Noerr’s Antitrust Bulletin for the 2024 ABA Spring Meeting

Recent Developments in Europe and Germany

Preface

We are a highly respected and frequently recommended team of over 30 antitrust specialists based in Germany, Brussels and Central and Eastern Europe.

We offer comprehensive advice on all antitrust and state aid matters. Our team helps clients develop sound business and transaction strategies, providing invaluable insights into digital economics. As trusted advisors in administrative and judicial proceedings, our litigation services also extend to damages cases. Companies seek our advice on M&A transactions, including merger control, direct investment (FDI) and foreign subsidies reviews. We have legal practitioners admitted to practice in the European Union, meaning that we benefit from unrestricted legal privilege in European proceedings. We have extensive experience in seamlessly coordinating and navigating complex cross-border matters.

Our services include, inter alia:

- Antitrust proceedings and investigations Private enforcement
- Merger control/investment controls
- Behavioral matters
- Digital business models
- State aid and foreign subsidies
- Competition compliance
- Horizontal and vertical cooperations

Content

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Noerr in a nutshell

In a rapidly changing world, Noerr anticipates developments, transforming change into advantage and charting new ways into the future. Covering the full depth and breadth of corporate and business law, its 500 advisors craft solutions with a strategic perspective. Together they help international corporations, small and medium-sized enterprises, financial investors and the public sector to achieve maximum possible impact, sustainability and resilience.

Noerr has offices in ten countries, partners with top law firms worldwide and is the exclusive member firm in Germany for Lex Mundi, the world's leading network of independent law firms with in-depth experience in 125+ countries.

> 500 Lawyers	**> 100** Partners	**> 1100** People working at Noerr	**15** Offices
> 30 % Female advisors	**> 25 %** Women in leadership positions	**> 30** Nationalities	**> 40** Languages spoken
+ 119 % growth in Germany since 2012 (Noerr Research)	**> 315** Revenue 2021 (mn €)	**Top 2** of the independent German firms (The Lawyer Europe 100, 2022)	**No 2** in Who's Who Legal 2022 Germany, based on the number of ranked lawyers

1. Stricter enforcement of European merger control

Concentrations in new markets and digital ecosystems are the key drivers for significant changes in the European Commission's enforcement practice which are accompanied by a landmark judgment on review criteria and the applicable standard of proof handed down by the European Court of Justice.

Inherent uncertainty in merger control without original jurisdiction

Parties to a concentration, especially in the pharma and digital economy sectors, are facing a risk that the European Commission will review their proposed transaction despite it not being originally subject to merger control either under European law or national law.

The General Court had already confirmed in 2022 that the European Commission may also review transactions which national competition authorities refer to Brussels without themselves having jurisdiction (T-227/21 – Illumina v Commission). The European Commission is already reviewing two other concentrations: Qualcomm/Autotalks and EEX/Nasdaq Power. The European Court of Justice is expected to decide on the lawfulness of this procedure this year. In addition, by its judgment of 16 March 2023 (C-449/21 – Towercast), the European Court of Justice enabled national competition authorities to review concentrations based on abuse of dominance control pursuant to Article 102 TFEU even where the concentrations do not exceed national thresholds and are not referred to the European Commission.

Less strict requirements of proof can make prohibitions easier

In its landmark decision of 13 July 2023 (C-376/20 P – Commission v CK Telecoms UK Investments), the European Court of Justice settled two fundamental questions:

To prohibit a merger, the European Commission only needs to demonstrate that the existence of a significant impediment to effective competition "*is more likely than not*". Contrary to the General Court's view, it is not necessary for the European Commission to demonstrate with a "*strong probability*" that such impediment exists.

Several criteria are relevant for the legal appraisal, none of which should be interpreted in an overly formalistic manner: for example, there is no general rule as to how close competitors need to be for a merger to lead to a significant impediment to effective competition; in any event, it is not only mergers between "*particularly close*" competitors that may lead to such impediment. The European Commission also does not need to demonstrate in this respect that an undertaking competes particularly aggressively – and especially not only based on competition in terms of price – to be classified as an important competitive force (for further details, please see our Noerr News article).

New theory of harm regarding digital ecosystems results in first prohibition

By its decision of 25 September 2023, the European Commission prohibited Booking's acquisition of eTraveli (M.10615 – Booking/eTraveli) based on a new theory of harm for digital ecosystems, irrespective of its own guidelines. Booking would have expanded its ecosystem for travel services by taking over the online flight booking portal as an important customer acquisition channel. Without examining potential foreclosure effects as is the traditional procedure, the European Commission established that the dominant position of Booking on the market for hotel online travel agencies in the EEA would be strengthened. The European Commission considers the new approach for digital ecosystems to be necessary and possible within the existing "flexible" framework of competition law.

2. German merger control: Federal Cartel Office has a "second string to its bow"

On 7 November 2023, the 11th Amendment to the German Act against Restraints of Competition (**"ARC"**) entered into force (see our Noerr News). It has significantly extended the intervention powers of the German Federal Cartel Office after the conclusion of a sector inquiry, specifically regarding merger review of transactions affecting the respective business sector (for more, see our Competition Outlook 2023).

