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The effective public enforcement of the prohibition of anti-competitive agreements: Why do undertakings in the Netherlands appeal?

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Dutch anti-cartel enforcement is characterised by high rates of challenged and annulled fining decisions. The fact that the percentage of decisions appealed is much higher than in many other areas of law in the Netherlands and the fact that not all other Member States experience such high rates of appeal justifies questioning what motivates undertakings in the Netherlands to file an appeal after receiving a cartel fine from the competition authority. In contrast to many previous empirical studies which make assumptions about factors driving litigation behaviour, this contribution answers this question on the basis of interviews conducted with fourteen lawyers who regularly represented undertakings fined for anti-competitive behaviour in the last fifteen years. Although the answer seems simple, since the fines and the likelihood of successful appeal are high, this research demonstrates that also reasons other than the fining decision itself influence the decision to file an appeal. The article starts with a brief introduction of the actors involved in the enforcement of competition law in the Netherlands, and an overview of litigation statistics for the Netherlands and nine other EU Member States. The interviews and reasons for appeal are then discussed and placed in a theoretical framework. Finally, the data provided by the lawyers is verified by an analysis of recent Dutch cartel cases and conclusions are drawn.

1. INTRODUCTION

The national competition authorities (NCAs) have an important role in the European enforcement of antitrust cases since 2004 thereby making the success of this enforcement largely dependent on the effectiveness of the NCAs' enforcement.¹ An analysis of the antitrust enforcement practices of different Member States raises doubts as to whether national enforcement is effective in every Member State.² The public law enforcement of the prohibition of anti-competitive agreements in the Netherlands is, for example, characterised by the high proportion of fining decisions of the Dutch competition authority which are challenged and annulled in court, which obstructs effective enforcement.³ The fact that the percentage of decisions appealed is much higher than in

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¹ The effective national enforcement of antitrust cases has received much attention lately, cumulating in the recent ECN+ Directive. This directive will provide the NCAs with a minimum of appropriate enforcement tools to empower the NCAs and has as goal to increase the effectiveness of their enforcement. 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.

² See for example A. Outhuijse, 'The shared enforcement of antitrust cases: effectivity difficulties at the national level', available at: <http://eulawenforcement.com/?p=281>.

³ A. Outhuijse, 'Effective public enforcement of the cartel prohibition in the Netherlands: a comparison of ACM fining decisions, District Court judgments, and TIAT judgments', in C.S. Rusu et al (eds), *Boosting the*

many other areas of law in the Netherlands and the fact that not all other Member States experience such high rates of appeal – as will be shown in section 2 – justifies questioning what motivates undertakings in the Netherlands to file an appeal after receiving a cartel fine from the competition authority.⁴ This contribution answers this question on the basis of interviews conducted with fourteen lawyers who regularly represented undertakings fined for anti-competitive behaviour in the last fifteen years.⁵ Although the answer seems simple, since the fines and the likelihood of successful appeal are high, this research demonstrates that there are also reasons other than the fining decision itself which influence the decision to file an appeal. The article starts with a brief introduction of the actors involved in the enforcement of competition law in the Netherlands, and an overview of litigation statistics for the Netherlands and nine other EU Member States. The interviews and reasons for appeal are then discussed and placed in a theoretical framework. Finally, the data provided by the lawyers is verified by an analysis of recent Dutch cartel cases and conclusions are drawn.

2. ACTORS, PROCEDURES AND PERCENTAGES

The Authority for Consumers and Markets (ACM) is responsible for the public law enforcement of the prohibition of anti-competitive agreements in the Netherlands.⁶ One of the instruments that the ACM can apply is the imposition of fines.⁷ The procedure used by the ACM when enforcing the cartel prohibition can be divided into two phases: the investigation and the decision-making phase.⁸ The ACM's Competition Department conducts the investigation during the investigation phase. This phase concludes with a penalty report which contains information on the procedure and the nature of the evidence, a review of the case's facts and circumstances, a legal qualification of these facts (e.g. agreement or concerted practice), an assessment in light of the relevant legal provisions (Article 6 Competition Act, Article 101 TFEU), and the establishment of the undertakings' involvement.⁹ The report does not contain a draft fining decision or other information about the fine to be imposed. The penalty report is handed over to the Directorate of Legal Affairs, which is a distinct department from the Competition

Enforcement of EU Competition Law at Domestic Level (Cambridge Scholars, 2017); A. Outhuijse and J.H. Jans, 'Judicial Review of Decisions of the Dutch Competition Authority', in W. Devroe et al (eds), *Mundi et Europae civis; Liber Amicorum Jacques Steenbergen* (Larcier, 2014) 265-79; J.H. Jans and A. Outhuijse, 'Advisory Objection Procedures in the Netherlands. A Case Study on its Usefulness in Dutch Competition Law', in S. Comtois and K.J. de Graaf (eds), *On Judicial and Quasi-judicial independence* (Eleven Publishing, 2013) 179-94. All available at SSRN.

