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FOREIGN DIRECT INVESTMENT

National level

UNITED KINGDOM AND GERMANY

National regulators continue to flex Foreign Direct Investment muscles – what are the emerging trends?

On 16 November 2022, the UK Secretary of State responsible for Business, Energy & Industrial Strategy ("BEIS") effectively blocked another transaction in the semiconductor industry under the National Security and Investment Act 2021 (the "NSI Act"). Nexperia, ultimately owned by Wingtech of China, was ordered to divest its 86% controlling share of the UK-based Newport Wafer Fab ("Newport"), following a prolonged NSI review which commenced on 25 May this year.

Since the NSI Act came into force at the beginning of this year, three transactions have been prohibited and a number of others have been approved subject to various conditions (including significant commitments from buyers offered to BEIS in order to secure its approval). The sectors most heavily scrutinised thus far are: defence; dual-use, critical supplies to the government; data infrastructure; and artificial intelligence.

The Newport/Nexperia deal is the first example of BEIS using its powers to review transactions that closed prior to the NSI Act coming into force. This is a clear signal that BEIS will not hesitate to review transactions – including up to five years post-completion – when national security concerns come into play (for more details on how the NSI regime works, see VBB on Competition Law, Volume 2021, No. 12).

The (very brief) Final Order issued by BEIS in Newport/Nexperia justifies the prohibition on the basis of two main national security concerns, namely that:

- the "*technology and know-how that could result from a potential reintroduction of compound semiconductor activities at the Newport site [could] undermine UK capabilities*", and
- "*the location of the site could facilitate access to technological expertise and know-how in the South Wales Cluster ("the Cluster"), [which in turn] may prevent the Cluster being engaged in future projects relevant to national security*".

In additional to the ongoing sensitivity regarding Chinese-controlled investors (see also VBB on Competition Law, Volume 2022, No. 7), the UK Government also seems to be keeping an increasingly vigilant eye on the location of relevant assets and businesses considered important to the UK's national security – and, arguably, industrial – interests. Such sensitivities appear even more pronounced in relation to the semiconductor industry, which was again the centre of attention in Pulsic/Super Orange – the second case blocked by BEIS this year.

Of course, the UK is not alone in its determination to enforce a stricter national security framework in light of the current global political and economic challenges, and the above cases therefore form only part of a wider European trend. For instance, the German regulators have recently blocked two deals not only concerning the same industry (semiconductors), but again also involving Chinese acquirers. The first was the acquisition of a German chip manufacturer (Elmos) by a Swedish subsidiary of a Chinese investor, followed by the sale of a semiconductor equipment manufacturer (ERS Electronic) to a Chinese buyer. Thus, investors potentially interested in acquiring such targets should bear in mind the associated deal risks, especially the seemingly ever-increasing complexity and uncertainty surrounding European FDI and national security reviews.

ABUSE OF DOMINANT POSITION

National level

FRANCE

French Competition Authority condemns Essilor's restrictions on online sales

On 8 November 2022, the French Competition Authority (the "FCA") published its decision of 6 October 2022 imposing a fine totalling EUR 81 million on companies belonging to Essilor group ("Essilor") for having engaged in discriminatory business practices over a period of nearly 12 years in the optical lenses sector.

Essilor was found to have a dominant position in France on the market for the wholesale distribution of corrective optical lenses. The FCA considered that Essilor abused this dominant position between 2009 and 2020 by implementing practices aimed at hindering the development of online distribution of optical lenses, a distribution channel in which Essilor was not present in France.

More specifically, Essilor implemented restrictions on deliveries, communications and warranties applicable to online sales operators in different ways:

- Essilor refused to supply Essilor-branded optical lenses to online retailers in France, although it did so in other countries.
- Essilor prevented online retailers from using Essilor's trademarks and logos and from providing information to customers regarding the origin of the lenses available on their websites.
- Essilor implemented practices aimed at discriminating against online sales operators with regards to warranties by requiring them to comply with the same conditions and protocols as in-store vendors in order for Essilor to bear the cost of replacing lenses. The FCA found that this penalised online sales operators in practice.

