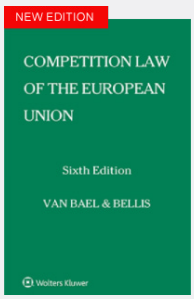
September 2025

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

National level

DENMARK

Danish Competition Authority exercises merger call-in powers for first time

The Danish Competition and Consumer Authority ("DCCA") has recently exercised its new merger call-in powers for the first time, assuming jurisdiction over two transactions falling below the statutory merger control thresholds.

The new Danish law

On 1 July 2024, the amended Danish Competition Act granted the DCCA the power to review a merger even if the ordinary merger control thresholds are not met. Under the revised Competition Act, the DCCA may call in a merger when: (i) the parties' combined annual turnover in Denmark is at least DKK 50 million (around €6.6 million) and (ii) the merger is suspected to significantly impede effective competition in Denmark, particularly if the transaction is likely to create an undertaking with a dominant market position.

The call-in power must be exercised within 15 working days of the DCCA becoming aware of the merger and no later than three months after a merger agreement has been concluded, a takeover offer has been published, or a controlling stake has been acquired, whichever is the latest, save in exceptional circumstances. If the DCCA calls in a transaction that has not yet been implemented, its review has a suspensory effect.

In August 2025, the DCCA exercised its new call-in powers twice in the course of two days.

Uber International Holding / Greenfleet Holding

On 26 August, the DCCA announced that it will review Uber's acquisition of Dantaxi, which was not otherwise subject to a mandatory notification requirement, citing concerns about a reduction of competitive pressure for taxi transport services in Denmark. The parties had already closed the transaction as it did not meet Danish merger control thresholds.

A key factor in the DCCA's decision to investigate the transaction was Uber's 2024 cooperation agreement with Drivr Danmark, a third-party competitor in the Danish taxi market. Following the cooperation with Uber, Drivr's customers can book taxis via Uber's app and the company had rapidly become a significant player in Denmark. The DCCA has concerns about how the acquisition of Dantaxi may affect the competitive landscape, presumably because both companies would be using Uber's app and might not be perceived to compete directly, and because barriers for other taxi transport services could increase.

OneMed / Kristine Hardam

On 27 August, the DCCA decided that OneMed and Kristine Hardam, wholesalers in the market for medical supplies and ostomy care products, must obtain approval for their intended below-threshold merger. According to the DCCA, the transaction would create the largest player in Denmark in markets already characterised by a small number of players. The DCCA cited another finding concerning Coloplast's abuse of a dominant position, in the form of a margin squeeze, in the same market in January 2025 as an influential factor in its decision. The transaction is now suspended, pending the DCCA's approval.

Key takeaways

National competition authorities across the EU are making increased use of new regulatory call-in powers, a development prompted by the Court of Justice of the European Union's judgment in the *Illumina/Grail* case

MERGER CONTROL

National level

(see VBB on Competition Law, Volume 2024, No. 9). Mergers that traditionally fall outside statutory notification thresholds can now be subject to closer scrutiny, without there necessarily being clearly established criteria that allow transaction parties to predict whether and where a transaction might require notification. This raises significant questions about legal certainty in merger control in Europe. In the face of this uncertain landscape, transaction parties are advised to consider the possibility of potential call-ins, including post-closing, in their transaction planning.

ABUSE OF DOMINANT POSITION

European Union level

Commission imposes €2.95 billion fine on Google for self-preferencing its ad tech services

On 5 September 2025, the European Commission found that Google had abused its dominant position in the online advertising technology ("ad tech") sector by implementing a self-preferencing strategy in breach of Article 102 TFEU, and imposed a fine of €2.95 billion.

As known, Google's main source of revenue is digital advertising. Beyond commercialising advertising inventory across its own platforms — including Search, YouTube, and Android applications — Google also acts as an intermediary, facilitating transactions between advertisers seeking online placement opportunities and publishers offering advertising space on third-party websites and applications. Google's presence in the ad tech chain includes Google Ads and DV360 (through which advertisers can buy ad space), DoubleClick for Publishers ("DFP", Google's publisher ad server on the sell side), and AdX (an ad exchange that intermediates between advertisers and publishers).

While the full text of the decision is not yet available, the Commission concluded that Google had created an "inherent conflict of interest" and had exploited its position by systematically favouring AdX in real-time bidding auctions, to the detriment of rival platforms and market participants. According to the Commission, AdX was given an advantage in the auction process run by DFP, for instance by receiving advance information about the value of the highest competing bids, which enabled it to outbid rivals. Moreover, the Commission found that Google Ads and DV360 were designed to channel demand primarily to AdX, avoiding alternative exchanges and thereby increasing its attractiveness to publishers.

The Commission ordered Google (i) to bring these self-preferencing practices to an end; and (ii) to implement measures eliminating the conflicts of interest along the ad tech supply chain. Google has been given 60 days to inform the Commission how it intends to comply. Interestingly, while the Commission did not prescribe any specific set of measures, it indicated that only a structural remedy — namely the divestment of part of Google's ad tech services — would effectively resolve the issue. Google has indicated its intention to appeal against the decision.

Key takeaways

While more detailed comments on the substance must await the publication of the full text of the decision, this case represents a landmark development in EU competition enforcement, notable both for the substantial fine imposed (reportedly increased due to previous fines for abuses, leading to the second highest fine ever imposed by the Commission) and for the Commission's unprecedented willingness to contemplate structural remedies in the digital sector, which have historically been exceptional in EU practice.

Previous examples of divesting businesses to address antitrust concerns — such as *ARA* (Case AT.39759) and *ENI/RWE* (Case COMP/39.402) — were implemented with the cooperation of the companies involved. In *Google/Ad Tech*, however, by already signalling (although without establishing a formal obligation to pursue that specific path) that divestiture may be necessary to resolve conflicts of interest in vertically-integrated ad tech platforms, the Commission has raised the stakes and suggested a possible shift from reliance on behavioural commitments towards more far-reaching structural solutions in Article 102 cases.

