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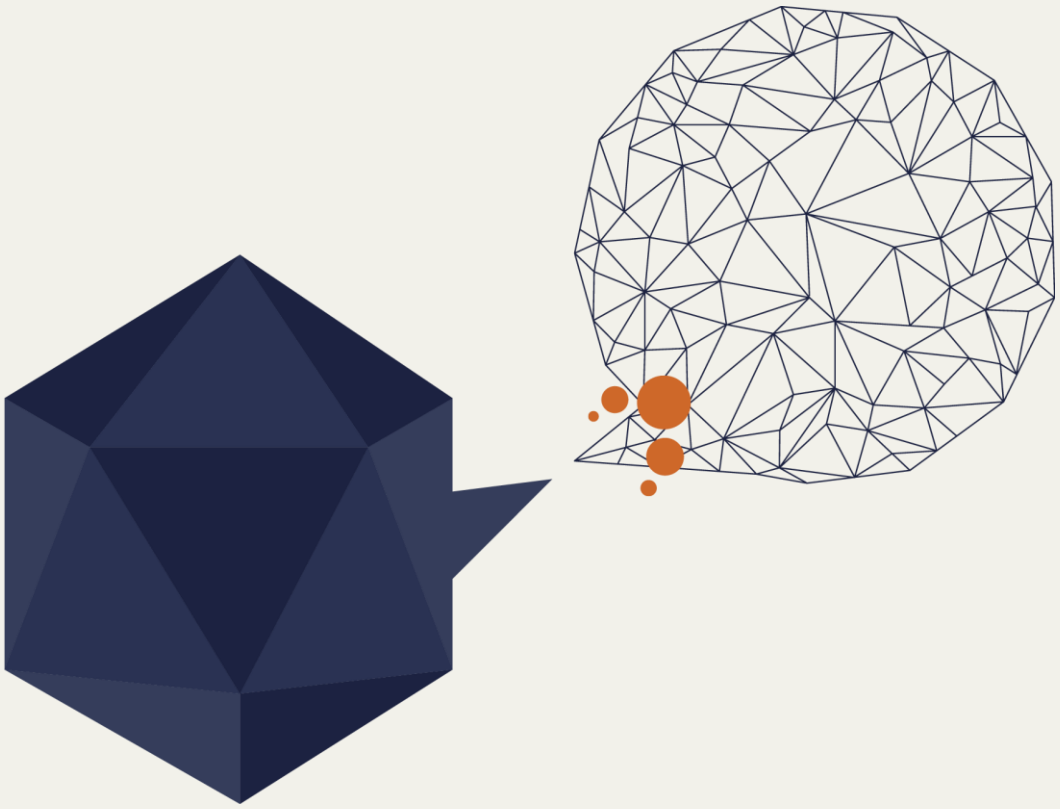

Competition Outlook 2021

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/ Review:
Key Trends in 2020

/ Covid-19 pandemic

/ Renaissance of State aid law in times of pandemic

Following the beginning of the pandemic and especially after the shutdown measures taking effect in Germany and many other EU Member States, governments have been adopting extensive emergency programmes to support the companies concerned. Most emergency programmes have to be qualified as State aid since they grant advantages for certain undertakings or sectors through state resources. They therefore require prior review and approval by the European Commission.

The European Commission reacted promptly and issued a legal framework addressing the compatibility of such programmes and measures with EU State aid standards. For example, as early as 19 March 2020, following consultations with the Member States, the "Temporary Framework" was adopted for State aid measures which was later expanded four times. Only shortly afterwards, the European Commission approved the first national programmes, including those of Germany and France. The Member States rarely have any leeway to introduce national programmes deviating from the Temporary Framework, so the conditions referred to there usually also apply to companies in practice. The Temporary Framework, in principle, will continue to apply until the end of June 2021.

According to the requirements of the Temporary Framework, the following aid can be approved for companies that were not already in financial difficulty on 31 December 2019:

- Direct grants, repayable advances and tax advantages of up to EUR 1m to address urgent need for liquidity;
- public guarantees on bank loans taken out by companies;
- subsidised interest rates for loans;
- recapitalisation and subordinated debt;
- aid for microenterprises and start-ups;
- incentives for the participation of private investors in recapitalisation measures;
- State aid for Covid-19 relevant research and development, the production of medicinal products, medical devices, protective equipment, etc. and investment aid for testing and upscaling infrastructures;
- aid for uncovered fixed costs of up to EUR 3m;
- deferrals of tax and/or social security contributions;
- wage subsidies;
- short-term export credit insurance for marketable risks.

For Germany, roughly 15 programmes have been approved, including the Economic Stabilisation Fund, the KfW Special Programme 2020, guarantee schemes, interim aid, Coronavirus emergency aid and, most recently, the November aid for businesses affected by the government ordered closure as part of the "wave-breaker" shutdown in November.

In addition to the Temporary Framework, the European Commission has also approved individual State aid granted to companies (such as Condor) and State aid programmes for certain industries on other legal bases.

Since the issuance of the Temporary Framework, more than 300 decisions have been delivered to approve State aid notified by Member States. What is interesting in this context is the imbalance which is viewed sceptically by politicians in Brussels: More than 50% of the State aid approved by the European Commission concerns Germany; followed with a considerable gap by Italy, France (approximately 15% each) and Spain (approximately 5%). Irrespective of this, the European Commission has shown that the State aid rules can be applied quickly and as required by the specific situation to tackle the economic difficulties previously unheard of in this form.

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/ The failing firm defence in light of the Covid-19 crisis

Germany, like many other countries, is experiencing the second major wave of the Covid-19 pandemic in the winter months of 2020/21. It is a well-known fact that this pandemic, in addition to the serious health effects, has also brought considerable economic problems. A large number of insolvencies can be expected, especially after the suspension of the obligation to file for insolvency ends (see here – German only). A possible way out of or around insolvency may be a takeover or an investment by another company. But, if this company is already active in the same markets as the distressed company and the takeover results in high market shares, such a rescue threatens to fail due to obstacles under merger control law. However, if the merging companies succeed in demonstrating that the weakening of competition in the markets concerned would also occur without the prospective merger, these hurdles can be overcome. This is typically referred to as a failing firm defence.

However, the German Federal Cartel Office generally sets high requirements for the failing firm defence. An easing of these requirements does not seem to be in the offing despite the economic hardships caused by the Covid-19 pandemic. The parties to the merger have to prove that (i) the exit of the company to be acquired from the market is imminent without the merger, (ii) there is no alternative buyer whose takeover would have less harmful effects on the market concerned and (iii) the market shares of the distressed company would "essentially accrue to the acquiring company" in the event of market exit even without the merger. Only if all these conditions can be demonstrated as being met and the weakening of competition is therefore not due to the merger, clearance by the German Federal Cartel Office and other competition authorities can be expected.

Typically, presenting suitable evidence that convinces the competition authorities that the listed conditions are met turns out to be particularly difficult. While presenting comprehensive internal and external valuations showing the financial situation of the company usually poses the least problems, it is above all difficult to prove that there is no alternative buyer whose merger with the distressed company would have less harmful effects on the competitive situation. This is because the parties have to prove the absence of a fact. Experience in practice has shown that this requires at least evidence showing that the seller has made sufficient efforts to sell the business to other parties. Documenting a bidding process can be a suitable method, for example. It is then up to the notifying companies to explain why individual bidders cannot be considered as actual purchasers.

In cases where the failing firm defence is being considered, the German Federal Cartel Office and/or other competition authorities should in any case be informed of the possible project at an early stage and involved in the process. This is the only way to establish a reliable basis for plans providing a minimum level of security during this critical phase.

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/ Impact of the Covid-19 pandemic on German competition law

In light of the Covid-19 pandemic, two interim rules of relevance for German competition law were adopted in 2020 under the Act "to mitigate the consequences of the Covid-19 pandemic in competition law and for the self-governing organisations of the commercial sector" which came into force on 29 May 2020:

For concentrations subject to merger control by the German Federal Cartel Office which were notified between 1 March 2020 and 31 May 2020, the examination period in Phase I was temporarily extended from one to two, and in Phase II from four to six months. The intention was to accommodate the delays in work processes caused by the Covid-19 pandemic, in particular in market surveys. The rule was not extended for notification after 31 May 2020.

In addition, the obligation to pay interest on antitrust fines has been suspended to take additional commercial pressure off the fined companies, and this suspension will continue to apply until 30 June 2021.

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/ Cartel damages in Germany

/ The Federal Court of Justice puts claims back on track

With no less than four leading rail cartel decisions in 2020, the newly composed cartel division of the German Federal Court of Justice clarified essential aspects of the elements giving rise to a claim, defining clear requirements for lower courts and their decisions in a large number of pending cartel damages proceedings.