⁴ The term cartel and anti-competitive agreements are in this contribution used as synonyms.

⁵ The author thanks the lawyers for their cooperation and time and in particular the two lawyers who read the earlier draft of this contribution.

⁶ Article 2(5) Dutch Establishment Act ACM.

⁷ Article 56 Dutch Competition Act.

⁸ The description of the procedure is based on the description in A. Outhuijse, *Schikken met ACM: gewenste koers of rechtsomkeert maken?*, SEW 2016(12), 510-522.

⁹ Article 5:48 General Administrative Law Act (GALA).

Department.¹⁰ The penalty report is also sent to the undertakings under investigation, which thereby receive the opportunity to review the information gathered by the ACM. They are subsequently invited to present their views on the penalty report and explain them at a hearing.¹¹ At this stage, the undertakings can point out inaccuracies in the penalty report and put forward exculpatory evidence. The Directorate of Legal Affairs decides within thirteen weeks of the report's date whether a fine should be imposed.¹² This department will make a primary fining decision if it consider this an appropriate response. The undertaking can lodge an objection against this fining decision, which is a prerequisite for initiating court proceedings.¹³ The ACM has the obligation to completely review and reconsider its decision during the objection procedure on the basis of the undertaking's objections which can concern all aspects of the fining decision and has full discretion to uphold, modify or withdraw its decision.¹⁴ The ACM has a number of options if it decides to modify the decision, including adding additional evidence to its decision or improving the reasoning. If the ACM decides to uphold the decision, with or without adjustments, the undertaking can apply for judicial review at two exclusively competent courts: the District Court Rotterdam as first instance court and the Trade and Industry Appeal Tribunal (TIAT) as a second and last instance court. The judicial review by the courts concerns both facts and law. Both courts generally apply a comprehensive review which includes the establishment of the facts, the qualification of the facts, the proof of the infringement, the compliance with the relevant procedures, the amount of

¹⁰ Article 12q of the Dutch Establishment Act ACM prohibits the ACM to involve the persons investigating an infringement in the decision-making concerning the fine. An infringement of this article will lead to the annulment of the fine if the fining decision is appealed in court. Example of a case in which this occurred: District Court Rotterdam 28 April 2004, ECLI:NL:RBROT:2004:BI3337 (*ETB Vos*).

¹¹ Article 5:49 and 5:50 GALA.

¹² Article 5:51 GALA. The decision-making department has full discretion to decide whether it will impose a fine, although ACM's board has the final responsibility and imposes the fine officially.

¹³ Article 7:1 GALA. Since 1 September 2004, undertakings have the option to bypass the objection procedure. Pursuant to Article 7:1a GALA, the undertaking which lodges the objection can request the ACM to consent to direct appeal to the District Court Rotterdam. Under the second and third paragraph of Article 7:1a, the ACM may consent to the request if the case is suitable for this procedure, but must refuse if one of the other involved undertakings wants to follow the objection procedure. If the ACM consents, the ACM will forward the undertaking's objection to the District Court Rotterdam and thereby the objection grounds will automatically become the grounds for appeal. A number of undertakings have successfully requested bypassing the objection procedure and proceeded immediately to court: Painters (2009), Ship waste collectors (2011), Bell Peppers (2012), Silver Onions (2012) and Planting Onions (2012). In light of the total number of cases, the option of direct appeal is used only occasionally, while the option has been available since 2004. The District Court Rotterdam rejected a direct appeal in a recent case while ACM granted the request of the undertaking. See ACM Decision on objection 15 December 2016, ACM/DJZ/2016/207499 (*H&S Coldstores*). The District Court Rotterdam concluded in its judgment of 1 July 2016 that the case was not suitable for direct appeal and that in this case first the objection procedure should be followed.

¹⁴ Article 7:11 GALA. Examples of cases in which the ACM withdrew its decision are Nozema and Broadcast (2005) and Caraat (2011). The ACM improved its reasoning or lowered the fine during the objection procedure in several cases. See for more information A Outhuijse, 'The Effective Public Enforcement of the Prohibition of Anti-competitive Agreements: Perceptions on the functioning of the objection procedure and the reality', not yet published.

the fine and the interpretation of the law.¹⁵ It is important to note that *reformatio in peius* is not permitted, which means that the objection, appeal and further appeal cannot cause the undertaking to end up in a worse position than it was before the objection.¹⁶ As a result the fine can, for example, not be increased during one of those procedures.

