May 2025

VBB on Competition Law

Issue Highlights

Jurisdictions covered in this issue

vbb@vbb.com
www.vbb.com

Table of contents

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

MERGER CONTROL

European Union level

Commission launches review of EU Merger Guidelines

On 8 May 2025, the European Commission (the "Commission") launched the review of the Horizontal Merger Guidelines and the Non-Horizontal Merger Guidelines. The Commission aims to update the framework for the assessment of mergers in light of new market realities and major developments affecting competitive dynamics such as digitalization, globalization, and decarbonization, bearing in mind relevant Commission enforcement practice and EU case law.

The initiative is consistent with the Draghi Report's call for the EU Merger Guidelines to place a heightened emphasis on innovation and future competition (See, VBB on Competition Law, Volume 2024, No. 9). It is also in line with the priorities highlighted in the Mission Letter to Executive Vice-President Ribera for the modernization of EU competition policy in areas such as resilience, efficiency, security, innovation, and sustainability, while also reflecting broader considerations impacting European productivity and competitiveness.

In the context of its review, the Commission has published two parallel consultations: (i) a General Consultation seeking input on high-level questions regarding the principles and approach followed by the Commission for the assessment of mergers; and (ii) an In-Depth Consultation including technical questions on seven key topics, i.e., competitiveness and resilience, assessing market power using structural features and other market indicators, innovation and other dynamic elements in merger control, sustainability and clean technologies, digitalization, efficiencies, and public policy, security and labour market considerations. The In-Depth Consultation is supported by focused papers on these key topics, outlining current challenges for merger control and setting out the technical background for the provision of feedback by interested stakeholders.

The consultations will remain open until 3 September 2025.

FOREIGN DIRECT INVESTMENT

National level

GREECE

Greece introduces FDI regime

On 23 May 2025, the Greek legislator enacted Law 5202/2025 on the adoption of measures for the implementation of Regulation (EU) 2019/452, thereby establishing a national screening framework for foreign direct investments on the grounds of security or public order.

The screening mechanism applies to foreign direct investments concerning infrastructure, assets, goods or services essential to (i) sensitive sectors (including energy, transport, health, information and communication technologies, and digital infrastructure), or (ii) particularly sensitive sectors (including defense and national security, cybersecurity, artificial intelligence, port and underwater infrastructure, and tourism infrastructure in border areas).

A foreign direct investment is subject to the screening mechanism if:

- the investment is made by a third-country foreign investor, and the target entity is active in one of the above-mentioned sectors; or
- the investment is made by an EU Member State foreign investor which is controlled either by a third-country natural person or entity, or is under the direct or indirect control of a third-country government, including state bodies or armed forces (such control may be exercised by means of the ownership structure or the provision of significant funding), and the target entity is active in one of the above-mentioned sectors; or
- the investment is made by an EU Member State foreign investor in which a third-country government, natural person or entity holds at least 10%, and the target entity is active in one of the particularly sensitive sectors.

The participation percentage into the target entity which triggers the screening mechanism is set to (i) (at least) 25% for sensitive sectors (with any increase in participation to 30%, 40%, 50% and 75% being also scrutinized), and (ii) (at least) 10% for particularly sensitive sectors (with any increase in participation to 20%, 25%, 30%, 40%, 50%, 60%, 70% and 75% being also scrutinized).

The screening mechanism does not apply in the case of (i) portfolio investments, (ii) intragroup restructurings which do not entail the increase of the shares or of the percentage of control/influence of foreign investors, or the granting of additional rights affecting the participation of the foreign investors in the management or control of the target entity, and (iii) pending tender procedures for which a binding offer has been received, or asset development contracts that have not been completed by the entry into force of the Law.

Investments falling under the screening criteria should be notified prior to their completion to Directorate B1 of the Ministry of Foreign Affairs which supports the screening bodies, i.e., the Interministerial Committee for the Screening of Foreign Direct Investments and the Minister of Foreign Affairs.

Potential prohibition, reversal, or imposition of mitigation measures results in the automatic nullity of the transaction. Failure to notify or submission of incomplete or false information may lead to the imposition of mitigation measures, the reversal or the prohibition of the investment. Administrative sanctions may reach up to €100,000 for procedural violations of the screening framework (i.e., failure to notify, non-provision of required information/documents, or provision of false information), and up to twice the value of the investment for more severe violations (i.e., completing a prohibited investment, obtaining approval based on false information, or non-compliance with the imposed mitigation measures or investment reversal).