Federal Cartel Office's expanded interventionary powers in merger control

Since July 2005, the Federal Cartel Office has been authorised to investigate individual business sectors or types of agreements if, on the basis of corresponding circumstances, it could be assumed that competition was restricted or distorted (sector inquiry). The Federal Cartel Office has made extensive use of this power.

Prior to the latest amendment of the ARC, publication of a final report generally constituted the final, formal end of a sector inquiry. Specific remedial measures could only be taken by the Federal Cartel Office if the authority established in separate proceedings an infringement of the cartel prohibition or an abuse of market power. Now that the 11th Amendment to the ARC added the new section 32f ARC, the Federal Cartel Office also has the right to take preventive action, even if an actual infringement of the antitrust laws has not yet occurred. This new power of intervention will also have an impact on German merger control.

Where there are objectively convincing indications that future concentrations will significantly impede effective competition in the sector investigated during the sector inquiry, the Federal Cartel Office can now require undertakings in that sector to notify all future M&A transactions. The usual turnover thresholds for German merger control will then not apply anymore. Instead, it will be sufficient for triggering the notification obligation if the acquirer generated turnover of more than EUR 50 million and the target company of more than EUR 1.0 million in Germany. This special notification obligation initially applies for three years but can be extended by up to three times by three years in each case.

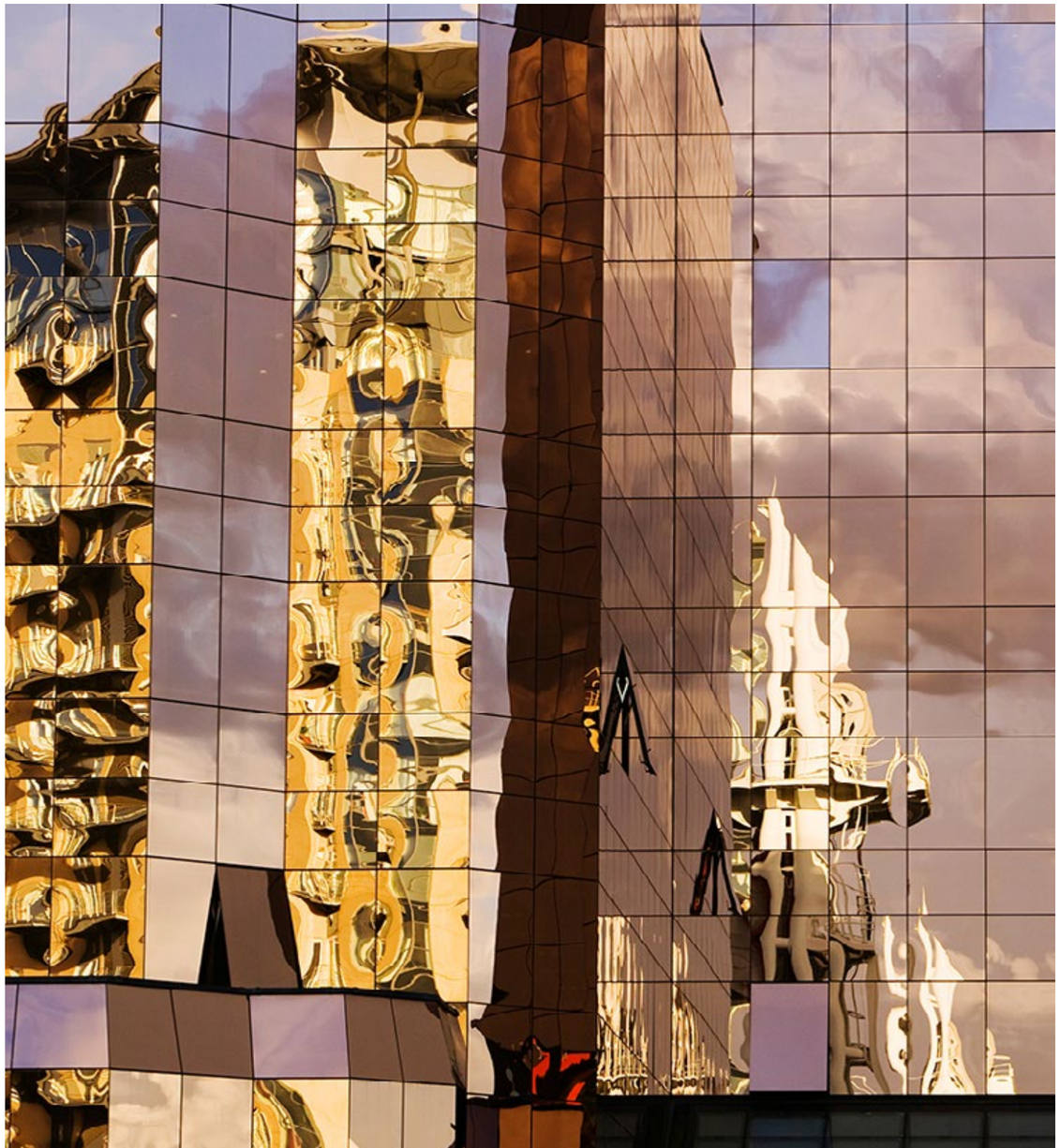
The Federal Cartel Office will now also have the authority to order the divestment of parts of an undertaking or assets. To that end, the Federal Cartel Office must first establish that there is a significant and continuing distortion of competition on at least one Germany-wide market and that no other appropriate remedial measures are available. However, such a drastic order can only be issued against a market-dominant undertaking or an undertaking with paramount significance for competition across markets (section 19a(1) of the ARC).

