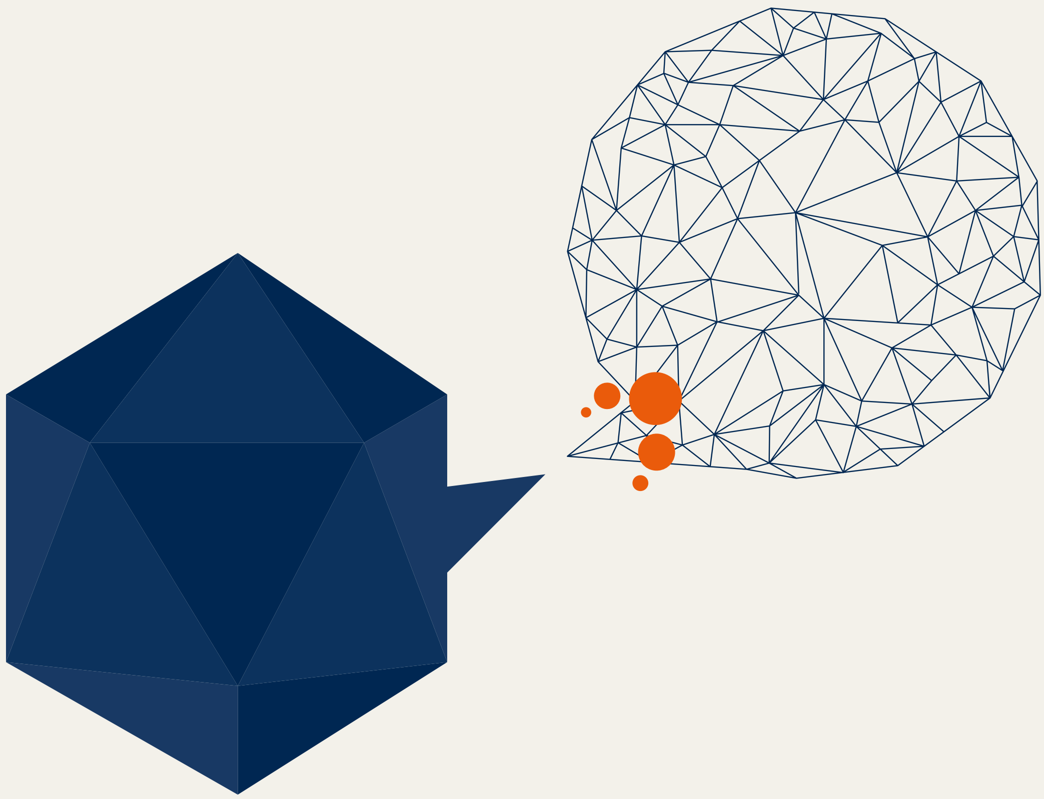
# Antitrust Developments in Europe and Germany

## Competition Outlook 2022



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# Preface

*In this year's Competition Outlook, Noerr's Antitrust & Competition practice group has summarised the most important antitrust and competition, merger control and State aid developments in Europe and Germany in 2021 for you under the maxim "Learn from the past and plan for the future".*

Special emphasis has been placed on developments for which companies should prepare in 2022. Our outlook focuses on the relevant key topics that we expect to play an important role in these areas of legal practice and in the area of investment controls.

We also take a close look at which developments companies should make sure they prepare for in 2022, especially against the backdrop of the Covid-19 pandemic. Our focus is on the key topics we expect to play a pivotal role in the above legal fields and in the area of investment controls.

The issues covered in our review of the year 2021 include the classification of narrow best-price clauses by the German Federal Court of Justice under antitrust and competition law and their consequences in everyday practice, the increased risk of sanctions due to "gun-jumping" and the strengthening of the rights of cartel victims in cartel damages proceedings.

Our outlook for 2022 shows that antitrust and competition law will not be left untouched by the major issues of the present and future. What further impact will the ongoing Covid-19 pandemic have on our new reality? What will green and digital transformations look like, and how much regulation will be needed?

Despite the fact that we have not yet left the Covid-19 pandemic behind us, competition authorities can (once again) be expected to conduct more and stricter investigations, which greatly increases the significance of companies' compliance programmes. Merger control relief for "failing companies" is still not to be expected. At EU level, changes can be expected in sales and distribution-related antitrust law due to the forthcoming amended version of the Vertical Block Exemption Regulation as well as the implications of the prohibition of unfair practices in the Digital Markets Act. In addition – despite and even because of the COVID-19 pandemic – there are clear indications that State aid will become an even more important topic. Finally, likewise investment controls and the accompanying notification requirements will become increasingly significant as the respective legal framework has recently been tightened.

# Content

# Review: Key trends in 2021

# Long-awaited decisions at European and German level

**Dr Sascha M. Giller, Maître en droit**
Associate

*Extensive proceedings of particular interest to the legal practice relating to the application of the ban on cartels were concluded in 2021.*

In particular, the German Federal Court of Justice (Bundesgerichtshof – "FCJ") clarified in the booking.com case that Article 101(1) TFEU also applies to narrow best-price clauses. As court of first instance, the Higher Regional Court Dusseldorf had ruled that the ban on cartels did not apply to narrow best-price clauses since they qualified as necessary ancillary agreements of the agency contracts with the hotel companies.

At European level, it was particularly the Commission's fine imposed on car manufactures that caused a stir. For the first time ever, the Commission established an infringement of Article 101(1) TFEU due to a restriction on technological development (exhaust gas treatment technologies).

# 1. BAN ON CARTELS





## Commission imposes fines on VW and BMW for concerted action on technical developments

**Peter Stauber, LL.M.**
Partner

*In a decision dated 8 July 2021, the European Commission determined that BMW AG, certain Volkswagen Group companies (Volkswagen, Audi, Porsche) and Daimler AG engaged in a concerted practice regarding exhaust gas treatment systems installed in passenger vehicles with diesel engines. The Commission found that this coordination constituted a breach of the European cartel prohibition (Art. 101(1) TFEU). Consequently, the Commission levied fines of 502.4 million Euro on the Volkswagen Group and 372.8 million Euro on BMW. Daimler was not fined because it was the first company to disclose the cooperation to the Commission and it acted as the Commission's principal witness.*

The Commission found that between 25 June 2009 and 1 October 2014 the car manufacturers coordinated the size of AdBlue tanks and the distances that could be travelled between fillings. They were also found to have discussed estimated average AdBlue consumption. According to the Commission, this restricted competition regarding these product attributes and thus regarding the technical development of exhaust gas treatment systems in new diesel passenger car.

Although this was not the full extent of the cooperation between the car manufacturers, the Commission determined that the other areas of cooperation did not restrict competition. Indeed, some aspects of the cooperation were even seen as conducive to competition. Examples include standardising AdBlue filler necks, establishing minimum quality requirements for system components, and discussing quality standards for AdBlue and suitable infrastructure for supplying AdBlue.

This case reveals once again that caution is advisable when cooperating with a competitor, but also that the cartel prohibition has nothing against such cooperation as long as it does not impair or if it promote competition. Due to the risk of a hefty fine, companies are urgently advised to closely examine in advance whether any intended cooperation is permissible under antitrust law.

