

# Concurrences

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Andreas Mundt:
Focus, implementation,
inclusiveness —
The impact of the ICN

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President, Bundeskartellamt, Bonn



## Interview

#### Andreas Mundt

President, Bundeskartellamt, Bonn

## Andreas Mundt: Focus, implementation, inclusiveness – The impact of the ICN

Sept. 2013

Chairman of the ICN

Since 2009

President of the Bundeskartellamt

2005

Director of the General Policy Division

2001

Head of Unit International Competition Matters Rapporteur in the 4th Decision Division (cardbased payment systems)

2000

Entry into the Bundeskartellamt Rapporteur in the 8th Decision Division (banking and financial services)

1993

Desk Officer for labour and social law in the parliamentary group of the Free Democratic Party (FDP)

1991

Entry into the Federal Ministry of Economics

Mr Mundt, you were appointed as president of the German Bundeskartellamt in 2009. In June of this year, the German Competition Law was revised. What are your reflections on the most recent developments in German competition law over these past four years?

I am proud to see the number of developments which have occurred in the past four year. We have seen a lot of changes in the Bundeskartellamt including the eighth amendment of the German Act against Restraints of Competition (ARC) in June

To name just a few of the changes in our agency: the number of staff has grown significantly in recent years. We have been able to hire many excellent new employees which support the various decision divisions. With regard to our organisation, we have strengthened our focus on cartel enforcement over the past years by making a couple of changes, including the creation of a new cartel division and the reorganisation of the litigation department.

We have strengthened our focus on cartel enforcement over the past years.

We have also significantly raised the number of staff working in the Bundeskartellamt's economic unit. In my opinion the focus of investigations on more refined economic concepts and corresponding market investigations has increased in the past which is also reflected in our new merger guidelines.

Probably the most significant change in the recently revised ARC concerns the substantive merger test. The German dominance test will be replaced by the SIEC

This amendment also brought about a couple of changes to our cartel enforcement regime. Before the reform, cartel members could prevent or substantially reduce the payment of fines by restructuring under company law. This problem has partially been resolved by the revised law, which enhances our cartel enforcement. Additionally, in June 2013 we adjusted our guidelines on the calculation of fines, following a recent decision of the German Federal Court of Justice.

Some sector specific changes in the new ARC are also noteworthy, some of which have not been particularly welcomed by us. This includes the decreased scope of our activities in the press sector, in the area of control of public fees and the health insurance market, which will now only partly be covered by competition law; although merger control will apply, control over restrictive agreements will not. Our duty is to advocate for the benefits of competition and competition law enforcement across all sectors. Our advocacy efforts are often successful, but in some areas it takes time.

Interview conducted by Jürgen Schindler and Ines Litzenberger, Lawyers, Allen & Overy, Brussels.

#### The Bundeskartellamt was promoted to the group of top competition authorities by the Global Competition Review in 2012. What are the future priorities for your authority's

The Bundeskartellamt continues to work on numerous proceedings and projects across all sectors. Cartel prosecution will of course remain a key area of action in our work. With the formation of three decision divisions exclusively dealing with cartels, the Bundeskartellamt has intensified its investigations and has been very successful in finding cartel agreements since then. We will continue this work in the future.

Current activities show that vertical competition restraints will also be an important issue. The growing significance of the internet as a distribution channel raises a number of well-known questions, such as the competitive assessment of restrictions to online distribution by manufacturers and the competitive effects of so-called 'most favoured customer' clauses used on internet portals. We are already tackling this issue and last year we conducted a number of proceedings where the main focus was the business relations between producers and retailers. In many cases, these proceedings concerned price maintenance agreements or the exertion of pressure by producers on retailers. A growing number of producers are introducing selective distribution systems with a vast number of sales conditions for retailers.

## Cartel prosecution will of course remain a key area of action in our work

We have been given new competencies for our work in the energy sector. Together with the Federal Network Agency, the Bundeskartellamt will assume new monitoring responsibilities regarding the production and wholesale markets for electricity and natural gas.

Sector inquiries remain an important tool to determine general competition problems in markets. We are currently conducting a major sector inquiry into the food retail sector. The examination focuses on the competitive conditions in the markets for the procurement of food and beverages by food retailers. The four leading retail companies have come to control around 85% of the total sales market in Germany. We intend to take a closer look at buyer power in the food retail sector in order to base the current debate on a solid body of data.

