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The effective public enforcement of the prohibition of anti-competitive agreements: which factors influence the high percentage of annulments of Dutch cartel fines?

Annalies Outhuijse*

ABSTRACT

The Dutch enforcement of the European and Dutch cartel prohibition is characterized by high rates of litigation and successful litigation. Several studies have devoted attention to these phenomena, all unraveling parts of the puzzle as to how the occurrence of these percentages can be explained. The subject of this article, an analysis of the factors which influence the rate of successful litigation, is however missing in this body of literature. To begin with, a theoretical framework of possible influencing factors is designed on the basis of relevant academic literature. In order to evaluate whether the factors identified in the literature can explain the Dutch practice, an assessment is carried out using several means, including a further analysis of the Dutch cartel practice, interviews with involved stakeholders, and comparisons with other Member States and Dutch market supervisors. The article concludes that specific factors that are woven into the Dutch practice (including specific court, party, and case characteristics), in combination with the nature of competition law, influence the Dutch annulment rate.

KEYWORDS: antitrust, competition authorities, successful litigation, influencing factors

JEL CLASSIFICATIONS: K00, K21, K23, K40, K41, K42, L40

I. INTRODUCTION

Dutch enforcement of the European and Dutch cartel prohibition is characterized by high rates of litigation and successful litigation.¹ Several studies have devoted

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¹ The terms cartel and anticompetitive agreements are in this contribution used as synonyms.

attention to these phenomena, all unraveling parts of the puzzle as to how the occurrence of these percentages can be explained. These studies have established that the percentages of (further) appeals are significant,² have set out the main grounds for successful appeals,³ showed that the first and second instance court regularly differ on how an individual case should be decided,⁴ have answered the question whether the Dutch trends of high proportions of (successful) litigation and the reasons for annulments can also be observed in the enforcement activities of other competition authorities,⁵ and questioned the stakeholders about the functioning of the administrative procedures,⁶ and what motivates them to appeal the decisions in court.⁷ On the basis of these studies, the phenomena and its scope could be established. Moreover, the factors influencing the rates of litigation were identified. The answer to the question of which factors influence the rate of successful litigation is missing in this body of literature. In other words, previous research showed high percentages of annulments of Dutch cartel fines and the main grounds for the annulments, but did not explain why the annulment of cartel fines in the Netherlands is a recurring phenomenon. This is important since the common assumption that the explanation of this phenomenon should merely be sought in the work of the competition authority is not confirmed by the analysis of cases, the discussions occurring between the two courts, or the comparisons with the other Member States.⁸ Rather, a broad analysis of the factors influencing the high percentage of successful litigation is required, including the nature of competition law, in combination with specific characteristics of the cases, parties, and court procedures, as done in the following sections.

The article is structured as follows. The article starts by setting out the percentages of annulments and reasons for annulments, as established in previous studies, in Section II. Subsequently, Section III gives an initial insight into the theoretical framework of possible influencing factors, which is designed on the basis of relevant academic literature, and sets out the methodology used for evaluating these factors in the following sections. Section IV discusses the individual factors, their assumed effect on the basis of the literature and tests whether there are indications that they influence the high percentage of successful litigation in the Netherlands. The factors are assessed through several means, including a further analysis of the Dutch cartel practice, interviews with involved stakeholders, and comparisons with other Member States and Dutch market supervisors, in order to evaluate whether the factors

2 Annalies Outhuijse and Jan H Jans, 'Judicial Review of Decisions of the Dutch Competition Authority' in Dirk Arts and others (eds), *Mundi et Europae civis; Liber Amicorum Jacques Steenbergen* (Larcier 2014) 265–79; Annalies Outhuijse, 'Effective Public Enforcement of the Cartel Prohibition in the Netherlands: A Comparison of ACM Fining Decisions, District Court Judgments, and TIAT Judgments' in Anne Looijestijn-Clearie and others (eds), *Boosting the Enforcement of EU Competition Law at Domestic Level* (Cambridge Scholars 2017) 26–52. Available at SSRN.

3 Outhuijse and Jans, *ibid*; Outhuijse, *ibid*.

4 Outhuijse, *ibid*.

5 Annalies Outhuijse, 'Rates of Challenged and Annulled Cartel Fines in Ten European Member States' (2019) 42 *World Competition* 171.

6 Annalies Outhuijse, 'The Effective Public Enforcement of Cartels: Perceptions on the Functioning of the Objection Procedure and the Reality' (2018) 39 *RdW* 38.

7 Annalies Outhuijse, 'The Effective Public Enforcement of the Prohibition of Anti-competitive Agreements: Why Do Undertakings in the Netherlands Appeal?' (2018) 13 *Competition Law Review* 163.

8 Outhuijse (n 2); Outhuijse (n 5); Outhuijse (n 7).

identified in the literature can explain the Dutch practice. Although the article clearly builds further on the previous studies, amongst others by applying the same methods, this article is the first publication in which factors influencing the rate of successful litigation are identified. Finally, in Section V, the results regarding the influencing factors are combined and policy recommendations are made on the basis of the findings of this and previous studies.

The additional value of this research is two-fold. First, as follows from the introduction, by explaining why the annulments in the Netherlands occur, this research provides the last puzzle piece for the work dedicated to explaining the high rates of (successful) litigation. The research, however, also has a broader relevance. One of the results of this study is the development of a theoretically grounded and widely applicable model that can be used to examine the factors influencing successful litigation rates, which is not only relevant to Dutch cartel fines, but also similar fines abroad. The model could be used for future studies, and would be particularly interesting for comparisons. It could, for example, be used to analyse why other European Member States are also experiencing high rates of annulments, while others are not. The addition to the existing studies is that the model combines the literature which focuses on case and party characteristics as determinants for successful appeals and the literature which focuses on the judicial decision-making process including the factors that influence this process. This study design permits statements about the influencing factors for successful litigation behaviour, without the risk of attributing effects to the case characteristics, while the explanation should have actually been sought in the court characteristics or vice versa. Concluding, in general, the research is of value because it can provide greater insight into the relationship between several factors, such as the nature of the law and a procedure's characteristics, and the rates of successful litigation.

II. INTRODUCTION TO THE DUTCH ANNULMENTS

After the inception of the Dutch competition authority in 1998, the first cartel fines were brought for judicial review before the Dutch courts in the early 2000s. Two studies by this author analysed District Court Rotterdam's judgments between 1 January 2003 and 1 January 2013, and the subsequent judgments which followed these at the Trade Industry and Appeal Tribunal (TIAT).⁹ Both studies found high rates of annulments—around 60 per cent of the cases—which could be categorized into annulments for defects regarding fine imposition, fine calculation, and reasonable time. The majority of the annulments fell into the 'fine imposition' category.¹⁰ The court concluded, in such cases, that the conditions for imposing a fine were not fulfilled for reasons such as insufficient evidence, insufficient economic analysis, or insufficient reasoning. Concerning the 'amount of the fine' category, the court ruled that though a fine could be imposed, the figure was excessive or wrongly calculated. The District Court Rotterdam and TIAT have held in various cases that the Authority for Consumers and Markets (ACM) used a wrong basis for the fine, misclassified the sanctioned conduct, or imposed a disproportionately high fine.

9 Outhuijse and Jans (n 2); Outhuijse (n 2).

10 Outhuijse and Jans (n 2).

A more recent study that analysed the case law from 1 January 2013 onwards shows that the percentage of annulments has definitely not decreased since 2013.¹¹ In contrast, the courts did not revise one or more fines in only two of the 18 cases.¹² A small majority of the recent annulments, nine out of the 16 cases, merely led to a fine reduction that was mostly based on a reduction of the severity factor, which is one of the elements of fine calculation.¹³ The court concluded in eight cases that the ACM could not impose fines because of insufficient evidence or insufficient economic analysis, which applied to all the undertakings that challenged the decision in six cases and to one or some of the undertakings in two cases.¹⁴ In the case of insufficient economic analysis, the court concluded that it was not convinced that the behaviour was capable of restricting competition due to the companies' market shares, the nature of the behavior, or other market-specific circumstances.

The judgments show that the disagreement between the courts and the ACM in recent years concerns substantive points, since main grounds for the annulment of fines are insufficient evidence, insufficient regard for the economic context, and the application of an incorrect severity factor. Previous studies showed the interesting observation that despite a general trend for the courts to impose lower fines, both courts also have had discussions on the amount of factual and economic analysis needed and the appropriate fine in an individual case.¹⁵ In Dutch practice, there are several examples in which the TIAT fully annulled the fine on the basis of insufficient evidence, whereas the District Court Rotterdam merely reduced the fine; however, the reverse also occurred.¹⁶ The discussion that occurs among the courts indicates that it is too simplistic to conclude that the factors influencing the outcome of a case, and leading to an annulment, should merely be sought in the work of the competition authority. Rather, further research into the factors influencing the high percentage of annulments is required, as done in the following sections.

11 Outhuijse (n 7).

12 The cases *Bencis* and *Prefab Garageboxes* led to a full confirmation of the imposed fine: District Court Rotterdam 16 March 2017, ECLI:NL:RBROT:2017:1907 (*Prefab Garageboxes*); District Court Rotterdam 26 January 2017, ECLI:NL:RBROT:2017:631 (*Bencis*). Both cases are momentarily under review at the TIAT.

13 See eg Outhuijse (n 7). Examples include: District Court Rotterdam 26 November 2015, ECLI:NL:RBROT:2015:8610 (*Demolition companies*); District Court Rotterdam 23 June 2016, ECLI:NL:RBROT:2016:4738 (*Construction cases Limburg*); CBb 14 July 2016, ECLI:NL:CBB:2016:184 (*Flour*).

14 See eg Outhuijse (n 7). Fine annulment for only part of the companies: *Laundries* and *Flour*. For all the appealing companies: *Foreclosure Auctions*; *LHV*; *Taxi*; *Homecare Midden-IJssel* and *Insulating double glazing*; *Cold stores*.

15 *Inter alia* Outhuijse (n 2); Annalies Outhuijse, 'Kroniek – Bestuurs- en civielrechtelijke rechtspraak mededingingsrecht 2016' (2017) SEW 199.

16 Outhuijse (n 2); Outhuijse (n 7). See *inter alia* the following recent cases: *Foreclosure Auctions*, *Flour*, *Limburg construction sites*. There are also examples in which the TIAT reduced the severity factor, whereas the District Court Rotterdam found the severity factor appropriate or the TIAT went for a further reduction of the severity factor than the District Court, see *inter alia* *First year onion plants*, *Wmo Friesland*, *Demolition companies*.

III. METHODOLOGY

Previous studies have identified factors that influence the outcome of cases and, consequently, the annulments of decisions. Existing literature either focuses on case and party characteristics as determinants for successful appeals, or on the process of judicial decision-making and factors which influence this process. Based on the literature, I have identified the following possible influencing factors for the existence of annulments, which will be discussed in greater detail in the next sections.

Case and party perspective

- Nature of the case
- The number and scope of pleas
- Identity of the parties
- The height of the fine

Judicial perspective

- Clarity of the law
- Powers of review
- Expertise of the court
- Diverging views on competition law

These factors are developed from previous empirical and theoretical studies. The search for relevant literature began with competition law literature, specifically focused on cartel fines. However, due to limited literature in this area, this was supplemented with more general literature. First, competition law literature exists which focuses on case and party characteristics as determinants for successful appeals regarding European Commission decisions. For instance, two studies of Carree, Günster, and Schinkel analysed European Commission fines and the subsequent litigation thereof for the period 1957–2004. They distinguished factors that influence the rate of successful appeals, such as the number of pleas, the level of the fine, the number of judges, the length of the decision, and whether it concerns the Article 101 or 102 case.¹⁷ Additionally, a more recent (2016) study by Hüschelrath and Smuda focused on the cartels fined by the European Commission between 2000 and 2012. They analysed the characteristics of undertakings that decided to file an appeal against European cartel decisions by comparing them with undertakings that did not, and assessed the characteristics of successful appellants.¹⁸ Furthermore, there is existing literature, in both competition law and generally, which focuses on the process of judicial decision-making and the factors that influence this process, such as clarity of the law, powers of review, and expertise of the courts.

While most studies focus on either the case and party perspective or the judicial decision-making perspective, this study combines both perspectives in order to

17 Andrea Günster, Martin Carree and Maarten Pieter Schinkel, *A Statistical Analysis of Court of Appeal Rulings in European Antitrust Enforcement 1957-2004* (2010) <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2008&paper_id=443> accessed 28 June 2019.

18 Kai Hüschelrath and Florian Smuda, 'The Appeals Process in the European Commission's Cartel Cases: An Empirical Assessment' (2016) 13 *Journal of Empirical Legal Studies* 330.

explain the reality as accurately as possible. Although the outcome of judgments evidently depends on the case and party characteristics, as provided by the first perspective, we should bear in mind that the court procedure is not a mathematical formula which provides the same outcome every time the same factors are presented. Accordingly, as the second perspective describes, it is important to take into account that the judges are influenced by many factors other than the parties and their case. Therefore, both perspectives offer interesting findings which are indispensable for the research and will therefore be taken into account. The two perspectives are further broken down into (i) case features, including the nature of the case and the height of the fine; (ii) the party features, including the scope and number of the pleas and identity of the parties; (iii) the features of the law, including the clarity of the law; and (iv) court characteristics, including powers of review, expertise of the courts, and personal views on competition law. Before discussing why and how these identified factors are considered relevant, what they entail, and whether in the employed methods supporting or rejecting indications are found regarding the influence on the Dutch rate of annulments, the methodology employed in the following sections requires further discussion.

In the following sections, the factors identified in the literature are discussed individually in eight separate sections, whereby each section follows the same pattern. First, it is explained from which study the factor originates, why the identified factor is considered relevant, and thereby its definition, operationalization, and assumed influence. Subsequently, the effect found in the previous study is assessed to analyse whether supporting or contradictory evidence could be found regarding the influence of this factor in the context of the Netherlands. Finally, conclusions are drawn regarding the possible influence of the factors on the rate of successful litigation in cartel cases in the Netherlands. A total of four methods are employed to establish whether the factors influence the annulments: (i) a further analysis of Dutch enforcement practice; (ii) interviews with the stakeholders involved; (iii) a comparison with other national competition authorities (NCAs); and (iv) a comparison with four other Dutch market supervisors.