# German Federal Court of Justice also declares narrow best-price clauses inadmissible




**Dr Fabian Badtke, LL.M.**
Partner

**Dr Sascha M. Giller, Maître en droit**
Associate

**Dr Lorenz W. Jarass**
Senior Associate

**Professor Dr Karsten Metzlaff**
Partner

*The "narrow" best-price clauses applied by the hotel booking platform booking.com had been a breach of the ban on cartels (German Federal Court of Justice (Bundesgerichtshof – "FCJ") decision of 18 May 2021– KVR 54/20).*

Under the narrow best-price clauses (also referred to as price parity clauses), hotels were not allowed to offer their rooms on their own website at lower rates or on better terms than on the booking.com platform. However, it was possible for hotels to offer their rooms more cheaply on other online reservation portals (prohibition of "wide" best-price clauses) and offline as well, provided they were not advertised or published online.

The FCJ dismissed these narrow best-price clauses saying that they noticeably restricted the tied hotels in price competition both with booking.com itself (intrabrand) and with other hotels (interbrand). The FCJ clarified that a possible "free-rider" problem, where hotel guests find the hotel using booking.com but book it on the hotel's own website due to cheaper rates, leads to the same finding. The FCJ further said that no efficiency benefits of the narrow best-price clause for competition are discernible because the restraints on price competition associated with narrow best-price clauses were too significant. It added that operating a permanent and commercially successful platform is possible even without agreeing upon narrow best-price clauses, stating that after all booking.com had grown continuously since the narrow best-price clause was suspended in 2016. Due to booking.com's high market share, no exemption under the Vertical Block Exemption Regulation ("VBER") was available either.

**Practical advice:** Companies should check whether any best-price clauses agreed upon are legally admissible, especially in the context of platforms. It is likely that even after the new VBER comes into force as of June 2022, best-price clauses involving market shares of less than 30% will still be eligible for exemption from the ban on cartels. However, an exception is currently planned for wide best-price clauses that prohibit suppliers selling on one platform from offering the relevant goods or services at lower prices on other platforms.





**Dr Jochen Christoph Hegener, LL.M.**
Associate

*For some time now, competition authorities and legislators have been examining the business models of large tech companies, focusing in particular on the possibility of abuses of dominant market positions.*

The year 2021 was no exception. With the 10th Amendment to the German Act against Restraints of Competition, the German legislators attempted to introduce specific rules to address the special challenges posed by the market power these companies have gained through their platform models.

A number of other legislative proposals in this context have further shaped public perception of antitrust law. This applies first and foremost to the European legislative process for the Digital Markets Act, which also primarily concerns the platforms designated as "gatekeepers" and their particular position. Even in the US, where many of the tech companies are based and have been rather cautiously regulated in the past, there are now a number of attempts to limit the market power of those companies and to prevent the unintended impact of the "tech economy" not only on the economy but also society at large.

In 2021, when the General Court confirmed the European Commission's decision in Google Shopping, one of the main landmark cases for the regulation of platform business models came to an end (for now). Apart from the (overly) long duration of the procedure, this judgment by the General Court shows that existing antitrust rules should be part of a more comprehensive regulation of platform markets.

# 2. BAN ON ABUSE

# Google loses Google Shopping dispute

**Sarah Blazek, E.MA**
Associated Partner

**Dr Jochen Christoph Hegener, LL.M.**
Associate

**Professor Dr Karsten Metzlaff**
Partner

*The most noteworthy case on an abuse of a dominant position this past year was the decision by the General Court of the European Union ("General Court") on the price comparison service Google Shopping. The decision confirmed the 2.42 billion Euro fine imposed by the European Commission in 2017.*

The General Court's decision reinforces the opinion expressed by the European Commission ("Commission") that Google had abused its dominant position on the market for general internet search services by illegally favouring its own price comparison service, Google Shopping, over competing price comparison services. Specifically, it stated that as of 2008, Google had used its strong position on the market for general internet search services in the EEA to display results linking to Google Shopping in an advantageous position in Google searches related to products sold on the internet. Such results appeared either very high on the results list or in eye-catching boxes to the right of the search results. The General Court also stated that Google programmed its algorithms to display the most relevant results referring to other price comparison services at best on p. 4 of the results. According to the General Court, this practice increased traffic to the Google Shopping site in some countries by the factor 45, while traffic on competitors' sites plummeted by up to 92%.

This practice by Google – frequently referred to as "self-preferencing" – has now been branded an abuse of a dominant market position by the Commission, and the General Court as well. Despite thenpossibility of an appeal by Google, the judgement represents an important victory for the Commission and will probably be widely seen as a boost to the efforts of numerous antitrust authorities and legislators to strengthen regulation of the business practices used by large digital companies.





# Far-reaching developments in German and European merger control

**Dr Sascha M. Giller, Maître en droit**
Associate

**Dr Jens Peter Schmidt**
Partner

*The German legislator significantly increased the turnover threshold of the parties to a merger which will trigger a notification obligation. This led to a welcome decrease of around 30% in the transactions notified to the German Federal Cartel Office (Bundeskartellamt – "FCO").*

However, at EU level, Brussels sent opposite signals, thereby jeopardising the consistent and predictable application of established competence and referral mechanisms between Member States and the Commission. Whereas formerly Member States could only refer transactions to the Commission which should have been notified nationally, referrals without a national notification requirement will now be allowed according to a Commission guidance document.

The Illumina/Grail merger (M.10188) illustrates the topicality of this practice. This merger, which does not require notification in any Member State, was referred to the Commission by France. The Commission then carried out an in-depth investigation, and there were procedural disputes in which the General Court of the European Union was also involved (T-227/21). In the Facebook/Kustomer merger (M.10262), the Cartel Office made its rejection of the Commission's practice clear.

In many transactions a high degree of uncertainty and complexity will remain until the relevant issues are clarified by the courts, and this uncertainty must be reflected in M&A practice. The same applies to the findings confirmed by Luxembourg in the first instance regarding the implementation prohibition with respect to certain SPA clauses and integration measures.

In terms of substantive law, the FCJ clarified for the first time the conditions for prohibition under section 36(1) of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) due to the reinforcement of a dominant market position and thereby established a strict standard for German merger control.

## 3. MERGER CONTROL

# SIEC test has no significance of its own when a merger strengthens an existing dominant position

**Dr Kathrin Westermann**
Partner

*On 12 January 2021, for the first time since July 2015, when the SIEC test was incorporated into German law, the German Federal Court of Justice (Bundesgerichtshof – "FCJ") handed down a ruling (KVR 34/20 – CTS Eventim/Four Artist) involving the issue of whether a merger that would strengthen a dominant position must in addition be subject to a test assessing the criterium of "significantly impeding effective competition".*

The FCJ rejected this proposition. In the FCJ's opinion, any merger that strengthens or creates a dominant market position significantly impedes effective competition and is to be prohibited. The FCJ also adhered to its previous practice according to which a dominant position can be considered strengthened even if the strengthening is neither noticeable nor significant. Rather, according to the FCJ, it is sufficient if existing or potential competition is impeded to a merely insignificant extent (e.g. by means of a – vertical – "increase in market share" of only 1%). The FCJ states that this applies in any event if (e.g., due to network effects) unfavourable conditions for subsequent entrant competitors prevail.