ABUSE OF DOMINANT POSITION

European Union level

Commission publishes *Copaxone* decision on manipulation of IP system and disparagement

As previously reported (VBB on Competition Law, Volume 2024, No. 10), on 31 October 2024, the European Commission (the "Commission") imposed a €462.6 million fine on Teva for alleged anticompetitive actions to hinder competition for its blockbuster multiple sclerosis medicine Copaxone, including a divisional patent strategy and a disparagement campaign (the "Decision"). This case marks the first infringement decision by the Commission regarding these types of conduct, which were part of a broader internal Teva project to protect Copaxone following the expiry of its main patent. The non-confidential version of the Decision has recently been made available, and it raises several significant takeaways, which are presented below. Teva has challenged the Decision before the EU Courts.

Market definition & dominance

Applying the recent case law of the EU Court of Justice established in the *Servier* (C-201/19 P) and *Generics UK* (C-307/18) judgments, the Commission applied a two-step test to establish the relevant market (i) identifying products that were therapeutically substitutable with Copaxone and (ii) assessing whether such products were "economically substitutable" and thus actually constrained Teva's pricing of Copaxone.

Applying this test, the Commission determined that the relevant market included only Copaxone and Synthon GA (a "generic like" product produced by Synthon), which were the only products containing the active ingredient glatiramer acetate. While the Commission acknowledged that other first-line therapies may have been therapeutically substitutable, they did not fall in the same relevant market because they were not "economically substitutable". The Decision states that these other therapies did not exert any effective and immediate constraint on Copaxone's pricing, volumes or profitability and were not capable of contesting the entire patient base for Copaxone. By contrast, Synthon GA competed for the same patient groups as Copaxone and introduced price competition "for the first time". Applying this narrow market definition, the Commission found that Teva held a dominant position in the relevant countries during the period of the infringement.

Misuse of the patent system ("divisional game")

Teva's basic patent protecting Copaxone expired in 2015, but Teva held two additional secondary patents covering a manufacturing process and a dosing regimen, as well as "divisionals" of these secondary patents.

According to the Commission, Teva's IP strategy included filing its divisional patents in a "staggered way", and strategically withdrawing relevant patents when they appeared likely to be revoked. Through this strategy, Teva sought to always have a patent in force to be used to delay the entry of its competitors. Further, when a patent looked likely to be revoked, the immediate withdrawal of the patent avoided a negative precedent that could call into question the validity of related divisional patents. The alleged strategy thus forced its competitors to repeatedly initiate new, lengthy legal challenges against each of the relevant patents. While Teva's competitors took action to invalidate the secondary patents and divisionals even before expiry of the main patent 2015 to clear their way to the market, it ultimately took approximately nine years for all of Teva's relevant patents to be annulled.

The Decision finds that Teva's actions did not constitute competition on the merits and were capable of producing harmful effects on competition. Citing existing case law, the Decision notes that patent protection does not shield the patent holder from the application of competition law. As held in *Generics UK* (C-307/18), patent-related conduct can be abusive if its purpose is to strengthen the dominant position with the intent to deprive potential competitors of

ABUSE OF DOMINANT POSITION

European Union level

effective access to the market. Further, the *AstraZeneca* case (C-457/10 P) confirmed that deregistration of a marketing authorization without objective justification to obstruct the introduction of generic products does not fall within the scope of competition on the merits.

The Commission argues that these principles similarly apply to actions aimed at hindering generic competition by delaying the legal review of a patent's validity and prolonging legal uncertainty. According to the Decision, the ability of generic entrants to effectively challenge the validity of patents is a crucial component of the competitive process in the pharmaceutical sector. The Decision also argues that divisional patents are "particularly susceptible" to creating legal uncertainty, referencing its 2009 Pharmaceutical Sector Inquiry Report, which noted that the filing of multiple divisional patents, combined with preliminary injunctions, can allow originators to maintain legal uncertainty and hinder market entry.