The analysis of the Dutch court judgments and the underlying documents is an important source when making statements about the influence of several factors, such as the number and scope of the pleas, the height of the fine, and identity of the parties. The judgments and underlying documents are analysed from both courts, dating from 1998 to 1 January 2019, which consists of a total of 52 distinguishable cartel cases.¹⁹ For a better understanding of the cases and processes leading to the judgments, this analysis was supplemented by attending the court hearings in the period 2016–19 and analysing literature describing Dutch practice. Furthermore, three ACM officials, 14 Dutch practitioners, and judges from both courts were questioned regarding what—according to them—are influencing factors for the high rate of

19 The cases are described more extensively in Outhuijse and Jans (n 2); Outhuijse (n 2); Outhuijse (n 7). The author recognizes the limitations of merely reading court judgments, such as the fact that the judgment is a simplification of the dispute, which is one reason why other methods are applied to supplement these limitations.

Dutch annulments.²⁰ The interviews were complemented by organizing expert meetings with members of the stakeholder groups, such as the District Court Rotterdam, TIAT, and ACM, in which the most important research findings of this article were discussed. Thirdly, the practices of several other European Member States²¹ and four other Dutch market supervisors²² were analysed to receive indications about the influence of factors which are consistent among Dutch cartel cases, such as the powers of review, expertise of the court, diverging views, and clarity of the law. Both types of enforcement systems have a few of the above-mentioned factors in common with Dutch anti-cartel enforcement, while others are different. The foreign authorities enforce the same norms and impose comparable high fines through different procedures, whereas Dutch authorities enforce different norms in the same jurisdictional setting of decision-making and court procedures. The comparisons make it possible to place the Dutch characteristics in perspective in order to analyse their possible relevance and influence.

This collection of methods is necessary to make statements about the influence of each of the factors identified in the literature. While for some factors only one method is available for making statements about the possible influence, for other factors all available methods could be used. No method is dominant. The methods complement each other and are all necessary to make statements about the influence of the individual factors. For example, while the analysis of Dutch practice on the basis of the court judgments is necessary for analysing the influence of the number of the pleas on the outcome of the case, the comparison with other Member States is necessary to get indications about the influence of the powers of review and the expertise of the courts. More information about which method was used for which factor can be found in the individual sections in which the factors are explained, operationalized, and evaluated.

IV. EVALUATING THE FACTORS

This section evaluates the factors and their influence. As mentioned, each section follows the same pattern for the individual factors. After describing the factor, the effect established in the literature, and its operationalization, the analysis follows whether one or more methods provide indications for accepting or rejecting the influence of these factors within the Dutch context.

20 See for the methods of selecting the interviewees and structuring the interviews: Outhuijse (n 6) and Outhuijse (n 7). The judges were approached in a more informal setting and were selected on the basis of already existing contacts.

21 See Outhuijse (n 5) for the selection of Member States and the in-depth analysis.

22 For internal comparison, judicial review of the District Court Rotterdam and TIAT, and the annulments rates for fines imposed for other market infringements by the ACM, the Netherlands Authority for the Financial Markets (AFM) and the Dutch National Bank (DNB) were analysed. These fines concern fines imposed by (i) the AFM and (ii) the DNB under the *Act on Financial Supervision* and the ACM for infringements of (iii) the *Dutch Act on Enforcement of Consumer Protection* and (iv) *Telecommunications Act*. These types of fines are chosen as comparison material because they bear interesting similarities with anti-cartel enforcement, namely that they also lead to high fines which are imposed on companies by independent authorities, also concern market supervision, have close connections with European law, represent only a limited number of decisions per year, and are reviewed by the District Court Rotterdam and the TIAT. The period analysed for these authorities is 2012–18.

Party features

Number and scope of the pleas

One of the influencing factors mentioned by previous studies is the *number and scope of the pleas*.²³ The scope of the pleas concerns whether the parties raise appeals against, for example, the finding of the violation or merely the fine calculation. This evidently has consequences on the case outcome, since courts will generally only review disputed elements. It is widely reported in literature, and specifically by Camesasca, that on the European level, appeals against cartel decisions of the Commission often aim at obtaining a fine reduction rather than annulment of the fine.²⁴ Another example is provided by Sousa Ferro who noted in his 2015 study that, in the analysis of 608 substantive annulments, defects regarding market definition were only raised in 134 cases which represents 22 per cent.²⁵ In conclusion, the hypothesis following from the literature entails that if pleas of the parties define the scope of the dispute and the courts will not *ex officio* review all parts of the decision, the scope of the pleas influences the outcome of the case and consequently the number and type of annulments.²⁶

Regarding the number of pleas, Günster and others found ‘that the number of pleas in law positively affects the probability of partial annulment, but has a negative influence on that of complete annulment’.²⁷ Hüschelrath and Smuda found that groups of companies which also requested fine annulment received larger fine reductions than those which only appealed for a fine reduction, supporting their hypothesis that the former case type is likely to have more substance.²⁸ They also found that the number of different reasons raised by a group in an appeal has a highly significant positive effect on the probability of a successful appeal, but does not influence the size of the fine reduction granted. They argue that the higher the number of pleas, the higher the possibility that a decisive point will be brought forward.

In contrast to other Member States, Dutch administrative procedural law does not contain limited grounds of appeal.²⁹ The undertaking fined can dispute the fining

23 Hüschelrath and Smuda (n 18); Günster, Carree and Schinkel (n 17).

24 Peter D Camesasca and others, ‘Cartel Appeals to the Court of Justice: The Song of the Sirens?’ (2013) 4 *Journal of European Competition Law & Practice* 215; Richard Whish, *Competition Law* (OUP 2008) 272–73; Damien Geradin and David Henry, ‘The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts’ Judgments’ (2005) 1 *European Competition Journal* 401.

25 Miguel Sousa Ferro, ‘Judicial Review: Do European Courts Care about Market Definition?’ (2015) 6 *Journal of European Competition Law & Practice* 400.

26 See *inter alia* Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar Publishing 2017) 332–36.

27 Günster, Carree and Schinkel (n 17).

28 Hüschelrath and Smuda (n 18).

29 For example, Croatia has a limited number of appeal grounds: (i) misapplication or erroneous application of substantive provisions of competition law, (ii) manifest errors in application of procedural provisions, (iii) incorrect or incomplete facts of the case, and (iv) inappropriate fine and other issues contained in the decisions of the Agency. Also other countries, for example, Bulgaria and Italy, have a similar system. See *inter alia* Marco Botta and Alexandr Svetlicinii, ‘The Right of Fair Trial in Competition Law Proceedings: Quo Vadis the Courts of the New EU Member States?’ in Paul Nihoul and Tadeusz Skoczny (eds), *Procedural Fairness in Competition Proceedings* (Edward Elgar 2015) 276–308; European Commission, *Pilot Field Study on the Functioning of the National Judicial Systems for the Application of*

decision on all possible points—the qualification of the facts, the evidence for the infringement, the compliance with the relevant procedures, the amount of the fine, and the interpretation of the law. The procedural limitation is, however, that the point should have been raised during the objection procedure if this was followed.³⁰ The reading of the judgments shows that the pleas of the appealing party define the scope of the dispute and consequently the possible grounds for annulment.³¹ In other words, the courts will not *ex officio* review all parts of the decision, which means that if a part of the fining decision is not disputed by the undertaking, the court assumes that this part is correct.³² There are exceptions to this; the courts, for example, review on their own motion whether the procedure's duration was unreasonable in light of Article 6 European Convention of Human Rights (ECHR). Moreover, there are examples in which the courts discuss certain elements spontaneously. For example, the District Court Rotterdam discussed the appropriateness of the severity factor in the *Wmo Friesland* case, while the companies did not raise this point.³³ The general rule is however that the pleas of the appealing party define the scope of the dispute, and therefore the factor of *scope of the pleas* as influencing factor is confirmed by the data and literature.

In Dutch practice, the undertakings raise pleas that are generally not focused on a limited part of the decision as is the case at the European level, for instance. Many elements of the fining decision, and sometimes all possible elements, are disputed during the court procedures.³⁴ In aggregate, parties raised pleas (i) on procedural grounds, (ii) on violation finding grounds, and (iii) on fine calculation grounds. Procedural grounds would generally include an alleged violation of the right of defence and access to evidence. Concerning violation finding grounds, parties would argue, generally, that (i) the alleged behaviour had not occurred or that there was insufficient evidence of its occurrence, (ii) there was no restriction by object, (iii) the economic analyses were faulty, since the alleged anticompetitive effects were not appreciable and the establishment of the relevant market was flawed and so forth. Regarding fine calculation grounds, almost all the parties made arguments that concerned the period of the conduct, the severity calculations, proportionality, and the existence of circumstances that could reduce the fine. Thus, what is more exception

Competition Law Rules (2014); OECD, *Judicial Perspectives on Competition Law. Contribution from Italy* (2017).

30 The objection procedure is a mandatory pre-trial procedure in which the administrative authority has to completely review its original decision on the basis of the individual's objections and can decide to confirm, amend, or withdraw its decision. Pursuant to Dutch procedural rules, access to court is only available after following the objection procedure. See about the practice of this procedure in cartel cases: Outhuijse (n 6); Jan H Jans and Annalies Outhuijse, 'Advisory Objection Procedures in the Netherlands. A Case Study on Its Usefulness in Dutch Competition Law' in Suzanne Comtois and Kars J de Graaf (eds), *On Judicial and Quasi-judicial Independence* (Eleven Publishing 2013) 179–94.

31 See for more general literature about *ex officio* application of the law by the Dutch administrative judges: Dorien Brugman, *Hoe komt de bestuursrechter tot zijn recht?* (Boom Juridische Uitgevers 2010) 223–32.

32 *ibid.*

33 CBb 11 January 2017, ECLI:NL:CBB:2017:1 (*Wmo Friesland*).

34 See also Outhuijse (n 7). Although the number and type of pleas differ per case, in many cases, more than 10 grounds of appeal are brought forward. In some extreme cases, the undertakings brought forward 38 grounds of appeals. See about the latter case Outhuijse (n 2).

than the rule is that the appeal focuses on a certain element of the fining decision, such as the amount of the fine.³⁵

Previous studies mentioned the number of pleas as a relevant factor and showed that filing many complaints reduces the chance of a complete annulment, but increases the chance of a fine reduction. These conclusions are not confirmed by the Dutch data. First, as described in Section II, there is a category of pleas that has a particular chance of success, namely insufficient evidence, insufficient regard for the economic context, and the severity factor; in recent years, most of the annulments are limited to these pleas. As a result, reliance on those factors would be sufficient in most cases. In addition, the data do not show a relation between the number of pleas and the successfulness of the appeal.³⁶ There are examples of cases in which there was only one ground of appeal and the case was successful. For example, in the *Limburg construction cases*, one ground was sufficient to receive a fine reduction from EUR 3 million to EUR 463,000.³⁷ In addition, there are cases with limited grounds of appeal that were unsuccessful, such as *Garage Boxes*; however, there were also cases in which many different grounds were raised, none being successful for some companies, such as the *Silver Onions* case.³⁸ In sum, the analysis rejects the number of pleas as an influencing factor to Dutch annulments.

Identity of the parties

The study of Hüschelrath and Smuda mentioned specific characteristics of the parties, such as being a ringleader, repeat offender, or leniency applicant, as possible determinants for successful cases.³⁹ They found that increased numbers of leniency applicants had no significant effect on the probability of a successful appeal, but if the appeal is nevertheless found to be successful, the number of leniency applicants had a positive effect on the level of fine reduction granted, which suggests that if an error occurs, it is of a more severe nature, thereby justifying larger fine reductions. Secondly, they also found strong support for the finding that both ringleaders and repeat offenders obtain larger fine reductions than firms without those two characteristics. In conclusion, they identified that the identity of the parties matter.

In American studies, the success of parties was also distinguished for different types of parties. Coate found, as one of his main conclusions in his 1995 study, that

35 Example: District Court Rotterdam 16 March 2017, ECLI:NL:RBROT:2017:1907 (*Garage boxes*).

36 Evidently, the reading of the judgments gives a limited picture since in the cases that were not successful all the raised arguments are discussed. It is precisely in those cases where there is no successful ground that it is clear how many grounds of appeal there were. For some of the successful cases it is however impossible to say what the number of pleas was, because one of the first grounds was successful and it is not clear how many other grounds there were. The order in which the grounds of appeal are discussed is namely a fixed sequence, first the procedural grounds are discussed, then the infringement-finding arguments and finally fine calculations grounds. The court stops discussing the other grounds at the moment one of the grounds is successful. This limitation was partly supplemented by observation during court hearings.

37 Cbb 8 May 2018, ECLI:NL:CBB:2018:141 (*Limburg construction cases*).

38 The existence of the large number of grounds of appeal is however not incomprehensible. In many cases, there are many companies involved each with their own legal assistance and with their own grounds of appeal. In addition, as described by previous research based on interviews with the Dutch practitioners, uncertainty exists in which grounds will be successful. Outhuijse (n 7).

39 Hüschelrath and Smuda (n 18).

the identity of the plaintiff affects the outcome of merger cases.⁴⁰ Data from 50 merger cases decided between 1982 and 1992 in the USA showed that the Department of Justice had a success rate of 27 per cent compared to the Federal Trade Commission and private parties, which had a success rate of over 60 per cent.⁴¹ Coate suggests that the result could be partly explained by the type of cases the parties brought to the court, though the identity of the parties also seems to matter. He concludes that merger decisions appear to be driven by the economic merits of the cases, but the specific barrier or competitive effect findings seem to depend on the type of case and the identity of the plaintiff.

Other literature on this topic—focusing on areas other than competition law—goes a step further and tries to explain why certain parties are more successful than others. The well-known research programme ‘Who wins and loses in litigation, and why?’, which started with the research of Galanter in 1974, focuses on the relationship between party characteristics and being successful in court.⁴² An important characteristic used in this research is the difference between repeat players and one-shotters, and resource-rich and resource-poor parties. Many studies followed Galanter’s research and duplicated the research for different countries, areas of law, and time periods.⁴³ The studies come to the conclusion that the repeat players and resource-rich parties are more successful because they are familiar with the procedures and therefore know the rules of the ‘game’. Moreover, the institutional characteristics of courts favour the repeat players and those with access to better resources, such as the best lawyers. The government, which is the prototypical repeat player, has extra advantages as the government makes the rules and is deemed to operate in the public interest.⁴⁴

The studies combined are a source of inspiration for the hypothesis that the identity of the parties, more specifically being a repeat player or resource-rich party, might be relevant for explaining the high rate of annulments in the Netherlands. The repeat player characteristic however does not relate to the companies in Dutch cartel

40 Malcolm B Coate, ‘Merger Analysis in the Courts’ (1995) 16 *Managerial and Decision Economics* 581.

41 See in contrast for antitrust cases in which higher numbers are reported for the Department of Justice in earlier years: Richard A Posner, ‘A Statistical Study of Antitrust Enforcement’ (1970) *The Journal of Law & Economics* 365.