Undertakings without significant market power but whose conduct and relevance for the market structure significantly contribute to the distortion of competition may only be subject to less invasive remedial measures. Such measures can be conduct-related or of a structural nature and, if necessary to end or mitigate the distortion of competition, can extend to unbundling obligations at most (i.e. the accounting or organisational separation of corporate or business divisions). Less intrusive remedial measures available to the Federal Cartel Office encompass, inter alia, ordering an undertaking to grant access to data, interfaces and networks, to require the use of certain contract types or contractual terms, or abiding by other requirements, or to establish transparent, non-discriminatory and open norms and standards.

Outlook

Orders by the Federal Cartel Office which make use of its new powers of intervention are supposed to be adopted within 18 months after the final report on the sector inquiry has been published. The Federal Cartel Office has published two final reports since the new legal provisions entered into force on 7 November 2023 and, respectively, in the preceding 18 months, the Federal Cartel Office published final reports of two sector inquiries: one concerning the Municipal waste collection and hollow glass processing sectoral inquiry (28 December 2023) (currently only available in German, but available as a press release in English) and the other concerning Online advertising sectoral inquiry (15 May 2023) (currently only available in German, but available as an executive summary and press release in English). The Federal Cartel Office may be considering the use of its new powers at least in these two sectors. This is all the more possible in case of the sector inquiries concerning Refineries and wholesale fuel trade and EV charging infrastructure sectors which are still ongoing (both press releases currently only available in German).

3. Public enforcement – competition authorities active in a broad variety of industries



Both the European Commission and the German Federal Cartel Office have been actively prosecuting cartels in a broad variety of industries and sectors in 2023.

The European Commission fined a number of players, including ethanol producers, pharma companies and defence companies.

In addition, the European Commission conducted investigations or inspections in the online food delivery sector, the construction chemicals sector, the medical devices sector, the synthetic turf sector, the fashion sector, the energy drinks sector and the fragrance sector.

Furthermore, the European Commission opened an investigation into possible anticompetitive practices by Microsoft regarding Teams (by tying or bundling Teams to Office 365 and Microsoft 365).

The Federal Cartel Office fined road builders for collusive tendering and was very active in numerous other areas. Even after the 2022 Vertical Block Exemption Regulation, price parity clauses or most-favoured-nation clauses (Lieferando; PayPal), i.e. clauses intended to ensure the best conditions possible for the party using them, remain a focus of the Federal Cartel Office.

The Federal Cartel Office is also examining whether Vodafone infringed competition law by impeding 1&1's options for co-using radio masts. In addition, the Federal Cartel Office initiated abuse of dominance proceedings, for example with regard to discount structures (Coca-Cola) or in abuse of dominance control relating to energy price relief (energy suppliers).

As regards sustainability initiatives, the Federal Cartel Office tolerated the help granted to cocoa farmers in the relevant countries of production, Ghana and Cote d'Ivoire, to earn a living income.

Moreover, there were several interesting decisions by the European courts which competition authorities will have to observe in future (administrative offences and fines) proceedings.

