

A.J. Metselaar, *Drie rechters en één norm, Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de nationale procedurele autonomie* (Deventer: Wolters Kluwer 2016), ISBN 978-90-1313-988-4, 696 p.¹

Articles 107 and 108 TFEU (Treaty on the functioning of the European Union) are the core provisions of state aid law. Article 107 prohibits any aid granted by a Member State or through state resources, which restricts competition by putting an undertaking or group of undertakings in a more favorable position than others. The enforcement of EU law depends largely on national courts and this is also true for EU state aid law.

National courts have to protect the interests and legal position of citizens and companies in the context of litigation that involves EU law and they also have to make sure that their Member State lives up to the obligations contained in the provisions of the TFEU. They do so mostly by enforcing the direct effect of Article 108(3) TFEU. That provision contains the stand still obligation requiring Member States to notify any new aid measures and to wait for approval by the Commission. In other words, any aid within the meaning of Article 107 TFEU which was not approved, cannot be granted. The exception to this rule, which is increasingly important in practice, occurs when an aid measure falls within one of the categories of aid covered by a block exemption.

Contrary to the provisions of Articles 101 and 102 TFEU (also part of the competition chapter of the treaty), the enforcement of state aid rules has not been entirely decentralised. National courts are only competent to protect the interests of individual parties and to ensure the respect for the stand still obligation mentioned before, but they cannot examine themselves the actual compatibility of a given aid measure with the treaty. This is because there is still exclusive competence for the European Commission to evaluate whether a measure that can be qualified as an aid within the meaning of Article 107 TFEU can be regarded as compatible with the internal market. The substantive (final) judgment of the aid and whether its benefits possibly outweigh its restrictive effects, is a matter for the Commission only.

As is the case for other areas of EU law, it is difficult to gain insight in the way national courts throughout all the Member States deal with their crucial role of '*premier juge communautaire*'. Any study which involves systematic research of case law in a given period in a Member State is therefore valuable. In this dissertation, ten years (November 2005 – November 2015) of Dutch state aid case law is examined.

The methodology which is chosen is very much linked to the typical characteristics of the Dutch procedural system. More specifically, this study is based

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on the distinction between civil judges, judges in fiscal matters and administrative law judges and goes into great detail in the comparison between the three procedural settings in which they operate. This focus and methodology limit the impact that this impressive study can have as a contribution to European law scholarship. However, this was the conscious choice of the author and as a consequence thereof the value of the dissertation lies in the analysis of the practice of the enforcement by Dutch courts through the comparison of the three procedural settings and what might be done at the national level to repair possible inadequacies in the enforcement.

The dissertation examines which role Dutch judges fulfill in the enforcement of the state aid rules against the background of the specific characteristics of Dutch procedural law. After setting out the research question and the methodology (first chapter) the dissertation is then divided into eight further chapters including a conclusion with an outlook for the future.

Chapter two outlines the European framework thereby rightly giving substantial attention to the case law of the European courts which consistently emphasises the important task that the national courts have in this respect. An overview of the substantive state aid rules is given and the division of tasks of the enforcement of the state aid rules is described. With regards to the role of the national courts, the different scenarios are described.

The first one is where the European Commission has already taken a formal decision declaring a particular aid measure as incompatible with the internal market. In such a situation the national court can be called to ensure that the Commission decision is implemented at a national level. According to established case law that means that any aid already granted must be reimbursed. It is up to the member state to make sure this is done effectively. The national courts shall have to use all the procedural tools they have to ensure effective reimbursement.

Another situation is the one already mentioned before where the national court is called upon to verify whether the stand still obligation has been respected by the Member State. In such a situation it shall usually be a third party invoking that a particular aid is indeed state aid within the meaning of Article 107 TFEU and was not but should have been notified to the European Commission. Many questions can arise concerning the consequences that the non-compliance with the stand still obligation should have. This is a question enquiring into the remedies that exist or should exist in the national system. These remedies are in principle within the realm of the procedural autonomy of the Member State. One of those remedies can be the order of the reimbursement of illegal state aid. Another might be the compensation of damages. As it appears clearly from the research done by the author, the role of a national court is particularly complicated when it comes to ensuring that the stand still obligation is met. Not only because of the problems in finding and enforcing the adequate remedy but also (or even more so) because the court will have to examine whether or not a particular aid indeed qualifies as state aid within the meaning of Article

107 TFEU. That step is a necessary prerequisite to determine whether the aid was subject to the prior notification requirement of Article 108 (3) TFEU.

The third chapter of the dissertation dives into the Dutch practice. It describes the type of litigation situations in which state aid rules play a role. This chapter is based on the distinction which is at the heart of the methodology that the dissertation has chosen: the distinction between the civil judge, the administrative law judge and finally the judge in fiscal matters. The three settings are compared in the light of the European framework. On the basis of this distinction between three categories of procedural settings, the next chapters then focus on specific themes which can provide some insight in the way the Dutch judges fulfill their role in the enforcement of state aid rules. For each theme the author analyses the case law in each of the three settings.

The first is the question of the legal interest of parties that invoke state aid rules. This has given rise to particular debate in the Netherlands which explains why there is a whole chapter on this issue. The second theme is the way in which Dutch judges determine whether a particular measure actually qualifies the state aid within the meaning of article 107. The next theme (chapter six) examines the relationship between the European Commission and the Dutch courts. Finally, in chapter seven, a key question for practice is addressed: the analysis of the consequences that judges are willing to attach to alleged violations of the stand still obligation and why. The right to individual judicial protection for the recipient of aid also receives sufficient attention in that chapter. This dissertation then also contains a chapter analysing which tools might be (or have already been) adopted by the Dutch legislator in order to address the potential flaws in the system of enforcement for state aid rules. Recent initiatives in that regard are discussed.

Not surprisingly, the author draws the conclusion that it is not self-evident to fit the effective enforcement of state aid rules within the practice of the Dutch legal system. Procedural autonomy can be, as is well-known in other areas of EU law, an obstacle to effective enforcement and perhaps also to effective judicial protection.

The conclusions in chapter nine of the dissertation draw together many of the interesting findings in this extensive work. Some of these findings are very much related to the specific Dutch framework and the particularity of the three different types of courts dealing with state aid law. Although this is not elaborated by the author in this book, it seems likely that many of the findings are most likely also valid for other Member States. This is not only true in relation to the practical difficulties following from the national procedural autonomy. One of the interesting conclusions relates to the reluctance that courts seem to have to play their role fully, even regardless of whether they have the adequate procedural tools or not. The author signals that this reluctance might be problematic, especially from the perspective of individual judicial protection. Research into the true causes of such a reluctance fall outside the scope of this dissertation. Further empirical research would probably be necessary to really

grasp the causes of this presumed reluctance. This is a very interesting subject. It seems too easy an explanation to attribute this reluctance to the lack of knowledge of EU law or the lack of specialisation of judges. The complex nature of the legal and economical issues in state aid cases can certainly be a factor but this also seems to be an unsatisfactory (only) explanation.

It would be interesting to research further the factors that play a role here from more than only a legal perspective, in a more multidisciplinary way and also by comparing different Member States. The author seems to have a preference for the adoption of formal legislation to repair the possible lack of effectiveness and lack of judicial protection at the national level. This is a valid argument to make (although harmonisation might certainly also be a valid route), but if there are more factors that determine the reluctance of national courts than only the lack of procedural tools, it remains to be seen whether new legislation shall entirely solve the problems the author has described. All in all, the book is a very dense and very detailed and thorough analysis of the Dutch case law in a given period, valuable to all practitioners and academics active in the Netherlands.

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