

Competition Law Developments in Germany: Three Things We Are Watching

A photograph of a modern building with a curved, glass-and-metal facade, showing multiple floors and windows, set against a light blue sky.

4 MIN READ

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As counsel to global companies, we often guide clients through not just U.S. antitrust issues, but also through a global antitrust landscape. Whether it is a merger or a business practice, it is crucial to understand how all the global pieces fit together.

Because Germany plays a key role in shaping competition law across Europe, we follow developments there, with help from our German law firm partners. And we follow, with interest, the commentary and debate in Germany and across Europe.

Developments in German competition law are a good lens through which to watch Europe more generally. A German (Ursula von der Leyen) holds the presidency of the European Union. And, its national competition law enforcer (the Federal Cartel Office) plays a key role in setting policy that affects many of the largest companies operating in Europe. For these reasons alone, the voice of Federal Cartel Office President Andreas Mundt provides a good window into where competition law is heading in Germany and, perhaps, across Europe.

As U.S. antitrust lawyers, here are three topics where we are following Mundt's comments with interest:

1. Whether to change competition law to allow more mergers, and how to reduce the time and expense of merger reviews?

Questions remain as to how current merger enforcement will be adapted to increase innovation and Europe's competitiveness overall since the publication of the September 2024 Draghi report. The report lays out a number of recommended changes to the European Commission's enforcement policy, including putting greater weight on future innovation in merger review and also generally revising the process by which competition policy is enforced "to make business operations easier and faster" and to reduce the burden on companies where possible.

Following the publication of the Draghi report, Mundt commented that "how Europe can regain competitiveness cannot be answered without competition" and he made clear that he "strongly rejects calls for weakening merger control," an approach that he did not read the Draghi report to advocate. Mundt further stated in an interview with GCR last month that, at least for the time being, the Federal Cartel Office is making "no political attempts to reduce the number of mergers." Mundt emphasized the efficiency of Germany's existing merger control framework, as one that already does not require pre-notification and includes "very limited requirements in the application."

In line with these comments, at the Cristina Caffara conference held in Brussels just a few weeks ago, Mundt seemed to warn against further changes in existing competition law, instead calling for less bureaucracy and more "entrepreneurial freedom." In some ways, this is the crux of the question in Europe (and elsewhere) — how much will antitrust law be blamed for slow growth? Mundt is pointing a finger at overregulation, just not in the competition law arena.

2. Whether and how to rehabilitate EC jurisdiction over so-called "killer acquisitions" following the Illumina/Grail ruling?

The European Commission's ability to scrutinize "killer acquisitions" was significantly hampered after the European Court of Justice's ("ECJ") ruling in the Illumina/Grail case in September 2024. In that decision, the ECJ determined that national competition authorities of EU Member States must have jurisdiction to review a deal themselves before they could refer the deal to the Commission under Article 22 of the EU Merger Regulation.

In the wake of Illumina/Grail, Mundt has continued to advocate for Member States using deal value thresholds as the way forward to balance both legal certainty and the intent to "get in the right mergers." This is in contrast to reliance on "call-in powers" or legal provisions that enable a competition authority to compel merging parties to file a notification even if the merger falls below traditional notification thresholds. In an interview given to GCR in November 2024, Mundt made clear the FCO's desire to lower the transaction value threshold from €400 million to €300 million and expressed his skepticism towards the growing number of member states seeking to rely on "call-in powers" following Illumina/Grail.

There seems to be a strong consensus among the largest Member States that national regimes should be changed to create Article 22 jurisdiction for the European Commission over so-called "killer acquisitions," but there is an ongoing dialogue over what form those changes should take. Mundt seems doubtful of call-in powers.

3. How to review AI “acqui-hires”?

Recent decisions in Germany have further highlighted new challenges presented by acquisitions in the AI space. Last Fall, the Federal Cartel Office considered whether Microsoft’s hiring of almost all of the employees of Inflection AI, a technology start-up known for developing the chatbot “Pi,” was notifiable under German merger control rules. At the time, Mundt commented on the Federal Cartel Office’s desire to examine the prospective operations of AI companies as part of its merger control process, as cases of AI show that “if we look at domestic impact, and only look at the current operations that these companies perform in Germany, it might not be sufficient to catch these mergers.”

The Federal Cartel Office ultimately determined that it could not review the transaction as Inflection AI did not have substantial operations in Germany at the time. Mundt nevertheless stated that the Microsoft/Inflection case showed “that German competition law can also cover less traditional takeover plans in the digital sector” including these types of “acqui-hires” that “mainly concern young, innovative companies in the digital sector, such as those involved in developing artificial intelligence.”

Mundt seems determined to maintain flexibility to address developments in the AI competitive landscape, but whether the FCO has the powers to do so remains unclear.

These are just 3 issues out of many, but they are the ones we are watching right now as a sign of future policy in Germany and across Europe.



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