The first decision in the series was the **rail cartel II** judgment of 28 January 2020 (case number KZR 24/17 – German only), where the cartel division made it clear that the being a "party affected" element of the offence which has to be proven in accordance with Section 286 German Code of Civil Procedure has to be construed widely in the light of European law requirements: If the anti-competitive conduct in sales transactions or otherwise is likely to directly or indirectly give rise to damage, the element of being a "party affected" is fulfilled. It therefore depends on whether the claim is covered by the scope of the cartel in terms of products, time and territory. As to cause, the Court finds that an overall assessment of all elements is required. Courts have somewhat more discretion here – based on the standard of Section 287 German Code of Civil Procedure – but there is no *prima facie* evidence supporting a claimant's cause. However, the rule of experience that cartels do cause damage, gives rise to a strong factual presumption and has the effect of circumstantial evidence. Expert opinions cannot substitute the judges' overall assessment and do not prejudice any outcome (our comments on the judgment).

This was followed by the **rail cartel III** (case number KZR 70/17 – German only) and **rail cartel IV** decisions in May 2020. In the first of these, the German Federal Court of Justice stressed that cartel members are jointly and severally liable under Sections 830, 840 German Civil Code (BGB) and that there is no need to differentiate based on which of several individual agreements a party participated in if it has been established that it was party to the fundamental agreement. The **rail cartel IV** decision (KZR 8/18 – German only) then addressed the question of "umbrella" price effects and the assessment to be conducted in this context. To reflect the extended "party affected" concept established in the Otis decision of the European Court of Justice (case number C-435/18), the German Federal Court of Justice recognised that the damaged party has to accept that any causal public law grants received will be considered to be a benefit of such party.

The German Federal Court of Justice's antitrust division ends its year with its **rail cartel V** (judgment of 23 September 2020 – KZR 4/19 – German only) which was published in December: On the one hand, the court thereby clarifies the standard of examination for the overall assessment by the judges and circumstantial evidence for damage resulting from cartels. In that context, the court clearly renounces a reversal of the burden of proof for the benefit of those damaged. If there are any doubts remaining in the overall assessment as to the occurrence of the damage, the claim has to be dismissed. On the other hand, the court thoroughly

addresses the issue of passing-on damage and the details of the submissions required for this. However, the court also finds that the passing-on defence may be excluded for reasons of law if it would lead to a cartel member being unreasonably disburdened, e.g. if in the event of dispersed damage it is unlikely to be held liable more than once by the next market level. In this context the court relies, among other things, on the idea that a civil law claim for damages serves effective enforcement of the ban on cartels.

In addition, with the start of 2021, a FCJ decision on the **truck cartel** (judgment of 23 September 2020 – KZR 35/19 – German only) was published. In its first judgment on the truck case (Noerr is representing truck manufacturer DAF in this matter) the Federal Court of Justice upholds its position regarding the broad binding effect of the factual and legal findings in decisions of antitrust authorities. The courts deciding the case also have to fully take such findings into account in their overall assessment. Furthermore, the antitrust division also assumed in the truck case that a principle derived from experience applies, namely that as a result of the infringement the prices achieved are generally higher than those which would have applied without the restrictive agreement. The antitrust division also decided that a suspension of the limitation period is already triggered by investigations of the European Commission. In the end, however, the appeal on questions of law lodged by the truck manufacturers was nevertheless successful because the Higher Regional Court (*Oberlandesgericht*) had also failed to fully consider the defences brought forward by the defendants in this case and erred in law when considering the factual presumption as facilitating proof for the benefit of the claimant. The Higher Regional Court therefore has to rehear and reassess the case.

This defines a clear framework and the note for future years: The lower courts have to examine individual violations and to thoroughly consider the parties' submissions – including their submissions on economic factors. It is obvious that the Federal Court of Justice imposes a strict standard on the work of the judge deciding the case and that the concept of factual presumption in this context is no more than an indication the weight of which is to be determined from time to time in the specific case.

Finally, there is another 2020 development which deserves emphasis: German courts view claim pooling by collection agencies critically. For instance, in its judgment of 7 February 2020, Munich I District Court (*Landgericht*) held that the assignment of cartel damages claims of various companies to Financialrights was invalid and dismissed a EUR 600m action brought against a truck manufacturer represented by Noerr. An activity which from the outset is only targeted at enforcing claims in court is also not covered by the collection licence. In addition, conflicts of interest arise when claims are pooled and due the involvement of litigation funders. Other courts followed this view stating similar reasons. The German Federal Ministry of Justice and Consumer Protection is currently preparing a reform of the Legal Services Act (German only) which addresses individual criticisms for the future.

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/ Merger control in the EU

/ Fewer merger bans by the European Commission?

In a noteworthy judgment of 28 May 2020 (Case T 399/16), the General Court of the European Union annulled the European Commission's prohibition of the proposed acquisition of Telefónica Europe Plc (O2) by CK Hutchison. It was the first time that the General Court of the European Union has dealt with the application of the European Merger Regulation (EUMR) to non-coordinated effects of a concentration in oligopolistic markets with few suppliers.

The judgment establishes and clarifies important concepts of the substantive test of "significant impediment of effective competition" (SIEC) and the standard of proof under the EUMR in relation to merger-specific efficiencies.

In order to prohibit a transaction, the General Court of the European Union states that the European Commission must explicitly involve the following circumstances in its assessment:

1. Elimination of important competitive constraints that the merging parties had exerted upon each other.
2. Reduction in the competitive pressure on the remaining competitors.

In that respect, the General Court of the European Union stresses that only a merger between particularly close competitors can give rise to competition concerns at all. The fact that the merging parties may be relatively close in some market segments is not sufficient for a prohibition, as otherwise any four-to-three merger would have to be prohibited. Moreover, the acquisition of a competitor in an oligopolistic market does not necessarily eliminate an important competitive force; the latter would have to stand out from its competitors in terms of its impact on competition.

Finally, the European Commission has to prove that prices would be likely to increase significantly after the elimination of the strong competitive pressure. Interestingly, the General Court of the European Union requires the European Commission to include the standard efficiencies that the merger could bring about. Finally, strict standard-of-proof requirements must be met. The European Commission is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments.

The judgment marks a major setback for the European Commission's approach to assessing competition concerns that are not covered by the classic dominance test. After this judgment, the European Commission may find itself in an awkward situation. On the one hand, it has to satisfy the requirements set by the General Court of the European Union, while on the other hand meeting the demands for a close scrutiny of what is known as "killer" acquisitions (acquisitions of start-up or nascent firms where there is significant uncertainty over the counterfactual) and finally also political demands of the Member States for a more dynamic and long-term approach to mergers. Will the judgment make consolidation easier?

Probably not – it is more likely to mean that investigations of critical transactions will become more protracted and burdensome for the companies concerned. The European Commission has appealed against the ruling.

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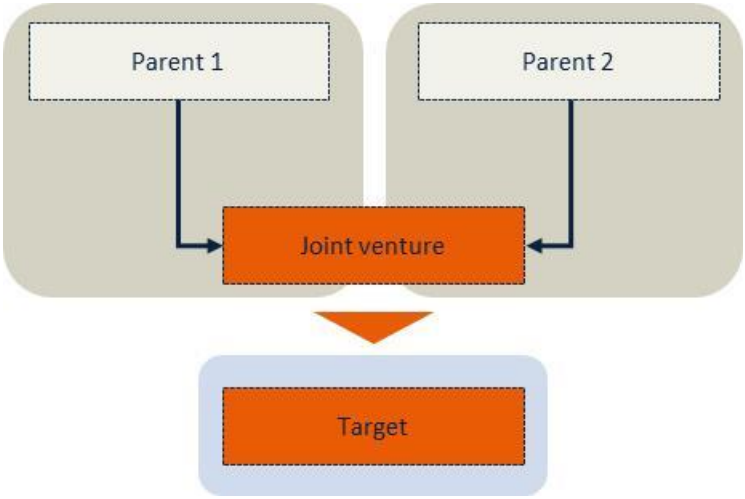
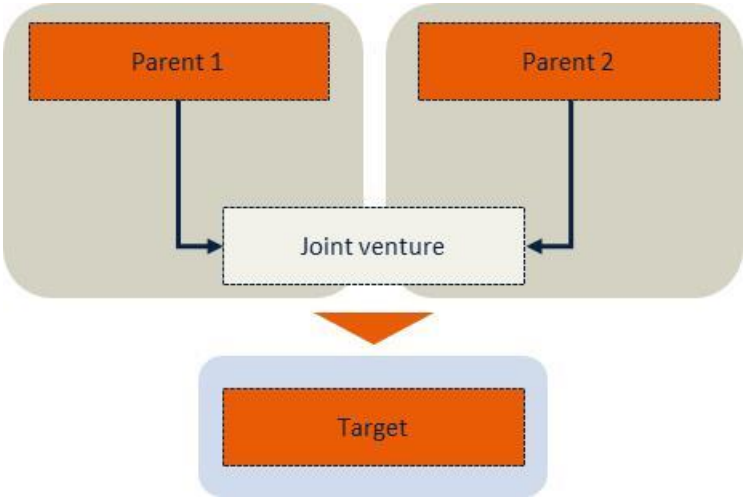
/ News on the calculation of turnover for joint ventures in EU merger control

Transactions have to be notified to the European Commission only if a certain EU-wide turnover has been generated by *each* of at least two undertakings concerned. If a jointly held joint venture acquires a company, the question arises with respect to the calculation of turnover and jurisdiction of the European Commission as to which of the companies are the undertakings concerned. The following chart shows this:



The two undertakings concerned in this case are, firstly, (i) the joint venture and, secondly, (ii) the target. An EU merger notification is only required if *each* the joint venture and the target reach the EU thresholds. If the target's turnover is too low, a notification in Brussels is not required. However, national notifications may be required.

