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VBB on Competition Law

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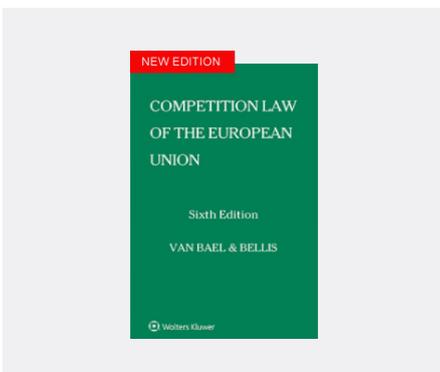
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MERGER CONTROL

National level

BELGIUM AND FRANCE

Belgian and French Competition Authorities continue to tackle mergers not caught by national merger control rules

On 12 November 2025, further to the instructions from the Belgian Minister for Economic Affairs, the Belgian Competition Authority (“BCA”) announced that it will investigate the acquisition of the Pukkelpop music festival by Live Nation. The transaction prompted concerns because of the multiple roles that Live Nation assumes in the music events sector in Belgium, replicating its worldwide activities as a leading organiser of large-scale music events, artist management company, provider of artist booking services, manager of large concert venues and operator of ticket sales. As the transaction was not notifiable under EU or Belgian merger control rules, the BCA will apply Articles 101 (on restrictive agreements) and/or 102 (on abuses of dominant market positions) of the Treaty on the Functioning of the European Union (“TFEU”) and its Belgian equivalents in its investigation.

The BCA has repeatedly shown that it will not hesitate to apply the antitrust rules to transactions that do not meet the thresholds for merger control review. Relying on the March 2023 ruling of the Court of Justice of the European Union in the *Towercast* case, the BCA prevented the acquisition of EDPnet by Proximus in 2023 and, earlier this year, the proposed acquisition of the artisan bakery business of Ceres by Dossche Mills Group. There is talk of supplementing this aggressive reliance on Articles 101 and 102 TFEU with new statutory powers for the BCA to “call in” mergers not caught by the Belgian merger control rules, a mechanism already adopted in numerous other EU Member States.

Meanwhile, on 6 November 2025, the French Competition Authority (“FCA”) found that telemedicine company Doctolib had abused its dominant position in the online medical appointment booking and remote medical consultation solutions sector. One of the objections raised against Doctolib was the non-notifiable acquisition

in 2018 of what was then its only emerging competitor, MonDocteur. The FCA found the transaction to be a “killer acquisition” that foreclosed the French market for online medical appointment booking. In reaching its findings, the FCA was assisted by self-incriminating documents produced by Doctolib, which were uncovered during the investigation. In particular, the FCA found internal evidence establishing Doctolib’s desire to “kill the [competing] product” and stating that “the creation of value [related to the transaction] is not the addition of [MonDocteur] but its disappearance as a competitor”. The FCA also noted that the transaction had allowed Doctolib to increase its prices several times more than if the acquisition had not occurred. As this was the first time that the FCA sanctioned as an abuse of a dominant position a merger below the notification thresholds, the fine related to this specific infringement was limited to €50,000 (out of a total fine of €4,665,000). Further information on other aspects of the case is provided in the Abuse of Dominant Position section below.

These cases illustrate the various ways in which mergers that fall below statutory thresholds and hence do not require prior notification and approval can nevertheless be reviewed by national competition authorities in Europe, a risk that must be carefully assessed and managed by companies engaging in such mergers. Indeed, the *post factum* review of such mergers under the traditional competition rules (Article 101 or 102 TFEU) is an avenue which competition authorities around Europe have started to pursue to cast a wider enforcement net than would be possible under the current merger control rules (see, e.g., [Van Bael & Bellis Life Sciences News and Insights of 23 March 2023](#)).



FOREIGN DIRECT INVESTMENT

National level

CYPRUS

Cyprus introduces FDI screening regime

On 30 October 2025, the Cypriot House of Representatives adopted Law No 194(I)/2025 entitled “*On the Establishment of a Framework for the Screening of Foreign Direct Investments Law*” (the “FDI Law”) which introduces a mandatory screening regime for foreign direct investments (“FDI”) on grounds of security or public order. The FDI Law will enter into force on 2 April 2026.

Under the FDI Law, foreign investors (i.e., natural persons who are not citizens of an EU/EEA Member State or Switzerland or legal persons established outside the EU, the EEA and Switzerland) are required to notify in advance their investment if the following cumulative conditions are met:

1. The FDI results in: (i) the acquisition of a “special participation” in the target entity, which is defined as the acquisition, directly or indirectly, individually or in coordination with other persons, of at least 25% of the share capital and/or voting rights in, or of the corresponding ability to exercise decisive influence over, the activities of the target entity, or (ii) the increase of an existing special participation in the target entity from below 25% of share capital and/or voting rights to at least 25%, or from below 50% to at least 50%.
2. The value of the FDI is at least €2 million, also taking into account the investment value of any other transactions between the same parties within the past 12 months. This condition does not apply where the FDI results in an increase of an existing participation from below 25% to at least 25%, or from below 50% to at least 50%.
3. The FDI concerns an undertaking of strategic importance, i.e., an undertaking which is active in one of the particularly sensitive sectors set out in the Annex of the FDI Law. These include critical

infrastructure, whether physical or virtual, including infrastructure in the sectors of energy, transport, water, health, education, tourism, communications, media, data processing or storage, aerospace, defence, electoral or financial services (including systemic credit institutions), sensitive facilities, as well as land and real estate crucial for the use of such infrastructure. The Annex of the FDI Law also covers critical technologies and dual use items, including technologies in artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies and biotechnologies, as well as the supply of critical inputs, including energy or raw materials, and food security. On the other hand, investments involving shipbuilding and ship sale and purchasing, except for floating storage and regasification units, are excluded from the mandatory regime of the FDI Law.

The mandatory regime also applies to FDIs by any legal person in which a foreign investor (a) holds at least 25% of the share capital and/or voting rights, and/or (b) is the ultimate beneficial owner, and/or (c) has direct or indirect control.

Planned investments subject to mandatory notification cannot be completed without prior approval from the competent authority (i.e., the Cypriot Ministry of Finance). The authority may examine any FDI, whether subject to mandatory notification or not, where it legitimately considers that the FDI could potentially affect security or public order in Cyprus. If the FDI is not subject to mandatory notification, the authority has 15 months from the date on which the investment was made to exercise this call-in power. For FDIs subject to notification but not notified, the power of the authority extends to five years from the date on which the investment was made.