42 Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95. See in general about the research programme: Frans L Leeuw and Hans JG Schmeets, *Empirical Legal Research* (Edward Elgar 2016).

43 Most of the studies concern the USA, although the Netherlands and UK are also included: Bahaar Hamzehzadeh, ‘Repeat Player vs. One-Shotter: Is Victory All That Obvious’ (2010) 6 *Hastings Business Law Journal* 239; Donald J Farole, ‘Reexamining Litigant Success in State Supreme Courts’ (1999) 33 *Law & Society Review* 1043; Peter J Van Koppen and Marijke Malsch, ‘Defendants and One-Shotters Win after All: Compliance with Court Decisions in Civil Cases’ (1991) 25 *Law & Society Review* 803; Stanton Wheeler and others, ‘Do the Haves Come Out Ahead - Winning and Losing in State Supreme Courts 1870-1970’ (1987) 21 *Law & Society Review* 403; Terence Dunworth and Joel Rogers, ‘Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991’ (1996) 21 *Law & Social Inquiry* 497; Bert Niemeijer, ‘Galanter Revisited: Do the “Haves” (still) Come Out Ahead?’ in Bernard Hubeau and Ashley Terlouw (eds), *Legal Aid in the Low Countries* (Intersentia 2014) 85–102; Herbert Kritzer and Susan Sibley, *In Litigation, Do the “Haves” Still Come Out Ahead?* (Stanford UP 2003); Burton M Atkins, ‘Party Capability Theory as an Explanation for Intervention Behaviour in the English Court of Appeal’ (1991) 35 *American Journal of Political Science* 881.

44 Niemeijer, *ibid*.

cases, since only two companies have so far been accused of being a repeat offender; however, it does relate to the ACM employees and the practitioners involved.⁴⁵

All stakeholders mentioned the identity of the parties as an influencing factor regarding the outcome of the case. Some of the practitioners mentioned that the individual ACM case handler, both in the decision-making procedure and the court procedure, can influence the quality of the case and the outcome of the procedure. The ACM officials saw the professionalism of the practitioners as one of the relevant factors explaining the high number of annulments. They mentioned that the fined undertakings are generally large companies represented by experienced law firms which know exactly where to direct their arrows. Finally, one of the judges mentioned that both parties are represented by highly experienced lawyers, which makes it a discussion between professionals.

The reading of the judgments confirms that the decisions address professional market parties which call in the assistance of highly qualified specialized lawyers and sometimes economic experts.⁴⁶ The practitioners mostly come from law firms with large and expert competition teams. The ACM is generally represented during court hearings by at least two or more lawyers from its legal department, sometimes supplemented by economic expertise from within the organization and, in older cases, the state attorney. Concluding, companies are generally represented by experienced practitioners and the ACM by experienced officials. When focusing on the element of being a repeat player, a distinction can be made between more experienced and less experienced professionals, for example, by more or less experience in assisting undertakings on whom cartel fines are imposed. There are practitioners who are specialized in competition law and have never assisted a company in court before and practitioners who, however quite exceptional, have already represented a company in five or six previous cases.⁴⁷ The same applies to the ACM officials. The assumption that can be drawn from the above-mentioned studies would be that more experienced practitioners and ACM officials would be more successful in winning their case.

The judgments do not show the pattern that more experienced practitioners and ACM officials, in the sense of being a repeat player, are more successful. There are cases in which the most experienced ACM employees are involved, but the court nevertheless decides to annul the fine completely or reduce it significantly. The same is true for the practitioners; there are cases in which most experienced practitioners and economic professionals are involved, but the fine is not annulled or only reduced to a very limited extent. There are, however, also examples in which less experienced practitioners are involved and nevertheless the case results in a complete annulment. There are even cases in which some of the companies are not assisted by

45 This is different on the European level as the research of William E Kovacic and others showed: William E Kovacic, Robert C. Marshall and Michael J. Meurer, 'Serial Collusion by Multi-product Firms' (2018) 6 *Journal of Antitrust Enforcement* 296. See also Wouter Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition* 5.

46 See also Jans and Outhuijse (n 30).

47 To illustrate, there are five lawyers who assisted companies on who were cartel fines imposed during court procedures for five or six times already while seven lawyers had experience of three cases and 10 lawyers only had experience in one or two case(s) before.

practitioners, but benefit from the grounds brought by other practitioners, such as the *Florenclosure Auction* case.⁴⁸

Previous research suggested that the number of appellants and practitioners can make a difference because 'a higher number of applicants joined together might exert more influence than a single firm, as jointly they invest more money, time and effort in practitioners, consultants and expertise than a single firm can'.⁴⁹ However, this was neither confirmed in that research nor confirmed by the Dutch data. Although companies benefit from points raised by the practitioners representing the other undertakings in some cases,⁵⁰ the data do not show a general trend that undertakings are more likely to succeed if the companies are represented by a strong army of practitioners.⁵¹

As Coate found in his study, the influence of the practitioners and their experience probably depends on the nature of the case. One can imagine that the help professionals render is not very influential in cases of a clear error, but there is also nothing that professionals can do in cases where no errors are made. It seems that experience is most influential in 'grey' areas where there is room for discussion and the courts need to be convinced that there is reasonable doubt or persuaded to arrive at alternative views from those the competition authority proposed. In Dutch practice, examples are visible in which the practitioners created reasonable doubt about the correctness of the relevant market, which was probably not possible without substantiation by an economic expert's report obtained by the undertaking and the practitioner. In cases like this, professionalism can be influential since the court would probably not have been convinced of an error in the decision had the undertaking not been represented by a highly professional team. There are indications of the relevance of this factor to be drawn from the private enforcement of stand-alone cartel cases. The case law showed examples in which companies were represented by practitioners who hardly had experience with competition law and did not seem to know which grounds should have been brought forward and in which way, therefore losing the cases unnecessarily. It is also reasonable to expect that the influence of the parties' professionalism depends on powers of review of the judiciary, namely whether it is sufficient to raise a certain point and hope that the judge will pick up on it or whether alternative arguments have to be provided, such as with regard to the relevant market, to convince the court that there are reasonable doubts about the correctness of the decision on that point.

In sum, companies are generally represented by experienced practitioners and the ACM by experienced officials. Therefore, the difference in influence between professional and not professional is not measurable. A distinction can however be made on

48 CBB 3 July 2017, ECLI:NL:CBB:2017:204 (*Foreclosure auctions*). See Annalies Outhuijse and Jaap JA Waverijn, Case Note *Foreclosure auctions*, AB 2017/34. Not all jurisdictions have the rule that companies can benefit from points raised by the practitioners representing the other undertakings. See for the European Union: Castillo de la Torre and Gippini Fournier (n 26).

49 Günster, Carree and Schinkel (n 17); see also Richard Startz and Albert Yoon, 'Litigant Resources and the Evolution of Legal Precedent' (2009), available at SSRN: <<https://ssrn.com/abstract=1475350>> accessed 28 June 2019.

50 See eg *Foreclosure Auctions*, CBB 3 July 2017, ECLI:NL:CBB:2017:204 (*Foreclosure auctions*).

51 See eg *Flour*, CBB 14 July 2016, ECLI:NL:CBB:2016:184 and 187 (*Flour*).

the basis between more and less experienced professionals, by focusing on the number of previous cartel fine cases done. The conclusion is that cases exist in which the team and its professionalism make a difference, but it does not seem influential in all cases. The data indicate that the influence will depend on other factors, such as the nature of the case. The influence of this factor is neither completely accepted nor completely rejected. This single factor is definitely not decisive, but it could strengthen the effect of other factors, and in combination with several other factors, such as the nature of the case, yield an annulment.⁵²

Case features

Complexity of the case

The authors in previous studies analysed the relation between the complexity of the case and the outcome of the court procedure.⁵³ They noted that although competition law cases can in general be seen as complex, the complexity differs per case and one case can have more substance and raise more legal and factual questions than the other. The latter also suggests that more complex cases have more elements to challenge and are more eligible for annulments.

Günster and others distinguished types of economic conduct; they, for example, distinguished between cartels and abuse of dominance and between horizontal and vertical cases for the former.⁵⁴ They concluded that cases which are characterized by horizontal agreements and abuse of dominance less often receive partial annulment in contrast to vertical infringements. Within one type of economic conduct, Günster and others used multiple factors as measures for the complexity of a case, namely the number of judges, the length of the court judgment, and the length of the Commission's decision. The underlying assumption was that if the conduct is complex, the Commission would use more text to defend its decision, more judges would be appointed to review the case, and the judges would use more wording to arrive at their final conclusion. They found that the number of judges have a positive impact on the number of accepted complaints. Consequently, the court cases in which the number of judges is high are more likely to achieve complete annulment or considerable fine reduction. In addition, they concluded that the likelihood of a decision being partially annulled increases with the length of the judgment. The exact reverse holds for cases in which the Commission went to great lengths, in terms of recitals, to justify its decision, which is evidently also one of the case factors. Although the number of judges is not a possible measure in the Netherlands, and the length of the decision and the judgment does not seem the best measure either, as recognized by Günster and others, the nature of the cases and their complexity is a possible relevant factor.⁵⁵

52 This does not however mean that an experienced lawyer is not needed, since great knowledge of competition law and previous cases are beneficial in other cases, and competition law is not an area which you can learn overnight.

53 Günster, Carree and Schinkel (n 17).

54 *ibid.*

55 *ibid.*

As described by the stakeholders, but as also follows from the literature, cartel decisions are, in general, regarded as complex decisions based on open norms, strongly casuistic in nature and can require complex factual, legal, and economic analyses.⁵⁶ Moreover, cartel fines contain many elements which can be discussed and on which an annulment could be based. In connection to these elements, there are many standards the competition authority has to comply with in order to justifiably carry out its task and impose a cartel fine. These include establishing in its decision the evidence for the alleged behaviour, explaining why the alleged behaviour entails an infringement which falls under the scope of the prohibition, and setting out how the fine is calculated and why it is justified. The overall complexity of establishing cartel fines could easily lead to erroneous decisions and thus lead to annulments in court. Previous research showed that the Dutch ACM is not alone in experiencing large proportions of annulments.⁵⁷ Courts in researched jurisdictions (Belgium, Bulgaria, Croatia, Finland, France, Italy, Sweden and the UK) also regularly conclude that fines should be annulled due to, for instance, errors in establishing an infringement or calculating the fine.⁵⁸

As described by literature but as also shown by the comparison with the other Member States, cartels take many different forms and are concealed in all sorts of ways and the ease in complying with the standards depends on the complexity of the case, including the kind of behaviour, the scale on which the behaviour took place, and the nature of the available evidence. The stakeholders also mentioned that for the Dutch practice, the complexity of a particular case influences the quality of the individual decisions. The most recent Dutch cartel cases all concern horizontal cartels, but distinctions can be made concerning whether a case can be regarded as a clear-cut cartel, such as market sharing between all available competitors, or is more complex and raises more legal and factual questions. The practitioners described a number of cases, which involved very standard cartels with clear facts and circumstances which are deemed *prima facie* unlawful, and the quality of those fining decisions was described as decent. Somewhat more complex cases, where the ACM sought to find new approaches and had to devise new theories, were described as of lower quality.⁵⁹ In particular, the analysis of the market was viewed as one of the elements which could be improved in those cases. A proper sense of the market in which the infringement occurred, understanding how the market works, what the

56 *Inter alia* Mark Biesheuvel and others, Van ordening naar marktwerking; Kanttekeningen bij het ontwerp-mededingingswet; preadvies voor de Vereniging 'Handelsrecht' en de Vereniging voor Mededingingsrecht (1996) 121; Laraine Laudati, 'The European Commission as Regulator: The Uncertain Pursuit of the Competitive Market' in Giandomenico Majone (ed), *Regulating Europe* (Routledge 1996); Fernando Castillo de la Torre, 'Evidence, Proof and Judicial Review in Cartel Cases' (2009) 32 *World Competition* 505.

57 Outhuijse (n 5).

58 *ibid.* The study shows differences in number and type of annulled decisions. While annulments are mostly limited to fine reductions in the UK and France, Bulgaria is one of the few countries in which the courts did not reduce fines but only completely annulled them. The other countries (Italy, Sweden, and Finland) have combinations of fine reductions and complete annulments.

59 For example, some cases concerned cover-pricing. For those cases, as is discussed in the literature, the question was whether this can be qualified as an object restriction: Andreas Stephan and Morten Hviid, 'Cover Pricing and the Overreach of 'Object' Liability under Article 101 TFEU' (2015) 38 *World Competition* 507.

relationships are between buyers and suppliers, and how the companies compete was felt to be missing in some decisions, according to the practitioners. The ACM was described as quickly arriving at the conclusion that the conduct harms competition, but the theory of harm, in the sense of explaining how this behaviour was capable of restricting competition, was viewed as flawed. In some cases, such as *Silver Onions* and *Flour*, this was not a critical point, since it was more a clear-cut cartel and it was clear what the market was and how it functioned. The practitioners also noted that many of the cartel cases enforced by the ACM are not straightforward and acknowledged that competition law is a difficult area of law and mistakes are easily made, also by other actors, such as other practitioners and the judges.

The interviews, judgments, and comparisons support the assumption that the complexity of the case influences the number of annulments which concerns both the individual cases and cartel cases in general. In addition, Dutch national features, such as the burden and standard of proof, make it more difficult for the competition authority to impose a cartel fine.⁶⁰ The influence of the complexity of the case with regard to the number of annulments namely also depends on the fact whether the competition authority has the burden of proof, whether the authority can rely on legal presumptions for cartel infringements, and what the standard of proof is. The facts that the Dutch authority cannot rely on presumptions, has the burden of proof, and has to comply with a high standard, which is not the case in all Member States, make the cases more complex for the ACM.⁶¹

In the majority of European Member States, the burden of proof is on the company which has to show an error in the decision of the NCA.⁶² In the Dutch practice, the ACM has the burden of proof for the elements of the fining decision which forms the major grounds for annulment. Although the appealing company has the burden of proof of the facts it alleges, it is sufficient for the undertaking to establish reasonable doubt about the accuracy of the decision regarding this element. This differs for the other grounds for appeal, which rarely lead to annulments, such as infringement of the right to defence.

