Germany

An interview with Andreas Mundt

Andreas Mundt is widely praised for modernising the processes and structure of Germany's Federal Cartel Office. Faaez Samadi talks to him about his achievements and what remains to be done

You've been head of Germany's Federal Cartel Office for three years. How has the organisation changed in that time?
You can see there's been long-running development at the Federal Cartel Office over the last 10 years. But if we look back over the last three years – those that I have been responsible for – you can see quite a lot of changes. The first very important development is that we restructured our litigation department so now it gives more advice to the decision-making divisions in cartel proceedings. It has installed some more checks and balances within the FCO to make sure we get excellent decisions and better representation before the courts. We are one of the few agencies that stand alone before the court; we don't hire lawyers, we work together with the public prosecutor. So we now have people who know all about the procedural side. We knew a lot about cartel law and agency proceedings of course but not that much about court, so we have changed that.

There are also more people working in the communications unit. It used to be a one-man show but we've tried to make it a more professional department. We have also set up the third cartel division, which is mainly dealing with vertical price fixing in the food retail and supply sectors. It's a very big case, much bigger than we first thought, and we have reacted to that by having more resources and staff. The economics unit has also grown over the past three years. Including Christian Ewald, our chief economist, we now have eight people in the unit. I remember when Mr Heitzer [Bernhard Heitzer, former FCO head] set up the division in 2008 or so and it started with Christian Ewald alone.

What's your view of the suggestion that the FCO could place more emphasis on economics?
It is of increasing importance, you can see that from the number of people now working in the unit. If you look at our work, there is no big merger case in which we don't use a lot of economic expertise. We have to discuss the issues, and in Phase II there is no discussion with the parties without our economists being present.

Do you use economics on the behavioural side?
We only apply really robust economics. I wouldn't say behavioural economics isn't robust, but you have to make it robust for competition law. It's something we continue to look at to see if we can benefit from it. We want to learn more about how we can make the most use of it and our economists are dealing with this issue.

How has the financial crisis affected the FCO's work?
For the time being, the crisis isn't as severe in Germany as it is in many countries around us. But we've learned a great deal about dealing with crisis since 2008. We have shared a lot of experiences with other competition agencies. From my point of view, the consequences have been twofold. One is in cartel enforcement regarding inability to pay. We have taken a lot of care to make sure we don't drive companies into insolvency; we never want that. We try to take into account a company's ability to pay and we have increased our staff in that area. We have hired controllers and accountants, and while we have tried to maintain the level of sanctions, we are trying to help companies through deferred payments and 10 per cent fine reductions through settlements; all these fringe tools that you have besides simply lowering the sanction. And I think we have been quite successful.

The second issue is that we have seen fewer mergers since the crisis, which has been a bit of relief for the FCO. But it went up last year so now we're back to 1,200 mergers, which is quite high. But given the structure we have we can deal with these cases well.

The FCO has carried out a number of cartel enforcement in the past 18 months. Are there any particular reasons for this?

There are a lot of reasons. Last year was very successful, but success isn't measured by the size of the fines – success is if the markets work well. We are not going for high fines; they are a collateral result of our work. But these figures say something about the activity of an agency, and we have imposed €303 million in fines over the past 18 months. Of course that says something about our level of activity, and I think it's due to a couple of things. Firstly we have hired the right people. We also have stable teams, so some of the people working in them are well experienced. We've improved the litigation department, and altogether this has led to a better court record despite the fact that in Germany we have possibly the highest burden of proof in Europe. It also helps simply that we are now more visible. We have succeeded in transmitting our record to parliament, the ministry [of economics and technology] and to the public. People are more aware of cartels and the damage they do.

Has the FCO has developed a tougher stance towards cartels?

We strive to make sure we deal with these issues quicker. We have always had the aim of finishing a cartel investigation within two years, which is very difficult in large cases. In some big cases, such as the rail supply cartel, we have been faster for a large part of it. That's because many of our experienced investigators have been put on this case and this is how we would like to work every case.

As part of our cartel enforcement record, we also have a very good settlement record and procedure. We are very reliable. Companies that come in for settlement know very well how we will deal with their case and how negotiations go. Sometimes we settle, sometimes we don't, but we have a good record that is due to us putting time in to really get to the point. If we go into a negotiation, we know that if we don't get a settlement, we can close the case through an infringement decision. Companies also know that.

What is the current situation regarding the proposed reforms to Germany's Competition Act. Have they been finalised?

Not yet – it's a never-ending story. There is now a working group that consists of members of parliament and the Bundesrat [Senate], and they are trying to resolve issues around the health-care sector being subject to competition law enforcement. But there hasn't been any result yet.

What's your view on the issue?

We started the discussion. If the health-care sector says openly "we are in competition", that clearly means they should be subject to competition law. That is what the legislature wanted. If I see nine heads of public health service companies telling people "we're going to raise our prices"... just imagine other sectors trying to do that. We also need merger control in the public health sector. They are acting as companies so merger control rules should apply to them. But that view isn't shared by the public health services and this is the political nucleus of all the discussion surrounding the reforms right now.

Is there a time frame for finalising the reforms? Before the general elections?

By the time this is published there might be a result.

The merger control reforms are one of the most significant changes. What are your thoughts on moving to the SIEC (significant impediment to effective competition) test from the dominance test?

We have promoted this a lot because we believe it's the better economic concept. We were very hesitant in this area during the last reforms, which were in 2005. But we've since gained experience and seen that the competition world has moved into the area of economics so this is simply a better concept. I'm not sure there will be too much of a change to our practices. Dominance still plays an important role in this test and the jurisprudence we have in this area remains valuable to us, which was an important consideration. We have not fully harmonised with the EU regime, which makes sense for us. For example, we're sticking to having assumptions in Germany; people may ask why you need assumptions if you have an economic test, but it helps before court. As I've said we have one of the highest burdens of proof in Germany that you can have. So it makes a lot of sense to shift a little of that burden of proof to the parties to really prove that you have an SIEC. You always have to see a merger regime in the full context of the jurisdiction.