The overlap between the Commission's 60-day deadline and the remedies phase of the US Department of Justice's ad tech case against Google in September and October 2025 may indicate a deliberate effort to align regulatory outcomes across jurisdictions, which could help the Commission avoid a situation where it would be first in imposing structural remedies on a US company, while the US court may require less far-reaching remedies.

ABUSE OF DOMINANT POSITION

European Union level

However, differences in procedural timelines — with Google expected to present a proposal to the Commission in November whilst the US court process may extend over several months — illustrate the practical difficulties of coordinating enforcement across jurisdictions in fast-moving sectors, suggesting the Commission may ultimately need to act independently and assume the risk of further upsetting transatlantic relationships.

Commission accepts commitments offered by Microsoft to address competition concerns related to Teams

On 12 September 2025, the Commission accepted legally binding commitments from Microsoft to address competition law concerns relating to Microsoft's tying of its collaboration platform, Microsoft Teams, to Microsoft's popular office suit (comprising Word, Excel, PowerPoint and Outlook), included in its Office 365 and Microsoft 365 suites for business customers. By proposing these commitments, Microsoft was able to avoid the finding of an infringement and potentially hefty fines.

Background

Business software providers, including Microsoft, increasingly offer their products as "Software-as-a-Service" ("SaaS"), where the software runs on cloud servers controlled by the provider. Microsoft follows a suite-based business model, tying different types of software into a single package. As part of this model, Microsoft made Teams a default feature of its Office 365 and Microsoft 365 productivity suites.

According to the Commission's preliminary assessment, Microsoft may hold a dominant position in the worldwide market for SaaS productivity applications for professional use; and, since at least April 2019, Microsoft has been tying Teams with its market-leading productivity Office suites, in potential violation of Article 102 TFEU. More specifically, the Commission indicated that Microsoft's tying may restrict competition in the market for cloud-based communication and collaboration tools, giving Teams an unfair distribution advantage. According to the Commission, this effect was reinforced by limiting interoperability with products competing with Teams. The Commission was also concerned that this conduct strengthened Microsoft's dominance in productivity software and its suite-based model, disadvantaging rival software providers.

Following the launch of the investigation, Microsoft changed its pricing strategy in 2023 and 2024, including offering some suites without Teams at a reduced price for knowledge and frontline workers. However, the Commission found these steps insufficient and concluded that more substantial measures were needed to effectively address the tying and its effects.

The commitments

At first, Microsoft offered a number of commitments to address the Commission's concerns:

i. Offering customers purchasing in the EEA versions of its Office 365 and Microsoft 365 suites without Teams at an appreciably lower price than the corresponding suites that include Teams. Additionally, Microsoft committed not to offer discount rates on Teams or on suites with Teams higher than those offered on suites without Teams;

ii. Giving customers purchasing in the EEA recurrent opportunities to switch to suites without Teams and allow for such suites to be deployed in data centres worldwide;

iii. Enabling Teams' competitors and certain third parties to (a) achieve effective interoperability with certain Microsoft products and services for specific functionalities; (b) embed the Office web applications within their own products; and (c) achieve prominent integration of their products within Microsoft's core productivity applications;

ABUSE OF DOMINANT POSITION

European Union level

iv. Allowing customers in the EEA to extract their Teams messaging data for use in competing solutions.

Following the market testing of the original commitments, Microsoft revised its proposal and offered additional commitments to promote the uptake of the untied version (by increasing the price gap between certain Microsoft 365 and Office 365 suites without Teams and their equivalent suites that include Teams – particularly those targeted at businesses, by 50%; or by ensuring that Microsoft websites promoting any software offer containing Teams also clearly display the corresponding offer without Teams) and to publish detailed information on interoperability and data portability across all relevant developer-oriented websites.

The Commission concluded that Microsoft's final commitments – which will remain in force for seven years (except for those relating to interoperability and data portability which will remain in force for ten years) – would adequately address its competition concerns in relation to Microsoft's conduct.

Efficient antitrust enforcement in digital markets?

When adopting its decision, the Commission claimed that the outcome of the case illustrates the use of commitments as a flexible enforcement tool in digital markets, which allow for timely intervention that can effectively mitigate harm to competition. Nevertheless, although the case focused on a fairly standard tying theory of harm, the investigation took several years during which Microsoft was able to strengthen the position of Teams in the market for cloud-based communication and collaboration tools. It remains to be seen whether Microsoft's commitments will indeed create robust competitive opportunities for Teams' rivals.

ABUSE OF DOMINANT POSITION

National level

PORTUGAL

Portuguese Competition Authority fines public undertaking for imposing exclusivity in exchange for advance EU public funds in Madeira

On 30 July 2025, the Portuguese Competition Authority ("PCA") imposed a €30,000 fine on GESBA, the public undertaking managing Madeira's banana sector, for abusing its dominant position in breach of Article 102 TFEU and the equivalent provision of Portuguese law (Article 11 of the Portuguese Competition Act) by imposing exclusivity requirements on its suppliers as a condition to receive advance payments of EU funds.

Although the case resulted in a very modest fine, it is a useful reminder that public undertakings engaged in commercial activities remain subject to competition law constraints and that their conduct, if it hinders the emergence of rivals, can be considered an infringement of the competition rules.

Background

Established in 2008, GESBA is a regional public undertaking (its largest shareholder being the Regional Government of Madeira) which places on the market the "Banana de Madeira" brand, a local banana variety sourced from around 3,000 local producers. GESBA has a dual role since it is responsible for both (i) the reception, classification, packaging, and marketing of bananas, and (ii) the distribution of EU funds to producers under the specific programme for remote and insular regions of the EU Common Agricultural Policy. GESBA had a *de facto* legal monopoly over the distribution of EU funds as the only 'recognised entity' to receive and distribute EU funds. Previous PCA recommendations for legislative changes to improve competition in the Madeira banana market had not been followed up by the legislator.

