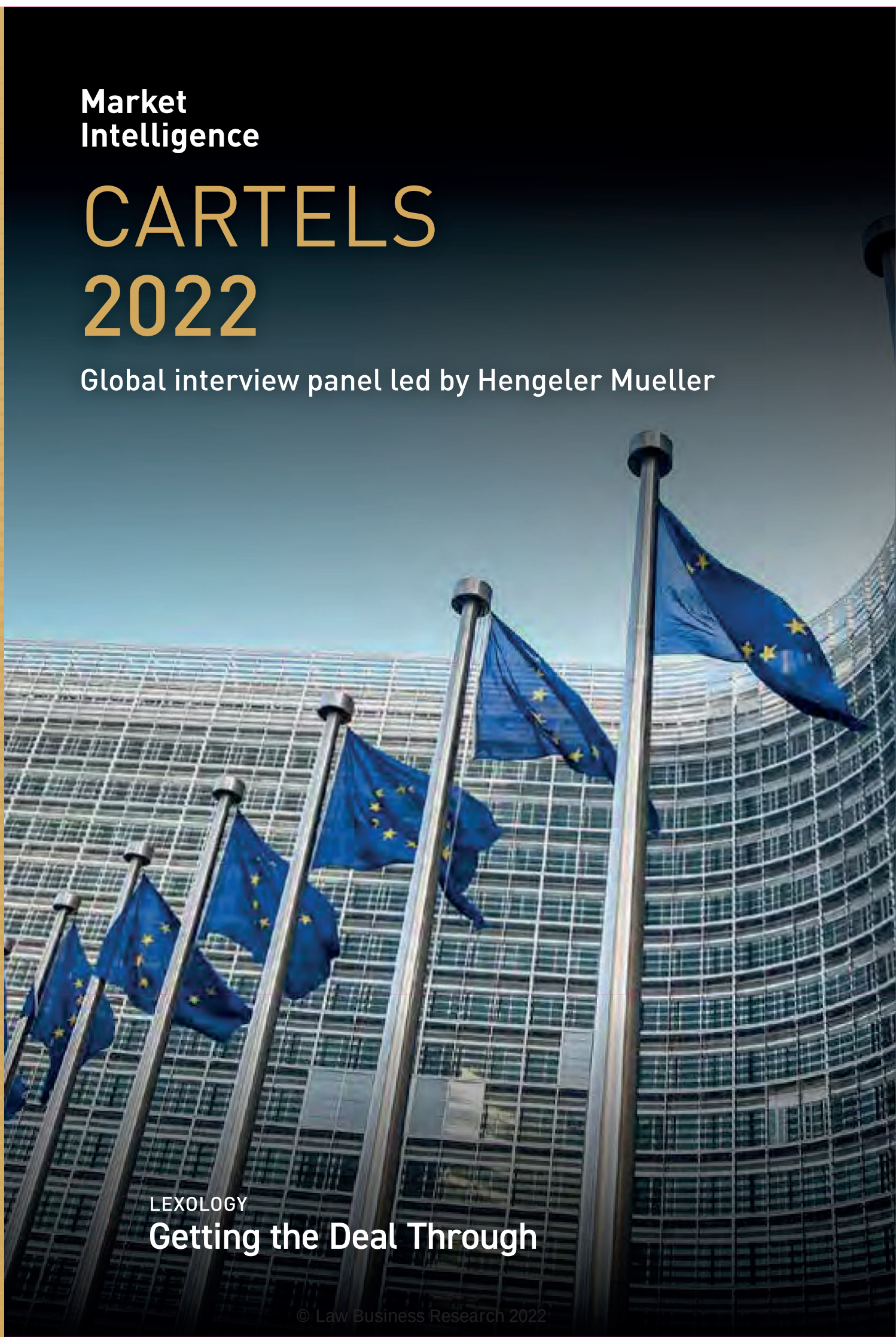
Market Intelligence

CARTELS 2022

Global interview panel led by Hengeler Mueller



LEXOLOGY

Getting the Deal Through

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CARTELS 2022

Germany

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As regards antitrust investigations, Alf has most notably advised Japanese companies in antitrust infringements proceedings by the European Commission. These proceedings include the Commission's investigations concerning chloroprene rubber, TV and monitor tubes and capacitors. He has also advised on settlements of antitrust proceedings of the European Commission and the German Federal Cartel Office.

Alf is listed in *Chambers Global* 2022 and in *Who's Who Legal – Competition* 2021 for competition in Germany.