This decision is noteworthy because the German legislator had adapted the wording of its prohibition criteria to European law. In fact, the European Commission does not usually consider an insignificant strengthening to be sufficient grounds for a prohibition. The FCJ counters that the legislator expressly did not intend for the amendment to change national decision-making practice or to restrict the powers of intervention of the German Federal Cartel office, but rather to expand them. The SIEC test, according to the FCJ, is intended to cover situations that cannot be easily resolved using the concepts of the creation or strengthening of a dominant position (complex oligopoly situations and non-coordinated and/or unilateral conduct).





# Competition authorities focusing on "gun jumping"

**Sarah Blazek, E.MA**
Associated Partner

**Dr Sascha M. Giller,**
**Maître en droit**
Associate

**Dr Jens Peter Schmidt**
Partner

*Around the world, companies face large fines if transactions subject to merger control are not notified and/or are implemented before clearance.*

This was demonstrated by the General Court of the European Union "General Court" in case no. T-425/18, Altice Europe v Commission, when it essentially confirmed the European Commission's highest fine to date (over 120 million Euro) for gun jumping based on contractually agreed pre-closing covenants and certain practices of the parties between signing and closing. Both the notification obligation and the standstill obligation are to be applied in parallel for the same conduct and it can make a difference for the fine whether a company complies with the notification obligation but infringes the standstill obligation or even both obligations.

The General Court has clarified the fluid boundaries in sales contracts between permitted pre-closing covenants that serve to preserve value and the impermissible possibility of a controlling influence. The General Court considered three categories of rights of influence repeatedly discussed in transaction practice to be too broad because they were within the ordinary course of business and were not necessary to protect legitimate value retention interests:

> appointing and recalling directors;
> modifying pricing policies and standard terms and conditions; and
> the possibility of entering into, terminating or modifying various contracts with relatively low monetary thresholds.

To avoid the risk that business transactions of the target company that are not considered essential to its value are subject to the influence of the buyer before a pending transaction is completed, utmost caution is needed when drafting the relevant SPA clauses. Even the mere possibility of exercising influence as of signing can be sufficient to constitute a gun-jumping infringement. Regardless of this, an exchange of information between buyer and seller may constitute an infringement which causes additional risks in the integration planning.

# 4. CARTEL DAMAGES

**Johanna Krauskopf, LL.M.**
Associate

**Dr Henner Schläfke**
Partner

*Several judgments in which the German Federal Court of Justice (Bundesgerichtshof – "FCJ") has recently emphasised the need for a more comprehensive judicial assesment of the facts in cartel damages cases have kicked off intense debate on how to estimate damages.*

Dortmund Regional Court (8 O 115/14 (Kart)) and Celle Higher Regional Court (13 U 120/16 (Kart)) made the first attempts to freely estimate damages based primarily on an overall assessment of factual aspects without econometric calculations. However, this approach remains the exception. Most of the courts appoint court-certified experts to draw up econometric expert opinions. Some of the initial expert opinions, e.g., regarding the sugar cartel, ascertained damage amounts, but some also rejected certain expert opinions commissioned by claimants as inadequate.

In its second ruling regarding the truck cartel (KZR 19/20), the FCJ also emphasised that expert opinions commissioned by a party are to be taken into account as relevant indicators in the context of an overall assessment in accordance with section 287 German Code of Civil Procedure (Zivilprozessordnung). The cartel senate of the FCJ also once again emphasised that the fact-based assumption of a price increase enabled by a cartel does not automatically result in a reversal of the burden of proof.

However, the FCJ found that general terms on lump-sum compensation can be used to determine the amount of damage. It declared that such clauses are permissible (KZR 63/18 – Rail Cartel VI) and that a lump-sum amount of up to 15% of the total invoice amount does not constitute an unreasonable disadvantage within the meaning of section 307 German Civil Code (Bügerliches Gesetzbuch).

Case law is increasingly dealing with the rights to claim surrender and information anchored in sections 33g and 89b German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen). In the tenth amendment to this law, the German legislator clarified that these rights apply to all proceedings initiated after 26 December 2016, regardless of when the claim arose.

At European level, the European Court of Justice ("ECJ") has shaped cartel damages law particularly with its rulings in the Sumal case (C-882/19) on liability of subsidiaries for cartel infringements by their parent companies and in the Volvo case (C-30/20) on issues regarding territorial jurisdiction.





## Permissible lump-sum for damages clauses leads to reversal of burden in proof in cartel damage claims

**Dr Fabian Badtke, LL.M.**
Partner

**Immo Schuler, LL.M.**
Senior Associate

*The quantification of damage in an action for cartel damages often poses difficulties for a claimant. In its February 2021 ruling in the Rail Cartel VI case, the German Federal Court of Justice (Bundesgerichtshof – "FCJ") strengthened the rights of cartel victims and declared that lump-sum cartel damages clauses in general terms and conditions are permissible.*

The FCJ established two essential prerequisites for the effectiveness of such clauses:

1. The amount of the lump-sum compensation must not exceed "the damage to be expected in the usual course of events". To avoid causing an unreasonable disadvantage to a contractual counterparty, a lump-sum damage payment anchored in general terms and conditions must be drafted in such a way that "undercompensation and overcompensation of the damage is equally likely". Accordingly, the lump-sum damage payment must be compared to the amount of damage typical in the sector. If there are no empirical findings for a damage amount that is typical for the sector, it is sufficient to refer to economically sound general statements regarding price increases in the context of a cartel. Based on current metastudies (e.g., the Oxera study), the FCJ considers lump-sum damage payments of 5–15% reasonable.
2. The contractual counterparty must be permitted to demonstrate a lower amount of damage. The requirements for demonstrating a lower damage amount are the same as those placed on a victim to demonstrate damage in cases where no lump-sum damages clause is in place.

**Practical advice:** Companies should review their existing purchasing agreements, add a lump-sum cartel damage clause where appropriate and include such a clause in all new agreements. A valid clause results in a reversal of the burden of demonstration and proof, i.e., the contractual counterparty must demonstrate and possibly prove that the damage is less than the lump-sum amount laid down in the clause. A counterparty that is unable to do so accepts the binding nature of the lump sum.

# ECJ strengthens cartel victims' rights in actions for damages

**Johanna Krauskopf, LL.M.**
Associate

**Sebastian Wrobel, LL.M.**
Associate

*In two landmark judgments in 2021, the European Court of Justice ("ECJ") once again emphasised the role that "private enforcement" plays in effective enforcement of European antitrust law.*

In one judgment (case no. C-30/20 – *Volvo*), the ECJ provided guidance in clarifying jurisdictional issues in actions for cartel damages by determining that Art. 7 No. 2 of Regulation No 1215/2012 ("Brussels Ia Regulation") governs not only international but also territorial jurisdiction. The ECJ specified that the place where the harmful event occurred within the meaning of Art. 7 No. 2 Brussels Ia Regulation is the place where the victim directly or indirectly acquired the items affected by the cartel. This applies if the acquisition occurred in only one place; otherwise, the claimant's registered office determines territorial jurisdiction. However, the Member States retain their power to centralise jurisdiction in favour of a specialised court.