The PCA's findings

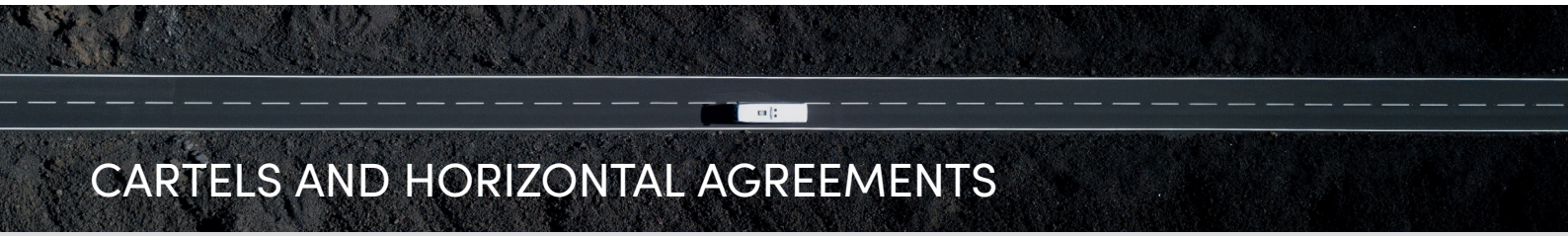
The PCA implicitly recognised the economic nature of GESBA's activities (a pre-condition for the applicability of the antitrust rules), despite its being a public entity, and found that it was dominant on the market for the reception, grading, packaging and marketing of bananas in Madeira. Since at least January 2025, GESBA required banana producers to sign exclusivity declarations (which were automatically renewed each year unless the producer expressly opted out) as a condition for receiving advance payments of EU funds, which required producers to deliver their entire annual production exclusively to GESBA and barred them from supplying other buyers. Any breach of this obligation required producers to repay the advance payments with interest.

The PCA concluded that these exclusivity clauses restricted producers' commercial freedom, impeded the emergence of competition in the market in the form of new producer organisations in the banana sector (contrary to its previous recommendations to the Portuguese legislator), and reinforced GESBA's dominant position.

The case was eventually resolved under a settlement procedure. In recognition of its cooperation, the PCA granted a substantial reduction of the fine, setting it at €30,000.

Key takeaways

This PCA's decision implicitly confirms that public undertakings entrusted with managing regional sectors bringing together large numbers of local producers remain fully subject to competition law obligations. By sanctioning GESBA's exclusivity clauses, the PCA also reaffirmed that restrictions which prevent producers from creating new and independent organisations are incompatible with competition law, even in small regional markets such as Madeira's banana sector. This decision is also a notable illustration of a national competition authority first acting to improve competition through targeted legislative recommendations and, when the legislator fails to act, following up with antitrust enforcement.



CARTELS AND HORIZONTAL AGREEMENTS

National level

ITALY

Italian Competition Authority imposes hefty fines on major fuel companies for coordinating biofuel component prices through direct and indirect exchanges

On 23 September 2025, the Italian Competition Authority ("ICA") imposed fines totalling €936 million on Eni, Esso, Ip, Q8, Saras and Tamoil for engaging for around three years (2020-2023) in a concerted practice affecting one of the components of fuel pricing. During this time, the investigated companies held over 90% of market shares (with Eni on its own holding over 35%). The investigation was initiated following a report by an anonymous whistleblower.

Background

Under Italian law, companies that place traditional fuels on the market must also introduce a minimum amount of biofuels, which market players generally achieve by mixing biofuels into diesel, or by purchasing certificates from companies which exceed their biofuel introduction targets. The costs deriving from these obligations are referred to as the "bio components" of the price. According to the ICA, the companies involved colluded on the bio component and, by focussing on this component rather than the final price of fuel, the companies were able to more effectively ensure compliance with the cartel, given that final prices were subject to daily fluctuations.

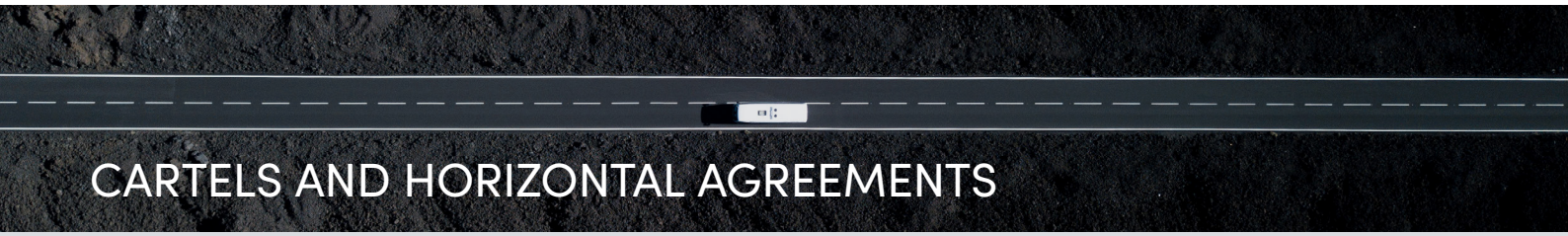
The conduct and the ICA's analysis

The ICA found that the fuel companies implemented parallel fuel price increases driven by both direct and indirect information exchanges between them concerning pricing. In addition to direct contacts between the companies to discuss price increases, the ICA found that they were able to learn about competitors' pricing intentions for the bio component through their regular publication in a specialised energy industry journal (*La Staffetta Quotidiana*). This system was initiated in January 2020 by the main market player (Eni) who provided information on its pricing to the journal.

