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Revised Market Definition Notice Confirms Established Framework with Emphasis on Global and Digital Markets and the Commission's Margin of Discretion

On November 8, 2022, the Commission published its draft Revised Market Definition Notice (the "Revised Notice") for consultation in view of a formal adoption in the third quarter of 2023.[1] The revision of the current 1997 Market Definition Notice (the "Original Notice") was initiated in April 2020, with a particular focus on improved analysis of global and digital markets.[2] In addition to guidance on these issues, the Revised Notice largely confirms the principles set in the Original Notice, integrates as additional background recent EU decisional practice and preserves the Commission's margin of discretion in market definition assessments.

Market definition – a mainstay of EU competition analysis

The Commission uses the concept of market definition to determine the boundaries of competition for a given product or service. Although there has been some debate as to the utility of market definition in recent years,[3] it still serves as the starting point to identify the competitive constraints bearing on the relevant undertakings in antitrust and merger control cases.[4] Once a market is defined, the Commission is able to calculate market shares, which

[1] Commission Press Release IP/22/6528, "Competition: Commission seeks feedback on draft revised Market Definition Notice," November 8, 2022.

[2] Cleary Antitrust Watch, "The Commission Test 1997 Market Definition Notice's "Fit-for-Purpose," April 3, 2020, available at https://www.clearyantitrustwatch.com/2020/04/the-commission-tests-1997-market-definition-notices-fit-for-purpose/

[3] *See e.g.*, CMA, Merger Assessment Guidelines, paras. 9.1 and following, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf, including the idea that evidence gathered as part of the competitive assessment may capture competitive dynamics more fully than formal market definition and the CMA's shift away from market definition towards a looser "frame of reference" approach.

[4] Communication from the Commission – Commission Notice on the definition of the relevant market for the purpose of Union competition law ("Revised Notice"), paras. 1 and 5, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6528

provide a preliminary indication of the involved undertakings' market power on the relevant market.

The market definition tool is applied in the assessment of cases under Articles 101 and 102 TFEU, as well as in merger control proceedings. Its application may, however, vary in practice depending on the nature of the proceedings in which it is applied. Merger assessment presents a greater focus on forward-looking elements whereas antitrust investigations tend to concentrate on past infringements with more limited forward-looking analysis to assess whether future practices may constitute an infringement.[5] This distinction affects the Commission's analysis, in particular for rapidly evolving markets, as the boundaries of relevant markets may evolve over time along with market dynamics. As a result, the Commission may define different relevant markets for the same economic activity or products over time and depending on the nature of the proceedings.[6]

The Commission's Market Definition Notice – a 25 year-old institution

The Commission adopted the original Market Definition Notice in 1997 to provide guidance on how it applies the concept of relevant market in its enforcement of EU law and improve transparency and legal certainty for businesses. While the principles it prescribes are only binding on the Commission, it has been widely relied on also by national competition authorities and courts and is often referred to in the Court of Justice's case law.[7]

In the aftermath of the *Siemens/Alstom* prohibition decision,[8] a number of EU Member States called for revisions of EU competition law, including to better reflect the reality of "global" markets.[9] Increased scrutiny over digital markets has also spurred debate over market definition and the best approaches for capturing the competitive realities of ecosystems and multi-sided platforms.[10] In this context, the Commission announced plans to review the Market Definition Notice in 2020, shortly after Vice President Vestager's appointment to her second term as Commissioner for Competition.[11]

What is staying and what is changing

In line with the Original Notice, the main objective of the Revised Notice is to "offer more guidance, transparency and legal certainty for businesses to facilitate compliance".[12] In doing so, the Revised Notice retains the core principles of the 1997 Notice and, in particular, the notions of product and geographic markets and its focus on demand-side substitution over supply-side substitution .[13] But the Revised Notice also provides welcome additional guidance in several areas.

