SULLIVAN & CROMWELL LLP

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State Aid and Tax – Where Are We Now?

Taking Stock After the Court of Justice of the EU Upholds the Commission on *Apple* but not on the *UK CFC Finance Exemption*

SUMMARY

On 10 and 19 September the Court of Justice of the European Union issued judgments in the *Apple* and *UK CFC finance exemption* cases on how the EU's state aid rules apply to corporate income tax regimes and rulings. These follow three other judgments in the past two years, in the *Fiat*, *Engie* and *Amazon* cases. Now is therefore a good time to take stock.

We first describe the state aid rules and the Commission's investigations into tax rulings. We then summarise the five recent Court of Justice judgments, focusing on the *Apple* and *UK CFC finance exemption* cases and looking at the facts underlying the Commission's decision, the case history and the judgments themselves. Finally, we describe what taxpayers can learn from the cases: how do the state aid rules apply to tax, what is the Commission's next move and what are the practical implications for multinationals?

BACKGROUND

In this section we set out the background to the *Apple* and *UK CFC finance exemption* cases: the prohibition against state aid and how it is identified; a summary of the tax ruling cases; and the Court of Justice's previous judgments on them.

What is state aid and how is it identified?

What is state aid?

Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) provides:

> "Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of

> certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

In theory, then, five elements must be present for a measure to constitute state aid:

1. an advantage for the beneficiary of the measure;
2. "selectivity", in that the advantage is not available to all comparable businesses;
3. funding by the Member State or through State resources;
4. an effect on trade between Member States; and
5. a distortion, or threatened distortion, of competition.

In practice, the Commission and the EU Courts assume the last two of these five elements to be present.

Measures satisfying these criteria can be lawful in certain circumstances, by falling within one of various exemptions, some of them available as of right, others requiring application to the Commission for approval before the measure is implemented. There is also a *de minimis* carve-out for measures that would result in aid with a value of less than €200,000 over three fiscal years.

If the Commission finds that a measure constitutes unlawful state aid, it must require the relevant Member State to recover the aid, with interest, from the beneficiary (unless recovery would be contrary to a general principle of EU law). The Commission can order recovery of state aid up to 10 years after the aid was granted or, if later, when the Commission became aware of it, although this period can be extended if any action is taken by the Commission or by a Member State (at the request of the Commission) with regard to the aid.

Even though direct taxation lies within the autonomous legislative competence of the EU member states, they must exercise that autonomy consistently with state aid law (just as they must exercise it consistently with the EU rules on freedom of establishment and free movement of capital). The state aid rules are broad. If a Member State grants favourable tax treatment to a particular undertaking or category of undertakings or in respect of certain goods or services, that may be state aid. Aid may take different forms, including statutory exemptions and tax rulings.

As noted above, the Commission and the Courts assume an effect on trade and distortion of competition. Moreover, any aid in the form of a reduction in tax will, by definition, be granted through State resources. Whether a tax measure is treated as unlawful aid therefore comes down to whether there is a "selective advantage". The Court will ask:

1. what is the relevant "reference system";
2. whether the tax measure derogates from that reference system in a way that differentiates between persons in a comparable factual and legal situation; and
3. whether that derogation can be justified.[1]

How is the existence of aid determined?

Where a potential aid has not been notified to the Commission for approval, the Commission may request information from the relevant Member State. If not satisfied that there is no aid, the Commission may open a formal investigation, which will be announced in an opening decision. The investigation is into whether the Member State has granted aid: it is a bilateral process. A key point to note is that the taxpayer has very little in the way of procedural rights independent of the Member State (by contrast, for example, with conventional antitrust challenges). Whether the taxpayer is to have any chance of persuading the Commission to close an investigation without taking further action will depend very much on the stance of the Member State and its willingness to involve the taxpayer in its advocacy to the Commission.