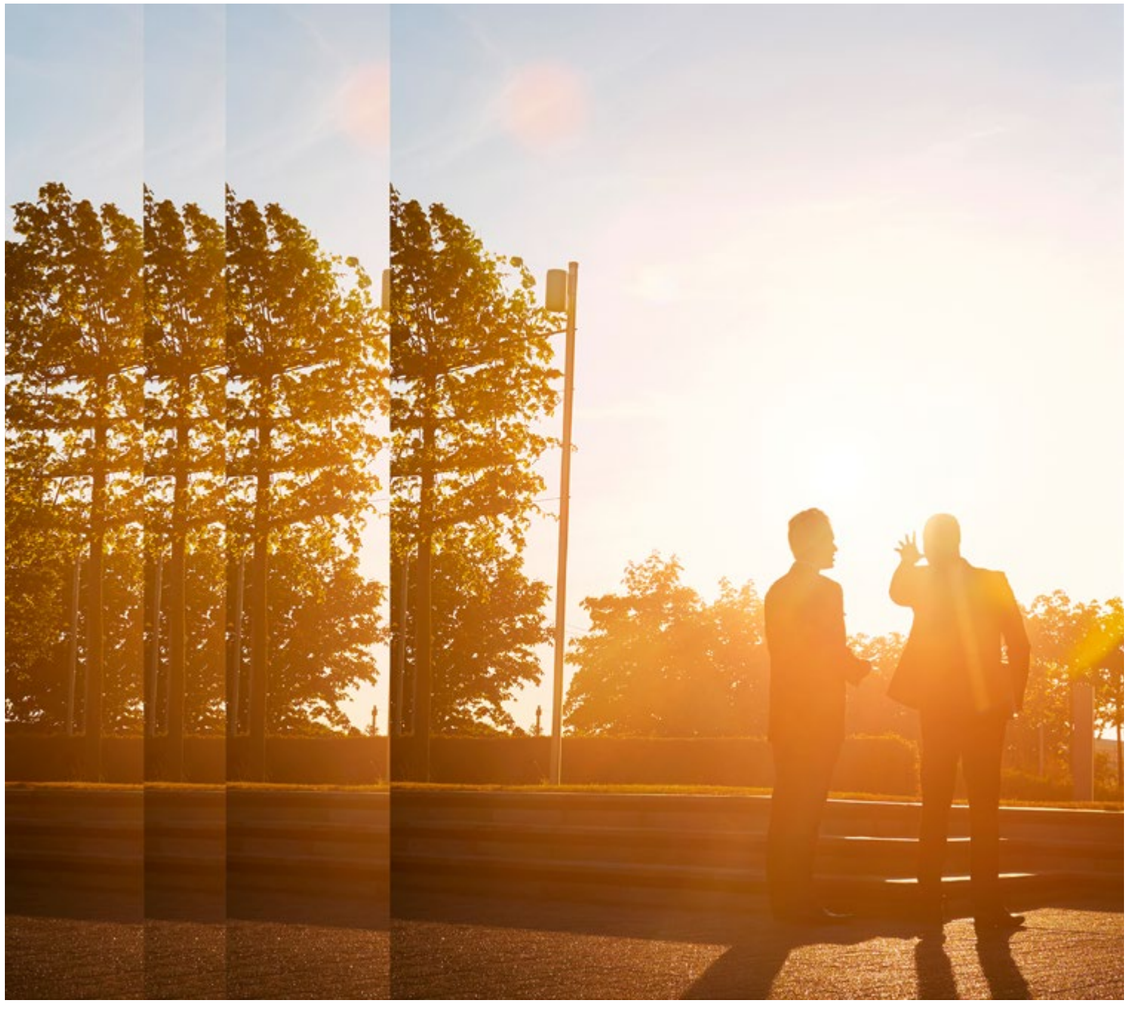
The European Court of Justice (judgment of 29 June 2023, C-211/22) clarified with regard to the concept of restriction of competition by object that it has to be interpreted restrictively and that a hardcore restriction (as defined in the Vertical Block Exemption Regulation) does not necessarily entail a restriction by object. According to the judgment, competition authorities always have to consider and recognise the specific circumstances of the individual case (see also our Noerr News article).

The European Court of Justice (judgment of 14 September 2023, C-27/22) also further specified the requirements regarding the application of the *ne bis in idem principle* („double jeopardy doctrine"). As a result, several (national) authorities investigating the same undertaking based on the same facts will have to coordinate their steps in the future, among other things.

Besides this, the General Court handed down a noteworthy decision (judgment of 18 October 2023, T-590/20) where the General Court emphasised that the European Commission has particularly wide discretion when determining the amount of fines, especially when taking into account criteria to increase such fines. However, the General Court also confirmed that the European Commission has to comply with the principle of proportionality and provide sufficient reasons for the amount determined, even in settlement procedures. As a result of this decision, those affected (in particular companies) now have a little bit more leeway when it comes to successfully defending themselves against certain aspects, even if the competition proceedings were terminated by means of a settlement.

4. Record number of judgments on level of damage in antitrust damages cases

In the area of antitrust damages, there were more judgments in 2023 than ever before which ruled on the level of damage caused. Some judgments were in favour of the claimants, while in others the defendants prevailed entirely or predominantly, despite assessments made by the trial judges.



Some of the legal disputes were decided on the basis of expert reports, while others were decided on the basis of a discretionary assessment conducted by the trial judge. There was a broad range of outcomes. Neither can it be said that discretionary assessments by trial judges led to a particularly high result (varying between 0.5% and 25%), nor did expert reports commissioned by the courts show any particular trend. For example, Mannheim Regional Court in its judgment of 23 June 2023 found after several years of expert proceedings in a sugar cartel case that there was an overcharge of just 2%. In other major antitrust damages cases involving drugstore products, trucks and railways, courts are currently taking evidence via expert reports, in some cases after Germany's Federal Court of Justice referred the cases back to the lower courts. Only a few courts are aiming for a discretionary assessment.

The Federal Court of Justice recently clarified in its judgment of 29 November 2022 in the *Schlecker* case that courts may not refrain from taking evidence even if the claimant's party expert report is incorrect, due to the principle of experience that states that cartels generally lead to increased prices. The Federal Court's competition panel had already given similar instructions when courts rejected the defendants' regression analyses without further examination.