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

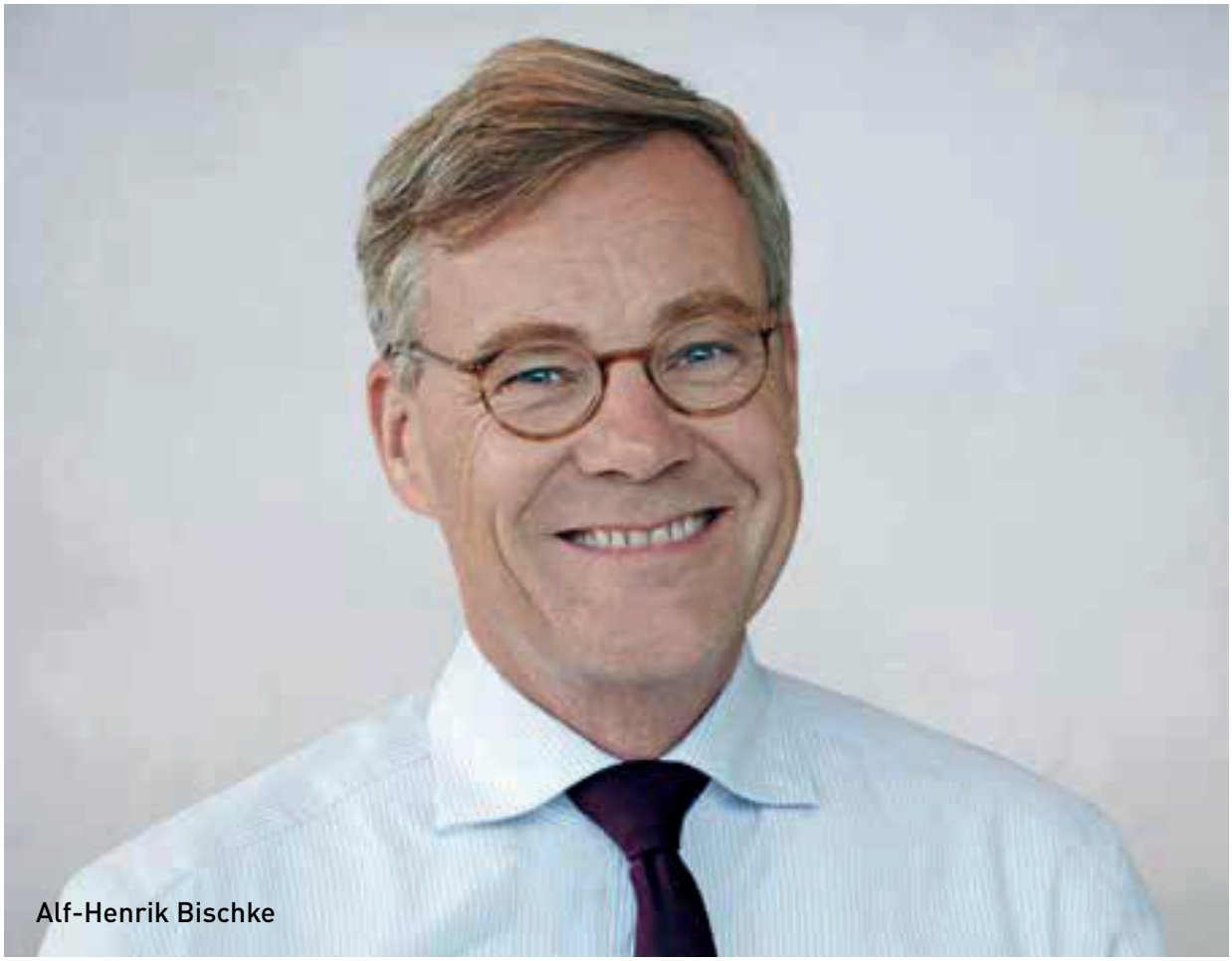
In 2021 the Federal Cartel Office (FCO) concluded antitrust investigations in different kind of sectors especially the digital economy. Affected were Amazon, Apple, Alphabet/Google and Meta (formerly Facebook). In addition, the FCO has also dealt with cases in sectors such as steel forging, as well as vertical price-fixing in the sectors of musical instruments, school bags and consumer electronics. In total, the FCO imposed fines of around €105 million on eleven companies and eight individuals in 2021. As in previous years, the FCO continued to focus on prosecuting horizontal infringements. In terms of fines imposed, 2021 was rather a down year with a more than 60 per cent reduction of the total fines compared to the total fines imposed in 2020 of €349 million. This is the second year in a row where a reduced amount of fines could be noticed.

