



CCR - Competition Competence Report Autumn 2016/1

## THE FRAME –

### A genuine European approach in EU competition law

*In August 2016 the European Commission concluded that Ireland granted undue tax benefits of up to €13 billion to Apple. This is illegal under the EU state aid rules, because it allowed Apple to pay substantially less tax than other businesses.*

*However, this is not an issue about whether a global electronics producer has paid sufficient tax or not, it is an issue about all companies – and governments and consumers - in the EU being treated in the same manner, namely equally. Member States cannot give tax benefits to selected companies only.*

#### Equality and social fairness objectives in EU competition law

The principle of equality is at the heart of the social market economy concept enshrined in Article 3(3) in the Lisbon Treaty.<sup>1</sup>

A market system motivates profit-maximising companies to increase productivity, to expand, to innovate and to create jobs. These exposed market forces are the generator of prosperity thereby creating wealth. On the other hand, a social market economy is a form of market capitalism combined with social objectives.

A social market contains all central elements of a free market economy such as private property, free trade, exchange of goods, freedom of contract and free formation of prices. But it also requires that the market system receives the support of all market players: businesses, consumers and workers.

Thus, on one hand a social market economy recognises that a functioning economy is indispensable in producing the material basis without which human society with all its other non-economic – human and cultural – dimensions cannot exist.<sup>2</sup> On the other hand, important elements in a social market system are social equality and fairness.

Moreover, in contrast to a free market economy, in a social market economy the state is not passive as it actively implements regulatory measures to protect free market forces. Integrated within these regulatory measures are social policy

---

<sup>1</sup> Article 3 (3) TEU. The first reference to a social market economy is found in the draft of the 2004 Rome Treaty and was retained in Lisbon in 2007.

<sup>2</sup> As Monti stressed in 2000: '*Where no wealth is created in the first place, none can be redistributed*': in Monti, Competition in a Social Market Economy, 2000

objectives that include a balancing of the distribution of gains from growth between the different economic actors. Thus, within a social market economy, the state's responsibility is to actively improve the market conditions and simultaneously to pursue a social balance.<sup>3</sup>

This means that the European social market economy system does not work with the concept of *laissez faire* capitalism. Instead, it requires government involvement to safeguard the social equality and fairness objectives. For this very reason, the European idea is not to leave a market economy alone to any development it might take, but to use a strong framework, specifically EU competition law, that ensures

- First, that social standards and other objectives of the society are respected.
- Second, that the beneficial workings of the market forces are not blocked, restrained or distorted by the short-sighted actions of the market actors themselves.<sup>4</sup>

This concept is a humanistic societal order based on the values of the EU.<sup>5</sup>

The equality principle in EU competition law - including the EU state aid rules - means that each actor faces equal and fair competition conditions. Moreover, it means a fair distribution of income and wealth between the different market actors. No market participant should receive a bundle that is worse for his preferences than a fair split of the available wealth gains.

Examples of the practical application of the equality principle in EU competition law are given in the following:

- The EU State Aid rules require that governments and companies are treated alike in EU competition law. So despite the receipt of a government subsidy, competition needs to take place on an equal basis. Similarly, the market investor principle requires the same treatment of subsidies no matter whether the financial means are given by a government or a private investor. With respect to taxes, a Member States cannot give tax benefits to selected companies only enabling them to pay substantially less tax than other businesses in a comparable situation.
- The equality principle inherent in the European social market economy concept is implemented in Article 101 (3) TFEU too. Where an agreement restricts competition but on the other hand improves the production or distribution of goods or promotes technical or economic progress, the resulting benefits and wealth gains should be redistributed fairly and on an equal footing between the market participants. Such an agreement

---

<sup>3</sup> This responsibility lies according to the Lisbon Treaty with the European Commission.

<sup>4</sup> It seems to be that then Commissioner Mario Monti was the first one who explicitly pronounced the link between the European model of a social market economy and EU competition law in 2000, sometime ahead of when the European model of a social market economy was declared as a European Union objective in Article 3 Treaty on the European Union. See (Monti, Competition in a Social Market economy, 2000)

<sup>5</sup> The values of the European Union, as stated in Article 2 Lisbon Treaty, are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

escapes the nullity provision of Article 101 (2) TFEU when consumers receive their fair share of the wealth gains achieved.<sup>6</sup>

- In Article 102 TFEU abuse cases, the equality principle is applied as well. Monopolies or dominant positions themselves are not seen as a problem in Europe. Nevertheless, EU competition law requires that the behaviour of these companies should be on an equal footing: A dominant company should behave in the same manner as a non-dominant company ('as-if' competition)<sup>7</sup> thereby refraining from any (abusive) conduct that is not based on fair competition considerations. Thus, competitive actions which are the result of normal competition are acceptable for both, dominant and non-dominant companies. Whereas in principle a dominant company is entitled to apply the same conduct as a non-dominant company, a dominant company has the special responsibility to refrain from such a conduct when it might produce negative competitive effects when applied by a dominant company.

So, the Commission's ruling against Ireland that granted Apple undue tax benefits of up to €13 billion relates to the social market economy concept in Article 3(3) Lisbon Treaty. This Lisbon Treaty provides guidance and orientation that in the interpretation of EU competition law the European concept of a social market economy is the prevailing one. Whereas in the past the establishment of an internal market was in the focus of EU competition law, post-Lisbon the attention has been changing in favour of and accommodating social fairness and equality objectives.

This is the modern European School approach discussed in the following.

### **The European School in EU competition law**

The economic order espoused by the European School requires that the social fairness and equality objectives enshrined in EU competition law are implemented in practice. As already stated, a fair distribution of wealth gains throughout society is one of the pillars in a social market economy concept.

This genuine European approach represents a useful guidance for Member States and national courts that increasingly apply EU competition law. The insights of the European School of thought are even more crucial for those new Member States that have no long-standing experiences with market economies or competition issues in general but are much more acquainted with established traditions in social cohesion. The European competition approach also provides guidance for jurisdictions outside the EU that apply similar constitutional competition frameworks. This is what makes Europe special: social market economies that can become role models for other countries worldwide.

In this context, the European School competes with the insights of the Chicago School worldwide.

Our next CCR is going to discuss these differences in a more detailed way.

---

<sup>6</sup> Technically a balancing between the anti-competitive effects takes place against the pro-competitive effects for both groups, producers and consumers.

<sup>7</sup> This position neither is an ordoliberal one nor can be found in German competition law. see (Schweitzer, 2007, p. 15)

## Conclusion

EU competition law enables the proper functioning of a social market economy for the well-being of people in Europe. Europe is rooted in a pro-regulatory philosophy: a defined economic order implemented by independent authorities and courts.

Economic analysis in a European style improves the understanding of how markets work and what type of economic effects are produced by agreements and mergers. The outcomes from these economic analyses cannot alter the pre-defined economic order. It is valuable in assessing market definition or the prognosis of merger effects but it is a supplement underpinning the law.

This school of thought is properly described in a more detailed way in the following publication.

## The Role of Economic Analysis in EU Competition Law – The European School

*The Role of Economic Analysis in EU Competition Law* is the 4<sup>th</sup> edition of the book published by Professor Doris Hildebrand. The book considers the changes that have occurred in EU competition law and how these changes have increasingly taken on the character of the so-called European School of economic thought.

The book elaborates on the development of the rationale behind the issues addressed by Article 101(1), Article 101 (3), Article 102, the Merger Regulation, as well as the State Aid provisions.

The book can be ordered at the following link:

[Order the book at Wolters Kluwer](#)

