



| Competition and Antitrust

Q&A with Alberto Pera

Expert Guides Editor **Phillip Bausk** sat down with **Gianni Origoni Grippo Cappelli** partner **Alberto Pera** to discuss the major Competition & Antitrust trends in Europe.

What was your experience like as the Secretary General of the Italian Competition Authority? What was your role and how do you think it helped shape your career today?

From 1990 to 2000, I was the first Secretary General of the Italian Competition Authority (ICA), established in 1990 under the first Italian Competition law. Previously, I had participated in the drafting of the law and in the governmental negotiations leading to the first EU merger regulation in 1989. The Secretary General is entrusted of the Authority's organization, and I supervised the activity of all the offices. Being the first Secretary in charge, I had to set up the structure of the ICA from scratch, therefore playing a special role in shaping the criteria for its intervention and the culture of the institution. I had a background in economics; therefore I thought that economic analysis was particularly important in those years the ICA was at the forefront for the use of economics. Also, I represented the ICA in the periodical meetings of the Directors General of the National Competition Authorities (NCA) with the European Commission.

This gave me an exceptional insight about what was happening at Community level and I was able to participate in the developments of EU competition law and practice: for instance, the role of the ICA in the reform of vertical agreements was very important. Obviously, this whole experience was fundamental to shape my understanding of competition law and practice and of the functioning not only of the ICA, but also of the Commission and other competition institutions. This was a decisive factor in orienting my choice when I decided to leave the ICA: I could have found a comparable position somewhere else in public service, but I liked the idea of continuing using my experience in the competition field and I thought I could do it better as a lawyer than as an economist!

You founded the antitrust practice at your current firm. What makes a complete antitrust practice and what was your strategy in building this practice on your own?

The first point is whether you see a practice just as a complement of the other activities of the firm, or you look at the development of a "complete" practice, which is selected by clients because of its specific antitrust expertise. A complete antitrust practice requires a certain degree of specialization, an excellent quality in the analysis and an open eye to developments in other jurisdictions, in particular at the EU level, but also in other well-established key jurisdictions like the US, as well as emerging realities like BRICS countries. To be able to handle a significant amount of complex matters, you also need a certain group size as well as very good lawyers. Furthermore, they must be continuously aware of developments in the law and its application. Good relations with foreign law firms and exchanges of views and experience are also very important. I was lucky because, at that time, my firm decided to invest in the practice and we were able to attract some excellent professionals. This gave us enough resources to specialize in the various fields and to guarantee efficient assistance even in very complex cases. In particular, I was lucky to find two excellent junior partners, Denis Fosselard, who later left the firm and is now at Ashurst in Brussels,

and Piero Fattori, who is now the Head of the department. Denis had a strong expertise on EU law, while Piero, a previous head of the legal Department of the ICA, was a recognized authority on national antitrust issues. Later Mario Todino, who had worked with Mario Monti in Brussels, also joined and took charge of our Brussels office. We also found some young and bright associates we could build on. Soon there were 12 people on the team, which makes it large by Italian standards. This allowed us to work on very complex issues.

At the same time, we established good and lasting relations with foreign law firms for exchanging work. At the beginning, we profited from the client base of the firm, also on some very relevant cases, but soon we were able to attract new clients looking for specialized antitrust assistance, therefore building a specific client base for the practice. This has been a point of strength, because this client base has sheltered us from the variability in the volume of M&A activity over the years: pure antitrust clients represent about 70 percent of the practice's revenues.

What industries do you see the most antitrust and competition cases? Why do you think these industries are more active than others?

We work in all sectors, even if there are some areas where we have developed a specific sectorial expertise, like TLC, energy, waste management, transportation, pharmaceuticals, constructions, consumer goods, banking and insurance. What we see is that Italian antitrust cases tend to concentrate in a relatively small number of industries, in particular, formerly regulated industries where there is an incumbent, like energy, communications and railways; and then banking, insurance, professional services; or industries frequently involved in public procurement (for example, health, constructions), especially for bid-rigging cases, a very important area for the ICA's enforcement. These are sectors where usually you have an incumbent, or very active consumer associations, or some supervisory authority.