Other implicated companies denied sharing similar information with the journal, and the ICA conceded that no conclusive evidence was found regarding the other companies' transmission of their prices to the journal. Nevertheless, the ICA considered that (i) the content of the journal articles accurately described the incoming increases; (ii) timing considerations suggested that the data was provided directly by individuals within the companies as the journal publications sometimes occurred prior to the official publication by the companies; (iii) importantly, the companies concerned never opposed the publication of their prices in the journal (i.e., they never asked the journal to stop publishing the prices, nor asked their customers not to share them with the journal); and (iv) the companies actively monitored and internally commented the content of the journal's articles. Thus, according to the ICA, the publication of the bio component played a key role in allowing the participants in the cartel to verify each other's price increases. It also gave an "official" connotation to the figures published in the journal, resulting in easier acceptance by clients who otherwise derived no benefit from their publication. In addition, the ICA found that the parties monitored the prices of competitors through their customers, who often provided such data to them.

According to the ICA, through these direct and indirect information exchanges, competitors were frequently made aware of the benchmarks to use for their own pricing. Based on the evidence it collected, the ICA determined that the cartel participants followed the announcements made in the journal and took these into consideration when determining their own commercial strategies.

In contrast to other cases where the intermediary of the cartel was itself found liable, the journal *La Staffetta Quotidiana* was not a party to the investigation (although its premises were raided alongside the cartel participants')



CARTELS AND HORIZONTAL AGREEMENTS

National level

and it was therefore not fined by the ICA. In its decision, the ICA however identifies the articles published in the journal as a "stability mechanism" for the cartel.

The ICA's recent focus on "Green Mobility"

This is the second fine adopted recently by the ICA connected to green mobility, coming on the heels of a fine of €2.3 million imposed in July 2025 on companies belonging to the ENEL X Way Group for abusing their dominant position in the market for electric charging services. The companies, active in the upstream market for charging point operators (installing and managing charging points for electric vehicles) and the downstream market for mobility service providers (offering charging services to clients through apps), were found to have engaged in margin squeezing. The ICA determined that the wholesale prices charged to ENEL X Way Group companies were not replicable by as efficient competitors for the period between July 2022 and August 2023. It is worth noting that, in its assessment of the gravity of the conduct, the ICA made reference to the current and future importance of the sector, which is destined to grow given the EU's green and digital development plans. In assessing gravity, the ICA also considered the innovative and nascent nature of the market for electric mobility.

It is apparent from both decisions that the ICA is particularly concerned about the sustainable development of the economy and, in particular, mobility. Given that current issues faced by car manufacturers in relation to CO2 regulations and emission reduction targets at EU level (for example the internal combustion engine ban due to come into force in 2035) are the slow uptake of electric vehicles by consumers and the insufficient number of charging points, anti-competitive practices that increase prices are likely to distance the industry further from the EU's goals and reduce the demand from consumers, while discouraging investments and innovation in electric vehicles.

NORWAY

Norwegian Competition Appeals Tribunal upholds Competition Authority's decision on grocery chains cartel

On 20 August 2025, the Norwegian Competition Appeals Tribunal fully upheld the decision of the Norwegian Competition Authority ("NCA") of 21 August 2024, which imposed fines totalling €420 million on three grocery chains: Coop, NorgesGruppen and Rema 1000 (see VBB on Competition Law, Volume 2024, No. 7 & 8).

The NCA had found that, between 2011 and 2018, the three grocery chains had engaged in anti-competitive information exchanges by using "price hunters" to collect information on prices. In 2010, the three chains had produced guidelines on industry standards for comparative advertising based on price, which included a provision stipulating that they could visit each other's stores to collect prices in order to document their advertised claims. In 2011, the three grocery chains further defined the conditions for access to their stores and in 2012 expanded this access.

During the period of the cooperation, the price hunting activities intensified to the point where information on price was received several times per day. The Appeals Tribunal found that this reciprocal conduct significantly increased price transparency among competitors. This, in turn, dampened incentives to cut prices since competitors would immediately match reductions, while making price increases more attractive for the same reason. The Appeals Tribunal reiterated, as in the NCA's decision, that the infringement did not concern the price collection as such but rather the cooperation between the companies on price collection. All three grocery chains have announced their intention to being further appeals against the decision.

STATE AID

European Union level

Court of Justice annuls Commission Decision on Hungary Paks II nuclear project

On 11 September 2025, the Court of Justice of the European Union ("ECJ") issued its judgment in Case C-59/23 P (*Austria v. Commission*), in proceedings concerning the financial aid that the Hungarian government was planning to provide for supporting the construction of two new nuclear reactors at Paks, Hungary. In its judgment, the ECJ – in its Grand Chamber composition – set aside an earlier judgment of the General Court ("GC") and annulled the relevant Commission Decision approving the aid.

Background to the dispute

By means of an international agreement signed in 2014, Hungary and Russia agreed to fund the construction of two new nuclear reactors in the already-operating nuclear power plant in Paks, Hungary ("Paks II"). According to the agreement, the construction of the two new reactors would be carried out by a Russian company (NIAEP) using Russian nuclear technology and financed with a €10 billion loan from Russia and €2 billion granted by Hungary. Once completed, the two new nuclear reactors would be owned and managed by a Hungarian public company ("Paks II company").

Following an in-depth investigation prompted by Hungary's notification, the Commission approved the measure. In particular, it found that the aid – which consisted in the provision, free of charge, of two new nuclear reactors to the Paks II company – was proportionate and necessary to attain the objective of the aid and it could not produce significant distortion of competition on the electricity market. Thus, while the measure involved State aid, it had to be considered as compatible with the internal market.

