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# VBB on Competition Law

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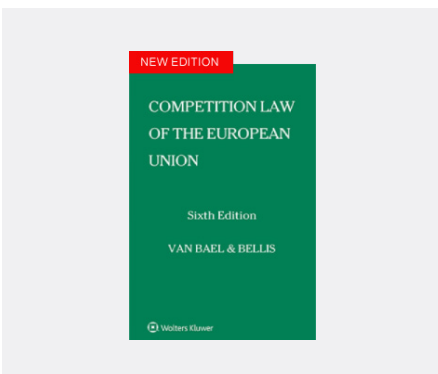
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## MERGER CONTROL

### National level

#### SPAIN

### **Spanish government conducts rare “Phase 3” review of transaction in the banking sector – after approval by the Spanish competition authority – and imposes stricter conditions**

On 24 June 2025, the Spanish government’s Council of Ministers (“SCM”) announced that it had conditionally cleared the proposed hostile takeover of Banco Sabadell (“Sabadell”) by Banco Bilbao Vizcaya Argentaria (“BBVA”). Spanish law allows the SCM to conduct a so-called “Phase 3” merger examination to assess the impact of a concentration on the grounds of non-competition-related general interests. The SCM’s Phase 3 decision followed the Spanish Competition Authority’s (“SCA”) conditional clearance of the takeover and is only the second time in which a deal has been examined in Phase 3.

#### *Investigation by the Spanish Competition Authority and Phase 2 decision*

On 12 November 2024, the SCA opened a Phase 2 investigation to examine competitive concerns arising from the transaction. The SCA analysed the takeover’s impact on the retail, corporate, private, and investment banking markets in Spain. The SCA concluded that the transaction threatened effective competition in the retail banking and payment services markets in Spain. Specifically, in the retail banking market, the SCA determined that the transaction risked creating either a monopoly or duopoly in numerous small- and medium-sized municipalities in Spain. The SCA concluded that the concentration would create a considerable risk of “financial exclusion” for many vulnerable customers, particularly in rural areas.

Notably, the merged entity would hold a market share of over 30% in the payment services markets, with the transaction eliminating the important competitive pressure that the entities exercised on each other. As a result, the SCA concluded that the merger would create a market leader with only one other significant competitor (CaixaBank) and high customer loyalty – conditions

that would give the merged entity both the ability and the incentive to raise prices. The SCA also expressed concerns that the merged entity might abandon certain municipalities, especially in remote areas, leaving only one – or in some cases no – competitor to serve those municipalities.

To address these competitive concerns, the SCA accepted behavioural commitments offered by BBVA. The case resembles the 2021 Caixabank/Bankia merger, in which the SCA also accepted behavioural commitments aimed at protecting vulnerable customers. The SCA rejected the need to establish structural remedies, finding that the risks to competition were not long-lasting and could be resolved by less restrictive measures. Specifically, the SCA reasoned that the three-year period of the commitments would be sufficient to guarantee that new players would enter the market in the municipalities where competition would (temporarily) be harmed as a result of the merger. Concerning the risk of the merged entity abandoning certain municipalities, the SCA was satisfied with BBVA’s commitment to maintain the merged entity’s physical presence in all Spanish municipalities where either a single competitor or none at all would remain as a result of the takeover. BBVA also committed to continuing Sabadell’s initiatives and policies for SMEs, including the conditions Sabadell previously offered for its payment transaction acquiring services, especially for short-term credit lines and for import/export financing lasting less than a year.

#### *Phase 3 decision*

On 26 June 2025, the SCM imposed further conditions on the transaction, with the aim of protecting a range of general interests. These interests included, first, general



## MERGER CONTROL

### National level

objectives concerning the sectoral regulation of banking activities, and in particular access to credit. The SCM argued that SMEs – a segment in which Sabadell plays a key role in the Spanish market – face greater difficulty and complexity in obtaining credit compared to larger companies. Upon reviewing the history of banking mergers in Spain, the SCM observed that when an acquired bank had a policy of focusing on SME-related operations – as in the case of Sabadell – the resulting merged entity typically did not maintain this approach, and instead tended to align its policies with the acquiring bank’s strategy. Consequently, the SCM concluded that there was a clear interest in avoiding an abrupt change in the financing conditions that Sabadell offered to its SME customers.

A second objective that was examined was the protection of territorial cohesion. The SCM’s main concern in this respect related to the fact that Sabadell has traditionally had a very important presence in several regions. The SCM argued that an abrupt change in Sabadell’s structure – including a change in the location of Sabadell’s decision-making centers – could negatively impact the development of these regions.

Third, the SCM examined the transaction’s impact on labour. The SCM was concerned that the potential layoffs resulting from the transaction could have a significant social impact, given the size of both companies.

Finally, the SCM referred to the protection of social objectives and the promotion of research, development and scientific progress, identifying a series of concerns, such as the transaction’s impact on the housing market and on entrepreneurs’ access to financing.

To address these concerns, the SCM required BBVA and Sabadell to remain separate legal entities for a period of three years, with the possibility of extending this condition for two further years. In addition, the SCM required BBVA to keep the assets of both banks

separate, and to ensure that they remained operationally independent. In particular, the SCM required the adoption of measures to guarantee that Sabadell would continue to operate autonomously with regard to credit and financing decisions (in particular for SMEs), human resources, physical office presence, and philanthropic foundations. Moreover, to protect workers, the SCM also prohibited BBVA from dismissing any Sabadell employees. In addition, the SCM confirmed all the commitments already imposed by the SCA.

