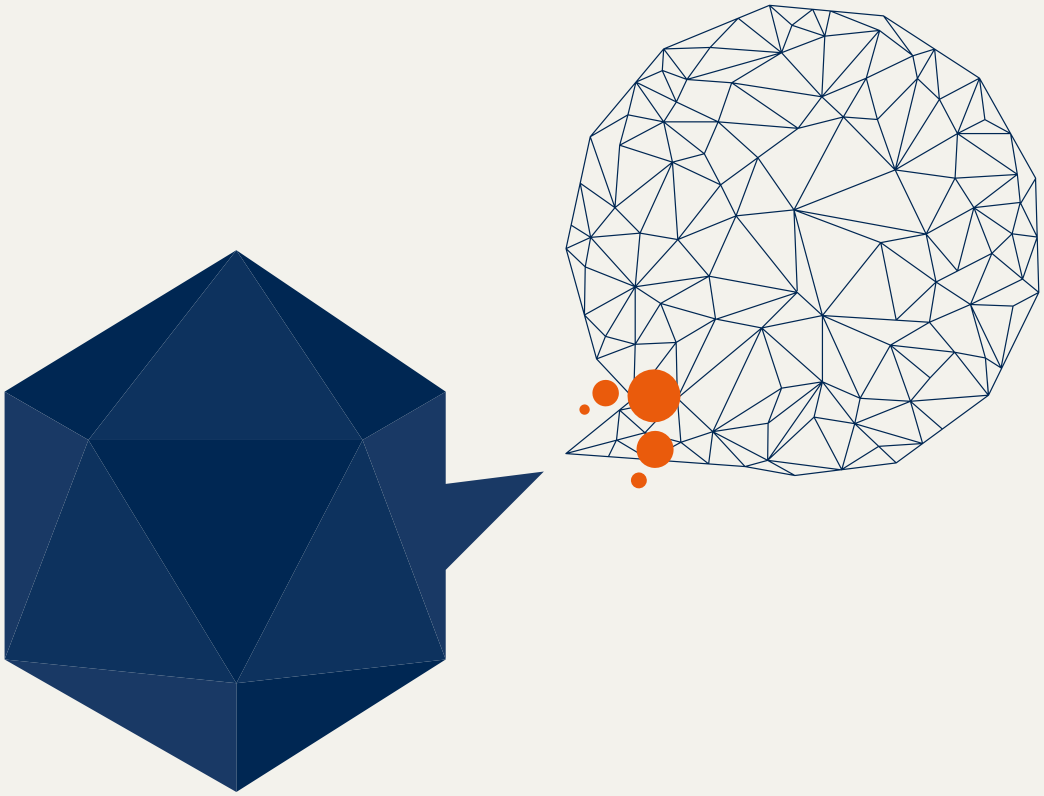
Antitrust Developments in Europe and Germany

Competition Outlook 2023



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Preface

In this Competition Outlook, Noerr's Antitrust & Competition practice group provides you with a summary of the most important developments in European and German competition and antitrust law in 2022, focusing on the most prominent issues, and gives an overview of the developments we can expect in these areas in 2023.

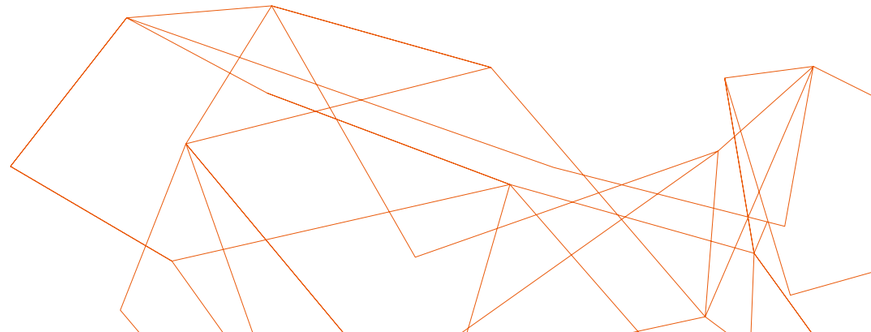
Topics relating to digitalisation once again played a special role in antitrust and competition issues in Germany and Europe throughout 2022. In Germany, the Federal Cartel Office is continuing to apply section 19a of the German Act against Restraints of Competition ("**Competition Act**"), introduced as part of the 10th amendment to the Competition Act, and this will also have a crucial impact in 2023. At a European level, last year saw the adoption of the new Digital Markets Act ("**DMA**"), which gives the European Commission extensive powers to monitor corporations classified as "gatekeepers". The new year will reveal which areas the DMA will be applied to first and how it interacts with section 19a of the Competition Act.

