As a multidisciplinary firm comprising lawyers, tax consultants and auditors, Esche Schümann Commichau advises clients on all aspects of competition and antitrust law.

Business risks and challenges are growing steadily in this area of law. In particular, violations of competition law may result in high economic loss, substantial fines and reputational damage. In addition, the right to claim damages for antitrust infringements is assuming an increasingly significant role in advice on antitrust law and is therefore also a major focus of our work.

As a multidisciplinary practice, we are also able to offer comprehensive advice to our clients on economic aspects in cartel cases by drawing on the expertise of our audit company.
Main areas of advice in antitrust law

Our practice concentrates primarily on the following areas:

- **Competition compliance** – Creating the basis to enable our clients to comply with all antitrust laws (national, EU, international)

- **Horizontal and vertical cooperations** – drafting horizontal and vertical agreements that meet antitrust requirements (e.g. sales and distribution and purchasing agreements)

- **Antitrust proceedings** – representing clients in administrative fine proceedings before the European Commission and the Federal Cartel Office and before German and European courts (antitrust violations and abuse of market dominance)

- **Private enforcement** – enforcing and defending civil antitrust damages claims

- **Quantification of cartel damages** – preparing economic opinions for the calculation of cartel damages (enforcement and defense)

- **Merger control** – structuring contracts and assisting in merger control proceedings in connection with M&A transactions
Holistic advice from a single source

In addition, we can provide full support to our clients with regard to frequent follow-up questions from other areas of law. To do so, we draw on expertise from many practice areas of our firm:

- **Corporate law** – for example, to review and enforce claims for damages against a company’s directors and officers after an antitrust violation, restructurings after an antitrust violation or for internal rules within a company (revising internal rules of procedure etc.)

- **Employment law** – to enforce necessary disciplinary measures after an antitrust violation or in connection with the conclusion of so-called amnesty agreements with executive board members, managing directors and employees

- **Tax law** – for example, for the optimized tax treatment of corporate fines or for the payroll tax treatment of fines assumed by employers on behalf of employees

- **Public procurement law** – carrying out legal self-cleansing after violations of competition law have been uncovered to enable public sector customers to be supplied in the future as well

- **Press law** – communications in crisis situations, dealing with media reporting (“Hamburg” or “Cologne” school) and devising legal strategies to handle criticism and shitstorms


**Competition compliance**

We help our clients avoid violating antitrust law. To that end, we offer them customized compliance programs. These are designed to enable executive board members and managing directors to meet their legal duties to prevent non-compliance.

We draw up the necessary internal guidelines for our clients (e.g. codes of conduct, guidelines for dawn raids) having regard to the works council’s rights of codetermination, train the corporate officers and employees of our clients and create the conditions under employment law to enable the required persons to be appointed (e.g. as commissioners or compliance officers). Upon request, we also act as an external ombudsman and set up reporting offices for suspicious cases (whistleblower hotlines).

**Drafting of agreements to ensure antitrust compliance**

To structure contractual relationships that comply with antitrust law, we consider, during the negotiations, whether the desired terms of the agreement are permissible under antitrust law.

This concerns, on the one hand, so-called horizontal agreements between (potential) competitors such as joint venture agreements, licensing agreements, bidding consortiums and joint ventures, and technology transfer agreements.

On the other hand, in antitrust law restrictions on competition in so-called vertical relationships with suppliers and buyers often assume an important role. These arrangements, which are often permitted, relate, for example, to exclusive distribution agreements, non-solicitation agreements, customer protection agreements, and other restraints on competition.
Representation in antitrust administrative fine proceedings and abuse of market dominance proceedings

Esche Schümann Commichau represents clients before the Federal Cartel Office and the European Commission in antitrust administrative fine proceedings and abuse of dominance proceedings. Through our global network of law firms (Lawyers Associated Worldwide – LAW), we can arrange for our clients to be represented before foreign cartel agencies and can offer them a one-stop cross-border defense.

Together with our clients, we devise the best possible defense strategy for the case at hand and our experienced team can ensure that the right decisions are taken immediately. In particular, we assist our clients in answering the critical question whether so-called leniency and key witness applications should be submitted.

In contentious cases with the cartel authorities (e.g. challenging their decisions to impose fines before the courts), we represent our clients before German and European courts.

In all proceedings – especially those concerning abuse of market power – we draw on the economic expertise of our auditors. In antitrust proceedings, it is always necessary to explain the economic relationships and effects to the authorities. In antitrust proceedings, we support our clients, for example by submitting economic opinions or appearing as witnesses before the court. As administrative fine proceedings have a prejudicial effect on antitrust damages claims, cartel members should take steps to clarify the economic issues at an early stage and counteract incorrect findings in administrative decisions to impose fines or court rulings. The correct economic analysis alone can often result in a positive outcome to antitrust proceedings for our clients.
Antitrust damages actions

Administrative fine proceedings are often followed by civil actions to recover damages caused by a cartel (private enforcement).

In such cases, our multidisciplinary setup enables us to provide clients with targeted one-stop advice with our experienced team of lawyers, tax consultants and auditors.

We assist clients when they enforce claims for antitrust violations in the civil courts and defend themselves against such claims. We develop an effective and focused negotiating strategy for each specific case, regardless of whether our clients wish to enforce claims as injured parties or are exposed to such claims as cartel members.

We support our clients both in out-of-court settlement proceedings and court proceedings at national and international level.

Clients that wish to claim cartel-related damages and those that have to defend themselves against such claims both require economic opinions to explain the impact of cartels with regard to the damage they cause. The key question is: What would the competitive price have been without any violation of antitrust law? In this connection, outstanding economic expertise is absolutely vital.

On the basis of hypothetical market conditions, derived from actual data and validated assumptions, our auditors calculate potential damages. To do so, we apply modern economic methods that have proven their worth in practice (in particular we work with comparable market concepts, cost-based calculation methods and market simulations).
Assistance in merger control proceedings

The efficient and rapid implementation of merger control proceedings is an important area of focus for our antitrust advisory services.

We provide effective support on competition aspects for M&A projects, including asset deals and the acquisition of single assets as well as restructurings.

In this area too, the firm’s multidisciplinary approach enables it to develop creative and legally sound solutions that take account of the legal, tax and financial aspects.

Our audit firm has considerable experience in competition-related economic aspects and merger control. Since the introduction of the so-called SIEC test, the economic assessment of a merger project has gained markedly in significance, especially in merger control proceedings.

Over many years of practice, we have also assisted a large number of clients in merger control proceedings before the Federal Cartel Office and the European Commission in oral hearings and informal talks, and enabled merger plans to be cleared. The approach we take is to provide effective economic support in merger control proceedings at the very outset. In view of the tight deadlines in such proceedings, this is essential and enables the authorities’ concerns to be identified at an early stage.

The economic analyses carried out by our auditors in merger control proceedings cover, for example, all questions relating to market definition (e.g. in price correlation analyses and the so-called SSNIP test), the effects of market power and reviews of so-called coordinated effects.
The business magazine “WirtschaftsWoche” ranked us among the “top law firms” in Germany in 2019 in competition/antitrust law. Dr. Philipp Engelhoven was named as a “top lawyer”.

To draw up the ranking, the Handelsblatt Research Institute (HRI) asked more than 4,400 attorneys in 223 law firms to nominate highly regarded colleagues. The ranking was prepared after evaluation by a jury of experts. The complete ranking is available in WirtschaftsWoche issue no. 30/2019.

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