The Decision concludes that Teva's strategy amounted to an unlawful abuse of its dominant position. Specifically, the Commission criticizes the *combination* of Teva's (i) filing divisional patents with overlapping content, (ii) strategically staggering the filings for divisional patents to prevent parallel review, and (iii) strategically withdrawing the relevant patents in order to obstruct legal review and prolong legal uncertainty. In support of its findings, the Decision cites both Teva's pattern (in terms of timing and repetition) of filing and withdrawing various patents, as well as internal documents that allegedly linked the filings and withdrawal of the divisional patents to Teva's broader "Copaxone Continuation Project".

Disparagement campaign

The Decision also finds that Teva abused its dominant position by implementing a systematic disparagement campaign against Copaxone's key competitor, Synthon GA. The Decision alleges that Teva spread misleading information regarding the safety, efficacy, and therapeutic equivalence of Synthon GA. Similar to the *Vifor* case (AT.40577, see Van Bael & Bellis, News & Insights, 11 December 2024), the Decision alleges that Teva's communications contradicted the findings of the relevant health authorities. This campaign allegedly targeted key players capable of influencing demand for the competing product, including HCPs (e.g., doctors, nurses, pharmacists) and payors (e.g., pricing and reimbursement authorities, insurance funds) and aimed to delay the market entry or uptake of the rival product.

Importantly, the Decision applies the same legal standard to evaluate communications with payors as applied to communications with HCPs. In particular, the Decision assumes that the ability of both HCPs and payors to evaluate complex scientific issues is limited, and thus companies are expected to accept the findings of regulatory authorities at face value without being allowed to submit any contrary evidence before both HCPs and payors. In this regard, the Commission explicitly states that any doubts concerning the safety or efficacy of competing products should only be raised to the regulatory authorities.

Procedural issue: Commission's maintenance of meeting minutes

In its grounds for annulment, Teva claims that the Commission breached its fundamental rights of defence by failing to record or by inadequately recording numerous meetings held between the Commission and the complainants. As reported in the Decision, Teva argues that the "reconstructed" minutes provided by the Commission were either incomplete or too vague, or not to be considered as an accurate representation of the meetings due to the lapse of time (up to six years). Teva relies on the *Qualcomm* case (T-235/18), where the failure of the Commission to appropriately take and retain meeting minutes led to the full annulment of the decision.

ABUSE OF DOMINANT POSITION

European Union level

In the Decision, the Commission has included an additional section which seeks to dismiss Teva's claims arguing that (i) it was not obliged to keep records for those meetings since it was not seeking to collect information (for which such an obligation would arise) and that, therefore, the minutes were provided to Teva for mere sake of transparency, (ii) the minutes were allegedly accurate since they resulted from a reconstruction exercise by the Commission based on its (undisclosed) internal documents and the complainants (who were asked to provide comments); and (iii) Teva did not prove that the alleged error would have resulted in a breach of its right of defence. The Commission also argues that, considering that the minutes concern meetings with the complainants, it was highly unlikely that any exculpatory evidence would have been presented during those meetings.

Key takeaways

For companies operating in the pharmaceutical sector in Europe, the application of narrow market definitions and findings of abuse of dominance for IP and promotional activities are not novel. National competition authorities have already prosecuted and imposed fines for abusive divisional patenting activities and abusive disparagement to hinder generic entry. Further, as far back as 2009, the Commission's Sector Inquiry Report indicated that actions to unfairly manipulate the divisional patent system may violate competition law.

The Decision nevertheless provides a wealth of important guidance (for those willing to read the 500+ pages). The Commission's new two-step test for market definition (discussed above) represents the first application by the Commission of the "*economic substitutability*" legal standard set out by the Court of Justice in the recent *Servier* judgment (C-201/19 P). Further, the Commission's detailed analysis of Teva's IP actions demonstrates how a company's divisional patenting strategies (and other strategies) applied over many years and countries may be closely scrutinized, demonstrating the need for close collaboration between IP and competition law counsel to ensure a solid defence against competition law complaints by generics or other competitors.

The Commission's strict legal standard applied to communications by pharmaceutical companies to HCPs and payors also requires careful consideration. In para 1513 of the Decision, the Commission states "*Teva was wrong to raise alleged public health concerns with HCPs and Payers. … In case of genuine concerns related to the safety and efficacy of a product, these should be raised with the competent authorities and not with HCPs and Payers*" (emphasis added). This unqualified statement implies that dominant pharmaceutical companies should not discuss safety or efficacy concerns about competing products, *even if such communications are correct, complete, balanced and fully substantiated*. Such a position, if confirmed by the EU Courts, could significantly constrain future dialogue by pharmaceutical companies with national pricing and reimbursement authorities and other experts tasked with evaluating the efficacy and safety of medicines in order to decide whether to reimburse, fund and ultimately prescribe pharmaceutical treatments.