In addition, competition and antitrust law in 2022 was influenced to a great extent by Russia's aggression against Ukraine and its repercussions. The Federal Cartel Office issued decisions on crisis-induced co-operations necessitated by possible gas shortages. Rising electricity, gas and fuel prices were also one of the motivations for the German legislator to prepare further changes to national competition law. The latest draft of the 11th amendment to the Competition Act sets out far-reaching powers of the Federal Cartel Office to intervene in oligopolistic markets that extend beyond the known merger and abuse of dominance controls. It will certainly be interesting to see how these intended powers take shape during the legislative process in 2023.

Last year, European State aid law was also forced to react to fallout from the war in Ukraine and the resulting negative effects on the economies of the Member States. The Temporary Crisis Framework, a regulatory instrument created for this purpose, is initially scheduled to apply until 31 December 2023. Alongside this, the new EU Foreign Subsidies Regulation will come into effect starting in July 2023, establishing yet another regulatory hurdle that companies will have to overcome during transactions on top of the standard merger and foreign direct investment controls.

By contrast, the tidal wave of effects of the coronavirus pandemic, which has also left its mark on antitrust and competition law over the last few years, seems to be ebbing away. One key consequence in 2022 was that the competition authorities resumed carrying out dawn raids at companies to investigate antitrust infringements. We can expect this trend to continue in the new year.

These are just a few of the many topics dealt with in our Competition Outlook, which also include the latest developments in the areas of antitrust law governing sales and distribution matters, cartel damages and foreign direct investment controls.



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1. EUROPEAN MERGER CONTROL

New (dis)order in European merger control

As a result of the completed review process of the merger procedural and jurisdictional rules in 2021, the European Commission has produced two work products:

- *its Notice on Case Referral in respect of concentrations;*
- *a draft revised Implementing Regulation for Council Regulation (EC) No 139/2004 ("**Merger Regulation**") and a Notice on Simplified Procedures.*

Notice on Case Referral in Respect of Concentrations

In 2022, the application of the Notice on Case Referral (in respect to Article 22 Merger Regulation) gained new impetus.

Article 22 empowers national competition authorities to refer defined concentrations to the European Commission for merger control review even if they exceed neither the European nor a national applicability threshold for merger control.

This referral option was most recently used by the competition authorities of several EFTA Member States to obtain an examination of Illumina's intended acquisition of Grail, Inc. The European Commission accepted the requests for referral and initiated merger control proceedings.

The General Court of the European Union ("**General Court**") confirmed this procedure in its judgment dated 13 July 2022. The General Court found that the wording of the Article does not lead to the conclusion that only Member States without their own merger control rules can request a referral to the European Commission.

Illumina promptly appealed. The final resolution of the issue by the European Court of Justice will take some time, although the judgement can come in the course of 2023.

Until then, the General Court's decision brings new (dis)order to merger control. In M&A practice, this means that it is now (more than ever) pivotal to determine at an early stage whether there is a risk of referral to the European Commission. This risk is particularly likely in sensitive business sectors or where non-European undertakings are involved. In such cases, it is advisable to clarify whether the transaction can be conducted without referral, for example by consulting with national competition authorities and the European Commission at an early stage.

Simplification of merger control procedures

In 2023, the European Commission intends to introduce new rules to simplify merger control procedures. Drafts to this effect were published in 2022.

The European Commission has emphasised that around 93% of concentrations do not give rise to competition concerns and receive unconditional clearance. It thus wishes to focus its resources on the 7% that it believes could raise concerns.

The changes proposed in the drafts pertain primarily to the following:

- introducing new categories and specifying in more detail the existing categories of concentrations that could be reviewed according to the simplified procedure and streamlining their reviews of these types of concentrations;
- streamlining the review of all other concentrations, particularly reworking the structure of and information required by Form CO;
- introducing electronic notifications.

The proposed changes may result in cost optimisation as well as more legal certainty at an early stage regarding concentrations that are not likely to give rise to concerns. However, the European Commission has demonstrated its willingness to prioritise and thoroughly examine concentrations that it deems likely to raise competition concerns.