Finally, both the Phase 2 and Phase 3 decisions impose monitoring measures, though the monitoring body differs depending on the authority imposing the relevant measure. Commitments accepted and imposed by the SCA are supervised by the SCA, while measures imposed by the SCM are monitored by the Office of the Secretary of State for the Economy, an office within the Ministry for the Economy.

### Key Takeaways

This is the first time that the Spanish Government has imposed additional conditions on a transaction through a Phase 3 investigation. This is a significant development given that the SCA had already cleared the transaction in a thorough Phase 2 examination and had imposed strict commitments. In the only other Spanish case to have undergone a Phase 3 examination (Antena 3/La Sexta, in 2012), the Spanish Government’s intervention had resulted in softening the conditions imposed by the SCA, as it deemed that interests beyond competition law (such as the protection of media plurality and the liberalization of digital frequencies needed for the rollout of 4G technology) outweighed the competitive concerns that the SCA had identified.

This Phase 3 investigation took place in the context of significant political pressure being brought to bear on the transaction. Companies contemplating future transactions in Spain involving politically sensitive sectors



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may likewise become caught between navigating the complexities of merger control proceedings and the political considerations of the post-clearance landscape. Issues that may not pose concerns under competition law, or that may be resolved through competition law remedies (such as access to finance, in this case), may nonetheless be examined under a different lens in the context of a Phase 3 investigation, resulting in additional requirements being imposed as a condition for clearance.



# FOREIGN DIRECT INVESTMENT

## National level

### HUNGARY

#### **Hungary lengthens FDI review period and expands pre-emption power**

On 24 June 2025, an amendment to the existing Hungarian Foreign Direct Investment (“FDI”) screening regime entered into force that significantly extends the government’s pre-emption right and increases the duration of the review process. The new rules, introduced by Government Decree No. 163/2025, apply to both future and ongoing proceedings.

The provision on pre-emption, originally introduced in December 2023, allows the Hungarian State, in the event of a prohibition decision, to acquire the target under identical terms and conditions as those agreed between the original parties. The State may exercise its pre-emption right within 90 days of delivery of the prohibition decision. The amendment extends the scope of this right to all industry sectors covered by the Hungarian FDI screening regimes.

The amendment increases the review deadline from 30 to 45 business days, extendable up to three times by an additional 30 business days if deemed necessary.

These new rules may make Hungary less attractive to foreign investors. The possibility of a review taking upwards of seven months could deter investors. Moreover, in cases where the proposed investment is ultimately prohibited, the right of the State to acquire the target on the same terms as agreed between the original parties might raise concerns with respect to the treatment of sensitive deal terms. The State’s pre-emption right in the case of prohibition also deprives the target from choosing its owner (or the seller from choosing to whom it wishes to sell) through a competitive bidding process.

# ABUSE OF DOMINANT POSITION

European Union level

## Advocate General Kokott reaffirms General Court's Google Android judgment: no need for counterfactual analysis or AEC test in assessing exclusionary abuses

On 19 June 2025, Advocate General Kokott (the "AG") proposed that the Court of Justice (the "ECJ") uphold the General Court judgment in *Google Android* and accordingly dismiss Google's appeal. Specifically with regard to assessing the effects of Google's tying conduct, the AG considered that the General Court was not compelled to carry out a counterfactual analysis or an as efficient competitor analysis.

### Background

On 18 July 2018, the European Commission (the "Commission") imposed a fine of €4.34 billion on Google for a range of practices which it found to constitute a single and continuous infringement that reinforced Google's dominance in the general internet search market, reduced competition in mobile browsers, and obstructed the development of Android forks (i.e., versions of the Android operating system not authorised by Google), by *inter alia* leveraging Google's dominance in the Android app stores market. Google's relevant conduct included requiring manufacturers to pre-install the Google Search app and Chrome browser app as a precondition for licensing Google Play Store (See, [VBB on Competition Law, Volume 2018, No. 7](#)).

On 14 September 2022, the General Court largely upheld the Commission decision and only annulled the decision insofar as it concerned Google's revenue sharing scheme – i.e., making the granting of a share of Google's advertising revenue to mobile manufacturers and network operators conditional on them not preinstalling competing search service providers. The fine was reset at €4.125 billion (See, [VBB on Competition Law, Volume 2022, No. 8 & 9](#)).

Google has appealed the General Court judgment to the ECJ. The ECJ will need to decide *inter alia* whether the finding of an abuse requires (i) a counterfactual analysis of the state of competition without the contested behaviour, and (ii) an analysis of the capacity of the

relevant behaviour to produce an exclusionary effect on undertakings considered to be as efficient as Google (i.e., the as efficient competitor or AEC test).

### Advocate General Kokott's Opinion

The AG considered that a counterfactual analysis was not required to establish exclusionary effects. While the Commission has to establish a causal link between the contested abusive behaviour and its anticompetitive effects, this can be done by relying on a range of evidence proving that the behaviour has the capacity to produce exclusionary effects (actual effects need not be proven). The conduct need not be proven to be the only reason for any exclusionary effects; it is sufficient if it has contributed to effects. With regard to the tying conduct in this case, the finding that users' behaviour was influenced in a discriminatory way by the status quo bias, which competing search and browser apps could not offset, was sufficient.