ABUSE OF DOMINANT POSITION

National level

GERMANY

Higher Regional Court of Cologne permits Meta to train AI tools with publicly available personal data

On 23 March 2025, the Higher Regional Court of Cologne (the "Court") refused a preliminary injunction against Meta to prevent Meta's use of publicly available personal data collected on its EU products for the training and development of its AI tools. The Court found that Meta had a legitimate interest to process the data in accordance with Article 6(1)(f) of the General Data Protection Regulation (the "GDPR") and dismissed the claim of a Digital Markets Act (the "DMA") violation.

Dispute history

On 14 April 2025, Meta announced that it would collect publicly available personal data such as posts and comments for the training of its AI tools while informing users by in-app notifications or email about opt-out possibilities. The regional Consumer Association for North Rhein-Westphalia (*Verbraucherzentrale NRW*) applied for a preliminary injunction before the Court seeking to stop the collection of data. It challenged the lawfulness of the processing under the GDPR and the DMA, and emphasised that it would be difficult to reclaim unlawfully processed data once it has been used for the training of an AI tool.

Notably, the same practice had attracted the attention of the Irish Data Protection Commission after Meta's original announcement in March 2024, which led to a recommendation issued by the European Data Protection Board (the "EDPB") in order to provide regulatory harmonisation in the EU. In its recommendation, the EDPB concluded that it could be possible to rely on the GDPR's legitimate interest justification for such processing and provided general criteria to be taken into account in a case-by-case compliance assessment, including the existence of technical safeguards and mitigation measures, the data subject's ability to control the use of its own personal data, and the data subject's reasonable expectation.

Outcome

The Court decided that Meta pursues a legitimate (economic) interest in AI development which it could not achieve with less intrusive means other than using only publicly available data for AI training purposes because such training requires vast amounts of data. The Court further recognized the safeguards Meta had put in place, including the open accessibility of publicly available data in online search engines, Meta's transparency campaign after the initial announcement in 2024 allowing sufficient lead time for users, the elimination of clear personal identifiers (i.e., name, email and postal address) from processing, the user's possibility to take control of their personal data (i.e., opt-out), and the effective protection of sensitive categories of personal data including those of minors. Therefore, the Court concluded that Meta could lawfully process publicly available data on the basis of its legitimate interest.

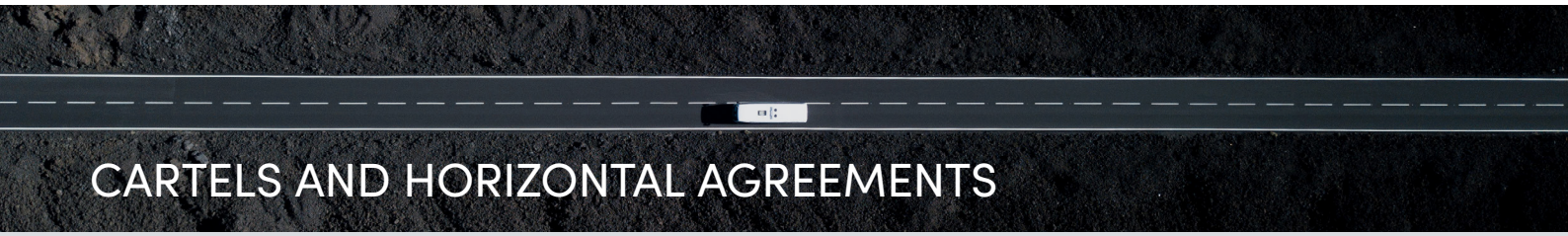
Interestingly, the decision also addressed the implications of Article 5(2) DMA, which requires Meta – as a gatekeeper – to seek end user consent for the combination or cross-use of personal data between services or the choice of an equivalent – albeit less personalised – service alternative. The European Commission (the "Commission") recently found that Meta had failed to comply with this provision and imposed a EUR 200 million fine on Meta (See, VBB on Competition Law, Volume 2025, No. 4). The Court, however, concluded that Article 5(2) DMA was not relevant as it could not find that Meta combined personal data from different ecosystems or third-party digital services or relied on other data sources in regard to the specific user. While the Court's press release does not provide more details, it appears that the Court concluded that there was no precedent supporting a different interpretation of the data combination provision in Article 5(2) DMA. The Court also noted that the tight timeline in preliminary injunction proceedings had made it impossible to coordinate with the Commission and consult on the Commission's non-compliance findings.

