

Concurrences

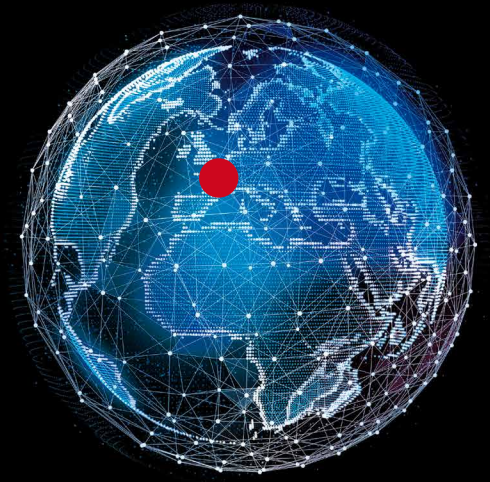
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8th International Concurrences Review Conference

26 June 2017 - Maison du Barreau - Paris



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PROGRAM

08.30 Registration & Continental breakfast

08.45 **INTRODUCTORY REMARKS**

Frédéric Jenny | Chairman, OECD Competition Committee, Paris | Professor, Director of International Relations at ESSEC | Co-Director of the European Center for Law and Economics

09.00 **OPENING KEYNOTE SPEECH**

Marc van der Woude | Judge and Vice-President, General Court of the European Union, Luxembourg

09.45 **COMPETITION AUTHORITIES: TOWARDS MORE INDEPENDENCE AND PRIORITISATION?**

José María Marín Quemada | Chairman, National Commission for Markets and Competition, Madrid

Wouter Wils | Hearing Officer, European Commission, Brussels | Associate Professor, King's College London

Eric Barbier de La Serre | Partner, Jones Day, Paris

Frank Maier-Rigaud | Managing Director and Head of European Competition Economics Group, NERA, Berlin | Professor, IÉSEG School of Management, Paris

LAURENCE IDOT | Professor, University Paris II Panthéon-Assas | Member, Autorité de la concurrence, Paris | President, Scientific Committee Concurrences Review, Paris

11.15 Coffee-Break

11.30 **MERGERS AND INNOVATION: DO MERGERS FOSTER INNOVATION?**

Andrea Coscelli | Acting Chief Executive, Competition & Markets Authority, London

Carles Esteve Mosso | Deputy Director-General Mergers, DG COMP, Brussels

Justus Haucap | Director, Institute for Competition Economics, Düsseldorf

Cristina Caffarra | Vice President, Head of European Competition Practice, CRA, Brussels/London

Hugues Calvet | Partner, Bredin Prat, Paris

ISABELLE DE SILVA | Chairperson, Autorité de la concurrence, Paris

13.00 Lunch

14.30 **STATE AID AND TAX RULING: IS THERE REALLY A COMPETITION ISSUE?**

Gert-Jan Koopman | Deputy Director-General State aid, DG COMP, Brussels

Damien Neven | Professor, Graduate Institute, Geneva | Senior Consultant, Compass Lexecon, Brussels

Jacques Derenne | Partner, Sheppard Mullin Richter & Hampton, Brussels

FRÉDÉRIC JENNY | Chairman, OECD Competition Committee, Paris

16.00 Coffee-Break

16.30 **EXPLORING THE POLITICS OF COMPETITION REGULATION: HOW POLITICAL IS COMPETITION LAW?**

Cecilio Madero | Deputy Director-General Antitrust, DG COMP, Brussels

Dominique Speekenbrink | Head Antitrust Practice Group, ABB Group, Zürich

Mathew Heim | Vice President and Counsel, Qualcomm, London

David Spector | Professor, Paris School of Economics

Mélanie Thill-Tayara | Partner, Dechert, Paris

ROBERT MCLEOD | Co-Founder & Chief Executive Officer, MLex, Brussels

18.00 Concurrences PhD Award 2017

18.30 Reception

PANEL 3

STATE AID AND TAX RULING: IS THERE REALLY A COMPETITION ISSUE?