In addition, the AG concluded that the AEC test is only one of a number of available tools to examine whether the contested pre-installation conditions were capable of restricting competition and that the General Court had rightly held that the Commission was not required to carry out the AEC test. Indeed, the AG found that it was not realistic to consider a hypothetical competitor that is as efficient as Google given Google's multi-market dominance and network effects across the Android ecosystem, and the status quo bias that no competitor could offset. Moreover, Google had not submitted an AEC test that the Commission failed to take into account, nor had the Commission (such as in *Intel*) relied on an AEC test that the General Court failed to consider. The AG also found that since the tying fell outside the scope of competition on the merits, the analysis of market coverage – which has in any case been developed for price-related practices – was not required to establish the abusive nature of the practice.

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The AG also agreed with the General Court that the various behaviours at issue constituted a single and continuous infringement despite the annulment of the revenue sharing scheme part of the Commission decision. This is because there was found to be an overall strategy aimed at anticipating the development of the mobile internet, while preserving Google's own business model, which is based on the revenues that it derives essentially from the use of its general search service. The AG also found that the General Court had calculated the fine correctly.

### Observations

The AG's Opinion was handed down in the wake of the Commission's draft Guidelines on Exclusionary Abuses, which specifically make the point that a counterfactual analysis is not always necessary, "*in particular where the conduct of the undertaking has made it very difficult or impossible to ascertain the objective causes of observed market developments*" – the draft Guidelines identify inter alia the General Court judgment in *Google Android* as being the source for this approach. Similarly, the draft Guidelines also make the point that the AEC test does not need to be carried out each time an exclusionary abuse is assessed and the source cited for this is the General Court's *Google Shopping* decision (which however limits this lack of necessity to non-pricing abuse cases). Indeed, the AG Opinion appears to reaffirm the draft Guidelines. It remains to be seen if the ECJ will view matters differently.

### **Actual hotel room occupancy may not be relevant for assessing whether CMO royalty rates for copyright use are excessive**

On 5 June 2025, Advocate General Szpunar handed down his Opinion in *OSA v Úřad pro ochranu hospodářské soutěže*, in which he concluded that the Czech competition authority was wrong in finding that OSA, a collective management organisation ("CMO"), had abused its dominant position because it did not take actual room occupancy rates into account when determining royalties payable for the making available of protected works on televisions and radios in hotel rooms.

### *Preliminary Reference to Court of Justice*

In the context of royalties collected under license agreements covering the making available of protected works on televisions and radios in hotel rooms, the central question referred by the Czech regional court to the Court of Justice ("ECJ") was whether a CMO could be considered to have imposed unfair trading conditions/unfair prices contrary to Article 102 TFEU when royalties payable by hotels are based on the number of rooms and do not take into account actual occupancy rates.

The Czech competition authority found that OSA had abused its dominant position by imposing unfair trading conditions because the OSA license agreements required hotels to make royalty payments even for unoccupied rooms where no copyright works can be said to have been made available.

### *Advocate General Opinion*

Advocate General Szpunar first concluded that the Czech competition authority's decision was based on an erroneous interpretation of copyright law. He emphasised that under the EU law concept of "communication to the public" of protected works, which covers all communication to the public not present at the place where the communication originates, actual room occupancy is not a relevant consideration. According to settled case law, a communication to the public occurs when a hotel provides access to protected works by placing television sets in its rooms through which it distributes television signals received by the central antenna. As a result, since in the present case the protected works were "communicated to the public" regardless of actual room occupancy, OSA could not be said to have charged royalties for non-existent services.

Turning to the interpretation of Article 102 TFEU, the Advocate General faulted the competition authority for examining OSA's royalty scheme under an "unfair trading conditions" standard. The Opinion clarified that since the case concerns prices charged by a CMO (as

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opposed to non-price trading conditions), the competition authority should have examined the royalty scheme in accordance with the case law on “unfair pricing” (often also called “excessive pricing”). This clarification is helpful as the competition analysis differs depending on the classification, and the standards to determine unfair trading conditions are even more fluid than those applied in excessive pricing cases.

The Advocate General further explained that there is no single method to assess whether a price could be considered “excessive”, and that all circumstances of the case must be taken into account. The national court is obliged to take into consideration the particular nature of copyright and to seek an appropriate balance between (i) the interest of the authors of copyright-protected works in receiving remuneration for the use of those works, and (ii) that of users in being able to use those works under reasonable conditions. Thus it is necessary to take account not only of the economic value of the collective management service as such (i.e., in line with the test set out in *United Brands*), but also of the nature and scope of the use of the works and of the economic value generated by that use (which depends on the actual number of persons who enjoy the protected works and the extent of the use of the musical works for licensees).

The ability of a hotel to make copyrighted works available has a definite economic value (since it influences room prices). However, the Advocate General did not consider that actual room occupancy rate – a proxy for the number of works actually viewed or listened to – should be relevant for ascertaining such value. Instead, the number of works made available would be relevant. Hence factors such as the number of television channels or radio frequencies made available to guests, or even the number of rooms in which television or radio receivers are made available, are the kind of factors that would need to be taken into account when setting royalties.

