

Next stop: digital markets

Andreas Mundt, president of the **Bundeskartellamt**, outlines the German regulator's priorities in light of market trends

Andreas Mundt, president of the German competition regulator (Bundeskartellamt), shares his views on the most pressing developments facing competition regulators today and what he is doing to pre-empt them. In 2015, the Bundeskartellamt established its Internet Think Tank and hot on its heels handled two interesting mergers relating to dating sites and online real estate platforms. The regulator is also on the eve of introducing its ninth amendment to the German Competition Act (due in 2017). The amendment will in part tackle competition issues arising out of the internet market, among other things adapting to cater for cases such as Facebook's \$19 billion acquisition of WhatsApp, whose revenue challenged established turnover thresholds in Europe.

What have been the key priorities in merger control for the Bundeskartellamt throughout 2016?

Currently we face a fundamental and quite challenging period of change in the economy. With increasing digitalisation we are witnessing a new economic revolution, which has an impact on literally all companies and

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which also raises new competition issues. In view of this in early 2015 the Bundeskartellamt set up an Internet Think Tank. Its objective is to develop the right approach on how to deal with online platforms under competition law, combining both theory and practice. Our colleagues in this team conduct research on existing literature and case law. They do conceptual work on how to assess cases in the digital economy and work on concrete cases.

We think that the classical tools of competition law are generally sufficient to deal with most of the new issues arising in the context of digitalisation. Nevertheless, some fine-tuning of the legal framework could help us to tackle the issues in this area appropriately.

In 2017 we will see the introduction of the ninth Amendment of the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB). The draft of the amendment contains important adjustments, for example, with regard to the notification of merger cases that do not meet the established turnover thresholds. In particular, a new transaction volume threshold is to be introduced into German competition law, a consequence of the takeover of WhatsApp by Facebook for more than \$19 billion as one example. There were only three jurisdictions in the entire EU that were competent to review this merger due to WhatsApp's extremely low turnovers. This was in obvious contrast to WhatsApp's market position in the EU. It is not unusual in the digital economy for important companies to start with a very low turnover. The transaction volume threshold could enable the Bundeskartellamt to look at such important deals.

Furthermore, the amendment is intended to expand the criteria for dominance which are defined in the current legislation. For example,

network effects can be decisive for the market position of any company on a digital market. Access to data has also developed into a significant competition parameter and potential source of market power. On the other hand, the internet is very dynamic. We also have to consider that new innovative business models can replace established companies. The amendment responds to these aspects, too.

How have merger control practices and the way you conduct reviews and investigations developed in recent years?

Merger review today is subject to a refined analysis of relevant market and competition conditions based on the use of data-based methods. The takeover of Kaiser's Tengelmann by Edeka is a good example of this. We made several data-based analyses, for example an empirical event analysis was carried out. Here we measured how the turnover quantities generated by the different supermarket formats (full range and discount) changed with the opening or closure of other outlets. This analysis helped to answer more precisely questions relating to market definition, the level of competitive pressure between the different distribution channels in the food retail sector and – above all – the closeness of competition between the merging parties.

What have been some of the Bundeskartellamt's biggest recent achievements and most significant cases?

I already mentioned our strong efforts to take account of the implications of digitalisation for merger control. We had two really interesting cases in 2015. Building on the knowledge gained by the Think Tank we cleared two mergers in the areas of real estate portals (Immonet.de and Immowelt.de) and dating platforms (Parship and Elitepartner).

In the first case, the merger concerned Germany's second and third largest online real estate platforms. Even after the merger the platform immobilien Scout24.de remains the market leader. Although the merger reduced the number of large real estate portals in Germany, it may also increase competitive pressure on the market leader. Customers (both providers and seekers of real estate) generally prefer large platforms, as a rising number of users increases the value for them (positive network effect). The risk in having numerous smaller competitors is that it will be the market leader in particular which wins new clients. With the merger, participants in this market will now have another large portal to choose from and be able to practise multi-homing more intensively.

In the second case, the online dating portals concerned are among the largest in Germany. Nevertheless, there are still sufficient alternative providers in the online dating platform market. Further, this market is a prime example of the innovative force and dynamic nature of the Internet, as its business models are under great pressure from mobile apps. The recent emergence of successful mobile dating platforms such as Tinder and Lovoo bear witness to this.

Currently, another important sector for the Bundeskartellamt in the area of merger control is the food retail sector. This market is highly concentrated. The four largest retailers Edeka, Rewe and Aldi and the Schwarz group (including Lidl) share between them over 85% of the total market. Therefore, in merger control proceedings the Bundeskartellamt analyses the situation in the affected markets very carefully.

This year REWE acquired the northern German food retailer Coop. The merger involved 200 supermarkets. We have closely looked at all the relevant regions and assessed whether local consumers will still have sufficient shopping alternatives after the takeover. The acquisition of the Coop supermarkets by Rewe would have impeded competition in some of the regions. Due to our concerns Rewe and Coop sold eleven branches in the regional markets affected to another food retailer.