In 2024, further pending appeal proceedings and upcoming initial appeal judgments on assessing damages will provide more guidance on the parameters to be observed. This should significantly reduce the duration of antitrust damages proceedings, which are sometimes felt to be overly long. However, it will only become apparent on a case-by-case basis whether the amounts awarded by the courts will ultimately meet claimants' expectations of the sometimes large sums of damages they have claimed.

Even if the courts show an increasing tendency to assess the overcharge, this assessment must then be applied in the judgment to the underlying facts of the case. This requires putting forward a sufficient factual basis for the disputed purchase transactions. After all, in the absence of a loss-causing event, there is no loss. Alongside assessing the level of damage, some courts are therefore currently defining the basic requirements for the claimant's factual submission on purchase processes. For example, Dusseldorf Higher Regional Court held in its judgment of 27 September 2023 (case number VI-U (Kart) 7/22) that a claimant must not only prove the purchase itself, but also the payment of the specific purchase price.

It remains to be seen to what extent the legislator will intervene in these principles established by the courts.

The Federal Ministry for Economic Affairs and Climate Action held a public consultation on the 12th Amendment to the Act against Restraints of Competition from 6 November 2023 to 4 December 2023, which also included questions on antitrust damages law. Some of the questions raised related to the revision of procedural and jurisdictional rules for more effective conduct of proceedings, the involvement of the German Federal Cartel Office in proceedings and a legal presumption on the level of damage caused. In 2024, we will therefore see which suggestions from practice the legislators will take up.

5. Digital Markets Act

The gatekeepers have been designated,...

The Regulation on contestable and fair markets in the digital sector – better known as the Digital Markets Act (**"DMA"**) – entered into force in November 2022 and has applied since 2 May 2023.

The objective of the Regulation is to ensure fair competition and to safeguard the contestability of the markets for digital services by regulating "gatekeepers", i.e. companies providing the core platform services defined in the DMA. These services can be considered a gateway between a large number of business users and consumers.

In September 2023, the European Commission designated Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft as initial six gatekeepers with regard to a total of 22 core platform services. Further reviews are currently being carried out so that other companies may be added to the list (for further details see our Noerr News article).

... must comply with the legal do's and dont's,...

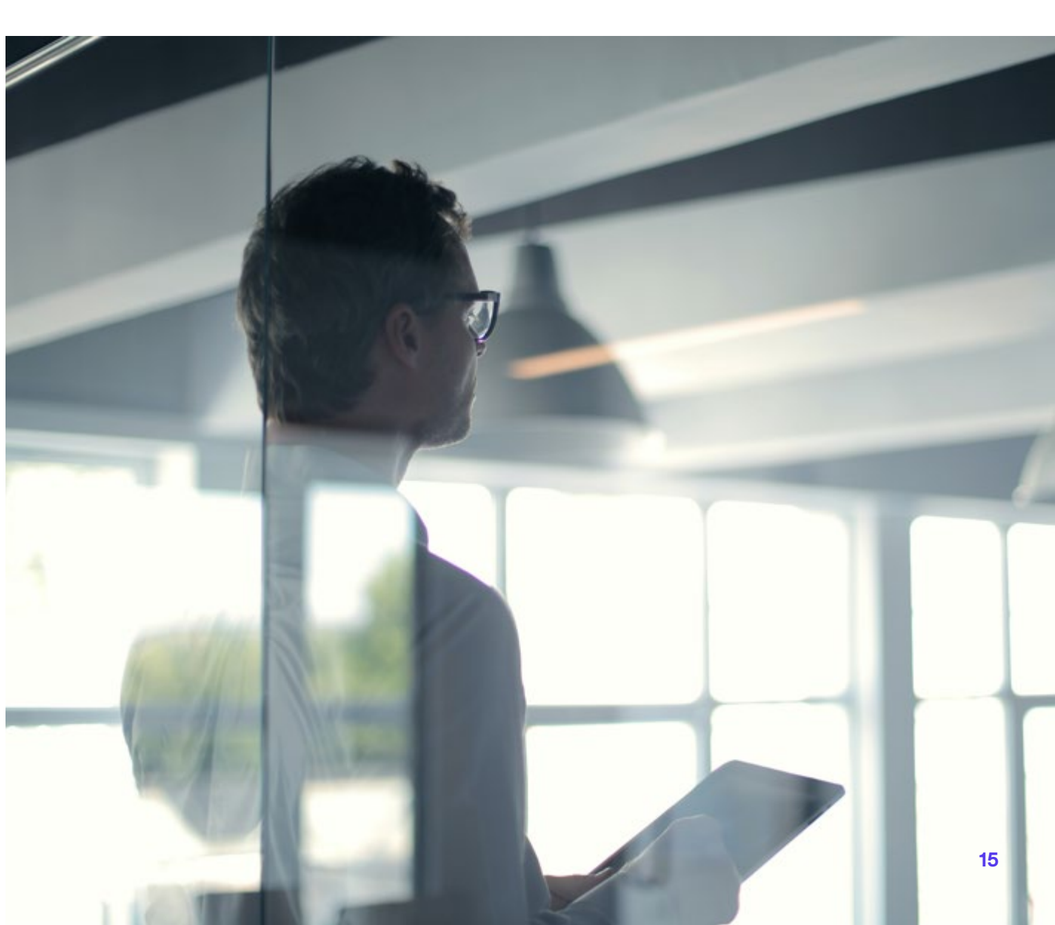
From the compliance day (7 March 2024), gatekeepers will have to regularly submit reports about their compliance with their obligations under the DMA to the European Commission (for background information in German, see here). The list of obligations under the DMA distinguishes between requirements that are applicable without further specification (e.g. the prohibition of tying or bundling and the prohibition of using most-favoured nation clauses) and obligations that are directly applicable but can be further specified for the individual gatekeeper by the European Commission (e.g. the prohibition of self-preferencing). Non-confidential versions of the compliance reports will be made publicly available by the European Commission, mainly to find out what platform users and competitors think and what their understanding of the market is.