In its Decision, the Commission also dismissed allegations that Hungary had failed to comply with EU public procurement rules when it awarded, without competition, the construction of the nuclear reactors directly to NIAEP. Indeed, besides assessing the compatibility of an aid measure with EU State aid provisions, the Commission may in certain circumstances also be obliged to assess whether the measure is also compliant with other non-State aid EU provisions. According to settled case law, such an obligation is imposed on the Commission only when the aspects at issue are so "inextricably linked to the object of the aid" that it is impossible to evaluate them separately. In the case at hand, the Commission found in its Decision that there was no indissoluble link between the direct award of the construction of the project and the object of the aid (i.e., the provision, free of charge, of the two nuclear reactors to the Paks II company). Thus, the assessment of the aid could not be affected by any possible infringement of the EU public procurement rules through the direct award of the construction contract to NIAEP.

The Commission also observed that, even if it was required to examine the compatibility of the direct award in light of the EU public procurement rules, it had already made this assessment in a separate infringement procedure. In this procedure, the Commission had in fact preliminarily found that the applicable EU public procurement rules were not violated, since – under Article 50(c) of Directive 2014/25/EU – a direct award was allowed when the service could be supplied only by a particular operator because, for instance, competition is absent due to technical reasons. According to the Commission, this was indeed the case for the relevant Russian nuclear technology that is intended to be used in Paks II.

The proceedings before the EU courts

On 21 February 2018, Austria challenged the Commission Decision before the GC. Austria's action was supported by Luxembourg, while Hungary, the Czech Republic, France, Poland, Slovakia and the UK intervened in favour of the Commission. On 30 November 2022, the GC handed down its judgment in which it essentially agreed with

STATE AID

European Union level

the Commission's analysis and upheld the Decision. This judgment was challenged by Austria before the ECJ, which has now issued its final judgment. In its ruling, the ECJ set aside the GC judgment and annulled the Commission Decision in its entirety.

Contrary to the GC, the ECJ found that the Commission had artificially separated the construction of the two nuclear reactors from the objective of the aid, i.e., the provision of the additional nuclear reactors to Paks II company to support the activity of nuclear energy production. Since the construction of the reactors was necessary for the attainment of this objective, the award of the construction project had to be considered as inextricably linked to the objective of the aid. Consequently, the ECJ found that the violation of the public procurement rules in the award of the construction project could render the measure incompatible with the internal market.

In this regard, the ECJ found that the Commission had failed to assess whether the direct award of the project complied with the relevant public procurement rules. Indeed, while the Commission referred to the outcome of its infringement procedure, the ECJ found that the Commission had not carried out that assessment in the framework of the State aid procedure. The ECJ also stressed that the Commission does not in fact have the power to determine conclusively in the context of infringement proceedings whether the conduct of an EU Member State is compatible with EU law, because it is only the ECJ that has jurisdiction to do so. Thus, in the ECJ's view, mere reference to the outcome of an infringement procedure that was closed in its preliminary phase was not sufficient to meet the Commission's obligation to assess and explain whether the direct award complied with EU public procurement rules.

Finally, the ECJ also suggested that the decision to directly award the construction project to NIAEP may have had an impact on the amount of aid. According to the ECJ, the absence of an open and transparent competition for the award of the construction contract may have artificially increased the construction costs and consequently also the aid that would be provided by Hungary for the construction of the two nuclear reactors.

Conclusion

This judgment provides clearer guidance on whether an activity is intrinsically linked with the object of an aid measure. In this regard, it limits the possibility to artificially separate and disregard certain aspects of an aid measure. It will consequently be more difficult for Member States to avoid scrutiny of their decisions to directly award the construction of strategic infrastructure projects to certain specific companies. Indeed, the Commission will from now on probably assess more carefully whether these national decisions are compatible with both State aid and non-State aid EU provisions.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level/United Kingdom

Technology Transfer Agreements – New draft EU guidelines & Block Exemption and new UK recommendations

The European Commission and the UK Competition and Markets Authority ("CMA") are currently updating their respective competition law guidance materials and block exemption regulations on technology transfer agreements, and have recently released important draft materials and recommendations.

- ***European Commission***. On 11 September 2025, the Commission published the Draft Technology Transfer Block Exemption Regulation ("draft EU TTBER") and accompanying draft Technology Transfer Guidelines ("draft EU TT Guidelines"). The Commission has also opened a public consultation running until 23 October 2025 seeking comments on the draft materials.

- ***UK CMA***. On 30 September 2025, the CMA issued its recommendation to the Secretary of State to adopt a new block exemption regulation to replace the Assimilated TTBER, which was retained after Brexit, and which is currently substantively the same as the EU TTBER.

The key changes presented in the draft materials and recommendations are summarised below.

Clarification of market share thresholds

The application of the EU and UK block exemptions are conditional upon the parties to a technology transfer agreement holding market shares below specific thresholds: 20% combined share for competitors and 30% individual share for non-competitors. However, the application of such thresholds, particularly concerning technology markets, raises practical challenges due to limited data visibility and the rapid evolution of new technologies.

To address these concerns, the Commission has proposed the following clarifications:

- for the purpose of applying market share thresholds in technology markets, technologies that have not yet generated sales of contract products in the preceding calendar year will be treated as holding a zero market share;

- the grace period, which allows the block exemption to continue to apply when market shares temporarily exceed the thresholds, has been extended from two to three years; and

- to address situations where data from the preceding calendar year may not be representative of the parties' market position, market shares are to be calculated as an average of the parties' market shares over the three preceding calendar years.

By contrast, the CMA has recommended retaining the existing market share thresholds for technology markets, while also introducing an alternative test, under which the block exemption would apply if three or more technologies exist that compete with the technology covered by the agreement.