Cases in other traditional market sectors for antitrust enforcement, in particular base industries or other industrial sectors, are occasional in Italy, often originating from the Italian extension of an EU leniency. This may be due to the difficulties in finding evidence of anticompetitive activities, in particular collusion. In any event, the ICA seems reluctant to launch cartel investigations at its own initiative, and national leniency programs have proved not to be very effective. Therefore, there is a tendency by the investigating offices to concentrate their attention on the "usual suspects", also because they are active in areas where the ICA has accumulated a sector-specific knowledge.

European countries have seen tough economic times over the past year or so. Do you think these recent struggles will impact the antitrust and competition market or will organizations continue to be as active as they were in previous years?

I think that there will continue to be interesting work, but it could be more diverse and hectic. The economic crisis has influenced the volume and the type of workload under several perspectives. First, merger work has had a significant slowdown over the last few years. The remaining merger activity is often related to restructuring, quite often implying lower margins. This may change as the level of activity revives and some expected changes take place in sectors needing consolidation (like TLC) as well as intercontinental mergers, perhaps from Asia. However I don't think we will see the merger craze that characterized the beginning of the century. As for behavioral antitrust, the Commission continues to pursue cartels, but at national level and not only in Italy, I see a lot of attention to the practices and sectors affecting consumers directly, also in order to show that antitrust may help consumers in times of hardship. In turn, this may have had effects on the kind of infringements that are pursued by the NCAs: for instance vertical agreements. In Italy, behavioral antitrust cases decreased, while the ICA has focused its attention on consumer protection. Antitrust fines decreased as well (probably as a result of the preoccupation that companies may be hit too hard in time of crisis) with a parallel increase of commitments decisions, in part lowering the companies' incentives to invest in competition law compliance. There may be some changes in these trends as the crisis becomes less acute, but I think it will take some time.

Additional developments – positive in my view - are represented by the growth in the area of litigation for recovery of damages and other commercial disputes involving competition law claims - as a result of both changes in jurisprudence and legal instruments and in attitudes - as well as the area of intellectual property. All in all, I think that this implies that there will be continuous activity in the antitrust field, but that it will be less predictable and more varied than in the past and practitioners will have to be ready to tackle this diversity.

In your experience, have your interactions with the European Union had a significant impact on your antitrust work? Is constant communication with the EU paramount to success within the industry?

Italian Competition law has always been closely related to EU law: an indication in this direction is already in article 1 of the law. Obviously, this tendency has been reinforced over the years by the process of convergence culminating in Reg. 1/2003. Therefore, it is obvious that continuous attention is needed to the developments in the EU, both at the substantial and the procedural level. Continuous communication with EU institutions, and in particular the Commission, is necessary, not only for EU cases. However, I would note that Regulation 1/2003 also had a different, perhaps unintended, effect, because National Competition Authorities which have acquired full competence in applying EU law, have however become more autonomous from the EU institutions, in particular from the Commission. Therefore one has to be very attentive, perhaps more than in the past, about the way national authorities interpret the common legislative framework: a clear example is in the field of verticals, where national practice may vary a lot across Europe.

Another field includes the exchange of information: for instance, the attitudes in Italy and in the UK are very different, as it was shown in some very recent cases where the authorities in the two countries took very different positions. This seems to indicate that there is insufficient coordination in the application of a single law. In principle, this should be attained not only through EU Courts, but also through the Commission's interventions, but in practice the Commission tends to limit those interventions in the areas it deems more relevant. The same tends to be true in the merger field, which is not yet fully harmonized at the national level. Another related aspect is that often some national authorities tend to move first (exchange of information is an example) and then other authorities tend to follow suit, without the Commission intervening. This is made easier by the existence of a formal consultation mechanism within the European Competition Network (ECN), comprising the NCAs and the Commission. Therefore, while constant communication with the Commission is important, attention to national practices has become also very important.

