do before the Competition Authority, in its entirety, will accept this approach with conviction. Certainly, the teachings of the Court of Justice are fundamental and, in this regard, I think that the *Intel* ruling is certainly important but it still does not seem to me that there is an unequivocal and definitive approach to this issue. In fact, if we read the comments on the ruling published in the first issue of 2018 of *Concurrences*, it is clear that there are different interpretations: some comments observe that the judgement merely defines a system for the allocation of the burden of proof between competition authorities and companies, while others see it as a turning point in favour of an effect-based approach.

Do you think that the close cooperation between national competition authorities and the Commission within the European Competition Network should be considered a model for future institutional arrangements also in the areas of merger control and consumer protection?

My answer is a definite yes. The national competition authorities are a two-faced Janus: on one face, they are national institutions, but on the other, they are European institutions. Regulation No. 1 of 2003 achieved a perfect balance between the reasons for centralization and those for decentralization, promoting efficient legal and economic integration with strong legitimacy. The ECN experience is a success story which should be replicated in other areas.

The Italian Competition Authority is a very active member of the International Competition Network. What are, in your view, the main benefits that a competition authority draws from discussions with other competition authorities worldwide?

The integration of markets at a European level, and often also at a global level, means that the events faced by the competition authorities are of a transnational nature, requiring cooperation that inevitably takes place both among the authorities of the European network and in a global dimension. In this situation, the ICN plays an increasingly important role because it fosters cooperation between authorities, makes greater convergence possible in the approach to problems, facilitates the exchange of models and best practices and strengthens the legitimacy of individual national competition authorities. This last aspect is crucial for all the competition authorities in a historical moment in which there are strong pressures contrary to the opening of markets and in favour of economic protectionism. Competition authorities have the task of protecting open markets and economic integration, not based on strict pro-market ideologies, but by demonstrating in practice how their intervention serves to ensure promotion of the benefits of the markets and the repression of their weaknesses, to achieve what Jean Tirole, in his recent book, defined the "économie du bien commun". ■

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