FOREIGN DIRECT INVESTMENT

National level

The FDI must be notified before the completion of the investment. Upon receipt of a complete notification, the authority has 20 working days to decide whether the FDI is subject to screening and another five working days to notify the foreign investor of its decision. If the case enters Phase 2, the authority has an additional 65 working days to decide whether the FDI affects security or public order in Cyprus and another five working days to notify the foreign investor of its decision. These deadlines may be suspended in case the competent authority requests additional information or clarifications from the foreign investor, and up until the submission of the requested information.

In case of failure to notify, the competent authority may impose an administrative fine ranging from €5,000 to €50,000, as well as prohibit or unwind the FDI. Higher fines up to €100,000 are envisaged for the provision of misleading information or for non-compliance with the conditions or measures ordered by the competent authority (in the latter case, an additional fine of up to €8,000 may be imposed for each day of non-compliance).

GREECE

Greece officially activates filing process for FDI screening mechanism

On 10 November 2025, the Greek Government adopted Joint Ministerial Decision No 64260/2025 which stipulates the detailed FDI filing process, application form and required documentation for notifying the national competent authority of foreign investments. The Ministerial Decision, which was published in the Government Gazette on 11 November 2025, entered in force with immediate effect, officially activating Greece's FDI screening regime which was adopted in May 2025 (see [VBB on Competition Law, Volume 2025, No. 5](#)). From now on, foreign investors are expected to submit their investments falling under the scope of the FDI mechanism for review.

ABUSE OF DOMINANT POSITION

European Union level

European authorities consult on draft joint guidelines on interplay between DMA and GDPR

On 9 October 2025, the European Data Protection Board and the European Commission (“Commission”) opened a public consultation on their draft Joint Guidelines on the Interplay between the Digital Markets Act and the General Data Protection Regulation (“Joint Guidelines”). While the Digital Markets Act (“DMA”) and the General Data Protection Regulation (“GDPR”) have different purposes, objectives and scopes, they apply in parallel to gatekeepers and therefore must be interpreted and applied in a compatible manner. However, while the Joint Guidelines provide useful guidance on certain provisions, they fail to provide guidance and legal certainty on a number of crucial and complex practical issues for the parallel applications of these two legal instruments in the digital economy.

Overview of the Joint Guidelines – DMA focus

Among other things, the Joint Guidelines provide guidance on the following provisions of the DMA:

- **Article 5(2) – valid user consent.** Pursuant to this provision, the DMA prohibitions on processing (for providing online advertising services), combining and cross-using personal data, and signing in end users to other services (to combine personal data) do not apply where the end user (i) has been presented with the specific choice of whether to allow the relevant act; and (ii) has given valid consent to the same.

The Joint Guidelines provide guidance on the elements that gatekeepers should consider in order to comply with the requirement of valid consent. Specifically, consent should be given by a clear affirmative action or statement establishing a freely given, specific, informed and unambiguous indication of agreement by the end user. For example, separate consents should be given for distinct purposes of data processing, combination or cross-use. Acceptance

and refusal options should be presented in neutral terms, without misleading or nudging end users towards consenting. There should be no pre-ticked boxes in consent requests and consent requests cannot be presented to an end user (who has made a choice) for the same purpose more than once a year.

The Joint Guidelines also describe the circumstances where consent may not be required, such as cross-use of personal data between a core platform service (“CPS”) and services provided together or in support of such CPS (i.e., services with a close functional interconnection with the CPS such as identification or payment services). The material and temporal scope of the personal data should be limited to what is strictly necessary to offer the interconnected functionalities.

- **Article 6(9) – data portability.** This provision enshrines the end users’ right to data portability and complements Article 20 GDPR insofar as the requesting end user is also a data subject pursuant to the GDPR. Article 6(9) DMA does however differ from Article 20 GDPR as it (i) applies irrespective of the lawful ground under which data has been processed by the gatekeeper under the GDPR; (ii) is not limited to personal data but applies to all data provided by the end user or generated through the activity of the end user on the CPS; and (iii) requires gatekeepers to enable continuous and real-time data portability to end users or third parties authorised by them.

In the draft, guidance is provided on the portability of personal data of individuals other than the end user. This must be done in compliance with the GDPR obligation on transparency and therefore data subjects must be informed about the recipients or categories of recipients of their personal data. Further, end users or their authorised third parties

ABUSE OF DOMINANT POSITION

European Union level

must be given relevant tools to exclude personal data of other individuals from the data set and must be warned that they are responsible for the processing of the personal data of other individuals that they are requesting.

Since gatekeepers are also required to comply with the GDPR obligations on integrity and confidentiality and security of processing, gatekeepers can request third parties' identity details and information on whether, and to what extent, the data porting will involve the transfer of personal data to a country not recognised as providing an adequate level of protection by the Commission (in which case, the explicit and specific consent of the end user is required for the transfer). Gatekeepers must have appropriate authentication measures in place but cannot make data portability conditional on the business use case/purpose and should not gather information about authorised third parties' GDPR compliance.

- **Article 6(10) – third party data access.** This provision obliges gatekeepers to provide data access to business users and authorised third parties. The Guidelines clarify that, when providing such data access, gatekeepers should establish effective and user-friendly authentication and authorisation procedures, in order to ensure that gatekeepers only process data access requests from a business user or a third party duly authorised by the business user. Gatekeepers should inform end users about the data access rights of business users and authorised third parties, and about specific recipients of their personal data. Gatekeepers are also required to provide a mechanism for business users to be able to effectively obtain end users' informed consent to access their personal data, e.g., by way of a configured online interface via the relevant CPS (which also allows for withdrawal of consent), although gatekeepers are not required to assess the validity of end user consent provided via such mechanisms.

Observations

While guidance on the interplay between the DMA and the GDPR is crucial for the purposes of developing a consistent regulatory framework for technology companies operating in the EU, the draft Joint Guidelines unfortunately fail to take a position on some of the complex challenges technology companies face. While they do address some areas of overlap between the two regulations (notably in the context of Articles 5(2) and 6(9) DMA), and serve as a helpful reminder that gatekeepers must continue to comply with GDPR obligations regardless of whether the relevant conduct is caught by the DMA, they do not provide sufficient insight into the practicalities of compliance.

For example, the Joint Guidelines explain that gatekeepers – for the purposes of complying with Article 6(11) DMA – are required to select a means of anonymising ranking, query, click and view data that (i) preserves the most quality and usefulness of the data for the third party requesting access, while also (ii) ensuring that the data is anonymised taking into account all the means reasonably likely to be used by the third party or by another person to identify end users directly or indirectly. Indeed, the Joint Guidelines recognise that anonymisation techniques inherently reduce the usefulness of the data for the data receiver, but instead of providing practical guidance on how to strike a balance between achieving effective anonymisation while maintaining competitive utility, this practical assessment is left up to gatekeepers.

