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VBB on Competition Law

Issue Highlights

Jurisdictions covered in this issue

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MERGER CONTROL

European Union level

Commission conditionally clears Boeing's acquisition of Spirit

On 14 October 2025, the European Commission announced its conditional clearance of Boeing's acquisition of Spirit Aerosystems Holdings ("Spirit").

Spirit is a US-based company that manufactures structural components for military and civilian aircraft. It was originally spun off from Boeing in 2005 and continued to supply aerostructures to Boeing. Since beginning to operate independently, Spirit also began supplying Boeing's competitors – notably Airbus. Boeing is now seeking to reacquire Spirit in order to regain greater quality control over its supply chain.

The Commission expressed concerns that following the transaction, the combined entity would have the ability and incentive to cease supplying aerostructures to rivals like Airbus, or at least to deteriorate conditions of supply. Moreover, as Spirit has access to commercially sensitive information relating to its clients, this information could be supplied to Boeing and used for its commercial advantage.

Finding an adequate resolution to these competition law concerns required the active participation of the parties, as well as Airbus. Ultimately, the parties agreed to divest to Airbus the business assets and personnel that currently manufacture aerostructures for Airbus, as well as to divest a manufacturing site in Malaysia to the third party Composites Technology Research Malaysia (CTRM). These divestments would allow Airbus to integrate and retain control over its supply chain, and enable CTRM to enter the market as a new aerostructure supplier. The Commission conditionally cleared the transaction on this basis, finding that these divestments resolved its concerns.

MERGER CONTROL

National level

SPAIN

Spanish Competition Authority issues first-ever prohibition decision in pharma sector merger

On 6 October 2025, the Spanish Competition Authority (*Comisión nacional de los mercados y la competencia* (CNMC)) prohibited Curium Pharma Holding Spain, S.L.U. (Curium) from taking over Institut de Radiofarmacia Aplicada de Barcelona, S.L. (IRAB). This is the first time the CNMC has issued a formal prohibition of a merger since its creation in 2013, representing the first full merger ban under the current Spanish Competition Act (*Ley 15/2007 de Defensa de la Competencia*).

Curium, which describes itself a leading nuclear medicine company, sells a range of radiopharmaceutical products for the diagnosis and treatment of several diseases, and also operates as a contract manufacturer for other companies supplying radiopharmaceuticals. IRAB also has a portfolio of radiopharmaceutical products, as well as a related contract manufacturing business. Additionally, Curium owns two cyclotrons (particle accelerators used in the production of radiopharmaceuticals) and commercially operates five public cyclotrons distributed across Spain, while IRAB operates a single cyclotron located in Barcelona.

According to the CNMC, the proposed acquisition of IRAB by Curium threatened competition in the markets for the supply of prostate-specific membrane antigen (PSMA) radiopharmaceuticals (used in prostate cancer detection), where the parties would hold combined market shares reaching 80–90% and 90–100%, and in the provision of contract manufacturing services to third parties in north-eastern Spain. The ostensibly narrow product market definitions and the geographical focus on the north-eastern part of Spain stem from the very short half-life of the PSMA radiopharmaceuticals, which prevents storage and limits delivery to customers outside of the immediate area in which the cyclotron produces the radiopharmaceuticals.

In addition to the parties' very high combined market shares, the CNMC identified a risk of coordinated effects in the affected supply markets between the merged entity and Novartis-owned Advanced Accelerator Applications Ibérica (AAA). Curium's case was not helped by the CNMC's 2021 finding that Curium and AAA had participated in a market-sharing and bid-rigging cartel, in relation to which the CNMC previously imposed a fine of €5.76 million.

Curium offered a series of commitments to address the CNMC's concerns, but these were deemed insufficient by the CNMC, which prohibited the transaction.

FOREIGN DIRECT INVESTMENT

European Union level

European Commission publishes fifth annual report on screening of foreign direct investments

On 14 October 2025, the European Commission published its fifth annual report on the screening of foreign direct investments into the European Union. The report shows that Member States have more strictly scrutinised foreign investments in critical technologies linked to defence, which triggered more in-depth reviews in 2024. While overall FDI flows into the EU declined, more transactions were screened. Governments are also increasingly using stronger tools to block or impose mitigating measures on non-European acquisitions of strategic assets such as infrastructure, technology and manufacturing. Critical technologies, semiconductors and aerospace attracted heightened attention, with half of detailed assessments tied to defence-related activities. The US remained the top investor, followed by the UK. Germany and France were the leading destinations for acquisitions, while Spain and Germany were the leading destinations for greenfield investments.

According to the report, in 2024, Member States conducted a total of 3,136 FDI screenings, a significant increase compared to previous years. Of these, 41% underwent formal screening, while the rest were deemed ineligible or unnecessary to screen. Of the screened investments, 86% were approved without conditions, 9% required mitigating measures, and only 1% were blocked, confirming that the EU remains open to foreign investment while addressing security risks.