F **rédéric Jenny:** Tax rulings are negotiated between States and multinational companies in order to avoid double taxation. It has long been clear that tax measures can be qualified as State Aid but the problem has become more acute since about 2000 as the number of cases involving tax rulings has soared. The reasoning is that such measures constitute a selective advantage and a possible violation of article 107. In 2013 the Commission launched a major inquiry into about 1,000 fiscal conventions. This resulted in several litigation cases (Starbucks, Apple, Fiat). In 2016 the Commission published guidelines relating to State Aid and tax rulings. The definition of selective advantage is central to the debate. From an economic perspective, important questions are also raised: what is the relationship between tax rulings and competition law? Can such negotiations affect markets in a way that is comparable to what is known in more common situations targeted by competition law? It is striking that recent comments by the Competition Commissioner on tax rulings made no reference to competition or the common market but only mentioned a breach of article 107.

Jacques Derenne: The Treaty does not provide a detailed definition of the concept of State aid. The authors of the Treaty kept it deliberately open to include all possible State measures likely to fall within that concept (most of them could not have been imagined at the time). Article 107(1) TFEU therefore merely refers to a few, cumulative, criteria: advantage, selective, undertaking, use of State resources attributable to the State, likely distortion of competition and trade between Member States likely to be affected. The EU case law modelled the concept of State aid. Distortion of competition and effect on trade are presumed conditions, once a selective advantage has been identified. State aid is a purely legal concept that leaves little room for economic analysis, albeit maybe more for financial analysis (in particular, for the test of market economy operator or for services of general economic interest). Although State aid is defined by its effects, there is no effect-based approach as in antitrust. Effects are often still considered in a purely theoretical way. The EU case law leaves no room for an argument that a State measure that grants a selective advantage does not effectively distort competition. Qualifying tax measures as State aid is not new. In that context, the two

conditions that are mostly discussed are the existence of an advantage and its selective nature. An advantage can be anything that is granted outside normal market conditions (like a tax exemption). Selectivity is a more mysterious criterion, especially in relation to tax law. The EU case law is not very consistent on that point. The difficulty with tax rulings is that the selectivity test should only be applied at the level of one Member State, while the problem is clearly cross-border. Moreover, many recent decisions of the European Commission seem to collapse the concepts of “advantage” and “selectivity”. Although the examination of these two concepts should be concomitant, they are clearly distinct. Advantage requires comparing the measure with what the State should have done under normal market conditions, whilst selectivity requires comparing the measure with what the State actually does for other undertakings placed in a factually and legally comparable situation. The comparison exercises are of a different nature. This does not result clearly from the current Commission’s approach in tax ruling cases. Selectivity should not be presumed simply because a measure grants an advantage (except where the advantage is clearly individually granted, outside the context of any scheme or general legislation, such as a cash grant to one single undertaking). There can be advantages which are not selective, if they are granted to all companies in a similar legal and factual situation. And this is the analysis that should be at the heart of the State aid assessment of tax rulings.

Damien Neven: In the Commission’s view of the Apple case, the Irish tax ruling reduces the tax liability of Apple relative to the application of the normal system of taxation. Hence it constitutes a selective reduction in the profit tax rate. The idea is that it creates a reduction in marginal cost and therefore distorts competition insofar as it reduces profit, maximizing prices: prices will go down and competitors will be affected. But it has long been established that in the real world a reduction in the profit tax rate distorts neither prices nor investments, as long as investments can be amortised and the cost of capital can be deducted. So it is very dubious that tax rulings result in distortion of competition. It should be made clear that the real motivation behind the Commission’s decisions is avoiding tax competition among Member States, not distortion of competition on given product markets.

Frédéric Jenny

Chairman, OECD Competition Committee, Paris

Jacques Derenne

Partner, Sheppard Mullin Richter & Hampton, Brussels

Damien Neven

Professor, Graduate Institute, Geneva |
Senior Consultant, Compass Lexecon, Brussels

Gert-Jan Koopman

Deputy Director-General State aid,
DG COMP, Brussels



- 1 Frédéric Jenny
- 2 Jacques Derenne
- 3 Panel
- 4 Damien Neven
- 5 Gert-Jan Koopman

Gert-Jan Koopman: Regarding the effects of tax rulings, I agree with Damien but if we look at the texts I have to agree with Jacques: effects are considered in a very formalistic manner. For instance, if we look at regional aid, it is quite clear that it does not have much impact on competition. So maybe the Court's interpretation of distortion is broader than just distortion of competition and includes distortion of market conditions. Damien's

argument is very well put, but in terms of what we have to do in our decisions we are constrained by the Court's case law and this sometimes leads to unsatisfactory reasoning. Moreover, the only mandate the Commission has in the field of State Aids is to restore the ex ante situation, i.e. to order recovery of aid. This is not the most efficient competition remedy, but it is the only one available.