ABUSE OF DOMINANT POSITION

National level

Key takeaways

The decision does not prejudice the outcome in the main proceedings (where some interaction with the Commission may potentially take place). Nevertheless, it indicates how AI developers can align their scraping of publicly available personal data with GDPR requirements and rely on a legitimate interest justification as long as they put appropriate safeguards in place. This serves as an example of EU regulation being interpreted in a way that does not stand in the way of AI innovation. At the same time, the provisional outcome in this case is not relevant for another pending dispute involving the AI industry, i.e., the inclusion of copyrighted material in the training of AI models, which has not yet been addressed by the courts.



CARTELS AND HORIZONTAL AGREEMENTS

European Union level

European Commission fines food delivery companies €329 million for collusion through minority shareholding, including no-poach agreements

On 2 June 2025, the European Commission (the "Commission") imposed a fine of €329 million on food delivery companies, Delivery Hero and Glovo, for having engaged in anti-competitive collusion in the online food delivery market. The conduct targeted by the Commission's investigation included (i) the conclusion of no-poach agreements between the parties, (ii) the exchange of commercially sensitive information between them and (iii) the allocation of geographic markets. The case was concluded under the Commission's cartel settlement procedure.

Delivery Hero's minority shareholding in Glovo was found to have facilitated the collusion, demonstrating the risks posed by acquiring a stake in a competing undertaking. This decision also marks the Commission's first finding of a cartel affecting labour markets.

Background

In July 2018, online food delivery company Delivery Hero acquired a minority share in Glovo and progressively increased its share ultimately acquiring sole control of Glovo in July 2022. In June 2022 and November 2023, the Commission conducted dawn raids at the premises of Delivery Hero and Glovo and formally opened an investigation in July 2024. The investigation was launched *ex officio* on the back of a market-monitoring exercise conducted by the Commission, which was itself triggered by certain information received from national competition authorities and from whistle-blowers. The investigation established that, between Delivery Hero's acquisition of a minority stake in July 2018 and its acquisition of sole control in July 2022, the undertakings had progressively engaged in various forms of anti-competitive coordination.

Findings

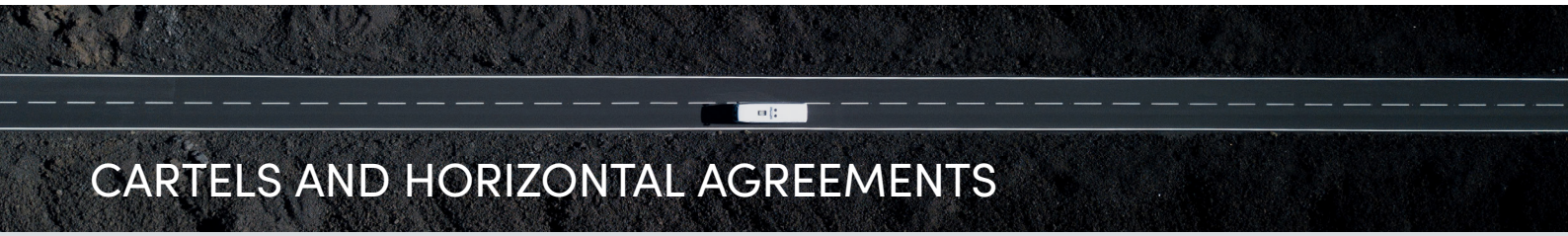
In its decision, the Commission found that the companies had engaged in three forms of anti-competitive coordination.

First, the Commission found that, at the time Delivery Hero acquired its minority shareholding in Glovo, the shareholder's agreement between the parties included a reciprocal no-hire clause covering certain categories of employees and that this arrangement was subsequently extended to restrict the companies from poaching one another's employees.

Second, the Commission determined that the undertakings had exchanged competitively sensitive information, notably on their respective commercial strategies, prices, capacity, costs and product characteristics. The Commission concluded that Delivery Hero's minority shareholding had facilitated its access to Glovo's commercially sensitive information and had enabled Delivery Hero to influence Glovo's decision-making and coordinate the companies' business strategies.