In general, the Dutch courts set high standards for the authority with regard to the elements mentioned. For example, with regard to the economic context, it is not sufficient for the competition authority to rely on the presumption that a certain kind of conduct is capable of restricting competition. The courts require the authority to establish that the specific conduct was actually capable of restricting competition. Both

60 Maria João Melicias, 'Did They Do It?' The Interplay Between the Standard of Proof and the Presumption of Innocence in EU Cartel Investigations' (2012) 35 *World Competition* 471; Castillo de la Torre and Gippini Fournier (n 26); Castillo de la Torre (n 56).

61 For example, the standard of proof differs per Member State, both on paper and in practice. In certain cases, it can conceivably make a difference whether the standard of proof entails 'the unfettered evaluation of evidence', 'the balance of probabilities', or 'an error in fact and law'. The balance of probabilities is for example the standard of proof used in the UK, while in Romania and Spain an error in fact and law should be proved by the undertaking. European Commission (n 29).

62 European Commission (n 29). For infringements of the European cartel prohibition, art 2, reg 1/2003 stipulates that 'the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement'. See in general about burden and standard of proof on the European level: Castillo de la Torre and Gippini Fournier (n 26).

courts clearly reject a formalistic application of competition law.⁶³ The authority should examine the legal and economic context in which the company operates and not base its analysis on models and assumptions.⁶⁴ Research shows that this is different for other NCAs.⁶⁵ As described by the OECD, competition enforcement currently consists of two modes of analysis with regard to economic evidence.⁶⁶ On the one hand, agencies and courts are supposed to pursue detailed market analyses to assess whether specific conduct is anticompetitive. On the other hand, there are rules concerning certain forms of behaviour which are presumed to be anticompetitive and dispense with market analysis.⁶⁷ The Netherlands clearly follows the first described type.

In sum, cartel cases are, in general, complex; for many elements of the fining decisions, the competition authority has to comply with high standards which can easily lead to erroneous decisions and, in some cases, the ACM did not meet those standards which led to annulments. The data support the assumption that the complexity of the case influences the number of annulments which concerns both the individual cases and cartel cases in general. In addition, Dutch national features, such as the burden and standard of proof and the fact that the authority may not rely on presumptions, make it more difficult for the ACM to impose a cartel fine.

Height of the fine

A specific characteristic of competition law fines is the height of the fines. The fines are much higher than in most areas of law and are also increasing, as reported in the literature.⁶⁸ The level of fines is identified as an influencing factor for successful appeals.⁶⁹ Günster and others concluded that the higher the fine is, the greater the

63 See Annetje Ottow, 'Observations on Economic Proof in Economic Cases' in Oda Essens and others, *National Courts and the Standard of Review in Competition Law and Economic Regulation* (European Law Publishing 2009).

64 For more general literature, Rein Wesseling and Marc van der Woude, 'The Lawfulness and Acceptability of Enforcement of European Cartel Law' (2012) 35 *World Competition* 573.

65 OECD, *Safe Harbours and Legal Presumptions in Competition Law* (2017) DAF/COMP(2017) 9; Antonio E Bernardo, Eric Talley and Ivo Welch, 'A Theory of Legal Presumptions' (2000) 16 *Journal of Law, Economics, & Organization* 1. See also about legal presumptions David Bailey, 'Presumptions in EU Competition Law' (2010) 31 *European Competition Law Review* 362; Cyril Ritter, 'Presumptions in EU Competition Law' (2018) 6 *Journal of Antitrust Enforcement* 89; Cristina Volpin, 'The Ball is in Your Court: Evidential Burden of Proof and the Proof-proximity Principle in EU Competition Law' (2014) 5 *Common Market Law Review* 1159; Steven C Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (2017) Georgetown Law Faculty Publications <<https://scholarship.law.georgetown.edu/facpub/2007>> accessed 28 June 2019; Steven C Salop, 'Decision Theory and Antitrust Rules' (1999) 67 *Antitrust Law Journal* 41.

66 OECD, *ibid.*

67 *ibid.*

68 *Inter alia* Wouter Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2009) 33 *World Competition* 5; Damien Geradin and Katarzyna Sadrak, 'The EU Competition Law Fining System: A Quantitative Review of the Commission Decisions Between 2000 and 2017' (2017) TILEC Discussion Paper No 2017-018, available at SSRN: <<https://ssrn.com/abstract=2958317>> accessed 28 June 2019; Outhuijse (n 2). The proposal of the ECN+ Directive also explicitly mentions that is that action should be taken to guarantee that NCAs can impose deterrent fines on companies. See 'Proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market' COM (2017) 0142 final, 23.

69 Hüschelrath and Smuda (n 18); Günster, Carree and Schinkel (n 17).

likelihood of a partial annulment and an accepted complaint, and the larger the fine reduction. Hüscherlath and Smuda also provide strong evidential support for their hypothesis that the higher the final fine, the larger the fine reduction resulting from the appeals process. The idea is that, if the authority fines excessively, these fines become an easy target for the appellants.

The factor 'height of the fine' is not confirmed by the Dutch data. No pattern could be detected between the amount of the fine and the presence or absence of either a fine reduction or a complete annulment. There are cases in which significant fines, significant compared to fines in other cases, are not reduced while requested for by the companies, such as the *Flour* case. The ACM imposed fines of respectively EUR 9, 12, and 22 million but both the District Court and the TIAT did not reduce the fine.⁷⁰ In contrast, in cases in which the fine was much smaller, such as in *Demolition companies*, the TIAT did reduce the originally imposed fines of EUR 69,000, 56,000 and 17,000.⁷¹ The same is true for the *Foreclosure Auction* case.⁷² Also, within the cases, there is no pattern that the higher fines are annulled and the lower fines are confirmed, as illustrated by the *Laundries* case and the *Flour* case.

The judgments also indicate that the courts are not influenced by the absolute amount of the fine, but whether it is correct or excessive in the individual case. The courts mainly focus in their review on the calculation of the fine, in particular on the severity factor, instead of on the absolute amount resulting from the calculation. In the analysis of the Dutch and foreign cases, there is the general trend that the courts lower the fines imposed or proposed by the competition authority.⁷³ It does not, however, mean that, in each case in which high fines are imposed, there is a large probability that the fine will be lowered because this depends on many factors including the market, the type of company, the type of behaviour, and the view of the courts regarding high fines. The latter is important since the comparison with other countries showed not only a general trend of courts imposing lower fines than the authority, but also showed that the German courts, for example, do not have a problem with the high fines and actually increased the fines in certain cases, while fines of more than a hundred million Euros are not uncommon in Germany.⁷⁴ Therefore, the height of the fine as an influencing factor is rejected on the basis of this data.

Law features

Clarity of the law

Various studies mention the clarity of the law as an influencing factor for the outcome of a case which should be interpreted broadly and extends to legislation, policy rules, and case law.⁷⁵ In determining the outcome of a case, judges are constrained

70 District Court Rotterdam 17 July 2014, ECLI:NL:RBROT:2014:5830; ECLI:NL:RBROT:2014:5849, ECLI:NL:RBROT:2014:5884; CBb 14 July 2016, ECLI:NL:CBB:2016:185, ECLI:NL:CBB:2016:186, ECLI:NL:CBB:2016:188.

71 CBb 12 October 2017, ECLI:NL:CBB:2017:325 (*Demolition companies*).

72 CBb 3 July 2017, ECLI:NL:CBB:2017:204 (*Foreclosure Auctions*).

73 Outhuijse (n 5).

74 See in more extent about this Outhuijse (n 7) and Outhuijse (n 5).

75 Giuseppe Dari-Mattiaci and Bruno Deffains, 'Uncertainty of Law and the Legal Process' (2007) 163 *Journal of Institutional and Theoretical Economics* 627; William M Landes and Richard A Posner, 'Legal

by the grammatical meaning of the law.⁷⁶ However, the constraints imposed by the law differ per area of law. In some instances, the language of the law is fairly precise and so provides indications for a correct answer to be provided to the legal question and thus limits judicial discretion. In other cases, the law as a collection of words is imprecise and does not systematically provide a single correct answer to the questions raised and consequently does not provide much constraint on judicial decision-making. The clarity of the law however does not only depend on the wording of the norms, but also whether the objectives underlying the law are clear and whether a stable interpretative framework could be achieved by years of jurisprudence or policy guidelines, which is capable of being adapted to all the eventualities.⁷⁷

The extensive body of literature discussing the ambiguity of competition law, including the content and scope of the norms, the objectives of competition law, the function of competition enforcement, and the role of economic analysis in competition policy, suggests that the clarity of the substantial law is a relevant factor for the judicial decision-making and possibly the annulments in Dutch cartel cases.⁷⁸

The interviews held with the stakeholders support the importance of this factor since it has been recurrently mentioned. As ACM officials have described it, the area of law is not black-and-white. It provides room for discussion about whether the authority has weighed certain aspects correctly. There is considerable debate possible about the violation and, more specifically, the qualification of the facts. In addition, the penalty guidelines provide guidance for the calculation of fines, but do not prescribe how certain facts should be valued. Furthermore, European and national judgments provide direction and result in a clarification of standards; however, they are limited insofar that the outcome is confined to the specific characteristics of a case. Consequently, each new case gives rise to a fresh debate.

Precedent: A Theoretical and Empirical Analysis' (1976) NBER Working Paper No w0146 <<https://ssrn.com/abstract=260335>> accessed 28 June 2019; Richard A Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 *Journal of Legal Studies* 399.

76 CK Rowland and Robert A Carp, *Politics and Judgments in Federal District Courts* (UP of Kansas 1996); Michael Heise, 'The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism' (2002) 4 *University of Illinois Law Review* 819; Jack Knight, 'Are Empiricists Asking the Right Questions about Judicial Decisionmaking?' (2009) 58 *Duke Law Journal* 1531 and studies mentioned there regarding the legal model explaining judicial decision-making.

77 *Inter alia* Dari-Mattiacci and Deffains (n 75).

78 *Inter alia* Pablo Ibáñez Colomo and Alfonso Lamadrid, 'On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know' in Damien Gerard, Massimo Merola and Bernd Meyring (eds), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant 2017); Pablo Ibáñez Colomo, *What's with This Obsession with the Objectives of EU Competition Law?* (Chillin'Competition, September 2015); Pablo Ibáñez Colomo, *Forget about Consumer Welfare: It's the Law vs Discretion Divide That Will Mark the Future of Competition Law* (Chillin'Competition, September 2018); William E Kovacic, 'Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework' (2017) 1(1) *GW Law Faculty Publications* 12; Svend Albaek, 'Consumer Welfare in EU Competition Policy' in C Heide-Jørgensen and C Bergqvist (eds), *Aims and Values in Competition Law* (DJØF Publishing 2013) 67; Damien Gerardin and Nicolas Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment* (2010) TILEC Discussion Paper No 2011-008, available at SSRN: <<https://ssrn.com/abstract=1698342>> accessed 28 June 2019; Kai Hüscherlath, 'The Costs and Benefits of Antitrust Enforcement: Identification and Measurement' (2012) 35 *World Competition* 121; Christopher JS Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control' (2011) 34 *World Competition* 383.

According to the officials, the standards are much more concrete in some other areas of law. While by comparison there is still room for some discussion about how certain concepts should be understood in other areas, there is less ambiguity when compared with cartel cases. An interesting point the officials raised is that this state of affairs does not appear to be improving:

Ten years ago, we were talking about this and in ten years' time that will probably still be the case. After all, it is not black and white. It is not a kind of mathematical formula that we are working on. You always have debate.⁷⁹

As already mentioned, the practitioners further stated that many of the Dutch cartel cases are not straightforward and acknowledged that competition law is a difficult area of law, where mistakes are easily made.⁸⁰ In addition, some noted that cartel fines contain aspects about which the law is unclear and discussion is possible. According to their view, it is possible to have a reasonable view about the qualification of the facts in light of the law, which is not necessarily the only correct one. As described by one of the practitioners:

Cartel cases consist of extensive files with many elements which can be disputed, and for some elements, it simply comes down to the question of how you interpret them.

The judges also mentioned the fact that the law consists of open norms and the cases largely differ from one another and are based on complex facts which had not been previously reviewed as factors that influence the discussion between the courts and the ACM, and in-between the courts themselves.

The open norms and casuistic nature of these cases easily lead to mistakes and differences of opinion.

The analysis of Dutch judgments confirms the findings of the interviews: certain elements are open for discussion and no single answer is necessarily the correct one. This does not count for all cases however. Whether an element leaving room for discussion arises depends on the nature and complexity of the infringement and whether the law—which should be interpreted broadly and thus also includes policy guidelines and European and national case law—provides an answer to the specific question.

Dutch cartel fines are based on the national cartel prohibition (Article 6 Dutch Competition Act), sometimes read with its European counterpart (Article 101 Treaty on the Functioning of the European Union; TFEU). Article 6(1) Dutch Competition Act reads:

Agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which may affect or have as their

⁷⁹ Own translation.

⁸⁰ See about the role of the advisory committee in Dutch cartel procedures Jans and Outhuijse (n 30); Outhuijse (n 6).

object the prevention, restriction or distortion of competition on the Dutch market or any part thereof, are prohibited.

As the prohibition shows, the legislator found inspiration in the European prohibition, with an important difference in the scope of application of the two prohibitions. Both prohibitions contain abstract wording which gives little guidance on how a specific case should be solved with regard to all the individual elements within a decision. European case law, as well as Commission decisions and policy guidelines, provide an important source of information for national practice with regard to the interpretation and application of the open standards contained in competition law provisions.⁸¹ The Explanatory Memorandum of the Dutch Competition Act also explicitly mentions that the legislator envisaged that Dutch actors would align as much as possible with the European Commission's decision-making practice and the Court of Justice of the European Union's (CJEU's) case law for the interpretation and application of the Dutch prohibition.⁸² The definition provisions at the beginning of the Dutch competition act also explicitly refer to Article 101 TFEU to explain certain terms, such as 'agreement' and 'concerted practices'.⁸³ In practice, the District Court of Rotterdam and the TIAT regularly cite European case law, as well as Commission decisions and policy guidelines, in their rulings when it comes to not only the interpretation of the national prohibition, but also for the application of the national prohibition and qualification of the facts in light of this provision.⁸⁴ Although in general this should lead to greater clarity, which in practice it does for some elements, considerable room for discussion is left for other elements.