Broader definitions of competitors and potential competitors

Under the current TTBER, a licensee is considered a potential competitor if it is likely to enter the relevant product market "*in response to a small and permanent increase in relative prices*". The Draft EU TTBER proposes to broaden this definition by removing the explicit link to a price increase. Instead, a party would now be considered a potential competitor if, absent the agreement, there would have existed "*real and concrete possibilities*" for that party to enter the relevant market and compete, provided this entry could occur "*within a timeframe that is sufficiently short to impose competitive pressure on undertakings that are already active on the relevant market*".

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level/United Kingdom

This revised definition of a potential competitor may impact on the compliance obligations of companies involved in technology licensing. If the counterparty to an agreement is a potential competitor, the agreement would be subject to the stricter 20% combined market share test (discussed above), and the agreement would be subject to a more restrictive list of hardcore prohibitions than those applicable to agreements between non-competitors.

In addition, the draft TT Guidelines broaden the concept of competitors by modifying the definition of blocking positions. Under the current TT Guidelines, parties are considered non-competitors if, at the time the licence was granted, they were in a one-way or two-way blocking position – meaning that a technology "*cannot be exploited*" or a party "*cannot be active in a commercially viable way*" without infringing the technology right of the other party. The draft TT Guidelines, however, expand this concept by defining a blocking position as a situation where a party is prevented from "*operating in or entering the relevant market*" without infringing such rights. Further, the draft TT Guidelines state that "*if both parties are already operating in the relevant market, it is very unlikely that they are in a blocking position, unless a final court judgment has confirmed the infringement and the validity of the intellectual property right*." The draft TT Guidelines also note that "*particularly convincing evidence of the existence of a blocking position is required where the parties have a common interest in claiming the existence of a blocking position in order to be qualified as non-competitors*".

New guidance on licensing negotiation groups

The draft EU TT Guidelines introduce new guidance on the competitive assessment of licensing negotiation groups ("LNGs"). In its recommendations, the CMA has indicated that the guidelines applicable in the UK would also address LNGs.

LNGs are arrangements whereby potential licensees jointly negotiate the terms of technology licences which they wish to obtain from technology owners. According to the draft EU TT Guidelines, LNGs meeting the following criteria qualify for a 'soft safe harbour':

- the LNG is open to all technology implementers meeting objective and non-discriminatory criteria;
- the LNG discloses to technology holders its operating rules and that it negotiates on behalf of its members;
- activities are restricted to joint negotiation of technology licence terms;
- there is no exchange of commercially sensitive information;
- technology holders and LNG members retain the freedom to negotiate and conclude agreements bilaterally, with the exception that LNG members may agree to restrict bilateral negotiations or conclude technology transfer agreements with a technology holder for up to six months during negotiations between that technology holder and the LNG in order to incentivise joint negotiation; and
- licensing fees negotiated through the LNG must not exceed 10% of the sale price of the products incorporating the licensed technology.

These conditions are stricter than those previously provided by the Commission in a specific case in which it assessed an LNG in the automotive industry (see VBB on Competition Law, Volume 2025, Nos. 7-8).

New guidance on data licensing

The draft EU TT Guidelines also include new guidance on data licensing. While the EU TTBER only covers data licensing when it constitutes know-how, the draft EU TT Guidelines now state that the Commission will also apply the principles set out in the Guidelines to data licensing

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level/United Kingdom

agreements between two undertakings for the production of goods or services, when the licensed data forms part of a database that is protected by copyright or by the *sui generis* right under Directive 96/9/EC on the legal protection of databases. The draft EU TT Guidelines explain that the assessment of these agreements mirrors that of traditional technology rights, as the creation of protected databases often requires significant investments, and their licensing can increase downstream innovation by reducing licensee costs or enabling new products.

The draft EU TT Guidelines also address the exchange of commercially sensitive information within the context of data licensing. The draft explains that such exchanges may infringe Article 101(1) TFEU if the database contains commercially sensitive information, and/or if the parties exchange such information to implement the data licensing agreement. Such exchanges of information will be assessed according to the principles set out in the Guidelines on Horizontal Agreements, although the draft EU TT Guidelines note that if a data licensing agreement itself does not restrict competition, then any ancillary exchange of information that is objectively necessary and proportionate to implement the agreement will equally not be prohibited.

With respect to the UK, rather than addressing such data licensing solely in the guidelines, the CMA's recommendations propose to broaden the definition of 'technology rights' in the new block exemption to explicitly include 'copyright in a database' and 'database rights'. The CMA's recommendation is based on the growing importance of data in the modern economy and the recognition that data licensing can drive innovation.

Modification of guidance on technology pools

Technology pools allow several technology right holders to group their technology rights in a single package, which they then license to pool members and third parties. The current EU TT Guidelines provide a soft safe harbour for the creation and operation of technology pools, as well as additional benchmarks for a case-by-case analysis where a pool falls outside the soft safe harbour.

To qualify for the soft safe harbour under the current EU TT Guidelines, the following conditions must be met: (i) participation in the pool creation process is open to all technology right holders; (ii) sufficient safeguards are adopted to ensure that only essential technologies are included in the pool and that the exchange of sensitive information is limited to what is necessary; (iii) the pooled technologies are licensed to the pool on a non-exclusive basis and on FRAND terms; (iv) both the parties contributing technology to the pool and the licensees may challenge the validity and essentiality of the pooled technologies; and (v) the contributing parties and the licensees are free to develop competing technologies. A technology is considered "essential" when it is indispensable to produce a particular product or carry out a particular process to which the pooled technologies relate, or if it constitutes a necessary part of the pooled technologies required to comply with the standard supported by the pool.

The Draft Guidelines introduce additional conditions for the application of the soft safe harbour. In particular, they also require that (i) the technology rights included in the pool be effectively disclosed to both potential and existing licensees; (ii) the methodology used to verify that only essential technologies form part of the pool be effectively shared with potential licensees; and (iii) the pool must ensure that licensees are not charged more than once for the same technology.