— ***Beyond the SSNIP test: taking account of non-price competition.*** While demand substitution in the Original Notice was centered around the question of whether "the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase" (the "SSNIP" test), the Revised Notice expands the assessment to take account of other competitive parameters and forward-looking elements such as quality and innovation. The Revised Notice recognizes that price-based substitution may not always be the best means of assessing demand substitution when

[5] Commission Staff Working Document – Evaluation of the Commission Notice on the definition of relevant market for the purpose of Community competition law of 9 December 1997, SWD(2021) 199 final of July 12, 2021, p. 33, ("Commission Staff Working Document").

[6] For instance, the Commission has defined different markets for similar products over time in the market for rail technology in *ABB/Daimler-Benz* (Case COMP/M.580), Commission decision of October 18, 1995 and *Alstom Holdings/Areva T&D* (Case COMP/M.5754), Commission decision of March 26, 2010 or in the market for steel and aluminum for automotive applications in *Alcan/Pchiney* (Case COMP/M.3225), Commission decision of September 29, 2003 and *Novelis/Aleris* (Case COMP/M.9076), Commission decision of October 1, 2019.

[7] *See* Commission Staff Working Document, pp. 27-29.

[8] *Siemens/Alstom* (Case COMP/M.8677), Commission decision of February 6, 2019.

[9] *See* our February 2019 EU Competition Law Newsletter.

[10] *See* The EU's Competition Policy for the Digital Era, Final Report 2019, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[11] Commission Press Release IP/20/1187, "Competition: Commission consults stakeholders on the Market Definition Notice," June 26, 2020.

[12] Commission Press Release IP/22/6528, "Competition: Commission seeks feedback on draft revised Market Definition Notice," November 8, 2022.

[13] *See* Revised Notice, paras. 12, 14 and 20.

undertakings compete on other parameters, or in the context of "zero monetary price products and highly innovative industries". The Revised Notice refers to *Google Android* as a case where an SSNDQ test ("small but significant non-transitory decrease of quality") was applied to assess consumer switching between Android app stores to app stores for other licensable mobile operating systems.[14]

— ***Multi-sided platforms***. The Commission's consultation identified digitization as a key trend that needed to be reflected in the Revised Notice,[15] with many respondents highlighting the lack of coherent regulatory guidance on the assessment of market definition for multi-sided platforms. The Revised Notice provides detail on the Commission's approach to assessing markets in cases involving multi-sided platforms, discussing how the regulator will take into consideration factors specific to these kinds of businesses, such as indirect network effects and non-price elements.[16] For instance, the Commission may define a relevant product market for the products offered by a platform as a whole,[17] or it may define separate relevant product markets for products offered on each side of the platform.[18] When doing so, and in particular where products are offered for free, the Commission can focus on non-price elements such as product differentiation and product functionalities, intended use, competitive constraints based on industry views and barriers to switching, such as interoperability with other products.[19]

— ***After-markets, bundles and digital ecosystems***. Following limited guidance on connected markets (primary and secondary or "after" markets) in the Original Notice, the Revised Notice clarifies how the Commission will take into consideration competitive constraints in these markets. The Revised Notice elaborates on the three different approaches the Commission may adopt in such cases,[20] including its treatment of "bundle" products.[21] Furthermore, it also explains that these principles could apply to digital markets. Additional guidance on this issue may have been welcome, particularly when the Commission's evaluation report referred to further case studies on when digital products might be viewed as primary and secondary products.[22]

— ***Updated approach to geographic markets.*** The Revised Notice now explicitly recognizes that markets can be defined as global in scope, and offers guidance on when this may be the case. For example, "when customers around the world have access to the same suppliers on similar terms regardless of the customers' location, the relevant geographic market is

[14] *See* Revised Notice, para. 32; The SSNDQ test aims to assess whether consumers would switch away to a competitor in the event of a "small but significant non-transitory decrease of quality". *See also, Google Android* (Case COMP/AT.40099), Commission decision of July 18, 2018: the Commission found that Google's mobile operating system Android and Apple's operating system iOS belonged in separate relevant product markets. The Commission argued that in case of a small but significant and non-transitory decrease in quality of Android, users would not switch to iOS. *See* our October 2021 and October 2022 European Competition Law Newsletters.

[15] *See* Commission Staff Working Document, p. 78.

[16] *See* Revised Notice, paras. 94-98.

