Interview with Oliver Heinisch

Sheppard Mullin's highly regarded antitrust partner talks to CLI

Q: Why did you want to become a competition lawyer?
A: My general interest in law was first triggered by attending lectures while still at school. I ultimately chose law over medicine and I liked it from the start – the abstract thinking, the mental discipline and so on. The German system gave us flexibility in the first two years of university – that changed drastically later – which also allowed me to focus on languages and US law. I went to study in Geneva after my second year of law where I did my first modules in European and international private law and also worked on my French.

My stagiaire post at the European Commission gave me insights into the other side of where I stand today. I got first-hand experience from case work with a focus on the pharmaceutical industry. It also was a lot of fun to attend the numerous social events with over 600 people from around the world. I still have very good friends from that time.

I then moved to Berlin where I qualified as a lawyer after running through the mandatory training as judge, prosecutor and finally as Rechtsanwalt.

The German system was designed to breed judges and hence required you to be an expert in all of civil, criminal and public law until the very end, and almost the entire subject matter was mandatory. Certainly, it was a great education but there was not much freedom to specialise with a focus. This is why I moved to London after qualification to attend a master's course at UCL in London. This is where I was able to spend one year studying EU competition law, IP and general European law. Like all competition lawyers, I was fascinated by the breadth of the discipline which involved looking at how economics, politics and law applied to a complex sets of facts. After my master's degree, I started working in London as competition lawyer and, after almost 14 years of practice, I'm still learning every day and enjoying this subject matter. It never gets boring. Just look at the current inquiry into ecommerce, the new collective action system in the UK, and German thinking about the introduction of criminal sanctions.

Q: What would you do if you couldn't be a lawyer?
A: In terms of professions, I would probably have become a doctor. I had early experience in medicine when training and working as a paramedic and driving an ambulance during my year and a half as a civil servant (instead of doing the then mandatory military service). I still have a soft spot for this discipline which you can apply everywhere in the world and where in most cases you can see immediately the effects of your work, with people feeling better.

Q: You've spent significant amounts of time in at least London, Berlin and Brussels. So where's home – Berlin?
A: Work takes me to Brussels on an almost weekly basis. I do miss Germany and am back in Berlin and elsewhere as often as I can. However, home is where my family is and that is London.

Q: When you're physically tired, do you think first in English or another European language?
A: Gute Frage.

Q: Is there a particular part of your practice that you enjoy – or are naturally more attuned to – than others?
A: Being a competition lawyer already means being highly specialised. I therefore enjoy the full mix within this practice area, including general European and regulatory law. After long weeks of running internal investigations assessing alleged cartel activity, it is a welcome change to advise on a merger with very different challenges and tighter timetables. Then there is the intellectually stimulating area of IP/competition law, where creative legal thinking is required and which I enjoy, and the abuse of dominance cases which come with it.

Q: Are there any cultural differences between how lawyers from different jurisdictions practise competition law?
A: There are certainly differences. However, in both Brussels or London, there is a great mix of European nationalities and ultimately competition lawyers do speak the same language – and I don't mean English with a funny accent – and have an overarching understanding of the legal and economic theories.

On the other hand, the style varies greatly and we've all had this moment where we smile when hearing or reading the pleading of a colleague from another jurisdiction, as we might have done it very differently (and maybe worse). I am really fond of Europe and the EU and strongly believe in its purpose. It is this diversity of cultural backgrounds within a relatively small space which makes Europe unique and such a great place to live and work. I very much hope the UK does the right thing and votes "Yes" in the referendum. Although I've been here for over 15 years and paid taxes for most of that time, I am unfortunately not allowed to vote in the referendum.

Of course, the way the law is applied in front of national authorities or courts requires specific knowledge both of the national law and of local custom. Applying your own background in front of a court or authority does not always work well.

In particular, international cartel cases which often involve the US, Europe and Asia require careful communication and collaboration. Any cultural insensitivity can lead to the breakdown of teamwork and inconsistent outcomes to the detriment of the client.

Q: Do competition lawyers – or, if you prefer, does competition law – do more harm than good? The economic evidence is apparently agnostic and (from the consumer's point of view) the benefits aren't always that obvious.

A: Competition law does a lot of good – just look at those countries where competition authorities do not exist or do not fulfil their mandate. There can also be no doubt of the key role competition law plays in the protection of free markets and our free society. Competition is dynamic and hence not perfect. It has winners and losers and what is considered beneficial is often subjective.