The CMA also plans to issue guidance on technology pools in the guidelines accompanying the next block exemption regulation.

Updated guidance on patent settlements

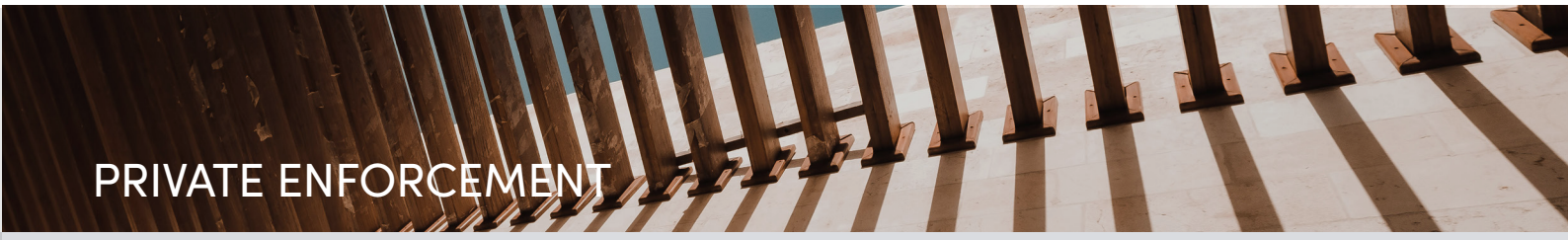
The Draft EU TT Guidelines state that 'pay-for-restriction' or 'pay-for-delay' settlement agreements between competitors are considered a restriction by object when

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

the transferred value clearly serves the commercial interests of the technology holder and the other parties involved not to compete, mentioning as an example payments that are large enough to discourage market entry or expansion. This clarification follows a series of ECJ judgments in the pharmaceutical sector concerning pay-for-delay settlement cases, notably *Generics UK, Lundbeck,* and *Servier.*

Withdrawal of block exemption

The Draft EU TT Guidelines expand the examples of circumstances that may warrant the withdrawal of the benefit of the block exemption by the Commission or national competition authorities. Specifically, withdrawal may be warranted (i) if customer access to the contract products is unduly limited as a result of restrictions on the ability of the licensor or licensees to make passive sales; and (ii) if royalties in a relevant technology market are set at a supra-competitive level as a result of the cumulative effect of similar cross-licensing agreements between competing undertakings.



PRIVATE ENFORCEMENT

European Union level

Court of Justice clarifies start of limitation period for follow-on antitrust damages actions based on National Competition Authority decisions

On 4 September 2025, the Court of Justice of the European Union ("ECJ") delivered its judgment in Case C-21/24 (*Nissan Iberia*) concerning the start of the limitation period for follow-on antitrust damages claims based on a decision of a National Competition Authority ("NCA").

In summary, the ECJ held that national legislation (in the case at hand, the Spanish rules on limitation as interpreted by the national courts), which determines that an injured party's has knowledge of the information necessary to bring a damages action based on an NCA decision (in the case at hand, the Spanish Competition Authority ("SCA")) before that decision becomes final, to be contrary to Article 101 TFEU, read in light of the principle of effectiveness, and Article 10(2) of Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions ("Damages Directive").

The ECJ considered that, where, under national law, courts hearing damages actions are bound by an NCA's finding of the existence of infringement only when the NCA's decision becomes final, the judicial review of those decisions plays a decisive role in the determination of the starting point of the limitation period for follow-on actions. The ECJ also clarified that such final judgments must fulfil the conditions of publication in an official, publicly accessible manner and bear a clearly established date of publication.

Background

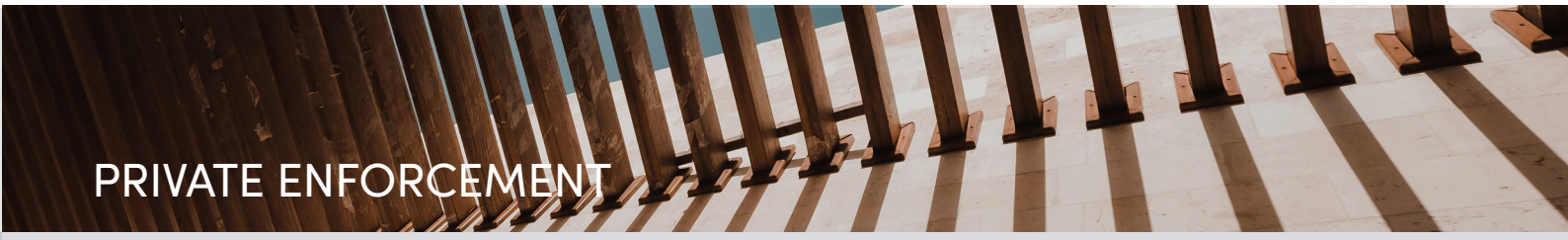
On 23 July 2015, the SCA issued a decision finding that several companies, including Nissan, had infringed Article 101 TFEU and Article 1 of the Spanish Competition Act. According to the decision, the anti-competitive conduct (exchange of commercially sensitive information) had ended in 2013. On 28 July 2015, the SCA published a relevant press release on its website. Following this, the full decision was published on SCA's website on 15 September 2015. The SCA decision was appealed and was ultimately upheld by the Spanish Supreme Court, as regards Nissan, in 2021, thus becoming final.

In March 2023, a follow-on action for damages was brought against Nissan before the Commercial Court of Zaragoza by a purchaser of a Nissan vehicle.

Nissan argued that the action for damages was time-barred on the basis of the one-year limitation period provided for in the Spanish Civil Code which was applicable prior to the transposition into Spanish law of the Damages Directive. Under the previous regime, the start of the one-year limitation period was linked to the knowledge of the infringement. According to Nissan, this knowledge had been acquired by the claimant as of the publication of the full decision on SCA's website (September 2015). In this respect, Nissan claimed that the SCA decision does not need to become final for the limitation period to begin to run.

