



Mededingingsregelgeving ter bevordering en/of ter belemmering van de Europa 2020 strategie

Gezamenlijke bijeenkomst NVvA en VvM
7 oktober 2016

Laura Parret



Universiteit Utrecht

Outline

- Europe 2020 strategy
- Common Goals
- Anti-trust
- State aid
- Outlook



Europe 2020 Strategy

- Smart, sustainable and inclusive growth – public interests
- 5 targets for the EU in 2020:
 - Employment
 - R&D
 - Sustainability and climate change
 - Education
 - Fighting poverty and social exclusion



Europe 2020 Strategy

- Public procurement and competition rules:
 - Common goals = internal market
- Differences in approach to integrating 2020 objectives?



Competition law: what is the problem?

- How can or must the 2020 goals be incorporated in competition law?
- Typically legal approach is:
 - These are open norms so how to fit these values into the existing legal system?
 - Look at Treaty context (art. 11 TFEU principle of integration)
 - Inward looking: where does it fit: in the rule or in the exception
 - The debate is similar in antitrust and in state aid
- But what if the question was: what are these goals and are they so new and important that we should integrate them in to the law and if so, can it be done within the system and in the context of the enforcement of the law? And if so, by whom?



Background and Context

- Question has been around for a long time but is alive:
 - The reduced belief in the significance of the market mechanism
 - The increase of support for environment and sustainability
 - The search of EU to defend interests close to the citizen
 - The search of regulators to justify their existence notwithstanding pressure from fundamental rights and procedural restraints
- The law always seems slow at responding to societal aspirations
- Is competition law too slow in responding? It seems to offer more resistance to incorporating non-economic interests than other areas of EU law?



Two perspectives

- Competition law in the strict sense: Article 101 TFEU
- State aid prohibition: Article 107 TFEU



Anti-trust – Article 101 TFEU

- Article 101 TFEU
 - (1) prohibition of “.. all agreements between undertakings(..) which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market..”
 - (2) (..)
 - (3) provision of paragraph 1 may be declared inapplicable in case of any agreement (..) between undertakings (..) which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit (..) and which does not (a) impose on the undertakings concerned restrictions which are not indispensable (..) and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question
- Art. 6 (1) and (3) Mededingingswet



Anti-trust - Public Interests

- Is there any room in art. 101(1) and (3) TFEU?
- Through prohibition of (1)?
 - Ongoing debate and never ending story (examples ...)
 - High on the Dutch agenda
- Main issue of the debate is how art. 101(1) TFEU should be interpreted



Anti-trust – Public Interests

- Through the exemption of (3)?
 - Technical or economic progress
 - Allowing consumers a fair share of the resulting benefit – room for weighing public interests?
 - Indispensable
 - Eliminating residual competition
- Commission seems more willing to exempt if contributing to environment but hardly any cases



Anti-trust - Tasks

- Parallel enforcement by Commission, NCA's and national courts make issue complex
- Most appropriate institution for change - Commission or ECJ? Parliament?
- Role of NCA - ACM
- NMa more lenient than ACM?
- Ministry of Economic Affairs – Policy rule Competition and Sustainability
 - ACM and Commission – “Treaty Articles do not empower the Commission nor the NCA's to enter into delicate balancing acts weighing sometimes contradictory public interests when assessing such initiatives by business.”
 - SER – inherent restrictions



Anti-trust

- In European competition law debate goes back well before financial crisis and 'Kip van Morgen' discussion
- The weighing of non-economic interests is not consistently applied in competition law
- The Treaty does not seem to leave much room and the authorities and judges do not seem to keen to "reorient" the law (but is that a bad thing?....)



State aid – Article 107 TFEU

1. Save as otherwise provided in the Treaties, 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.
2. The following shall be compatible with the internal market:
 - (a) aid having a social character, granted to individual consumers, [...];
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
 - (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany [...].
3. The following may be considered to be compatible with the internal market:
 - (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, [...];
 - (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
 - (c) aid to facilitate the development of certain economic activities or of certain economic areas, [...];
 - (d) aid to promote culture and heritage conservation [...];
 - (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.