Similarly, the Joint Guidelines offer limited, if any, guidance on the practicalities of how gatekeepers can offer a less personalised but equivalent alternative of their CPS service to end users who refuse consent to the processing, combination or cross-use of personal data covered by Article 5(2) DMA. This topic has been the subject of significant debate in recent months, particularly in the context of Meta's Pay or Consent model.

ABUSE OF DOMINANT POSITION

European Union level

It might have been expected that the Joint Guidelines would shed further light on this difficult topic, which they unfortunately do not. The Joint Guidelines also take the view that the imbalance of power between gatekeepers and end users can impact the validity of consent given by end users, and given the Commission's perception of there being limited competition in these markets, such vague protective provisions render compliance even more fraught with legal uncertainty.

ABUSE OF DOMINANT POSITION

National level

FRANCE

French Competition Authority imposes substantial fine on telemedicine firm on account of abusive conduct

In a decision published on 6 November 2025, the French Competition Authority (“FCA”) imposed a fine of more than €4.5 million on telemedicine company Doctolib for abusing its dominant position in the online medical appointment booking and remote medical consultation solutions markets.

The FCA held that on these markets Doctolib had (i) foreclosed competitors by tying healthcare professionals to its services; and (ii) restricted competition by acquiring in 2018 what was then its only emerging competitor. The FCA considered these practices to be abusive in breach of Article 102 TFEU and Article L-420-2 of the French Commercial Code.

Foreclosure

Doctolib applied an exclusivity clause in its subscriptions with healthcare professionals which prevented these professionals from using other medical appointment booking services or remote consultation solutions. The FCA indicated that it had found “numerous internal documents” that evidenced this lock-in strategy, including advice from in-house counsel that had warned that the exclusivity clause was “illegal under competition law” and should be deleted.

Healthcare professionals were also always obliged to take out a subscription to the online medical appointment booking service if they expressed an interest in the remote medical consultation solution.

Killer acquisition

The second abuse consisted of the acquisition in 2018 of a rival in the market for medical appointment booking services, MonDocteur. That transaction did not meet

the financial thresholds for notification under applicable merger control rules and had therefore initially escaped the scrutiny of the FCA or the European Commission. Further detail on this aspect of the case is provided in the Merger Control section above.

ITALY

Italy’s top administrative court clarifies legal standard for abuse of economic dependence

On 3 October 2025, the Italian Council of State (“Court”) handed down a judgment providing key guidance on the concept of abuse of economic dependence under Italian law and the Italian Competition Authority’s (“ICA”) enforcement powers in this field. On the facts, the Court upheld the ICA’s finding in a 2021 decision that subcontractor Soluzioni was economically dependent on Poste Italiane (“Poste”), but confirmed the Regional Administrative Tribunal for Latium’s (“RATL”) annulment of the €11.3 million fine imposed by the ICA in that decision, finding that no abuse had been proven.

Background

Soluzioni provided mail delivery services for Poste in Naples. Between 2007 and 2012, Soluzioni won all tenders organised by Poste for the Naples area, operating almost exclusively for Poste. In 2016, Poste launched a new tender for Naples, which Soluzioni lost to another operator.

In a 2021 decision, the ICA found that Poste had abused Soluzioni’s position of economic dependence by imposing unfair contractual clauses, including provisions banning Soluzioni from combining delivery of Poste’s mail with third-party mail and allowing Poste to unilaterally vary delivery volumes, effectively preventing Soluzioni from expanding its client base. The ICA imposed a €11.3 million fine on Poste. Poste subsequently appealed against the

ABUSE OF DOMINANT POSITION

National level

ICA's decision before the RATL, which in 2023 partially upheld the appeal holding that the contested clauses did not amount an abuse. The ICA then brought an appeal before the Court against the RATL's ruling.

Establishment of economic dependence

In its judgment, the Court confirmed that Soluzioni was economically dependent on Poste, while criticising the ICA's overly formalistic approach to the existence of an abuse. The Court emphasised that economic dependence is a factual situation that cannot be assessed solely on the basis of contract clauses. Rather, the Court indicated that the ICA must also carry out a realistic assessment of the factual circumstances, evaluating whether the dependent undertaking is effectively subject to the other's unilateral power and whether it has any realistic alternatives. The Court further clarified that an "excessive" imbalance of contractual rights and obligations is relevant to the existence of the abuse itself, not the issue of economic dependence.

The Court underlined the importance of analysing switching costs (i.e., the additional costs a party would bear or the benefits it would forgo if it replaced its contractual counterparty) in assessing economic dependence. In this regard, the Court indicated that the choice to participate in tenders may itself be an expression of dependence.

The Court found that the relationship was characterised by Soluzioni's substantial dependence on contracts with Poste (from which it derived 90-95% of its turnover), operational integration requiring investments tailored to Poste's production process (including hardware and software supplied by Poste) and the absence of viable alternatives. The Court held that alternatives must be real, satisfactory, capable of allowing the weaker undertaking to remain competitive and maintain a position equivalent to that previously held, within a reasonable period of reconversion or reorganisation. The 5-10% of turnover from other clients did not constitute viable alternatives capable of replacing Poste.

Absence of abusive conduct

Despite confirming that Soluzioni was economically dependent on Poste, the Court held that the ICA had not established the existence of an abuse. The Court criticised the ICA's formalistic approach based on abstract analysis of contractual provisions, holding that clauses must be assessed in their economic and market context. The Court explained that abuse of economic dependence requires either arbitrary conduct contrary to good faith or intentional oppression of the other undertaking, pursued for aims unrelated to lawful business. Conduct serving an appreciable business interest of the dominant undertaking does not constitute abuse.

Regarding the joint delivery prohibition, the Court held that the clause served a specific, rational and objective purpose for Poste, namely ensuring service quality and timely delivery.

Regarding volume variability clauses, the Court noted that the postal sector regulator had documented declining demand and variability in postal volumes. These market realities were generally foreseeable by economic operators acting with ordinary business prudence, making volume variation clauses reasonable. The Court held that the ICA had failed to investigate whether Soluzioni's business structure was adequate in light of general market conditions, focusing only on contractual commitments, rather than conducting a substantive inquiry into whether Soluzioni could reasonably have anticipated and adapted to market-driven variations.

Absence of conduct with market relevance (to trigger ICA's enforcement powers)

Under Italian law, the ICA can only intervene with its public enforcement powers if an abuse of economic dependence also has "market relevance", meaning conduct that distorts the structure of the market or harms competitors (not merely the contracting party). According to the Court, this condition is met only if the abuse forms part of an

ABUSE OF DOMINANT POSITION

National level

exclusionary strategy. On the facts, the Court found such evidence lacking, as allegations in this regard were unsupported.