Specifically, the FCO imposed the first fine of 2021: a total of €35 million against three special steel producers and steel forging companies for their involvement in an anticompetitive information exchange. The FCO further imposed fines on three manufacturers and two dealers of musical instruments for vertical and horizontal price-fixing in several cases in the amount of €21 million. In December 2021, the FCO imposed a fine of €7 million on a manufacturer of audio products for ensuring that its products were not offered at prices significantly below the recommended retail price. The most recent fine of €7.3 million was imposed on two manufacturers of multi-profile bridge expansion joints on 10 February 2022 for fixing their market shares in the form of quotas and thereby dividing the market among themselves.

As mentioned at the beginning, the FCO continued to expressly focus on the digital economy. After initiating an abuse of dominance proceeding against Meta in December 2020 concerning the linkage of virtual reality products with the group's social network, the FCO also started to investigate Alphabet/Google in June 2021. The focus of the investigation is the Google News Showcase offer and its relationship with the new ancillary copyrights of press publishers, which were introduced by article 15 of the EU's Copyright Directive. The FCO also put an emphasis on investigations against Alphabet/Google, Amazon, Apple and Meta under section 19a German Act against Restraint of Competition (GWB), which is new since the 10th amendment to the GWB.

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

Different events can trigger an investigation by the FCO. The FCO can either initiate proceedings on its own initiative, or upon application by or receiving complaints from



Alf-Henrik Bischke

third parties. For the protection of third parties, the FCO has implemented a standardised whistle-blowing system. Additionally, anonymous hints can be submitted by post, email or telephone. Whistle-blowers can be companies or employees and both can benefit from the FCO's leniency programme.

The FCO conducted two dawn raids in 2021 under strict hygiene rules. The pandemic slowed the FCO down in the prosecution of cartels. The FCO announced it would be ready to initiate new proceedings in 2022 and according to press reports already has conducted a dawn raid against several manufacturers of cables and wires at the beginning of 2022. In 2021, nine companies provided the FCO with new information on infringements in their sector via leniency applications, and the FCO also received further information from other sources.

Furthermore, the proceedings that the FCO wrapped up in 2021 show that companies almost always seek to end the proceedings via settlement in which the companies admit to the facts and legal assessment by the FCO in turn for a (further) reduction of the fine.

While the EU Digital Markets Act is not yet enacted, the FCO continues to scrutinise large digital economy companies. After the German legislator strengthened

the FCO's position by amending the GWB, the FCO immediately began investigations under the new section 19a GWB applying to undertakings of 'paramount significance for competition across markets' against Meta and later also against Amazon, Apple and Alphabet/Google. In the Alphabet/Google investigation, the FCO concluded in January 2022 that section 19a GWB is applicable. On the basis of this finding, the FCO can prohibit the company from engaging in certain practices that threaten competition, such as self-preferencing.

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

According to the FCO chief Andreas Mundt, the numbers of leniency applications continues to plummet due to a rise in private damages litigation. In 2016, there were 59 applications, in 2017 there were 37, and in 2021 there were only nine. Mundt wants to protect the first leniency applicant within a cartel from private damages claims to increase the number of leniency applicants. Whether this will be the subject of a legislative amendment is open.

The leniency system itself was subject to major change in 2021. While it was previously laid down in the FCO's own leniency programme, the legislator chose to enshrine the programme in the GWB (section 81h to 81n GWB that were introduced with the 10th amendment to the GWB). As before, the leniency programme only applies to horizontal infringements. In addition to companies and associations of companies, natural persons can also make use of the leniency programme. The leniency programme applies exclusively to proceedings before the cartel authorities, but not to court proceedings, and it still offers no protection for individuals against criminal prosecution. Furthermore, the leniency programme does not protect clients against follow-on damages litigation. Therefore, even immunity from fines does not exempt them from follow-up civil law damages claims, although there are some legal limitations to the leniency applicant's joint and several liability that were introduced in 2017.