State aid – Europe 2020 Strategy

“Through the implementation of competition policy the Commission will ensure that the single market remains an open market, preserving equal opportunities for firms and combating national protectionism. But competition policy will do more to contribute to achieving the Europe 2020 goals. Competition policy ensures that markets provide the right environment for innovation, for example [...]. Preventing market abuse and anticompetitive agreements between firms provides a reassurance to incentivise innovation. State aid policy can also actively and positively contribute to the Europe 2020 objectives by prompting and supporting initiatives for more innovative, efficient and greener technologies, while facilitating access to public support for investment, risk capital and funding for research and development.”

(Commission Communication - EUROPE 2020: A strategy for smart, sustainable and inclusive growth)



State aid – Modernisation

- 2005: State aid action plan (SAAP)

- Introduction of the 'refined economic approach' and the 'balancing test':

"In assessing whether an aid measure can be deemed compatible with the common market, the Commission balances the positive impact of the aid measure (reaching an objective of common interest) against its potentially negative side effects (distortions of trade and competition)."

- 2012: State aid modernisation (SAM)

- One of the objectives was to foster inclusive and sustainable growth in a strengthened, dynamic and competitive internal market – especially in relation to the Europe 2020 Strategy:

"The link between the Europe 2020 objectives and flagship initiatives on the one hand, and State aid rules on the other, should be further developed to streamline the Commission's instruments and to encourage Member States to direct scarce public resources to common priorities."



State aid – Public Interests

- Integration of non-economic interests through art. 107(1) TFEU?
 - Commission Notice on the notion of State aid (2016): clarifies the Commission's understanding of Article 107(1) TFEU, as interpreted by the Union Courts
 - The existence of an undertaking
 - The imputability of the measure to the State and its financing through State resources
 - The granting of an advantage: the market economy operator (MEO) test
 - The selectivity of the measure
 - Its effect on competition and trade between Member States
= leaves little to zero room for public interests
 - Only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the State intervention (Case 173/73, *Italy v Commission*, ECLI:EU:C:1974:71)



State aid – Public Interests

- Integration of non-economic interests through art. 107 (2) and (3) TFEU?
 - General Block Exemption Regulation (GBER)
 - Often refers to the Europe 2020 Strategy
 - Important areas for the Europe 2020 Strategy are included, for example notification thresholds for research, development and innovation aid
 - Guidelines
 - Framework for State aid for research, development and innovation (R&D&I)
 - Guidelines on State aid for environmental protection and energy 2014-2020
 - = Often refers to the Europe 2020 Strategy
 - = Creates room to take into account the public interests through the 'common assessment principles' (= the 'balancing tests')



State aid – Public Interests

- Common assessment principles in the Guidelines:
 - (a) contribution to a well-defined objective of common interest;
 - Example R&D&I Framework: *"The general objective of R&D&I aid is the promotion of R&D&I in the Union. In doing so, R&D&I aid should contribute to the achievement of the Europe 2020 strategy of delivering smart, sustainable and inclusive growth. Member States considering awarding State aid for R&D&I, must precisely define the objective pursued, and in particular explain how the measure intends to promote R&D&I."*
 - (b) need for State intervention;
 - (c) appropriateness of the aid measure;
 - (d) incentive effect;
 - (e) proportionality of the aid;
 - (f) avoidance of undue negative effects on competition and trade between Member States;
 - (g) transparency of aid.



State aid roundup

- Recent modernisation shows clear signs of integration of the policy objectives of 2020
- Resistance in the context of the “rule” in 107 (1): a selective advantage to an undertaking is aid (similar to anti-trust)
- Choice seems to be via 107 (3), the “exception”: this implies a balancing of interests by the Commission (exclusive competence still) (judges excluded?)



Concluding remarks and outlook

- The legal approach to the question is similar in antitrust and state aid: inward looking debate searching for integration by interpretation
- Is that approach justified? Also viewed from the perspective of the consequences for enforcement and judicial protection?
- Debate and resistance greater under 101 than under 107:
 - Nature of the rules?
 - Text of the treaty?
- Is it justified that rules that have the same goal (internal market) have a different approach (public procurement, competition, state aid)?