Scrutiny is expected to intensify in future as more Member States adopt or tighten screening laws. By the end of 2024, 24 Member States had operational FDI screening mechanisms, with several introducing amendments to tighten security and adapt to evolving risks. Bulgaria and Ireland implemented new mechanisms, while Croatia, Cyprus, and Greece advanced their legislative processes. Updates across Member States focused on expanding sectoral coverage, integrating cybersecurity and critical infrastructure considerations, and refining procedural rules.

The report also refers to the European Commission's proposal of 24 January 2024 to revise the FDI Screening Regulation to address weaknesses in the current system, such as inconsistent national rules and gaps in screening coverage. Drawing on over 1,200 FDI cases, studies and audits, the Commission's proposal seeks to ensure all Member States establish FDI screening mechanisms, to create a common minimum scope and harmonised national frameworks, to include EU-based investors controlled by non-EU entities within the screening process and to enhance cooperation and accountability between Member States and the European Commission.

In particular, the new rules would extend coverage to investments in critical sectors such as raw materials and transport infrastructure. If endorsed by the European Parliament and the Council of the EU, the updated framework would also harmonise national screening procedures and empower the European Commission to intervene either on its own initiative or in cases of disagreement between EU Member States regarding potential risks to security or public order from specific foreign investments.

The legislative review of the EU FDI Screening Regulation is currently in the final stage of interinstitutional negotiations (known as "trilogue" negotiations) between the European Parliament, the Council and the European Commission. Key areas of disagreement between the institutions include issues such as the extent of the Commission's powers, the scope of screening and implementation timelines.

The European Parliament, for instance, has suggested stronger, more impactful EU oversight, proposing to grant the European Commission the power to ultimately prohibit a foreign investment, even if the host Member State has approved it. The European Commission itself had not proposed this extension of its powers and the Council strongly resists the proposal, emphasising the principle

FOREIGN DIRECT INVESTMENT

of national sovereignty and the exclusive right of Member States to make final decisions on foreign investments within their territory.

The treatment of greenfield investments is also a point of contention. The European Parliament proposes that the scope of national screening mechanisms should mandatorily extend to certain greenfield investments (i.e., investments involving the creation of new facilities, not just the acquisition of existing ones), particularly if they are in sensitive sectors, involve a sensitive investor (e.g., a state-controlled investor) and exceed a certain monetary threshold (e.g., €250 million). The Council however suggests leaving the decision on whether to include greenfield investments in mandatory national filings to each Member State's discretion.

Finally, the suggested implementation timeline ranges between a 12-month transition period proposed by the European Commission, while the European Parliament proposed 15 months and the Council proposed a longer 24-month transition period counting from the publication date of the revised regulation.

These areas of disagreement between the institutions will need to be resolved before the revised regulation can be adopted.

ABUSE OF DOMINANT POSITION

National level

ITALY

Italian Court relies on internal documents to uphold finding that Roxtec engaged in strategic exclusionary conduct through unmeritorious litigation and product disparagement

On 30 September 2025, the Administrative Court of First Instance of Latium ("Court") upheld the 2023 decision by the Italian Competition Authority ("ICA") finding that Roxtec, a global leader in the manufacturing and distribution of tube and cable sealings, had abused its dominant position by implementing a complex strategy aimed at foreclosing WallMax, its main competitor ("Decision"), and imposing a fine of over €15 million on Roxtec (see VBB on Competition Law, Volume 2023, No. 9).

In its ruling, the Court confirmed that Roxtec, after the expiry of its patent for a tube and cable sealing system in 2010 and after the entry into the market of WallMax, adopted a strategy combining unlawful IP filings, unmeritorious litigation and systematic disparagement with the objective of hindering WallMax's entry and expansion. The Court also provided important clarifications concerning the applicable evidentiary standards to be met to support the finding of an overarching exclusionary strategy. The Court's findings on the various measures taken by Roxtec and found by the ICA to be problematic are summarised below.

Exclusionary trademark registration

Roxtec filed trademark applications with the European Union Intellectual Property Office ("EUIPO"), closely mirroring the technical characteristics of its expired patent but changing the colour of the product with each application (including the colours used by WallMax which Roxtec had never used before). The Court underlined that the use of a certain colour (black) in one of the applications was not a mere aesthetic factor but was derived from the use of carbon black, a specific substance with technical properties that other materials could not ensure. Therefore, the content and timing of the trademark registration (later invalidated by EUIPO) were found to be driven by exclusionary intent against WallMax.

Exclusionary litigation

Roxtec initiated multiple court proceedings against WallMax in five different countries (India, Germany, Italy, the USA and The Netherlands) mainly based on unfair competition, trademark infringement and unjust enrichment claims. In this regard, the Court endorsed the ICA's approach to distinguish the case from the *Promedia* sham litigation test (T-111/96) which requires litigation to be objectively baseless to constitute abuse. Here, the Court held that the assessment did not concern the unlawfulness of a single action but rather a broader "complex exclusionary strategy", which would in its view justify a different evidentiary standard.