[17] Revised Notice, para. 95; in *Microsoft/LinkedIn*, the Commission thus defined a single market for online recruiting services that encompassed both job seekers and recruiters (Case COMP/M.8124, Commission decision of December 6, 2016, paras. 126 and following).

[18] Revised Notice, para. 95; in *Mastercard*, the Commission thus defined the issuing and acquiring side of payment card systems as distinct relevant product markets (Case COMP/AT.34759, Commission decision of December 19, 2007, paras. 286 and following).

[19] Revised Notice, para. 95-98.

[20] *General Electric/Alstom* (Case M.7278), Commission decision of September 8, 2015; *Watch Repair* (Case AT.39097), Commission decision of July 29, 2014; *Assa Abloy/Agta Record* (Case M.9408), Commission decision of February 27, 2020; and *CEAHR v Commission* (T-427/08) EU:T:2010:517.

[21] For instance, the Revised Notice explains that in case of primary and secondary products, the market can be defined as: (i) a system market comprising both the primary and secondary product (e.g. in *General Electric/Alstom* (Case COMP/M.7278), the Commission defined a market for the sale of gas turbines and subsequent servicing); (ii) multiple markets consisting of a market for the primary product and separate markets for the secondary product associated which each brand of the primary product (e.g. in *Watch Repair* (Case COMP/AT.39097), the Commission defined multiple separate markets for spare parts, each associated with a particular watch brand); (iii) dual markets consisting of the market for the primary product on one hand and the market for the secondary product on the other hand (e.g. in *Assa Abloy/Agta Record* (Case COMP/M.9408), the Commission defined a market for after-sales services without distinguishing the service provider). In addition, the Commission's approach to digital ecosystems constitute a possible fourth category: in such cases, the markets can be thought of consisting of separate markets for a primary core product and several secondary digital products whose consumption is connected to the primary product (an example of a digital ecosystem would be an ecosystem of products built around a mobile operating system, including hardware, an application store and software applications).

[22] *See*, Commission Staff Working Document, p. 53.

likely to be global".[23] The Revised Notice also acknowledges temporal considerations when defining the relevant geographic market, including factors such as seasonality and peak/off-peak time considerations,[24] again taking into account the feedback of some stakeholders who highlighted the need to consider cyclical variations in the market definition analysis. In addition, following the *Siemens/Alstom* prohibition decision, stakeholders advocated for changes in the European competition framework to take greater account of "potential future competition" and the relevant timeframe applied in this regard in order to better account for geopolitical pressure that originates outside the defined geographic market.[25] In this respect, the Revised Notice takes into consideration stakeholders' feedback[26] on the need to introduce forward-looking evidence in the assessment of potential competition, with additional detail on how imports and trade flows can contribute to the assessment of competitive constraints.[27]

— ***Codifying evidentiary practices.*** Finally, the Commission clarifies the possible sources of evidence and their probative value when defining relevant markets. The Commission's "open approach" aims at making effective use of available information, while still allowing for differentiation in different cases. As certain types of evidence may be decisive in one case, others can be of limited importance in other cases. While the Revised Notice notes that it will not rigidly cling on to a strict hierarchy of different sources of information, it nevertheless considers that higher probative value is attributed to evidence that cannot have been influenced by the Commission's investigation (such as pre-dating discussions of concentrations or conduct pre-dating a Commission's investigation).[28] This means that documents prepared in view of an investigation would carry less importance than ordinary internal documents.

Conclusion and key takeaways

The Revised Notice is the result of a comprehensive update effort and thorough review of the Commission's decisional practice. It builds on the principles set out in the Original Notice, while including expanded guidance to address issues such as global markets, digital and platform markets, and non-price competition. The principles outlined in the Revised Notice favor a forward-looking approach to market definition to better account for factors such as innovation and potential and global competition.

In developing this improved guidance, the Commission has maintained a degree of flexibility in the approach it must follow in market definition assessments, both in its application of substantive principles and methodology for collecting and evaluating evidence. The result is a valuable tool that will enable undertakings and their counsel engaged in or preparing for merger control or antitrust proceedings to anticipate the key market definition issues that the Commission is likely to examine according to its latest theory. However, while the Revised Notice offers greater guidance and clarity, the Commission retains substantial leeway over how to conduct market definition analyses in specific cases, as the Revised Notice appears to have sought a balance between the promotion of legal certainty and ensuring that the Commission retains a measure of flexibility in years to come.