In the other judgment, *Sumal* (C-882/19), the ECJ substantially expanded liability for cartel damages in a group of companies by adding to the previously known scenario of liability of a parent company for its subsidiary a converse liability under certain circumstances. According to the concept of an economic unit, a subsidiary can be held liable for anticompetitive conduct on the part of its parent company if (i) the two legal entities are connected by economic, organisational and legal links and (ii) there is a specific link between the subject matter of the parent company's antitrust infringement and the economic activity of the subsidiary – for example if the infringement is related to the same product market on which the subsidiary is active. It remains to be seen whether liability between "sister companies" can also be derived from this liability concept established by the ECJ.





**Immo Schuler, LL.M.**
Senior Associate

*Sectoral inquiries help the European Commission and the German Federal Cartel Office (Bundeskartellamt – "FCO") investigate and analyse the structures and conditions of competition in a certain industry. The only condition for conducting a sectoral inquiry is that "rigid prices or other circumstances" suggest that competition may be restricted or distorted. The investigation is therefore not directed at an individual company, but is intended to help review the overall competitive structures of an economic sector. The investigative powers of competition authorities, in particular requests for information, are therefore broad.*

Depending on the results of the inquiry, competition authorities may, for example, launch specific investigations into individual companies or make recommendations to politics. Even the fact that a sectoral inquiry is carried out at all may prompt companies in the sector concerned to review and, where appropriate, adapt their behaviour.

In practice, following initial reluctance by competition authorities, sectoral inquiries now play a significant role. For example, the European Commission and the FCO have already carried out sectoral inquiries in the fields of e-commerce, roaming, cement and ready-mixed concrete, fuels, and milk (see here and here for overviews of previous sector inquiries conducted by the European Commission and the FCO).

The European Commission and the FCO are currently conducting sectoral inquiries into the "Internet of Things" and the "Provision and marketing of publicly accessible charging infrastructure for electric vehicles". Interim reports were published in July and October 2021, respectively.

# 5. SECTOR INQUIRIES

# IoT sector inquiry targets Siri, Alexa, Google Assistant

**Sarah Blazek, E.MA**
Associated Partner

**Markus Brösamle**
Senior Associate

*An inquiry into the consumer IoT (Internet of Things) sector in the EU is one aspect of the digital strategy followed by the European Commission ("Commission"). It is joined by a number of digital actions increasingly being taken by the Commission as well as by national antitrust authorities to protect competition (more) effectively where needed.*

In July 2021, the Commission issued an interim report on the first results of the ongoing IoT sector inquiry. The Commission's goal is to gain a more accurate understanding of the sector and its trends, the competition situation and potential competition problems. The Commission gathered information from more than 200 (international) IoT companies of all sizes. The study focused on segments such as voice assistants, smart applances (such as refrigerators and washing machines), wearable devices (e.g., fitness trackers) and IoT services for consumers (e.g., carsharing services or services for creative content such as Spotify).

Focus on Siri, Alexa and Google Assistant: allrounder voice assistants were found to have a key impact. Such user interfaces that connect consumers to various smart devices and IoT services are seen to have a gatekeeping function. Competition concerns include the provider's unilateral control over interoperability and integration processes, exclusivity and bundling practices as well as advantages from access to data. The study also found that the market has high barriers to entry because developing a voice assistant is very expensive.

The final report is expected in the first half of 2022. The impact of the findings of the inquiry could include specific investigation proceedings against certain companies or being taken into consideration when new laws are drafted. It will be interesting to see what happens next.





# Preliminary findings of sector inquiry on charging infrastructure – German Cartel Office calls for more competition

**Immo Schuler, LL.M.**
Senior Associate

**Peter Stauber, LL.M.**
Partner

*On 12 October 2021, the German Federal Cartel Office (Bundeskartellamt – "FCO") published a preliminary report (see here) on the findings of its currently ongoing sector inquiry into the competition situation as regards infrastructure for charging electric vehicles.*

The objective of the inquiry is early identification of potential competition problems in the current market phase of infrastructure creation. To achieve this objective, the FCO is examining the competition situation for three levels in the value added chain:

1. providing suitable space for publicly accessible charging stations,
2. operating publicly accessible charging stations and
3. supplying electricity and/or providing mobility services.

Current findings show that the product and services markets are still developing, as are the positions of the market players. This will need to be taken into consideration when evaluating market power. The FCO also emphasises that there must be no discrimination in the context of government support for the quick and comprehensive construction of the infrastructure. Plans that call for the government to assume all or part of the operating risk for charging stations and plans that could restrict operators' freedom to set prices independently are viewed critically.

One important method to develop functioning market structures mentioned by the FCO is public calls for tenders for suitable spaces. Otherwise, the FCO contends, regional operators with market power could arise, increasing the risk of strategies that impede competition and foreclose the market. At this point, the FCO believes, however, that the existing intervention options under antitrust law are sufficient for an appropriate reaction to abusive conduct and that thus regulatory intervention is not necessary.

After analysis of the collected data, the FCO will publish the final results of its sector inquiry.

# 6. STATE AID





## Companies from third countries beware: EU wants to examine foreign subsidies more closely



**Sarah Blazek, E.MA**
Associated Partner

**Dr Jens Peter Schmidt**
Partner

**Giovanna Ventura**
Legal Advisor

*Times are getting harder for foreign investors in the EU. Because investments by foreign companies, including state-owned companies, have increased rapidly in the EU in recent years, political decision-makers in the EU have become more doubtful that the existing instruments for State aid, cartel and merger control, sourcing and political instruments to protect trade are sufficient to combat the (seeming) distortions caused by subsidies from non-EU countries.*

For this reason, in May 2021, the Commission published a proposal for a regulation to provide it with three new regulatory instruments: (i) a reporting-based investigation instrument for certain transactions; (ii) a reporting-based investigation instrument for bids on large public contracts; and (iii) a general investigation instrument.

This proposal is currently under discussion in the European Parliament and the Council, with the Committee on International Trade (INTA) taking the lead in the Parliament. The first debate on the wording took place in October. The rapporteur, Mr Hansen (EPP parliamentary group) and other Members of Parliament emphasised the necessity of concentrating on notification thresholds, which should be further lowered in comparison to the Commission's proposal. As soon as the European Parliament and the Council have established their own positions, the interinstitutional negotiations on the final wording can begin. In order to be adopted, the proposed regulation must be approved by not only the Council but also the European Parliament. It is expected to be formally accepted by the end of 2022 and to enter into force as of mid-2023.

# Outlook: What to expect in 2022

**Dr Alexander Birnstiel, LL.M.**
Partner

**Dr Jochen Christoph Hegener, LL.M.**
Associate

**Dr Raphael Reims, LL.M.**
Associate

*The ban on cartels is one of the cornerstones of German and European competition and antitrust law. It can be expected to continue to play a key role in the work of competition authorities in 2022. While recent public debate has often focused on issues related to digital business models and abuses of market power by "gatekeepers", who are being monitored ever more closely, the application and enforcement of the ban on cartels is also constantly evolving.*

In Germany in particular, the 10th Amendment of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen), that entered into force in early 2021, has led to far-reaching if less publicly noted innovations, the full relevance of which may not become clear until administrative proceedings involving fines are conducted and concluded under the new rules. This can be expected to take place in 2022. In particular, the investigative powers of the German competition authorities were strengthened by various new and revised means of detecting and prosecuting cartels. In addition, it is likely that the first fining decisions taking into account the new "compliance defence" will occur in 2022. Finally, 2022 is also expected to provide more clarity on the extent to which sustainability aspects are to be taken into account in the application of the ban on cartels.

