With Andreas Mundt, President of the German Bundeskartellamt (Federal Cartel Office).

Thank you, President Mundt, for granting this interview to CPI.

1. There has been a lot of conversation about "Hipster Antitrust" (or "Big is Bad" antitrust) in the United States lately, from commentators, competition enforcers, and lawmakers. You even used the term at the Fordham International Antitrust Law and Policy Conference last September. How has the "Hipster Antitrust" conversation progressed in Europe? Has it had much of an impact in Europe?

There was indeed a lively debate in recent months in which a number of fundamental issues were raised: Are the established principles of competition law the right answer to today's challenges; are they the right principles for the globalized and digitalized economy? These are the questions we have to answer and I am not sure if it is helpful to call those rightly asking them "hipsters."

There are different approaches to these issues in the U.S. and Europe, but also inside Europe. One example are vertical restraints in the digital economy. Vertical restraints are seen as a huge problem in many Member States in Europe because they have seen a renaissance in online markets. There are a couple of reasons for this. Firstly competition has dramatically increased and there is a tendency towards lower prices. With the Internet and the emergence of e-commerce, the number of retailers the individual consumer can choose from has risen dramatically. Secondly, the Internet gives manufacturers a better overview of the prices at which retailers offer their products. Monitoring is easy. In the beginning of the internet age, increased competition and prices that are easy to monitor led to an increase of Retail Price Maintenance ("RPMs") and to a wave of RPM cases. However, we sent clear signals by imposing high fines and after a couple of cases manufacturers understood that mere and pure RPM were under a heavy threat of fines. Thus, they began looking for other options to control online distribution. Recent examples of our case work show the growing importance of more sophisticated strategies of vertical restraints in online markets. A good example is the *ASICS* case where we saw a combination of strategies like the prohibition of third-party platform sales, prohibition of price comparison websites, etc.

It is not surprising that these kind of cases are more likely to be taken up in Europe than in the U.S. This has something to do with different approaches in the EU and in the U.S. In Europe, RPM in the sense of fixing retail prices or setting minimum prices is considered a hardcore restriction under the applicable Block Exemption Regulation. It can be justified under the general rules, but only under narrow conditions, i.e. in a rather limited number of cases. We also have a critical view on some other, non-price vertical restraints. However, in the U.S. we see some more flexibility. This has also something to do with a different burden of proof.

More differences of this kind show up when we broaden our perspective. In the U.S., there is generally more reliance on the dynamics of markets, which results in less need seen for intervention. Against this background it is not so surprising that in the last few years many important cases in the digital economy were initiated in Europe. The former OFT in the UK and the Bundeskartellamt started early on to tackle the best price clauses of hotel booking platforms. In its *ASICS* decision the Bundeskartellamt took a closer look at the prohibition of price comparison engines, sales via third party platforms and use of brand names.

Moreover, it could well be that in Europe there is a greater awareness of the market power of large internet platforms. There is the case against Google by the EU Commission, the British OFT and ourselves have looked at Amazon Market Place, and the Bundeskartellamt has an ongoing proceeding against Facebook.

We must further develop the established principles of competition law with regard to the digital economy. And we must develop and apply new parameters like network effects and access to data with regard to these huge platforms. In my opinion this is not "hipster" but simply a question of applying established and internet-specific parameters of competition to new situations and cases in a stringent manner. There is nothing experimental about this but, of course to some extent, we are doing pioneering work. Still, at the end of the day, it is simply a question of further developing existing approaches.

2. However, competition authorities can also harm incentives to innovate through over enforcement. The Bundeskartellamt, which is currently conducting a number of cases in the digital economy, is also accused of this. What is wrong with relying on the built-in adjustment mechanisms of the markets?

Of course unnecessary intervention has the capability to destroy incentives to innovate and economies of scale. This is why it is so difficult in the digital economy to determine when an agency should intervene. Dynamic markets must remain dynamic. And obviously we always have this in mind. On the other hand, the economic and social costs of under-enforcement can also be very high. We see companies with years of stable market shares of over 90 percent, global business models, network effects, lock-in effects and competitive advantages due to privileged access to data. Therefore the question whether there is too little rather than too much enforcement in the digital world is a legitimate one. Many consumers are shocked to see the extent to which data is collected by dominant companies and how their data is subsequently used.

