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Andreas Mundt: Giving back to digital consumers

Interview | Concurrences N° 1-2022
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President
Bundeskartellamt, Bonn

Interview conducted by Thomas Vinje, Partner, Co-Chair, Global Antitrust Group, Clifford Chance, Brussels

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+ Interview

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Andreas Mundt: Giving back to digital consumers

Since 2009
President of the Bundeskartellamt

From 2005 to 2009
Director of the General Policy Division

From 2001 to 2005
Head of Unit International Competition Matters

2000
Entry into the Bundeskartellamt
Rapporteur with responsibility for banking and card payment systems issues

From 1993 to 2000
Desk Officer for labour and social law in the parliamentary group of the Free Democratic Party (FDP)

From 1991 to 1993
Entry into the Federal Ministry of Economics

You have been president of the Bundeskartellamt since 2009 and worked in competition law for several years before that. In recent years, we have seen a few companies gain such predominant power over key parts of today's global digital economy that issues regarding anti-competitive exercises of that power naturally increase in importance. These issues grow beyond even the realm of antitrust lawyers and become of central concern to citizens and senior politicians. How has this shift impacted your work? How much of your time do you currently spend thinking about big tech, and why?

The Digital Economy has been our focus for years, and I don't see this changing anytime soon. We are going through a tremendous transformation process that affects all of us—companies, consumers, competition, competition agencies.

What we have seen under COVID-19 is that this development has been boosted in two directions: COVID-19 has boosted the benefits of digitalization—just think about working from home, video conferences, online shopping. There is more awareness of how important digitalization has become, and there is more awareness of its necessity. I think these are positive effects.

However, COVID-19 has also boosted the drawbacks: big tech companies have become even bigger and more influential. When we talk to the business community, when we speak to the competitors of the big tech, they show growing concern about the future. We hear lots of complaints about potential anticompetitive practices, and these complaints become louder every day. We live in times where already a subtle hint of change to an algorithm by a big tech company can have a major impact on competition. Interventions need to be fast and effective, which poses a challenge to conventional antitrust law. So, it is no surprise that we are having a debate about what is the right approach, what is the right framework, for the digital economy worldwide. That is happening here in Europe, in the US, Australia, Asia, wherever you go.

As you mention, competition authorities and governments everywhere are designing and debating new frameworks to regulate big tech. I can think of one reason, based on my experiences as an antitrust lawyer. Enforcement cases in this sector have largely been ineffective, in part because they take so long. Take *Google Shopping*. The initial complaint, in that case, was made in November 2009, but the judgment was announced on 10 November 2021—a twelve-year gap. I helped draft the initial complaint in the *Google (Android)* case back in 2009 but waited over ten years to plead before the General Court, in September of this year. From your perspective, however, why is there a need for different regulatory tools? Does the digital economy present "new" problems, against which existing competition law is ineffective?

In my view, there are plenty of excellent competition cases which have dealt with big tech companies and have been successful. Besides *Google Shopping*, take for example our *Amazon* case or *Booking.com*. Consider the adjustments we achieved in Amazon's terms for sellers worldwide or how we addressed Booking's broad and narrow price parity clauses. This shows: you can, at least in principle, apply the current competition law to the digital economy.

*Based on an exchange at Chatham House Competition and the Digital Economy Panel organized by Concurrences Review on 18 November 2021.

> "There are plenty of excellent competition cases which have dealt with big tech companies and have been successful"

What is new, from my perspective, is that such companies grow to become operators of what we sometimes call "digital ecosystems," in particular through network effects and data-driven processes. This can go beyond traditional market-related dominance, as we are facing integrated and conglomerate structures across markets. And as we have seen, traditional abuse control can entail a lengthy process. This is why I believe that we need a certain degree of regulation and a strict application of competition law, including stringent merger control, in order to prevent a "tipping" of markets.

Sticking with mergers, we understand merger control within the digital economy is an area that has provoked and continues to provoke calls for reform. How do you think our approach to mergers could, or should, change?