The Court relied extensively on internal documents obtained by the ICA, which revealed that Roxtec initiated litigation not to protect its legitimate IP rights but to exclude its competitor, as no internal analysis suggested any real risk of trademark confusion. The Court also viewed the choice of India as the first forum – where WallMax had production facilities – as evidence of targeted exclusionary intent. In relation to this finding, the Court again relied on internal communications showing management's express intention to use unfair competition claims as a weapon, and considered it less relevant whether procedural considerations may have played a role in the forum selection.

The Court also noted that these proceedings were either settled or unsuccessful for Roxtec (despite interim measures sometimes being granted – often *ex parte*, but later overturned). The Court also dismissed the argument that one favourable judgment could legitimise other judicial actions.

Importantly, the Court emphasised that confirming the ICA's findings regarding intent does not render the notion of abuse subjective. Instead, internal documents serve as a "correct interpretative key" linking multiple practices into a single exclusionary strategy.

ABUSE OF DOMINANT POSITION

National level

Disparagement

Roxtec directly contacted WallMax's customers to spread allegedly disparaging statements regarding product quality and regulatory compliance, and referenced the existing litigation to cast doubt on WallMax's credibility. In contrast with the Commission's *Teva* decision (Van Bael & Bellis Life Sciences News and Insights, 31 October 2024) that focused on the truthfulness and completeness of the communication, the Court emphasised the peculiar method used: Roxtec intentionally relied on oral communications to avoid creating written evidence. Once again, internal communications were relevant as they encouraged staff members to mention the interim decisions favourable to Roxtec while omitting their later reversal on the merits.

Roxtec also commissioned an external report to demonstrate the poor quality of WallMax products. However, the report's authors themselves stated that the report could not be used to assess regulatory compliance. The Court added that, even if the allegations were true, market operators' technical expertise would make it "almost impossible" for a low quality product to be marketed.

Key take-aways

The Court endorsed the ICA's assessment that the various actions formed part of a single exclusionary strategy. In the Court's view, a production shutdown suffered by WallMax and the legal costs it incurred as a result of Roxtec's litigation strategy supported the finding that the conduct was capable of foreclosing WallMax (a point underscored by the fact that WallMax's legal expenses equaled its entire turnover). Moreover, the Court gave decisive importance to internal documents demonstrating Roxtec's exclusionary intent, which justified that ICA's departure from stricter legal tests, such as the *Promedia* sham litigation standard.

Finally, the Court's confirmation that disparagement by a dominant firm can constitute an abuse of dominance serves as a useful reminder that exclusionary communication practices can also be targeted by competition law enforcement outside the pharmaceuticals sector.

SWEDEN

Swedish Competition Authority closes investigation into alleged excessive pricing of orphan medicine

On 15 October 2025, the Swedish Competition Authority (*Konkurrensverket*) announced that it would discontinue its investigation into the alleged excessive pricing of *Namuscla* (mexiletine), an orphan medicine approved for treatment of inherited muscle disorders (*non-dystrophic myotonia* (NDM)). Namuscla is marketed by Lupin and distributed in Sweden by Macure Pharma.

The investigation was triggered by the Authority's 2023-2024 study addressing "repurposed" orphan medicines, particularly older generic medicines originally developed and sold for the treatment of a different disease, but also used off-label for the orphan indication. In recent years, some companies have compiled evidence and obtained orphan medicine status and EMA approval for the marketing of these medicines in the orphan indications. The companies have thereafter launched new medicines, which have market exclusivity, at higher prices than the older generic therapies.

With respect to Namuscla, the Authority found that its orphan designation, EMA approval and launch in Sweden had led to an eight- to eleven-fold increase in treatment costs compared to the prior off-label use of generic mexiletine. Nevertheless, the investigation revealed that the prices charged for Namuscla were not clearly excessive relative to the costs incurred by Lupin to obtain EMA approval, and therefore discontinued the case.

ABUSE OF DOMINANT POSITION

National level

Timeline of key events

- ***Pre 2018 – Off-label use of generic mexiletine***. Prior to Namuscla's approval, doctors treated NDM with generic myotonia approved for cardiac arrhythmia.
- ***October 2018 – Namuscla EMA Approval***. As an orphan medicinal product, Lupin also received 10 years of market exclusivity for NDM.
- ***2021 – Sweden launch***. As the price of Namuscla was significantly higher than generic mexiletine, which could no longer be prescribed for NDM, treatment costs rose eight- to eleven-fold.
- ***2023-2024 – Study of repurposed orphan medicines***. The Authority's study noted the substantial increased cost of treating NDM and raised excessive pricing concerns.
- ***May 2024 – Start of formal investigation of Namuscla.*** The Authority initiated its investigation of the pricing of Namuscla by Lupin and Macure Pharma.

