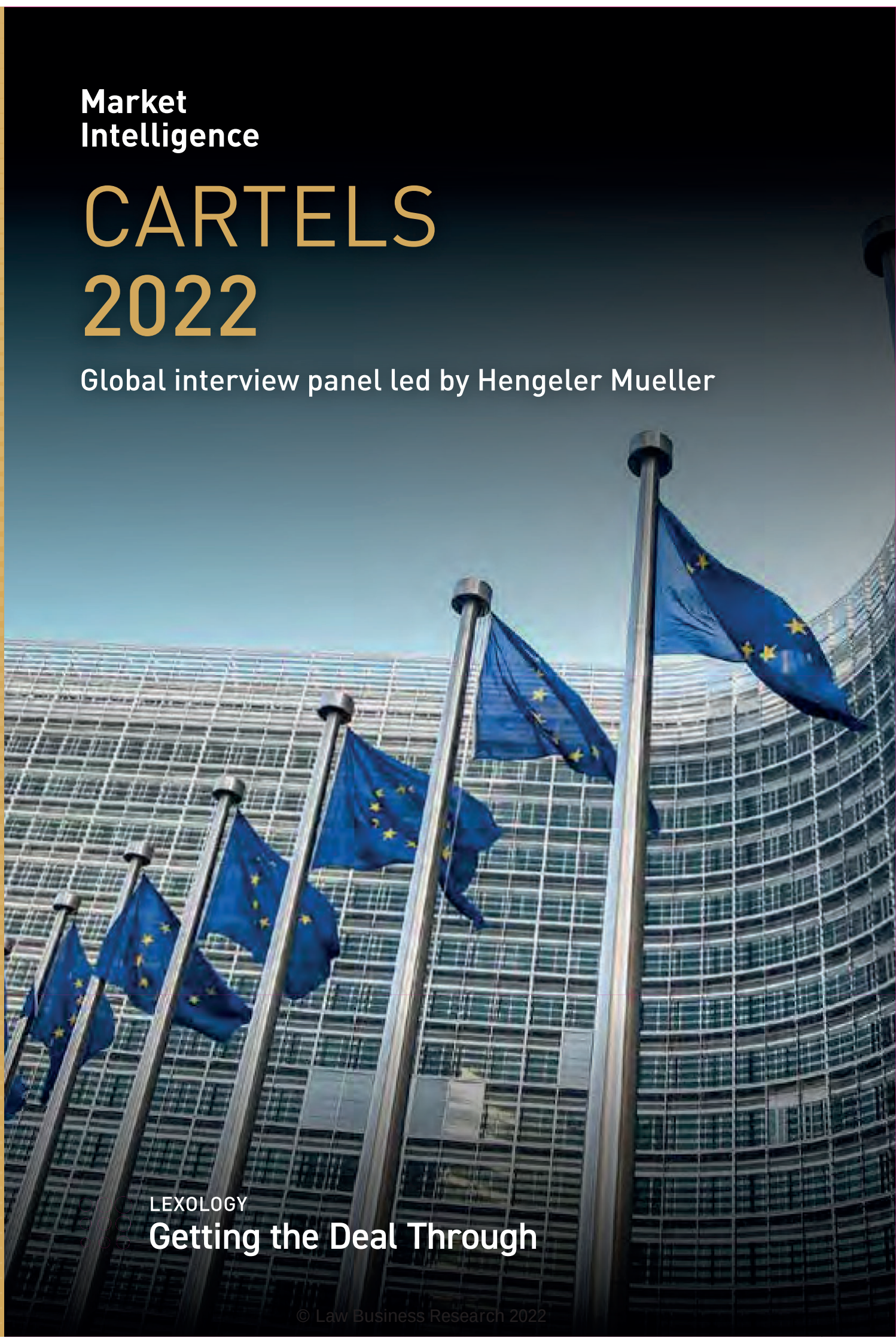
Market Intelligence

CARTELS 2022

Global interview panel led by Hengeler Mueller



LEXOLOGY

Getting the Deal Through

LEXOLOGY
Getting the Deal Through

Publisher
Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Head of business development
Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager
Dan Brennan
dan.brennan@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

Cover photo: shutterstock.com/g/areporter

ISBN: 978-1-83862-963-2

Printed and distributed by Encompass Print Solutions

CARTELS 2022

European Union

Markus Röhrig is a partner of Hengeler Mueller's antitrust practice and based in the firm's Brussels office. He advises clients on European and German competition law, including in merger reviews, cartel investigations and unilateral conduct cases both before the regulators and in court. He also offers antitrust compliance advice and counsels clients conducting internal antitrust investigations. Markus acts for a diverse client base from a broad range of industries, including the insurance sector.