If the Commission issues a final decision that the Member State has granted unlawful state aid, both Member State and taxpayer may apply to the General Court (GCEU) to annul that decision. This is not an appeal on the merits of the case, but an examination of the lawfulness of the Commission's decision: the closest English analogue is a judicial review. Deadlines are tight; the number and length of submissions are strictly limited. The General Court may annul the decision if the Commission has misapplied the relevant provisions of EU law, has made a manifest error of assessment, or has infringed essential procedural requirements. The losing side may appeal to the Court of Justice of the European Union (CJEU).

The tax ruling cases: background

Until 2013, the Commission's state aid investigations in the tax sphere had tended to examine "aid schemes" – rules applying to any taxpayers falling within their terms – rather than "individual aid". In particular, in a series of decisions in the mid-2000s, the Commission had found the "coordination centre" regimes operated by several Member States to be unlawful state aid.

The Commission then began to focus on individual aid in the form of rulings given by Member States to specific taxpayers. In 2013, against a backdrop of increasing media coverage of the tax affairs and structuring of multinationals, the Commission set up a dedicated task force to look at "tax planning practices". That year the task force began state aid investigations into specific rulings granted to subsidiaries of Apple, Fiat Chrysler Automobiles and Starbucks (by Ireland, Luxembourg and the Netherlands respectively). In the years up to 2020 it opened further investigations into Luxembourg's treatment of subsidiaries of Amazon, McDonald's, GDF Suez (now known as Engie) and Huhtamäki; and into the treatment by the Netherlands of Inter IKEA and subsidiaries of Nike. Meanwhile, the Commission was also looking at Gibraltar's tax ruling practice, the Belgian excess profit rulings regime, and the finance exemption from the UK's controlled foreign companies regime.[2]

The *McDonalds* case involved a cross-border arbitrage arising from different views in Luxembourg and the US of what constitutes a permanent establishment: the Commission found that there was no aid. It found that some but not all of the measures in Gibraltar constituted aid; some but not all of the alleged recipients

of aid are challenging that assessment. The Commission has not yet published final decisions in *Huhtamäki*, *Inter IKEA* and *Nike*.

In all the other cases the Commission found that the relevant Member State had provided state aid and was challenged by the Member State and taxpayer (several taxpayers, in the case of the Belgian and UK regimes). The table below summarises the state of play in these cases: only the Belgian excess profit scheme cases have not been finally determined.

Taxpayer / regime	**State**	**Date**	**Latest event**	**Tax issues**
Amazon	Lux	Dec 2023	Commission decision **annulled by CJEU**	Transfer pricing – US MNE parent with valuable IP; licence fees relating to sales in EU jurisdictions; profits claimed to be outside EU and US tax net
Apple	Ire	Sep 2024	Commission decision **upheld by CJEU**	Allocation of profits to permanent establishment – US MNE parent with valuable IP; licence fees relating to sales in EU jurisdictions; profits claimed to be outside EU and US tax net
CFC finance exemption	UK	Sep 2024	Commission decision **annulled by CJEU**	Full or partial exemption of certain non-trading finance income under the UK CFC rules
ENGIE	Lux	Dec 2023	Commission decision **annulled by CJEU**	Arbitrage within member state and non-application of local general anti-avoidance rule
Excess profit regime	Bel	Sep 2023	Commission decision **upheld by GCEU**; **appeals ongoing**	Regime allowing reduction in income recognised in Belgium ostensibly based on transfer pricing
Fiat	Lux	Nov 2022	Commission decision **annulled by CJEU**	Transfer pricing – interest charged by finance company on intra-group lending; whether income arising in Luxembourg or (predominantly) Italy
Starbucks	NL	Sep 2019	Commission decision **annulled by GCEU**; no appeal	Transfer pricing – US MNE parent with valuable IP; licence fees relating to sales in EU jurisdictions; profits claimed to be outside EU and US tax net