2. GERMAN MERGER CONTROL

German merger control to be tightened again

*In September 2022, the German Federal Ministry for Economic Affairs and Climate Action published a draft bill (available only in German) ("**Draft**") of the 11th amendment to the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen ("**Competition Act**")) in the shape of a new "**Competition Enforcement Act**" (Wettbewerbsdurchsetzungsgesetz). The main aim of the Draft is to expedite and optimise sector inquiries by granting the German Federal Cartel Office (the "**FCO**") additional powers. Up to now, the FCO has only been empowered to intervene in response to a violation, which means that it has no suitable tools at its disposal to prevent oligopolistic markets from arising as a result of merger control-free company acquisitions, market exits or growth. In addition, sector inquiries can take a very long time. The intention behind section 32f of the Draft is to counteract both weaknesses.*

This provision will give the FCO new authority with regard to sector inquiries. It will now be able to lay down rules regarding such aspects as granting access to data, supplying other companies, supply relationships between companies on the markets under investigation and organisationally separating business units or divisions.

Besides organisational unbundling, section 32f of the Draft even grants powers to unbundle the ownership rights of each company (obligation to dispose of shares or assets) as a last resort. However, to protect legitimate expectations, final clearances under merger control law are exempted from these basic powers (regarded as unconstitutional by some) for five years.

To expedite sector inquiries, section 32 of the Draft recommends that they last no longer than 18 months. However, this is not a compulsory provision; no legal consequences are provided in case it is breached. In addition, the rules will apply not as of the date on which the Competition Enforcement Act enters into force (planned for 2023), but also retroactively to sector inquiries that have been completed and for which the final report has been issued up to one year previously. This means that companies involved in ongoing inquiries, such as in the waste disposal sector or online advertising, would not be protected from interventions even if the final report is published before the Competition Enforcement Act is passed.

Finally, section 39a of the Competition Act, which was only recently added by the 10th amendment to the Competition Act, is to be tightened and moved to section 32f of the Draft. Section 39a of the Competition Act currently empowers the FCO to order companies to notify certain concentrations even if they are below the thresholds specified in section 35 of the Competition Act for three years if the relevant business sectors have previously been subject to a sector inquiry.

The current thresholds for ordering such an obligation regulated in section 39a of the Competition Act are to be lowered. In particular, there will only be two domestic turnover thresholds (€50 million for the purchaser and €0.5 million for the target company). The current market share criterium, the worldwide turnover threshold (€500 million) and the two-thirds requirement for the target company's domestic turnover are to be dropped.

The FCO's new tools are so dangerous for companies because the Draft does not provide any options for recourse against the final report of a sector inquiry. Since the FCO will be able to intervene even in the absence of any misconduct on the part of a company, it is essential for companies and their advisors to cooperate very closely to be prepared for the FCO's new options.

3. ANTITRUST PROCEEDINGS - EU

Developments regarding antitrust proceedings of the European Commission

In the October 2022 issue of its policy brief the European Commission calculated that all its antitrust and merger interventions result in direct customer savings in the range of €12 to €21 billion per year. Last year is likely to represent something of a blip, however, as a number of the competition authority's decisions were annulled.

After the European Court of Justice annulled an initial judgment against Intel and referred the case back to the European General Court ("**EGC**"), a new judgment by the EGC on the €1.06 billion fine imposed by the European Commission on Intel was handed down on 26 January 2022. The case involved direct payments made by Intel to customers so that they would delay, cancel or restrict ("naked restrictions") certain sales of products of AMD (Intel's closest competitor) and certain exclusivity rebates. While the naked restrictions apparently always qualify as an abuse of dominance, the exclusivity rebates must be assessed on a case-by-case basis – at least if parties challenge that the specific rebate is not capable of excluding competitors. A tool to asses this is the as-efficient-competitor test. The EGC annulled the entire fine, as it was not able to separate the part of the fine attributable to the exclusivity rebates from the part attributable to the abusive naked restrictions.

Similarly, in the Qualcomm case, a fine of €997 million imposed by the European Commission was annulled by a judgment given by the ECG on 15 June 2022. Qualcomm had made payments to Apple so that it would not buy LTE-compatible chips from other manufacturers. According to the European Commission, this led to other competitors being excluded from the market for LTE chipsets for over five years. By contrast, the ECG ruled that pricing behaviour by a company with a dominant market position involving exclusivity commitments is in principle an infringement of Article 102 TFEU. However, according to the ECJ, the situation is different if this does not lead to the exclusion of competitors in a specific case, for example because there were no technical alternatives to the dominant company's offer during the relevant period. The court also contested procedural errors, stating that all interrogations with third parties carried out by the European Commission when preparing its decision are to be documented and included in the case file.