Key takeaways

The Court's judgment provides significant clarifications regarding the scope of the prohibition of abuse of economic dependence under Italian law and sets out the applicable legal standard. In particular:

- **Realistic assessment over formalism:** The judgment underscores the need for a substantive, fact-based inquiry when assessing the existence of both economic dependence and abusive conduct.
- **Distinction from abuse of dominance:** The Court distinguishes abuse of economic dependence (based on "relative power" assessed at the level of a bilateral relationship) from abuse of dominance (based on "absolute market power"). Accordingly, the Court indicated that certain antitrust concepts, notably the notion of "undertaking", are not applicable in this context, as they would conflict with the bilateral nature of the relationship. Accordingly, transactions between the weaker party and other companies in the stronger undertaking's corporate group were excluded from the assessment of both the existence of dependence and the alleged abuse.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Court of Justice clarifies framework for transfer of leniency statements and settlement submissions between public authorities

On 30 October 2025, the Court of Justice of the European Union ("ECJ") gave judgment on a request for a preliminary ruling from the Austrian courts on questions concerning the transfer of leniency statements and settlement submissions between public authorities (e.g., a disclosure of such materials by a competition authority to a public prosecutor or other criminal enforcement authority) (Case C-2/23 *FL und KM Baugesellschaft*). The judgment provides important guidance on the circumstances in which such transfers may take place and the safeguards they must observe.

Background

In Austria, the public prosecutor conducted a criminal investigation into bid-rigging in the construction sector between 2006 and 2020. In parallel, the Austrian Federal Competition Authority ("FCA") initiated cartel proceedings. Two of the construction companies involved submitted a leniency application and received a reduced fine from the cartel court. In the context of mutual assistance, the public prosecutor requested and received a copy of the file from the cartel court, and of certain documents from the FCA, including leniency statements and settlement submissions that had been made by the parties (for ease of reference, together "leniency statements"), together with their annexes. The public prosecutor instructed the police to carry out further investigations on the basis of the information obtained.

Despite the requests of the two affected construction companies to the contrary, the public prosecutor added the documents to its file and agreed, on a provisional (rather than permanent) basis, only to exclude the leniency statements from access to file by the other parties under criminal investigation and by the injured persons.

The two companies challenged this decision through the national courts. The Higher Regional Court of Vienna referred three questions to the ECJ on the extent of protection conferred on leniency statements by the Damages Directive (Directive 2014/104) and ECN+ Directive (Directive 2019/1). In particular, it asked whether the protection: (i) was absolute (therefore preventing any use of such statements in criminal proceedings); (ii) extended to materials supporting leniency statements; and (iii) entailed that no other parties to criminal or civil proceedings could access or inspect those statements and materials.

Transmission of the file between from a competition authority to another public authority is not specifically governed by EU law, but the mechanism for administrative assistance must not undermine the effective application of Article 101 TFEU

In its judgment, the ECJ observed that the transfer of the file from a competition authority to another public authority, in the context of mutual assistance, does not fall within the material scope of either the Damages Directive or ECN+ Directive. However, as the leniency statements were drawn up in the context of the application of Article 101 TFEU by the FCA, the ECJ answers the first question by reference to whether Article 101 TFEU precludes national legislation from allowing such a transfer.

Relying on its recent judgment in C-511/23 *Caronte & Tourist*, the ECJ stated that, while Member States are competent to decide on how an administrative assistance mechanism works, they must exercise this competence in a way which does not jeopardise the effective application of Articles 101 and 102 TFEU. The Court then recalled its *Pfleiderer* and *Donau Chemie* case-law concerning

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European Union level

the usefulness of leniency programmes, and the fact that their effectiveness could be undermined if leniency statements are disclosed to those seeking damages. It concluded that, similarly, administrative assistance must be structured in such a way as to prevent the protection afforded to leniency statements being rendered meaningless through access or disclosure.

In short, the ECJ held that the transmission of leniency statements (and settlement submissions) between authorities is permitted, provided that such a mechanism “does not undermine the effectiveness” of Article 101 TFEU. This is not a surprising outcome. The interest lies in the Court’s answer to the question of who might have access, and in which types of proceedings.

Defendants in criminal proceedings can access leniency statements and settlement submissions where necessary to exercise their rights of defence; other parties to criminal proceedings (including those seeking damages) have no such right of access

In criminal proceedings, Austrian law in principle permitted other parties under investigation (e.g., co-defendants) to access leniency statements and settlement submissions, as well as other parties to the criminal proceedings, such as those seeking compensation for harm caused by the competition law infringement. The ECJ addressed the question of whether this was permitted by Article 31(3) of the ECN+ Directive (access to file and related limitations).

The ECJ held:

- The right to a fair trial and the rights of defence mean that Article 31(3) of the ECN+ Directive must be interpreted to allow the disclosure of leniency-type statements (where relevant and necessary) to defendants in criminal proceedings. These disclosure rights are not absolute: it may be necessary to withhold certain evidence so as to preserve the rights of another individual or safeguard an important

public interest. However, access cannot be refused simply by reference to the claimed ‘leniency nature’ of the document: a case-by-case examination of the document’s content is required. The Court here draws on Articles 47 and 48(3) of the EU Charter of Fundamental Rights, and relevant case-law of the European Court of Human Rights (*Yakuba v Ukraine* and *Mirilachvili v Russia*);

- In respect of parties other than defendants in criminal proceedings, the text of Article 31(3) of the ECN+ Directive applies, ‘as is’. In other words, the ECJ found that access to leniency-type statements may only be granted to parties *subject to competition law enforcement procedures*, when necessary for exercising their rights of defence. This means that all other persons, including non-defendant parties in criminal proceedings and those seeking damages, have no such rights of access. In short, the transfer of a competition law file to a criminal enforcement authority cannot be used to change or undermine the level of protection against disclosure to non-defendant parties.

Leniency and settlement protection only extends to the statement itself, not supporting or pre-existing materials

In its judgment, the ECJ confirms that the leniency and settlement protection granted under Article 31(3) of the ECN+ Directive only relates to the statements and submissions themselves and not to supporting or pre-existing materials. Its view is based on the following factors:

- Article 31(3) expressly refers to “*leniency statements*” and “*settlement submissions*”. These terms are defined under Article 2(1)(17) and (18) of the ECN+ Directive as referring to documents drawn up specifically for the relevant procedure, and do not cover pre-existing materials;

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

- Damages actions by injured parties strengthen the working of the competition rules (*Pfleiderer*), but are characterised by information asymmetry (*Volvo and DAF Trucks*). The ECJ did not spell this out, but the implication is that while leniency is important, so is redress for injured parties;
- The Court has previously ruled (*Evonik Degussa*) that the disclosure of materials supporting a leniency statement was permissible.