Following our sector inquiry in the fuel sector, which triggered a broad public debate, in September 2013 we launched a transparency unit for fuels which enables consumers to inform themselves on up-to-date fuel prices in Germany. As a result, via the internet, a mobile device or a navigation system, motorists are now able to gain information on the current fuel prices or the cheapest petrol station in their vicinity or along a specific route. In September 2012 we also started another sector inquiry in the upstream market of refineries and the oil wholesale sector.

Many companies face the task of working in an increasingly globalised environment. However, it is not only companies that have to deal with the new benefits and challenges of this internationalisation, competition authorities also have to address them. How does the Bundeskartellamt deal with this task?

As many of our cases have an impact on German and foreign markets, we experience internationalisation every day. As a result of globalisation and the immense growth in international trade during recent decades, we are dealing with global companies on a daily basis. Accordingly, the need for international cooperation among the worldwide community of competition authorities has increased sharply.

When the Bundeskartellamt was established in 1958, the ARC had a clear focus on national markets and the competition law community was quite small. Since then, markets have become more and more interconnected and there has been an immense rise in the number of competition jurisdictions worldwide. In addition, national competition laws have undergone immense developments.

Globalisation in markets, as we observe it now, emphasises the importance of cooperation between competition authorities beyond national frontiers. The Bundeskartellamt cooperates bilaterally with competition authorities in other countries, but great importance is also placed on multilateral cooperation in international fora, such as the European Competition Network (ECN) and the International Competition Network (ICN).

Mr Mundt, after Ulf Böge, you are the second president of the German Bundeskartellamt to become chairman of the ICN. The ICN has grown from a small group of competition authorities to one of the largest and most successful informal international networks. As a mature and experienced competition authority, what special perspective is the Bundeskartellamt able to bring to the ICN?

Indeed, the growth of the ICN in the past decade is quite impressive. In 2001, on the occasion of the Fordham Law School's annual international antitrust conference in New York, the creation of the ICN was announced. Back then it was little more than a dozen of us who, building on, inter alia, the work of the International Competition Policy Advisory Committee (ICPAC), formed this organisation.

Nowadays the ICN has 126 members from 111 jurisdictions from all over the world and has also received further applications from other authorities wishing to become ICN members. We take pride in the fact that this organisation is not only attractive to mature agencies, but also to young agencies. Our membership is as diverse, in terms of size of agencies, organisation, enforcement environments, geographic diversity etc., as our tasks.

The composition of our membership is one of the main assets of the ICN. With such a membership, the ICN is able to ensure that it is always aware of what is new in competition law enforcement and can advocate its views at an equally global level. The operative motto for the ICN, as articulated during the founding phase, was "competition policy all of the time". It could not be more up to date 12 years down the road.

On the other hand of course this vast diversity brings the challenges you mentioned. With many different time zones and working languages in the different regions, we have to take care that these different needs are thoroughly taken into account. Plus we have to cover the needs of both the young and the mature agencies, which are not the same. The spectrum of the ICN has become so broad that some might fear it is not possible to keep up with all the work we are doing. I think, to a certain degree, we need to concentrate our work, in particular with a view to the fact that many agencies are faced with budget cuts.

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Currently we are in the fortunate position that we have very dedicated staff in the various competition agencies around the world. The staff of agencies in different time zones are willing to attend teleseminars and conference calls during non-office hours. In order to alleviate this situation, some working groups regularly conduct conference calls and teleseminars at a so called 'Asia-Pacific friendly' time. These have proven to be well received and well attended. Also we are considering how to overcome the language barrier. For some regional events this is easier to achieve, but we are currently also evaluating the extent to which we can organise a bilingual Annual Conference in Marrakech next year.

For the Bundeskartellamt, as a more mature authority, the ICN has a lot to offer. We find the exchange with the other competition stakeholders, be it other authorities or non-governmental advisers (NGAs), very stimulating and valuable. We can bring our experience to the ICN and try to prevent others from having to make the same mistakes that we did. On the other hand, some of the Recommended Practices and other practical work products of the ICN also have direct influence on our jurisdiction. The local nexus in the German merger regime originates mainly from the Recommended Practices of the ICN Merger Working Group.

