

Competition enforcers and the body social

Autorità, Mercato, Concorrenza, Convegno per salutare Giovanni Pitruzzella – Rome, 4 October 2018

*Signore e signori,
Autorità,
Caro Giovanni:*

Sono molto felice di essere a Roma per salutarti di nuovo ora che il periodo che hai passato al timone dell'Autorità garante volge al termine.

Ricordi il nostro incontro di Treviso lo scorso maggio. Anche allora ti avevo augurato grandissima fortuna per il tuo nuovo impegno presso la Corte di giustizia dell'Unione europea. Ma stavolta il mio saluto – e quello di tutte le illustri personalità che interverranno oggi – ti giunge in un contesto per così dire più ufficiale.

Non sono troppo abituato a parlare in pubblico in italiano. Tuttavia, scorrendo il programma di questo convegno, mi sono reso conto di essere il solo relatore non italiano e quindi ho voluto mettermi alla prova con qualche frase.

Ma non sarebbe giusto mettere alla prova anche la vostra pazienza, quindi passerò senz'altro all'inglese.

Scherzi a parte, it is an honour for me to bring the only non-Italian voice to our debate today. I would like to thank the organisers of today's event – the LUISS School of Law, the LUISS Business School and the Associazione Antitrust Italiana with President Alberto Pera – for the invitation. This being said, at the Commission, we do not usually dwell on where our colleagues and stakeholders come from. We – as an institution – defend the common interest of *all* Europeans, after all. All the more so at DG Competition, where we are blind to the flags pinned on the companies involved in our cases and where we apply the same rules to all parties and treat everyone with the same respect.

But precisely because of this, let me emphasise that we should not forget that Europe's diversity is a source of strength. We need to recognise and respect our diversity as we build the "homeland of our homelands" as Václav Havel once put it. And we need to be careful as we put our traditions together.

I am very happy to be in Rome to say goodbye again now that the period you have spent at the helm of the *Autorità garante* is coming to an end.

You will recall our meeting in Treviso last May, when I also wished you good luck for your new job at the Court of Justice of the European Union. But this time my greetings – and those of all the personalities that will speak today – come to you in a more official context, as it were.

I'm not used to speaking in public in Italian. However, scrolling through the program of this conference, I realized that I was the only non-Italian speaker and therefore I wanted to test myself with a few sentences.

But it would not be fair to put your patience to the test, so I will switch to English.

Since 1958, integrating Europe has never been about replacing the different legal, institutional and cultural features of Europe's traditions by a new, wholly uniform framework.

Rather, it has been about patiently building on the particular traditions of each Member State to advance the common project, with the utmost respect and following the principles of subsidiarity and proportionality.

The scale of the challenge should not deter us. We have all it takes. We can rely on the values, principles and methods Europeans have tested and tried for over 60 years.

There is a passage in President Juncker's State of the Union speech last month that gives us a good reason *why* we should not relent in our efforts.

He spoke of a belief: "This belief that 'united we stand taller' is the very essence of what it means to be part of the European Union" – he said.

I would like to put this argument on the table at the outset as an encompassing inspiration for our debates today.

Only by doing things together does Europe stand a chance to be a force for peace and stability; advocate for a multilateral and rules-based world order; defend its values and interests; and protect the freedom and prosperity of its citizens.

European Competition Network

The truth of big ideas is often shown by how they work in practical circumstances in everyday life.

We have seen the truth of 'standing taller together' many times – have we not, Giovanni – in the European Competition Network (ECN). We really do things together. And this makes us better together. I am wont to say that – within its proper, carefully drawn boundaries – the ECN is one of Europe's most advanced forms of cooperation, of division of labour between the Union and its Member States.

It was not a foregone conclusion when the network was established back in 2004 under the leadership of Senator Mario Monti, Commissioner for Competition at the time, that the Commission and the National Competition Authorities (NCAs) would truly play as a team – and deliver. As Angelo Cardani – who was directly involved then and is present here today – said: "It was an adventure".

Today the ECN is a force for convergence and cooperation as much as it is a force for complementarity and creativity. National competition authorities take about 85% of all antitrust decisions in the EU. Antitrust enforcement across the Single Market would not have been as effective as it is today without the decentralisation of 2004 and the contribution of national authorities. Because this is not a zero sum game, where the Commission is doing less and the Member States more. We do more together – and, what is crucial, our work is more focussed and more significant.

