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EU Competition Law Newsletter

Highlights

— *Ryanair v. Commission* (*Swedish And French Schemes; COVID-19*): Any Room Left For Non-Discrimination On Grounds Of Nationality And The 'Balancing Test' In Crisis Aid?

— *Commission v. Ireland and Others* (Case C-465/20 P): Opinion of Advocate General Pitruzzella

Ryanair v. Commission (*Swedish And French Schemes; COVID-19*): Any Room Left For Non-Discrimination On Grounds Of Nationality And The 'Balancing Test' In Crisis Aid?

On November 23, 2023, the Court of Justice ("ECJ") delivered two important judgments in the *Ryanair v. Commission* cases concerning Ryanair's challenge of two State aid schemes granted by France and Sweden to airlines holding "national operating licenses"[1] during the COVID-19 pandemic.[2]

Background

French Scheme. On March 31, 2020, the Commission decided not to raise objections to a €200.1 million French aid scheme providing a moratorium to airlines with a "French operating license"[3] on the civil aviation tax and solidarity tax on airline tickets, declaring the measure compatible with Art. 107(2)(b) TFEU (*i.e.*, "*aid to compensate damage caused by an exceptional occurrence*").[4]

[1] Articles 2(1) and 3 of Regulation 1008/2008 establish that any undertaking seeking to carry by air passengers and/or cargo for remuneration and/or hire requires an operating license. To obtain such a license, an air carrier has to comply with *the conditions set out in Chapter II of Regulation 1008/2008, notably the air carrier has to have its "principal place of business*" in the Member State granting the license *inter alia* (Arts. 4-11 Regulation 1008/2008). Article 2(26) of Regulation 1008/2008 clarifies that the "*principal place of business*" is "*the head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised*". Once the air carrier obtains the operating license from a Member State, it is "*entitled to operate intra-Community air services*", without the need for any additional permits or authorizations in other Member States pursuant to Article 15 of Regulation 1008/2008 and the principle of mutual recognition.

[2] *Ryanair v. Commission (COVID-19; Swedish Scheme)* (Case C-209/21), EU:C:2023:905 and *Ryanair v. Commission (COVID-19; French Scheme)* (Case C-210/21), EU:C:2023:908 (respectively, "ECJ *Swedish Scheme*" and "ECJ *French Scheme*").

[3] *See* footnote 1 above.

[4] Commission decision not to raise objections of March 31, 2020 (SA.56765).

Swedish Scheme. On April 11, 2020, the Commission decided not to raise objections to a €455 million Swedish aid scheme providing a State guarantee on new loans to airlines with a "Swedish operating license",[5] declaring the measure compatible with Art. 107(3)(b) TFUE (*i.e.*, "*aid to remedy a serious disturbance in the economy*") as interpreted in light of the then applicable COVID-19 State aid Temporary Framework.[6]

Procedure. In May 2020, Ryanair sought the annulment of the Commission decisions authorizing the French and Swedish Schemes, but the General Court dismissed the actions in their entirety in February 2021.[7] Ryanair appealed the General Court judgments in April 2021 to the Court of Justice. These cases were the first in a long series of appeals brought by Ryanair and other low cost airlines against Commission decisions clearing aid (whether granted through schemes or individual aid measures) by Member States to national airlines.

Below we discuss the main findings of the EU Courts concerning: (i) the application of the principle of non-discrimination on grounds of nationality and free movement rules in State aid; and (ii) the so-called "balancing test" in Article 107(3)(b) TFEU.

Application Of Non-discrimination On Grounds Of Nationality And Free Movement Provisions In State Aid (*French* And *Swedish Schemes*)

Ryanair challenged the two Commission decisions authorizing the French and Swedish Schemes before the General Court, raising the incompatibility of their eligibility criteria, which conditioned the grant of aid on airlines holding a "national licence" with the principle of non-discrimination on grounds of nationality (Art. 18 TFEU) and freedom to provide services (Art. 56 TFEU).