In recent years, there has been some impetus for reform. In Germany, we have introduced the transaction value threshold, which amounts to €400 million and helps catch certain types of mergers. In the public debate preceding the recent amendment of the German Competition Act, it was suggested to ease the standard of proof or reverse the burden of proof. Now we have lots of discussions about "killer acquisitions," which the new German government coalition has also put on its agenda. The problem is, they are not easy to tackle in the world of big tech. There are mergers that strategically contribute to market dominance in the future or might build a monopoly. But as competition authorities, we have to deal with the merger at the time it is notified. How are we able to tackle the strategy behind the merger if, for the time being, the merger does not amount to a problem enabling us to prohibit it? In my opinion, we have to think about this. Merger control is of utmost importance. It is the only tool at our disposal to prevent too much market power from falling into the hands of too few.

Let's turn specifically to Germany. The Bundeskartellamt has been a pioneer in the digital sphere, in particular with the new amendment to your Competition Act, Section 19a, which provides for new regulatory tools targeted at big tech. How do you think Section 19a differs from existing European competition law, and has it influenced action in other Member States?

If you take the perspective of Germany, I think it is fair to say that from early on the digital economy has been a key topic for legislation and enforcement. We had the first provisions pertaining to the digital economy in our law, in the German Competition Act, already in 2017. That was followed by the 10th amendment to the German Competition Act in early 2021.

The focus of the new Section 19a in the Germany Competition Act is to strengthen abuse control vis-à-vis large digital companies. In a nutshell: we are going to address undertakings of paramount significance across markets. For this, a designation process and a designation decision are required as a first step. In a second step, we can activate specific prohibitions with regard to certain kinds of conduct—for example, against self-preferencing, hindering interoperability, envelopment strategies in certain markets. The respective dos and don'ts can also be activated for markets in which the company is not yet dominant and even if a certain practice is not yet being practised. On this basis, we can intervene earlier and more effectively. Immediately after the new law has come into force, we initiated proceedings against all four GAFA companies on this basis. Under the new rules, we will also benefit from a shortened judicial review in the future. There will be only one instance in which decisions based on Section 19a can be challenged—the Federal Court of Justice. In some other Member States within the EU, similar rules have been suggested: Section 19a has been taken as a model for similar competition law provisions for example in Italy, and others are considering national rules for ecosystems, for example in Greece.

> "We are going to address undertakings of paramount significance for competition across markets"

What are some of the key differences between Section 19a in Germany and proposals taking shape elsewhere, such as the European Union's Digital Markets Act (DMA), the UK's "pro-competitive regime," and the US's tech-focussed antitrust reform bills?

First of all, it is important to keep in mind that all of these proposals share one common goal—to make digital markets more contestable and to limit the harmful impact of the strong positions of some platforms. It is all about benefiting competition and giving back choices to consumers. This is the common goal of all approaches we see worldwide.

However, there are both similarities and differences in some important details: the UK proposal is quite similar to Section 19a in that it addresses undertakings with so-called strategic market status. Furthermore, in Germany and the UK, addressees will be identified through a holistic assessment. The US proposals explicitly include numbers and figures like turnover, monthly active users, or market capitalization in determining addressees, not unlike the presumptions in the DMA. Of course, if you use such criteria, the process might go faster, but it carries the risk that measures might be less targeted.

Another difference is that the DMA contains a set of very specific rules, which are characterized as self-enforcing by some. While this sounds very effective, I wonder what happens if companies come around with new behaviour, not mentioned specifically in the DMA. What if they claim a certain complex change of an algorithm is benign? That is the reason why the broader Section 19a in Germany provides for a case-by-case assessment that will be able to adapt more easily to the dynamic changes of markets and the complex technical change we see almost every day.

Let's now turn to the DMA which will enter trilogue negotiations between the European Commission, European Parliament and Council of the European Union in early 2022, under the French presidency. What are your thoughts on the current draft of the DMA? If you had the chance, what aspects would you change?