Accordingly, leniency/settlement protection does not cover “documents and information provided in order to explain, specify the detail and prove the content” of any leniency/settlement statement itself.

Key takeaways

The ECJ continues to attach a high importance to leniency protection, but tempers this with the rights of defence. Accordingly, outside the narrow group of defendants in competition law or criminal law proceedings, disclosure of leniency statements and settlement submissions remains prohibited.

In practice, however, the appropriate scope of protection is not always so straightforward. While the leniency statement itself is clearly protected, decisions of competition authorities will also typically redact (relying on *Evonik Degussa*) details such as those which might help identify the source of the leniency information. Which details may legitimately be redacted can be a matter for debate, and claimant lawyers may disagree with the position taken by the competition authority. This happened in for example the Norwegian Trucks cartel cases, where the EFTA Surveillance Authority and European Commission raised concerns before the Norwegian Supreme Court about the extent of disclosure contemplated by the national courts. In the end, the Norwegian courts took a relatively claimant-friendly approach to disclosure, and the Court of Appeal’s judgment awarding damages recently became final, following the Supreme Court’s rejection of further leave to appeal.

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National level

SPAIN

Spanish High Court annuls tobacco information exchange decision

On 3 November 2025, the Spanish High Court (“High Court”) annulled the decision adopted by the Spanish Competition Authority (“SCA”) in 2019 imposing fines on three tobacco producers (Philip Morris Spain, Altadis and JT International) and their Spanish wholesale distributor, Logista, for allegedly engaging in a single and continuous infringement of Article 101 TFEU and the equivalent provision of national law by exchanging of strategic information (see [VBB on Competition Law, Volume 2019, No. 4](#)). According to the High Court, contrary to the SCA’s findings in its decision, the exchange related to non-strategic information that could not influence business decisions and distort competition.

The SCA’s decision

In its decision, the SCA found that the parties had participated in an exchange of information concerning “sell-in” volume data (i.e., sales from Logista to downstream retailers). The data was shared on a daily basis through Logista’s proprietary online reporting platform, originally intended for logistics management, which granted each manufacturer access to a detailed breakdown of Logista’s wholesale volumes by brand, product and geographic area. The SCA considered that this non-public and reciprocal flow of information went beyond the aggregated data that Logista was required to submit to the Tobacco Market Regulator (which, in turn, published monthly aggregated sales data at provincial level) and allegedly reduced market uncertainty, stabilised market shares and contributed to parallel pricing behaviour. While acknowledging that information exchanges may, in certain cases, amount to a *by object* restriction of competition, the SCA decided in this case to first assess whether the data could be considered strategic and, once this was established, carried out an effect-based analysis. The SCA eventually concluded the practice had collusive effects and imposed fines on the parties. The manufacturers and Logista appealed against the decision before the High Court.

The High Court’s ruling

The High Court noted that to establish a restriction of competition *by effect* (rather than *by object*), the SCA was required to meet a higher evidentiary threshold and demonstrate a clear causal link between the information exchange and the alleged deterioration of competitive conditions in the market. To do so, the SCA was required to provide a coherent economic analysis supported by evidence that the practice was capable of restricting competition. It also had to conduct a plausible counterfactual analysis showing how the market would have evolved absent the conduct. The High Court further stressed that the judicial review of complex economic assessments made by the SCA must relate to the coherence, reliability and sufficiency of the SCA’s economic reasoning.

In this regard, the Court found that the alleged strategic value of the information exchange had not been proven by the SCA. The information’s temporal and geographic scope was found to be irrelevant for the three competitive factors influencing the Spanish tobacco market (pricing, product innovation and sales promotions). The High Court stated that sharing sell-in volumes, with insufficient granularity to influence pricing, promotions or innovation, lacked the level of strategic value that could justify a *by object* approach. Further, it expressly noted that the sharing of sell-out data (i.e., data on sales from retailers to consumers) would have been more strategic in nature, since, in comparison, the sell-in data shared did not allow manufacturers to design, align or monitor pricing or promotional strategies in any decisive manner.

The High Court also found that the SCA had failed to establish a robust causal link between the exchange and its purported effects. Although the exchange system had been in place since 1999, the SCA only identified anticompetitive effects from 2008 onwards without providing any empirical justification. According to the High Court, these elements undermined the alleged causality

CARTELS AND HORIZONTAL AGREEMENTS

National level

between access to the data exchanged and a reduction of competitive pressure.

Finally, the High Court found no concrete evidence of anticompetitive effects. According to the Court, the SCA's narrative that the exchange eliminated uncertainty and avoided price wars remained speculative, as it did not prove that manufacturers' business decisions were affected by the sell-in data. The High Court also accepted expert opinions suggesting that parallel pricing could occur in a highly regulated and transparent oligopoly, without implying collusive price coordination.

For these reasons, the High Court concluded that the SCA had not met the evidentiary standard required to find a restriction by effects and annulled the SCA's decision in its entirety.

Key takeaways

The approach taken by the SCA to establish a by effect restriction contrasts with recent decisions in other Member States concerning information exchanges in the tobacco sector, which were based on findings of by object restrictions (thus, not requiring an effects-based analysis) because they related to the exchange of future pricing (i.e., a category of data that is generally considered strategic). Specifically:

- In Belgium, the Market Court partly upheld the Belgian Competition Authority's finding of an infringement by object based on tacit consent, concluding that the indirect sharing of confidential future pricing intentions among four cigarette manufacturers through their common distributors constituted an anti-competitive concerted practice (see [VBB on Competition Law, Volume 2022, No.7](#)).
- Similarly, in the Netherlands, the Dutch Competition Authority ("DCA") imposed fines of over €82 million on four tobacco manufacturers for indirectly exchanging future retail pricing intentions via wholesalers based

on evidence such as explicit requests for competitors' price lists and internal emails recommending price increases. The conduct was therefore treated as a hub-and-spoke cartel and classified as a restriction by object. The manufacturers appealed against the decision, but the Rotterdam District Court dismissed the challenge and confirmed the DCA's approach (see [VBB on Competition Law, Volume 2023, Nos. 7-8](#)).

While the High Court's judgment can still be appealed, it is a useful reminder of the limits of competition authorities in proving restrictions of competition by effect, even in highly regulated and concentrated markets with significant market information flows. In particular, the High Court's judgment raises the bar for effects-based enforcement in Spain and signals that future information exchange cases will need a robust economic foundation to withstand judicial scrutiny, with a particular focus on the strategic competitive value of the information concerned and the need for a proper counterfactual analysis.