The General Court rejected Ryanair's actions, finding in essence that Articles 107(2)(b) and 107(3)(b) TFEU are *lex specialis* to Art. 18 TFEU and free movement rules.[8] Accordingly, the General Court found that the Commission only had to review whether the aid measures complied with the requirements of Arts. 107(2)–(3) TFEU, and to that extent were appropriate, necessary and proportionate.[9] The General Court concluded that limiting the eligibility of aid to airlines holding a national operating license complied with these requirements because "*by adopting that criterion* [Member States] *sought, in essence, to ensure a permanent link between* [them] *and the airlines benefiting from* [the aid], *resulting in the presence of an important legal entity, namely the principal place of business of those airlines, on its soil, which would not have existed in that regard with airlines operating under a licence issued by* [another] *Member State* [...], *in that the latter are not subject to financial and reputational monitoring by the* [national] *authorities within the meaning of Regulation No 1008/2008 and, in their situation, that reciprocal stable link between it and the airlines holding an operating licence which it issued is absent*."[10]

On appeal, the ECJ found that any State aid is by nature selective and therefore discriminatory and restrictive.[11] Hence, it is sufficient for the aid to be granted for the purposes of an objective recognised in Arts. 107(2)–(3) TFUE and "*within the limits of what is necessary and proportionate to the achievement of that objective*", without the

[5] *See* footnote 1 above.

[6] Commission decision not to raise objections of April 11, 2020 (SA.56812).

As for the Temporary Framework (communication from the Commission "*Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*" of March 19, 2020 in OJ 2020 CI 91, p. 1), at the time of the Swedish decision it had already been amended for the first time (communication of April 3, 2020 in OJ 2020 CI 112, p. 1).

[7] *Ryanair v. Commission (COVID-19; French Scheme)* (Case T-259/20), EU:T:2021:92, and *Ryanair v. Commission (COVID-19; Swedish Scheme)* (Case T-238/20), EU:T:2021:91 (respectively, "GC *French Scheme*" and "GC *Swedish Scheme*").

[8] Art. 18 TFEU only applies "[w]*ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein* [...]". The *French Scheme* and *Swedish Scheme* cases are the first precedents where the EU Courts have found Article 107 TFEU to be a special provision of Article 18 TFEU.

[9] GC *Swedish Scheme*, paras. 31 *et seq*; GC *French Scheme*, paras. 32 *et seq*.

[10] GC *Swedish Scheme*, paras. 40–44; GC *French Scheme*, paras. 35–41.

[11] ECJ *Swedish Scheme*, para. 29; ECJ *French Scheme*, para. 34.

need to assess whether the aid measures comply with Article 18 TFEU and free movement rules separately.[12] To substantiate that an aid measure infringes free movement rules, applicants have to show that the contested measure produces restrictive effects that "go beyond" those inherent in State aid from selectivity.[13] The ECJ, however, appeared to implicitly dismiss the reasoning of the General Court insofar as it relied on the financial and reputational monitoring mechanisms provided in Regulation 1008/2008 to justify the discriminatory approach of the aid schemes.[14]

Balancing Test Under Article 107(3)(b) TFEU (*Swedish Scheme*)

Another key question that was raised in the *Swedish Scheme* case was whether aid granted under Article 107(3)(b) TFEU requires the Commission to conduct a so-called "balancing test", *i.e.*, to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition "*within an EU context*".[15]

The General Court held that the balancing test would have "*no raison d'être in the context of Article 107(3)(b) TFEU, as its result is presumed to be positive [as] the fact that a Member State manages to remedy a serious disturbance in its economy can only benefit the European Union in general and the internal market in particular.*"[16] The General Court relied on the textual differences between Article 107(3)(b) and 107(3)(c) TFEU, citing the ECJ ruling *Austria v. Commission*.[17]

Following Ryanair's appeal, Advocate General Pitruzzella opined that the General Court had erred in law because, according to established case law, the balancing test applies to all limbs under Article 107(3) TFUE, and *Austria v. Commission* did not support the General Court's reasoning, even if in this case he ultimately found the balancing test to be embodied in the COVID-19 Temporary Framework.[18] Nonetheless, the ECJ reiterated the General Court's ruling, finding that aid measures aimed at remedying a serious disturbance in the economy under Article 107(3)(b) TFUE contribute to objectives of an exceptional nature and therefore, are "*considered to ensure a fair balance between their beneficial effects and their adverse effects on the internal market and are therefore in the common interest of the European Union*", provided that they are necessary and proportionate.[19]

What Possible Consequences For The EU's Internal Market?

