

Italy

## An interview with Giovanni Pitruzzella

Giovanni Pitruzzella became president of Italy's Antitrust Authority at the end of 2011. After a year at its helm, he talks to **Stefano Berra** about his plans to spread a competition culture in the country and the authority's track record

**What is your background?**

I have an academic and professional background. I am a professor of constitutional law. I have also practised administrative law for a long time, particularly focusing on the energy and transports markets and on local public services – a sector that I follow with particular interest. Over the years, I have cooperated with public institutions and private consultancies to reform the public administration. I am also a scholar and I have written articles, books and one of the most popular manuals of constitutional law in Italy.

**What challenges do you face as a constitutional law expert?**

I face the same professional challenges of every legal practitioner. Many of the presidents of Europe's authorities are legal practitioners – lawyers, academics or judges. Every legal practitioner must face one challenge: combining law and economics.

We are trying to strengthen economic analysis in our proceedings. In this respect, I created the role of chief economist. One of our challenges is how to integrate economic analysis and the application of the law, also because our proceedings are subject to the review of an administrative judge.

What is helpful? Fundamentally, my knowledge of certain markets – how they work and what their rules are. Our markets are highly regulated, following the EU model. There is a tight relationship between antitrust enforcement and regulation. To apply antitrust rules you must know how markets function. My knowledge of public law has been very helpful in this respect.

On the other hand, my aptitude as a constitutional lawyer to constantly balance different interests has helped me. In many fields, from cartels to mergers, we need to strike a balance between different interests, for example, when evaluating the pro-competitive and anti-competitive aspects of a deal. Finding a balance between these elements is a constitutional lawyer's skill.

**What have you prioritised since being appointed?**

I strongly believe in the need to reinforce the authority's independence. This is a crucial goal for us. I believe the Italian authority is independent, but anything that could strengthen this independence is helpful. Immediately after my appointment I proposed to change the authority's financing regime. Until now, the authority's budget came from the state's public finances. In my opinion, this affected the authority's



independence, because it meant we had to negotiate [with the government] over our own resources. I publicly pleaded for this reform, which freed us from the need to obtain our resources from the state. Now we receive a contribution from companies with a turnover of more than €50 million. This measure was approved in the first months of my tenure. It fosters our independence from political power.

I also strengthened the authority's collegiality. Collegiality is the best guarantee of the authority's independence. The president is important, but so are the other board members. Strengthening collegiality means we all have to work a bit more, but it's a guarantee that things will be thought through. I also strengthened the case handlers' autonomy.

**What is your management style?**

Our method is to leave the responsibility for making a proposal to the case handlers. This doesn't mean that their proposal is automatically adopted in the final decisions, but it's an important technical basis that I and the other board members examine and elaborate. I strongly believe in cooperation.

**Do you discuss cases directly with parties?**

I listen to the parties' positions in a formal role. If they ask to meet me to present their views, I listen to them to understand their position, together with the legal counsel, the secretary general and the head of cabinet. But I avoid any form of bargaining. I'm interested in hearing the different points of view, but I completely rule out the possibility that these meetings may lead to a commitment in one direction or another.

**In which ways do you want to follow your predecessor Antonio Catricalà and what do you want to do differently?** There is continuity with my predecessor and with the rest of the authority's history. The institution has a history that needs to be safeguarded and increased. There's also mutual respect.

I want to strengthen the relationship with the European Commission and with the other most important antitrust authorities' in the world. This is very challenging. I have attended all the European Competition Network meetings since I was appointed. We are trying to contribute to a greater harmonisation of antitrust law. Antitrust law is fundamentally European, with national peculiarities. I believe we need to push towards the harmonisation of national antitrust laws. We also have cooperated in several specific cases. This helps to strengthen our investigations.

Another thing I really care about for my country is promoting a competition culture. Much has been done by the authority, but much remains to be done to promote the knowledge of antitrust rules, particularly among small and medium-sized companies. Multinationals and large companies know about competition law, medium-sized companies don't. We need to promote competition culture in the country because many have a superficial and even ignorant approach.