How have we achieved this?

The most important foundation to the ECN as a European epitome of collaboration is Regulation 1/2003. Through this Regulation we have built a fully cooperative system of enforcement of EU competition law, where primary Treaty articles are enforced jointly by the Commission and the NCAs.

Since the beginning the system was predicated upon partnership and cooperation to make sure that the decisions that would be taken by the different authorities would apply EU competition rules in an effective and consistent manner.

Giovanni, in a recent interview you found a good turn of phrase to describe Regulation 1/2003. You said it “achieved a perfect balance between the reasons for centralization and those for decentralization”.¹

You also confirmed that the ECN has been a success story. We agree.

But I also know that neither of us think for a moment that we can rest on our laurels.

The success of the ECN in terms of the decentralisation on substance in Regulation 1/2003 did not mean that there would be no room for improvements to tap the full potential of an effective enforcement system in Europe.

This is the rationale behind the ECN+ initiative – which has been supported and promoted by your authority and each and every one of our sister authorities within the ECN. The Directive proposed by the Commission in March last year is designed to empower competition authorities in *all* EU countries to become even more effective enforcers.

The legislative initiative responds to a series of issues that emerged a few years ago from a number of national enforcers across Europe in the course of our exchanges within the ECN.

Some shared with us concerns about their own independence from political and corporate pressure. Others reported they did not have the resources they needed to do their work properly, especially the resources to hire and keep qualified staff.

Moreover, on the statutory side, not all national authorities could impose deterrent fines and not all had sufficient powers to gather evidence as they looked into their cases. For instance, some NCAs cannot search laptops or mobile phones – where, of course, much of the information we typically look for is stored these days.

The ECN+ Directive as proposed by the Commission addresses these and other concerns in a systematic fashion, with a strong emphasis on linking effective enforcement with adequate rights of defence and due process.

The standards, guarantees and safeguards it includes are themselves the result of a collective effort. An online public consultation was conducted and there have been extensive exchanges with all ECN members and – at a later stage – with the two co-legislators: the European Parliament and the Council.

¹ All quotations from: <http://www.concurrences.com/en/review/issues/no-3-2018/interview/giovanni-pitruzzella-the-great-transformation-challenges-for-competition-en>.

The proposal went through the legislative process remarkably swiftly after it was formally introduced. The European Parliament and the Council reached a political agreement last May. We can confidently hope for the Directive to be formally adopted by the end of 2018.

I am sharing this story with you because it shows to what extent we take partnership seriously among Europe's competition enforcers. When members of the ECN expressed their concerns, we took notice as a team and – together – looked for the best way to meet them.

When the ECN+ Directive is part of the EU's *lex terrae*, all NCAs will have a clear path to boost enforcement at national level and – this is what counts most – the interests of consumers will be better protected.

Fairness

The interest and welfare of consumers is indeed the main beacon of any competition enforcer. This is another issue on which our views converge, Giovanni. In that same interview, you speak of “a feeling of anguish and insecurity [that] has spread among European citizens” and indicate what competition enforcers can do to respond.

It is a fact that uneasiness and discontent have grown in many parts of Europe in the wake of the financial and economic crisis that started just over ten years ago. I would just add that it does not affect only European citizens but other world regions as well.

This dramatic change has had an impact on practically every part of our policy and on every public institution, including – of course – competition authorities. You say that enforcers responded to this state of affairs by returning to the fundamental issues.

Once again, I agree – and do not think for a second that I agree so much with you today just because this event was organised in your honour.

Yes, in this juncture it is only natural that we give a long look at all the implications of our action, including the indirect implications of upholding a single set of rules for anyone who does business in the Single Market.

Commissioner Margrethe Vestager has led this reflection on the core issues of competition policy and enforcement at the European Commission throughout her mandate.

For instance, speaking to the students of another business school about a month ago, she said – and I quote – that “running your business in a way that is fair to your competitors, fair to your business partners, and above all fair to consumers [...] goes to the core of what competition policy has been about since the European Union was founded over 60 years ago”. “People deserve fair, open and competitive markets”², she added.