Finally, the Commission concluded that the two companies had engaged in geographic market sharing. More specifically, Delivery Hero and Glovo had agreed to allocate existing national markets in the EEA to one another and had also allocated potential future markets where neither company was already operational.

According to the Commission, these three practices amounted to a single and continuous infringement of Article 101 TFEU. Both Delivery Hero and Glovo admitted their participation in the anti-competitive conduct under the settlement procedure and received a 10% reduction in the fine. The two companies received fines of €223.2 million and €105.7 million respectively.



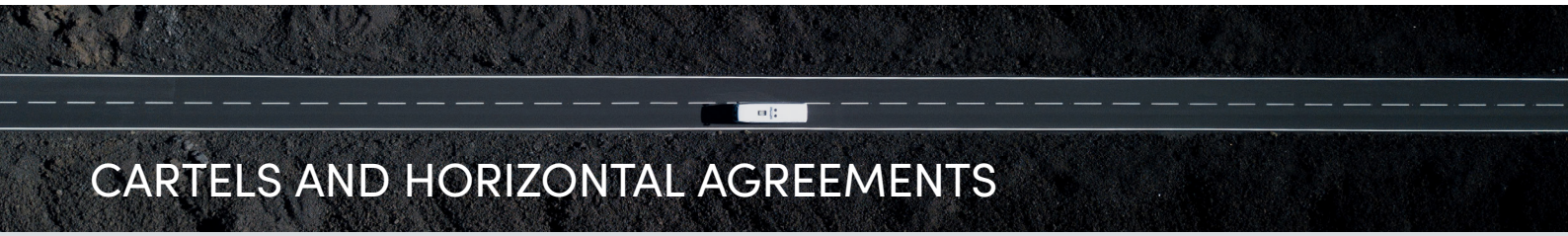
CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Key Takeaways

This decision marks the first time the Commission has sanctioned the anti-competitive use by one undertaking of a minority shareholding in a competing undertaking. Although the Commission emphasises in its press release announcing the decision that a minority shareholding is not in itself an infringement of competition law, it notes that, in this case, Delivery Hero's minority stake facilitated the anti-competitive conduct. The decision thus highlights the antitrust risks posed by the acquisition of a minority shareholding in a competing entity and highlights the need for appropriate compliance safeguards where companies are considering making investments in current or potential competitors.

In addition, this decision represents the Commission's first finding of a cartel involving anti-competitive conduct affecting labour markets, which fits into the increasing recognition of restrictions on labour market mobility as an enforcement priority among European and national competition authorities (See, for example, VBB on Competition Law, Volume 2025, No. 3, VBB on Competition Law, Volume 2025, No. 2 and, most recently, the French decision discussed below concerning practices in the engineering, technology consulting and IT services sectors). Competition enforcers' increased focus on labour markets underscores the importance for companies to review their existing practices and to ensure that guardrails are incorporated into internal compliance policies.



CARTELS AND HORIZONTAL AGREEMENTS

National level

FRANCE

Autorité de la Concurrence fines service providers for no-poach and no-hire agreements

On 11 June 2025, the Autorité de la Concurrence (the "Autorité") fined four companies in the engineering, technology consulting and IT services sectors a total of EUR 29.5 million for entering into general no-poach agreements. The Autorité imposed fines in respect of two separate anticompetitive agreements between (i) Ausy (now Randstad Digital) and Alten and (ii) Expleo and Bertrandt. These practices took the form of gentlemen's agreements aimed at prohibiting the companies in question from both soliciting and more broadly hiring (through spontaneous applications) each other's employees, which the Autorité considered to be an essential competitive parameter in the labour markets in which the companies are active. The Autorité considered that the agreements constituted 'by object' restrictions of competition. Ausy received full immunity from fines due to its status as a leniency applicant.

Interestingly, the Autorité also conducted a detailed analysis of non-solicitation clauses in certain partnership contracts but concluded that the clauses could not be qualified as restricting competition, notably given their limited temporal and material scope and their objectives. The Autorité nonetheless stressed that this finding did prejudge the possibility that, in view of the circumstances specific to each case, such clauses might be considered anticompetitive by object in future cases. As such restrictions can be a legitimate means to incentivize parties to enter into broader pro-competitive forms of collaboration, it is hoped that the text of the Decision may provide further guidance when it becomes available.