[23] Revised Notice, para. 70.

[24] For instance, in *Ryanair/Laudamotion* (Case COMP/M.8869), the Commission made a distinction between the summer and winter season in air passenger transport (paras. 96-97).

[25] A Franco-German Manifesto for a European industrial policy fit for the 21st Century, February 2019, p. 4, available at https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2019/02/1043_-_a_franco-german_manifesto_for_a_european_industrial_policy_fit_for_the_21st_century.pdf

[26] Summary of the stakeholder consultation to the Evaluation of the Market Definition Notice, July 12, 2021, p. 18, available at https://competition-policy.ec.europa.eu/system/files/2021-03/summary_of_contributions_stakeholders.pdf

[27] Revised Notice, paras. 44-45 and 75.

[28] Revised Notice, para. 76.

State Aid: Court of Justice Clarifies Limits for Multinational Tax Deals in *Fiat Chrysler*

On November 8, 2022, the Court of Justice set aside the General Court's judgment in the *Fiat* State aid case.[29] In doing so, the Court of Justice effectively annulled the Commission decision which found that the tax ruling granted to the Fiat Chrysler group by the tax authorities of Luxembourg was an unlawful tax break of €20–30 million.[30] The Court of Justice affirmed the supremacy of national law in corporate taxation and rejected the Commission's attempt to develop an EU-wide arm's length principle as a standard of review for Member States' tax decisions under State aid rules. The judgment is a setback for the Commission's policy of using State aid rules to target allegedly unfair tax deals for multinational companies.

State aid and tax fairness – the current state of play

In the EU, Member States decide on their own tax legislation and the EU only has limited competences over tax linked to the smooth running of the single market. However, free competition over tax matters and a lack of cooperation between Member States has created "disconnection between where value is created and where profits are taxed"[31] and allowed multinational companies to engage in aggressive tax planning practices to pay the least tax possible ("tax avoidance").

Amid this backdrop, the Commission took a series of enforcement actions that used State aid tools to tackle Member State tax decisions. Many of these cases – including the *Fiat* case – focused on transfer pricing arrangements,[32] but the Commission has also challenged other tax practices.[33] Under EU State aid rules, Member States cannot provide subsidies (including fiscal incentives) to selectively benefit a business outside of narrowly-defined exceptions. The Commission has contended that countries such as Belgium, Ireland, Luxembourg and the Netherlands applied their tax rules in a way that amounted to illegal State aid. These efforts have been criticized as "harmonization through the back door", as legal commentators have questioned the novel reasoning adopted by the Commission in these cases.[34]

In *Fiat*, the Court of Justice ruled on the key issue of whether the Commission can assess the existence of a selective advantage in light of an arm's length principle defined at EU level. The Court of Justice struck down the Commission's view that the arm's length principle applies "independently of whether a Member State has incorporated this principle into its national legal system" as "a general principle of equal treatment in taxation falling within the application of Article 107(1) of the TFEU".[35] Instead, the Court of Justice clarified that the arm's length principle may only be used to the extent it forms part of the relevant national tax system, and required the Commission to fully examine how the principle is integrated and applied in the relevant national law. The judgment will likely impact other tax ruling cases. Indeed, among the at least 11 Commission State aid

[29] *Fiat Chrysler Finance Europe and Ireland v Commission* (Cases C-885/19 P and C-898/19 P) EU:C:2022:859 (the "Fiat Judgment"); *Luxembourg and Fiat Chrysler Finance Europe v Commission* (Cases T-755/15 and T-759/15) EU:T:2019:670.

[30] *State aid which Luxembourg granted to Fiat* (Case COMP/SA.38375), Commission decision of October 21, 2015 (the "Fiat Commission Decision").

[31] European Parliament, Report on tax rulings and other measures similar in nature or effect, November 5, 2015, available here.