The above practices were considered particularly serious by the FCA because (i) they were implemented in the public health sector where prices are generally high, (ii) the restrictions affected online sales sites, which are particularly important for competitiveness and lower prices, and (iii) the restrictions limited consumer choice and information regarding Essilor's products, which, given their reputation, are essential for the development of online sales operators in this sector.

According to the FCA, Essilor did not provide any evidence showing that its conduct could be justified on the basis of objective reasons such as the difference in business models between in-store and online vendors, the necessity to preserve Essilor's brand image or the risks of "free-riding".

This decision confirms that companies should be very careful when dealing with online distributors, as restrictions in this field could easily be caught – depending on the case – by either Article 101 TFEU (as in the Italian competition authority's last year decision against Amazon and Apple for vertical agreement limiting access to the former's platform: see VBB on Competition Law, Volume 2021, No. 11) or, as in this case, Article 102 TFEU.

CARTELS AND HORIZONTAL AGREEMENTS

National level

General Court dismisses appeals against price-fixing decision re-adopted nearly two decades after initial decision

On 9 November 2022, the General Court dismissed in their entirety appeals lodged by a number of Italian manufacturers against the European Commission's ("Commission") re-adopted decision of 2019 in the Reinforcing steel bars cartel case. (T-655/19, *Ferriera Valsabbia and Valsabbia Investimenti*; Case T-656/19, *Alfa Acciai*; Case T-657/19, *Feralpi*; and Case T-667/19, *Ferriere Nord*)

The case's origins date to 2002, when the Commission adopted a decision finding that eleven Italian steel companies had infringed Article 65 of the European Coal and Steel Community ("ECSC") Treaty through their involvement in a price-fixing cartel between December 1989 and July 2000. In 2007, however, that decision was annulled by the General Court because, at the time that decision was adopted, the ECSC Treaty – the sole legal basis of the underlying decision – was no longer in force. In 2009, the Commission accordingly re-adopted the decision on the basis of Articles 7(1) and 23(2) of Regulation 1/2003 but, in 2017, that decision was once again annulled (this time by the Court of Justice) as the Commission had not invited the competition authorities of the Member States to participate in an oral hearing before the re-adoption. In 2019, seventeen years after its original decision, the Commission adopted a decision against the Italian steel companies for a *third* time, granting the parties a 50% fine reduction in recognition of the long duration of the proceedings.

Ruling on challenges to the decision readopted in 2019, the General Court concluded in its recent judgments that the Commission had not committed any procedural errors in the re-adoption of its decision and dismissed the appeals brought by the parties against the decision on substantive grounds. The applicants raised a number of pleas, the most significant of which are discussed below.

One of the common pleas made by the applicants was that the Commission had infringed Article 41 of the Charter of Fundamental Rights by failing to consider whether re-adopting the decision at issue would comply with the principle that an action must be brought within a reasonable period. This ground of appeal was, however, dismissed as unfounded. According to the General Court, the reasonableness of a period should be appraised in light of the circumstances specific to each case. Here, the General Court found that the case was complex because the infringement covered a long period (over ten years), concerned a significant number of participants and involved a large volume of documents (over 20,000). Further, the General Court also noted that the overall length of the proceeding was partially due to judicial review interruptions linked to the number of appeals before EU courts. Finally, as the applicants had had the opportunity to put forward their arguments throughout the proceeding (seven times), there was no finding that their rights of defence were infringed.

The General Court also dismissed the appellants' argument that the Advisory Committee, which comprises the competition authorities of the Member States, was not in a situation in which it would opine in an impartial manner because of the two previous decisions adopted by the Commission imposing fines. In this respect, the General Court found that, even if the relevant Member State authorities had knowledge of the position adopted by the Commission in the previous cases, this would not establish a lack of impartiality on their part that would affect the legality of the re-adopted contested decision.