... mainly monitored by the European Commission...

The European Commission is the sole enforcer of the DMA. However, the Member States' competition authorities are expected to support the European Commission. It was for this reason, for example, that the German Federal Cartel Office was conferred investigation powers (such as powers to search and seize and the right to demand information from gatekeepers) by the latest amendment to the German Act against Restraints of Competition (**"ARC"**), which has been in force since 7 November 2023 (see section 32g ARC).

... and under the watchful eyes of the market participants.

Undertakings do not only have the possibility to contribute to the gatekeepers' compliance procedure before the competition authorities in the European Union; they may also consider asserting rights by means of private enforcement. Steps to facilitate the enforcement of rights have already been taken in Germany. The provisions of German competition law at least partially expand the mechanisms set out in sections 33 onwards of the ARC, which are most known from the field of cartel damages. These mechanisms now also apply to breaches of the DMA and should make private enforcement of the DMA easier.



6. Digital antitrust law in Germany: one step ahead

The 11th Amendment to the Act against Restraints of Competition (**"ARC"**), which came into force on 7 November 2023, also introduces legislative changes intended to boost the enforcement of the Digital Markets Act ("**DMA**") (see our Noerr News article). The new section 32g of the ARC gives Germany's Federal Cartel Office the power to investigate designated gatekeepers for possible violations of Articles 5, 6 and 7 of the DMA. As provided for in the DMA, the Federal Cartel Office is thus able to support the European Commission, which is solely responsible for enforcing the DMA. Besides supporting the European Commission, this investigative power serves to distinguish between DMA proceedings and antitrust proceedings.

Alongside this, the private legal enforcement of the DMA is supported by changes to section 33 onwards of the ARC. The 11th Amendment to the ARC largely extends the mechanisms for facilitating private enforcement in antitrust cases (introduced to implement the Antitrust Damages Directive) to include breaches of the DMA. This extension applies to follow-on actions, for instance. On the other hand, the presumption of harm in the antitrust damages claim (first sentence of section 33a (2) ARC) has not been extended.

It will remain interesting to see how the DMA interacts with section 19a ARC. There will still be room for the Federal Cartel Office to apply section 19a ARC, especially where gatekeepers are subject to more comprehensive obligations under national antitrust law (see Article 1(6) DMA). The Federal Cartel Office's decision on commitments in the *Alphabet/Google's data processing case* (B7-70/21) illustrates how these provisions can work together in the future as well. In addition to closely coordinating its actions with the European Commission, the Federal Cartel Office limited its investigation under section 19a (2) ARC after the designaton of Alphabet as a gatekeeper to services that were not designated as a core platform service.

In 2023, the Federal Cartel Office took action against Alphabet/Google in two further proceedings under section 19a(2) ARC. With regard to the news platform Google News Showcase (V-43/20), the Federal Cartel Office refrained from issuing a commitment decision after Google had made adjustments. One thing Google did was to abandon its very questionable plans to integrate Google News Showcase into the Google search. This means that the participation of press publishers in Google News Showcase will not affect the ranking of search results in general Google searches in future. The Federal Cartel Office is monitoring the implementation of the measures. The Federal Cartel Office also issued a warning to Google in relation to practices in connection with Google Automotive Services.

To date, the Federal Cartel Office has not yet issued a prohibition order (section 19a (2) ARC) against one of the companies it has classified as being of paramount significance to competition across markets. The antitrust concerns are to be eliminated by the measures taken.

In addition to Alphabet/Google, only Meta has so far been legally determined as being of paramount significance. The proceedings against Amazon and Apple have not yet been finalised, as both tech companies have lodged an appeal against the Federal Cartel Office's determination with the Federal Court of Justice. On 28 March 2023, the Federal Cartel Office initiated the fifth proceedings in total to review Microsoft's status as being of paramount significance.