Stephanie The is a partner at De Brauw Blackstone Westbroek, widely recognised as the leading international law firm in the Netherlands. She is a skilled competition lawyer and litigator with over a decade of experience practising in Brussels, Amsterdam and New York. Stephanie counsels clients on a broad range of European and Dutch competition-related matters, building on her experience representing multinational clients before the European Commission as well as Dutch and US authorities. Stephanie has built up extensive skills and knowledge in transactional competition matters – winning clearance for complex remedies across the globe. Stephanie has handled a variety of sensitive investigative matters concerning competition law and anti-money laundering controls and appears regularly before the Dutch courts and the European Court of Justice.

Anna Lyle-Smythe is a partner in Slaughter and May's Brussels office. She has a broad competition practice, including advising on mergers, cartels, state aid and market investigations. Her highlights include advising DuPont on the EU investigation of the chloroprene rubber cartel, and in the subsequent appeals to the EU General Court and European Court of Justice (ECJ).

Photo: shutterstock.com/ Botond Horvath

1 | What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

Markus Röhrig: The Commission finally broke cover, conducting its first dawn raid since the start of the pandemic. The subject of the raid was a German company active in the sector of garment manufacturing and distribution. The dawn raid in question was all the more relevant since on this occasion the Commission departed from its usual approach of only confirming inspections once a company makes them public. Instead, it confirmed the inspections in a press release, without naming the company involved, before the company put forward any press release. Throughout the rest of the year, the Commission undertook two other unannounced inspections regarding cartel suspicions in the field of wood pulp (October) and defence (November).

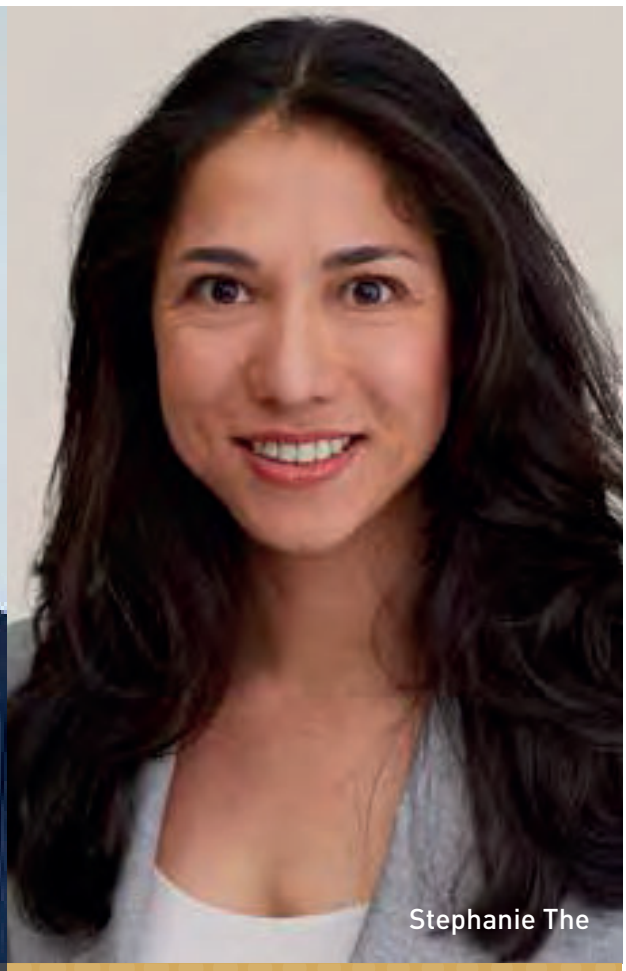
The three cartel-related dawn raids are part of a larger upswing in the Commission's antitrust enforcement activity, which also included inspections related to a potential abuse of a dominant position in the animal health sector. Commissioner Vestager herself had already warned in October that more antitrust inspections were on the horizon. She specifically referred to a number of types of conduct the Commission would likely target, including procurement cartels, no-poach agreements and collusion on sustainability.