Innovation remains at the centre of the current big cases in front of the Commission and competition law plays a key role providing the right environment for innovation to prosper. Competition law has a role to play where markets fail or companies use, for example, the intellectual rights given to them in a way to slow down innovation or harm consumers.

Having said that, I agree that competition authorities have the power to influence markets to the detriment of society. Both positive and negative decisions of competition authorities often have far-reaching consequences, not only for the parties involved but also for third parties. So they almost always have a political dimension. The risk involved in taking a wrong decision is far greater than in other areas of law. This increases the burden on authorities to use their discretion carefully and to balance all interests involved.

Certainly, the impact the internet has had on competition and markets was for a long time underestimated. Now, as we understand better and the benefits can be seen, internet trade is being protected and encouraged. This has led to the emergence of internet discounters and the slow death of independent and specialised brick and mortar shops. It remains to be seen whether the right balance has been struck. This is a process and we are right in the middle of it, assessing economic evidence and reassessing socio-economic values that will define the nuances of future competition policy and decision-making.

Q: Why are cartelists so stupid? I mean by, for example, having minutes of illicit discussions/meeting in hotels that are obviously under surveillance/coming up with pathetic schoolboy excuses for their conduct.

A: They are neither more nor less stupid than other people. But they are careless and cause their employer to break the law and often commit a criminal offence themselves. I have come across many reasons for that in the numerous interviews I've conducted: pressure from superiors or peers, ignorance, following the bad example of others, being new to the industry, fear of losing a job, friendship with a competitor, vanity, ambition, working in a society where the local law is enforced in a different way or not at all, pursuing a local custom which, in other jurisdictions, would be considered a serious breach (a good example is information exchange). Cartels often run for years and, from the evidence I have seen in the cases I've been involved in over the years, people eventually get complacent and less cautious. This means that emails with the title "Destroy after reading" or something similar do end up on the file of a regulator.

Q: What distinguishes cartel practice from competition law generally?

A: Working on a cartel investigation is often compared with playing three-dimensional chess and that is true, at least from my experience, when it comes to investigations at a national level such as Germany or the UK, or in front of the European Commission. In addition to complex factual, legal and strategic considerations, there is the psychological element of dealing with the individual perpetrators and also regulators, while at the same time supporting the legal teams and management of your client. Once you have attended a dawn raid, you know how an investigation triggers an enormous amount of stress for the companies and employees involved (much more than mergers do, as the stress there is usually limited to the deal team). This will further increase with the rise of criminal sanctions across the EU. Devising and implementing strategies is highly complex and has to balance all the interests involved.

Another difference: being a cartel lawyer today allows you to be involved in an ever increasing amount of litigation both in Luxembourg but also, more importantly, in front of national courts defending antitrust damages actions. In particular, damages actions have become a regular occurrence in cartel cases and I was lucky to have been involved in some of the early ones.

Q: What are likely to be the major future challenges for cartel lawyers?

A: There will be a greater focus on prevention and the crafting of effective compliance programmes, with competition law also being high on the agenda of corporate governance and authorities pushing for effective prevention. Many companies have become very proactive and, in addition to a regular update to their compliance programmes, I have seen an increase in a demand for competition audits.

Cartel enforcement will become increasingly international, with product markets growing beyond national borders and more authorities joining the circle of enforcers. The fact that authorities co-operate more closely equally increases the need for outside counsel from different jurisdictions to work together. In one of my cases, co-operation went as far my assisting a client's local Asian counsel when it came to arguing a case in front of his local authority, using well-established arguments from EU competition and constitutional law.

A totally different challenge (mainly for enforcers) will be to understand how the internet can facilitate cartel behaviour and I'm not talking about the simple use of chat rooms which featured in the Libor investigation. Having said that, I am not expecting the more standard cartel activity simply to disappear.

Q: Are there particular competition law problems in the intellectual property field? The vast IT/IP battles between, say, Samsung and Apple / Microsoft and Google over patents worldwide seem never-ending and on a different scale to other kinds of competition law disputes.