There will be some change, though. I expect that we will further refine our economic tools when applying the SIEC test in practice. We have a couple of units who are already looking at the issues of unilateral and multilateral effects and the efficiency defence. We need to work out how we are going to deal with these under the new test. All the economic developments we have made over the years have been under the umbrella of the dominance test. But we have a new test now and we will take a dynamic approach to applying it.

What are the FCO's enforcement priorities?

We don't have sectoral priorities. We focus on areas of competition law and one will be cartel enforcement again. I hope we will be able to improve our procedures in this area. We have been working on some old cases for a very long time, and it is time to close them. A lot them have been closed already through settlements and decisions, although we haven't issued any press releases yet because we're waiting until the last party has left the office with or without a settlement. But we will close the flour mills case in due course and a lot of others in food retail. Not the big vertical case, that may yet take some time, but all the other cases we have in this area. This is our focus at the moment and we're really working hard on it.

We will do some more work on vertical restraints. It's a problem throughout Europe. We have masses of complaints about vertical price-fixing and competition issues, many of them regarding internet sales. We have to figure out how to deal with these cases and we're not the only ones doing so. I know the OFT [UK's Office of Fair Trading] is working on similar cases. We have "best price" clauses in the hotel sector. How do we deal with that? To me that's nothing but vertical price-fixing. We even have these issues in some mergers. These cases are very complicated and you apply traditional competition law to completely new business cases that no one has ever dealt

with. It's a little bit like working with moving targets; things such as market shares are changing rapidly. To try and work out a theory of harm and working out what the companies are doing that constitutes an infringement is difficult. But we have people who are deeply involved in these very interesting cases.

Germany is one of the preferred forums for follow-on damages in Europe. But in light of developments in the UK, will Germany become a less desirable forum?

In Germany we have a pretty good system. Since the last reforms in 2005, private enforcement has developed very well. You have these claims aggregators like CDC [Cartel Damage Claims], which is something that really works. It's true we haven't seen very many court rulings yet, but as far as I know we have a lot of out-of-court settlements. So it seems Germany is a good forum for collective actions for larger claims, at least for the time being. Plus we have done something for the consumer associations; they can request cease-and-desist orders before the courts and they can pursue claims for consumers that have opted in. In the end, Germany is a wanted forum. That might change if we see these UK reforms, but as far as I know, to go before court in the UK is far more costly than in Germany. But every jurisdiction has features that are of benefit and detriment to claimants. In the end you have to find the right balance and it's a calculation of costs. I think the advantages in Germany are pretty clear: we have a very reliable court system and it's becoming stable in terms of legal certainty.

What's your opinion on the application of the European Court of Justice's (ECJ) *Pfleiderer* ruling by two German courts, both of which have rejected requests for access to leniency files?

We can live well with the ECJ's *Pfleiderer* ruling, both what the district court in Bonn has made of it [in the decorating paper case], and also the decision of the Higher Regional Court in Düsseldorf, which was a different case [coffee cartel investigation]. Two similar decisions in different cases means the precedent may be reliable for future cases. That is a big advantage, that leniency applicants know what they can expect. After the ECJ ruling we weren't very sure, we had no idea what the Bonn court would decide. That is all stable now. Nonetheless I think some legislation, be it at national or EU level, would be very helpful for competition agencies and I think we should have a level playing field in this area. In Germany we grant access to the decision but not leniency documents. In most cases they aren't very helpful to claimants because we calculate the fine on the basis of turnover. We don't look that much into the surcharges or financial gains made.

On the other hand, if you want to file a private action, even though we don't grant access to leniency files we have the regulation that the finding of an infringement by the competition agency is binding for the court. So the grounds for these claims are laid, and that is something we are envied for in a lot of countries. That is another feature in Germany that perhaps compensates claimants a little for us not disclosing the leniency file to the degree they want. But we have to observe a balance between the leniency applicant and the claimant.

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The FCO recently ruled that plaintiffs might potentially be granted access to different versions of the authority's decision. Why has this decision been taken?

It's a very good idea. There is a tension: you have the desire of the claimant to look at the file, and you have to protect business secrets. What you can do is go through that process in a very formal way, or allow some differentiations. You take the line that a certain business secret may be revealed to some and not to others. So we take the utmost care to protect business secrets but offer access to our files as far as possible. That's not easy for us, it's a very complex business, but you look for the right balance between all the requests in these matters. Of course, you must have the capacity and, for the time being, we can handle it. It's not often much of a difference; in most cases a business secret is not available for anybody to look at. But there are different cases. We want to support claims as far as possible but not to the detriment of our own work or the leniency applicant.

Your main concern must be protecting the integrity of your leniency programme.

Absolutely. When I began in this business I was head of the general policy division here. My first task was to set up the new leniency programme and all these issues we are discussing today we talked about back then in 2005 in my old office. It's very interesting that all these things that were theoretical problems back then have turned into actual practical issues today. That's really quite amazing. Even back then we tried to find that correct balance between providing legal certainty and giving the incentive to leniency applicants to come in. Eight years ago we knew it would be really difficult. Today, I must say that everything we wanted in 2005 has been fulfilled in 2013. I think that was an excellent path to balancing all these interests and I'm very happy that the ECJ has confirmed this. We can live very well with the state of play as it is and if you look at the European authorities, I think the German regime has many features you could copy. Other agencies also have great features too, but if you look at Germany you can see that things were more difficult and that development over many years has taken place and improved things.