The Decision

The Swedish Competition Authority found that Lupin likely held a dominant position as the exclusive producer of mexiletine for the treatment of NDM, for which no other therapies were approved or available in Sweden. The authority therefore applied the *United Brands* framework to evaluate whether the pricing of Namuscla was excessive and constituted an abuse in violation of EU and Swedish competition law.

Under the *United Brands* framework, a price may constitute an abuse if both of the following are satisfied:

- ***Is the price excessive relative to the parties' costs?*** The Authority's price-cost test *did not* conclusively show that the price of Namuscla was excessive relative to costs. Lupin's regulatory costs to obtain EMA approval were high, while sales of Namuscla were lower than forecast, which resulted in a higher cost per unit.
- ***Is the price unfair?*** While the Authority did not reach a conclusion on whether the price was unfair, it noted that the price increased significantly, and it was unclear whether Namuscla offers benefits to customers that justify the increased costs. The Authority also noted that the increased price led to fewer NDM patients receiving mexiletine.

As the evidence did not satisfy both limbs of the test (particularly the price-cost test), the Swedish Competition Authority discontinued the investigation, while also reserving its right to further investigate the pricing of Namuscla should market circumstances change.

Key take-aways

This decision illustrates that even a price increase of 800%-1100% does not automatically constitute an abuse under the competition laws. Each case must be assessed on its specific facts and economic context. It also shows that competition law is not a substitute for sectoral regulation: structural issues in the EU orphan medicine framework may be better addressed through legislative reform to ensure that incentives truly deliver value for patients and health systems.

For companies, the case also serves as a reminder that large price increases – particularly for products benefiting from regulatory exclusivity – will attract close scrutiny from competition authorities. Companies should ensure that any such increases are well-documented and objectively justified, whether by reference to underlying cost structures (e.g., R&D or regulatory approval costs) or to the value created for patients and health systems.

In practice, companies should also regularly update their competition-law assessments as market conditions evolve. In this instance, Lupin's position was arguably strengthened by lower-than-expected sales volumes, which raised per-unit costs and helped justify a higher price. Had sales volumes instead been higher – reducing the cost per unit – the same price could have appeared excessive, potentially leading to an adverse finding and fines, as seen in the *Leadiant* cases in the Netherlands, Italy, and Spain.

ABUSE OF DOMINANT POSITION

National level

UNITED KINGDOM

CMA confirms first-ever SMS designations in relation to Google's general search services and Apple and Google's respective mobile platforms, with possible interventions now being considered

Summary

In October 2025, the UK's Competition and Markets Authority (CMA) announced (see here and here) that – following extensive consultation – it had confirmed its earlier proposed decisions to designate (i) Google with strategic market status (SMS) in relation to general search and search advertising (together, "general search services") and (ii) each of Apple and Google with SMS in relation to their respective mobile operating systems, native app distribution services and mobile browser and browser engines (together, their "mobile platforms"). Such designations will last for a period of five years, unless the CMA decides to revoke them.

These SMS designation decisions, which are the latest step in investigations launched in early 2025, are the first of their kind under new powers afforded to the CMA by the Digital Markets, Competition and Consumers Act 2024 (DMCCA). They represent an important milestone in the UK's regulation of digital markets.

Now that the designations have been confirmed, the CMA can impose Conduct Requirements (CRs) on the designated firms and/or introduce Pro-Competition Interventions (PCIs) to address the root causes of market power in the relevant markets – and, for each of these first cases, the CMA has already indicated how it may intend to prioritise such actions.

The CMA's findings

In essence, the CMA has now confirmed the key positions set out in the corresponding proposed designation decisions published in June/July 2025. More specifically:

1. ***As regards Google's general search services,*** the CMA has confirmed, among other things, that (i) Google has substantial and entrenched market power – and a position of strategic significance – in this regard, and has thus been designated with SMS; (ii) Google's Gemini AI assistant is not within the scope of the designation (but the CMA will keep this under review, particularly in light of uncertainty around how that market is developing); and (iii) other AI-based search features, such as AI Overviews and AI Mode, are within the scope of the designation.

2. ***As regards Apple and Google's respective mobile platforms***, the CMA has confirmed, among other things, that (i) each of Apple and Google has substantial and entrenched market power – as well as a position of strategic significance – in this regard (including because UK mobile device holders use either Apple or Google's mobile platform and are unlikely to switch between them); and (ii) ongoing technological developments – particularly involving AI – are unlikely to eliminate Apple or Google's respective market power over the five-year designation period.