Moreover, on 25 October 2022, the European Commission published guidelines on its leniency programme in the form of frequently asked questions. Apart from a large number of clarifying definitions, these also contain new procedural aspects such as the introduction of leniency officers, the possibility of communicating about potential leniency applications anonymously and the extension of the eLeniency platform. This is intended to make the requirements for an leniency application and its outcome more predictable and in this way facilitate the detection of cartels in the future (Link).

4. ANTITRUST PROCEEDINGS - GERMANY

Federal Cartel Office focuses on collaboration in sustainability, crisis and purchasing situations

*For the first time after searches were suspended due to the COVID-19 pandemic, the German Federal Cartel Office ("**FCO**") conducted eleven searches in 2022 (five cases of its own and six for other national competition authorities or the European Commission). The total amount of the fines imposed in relation to completed cases was relatively modest at around €20 million (Fines imposed on manufacturers of modular expansion joints for bridges involved in a quota cartel; Fines imposed for concluding agreements in the industrial construction sector). Experience suggests that the FCO can be expected to impose higher fines and initiate larger proceedings over the next few years.*

In 2022, the Federal Cartel Office also investigated and issued decisions in other interesting cases, including with regard to the following issues:

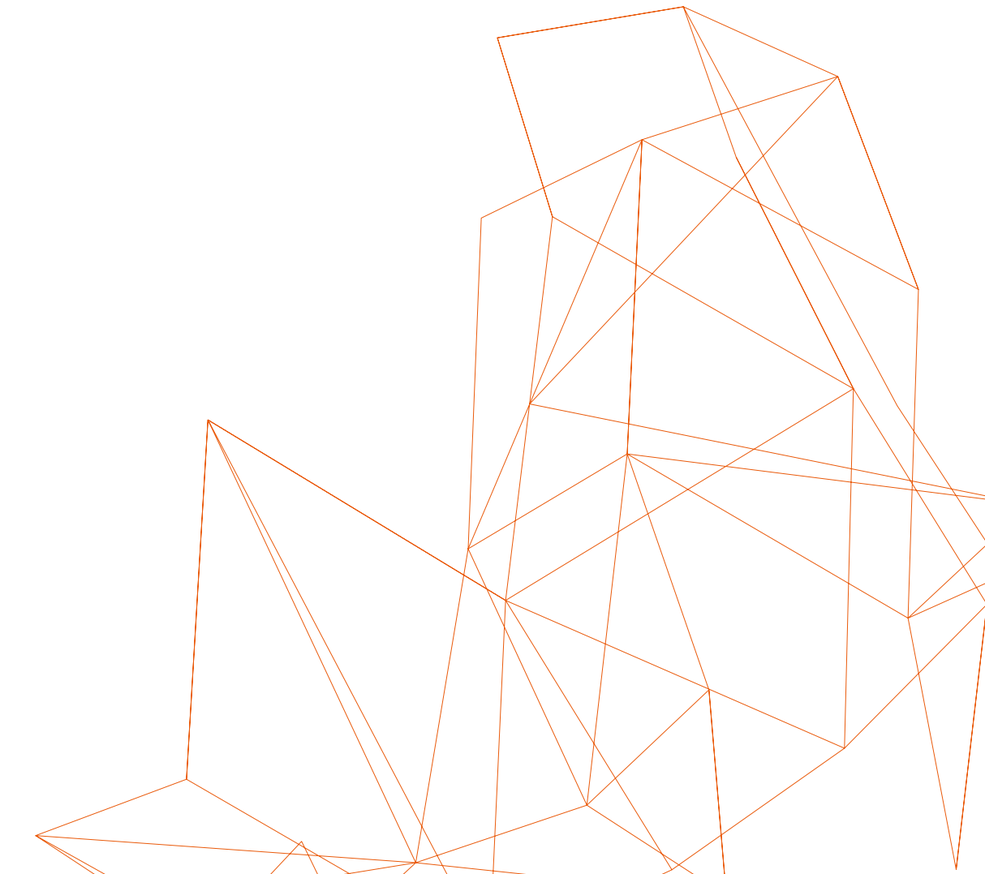
Sustainability
The FCO examined various initiatives (including those working on animal welfare, living wages in the banana sector and dialogue regarding milk) intended to improve sustainability in business. Here, the FCO has acknowledged the significance of the merits of such collaborations among competitors or contracting parties. At the same time, it has clarified that such collaborations are not automatically permissible solely because their goal is the common good. Instead, the effects on competition are to be examined on a case-by-case basis. For example, clear boundaries are drawn at price fixing or even simply exchanging information in this context. It is of particular importance to the FCO that joint initiatives operate in a non-discriminatory, open and transparent manner (for more information, see the Lex Mundi Sustainability and Competition Global Practice Guide).