The general conditions for a successful leniency application, now enshrined in section 81j GWB, remain the same. In summary, leniency applicants have to disclose all relevant facts pertaining to the infringement, including their own participation therein. Further, the leniency applicants have to terminate their participation in the infringement immediately after filing when the infringement is still ongoing, and cooperate effectively and comprehensively. If these conditions are fulfilled, the FCO can grant immunity to the first cooperating applicant according to section 81k GWB. Therefore, a timely submission of a marker for a leniency application is still paramount for the possibility of achieving immunity. The submission of the marker

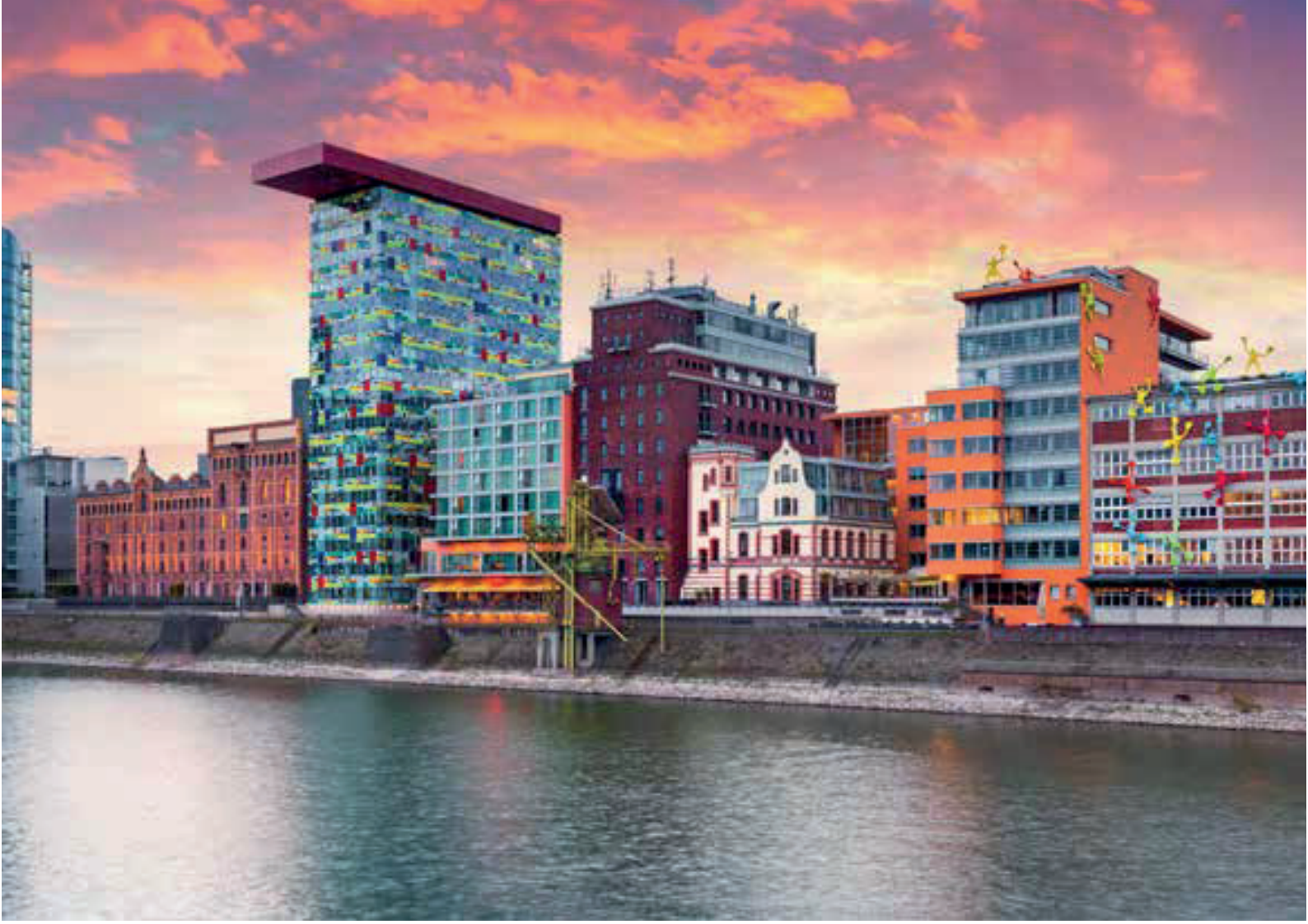
"In addition to companies and associations of companies, natural persons can also make use of the leniency programme. The leniency programme applies exclusively to proceedings before the cartel authorities, but not to court proceedings or criminal prosecution."

itself is now stipulated in section 81m GWB. After submitting the marker, which has to describe the misconduct precisely, the FCO usually grants an extended period of eight weeks to submit a fully fledged leniency application. In particular, the marker has to include a statement on the type and the duration of the infringement, the products and geographies concerned and other members of the cartel. As before, it is important to consider whether sufficient information and evidence has been gathered to apply for leniency and whether the company is able to provide this information to the FCO in a timely manner. When engaging (former) employees (ie, the key knowledge bearers within the company) to partake in the process or incentivising them to do so, certain labour and corporate law provisions have to be considered as well, particularly when indemnifying individuals that may have been involved in the alleged misconduct. Leniency applicants are strongly advised to resolve these issues with their external and internal counsel as soon as possible to fulfil the cooperation obligation under the leniency system. Unlike under the previous leniency programme, it has to be stated expressly if the leniency application is not submitted in the name of certain current or former employees.