As commented above in relation to the Delivery Hero/ Glovo case, competition enforcers' increased focus on labour markets underscores the importance for companies to review their existing practices and to ensure that guardrails are incorporated into internal compliance policies.

INTELLECTUAL PROPERTY/LICENSING

National level

UNITED KINGDOM

United Kingdom decides to maintain UK+ Intellectual Property Exhaustion Regime

On 15 May 2025, the Government of the UK (the "UK") announced that the UK had opted to maintain the UK+ Intellectual Property Exhaustion Regime (the "UK+ exhaustion regime"), following a stakeholder review on the existing regime and alternative regulatory frameworks. The UK+ exhaustion regime applies territorially to England, Northern Ireland, Scotland, and Wales and the substantive scope of this regime includes trade marks, copyright, design rights, and patents. Under this present regime, when goods are placed on the UK or European Economic Area (EEA) market, the rightsholder cannot prevent the resale or distribution of the concerned goods in or into the UK. Conversely, under established principles of EU/EEA law, goods placed on the UK market are not considered exhausted in terms of IP rights in the EU/EEA. Therefore, EU/EEA rightsholders can challenge unauthorised parallel trade in the concerned goods from the UK to the EU/EEA by relying on their IP rights.

The UK public consultation considered four options: (i) the retention of the UK+ exhaustion regime; (ii) the adoption of a national exhaustion regime; (iii) the adoption of an international exhaustion regime; or (iv) the adoption of a mixed exhaustion regime.

A national exhaustion regime would result in IP rights being considered exhausted only when the goods are placed on the domestic market. This regime would enable rightsholders to assert their rights over non-UK goods. This alternative regime would pose a barrier to the free movement of goods from the Republic of Ireland and the rest of the EEA into Northern Ireland – and, as such, was not considered compatible with the Northern Ireland Protocol. An international exhaustion regime would consider IP rights to be exhausted in the UK once a good is placed on the market in any country, thus enabling parallel imports from anywhere in the world without permission from UK IP rights holders. A mixed exhaustion regime would customise the UK's exhaustion rules for specific goods, sectors, or IP rights, and was considered liable to create additional complexity. Although each regime presented significant drawbacks, overall stakeholders favoured the retention of the existing UK+ exhaustion regime despite the asymmetric nature of the existing model. The UK has decided to maintain this existing regime finding that it strikes the best balance between the promotion of competition and the fair access to IP-protected goods.

Restrictions of parallel trade into the UK of goods no longer protected by IP rights including through the application of the UK+ exhaustion regime are potentially subject to competition law. The Competition and Markets Authority (the "CMA") provided clarity on the treatment of restrictions on exports, imports and reimports from outside the UK in their guidance on the Vertical Agreements Block Exemption Order (See, VBB, Distribution across Europe and the UK Verticals regime: Do you really need to mind the "gap"?). The CMA concluded that these forms of restrictions are "*unlikely*" to have the object of restricting competition within the UK. Thus, the CMA will instead assess these restrictions from an "effects" perspective – taking into account the specific good or service, the operating conditions and the structure of the market concerned.

STATE AID

European Union level

Expanding access to justice in EU State aid Law: NGOs get a seat at the State aid table

On 12 May 2025, the European Commission (the "Commission") adopted revisions to EU State aid law to make room for environmental accountability. It adopted an amendment to Implementing Regulation (EC) No. 794/2004 (the "Implementing Regulation") and updated the Code of Best Practice on State aid procedures (the "Code"), granting environmental non-governmental organisations (the "NGOs") the right to request reviews of final Commission decisions authorising State aid, where breaches of EU environmental law are alleged.

This reform responds directly to a 2021 finding by the Aarhus Convention Compliance Committee, which held that the EU failed to provide NGOs with adequate legal remedies to challenge State aid decisions potentially at odds with environmental legislation.

The new review mechanism for NGOs

The revised Implementing Regulation and Code introduce a review mechanism that allows eligible NGOs to request an internal (before the European Commission) review of final decisions adopted under Article 108(2) TFEU – in particular, decisions in which the Commission approves State aid as compatible with the internal market, either unconditionally or subject to conditions. In an attempt to preserve flexibility in cases driven by urgent public policy needs or emergencies, the mechanism however expressly excludes decisions based on Article 107(2) TFEU (e.g. social aid or aid for natural disasters) and those falling under the first limb of Article 107(3)(b) TFEU (aid addressing serious economic disturbances). The NGOs concerned will subsequently be able to challenge the Commission's reply before the European Court of Justice (the "ECJ").