## Observations

The Opinion offers helpful clarification that when examining allegedly unlawful pricing conduct, the relevant framework for assessment is that of excessive pricing rather than that of unfair trading conditions, a theory of harm that has been gaining traction in recent years at both EU and national levels. This is helpful because, although the standards in excessive pricing cases leave significant room for interpretation, the standards used to determine whether trading conditions can be considered “unfair” are even more vaguely defined, giving competition authorities considerable discretion and creating considerable uncertainty for market participants.

That said, the Opinion fails to give much guidance on the factors CMOs can consider in setting their royalty rates without incurring competition law risks. On one hand, the Opinion emphasises that royalties should seek to accurately capture the economic value of protected works “without [...] leading to a disproportionate increase in the costs incurred for the purposes of the management of contracts and the supervision of musical works protected by copyright” – a royalty rate based on the number of hotel rooms appears to be aligned with this principle. However, by suggesting that CMOs may be required, in setting their royalty rates, to consider the number of television channels or radio frequencies available in a hotel, or the number of rooms with a television or radio, the Opinion appears to retract from the principle focusing on administrative workability and cost effectiveness for CMOs, leaving considerable uncertainty about how CMOs can cost effectively apply royalty schemes in mass markets.

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## National level

### GERMANY

#### **Higher Regional Court of Cologne clarifies that Meta's AI training is not limited by Article 5(2) DMA**

The Higher Regional Court of Cologne (the "Court") has published its full decision concerning Meta's use of publicly available personal data collected on its EU products for the training and development of its AI models. As previously discussed (See, [VBB on Competition Law, Volume 2025, No. 5](#)), this case focused on the interplay between data protection and competition law, and the Court found that Meta could lawfully use publicly available personal data of its users on the basis of legitimate interest by respecting certain safeguards, including Meta's transparency campaign and opt-out possibilities for end users.

The full text of the decision reveals the first judicial interpretation of the term "data combination" under Article 5(2)(b) DMA, which prohibits the combination of personal data by gatekeepers sourced from various destinations (i.e., its own or third-party digital services). The decision clarifies that Article 5(2)(b) DMA only refers to personal data that is processed for targeted use in relation to a specific end-user. Therefore, it cannot be used to prevent gatekeepers from collecting and processing personal data for non-client-specific purposes, such as to train AI models. This is important given the increasing relevance of AI language models in the digital economy.

In this case, the Court held that Meta was not combining personal data within the meaning of Article 5(2)(b) DMA because Meta's conduct did not fall into the material scope of the practice envisaged in that provision. In fact, while Meta's services collect publicly available personal data to create a generic and unstructured dataset for AI training (without a direct link to a specific end-user), the conduct prohibited by Article 5(2)(b) DMA has a different purpose as it requires a targeted combination of personal data across multiple platform services into a single end-user profile.

The Court also relied on the decision of the European Commission ("Commission") concerning the fine imposed on Meta for an Article 5(2) DMA infringement (See, [VBB on Competition Law, Volume 2025, No. 4](#)). In that decision, the Commission stated that Article 5(2)(b) DMA applies for data combination regardless of the underlying purpose (i.e. theoretically applying to AI training). However, the Commission mentioned that Article 5(2) DMA prohibits combining personal data related to the "same" end-user. Furthermore, according to the Court, the legislative history of Article 5(2) DMA does not consider the specific purpose for AI training and development. On the contrary, it confirms the aim of preventing the targeted collection of personal data linked to a specific end-user. In this context, the Court nevertheless noticed that the preliminary and expedited nature of the proceedings excluded the possibility of receiving observations from the Commission (Article 39 DMA) or applying for preliminary reference to the Court of Justice of the European Union.

The Court also recalled that the European Commission is the primary enforcement authority of gatekeeper obligations under the DMA. However, Article 42 DMA allows collective actions by qualified consumer associations against infringements before national courts. Nonetheless, the Court also recalled that such collective action claims would be permissible only if Article 5(2)(b) DMA confers an individual right on end users. Since the Court dismissed the application of that provision on substantive grounds, the crucial question of whether the said provision creates such a right was left open by the Court. A potentially negative conclusion to this issue may limit the private enforcement of Article 5(2) DMA that could serve as a supplementary to ensure gatekeeper compliance with data-related obligations, alongside with enforcement by the Commission.

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## National level

### ITALY

#### **Italian Competition Authority imposes a fine for a two-tier exclusivity scheme**

On 24 June 2025, the Italian Competition Authority (“ICA”) issued a decision imposing a fine of over €32 million on Novamont (jointly with its parent company ENI) for abusing its dominant position on the national markets for raw materials used in the production of (lightweight and ultra-lightweight) shopping bags. According to the ICA, Novamont created a two-tier exclusivity system with both direct and indirect customers to ensure that neither level was incentivised to source competing raw materials or bags manufactured with such competing materials.

#### *Factual Background*

Novamont had developed a bio-compound (“Mater-Bi”), the raw material for shopping bags, and implemented a two-tier exclusivity system by concluding:

1. agreements with its direct customers, the “converters” (transforming bio-compounds to manufacture shopping bags), preventing them (fully or mostly) from buying materials other than Mater-Bi. The agreements also included strict monitoring mechanisms and the possibility for Novamont to terminate them in case of violation of the exclusivity; and
2. agreements with the converters’ customers (the leading national large-scale retailers) obliging them to exclusively market or use bags manufactured with Mater-Bi and from converters that are Novamont’s licensees, in exchange for economic incentives.