Next steps

Alongside the respective provisional designation decisions published earlier this year, in each case the CMA also published a bespoke roadmap (see here, here and here) outlining how it intended to prioritise possible CRs and PCIs during the first half of the five-year designation period – and essentially identifying various different prioritisation categories of potential measures – in the event that the provisional SMS designation decisions were confirmed. The CMA is expected to begin consultations on certain priority interventions later in the year – presumably focusing, at least in the first instance, on the CRs that were previously identified as "Category 1" in the respective roadmaps. In particular:

ABUSE OF DOMINANT POSITION

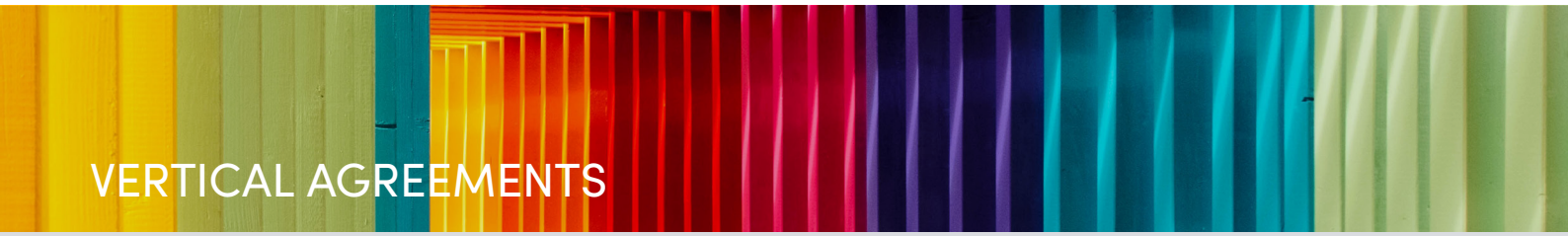
National level

1. ***As regards Google's general search services***, the list of Category 1 CRs identified in the relevant roadmap includes the following: (i) ensuring UK consumers can easily choose and switch between search services (potentially including AI assistants), including through choice screens; (ii) ensuring effective data portability mechanisms for consumers to support competition and innovation; (iii) fair ranking principles and effective complaints process for businesses listed in search; (iv) fair treatment of specialist search services; and (v) ensuring transparency, attribution and choice for publishers in how their content – collected for search – is used in Google's AI services.

2. ***As regards Google's mobile platform,*** the list of Category 1 CRs identified in the relevant roadmap includes: (i) requiring Google reviews apps to be distributed in its app store in a fair, objective and transparent manner; (ii) requiring that Google ranks apps in its app store in a fair, objective and transparent manner; and (iii) requiring that Google does not use data collected for the purposes of reviewing apps unfairly, such as for its own app development purposes.

3. ***As regards Apple's mobile platform***, the list of Category 1 CRs identified in the relevant roadmap includes (as well as measures corresponding to each of those identified above in relation to Google's mobile platform): (i) requiring that Apple allows app developers to direct their potential customers off the App Store (i.e., "steering"); and (ii) requiring Apple to fairly and objectively consider requests from third parties for interoperable access to functionality in its operating systems.

More generally, the CMA plans to issue updated roadmaps in the above cases in due course – in early 2026 for Google's general search services, and in the first half of 2026 for Apple and Google's respective mobile platforms – in order to reflect international developments, as well as any feedback received from stakeholders.



VERTICAL AGREEMENTS

European Union level

European Commission imposes fines totalling €157 million on three high-end fashion brands for RPM practices

On 14 October 2025, the European Commission fined the fashion companies Gucci, Chloé and Loewe €119,674,000, €19,690,000 and €18,009,000 respectively for having restricted third-party retailers from independently setting their own retail prices for the brands' products resold both online and in physical stores. The fine imposed on Gucci is the highest ever imposed by the Commission for resale price maintenance (RPM). This is also the first RPM fine imposed by the Commission in over seven years.

The practices

The Commission found that Gucci, Chloé and Loewe reduced competition between independent third-party retailers and also protected their own direct-to-consumer sales through their brand-owned stores by adopting various pricing practices. In particular, the Commission found that the brands: (i) required independent retailers to follow recommended retail prices and apply maximum rates of discounts; (ii) dictated the specific timing of sales; and, in certain cases, (iii) prohibited discounts entirely. Additionally, Gucci required its online retailers to stop selling a specific product line online. Each of the three fashion companies monitored retailers' compliance with their pricing policies, with the goal of having retailers apply the same prices and sales conditions as the brands applied in their brand-owned stores. These practices were applied across the EEA and lasted, in the case of Gucci, from April 2015 to April 2023, in the case of Loewe, from December 2015 to April 2023, and, in the case of Chloé, from December 2019 to April 2023.

The procedure

The Commission opened the investigation on its own initiative and carried out dawn raids at the premises of each of the fashion companies in April 2023. The three fashion companies all received reductions in the level of the fines (e.g., up to 50% in the case of Gucci) for having cooperated with the Commission and by ultimately acknowledging both the facts and the finding of infringements. Although the pricing practices of the three companies were independent of each other, the cases overlapped both in terms of the duration of the infringements and because many affected retailers sold the products of all three brands.