To qualify for standing, NGOs must be independent, non-profit entities with a demonstrated record in environmental advocacy. Review requests must contend that the aid measure – or any component of the measure that is "*indissolubly linked*" to its objective – violates one or more provisions of EU environmental law (the Commission is expected to publish interpretative guidance on the concept of the "*indissoluble link*" in Q4 2025).

Once in force, the review mechanism will apply to two categories of State aid decisions – namely, (i) final decisions approving notified aid and (ii) final decisions approving non-notified aid, both following a formal investigation. In line with the EU's transparency commitments under the Aarhus Convention, both the review request and the Commission's reply will be made publicly available.

What this means in practice

The new mechanism formally integrates NGOs into the State aid review process, reinforcing the Commission's alignment with the EU Green Deal and the EU's obligations under the Aarhus Convention. It represents a significant procedural innovation in two respects: first, it broadens the category of actors who can challenge State aid decisions by means of a parallel proceeding; second, it allows such challenges to be brought on the basis of alleged breaches of EU environmental law, rather than solely under the traditional State aid legal framework.

Additionally, it is important to note that the new mechanism will allow eligible NGOs to bring proceedings before the ECJ. In fact, where the NGOs concerned are not satisfied with the Commission's reply, they will be able to bring an action against it before the ECJ, since the reply will consist in an act specifically addressed to them.

This development stands in sharp contrast to the position of trade associations – as well as to that of most "interested parties" in State aid procedures – which continue to face well-established admissibility hurdles before the EU courts. To bring a challenge against a

STATE AID

European Union level

State aid decision following a formal investigation, trade or professional associations must either (i) demonstrate derived standing by representing at least one member who is individually concerned by the aid measure and is not bringing an own action for the annulment of the contested decision, or (ii) assert a distinct institutional interest. The latter requires evidence of a specific and individualised role in the administrative procedure – for example, as a key interlocutor – sufficient to meet the applicable test of individual concern (i.e., the so-called *Plaumann* test).

In conclusion, by allowing NGOs to request reviews of Commission State aid decisions, the new mechanism will introduce a new layer of environmental accountability for State aid decisions and will most likely increase State aid litigation before the ECJ.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

EU and UK conclude negotiations on Competition Cooperation Agreement

On 19 May 2025, the EU and UK issued a joint statement announcing the successful conclusion of negotiations of a EU-UK Competition Cooperation Agreement (the "Agreement"), and on 20 May 2025 published the text of the Agreement, which remains subject to ratification.

The Agreement addresses cooperation between the competition authorities of the UK and EU concerning the application of the competition laws on anticompetitive agreements, abuse of dominance, and merger control in the UK and at EU level. Key elements of the Agreement include:

- a requirement to notify the other party of enforcement activities likely to affect that party's important interests (Article 3);
- voluntary coordination when the parties pursue or intend to pursue the same or related enforcement activities (Article 4);
- obligations to give careful consideration to, and make reasonable efforts to accommodate, the important interests of the other party (negative comity, Article 5); and
- provisions for sharing and use of information between authorities in compliance with confidentiality and data protection laws (Articles 6 and 7).

The EU-UK Agreement is unique as it is the first EU competition cooperation agreement to also enable national competition authorities within the EU to cooperate directly with the authority of a third country. However, the Agreement only concerns the application of EU laws, and does not apply to the corresponding laws of individual EU Member States. The Agreement also only covers cooperation with the CMA and not with other UK sector regulators that may equally investigate infringements of UK competition law. Further, unlike the EU-Swiss cooperation agreement, the competition authorities acting under the EU-UK Agreement will require consent from relevant parties in order to share confidential information.

Brussels
Glaverbel Building
Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone:+32 (0)2 647 73 50
Fax:+32 (0)2 640 64 99

Geneva
26, Bd des Philosophes
CH-1205 Geneva
Switzerland

Phone:+41 (0)22 320 90 20
Fax:+41 (0)22 320 94 20

London
Holborn Gate
330 High Holborn
London
WC1V 7QH
United Kingdom

T +44 (0)20 7406 1471

VAN BAEL & BELLIS

www.vbb.com