This is caused, first of all, by the fact that European case law and its consequences are not always clear.⁸⁵ The case law can leave space for discussion, which is illustrated by the amount of academic literature dedicated to explaining certain judgments. A good example for the Dutch practice is the *Expedia* judgment and the consequences thereof for the economic analysis required in a case of object restrictions.⁸⁶ Following the judgment, a much-debated issue among the parties, courts, and also academic literature, was whether the Court of Justice had taken the view in *Expedia* that restrictions by object automatically have an appreciable effect on competition. Answering this question in the affirmative would eliminate the separate appreciability test which was conducted in the Netherlands after qualifying behaviour

81 Anna Gerbrandy, *Convergentie in het mededingingsrecht* (BJU 2009).

82 *ibid.*

83 For general literature, see Marek Szydło, 'Leeway of Member States in Shaping the Notion of an 'Undertaking' in Competition Law' (2010) 33 *World Competition* 549.

84 See eg Gerbrandy (n 81). More recent judgments show comparable examples.

85 See about for the Dutch context: Pieter Kalbfleisch, 'Standard of Proof, Burden of Proof and Evaluation of Evidence in Antitrust and Merger Cases: A Perspective of the Netherlands Competition Authority' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011).

86 Court of Justice 13 December 2012, C-226/11 (*Expedia*). See for the discussion, Annalies Outhuijse, 'Wat doet de Nederlandse rechter met het merkbaarheidvereiste na *Expedia*?' (2014) 9 *SEW* 391; Outhuijse (n 15) and literature mentioned there.

as a restriction by object.⁸⁷ This includes the test of the undertakings' market shares to determine whether the parties were actually capable to restrict competition.⁸⁸

Although the District Court of Rotterdam held that restrictions by object automatically have an appreciable effect on competition in its judgments shortly after *Expedia*,⁸⁹ it reintroduced a separate assessment of the appreciability test after the *Cartes Bancaires* judgment.⁹⁰ In 2016, this led, amongst others, to an annulment in *Taxi drivers*, in which the District Court, after qualifying the behaviour as a restriction by object, ruled that the ACM's economic analysis, more particularly its market definition, was insufficient to demonstrate that the alleged behaviour had been capable of appreciably restricting competition.⁹¹ The TIAT finally received the opportunity to opine on this issue in 2016, and in two rulings—one in 2016 and one in 2017—the TIAT appears to have decided that the appreciability test forms part of the analysis of whether the behaviour can be qualified as a restriction by object, thereby making this the present Dutch assessment adopted by the highest public law court.⁹² The District Court of Rotterdam similarly adopted this line in its jurisprudence in 2017 and concluded, contrary to its case law in 2016, that a separate assessment of the appreciability of the competition restriction is no longer necessary.⁹³ In 2018, also the ACM clarified—and was confirmed by the TIAT—that in order to impose a cartel fine, (i) the nature of the conduct must be concretely suitable for restricting competition and (ii) that the companies must not have a negligible position on the relevant market.⁹⁴

This example illustrates that case law coming from the European level can provide a source for discussion instead of a source for clarity. The more general problem is, if the case law is clear, that the national actors still have to make the extra step of linking the existing case law to the present case. In competition law, this step from

87 The same is true for private law jurisprudence, where it was not completely clear what has to be proved by the claimant in standalone cases, but is also the question whether the private law will follow the public law development. See the judgment of the highest judge in this area of law which still leaves room for discussion in the literature and newer judgments: HR 14 July 2017, ECLI:NL:HR:2017:1354 (*Agib/SGD en KNMvD*); Annalies Outhuijse, 'Kroniek – Bestuurs- en civielrechtelijke rechtspraak mededingingsrecht 2017' (2018) 4 SEW 149.

88 Outhuijse (n 86).

89 Eg District Court Rotterdam 20 March 2014, ECLI:NL:RBROT:2014:2045; District Court Rotterdam 12 June 2014, ECLI:NL:RBROT:2014:4689.

90 Court of Justice 11 September 2014, C-67/13 (*Cartes Bancaires*). Eg District Court Rotterdam 18 December 2014, ECLI:NL:RBROT:2014:10173 (*Foreclosure Auctions*); District Court Rotterdam 30 April 2015, ECLI:NL:RBROT:2015:2912 (*Wmo Friesland*).

91 District Court Rotterdam 13 October 2016, ECLI:NL:RBROT:2016:7659-7664 (*Taxi*).

92 CBb 14 July 2016, ECLI:NL:CBB:2016:184 and 187 (*Flour*); CBb 11 January 2017, ECLI:NL:CBB:2017:1 (*Wmo Friesland*).

93 In short, the line seems to be that the elements of the appreciability test, such as the undertaking's position on the market, are part of the qualification test as object restriction and do not constitute a separate test. The qualitative part of the appreciability assessment, in other words, examining whether the alleged behaviour is by its very nature, capable of restricting competition in this specific market, was already part of the assessment whether the behaviour can be qualified as a restriction by object.

94 CBb 23 October 2018, ECLI:NL:CBB:2018:526 (*Laundries*). See Annalies Outhuijse and Jaap JA Waverijn, Case Note *Laundries*, AB 2019/7.

interpretation to application is often complicated.⁹⁵ The legal rules developed through jurisprudence are often very closely related to the individual facts of each case, making it difficult to apply them verbatim to other factual situations, thereby, thus leaving room for discussion. In addition, each case consists of a unique set of legal and factual circumstances which makes establishing general lines over time all the more difficult. In view of the very abstract wording of the legal provisions and the casuistic and factual case law, much room is left to be filled by the national practice. Consequently, this offers a source for discussion between the various actors within national practice.⁹⁶

In addition, there are matters that mainly fall within the national competence. An example is the standard of proof and the sources of evidence which can be used to meet this standard. As observed in the recent *Eturas* case, the assessment of evidence and the standard of proof are governed by the principle of procedural autonomy and, therefore, by national law.⁹⁷ The prevailing principle in Dutch law with regard to the assessment of evidence and the standard of proof, as is the case in European law,⁹⁸ is that of the ‘unfettered evaluation of evidence’, and the relevant criterion for such evaluation relates to its reliability, which leaves much to the court’s own assessment.⁹⁹

As described in the literature, the completion of this standard leads to the application of an equivocal standard of proof by the Dutch courts whereby the exact standard depends on the circumstances of the case.¹⁰⁰ Sometimes, the infringement must be shown to be plausible, while other cases require it to be sufficiently proved or even proved convincingly.¹⁰¹ There is no specific discernible factor that justifies the difference and the question is whether there is a difference in practice. The case law suggests that the test comes down to whether the individual chamber of judges is convinced that the decision contains sufficient evidence to prove the alleged infringement. The courts then verify the arguments of the parties against the whole body of evidence and the conclusions set out in the ACM’s decision. The judgments and disagreement between the two courts show that it is not always clear what the required standard of proof is which has to be applied in a specific case, and whether

95 Anthony M Collins, ‘Of Cattle, Crashes & Cards – Recent Case-law of the Court of Justice on Restrictions by Object’ in Adriana Almăşan and Peter Whelan (eds), *The Consistent Application of EU Competition Law* (Springer 2017).

96 Gerbrandy (n 81).

97 Case C-74/14 *Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba* [2016], 21 January 2016 ECLI:EU:C:2016:42 para 34. The national rules are, evidently, subject to the principles of equivalence and effectiveness, meaning that the same rules should apply to national and European variants of the prohibition and that national rules governing the assessment of the evidence and the standard of proof must not render the implementation of EU competition rules impossible or excessively difficult and, in particular, must not jeopardize the effective application of Articles 101 TFEU and 102 TFEU.

98 See among others, Eric Gippini-Fournier, ‘The Elusive Standard of Proof in EU Competition Cases’ (2010) 33 *World Competition* 187; Castillo de la Torre and Gippini Fournier (n 26).

99 Ymre Schuurmans, *Bewijslastverdeling in het bestuursrecht. Zorgvuldigheid en bewijsvoering bij beschikkingen* (Kluwer 2005); Raymond JN Schlössels, ‘Een vrije en kenbare bewijsleer?’ in Raymond JN Schlössels and others (eds) *Bestuursrechtelijk bewijsrecht: wetgever of rechter?* (BJU 2009).

100 Gerbrandy (n 81).

101 See Outhuijse (n 2) for an extensive overview. See for the European practice, Per Hellström, ‘A Uniform Standard of Proof in EU Competition Proceedings’ in Ehlermann and Marquis (n 85).

the work of the competition authority which is set out in its decision complies with this. This is, for example, shown in the *Foreclosure Auction* and *Flour* cases, where the courts did not agree on the standard of proof and whether sufficient evidence had been adduced.¹⁰²

Even though the case law develops the standard of proof and certain requirements for adducing evidence, the problem remains that the legal rules developed in the jurisprudence are closely related to the individual facts of the case, making it difficult to apply them consistently alongside other factual situations. In addition, the number of cases is limited and new variants of facts will continue to occur for which no rule has been established and the court will have to decide whether it is convinced by the ACM's evidence that the behaviour alleged has occurred. In sum, the standard of proof remains a vague standard, which differs on a case-by-case basis and thus leaves room for discussion.

This combination of vagueness in the rules and the uniqueness of every case also holds true for another common ground for annulments—the severity factor. In many cases, there has been discussion between the courts and the ACM, but also between both courts over the appropriateness of the severity factor in a specific case. The District Court lowered the severity factor in several recent cases.¹⁰³ In addition, the TIAT has lowered the severity factor set by the ACM in many recent cases, whereas the District Court of Rotterdam ruled that the ACM's consideration was appropriate.¹⁰⁴ Although there are some guidelines for determining the severity factor, the exercise in determination is not an exact science.

The ACM has a wide margin of discretion in determining the size of fines, albeit its powers are largely governed by policy rules—the so-called 'fining guidelines'.¹⁰⁵ These guidelines prescribe how the fine should be calculated, and also contain many abstract terms which have to be filled in by the enforcement actors in individual cases. An ACM fine for violation of competition rules is calculated as follows. The starting point is 10 per cent of the involved undertaking's turnover, meaning the turnover of the company achieved by the supply of goods and services related to the violation. This amount is then multiplied by a severity factor that currently can vary between 0 and 5.¹⁰⁶ The size of this factor depends on the severity of the violation, divided into three categories: very severe, severe, and less severe. The further guidance of establishing the severity is limited and therefore, the determination of the severity factor leaves room for discussion and largely depends on the exact characteristics of the case and the determiner's view of the importance of the characteristics and the consequences thereof.

The conclusion can be drawn that for the major points of concern, namely factual and economic evidence and the severity factor, the law does not systematically

102 CBb 3 July 2017, ECLI:NL:CBB:2017:204 (*Foreclosure Auctions*); CBb 14 July 2016, ECLI:NL:CBB:2016:187 (*Flour*).

103 Eg District Court Rotterdam 26 November 2015, ECLI:NL:RBROT:2015:8610 (*Demolition companies*); District Court Rotterdam 23 June 2016, ECLI:NL:RBROT:2016:4738 (*Construction cases Limburg*).

104 Eg CBb 14 July 2016, ECLI:NL:CBB:2016:184 (*Flour*); CBb 11 January 2017, ECLI:NL:CBB:2017:1 (*Wmo Friesland*); CBb 6 October 2016, ECLI:NL:CBB:2016:272 (*First year onion plants*).

105 In the Netherlands, these policy guidelines are issued by the Minister and not the competition authority.

106 Before 2009, this factor varied between 0 and 3.

provide a single correct answer. There is scope for discussion about how much evidence is needed to establish an infringement, the requirements regarding the assessment of appreciability, and the appropriateness of the severity factor. These elements are subject to interpretation which can lead to different, yet legitimate views. In addition, each case consists of a unique set of legal circumstances, making the establishment of general lines over time difficult, which is possible for other elements of the fining decision. Moreover, although in the course of time much clarity on several points can be reached, new points of discussion will always appear because of new types of behaviour or new market-specific characteristics that were not fined previously.¹⁰⁷ The interviews, the reading of the law, and the analysis of Dutch practice, including the discussion of the courts on the major points of annulments, substantiate the view that legal clarity is an influencing factor for annulments.

There are additional indications that support this conclusion, namely the fact that both courts arrive at different conclusions with regard to the same elements in cartel cases, while this does not occur regularly in Dutch cases in other fields. Research on the judicial review of fines imposed by the other four market supervisors in the areas of consumer protection, telecommunication law, and financial markets has showed that in general, annulments in those cases are mostly limited to fine reductions. In other words, the courts and the authority have less discussion about the facts, the evidence for the occurrence of those facts, and the qualification of the facts. Moreover, although the percentage of further appeal is relatively high, the TIAT often confirms the judgment of the District Court in these areas, which is an important distinction from Dutch cartel cases. There appears to be much less discussion between the two courts in these areas of law. These conclusions support the idea that the nature of cartel fines and the underlying law provide more room for discussion than is the case in other areas of law.

A final indication is provided by the fact that the Netherlands is not alone in experiencing this phenomenon. Courts in the researched jurisdictions where both court instances review questions of law and fact, similar to the Netherlands, also tend to differ on whether sufficient evidence is submitted or what the amount of the fine should be.¹⁰⁸ This was, for example, visible in Sweden, Finland, and Italy. The comparison among Member States in the previous study and, in particular, the difference in type and number of annulments and the evolution of annulments, however, indicates that the clarity of the law is not decisive and jurisdictional characteristics, such as the court which reviews the case and its powers of review, also have an important influence on this phenomenon, as the next section illustrates.

Court features

Powers of review

An array of literature describes the need for effective judicial protection against government decisions, especially in competition law cases where powerful authorities

107 Related to this topic, David Bailey described that art 102 TFEU has been applied in new sectors and to new practices on dominated or associated markets. David Bailey, 'The New Frontiers of Article 102 TFEU: Antitrust Imperialism or Judicious Intervention?' (2018) 6 *Journal of Antitrust Enforcement* 25.