Stephanie The: Both the European Commission and national competition authorities of the EU member states are focusing on a transition to a greener and more digital economy. Those policy goals are broader than competition law alone. But these priorities effect the enforcement priorities. The Commission and their European counterparts are, therefore, developing guidelines to give comfort to undertakings when they want to cooperate with their competitors to genuinely pursue green goals. On the other hand, infringements related to these policy goals are also on the radar. For example, the Commission has settled with German car manufacturers restricting competition on the quality of emission-cleaning technology in their cars.

2 | What do recent investigations in your jurisdiction teach us?

MR: Apart from a very obvious increase in the Commission's cartel enforcement activity in the past year, we noticed more and more chatter in the institutional sphere about buyer cartels — where buyers collude to fix prices of the goods they are buying, eliminate competition for their purchases or otherwise control suppliers' market conditions. According to the Commission, going forward, it will not make 'any distinction' between the purchasing cartels and selling cartels when assessing them and imposing fines, since – according to the Commission – purchasing cartels are just


Markus Röhrig


Stephanie The


Anna Lyle-Smythe

“The Commission finally broke cover, conducting its first dawn raid since the start of the pandemic.”

as serious as selling cartels. Apparently, the Commission is taking a particular interest in the buyer cartels because recent years had seen a 'new wave' of these cartels. Two examples are the *Car Battery* case and an investigation started in 2017 into purchasers of ethylene.

ST: Leniency applications still seem the most important trigger for the Commission to start a case. The investigation into emission cleaning technology was triggered by a leniency application by a German car manufacturer. Next to that, the instrument of a sector inquiry seems to be an important source for starting new cases. At least that is what the e-commerce sector inquiry has shown us. Last year, the European Commission finished its sector inquiry into the consumer internet of things.

Anna Lyle-Smythe: The leniency regime remains key in the Commission's enforcement toolkit. That said, the Commission and other agencies are talking more and more about 'own initiative' investigations and exploring tools they can use or develop to detect potentially anticompetitive activity even in the absence of a whistle-blower. The growth of dawn raids is, I agree, also a noteworthy development, particularly since they took place when travel and teleworking restrictions were in place to some extent in the relevant jurisdictions. It will be interesting to see how those experiences shape the Commission's dawn raid policy in the years to come, particularly in terms of being able to access information held in home offices and to use their interview powers for staff who are not located on-site.

3 | How is the leniency system developing, and which factors should clients consider before applying for leniency?

ALS: There have been no formal changes to the leniency regime but the very clear drop in cases – which has been seen both at the EU and member state level – is raising some interesting questions about what is behind that and whether anything can be done to reverse the trend.

MR: Companies have certainly stepped up their compliance efforts in recent years, which must be a contributing factor. But the risk of follow-on damages claims is also putting pressure on the leniency system. A new solution would be offering protection to immunity applicants (ie, offering companies exemptions from civil damages). According to the Commission itself, it is currently in the process of considering tweaks to the leniency notice to make it more attractive. The potential immunity for such applicants is strongly backed by the German Federal Cartel Office, which saw its yearly number of leniency applications drop from around 50 to only 16.

> **"The leniency regime remains key in the Commission's enforcement toolkit. That said, the Commission and other agencies are exploring tools they can use or develop to detect potentially anticompetitive activity even in the absence of a whistle-blower."**

ST: The leniency landscape is also quite fragmented in the EU, and there is still no one-stop-shop leniency programme at EU-level. In my view, the European legislator missed the boat on that when it enacted the ECN+ Directive, which has to be transposed in all member states, meaning that undertakings must decide whether to apply for leniency to the Commission only, or also to other competition authorities.

4 | What means exist in your jurisdiction to speed up or streamline the authority's decision-making, and what are your experiences in this regard?