The tax ruling cases: CJEU judgments so far

Fiat

The first of the recent crop of cases to reach the Court of Justice was the *Fiat* case, decided in November 2022.[3] (Sullivan & Cromwell advised Fiat alongside Maisto e Associati.) The Court rejected the Commission's attempt to found an EU-wide requirement for arm's-length transfer pricing on the basis of the

state aid prohibition in Article 107. It held that the reference framework for any state aid enquiry must be the national tax law. That disposed of the Commission's primary line of argument, based on an EU arm's-length principle; and its subsidiary line of argument, supposedly based on national law, relied entirely on the Commission's primary analysis so could not be separated from the flaws in that analysis.[4]

Engie* and *Amazon

In December 2023 the Commission also lost the *Engie*[5] and *Amazon*[6] cases.

In *Engie* the Court of Justice rejected the Commission's (and General Court's) view that profit distributions could only be exempt in Luxembourg if they were not deductible for the payer; and criticised the Commission's attempt to apply the Luxembourg anti-abuse doctrine without examining whether the ruling at issue was consistent with Luxembourg practice.

In *Amazon* the Court of Justice held that the General Court's judgment, although annulling the Commission's decision, had been too favourable to it: the Commission should have lost at an earlier stage of the analysis. The reference framework was limited not only to national tax law, but to explicit provisions of national tax law.[7] If the arm's-length principle and the OECD Transfer Pricing Guidelines were not explicitly incorporated or adopted in Luxembourg law, the Commission could not treat them as part of the reference framework.

In both cases Advocate General Kokott had suggested in her advisory opinion to the Court of Justice that a "modified standard of review" should apply in tax ruling cases: "not every incorrect tax ruling but only those which are manifestly erroneous in favour of the taxpayer constitute a selective advantage".[8] The Court did not take up this suggestion in its judgment in either case.

The *Apple* and *UK CFC finance exemption* cases

The Court of Justice has now issued decisions in the *Apple* and *UK CFC finance exemption* cases (on 10 and 19 September respectively). In both cases the Court followed the Advocate General's advisory opinion. (The Court usually follows the Advocate General, so there had been some warning that the Court might decide against Ireland and Apple.) We summarise below the facts underlying the Commission's decision in each case, the case history and the CJEU's judgment.

APPLE

Facts

The *Apple* case relates to two Irish-incorporated subsidiaries of Apple, Inc.

Under Irish law during the relevant period, the two subsidiaries were not considered resident in Ireland; nor were they resident in any other jurisdiction for tax purposes. The subsidiaries did, however, conduct operations through branches in Ireland (manufacturing and the provision of support services to related companies in one case; procurement, sales and distribution in the other).

In 1991 and 2007 the subsidiaries obtained advance opinions from Ireland on how much of their profits should be attributed to those branches. The profits attributed to the branches were in each case a small proportion of the profits recognised by the companies and did not include revenue derived from intellectual property rights, which Apple claimed were not attributable to the Irish branches. A substantial amount of income was therefore not subject to current taxation in any jurisdiction. (The Commission found that Apple paid an effective corporate tax rate on the profits of one of its Irish subsidiaries of 1% in 2003, falling to 0.005% in 2014. If these profits had been repatriated to the US as dividends, they would then have been subject to US taxation. Indeed, they were later caught by the US deemed repatriation tax enacted in the Tax Cuts and Jobs Act of 2017.[9])

The story so far

The Commission concluded its investigation in 2016, finding that the opinions given to the Irish subsidiaries endorsed an inappropriate attribution of profit within the Irish subsidiaries and constituted unlawful state aid. Specifically, it found that:

1. Irish law required profits to be allocated to the branches according to the arm's-length principle by virtue of Article 107, applying the Authorised OECD approach;
2. each company's "head office" had no operating capacity to handle the company's business and only its Irish branch had capacity to generate any income from trading; and,
3. accordingly, the profits should have been recorded in the Irish branch and taxed there.

Ireland and Apple applied to the General Court to have the Commission's decision annulled.

