



Arbitrating between competition and other social aims – a fairness dilemma?

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Outline

I The issue

II An issue of what?

III Possible solutions



I. The issue (1)

- Dairy farmers protecting the black tailed godwit
- Marble importers & retailers to protect workers' rights



I. The issue (2)

Assessment under article 101 TFEU:
balancing positive and negative effects

Price increase



Better quality,
service, range
or innovation



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Illustration: Pinterest

I. The issue (3)

... but difficulties for non-economic benefits



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I. The issue (4)

Result: agreements not allowed under competition law

Is this (un)fair?





II. An issue of fairness?

Many different meanings of fairness...

I.

Fairness within
competition

- competition on the merits
- consumers' choice
- consumer welfare

II.

Fairness as overarching
concept/
theory of justice

- rights to equal basic liberties
- fair equality of opportunity
- advantages ought to benefit the least-advantaged

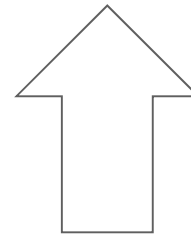
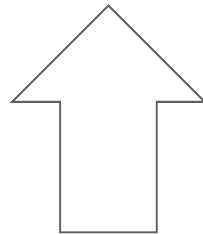


II. An issue of competition law?

Different answers

I. Fairness within competition/consumer welfare

II. Fairness as overarching concept/theory of justice



descriptive & normative answers



III. Could we solve the problem?

Outside 101 (1) TFEU

- Wouters-doctrine (inherent restrictions)
- solidarity-type exceptions
- government involvement as legitimizing factor?

Article 101 (3) TFEU

- wider range of benefits count
- qualitative approach to benefits
- a 'fair' share for consumers

- Commission: efficiencies-centred
- but pre-modernisation cases more flexible





III. Could we solve the problem?

But:

- this leads to less certainty for companies
- problem of legitimacy for (national) agencies

However:

- EU competition law part of a constitutional system
- within that system: multiple goals

And also:

- competition law ought not to be isolated from society





III. Could we solve the problem?

Meanwhile, in the Netherlands:

- informal non-enforcement
- legislative proposal for 'sustainability initiatives'





Conclusions

- Issue of balancing competition interests with non-competition interests is a problem
- Fairness, when encompassing more than consumer-welfare, could help shape solutions
- Responsive competition law is necessary





- A. Gerbrandy, Futureproof Competition Law (inaugural lecture), Eleven Publishing 2018 (*forthcoming*)
- R.J.G. Claassen & A. Gerbrandy, Doing Good Together, BEQ 2018 (*forthcoming*)
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