The situation is different if the joint venture is not an undertaking concerned while the two parent companies are:



In this example, three companies are involved: (i) parent 1, (ii) parent 2 and (iii) the target. As a result, parent 1 and parent 2 can already reach the EU turnover thresholds. Even if the target generates zero or only little turnover in the EU, a notification in Brussels may nevertheless be required.

When determining whether the turnover of the joint venture or that of the two parent companies has to be considered, the General Court of the European Union based its assessment for the judgment of 5 October 2020 (T 380/17, *HeidelbergCement AG/Schwenk Zement KG v. European Commission*) on who the actual economic players are, i. e. those essentially initiating, organising, and financing the transaction. The following elements suggest that the parents play a significant role:

- The joint venture is a mere vehicle for acquisition.
- Representatives of a parent company determine the composition of the steering committee and attend negotiations at an early stage, negotiate non-disclosure agreements, organise the due diligence, plan the integration, prepare the documentation, engage with banks and negotiate the purchase price.
- The other parent company is regularly informed and involved in considerations regarding the transaction structure.
- The joint venture has no human and/or other resources to manage a transaction of this size alone; however, an independent market presence (so-called “full-function”) is irrelevant.
- The parent companies ultimately provide the capital for the own funds and authorise the financing.

The judgment shows once again how important it is to thoroughly analyse the data relevant for establishing jurisdiction of competent antitrust authorities, including the European Commission, in order to avoid gun jumping issues that in the worst case may even result in hefty fines. What is most important is to have a clear understanding of the roles of the parent companies. In cases of doubt, the General Court recommends clarifying the jurisdiction issue with the European Commission in advance. We note that companies should allow for sufficient time when following that route; an informal consultation procedure with the Directorate-General for Competition sometimes requires the submission of a lot of information before the case team can make a robust statement on which companies can rely, sometimes only after several weeks have passed and after involvement of, for instance, the Legal Service.

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/ Fine proceedings

/ Germany's Federal Court of Justice rules on "beer cartel"

With its decision of 13 July 2020 (KRB 99/19 – German only) the Federal Court of Justice has again overturned a decision of Düsseldorf's Higher Regional Court in a fine case and has referred the case back to the Higher Regional Court.

In its judgment, the Düsseldorf Higher Regional Court had annulled the fine imposed by the Federal Cartel Office on a company, ruling that the offence had become statute-barred. Although the Düsseldorf Higher Regional Court considered an exchange of information in 2007 to constitute a concerted practice, it decided that such practice had ended with the conclusion of the relevant meeting, in particular that there had been no agreement to increase the beer prices. In the opinion of the Düsseldorf Higher Regional Court, a beer price increase which took place at the beginning of 2008 was not a result of such exchange of information.

In its decision, the Federal Court of Justice has stated once again that in order to establish a concerted practice, it is necessary that there is an element of concertation between competitors, which then leads to a market conduct that is causally brought about by the concertation.

The Federal Court of Justice has further stated that in particular the assessment of evidence by the Düsseldorf Higher Regional Court was incomplete with regard to the second aspect of the concerted practice, as the Düsseldorf Higher Regional Court denied the existence of any market conduct that was causally based on the concerted practice, while failing to address the set of experience known from European case law *"that it regularly has an effect on the market conduct of competing undertakings if they have exchanged competitively relevant information for the purpose of coordination*".

If the trial court is unable to convince itself of a causal connection between the concerted practice and the market conduct, the assessment of evidence is legally erroneous due to the potentially strong indicative effect of the set of experience if the trial court does not deal with this set of experience in the reasons for its judgment. According to the Federal Court of Justice, the set of experience does not, due to the presumption of innocence, lead to a reversal of the burden of proof, but must be taken into account in the assessment of evidence due to its indicative effect.

The Federal Court of Justice concluded that the increase in beer prices in 2008 "necessarily" also took into account insights gained in the meeting in 2007 and that the exchange of information had at least reduced the uncertainty in the decision-making process. It also said that therefore the Düsseldorf Higher Regional Court's assumption that the offence had become statute-barred was incorrect, since in the case of coordinated price increases, the relevant offence could only be considered concluded when the goods affected by this were no longer on the market at the increased price. However, the prices were only adjusted in the course of 2009.

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/ Digital topics in 2020

/ European Commission sector inquiry on the Internet of Things

By decision of 16 July 2020, the European Commission initiated a sector inquiry into the Internet of Things („**IoT**“) for consumer-related products and services in the European Union.

The sector inquiry is broad in scope: It covers all products and services that are connected to a network and can be controlled remotely. The inquiry specifically names wearable devices (such as smart watches or fitness trackers) as well as smart home devices (such as refrigerators connected to the internet, smart TVs and washing machines). In the area of services offered via smart devices, the focus is on digital voice assistants as well as music and video streaming services.

In order to develop as comprehensive an understanding as possible of the dynamics in these markets, the European Commission surveyed companies from a wide range of sectors in the digital economy. The spectrum ranges from manufacturers of smart devices to providers of delivery services or car sharing. A preliminary final report from the European Commission is currently expected for spring 2021.

The European Commission's antitrust concerns are primarily based on the extent and continuity of the data flows that smart devices collect from consumers. Access to this data can play a key role in the development of market power and competitive structures not only in the field of IoT but also, for example, in the development of artificial intelligence. Market participants should not be able to abuse their control over this data to distort competition or otherwise exclude competitors from (emerging) markets.

Another focus of the sector enquiry is the relationship between voice assistants or home hubs on the one hand and IoT devices on the other. To this end, the European Commission wants to investigate how interfaces and communication standards between the two sides are created and work. In particular, the European Commission seems to fear that voice assistants could become "digital gatekeepers" of consumer-related IoT by specifying technical standards that manufacturers of smart devices must comply with in order to be able to integrate voice assistants. In this way, voice assistants could set market standards and thereby exclude potential competitors and hinder competition on innovation.

What will happen next? A sector inquiry is not directed against a specific company. However, the European Commission has used the findings of sector inquiries in the past to initiate individual proceedings. Also, the results of sector inquiries frequently influence new legislative acts of the European Union.

Executive Vice-President and Competition Commissioner Margrethe Vestager has already announced her intention to make greater use of sector inquiries in the future in order to better understand developments in the dynamically changing and frequently interlinked markets

in the digital sector. Launching this sector inquiry in the area of IoT is thus a further step towards a "*Europe fit for the digital age*".

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/ Sector inquiry into smart TVs: Consumer protection as a competition parameter?

With the 9th Amendment of the German Act Against Restraints of Competition (2017), the German Federal Cartel Office was given powers regarding consumer protection for the first time. Since then, the German Federal Cartel Office, specifically its *Consumer Protection Decision Division*, has been able to conduct **consumer-related sector inquiries,** but without having any powers to intervene itself.

The focus is on issues that affect the **everyday digital life of consumers.** Based on its application of competition law, the German Federal Cartel Office has extensive expertise and market knowledge in this area. It has made immediate use of its new powers. Sector inquiries have been carried out, for example, on comparison portals, fake ratings on the internet and smart TVs. The German Federal Cartel Office published the results on its smart TVs inquiry in a **final report** in July 2020.

The main criticism of this final report is that smart TVs are able to collect a lot of differentiated (personal) user data, but that **consumers are only provided with insufficient information about the data processing by smart TVs.** This takes place sometimes even in breach of consumer law, in particular the General Data Protection Regulation. The German Federal Cartel Office is therefore calling for more transparency and recommends among other things:

1. **Consumers** should be more comprehensively **informed** about the extensive collection and use of data. Data protection standards guaranteed by the manufacturer should already be clear to the consumer at the time of their purchase decision (such as by means of explanatory symbols).
2. Companies should be obligated to meet their **duty to provide the necessary information,** such as product information, data protection, pre-setting options, etc., in a **clear and simple manner.**
3. Consumers should be **entitled to software updates** from the manufacturer.