Key take-aways

The recent decision demonstrates that resale price maintenance remains a major enforcement priority for the Commission and serves to complement the numerous RPM cases brought by national competition authorities. The fact that the Commission started these investigations on its own initiative is also significant as it highlights the very real risk of detection even when retailers do not complain about a supplier's pricing practices. The Commission has indicated that the case should serve as a strong signal to the entire fashion industry, which underscores the need for other brands to review their practices in a timely fashion to ensure they do not restrict the freedom of retailers to compete on price, including with brands' own direct-to-consumer businesses.

STATE AID

European Union level

Uniform interpretation v. legal certainty: Court of Justice clarifies effect of correcting linguistic errors in EU legislation

On 9 October 2025, the Court of Justice of the European Union delivered its judgment in Joined Cases C-416/24 *On Air Media Professionals* and C-417/24 *Different Media*. In this preliminary ruling responding to questions from the Romanian courts, the Court of Justice provided important guidance on the temporal scope of provisions correcting linguistic versions of EU legislation and their interaction with the principles of legal certainty and legitimate expectations. Despite arising in the context of a minor State aid matter, the conclusions reached by the Court are of general application and extend to all fields of EU law.

Background to the dispute

In August 2020, Romania introduced a State aid scheme to support companies affected by the COVID-19 pandemic. The scheme – which envisaged, among other things, micro-grants of up to €2,000 for SMEs – was authorised by the European Commission, with the condition that aid could not be granted to undertakings in difficulty as defined by Article 2(18) of the General Block Exemption Regulation (GBER).

On Air Media Professionals SRL and Different Media SRL received grants under the scheme in December 2020. Nevertheless, at the end of 2022, the competent Romanian authority ordered the recovery of the grants, claiming that the companies had been "undertakings in difficulty" within the meaning of the GBER on 31 December 2019.

The two companies challenged the recovery decisions before the national courts, arguing that, under the Romanian language version of the GBER in force when they applied for the aid, SMEs that had been in existence for at least three years were *not* considered undertakings in difficulty. Both companies had existed for more than ten years and, therefore, they argued that they met the eligibility criteria.

The dispute focused on a translation error in the Romanian language version of Article 2(18) of the GBER. While all other language versions of the GBER precluded SMEs "*in existence for less than three years*" from being considered undertakings in difficulty, the Romanian language version erroneously excluded SMEs "*in existence for at least three years*". This translation error was finally corrected by Regulation 2021/452 in March 2021 ("correcting regulation").

The proceedings before the Court of Justice

The dispute before the Romanian courts was eventually referred to the Court of Justice for a preliminary ruling on the matter. In particular, the referring court asked, first, whether the correcting regulation applied *ex tunc* or *ex nunc* (i.e., as from the entry into force of the GBER or of the correcting regulation). Second, the referring court asked if, in case of *ex tunc* application of the correcting regulation, the principles of legal certainty and legitimate expectations should prevent the recovery of aid from the beneficiaries.

As regards the first question, the Court of Justice clarified that the correcting regulation had a retroactive effect. According to the Court, this followed implicitly from the purpose of correcting a translation error that affected the GBER from the beginning. Applying the correction only for the future would allow two conflicting versions of the same regulation to co-exist, violating the principle of the uniform interpretation of EU law. Therefore, the Court held that the correcting regulation had to be regarded as applying as from the date on which the GBER entered into force (i.e., *ex tunc*).

As regards the second issue, the Court observed that, while unlawful State aid must normally be recovered, in exceptional circumstances the principles of legal certainty

STATE AID

European Union level

and legitimate expectations may preclude its recovery. This is the case where the beneficiary legitimately believes the aid was lawful, particularly when the beneficiary receives precise, unconditional and consistent assurances of the aid's lawfulness from an authoritative EU source.

In the case at hand, the Court indicated that the companies concerned had legitimate grounds to believe they were eligible to receive the grants, since they had relied on the official Romanian language version of the GBER and the aid scheme that had been authorised by the European Commission. Therefore, the Court found that the companies had acted in good faith and Romania could not recover the aid granted before the adoption of the correcting regulation.

In conclusion, although the correction of an error in a language version of EU legislation operates *ex tunc*, its retroactive effect must still respect the principles of legal certainty and the legitimate expectations of affected individuals and companies. Indeed, while the uniform interpretation of EU law must be ensured, it cannot be achieved at the expense of individuals and companies that have relied in good faith on measures originally published in the EU Official Journal. Importantly, this conclusion is not limited to State aid matters, but is of general application in all fields of EU law.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

T-306/23 *Red Bull v Commission*: dawn raid procedural law – where are we now?

On 15 October 2025, the General Court of the EU gave judgment in Case T-306/23 *Red Bull GmbH v Commission*. Together with T-263/23 *Symrise v Commission* (30 April 2025) and T-188/24 *Michelin v Commission* (9 July 2025), *Red Bull* forms one of a string of challenges to dawn raid decisions this year. The key takeaways from these three cases are summarised below, grouped by the type of plea raised by the applicants.