The EU Courts' findings on the application of non-discrimination on grounds of nationality in State aid appear to restrict the scope of previous case law, which so far stated that the Commission had to assess the compatibility of an aid measure with Article 107 TFEU and, *in parallel*, the compatibility of any requirements that are "*indissolubly linked*" thereto[20] with any other provisions of primary law, secondary law, and general principles,[21] including a fortiori free movement rules.[22] They also appear at odds with the ensuing Commission guidance in some fields of State aid law, which explicitly prohibits Member States from conditioning the award of State aid on beneficiaries having their

[12] ECJ *Swedish Scheme*, paras. 31–36 and ECJ *French Scheme*, paras. 36–41.

[13] ECJ *Swedish Scheme*, para. 75 and ECJ *French Scheme*, para. 86.

[14] ECJ *Swedish Scheme*, para. 51 and ECJ *French Scheme*, para. 56.

[15] *HH Ferries v. Commission* (Case T-68/15), EU:T:2018:563, paras. 210–214; *Philip Morris v. Commission* (Case 730/79), EU:C:1980:209, paras. 11–12; and *AITEC and Others v. Commission* (Case T-447/93), EU:T:1995:130, paras. 124, 127, 133, and 142.

[16] GC *Swedish Scheme*, para. 68.

[17] GC *Swedish Scheme*, para. 82; *Austria v. Commission* (Case C-594/18), EU:C:2020:742, paras. 20 and 39.

[18] Advocate General Opinion in ECJ *Swedish Scheme*, para. 84–88 and 95.

[19] ECJ *Swedish Scheme*, para. 86.

[20] *Iannelli v. Meroni* (Case C-74/76), EU:C:1977:5, para. 14.

[21] *Nuova Agricast* (Case C-390/06), EU:C:2008:224, para. 50, and *Hinckley Point* (Case C-594/18 P), EU:C:2020:742, para. 44.

[22] *Niki Lufthart* (Case T-511/09), EU:T:2015:284, paras. 215–216: "[The] *obligation on the part of the Commission to ensure that Articles 87 EC and 88 EC are applied consistently with other provisions of the EC Treaty is all the more necessary where those other provisions also pursue the objective of undistorted competition in the common market, as Art. 43 EC does in the present case in seeking to preserve freedom of establishment and free competition between the economic operators of one Member State established in another Member State and the economic operators of the latter Member State.*" (Emphasis added)

central seat, or being predominantly established, in their territories.[23] Moreover, the Commission's practice during COVID-19 showed that discrimination on grounds of nationality is not a feature inherent to State aid, as the Commission authorized, without impediment, a number of aid schemes that, though selective, also had open eligibility criteria that were neutral to the nationality of eligible beneficiaries.[24]

The EU Court's application of the balancing test under Article 107(3)(b) TFEU further departs from the case law, based on which the Commission had also set out its decisional guidance. For instance, in *Spain v. Commission*, the ECJ stated that the "*difference in wording* [between the limbs in Article 107(3) TFEU] *cannot lead to the conclusion that the Commission should take no account of the Community interest* [...] *without assessing the*[..] *impact* [of the measures involved] *on the relevant market or markets in the Community as a whole*".[25] Accordingly, the Commission's guidance, including under Article 107(3)(b) TFEU, required a balancing test.[26]

In sum, the EU Courts' rulings in the French and Swedish cases leave little room for the application of the principle of non-discrimination on grounds of nationality and free movement rules in State aid, and no room for the application of the balancing test in crisis aid granted under Article 107(3)(b) TFEU. The Commission would still arguably be bound by its general guidelines under Article 107 (3)(b) TFEU, and more generally by the principles of necessity and proportionality of the aid. But Member States with "deep pockets" might feel freer to support national champions of their choice without regard to the principles of non-discrimination on grounds of nationality and free movement rules, and without accounting for the negative effects of the aid to the EU internal market as a whole as long as there is a "serious disturbance in the economy" in the sense of Article 107(3)(b) TFEU or an "exceptional occurrence" in the sense of Article 107(2)(b) TFEU. It remains to be seen whether the consequences of such a relaxation of State aid principles will be limited to the airline industry or whether it might lead to a more serious fragmentation of the single market in times of recurring crises.