108 Outhuijse (n 5).

impose significant fines.¹⁰⁹ The literature further reports that the powers of review decide the scope of the judicial protection and the likelihood of a court to arrive at a particular decision.¹¹⁰

Judicial review in the Member States can vary extensively based on the constitutional arrangements and competences conferred to the judicial branch.¹¹¹ Even though these standards must comply with European Union (EU) and ECHR law,¹¹² the scope and intensity of judicial review can vary and lead to different outcomes.¹¹³ The European legislature and European Courts have so far avoided setting guidelines for judicial review in competition law, in contrast to, for instance, telecommunications law.¹¹⁴ As a result, similar topics will continue to be reviewed differently in the Member States as a consequence of the procedural autonomy enjoyed by Member States, as long as the basic requirements of equivalence, effectiveness, and effective judicial protection are guaranteed.¹¹⁵

Therefore, as recognized in the literature, it is important to focus on the different methods Member State courts employ with regards to the scope and intensity of the

- 109 David Bailey, 'Scope of Judicial Review under Article 81 EC' (2004) 41 *Common Market Law Review* 1327; Heike Schweitzer, 'Judicial Review in EU Competition Law' in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar Publishing 2013) 491; Heike Schweitzer, 'The European Competition Law Enforcement System and the Evolution of Judicial Review' in Ehlermann and Marquis (n 85); José Carlos Laguna de Paz, 'Understanding the Limits of Judicial Review in European Competition Law' (2014) 2 *Journal of Antitrust Enforcement* 203; Alice Setari, 'The Standard of Judicial Review in EU Competition Cases: The Possibility of Introducing a System of More Intense or Full Judicial Review by the EU Courts' (PhD thesis, University of Milan 2014) 46; José Luís da Cruz Vilaça, 'The Intensity of Judicial Review in Complex Economic Matters—Recent Competition Law Judgments of the Court of Justice of the EU' (2018) 6 *Journal of Antitrust Enforcement* 173; Castillo de la Torre and Gippini Fournier (n 26).
- 110 See *inter alia* Essens and others (n 63).
- 111 Dubravka Aksamovic, 'Judicial Review in Competition Cases in Croatia and Comparative Jurisdictions' (2017) 67 *Zbornik PFZ* 405, 437.
- 112 See amongst others: ECHR 23 November 2006 *Jussila v Finland* (Application no 73053/01); ECHR 27 September 2011 *Menarini Diagnostics v Italy* (Application no. 43509/08); Case C-272/09 *KME Germany and Others v Commission* EU:C:2011:810; Case C-386/10 *P Chalkor AE Epexergasias Metallon v European Commission* EU:C:2011:815, para 51. See Wouter PJ Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker' (2014) 37 *World Competition* 5.
- 113 Botta and Svetlicinii (n 29); Christopher Bellamy, 'ECHR and Competition Law Post Menarini: An Overview of EU and National Case Law' (2012) e-competitions N47946 2012; Bo Vesterdorf, 'Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement' (2005) 1 *Global Competition Policy* 3, 9ff; Gerardin and Petit (n 78).
- 114 Rolf Ortlep and Rob JGM Widdershoven, 'Rechtsbescherming' in Sacha Prechal and Rob JGM Widdershoven (eds), *Inleiding tot het Europees bestuursrecht* (Ars Aequi Libri 2017) 397. See art 4(2) Dir 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).
- 115 Albert Sánchez-Graells, 'ECJ Avoids Providing Guidance on Intensity of Judicial Review of Procurement Decisions by Sticking to Strictly Formalistic Approach: The Gaping Hole Remains (C-171/15)' (*How to Crack a Nut – A Blog on EU Economic Law*, 15 December 2016) <<http://www.howtocrackanut.com/blog/2016/12/15/ecj-avoids-providing-guidance-on-intensity-of-judicial-review-of-procurement-decisions-by-sticking-to-strictly-formalistic-approach-c-17115>> accessed 28 June 2019.

review, even though the topic reviewed is the same.¹¹⁶ Of particular interest is the 2009 study by Oda Essens, Anna Gerbrandy, and Saskia Lavrijssen, which focuses on the standard of review by national courts in competition law and economic regulation.¹¹⁷ It showed that since the Member States apply different systems of judicial review which differ in their intensity and scope, the outcome can also vary in the sense of which elements of the fining decisions are reviewed and how this review is performed.

The scope of judicial review consists of the elements of the decision which can be reviewed by the courts. The elements under review by the courts could be limited to the interpretation of the law and protection of due process, or could also include the verification of evidence, factual findings and the legal qualifications derived therefrom. Most countries have one or two instances of courts which have the powers to review questions of law and fact.¹¹⁸ For some of the countries, such as Italy, Croatia, and Bulgaria, the scope of the judicial review is limited to specific elements.¹¹⁹ The grounds of judicial review are limited, for example, to determinations of incompetence, breach of legal requirements, and misuse of power, while in other countries all the elements of the decision can be reviewed.¹²⁰ With regard to second instance courts, a minority of national courts review both questions of law and fact.¹²¹ The others are restricted to questions of law. The fact that in some countries the elements to be reviewed by the national courts are limited confines the possible outcomes of the cases.

Moreover, intensity refers to the depth of review performed by a court. Although the literature uses different terminologies to describe the degrees of intensity of review, most authors agree that intensity is a spectrum of control ranging from a more lenient test of whether an authority could have lawfully and reasonably arrived at a particular decision—such as the *Wednesbury* test of unreasonableness in the UK—to intensive scrutiny including questions of whether the decision was correct and appropriate in the specific case.¹²²

Essens, Gerbrandy, and Lavrijssen revealed in their 2009 book that in case of competition law decisions, the standard of review in most countries differs depending on the elements under review. As described by the authors, many national courts fully review the establishment of the facts, the interpretation of the law, and

116 Aksamovic (n 111); Bellamy (n 113); Gerardin and Petit (n 78); Vesterdorf (n 113); Ioannis Lianos and others, 'Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective' (2014) Cles Research Paper 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2542993> accessed 28 June 2019.

117 Essens and others (n 63).

118 European Commission (n 29).

119 Botta and Svetlicinii (n 29) 248; Peter Petrov, 'Bulgaria', in *the International Comparative Legal Guide to: Enforcement of Competition Law* (Global Legal Group Ltd 2009); European Commission (n 29); OECD (n 29).

120 *ibid.*

121 European Commission (n 29).

122 Tom Zwart, 'The Scope of Review of Administrative Action from a Comparative Perspective' in Essens and others (n 63); Cosmo Graham, 'Judicial Review of the Decisions of the Competition Authorities and the Economic Regulators in the UK' in Essens and others (n 63). The *Wednesbury* test of unreasonableness is however not applied in cartel fine cases.

compliance with relevant procedures.¹²³ They may evaluate whether the findings of the authority were correct with regard to these matters and substitute the findings of the authority with their own. However, if the authority disposes of any discretion or margin of appreciation, the courts will in general apply a marginal review, meaning that they do not review whether the exercise of the margin of appreciation was correct, but whether the decision was outrageous or patently unreasonable or as the European Court describes it, involved a manifest error of assessment.¹²⁴ As described, this is particularly the case where it concerns economic analysis, which is a technical appraisal, and the review is more restricted due to the margin of appreciation provided to the authority and the specific expertise the authority has in this matter.¹²⁵ This is described, for example, for Italy in older literature where a weak form of judicial review based on legality was justified because of the authority's expertise.¹²⁶ By contrast, in some countries, such as the UK, the question of intensity of review depends on the expertise of the court and not on the authority's expertise.¹²⁷ The review of the fine amounts is often subject to an intensive review.

Essens and others further noted that the intensity of review changes over time and suggested that this could influence the outcome of the cases.¹²⁸ They pointed out an emerging tendency of the national courts to apply full, at least more intensive, review of discretion in specific circumstances, and broaden the scope of the subject matter.¹²⁹ For example, they describe an initial reluctance, which was followed by an increasing willingness in the Spanish judiciary to review the core of administrative decisions on economic issues.¹³⁰ The literature describes a similar development for Italy. As mentioned, in older literature the Italian review was described as marginal, in particular with regard to technical appraisal.¹³¹ The review intensified through the

123 Saskia Lavrijssen, Anna Gerbrandy and Oda Essens, 'European and National Standards of Review: Differentiation or Convergence' in Essens and others (n 63).

124 *ibid.*

125 *ibid.* See about the European practice Sousa Ferro (n 25) who described that applicants have a very small chance of seeing the European Courts overturn a market definition in a Commission decision, because there is a tendency to limit judicial review of market definitions to manifest errors of assessment. See for different analysis: Castillo de la Torre and Gippini Fournier (n 26); Andriani Kalintiri, 'What's in a Name? The Marginal Standard of Review of "Complex Economic Evaluations" in EU Competition Enforcement (2016) 53 Common Market Law Review 1283; Gerardin and Petit (n 78).

126 Roberto Caranta and Barbara Marchetti, 'Judicial Review of Regulatory Decisions in Italy; Changing the Formula and Keeping the Substance' in Essens and others (n 63).

127 Lavrijssen, Gerbrandy and Essens (n 123).

128 *ibid.* Also, American studies confirmed that differences in standard of review has consequences on the outcome of the case. See eg Kent H Barnett, Christina L Boyd and Christopher J Walker, 'Chevron Patterns in the Circuit Courts' (2018) *Administrative & Regulatory Law News*, available at SSRN: <<https://ssrn.com/abstract=3257041>> accessed 28 June 2019.

129 More countries have known a development in the degree of intensity of judicial review from marginal to intensive or more intensive review. See eg for Hungary: Csongor I Nagy, *Competition Law in Hungary* (Wolters Kluwer 2016) 139; A Kovács and M Varjú, 'Hungary: The Europeanization of Judicial Review' (2014) 2 *European Public Law* 195. See for Poland Maciej Bernatt, 'Between Menarini and Delta Pekarny. Strasbourg View on Intensity of Judicial Review in Competition Laws' in Csongor I Nagy, *The Procedural Aspects of the Application of Competition Law* (Europa Law Publishing 2016); Maciej Bernatt, 'Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference' 97(2016) 9(14) *Yearbook of Antitrust and Regulatory Studies*.

130 Lavrijssen, Gerbrandy and Essens (n 123).

131 Caranta and Marchetti (n 126).

Council of State's case law, which states that judges are vested with the task of ascertaining whether the power conferred to the Italian NCA has been correctly exercised.¹³² In addition to this intensified review, another interesting development is observed in the literature. While earlier literature described that the *Industrial Gas* case was remarkable since it constitutes one of the very few instances in which a cartel decision has been annulled in its entirety upon judicial review, recent study showed that full annulments form a significant part of the annulments in the period from 2010 to 1 July 2017.¹³³ The examples show that the scope and intensity of judicial review vary, change over time, and possibly influence the proportion and types of annulments.

In the Netherlands, undertakings can apply for judicial review before two exclusively competent courts—The District Court of Rotterdam as the first instance court and the TIAT as the second and final instance court. Both courts review questions of law and fact. The fact that both courts can review all the elements influences the chances that companies will appeal successfully.

As considered by the TIAT in several cases, such as the *Flour* and *Foreclosure Auctions* rulings, the task for the courts when reviewing a decision to impose a fine for a violation of Article 6 Mw and/or Article 101 TFEU is to assess whether the ACM fulfilled its obligation to prove that the conditions for fine imposition have been met.¹³⁴ According to the TIAT's established jurisprudence, it is not only necessary to assess whether a decision was arrived at deliberately and based on sound justification, but also whether the ACM correctly interpreted the legal concepts and made a plausible argument that the facts and circumstances meet the legal conditions.¹³⁵ In particular, the court should not only check the material accuracy of the evidence, its reliability and consistency, but also whether those elements correspond to the relevant factual framework for assessment and whether they support the conclusions drawn from them.

The reading of the judgments show that the Dutch courts perform a thorough assessment of these elements.¹³⁶ The intensity of the review by the District Court of Rotterdam and TIAT can therefore, in general, be described as comprehensive, in particular with regard to the common grounds for annulments.¹³⁷ The courts review whether the ACM established the facts and qualified them in light of the law and their consequences correctly. In other words, unlike practice in other Member States, the courts do not provide the ACM with a margin of appreciation in this

132 OECD (n 29).

133 Outhuijse (n 5).

134 CBb 14 July 2016, ECLI:NL:CBB:2016:185 (*Flour*); CBb 3 July 2017, ECLI:NL:CBB:2017:204 (*Foreclosure Auctions*).

135 See for example the ruling of 31 December 2007, ECLI:NL:CBB 2007:BC1396 (*Mobile Operators*).

136 See for elaborate discussion and examples: Outhuijse (n 2).

137 Saskia Lavrijssen and Maartje de Visser, 'Independent Administrative Authorities and the Standard of Judicial Review' (2006) 2 Utrecht Law Review 111; Saskia Lavrijssen, 'More Intensive Judicial Review in Competition Law and Economic Regulation in the Netherlands: Vice or Virtue?' in Essens and others (n 63). There are elements which are reviewed with a more marginal approach, namely, for example, whether the companies could benefit from the justification of art 6(3) Competition Act and whether the turnover used is reasonable.

regard.¹³⁸ What is described in older literature still counts in recent cases, namely that the courts in practice substitute their findings for those of the ACM and do not limit themselves to the question whether the ACM could reasonably have reached a particular conclusion.¹³⁹ Finally, the courts additionally do not rely on the ACM's explanation of the law and the European case law, nor the qualification of the facts in light of the law.

With regard to the amount of the fine, the Dutch courts state that they have to apply a full review on the basis of national, ECJ, and ECHR case law.¹⁴⁰ As asserted in their respective judgments, the courts must consider whether the ACM applied the policy guidelines correctly, whether the maximum fine is not exceeded, whether the relevant facts and circumstances have been taken into account and whether the fine is proportionate to the violation. These conditions include, in any case, the nature and seriousness of the violation, the extent to which it can be accounted to the individual undertaking and the circumstances under which it was committed. On the basis of Dutch law, the court must reduce the fines if it considers that this standard has not been met.¹⁴¹

The *Wmo Friesland* case forms a good illustration of the abovementioned.¹⁴² The case illustrates that the TIAT reviews the functioning of the market intensively for the establishment of both the infringement and the severity factor. Based on a comprehensive analysis of the structure of the tenders (eg the role of price in the tender) and competitive relationships (the fact that the appellant had by far the largest market share of current healthcare providers, that the competitive pressure from small providers was limited and, therefore, only a handful of relatively large suppliers were competitors), the TIAT concluded that the concerted practice affected competition to such an extent that it could be considered to have an anticompetitive object. In assessing the level of the fine, the TIAT took into account, among other things, the limited consequences of the behaviour for patients on the market, the restricted intensity of collaboration, and the fact that the companies were deemed to make a change in an unrealistically short term from a government-funded foundation under the collective health insurance scheme to a commercial enterprise. Based on these circumstances, the TIAT reduced the fine by nearly 1 million euros from €1,757,000 to €767,000 by decreasing the severity factor from 1.5 to 0.5.