# 1. BAN ON CARTELS





## Resurgence and reinforcement of investigations of accused companies



**Dr Alexander Birnstiel, LL.M.**
Partner

**Dr Jochen Christoph Hegener, LL.M.**
Associate

**Dr Raphael Reims, LL.M.**
Associate

*First of all, investigative measures can be expected to intensify following the marked decrease in these measures due to the Covid-19 pandemic. This holds true particularly for dawn raids, i.e. searches of the offices of companies that are suspected of having infringed the ban on cartels. According to its annual report for 2020, the German Federal Cartel Office (Bundeskartellamt – "FCO") conducted an unusually small number – specifically, a mere two – dawn raids in that year. When the pandemic winds down, it can be expected that the FCO as well as the European Commission will once again conduct more dawn raids. Both authorities have indicated this intent.*

In any case, the Federal FCO's investigations will become more intrusive and intense due to several expansions of its investigative authority under the 10th Amendment of the German Act against Restraints of Competition that entered into force in early 2021. For example, as already enshrined in EU law, dawn raids conducted by German cartel authorities will now include a cooperation obligation for employees of the company, with breaches of such obligation being punishable by fines. Likewise for the first time, companies may now have to answer extensive written information requests from German cartel authorities on the facts of a case.

Consequently, companies affected or potentially affected by extensive investigations should very carefully consider whether they should make use of the leniency programme or at least act proactively and more cooperatively vis-à-vis the authorities, rather than simply enduring such investigative measures. The 10th Amendment of the Act against Restraints of Competition upgraded the FCO's leniency programme by anchoring it in law for the first time. The FCO reacted by revising its leniency programme guidelines in August 2021. Even under these new rules, however, a company should still seriously consider entering into a leniency programme when it believes that the suspicions of the competition authorities cannot easily be disproved and that defending against the accusations will tend to be difficult.

# The increasing importance of compliance programmes



**Dr Alexander Birnstiel, LL.M.**
Partner

**Dr Jochen Christoph Hegener, LL.M.**
Associate

**Dr Raphael Reims, LL.M.**
Associate

*In addition, companies should take preventive measures. These include in particular compliance programmes concerning competition and antitrust law, which are set to be increasingly important in future. Since the 10th Amendment to the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen), the German Federal Cartel Office (Bundeskartellamt – "FCO") has been required to consider, when setting fines, adequate and effective precautions to prevent and uncover breaches of competition and antitrust law. Accordingly, in the future, compliance programmes may not only prevent breaches, but also minimise the fine if there is a breach. This "compliance defence" may even be applied to situations that occurred prior to the Amendment.*

The FCO has responded to these new provisions with revised Guidelines on setting fines. According to the Guidelines, the specific requirements for a legally relevant compliance programme depend especially on the type, size and organisational structure of a company. Companies must therefore focus on developing a compliance programme tailored to their specific business and its risks under competition and antitrust law. In light of this, disputes with the FCO about what constitutes an adequate and effective compliance programme seem to be inevitable.

Details of applicable compliance programmes must also be explained by companies in any application for early removal of an entry from the competition register, which lists cartel fines, among other things. Public-sector clients must consult the register in major procurement procedures and then decide according to public procurement regulations whether a company should be excluded from taking part in the procedures.

It is therefore worth remembering that in future, the consequences of a lack of or inadequate compliance programmes may be expensive for the companies concerned. A carefully developed, up-to-date programme tailored to the company's specific needs is thus all the more advisable for every company.





# Sustainability and antitrust law



**Markus Brösamle**
Senior Associate

**Dr Lucas Gasser**
Senior Associate

**Dr Lorenz W. Jarass**
Senior Associate

*ESG criteria (environmental, social and governance) and sustainability initiatives have become increasingly important across all sectors in recent years. Thus, sustainability parameters also become competition parameters. At the same time, companies are increasingly attempting to join forces to achieve sustainability goals. The extent to which antitrust law impedes such collaborations or what contribution it can make to a "green economy" are issues yet to be generally clarified.*

The ban on cartels requires that coordinated conduct between companies – especially competitors – is to be examined. Thus, even coordinated conduct regarding sustainability can, in principle, constitute a breach of antitrust law. Neither the "Green Deal" nor any other laws provide for exemptions in this regard. Consequently, a thorough investigation must be conducted in each individual case to determine whether joining forces to achieve sustainability goals actually restricts competition. It is possible that the necessary (long-term) examination could reveal that individual agreements may have a positive effect on competition and are therefore permissible.

As such arrangements often do constitute a restriction of competition, individual exemption from the cartel prohibition becomes relevant. One requirement for such exemption is that the cooperation increases efficiency gains that provide appropriate benefits to consumers. Since it has not been clarified so far whether and to what extent sustainability aspects can be recognised as increasing efficiency, a thorough examination is required on a case-by-case basis.

2022 will hopefully bring more clarity in this respect. The European Commission has announced that it will include sustainability aspects in the current revision of its numerous guidelines. The coalition agreement of the new German government also provides for the topics of sustainability and social aspects to be addressed from a competition law perspective. If in doubt, companies should approach antitrust authorities directly to jointly clarify the permissibility of a particular potential sustainability collaboration. It would therefore be helpful if the antitrust authorities were to publish the results of such consultations in future.

# Prohibition of abusive practices in the digital age

**Dr Fabian Badtke, LL.M.**
Partner

**Dr Sascha M. Giller, Maître en droit**
Associate

**Dr Lorenz W. Jarass**
Senior Associate

**Johanna Krauskopf, LL.M.**
Associate

*In the coming year, at both the European and national level the topic of prohibition of abusive practices will continue to be a focus of antitrust law.*

In Germany, significant steps have been taken to modernise antitrust law in the digital age via the 10th Amendment to the German Act against Restrictions of Competition (Gesetz gegen Wettbewerbsbeschränkungen – "Competition Act"). The core provision is section 19a Competition Act, which lays down criteria for intervention, thus permitting the German Federal Cartel Office (Bundeskartellamt – "FCO") to effectively intervene, especially against large digital companies.

The new anti-abuse legislation provides for a two-step procedure. First, the FCO must examine whether the relevant company has "paramount significance for competition across markets"; to then prohibit certain abusive conduct.

In the first six months after the Amendment entered into force, the FCO has already used the new anti-abuse instrument to initiate phase-one proceedings against all four large US digital technology companies (Google, Apple, Facebook [Meta] and Amazon). It will be interesting to see how strongly the FCO will react to any violations.

The legal remedy available against orders under section 19a leads directly to the German Federal Court of Justice (Bundesgerichtshof – "FCJ"). This shortening of the legal process is justified by the need to accelerate proceedings, which is required for digital business models.

At European level, it will be interesting not only to follow the pending abuse proceedings against Google and Apple but also to see whether the Digital Markets Act, which is scheduled to enter into force in 2022, unleashes a dynamic force similar to that launched in Germany by section 19a Competition Act.