Cooperating in a crisis:
The FCO has also examined cooperation among sugar producers that has arisen in connection with the current difficult economic conditions (sugar). This collaboration is intended in particular to prevent a possible imminent shortage of natural gas. The FCO declared that it is permissible for sugar producers to allow each other to use production capacity. However, using a competitor's capacity must remain a last resort. In addition, such collaboration is only permissible for a limited time (until June 2023).

In the light of the current critical situation, the Federal Cartel Office has also examined and permitted cooperation among natural gas importers and wholesalers in constructing and operating floating liquid natural gas (LNG) terminals. Under "normal" conditions, the FCO would have been more critical of the cooperation. It has stated that, while the collaboration did tend to restrict competition, the potentially negative effects were at least currently outweighed by major advantages. Here again, the collaboration has a deadline (initially until March 2024).

Cooperative purchasing:
The FCO also examined various purchasing collaborations (including furniture and beer). In such cases, it is important to take merger control into account (which can be applicable depending on the type of cooperation and the enterprises involved) and particularly to examine and ensure that neither the information exchanged nor the scope of the joint purchasing constitutes an infringement of the ban on cartels, i.e. the cooperative purchasing does not result in a prohibited anti-competitive agreement.

According to the president of the FCO, Andreas Mundt, investigations will continue to be given high priority in 2023. A not insignificant amount of dawn raids can therefore also be expected for 2023, reversing the trend seen during the Covid-19 pandemic.



5. ANTITRUST DAMAGES

Judgments by the Federal Court of Justice spur on new developments

Last year saw an increase in the number of actions for damages due to infringements of competition law. In Germany, the lower courts that have responded to the call from the German Federal Court of Justice (Bundesgerichtshof) to discuss claims in detail, including the values of such claims, are moving forward with proceedings. It remains rare for courts to hand down judgments that award damages or come to the conclusion that an infringement has caused no harm, but such decisions are to be expected in 2023. Two methods are available to courts in such cases: estimates made by the court at its own discretion according to section 287 of the German Code of Civil Procedure (Zivilprozessordnung) and extensive procedures involving court commissioned expert opinions. It cannot yet be predicted which means of quantifying harm will prevail and this is ultimately a matter to be assessed on a case-by-case basis.

The Federal Court of Justice also affirmed its previous case law, which requires a detailed assessment of the party submissions by judges, in its *Schlecker* judgment (Case KZR 42/20 (in German)), the text of which was published at the beginning of 2023 (see also the following detailed review).

Then, when it seemed that the question of limitation periods for claims for antitrust damages had been largely clarified in German law by the Federal Court of Justice's landmark judgments in the past few years, the European Court of Justice opened up a new debate with its judgment in *Volvo and DAF Trucks* (Case C-267/20). The question of timely transposition of the Antitrust Damages Directive (Directive 2014/104/EU) has been resolved in favour of the German legislator. However, continued remarks by the European Court of Justice regarding possible results of *effet utile* in relation to Spanish law on statutes of limitations can give rise to hope among claimants that old claims from long-past infringements could still be asserted in Germany after all.

In addition, in its judgment in *VBL-Gegenwert III* (Case KZR 111/18 (in German)) at the end of the year, the Federal Court of Justice clarified that the enrichment achieved by each cartelist by means of infringement can be claimed even after the knowledge-based limitation period pursuant to section 852 German Civil Code (*Bürgerliches Gesetzbuch*) has expired.

In another judgment regarding interpretation of the Antitrust Damages Directive (Case C-163/21), the European Court of Justice decided that, in the context of claims for disclosure and information, it is reasonable to require the respondent to also create new and not just surrender existing records.

In contrast, the extent to which damages claims related to infringements of competition law can be bundled in Germany remains unresolved. In its *financialright* judgment (Case VIa ZR 418/21 (in German)), the Federal Court of Justice deemed such business models in relation to other bundled claims admissible in principle. Debate continues as to whether antitrust damages claims are too complex and heterogenous to permit bundling without various claimants having conflicting interests.