The analysis of Dutch practice confirms the literature's account of older cases; both courts continue to engage in an intensive review of the fines in recent cases, in particular with regard to evidence, economic analysis, and severity factor.¹⁴³ The comparative instigation into Member State practice supports the notion that the powers of review by the court is an influencing factor with regard to the number of

138 See also Kalbfleish (n 85).

139 Lavrijssen and de Visser (n 137) 182.

140 *Inter alia* CBb 11 January 2017, ECLI:NL:CBB:2017:1 (*Wmo Friesland*); District Court Rotterdam 26 November 2015, ECLI:NL:RBROT:2015:8610; CBb 12 October 2017, ECLI:NL:CBB:2017:325 (*Demolition companies*); District Court Rotterdam 23 June 2016, ECLI:NL:RBROT:2016:4738 (*Construction cases Limburg*).

141 art 8:72 (3) and 8:72axe "@8:72a" General Administrative Law Act.

142 CBb 11 January 2017, ECLI:NL:CBB:2017:1 (*Wmo Friesland*).

143 Lavrijssen and de Visser (n 137) 182; Kalbfleish (n 85).

annulments. The comparison between countries points to existing differences in the precise elements reviewed by the national courts, for example, whether the economic assessment is reviewed or not, how it is reviewed, and the standards set by the courts.¹⁴⁴ The examples illustrate that the Dutch courts do not provide the ACM with any relative margin of appreciation, in contrast to other Member States.¹⁴⁵ The assumption here is that if the Dutch courts would not review certain elements or merely do so marginally, this would have resulted in a lower number of annulments. If the TIAT were, for example, not competent to review both questions of law and fact, the discussion between the courts would not occur to the extent it presently does and this would thus avoid the present degree of annulments. The same arguments would equally count with respect to, for example, the economic assessment.

The stakeholders also mentioned the broad and intensive review by both courts as one of the relevant factors. The ACM officials noted, for instance, the fact there are two instances of intensive and critical review. Moreover, the TIAT reviews the District Court's analysis very critically.¹⁴⁶ As mentioned:

In contrast to other countries, there is no focus on the legal debate. The TIAT returns to the facts and often re-does the work of District Court completely. They do not seek to confine their inquiry. The questions of the TIAT go into much detail.

The practitioners also mentioned the intense review by the courts, especially when compared with merger cases and other courts, such as the European courts.¹⁴⁷ Most practitioners further noted, after explicitly being asked, that there are in general no differences between the courts in intensity and scope of review, although sometimes the TIAT focuses on other aspects than the District Court:

I would not say in general. You see that in some cases you have the idea, both in your own cases and in colleagues' cases, that one court reviewed the case less intense than the other court, but in general I would not say there are structural differences. In general, I get the impression that the court is more inclined to conclude that there was no violation whereas the TIAT is more critical of the fine calculation. That is a difference.

In summary, the Dutch courts are competent to review all the elements of a fining decision and review the elements intensively, including with respect to situations where the law provides a margin of appreciation. The courts, for example, do not rely on the competition authority's assessment with regard to the establishment of the facts, the qualification of the facts, the economic analysis, or the interpretation of the law and case law. The assumption is that the number of annulments would have

144 OECD (n 65); Lavrijssen, Gerbrandy and Essens (n 123); Outhuijse (n 5).

145 Essens and others (n 63); OECD (n 65).

146 The legislative history of the general introduction of the further appeal in administrative disputes emphasized the importance of the further appeals' resit function. *Parliamentary papers* 1991–92, 22 495, nr 3, 24.

147 See also about this Bellamy (n 113).

been lower if the courts reviewed certain elements more marginally as they for example do in merger cases. The fact that the courts do not feel the urge to provide the competition authority with any margin of appreciation probably follows from the fact that the judges are also competition law experts and perceive themselves as such, which is the next factor mentioned in the literature.

Expertise of the courts

Several studies have shown that judicial decision-making is influenced by much more than the law and powers of review, especially where the law allows for discretion.¹⁴⁸ Theories discussing personal and environmental factors influencing judicial decision-making have been tested at great length, mostly in the American court system, and most researchers have come to the general consensus that legal factors, while important, are not the only factors which can explain judicial behaviour and case outcomes.¹⁴⁹ The literature has come to recognize that even in cases where the law provides indications for the correct answer, courts do not make decisions in a vacuum and will be influenced by personal and environmental factors, such as personal views and experiences, which can have a sizeable impact on judicial decision-making.¹⁵⁰ In addition, the literature has shown that judges are also influenced by their own interests.¹⁵¹

Competition law literature has recognized that the expertise of judges may be regarded as a personal characteristic which influences what is reviewed, how it is

148 Brian Z Tamanaha, 'Understanding Legal Realism' (2008) St. John's Legal Studies Research Paper No. 08-0133 <<https://ssrn.com/abstract=1127178>> accessed 28 June 2019; Timothy J Capurso, 'How Judges Judge: Theories on Judicial Decision Making' (1998) 29 University of Baltimore Law Forum 5; Richard A Posner, *How Judges Think* (Harvard UP 2010); Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (CUP 2002) 110–14; William M Landes and Richard A Posner, 'Rational Judicial Behavior: A Statistical Study' (2009) 1 Journal of Legal Analysis 775; Lee Epstein, William M Landes and Richard A Posner, 'Why (and When) Judges Dissent: A Theoretical and Empirical Analysis' (2011) 3 Journal of Legal Analysis 101; Heise (n 76); Knight (n 76) and many other studies mentioned there.

149 *ibid.*

150 *ibid.* Many American studies found indications that the outcome of a case depends on political ideology, namely on whether the judges are conservative or liberal and whether they support republicans or democrats. In competition law cases, this has not been established in empirical studies. Coate's study analysing merger cases for example found that the political affiliation of the judges does not affect their decisions. Other factors which can influence the decision include race, gender, social background and previous careers. Coate (n 40).

151 For example, Joanna Shepherd described the growing empirical evidence in support of the Public Choice Model of judicial decision-making. The Public Choice Model focusses on how self-interest drives judicial decision making. Judge Posner, also a well-known author in the area of antitrust enforcement, has played an important role in the development of the public choice model and notes that judges are 'rational, and they pursue instrumental and consumption goals of the same general kind and in the same general way that private persons do'. Posner identifies variables such as leisure time, day-to-day pressure, temptations and reputation, which influence judicial decision-making. Joanna Shepherd, 'Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior' (2011) University of Illinois Law Review; Emory Public Law Research Paper No. 11-164; Emory Law and Economics Research Paper No. 11-110. Available at SSRN: <<https://ssrn.com/abstract=1910918>> accessed 28 June 2019.

reviewed, and the outcome of cases.¹⁵² In December 2017, the Global Forum on Competition of the OECD held a roundtable discussion, which also addressed the expertise of the courts to review competition decisions.¹⁵³ Explicitly, one of the questions posed was:

Does lack of economic expertise on the part of judges create obstacles to the effective enforcement of competition law? If so, how can those obstacles be addressed?

As described in the report, ‘competition cases are often characterised by complex litigation and differing sets of economic evidence. Compounding these difficulties, judges may face the prospect of overturning decisions from a competition agency with vast resources and expertise which exceeds their own’. The report stated that courts in a significant number of jurisdictions face serious difficulties when confronted by economic matters and often seek to resolve cases on procedural grounds. Subsequently, judicial specialization is suggested to be the solution. In general, specialized courts have more extensive knowledge of the substantive issues of competition law and greater experience as a result of a steady stream of cases. The underlying assumptions seem to be that more qualified judges, in the sense of possessing greater knowledge and expertise, arrive more quickly at diverging views and, therefore, provide greater judicial protection.

In practice, a great variety of designs for legal review of NCA decisions exist.¹⁵⁴ While a few European countries employ general courts to review competition law cases, many countries have adopted specialized courts.¹⁵⁵ Among the latter countries, differences include whether there are one or two instances of specialized courts.¹⁵⁶ Among specialized courts, many variations are possible. For example, while some specialized courts are composed of lawyers only, others have both lawyers and non-lawyers.¹⁵⁷ Nevertheless, for the large number of specialized courts in the EU, the

152 OECD, *Judicial Perspective on Competition Law* (2017) DAF/COMP/GF/WD(2017)16; OECD, *Presenting Complex Economic Theories to Judges* (2008) DAF/COMP(2008)31; Michael R Baye and Joshua D Wright, ‘Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals’ (2011) 54 *Journal of Law and Economics* 1; Mitja Kovac and Ann-Sophie Vandenberg (eds), *The Economic Evidence in EU Competition Law* (Intersentia 2016); Joshua D Wright and Angela M Diveley, ‘Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission’ (2013) 1 *Journal of Antitrust Enforcement* 82. More general: See Matthew C Stephenson and Justin Fox, ‘Judicial Review and Democratic Failure’ (2009) Harvard Public Law Working Paper No 09-47 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458632> accessed 28 June 2019; David S Evans, ‘How Economists Can Help Courts Design Competition Rules: An EU and US Perspective’ (2005) 28 *World Competition* 93; John Coughlan, ‘The Training of National Judges on EU Competition Law’ (2016) 17(1) *Journal of the Academy of European Law* 119.

153 OECD, *Judicial Perspective* (n 152).

154 European Commission (n 29).

155 Some Member States, such as Belgium, Croatia, Germany, and the Netherlands do not have specialised courts, but do have courts or chambers within courts with exclusive competence for competition law cases which can work in the same way as specialised courts in practice. European Commission (n 29).

156 Sweden, Finland, and the Netherlands for example each have two instances of specialized courts while in the UK only the first instance court is a specialised court. European Commission (n 29); Outhuijse (n 5).

157 The UK, Sweden, and Finland have non-lawyers as court members. European Commission (n 29). See for more examples of differences Outhuijse (n 5).

fact remains that some of the courts are more experienced than others in the sense that they have dealt with more cases in recent years compared to others. For example, the Belgian court only reviewed three cartel fines since 2001, while the Italian and French courts have already heard 30 cases since 2010.¹⁵⁸ It is also important to consider whether the cases are decided by a stable group of judges within the court, which seems to be a problem for Portugal, for instance.¹⁵⁹

As mentioned, the District Court Rotterdam and TIAT are the exclusively competent courts. Although an exclusively competent court is not unique for competition law, this kind of procedure —judicial protection in two instances with a concentration of cases in one District Court—was first introduced in the Competition Act 1998. Arguments for the concentration of jurisdiction were the complex and specialist nature of the area of law and the small number of cases expected. According to the legislator, economic concepts such as ‘relevant market’ and ‘restriction of competition’ play an important role in competition law and their application requires specific expertise, which can be accumulated by concentrating judicial protection in a single court.¹⁶⁰ The combination of the District Court of Rotterdam and TIAT as exclusively competent courts was also selected for the allocation of other areas of economic administrative law, such as consumer protection, telecommunication and energy, to stimulate coherence between the different areas of regulation, and to make use of the already built-up expertise.

Both Dutch courts have expertise in competition law, which not only results from the fact that the courts are exclusively competent, but also since they have special teams dealing with competition cases: only a limited number of judges and legal advisers deal with such cases.¹⁶¹ They are specially trained, accumulate expertise to rule in these cases, and conduct internal discussions every six to eight weeks to consider current issues. Cartel fines are dealt with by a chamber consisting of three judges and one legal adviser, with one substitute judge joining the chamber in some cases. A substitute judge may be called on because of their special expertise, for example of the CJEU’s case law. Examples have included professors of Competition law, European law, or Internal Market. The courts are also empowered to appoint experts during the court procedure, for example, to bring in specialized economic

158 Outhuijse (n 5).

159 OECD, ‘Judicial Perspectives on Competition Law, Contribution from Portugal’ (2017). Portugal recently introduced a specialized court, but there is still a high degree of judicial rotation, which makes it difficult for the court to develop further practical expertise in dealing with competition matters over time.

160 *Parliamentary papers* 1996–97, 24 707, no 6, 102. See Anita Böcker and others, *Specializing Courts Pays Off. Experiences of Large Corporations with Specialised Courts in the Netherlands* (Raad voor de rechtspraak 2010).

161 To illustrate, the team of the District Court Rotterdam gave judgments in 18 cases in which ACM imposed cartel fines on undertakings between 1 January 2013 and 1 January 2019. In total, 11 different judges and three legal supporters were involved in these 18 cases. The number of cases done by the individual judge differ per judge, but there are several judges who have done more than five cases in which cartel fines were imposed on companies. There are also individuals who have done more than 10 cases already. The judges who dealt with a lower number of cases since 1 January 2013 often concern substitute judges. The legal adviser assisted in respectively 10, 8, and 1 case(s). In addition to these numbers, the judges deal with other type of cartel cases, such as complaint cases and commitment decisions. The data is not much different for the TIAT.

knowledge, but this has never occurred to the best of my knowledge, indicating that the courts do not feel that they lack expertise.

Regarding the expertise, most practitioners felt that the courts are better than any general chamber in the country. In general, the judges were described as people who mastered the subject matter well. As expressed by one of the practitioners:

I think the expertise of the judges is generally good. Both the Rotterdam District Court and the TIAT work with a permanent team of experienced judges. We often see the same judges. I think that the expertise is there. You also see that there are opportunities to get a different opinion from the courts. I am generally satisfied with the quality. Of course, there is sometimes a judgment, especially if you do not win the case, of which you think how could this be possible, but in general I think that the legal protection is good and effective, although procedures can take a very long time.

The foregoing supports the idea that the expertise of the courts is an influencing factor for the high proportion of annulments. The fact that judges in Dutch courts are also competition law experts probably makes them confident to reach different conclusions from the competition authority. The assumption in the latter, which is in line with literature on this topic describing theory and practice, is that if the courts had less expertise, they would grant the authority more discretion in carrying out their duties due to the vague formulation of competition laws and will limit themselves to aspects which are familiar to them, such as due process, factual evidence and the proportionality of fines. The OECD reports on this topic confirm the point observed in earlier literature that the knowledge and expertise of the judges can influence the reviewed elements of the fining decision and how they are reviewed.¹⁶² On the basis of the data observed, the assumption is accepted that the Dutch courts arrive more quickly at diverging views because of their expertise. An additional factor should be introduced in line with this, namely that the courts actually have diverging views from the competition authority.