#### *The ICA’s Assessment of the Exclusivity System*

The ICA considered that the system created by Novamont was abusive in violation of its special responsibility as the dominant firm since the conduct was capable of excluding competitors.

First, the system was implemented through long-term agreements (lasting 1-2 years for the converters and annual contracts with automatic renewal for the retailers). In this regard, the ICA relied on the Commission’s decision in *Broadcom*, which shortened the period envisaged in *Hoffmann-La Roche* (2 years) to consider exclusivity dealing to be incompatible with undistorted competition. In addition, while both converters and retailers had the right to withdraw from these contracts, the ICA considered this to be irrelevant from a practical standpoint. Converters never exercised it in practice, as withdrawing would have resulted in giving up a significant part of their turnover. For retailers, the right was not absolute, but rather conditional upon certain exceptional circumstances.

Second, the conduct covered a significant share of the market, involving the majority of converters (accounting for 52% to 70% of demand for bio-compounds for the relevant bag types) and a substantial share of retailers (representing 44% of the demand for bags).

Moreover, the ICA also emphasised the cumulative impact of the two-tier exclusivity system. The co-existence of two levels of exclusivity ensured that players on both levels (converters and retailers) remained within the system, thereby each reinforcing the exclusionary effects of the conduct on the other side. This precluded the incentive for customers on either level to switch to other suppliers (a circumstance that was reinforced by the timing of the different contracts, which entailed that independent undertakings from each side would have to change supplier without knowing whether the other side would follow). The exclusivity scheme also had an effect on prices as converters were prevented from sourcing cheaper materials of comparable quality.

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During the investigation, Novamont submitted an As-Efficient Competitor (“AEC”) test to attempt to prove that the conduct was not capable of harming competition. In response, the ICA first recalled the CJEU’s ruling in *Unilever* (See, [VBB on Competition Law, Volume 2023, No. 1](#)), which clarified that the AEC test is not mandatory when assessing exclusivity. According to the ICA, Novamont’s AEC test was both incomplete and inaccurate. More importantly, the ICA considered it inappropriate in the context of this case, as it focused on the replicability of prices and discounts, while the exclusionary effects arose from the interplay between the two levels of exclusivity, rather than from pricing practices alone. Citing economic literature demonstrating that an AEC can be excluded from the market even in the absence of direct economic harm to the dominant firm, ICA concluded that the AEC test was inadequate to capture the market dynamics and incentive structures at play.

Finally, the ICA rejected Novamont’s claims that the conduct was objectively justified. First, the fact that a similar scheme did not exist in other countries was used as an argument against the existence of economic efficiencies. Second, the ICA dismissed claims that the exclusivity was remunerating certain investments because they were not quantified or, in any event, not supported by a sufficient explanation regarding the proportionality of an exclusivity system. Third, Novamont argued that the system remunerated some tests carried out by the dominant company, but this was rejected because these tests also concerned bags sold by retailers not contracted by Novamont. Similarly, the ICA rejected claims regarding possible reputational repercussions related to the sale of non-compliant products, as certain converters only had semi-exclusivity and could therefore sell products that were potentially non-compliant with the law.

### Key Takeaways

The present case is significant as it demonstrates how a competition authority would evaluate a two-tier exclusivity scheme. In line with the Commission’s Draft

Article 102 Guidelines and case law of the EU Courts, the ICA conducted a typical assessment of the duration of the exclusivity conditions and the affected share of the market, as well as the AEC test submitted by Novamont. However, the ICA also closely evaluated the effects of the two-tier exclusivity system, and highlighted the potential anti-competitive effects of the scheme targeting two levels in the supply chain and covering the major players at both levels.

The decision is also noteworthy as the ICA stated that Novamont’s conduct precluded the emergence of potentially more efficient or environmentally friendly competitors. It thus represents an example of how competition law can be used to promote environmental goals, although considerations of the potential harmful environmental impact do not seem to have played any independent role in the finding of liability.

## THE NETHERLANDS

### **Rotterdam District Court upholds Dutch Competition Authority decision that Apple imposed unreasonable conditions on dating app providers**

On 16 June 2025, the Rotterdam District Court largely upheld the decision of the Dutch Competition Authority (“ACM”) finding that Apple abused its dominant position by imposing unreasonable conditions on dating app providers in the App Store by (i) requiring dating app providers to use Apple’s payment system, (ii) prohibiting them from referring to payment options outside the app; and (iii) charging commissions ranging from 15% to 30% on transactions processed through Apple’s payment system. Accordingly, the District Court affirmed the ACM’s order to impose periodic penalty payments totalling €50 million due to Apple’s non-compliance with its 2021 decision.

### *District Court Judgment*

The District Court noted that Apple’s unreasonable conditions limited dating app providers’ ability to offer

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## National level

payment options tailored to user preferences, thereby undermining consumer service. It further held that the obligation to use Apple's payment system meant that dating app users were effectively Apple's customers rather than those of the app providers, preventing providers from developing direct relationships with their users. This interference extended further, as the District Court also found that Apple refused to share user-identifying data with app providers, impeding their ability to offer customer support for billing, cancellations and refunds, as well as to perform identity and safety checks.