In addition, the German Federal Cartel Office provides tips for consumers. Its intention is to increase awareness on the part of consumers. Apparently, the aim is to enable consumers to also make their purchase decision dependent on the data protection and data security quality of a product. Among other things, the German Federal Cartel Office advises them to pay attention to the possibility of reliable and long-term software updates. If these are no longer guaranteed, for example, one could switch to signal sources. Buyers should therefore ask themselves how the device handles their data and what options the company offers to them. The German Federal Cartel Office encourages manufacturers to **compete to offer the best data protection standards.** It is attempting to compensate for its lack of powers to intervene with the forces of competition – consumer protection as a parameter of competition.

The inquiries show the trend in recent years that **consumer protection, especially data protection, and competition and antitrust law are becoming increasingly interlinked.** Smart TVs are just representatives of the "*Internet of Things*"; these assessments can be applied to numerous "smart" devices. **Data protection and consumer protection** will become increasingly important **competitive parameters** in the future. It is therefore to be expected that breaches of consumer protection rules (such as data protection law in particular) will gain in importance in antitrust and competition law and may also be used as a starting point for antitrust infringements.

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/ Germany's Federal Cartel Office investigates falsified user ratings on online platforms: operators should be held more accountable

Before they spend money on products or services on the internet, a steadily increasing number of consumers inform themselves on the basis of the testimonials and ratings of other users. However, the ratings are often falsified or systematically distorted. The Federal Cartel Office therefore conducted a sector inquiry into this trend, which is also on the increase. The subject of the inquiry was the functioning of rating systems and the interests of the various market participants. The Federal Cartel Office has thus once again made use of its still relatively new power under section 32e (5) of the German Act Against Restraints of Competition, according to which it can also initiate a sector inquiry if there is a well-founded suspicion of substantial, persistent or repeated breaches of consumer protection regulations.

As part of the inquiry which was completed at the beginning of October 2020, the Federal Cartel Office surveyed a total of 66 internet portals which are particularly relevant for German consumers and which display user ratings for products, companies or apps from a total of 16 different sectors. The Federal Cartel Office concludes that the portals, being operators of the rating systems, should be held more accountable for identifying and removing manipulated or inauthentic ratings on their websites. To improve this, the Federal Cartel Office suggests that portals make greater use of the possibilities of automated data analysis and technical filters to check ratings for authenticity and possible manipulation before they are published.

The Federal Cartel Office cannot initiate proceedings against companies suspected of violating consumer protection law. In contrast to breaches of competition law, the Federal Cartel Office does not have any such powers when it comes to breaches of consumer protection law. The Federal Cartel Office's proposals can therefore only be implemented on a voluntary basis or indirectly through increased civil law prosecution of legal violations in connection with user ratings. Up to now, German courts have predominantly considered falsified ratings to be a violation of fair trading law. At the European level, a series of regulations to protect against fake consumer ratings have been adopted within the framework of what is known as the "New Deal for Consumers".

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/ Outlook: What to expect in 2021

/ Brexit

/ Brexit: The transition period is ending – what do you need to know?

Following the United Kingdom's official withdrawal from the EU on 31 January 2020, the withdrawal transition period, in which various provisions of EU antitrust law continued to apply, has now expired on 31 December 2020. Although the recently concluded Trade and Cooperation Agreement between the EU and the United Kingdom contains, among other things, certain provisions for cooperation between the countries' competition authorities, it does not change the fact that companies should prepare for certain changes:

Merger control

For UK-related transactions notified to competition authorities after 31 December 2020, the so-called 'one-stop-shop' no longer applies. Under this principle, the European Commission was fully competent for transactions that met the turnover thresholds of EU merger control and therefore had an EU dimension. This was also true in so far as the transactions concerned the United Kingdom. After the end of the transition period, this will change and companies will have to prepare themselves for the increased review of notifications by the UK Competition and Markets Authority ("CMA") parallel to those conducted by the European Commission.

In the future, when assessing whether the turnover thresholds of EU merger control are met, it will also be necessary to ensure that turnover from the United Kingdom is no longer taken into account. However, as the thresholds for EU merger control have not been adjusted downwards despite the withdrawal of the United Kingdom, fewer transactions could fall within the scope of EU merger control from January 2021 onwards. This may lead to the need for more parallel notifications in the remaining EU Member States, as the thresholds there are significantly lower than at EU level. In individual cases, however, consideration may be given to referring the matter to the European Commission.

Antitrust proceedings

The European Commission remains competent for antitrust proceedings if it has already initiated these before the transition period expired. If the European Commission has not initiated antitrust proceedings in a matter which also concerns the United Kingdom before the transition period expired, the CMA may initiate proceedings regardless of whether the conduct took place before or after 31 December 2020. It is important to note, however, that, in accordance with the effects doctrine, the European Commission is also competent for misconduct in such cases where the conduct in question has an effect within the EU (in addition to the United Kingdom). In the area of antitrust proceedings, too, companies will therefore have to anticipate parallel proceedings in future, thereby increasing the risk of fines.

There are other practical issues in addition to these selected problems: Will antitrust decisions of the European Commission or the EU courts have a binding effect in the United Kingdom? This binding effect on national courts is of considerable importance in cartel damages proceedings because it facilitates the burden of proof requirements for a claimant. Will British courts still recognise such a binding effect in future or should a potential claimant seeking cartel damages preferably assert its claims in an EU Member State for reasons of legal certainty?

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10th amendment to the German Act against Restraints of Competition (GWB):

Antitrust law and digitalisation

/ Merger control

The 10th amendment to the Act against Restraints of Competition ("**ARC**") provides for changes in merger control:

Both national turnover thresholds are being raised significantly, section 35(1) Draft ARC: The first national turnover threshold is to be set at EUR 50m (previously EUR 25m), the second national turnover threshold at EUR 17.5m (previously EUR 5m). The number of notifications is to be reduced by approximately 20% as a result (Government explanation, p. 106, whereas the government draft still assumed a smaller increase to EUR 30m and EUR 10m, respectively). The "de minimis" clause of Section 35(2) sentence 1 ARC will not be changed but deleted. According to said provision, a merger of a non-dependent undertaking with an annual global turnover of less than EUR 10m did not have to be notified (as a result, such mergers still do not have to be notified in the future as such undertakings will stay below the new second national turnover threshold).

The transaction threshold will be adapted accordingly in view of the new national turnover thresholds, Section 35(1a) Draft ARC: An undertaking must have generated more than EUR 50m in Germany, whereas neither the target nor any other undertaking was supposed to generate more than EUR 17.5m.

The amendment newly introduces a request to notify future mergers, Section 39a Draft ARC: The German Federal Cartel Office thereby will be able to impose, by corresponding order, an obligation on undertakings, applicable for three years in each case, to notify all concentrations within certain sectors after a sector inquiry has been conducted, provided that the following requirements are met: The acquiring undertaking alone has to generate global turnover of more than EUR 500m and the target global turnover of more than EUR 2m, with Germany accounting for two-thirds of the target's turnovers. There must be indications that future mergers would be likely to impair effective competition within the relevant industry sectors. The acquiring undertaking must hold market shares of at least 15% within such industry sectors. The rule is aimed at gradual acquisitions which each in itself were previously not subject to merger control and lead to an extensive concentration of the market.

Other changes of relevance in practice include, for example: (i) The main examination proceedings (phase II) will be extended by one month to a total of five months from filing. (ii) Electronic merger control filings can also be transmitted to the special electronic administration mailbox in the future which will allow lawyers to submit filings through the special electronic lawyers' mailbox. (iii) The obligation to notify the completion of a merger will cease to apply. (iv) The minor market clause will be raised from EUR 15m to EUR 20m. (v) For mergers of press undertakings (not including broadcasters) the turnover multiplier will be reduced from eight to four. (vi) For certain mergers in the hospital sector, merger control regulations will temporarily not apply, Section 186(9) Draft ARC.

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/ Modernising control of abusive practices

On 9 September 2020, the German government published its draft Act on the Digitalisation of German Competition Law (the "Draft ARC") (German only), which– including various amendments by the Committee for Economy and Energy – was adopted by the German Parliament on 14.01.2021 and is expected to come into force in the first half of 2021. The aim of the 10th Amendment to the German Act Against Restraints of Competition is to create a regulatory framework that is tailored to the requirements of the digitalisation of the economy. A key element of the 10th Amendment is the modernisation of control of abusive conduct by the competition authorities, which is intended in particular to better capture the abusive use of market power by large digital platforms.

One of the most intensively discussed planned innovations concerns the German Federal Cartel Office's far-reaching powers to intervene against companies "with overwhelming importance for competition across multiple markets (section 19a Draft ARC). After the German Federal Cartel Office (in a decision limited to a period of five years) has established such a market position, which does not necessarily require market dominance, it can prohibit the company concerned from engaging in certain conduct. This includes, among other things, preferential treatment of the company's own products or services, setting up barriers to market entry, or "taking over" of not yet dominated markets through unfair practices (e.g. predatory pricing, exclusive tying or bundled offers) as well as the demanding of unreasonable advantages for intermediate services (prohibition of tapping). The Federal Court of Justice (Bundesgerichtshof) is to have exclusive jurisdiction for appeals against decisions by the Federal Cartel Office on the basis of this new intervention standard - a novelty in German antitrust law - so that appeals are to be decided quickly within one instance.