² *A responsibility to be fair*, Copenhagen Business School, 3 September 2018.

https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/responsibility-be-fair_en.

There is a sense in which practically every decision we take upholds the rule of law; make markets a little bit fairer; and sends to the people a clear message that there is a network of public institutions across the European Union that stands by their side.

I can think of many actual examples to make this point. Look at the recent decision taken by the Commission involving Google and the Android operating system the company develops.

The decision is about illegal tying of Google's search and browser apps, illegal payments conditional on exclusive pre-installation of Google Search, and illegal obstruction of development and distribution of competing Android forks.

This is the level of a competition enforcer's *technê*. It results from painstaking investigations, principled respect of due process, and the accurate and careful application of EU competition law to the facts before us in a specific case. These are the foundations on which any other consideration will stand. And they must be rock solid.

But what are the implications of a decision like this to the man and woman in the street?

We all like the devices and services that the wizards behind the digital revolution have put in our pockets. There is no doubt about their success. But when a digital firm steps on the wrong side of competition law, it is the task of competition enforcers to hold them accountable.

And it doesn't matter whether the infringement comes from a start-up or a global behemoth. *La legge è uguale per tutti* – as we can read in every courtroom in Italy. This is probably one of the messages that many people will read in decisions like Google Android.

Another example is the four (prohibition) decisions the Commission took in July against a group of manufacturers of consumer electronic products that had imposed fixed or minimum resale prices on their online retailers.

Once again, a case specific analysis of vertical restrictions and retail price maintenance are the bedrock here, but we cannot ignore the broader message.

Most likely, to the over 50% of European consumers who made an online purchase last year those decisions were about making online markets fairer so that their expectations could be met.

One of the things that people expect from online shopping is that they can look for their next laptop from countless retailers and pick the best deal from the comfort of their living rooms. But that will not come to pass if manufacturers condition online retailers who sell at a discount to bring the price up again.

Or we can think of the formal investigation involving BMW, Daimler and the VW group that the Commission opened on September 18. As you know, we are looking into the practices of these companies to investigate whether they have colluded to avoid competition on the development and roll-out of technology that cuts harmful car-exhaust emissions.

The rules that apply in this case are those that prohibit cartels and restrictive business practices, including agreements, to limit or control technical development under Article 101 TFEU.

But these rules are not an end in themselves.

In the present case, they serve to assess whether there was collusion on not reducing pollution even though the technology for cleaner exhaust gases is already out there.

The presumption of innocence applies.

But we investigate – and will sanction if infringements are found – because the legislators of the Treaties considered – rightly I believe – that our society and our citizens benefit from competition, including on innovation, including on finding ways and means to improve the quality of the air that we breathe.

I will go a bit further back in time to look for my next example. Back in May the Commission took a commitments decision under Article 9 of the EU's antitrust Regulation 1/2003, which will change the way Gazprom distributes its gas and sets its prices in central and eastern Europe.

Market partition and excessive pricing are the two main points of the decision. Indeed, the latter is particularly interesting for competition circles because abuse of dominance cases involving excessive pricing have been rare at the Commission.

Excessive pricing is also a competition abuse that harms consumers directly and therefore strikes many people as unfair. In fact, excessive pricing falls under the first example of abuse mentioned in Article 102; namely, “imposing unfair purchase or selling prices or other unfair trading conditions”.

Gazprom's contracts were such that customers in Eastern Europe paid much more for their gas than German customers, although the gas had to travel through Eastern Europe before it could reach Germany.

The commitments the Commission made binding on Gazprom ensure that this will not happen again in the future.

With these examples, we can show that fairness is a rationale that underpins competition law. Indeed, the concept of fairness is inherent in EU competition law. Both Articles 101(3) and 102 TFEU explicitly refer to the term "fair".

Under Giovanni's mandate, the *Autorità garante* has made an important contribution to the enforcement of Article 102 in the EU with a pioneer application of the ban on unfair (excessive) pricing practices in pharmaceutical markets.

Take the example of a company buying some older, off-patent, rather niche pharmaceuticals from an originator and suddenly greatly increasing the price. With its Aspen decision of 29 September 2016, the Italian authority was the first in Europe to successfully conclude an investigation into such practices.