VERTICAL AGREEMENTS

National level

UNITED KINGDOM

UK CAT clarifies rules on exhaustion of IP rights for software resale

On 12 November 2025, the UK's Competition Appeal Tribunal ("CAT") handed down its judgment in *JJH Enterprises Limited ("ValueLicensing") v Microsoft Corporation ("Microsoft")*, in which the CAT addressed two preliminary issues with significant implications for the resale market in pre-owned software licences.

ValueLicensing was a vendor of pre-owned licences for Microsoft software products. In the main proceedings, ValueLicensing claimed that Microsoft migrated customers from perpetual licences to its subscription-based service (Microsoft 365), and in so doing had required customers either to surrender or to retain (i.e., to not sell) the perpetual licences they no longer required in exchange for discounts – thus hindering the supply of pre-owned licences to resellers. ValueLicensing argued that this conduct amounted to (i) the conclusion of anti-competitive agreements; and/or (ii) an abuse by Microsoft of its dominant position contrary to, respectively, Articles 101 and 102 TFEU (and analogous provisions under the Competition Act 1998). In its defence, Microsoft argued that (i) the relevant agreements would fall within the scope of Article 101(3); (ii) the conduct would be objectively justified as a proportionate means to protect Microsoft's IP rights if the CAT were to consider the conduct to be an abuse of dominance; and/or (iii) any anti-competitive effects arising from Microsoft's conduct were proportionate to the pro-competitive effects. The CAT therefore ordered the hearing of two preliminary issues related to IP rights, each of which is explored in more detail below.

The first preliminary issue

The CAT first considered whether licensed usage for Microsoft Windows and Microsoft Office purchased by customers in bulk (i.e., through single orders for multiple users) could be resold individually, or whether the terms applicable when the licensed access rights for multiple

users were first purchased from Microsoft would continue to apply which, as a result of contractual minimum quantity requirements, would restrict resale on an individual basis.

According to the Court of Justice of the European Union ("ECJ") in *UsedSoft*, applied by the CAT, copyright does not prevent perpetual licenses from being resold as the copyright holder's distribution rights are exhausted "on the occasion of the first sale in the European Union by that right holder" of the product in question. The ECJ stated that the imposition of contractual terms opposing resale does not prevent the consequences of exhaustion and therefore cannot prohibit further transfers. However, the ECJ also held that, where individual licences grant access rights to multiple users, these individual licences cannot be subdivided for the purpose of resale as the acquirer is not authorised by the effect of exhaustion to resell only some of the user access rights granted by the individual licence.

In Microsoft's view, the arrangement under which it commercialised Microsoft Office and Microsoft Windows involved the sale of an individual licence giving the acquirer access to a minimum quantity of licensed usage (rather than the sale of a bundle of individual licences) and therefore, applying *UsedSoft*, the individual licences could not be subdivided and resold. As explained by an employee of Microsoft, customers that purchase Microsoft Office and Microsoft Windows are provided with a single link to the Microsoft server to download an installation file, from which the customer installs the number of copies permitted by its licences, a unique digital key being then needed to activate each installation for each user. The CAT, however, disagreed with Microsoft, finding that, although there was a single purchase agreement, the arrangement gave rise to a contract for multiple licences (also reflected by language used in Microsoft's own contractual documentation).

VERTICAL AGREEMENTS

National level

Microsoft additionally argued that customers received favourable pricing in exchange for the purchase of minimum usage quantities and that this minimum quantity requirement should attach to any resale to ensure that a second acquirer did not obtain rights broader than those of the first acquirer. Again applying *UsedSoft*, the CAT disagreed, holding that a rights owner cannot contract out of the legal effects of exhaustion. The CAT therefore concluded that the subdivision and resale to different customers of user rights acquired from Microsoft under a single purchase agreement *was permissible* – the first acquirer must however no longer be able to use the copy of what they resold to ensure there are not more copies in circulation than had originally been licensed.

The second preliminary issue

Secondly, the CAT assessed whether Microsoft could continue to control the distribution and reproduction of non-program works (such as the graphic user interface, clip art, user manuals, helpfiles and typefaces/fonts) once the rights to the computer programs (Microsoft Office and Microsoft Windows) have been exhausted.

The CAT relied on the ECJ's judgments in *Tom Kabinet* and *Nintendo* in assessing the product placed on the market *as a whole* rather than considering each copyrighted work separately. The CAT concluded that, in this case, the non-program works were ancillary or incidental to the computer programs: they existed to allow users to use the computer programs fully and to fulfil their function. Furthermore, the Microsoft contractual documentation in question did not distinguish between computer programs and non-program works. The CAT therefore determined that there was no evidence that a first purchaser of Microsoft Windows or Microsoft Office would understand that they cannot sell the computer program along with the other works as if it were their own, and that they would therefore have a legitimate right to expect to be able to sell the computer program without needing Microsoft's consent owing to non-program elements.

Key takeaways

This judgment provides important clarifications on the scope of exhaustion of IP rights in computer programs under UK law following Brexit, confirming in particular that UK courts will continue to apply the principles established in *UsedSoft* (as they concern the interpretation of EU Directives that had been transposed into UK law before 31 December 2020).

Moreover, the CAT's rejection of contractual restrictions on the subdivision of licences purchased in bulk confirms that exhaustion cannot be circumvented through contractual terms. Software vendors cannot therefore – as a matter of copyright law – invoke minimum purchase requirements or other contractual restrictions to prevent the legitimate resale of perpetual licences by enterprise customers. Furthermore, the existence of multiple ancillary copyrights cannot prejudice the possibility of reselling products.

Microsoft has been granted permission to appeal against the CAT's ruling on the IP issues. If the Court of Appeal confirms that Microsoft cannot prevail on the basis of its IP rights, the CAT would next need to address the competition law aspects of the claim and decide if the resale restrictions constituted a competition law violation. In that case, it would be interesting to see if the CAT applies a similarly strict approach to that taken by the European Commission and the EU Courts recently to sales restrictions in cases where the scope of IP rights was also an issue (such as *Valve* and *Canal Plus*). In these cases, the restrictions were found to infringe competition law without even needing to decide if the relevant IP rights were exhausted. As these cases concerned restrictions affecting cross-border sales within the single market, a context arguably less relevant to the UK since Brexit, the CAT could potentially be more open to considering Microsoft's economic defences. On the other hand, *UsedSoft* was also a case in which single market principles were applied, and the CAT nonetheless saw no reason not to apply it to the claim.

STATE AID

European Union level

State aid and arbitration awards: sequel to ECJ's February 2024 *DEI* ruling

On 12 November 2025, the EU's General Court (GC) delivered its judgment in Joined Cases T 639/14 RENV II, T 352/15 RENV and T 740/17 RENV *DEI*. The ruling follows the remittal of the case by the Court of Justice of the European Union (ECJ) in February 2024, following its judgment overturning the GC's earlier decision in the longstanding State aid dispute concerning an arbitral award rendered between the Greek companies *DEI* and *Metlen*.