Of particular importance will be the additional possibilities to obtain access to data that is important in competition. For this purpose, the "essential facilities doctrine" (section 19(2) no. 4 Draft ARC) will be reworded and supplemented by a right to data access against market-dominant enterprises. However, even non-market-dominant companies on which other companies are dependent (for example, due to the importance of the data they collect) may be exposed to data access claims in the future (section 20(1a) Draft ARC). What is of particular practical relevance is that disclosure of data can be requested not only by small and medium-sized enterprises, but also by large (dependent) enterprises. The possibility of claiming access to data before civil courts without the prior intervention of a competition authority is also planned.

Furthermore, a new far-reaching rule has been introduced which prohibits companies with superior market power on platform markets from engaging in what is known as "tipping" (i.e. monopolisation) of markets characterised by network effects (section 20(3a) Draft ARC). The rule aims to prevent, for example, the obstruction of multi-homing or setting up hurdles

to platform changes. This new rule is also intended to be enforceable not only by competition authorities, but also by private persons before civil courts. Finally, another important element is the concept of “intermediation power”, which is to be introduced as a new criterion for determining market power (section 18(3b) and section 20(1) sentence 2 Draft ARC). This relates to intermediary services provided by (digital) platforms, which can be of particular significance for other companies when accessing supply and sales markets.

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/ Extended investigation powers of the Federal Cartel Office

A major reason for the 10th Amendment to the German Act Against Restraints of Competition (ARC) is transposing the requirements of the ECN+ directive (directive 2019/1/EU) into German competition law. The requirements, which have been implemented in the government draft of the amendment (German only), concern, among other things, the leniency programme, sanctions for competition law violations and judicial fine proceedings.

Another fundamental amendment concerns the expansion of the Federal Cartel Office's investigation powers for searches. As is already the case under Union law, there will be – in addition to the mere duty to tolerate – a duty to cooperate on the part of natural persons, which is subject to a fine and also brings with it a restriction of the right to refuse information (section 59b (3) Draft ARC). The duty to cooperate refers to information that enables access to evidence as well as explanations of facts or documents that could be related to the subject matter and purpose of the search. Insofar as natural persons are obliged to cooperate, they must – where obtaining the information in any other way is significantly more difficult or cannot be expected – also disclose facts that are capable of leading to prosecution for a criminal offence or an administrative offence. Companies are therefore well advised to update their dawn raid policies and guidelines if this amendment should be implemented.

Another very significant change is the restriction of the right to refuse information in the context of requests for information. Pursuant to section 59 (3) Draft ARC, a request for information must be proportionate and must not force the addressee to confess to a criminal offence, an administrative offence or a violation of a provision of the ARC or Article 101 or 102 TFEU. Insofar as the request for information is addressed to an undertaking, but natural persons are obliged to cooperate by providing information or handing over documents, they must also disclose facts that are capable of leading to a prosecution for a criminal offence or an administrative offence if obtaining the information in any other way is significantly more difficult or cannot be expected.

However, the information to be provided by natural persons on the basis of these extended powers may not be used against that person in criminal or administrative offence proceedings.

If requests for information are addressed directly to natural persons, the right to refuse to testify under section 55 of the German Code of Criminal Procedure applies accordingly. However, it is not possible for natural persons to invoke the right to refuse to testify if there is only a risk of prosecution in the competition authority's fine proceedings and the competition authority eliminates this risk by agreeing not to prosecute. Accordingly, these amendments represent a significant restriction of the rights of defence of companies in competition proceedings.

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/ Procedures for imposing administrative fines proceedings

The 10th Amendment to the German Act Against Restraints of Competition provides a range of significant changes affecting the procedures for imposing administrative fines.

One of the key changes in this area is the broader investigative powers granted to the German Federal Cartel Office both in searches and in requests for information and the associated restrictions on the right to withhold information.

The draft also includes a sharp increase in the fines that can be imposed for breaches of certain procedural obligations (section 81c(3) draft Act on the Digitalisation of German Competition Law (the "Draft ARC"). The scale of fines, which is currently capped at EUR 100,000, is to be increased to up to 1% of group-wide turnover for the previous year, the aim being to bring these into line with the fines at EU level. The duties to cooperate that are affected include, amongst others, answering requests for information pursuant to section 59(2) and (4) Draft ARC, hindering searches and breaking seals.

The draft also leads to higher liability risks especially for associations of undertakings in two respects. First of all, the scale of applicable fines will become much broader. If the infringement resulting in the fine is linked to the members' activities, it may amount to up to 10% of the total turnover of the members who were operating on the relevant market. The turnover of members who have already been independently fined must not be taken into account (section 81c(4) Draft ARC). Moreover, a kind of contingent liability is created for members of an association of undertakings: if the association is unable to pay a fine imposed on it, its members are to be held liable in certain circumstances (section 81b(2) and (3) Draft ARC). The upshot of these new rules is that simply being a member of an association will also lead to a risk of being held liable.

The leniency procedure currently set out in the guidelines of the Federal Cartel Office is now to be codified in section 81h to l onwards of the Draft ARC. Apart from minor variations, the contents will essentially continue to be the same as in the current requirements.

A non-exhaustive list of criteria for assessing fines is to be incorporated into section 81d Draft ARC in the future. One criterion referred to is the turnover associated with the offence. This is intended to level out the sometimes significant and constitutionally problematic divergences between the German Federal Cartel Office and Düsseldorf Higher Regional Court in calculating fines. Although the statutory rules on the specifications for setting fines are to be welcomed, they still do not ensure that the German Federal Cartel Office and Düsseldorf Higher Regional Court will actually be induced to apply the criteria "to be particularly taken into account" in a uniform manner in the future.

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/ Revision of EU (competition) law

/ Review of the Vertical Block Exemption Regulation – next phase has started

On 31 May 2022, the current Block Exemption Regulation (EU) No 330/2010 ("Vertical Block Exemption Regulation") and the related Vertical Guidelines of the European Commission will expire. The review process started in October 2018 with the evaluation phase, which was concluded in September 2020 with the publication of the European Commission's Staff Working Document. In the meantime, the impact assessment phase has begun.

The Vertical Block Exemption Regulation and the Vertical Guidelines were introduced to assist companies in particular in assessing the legality of vertical agreements with a view to the ban on cartels (Article 101 TFEU). While the rules create a "safe harbour" for certain vertical agreements, other agreements are deemed to generally violate the ban on cartels. Accordingly, the purpose of both the Vertical Block Exemption Regulation and the Vertical Guidelines is to increase legal certainty. Digitalisation and the increase in online trade as well as the growing number of online platforms (as intermediaries) have led to significant changes in markets and distribution models since the last Vertical Block Exemption Regulation was adopted in 2010. The coronavirus pandemic has meanwhile further accelerated these developments. For example, the number of direct sales and the use of selective distribution systems has increased. Within the framework of the evaluation phase, the European Commission asked itself the question of how to proceed with the existing regulations: Let them expire, extend them or revise them.

For this reason, the European Commission conducted a public consultation in which all stakeholders were able to provide feedback on the existing regulations in prepared questionnaires or their own comments. These results were discussed in an in-depth stakeholder workshop. Further sources of information for the European Commission were an external study, the sector inquiry on e-commerce, a consultation of the national competition authorities as well as findings from its own decision-making practice.

The Staff Working Document summarises the entire evaluation phase and the findings obtained. The European Commission concludes that the Vertical Block Exemption Regulation and the Vertical Guidelines should continue to exist, but that they need to be revised. The European Commission states that the focus should be on eliminating linguistic ambiguities, considering current case law and adapting to the developments in the online sector. The following areas are explicitly mentioned: Selective distribution, dual distribution, sales agency agreements, parity clauses, treatment of online shops, marketplaces and price comparison tools. No position has yet been taken on the scope or nature of the changes.

Based on the knowledge gained so far, the European Commission intends to use the impact assessment to find out to what extent EU measures are necessary and what the possible

effects of the various solutions could be. A first new draft of the Vertical Block Exemption Regulation and Vertical Guidelines is expected to be published in the course of 2021, with stakeholders having the opportunity to comment.

Further information on the reform process.

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/ New EU legal framework for the digital economy

On 15 December 2020, the European Commission presented far-reaching proposals for regulating online platforms with the Digital Markets Act (DMA) and the Digital Services Act (DSA).

From a competition law perspective, the DMA in particular contains considerable changes. In recent years, the European Commission has repeatedly taken action against online platforms such as Google and Amazon based on the abuse of a dominant market position (Article 102 TFEU). With the DMA, the European Commission now intends to create a supplementary legal framework on the basis of which "faster and more targeted" action can be taken against anti-competitive practices of "system-relevant" online platforms.