Finally, the General Court also rejected as unfounded the appellants' argument that the Commission infringed the *ne bis in idem* principle, which prohibits taking legal action twice against the same alleged infringement. According

CARTELS AND HORIZONTAL AGREEMENTS

National level

to the General Court, that principle does not in itself prevent the resumption of proceedings as regards the same anticompetitive conduct where the first decision was annulled solely on procedural grounds without any ruling on the substance of the case. In the present case, the fines imposed by the 2019 re-adopted decision were not added to those imposed by the annulled 2002 and 2007 decisions, but rather replaced them.

The General Court's judgments lends support for the Commission's policy of readopting infringement decisions after annulment where it can, even where this leads to proceedings extending for extremely long periods. It seems likely that the General Court's judgments will be the subject of further appeal before the Court of Justice.

INTELLECTUAL PROPERTY/LICENSING

European Union level

European Commission seeks feedback regarding Technology Transfer Block Exemption Regulation and associated Guidelines

On 25 November 2022, the European Commission launched a Call for Evidence seeking feedback regarding the scope and content of the upcoming evaluation of the Technology Transfer Block Exemption Regulation ("TTBER") and the associated Guidelines.

The TTBER exempts specific categories of technology transfer agreements from the prohibition of anti-competitive restrictions contained in Article 101(1) TFEU. Technology transfer agreements allow one party to authorise another party to use the former's intellectual property rights for the production of goods or provision of services. The aim of the TTBER is to increase **the incentives for research and development, facilitate the spreading of technologies and promote competition**. The current rules will expire on 30 April 2026.

The purpose of the evaluation is to gather evidence on how the TTBER has been applied in practice, and this information should help the Commission decide whether to renew the TTBER, revise it, or allow it to expire.

All interested parties can submit their views on the Commission's Have your Say Portal until **23 December 2022**. The feedback obtained will help the Commission prepare a further public consultation, which it schedules to launch in the second quarter of 2023.

STATE AID

European Union level

Court of Justice's landmark State aid judgment sets clear limits to Commission's crusade against "unfair" tax arrangements

On 8 November 2022, the Grand Chamber of the European Court of Justice ("ECJ") delivered its judgment in Joined Cases C-885/19 P, *Fiat Chrysler Finance Europe v Commission*, and C-898/19 P, *Ireland v Commission*, annulling a 2015 Commission decision that had found that a transfer price tax arrangement between Fiat Chrysler Finance Europe ("FFT") and Luxembourg by means of an advance tax ruling constituted unlawful State aid, and had ordered Luxembourg to recover approximately EUR 20-30 million in unlawful aid.

With this landmark judgment, the ECJ firmly sides with the rule of law and the principles of legal certainty and predictability, emphasizing that the Commission must respect clear and well-established rules of EU law when assessing Member State tax arrangements under State aid law, and must not deviate from these rules in the pursuit of "fairness" policy goals.

Background

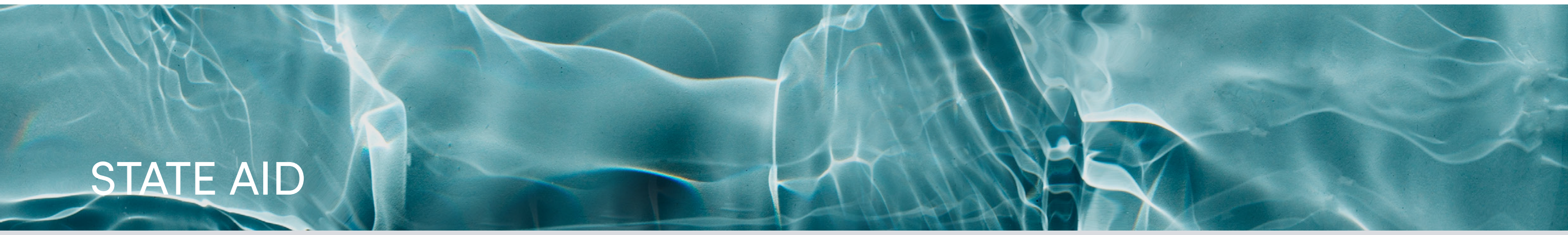
In 2013, the Commission started investigating Luxembourg's tax arrangements with multinational corporations as part of a wider, controversial effort to use EU State aid law to combat Member State taxation systems that – allegedly "unfairly" – enabled multinational corporations to reduce their tax liabilities. In this context, it determined that Luxembourg had granted FFT unlawful state aid by way of a tax ruling that did not comply with the arm's length principle (an international tax law principle requiring that intra-group transactions must include remuneration as if they had been agreed to by independent companies) and therefore conferred an advantage to FFT.