## 2. BAN ON ABUSE





# European judges not finished with Google yet

**Dr Till Steinvorth**
Partner

*After the European Commission levied fines amounting to billions of euros in each of the years 2017, 2018 and 2019 against Google and its parent company Alphabet, the two companies brought an action against each of the three decisions with the General Court of the European Union "General Court". Once again in 2022, European judges will be dealing with the following actions:*

## Google Shopping

The 2.42 billion Euro fine levied in 2017 was aimed at the price comparison service Google Shopping. Google was accused of presenting search results in the general Google search in such a way as to give its service an advantage over competing price comparison services (primarily by giving them a more advantageous position and presentation). The General Court upheld the Commission's fine in a judgment (T-612/17) dated 10 November 2021. Google can challenge the General Court's judgment before the European Court of Justice "ECJ". If this happens – which would hardly be surprising given the importance of the case for Google's business model – starting in 2022, the ECJ will also look at how the practice of self-preferencing is to be assessed under antitrust law.

## Google Android

The 4.34 billion Euro fine levied in 2018 had to do with the Android smart mobile operating system (smartphones and tablets) developed under Google's leadership.

Since Android operates with an open source licence, any company is free to use it. However, according to the Commission's findings, Google had taken various steps to pre-install Google Search applications and its own browser (Chrome) on all Android devices. For example, manufacturers of the devices could only license Google's app store (Play Store) if these two apps were pre-installed. Google also made payments to some major manufacturers and mobile network operators for pre-installing only the Google search app on their devices. Google also took steps to prevent alternative Android versions ("Android forks") from being developed.

The Commission was of the opinion that these measures were intended to ensure that internet use on Android devices was routed through the Google search engine, from which Google generates most of its revenue. However, based on the following grounds, the Commission found that this is contrary to the prohibition in Article 102 TFEU. First, Google dominates three of the markets concerned here: the market for general internet search services, the market for licensed operating systems for smart mobile devices (smartphones and tablets) and the market for Android app stores. Secondly, Google does not live up to the responsibility it bears in regard to competition as the market-dominating company. More specifically, the Commission saw three different forms of exclusionary conduct:

1. unauthorised coupling of the Google Play Store with the apps Google Search and Google Chrome,
2. Illegal financial incentives for the exclusive pre-installation of Google Search on Android devices, and
3. Illegal obstruction of the development and distribution of competing Android operating systems.

According to the Commission, the common objective of these practices was to consolidate Google's dominant position in the market for general internet search services.

Google's action against the Commission's decision (T-604/18) is currently pending before the General Court. The hearing took place during the week from 27 September to 1 October 2021. A judgment could come as early as the end of 2022.

### Google AdSense

The 1.49 billion Euro fine levied in 2019 is based on Google's activity as an intermediary to provide search engine advertising for websites (e.g., news pages, blogs or travel portals) that offer a search box. These search boxes provide not only search results but also advertisements. A website operator (publisher) that wants to monetise the space around the search results can use Google's "AdSense for search" service. This puts Google in the position of a broker between advertisers and publishers.

The decision mentioned three different clauses in the service contracts with the operators of the websites:

1. an exclusivity clause obliging publishers to use Google as its intermediary for advertisements,
2. a "premium" placement clause requiring publishers to reserve the most prominent areas on their search results pages for a minimum number of Google ads, and
3. a clause requiring publishers to have Google's written consent to change the way search engine advertising for Google's competitors was displayed.

The Commission concluded that Google's use of these clauses constituted an infringement of Article 102 TFEU. Its first reason was that Google dominates the market for brokering online search engine advertising (in addition to the market for providing online search engine advertising). Its second reason was that the clauses prevented Google's competitors from entering the market for advertising brokering, thus guaranteeing its own dominance.

Google brought an action (T-334/19) against the Commission's decision before the General Court. The hearing could take place in 2022.





# 3. MERGER CONTROL

# Covid-19 pandemic – Is the failing company defence a possible way out?

**Dr Lucas Gasser**
Senior Associate

*Even after two years, the Covid-19 pandemic shows no signs of ending. Every new wave of infections creates economic uncertainties and problems in a variety of sectors. Since 1 May 2021, when usual requirements for filing for insolvency were reinstated, many companies' economic problems have once again begun to entail an urgent risk of insolvency.*

One possible means of escaping or avoiding insolvency, is a rescue by another company in the form of a takeover or an investment. However, if the rescuing company is already active in the same markets as the distressed company and the takeover would result in high market shares, it is likely to fail due to merger control hurdles. Nevertheless, these obstacles can be overcome if the parties are able to demonstrate that the competitive situation in the relevant markets would have deteriorated even without the proposed merger. Such a situation may justify the use of the failing company defence in merger control proceedings.

However, the German Federal Cartel Office (Bundeskartellamt – "FCO") is continuing to impose strict requirements on each of the prerequisites for such a failing company defence. The Covid-19 pandemic does not seem to have occasioned any relief. For example, in 2021, the FCO prohibited the planned acquisition by the FUNKE publishing group of the newspaper "Ostthüringer Zeitung" primarily because it concluded that the prerequisites for a failing company defence were not given. Likewise, there is no evidence that the European Commission pursued the possibility of a failing company defense in one single case in 2021.

Given the fact that the antitrust authorities are applying the prerequisites for a failing company defence strictly, it continues to be necessary in 2022 to liaise with the authorities at an early phase and conduct a detailed assessment before considering a failing company defence at all.





**Dr Lucas Gasser**
Senior Assoaciate

*In 2022, two key European legislative acts relevant to antitrust and competition law are expected to enter into force which have already provided a lot of material for debate in the past few years and will certainly continue to do so.*

Firstly, there is the Digital Markets Act (DMA) which together with the Digital Services Act (DSA) is regularly referred to as the European constitution for the digital economy. In essence, the DMA aims at the competitive regulation of large platform opera tors (known as gatekeepers). The DMA will therefore be a significant addition to the regime regarding the abuse of a dominant position (Article 102 TFEU). Unlike in Article 102 TFEU, the European Commission will be given the authority to issue and demand observance of certain rules of conduct by gatekeepers even before they abuse their market power.

Secondly, the revised Vertical Block Exemption Regulation ("VBER") will enter into force on 1 June 2022, replacing the previous version in force since 2010. The VBER, which is particularly relevant to distribution contracts and other agreements between companies from different market levels, is thus also being adapted to the changing markets and balances of power in the digital age. Most of the new provisions relate to the now overwhelming importance of online retail and the role of online marketplaces.

As regards German legislation for 2022, no relevant new antitrust rules are expected. Practitioners and above all the German Federal Cartel Office (Bundeskartellamt – "FCO") are gathering initial experience with cases based on section 19a of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen), which entered into force in 2021 with the 10th Amendment.