Commission v. Ireland and Others (Case C-465/20 P): Opinion of Advocate General Pitruzzella

On November 9, 2023, Advocate General Pitruzzella delivered his Opinion,[27] proposing that the Court of Justice uphold the appeal brought by the European Commission ("Commission")[28] against the General Court judgment of July 15, 2020,[29] which annulled the Commission decision of August 30, 2016, finding that the Republic of Ireland ("Ireland") had granted €13 billion in undue tax benefits to Apple Inc ("Apple").[30] The Commission had found that Ireland granted a

[23] *See e.g.*, Commission IPCEI Communication, para. 10; Commission R&D&I Guidelines, paras. 38 and 104, Commission Risk Finance Guidelines, para. 41.

[24] *See e.g.*, Aid schemes in Romania (SA.57817), Denmark (SA.58157), Cyprus (SA.57691), Hungary (SA.57767), Slovenia (SA.59124), which establish eligibility criteria that do not discriminate on the basis of nationality but are selective, *i.e.*, airlines: (i) "starting or resuming operations" at a given airport; (ii) "landing in and departing from" a given Member State; (iii) "operating routes to/from" a given Member State, *etc*.

[25] *Spain v. Commission* (Case C-169/95), EU:C:1997:10, paras. 15–17 and *Spain v. Commission* (Case C-113/00) EU:C:2002:507, para. 67.

[26] *See e.g.*, Commission IPCEI Communication, paras. 28 and 42–47.

[27] *Commission v. Ireland and Others* (Case C-465/20 P), Opinion of Advocate General Pitruzzella, EU:C:2023:840 (the "Opinion").

[28] Appeal brought on September 25, 2020 by European Commission against the judgment of the General Court delivered on July 15, 2020 in *Ireland and Others v. Commission* (Joined Cases T-778/16 and T-892/16) EU:T:2020:338.

[29] *Ireland and Others v. Commission* (Joined Cases T-778/16 and T-892/16) EU:T:2020:338 (the "GC Judgment").

[30] Commission Decision C (2017) 5605 of August 30, 2016 (State Aid 2014/C (ex 2014/NN)), OJ 2017 L 177/1 (the "Commission decision"). *See also* Commission Press Release IP/16/2923, "Ireland gave illegal tax benefits to Apple worth up to €13 billion," August 30, 2016.

selective advantage to Apple through two individual tax decisions ("tax rulings"[31]) adopted in 1991 and 2007, addressed to the Irish-based subsidiaries, Apple Sales International ("ASI"), and Apple Operations Europe ("AOE") (together, "the Irish branches"). As AG Pitruzzella pointed out, this case is part of a "series of somewhat extensive cases concerning the application of Article 107(1) TFEU to tax rulings."[32]

The Commission Finds that Ireland Granted Unlawful and Incompatible State Aid to Apple

In 2016, the Commission determined that the two Irish tax rulings addressed to the Irish branches granted a selective advantage to Apple, hence constituting unlawful and incompatible State aid under Article 107(1) TFEU, and ordered Ireland to recover from Apple €13 billion with interest (€14.3 billion in total). In particular, the Commission found, first, that the Irish tax authorities erred in accepting Apple's unsubstantiated claim that its IP licenses should be allocated for tax purposes outside of Ireland to the head offices of the Irish branches (which were not taxed anywhere), which led to the Irish branches' annual chargeable profits departing from a market-based outcome in accordance with the so-called arm's length principle (the "primary line of reasoning").[33] Second, the Commission found that even if the Irish tax authorities had been correct in accepting Apple's claim, the outcome would nevertheless have been the same because the tax rulings approved a profit allocation based on inappropriate methodological choices, which led to a reduction in Apple's corporate tax compared to undertakings in a similar situation (the "subsidiary line of reasoning").[34] In the alternative, the Commission concluded that since the Irish tax provisions did not lay down any objective criteria for allocating profits to different parts of a non-resident company, the broad discretion applied in the tax rulings necessarily conferred a selective advantage on Apple in breach of EU State aid rules (the "alternative line of reasoning").[35]