The DMA provides for a set of criteria according to which large online platform companies are initially to be classified as "Gatekeepers". These criteria are to be used to review whether (i) the online platform has a strong economic position with a significant impact on the internal market and is active in several EU countries, (ii) it has a strong intermediary position, i. e. it connects a large user base with a large number of companies, and (iii) whether it has an entrenched and durable market position, i. e. it will operate in the long term. For this purpose, essentially turnover and user number thresholds were defined (e. g. more than EUR 6.5 billion annual turnover in the European Economic Area and more than 45 million users of a core product of the online platform). The decisive factor for an entrenched and durable position in the market is whether these turnover and user number thresholds have been exceeded in three consecutive years.

For those companies that are classified as Gatekeepers by the European Commission, special behavioural restrictions or requirements apply. In this regard they must comply with a list of "Do's" and "Don'ts" within six months. The special characteristic of this "Do's" and "Don'ts" list is that, according to the DMA proposal, it provides for some fixed behavioural requirements, but also allows for individual adjustments for each Gatekeeper (based on a statutory catalogue of measures). As an example of a possible "Do", the European Commission cites ensuring the interoperability of platform-owned services with those of third parties. An example of a "Don't" is the prohibition of unequal treatment of third-party services and products compared to the platform's own (prohibition of self-preference).

Just like abusive behaviour by dominant companies already today, breaches of the requirements of a gatekeeper's "Do's" and "Don'ts" can also result in significant fines of up to 10 % of the company's annual worldwide turnover or in periodic penalty payments. In addition, further measures can be taken to ensure compliance with the "Do's" and "Don'ts" list.

The proposals of the DMA and the DSA will now be discussed by the European Parliament and the Member States in the usual EU legislative procedure. It remains to be seen what

changes the proposals will undergo on the way to becoming law and whether the legislative process can still be completed in 2021.

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White paper of the European Commission on foreign subsidies in the single market

On 17 June 2020, the European Commission adopted its long-awaited white paper on foreign subsidies in the single market ("White Paper"). The White Paper outlines new and far-reaching proposals to deal with the distortive effects caused by foreign subsidies in the EU. It focuses on economic activities within the EU internal market that have benefited from foreign subsidies and do not fall under the EU's existing competition and trade protection rules. The aim is to close a regulatory gap. (Former) EU Trade Commissioner Phil Hogan noted: "*The EU is amongst the most open economies in the world, attracting high levels of investment from our trading partners. However, our openness is increasingly being challenged through foreign trade practices, including subsidies that distort the level playing field for companies in the EU. Along with other tools available at EU level such as foreign direct investment screening and trade defence measures, the White Paper is a welcome addition to the toolbox for our open strategic autonomy.*"

The European Commission intends, among other things, to establish a general market review instrument to cover all situations where subsidies from third countries may cause distortive effects on the single market. The supervisory authority (Member State authority or the European Commission) could then act on a tip-off or information that a company in the EU is benefiting from a foreign subsidy.

Furthermore, requirements to file prior notifications for planned acquisitions and public tenders facilitated by foreign subsidies are under discussion. For example, companies receiving foreign financial support should notify the acquisition of EU companies above a given threshold to the competent supervisory authority. The White Paper proposes the European Commission as the competent supervisory authority. The transactions could then only be completed after the review carried out by the European Commission has been concluded.

All intervention measures would significantly increase the regulatory complexity of transactions which are often already subject to merger control and FDI screening and of economic activities in the EU.

The almost 50-page document launched a consultation period until 23 September 2020, during which stakeholders were able to share their views with the European Commission. The results of the consultation are now available. Almost 150 comments were received. Practically all Member States are basically in favour of new legislative measures, albeit with some nuances as to the level of support. Other EU stakeholders also welcome the initiative by a majority and consider that there is a real need for the new instrument. However, unsurprisingly, criticism has been voiced from non-EU countries.

The public consultation was part of the preparation of a legislative proposal by the European Commission. This is already planned for the second quarter of 2021. Supposing that all proposals are implemented, this could mark one of the most important changes to the single market rules since the introduction of merger control.

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/ The era of the Foreign Investment Screening Regulation begins

Investment controls are irrevocably on the rise in Europe. An increasing number of countries wish to review acquisitions of "domestic" companies incorporated in their territory from a security angle. As of 11 October 2020, the new Foreign Investment Screening Regulation (EU) 2019/452 (the "**Regulation**") has started to apply in the European Union. Although on the surface the Regulation does not appear that revolutionary (it does not introduce any review procedure equivalent to the merger control procedures at the European level and leaves the decision on whether to set up a national regime to the Member States), it has significant legal and practical consequences.

Two of the most important new developments are the introduction of (i) a cooperation mechanism and (ii) a range of minimum requirements on investment screening procedures by Member States (see also here). The cooperation mechanism requires Member States to exchange information on ongoing review procedures with each other and the European Commission. Where transactions potentially have effects in other Member States, both the other Member States and the European Commission can give their opinions, which the reviewing country then has to consider. The minimum procedural requirements mainly relate to transparency requirements, review periods and the possibility to appeal decisions.

While the Regulation does not oblige Member States to introduce their own investment screening procedures, the European Commission gave a very clear recommendation to do so in the context of the Covid-19 pandemic. At the moment, fifteen Member States have their own national procedures, while five are already working on new regimes. Other countries, including Germany, have further tightened their review processes in light of the pandemic and the adjustments required to comply with the Regulation. The lack of uniform review procedures, the longer average review periods compared to merger control procedures and the lack of published decisions mean that companies have to closely check the notification requirements beforehand.

Alongside the legal effects, the Regulation also has practical implications. Perhaps the main consequence of the Regulation (and the one to keep an eye on) is the increased exchange of information between Member States and the political pressure to scrutinise transactions more closely.

The introduction of new instruments, above all if they are structured differently in each Member State, can lead to diverging decisions within the European Union. Although it is unclear as yet what specific effects the Regulation will have, the following questions will be significant:

- How often will Member States, and above all the European Commission, make use of their right to comment on ongoing procedures? To what extent will these comments actually be taken into account?
- Will review procedures have to be extended to take into account the deadlines for submitting opinions?
- How will merger control and investment screening procedures interact, especially if approvals require conflicting remedies to be implemented?
- As appeal options are often limited at national level at the moment, will companies file appeals against transactions with the European courts?

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/ Competition law and sustainability

/ Is a “new ecological approach” on the way in EU competition law?

With its Green New Deal, the European Commission is pursuing the goal of establishing a climate-neutral, sustainable economy in the EU by 2050. The discussion on this has also reached antitrust and competition law and essentially revolves around two core issues.

Ban on cartels: So far, there is no certainty to what extent agreements between companies which, for example, serve to protect the environment or reduce CO2 emissions, can be reconciled with the ban on cartels. In fact there is no doubt that agreements intended to implement non-profit or public interest objectives can also affect competition.

If, for example, companies want to agree throughout their industry that only a fixed amount of CO2 may be caused for manufacturing a certain product unit, there is a risk that this agreement infringes the ban on cartels. Similarly, establishing a circular economy system, which also requires industry-wide arrangements, can also be problematic. In addition, more and more research and development cooperation projects are likewise aimed at making products more climate-friendly. The usual antitrust requirements also apply here.

The underlying question of the role of public interest objectives (such as sustainability) within the framework of the ban on cartels is by no means new. In its Horizontal Guidelines, the European Commission has already defined the conditions under which cooperative ventures intended to implement technical standards or quality marks that serve public interest objectives should be exempt from the application of the ban on cartels. Although it is not explicitly stated that the sustainable production of goods is a recognised public interest aspect, an assessment to this effect is certainly conceivable. It is also to be expected that a clarification will be provided in a new version of the Horizontal Guidelines.

In short: Against the background of the discussions at the political level, competition authorities can (and will) no longer close their minds to such arguments, which could lead to facilitation of cooperation between competitors under sustainability aspects.

Merger control: The question of how sustainability aspects should be treated within the framework of merger control has not yet been conclusively clarified either.

Can companies (in future) argue with environmental arguments in merger control proceedings and convince the competition authority to grant clearance, even if the project is viewed critically from a competition point of view? Or can mergers even be prohibited on the grounds that the resulting company is expected to have harmful effects on the climate?

In view of this, it remains to be seen to what extent such arguments will affect future decisions. It appears obvious, however, that they will be gaining in importance in merger control proceedings as well.

The competition authorities of several European countries have already addressed these issues in publications and have thus put the topic on their own agendas (e.g. Germany, France, Greece and the Netherlands). It therefore cannot be ruled out that companies will in future also discuss with competition authorities what is meant by sustainability. The case practice of the coming years can be eagerly awaited. Clear assessment standards will probably only develop as the number of such cases increases. In any case, competition authorities are already free to take public interest aspects into account in their decisions today.