# 4. LEGISLATION

# Antitrust distribution law – the new Vertical Block Exemption Regulation

**Markus Brösamle**
Senior Associate

**Dr Lucas Gasser**
Senior Associate

**Dr Fabian Hübener, LL.M.**
Associated Partner

**Professor Dr Karsten Metzlaff**
Partner

**Peter Stauber, LL.M.**
Partner

*On 1 January 2022, a new Vertical Block Exemption Regulation ("VBER") will enter into force to replace the previous VBER which is around eleven years old. The provisions of the new VBER are intended to take into account recent developments, especially as regards internet sales, which now need less protection than they did eleven years ago.*

The new draft VBER provides for changes – some considerable – in many areas:

> The VBER will now be applicable – for the first time – to online marketplaces.
> Hybrid platforms will no longer qualify for block exemption.
> Selected platform prohibitions for sales intermediaries will generally be exempted.
> Manufacturers will also have more control over their internet sales, but it will not be permissible to prevent dealers in their effective use of the internet.
> One of the new options for manufacturers is dual pricing, applying different sales prices to their dealers for online as opposed to brick-and-mortar sales channels.
> The changes intended regarding dual distribution will probably prove to be particularly noteworthy. Their most important content regards restrictions on information exchange between manufacturers and dealers whose aggregate share of the relevant retail market exceeds 10%. Very heated discussions arose during the reform process regarding this new threshold and the issue of the extent to which information exchange is to be privileged in dual distribution constellations. Indications are that the European Commission will make adjustments here.
> Other changes affect such aspects as the term of competition prohibitions, allocation of exclusive sales territories and permissible restrictions on selective distribution systems.
> You can find a more in-depth discussion of the changes here.

Parties to existing contracts must comply with the requirements of the new VBER by 31 May 2023. Parties to agreements entered into after 31 May 2022 must immediately comply with them.





# Online platforms in focus – DMA and DSA on the home stretch

**Dr Lucas Gasser**
Senior Associate

**Dr Fabian Hübener, LL.M.**
Associated Partner

**Immo Schuler, LL.M.**
Senior Associate

*In December 2020, the European Commission presented two legislative proposals with wide-ranging implications for online platforms: the Digital Market Act ("DMA") and the Digital Services Act ("DSA"). In November and December 2021, the Council of the European Union and the EU Parliament presented their amendment proposals for the two legislative proposals. On this basis, trialogue negotiations are scheduled to start in spring of 2022.*

Proposals relating to antitrust and competition issues are found primarily in the DMA. The European Commission's objective under the DMA is to take quick and decisive action against practices by "systemically important" online platforms that impede competition. The DMA will thus supplement the current legal antitrust provisions on the abuse of dominance.

The DMA provides for a number of criteria according to which large online platforms are to be classified as "gatekeepers". The exact thresholds for the criteria – e.g. the relevant sales and user number thresholds – are still to be established in the trialogue negotiations.

Once an online platform is qualified as a gatekeeper, special obligations concerning its business conduct are imposed, primarily that the gatekeeper must comply with a "Dos & Don'ts" list, which can include tailored requirements for that specific gatekeeper, within six months. The European Commission has provided several examples of a potential "Do" such as safeguarding the interoperability of the platform's own services with those of third parties. An example of a "Don't" is unequal treatment of third-party services or products as opposed to the platform's own (self-preference prohibition).

Gatekeepers that breach the requirements of this individual "Dos & Don'ts" list can face the same consequences as market-dominating companies that use abusive practices – including sizable fines of up to 10% of their annual worldwide turnover.

# New German coalition and antitrust law – what are the new government's plans?

**Sarah Blazek, E.MA**
Associated Partner

**Markus Brösamle**
Senior Associate

*According to its coalition agreement, the new German government consisting of the Social Democrats (SPD), the Free Democrats (FDP) and the "Greens" wants to commit itself to "fair competition".*

The agreement also expressly states that innovation, sustainability, consumer protection and social justice are to be protected by antitrust law. The government is therefore likely to address ESG issues (see above). At European level, the government also wants to work to prevent strategic acquisitions of potential competitors that hinder innovation (also referred to as "killer acquisitions"). In consolidated markets, on the other hand, a deconcentration option independent of whether a dominant position is being abused is considered useful only as an ultima ratio.

It is also being examined whether the German Federal Cartel Office (Bundeskartellamt – "FCO") should become a "consumer protection authority" equipped with appropriate powers to prosecute economic violations of consumer protection. This is not a new idea. After all, the FCO usually has the market knowledge required to take effective action here.

In future, it will again be possible to take legal action against what is referred to as "ministerial authorisation". The Bundestag is also to be involved in the proceedings. The background to this is likely to be the latest proceedings, some of whose decisions were controversial. For example, the ministerial authorisation of the Edeka/Kaiser's merger led to the resignation of the chairman of the Monopolies Commission.

Furthermore, an interoperability obligation at European level and via the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) is intended for market-dominant companies. Data portability is to be strengthened. With all the focus on the "big players" or GAFA (see above), it is made clear that the interests of small and medium-sized enterprises ("Mittelstand") should always be taken into account.

At EU level, the intention is to champion an "ambitious" DMA (see above), which is to be enforced by the national competition authorities.

The coalition agreement indicates that antitrust law will be used to achieve the desired market structure or concerns. Somewhat more regulation can be expected.





# 5. STATE AID

# European State aid law increasingly significant



**Sarah Blazek, E.MA**
Associated Partner

**Dr Raphael Reims, LL.M.**
Associate

**Dr Jens Peter Schmidt**
Partner

*During the Covid-19 pandemic, European State aid law has experienced a renaissance, as governments are passing law after law on wide-ranging emergency programmes that qualify as State aid in support of affected companies. The European Commission has been reacting to this by continually extending and/or expanding a "temporary framework" that establishes the compatibility of such programmes and measures with State aid rules. The Commission is to be expected to extend and/or expand for the seventh time the current framework, which – as matters stand – will expire on 31 July 2022.*

The significance of European State aid is even strengthened by the fact that the Commission has announced that instruments available under State aid law will be its main means of effecting the "green transformation". For example, on 21 December 2021, the Commission issued new guidelines for State aid related to climate, environmental protection and energy that include these new categories.

But this special development is not the only one in regard to State aid. On 1 January 2022, new guidelines for regional State aid created by the Commission to lower hurdles encountered in digital investments entered into force. On the same date, a reworked Commission communication containing criteria according to which, for example, significant innovations in key sectors for "important projects of common European interest" (IPCEI) are evaluated likewise entered into force. Finally, the amended General Block Exemption Regulation is expected to be adopted in the first six months of 2022. It will not only address the abovementioned issues such as State aid for environmental protection but also include modified prerequisites for granting more standard State aid such as for research and development.





**Dr Jens Peter Schmidt**
Partner

*Whilst only a few years ago "investment control" was an unknown concept for many, transaction specialists now come across it everywhere. Legal developments in the last few years – given further impetus by the Covid-19 crisis – included (i) the entry into force of the new EU FDI Screening Regulation No. 2019/452, (ii) the introduction of at least six new screening laws (even more if counting in amendments), and (iii) significant tightening of the existing rules.*

Also in Germany, home of some of the most established investment control legislation in Europe, the rules have been markedly strengthened – including by naming a number of new sectors that are now subject to obligatory screening. This trend is to be seen in the context of an increasing effort on the part of European governments to protect domestic companies and technologies that play an important role in local economic growth. However, it is important not to fail to see the forest for the trees. The first and most important step for the parties to a transaction remains identifying any notification obligations at an early stage and factoring them into the transaction process. The second step is to communicate clearly and transparently with the authorities, which usually leads to timely clearance and thus closing of the transaction.

Investment controls will continue to be an important issue in 2022. It remains to be seen what conclusions for its national screening laws each Member State will draw from the Commission's first annual report on FDI screening. It will be an interesting year.