The *Autorità garante* found that Aspen had imposed largely unjustified price increases amounting to an abuse of a dominant position. After the Italian authority, also the British and Danish authorities adopted infringement decisions against unfair pricing practices.

As you know, in 2017 the Commission too opened formal proceedings against Aspen on its practices elsewhere in the EU, excluding Italy.

We are still at an early stage, so I stress that the opening of formal proceedings does not prejudice the outcome of our investigation.

Again, the presumption of innocence applies. But the opening of the proceedings is a message in itself. We do not jump to conclusions, we look thoroughly. The people can rely on our watchfulness.

Conclusions

I could offer more examples, but I will rest my case here. I believe that the notion of fairness has emerged quite clearly in its contours; not as a substitute for painstaking investigation and exact application of legal rules based on thorough economic analysis, but as a rationale that underpins the *raison d'être* of the rules.

In fact, our decisions must be built on solid evidence, careful legal and economic analysis and the respect of the primary and secondary law and of the rulings of the Union courts.

But it is precisely thanks to this thoroughness that we can win the trust of consumers. It is not enough to state that we stand by the side of the people. It is far better to let our cases and decisions do the talking.

Open, rule-based and fair markets that work for all – and not for the lucky or well-connected few – are good for the economy. They allocate resources to the most productive and innovative players. They create jobs.

They are also good to counter popular mistrust and discontent, because they empower people. At the end of the day, one can argue that well-regulated, functioning markets are a boost for our democracies.

The significance of talking about empowering Europeans in Rome is not lost on me. Not only because the original Treaties were signed in this city, but also because one of Italy's founding fathers – Giuseppe Mazzini – was an early advocate of a united Europe.

Some of the words Mazzini wrote over 180 years ago when he founded *La Giovine Europa* are surprisingly modern, *e passerò di nuovo all'italiano*.

Fra le Istruzioni generali per gli iniziatori che, assieme al Patto di fratellanza, costituiscono gli Atti della Giovine Europa, leggiamo al punto quattordici questa frase:

*Ovunque il privilegio, l'arbitrio, l'egoismo s'introducono nella costituzione sociale, è dovere d'ogni uomo, che intende la propria missione, di combattere contr'essi con tutti i mezzi che stanno in sua mano.*³

Wherever privilege, arbitrariness, selfishness seep into the body social, it is the duty of every man who understands his mission to fight against them with all the means at his disposal.

Non occorrono commenti; è meglio lasciare questo pensiero come una conclusiva epigrafe.

³ Giuseppe Mazzini, *Scritti: politica ed economia* vol.1, Milano, Sonzogno, 2008:89.

*Signore e signori,
Autorità:*

Vorrei chiudere il mio intervento così come l'ho iniziato, rinnovando i miei migliori auguri a Giovanni per la sua prossima avventura in Lussemburgo.

Sono certo che porterai con te, oltre alla tua indiscussa eccellenza di giurista, le caratteristiche e le passioni che ti contraddistinguono.

Per esempio, sono convinto che non perderai l'abitudine di offrire il caffè ai tuoi collaboratori e ospiti quando ti vengono a trovare.

Né devi preoccuparti di come farai a tenere viva la tua passione per la vela così lontano dal mare. Ho controllato; se non trovi troppo traffico, le marine del Belgio e dell'Olanda sono a poche ore di guida dal Lussemburgo.

Vorrei anche augurare all'Autorità garante e a tutta la squadra – Gabriella, Michele, Filippo e tutto il personale – buon vento nelle vostre vele. Continueremo a contare sul vostro preziosissimo contributo nel nostro viaggio comune.

Grazie per la vostra attenzione.

I would like to close my speech as I started it, renewing my best wishes to Giovanni for his next adventure in Luxembourg.

I am sure that you will bring with you, in addition to your undisputed excellence as a jurist, your characteristics and passions that distinguish you.

For example, I am convinced that you will not lose the habit of offering coffee to your collaborators and guests when they come to visit you.

Nor should you worry about how you will keep your passion for sailing alive so far from the sea. I checked, if you do not find too much traffic, the marinas in Belgium or the Netherlands are a few hours' drive from Luxembourg.

I would also like to wish the Autorità garante and the whole team – Gabriella, Michele, Filippo and all the staff – good wind in your sails. We will continue to rely on your invaluable contribution in our common journey.