Finally, the eleventh amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* ("**Competition Act**")) will probably also make new damages claims possible because the current draft bill (in German) ("**Draft**") grants individuals the right to enforce obligations that the Digital Markets Act ("**DMA**") places on "gatekeepers". Articles 5, 6 and 7 of the DMA are included in section 33(1) of the Draft, which means that if these provisions are infringed, the injured parties acquire judicially enforceable rights to claim injunctive relief and/or abatement or removal and, according to section 33a(1) of the Competition Act, damages. This makes it clear that gatekeepers are also vulnerable to civil claims.

6. DIGITAL ANTITRUST AND COMPETITION LAW IN THE EU

The EU's treatment of tech companies under antitrust and competition law

*In the digital sector, a great deal of attention continues to be given to the competition and antitrust aspects of the Digital Markets Act ("**DMA**"). This EU regulation is intended to ensure that "gatekeepers", i.e. online platforms such as search engines, social networks and marketplaces, that provide other companies with services that are important for accessing digital markets, cannot – for example – block access to their users.*

The DMA entered into force on 1 November 2022 and will apply starting on 2 May 2023. The European Commission is expected to designate the first companies as gatekeepers by early September 2023 if they are unable to rebut this statutory presumption. Only a few companies (a low two-digit number), including Amazon, Apple, Meta und Google, that reach the relevant quantitative thresholds (annual turnover (€7.5 billion), market capitalisation (€75 billion) and number of end users (45 million)) are projected to be designated as gatekeepers.

In comparison to the rather abstract instruments antitrust law has provided so far, the DMA relies on specifical conduct obligations and requirements. These obligations and requirements are derived from the current practices in competition law in the digital sector. However, the DMA does not foresee that companies can justify their behaviour or cite efficiencies achieved with their conduct as a rationale for failing to comply with the rules. Thus, the DMA is intended to prohibit conduct that would be difficult to prohibit at all or quickly enough under the prohibition of abusive practices under competition law.

Although the conclusive rules on conduct provided in the DMA will not enter into force until six months after a company is designated as a gatekeeper (i.e. as of spring of 2024), these companies and their contracting parties will be preparing themselves for this at the latest during 2023. This could result in changes to at least some aspects of large digital groups' business models to line up with competition law and the DMA.

In the coming months, decisions are also expected in various prominent EU antitrust investigations of large tech companies such as Google, Apple, Meta and Amazon. The European Commission is apparently planning to conclude some of their on-going proceedings before the rules of the DMA become applicable. The Commission has made clear that it will continue to take action against large tech companies under antitrust law, especially with proceedings on abusive practices, even while applying the DMA. The interaction between the DMA and European (and national) antitrust and competition law will be especially challenging.

The Google-Android decision will continue to be a focal point at European court level. After the General Court of the European Union largely confirmed the fine of more than €4 billion imposed by the European Commission for abuse of market power (Case T-604/18) in September 2022, Google has taken the fight regarding the record fine to the European Court of Justice (Case C-738/22). Google is seeking clarification on the extent to which Android's positive effects on the ecosystem were not sufficiently taken into consideration.

7. DIGITAL ANTITRUST AND COMPETITION LAW IN GERMANY

Halfway there

German antitrust and competition law continues to hone in on the digital economy. Although competition and antitrust rules are increasingly taking shape in legislation and court decisions, a clear picture has yet to emerge.

The German Federal Cartel Office (*Bundeskartellamt*) may prohibit undertakings that are of paramount significance for competition from engaging in anti-competitive practices in a two-step procedure due to the new section 19a of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) (the "**Competition Act**"), which came into force in January 2021.

As a first step of these new means of control of abusive practices (section 19a(1) of the Competition Act), in 2022 the Federal Cartel Office determined with legally binding effect that the large tech companies Alphabet/Google, Meta/Facebook and Amazon have the status of undertakings of paramount significance for competition. The first two decisions have become final and unappealable. However, Amazon has contested the finding against it before the competent court (the German Federal Court of Justice (*Bundesgerichtshof*)). These proceedings are yet to be completed, as is a fourth case brought by the Federal Cartel Office against Apple (see table).

As a second step of these new means of control of abusive practices, the Federal Cartel Office is able to prohibit specific anti-competitive practices by such undertakings (section 19a(2) Competition Act). The Office is currently examining this in several legal cases (see table).