That's why I greatly strengthened our advocacy. Our legislative proposals to open up markets have been followed by the government. The fact that Mario Monti is prime minister and Catricalà is under-secretary – both have strong antitrust experience – has certainly helped.

**Which economic sectors will you prioritise?**

I will focus on sectors with a former monopolist, where there are still strong incumbents. We want to ensure markets open up, that there are no abuses of dominant position or cartels. I am thinking about the energy, railway transportation and telecoms sectors. These are areas in which our commitment has been particularly strong.

I also care a lot about other policy issues. The public administration sector is one of those. I am convinced that the problems of the public administration are a major obstacle. Beyond inefficiency issues, some of the public administration's behaviour is highly anti-competitive, for example, in public tenders. The government has given us a new power to warn public administrations when they are violating competition rules and to challenge their provisions in court. This is a new challenge for the authority.

**We have seen very few cartel investigations recently, fewer than in jurisdictions of comparable size and resources. Are there fewer cartels in Italy, or does the authority have problems in detecting them?**

There are three things. Certainly the authority's success and our threats to cartel activity has reduced the number of cartels. Deterrence is very strong.

There is a second point. We experience difficulties in conducting investigations, because nowadays large companies are equipped with internal competition units that try to resort to countermeasures.

But I think there is a more important issue. In Italy, historically we have had some difficulties in implementing our leniency programme. Why? Because whistle-blowers are concerned about possible criminal proceedings. We are asking the government and parliament to make it clear that those who apply for leniency are shielded from criminal prosecution. I think this could boost the Italian leniency programme and make the fight against cartels easier.

**Don't you think companies might simply not be afraid at all of being caught – perhaps because they think fines are low?**

I don't think so. We have issued significant fines. When I was appointed I said that commitments are important – we have used them in important cases following the European Commission's example. But we must always emphasise the deterrent role of penalties. We may discuss commitments, but it must be clear that the authority can impose fines. In the past few months, we have issued fines both in competition and consumer protection cases, sometimes even testing the appeals court to see how far we could go.

**The appeals court, the Regional Administrative Tribunal for Lazio (TAR), has recently annulled many of the authority's most important decisions.**

Overall, these are a small percentage of our decisions. Of course, they were important cases that grabbed headlines, but they are a very small percentage of the decisions we have taken.

**But they often involve the highest fines.**

Yes, but in some cases we only have the TAR's ruling, while the State Council's decision is pending. Statistically, in Italy a not too small percentage of the first instance court's judgments are set aside on appeal, even though I'm not necessarily saying that this will happen in these cases.

The number of these cases is small. Certainly two important cases have been quashed, which are the abuse of dominance decision against Poste Italiane and the one against Pfizer, plus one interim suspension of our decision.

**But beyond the specific cases, do you think there is a broader problem?**

In my opinion there is an issue of a lack of awareness of competition law, beyond this specific period. As I said before, we need to improve awareness of competition law. Not just among companies and market players, but also among legal practitioners, from judges to the lawyers of small and medium companies – large companies are already aware. Sometimes there could be the tendency to apply general administrative law rules to antitrust law cases, which have their own peculiarities.

Do you think each single case has its own problem, or are there some wider issues?

Since the percentage of such cases is small, even if it involves some headline-grabbing cases, I think the problem lies in each individual case. Sometimes these are the most complicated cases, which involve stronger economic analysis. In the easiest cases, the legal aspect is central. In the more complex cases the economic analysis has a more prominent role. Judges must get used to looking at these issues through a different lens from the one generally used by an administrative judge. They need to look at things through a competition law lens, which is strongly influenced by economic analysis.

So you believe the problem lies within the court?

They should probably deepen their analysis, but it is not an accusation. In my opinion, the problem is making our decisions easier to understand for an administrative judge. The administrative judge in Italy is a generalist judge. He does not deal only with competition law. One day he deals with contracts, the next with the public administration, then with expropriation and then with some other matters. And only sometimes with competition law. So what are we going to do? We must change the way our decisions are structured, making them much more concise and much more intelligible, more similar to the structure of traditional public administration acts, moving the part about the economic analysis to appendices. This may help to facilitate the administrative judge's task and to strengthen our dialogue with the courts.