A: These IT cases throw up the most fascinating problems and an endless list of challenges. I have advised on many different legal issues involving most of the companies you mention since I started practising. However, new challenges arise as new technologies are developed and new IT giants emerge. These cases are of different scale, not only because they involve the most successful and powerful IT companies but also because they raise questions relating to the interface of IP and competition, which has interested antitrust lawyers for a long time, starting way before my time with, for example, the ECJ in *Consten* and *Grundig* back in 1966. A lot has happened since and you mention the current cases and battlegrounds. Some of them concern new markets which were not in existence some 15 years ago, like interface technology and internet search. Others concern standard essential patents, which are patents that cover technology that is included in an industry standard, such as the UMTS or 3G standards, which can confer dominance on its owner. Although the existence of those IP rights themselves cannot be challenged, competition law is concerned with the exercise and, in particular, how much can be charged for those rights.

Q: What are the major differences in attitudes between European and US authorities when it comes to competition law enforcement, besides the fact that the US likes to jail people for cartel behaviour?
A: I think one major area of difference is the way article 102 is enforced in Europe. The Commission has been very active and is easily the strictest enforcer in the world of abusive conduct. The problem, though, is that not all cases with novel elements reach decision stage and are settled by commitment decisions (and I am not referring to the Rambus case).

Q: If you could make one major legal change in competition law, what would it be?
A: Finding a solution to avoid (unnecessary) filings in certain non-EU jurisdictions which are seemingly unaffected by a merger. In the absence of a global competition authority or international agreements, this change is unfortunately not likely to be seen any time soon.

Q: What is so ethically wrong about state aid?
A: It depends. State aid to a hospital or an opera is a wonderful thing. But state aid to a zombie bank or a state-owned enterprise triggering overcapacities and dumping abroad is detrimental to the taxpayer, consumers and the economy as a whole. State aid has its role to play where markets fail or issues of common interest deserve protection. A careful assessment is required in order not to destroy the level playing field that competition law tries to protect and promote.

Q: Does competition law have any underlying philosophy or is it simply a legal version of the Highway Code (ie a ragbag of rules that practitioners simply have to know by rote)?
A: Again, a very big topic. Free competition is a key pillar of an open and free society. Competition law wants to regulate economic power to guarantee freedom. The law has been developing for more than a century alongside economic theories and an evolution of our society. In addition to being experts in the law and economics, we have to be acutely aware of the political environment in which arguments are made.

Q: Are there some cases – or industries – which are just too big for a single regulator to deal with? For example, airlines presumably need a collaborative approach between regulators worldwide as by definition aircraft cross national boundaries all the time. So how good is collaboration between different regulators worldwide?
A: Whenever a European consumer is affected, I would expect the Commission to assume jurisdiction, no matter how big the cartel. It also does not matter whether the cartel meetings happened entirely outside the EU. I have worked on cartel investigations by the Commission where no participant was headquartered in Europe and the alleged conduct happened entirely outside the EU. The US authorities would take a similar approach and, with more enforcers around the world becoming more active, collaboration among the enforcers becomes more relevant. I believe this is already happening successfully between the established authorities.

Q: What's been the high spot / low spot of your career so far?
A: A high spot must be to get the complaint against Rambus off the ground and, after eight long years, see a Commission decision issued (if only a commitment decision). Overall, it took over 10 years of battle involving major semiconductor companies in front of numerous patent courts and competition authorities around the world to resolve that case. The dispute concerned conduct which could be characterised as patent ambush and patent hold-up. IP rights were at the centre of the case: they were used to extract royalties from the industry which had opted to implement a certain industry standard to design their microchips, which was allegedly covered by those IP rights.

It was a fairly novel set of facts when we went to the Commission to complain about this conduct. It took a lot of convincing and detailed legal submissions and discussions, and ultimately the Commission allocated substantial resources to the case. What followed was a fantastic joint effort by the European Commission's case team and the key complainant in the case, which we represented. The dispute was eventually settled by the Commission adopting a decision making binding commitments offered by Rambus. We appealed this decision but the case was then settled between the parties before the General Court was able to resolve things to the satisfaction of our client. One reward for all the hard work that went into this case is that the guidelines on horizontal agreements address a lot of what we discussed during many fruitful meetings with the Commission.

The low point was being told by a German patent court that our antitrust defence was not going to be heard for more than five minutes in a several days' long trial. Years later, these very arguments were heard by the ECJ and finally confirmed in *Huawei v ZTE*.

Q: What do you do outside work?
A: It's never boring, with everything London has to offer, on and off the beaten track. I like playing and listening to music, and have a passion for opera. Also, I like riding my motorbike, preferably down to the south coast. Most of all, I enjoy my growing family.