Brussels is regarded as the antitrust and competition capital of Europe. Are there any other locations in Europe that are becoming more active? Why do you think these places are seeing increased activity?

There is little doubt that a number of national jurisdictions have become extremely relevant in recent years. I would note that their activity is becoming more and more important not only in itself, but because as mentioned, they consult through the ECN and each NCA tends to consider other NCAs decisions. Traditionally, the UK Authorities, the Office of Fair Trading (OFT) and the Competition Commission, as well as the CAT, have always been very well regarded because of the strong economic insights and the strength of the legal analysis. We expect the same to continue with the new UK Authority. From an enforcement point of view, the French Authority and the *Bundeskartellamt* have become more and more relevant in the last decade. The German Authority has a really impressive record of activity, with very innovative decisions in areas like energy and IP. The quality of decisions has definitely improved, and there is a growing attention to economic aspects.

The French Authority has also been good at incorporating economic analyses, and has been fast to move in the application of legislation concerning vertical agreements. Recently, the Spanish Authority has also been taking important decisions. Increased activity may depend on the diffusion of the knowledge of the law and its application, for instance through the ECN and on institutional changes, which make the institutions more effective (this is likely the case in Spain). However, there is also a subjective/personal element, given the peculiar character that Competition Authorities often have as the President of the French Autorité has been very active in fostering the institution activity and the same was true in the UK with John Fingleton. Changes in the head of the Authorities may affect the direction and volume of the institutions activity.

What do you find rewarding as an antitrust practitioner? What are your favourite parts about mentoring younger attorney looking to start a career in this field?

Antitrust is a very attractive discipline for many reasons. First, because of the subject matter, which directly concerns the relation between law and economics, an attorney requiring knowledge of contract, commercial and regulation law, and also a deep understanding of economic issues and how different markets work: I find all this very fascinating and I think this opinion is shared by a lot of young lawyers. Second, antitrust has a European and international dimension, because antitrust law is at the core of the EU integration process, and because antitrust has

become a part of the world economy legal order. Then, there is the character of the specific issues at hand as antitrust issues are often crucial for clients, because they concern their position and strategy on the market. This gives the antitrust lawyer the possibility to have a wide interaction with clients on very crucial issues.

In a number of cases, the antitrust lawyer interacts not only with the general counsel but with the CEO or key management on vital issues for the company's business. I think this may give a lot of satisfaction, particularly if the lawyer is interested in substantive issues. When talking to young attorneys, I try to see whether they have the appropriate mix of competences and to stimulate them to always go beyond a formalistic approach to the issue they have before them. I also try to show them how wide the boundaries of our discipline are, and I am glad when they decide to explore new territories.

What advice would you give to an aspiring antitrust lawyer in the European market?

I think this is a very interesting field which requires knowledge of a wide array of subjects and an interest for constantly keeping pace with legal and economic developments. Building an appropriate curriculum would include experiences in torts, contracts, commercial law, regulation, community law, as well as economics. In general, we ask our associates to have or to pursue a master's degree abroad, often in Bruges or in reputable UK Universities. Personally, I would suggest some training in the US. US antitrust still differs from EU's in many aspects, but it is very sophisticated and often more attentive to economic analysis and business practice than it is the case in Europe. From what I can see from young lawyers who trained in US antitrust, they come out with a deeper understanding of legal and economic relations, and they may apply it well while working with EU antitrust matters. Then, an aspiring antitrust lawyer will have to decide where to apply. I think there are some very good national law firms, where antitrust may be practised in a very exciting way. Still, I would suggest a stint in Brussels or in London: in Brussels because this is where EU antitrust law is practised and where a lot of ideas continue to flow. You have conferences nearly every week by relevant academics, lawyers or officers, discussing any relevant subject.

I also recommend London, because it is still the most international city in Europe, where a lot of multinational companies reside; in addition, London is becoming the main European forum for antitrust litigation: and this is one of the areas of antitrust that is developing fastest.