Background

The case centres on a long-running dispute between *DEI*, a Greek state-controlled electricity company, and *Metlen* (formerly *Mytilinaios*), a large aluminium producer. The two companies had entered into a preferential electricity tariff agreement dating back to 1960, which expired in 2006. After failed renegotiations, they agreed in 2011 to refer their dispute to arbitration under the Greek Energy Regulator's (RAE) permanent arbitration body. In 2013, the tribunal issued an award fixing a reduced electricity tariff for *Metlen*. Following an unsuccessful attempt to challenge the award in the Greek courts, *DEI* brought a complaint before the European Commission, alleging that the tariff fixed by the arbitral award amounted to incompatible State aid. However, the Commission dismissed *DEI*'s complaints, by concluding that *DEI* had acted as a prudent private actor when it decided to submit the dispute to arbitration.

The judicial proceedings

DEI challenged the relevant Commission decisions dismissing its complaints before the GC, which annulled them in 2021. In its judgment, the GC held that the arbitration proceedings displayed characteristics similar to those of ordinary Greek courts, and that the arbitral award constituted a legally binding decision capable of conferring an advantage on *Metlen* – and thus, potentially, of constituting State aid – if the tariff it set did not reflect normal market conditions.

Following appeals lodged by the Commission and *Metlen*, the ECJ gave judgment in February 2024. In its judgment, the ECJ rejected the GC's characterisation of the arbitration tribunal as equivalent to an ordinary court. The ECJ observed that the tribunal's jurisdiction derived from a voluntary agreement between *DEI* and *Metlen*, rather than from a mandatory mechanism imposed by law. Because the arbitration was voluntary, the only relevant measure for the purposes of Article 107 TFEU was *DEI*'s decision to enter into the arbitration agreement. By contrast, the content of the arbitral award itself had no bearing on the State aid analysis.

In essence, the ECJ endorsed the Commission's approach, finding that *DEI*, despite being a public undertaking, acted in the same way as a private investor when it opted to submit the dispute with *Metlen* to arbitration. As a result, the ECJ annulled the GC's earlier judgment and remitted the case to the GC for reconsideration.

Following the ECJ's remittal, the GC has now issued a new judgment at first instance, as its 2021 ruling had not examined all the pleas in law raised by *DEI* in its original appeal. In its new judgment, the GC reiterated – in line with the ECJ's findings – that the only measure capable of constituting State aid was *DEI*'s decision to conclude the arbitration agreement with *Metlen*. To determine whether that decision conferred an advantage on the latter company, it was therefore necessary to assess whether a private operator, acting under normal market conditions, would have entered into such an agreement on the same terms.

In light of this reasoning, the GC dismissed all of *DEI*'s pleas that it had not addressed in 2021. In particular, it rejected the plea challenging the applicability of the private operator test in the case at hand, and it held that the applicant had failed to demonstrate that the Commission should have *prima facie* doubts as regards the compatibility with the internal market of *DEI*'s decision to conclude the arbitration agreement.

STATE AID

European Union level

Key takeaways

While the GC latest judgment is still subject to possible appeal before the ECJ, the EU Courts' findings in the case at hand already allow interesting conclusions to be drawn with regard to the State aid implications of arbitral awards.

When parties freely submit their dispute to arbitration, even if one is State-controlled, the award should not normally amount to State aid – especially when the arbitral tribunal is bound by impartial and reasonable conditions established in advance. The situation appears, however, to be different in case of mandatory arbitration (or arbitration imposed by the State). In such cases, an arbitration award appears more likely to be imputable to the State, and thus potentially to constitute State aid. In any case, the private operator test retains its central role. The decision of a public undertaking to arbitrate must be in fact examined through this test in order to determine whether it acted as a private operator.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

European Commission publishes policy paper rejecting potential extension of legal professional privilege to in-house lawyers

On 10 November 2025, the European Commission (“Commission”) published a policy brief discussing the scope of legal professional privilege (“LPP”) and the possible extension of LPP to also include communications of in-house lawyers. The policy brief was published in the context of the ongoing process to update the EU competition procedural rules set out in Regulation 1/2003 (see [VBB on Competition Law, Volume 2025, Nos. 7-8](#)), during which multiple stakeholders have argued in favour of extending the scope of LPP to communications of in-house counsel.

In the policy brief, the Commission officials state that LPP should be interpreted restrictively, limiting its scope to three categories of documents:

- i. “written communications exchanged between a client and that client’s independent, EU-qualified, lawyer for the purposes of the client’s rights of defence”;
- ii. “documents circulated within an undertaking that do no more than report the text or content” of the communications under (i); and
- iii. “preparatory documents created exclusively for seeking legal advice from an independent, EU-qualified, lawyer in the exercise of the rights of defence”.

The policy brief seeks to refute arguments made in favour of the potential extension of LPP to communications of in-house counsel, arguing:

- there is “no predominant trend” in Member States to extend LPP to in-house counsel, as the policy brief claims that only five EU Member States currently recognise LPP for in-house counsel (Belgium, Ireland, Hungary, the Netherlands and Portugal);

- the legal position in the Member States is not determinative, as the EU courts have established that LPP protection only concerns *independent* lawyers, i.e., lawyers (i) not bound to their client by a relationship of employment; and (ii) not employed by an “entity connected to the party he or she represents”;
- protecting the communications of in-house counsel does not necessarily increase compliance with the competition rules, and may instead be “liable to be abused [...] to conceal or even facilitate wrongdoing”; and
- extending LPP to in-house counsel communications would make investigations “lengthier and more cumbersome” due to the challenges of distinguishing between protected legal advice and other non-protected communications involving in-house counsel.

While the preference in the policy brief for a restrictive interpretation of LPP is not surprising, its approach raises fundamental questions. For instance, the policy brief limits the scope of LPP to rights of defence connected with investigations, implicitly excluding legal advice. However, in its judgment in *Orde van Vlaamse Balies* case (C-694/20), the Court of Justice of the European Union (“ECJ”) held in December 2022 that the “specific protection which Article 7 of the Charter and Article 8(1) ECHR afford to lawyers’ legal professional privilege [...] is justified by the fact that lawyers are assigned a fundamental role in a democratic society” (C-694/20, para. 28) and includes “not only the activity of defence but also legal advice [...] both with regard to its content and to its existence” (C-694/20, para. 27). The policy brief does not explain how the restrictive position which it favours can be reconciled with this recent pronouncement

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

of the ECJ other than by ostensibly dismissing the *Orde van Vlaamse Balies* case as a matter of “*administrative cooperation in the field of taxation*” (footnote 20 of the policy brief).