Luxembourg tax law incorporated the arm's length principle, and the tax ruling was consistent with the national legal framework. It was, in fact, not disputed that Luxembourg had consistently applied its rules in all relevant situations. The Commission, however, reviewed whether the methodology used in Luxembourg law and the tax ruling confirming compliance of FFT's intra-company transfers with the arm's length principle departed from a methodology that would lead to a reliable approximation of a market-based outcome. For this review, the Commission relied on methodologies it derived from OECD Transfer Pricing Guidelines, although these had not been incorporated in Luxembourg tax law. Against this background, it determined that the methodology used in the Luxembourg tax ruling resulted in a lowering of FFT's tax liability, compared to the amount of taxes that would have been payable by a stand-alone company. Thus, according to the Commission, the Luxembourg tax ruling conferred on FFT a selective advantage.

In an action for annulment of the Commission decision, FFT and Luxembourg claimed, among other things, that the Commission violated the principles of legal certainty and protection of legitimate expectations. In one of the Commission's rare wins in a number of similar "tax fairness" cases, the General Court ("GC") had initially upheld the Commission decision (see VBB on Competition Law, Volume 2019, No. 9). The ECJ, however, has now annulled the GC's judgment and, at the same time, the Commission decision.

Key elements of the ECJ's analysis

The ECJ observed that, in order to assess whether a state measure confers a selective advantage, the Commission must first identify the reference system against which the state measure's selectiveness can be assessed. It emphasized that in the area of tax law, which has not been harmonized by EU law, such a reference system must be constructed by reference to the national law applicable in the Member State concerned. If the national law was clear and applied consistently in all like situations, there was in principle no basis for a finding of selectivity.



European Union level

In light of this, the Court faulted the GC for upholding the Commission's analysis, which had, in essence, used its own definition of the arm's length principle for the purposes of applying Article 107(1) TFEU and ignored the definition used in Luxembourg law. The Commission's approach of substituting its own understanding of the arm's length principle for that used by a Member State was therefore found to be flawed, as it failed – contrary to EU law – to consider Luxembourg's legitimate legislative choices.

Observations and take-aways

Fiat Chrysler creates significant limits to the Commission's attempts to get around the lack of EU powers in the area of tax law by using State aid law to attack, in the name of "tax fairness," Member State tax arrangements with multinational corporations. The judgment does confirm that the Commission can in principle review national tax laws under EU State aid rules. But it sets a high threshold for the Commission to prove that tax arrangements constitute unlawful State aid – if a Member State has adopted clear rules incorporating the arm's length principle to assess the transfer prices of integrated companies, the Commission can establish unlawful State aid only if it can demonstrate that "*the parameters laid down by national law are manifestly inconsistent with the objective of non-discriminatory taxation of all resident companies, whether integrated or not, pursued by the national tax system, by systematically leading to an undervaluation of the transfer prices applicable to integrated companies* […] *as compared to market prices for comparable transactions carried out by non-integrated companies*."