According to the General Court, the Commission was right to apply the arm's-length principle and the Authorised OECD approach, but was wrong to conclude that the profits had to be allocated to the Irish branches on the basis that the companies had no other employees capable of managing the IP without actually establishing that the Irish branches had performed those management functions (an "exclusion approach"). Moreover, the Commission had not shown in fact that the branches performed the relevant functions or that the head offices did not. Finally, although the Commission had identified flaws in the process and methodology of the advance opinions, it had not demonstrated that those flaws had resulted in an advantage to Apple.

The Commission appealed.

The CJEU judgment

The Court of Justice overturned the General Court's judgment annulling the Commission's decision. It held –

1. The General Court had misinterpreted the Commission's decision: the Commission had not confined itself to the "exclusion approach", but had also based its reasoning on the activities of the Irish branches.

2. The General Court had erred in reviewing the Commission's allocation of activities to the Irish branches in two respects:

   - the evidence of the head offices' activities that the General Court had accepted was inadmissible as it had not been produced to the Commission during its investigation; and
   - the activities of Apple Inc which it had taken into account were irrelevant: on the General Court's own (implicit) reasoning only activities of the two subsidiaries (whether in their head offices or branches) should be taken into account.

The Court of Justice went on itself to consider Ireland and Apple's application for the annulment of the Commission's decision, rather than referring the case back to the General Court. It dismissed the application and upheld the Commission's decision.

It refused to consider several arguments on the ground that the General Court had already rejected them and Ireland and Apple had not cross-appealed them.

The Court of Justice considered and rejected the remaining arguments. These included suggestions that requiring Ireland to recover the state aid would breach the EU law principles of legal certainty and legitimate expectation. Perhaps the most interesting arguments were on process: in particular, that the Commission's final decision was so different from its opening decision in the facts found and the analysis of them that the other parties had not had a proper opportunity to adduce relevant facts. The Court disagreed: there had been no change in the subject-matter of the investigation and only that would have been enough to require a new notification to the parties; it was up to them to notify the Commission of any facts they thought relevant.

Comment

What the *Apple* decision is not

The Court of Justice's judgment in *Apple* is not a tax decision. The Court did not go into the details of how profits should be attributed to permanent establishments, which functions were performed at the level of the Irish branches or the head offices, or whether the Irish tax authorities correctly applied Ireland's profit attribution when granting the ruling. It is therefore very different from a court decision deciding on a tax controversy between a tax administration and a taxpayer.

What it is

The Court of Justice's *Apple* decision is a judgment on what arguments the parties could run, what the General Court's judgment meant, whether it was flawed and whether the Commission's decision should be allowed to stand. Tax law – in this case Irish tax law – was part of the factual matrix to which the EU institutions were attempting to apply EU state aid law.

What points can be drawn from it

That is not to say that the *Apple* decision is irrelevant to tax. At least for the purposes of this one case, the Commission (and to a degree the Courts) came to a particular understanding of profit allocation. The case

therefore illustrates the sort of view they might come to on this and other areas of tax law in future. It also shows that the process does not favour the taxpayer, who may be required to have answered the right questions even if the Commission did not ask them.

As a state aid decision, the judgment is perhaps surprisingly generous to the Commission in apparently holding that the Commission is under no obligation to seek out any information not submitted to it.

The judgment might also suggest that the Court of Justice does not act in a vacuum free of political considerations, as its conclusions on several points might otherwise seem surprising. For example, if the General Court explicitly took Apple Inc's activities into account, it seems odd to conclude that it must implicitly have decided that those activities were irrelevant. As for whether the Commission had really based its decision on the activities carried out by the Irish branches rather than a lack of activities in the head offices, the Commission had merely said in its decision that, in light of the branch activities, "it was incumbent on Irish Revenue to at least have confirmed that the Apple IP licenses should not be allocated . . . to the Irish branches"[10]: is that any less superficial than the Commission's subsidiary line of argument in *Fiat*, which the Court found insufficient?