The aim of the Bundeskartellamt's Facebook proceeding is to tackle precisely these issues. We need to look at the collection, processing and relevance of data and to provide answers. This isn't hipster either but an attempt to establish a correlation between access to data and the competitiveness of companies.

3. Is "Hipster Antitrust" already just mainstream European competition law?

In my view the European approach to digital competition issues of the early 21st century is extremely positive. What we do is a consistent application of competition law, in particular stringent merger control and abuse control, in Germany and Europe to prevent the concentration of markets, the abuse of market power and to protect consumers from harm. In view of that I would not call our enforcement practice "hipster" only because we apply the rules in the special environment of the digital economy.

In the summer of 2017 the former FTC Commissioner and Professor Joshua Wright used the hashtag #hipsterantitrust, in debates on Twitter, in order, in his own words, "to capture a worldview of antitrust regulation expansive enough to solve societal woes ranging from economic inequality to climate change, mixed with the kind of vintage 1960s style 'big is bad' thinking." The issues which Wright raises are obviously important. But we don't claim to be able to solve all these problems with competition law. We are operating on one of many regulatory levels and our aim is to solve problems that are essentially competition problems with competition law. This is also our approach in our proceeding against Facebook. The statement mentioned above is rather hyperbolic in order to attract attention but it is not reflective of our core work.

All the same: Protecting competition is not an end in itself. Competition creates better and cheaper products and leads to innovation. But it is also about ensuring choice and diversity and preventing the concentration of too much power in the hands of a few. So competition has many positive effects which extend beyond purely economic benefit.

4. Do you believe that technology firms need to have a different standard applied to them than other types of firms in evaluating the competitive impact of their acquisitions and other conduct?

I think that the German and European competition law which we apply at the Bundeskartellamt is flexible enough to also deal with new questions and new markets.

Nonetheless there is need for adjustment because the digital economy works on different principles than the traditional sectors. It operates differently. Network effects can lead to large companies becoming bigger and bigger. Access to data also plays a key role. The question of multi- and single-homing is an important one. All these parameters go far beyond former criteria developed for traditional off-line markets. These parameters are now incorporated into German law, this is a huge modernization. So what we are talking about is not really a different treatment but adjusted parameters.

Very early on we launched a "Think Tank" to create the necessary conceptual bases for applying competition law in the digital economy. We published a working paper on the “Market Power of Platforms and Networks” and, together with the French competition authority, a paper on “Big Data.” The Think Tank’s work results are always reflected in our case practice.

We also advocated that the lawmaker provide detailed clarifications on these issues in the latest amendment to the competition law. This was done in the 9th Amendment to the German Competition Act (“GWB”) in the summer of 2017. Germany is therefore one of the first countries to have its own competition rules for the digital economy.

5. What new rules are there?

I already mentioned network effects, access to data, multi- and single-homing that are now explicitly mentioned in the German law as important factors in assessing market power.

The amendment also clarified that a market may also be assumed where no monetary payments occur. This conclusion – especially in two-sided markets – had already been adopted in the competition authority’s practice but until now had not been explicitly provided for in the German competition law. This is a very important aspect because in the digital economy people often pay with their data instead of money.

We have also implemented a new additional threshold for merger filings. The existing turnover thresholds turned out to be insufficient to cover all relevant mergers and acquisitions in the digital economy and other innovative sectors. Therefore, a new transaction volume threshold amounting to 400 million Euros has been introduced. The Bundeskartellamt can now also examine acquisitions of companies which only achieve marginal turnover but for which a relatively high purchase price was paid. This is often the case with start-ups and other innovative assets. In such acquisitions, the high purchase price is often indicative of an innovative business idea with a high competitive potential.

6. Are further changes to the law planned to deal with digitalization?

We are of course always thinking about how we can better position ourselves as an authority and how the legal framework conditions can be improved. We are thinking about how to improve our technical understanding by hiring more technical staff to monitor overall digital development independently of specific cases. If you want to examine the pricing algorithms of companies, you need good digital competence.