Fiat Chrysler likely will have consequences far beyond its impact on ongoing judicial proceedings related to Commission decisions concerning comparable tax rulings, where it clearly signals that these decisions cannot be sustained. Going forward, the judgment provides Member States a clear path for how to maintain tax incentives for multinational corporations without running afoul of EU State aid rules, and it is likely to limit future Commission's investigations in similar circumstances. Thus, tax competition among EU Member States is likely to continue, within the framework set out in *Fiat Chrysler*.

In addition, the judgment is also bound to affect the application of the EU's Regulation on foreign subsidies distorting the internal market ("FSR"), which was recently adopted by the EU co-legislators. The FSR uses a very wide definition of financial contributions that could constitute a distorting subsidy, reflecting both EU state aid law and EU trade/anti-subsidy law. In principle, any third country tax arrangement could potentially have been considered a notifiable financial contribution and constitute a distorting subsidy. As a result of *Fiat Chrysler*, however, tax agreements of third countries that comply with the judgment's framework should fall outside the scope of the FSR and thus escape future FSR investigations.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

National courts may hear claims under Article 102 TFEU for excessive railway infrastructure fees only after the sector regulator has ruled on the fees' lawfulness

On 27 October 2022, the European Court of Justice ("ECJ") handed down a ruling on the permissibility of private damages claims for excessive railway infrastructure fees under Article 102 TFEU. The ECJ found that a national court is precluded from awarding damages for excessive fees until the national sector regulator has adopted a decision on the fees and, even though the court is not required to follow the regulator's decision, it must take the decision into consideration when determining whether the fees infringed EU competition law (Case C-721/20, *DB Station*).

Background

The dispute in the main proceedings involved DB Station, which operates some 5,400 railways stations in Germany, and a rail transport company using DB Station's infrastructure. In 2005, DB Station issued a new pricing structure resulting in an increase of its infrastructure fees for railway undertakings. In 2009, the Federal Network Agency, which has the exclusive power to review the lawfulness of such charges, preliminarily declared DB Station's 2005 pricing structure invalid, a decision that DB Station appealed. While the appeal was pending, several railway companies sought to recover excess charges through parallel proceedings under Article 102 TFEU before national courts. Certain courts considered themselves precluded from ruling on private damages claims before the Federal Network Agency issued its final decision. In contrast, the Federal Court of Justice found that national courts were required to apply Article 102 TFEU without waiting for the regulator's final decision. These circumstances led to a reference for preliminary ruling to the ECJ.

The ECJ's judgment

The ECJ emphasised at the outset that national courts must safeguard the full effectiveness and direct applicability of Article 102 TFEU. Accordingly, individuals must have the right to bring damages actions before national courts alleging an abuse of dominance even if the allegedly unlawful conduct is also subject to sector regulation. The ECJ then pointed to the regulator's special role in ensuring the consistent management of railway networks and in enforcing sectoral rules. It concluded that, as the applicable sectoral rules are intended to further the objectives of Article 102 TFEU, the regulator must also apply Article 102 TFEU in its assessment of infrastructure fees. This includes fees levied in the past, even if national law did not confer these powers on the regulator.

Having established parallel powers to apply Article 102 TFEU to the same facts in judicial and administrative proceedings, the ECJ then sought to develop a procedural framework that sought to protect judicial independence while reducing the likelihood of conflicting outcomes. Accordingly, it held that a railway company must first challenge the legality of infrastructure charges before the national regulator (which would have to include Article 102 considerations in its determination) before launching a private action for damages under Article 102 TFEU, alleging excessive infrastructure charges. Once the regulator has decided, however, national courts are not bound by the decision, nor are they required to wait for the outcome of any appeals against the regulator's decision. They must, however, take the regulator's decision into account when ruling on the excessive pricing claim.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

Observations

DB Station seeks to balance different fundamental principles of EU law, but the resulting procedural framework raises several questions. On the one hand, the ECJ confirms that a national court is required to take account of the entire legal and economic context to make a determination under Article 102 TFEU. Clearly, this would be difficult to attain without due consideration being given to the views of the sectoral regulator. On the other hand, the judgment's logic appears flawed to the extent that the national court does not need to wait for the outcome of appeal proceedings against the regulatory decision. The ECJ's compromise solution would require a national court to take a regulator's decision into account which could later be invalidated in an appeal.