Up to now, the Federal Cartel Office has not issued a prohibition under section 19a(2) of the Competition Act. Instead, it looks as if the tendency will be to settle proceedings amicably. This is indicated for instance by the proceedings against Meta in the "Oculus" case involving the linkage of Oculus' smart glasses with the Facebook social network. Meta has responded to the Federal Cartel Office's concerns and made it possible to open a separate account – the Meta account – so that it is no longer necessary to register with a Facebook account to be able to use such glasses (Federal Cartel Office case report on Case B6 – 55/20). Although this does not mean that the case has come to an end, the likelihood of a decision involving a prohibition in the form described in section 19a(2) of the Competition Act has become remote.

Against this backdrop, it remains to be seen how sharp the new sword for controlling abusive practices provided in section 19a of Competition Act will actually be. It will also be interesting to see how questions involving competences and division of tasks between the Federal Cartel Office (section 19a Competition Act) and the European Commission, with its future options for action once the Digital Market Act (DMA) comes into force, will be resolved. Some overlaps namely exist between the scope of the DMA and that of section 19a of the Competition Act.

There are also other recent digital rules created in early 2021 that will be making their way into decision-making practices on antitrust and competition matters. One example is the first decision by a higher court regarding the new "tipping section" (section 20(3a) of the Competition Act). The provision is intended to prevent a market characterised by competition from reaching a tipping point and becoming a market without any competition. Berlin Court of Appeal (*Kammergericht*) (Case U 4/21 Kart (in German)) recently decided (in line with the lower instance court) that the real estate portal Immoscout is no longer allowed to offer certain "list first" discounts because these could drive competitors such as Immowelt from the market. This decision could turn out to be a precedent for other online marketplaces.

8. DISTRIBUTION ANTITRUST LAW

Developments in distribution antitrust law

*The most important development in distribution antitrust law is the new version of the Vertical Block Exemption Regulation (**VBER 2022**), which has been in effect since June 2022, and accompanying new Vertical Guidelines. Under preconditions laid down in the VBER 2022, vertical agreements between companies that are active at different levels of a production or distribution chain (**supplier-buyer relationship**) are exempted from the ban on cartels (**safe harbour**). In particular, the new version takes into account the increasing significance of online sales and the accompanying new sales channels such as omni-channel, multi-channel and platform distribution.*

The most important changes by the VBER 2022 are:

- Certain practices in the context of **online sales** that were not exempted are now permitted. In future, it will be permissible to charge one and the same trader different wholesale prices for products depending on whether they are sold online or offline. In addition, various selection criteria can be established for online and offline sales in selective distribution systems. Placing restrictions on individual online advertising channels and platform bans will continue to be possible. However, buyers must always be left with a means of effective internet distribution.
- It has been clarified that distribution agreements with **online marketplaces** are to be assessed according to the requirements of the VBER 2022. Platforms on which the operator itself also offers goods or services as a trader (**hybrid platforms**) will no longer be covered by the scope of the VBER 2022.
- Revisions have also been made to protections regarding **exchange of information** between suppliers and buyers in dual distribution systems, i.e. where a supplier sells goods or services not only at the upstream level but also at the downstream level (e.g. online), thereby competing with its independent distributors. Information exchange between suppliers and buyers must be necessary for the distribution system in order to be exempted under the VBER 2022.
- **Most Favoured Nation clauses (MFNs)** are generally exempted by the VBER 2022. Exceptions to this are MFNs in the context of platform distribution. If a buyer is only obliged not to offer its goods or services more cheaply in a direct distribution system (of its own), these MFNs remain eligible for exemption under the VBER 2022 (**narrow MFNs**). In contrast, an exemption does not apply where a buyer is obliged not to offer products or services more cheaply even via other distribution channels (**broad MFNs**).

As of 1 June 2023 at the latest, exemptions according to the previous VBER will no longer be possible. For this reason, companies should examine their current distribution agreements to see whether the competition restrictions in them will continue to be exempted from the ban on cartels under the VBER 2022.

In addition to the VBER 2022, the European Commission intends to continue to regulate the distribution of new motor vehicles based on a sector-specific BER. The Motor Vehicle Block Exemption Regulation (**MVBER**), which expires on 31 May 2023, is to be replaced by a new BER. For this reason, the European Commission presented a draft regulation on 6 July 2022 that also includes provisions regulating vehicle-generated data.