Already in 2015 the Bundeskartellamt had prohibited the planned acquisition of Kaiser's Tengelmann outlets by EDEKA. In our opinion the takeover would have greatly limited choice for local consumers. It would have also led to further concentration on the demand side in the food

procurement markets. It is still being discussed whether the companies can implement the merger with special approval: a so-called ministerial authorisation. We will have to wait and see.

All in all the market structure in the food retail sector will definitely remain an important topic for the Bundeskartellamt in the months to come.

What do you expect to be the number of merger reviews, clearances with condition and prohibitions over 2016 and how has this compared with previous years?

For several years the number of notified mergers has remained stable. During 2015 the Bundeskartellamt decided on 1,169 merger control cases. We do not expect much change in 2016.

So far we have had no prohibitions this year. One case was cleared subject to conditions – it was the acquisition of the food retailer Coop by REWE which I have already mentioned.

Access to data has also developed into a significant competition parameter and potential source of market power

Sometimes companies withdraw their notification when we express our concerns. For example, the companies Owens Corning and Ahlstrom did so one month after we had sent a draft decision to the parties in which we informed them of our concerns about the merger. Owens Corning had intended to acquire Ahlstrom's glass fibre nonwoven business. Glass fibre nonwovens are mainly used in the construction industry, for example for roofing, wall lining and flooring. According to our preliminary investigations, the companies together would have reached high market shares in some of the business areas affected.

You have recently conducted an in-depth study into big data and its implications for competition law. Looking at this and the work you have done on the digital market in general what do you think are and will be the biggest challenges for competition authorities?

The joint study on big data by the French Autorité de la concurrence and the Bundeskartellamt gives an excellent overview on how we include the use of data in our assessment of competition cases. Business models, particularly in the digital economy, often involve a massive collection and use of (personal) data. Factual data seems to be some kind of a currency. But there are many legal questions.

For example, if you have a market on which there is no exchange of money, is this a market in the sense of competition law? The lawmaker intends to clarify this in the upcoming amendment of the German Competition Act (GWB).

The Bundeskartellamt and the European Commission already consider this issue in their work. Of course companies like Google participate in a market, although the search engine is free for the user. But on the other hand there is the aspect of the commercialisation of the data for advertising purposes. So you have to look at the whole business model. A clarification in the law should help us to deal with the cases in the internet economy.

The Bundeskartellamt has also published a working paper which deals with the *Market Power of Platforms and Networks* in the internet. The report focuses on the factors relevant for assessing the market position of platforms and networks. For example, we see that large and powerful companies which

dominate the digital economy benefit from network effects. Newcomers and smaller competitors find it difficult to keep up with them. Therefore, protecting competition in the Internet means above all keeping markets open for competitors, newcomers and new business models. We must develop existing examination models further to enable us to quickly and efficiently analyse and assess our cases. And we highly welcome that the amendment of the German Competition Act is to expand the criteria for dominance, as I have already mentioned.

There has been a strong effort to harmonise European competition rules over recent years, how successful has this been and where would you like to see further development?

In European competition law merger control is an area with a clear allocation of jurisdiction. Convergence and harmonisation in merger control is not necessarily centered around aligning the merger control rules of the individual member states. Instead, the focus is on soft convergence and increased cooperation.

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In the European Competition Network (ECN) the national competition authorities and the European Commission exchange information about cases and decisions and cooperate closely. An important forum of the ECN is the EU Merger Working Group. Various initiatives have been carried out in recent years: for example, in 2011 the Merger Working Group adopted the European Best Practices on Cooperation in Merger Cases. These best practices give guidance to the parties and the national competition authorities themselves on when cooperation is useful for making the review process smoother and for achieving consistent outcomes. They are also intended to ensure that any remedies chosen to address competition problems are not inconsistent.

In 2016 the Merger Working Group published a report and compilation of information requirements for merger notifications across the European Union's jurisdictions. This report provides a comparative overview of the information requirements for merger notifications among the members of the Merger Working Group. This project has confirmed that there is already a significant level of convergence across national EU jurisdictions. Merging parties need to submit the same categories of information to ensure that the transaction's likely impact on competition can be assessed. However, the project has also showed that some differences remain.

There are many other examples of increased convergence in the EU. Take the substantive test (SIEC test) as one example. There is no predefined end to this development. We think that projects like the ones I have mentioned are the right way to foster soft convergence.



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About the author

Andreas Mundt has been president of the German Bundeskartellamt since December 2009. In September 2013 he was elected as the steering group chair of the international competition network and was re-elected for a second term in May 2015. Since 2010 Mundt has been a member of the Bureau of the OECD Competition Committee.

After qualifying as a lawyer following studies at the University of Bonn and the University of Lausanne, Switzerland, Mundt entered the Federal Ministry of Economics where he worked from 1991 to 1993. He then joined the staff of the Free Democratic Party in the German Parliament from 1993 to 2000, where he was in charge of the portfolio of labour and social law. In 2000 Mundt joined the Bundeskartellamt as rapporteur, with responsibility for banking and card payment systems issues. He was head of the international section of the Bundeskartellamt from 2001 to 2005 and director of general policy from 2005 to 2009.