The General Court Annuls the Commission Decision

In 2020, the General Court annulled the Commission's decision on the ground that the Commission did not prove, to the requisite legal standard, that the Irish tax rulings had granted a selective advantage in the sense of Article 107(1) TFEU to Apple. In particular, the General Court found that the Commission did not prove that: (i) Apple's IP and associated profits should have been attributed to Apple's Irish branches, as opposed to the head offices (primary line of reasoning); (ii) insufficient profits were allocated to Apple's Irish branches (subsidiary line of reasoning); and (iii) the Irish tax rulings involved the exercise of discretion (alternative line of reasoning).[36] The theme underlying the General Court's three-fold finding was that the Commission did not positively prove that the Irish tax rulings had granted an advantage to Apple, particularly insofar as the Commission: (i) *presumed* that, since the head offices of ASI and AOE had no presence or employees, they could not have controlled the relevant IP, and therefore all associated profits must be allocated *by default* to the Irish branches (exclusionary approach);

[31] "The function of a tax ruling is to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances," Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016 C 262/2, para. 169. "A 'tax ruling' allows undertakings to apply to the tax administration for an 'advance decision' concerning the tax to which they will be subject and thus to obtain an official position from that administration on the application of national tax rules and assurances as to the tax treatment that will be applied to them", Opinion, para. 1.

[32] Opinion, para. 1. DG Competition set up a Task Force on Tax Planning Practices in summer 2013 to follow up on public allegations of favorable tax treatment of certain companies (in particular in the form of tax rulings). In December 2014, the Commission sent an information inquiry to all Member States. Since then, the Commission has adopted a number of decisions finding that the United Kingdom, Belgium, Luxembourg, and Ireland had granted unlawful and incompatible State aid through tax rulings (overview available here). These cases have been followed by extensive litigation before EU Courts, with mixed results for the Commission.

[33] Commission decision, paras. 265–321. The purpose of the arm's length principle is to ensure that transactions between integrated group companies are treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been carried out by non-integrated standalone companies (Opinion, para. 10; Commission decision, paras. 252 and 253).

[34] Commission decision, paras. 325–360.

[35] Commission decision, paras. 369–403.

[36] For a detailed analysis of the GC Judgment, *see* our Alert Memo, "EU General Court Strikes Down Commission's €14 billion State Aid Decision against Apple and Ireland," July 24, 2020, available here.

(ii) pointed out methodological defects *without actively showing* that the chosen method *effectively* led to a reduction in the tax burden; and (iii) *presumed that the discretion allowed by the Irish tax rules necessarily* granted an advantage.

The Commission appealed the ruling to the Court of Justice on September 25, 2020.

Advocate General Pitruzzella's Opinion: Victory for the Commission in Historic Apple Case?

Regarding the primary line of reasoning, Advocate General Pitruzzella opined that the General Court made a number of fundamental legal and methodological errors, particularly around the attribution of IP licenses and related profits for corporate tax purposes. Principally:

— First, the General Court misinterpreted the Commission decision. Contrary to the General Court's judgment, the Commission did not find that the absence of employees or physical presence in the head offices of the Irish branches, *in itself*, entailed that the head offices could not have controlled the relevant IP, and therefore that all associated profits must be allocated *by default* to the Irish branches.[37] The Commission also relied on the "multiplicity and centrality of [the functions and risks] assumed by the [Irish] branches" in order to *positively attribute* the IP licenses and related profits to the Irish branches.[38]

— Second, the General Court contradicted itself in finding that the Commission had (i) not attempted to show that the allocation of the IP licences to the Irish branches followed from the activities actually carried out by the branches and, at the same time; and, (ii) identified the functions performed by those branches which, in its view, justified such an allocation.[39]

