

Confessions of a scuba diver

An Italian competition lawyer who loves Britain but now lives in Brussels, Covington & Burling's Andrea Zulli talks to CLI

Q: Can the CMA do a decent job after Brexit? It is being widely said that it will have a vastly increased workload and – in a political climate where the British government will be desperate to do deals with large companies – will have neither the money, nor the staff, nor the will to investigate cartels or abuse of dominance cases involving major multinationals.

A: Let's leave the politics to the politicians. I think the scenario you have painted is far too gloomy: it's an Armageddon scenario. I am a strong believer that the CMA will carry out its business as usual. It is an independent and an extremely competent body. It is led by excellent professionals. The case handlers at the more junior level are also very professional. I do not think that, after Brexit, you will have a CMA that is not as good or as strong as it is today. In my view, the CMA will continue to act as they are doing now: they will be an independent authority shielded from political interference. I believe that the CMA will continue to be led by the principles of competition law and will enforce competition law against cartels, and will review mergers according to principles of efficiency and market power.

The interesting question will be whether after Brexit the CMA will look more to the US when it comes to making a substantive assessment – for example in relation to vertical agreements or in price maintenance cases. So it will be interesting to see what happens when the CMA is not bound by EU jurisprudence – to see if they do in fact lean more towards the US regime than at present. But I do not believe that Brexit will mean the end of the CMA as a good and powerful authority.

Q: But can you really see a competition authority in this country, post Brexit, squaring up to a multinational on competition grounds when the British government will be desperate for trade deals with such companies?

A: I think they will have the moral courage to take the right decisions from a competition law perspective. If there is an abuse of dominance or a cartel, for instance, they will take the right steps in competition law terms. I don't think they will shy away from doing that. I am clearly naïve, but I still hope that a miracle may happen and that Britain will stay in, or at least stay close to, the European Union in future. My dream is that the British parliament says, "We got it wrong" and the country has a general election with MPs saying, "I believe in Europe, vote for me". But I accept we are in dreamland here.

But even if Brexit does happen, is it true that the economy will suffer so badly? It's very much about how Brexit happens in practice. I love this country. I have lived here for many years and I hope that Brexit will allow Britain to have at least a good commercial relationship with Europe.

It would be extremely sad if the CMA did not take a strong stand on competition law issues after Brexit. It would be even sadder if the government cut the funds to the CMA or its personnel so that it went from being a fantastic authority to being merely the shell of an authority.

Q: Why did you want to be a lawyer?

A: It was during my high school humanistic studies. It was a



combination of reading Cicero and Rumpole of the Bailey. For a term, I studied in a public school here in the UK, up in the North. So at that time I did read Rumpole of the Bailey! And I found I did like the subject of law and I was fascinated by the economics.

Q: And if you hadn't been a lawyer at all?

A: I would probably have opened a diving centre in some exotic location – something like Krabi or possibly in Sicily. I'm talking about scuba diving. I think that when you're talking hypothetically like this, you have to be honest about your dreams.

Q: Do you scuba dive now?

A: I have two daughters and I plan to teach them how to scuba dive. They are very young right now, though. I have scuba dived for many years in Italy, in Europe, in Asia and in the Caribbean.

I started freediving with my father when I was young and then I took to scuba diving. It was my passion because I wanted to see the underwater environment without any sense of urgency. If you just free dive straight down into the sea, your vision is limited. Because time is short, or at least it was for me, you are never part of the subterranean environment. But when you scuba dive, you have the time to move and look around you, so the other sea life forms look at you as if you are a different – although a very big – type of fish. You actually feel part of the underwater world. I grew up near the sea.

Q: Where is home for you? You've lived all over the place.

A: Italy, Italy, Italy. I am originally from a little town 50 km from Rome. When you are an expatriate for so many years, it doesn't matter which city you come from in your home country. So for me, Rome is as much home as Milan, where I lived for five years. If you only ever live in one country, though, then

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whichever city you live in is home. If you spend 20 years of your life abroad, then your perspective changes. Then it is the country you come from that is your home, not a particular city.

But I will be very interested to see what my daughters will consider to be home. At present, we live in Brussels and my wife is German. We just came back to Brussels two years ago from Milan. One of my daughters is three and the other is five. So for me, the really interesting question is: what will be home for two young girls who live in Brussels? Will they be truly European – as I hope they will be?

Q: What languages do they speak?

A: They speak Italian to me, German to my wife and French at school. And they do switch easily between the languages, even if they sometimes muddle up certain words as kids do.