Parties that do not achieve immunity may still obtain a significant reduction of the fine if they fulfil the conditions described above and submit evidence of the cartel that, in terms of proof of the offence, provides significant 'added value' compared to the information and evidence already in the FCO's possession of the FCO. This value may lie in the fact that the information and evidence clarify existing connections or strengthen the evidence of facts already known to the FCO. In this context, it is noteworthy that in contrast to the previous leniency programme, section 81l(2) GWB does not contain any specification of the maximum reduction. The reduction will be based on the value of the evidence as well as on the timing of the leniency or bonus applications.

Moreover, a bonus applicant may now qualify for a partial immunity from a fine under section 81l(3) GWB if the applicant is the first company to submit substantial evidence, which the FCO uses to establish additional facts that lead to higher fines on other cartel members. These additional facts will be disregarded when determining the fine that will be imposed on the applicant that submitted these facts.

In October 2021, the FCO published new guidelines on the leniency programme. They specify the statutory leniency programme and have been issued because the FCO wants companies that are involved in a cartel to be able to judge more easily what they can expect and under what conditions they can be considered for exemption from paying a fine or having their fine considerably reduced. The new guidelines mention that the maximum reduction is 50 per cent, as before.



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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?

There are essentially two ways to streamline the process: staying responsive and cooperative throughout the process and indicating a willingness to settle the case. Unlike the previous leniency programme, the requirements for the settlement procedure are not regulated by statute. The subject of a settlement procedure is a settlement declaration in which the person concerned declares that, from his or her point of view, the facts charged are accepted as true and that the fine is accepted up to the prospective amount. Both the FCO and clients may have an interest in settling the case. For the FCO, reaching a settlement may significantly reduce the case team's workload and, from a practical point of view, also the risk that its fining decisions are appealed. This is why, in our experience, the FCO is rather interested in bringing investigations to an end by means of settlements. The advantage for a client under investigation is that the fine can be reduced by (another) 10 per cent. Another advantage for clients confronted with cartel allegations is the fact that the FCO will only draft a decision with basic reasons as opposed to a fully fledged

decision with numerous details of the case, which may be helpful in subsequent proceedings regarding private damages claims. However, as cartel participants have to acknowledge the facts established by the FCO, including their role in the misconduct, the FCO's decision proves both the existence and the scope of a cartel law infringement so these facts cannot be challenged in courts any more. Thus, whether a settlement is actually a good option or whether the client is better off defending against the authority's allegations must be carefully considered.

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

The lead cases in terms of fines concern the forging companies in the automotive industry and the trade in musical instruments. The largest case in 2021 involved three steel forging companies (and two individuals), which were fined €35 million for an anticompetitive information exchange.

The companies reportedly had discussions on passing on procurement costs to customers with the aim to avoid having to bear increasing costs. The exchange of information, which took place at least in the period from October 2002 to December 2016, was particularly concerned with the respective cost situation of the companies, their pricing strategies and concrete negotiations with suppliers and customers. This case is in line with previous FCO decisions from 2018 and 2019 concerning the metal industry, where companies have been heavily fined.

The second largest case involved three manufacturers and two retailers of musical instruments. The companies concluded in vertical and horizontal price-fixing and systematically worked for years to restrict price competition towards end consumers by not undercutting minimum sales prices. The FCO fined the companies (and individuals) €21 million.

In another important decision, the FCO found that Alphabet/Google has 'paramount significance for competition across markets' and, therefore, applied the new section 19a GWB for the first time. Section 19a GWB essentially aims to identify special positions of power and their possible anticompetitive effects and threats to competition in the area of 'digital ecosystems', with any gatekeeper functions of individual companies. After the first step of determining this status, the FCO can prohibit certain practices that threaten competition. The FCO is scrutinising Google's use of customer data as well as the Google News Showcase offering. This is a Google service that offers publishers in Germany and many other countries worldwide the opportunity for highlighted and in-depth presentation of publisher content. Based on a complaint filed by a collection society, the FCO is now investigating,

“The FCO both investigates infringements and issues decisions and does not have to coordinate or consult with other authorities. However, the FCO needs to obtain court approvals for certain investigation measures such as dawn raids.”

inter alia, whether the Google News Showcase offering may give Google preferential treatment or make it difficult for press publishers to enforce the ancillary copyright.