[32] *See e.g., State aid implemented by the Netherlands to Starbucks* (Case COMP/SA.38374), Commission decision of October 21, 2015; *Excess profit exemption in Belgium* (Case COMP/SA.37667), Commission decision of January 11, 2016; and *State aid implemented in Ireland to Apple* (Case COMP/SA.38373), Commission decision of August 30, 2016.

[33] For instance, in the *Engie* case, the Commission scrutinized tax rulings approving the legal treatment of payments which led to reduced profits or tax exemptions (*State aid implemented by Luxembourg in favor of Engie* (Case COMP/SA.44888), Commission decision of June 20, 2018). In *McDonald's*, the Commission investigated, but did not ultimately sanction, the double non-taxation of McDonald's profits under Luxembourg national law and the Luxembourg-US Double Taxation Treaty (*Tax rulings granted by Luxembourg in favor of McDonald's Europe* (Case COMP/ SA.38945), Commission decision of September 19, 2018).

[34] *See e.g.*, G. Allevato, "Judicial Review of the State Aid Decisions on Advance Tax Rulings: A Last Resort to Safeguard the Rule of Law", European Taxation, 2022 (Volume 62), No.2 and commentary cited.

[35] Fiat Commission Decision, para. 228.

investigations and decisions since 2013 in relation to tax rulings[36], three are pending appeal before the Court of Justice, including the *Apple*[37] and *Amazon*[38] cases, in which the General Court had upheld the Commission's application of the arm's length principle. In addition, at least three investigations[39] are ongoing, in which the Commission will have to assess the existence of a selective advantage and any violation of the arm's length principle by reference to the national tax system.

The Commission continues to pursue "tax fairness" as a policy priority. In December 2022, Vice President Vestager commented that: "Ending unfair tax subsidies protects the interests of taxpayers. And it is a step towards addressing the rising inequality that is tearing our societies apart."[40] The Commission will continue to focus on State aid enforcement and has proposed legislation to establish a "Framework for Income Taxation" which will introduce a common set of rules for EU companies to calculate their taxable base and allocate profits between Member States.[41]

Notion of State aid: when does a tax ruling confer an unlawful "advantage"?

A Member State measure amounts to State aid if several core elements are met: (a) the measure involves the use of State resources; (b) the measure confers an "advantage" on the recipient; (c) this advantage is "selective" (*i.e.*, only available to specific companies or sectors); and (d) the measure distorts competition and affects trade between Member States.

In *Fiat*, the Commission assessed the existence of an "advantage" by comparison to a benchmark based on the "arms-length" principle, *i.e.*, the behavior of independent companies negotiating under market conditions. However, the Commission failed to consider whether and how this principle had been incorporated into Luxembourg national law, but rather, sought to apply an "abstract expression of that principle" based on OECD Guidelines. The Court of Justice confirmed that the Commission should carry out its State aid assessment "based exclusively on the normal tax rules laid down by the legislature of the Member State concerned" and should only have taken into account such external rules to the extent they had been incorporated in national law.

The Commission's decision in Fiat Chrysler

In September 2012, the Luxembourg tax authorities adopted a tax ruling in favor of Fiat Chrysler Finance Europe, formerly Fiat Finance and Trade ("Fiat"), a Luxembourg-based subsidiary of the Fiat Chrysler group, approving a transfer pricing arrangement governing intra-group financing transactions (the "Tax Ruling"). A tax ruling is a decision by a tax authority on the tax treatment of a given arrangement and is used to provide certainty to companies. Fiat Finance and Trade performs treasury functions for the Fiat Chrysler group: it raises funds in the market through loans, bond issuances and fund investments and makes them available to European companies within the Fiat group through intercompany loans. The Tax Ruling concerned the methodology for determining the taxable profit of Fiat Finance and Trade.

In October 2015, the Commission found that the Tax Ruling constituted illegal State aid and ordered Luxembourg to recover the unpaid tax

[36] For an illustrative overview of the Commission's activities with respect to tax rulings, see here.

[37] *Aid to Apple* (Case COMP/SA.38373), Commission decision of August 30, 2016 (the "*Apple* decision"); and *Ireland and Apple v. Commission* (Cases T-778/16 and T-892/16) EU:T:2020:338, see paras. 224-225.