— Third, Advocate General Pitruzzella noted that the Irish tax provisions relating to the taxation of non-resident companies (Section 25 of Tax Consolidation Act 1997)[40] did not specify exactly how the profits had to be attributed to the Irish branches.[41] As such, the parties disagreed over the method for determining the taxable profits of a foreign company in Ireland: (i) the Commission considered the allocation of assets, functions, and risks within the corporate group; whereas, (ii) Ireland favored considering actual activities; and, (iii) Apple argued that the key factor was IP control. Advocate General Pitruzzella sided with the Commission's interpretation, *i.e.*, the profits should be attributed to entities within a corporate group based on the allocation of assets, functions, and risks.[42] This method is the only way, according to the Advocate General, to identify, in line with the wording of Section 25 of Tax Consolidation Act 1997, the "trading income arising directly or indirectly" from the branch and from property or rights "used by, or held by or for, the branch [...]".[43]

Regarding the subsidiary line of reasoning, notably, Advocate General Pitruzzella rejected the Commission's argument that, in demonstrating the existence of an advantage, it was merely required to demonstrate that the tax rulings contained methodological errors which established that it was "plausible" that the rulings had led to a reduction in the tax liability of the Irish branches (plausibility burden of proof).[44] Nevertheless, the Advocate General found that the Commission had sufficiently demonstrated

[37] Opinion, paras. 23–30.

[38] *See idem.*

[39] Opinion, para. 35.

[40] Under Section 25 TCA 97, a non-resident company is not to be charged corporation tax in Ireland, unless it carries on a trade in Ireland through a branch or agency. If it does so, that non-resident company is to be taxed "on all of its trading income arising directly or indirectly from the branch or agency and from the property or rights used by or held by or for the branch or agency [...]."

[41] Opinion, para. 17.

[42] Opinion, para. 58.

[43] Opinion, para. 57.

[44] Opinion, paras. 99 and 103.

that the tax rulings *actually* granted an advantage to Apple, insofar as they accepted a method of calculation that contained "fundamental errors" that "necessarily [led] to an undervaluation of those profits compared to an arm's length result and are therefore inherently or manifestly capable of reducing the tax burden" of the Irish branches.[45]

Advocate General Pitruzzella chose not to assess the alternative line of reasoning.[46]

In light of the above, the Advocate General advised the Court of Justice to set aside the General Court's judgment and send the case back to the General Court for a new ruling on the merits.[47]

Final Remarks

Although the Court of Justice is not bound by Advocate General Pitruzzella's Opinion, if followed, it would mark a significant vindication for the Commission on one of its key priorities: upholding its pursuit of State aid rules to combat preferential tax agreements.

News

Updates

Key Competition Law Takeaways From the 2023 G7 Joint Competition Enforcers and Policy Makers Summit

On November 8, 2023, the Japan Fair Trade Commission ("JFTC") held the G7 Joint Competition Enforcers and Policy Makers Summit (the "Summit") in Tokyo. The focus of the Summit was for the G7 competition authorities and policymakers (the "Authorities") to discuss effective approaches to enforcing and promoting competition in digital markets. At the Summit, the Authorities adopted the "Digital Competition Communiqué"[48] (the "Communiqué") and updated the "Compendium of approaches to improving competition in digital markets"[49] (the "Compendium").

Key takeaways from the Communiqué

The Communiqué recognizes that digital markets can raise particular competition concerns, as markets characterized by network effects, economies of scale, digital ecosystems, and accumulations of large amounts of data can be prone to increasing or creating barriers to entry, tipping, and dominance.[50] It sets out the Authorities' initiatives and commitments to promote and protect competition in digital markets.

— **Expansion of institutional capabilities.**[51] The Communiqué sets out a commitment to continuously expand the Authorities' capabilities and resources. Concrete forms of such institutional expansion include the creation of new tech-focused task forces as well as undertaking horizon scanning, research, and market inquiries to better understand new technologies and the accompanying evolution of competition.

— **Focus on emerging technologies.** The Communiqué identifies a number of emerging technologies that may facilitate the rapid growth of a few market participants, thereby opening the door for potential harm through consolidation of market power. These

[45] Opinion, para. 104.

