



INTERVIEW WITH ANDREAS MUNDT: PRESIDENT OF THE BUNDESKARTELLAMT



In recent months, the Bundeskartellamt (BKartA) has been very active in antitrust advocacy and enforcement. Good examples of this are the Joint Report with the French Competition Authority regarding Big Data, the opening of an investigation against Facebook and the most recent report on Market Power of Platforms and Networks. It seems that a new era where competition, consumer protection and digital markets go hand in hand has begun, and your office is leading this effort in Europe and, to some extent, in the world.

1. Please, could you tell us why this is the right moment to address these issues and these markets?

Digitalization and the internet economy are increasingly affecting more and more of the economy. This is certainly a demanding development not only for the business community but also for competition agencies.

The internet economy raises new questions regarding competition law enforcement. The conduct and strategies of large internet companies are provoking intense discussion about the competitive harm these strategies cause, whether they are legal and to what extent they should be subject to control. Against this background the Bundeskartellamt launched an “Internet Think Tank” in early 2015.

The Think Tank has three main tasks: first, to conduct in-depth research on existing literature and – national and international – case law, second, to develop concepts on how to assess cases in the digital economy. Third, the Think Tank supports case teams by offering a platform to discuss their ongoing cases in digital markets and help to apply new concepts in



practice.

2. The Big Data report and the Market Power on Platforms report were released almost at the same time. Does this mean that it is necessary to really understand both subjects to adequately face the upcoming challenges for competition and regulation?

In many cases the implications of big data and of the network effects and other specifics of platforms often go hand in hand.

Today many firms achieve high turnover based on business models which involve the use of data. For us as a competition authority it is important to understand and determine whether, how and to what extent data can become a factor contributing to market power.

Companies in digital markets often also benefit from network effects. Consider real estate platforms as an example: A large platform is often more attractive to new users looking for real estate as it can offer a larger number of real estate offerings. At the same time, a large number of users makes the platforms more attractive to real estate offerings. Because of this effect, many digital markets show a certain tendency towards concentration.

All in all, we can see two somehow opposing trends in the internet: On the one hand, the digital economy is very dynamic and new ideas and business models can grow fast. On the other hand, the heavyweights can make use of big data and network effects to gain a competitive lead which might make it difficult for newcomers to keep up with them.

Therefore, protecting competition in the Internet means above all keeping markets open for competitors, newcomers and new business models, especially by controlling abusive practices. Enforcing competition law in a consistent manner greatly contributes to maintaining the dynamics of the web.

3. These two reports came soon after the BKartA opened the Facebook investigation, which may address consumer protection and competition concerns. There has been a long debate whether these two areas of law should be dealt with together or separately. What is your view on this?

It is a pending case, so I cannot talk about any details. In general, I can say that we are not a data protection authority. However, if our investigation shows that Facebook is a dominant company and if it uses unlawful terms of service on the use of user data, then this is maybe something not only for data protection officers. There could also be a link to competition law. *Dominant companies are subject to special obligations. They are not allowed to abuse their market power. They are also obliged to use adequate terms of service as far as these are relevant to the market. For advertising-financed internet services such as Facebook, user data are hugely important. For this reason it is necessary to examine whether the terms and conditions could represent an abusive imposition of unfair conditions on users.* The Bundeskartellamt is conducting the Facebook proceeding in close contact with the competent data protection officers and consumer protection associations.



There have always been many connections between competition law and consumer protection. As I mentioned, in the digital economy there can be a tendency towards concentration. Therefore, we might see more abuse of dominance cases in the future than before. I have always said that the protection of fair competition is also the best protection for consumers. In the digital economy this statement is more fitting than ever before.

4. After reading both reports, it is clear that the BKartA shares the view that data could constitute a market itself and accumulation of data could result in market power. The BKartA also suggests, referring to Evans & Schmalensee, that new elements (such as the relevance of direct and indirect network effects, the access to data or the innovation potential in digital markets) need to be considered in the analysis of market definition and market power. Are competition authorities ready to move away from traditional analysis and adopt a more innovative approach in these new markets?

First, let me stress that we did not take a position on whether data constitutes a market in itself. We see, however, that in digital markets services are often offered free of charge. These free-of-charge services are often financed by targeted advertising that is based on data that a provider collects from the user. In that respect you could consider that a user “pays” for the service by providing personal data in response to targeted ads.

Second, recent case practice shows that the classical tools of competition law are generally sufficient to deal with most of the new issues arising in the context of digitalization. Competition law is a lively and breathing law, designed to cope with all kinds of economic developments and disruptions.

Nevertheless, the Bundeskartellamt is in regular contact with lawmakers to discuss how the legal framework could be adjusted and fine-tuned to tackle the issues in this area appropriately. In 2016 we will see the introduction of an Amendment of the German Competition Act. In this amendment it should be considered whether to expand the criteria for dominance. Network effects and the access to data can be important factors for the market position of any company, they can be a potential source of market power. Other competition parameters such as price competition or market shares as an indicator of market power tend to be less important for some cases in the internet economy than for more traditional markets.

5. The publication of these reports has raised (even more) interest in big data, online platforms and the matchmaker economy. Many people are waiting for the BKartA’s next steps. What could you tell us about the advocacy and enforcement priorities for this year and the next? Does the BKartA plan on collaborating with other competition authorities in the near future?

I think that with the reports on Big Data and on the market power of platforms and networks we have now built a theoretical fundament to cope with the new challenges in the digital economy. Now it is crucial to use this knowledge for conducting cases. As you know, we have several proceedings, for example Facebook and CTS Eventim. Especially in our



online cases we are always in close contact with the European Commission and the competition authorities of the other EU Member States.

In addition to the internet economy, the Bundeskartellamt will be working on numerous other proceedings and projects across all sectors. Of course, in the coming years we will also still give high priority to the prosecution and punishment of cartels.