[38] *Aid to Amazon* (Case COMP/SA.38944), Commission decision of November 4, 2017; and *Amazon* (Cases T-816/17 and T-318/18) ECLI:EU:T:2021:252, see para 122.

[39] *Aid to Huhtamäki* (Case COMP/SA.50400), Commission decision of March 7, 2019, initiating the formal investigation procedure; *IKEA* (Case COMP/SA.46470), Commission decision of December 18, 2017, initiating the formal investigation procedure; and *Aid to Nike* (Case COMP/SA.51284), Commission decision of January 10, 2019, initiating the formal investigation procedure.

[40] Commissioner Vestager, *Competition in the wider policy context*, Speech to OECD 21st meeting of the Global Forum on Competition, Paris, December 1, 2022, available here.

[41] European Commission, Business in Europe: Framework for Income Taxation (BEFIT), public consultation launched on October 13, 2022, available here. More recently on December 12, 2022, the Council of the EU also agreed to adopt the Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, which seeks to reduce opportunities for tax base erosion and profit shifting and aims to ensure companies subject to the rules are taxed at a minimum rate of 15% (*see* Council of the EU Press Release, "International taxation: Council reaches agreement on a minimum level of taxation for largest corporations", December 12, 2022, available here).

from Fiat.[42] The Commission examined the methodology adopted by the Luxembourg tax authorities and concluded that it did not correspond to market-based outcomes and thus conferred an illegal selective advantage under Article 107 TFEU.[43] According to the Commission, the Tax Ruling: (i) calculated a capital base that was much lower than Fiat Finance and Trade's actual capital; and (ii) applied lower-than-market rates in estimating the remuneration applied to that capital.[44] The Commission found that taxable profits declared in Luxembourg would have been 20 times higher if the capital and remuneration calculations had been consistent with market conditions.[45] Fiat's taxes, therefore, had been calculated based on underestimated profits. As a result, Luxembourg granted Fiat an illegal "tax break" of €20–30 million.[46]

Fiat and Luxembourg challenged the Commission's decision before the General Court, which upheld the Commission's decision in September 2019. The General Court held that the Commission had appropriately used the arm's length principle in determining that, as a result of the Tax Ruling, Fiat was given a selective economic advantage compared to similarly situated companies.[47] Fiat – together with Ireland, as an interested Member State[48] – appealed the General Court's ruling before the Court of Justice.

The Court of Justice judgment

The Court of Justice sided with the appellants. It first reiterated the applicable principles to assess whether a national tax measure confers a selective advantage. As a first step, the Commission must identify the reference system, that is, the "normal" tax system applicable in the Member State concerned. As a second step, the Commission must demonstrate that "the tax measure at issue is a derogation from that reference system" because it applies differential treatment to similarly situated entities, unless such differentiation is "justified, in the sense that it flows from the nature or general structure of the system of which those measures form part."[49]

The Court of Justice emphasized that the identification of the applicable reference system is "an essential prerequisite for assessing not only the existence of an advantage, but also whether it is selective in nature."[50] However, the Commission had applied the wrong approach in defining the reference system as it should have examined the Tax Ruling on the basis of Luxembourg tax law and any version of the arm's length principle incorporated therein.[51] This is because, in the absence of harmonization in EU law, the rules for the application of that principle "are defined by national law and must be taken into account in order to identify the reference framework for the purposes of determining the existence of a selective advantage."[52] In this context, the Court of Justice explained that parameters and rules external to the national tax system at issue, such as the OECD Transfer Pricing Guidelines, are relevant only to the extent that these external rules are incorporated in national law.[53] But the Commission applied a different arm's length principle from that defined in Luxembourg law, and "confined itself to identifying [...] the abstract

[42] *Fiat Commission Decision*, paras. 354-371.

[43] Commission Press Release IP/15/5880, "Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules," October 21, 2015 and *Fiat Commission Decision*, paras. 339-340 and 346-347.

[44] *Fiat Commission Decision*, paras. 234-311 ; *see also* our October–December 2015 European Competition Report, pp. 11-12.