Until the reform of the ARC, Germany was one of the few countries in the world where the thresholds for merger notification could be triggered by one of the parties alone, even though the other parties had little or no business in Germany.

These notification requirements tended to draw into our ambit transactions that were essentially foreign. By introducing a second domestic turnover threshold, we have strengthened the local nexus of merger control and have significantly reduced the need for merger control filings with a clear focus outside Germany.

This reform has brought German merger notification requirements fully in line with the recommended practices of the ICN. In fact, living up to the ICN recommendations was one facilitating factor in bringing about this domestic reform.

The criticism that was voiced from inside the business community in the past has been silenced. At the same time, the reform has freed up sorely needed resources in the Bundeskartellamt for higher-priority tasks. This serves to enhance the effectiveness of our overall work.

Since its creation just over 10 years ago, the ICN has lead to a significant degree of harmonisation of national competition laws – all based on an informal working basis and the goodwill of the ICN's member agencies. In your opinion, in which areas has the ICN achieved the highest degree of harmonisation and in which areas do you expect divergences to continue to exist in the future?

The first flagship project of the ICN can be found in the area of Mergers. Multi-jurisdictional mergers had become one of the main challenges for competition authorities and companies and they were one key factor in the decision to establish the ICN. And what was true more than a decade ago is all the more true today. There is a strong need for sound and principled procedural and substantive standards that ensure that unnecessary costs for companies and economies worldwide are minimised. This also helps to reduce the uncertainty for the business community and the market.

Therefore, in 2002 the ICN Merger Working Group formulated a set of "Guiding Principles for Merger Notification and Review". These include eight principles that, in sum, were the starting point for procedural convergence in international Merger control regimes. The Recommended Practices also encourage competition authorities to further coordinate their approach in merger review in particular cases and to create a level playing field for business, legal certainty and efficiency.

But this is just one of many very valuable ICN work products which have lead to further convergence.

When asked about the areas in which I see the divergences to continue even in the future, I would point to cartel cases, unilateral conduct cases and more recently vertical restraints. These are the areas in which we still have the highest degree of difference. Such difference can be found with regard to the general perception of probable efficiencies and harm of vertical restraints. Also different legal systems, such as criminal law regimes versus administrative regimes in cartel cases, create divergence.

The ICN can and will strive to lead to further harmonisation, but not to the elimination of legal differences.

In its first decade, the ICN created a wealth of work products. How can ICN members and their delegations ensure that these work products are disseminated within their own agencies and are used by their colleagues in their daily enforcement work?

The implementation of work products is key for the ICN.

Only if we can ensure that our work products are put to use, can we ensure that the ICN and its work matter in the day-to-day work of the authorities. For this reason, the two Vice-Chairs and I have made implementation one of the three focus areas for this term. Vinicius Marques de Carvalho, President of the Brazilian Administrative Council for Economic Defence (CADE), will concentrate his efforts as Vice-Chair on the question of how we can strengthen our implementation efforts.

The ICN offers truly unique opportunities. We have created a library of work products which has an encyclopaedic character. It would be difficult to find another collection of knowledge that is so full of the key players' perspectives. As I see it, it is my and my colleagues' task to promote these work products. By including as many ICN members as possible in the process of preparing these work products, we want to make sure that everyone is aware of what is in stock. It is only by doing so that we can convince ICN members and legislators around the globe of the benefit of complying with ICN standards. For Germany, the best example was the introduction of the second domestic threshold in merger regime, which I have just mentioned. We as the ICN can offer best quality in our work, but now we have to sell these products successfully to the stakeholders.

Therefore, I see it as one of my personal main tasks to raise the awareness for the ICN and by that increase the impact that our work can have.

By the way, the ICN library does not only reflect the input of competition authorities. NGAs have also provided us with extremely valuable input over the past years; our work products would not have the same hands-on character nor the same quality without them. That is another unique feature of the ICN. No other International Organisation includes the NGAs in their work process to the same extent that the ICN does.

Together with the Vice-Chairs, I am currently considering a whole bundle of instruments to pursue the general task of disseminating ICN work products. A regional approach might be a good way to assess the needs of the diverse membership. In different regions competition authorities may be more similar in terms of economic situation, institutional set up, legal framework and size. In such a case, the needs of these members might be similar and a certain work product might be best suited to be promoted and implemented in that region.