Are you concerned that the annulment of these high-profile cases may negatively affect deterrence?

No, precisely because they are only a few cases. The Italian market knows that these are very specific cases, and in addition, the courts have not taken a final decision. Every market player knows that what the TAR's judges say can be overturned by the State Council – and that this is not uncommon. In many pending cases, companies come to the authority and submit commitments. They know that if they don't act immediately the proceedings can continue and may result in a penalty.

On the subject of remedies, your predecessor was often criticised for relying too much on them and for choosing soft commitments. What is your approach?

I believe that the use of commitments is in line with the practice of the European Commission. We are following the EU example as much as possible. The use of commitments is a current, correct and useful tool that we do employ. Catricalà did well in strengthening their use. But I am convinced of one thing. The possibility of imposing sanctions must be there. As you would have seen, we are indeed imposing fines. In this context we can employ commitments.

We have adopted a reform regarding commitments. What does this mean? A fixed timetable. I think one should avoid negotiations with companies. If there's a problem and we start an investigation, a company must submit credible commitments from the very beginning. Otherwise one risks beginning a bargaining process that undermines the authority's independent image. In confrontational proceedings we always make

enemies. It's part of our role. If the timetable for commitments is certain, companies will get used to being serious from the beginning. If they want to close proceedings with commitments, they must come up with serious commitments.

Why have you opened a number of investigations of professional associations of lawyers, notaries, etc?

Consistent with the European Commission's indications and with the policy of this authority, we believe that opening up the market for professional services is an important goal that can help spur growth. For this reason, from an advocacy standpoint, we have suggested parliamentary measures to open up these markets. But these rules are not enough. One must ensure that they are applied – for example, monitoring the abolition of fixed tariffs. I personally believe that advocacy is important, but there is the risk – typical of Italy – of believing that problems can be solved simply by making up a law. This is not the case. We have constantly monitored the implementation of these new measures to ensure their application in the professional services sector.

You have recently fined incumbent railway operator Trenitalia for an abuse of dominance towards competitor Arenaways. You imposed a small penalty of €300,000, justifying it with the novelty of the infringement even though you said the violation was very serious. Why?

Misleading the sector regulator might have been very serious. What's the real problem? The regulatory framework was unclear. This framework is the element on the basis of which any operator behaves. What's the message that we wanted to give? That when a new operator enters the market we monitor the sector very carefully. In that case, however, the rules were actually uncertain. We had two hearings with the sector regulator, who said that the regulatory framework was not easy to interpret. Today that framework has changed and we wanted to signal that we are keeping a close eye on the sector. But since the framework was unclear, the company's violation did not merit a higher fine.

Are you concerned that this could undermine deterrence?

This might have been true if we always reduced penalties. But we have imposed high penalties. We do not want to come across as an authority that intervenes only to punish. We punish with significant penalties, but we have always said that to ensure an efficient market the rules must be clear. This was one of the authority's battles. If the rules are actually obscure – the regulator himself said it – we cannot ignore it. Our choice was courageous. We intervened in contrast to what the regulator said. The regulator said the behaviour was fine. It's quite uncommon in Italian cases that the competition authority decides to punish behaviour even though that behaviour has been backed by the sector regulator. We sent a strong signal to the market. We believe that it was a courageous decision against the backdrop of a confused regulatory framework. It had a very strong symbolic value.

In the energy sector, is the authority more cautious after the TAR slashed a €290 million fine – one of the agency's highest penalties – against incumbent Eni last year?



Look, we do not make exceptions for anyone, although we try to be very balanced. We do not want to be perceived as keen to punish at all costs, but at the same time we do not want to adopt a lax attitude. The message is clear. Everyone must comply with competition rules. We can impose a penalty if you do not comply. We prefer a preventive approach. We keep you informed about your duties, we make you aware about your risks and possibilities. Our goal is opening up the market, not amassing sanctions.

Having said that, we examine sectors with a former legal monopolist carefully. We have recently closed a case against Eni with very tough commitments regarding upstream gas acquisition and the sale of gas transportation rights on some pipelines. We are trying to adopt a European perspective. We need to address energy issues in a European framework. If we don't do so, we face strong limitations in opening up markets.