However, the District Court annulled the part of the ACM's decision that required Apple to allow both alternative payment methods within the app and the option to direct users to external payment systems. The District Court held that these two remedies serve the same purpose, and therefore Apple should not be required to implement both simultaneously.

### Key Takeaways

The ACM's case against Apple was brought before the Digital Markets Act ("DMA") entered into force and was therefore examined under Article 102 TFEU and its national equivalent. Apple's conduct at issue – requiring dating app providers to use its payment system and prohibiting references to alternative payment options – today falls within the scope of the DMA's anti-steering provisions, and has already led to a Commission decision under the DMA. This suggests that, if the similar facts arose today, the ACM would investigate a potential DMA infringement and refer the matter to the European Commission.

## UNITED KINGDOM

### UK High Court finds that MGA Entertainment abused its dominant position, but declines to grant damages to affected competitor

On 16 June 2025, the UK High Court ("High Court") found that leading toy manufacturer, MGA Entertainment ("MGA"), abused its dominant position by engaging in an anticompetitive exclusionary campaign against a new competitor Cabo, which produced "Worldeez" toys that competed with MGA's "L.O.L Surprise!" toys. However, the High Court ruled that Cabo was not entitled to damages as it had not demonstrated that, in the absence of the abusive conduct, it would have traded profitably.

### Background

In May 2017, MGA contacted several existing customers supplying the UK toy market and indicated that – unless such customers agreed not to purchase Worldeez – MGA would refuse to supply them with L.O.L Surprise! (MGA's bestselling product). MGA also informed a selection of its existing customers of its intention to initiate patent infringement proceedings against Cabo and claimed that Worldeez was a "knock-off" version of L.O.L Surprise! At the same time, MGA issued a cease-and-desist letter against Cabo and threatened to initiate patent infringement proceedings if Cabo continued to sell Worldeez to any retailer. In 2018, Cabo discontinued Worldeez and initiated competition law proceedings against MGA.

### The High Court's findings

**Abuse of Dominance.** While the High Court acknowledged that the broader toy market is highly competitive and characterised by volatile consumer trends, the Court defined the relevant market for this case very narrowly, as surprise collectible toys with a sophisticated unwrapping experience aimed at girls aged 6–9 years. In this narrow

# ABUSE OF DOMINANT POSITION

## National level

market, the High Court determined that MGA was able to act independently with “*complete disregard of the wishes of its major competitors*” meaning that a finding of dominance was ‘*inescapable*’.

The High Court found that MGA abused this dominant position by engaging in an exclusionary strategy consisting of (i) threats to withdraw supply of L.O.L Surprise! to existing customers if they supplied Worldeez – accompanied and reinforced by (ii) the dissemination of disparaging claims against Worldeez; and (iii) unsubstantiated threats to instigate patent infringement proceedings. The High Court considered that the threat to bring patent proceedings was intended to interfere with the commercial relationship between Cabo and toy retailers – and declared MGA’s threats as unjustified. Although MGA asserted that its conduct was “*a legitimate and proportionate response to an attack on its commercial position*”, the High Court concluded that dominant undertakings are not entitled to circumvent legal action and engage in retaliatory anti-competitive conduct on the basis of a perceived unfair similarity between a competitor’s product and their own.

**Anticompetitive Agreements.** The High Court also assessed whether MGA had entered into anticompetitive agreements with the retailers. While the Court found that the agreements of retailers to refrain from purchasing Worldeez were by-object restrictions of competition, the High Court held that the agreements could nevertheless benefit from the Vertical Agreements Block Exemption Regulation (VBER). Under the terms of the VBER, the calculation of the parties’ market shares is based on the “preceding calendar year”. In the present case, the High Court determined that, even though MGA held a dominant position during the period of the infringement, MGA held a significantly lower market share during the preceding calendar year, and therefore still qualified for the VBER.

**Damage Claims.** The High Court engaged in a counterfactual analysis to assess whether, *but for* MGA’s anticompetitive conduct, Cabo would have traded profitably. The analysis considered the quality of Cabo’s product and marketing campaign, the extent of retailer support for the product, the financial projections, operational abilities and available working capital of Cabo, expert evidence on the likelihood of commercial success, the quantity of sales needed for Cabo to break even and the actual sales obtained. Overall, these factors indicated that Cabo would not have traded profitably – and as such, the High Court found that Cabo was not entitled to damages.

### Key takeaways

This judgement demonstrates that competitors affected by anticompetitive conduct are not automatically entitled to damages. Indeed, the thorough and differentiated counterfactual analyses conducted in this case to determine the likelihood of commercial success are indicative of the difficulty and complexity of proving the (hypothetical) commercial viability of an undertaking and the quantum of lost profits.

In addition, the High Court’s finding that MGA’s threats to instigate legal proceedings may constitute an abuse emphasises that dominant companies must have a genuine belief that such legal proceedings, if ultimately brought, would be successful.

## VERTICAL AGREEMENTS

### National level

#### GERMANY

##### **German Federal Cartel Office imposes fines on audio products manufacturer for vertical price fixing**

On 16 April 2025, the German Federal Cartel Office (“FCO”) imposed fines totalling almost €6 million on Sennheiser electronic SE & Co. KG and Sonova Consumer Hearing Sales Germany GmbH (together: “Sennheiser”), as well as three responsible employees, for engaging in vertical price fixing in relation to the sale of Sennheiser headphones by dealers.