ST: Both settlement and commitments offered by the undertakings under suspicion can speed up the process significantly. With regard to cartels, settlements are more used than commitments. The latter are more used in abuse of dominance cases. That being said, 2021 has shown that commitment decisions are also used to solve competition law issues with anticompetitive agreements. This happened in relation to the network sharing agreements between mobile phone operators in the Czech telecoms market.

MR: The settlement procedure started out as a way of streamlining the Commission's decision-making, but with the advent of the 'hybrid cases' (ie, where only a part of the participants to the cartel agree to settle, while others continue along the regular procedure), the question of timing became quite sensitive and unclear.

However, in 2021, the Commission showed it can be flexible when faced with a cartel probe where some companies cooperate while others fight. Just weeks apart, the Commission wrapped up two cartel probes in very different ways. First, for Forex-fixing banks, the regulator waited until it could pin the case on all participants before imposing a fine. But for makers of canned vegetables, the companies that settled got out early, while another company fought on alone. The two contrasting outcomes show that the Commission has options in how it runs its probes, and ends a period of uncertainty in the wake of the *ICAP* judgment, a period during which EU court rulings had cast doubt over the fairness of such hybrid probes. As a result of the *ICAP* ruling, the Commission preferred to avoid the risk of split proceedings. Consequently, it still ran hybrid probes but adopted decisions against the 'settlers' and the 'holdout' at the same time. By wrapping everything up on the same day, there was no risk that an initial decision would prejudice a later one.

ALS: Particularly in light of *ICAP*, the Commission will have been pleased by the General Court's recent endorsement of hybrid settlements when it rejected Scania's appeal against the Commission's cartel decision. Scania had argued that the Commission's hybrid approach infringed its rights of defence, the principle of good administration and the presumption of innocence. The Court found that the Commission had not prejudged Scania's liability, that the settlement decision against the other cartel participants could not be read as a premature expression of Scania's liability, and that when examining evidence submitted by Scania, the Commission was not bound by the findings it adopted in the settlement decision.

ST: Yes, the European Court of Justice had similarly decided on that question in the *Pometon* case where it held that stating the factual circumstances around Pometon's behaviour without deciding on whether that led to an infringement was not contrary to the principle of a fair trial.

5 | Tell us about the authority's most important decisions over the year. What made them so significant?

MR: On 8 July 2021, the Commission finally handed down its decision in the ground-breaking *AdBlue* case against Daimler, BMW and VW. This cartel fine is the first of its kind – unlike previous sanctions, it did not punish the companies for colluding to increase prices. Rather, it targeted contacts between the carmakers' technical

Photo: shutterstock.com/ Botond Horvath

experts who met regularly to discuss the implementation of technological developments. In the case at hand, the Commission focused on discussions related to technology called 'selective catalytic reduction' (SCR), which eliminates harmful nitrogen oxide emissions from diesel passenger cars through the injection of urea (also known as 'AdBlue'). The decision states that the collusion meant the companies did not compete to offer better solutions than those mandated by environmental law. This included an agreement on tank sizes and ranges, as well as a 'common understanding on the average estimated AdBlue consumption'.

Even more innovatively, the same day, the Commission sent another letter to the addressees of the first decision to explain what kind of contacts between technicians are unlikely to raise antitrust concerns. Those include the joint development of a software platform for AdBlue dosing, which each carmaker 'implements individually'. This does not seem to 'restrict the effectiveness' of the SCR system, according to the letter.

6 | What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

ALS: We have mentioned a few cases already, including on the topic of hybrid settlements. Another interesting development last year was the ECJ's judment in *Printeos* and the GC's judgment in *Deutsche Telekom*, which relate to the level of interest payment the Commission needs to pay to companies who have paid their fines which are then later overturned in the courts. This has implications both for cartel and antitrust cases but, given the duration of the court proceedings in both types of cases, has potentially significant financial implications for the Commission.