7. Almost two years of the Vertical Block Exemption Regulation and other topics from the world of distribution antitrust law

Although it is almost two years old, the Block Exemption Regulation on Vertical Agreements (**"Vertical Block Exemption Regulation"**), which was updated in May 2022, and the associated guidelines continue to raise issues in distribution antitrust law. Vertical agreements between companies at different stages of the production or distribution chain are exempted from the prohibition of cartels under the conditions of the Vertical Block Exemption Regulation (safe harbour). In particular, innovations in online sales and distribution, online trading platforms and hybrid platforms, as well as the sharing of information in dual distribution, give rise to a particular need for advice in practice, as already described in our Competition Outlook 2023. We expect this to remain the focus in 2024. Although the Vertical Block Exemption Regulation and Vertical Guidelines already contain helpful information clarifying the aforementioned topics compared to the previous versions, which are no longer valid, there are some pitfalls that are not obvious at first glance and that can quickly lead to a breach of antitrust law and should be avoided. However, there is also room for manoeuvre which can or should be used when designing a distribution model.

In addition, the *Super Bock Bebidas* decision (case C-211/22) given by the European Court of Justice on 29 June 2023 should be highlighted (see our Noerr News). The case concerned the question of whether a supplier setting a minimum price for resale by its customers should always be regarded as a restriction of competition by object. Such price fixing is a "hardcore restriction" within the meaning of the Vertical Block Exemption Regulation, and therefore such an agreement is excluded from the safe harbour of the block exemption. However, it must be examined on a case-by-case basis whether it restricts competition by object or by effect.

The European Court of Justice has clarified that the category of "hardcore restriction" cannot be equated with the category of "restriction of competition by object". If an agreement is a restriction by object, a competition authority no longer has to review and prove adverse effects on the market in order to establish that there is an infringement of the prohibition of cartels. This significantly reduces the effort required by the competition authorities to investigate the matter. However, according to the European Court of Justice, classifying a restriction as a restriction by object is justified only in exceptional cases. The mere fact that an agreement constitutes a hardcore restriction does not release the competition authority from its duty to prove that there has been an infringement of EU competition law. The competition authority must take into account the specific circumstances of each case in order to be able to presume a restriction by object. It is true that this decision has increased the burden of proof for the authorities. However, it should not be seen as an open invitation to engage in vertical price fixing, the prosecution of which is a priority for many competition authorities and is likely to remain so.

8. Court reviews investment control

For the first time in the history of German foreign direct investment (**"FDI"**) control, Berlin Administrative Court repealed two decisions of the German Federal Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz*, **"BMWK"**) in 2023.

The first decision concerned the acquisition of an interest in PCK Raffinerie GmbH in Schwedt. The company is the operator of the most important crude oil refinery in eastern Germany, supplying 95% of Berlin und Brandenburg with fuels. Austrian acquirer Alcmene GmbH, whose parent company is based in Guernsey, had notified the BMWK of the transaction for investment control purposes. However, a dispute about the validity of the purchase agreement arose between the acquirer and the seller, and the BMWK discontinued the procedure by means of a "decision", stating that according to the seller's submissions the share purchase agreement had become invalid. In the absence of a legal transaction, the BMWK saw no reason for the FDI procedure to continue. Alcmene took legal action against this decision.

By its judgment of 7 November 2023 (case No. VG 4 K 536/22), Berlin Administrative Court decided that the BMWK should not have discontinued the procedure against the will of Alcmene. As a general rule, an investment screening procedure initiated due to a notification filed by an acquirer may be discontinued only with that acquirer's consent. The law provides no legal basis for a "discontinuation decision" to the detriment of the filing party. Furthermore, the Court decided that, as a result of the expiry of the statutory screening deadline, the purchase agreement was approved by default. Even where the validity of the contract is disputed between parties, the approval by default still applies. Something different may apply where it is obvious that the acquisition can no longer be implemented. However, this was not the case in the case at hand.

The second decision was about the acquisition of Heyer Medical AG, a German manufacturer of anesthesia equipment and ventilators, by the Chinese Aeonmed group. Closing of the transaction had already occurred in 2019. When the BMWK learnt of the transaction in April 2020, it contacted the companies involved, thereby prompting the acquirer to file an application for a certificate of non-objection with the BMWK. In August 2020, the BMWK initiated a screening procedure and prohibited the transaction in 2022. The reason given by the BMWK was the significance of ventilator technology during the Covid-19 pandemic.

By its judgment of 15 November 2023 (case number VG 4 K 253/22), Berlin Administrative Court overturned the prohibition. Firstly, according to the Court, the BMWK had failed to properly hear the acquirer with respect to numerous facts which the BMWK had cited to justify the prohibition. Secondly, the BMWK hat opened the screening procedure too late. The period during which a prohibition was possible at the time had already expired when the procedure was opened. The application for a certificate of non-objection did not cause the period to begin again.

These judgments significantly strengthen companies' procedural rights in FDI proceedings. In particular, the hearing requirement is likely to increase the transparency and predictability of proceedings.

Noerr represented Alcmene GmbH in the FDI procedure and before Berlin Administrative Court.