On a practical level, implementation may be achieved by various means. It can be promoted by presenting work products during teleseminars, using work products at workshops or internal training classes, or within the advocacy work of ICN members. ICN members and Working Groups are free to choose the most appropriate tool to use for the promotion of work products.

In this they can also seek advice from the Advocacy & Implementation Network, which is the group responsible for promoting better use of ICN work products, building awareness of ICN work products and facilitating technical assistance for ICN members.

Cooperation is one of the core objectives of the ICN for the next decade. Currently, the ICN is running a pilot project on cooperation with the OECD. Can you tell us more about this pilot project and how its potential outcomes could influence how competition agencies will work together in the future? How would you describe the relationship and interaction of the ICN with other international and regional organisations?

As competition authorities, we are increasingly confronted with multi-jurisdictional cases. Since we will never have a "World Competition Agency" to deal with such cases, the 'bottom-up' approach of cooperation between agencies worldwide is without an alternative.

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The ICN has always ensured that it reaches out to other international organisations, such as the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organisation (WTO) and the World Bank. But other regional organisations, such as the African Competition Forum, the Association of Southeast Asian Nations (ASEAN), the Southern African Development Community (SADC), the West African Economic and Monetary Union (UEMOA) and the ICN members CARICOM (Caribbean Community and Common Market), COMESA (Common Market for Eastern and Southern Africa) and the Andean Community, to name just a few, are also important stakeholders. The ICN tries to ensure that its efforts do not lead to a duplication of work for ICN members and that its work brings significant benefits to the members. With its very practical hands-on and project-based approach, the ICN is able to bridge some of the gaps. In addition, in the future the ICN will ensure that contacts are made and deepened with the respective international organisations.

Accordingly, in April 2012 a Steering Group Project on International Enforcement Cooperation was launched. More or less at the same time, the Competition Committee of the OECD agreed to begin its own study on cooperation. Both organisations committed to an unprecedented comprehensive joint survey on the current status of international cooperation and cooperation frameworks, in order to avoid duplication of work.

The outcome of this project will have a direct impact on the ICN's work and also the member authorities' work. In general, respondents to the survey thought that the OECD could take a leading role as a forum to help member countries shape a new legal framework for international cooperation. For example, many respondents believed that the OECD should more explicitly encourage national legislators to address legal obstacles to co-operation in their current legislation. One idea was to achieve this by facilitating information exchanges and investigatory assistance between enforcers. Many respondents suggested that the OECD should work on a model bilateral or multilateral co-operation agreement and on a model bilateral or multilateral agreement for the exchange of information. For the same reason, interest was also expressed in a new OECD recommendation on international co-operation, or a revision of the 1995 Recommendation on international co-operation.

Although respondents' experiences and answers varied considerably, there was near-consensus on some basic issues. The ICN will use this joint survey to deduce which projects the members want to see prioritised in the future. These could include further work on the cooperation topic in the Mergers, Cartels and Unilateral Conduct Working Groups and possibly even guidance documents.

The European Network of Competition Agencies (ECN) will soon celebrate its 10-year anniversary. The Bundeskartellamt has been a very active member within the ECN (eg spearheading an initiative which allows ECN members to more easily inform each other of merger notifications). To what degree can the ECN serve as an inspiration for closer cooperation between ICN members?

Similar to the ICN, the ECN is a very unique organisation from which the Bundeskartellamt has benefited immensely.

As European competition rules are applied by all members of the ECN, the ECN provides a means to ensuring their effective and consistent application. One of the objectives of the ECN is that the competition authorities inform each other of proposed decisions and take on board comments from the other competition authorities. In this way, the ECN allows the competition authorities to pool their experience and identify best practices. As I have mentioned, it is very unique to have numerous competition authorities applying the same law.

The situation is very different from the situation in the ICN and therefore it is difficult to compare the two since not all ICN members have similar legal traditions unlike the case in the ECN. Also, the European Commission is accepted as primus inter pares and we have a binding authority, the Court of Justice of the European Union, to ensure a coherent application of the law, whereas in the ICN all members are equal and there is no authority, just consensus. Within the ECN this situation allows for case allocation, exchange of confidential information and mutual help in investigations, specifically dawn raids on foreign territory. It is not very realistic to imagine a similar degree of cooperation at the international level. Up until now a bilateral approach has proven to be more successful than a transnational approach in the field of international cooperation.