UK CFC FINANCE EXEMPTION

Facts

The UK extensively reworked its controlled foreign company rules in 2012 to focus on profits "artificially diverted" from the UK. The new rules had several gateways by which profits of foreign companies could be brought within scope and then a number of exemptions by which those profits could be taken out again. Profits remaining in scope could be taxed on a UK shareholder to the extent not already taxed. Non-trading finance profits were subject to special rules, in some respects less generous to taxpayers, in some respects more so –

1. While most profits could be caught if the CFC's assets and risks were managed at least partly in the UK (through UK "significant people functions" or "SPFs"), non-trading finance profits could *also* be brought in where the capital deployed was considered to have a UK origin ("UK connected capital") and in certain other circumstances.
2. If they were profits derived from "qualifying loan relationships" – loans to group members outside the UK – they could be exempted as to 75% (by default) or up to 100% (if made out of "qualifying resources" or under the "matched interest" rule: "qualifying resources" were certain sources of capital not considered to create risks of artificial diversion of profits from the UK; the "matched interest" rule applied to the extent relevant CFC profits derived from qualifying loan relationships exceeded the net interest expense of the UK group).

The story so far

The Commission began an informal investigation shortly after the rules came into force in 2013 and opened a formal investigation in 2017. In a final decision in 2019 it found that:

- the relevant reference system was the UK CFC regime;

- the finance exemption derogated from that system in a way that differentiated between persons in a comparable factual and legal situation; but
- that derogation could be justified as an administrative simplification to the extent that it disapplied the "UK connected capital" gateway, but not where the profits were brought in as relating to UK significant people functions.[11]

From 2019 the UK had restricted the finance exemption so that it did only disapply the "UK connected capital" gateway. The Commission did not object to the amended regime.

The UK and a number of the taxpayers affected applied to the General Court to have the Commission's decision annulled. The principal argument was that the Commission had identified the reference system incorrectly: it was not the UK CFC regime, but the UK's corporation tax system taken as a whole. The CFC finance exemption should not be viewed in isolation as a potentially unjustified carve-out from an otherwise coherent CFC regime, but as a legitimate choice about what scope the CFC regime should have in the light of the UK corporation tax regime's objectives generally.

The General Court did not accept this argument and upheld the Commission's decision.

The CJEU judgment

The Court of Justice overturned the General Court's judgment and annulled the Commission's decision.

The Commission had indeed identified the reference system incorrectly. "[W]here the tax measure in question is inseparable from the general tax system of the Member State concerned, reference must be made to that system"[12]. Moreover, "the Commission is in principle required to accept the interpretation of the relevant provisions of national law given by the Member State … provided that that interpretation is compatible with the wording of those provisions … [unless] another interpretation prevails in the case-law or the administrative practice of that Member State"[13]. The UK had argued during the administrative procedure that its corporation tax system was now generally territorial; the CFC regime provided for limited extra-territorial taxation where there would otherwise be a high risk of artificial diversion of profits from the UK. The Court of Justice accepted that the CFC rules generally and the finance exemption in particular supplemented the UK's general corporation tax system, which was therefore the correct reference system. As the identification of the reference system was the foundation of the Commission's decision, it could not stand and must be annulled.

Comment

The *UK CFC finance exemption* judgment vindicates the right of the Member States to determine their own tax rules. The Commission must defer to the Member State's own account of the objectives and interpretation of its tax rules unless the Member State is demonstrably wrong. This is similar to the deference that Advocate General Kokott was arguing for in the context of individual tax rulings.

WHAT'S NEXT?

The Court of Justice has now given judgment on all of the tax ruling cases appealed to it, except those on Belgian excess profit rulings.