In addition, there is a question whether *DB Station* is entirely consistent with ECJ judgments establishing that compliance with sectoral regulation does not create a safe harbour against antitrust liability (see, e.g., *Deutsche Telekom* and recently *bpost*, which was covered in VBB on Competition Law, Volume 2022, No. 3). If a regulator's decision cannot determine the outcome in a competition law case involving identical facts, what are the benefits of requiring a plaintiff to first bring a case before the regulator, and require waiting for the regulator's decision? What is certain, however, is that this judgment creates yet another hurdle for private damages claimants and further complicates the effective enforcement of the competition rules.

Lastly, the judgment might ostensibly be limited to the railway sector, as the ECJ repeatedly emphasises the particular features of sectoral regulation in the railway sector and interprets the scope of national rules implementing the EU's railway Directives. Nevertheless, it appears almost inevitable that litigants will seek to extend the principles established in *DB Station* to other regulated industries, triggering questions about whether sector regulation can limit or delay the right to enforce competition law claims.

PRIVATE ENFORCEMENT

European Union level

Court of Justice rules that 'relevant evidence' under the Damages Directive is not limited to pre-existing documents

On 10 November 2022, the European Court of Justice ("ECJ") clarified the meaning of 'relevant evidence' within the meaning of Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions ("Damages Directive"). In particular, the ECJ found that national courts may order the disclosure of documents which must be created *ex novo*, provided that such disclosure order does not place a disproportionate burden on defendants and third parties to private damages actions (Case C-163/21, *PACCAR and Others*).

Following the decision of the European Commission ("Commission") of 19 July 2016 finding that DAF, Volvo and other truck manufacturers participated in a cartel between 1997 and 2011, 45 unnamed claimants filed an action for damages against PACCAR and DAF Trucks before the commercial court of Barcelona in March 2019. Against this background, the claimants applied for an order to disclose evidence in the defendants' possession to compare recommended prices before, during and after the cartel period. In turn, the defendants objected to this request on the ground that it was disproportionate: the documents could not simply be 'disclosed' since they did not exist and instead had to be prepared on an *ad hoc* basis.

These circumstances led the Barcelona commercial court to stay the proceedings and to refer a request for a preliminary ruling to the ECJ. In particular, the Spanish court asked whether Article 5(1) of the Damages Directive – which provides that national courts may order the defendant or a third party to disclose relevant evidence which lies within their control – refers only to pre-existing documents or also to documents to be created *ex novo*, for example by compiling or classifying information, knowledge or data.

First, a textual analysis of the Damages Directive led the ECJ to consider that evidence does not necessarily refer to pre-existing documents. Next, the ECJ noted that the very purpose of Article 5 of the Damages Directive is precisely to remedy the information asymmetry between parties to an action for damages for infringement of competition law. In light of this, providing (a large amount of) unprocessed pre-existing documents would only imperfectly respond to the claimant's request. Thus, the ECJ found, excluding *ex novo* documents from the scope of Article 5(1) of the Damages Directive would undermine the effectiveness of the private enforcement of EU competition rules.

For good measure, the ECJ did note that its broad interpretation of 'relevant evidence' cannot lead claimants to turn their burden of demonstrating the existence and extent of their harm entirely over to the defendants. In this regard, it recalled that, in application of Article 5(2) and (3) of the Damages Directive, national courts must thoroughly review the applications for disclosure before them and assess whether there is a link between the evidence being requested and the claim for damages, whether such evidence is being identified sufficiently precisely, and whether ordering its disclosure would not place a disproportionate burden on the defendant or third party concerned, either due to workload or costs.

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