[45] *See* Commission Press Release IP/15/5880, "Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules," October 21, 2015 and *Fiat Commission Decision*, paras. 311 and 365-369.

[46] *See* Commission Press Release IP/15/5880, "Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules," October 21, 2015.

[47] *Luxembourg v. Commission* (Case T-755/15) EU:T:2019:670, paras. 359–367; *see also* our August–September 2019 EU Competition Law Newsletter, pp. 5-6.

[48] Ireland had the right to appeal the General Court judgment, because it supported both Fiat and Luxembourg before the General Court as an intervener.

[49] *Fiat Judgment*, para. 68.

[50] *Ibid*, para. 74.

[51] *Ibid*, paras. 91-93.

[52] *Ibid*, para. 93 and 95.

[53] *Ibid*, paras. 96-97.

expression of that principle," rather than examining "the content, interaction and concrete effects" of the Luxembourg tax rules.[54] The Commission decided that the arm's length principle formed part of its assessment irrespective of whether it had been incorporated in the national legal system and also disregarded Luxembourg's own Tax Code and tax circulars that sought to apply this principle. In doing so, the Commission infringed the well-established rule of the Member States' autonomy in the field of direct taxation.[55]

The Court of Justice further clarified that there is no autonomous arm's length principle in EU law that could apply independently of the incorporation of that principle into national law. It clarified, in that regard, that the *Belgium and Forum 187 v Commission* judgment,[56] which the Commission cited in its decision to support its position, referred to the arm's length principle as incorporated into Belgian law and did not establish a generally-applicable arm's length principle in EU law.[57]

Despite emphasizing the primacy of national laws and policy in the State aid assessment of tax measures, the Court of Justice left the door open for the Commission to challenge a Member State's interpretation of the arm's length principle when identifying a "selective advantage". It observed that the Commission could establish that "the parameters laid down by national law are manifestly inconsistent with the objective of non-discriminatory taxation [...] pursued by the national tax system, by systematically leading to an undervaluation of the transfer prices applicable to [certain companies] as compared to market prices for comparable transactions carried out by [comparable companies]."[58] Accordingly, the Court of Justice affirmed that tax measures are not exempted from the scope of State aid rules and the Commission could seek to disregard national rules that clearly contradict the stated objectives of a national tax framework.

Conclusion

The Court of Justice's judgment in *Fiat* deals a blow to the Commission's efforts to tackle inconsistent Member State tax practices through the deployment of "objective" EU-level standards. The judgment clarifies the boundaries of EU competences – in this case, the State aid regime – and Member State autonomy in tax matters. It will not, however, be the last word in EU efforts to regulate Member State corporate taxation, as the Commission has promised to continue pursuing enforcement and legislative initiatives in this area.

Court of Justice Backs the Creation of *ex novo* Evidence in Private Enforcement Disclosure

On November 10, 2022, in a judgment on a request for a preliminary ruling on the interpretation of Article 5(1) of Directive 2014/104 (the "Damages Directive") and the scope of its rules on evidence production, the Court of Justice confirmed that national courts could require defendants to disclose evidence that did not exist at the time of the court proceedings ("*ex novo* evidence")— by compiling or classifying knowledge, information or data in their possession— rather than to merely produce documents that already exist.[59] In this instance, the applicants were seeking price data to quantify the artificial price increase caused by a cartel. The Court of Justice considered that the need to ensure the effective implementation of EU competition law could justify this interpretation, provided

[54] *Ibid*, paras 91-92.

[55] *Ibid*, para. 94.

[56] *Belgium and Forum 187 v. Commission* (Cases C-182/03 and C-217/03) ECLI:EU:C:2006:416.

[57] *Fiat Judgment*, para. 104.

[58] *Ibid*, para. 122.

[59] *AD and others v. Paccar Inc, DAF TRUCKS NV, DAF Trucks Deutschland GmbH* (Case C-163/21) ("*AD and others judgment*"). The Court of Justice's reasoning largely followed Advocate General Szpunar's opinion (*see* our April 2022 EU Competition Law Newsletter).

that national courts limited disclosure of *ex novo* evidence to necessary and proportionate requests. This ruling will increase the burden of follow-on litigation on companies and, in particular, the time and costs of carrying out disclosure.