Q: How easy is it to preserve confidentiality in business discussions, given the spread of cyberspace eavesdropping?

A: Cybersecurity is important and an issue for everyone. For lawyers, it is very important that they conform to the IT policy of their firm. Here at Covingtons, we have one of the best cyber security teams in the world, so our IT policy is excellent. But cyber security is something that we are all very aware of, so we do play by the IT policy. In my view, that is the best way to avoid viruses or people trying to hack the system. But we all know that no IT system is 100% safe – not even the NSA in America.

Q: Are there are cultural differences between how competition law is practised in Italy, the UK and elsewhere in the world?

A: I think in Europe there is still a difference between the more established competition authorities and the newer ones. But the gap is rapidly closing, due in part to the European International Competition in the EU and the International Competition Network globally. Going by stereotype, the southern countries in Europe, with the tradition of the Civil Code, might be thought to be a bit more formalistic, and less economic-oriented, in their approach. However, the gap is closing. There are still differences with certain countries where they still take a more formal approach when it comes to corporate documents – or where they place less reliance on economic analysis. And that is perhaps the main difference between competition authorities, I would say: the extent to which regulators use or don't use economic analysis. So when you are a fledgling competition authority, you start by being more legally based, more concerned with the form and structure of things. But when you grow up as an authority, then you start using economics more and more.

Q: What are the particular challenges facing competition lawyers now, especially when the political mood across Europe appears to be swinging towards the right and protectionism?

A: I haven't seen the mood you are describing as impacting on my job. I think protectionism and isolationism are part of the 20th century, not this one. My experience of the European Commission and many other competition authorities is that they are truly independent authorities – although I accept that, in certain countries, there is more political influence than in others. But in the main – and whether we are talking about

mergers or cartels – the regulatory authorities will act according to competition law principles and rules. State aid at the European level is a slightly different field perhaps. There is (or can be) a political dimension in that area. But generally speaking, the changing political mood you describe has had little (if any) impact on DG Comp and I think that will continue to be the case in future. But then I am an optimist.

Q: What is the best – and the hardest – part of being a competition lawyer?

A: I think the best and the hardest part is that you put your clients first. Now that has an impact on your family life. But it is both the best and the hardest part. As lawyers, we are in a service industry and the client is at the heart of that. And that is the most difficult part of the job because their needs are often immediate and you as their legal adviser are under considerable time pressure. But it is also the best part because you become part of your client's organisation. That is particularly after, say, a merger when you have established such a relationship with your client that you really do become part of their team.

Q: The European Commission has an image of a priesthood that doesn't understand business. This is a criticism that is levelled against young case handlers, in particular. The Commission is also repeatedly criticised for failing to see what is actually happening in the outside world. For example, it is said that the Commission closed its eyes to the prospect of a Brexit vote long after people in this country suspected this could happen in practice. How can the Commission recover its authority?

A: I think the starting position is that the European Commission remains the most sophisticated authority in Europe – and together with the US competition authorities, probably the most sophisticated regulator in the world.

It is, I accept, true that in some cases involving complex industries, it may take some time to explain those businesses and how they work to the case team at the Commission. But that is a fundamental part of our job as lawyers. We cannot expect the Commission to be experts in every niche market in the world! There are also fast-moving new markets where we have to explain to the regulator why a proposed deal works within competition law rules, although there may be many debates about the final outcome. But I have always found the dialogue with DG Comp to be open and constructive.

As regards the junior people you are referring to in your question, well they also need to learn the tools of the trade somehow! But when you are very young, about 25, and this is your first job, then you may well be a bit more aggressive than you would be if you were older. It's called growing up, professionally.

What would be very good, though, would be to have more of a revolving door policy, as happens in the US. That is particularly true when one is talking about those at the top of the Commission. But what is really good about the US system is that somebody experienced in an industry can go and work with the regulator and the regulator benefits from their experience. And then, that person can go back to private practice or industry knowing more about the regulator and how it works and thinks. As I say, this is something the Americans are very good at and I think the European Commission should adopt a similar policy.

Q: Does competition law have any underlying philosophy or is it just a hotchpotch of rules?

A: I like your sense of humour but in the context of a market economy, competition law has the underlying philosophy of protecting the market and the consumers. You can say that competition is the key underlying principle of a market economy and competition law only ensures that competition is not harmed, as any law does in respect of the principles it protects. That said, it is also true that in Europe certain decisions make you wonder if weak competitors are also taken into the equation and protected.