In the same vein, the policy brief limits the benefit of LPP protection to EU-qualified lawyers. However, in *Orde van Vlaamse Balies*, the ECJ equates the LPP protection granted by Article 7 of the Charter of Fundamental Rights to that of Article 8(1) ECHR. The ECHR applies in 46 countries, including countries that are not members of the EU. This raises the question of whether advice given by independent lawyers qualified in a non-EU country that is a signatory to the ECHR or elsewhere is also protected by LPP. Again, the policy brief does not address this issue.

In addition, the policy brief does not address the practical consequences of its position in those EU Member States whose national law recognise LPP for in-house lawyers. In Belgium, for example, LPP extends to legal advice provided by registered members of the Institute of Company Lawyers (“ICL”). However, the restrictive interpretation followed by the Commission undermines the effectiveness of the broader protection granted by Belgian law: while the advice provided by members of the ICL is protected from disclosure to the Belgian Competition Authority, it remains within the reach of the Commission. This means that, depending on which authority opens an investigation, legal advice of in-house counsel registered with the ICL could be used against companies in the event of a competition law investigation.



PRIVATE ENFORCEMENT

National level

SPAIN

Madrid Commercial Court rules on start of limitation period for follow-on antitrust damages actions

On 16 October 2025, Commercial Court No. 14 of Madrid (“Madrid Commercial Court” or “Court”) handed down a judgment on a follow-on damages action (Judgment No. 117/2025), aligning with recent EU and Spanish case-law on the start of the limitation period for follow-on actions and providing important clarifications on the evidentiary value of decisions of the Spanish Competition Authority (“SCA”) that are subject to appeal as well as insight into the issue of the quantification of damages.

Background

The action was brought in ordinary civil proceedings in December 2022 against milk purchasers Grupo Lactalis Iberia, S.A. and Industrias Lácteas de Granada, S.L.U. The claim relied primarily on the SCA decision of 19 July 2019 (S/0425/12 – Industrias Lácteas 2), which identified a long-standing cartel - between 2000 and 2013 - involving the exchange of commercially sensitive information, allocation of farmers and coordination of purchase prices among the main purchasers of raw milk in Spain. The SCA’s decision is not yet final as it has been appealed and — insofar as it concerns the defendants — is currently under review before the Spanish Supreme Court.

Analysis of the judgment

A first key legal issue raised before the Court concerned the determination of the day on which the limitation period begins to run. The defendants argued that the action was time-barred, contending that the limitation period should run from the publication of an earlier 2015 decision of the SCA, which had been partially annulled by the High Court. This would have rendered applicable the one-year limitation period under Article 1968 of the Spanish Civil Code, which the defendants claimed had already elapsed by 27 December 2016, the deadline for

the transposition of the EU Damages Directive (Directive 2014/104). Conversely, the five-year limitation period introduced by the Damages Directive would not apply. The claimants, by contrast, maintained that the action only arose with the adoption of the SCA’s 2019 decision and that the limitation period could not begin while that decision remained subject to judicial review.

The Court rejected the defendants’ position and relied on the recent Spanish Supreme Court judgment in the *Envelopes Cartel* (see [VBB on Competition Law, Volume 2025, No. 6](#)), holding that the limitation period for follow-on actions cannot begin to run until the corresponding SCA decision becomes final (i.e., from when all court appeals against the decision have been exhausted). This interpretation was also found to be consistent with the case law of the Court of Justice of the European Union (“ECJ”), according to which the injured party should have (or be reasonably able to have) knowledge of the essential elements of the claim before limitation can begin (see, e.g., [VBB on Competition Law, Volume 2022, No. 6](#)). Since the SCA’s decision remains under appeal before the Spanish Supreme Court, the Court concluded that the action was admissible and filed in time.

The evidentiary value of the SCA decision was another key issue addressed by the Madrid Commercial Court. The defendants argued that, since the decision is not yet final, it could not bind the civil court or even be relied upon as having probative value as this would amount to granting it *de facto* binding effect before it became final. Relying on established doctrine of the Spanish Supreme Court, the Court held that administrative decisions, although not binding in civil proceedings, may nevertheless carry significant persuasive evidentiary value, particularly when issued by specialised authorities following a structured procedure with due process



PRIVATE ENFORCEMENT

National level

guarantees. It further noted that denying any probative value to administrative decisions under appeal would undermine the principle of effective judicial protection and could render damages actions excessively difficult, contrary to EU law requirements.

In this context, and although the claim was brought as a follow-on action, the Court noted that the SCA's 2019 decision is not yet final vis-à-vis the defendants. Consequently, the Court conducted its own assessment of the existence of collusive conduct, while relying on the SCA decision as a persuasive evidentiary element under national rules of evidence. On that basis, the Court found that the defendants had engaged in a concerted practice over more than a decade, involving exchanges of commercially sensitive information, allocation of suppliers and coordination of purchase prices for raw milk. This conduct was characterised as a restriction of competition by object, in breach of Article 101 TFEU, Article 1 of the Spanish Competition Act and Law 16/1989.

As regards causation, the Court relied on the triple coincidence - temporal, material and subjective - between the cartel and the commercial relationship maintained by the claimants with the infringing parties, and in line with Article 72 of the Spanish Competition Act, shifted the burden of proof to the defendants. Since they failed to demonstrate that the prices paid were unaffected by the cartel or that they acted independently, the Court upheld the causal link.

On the quantification of harm, the Court carried out a substantive review of the expert evidence, ultimately accepting the methodology of the claimants' experts. The methodology relied on two complementary approaches — oligopolistic simulations and a Difference-in-Differences (DiD) analysis comparing price trends in Spain with unaffected markets. The Court limited the volume of affected commerce to direct sales to the cartel participants, finding the evidence insufficient to substantiate umbrella effects. It ultimately fixed the level

of undercharge at 9.4%, adopting the lower bound of the range estimated by the experts.

Consistent with the principle of full compensation and Spanish Supreme Court precedents, the Court also awarded compound interest up to the date of claim, with default and procedural interest running thereafter.

Key takeaways

The Madrid Commercial Court's judgment takes a firm position on the limitation period, holding that it cannot begin to run before the competition authority's decision becomes final, in line with the recent *Nissan Iberia* judgment of the ECJ (see [VBB on Competition Law, Volume 2025, No. 9](#)). It also confirms that SCA decisions under appeal may have significant evidentiary value in civil proceedings, provided they are issued following a proper administrative procedure. On causation and quantification of harm, the Court was similarly firm, applying Article 72 of the Spanish Competition Act to shift the burden of proof to the defendants, accepting a robust expert methodology to define the amount of the claimants' loss and awarding compound, default and procedural interest.

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