We should now expect the Commission to complete its investigations into Huhtamäki, Inter IKEA and Nike. Will the Commission also open a new series of investigations? On 10 September Commissioner Margrethe Vestager[14] issued a statement responding to the *Apple* judgment.[15] She said that since the Commission had begun its investigations Member States had made changes to their national tax laws to reduce the scope for tax avoidance, but aggressive tax planning practices were still widespread, involving Ireland, the Netherlands, Luxembourg and Belgium in particular. In her view, the *Apple* judgment served as encouragement for the Commission to continue its work on "aggressive tax planning … [b]oth in terms of legislative proposals and enforcement".

WHERE ARE WE NOW?

How the state aid rules apply to tax

There is no EU arm's-length principle implicit in the state aid prohibition under Article 107. A state aid challenge may be sustained only if the Member State has failed to apply national law.

What can be included in "national law" for these purposes has been a point of debate. The General Court said in *Apple* that the Commission could not be criticised for trying to rely on the authorised OECD approach to profit allocation because it "overlapped" with Ireland's description of how its profit allocation rules worked. As Ireland and Apple did not cross-appeal this conclusion, the Court of Justice treated it as *res judicata*. It is, however, difficult to square with the Court of Justice's recent statement in *Amazon* that Commission could only treat the arm's-length principle or OECD Transfer Pricing Guidelines as part of the reference framework if they were *explicitly* incorporated or adopted into national law.

The Commission must defer to a Member State's interpretation of its national law (including the objectives of that national law) unless it can demonstrate that the Member State is incorrect. A Member State will be in a stronger position when the question is one of purely national law and OECD guidance on transfer pricing or profit attribution is not relevant.

When the breadth of the reference system has been in dispute, the Court has tended to draw it widely: in *Apple* the General Court agreed with the Commission that the reference system was the Irish corporate tax system as a whole, not just the provision determining the chargeable profits of non-resident companies with Irish branches[16]; and in the *UK CFC finance exemption* case the Court of Justice found that the reference system was the UK corporate tax system as a whole, not just the UK's CFC rules. This did not make any practical difference in *Apple*, where the Court reviewed Irish Revenue's advance opinions against its

understanding of the relevant provisions of Irish law; but it was decisive in the *UK CFC finance exemption* case.

The Commission has described the cases it was investigating as "outliers" and "off the radar screen", but has not suggested that a case must meet that threshold before it can make a finding of state aid. As mentioned earlier, Advocate General Kokott has suggested that a "modified standard of review" should apply in tax ruling cases so that "only those which are manifestly erroneous" are treated as giving rise to state aid, but the Court has not yet taken this up.

Although the Commission has brought in some tax expertise, it is not experienced in cross-border transfer pricing. The Commission has come to unorthodox interpretations of the OECD approach and successfully defended them before the Courts.

Implications for multinationals

This highlights the importance of the process, which is stacked against the taxpayer. Once the Commission has made its final decision, the taxpayer may only put forward limited written and oral representations, which must show that the Commission has fallen into error. Taxpayers therefore need to ensure that the correct view is clearly put to the Commission – and evidenced – during the investigation procedure. It is unfortunate, then, that the taxpayer has very little in the way of procedural rights independent of the Member State (by contrast, for example, with conventional antitrust challenges). Whether the taxpayer is to have any chance of persuading the Commission to close an investigation without taking further action will depend very much on the stance of the Member State and its willingness to involve the taxpayer in its response to the investigation.

The *Apple* decision serves as a reminder of how far back the Commission can look: the Commission opened its investigation into Apple 22 years after Apple obtained its first advance opinion from Irish Revenue; and final judgment from the Court of Justice has come another 11 years on. The Court may have rejected Ireland and Apple's attempts to invoke legal certainty and legitimate expectation, but there has at the very least been a shift in practice since 1991: few would have envisaged then that the Commission would require Ireland to tax Apple on the basis it did.