9. FOREIGN DIRECT INVESTMENTS

Screening of foreign direct investments

*Investment control procedures for the screening of foreign direct investments ("**FDI**") continue to gain importance in Germany and Europe.*

In 2022, the European Commission published figures on the screening of FDI in the European Union in 2021. These figures show that the slow-down induced by the Covid-19 pandemic has been overcome. In 2021, investments from outside the EU/EFTA exceeded the level of the pre-Covid year of 2019 by 11% and 2020 investments even by 52%. The main countries of origin of investors were the USA and the UK, while other countries such as China and Japan remained below their previous figures. Germany was the main target country for non-EU/EFTA investors. With 16.4% of all foreign investments into the EU, 2021 even saw a 20% increase in FDI compared to the previous year. For greenfield investments, Germany ranked third behind France and Spain.

By now, nearly all EU Member States have established FDI screening procedures, the only exceptions being Bulgaria and Cyprus. By adopting the 17th amendment to its Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*), Germany recently increased the case groups subject to mandatory notifications in cross-sectoral reviews from 11 to 27 to cover not only critical infrastructure but also sectors such as the health sector and future and key technologies (artificial intelligence, autonomous driving, robotics and cyber security). Until clearance by the German Federal Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz*), notifiable investments are subject to a standstill obligation, which, if not complied with, entails fines and even criminal sanctions.

Keeping in mind the FDI requirements is therefore crucial to transactions involving investors from outside the EU/EFTA. For cross-border M&A transactions it should be considered, in particular, that notification requirements may exist in several countries. Such requirements will have to be carefully analysed by both the buyer and the seller, not least because legislation in this area tends to change frequently. Transaction agreements should include provisions on such mandatory notification requirements. As regards transaction timing, schedules should allow for sufficient time to obtain official authorisation and for a potential prohibition. Ultimately, however, investment controls rarely ever prevent a transaction: in 2021, only 1% of all transactions reported to the European Commission were blocked by the EU Member States. At 2%, the figure for measures restricting an acquisition (including prohibitions, but also clearances subject to mitigating measures) was similar in Germany.

10. STATE AID LAW / FOREIGN SUBSIDIES

EU state aid rules: spotlight on crisis and control of foreign subsidies

Temporary Crisis Framework Ukraine

After the restrictions caused by the COVID-19 pandemic, the economic environment in 2022 was particularly hard hit by the consequences of Russia's war of aggression against Ukraine. On 23 March 2022, to mitigate the resulting negative effects and enable the Member States of the European Union to support the economy with State aid, the European Commission adopted a "Temporary Crisis Framework", which was prolonged and amended on 20 July 2022 and 28 October 2022 due to the continued situation. One of the implications of this is that the European Commission established the legal basis that enabled the Federal Republic of Germany to adopt instruments to cap hikes in electricity and gas prices and thus contribute to curtailing increased energy costs caused by the war and crisis. According to the Temporary Crisis Framework, these instruments are to remain available at least until 31 December 2023. In its final report, "Safe through the winter", Germany's Gas Price Commission even recommended extending the measures until 30 April 2023. Whether this extension can be granted remains to be seen and will probably depend primarily on how things develop in 2023. However, it does seem clear that the Temporary Crisis Framework will probably remain a dynamic instrument of exceptional significance in EU State aid law in 2023.

New EU regulation on foreign subsidies

Concerns have been voiced in the European Union for quite a while that subsidies from non-EU countries that benefit companies operating in the European Union undermine the level playing field in the internal market. These businesses could profit from advantages that EU Member States are not permitted to grant to "their" companies due to the requirements of EU State aid law. Furthermore, in the opinion of the European Commission, it is not possible to exercise appropriate control over foreign subsidies using the existing instruments available under EU State aid, merger control, procurement and foreign trade law.

Since the EU institutions needed less than one and a half years to agree on the wording of a regulation closing this presumed loophole, a **new Foreign Subsidy Regulation** will be applicable as of July 2023. The new regulation provides for three instruments to investigate the compatibility of foreign subsidies with the internal market:

(i) a notification-based investigation instrument for transactions,
(ii) a notification-based investigation instrument for offers on large public contracts, and
(iii) a general investigation instrument.

Above all, the investigation instrument for transactions (depending on whether certain thresholds for turnover and contributions from non-EU countries are exceeded), can be expected to create a need for careful preparation on the part of the companies concerned. However, the new regulation also offers undertakings an opportunity to prevent any disadvantages to themselves by using the general investigation instrument to inform the European Commission about distortive foreign subsidies provided to competitors.

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