There appear to have been conflicts in the approach followed by Spanish courts to this question. While the referring court appears to have endorsed Nissan's arguments, it appears that other national courts had ruled that the limitation period for follow-on antitrust damages actions cannot begin to run until the SCA's decision becomes final following judicial review.

In this context, the referring court asked the ECJ to clarify whether Article 101 TFEU, read in the light of the principle of effectiveness, and Article 10(2) of the Damages Directive (which governs the commencement of limitation periods) preclude national rules according to which the claimant should be considered to be aware



PRIVATE ENFORCEMENT

European Union level

of the information necessary to file a follow-on damages action based on a NCA decision before that decision becomes final.

It should be noted that the ECJ has previously dealt with the issue of the commencement of the limitation period for follow-on actions based on European Commission decisions in Case C-605/21, *Heureka Group* (see VBB on Competition Law, Volume 2024, No. 4). There, the Court held that a claimant may rely on the findings of a Commission decision under appeal, as such a decision remains legally binding until it is annulled.

Judgment

The ECJ first addressed the temporal application of Article 10 of the Damages Directive. For this purpose, the ECJ, relying on its judgment in *Heureka*, sought to establish whether - at the date of expiry of the time limit for transposition of the Damages Directive (i.e., 27 December 2016) - the one-year limitation period provided for in the Spanish Civil Code had elapsed. This, in turn, required the ECJ to ascertain the starting point of the limitation period on the basis of the applicable national rules – while taking account of the principle of full effectiveness of Article 101 TFEU.

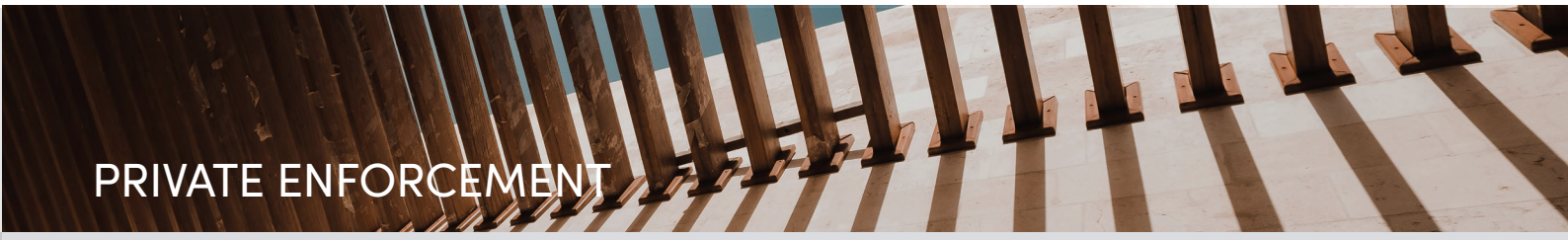
In this regard, the ECJ recalled that even the national legislation governing limitation periods applicable before the expiry of the time limit for the transposition of the Damages Directive needed to ensure the full effectiveness of Article 101 TFEU. According to the Court, this means that two conditions must be met before the limitation period commences, namely that the competition law infringement has ceased and that the claimant knows, or can be reasonably expected to know, the information necessary to bring an action for damages (i.e., the existence of a competition law infringement, the existence of harm, the causal link between the infringement and the harm, and the identity of the infringer).

On that basis, the ECJ held that a claimant cannot be considered to have such knowledge up until the time that the SCA decision becomes final. In this respect, the Court attributed particular importance to the fact that, under the national legislation, courts hearing damages actions are only bound by a finding of infringement set out in a final SCA decision. Conversely, this means that non-final SCA decisions do not include definitive information on which the claimant can rely to substantiate their damages action.

Importantly, the ECJ drew a distinction between the situation at hand and the start of limitation period for follow-on actions based on infringement decisions of the European Commission which produce binding effects for the national courts pursuant to Article 16(1) of Regulation No 1/2003 (dealt with in the *Heureka* case).

Additionally, the ECJ emphasised that the publication of the judgments that render NCA decisions final is an integral element of the knowledge requirement for the commencement of the limitation period. According to the Court, such judgments should be published in an official and publicly accessible manner and should bear a clearly established date of publication. In the case at hand, Cendoj, a freely accessible database operated by the Spanish General Council of the Judiciary, was considered to satisfy this publication requirement.

In light of the above, the ECJ stated that by the transposition deadline of the Damages Directive in December 2016, the one-year limitation period provided for in the Spanish Civil Code had not yet been initiated as the SCA decision became final only after the publication of the Spanish Supreme Court judgment in 2021. As a result, the ECJ ruled that Article 10 of the Damages Directive applied *ratione temporis*. The Court concluded that Article 101 TFEU, the principle of effectiveness and Article 10(2) of the Damages Directive preclude national legislation which attribute to the injured party knowledge of the information necessary to bring a follow-on damages action based on an NCA decision before that decision becomes final.



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European Union level

The *Nissan Iberia* judgment provides important clarifications in relation to the relevance of NCA decisions in the determination of the starting point of the limitation period for follow-on damages action. It is noteworthy that, earlier this year and in parallel with the ECJ proceedings, the Spanish Supreme Court had already settled the issue in a similar manner (see VBB on Competition Law, Volume 2025, No. 6). The relevance of the ruling for other EU Member State jurisdictions would likely depend on when NCA decisions are considered final under national law and remains to be seen.

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

Phone:+32 (0)2 647 73 50
E-mail: brussels@vbb.com

Geneva
2, Chemin des Mines
CH-1205 Geneva
Switzerland

E-mail: geneva@vbb.com

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

Phone: +44 (0)20 7406 1471
E-mail: london@vbb.com

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