We have recently seen Germany, France, the UK and Spain take action against concentration in the television market. Do you see competition issues in the Italian TV market and do you intend to take action?

In Italy, the communications regulator is in charge of this sector. The current levels of concentration – or rather, alleged concentration; I do not want to stir a political controversy – come from laws and administrative rules imposed by the regulator. Obviously I cannot intervene to change the law or the rules. Then as a citizen or as a scholar I can have my own ideas on the market, but given my role I must keep them to myself.

As an antitrust authority in Italy – differently from the Spanish authority, which has many of the powers of our communications regulator – we can intervene in three cases. If there is a cartel, if there is an abuse of dominant position or if there is a merger. We haven't had mergers. There is no evidence of cartels – in fact, competition between operators, including Sky, is particularly strong. These are our tools, and I cannot decide on market concentration policies, which is outside my competence.

We have intervened only in one important case, with a decision that has survived an appeal at the TAR, which is the abuse of dominance case against Auditel, a company that monitors TV audiences. Each TV programme's advertising market depends on its audience because advertisers pay more if they have larger audiences. Auditel is a company owned by RAI and Mediaset. We intervened after a complicated investigation that showed that Auditel gave false data to support its shareholders. We issued a fine of more than €1 million – a significant penalty given the company's turnover – targeting the companies behind it, RAI and Mediaset, which benefitted from this behaviour. In this sector, I think we did what we could do with the tools we have.

The authority has received numerous consumer protection powers over the years. Are you concerned this may negatively affect antitrust enforcement?

No. Like other authorities, we have a shortage of human resources – if we could increase them, all the better. But my officials have a true spirit of self-denial. If you go around the authority's offices you will see there are no fixed timetables.

We believe that consumer protection is one of the pillars of authority. There are two pillars: protection of competition and

consumer protection. We have achieved good results in the consumer protection field, and this is an aspect that can be useful. We believe that to spur competition and growth, one needs to take action on the supply front – by opening up the markets – but also on the demand front. An informed and protected consumer can exert a significant pro-competitive pressure. This is our philosophy. Both areas are important and complementary.

A recent reform will raise merger thresholds significantly. Are you concerned that mergers with a potentially high impact on competition may escape scrutiny?

No. We will continue to investigate significant mergers. This change frees us from meaningless paperwork. At the moment, every small merger, including many deals irrelevant to competition, ends up on our desk. This requires a lot of work, because we need to open investigations, examine evidence, and ask the council to rule on them. The reform reduces the amount of paperwork and allows us to free up resources for more important activities, such as the repression of hard-core competition infringements.

The financing regime of the authority is changing. A fee on companies above a certain threshold is replacing other financing tools. How will your budget change?

It will not increase. It's up to us to define it within a certain range. We will take into account the current difficult economic situation. For the next year, the level of the fee was fixed by law, but for the following years, we are oriented to keep the contribution to a statutory minimum. It's clear that we will see changes along the way and maybe next year we will have more precise data. When this rule was decided, the intention was to keep the actual budget size.

Do you think it's fair to charge every large company, including those that do not do mergers?

Absolutely. A well-functioning competitive market is in the interest of every business. Spreading the cost among many businesses means cutting costs, but above all it means reducing and removing the authority's dependency on anyone. We do not finance the authority with our fines, so no one can accuse us of imposing fines only to increase our resources, we are not funded only by the largest companies, and we are not funded by the government. We are funded by a wider range of market players, each with a smaller share of the total funding. I think this is a tool to strengthen our independence – that's how I designed this change.

What are your main goals and concerns as president of the authority?

My goal is to open up the markets with all possible means, from advocacy, to commitments, to sanctions. My goal is to ensure that competition can be a useful element to spur growth. Competition Commissioner Joaquín Almunia always says it. At a time when we cannot afford spending policies to foster growth, or at least the scope for these is very small, we have to think about other policies, such as improving competition, that can foster innovation and reduce costs without affecting public budgets. I also want to spread a competition culture among all market players, from companies to legal professionals.