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/ Reform of EU State aid law in light of the Green New Deal

In the European Commission's view, it is the State aid rules in particular which can help further the main priorities of what is known as the "Green New Deal" (decarbonisation, energy efficiency, sustainable mobility, circular economy and a zero-pollution action plan). These are currently undergoing a comprehensive review to determine whether there is still room for improvement. Due to their central role, the European Commission intends to bring forward the revision of the relevant State aid guidelines already to the end of 2021. This applies to the Regional Aid Guidelines, the Communication on Important Projects of Common European Interest (IPCEI), the Union Framework for State Aid for Research, Development and Innovation, the Risk Financing Guidelines, the State Aid Guidelines for Environmental Protection and Energy and the relevant provisions of the General Block Exemption Regulation.

The first step was the review of the guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme (ETS). The revised ETS Guidelines were adopted in September 2020 and will enter into force on 1 January 2021. They aim to reduce the risk of companies relocating production capacity – and thus CO2 emissions – to countries outside the EU with less ambitious climate targets.

As regards the State Aid Guidelines for Environmental Protection and Energy, the European Commission launched a public consultation in November 2020, which already covers several aspects of the future review (in particular reconciliation of these guidelines with the implementation of the Green New Deal). Stakeholders could provide their feedback by 7 January 2021 – an important opportunity also for companies to get involved in the legislative process. The new guidelines will set the State aid legal framework for many future business projects. The European Commission plans to hold another public consultation on the new draft text of the revised guidelines in 2021.

On 13 October 2020, the European Commission also launched a general call for contributions on competition rules and sustainability policy. A significant part of the questions related to State aid control: What substantive changes would be necessary? How could lower or less aid be granted for activities with negative environmental impacts or higher aid be granted to support environmental objectives? Around 200 contributions were received by the deadline of 20 November 2020. These will now be analysed by the European Commission and subsequently presented at a conference on 4 February 2021.

Further revisions will follow, meaning that additional substantial changes to the existing State aid rules are likely to emerge in 2021.

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/ Cartel damages in Germany

/ Damage assessment and expert opinions

After the Federal Court of Justice clarified key questions of how a claim should be asserted and provided guidance on the assessment of facts by trial courts in its series of decisions on the rail cartel in 2020, the framework has been set. In the multitude of pending proceedings, it is now up to the trial courts to examine the individual infringements and comprehensively assess the parties' submissions (including those on economic issues) in each individual case. We have already seen indications that the approach taken by the various courts will differ.

In some (even high-profile) cases, such as the truck complex or the drugstore cartel, lawsuits have failed simply because the expert opinions submitted by the claimants did not stand up to critical scrutiny by the trial court. This was particularly because the claimants have been unable to show a connection between the infringement established and the damage it is claimed to have caused.

Already in the past, German district courts appointed experts to examine whether damage was actually suffered. Some of the proceedings are well advanced. However, in some cases, such as in a case recently decided on by the Cologne District Court regarding the sugar cartel, the court was unable to establish any cartel effect and dismissed the claim. Generally, proceedings based on expert opinions are complex and take time, which is why we still have to wait for a case in which a German court has determined and awarded damages on the basis of an expert opinion.

In a first judgment of 30 September 2020 (Case 8 O 115/14 – German only), Dortmund District Court awarded the claimant minimum damages of 15%. However, the court did not base this decision on expert opinions obtained by the court or the litigants and instead determined this amount by way of a free estimate in accordance with section 287 of the German Code of Civil Procedure (ZPO). The president of the 1st Competition Senate of Düsseldorf Higher Regional Court, Professor Kühnen, had previously suggested such an approach in an essay (NZKart 2019, 515). For its assessment, Dortmund District Court has now considered the duration, degree of organisation and market coverage of the cartel and relied on an "economic rationale" used by the cartelist with regard to the risk of having to pay damages upon discovery: a contractual penalty of 15%, which had been agreed in one of several projects, serves as a basis for the court's assessment. The ruling immediately triggered heated debates on whether such an approach would significantly shorten the path for claimants. It is doubtful, however, that such a simplified approach, which in particular does not take expert opinions obtained by the litigants into account, meets the requirements established by the Federal Court of Justice for an overall assessment of the litigants' entire submissions (most recently Schienenkartell (rail track cartel) V, judgment of 23 September 2020, KZR 4/19, para. 27 onwards – German only).

This complex situation involving substantiation requirements, expert opinions, free court estimates or even lump-sum assessments will determine the debate on the topic of cartel damages in the near future. While there is a lot of room for the individual case, convincing economic arguments will be required in legal disputes.

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/ Digital topics in 2021

/ The importance of data and the antitrust cases against Facebook

Facebook is the focus of antitrust authorities worldwide. The European Commission is investigating "data-related practices" (AT.40628) and allegations of abuse regarding the "Facebook Marketplace" (AT.40684). In the US, the Federal Trade Commission and the attorneys general of 46 states, the District of Columbia and Guam are suing Facebook. They are accusing Facebook of illegal monopolisation by acquiring Instagram and WhatsApp and by imposing restrictive conditions on software developers (press release of 9 December 2020). Meanwhile, in Germany, the Federal Cartel Office has imposed restrictions on Facebook's collection of user data (press release of 7 February 2019). In addition, in December 2020 abuse proceedings were initiated against the company on the ground of the connection of the "Oculus" virtual reality products with the Facebook network (press release of 10 December 2020).

A common feature of the above-mentioned proceedings is the key role of the collection of user data in Facebook's business model. From an antitrust perspective, Facebook is a platform with two market sides. On the one side are the private users. For them, the use of the network is free in the sense that they do not have to provide any monetary consideration. Their actual consideration is the personal data that Facebook collects about its users. Facebook monetises this data on the second market side by selling online advertising. This advertising is considered particularly effective because the advertising messages can be rolled out in a targeted and highly personalised manner based on the data collected.

In its decision of 6 February 2019, the Federal Cartel Office prohibited Facebook from using certain terms of service. This essentially concerns the fact that Facebook collects data not only on the behaviour of users on the social network ("On-Facebook"), but also when using other group-owned services (e.g. WhatsApp, Instagram) and on third-party sites ("Off-Facebook"). The decision of the Federal Cartel Office prohibits the collection and linking of data from the various sources without the user's explicit consent.

Facebook has filed an appeal against the Federal Cartel Office's decision with the Düsseldorf Higher Regional Court. No decision has yet been made on this appeal. However, an urgent petition filed in parallel (for suspensive effect pursuant to section 65(3) sentence 3 of the German Act Against Restraints of Competition) was successful, so that Facebook did not have to implement the Federal Cartel Office's prohibition for the time being (decision of 26 August 2019, Kart 1/19 (V) – German only). In a landmark decision, the Federal Court of Justice overturned the decision of the Düsseldorf Higher Regional Court and confirmed the Federal Cartel Office's decision (decision of 23 June 2020, KVR 69/19 – German only, see Noerr News of 14 September 2020).

The decision of the Düsseldorf Higher Regional Court in the main proceeding is expected in the first half of 2021. In addition, the Düsseldorf Higher Regional Court again overruled the Federal Cartel Office's decision in a second summary proceeding in December 2020. The Fed-

eral Cartel Office has filed an appeal against the denial of leave to appeal, which the Federal Court of Justice could decide on in early 2021.

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/ Narrow ‘best price’ clause under review by German Federal Court of Justice

Following prohibition of what are known as wide ‘best price’ clauses by the Federal Cartel Office (B 9-66/10, decision of 20 December 2013 – German only) and the Düsseldorf Higher Regional Court (Kart 1/14 (V), decision of 9 January 2015 – German only), the Federal Court of Justice might now also find narrow ‘best price’ clauses to be inadmissible under competition law.

The case under review concerns the narrow ‘best price’ clause of hotel platform operator Booking.com. According to this clause, hotels are allowed, unlike in the case of a wide ‘best price’ clause, to offer better terms than on Booking.com for their rooms on other platforms, but not on their own website.

In its decision of 22 December 2015 (B 9-121/13 – German only), the Federal Cartel Office declared this narrow ‘best price’ clause to be in breach of competition law.

The Düsseldorf Higher Regional Court overturned this decision in its ruling of 4 June 2019 (Kart 2/16 (V) – German only), saying that the narrow ‘best price’ clause in the specific case was a necessary ancillary covenant that was neutral under competition law and necessary for the performance of the service agreement between Booking.com and the hotels in order to avoid ‘free riders’. These are customers who use Booking.com’s (free) advisory service during their hotel search, while then booking at a lower price on the hotel’s website. Accordingly, based on the idea of inherent legality, the Düsseldorf Higher Regional Court considered the narrow ‘best price’ clause to be exempt from the competition law prohibition.