9. European State aid law – a key to the European Union's crisis management, transformation and competitiveness

European State aid law continues to play a major role in addressing current crises and driving the green and digital transformations. However, another core concern is increasingly to ensure that the European Union remains competitive in an international context. These aims had a strong effect on the year 2023.

The Temporary Crisis Framework which was again revised and partially extended in March and November 2023, continues to play an important part in overcoming the energy crisis and driving the green transformation. It continues to facilitate State aid in key areas such as generating renewable energies and the decarbonisation of the industry. Since March of 2023, Member States have also been permitted to match subsidy initiatives in non-European countries to prevent the diversion of investments from the European Union that are strategically important for the transition to a climate-neutral economy. The "matching aid clause" is to be understood as a reaction to non-European State aid initiatives, particularly the USA's Inflation Reduction Act, and to increasingly intense global competition for investments.

A number of large State aid amounts were also approved in 2023 under the Guidelines on State aid for climate, environmental protection and energy 2022, including a State aid award of up to EUR 2 billion to support ThyssenKrupp Steel Europe in decarbonising steel production and to enable faster conversion to the use of green hydrogen. In addition, in June of 2023 another important project of common European interest (**"IPCEI"**) by 14 Member States entailing public aid of EUR 8.1 billion for the microelectronic and communications technology industries was approved based on the European Commission's IPCEI Communication of 2021.

The revised General Block Exemption Regulation, which entered into force in July of 2023, is likewise intended to facilitate progress, for example in renewable energies, research and development and broadband infrastructure, by raising notification thresholds. And finally, the European Chips Act, in effect since September 2023, contributes to implementing the digital transformation. This law is intended to mobilise public and private investment amounting to EUR 43 billion, thus making it possible to expand the semiconductor industry in the European Union.

However, the extent to which intended aid projects can actually become a reality after the German Federal Constitution Court's "budget decision" remains to be seen. This decision, handed down in November of 2023, found that the Second Supplementary Budget Act of 2021 was unconstitutional, thus voiding credit authorisations amounting to around EUR 60 billion for the climate and transformation fund. Planned support for climate projects or chip factories in Germany may feel the loss of this money.

In summary, as a catalyser for crisis management and transformation, European State aid law has been responsible for some success stories. However, it remains to be seen whether the State aid framework that has been created will result in sufficient investment to master ongoing crises while also securing the European Union's long-term international competitiveness.

10. The "new kid on the block": the Foreign Subsidies Regulation

The new EU regulation on foreign subsidies distorting the internal market (**"Foreign Subsidies Regulation"**) has been in full force since the end of last year. It aims to ensure more equal opportunities and a level playing field in the EU internal market. In addition to EU law on State aid, merger control, public procurement and foreign trade, subsidies granted by non-EU countries to companies can now be thoroughly investigated for their possible effect on the EU internal market. The standard of substantive investigation, which is still unclear, is likely to be largely based on EU State aid law principles.

The new Regulation provides the European Commission with three tools for investigating foreign subsidies. The European Commission has announced that it will make increasing use of its new investigative powers in the coming months and intends to progressively create the necessary capacities.

M&A transaction tool

From now on, in addition to other possible regulatory notification obligations (such as merger control), companies involved in M&A transactions will be subject to a supplementary notification obligation if certain statutory thresholds are exceeded. This is paired with a standstill obligation subject to a fine until "clearance" by the European Commission.

Consequently, compliance with the supplementary notification obligation should already be taken into account when drafting contracts and in due diligence processes ("M&A readiness"). Ascertaining whether or not a company is subject to a notification obligation requires a substantial amount of information and careful preparation. For this reason, companies should establish an internal reporting system despite the significant expenditure of time and resources. Similar to clauses regarding merger control notification, the contracts must likewise reflect information gathering, notification and the standstill obligation. The importance of M&A readiness has become apparent by the appreciable number of notifications and pre-notifications to the European Commission in the first few weeks since the notification obligation entered into force. It seems that considerably more than the estimated 30 notifications per year are to be expected.

Public procurement tool

If the thresholds established in the Regulation are exceeded, the notification obligation also extends to public procurement procedures. In this case, the notification must be submitted together with the submission of a tender or the request to participate in procurement procedures.

Ex-officio investigation tool

Another important wide-ranging control over foreign subsidies results from *ex-officio* investigative powers. In this respect, the European Commission has very broad discretionary powers regarding when to initiate an investigation on its own initiative.

Companies may also use complaints to the European Commission to instrumentalise the *ex-officio* investigation tool against their competitors. However, the European Commission has responded with restraint to the first complaints, which were lodged by football clubs and associations last year. The European Commission stated that it would initially prioritise investigations under the M&A transaction and public procurement tool. Nevertheless, the European Commission recently announced its intention to make use of its new powers with regards to the wind energy sector. Companies have been explicitly requested to report potentially unfair, competition-distorting circumstances. Thus, it remains unclear to what extent companies will be able to use the *ex-officio* investigation tool as a "sharp" or merely "dull" sword against competitors.