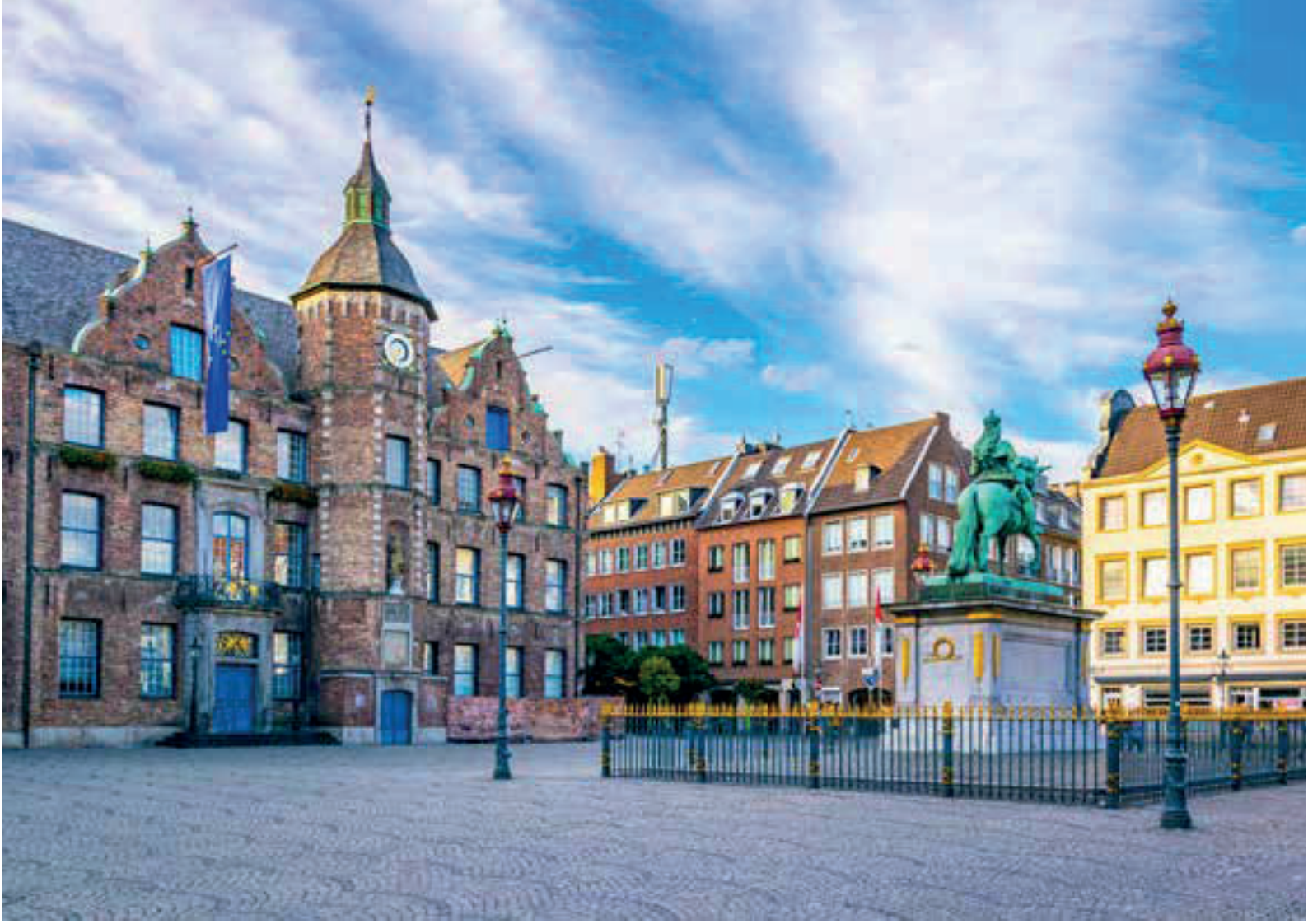
6 | What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority’s decisions in the courts over the past year?

The FCO both investigates infringements and issues decisions (ie, is ‘prosecutor and judge’) and does not have to coordinate or consult with other authorities. However, the FCO needs to obtain court approvals for certain investigation measures such as dawn raids.