Should multinationals eschew rulings altogether? It is certainly the case that rulings have provided the Commission with targets for its investigations. A ruling is not necessary for the Commission to be able to allege that the Member State has granted state aid, but it may be harder for the Commission to identify potential state aid where the Member State has simply accepted the taxpayer's return. On the other hand, taxpayers apply for rulings because they want to achieve certainty. Is that still possible? This will come down to a case-by-case analysis, but a ruling would seem less likely to be targeted if it is:

- a bilateral ruling between two states with opposing interests;
- one on a point of law applicable to taxpayers in general; or

- clearly grounded in and consistent with published law or guidance (whether from the state itself or the OECD).

Although the TFEU provisions on state aid no longer apply to the United Kingdom following Brexit, the EU/UK Trade and Cooperation Agreement contains subsidy control provisions modelled on the TFEU. More widely, multinationals seeking to acquire EU-based targets or compete for public procurement contracts in the EU will need to consider the EU's still-relatively-untested foreign subsidies regulation.[17] This requires notification of tax measures akin to subsidies; although the regulation is not in the same terms as the TFEU prohibition on state aid, some of the state aid concepts are likely to be relevant, at least in practice. These are not risks confined to taxpayers in EU Member States.

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ENDNOTES

[1] See Joined Cases C-78/08 to C-80/08, *Paint Graphos and others*, paragraphs 49 and 64; and for more detail see our client briefing of 17 January 2017 *State Aid and Tax: The European Commission's Application of the State Aid Rules to Tax – Where Are We Now?*

[2] For more detail on the Commission's investigations and the earlier cases, see the web page of the Commission's Directorate-General for Competition on *Tax rulings* and our client briefing of 17 January 2017 *State Aid and Tax: The European Commission's Application of the State Aid Rules to Tax – Where Are We Now?*

[3] Cases C-885/19 P, *Fiat Chrysler Finance Europe v Commission*, and C-898/19 P, *Ireland v Commission*, CJEU judgment, 8 November 2022. See our client briefing of 9 November 2022 *EU State Aid and Tax: EU Court of Justice Annuls Commission Decision that Luxembourg Granted Illegal State Aid to Fiat in Ruling on Transfer Pricing*.

[4] *Fiat and Ireland*, CJEU judgment, paragraphs 111 and 112.

[5] Joined Cases C-451/21 P *Luxembourg v Commission* and C-454/21 P *Engie v Commission*, CJEU judgment, 5 December 2023.

[6] Case C-457/21 P *Commission v Luxembourg and Amazon*, CJEU judgment, 14 December 2023.

[7] In this the Court was following its reasoning in *Fiat and Ireland*, CJEU judgment, paragraph 96.

[8] Case C-457/21 P *Commission v Luxembourg and Amazon*, Advocate General's Opinion, 8 June 2023, paragraphs 90 and 94. The same concepts are expressed in different words in Joined Cases C-451/21 P *Luxembourg v Commission* and C-454/21 P *Engie v Commission*, Advocate General's Opinion, 4 May 2023, paragraph 101.

[9] See Apple's Form 10-K for 2018, page 52.

[10] Commission Decision of 30.8.2016 C(2016) 5605 final on *State Aid SA.38373 implemented by Ireland to Apple*, recital (295).

[11] Commission Decision of 2.4.2019 C(2019) 2526 final on *State Aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption*.

[12] Joined Cases C-555/22 *UK*, C-556/22 *ITV* and C-564/22 *London Stock Exchange*, CJEU judgment, paragraph 95.

[13] Paragraphs 97 to 98, with references back to the Court's recent judgment in *Engie*.

[14] Commissioner for Competition since 2014; Executive Vice-President since 2019.

[15] Remarks by Executive Vice-President Vestager following the Court of Justice rulings on the Apple tax State aid and Google Shopping antitrust cases

[16] Cases T-778/16 *Ireland* and T-892/16 *Apple*, 15 July 2020, paragraphs 153 to 164.

[17] See our client briefing of 17 July 2023 *New Filing Obligations in M&A Transactions* and client highlight of 24 September 2024 *S&C Represents e& in First In-Depth Conditional Merger Clearance Under EU Foreign Subsidies Regulation*.

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