##### *Sennheiser’s Activities*

Sennheiser distributed its consumer electronic products, including headphones, using a selective distribution scheme based on qualitative selection criteria. Sennheiser monitored compliance with these criteria by authorised retailers. As part of this monitoring, Sennheiser’s sales division used “web-crawler” software together with online price comparison tools to monitor retail prices for certain premium headphones. Sennheiser’s sales team intervened where retail prices were significantly below the recommended retail price (“RRP”) or when other authorised dealers complained.

The sales team communicated internally using “code language”, to avoid explicit references to price-fixing. In particular, the sales team referred to compliance with the qualitative selection criteria, in order to conceal the anti-competitive nature of the price fixing. These practices were implemented after internal antitrust-compliance trainings in which it had been stated that, whilst it was not permissible to request dealers to adjust their prices, dealers could be told that they must comply with the selective distribution criteria. When communicating with dealers, the sales team avoided using explicit language, but did so in a way that dealers would understand as requesting them to increase their retail price, which in most cases they did.

##### *The FCO’s Investigation*

In September 2022, the FCO initiated the investigation with a dawn raid, following a request from the Austrian Federal Cartel Office for mutual assistance. Through the investigation, the FCO determined that unlawful vertical price fixing took place in the context of Sennheiser’s selective distribution scheme from at least 2015 until September 2022. The investigation was concluded by way of a settlement and, in determining the level of the fine, the FCO took into account Sennheiser’s extensive cooperation during the investigation. No fines were imposed on the retailers involved. Sonova’s involvement in the case stems from the fact that it had acquired the Sennheiser business in March 2022.

##### *Key takeaways*

The case is one of numerous recent examples of how resale price maintenance remains a major enforcement priority in the EU. It also demonstrates how the legitimate practice of monitoring compliance by dealers with selective distribution criteria cannot be misused to control dealer pricing.

# LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

## European Union level

### **Competition assessments after the Defence Readiness Omnibus: a more permissive era for defence-sector deals and cooperations?**

On 17 June 2025, the European Commission (the “Commission”) published the “Defence Readiness Omnibus” package, which includes a series of simplification proposals in defence-specific legislation and programs, as well as in non-defence-specific laws, aimed at removing regulatory barriers and facilitating EU defence readiness. The Commission also considers the role of competition law in this context, signalling that improved defence and security readiness could become a factor not only in state aid cases, but also in the analysis of mergers and collaboration arrangements.

Strengthening defence capabilities and security has been at the forefront of the EU’s recent political agenda. In response to the 2024 Draghi report, which already highlighted the need for an expanded European industrial defence capacity as well as improving standardization and interoperability of European defence equipment, the Commission leadership announced plans for “a new era for European defence and security,” including the strengthening of the European defence industry through regulatory simplification and harmonization. More recently, the European Council also called on the Commission to accelerate work on simplifying legal and administrative frameworks to help improve European defence readiness, i.e., the capacity of the EU Member States and defence industry to acquire and maintain the resources, capabilities and infrastructure required to respond effectively to crises and to deter threats through credible preparedness.

It is in this broader context – and directly responding to the European Council’s call – that the Commission published its detailed simplification proposals comprised in the Defence Readiness Omnibus package.

*How defence readiness could impact EU merger control, antitrust, and state aid*

Specifically with regard to EU merger control, antitrust, and state aid laws, the Commission proposes:

- Taking defence readiness into consideration in its merger control, antitrust enforcement and state aid control.
- Giving adequate weight to the changed security and defence environment in its ongoing review of the EU Merger Guidelines, and in particular assessing the overall benefits from enhanced defence and security within the EU leading to efficiencies.
- Being prepared to provide guidance on the application of EU antitrust rules to cooperation projects in the defence sector, particularly where such collaboration is necessary to scale up production or where individual companies would otherwise be unable to develop or manufacture a product on their own (e.g., in the case of joint procurement of raw materials by defence companies).
- Considering the efficiencies generated – e.g., the positive effects of the cooperation in terms of defence readiness, and resilience of defence supply chains and of the internal market – when assessing cooperation projects.
- Deeming state aid measures that support investment in defence production capacity to fall within Article 346 TFEU, eliminating the need for prior approval by the Commission.

## LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

### European Union level

- For state aid measures that do not fall with Article 346 TFEU, taking defence readiness, protection of security interests, security of supply of defence products/inputs, reduction of dependencies on third countries, closing of critical defence capability gaps, and other related considerations into account in their assessment.
- Prioritizing treatment of state aid cases with the objective of defence readiness, and providing guidance on the assessment of public support for the defence sector.

#### *What will be the practical impact of the Commission's proposals?*

The Defence Readiness Omnibus, as well as the broader political context in which it was issued, could signal a move towards increased permissiveness in respect of defence-sector mergers, collaborative arrangements and state aid. The political pressure on the Commission to adapt its approach to EU competition law enforcement in the defence and security sectors resembles developments a few years ago, when the green deal and sustainability topped the Commission's political agenda, creating a need to demonstrate that competition law would not stand in the way of collaborative efforts to transition to a more sustainable economy.

Some of the previous, sustainability-related experience could also become relevant for the defence sector and inform expectations and compliance strategies, especially in the area of antitrust enforcement.