In its order of 14 July 2020 (KVZ 56/19 – German only), the Federal Court of Justice allowed an appeal against this decision stating that the legal question addressed by the Düsseldorf Higher Regional Court had not yet been decided by the highest courts, contrary to what the Düsseldorf Higher Regional Court said in its first instance decision. The case will thus be reopened and finally clarified by the Federal Court of Justice or, if necessary, the European Court of Justice by way of a preliminary ruling procedure. Until then, it remains to be seen whether the narrow ‘best price’ clause is in line with competition law.

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/ Brandgating: Amazon again in the German Federal Cartel Office's focus

Andreas Mundt, President of the Federal Cartel Office, regularly emphasises that the digital economy, in particular internet platforms, is at the top of the Federal Cartel Office's agenda (see e.g. here). The Federal Cartel Office's current proceedings against Amazon and Apple are yet another indication of this. These proceedings concern "brandgating agreements", i. e. agreements which provide that in addition to the manufacturer of a branded product only certain authorised dealers may offer the same product, so that a product or brand is blocked from distribution. This means that unauthorised third-party retailers can be excluded from selling products on the German Amazon marketplace.

Even though such agreements may serve a legitimate interest, specifically protection against counterfeit products, the Federal Cartel Office is currently investigating to what extent this can be seen as a cooperation between Amazon and brand manufacturers, for example Apple, to the detriment of third-party retailers. Brandgating can be very far-reaching and take different forms. For example, all retailers with the exception of Amazon itself and the brand manufacturer can be excluded across the board or the exclusion can only apply to some third-party retailers. Whether competition is unlawfully restrained appears to depend above all on the concrete form of the agreement and aspects of proportionality.

Amazon and Apple have announced that they are willing to cooperate with the Federal Cartel Office. Amazon already amended its terms and conditions in 2019 in response to the Federal Cartel Office's investigations.

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/ Competition law becoming more important for Standard Essential Patents

With the increasing prevalence of the Internet of Things ("**IoT**"), Standard Essential Patents ("**SEP**") are once again coming under the spotlight of competition law.

To connect their devices and apps, manufacturers must use modern telecommunication standards. Most of these standards come from the telecommunications sector and include a large number of patent-protected technologies. A patent that is essential for the standard is called an SEP. How SEPs are used can lead to legal disputes that drag on for years. After the "patent wars" that involved primarily manufacturers of smart phones, SEP holders have recently begun to take action against automobile manufacturers. One case that has made headlines is the dispute between Nokia and Daimler. Nokia accuses Daimler of equipping its vehicles with telematics features that use the UMTS mobile radio standard, thus infringing patents belonging to Nokia. Nokia has brought actions before several courts, and Daimler is defending itself by lodging an antitrust complaint with the European Commission.

From an antitrust viewpoint, the holder of an SEP can have a dominant market position, and asserting the right to a prohibitory injunction under patent law can, under certain circumstances, constitute a breach of the abuse prohibition found in Art. 102 TFEU. This is especially likely if the standard is based on an industry agreement and the patent holder has entered into a commitment to make its patent available to third parties at fair, reasonable and non-discriminatory conditions ("FRAND"). In the case *Huawei v ZTE* (Case no. C-170/13), the Court of Justice of the European Union established a complex system of reciprocal obligations for such cases. Only where the holders of an SEP comply with these requirements, they can be successful in an action against a patent infringer.

Nevertheless, licensing and enforcing SEPs does not run smoothly in everyday practice. For example, it is a matter of dispute how soon and with what content the users of an SEP must declare their willingness to enter into a licensing agreement before they can object to an action of the SEP holder under competition law. It is also in dispute whether the SEP holder must grant every company in a multi-level supply chain a licence or whether it is sufficient to grant a licence to the manufacturer of the final product only. As the price for a final product is many times higher than the price of its components, and licence fees are typically calculated based on the sale price, licencing tends to be less lucrative for the SEP holder the further away from the final product, i. e. the higher up in the supply chain the licensing occurs.

On 26 November 2020, the Düsseldorf District Court submitted several questions on the licensing of SEPs in supply chains, which arose in a dispute between Nokia and Daimler (Case no. 4c O 17/19 – German only), to the Court of Justice of the European Union for a preliminary

ruling. The decision is expected to provide important guidance on the applicability of the abuse prohibition under competition law in the context of SEPs. Not only the automobile industry but all companies with IoT products should keep an eye on this case.

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/ Google/Fitbit – Digital mergers and merger control

In November 2019, Google announced the acquisition of Fitbit for over USD 2 billion. A US company, Fitbit is active mainly in developing, producing and distributing smartwatches and fitness trackers. Over the years, Fitbit has built up a large health database on its users, which is likely to continue to grow rapidly in the coming years given the proliferation of these wearable devices. The data generated in this way allows deep insights into the personal circumstances and the health of its users and is therefore extremely valuable for all of Google's business activities.

"Big data deals" pose many challenges for competition authorities: Specifically how should the value and market power provided by data be determined? In which markets can the data be or become important? Due to its complexity, the European Commission examined the Google / Fitbit merger in an in-depth review procedure (second phase) and eventually cleared it subject to conditions in December 2020. The critical examination of the merger by the European Commission can probably be explained not least by the numerous critical submissions and comments from market participants from various sectors and consumer associations. It is therefore important for third parties (customers, suppliers, competitors) to get involved in merger control proceedings at an early stage (e. g. by responding to the European Commission's questionnaires, making independent submissions and holding discussions with the case team) in order to make their voices heard sufficiently..

The European Commission examined the extent to which Google could further personalise, and thus expand, its market position in the online advertising markets by using the newly acquired health data. It also looked at how combining Fitbit's health data with Google's analytical capabilities could impact the growing digital health services industry. Finally, another aspect was whether Google could affect the interoperability of fitness trackers and smartwatches with smartphones that use Google's popular Android operating system, in order to increase sales of its own fitness trackers and smartwatches (not least so as to obtain even more health data).

Google therefore offered to make concessions to the European Commission to eliminate the numerous competition concerns against this merger. Concessions include that Google will not use health data for personalized advertising for an extended period of time.

The commitments highlight another challenge of digital mergers: While the European Commission traditionally favours structural remedies (e. g. the sale of certain business divisions), behavioural remedies gain relevance in cases of digital mergers (see for example the Facebook/WhatsApp decision). However, the latter remedies must be continuously monitored and can potentially be more easily undermined, despite high fines for such behaviour.

The proposed merger is important for the field of digital business models and the assessment of (health) data power. The decision of the Australian Competition Authority in December 2020, which rejected Google's concessions, shows that the correct legal assessment of such merger projects is in flux and debatable.

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/ Google Android reloaded? – Legal action by the US DOJ

US tech companies have long since been in the focus of the European Commission and the German Federal Cartel Office (see our articles here and here). Now, the US Department of Justice ("**DOJ**") has also brought a legal action against Google. In the complaint, Google is accused of unlawfully maintaining monopolies (Sec. 2 Sherman Act) in the markets for general search services, search advertising, and general search text advertising. This case has many specific parallels with the European Commission's decision back in 2018 (Google Android).

No doubt every internet user is more than familiar with search results from Google. This applies also and especially in the field of mobile searches, i.e. by using a smartphone, tablet or smartwatch. According to the DOJ, this is not a coincidence but the result of Google's business practices over the last two decades: regardless of whether Google's own operating system (Android) or Apple's operating system (iOS) is used and irrespective of how the mobile search is started (e.g. through the browser, a search app, widget or voice assistant – known as "search access points"), the user always receives search results from Google.

According to the DOJ, this is because Google uses agreements with manufacturers (including Apple) and mobile phone carriers to make sure that Google is the pre-set default for all search access points. It says that experience shows that users rarely change the default (as the DOJ puts it, "defaults are sticky").

The DOJ claims that Google achieves this by three measures: (1) by entering into anti-forking agreements with manufacturers Google ensures that its (open source) operating system (Android) used by manufacturers complies with Google's standards. The DOJ explains that in this way alternative operating systems are prevented from entering the market. (2) To be able to access Google's APIs (application programming interfaces) and Google's App Store, a bundle of Google apps (including Maps, Gmail and YouTube) has to be pre-installed. These apps must also have the most visibility (e.g. on the home screen) and have to be undeletable. (3) Finally, Google provides manufacturers (including Apple in particular) a percentage of search advertising revenue through "revenue sharing agreements" if Google is the sole pre-set default general search service. The DOJ argues that through these measures Google effectively forecloses distribution channels for the search engines of its competitors.

It remains to be seen whether Google will be able to successfully defend itself against these accusations in what in its view is a "*deeply flawed lawsuit*". In any case, the European Commission probably feels that its very similar statements in Google Android have been endorsed by the DOJ's legal action. Against this background, it is likely that the control of abusive behaviour by competition authorities on digital markets in Europe and beyond will become even more important over the coming years. Thus, every company should take a critical look at whether antitrust compliance is guaranteed when developing and structuring their digital business models.

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