Fining decisions of the FCO can be appealed before the Düsseldorf Higher Regional Court, which can decrease or increase a fine as the court is not bound by the FCO’s Fining Guidelines. In practice, the Düsseldorf Higher Regional Court often increased the fines imposed by the FCO, which resulted in companies from refraining to appeal fining decision of the FCO. On points of law, a further appeal to the Federal Supreme Court is possible.

An important verdict has been handed down in the *Beer* cartel. In 2014, the FCO issued fining decisions for a total fine of €62 million on beer brewers, including Carlsberg, for price-fixing. In 2019, the Düsseldorf Higher Regional Court confirmed a coordination between the brewers and the FCO's legal assessment of the infringement. However, contrary to the FCO's findings, the Higher Regional Court held that there was no evidence of Carlsberg's involvement or promotional participation in the period from March 2007 until June 2009. For that reason, Carlsberg was able to successfully point to the statutory limitation period, meaning that fines against Carlsberg could not be imposed for its infringement until March 2007. However, in 2020 the Federal Supreme Court overturned the Higher Regional Court's decision and referred the matter back to another senate of the Düsseldorf Higher Regional Court. The Federal Supreme Court, unlike the Düsseldorf Higher Regional Court, based its decision on the period in which the misconduct had effects on the market, rather than assuming that Carlsberg participation in the infringement ended after its last participation in a meeting with competitors. Further, the Federal Supreme Court noted that there is empirical evidence that companies use knowledge about intended or contemplated market behaviour of competitors to determine their own market behaviour. Based on this assumption, it seems that subsequent price increases may also have been influenced by findings from the meeting in March 2007 in which Carlsberg participated. Therefore, a corresponding market behaviour by Carlsberg could have been presumed to have resumed beyond March 2007. The outcome in the case against Carlsberg is still open: The last day of the trial before the Düsseldorf Higher Regional Court took place on 30 November 2021, so a verdict in this case can be expected in 2022. However, three of the accused beer brewers have now been acquitted in separate proceedings before the Düsseldorf Higher Regional Court – only two of the 14 witnesses remembered alleged price-fixing, and one of the witnesses was not even sure. As a result, the fines were lifted.

There are also new procedural developments in the Facebook abuse of dominance case. After the FCO prohibited Facebook from combining user data compiled from different sources without obtaining the users' consent (February 2019), Facebook successfully lodged an emergency appeal against the FCO's decision in August 2019. As a result, the enforcement of the decision was suspended, and Facebook thus did not have to comply with the decision until the decision on the merits, because the Düsseldorf Higher Regional Court had concerns about the legality of the FCO's decision. In June 2020, the Federal Supreme Court upon appeal on points of law by the FCO reversed the decision of the Düsseldorf Higher Regional Court and reverted the case back to the Higher Regional Court. In a second emergency appeal proceeding initiated by Facebook (again, aiming at suspending the enforcement of the FCO's decision), the Düsseldorf Higher Regional Court



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suspended the enforcement of the FCO's decision. The Higher Regional Court did not admit an appeal on points of law, but the FCO successfully appealed the non-admission decision before the Federal Court of Justice. Before the Federal Court of Justice could decide on the appeal on points of law against the second emergency appeal, Facebook withdrew its appeal. At the hearing of the main proceedings at the beginning of 2021, the Düsseldorf Higher Regional Court ruled that the question of whether a breach of the General Data Protection Regulation constitutes an abuse of a dominant position requires interpretation of European law and, therefore, suspended the proceedings and referred seven questions to the European Court of Justice.

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

In 2021, the number of follow-on private damages claims continues to remain high. According to the FCO, the fear of follow-on damages claims has led to a decreasing number of leniency applications. The legal environment in Germany has been quite claimant-friendly, even before the implementation of the EU Directive

on cartel damages. As a rule, a decision is first taken by the FCO or the European Commission. Based on an established infringement of antitrust law or a prohibition of abuse, lawsuits in the field of private law follow. The FCO even explicitly refers to the possibility of claiming damages in its case summaries. As a recent example, the Commission's decision imposing fines on Europe's leading producers of lorries in 2016 led to a vast amount of damages claims of customers of these companies, particularly in Germany, virtually before every regional court competent for antitrust damages claims.

The legal position of claimants has further improved following the 10th amendment to the GWB with an easing of the burden of proof for the claimant. In response to case law, section 33a(2) GWB provides for a rebuttable presumption that transactions with cartel members have been affected by the cartel. This presumption also extends to indirect purchasers in the event that a price surcharge is passed on.