The context of the three cases can be summarised as follows:

- *Symrise* concerned suspected anticompetitive information exchange and behaviour in relation to consumer fragrances and fragrance ingredients.
- *Michelin* concerned suspected coordination through public communications in relation to tyres for cars and trucks.
- *Red Bull* concerned suspected anticompetitive practices (including a smear campaign and financial incentives to delist competing products) in the energy drinks sector.

In all three cases, the applicants challenged the Commission's decisions to carry out unannounced inspections to investigate the suspected anticompetitive conduct.

Failure to give reasons / lack of precision of the decision

In all three cases, the applicants alleged in some way that the inspection decisions were not compliant with the duty to give reasons. Such an obligation is a fundamental requirement: not only to demonstrate that the inspection is justified, but to enable those affected to grasp the scope of their duty to cooperate and preserve their rights of defence. In none of the cases was the applicant successful.

If the essential features of the suspected infringement are correctly described, it may be hard to argue the reasoning is deficient: The Court in *Red Bull* takes a pedagogical approach, recalling case-law on the "*essential elements*" of the suspected infringement, which must, under Article 20(4) of Regulation 1/2003, be included in an inspection decision (i.e., the presumed market concerned, the nature of the suspected restrictions of competition, how the undertaking is presumed to be involved in the infringement and a description of the powers conferred on the Commission). The Court then (as did it in *Symrise* and *Michelin*) recalls that inspections by definition take place at a very early stage of the Commission's investigation, where the Commission does not have precise information and where, to safeguard the inspection, the Commission is not required to communicate to the undertaking all the information at its disposal, nor to define precisely the relevant market, nor to carry out an exact legal classification of the infringements, nor to indicate the period during which the infringements were allegedly committed.

Having set out such a framework for its assessment, the Court in *Red Bull* (as in *Symrise*) proceeds to 'check off' each essential element and, on that basis, concludes that the aim and purpose of the inspection are sufficiently well described. The boxes being ticked, and the Court having so clearly recalled the early stage of the investigation, it is then perhaps not so surprising that, in *Red Bull,* the Court rejects the applicant's arguments that the Commission should have explained further what was meant by concepts such as "*smear campaign*" (which the Court concludes can be understood "*without excessive interpretative effort*") and should not have used open terminology like "*in particular*" and "*potentially*". Similar arguments were rejected in *Symrise* and *Michelin*.

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The reasoning must be appropriate in the circumstances of the case, but if the Commission already has a lot of information, this does not necessarily raise the bar: In *Red Bull* the applicants argued, by reference to C-247/14 P *Heidelberg Cement*, that the Commission already had a lot of information from an informal complaint, and that stricter requirements therefore applied in relation to the statement of reasons (i.e. more information should have been provided). This type of argument has come up in a number of cases recently, including before the EFTA Court. The Court rejected the argument on the basis that (i) *Heidelberg Cement* differed substantially on the facts (in that case, there had been previous inspections and several rounds of requests for information before the challenged request for information was made) and (ii) in *Red Bull* the subject matter and purpose (essential characteristics) of the inspection had, unlike the request in *Heidelberg Cement*, been described in a manner which was relatively detailed and clear.

Lack of sufficiently serious evidence (leading to the decision being arbitrary)

There is a trend towards the disclosure of the indicia and information based on which the Commission adopted its inspection decision, in order for the Court to satisfy itself that the Commission had reasonable grounds for its suspicions: In *Red Bull*, *Michelin* and *Symrise*, it is possible to see a mix of voluntary disclosure by the Commission and measures of organisation/inquiry ordered by the Court, in order to test the sufficiency of the Commission's indicia. When weighing up the indicia, the Court will typically recall that:

- it must satisfy itself only that there are reasonable grounds for suspecting (not proving) an infringement, and
- a mere difference of opinion as to the interpretation of the indicia will not prevent it constituting reasonable grounds, provided the Commission's interpretation is plausible (also referred to in *Michelin* as "*reasonably conceivable*").

Other key points can be summarised as follows:

- Disclosure need not extend to sources of information which may reveal working methods; in this context, whistleblowers may be protected (*Symrise*).
- The Court has discretion as to the form of disclosure and may order summary disclosure or use counsel-only confidentiality rings (*Red Bull*).
- In line with previous case-law, a single source of information (e.g., a well-informed complainant) may suffice, where verified. The Court recognises the danger of 'leaks' when checking matters with third parties (*Red Bull*).
- Publicly available material is capable of constituting reasonable grounds for ordering an inspection, following, e.g., quantitative and qualitative analysis (*Michelin*).