Nevertheless there are important lessons to be learned from the ECN. Accordingly, the ECN can be an inspiration for the ICN. If we look at the main reason for the ECN's success, most ECN colleagues would agree that it is based on the unique spirit of a common network and the aim of working towards a common goal. Frequent informal cooperation and contacts also help to build mutual trust between the parties. In my opinion mutual trust is the basis for any beneficial and fruitful cooperation.

I believe that it is such a mutual spirit that we also need in the ICN. And I am happy to see that we already have started to lay down an equally fruitful basis for international cooperation. I would also like to highlight that the ECN has been so successful because it has managed to ensure that all members are involved equally. For the continuing success of the ICN we therefore also need to insure inclusiveness of all ICN members and stakeholders.

On a more practical level, the ICN has already benefited from the ECN's past work. Just to give you one example, look at the ICN's Framework for Merger Review Cooperation. In the drafting process, the Merger Working Group was able to draw inspiration from a considerable amount of preparatory work that had been done in the ECN.

We can already acknowledge a high degree of harmonisation and cooperation within the ICN and are also happy to build on this also for our further work in the ICN.

Next year, the ICN Annual Conference will take place in Marrakech. Is the choice of venue in recognition of the fact that the African continent has seen an increased interest in competition law and competition law enforcement?

The 13th ICN Annual Conference in Marrakech, which is being held on 22-25 April 2014, will be a very good opportunity to reinforce our commitment to more inclusiveness. We are hoping that many of our African colleagues will be able to join us at this event.

Bruno Lassere, President of the French Autorité de la concurrence, is the Vice-Chair for enhanced member and NGA engagement and outreach. He will play an important role in the preparations for the Annual Conference in Marrakech to help ensure we get as much participation as possible from our African colleagues and our NGAs.

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The ICN has grown to a mature organisation of currently 126 members. The membership shows a pleasing level of diversity. However with such diversity we also face some challenges. With regard to the upcoming conference we will try to tackle one of the main challenges: the language barrier. Even though the working language in the ICN is and will remain English, we are discussing the possibility of organising a more bilingual programme in order to further include the francophone colleagues.

#### Are there any special projects that you would like to see being realised during your tenure as Chairman of the ICN? Looking ahead to the future, where would you like the ICN to be when it celebrates its 20-year anniversary?

I feel very honoured to be the chairman of this very unique organisation. As I point out in my vision statement, the ICN has produced a number of very useful work products and is continuously dealing with the latest topics. At the end of the first decade we engaged in a stocktaking process that allowed us to refocus our efforts. The so called 'Second Decade Project' helped the ICN identify the tasks ahead, namely four high-level goals. These include the dissemination of competition experience and best practices, the formulation of proposals for procedural and substantive convergence, the promotion of competition advocacy and efforts to facilitate effective international cooperation. All these topics have become the core business of the ICN.

In the near future. I would like to see the ICN focus its efforts further, while ensuring inclusiveness for all members. Also implementation and advocacy remain key aspects in which I would like to see the ICN excel.

With regard to specific topics, we have seen that the topic of vertical restraints in the internet economy is currently hitting a nerve. It is a topic being discussed at different international conferences. I am planning to consult my colleagues within the ICN Steering Group and the Working Group Chairs to see whether we also want to address this topic in the ICN and if so in which Working Group and project it would then be best placed.

With regard to the more remote future, I am very confident. In comparison with other international organisations the ICN distinguishes itself by being a very flexible and informal network, without a formal secretariat or premises. It is a virtual, results-based and project-oriented organisation, which can react easily to its members needs. Due to this unique set up, the ICN will exist as long as its services are required.

Now, do I think that in 2021 we will still require an ICN? Yes, I do. Competition authorities are faced with multinational players that operate on worldwide markets. This globalisation assigns the competition authorities with new tasks and challenges and will require the ICN to help create a transparent and level playing field for all actors. I don't know in detail what challenges we will be facing nor what tasks the ICN will have, but I am confident that our flexible hands-on approach and our practical guidance documents and other work products will help ICN members to meet the forthcoming demands.

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