First, the DMA has been particularly motivated, like Section 19a, by threats that are posed by digital ecosystems. Regarding the scope, I think we should be very cautious not to submit companies to this extended regulatory framework that cause no problems. In the current draft of the DMA, quantitative criteria are used in the context of presumptions for designating an addressee. This might be difficult if you have very specific problems with very specific business models and companies like in the digital economy but only a few general quantitative indicators.

Secondly, I think we need further clarification with regard to the relationship between competition law and the DMA. This also relates to the question of who is going to enforce the DMA.

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These questions still need to be answered. So far, despite the fact that all national competition authorities support a more active role for themselves in the enforcement of the DMA, the EU institutions (Parliament, Commission, and Council) have not shown themselves to be receptive to this position.

Indeed, these questions are some of the most hotly debated in the DMA. The Parliament is proposing the creation of a European High-Level Group of Digital Regulators to facilitate cooperation and coordination between the European Commission and Member States in enforcement decisions. The Members of the European Parliament (MEPs) have supported keeping the Commission central to enforcing the DMA. The Council has also supported the European Commission being the sole enforcer of the DMA while allowing Member States to empower national competition authorities to start investigations into possible infringements and transmit their findings to the European Commission. If it were up to you, what would govern the relationship between the Commission and national competition authorities when it comes to the application of the DMA? Do you think this should be different from the relationship between the Commission and national competition authorities when it comes to the application of European and national competition law? Do you see a role for the European Competition Network (ECN)?

I personally believe that the DMA will be most successful with DG Comp as its main enforcer. If a different DG is designated to enforce the DMA, there will be a need to coordinate between those applying Article 102 and those enforcing the DMA. But I also think that there should be an option for complementary interventions by the national competition authorities enforcing the DMA besides DG Comp. The national competition authorities have done brilliant cases in the past. I believe that the DMA would benefit immensely from a cooperative framework such as the ECN, which has proven its value in competition law and has avoided enforcement bottlenecks in the past.

When we started the ECN, many voices said that it would be impossible to get so many different agencies to work together and that this would lead to contradicting case practice across the EU. Nevertheless, it did work and, if I may say so, very successfully. Some German and French cases have had EU-wide or even worldwide implications. Think of the French *Ad Tech* case in 2021 or our *Amazon* case in 2019.

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The implementation of the ECN into national law has played an important part in this. We should use this existing structure, as well as the resources and the cumulative case experience within the ECN, and involve the national competition authorities in the enforcement of the DMA. I believe this is of utmost importance if we want to tackle big tech and if we want to have an impact on the markets. To achieve this, we will need to combine our forces and work together.

You've had a fair bit to do with the question of how data protection law and competition law interact. One pertinent example is your 2019 case against Facebook. In this case, you considered whether Facebook's data gathering—by depriving users of choice as to how their data is processed—infringed German competition law. Your findings were upheld by the Federal Court of Justice. You also looked at Facebook's lack of compliance with the General Data Protection Regulation (GDPR). However, in its judgment, the Court doubted that breaches of GDPR by dominant undertakings would be sufficient to justify intervention under German competition law. As this example demonstrates, the relationship between data protection and competition is clearly a very live issue. What do you see as the future here? What is your ideal for how these two bodies of law can interact?

The relationship between competition and consumer laws and policies has been the subject of intense discussions for over a decade. In our *Facebook* case, the Higher Regional Court in Düsseldorf referred certain questions with regard to the GDPR to the European Court of Justice (ECJ). I believe that if you want to assess cases like this as a competition authority, you have to look at the way data is gathered and used. Data-driven power is key for these markets. And for the users, their data, their choice, and

voluntary consent are at stake, especially when facing a dominant company. We hope that the ruling of the ECJ will provide guidance on how to include data-related market power into our assessment.

This topic is also actively being discussed within the International Competition Network (ICN), where a special project on the intersection between competition law, privacy, data protection, and consumer protection has been initiated, which will provide more visibility to this topic. I am also happy that this important topic is now being addressed in the DMA. ■

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