- First, after an intense debate in the competition community, the Commission adopted the sustainability chapter in the EU Horizontal Co-operation Agreements Guidelines, indicating that many sustainability-related collaborative arrangements would be unlikely to raise competition law concerns and creating a soft safe harbour for standard setting. But the guidelines also adopted a rather conservative approach to the

consideration of sustainability gains in an Article 101(3) efficiency analysis. The complexity of the proposed efficiency analysis limited its practical relevance, and parties typically decided to rely on standard compliance safeguards applicable to all collaborative arrangements to manage competition law risks, rather than a complex and highly uncertain 101(3) sustainability efficiency defence.

- Second, although the Commission welcomed pro-competitive sustainability agreements and promoted an open door policy for parties seeking guidance from the Commission, the enforcement record demonstrates that the Commission drew a hard line and has been at least equally interested in uncovering green cartels, i.e., agreements that purported to pursue sustainability goals but in practice were, or over time became, collusive agreements.

#### *Greater leniency for defence deals?*

It remains to be seen how the Commission proposals will ultimately play out in practice. The overall defence readiness plan envisages substantially increased defence spending, and experience in previous instances where the EU and Member States committed to robust financing of major policy initiatives suggests that relaxed state aid rules could become a major accelerator.

It is less certain what, if any, impact there will be on the more traditional priorities underpinning EU competition laws, such as protecting consumer welfare and ensuring the proper functioning of the Internal Market. Indeed, the highly fragmented nature of the European defence industry suggests (despite political sensitivities) a push for consolidation.

Défense industry projects invariably involve complex collaborative arrangements, among European players as well as those across the Atlantic, in Japan, and elsewhere. The review standards in EU merger control and antitrust law could therefore be of great importance



## LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

### European Union level

for the feasibility of planned projects and it will be interesting to see if the Commission will approve transactions, and accept collaborative arrangements, in the defence industry that would normally be considered anticompetitive (and may generate customer opposition) on the grounds that their strategic importance outweighs any anticompetitive impact on the market.



## PRIVATE ENFORCEMENT

### National level

#### SPAIN

### **Spanish Supreme Court rules that the statute of limitations in competition damages claims begins when the competition authority's decision becomes final**

On 5 June 2025, the Spanish Supreme Court (“SSC”) rendered, on appeal, its judgment on a follow-on antitrust damages action (SSC Judgment 2621/25), which provides important clarifications on the starting point of the limitation period for follow-on actions based on a decision of the Spanish Competition Authority (“SCA”).

The case stems from a 2013 SCA decision finding a cartel infringement in the national paper envelope market between 1977 and 2010 involving market-sharing, bid-rigging and exchange of commercially sensitive information. In 2019, the political party *Partido Socialista Obrero Español* sought damages from some of the parties involved before the Commercial Court of Barcelona claiming that it had overpaid for electoral ballot envelopes as a result of the anticompetitive behaviour.

One of the arguments raised by the defendants was that the limitation period began to run as soon as the SCA announced on its website that it had adopted an infringement decision in 2013. Therefore, according to the defendants, the action was subject to the one-year limitation period provided for under Spanish tort law and became time-barred before the expiration date for the transposition of the EU Damages Directive (Directive 2014/104/EU) on 27 December 2016, which provides for a longer five-year limitation period.

The SSC ruled that the limitation period started to run not from the time of publication of the decision on the SCA's website but rather from when the infringement decision became final following judicial review (i.e., from when all court appeals against the infringement decision had been exhausted). In the present case, the SCA decision became final with the Supreme Court's Order of 27 October 2017 which rejected to hear the appeal. The SSC considered this to be the proper starting point because that is when the claimant had at its disposal all the necessary facts, in particular the identity of the parties involved and the extent of the infringement.

The Court also noted that the ruling of the Court of Justice of the European Union (“CJEU”) in *Heureka* (See, [VBB on Competition Law, Volume 2024, No. 4](#)) was not relevant given that the SCA's decisions are not published in the Spanish official journal, and there was no evidence that the plaintiff had been aware of the constitutive elements of the SCA's decision as long as the decision had not become final. On this basis, and upon relying on the relevant CJEU case law, the SSC ruled that the five-year limitation period established by the EU Damages Directive applied to the action at hand, thus dismissing the defendants' claim.

The SSC Judgment follows on from the CJEU's case law in *Volvo and DAF Trucks* (see [VBB on Competition Law, Volume 2022, No. 6](#)) and *Heureka* and adds to the growing body of case law at EU and national level on limitation periods imposing strict conditions of knowledge of information by the plaintiff required to bring an action for damages. However, there seems to be a tension between the SSC's view that as long as an SCA decision is not yet final a plaintiff cannot be aware of all information necessary to initiate an action for damages and the CJEU's view in *Heureka* that a plaintiff may rely on the findings made in a Commission decision under appeal as such decision has binding effect for as long as it is not annulled.

The CJEU is expected to provide its guidance on this legal issue in a case currently pending before it following a preliminary reference from the Commercial Court of Zaragoza (see Case C-21/24, *Nissan Iberia*). In the AG Opinion of 3 April 2025 in *Nissan Iberia*, Advocate General Medina advised the Court that national legislation can provide that the limitation period does not start to run until the decision has become final after all appeals have been exhausted.

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