Q: How far is competition law simply the arbitrary imposition of a set of economic beliefs on political choices? If, for instance, a national government wants to support a loss-making national postal service to the detriment of rival commercial businesses, why shouldn't a democratically elected government do that?

A: The answer again goes back to the fundamental point of a market economy and the rules of the game. If politicians want a market economy, then the rules of the game must be the same for all players. Competition law simply ensures a level playing field for the players and protects the market economy from what a specific government may want to do at a certain time. It's like with sports: you decide to play a certain game and you play it by its rules – being democratically elected, politicians can choose the game and set the initial rules, but once the game starts, they cannot change the rules to favour one player while you are still playing.

Q: Why do people go in for cartels, do you think, when the risk of exposure is so high and the penalties so swingeing? At least with a bank robbery you're in and out pretty quickly.

A: If you're talking about the classic case of a cartel – with people sitting around in smoke-filled rooms – then this is very much in the past, although maybe you might still see something like this in the declining industries. What you deal with now is different and a much more of a grey area of cartels, involving behaviour such as information exchange or price signalling. These are the furthest reaches of possible cartel activity, where the European Commission keeps pushing the boundaries of article 101.

This is where companies may find themselves in difficult situations without even knowing it. In such cases, compliance is of the essence. At the end of the 1990s, very few companies had properly thought-out compliance programmes. Now having such programmes is standard, so there has been a big shift in the compliance culture. Such programmes really are the only way for companies to steer their way through such uncertain waters.

Q: If competition law was serious about tackling abuses of a dominant position, wouldn't it ban outfits like, say, Amazon outright because the whole purpose of such companies is to dominate and abuse?

A: Abuse of a dominant position is a very tricky area in terms of determining what the actual relevant market is and whether there really is market power. Answering these sorts of questions is complex – as is deciding the extent to which the behaviour is abusive and what the law actually qualifies as abusive.

If you look at tying and bundling, for instance, then, if you are not dominant, you can do it because it usually leads to lower prices

without the risk of foreclosing the market. The situation changes when you are dominant and you do it to foreclose competition – at that point it becomes anticompetitive as you are using market power to exclude competitors. So I go back to my original point about it being complex to say when you are dominant and when you are not, as well as when your behaviour is abusive. Rebates are another example of where it is tricky and it is often not clear at first sight whether a particular scheme breaks competition law rules or not. So this is an area where enforcement needs to be well thought-out, otherwise you risk stifling innovation.

Q: Can you prove that competition drives innovation? It's just an assumption, isn't it? Would Rembrandt or Vermeer really have painted differently if they'd had more or fewer competitors?

A: I beg to differ. I think innovation drives companies because when you are a company and you need to compete, your product has to develop in order to succeed. It is true that innovation is driven by ideas and that's why companies invest a lot of money in research and development. But look at what has happened to the internet. Companies compete over and over about the internet and, because of that, they innovate. Compare mobile phones to what we had 20 years ago. If competition had not driven innovation, then we would still be stuck with those enormous brick phones, whereas now, with the modern smartphone, you have a computer in your pocket.

People may be a bit too short-term focused here, though. Sometimes, when it comes to innovation, you need to look across a longer span of time. So if you take the energy or telecoms sectors, for instance, back in the 60s, both markets were dominated by monopolists. Now they're not and companies in these areas are (and have to be) more innovative in terms of product offerings and quality of their products.

Q: What has been the high spot / low spot of your career so far?

A: I consider myself very lucky in that I have a lot of good memories. But if I have to pick a couple of examples, I would certainly say the first time I brought in a client – I was a managing associate at that time – and my partnership election. The worst day of my professional life was back in 2008 when my law firm – like most law firms in that period – started a redundancy process, and the whole competition group was in a room with the head of group explaining to us what was going to happen. I was not affected but the atmosphere in that room was awful for everyone, including the partners who, I believe, never expected to have to face such a day in their professional lives.

Q: What do you do outside work?

A: I spend as much time as I can with my family. I am traditional. I love to spend as much time as possible with my two daughters. It's nice to see your kids growing up. And when my children go to bed, I like to read – right now, I'm reading the History of Italy by Montanelli – or sometimes to watch movies. I used to do quite a lot of sport a long time ago but nowadays I do a bit less!

Q: What sort of movies?

A: Historical movies mainly. I like history a lot: I think it helps you to make sense of the present. But of course, I also like *Fawlty Towers* and *Blackadder*.