Background

In July 2016, five European truck manufacturers settled a cartel investigation with the Commission. This decision led to hundreds of follow-on damages cases before Spanish courts as well as in other Member States.

In March 2019, a claimant requested the Court of first instance of Barcelona to order the disclosure of evidence pertaining to the calculation of potential harm suffered by the company.[60] Article 5(1) of the Damages Directive allows national courts to order the disclosure by the defendant or a third party of relevant evidence "which lies in their control". The applicants claimed the evidence requested was necessary to quantify the artificial price increase caused by the cartel, by carrying out a comparison of recommended prices before, during and after the cartel period.[61] Specifically, they requested a list of models manufactured during an approximately 38-year period (1990 to 2018), classified by year and by certain characteristics, as well as the ex-factory (gross) price for each model on the list, and finally, the "total delivery cost" for those models.[62] The defendants argued that the Damages Directive did not allow the national court to request the disclosure of such evidence because it did not "lie in their control" but needed to be drawn up on an *ad hoc* basis.[63]

In February 2020, the Spanish court sought guidance from the Court of Justice on the interpretation of Article 5(1) of the Damages Directive. Specifically, the Spanish court asked whether Article 5(1) could cover the disclosure of evidence created by compiling or classifying information, knowledge, or data that had not been compiled or classified to date.

The Court of Justice judgment

The Court of Justice considered the issue based on a textual, contextual, and teleological interpretation of the relevant EU provision:

— **Textual interpretation.** The Court of Justice observed that the plain wording of Article 5(1), and specifically the terms "in [...] control", suggested that it only concerned pre-existing evidence.[64]

— **Contextual interpretation.** However, a consideration of this phrase in the context of the Directive's recitals and other provisions led the Court of Justice to conclude that it amounted to a mere description of the information asymmetries often existing in competition law disputes, and the factual situation the EU legislature intended to remedy, and did not preclude an interpretation that would require defendants to prepare and disclose new material.[65]

— **Teleological interpretation.** The Court of Justice observed that the Damages Directive was intended to facilitate private litigation, which was viewed as necessary to ensure full compliance with Articles 101 and 102 TFEU, while providing a direct remedy for any damages suffered.[66] Allowing courts to require the production of *ex novo* evidence would advance this objective.

Thus, the Court of Justice considered that Article 5(1) of the Damages Directive allowed national courts to require companies to process information or otherwise create new documents

[60] *AD and others judgment*, para. 20.

[61] *AD and others judgment*, para. 20.

[62] *AD and others v. PACCAR Inc, DAF TRUCKS NV, DAF Trucks Deutschland GmbH* ("AD and others") (Case C-163/21), opinion of Advocate General Szpunar, EU:C:2022:286, para. 9.

[63] *AD and others judgment*, para. 21.

[64] *AD and others judgment*, para. 39.

[65] *AD and others judgment*, para. 49.

[66] *AD and others judgment*, paras. 55-56 and 62.

for disclosure purposes.[67] It stressed, however, that national implementation of the Damages Directive requires strict supervision by the national courts,[68] which must determine whether such requests are proportionate and necessary on a case-by-case basis. The national courts will weigh up factors in favour of disclosure, such as the relevance of the requested evidence, its significance in the damages claim and whether the requested evidence is sufficiently targeted, against the time, cost and workload involved, to assess the overall proportionality of the request.[69]

Claimants to receive access to the evidence prepared *ex novo*

Claimants will approve of the Court of Justice's approach, as it will facilitate their cases and create additional opportunities to put pressure on defendants during discovery. This being said, the disclosure of *ex novo* evidence will still require national courts to agree that claimants' requests for such evidence are proportionate. The extent to which this judgment will change access to evidence in follow-on litigation will therefore now depend on the practice of national courts. This will entail the emergence of national law principles to assess when such *ex novo* document requests are justified.

[67] *AD and others judgment*, para. 69.

[68] *AD and others judgment*, para. 68.

[69] *AD and others judgment*, paras. 64 and 68.

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