Diverging views on competition law

The fact that the law provides space for discussion and the courts feel confident to differ from the competition authority because of their competences and expertise does not signify that they automatically do so. The views of the various actors must first diverge. There are clearly different views between the courts and the ACM with regard to certain elements of the fining decisions. This is especially evident on points of economic analysis and the severity factor.

Older decisions indicated a preference of the competition authority for applying a formalistic approach with regard to economic analysis based on presumptions.¹⁶³ As noted above and described in older literature, for example in separate studies by Annetje Ottow, Anna Gerbrandy, and Saskia Lavrijssen from 2009, the Dutch courts

162 OECD, *Judicial Perspective* (n 152); Essens and others (n 63).

163 See about this, for example, Outhuijse (n 86).

require a more economic approach.¹⁶⁴ According to the courts, the authority was not allowed to rely on the presumption that a certain kind of conduct is capable of restricting competition.¹⁶⁵ As was illustrated above with regard to appreciability, what was required changed over time and swings between a more economic and formalistic approach. Following *Expedia*, the Rotterdam District Court held that economic analysis with regard to appreciability was not needed if the alleged behaviour was shown to be a restriction by object.¹⁶⁶ It appeared at that point that the jurisprudence was heading towards a more formalistic approach: after proving that certain behaviour has taken place, such as price fixing or concerted practice, a fine can be imposed even if the conduct is not capable of restricting competition appreciably, for example, because of small market shares. The data indicate that continuation of formalism would have resulted in a lower number of annulments.

The current jurisprudence of the Dutch courts is, however, again more economic. The courts demand a lot from the competition authority with regard to its market analysis; it does not require that the effects of certain behaviour are proven, but it does demand a sufficient analysis of the relevant market and its functioning and the position of the undertakings on the market, if not all the undertakings operating in the market participated in the alleged behaviour. The courts emphasize the importance that behaviour is actually capable of amounting to a restriction of competition, which requires analysis of the functioning of the market and the position of the undertakings on this market. In recent cases, this economic view has resulted in annulments.

A mentioned example is the *Taxi Driver* case, where the District Court, after qualifying the behaviour as a restriction by object, ruled that the ACM's economic analysis, more particularly its market definition, was insufficient to demonstrate that the behaviour alleged was capable of restricting competition appreciably.¹⁶⁷ This resulted from a disagreement between the District Court of Rotterdam and the ACM on whether the relevant market was limited to Rotterdam, as argued by the ACM in its decision, or comprised the entirety of the Netherlands, as argued by the appealing companies. Another recent example is *LHV*, in which the District Court of Rotterdam annulled the fine EUR 5.9 million imposed on the National General Practitioners Association because it ruled that its price recommendations did not constitute an effective means of restricting competition.¹⁶⁸ In the cases mentioned, a much more formalistic approach could have been applied, for example, by saying in *LHV* that the recommendation of prices by its nature is unlawful, which would also have been a justifiable view on the case.¹⁶⁹ Without judging about the correctness of

164 Ottow (n 63); Lavrijssen (n 136) at 182; Gerbrandy (n 81).

165 Ibid. See also Kalbfleish (n 85).

166 Outhuijse (n 86).

167 District Court Rotterdam 13 October 2016, ECLI:NL:RBROT:2016:7659-7664 (*Taxi drivers*).

168 District Court Rotterdam 17 December 2015, ECLI:NL:RBROT:2015:9352 (*LHV*).

169 In general there is a discussion about the role of economic analysis in competition policy. See amongst others Kovac and Vandenberg (n 152); William E Kovacic, 'The Influence of Economics on Antitrust' (1992) 30(1) *Economic Inquiry* 294; Pablo Ibáñez Colomo, *Discretionarists vs Legalists: The True Divide in the Competition Law Community?* (Chillin' Competition, May 2018); Gerardin and Petit (n 78).

this view, one may observe that this would have prevented multiple annulments and the divergence in views, which forms the basis for said trend.

There is also a clear difference of perspectives between the ACM and the courts on the severity factor, and also between the courts.¹⁷⁰ While the District Court of Rotterdam confirmed the ACM's severity factor in several cases, the TIAT has put more weight on the consequences of the alleged behaviour for establishing the severity factor as well as on the proportionality principle and the fact that lower fines more often fall in line with this principle. This in contrast with the ACM, which has emphasized the importance of higher fines to achieve deterrence. This instrumental approach to fines is not surprising for the competition authority.¹⁷¹ This difference in approach offers some explanation for the number of decisions successfully challenged in this category.

The difficulty here is that there are two external actors that influence the competition authority's fine calculation and both drive the ACM in the direction of imposing higher fines. In the first place, this is the Minister who establishes the ACM's fining guidelines and increased the range of the severity factor from 0-3 to 0-5, which results in higher fines.¹⁷² In addition, legislation of 2016 increased the maximum fine which will probably lead to higher fines in the future.¹⁷³ The maximum cartel fine was raised from EUR 450,000 to EUR 900,000, or 10 per cent of the annual turnover of the undertaking if the latter was higher.¹⁷⁴ If the infringement lasted longer than two, three or four years, the maximum fine is raised to EUR 1.8, 2.7, or 3.6 million, respectively, or up to 20, 30, or 40 per cent of annual turnover. This amount can even be doubled for recidivists up to a maximum of either EUR 7.2 million or 80 per cent of annual turnover—whichever is higher. The objective of the legislation is to increase deterrence. This will probably lead to higher fines, since many of the fines are currently capped because they exceed the maximum fine.¹⁷⁵

The data on the Dutch practice provide strong indications that the fact that the courts have a diverging view is an influencing factor for the high annulment rate. As mentioned, it is not sufficient to have a law which provides space for different views and a court which conducts a highly comprehensive review; there should also be opposing views for annulments to be achieved. A good example of this can be found in Germany.¹⁷⁶ The German courts apply a very comprehensive review but do not generally consider fines to be excessive for the infringement and have actually increased fines by a few million EUR in several cases. The possibility of having different views is, however, not limitless. The court is not allowed to arrive at any conclusion it

170 Also in the literature, there is also much discussion about the correct severity factor in an individual case. While most authors find the factors excessive in some individual cases, others state that the factors are too low. See *inter alia* about the *Wmo Friesland* case: Cees Dekker and others, 'Kroniek Nederlands mededingingsrecht 2010' (2011) 2 M&M 85; Claudia Bruins, CBb doet passende uitspraak in Friese kartelzaak thuiszorg, <<https://www.c-law.nl/nl/blog/cbb-doet-passende-uitspraak-in-friese-kartelzaak-thuiszorg/>> accessed 28 June 2019.

171 See about this Outhuijse and Jans (n 2).

172 See about this Outhuijse (n 2).

173 Outhuijse (n 15); Outhuijse (n 2).

174 Act of 23 December 2015, *Stb.* 2016, 22.

175 Outhuijse (n 15).

176 Outhuijse (n 5).

wants. Alternative views have to be found within the limits of the law and in the range of acceptable views on the law. In short, although the law does not prescribe a correct answer to all cases, the courts have to connect and justify their view with reference to the law in order to legitimize their judgments. If the courts have strayed outside the borders of this framework, they would resultantly lose their legitimacy.

V. SUMMARY AND CONCLUDING REMARKS

The annulment of cartel fines by the Dutch courts is a recurring phenomenon. The aim of this research was to identify the factors which influence the high number of annulments in Dutch cartel enforcement. On the basis of previous studies, a theoretical framework of possible influencing factors was established which was subsequently evaluated. Following the analysis of Dutch practice, comparisons with other Member States and Dutch market supervisors, and interviews with Dutch stakeholders, it was found that the high percentage of annulments is influenced by a set of factors. The factors concern both the nature of competition law and characteristics of the cases, parties and court procedures. Based on the analysis described above, the following factors are identified as those influencing the high percentage of annulments in the Netherlands:

- Scope of the pleas
- Identity of the parties
- Nature of the case
- Clarity of the law
- Powers of review
- Expertise of the court
- Diverging views on competition law

The list of factors shows that the nature of competition law, as well as factors which are woven into the Dutch practice, are accepted as influencing factors. The mutual relationship between the factors is such that the factors seem to influence each other and are also dependent on each other. It is assumed that, in many cases, the factors do not result in an annulment on their own, but only in combination with each other. Moreover, the factors seem to amplify each other's effect.

The analysis in the preceding sections indicates that certain requirements need to be fulfilled to arrive at an annulment. A decision with at least one error or one element which provides room for debate and on which an annulment can be based is necessary. The specific features of Dutch cartel cases and the clarity of competition law stimulate the high percentage of annulments since they provide a source for discussion and the complexity of the cases and the high evidence standards for these fines easily lead to erroneous decisions. Although the decision needs at least one error or element which provides room for discussion, the effect of annulment is not automatically manifested if that is present. The realization of an annulment is dependent on other factors, such as an involved party raising this point and a court which is competent, capable, and willing to review the decision on the point raised and annul the fine on this point if it is convinced that this is lawful and justified.

The influence of the powers of review, the expertise of the courts, and the diverging views on the outcome of a case will, however, differ per case and will depend on the clarity of the possible errors and the room the law leaves for different interpretations and applications regarding these elements. For example, in the case of a manifest error, the scope and intensity of the judicial review will make less of a difference. The same is true with regard to the expertise and knowledge possessed by judges. Nonetheless, it can be expected that a case will be annulled more readily by courts with great expertise and knowledge, and some cases would not have led to annulments if the courts lacked expertise and own opposing views. The same applies to the influence of the professionalism of the parties, which also depends on the clarity of the possible errors and the room the law leaves for different interpretations and applications.

The research showed that the high proportion of cartel fines cannot simply be explained by the quality of the work of the competition authority, specific features of the decision-making or court procedures, or the nature of competition law, but by a more complex combination of factors influencing the high percentage of annulments. It is not possible to assign a more precise weight to the individual factors on the basis of this analysis.¹⁷⁷ In fact, the foregoing also expresses the assumption that the individual weight of the factors will differ per case. The outcome also assumes the existence of equifinality—the acknowledgment of the situation in which alternative factors can produce the same outcome. Various combinations of these factors can lead to an annulment, and it will depend on the nature of the case which factors will have an influence. Nevertheless, it is assumed that all identified factors influence the high percentage of annulments of Dutch cartel fines.

As a consequence of the number and variety of the influencing factors, if we are persuaded that the rates are problematic and should be solved, there is no silver bullet available to address them. For example, the factor of clarity of competition law, which provides room for Dutch stakeholders to have a substantive discussion about the correct interpretation and application of the law in concrete cases, is one factor with an evident influence. Identifying possible solutions to decrease these discussions seems to be straightforward, such as changing the type of cases the ACM chooses to enforce, the manner in which fining decisions are formulated, and the manner in which the case law is formulated. However, an in-depth assessment of the feasibility, desirability and negative consequences of these options is needed to formulate sustainable solutions. For example, while achieving less discussion seems desirable from the perspective of legal certainty, the question could be raised whether the high intensity of disagreement between the ACM and the courts, and also between the courts, can be seen as an indication of a proper functioning system of judicial review as well. The additional question regards what the consequences are for the level of

177 Although the outcome that the presence of annulments could be the result of interaction between the factors is not common in most empirical studies which review the effect of a single factor, this is acceptable in studies using a set-theoretic method. Studies which use a set-theoretic method understand the world in terms of configurations of factors: the occurrence of a social phenomenon is not the consequence of a single factor, but a combination of multiple factors.

judicial protection if one tries to reduce the incidence of dispute. This analysis goes beyond the scope of this article and requires follow-up research.

Moreover, the relation with previous research which analysed the factors influencing the rates of litigation should be kept in mind. Evidently, the appeal rate impacts the total annulment rate: a decision will not be annulled if it is not challenged in court in the first place. The importance of this is revealed by the general trend in many Member States—such as the UK, Germany, and France, and more recently Belgium and Sweden—of a shift towards a more consensus-oriented and less litigation-oriented regime for antitrust enforcement.¹⁷⁸ In recent years, more cases are being settled, which has consequences for the rates of litigation in those Member States, as also described by Hellwig and others in the context of the European Commission. Cooperation with the competition authority significantly limits the grounds for an undertaking to file an appeal, and an appeal becomes less likely following an undertaking's past cooperation, especially if the undertaking does not want to dispute the settlement terms. Therefore, if one would influence the rate of appeal, one would also influence the rate of total annulments.

The influence, however, also works in the reverse. Previous research showed that the undertakings' assessment of whether to challenge a decision in court includes an analysis of the likelihood of a successful appeal based on the quality of the fining decision, the quality of the evidence, the correctness of the amount of the fine, and the expected quality of the review by the court.¹⁷⁹ Practitioners determine on the basis of this analysis whether an appeal is worth arguing, legally. According to the practitioners in the Netherlands, this is often answered in the affirmative because, *inter alia*, the prospect of a successful appeal is very high in the Netherlands: more often than not, a significant reduction or complete annulment of the fine can be achieved. Therefore, the rate of successful litigation influences the rate of litigation.

On basis of the foregoing, the conclusion which can be drawn is that the rates of challenged and annulled cartel fines influence each other in numerous ways. Measures to influence one percentage positively also influence the other and vice versa. Introducing one or more measures to address one of these percentages can have a positive effect, but it is difficult to predict what the result of these measures will be and what kind of side effects they will have. Therefore, as mentioned, more research is needed if we are persuaded that the rates are an issue, which could and should be solved.

Generally, more research is needed on the influence of the factors in different contexts. Although the research gives important insight into the factors influencing the percentages of successful litigation in case of Dutch cartel fines and thereby explaining the high rates of successful litigation, the research has important limitations, including the fact that certain elements in the research remain rudimentary and require significant additional information and time for the exact influence of the factors and the influence in different contexts to be determined. To overcome this

178 Outhuijse (n 5).

179 Outhuijse (n 7).

problem, a project comparing all Member States, for example, by involving one researcher per country to overcome the limitations of information and languages, would be very beneficial to gather insight into the influence of the factors on the percentage of successful litigation. The European Commission can hopefully be persuaded to take the lead in this initiative. The designed model in this study can form the basis for the analysis why some Member States are experiencing many annulments and others are not. If this dream ever becomes true, I will certainly be available for advice and assistance at any time.