And we have to ask ourselves how we can solve the conflict between fast-moving markets and the due process of law. We have to investigate all the facts in our cases very thoroughly which is time consuming and resource intensive. But this is absolutely essential because our decisions obviously have to stand up in court. However, if we conduct our proceedings too slowly, our decisions could be too late. In the meantime a dominant company could have already forced its competitors out of the market. So we have to find the right balance between procedural efficiency and thoroughness. One option could be preliminary injunctions. But even this is by no means a cure-all not least because it could involve huge liability risks. Another possibility would be easier proof that the conditions for intervention are met. It might also be appropriate and necessary to intervene and prohibit abusive practices before a dominant position of one or more companies is created. These are all aspects which we need to discuss.

7. What role, if any, do you think competition law should take on with respect to issues of income inequality, or unemployment (as opposed to focusing specifically on competition issues)?

In its work the Bundeskartellamt concentrates on protecting competition. That is our task; and competition has many positive effects. Consumers benefit from lower prices, more choice, better quality and innovations.

But, of course, competition is not everything. There are other legitimate aims in a society: social justice, environmental protection, good access to education and much more. Not all these issues can be solved by competition law. These are objectives which can be achieved by the state, for example, via taxes, legislation and other measures. Conversely, misguided regulatory intervention can reduce competition and the competitiveness of companies. Tax legislation is sometimes a good example of this.

In the *Bayer/Monsanto* merger case many citizens expressed their concerns to the EU Commission that the merger could have negative effects on environmental protection or food safety. The Commission made it very clear that it takes these concerns seriously but that they cannot be the basis for a merger control proceeding. The aim of the proceeding was to examine whether the merger can have negative effects on prices, quality, choice or innovations. The Commission stressed that other non-competition concerns expressed by interested third parties are protected by other European or national rules on human health, food safety or environmental protection. The merged entity will continue to be subject to these rules post-transaction. I couldn't have said it any better.

With regard to our merger control cases, there is a division of competences in this area in Germany. The Bundeskartellamt examines mergers for their effects on competition. In exceptional cases the Federal Ministry for Economic Affairs and Energy can still clear a merger which has been prohibited by the Bundeskartellamt if the restraint of competition is outweighed by advantages to the economy as a whole, or if the concentration is justified by an overriding public interest. In the past the reasons considered were for example jobs, health research or energy security. Many jurisdictions have this kind of political instrument as a safety valve. For example, in the UK the government may intervene when it comes to national security, media plurality or the stability of the UK financial system. So the question is not so much whether there should be a political safety valve but rather what form it should take and its possible scope. The important thing is not to overload competition authorities with political issues.

8. One of the reasons for the current debate is that several recent studies have concluded that market concentration is increasing in a variety of industries. Do you share this concern? Has the *status quo* of competition law failed to preserve the rise of dominant firms?

Yes, there were several studies which show that concentration and profit margins have increased significantly in many sectors in the U.S. This was accompanied by a fall in the wage ratio, i.e. a shift in favor of capital owners and to the detriment of earned income. However, interestingly enough, the wage ratio did not fall to the same extent at all the companies but most notably at companies where the wage ratio tended to be lower in any case, i.e. large companies. The fall in the wage ratio can therefore be attributed at least to some extent to the increase in size of the large companies. This effect is most noticeable in the economic sectors with the highest increase in concentration. However, these studies are only based on the situation in the U.S. In Europe, and in Germany especially, we have not observed any similar trends. At least there are no comparable studies which would indicate this.

However I would like to make one exception: the digital economy. Here we are currently witnessing a trend towards size everywhere in the world. This is closely connected with the specifics of the digital economy. Network effects result in the concentration of a large number of users on individual platforms. Access to data can also create significant competitive advantages for some companies. As competition authorities we have to ensure that markets are kept open and newcomers have a chance. For example, we took action against the best price clauses of hotel booking portals. The best price clauses are essentially minimum prices which the portals require the hotels to observe in order to prevent new innovative platforms from offering lower prices. That is the one issue: Keeping markets open. The other is: If we have more large companies to deal with in the digital economy, abuse control will become a more important tool than ever before. We can already see this in several proceedings like for example our *Facebook* case where we are examining Facebook's market power and whether it is acting abusively in the collection and use of its users' data.