## 6. FOREIGN DIRECT INVESTMENT CONTROL

# Investment screening as a deal breaker – new case groups in the German Foreign Trade and Payments Regulation

**Dr Bärbel Sachs, LL.M.**
Partner

**Dr Jens Peter Schmidt**
Partner

**Dr Till Steinvorth**
Partner

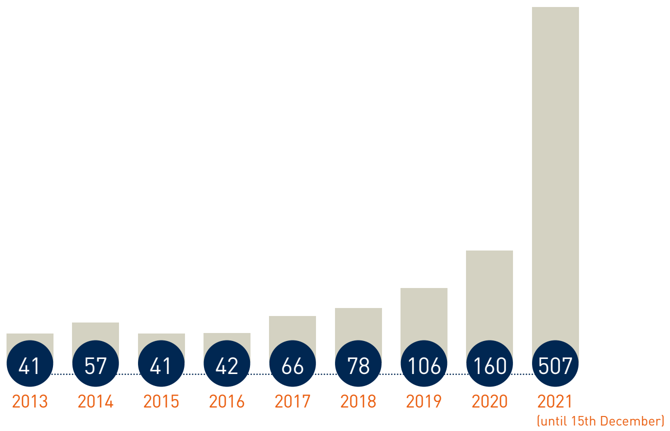
*Investment screening is becoming increasingly important to the transaction business. The large number of stricter legal provisions and the associated significant increase in notifications to the German Ministry for Economic Affairs and Climate Action (Bundesministerium für Wirtschaft und Energie – Federal Ministry) (approx. 45 notifications in 2016 versus approx. 250 in 2021) reflect this development.*

With the entry into force of the 17th Amendment to the German Foreign Trade and Payments Regulation (Außenwirtschaftsverordnung), the number of sectors subject to reporting obligations under the cross-sectoral procedure has increased from 11 to 26. The new case groups mainly concern companies in the fields of IT, robotics, semiconductors, aerospace and quantum technology. Acquisitions of voting rights must also be reported if they meet or exceed certain thresholds (20%, 25%, 40%, 50%, 75%). However, in contrast to France or Italy, for example, Germany has still opted for a narrow subject-matter definition of reportable activities, meaning that reporting obligations can often be excluded in individual cases.

Given its regular review period of two months (phase I) and four months (phase II), investment screening provides for a particularly long regulatory review procedure compared to merger control, especially as these periods can be further extended. However, unproblematic transactions are still mostly approved in phase I. If in phase 2, the European Cooperation Mechanism may lead to procedural delays.

At the same time, it should be noted that only two transactions have so far been prohibited by the Federal Ministry. In most cases, critical transactions are eligible for approval if the acquiring parties make commitments under a public-law contract (e.g., to protect security-relevant information or make delivery commitments).

The year 2022 will reveal further developments; with an increasing number of national reporting laws, more and more cases will pass through the European Cooperation Mechanism. In Germany, there is potential for further legislative changes, as phase I procedures are not currently included in the Cooperation Mechanism.




Investment reviews in Germany

For further questions please contact:

# YOUR TEAM

**Dr Fabian Badtke, LL.M.**
Partner
**Frankfurt/M.**
T +49 69 971477124
fabian.badtke@noerr.com

**Dr Alexander Birnstiel, LL.M.**
Partner
**Munich**
T +49 89 28628241
alexander.birnstiel@noerr.com

**Professor Dr Karsten Metzlaff**
Partner
**Hamburg**
T +49 40 3003970
karsten.metzlaff@noerr.com

**Dr Bärbel Sachs, LL.M.**
Partner
**Berlin**
T +49 30 20942131
baerbel.sachs@noerr.com

**Rusandra Sandu**
Partner
**Bucharest**
T +40 21 3125888
rusandra.sandu@noerr.com

**Dr Henner Schläfke**
Partner
**Berlin**
T +49 30 20942079
henner.schlaefke@noerr.com

**Dr Jens Peter Schmidt**
Partner
**Brussels**
T +32 2 2745570
jens.schmidt@noerr.com

**Iulian Sorescu, FCCA, CMC**
Partner
**Bucharest**
T +40 213125888
iulian.sorescu@noerr.com

**Peter Stauber, LL.M.**
Partner
**Berlin**
T +49 30 20942175
peter.stauber@noerr.com

**Dr Till Steinvorth**
Partner
**Hamburg**
T +49 40 300397145
till.steinvorth@noerr.com

**Dr Kathrin Westermann**
Partner
**Berlin**
T +49 30 20942151
kathrin.westermann@noerr.com

**Sarah Blazek, E.MA**
Associated Partner
**Munich**
T +49 89 28628513
sarah.blazek@noerr.com

**Dr Fabian Hübener, LL.M.**
Associated Partner
**Brussels**
T +32 2 2745572
fabian.huebener@noerr.com

**Pascal Schumacher**
Associated Partner
**Berlin**
T +49 30 20942030
pascal.schumacher@noerr.com

**Luiza Bedros**
Counsel
**Bucharest**
+40 21 3125888
luiza-elena.bedros@noerr.com

**Robert Pahlen**
Counsel
**Berlin**
T +49 30 20942316
robert.pahlen@noerr.com





**Dr Szilvia Andriska**
Senior Associate
**Budapest**
T +36 1 2240900
szilvia.andriska@noerr.com

**Markus Brösamle**
Senior Associate
**Berlin**
T +49 30 20942067
markus.broesamle@noerr.com

**Dr Lucas Gasser**
Senior Associate
**Berlin**
T +49 30 20942067
lucas.gasser@noerr.com

**Dr Lorenz W. Jarass**
Senior Associate
**Frankfurt/M.**
T +49 69 971477124
lorenz.jarass@noerr.com

**Immo Schuler, LL.M.**
Senior Associate
**Munich**
T +49 89 28628354
immo.schuler@noerr.com

**Jan-Hendrik Fitzl**
Associate
**Hamburg**
T +49 40 300397141
jan-hendrik.fitzl@noerr.com

**Dr Sascha M. Giller, Maître en droit**
Associate
**Frankfurt/M.**
T +49 69 971477124
sascha.giller@noerr.com

**Dr Jochen Christoph Hegener, LL.M.**
Associate
**Munich**
T +49 89 28628513
jochen.hegener@noerr.com

**Johanna Krauskopf, LL.M.**
Associate
**Frankfurt/M.**
T +49 69 971477273
johanna.krauskopf@noerr.com

**Dr Raphael Reims, LL.M.**
Associate
**Munich**
T +49 89 28628513
raphael.reims@noerr.com

**Sebastian Wrobel, LL.M.**
Associate
**Berlin**
T +49 30 20942151
sebastian.wrobel@noerr.com

**Tzu-Yuan (Thomas) Chu, LL.M., MBL**
Project Lawyer
**Berlin**
T +49 30 20942000
tzu-yuan.chu@noerr.com

**Giovanna Ventura**
Legal Advisor
**Brussels**
T +32 2 2745573
giovanna.ventura@noerr.com

Alicante
Berlin
Bratislava
Brussels
Bucharest
Budapest
Dresden
Düsseldorf
Frankfurt/M.
Hamburg
London
Moscow
Munich
New York
Prague
Warsaw

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