ST: There were also some notable decisions with the review of procedural issues as well. One case concerned Slovak Telekom, which was confronted with parallel enforcement procedures regarding abusive behaviour. The ECJ ruled that parallel enforcement was not contrary to the principle of *ne bis in idem*, since the enforcement procedures concerned different markets. Similarly, Amazon was confronted with parallel enforcement. Since the Commission's procedure concerned the same market, the European Commission carved out the Italian market on which the Italian competition authority was focusing its enforcement actions. As for judicial review, this procedural carve-out could not be reviewed by the General Court of the EU since it decided that that procedural act did not produce legal effects vis-à-vis Amazon. Therefore, that act could not be reviewed on the merits and the action was dismissed as inadmissible.

7 | How is private cartel enforcement developing in your jurisdiction?

ST: Follow-on damages claims are litigated before the national courts of the member states, but some cases make their way to the ECJ in the event of referrals for a preliminary ruling. Each member state typically has its own procedural issues and developments because the majority of national civil procedural law has not been harmonised by the Cartel Damages Directive. Those cases that reach the ECJ often concern fragmented issues of the case at hand, such as standing before the national courts under international private law, time limitation periods, etc.

MR: The Court of Justice's *Sumal* case was one of those preliminary ruling cases and ranked high on the watch list for antitrust litigators. The Court's judgment certainly lived up to the expectations. The notion that subsidiaries can be liable for antitrust violations committed by their parent entity, or possibly other companies of the same corporate group (top-down liability) marks a major milestone for private antitrust litigation across the EU and could have spillover effects in the Commission's cartel

> “Follow-on damages claims are litigated before the national courts of the member states, but some cases make their way to the ECJ in the event of referrals for a preliminary ruling.”

enforcement and impact the scope of due diligence that companies will want to conduct in M&A deals.

8 | What developments do you see in antitrust compliance?

ALS: We saw a lot of interest from clients in updating their antitrust compliance policies and refreshing their internal training programmes over the pandemic. The announcements on dawn raids have prompted many companies to make sure their own policies on inspections are up-to-date and fit-for-purpose in a hybrid working world. For me, corporate culture is still the number one issue in terms of making those policies and training programme effective. That compliance is endorsed by the very highest levels of the organisation is critical.

MR: Generally speaking, companies are stepping up their compliance programmes, a trend that we have been observing for a number of years. However, the Commission is firmly following its 2010 line that no fine reductions are granted for compliance programmes, although the number of jurisdictions around the world that grant credit

for compliance programmes has significantly increased since 2011, according to a 2021 OECD report. Following their example would signify a turn in the Commission's policy, but we believe that nothing is off the table.

ST: We have also seen a shift that companies sometimes prefer a thematic approach to compliance training sessions. For example, when it comes to the use of personal data for commercial purposes, the session will look not only at compliance with competition law, but also with consumer law and data protection law. Similarly, when a company is active in a bidding market, both compliance with competition law and anti-bribery rules are important. We see an increase in these more cross- expertise compliance trainings.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

MR: In line with Commissioner Vestager's October announcement regarding the cartel enforcement priorities of the Commission, we are expecting a new series of dawn raids and can expect to see more enforcement on issues such as 'no-poach' agreements, following a wave of these investigations in the US and Portugal, for example.

ALS: I agree that we can expect to see more enforcement – whether this year or in the coming years – on the less traditional cartel structures such as buy-side cartels and no poach agreements, I also think we will see more and more enforcement of anti-competitive information exchange, as the authorities grapple more with the question on where to draw the line on that topic. Of course, were a price-fixing, market-sharing or bid rigging case to come to light, the Commission would not hesitate to enforce that very strictly.

ST: On a different note, both the Vertical Block Exemption Regulation and block exemptions on R&D and specialisation will expire this year. We expect new ones to be adopted. They will be accompanied by revised guidelines. We expect the vertical guidelines to take into account newly developed distribution models due to e-commerce. As for the horizontal guidelines, the Commission recently launched a consultation; they must definitely include guidance how competitors can cooperate to genuinely pursue green goals. This fits the broader goals of the Commission on the transition to both a greener and more digital economy.