8 | What developments do you see in antitrust compliance?

Antitrust compliance continues to become ever more important. The 10th amendment to the GWB includes provisions on the acknowledgement of an effective compliance system. Specifically, section 81d(1) GWB provides the possibility of reducing fines in the case of both preventive and subsequently implemented compliance measures. In October 2021, the FCO published new guidelines on the Setting of Fines in Cartel Proceedings and explained in detail in which situations compliance systems can reduce potential fines. However, preventive compliance cannot be taken into account if the offence involved a person responsible for the management of the company. In the case of subsequently implemented compliance measures, the FCO will consider the reduction of fines in particular if the company convincingly demonstrates the precautions taken to effectively avoid future comparable infringements and provides a clearly recognisable commitment to act in conformity with the law. The effort to repair the damage is also included in this assessment.

In order to avoid infringement of antitrust law from the outset or detect misconduct at an early stage, antitrust law compliance measures continue to be of paramount importance. These measures go beyond regular compliance training and may include effective whistle-blowing systems, internal audits and reporting lines. Additionally, companies may be advised to prepare for scenarios in which prompt reactions are required (eg, by conducting mock dawn raids and providing clear and tailor-made guidelines with dos and don'ts). Ultimately, it is of the utmost importance that the company lives a compliance-focused atmosphere and business policy that is promoted by senior management.

> **"The FCO will consider the reduction of fines in particular if the company convincingly demonstrates the precautions taken to effectively avoid future comparable infringements and provides a clearly recognisable commitment to act in conformity with the law."**

Lastly, in March 2021, the FCO launched its Competition Register for Public Procurement, a nationwide register that provides contracting public authorities and concession-awarding authorities with information on submission proceedings that enables the contracting authorities to check whether a company is to be or can be excluded from tenders due to relevant economic offences. This increases the importance of effective compliance systems for companies interacting with public counterparties even further.

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

Since major changes have just been enshrined by the 10th amendment to the GWB that came into effect on 19 January 2021, another major legislative change at national level in 2022 is unlikely. But the effects of the 10th amendment to the GWB will unfold, namely the investigations under section 19a GWB against Meta, Amazon and Apple will be concluded by the FCO, and there will probably be follow-up measures against these companies. Also, since the pandemic is slowing down, we

are likely to see more dawn raids. Companies should ensure that they establish adequate compliance programmes to defend themselves against cartel allegations. They should take into consideration the leniency programme and the Guidelines on the Setting of Fines in Cartel Proceedings of the FCO from October 2021. At the European level, it will be interesting whether, and if so when, the Digital Markets Act (DMA) will enter into force and its impact especially on the big tech firms and the jurisdiction of the FCO.

10 | Has the antitrust authority recently adopted any covid-19 antitrust measures? To which industry sectors were they applied?

With respect to cartels, the Act on Mitigating the Consequences of the COVID 19 Pandemic in Competition Law and for the Area of Self-Governing Organisations of the Commercial Sector (which came into effect on 29 May 2020) suspended the obligation to pay interest on antitrust fines until 30 June 2021 if payment reliefs (ie, payment of the fine in instalments) were granted by the FCO. However, the legislator did not extend this law.

Neither the FCO nor the Düsseldorf Higher Regional Court have granted significant covid-19 rebates in cartel cases in the past. It is, therefore, not to be expected that the FCO will make concessions due to the pandemic this year.

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The Inside Track

What was the most interesting case you worked on recently?

We have represented companies in cartel proceedings in an industry heavily struck by the covid-19 pandemic. Besides the regulatory suspension of the obligation to pay interest on antitrust fines until 30 June 2021 if payment reliefs were granted by the FCO, it proved challenging to convince the Federal Cartel Office to take into account the effects of the pandemic. The client's business was severely affected to the extent that made taking into account the last complete fiscal year's turnover disproportionate due to a hefty decline in the current fiscal year. Ultimately, the proceedings ended in settlements, and the client was granted payment reliefs that took account of the projected recovery rate from the crisis.

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

We have advised in a number of projects in the digital economy. New forms of cooperation emerge that need to be assessed under antitrust law. Due to the authorities' reactive stances, it is challenging for companies engaging in this space to navigate potential antitrust law pitfalls. Therefore, closer guidance on different forms of cooperation would be highly appreciated to allow for a safer self-assessment by the companies. Until then, clients are highly encouraged to obtain advice from their antitrust law counsel.

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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

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