[46] Opinion, para. 10.

[47] Opinion, paras. 137–138.

[48] The Digital Competition Communiqué is accessible here.

[49] The Compendium of approaches to improving competition in digital markets is accessible here.

[50] Communiqué, p. 1.

[51] *Ibid.*, p. 2.

technologies include generative artificial intelligence ("AI"), blockchain, and the metaverse. The Communiqué focuses specifically on generative AI: it describes the benefits and risks associated with generative AI, emphasizing that competition authorities are in a position to enforce competition laws in this space. This spotlight on AI follows the G7's commitment to develop guidance for AI policymaking, after establishing the Hiroshima AI Process in May 2023 and publishing a Code of Conduct for Organizations Developing Advanced AI Systems and Guiding Principles for Advanced AI Systems in October 2023.[52]

— **Internal and international cooperation.**[53] The Communiqué emphasizes the need for national and international cooperation among government departments, authorities, and regulators, as digital markets affect not only competition law, but a range of other regulatory and policy areas.

Key takeaways from the Compendium

The Compendium describes the current digital markets developments, competition enforcement, and policy initiatives by different competition authorities. It provides a cross-jurisdictional analysis that can identify commonalities and coherences in approaches, to work toward a consensus view on key challenges.[54] The first edition of the Compendium was published in 2021, after a meeting of G7 leaders held by the UK Competition and Markets Authority ("CMA"). As part of the G7's goal to offer the Compendium as a tool for authorities and policymakers, it was updated in 2022, and now again in 2023.[55]

— **Challenges that digital markets present for competition enforcement and policy.** The Compendium describes the unique features of digital markets, which allow for rapid growth and bring about unprecedented challenges for competition authorities globally.[56] For example, the Compendium highlights the difficulty of applying traditional theories of harm to digital markets, as well as the challenges for market definition posed by zero price markets and other multi-sided markets. In describing such challenges, the Compendium uses language that is reflected in some of the new legislative initiatives around the world. For example, the Compendium describes powerful actors in digital markets as 'gateways' (similar to 'gatekeepers' in the EU Digital Markets Act) or 'essential trading partners' (similar to 'critical trading partners' in the U.S. American Innovation and Choice Online Act).[57] This reflects the G7's goal to achieve commonality and create coherence in the Authorities' approach to these issues.[58]

— **Areas of focus based on the Authorities' experience with competition enforcement in digital markets.** The Compendium identifies four key areas requiring special attention in digital markets: (i) digital advertising; (ii) companies' use, processing, and sharing of data and algorithms; (iii) online marketplaces and app stores; and (iv) mergers and (killer) acquisitions.[59] As these areas can require new resources, competition authorities have taken steps to strengthen their institutional capacity by establishing new units and onboarding experts who can assist in handling complex digital cases.[60]

[52] For an overview of the Hiroshima AI Process, the Guiding Principles, and the Code of Conduct, *see* our Cleary IP and Technology Insights Blog Post "G7 Leaders Publish AI Code of Conduct: A Common Thread in the Patchwork of Emerging AI Regulations Globally?", November 1, 2023, available here.

[53] Communiqué, p. 4.

[54] Compendium, pp. 2-3.

[55] *Ibid.*, p. 2.

[56] *Ibid.*, pp. 7-9.

[57] *Ibid.*, p. 9.

[58] *Ibid.*, pp. 9-10.

[59] *Ibid.*, pp. 12-25.

[60] *Ibid.*, p. 27.

Next steps

The Authorities emphasize the need to stay alert on whether the competition instruments currently at their disposal remain up to the task of protecting competition in the digital sector, or whether new tools are necessary to address new challenges. The Communiqué sets out a commitment to continuously share updates on enforcement approaches to promote competition in digital markets, with the goal of revisiting the topic in the 2024 digital competition summit.[61] While the G7s commitment to global cooperation may lead to more legal certainty and facilitate competition law compliance in the global digital market space, it remains to be seen whether leading competition regulators accept global competition law reference frameworks, or whether more local industrial policies and enforcement priorities may override the interest of global enforcement alignment.

[61] Communiqué, p. 5.

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