Photo: shutterstock.com/ carlo deviti

10 | How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

MR: The impact of covid-19 on EU cartel enforcement in 2021 shifted the focus to less immediate consequences of the virus, and here we are talking about the shipping industry. Already in January 2021, European shippers and freight-forwarders were considering filing a formal EU antitrust complaint against the maritime shipping industry, since the freight shipping industry has seen prices soar during the covid-19 crisis. Fast-forward to November, the Commission stated that price hikes in the shipping industry do not appear to be anticompetitive as the evidence stands, an opinion shared by its key counterparts in China and the US. That being said, the December 2021 move from Maersk and Hamburg Süd to deal directly with shippers has attracted competition warnings from freight forwarders and logistics companies once again.

We also saw a reduced number of antitrust inspections since the start of the pandemic, from the side of the Commission. However, in October 2021, Commissioner Vestager announced that the Commission would reverse the trend, with the strict respect of the hygiene measures, of course.

The Commission has also insisted that companies not use the pandemic as a cover or a pretext for collusion. For instance, the two matchmaking events in 2021 for speeding up the development and production of covid-19 medicines were organised and closely monitored by the Commission. Before the events took place, the Commission issued a comfort letter providing guidance on how the matchmaking and exchanges between participating companies, including direct competitors, can take place in compliance with EU competition rules.

ST: Due to the various coronavirus health and safety measures established by the EU member states, the number of dawn raids by the Commission has seriously dropped in the past few years. Not only for the Commission by the way, but also for the national competition authorities of the EU member states. During the various lockdowns, dawn raids even seemed impossible. In 2021, the Commission's dawn raids picked up again. It published press releases about four unannounced inspections it made last year, whereas the Commission was silent on that in 2020.

ALS: On a practical note, the pandemic has changed some of the Commission's practices, for example, on how to conduct oral hearings and access to file. And no doubt the Commission was relieved to have introduced the e-leniency system well ahead of the pandemic so such applications could still be made notwithstanding their offices being closed. I think we can expect to see some of the measures adopted during the pandemic becoming standardised even as businesses and the Commission return to the office.

Markus Röhrig
markus.roehrig@hengeler.com

Stephanie The
stephanie.the@debrauw.com

Anna Lyle-Smythe
anna.lyle-smythe@slaughterandmay.com

Hengeler Mueller
Brussels
www.hengeler.com

De Brauw Blackstone Westbroek
Brussels
www.debrauw.com

Slaughter and May
Brussels
www.slaughterandmay.com

The Inside Track

What was the most interesting case you worked on recently?

ST: One of the most interesting cases I worked on last year was referred from the Dutch court for a preliminary reference from the ECJ in the *Air Cargo* follow-on damages litigation. The Commission's decision had not established an infringement, simply put, prior to 2004 because the Commission lacked the competence under the applicable transitional regime of articles 104–105 TFEU. Still, the ECJ found that article 101 TFEU had direct effect and that claimants could nonetheless rely on article 101 TFEU when suing for damages before the national courts.

ALS: Without going into specifics given the confidential nature of the work, I think some really interesting questions are coming up on issues of information exchange and where to draw the line on what is and is not permitted. I am also watching out for any impact the Court's judgments (both those already delivered and ones still under appeal) on interest payments have on how the Commission's practice develops in this area.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

ALS: I would be keen to see a 'one stop shop' for leniency in the EU. I think this would serve both the enforcers and the business community much better than the current system.

MR: We support the line of thought of the German Federal Cartel Office regarding the shielding of immunity applicants, in order for the leniency gap to be filled. As the situation stands right now, there are very few incentives (if any) for an immunity applicant to come forward to the Commission.

ST: I agree. I am not sure the system is currently striking the right balance between public and private enforcement. A perceived enforcement gap was one of the reasons for adopting the EU Directive that in essence facilitated claimants to bring follow-on damages claims. The risk and costs associated with defending follow-on damages claims can nowadays be many times the amount of the fine for the infringement. This seems skewed and, therefore, has a real impact on a company's decision to apply for leniency or not. One way of making the pendulum swing back in the right direction is having the Commission carefully consider the nature of the infringement in the reasoning of its decision and being conscious of the significance of the wording in the decision in potential follow-on litigation.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Hengeler Mueller, this Cartels volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

Judicial review
Sector focus
Private enforcement
2022 outlook

ISBN 978-1-83862-963-2