Disproportionate interference with the right to privacy

Arguments that fact finding should have been conducted by request for information (RFI) rather than by inspection have not been successful: The Court in *Red Bull* and *Michelin* reiterates case-law (e.g., T-402/13 *Orange*) that it is for the Commission to assess whether it considers an inspection necessary, even where it is already in possession of information or even evidence relating to the existence of an infringement. It recalls the difficulty of obtaining incriminating evidence otherwise (as well as the possibility of its destruction). In *Michelin,* the Court goes quite far in noting that the fines for failure to comply with an RFI are much lower than those for an infringement, and therefore that an undertaking to which a simple request is made "*may be tempted not to comply.*"

Arguments about the disproportionate impact of continued inspections must be backed up: In *Symrise,* the inspection continued three and a half months after the on-site inspection, first at the premises of the Commission and then at those of the applicant's lawyer. The Court

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found that the applicant had failed to establish how this constituted a disproportionate interference with the right to privacy.

The fact that an inspection decision provides a date for the inspection "or shortly thereafter" does not mean that the inspection is open-ended and disproportionate: The applicant in *Symrise* argued that the way in which the start date of the inspection was formulated meant that it remained exposed to the possibility of a future inspection, possibly repeatedly. The Court rejected this argument, referring to Article 41(1) of the Charter of Fundamental Rights (a reasonable time limit must be observed), as well as to the practical matter that the applicant had received confirmation of the end of the inspection from the Commission, just under four months after it had begun.

Procedural housekeeping

More generally, the Court remains alert in all three cases to matters such as the need to respect procedural time limits, to frame pleas correctly and to back up arguments with concrete examples or evidence.

- ***Arguments about the way in which the inspection is conducted generally have no bearing on the lawfulness of the inspection decision itself (and will therefore be irrelevant or ineffective):***
    - In line with settled case-law, the Court will usually reject arguments about the way the inspection was conducted (perhaps unexpectedly, in Symrise the applicant criticised the inspection as being "*particularly superficial*"). Interestingly, while the Court in *Michelin* recalls this case-law (and relies on it to reject a number of Michelin's arguments), Michelin managed to have the Court consider its arguments about excessive disruptions to its commercial functioning, *caused by way in which the inspection was conducted*, under the head of a proportionality plea. It did not however succeed on the facts: the Commission's conduct of the inspection appears to have been 'best-in-class' in terms of minimal intrusion (and Michelin did not contradict this before the Court).
    - The Court in *Red Bull* and *Michelin* rejects arguments about the negative impact of an inspection on a company's reputation. In *Michelin,* the Court observes that the relevant press release is a separate measure from the inspection decision and that such a line of argument is concerned more with compensation for harm rather than (properly) the legality of the decision.
    - In *Red Bull*, the Court finds that complaints relating to conduct which took place after the adoption of a decision are not relevant to the decision's legality, even though some acts took place *before the decision's notification* to Red Bull. It thus rejects arguments about the allegedly aggressive behaviour of Commission agents (and the need to call witnesses to the behaviour), the alleged delay in allowing employees to contact an external lawyer, and the seizure and consultation of employee mobile phones.
- ***The Court will continue to probe the arguments of the applicant and the Commission at the hearing:***
    - In *Michelin*, the Court questioned the applicant about the concrete consequences of the formulation "*and/or*" used in the inspection decision for the scope of its duty to cooperate or rights of defence during the inspection. According to the court report, the applicant was unable to identify any such consequence. In *Michelin*, the Court also sought confirmation from the Commission that it had not provided the Court with indicia contemporary with a particular (earlier) temporal period.

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- In *Red Bull,* the applicants argued that the decision was manifestly unfounded because, even if proven, the practices would not constitute an infringement of Article 101 or 102 TFEU. Among other things, Red Bull claimed that the hypothesis that it might occupy a dominant position was not convincing. On questioning, however, Red Bull appears to have conceded that it could not be excluded, based on presumptions relating to market shares, that it was in a dominant position in relation to all or part of the internal market.

Conclusion

Successfully challenging inspection decisions is a difficult process and companies facing a dawn raid should approach their defence strategically. The key is to evaluate early whether a legal challenge will materially advance their position. Companies should be aware that:

- to preserve efficiency (and keep litigation costs down) many arguments which a company would instinctively wish to run must procedurally be 'left out' and reserved to a later challenge of any final finding of infringement;

- even where a company is successful in having part of the inspection decision annulled (e.g., Michelin in respect of a particular time period for which the Court found that the Commission did not have sufficiently serious indicia), the company may – depending on the circumstances – remain exposed to requests for information and thus the investigation will simply proceed, at possibly an even slower pace.

In some cases, there may be solid arguments to challenge an inspection decision or the advantage of delay even if the decision is not annulled. In others, it may be more effective to conserve litigation resources and focus on influencing the Commission's assessment and, if necessary, the Court's review in the main proceedings (if an infringement decision is ultimately adopted). A well-designed defence plan should balance these considerations, to ensure that procedural actions align with the company's long-term legal and business interests.

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