In sum, several phases can be distinguished in disputes between an undertaking and the ACM: the undertaking concerned may submit a ‘view’ against the report, after which an objection may be lodged against the fining decision; subsequently, an appeal may be lodged at the District Court Rotterdam; and finally, a further appeal may be brought to the TIAT. As the procedures are intended to be, amongst others, dispute-resolution procedures, the procedures are expected to have a ‘filtering’ effect, meaning that the objection proceedings should infrequently be followed by judicial appeal proceedings and if they are, this appeal should rarely be followed by a further appeal.¹⁷ Dutch research of administrative law cases other than competition law, in which the same objection procedure is used¹⁸, has shown this to be the case for the objection procedure: studies showed that an objection procedure against an administrative decision is only followed by judicial appeal proceedings in ten percent of cases.¹⁹ This trend is however fundamentally different in cases regarding fining decisions for infringements of the prohibition of anti-competitive agreements. Previous studies showed that the undertakings file an appeal at the District Court Rotterdam in more than seventy percent of cases.²⁰ In recent years, this rate has risen. Since 2010, the ACM imposed a fine in 21

¹⁵ In the majority of Member States, the court of second instance only reviews questions of law. See European Commission, ‘Pilot field study on the functioning of the national judicial systems for the application of competition law rules’, 7 March 2014.

¹⁶ Article 7:11 GALA.

¹⁷ Parliamentary papers II 1991-1992, 22 495, nr. 3, pp. 36-38; PG Awb II, p. 75; PG Awb I, p. 279, available at: <www.pgawb.nl>.

¹⁸ The design of the objection procedure is in principle the same for each Dutch administrative authority. The authority merely has the freedom to decide how it will organise the mandatory hearing which is part of the objection procedure. Under Article 7:2 GALA, the administrative authority must give interested parties the opportunity to be heard before giving a decision on the objection. For this, it has two options. First, under Article 7:5 GALA, it may conduct a hearing itself. Alternatively it can appoint an external advisory committee under Article 7:13 GALA. The competition authority had a mandatory external advisory committee for cases which had started before 1 April 2013. See about this, Jans and Outhuijse, n 3.

¹⁹ See *inter alia* B.J. Ettekoven and A.T. Marseille, ‘Afscheid van de klassieke procedure?’, in: Preadvies Nederlandse Juristen-Vereniging (Den Haag: Wolters Kluwer, 2017), pp. 139-264; A.T. Marseille, ‘Burgers in bezwaar en beroep; over de toegankelijkheid van het bestuursrecht’ [2014] 1 Justitiële Verkenningen 20-36; J.G. van Erp en C.M. Klein Haarhuis, *De filterwerking van buitengerechtelijke procedures* (Den Haag: WODC, 2006); I.M. Boekema, *De stap naar hoger beroep* (Den Haag: BJu, 2015). Moreover, in the field of other economic fining decisions, such as banking supervision and the supervision of financial markets by the DNB and AFM, only a limited number of undertakings submit their cases for judicial review. See: A. Mein, *De boete uit balans. Het gebruik van de bestuurlijke boete in het kader van het financieel toezicht* (Dissertation Erasmus University Rotterdam 2015), 308-9.

²⁰ Outhuijse 2017, n 3. This percentage was calculated on the basis of the cases before 2010. Including all cases in which the ACM imposed fines for anti-competitive agreements (1999-present) leads to percentage of 81 percent of cases: an appeal was filed to the Rotterdam District Court in 42 out of 52 cases. In the parliamentary papers for establishing the ACM in 2013 is mentioned a percentage of 87 percent between the years 2000 and 2011, although it is not clear what is included in this percentage. Parliamentary papers II 2012/13, 33622, nr. 3, p. 12.

cartel cases.²¹ At least one or more undertakings filed an appeal in eighteen of the 21 cases, representing 86 percent of cases, while appeal is still possible in one case.

An interesting question to rise is whether a high percentage of challenged fines also occur in other EU Member States where the same norm is enforced and similar high fines are imposed²², but using different procedures as a consequence of the principle of procedural autonomy.²³ I was able to obtain data on the frequency of litigation in case of fines for anti-competitive agreements through analysis of the fining decisions and court judgments for nine Member States: Belgium, Bulgaria, Croatia, Finland, France, Germany, Italy, Sweden and the United Kingdom.²⁴ The analysis of the appeal rates in those countries show a diverse picture. The appeal rate in the majority of these countries is above fifty percent with percentages ranging from between 50 and 70 percent (Belgium, Finland, France and Sweden), between 70 and 90 percent (Bulgaria and Italy) and over 90 percent (Croatia).²⁵ The United Kingdom and Germany are the only countries of those analysed in which the appeal rate is below fifty percent.²⁶ After receiving a fine from the Consumer and Market Authority (CMA), undertakings can file an appeal on the merits at the

²¹ The period analysed is 1 January 2010 – 1 May 2018.

²² European Commission, n 15. Article 3 (1) of Regulation 1/2003 imposes an obligation on national authorities to apply Articles 101 and 102 TFEU in parallel with their national competition rules when “effect on trade between Member States” can be established. In addition, most national competition laws mirror the European prohibitions.

²³ The acceptance of ECN+ Directive (COM (2017) 0142 final) would limit the freedom of the Member States to establish the decision-making procedure and competences of the NCA. On 22 March 2017, the European Commission released a press release stating that it has submitted a proposal to the European Parliament and Council for a directive to reach further convergence in investigative and sanctioning powers for antitrust infringements. The directive will provide the NCAs with a minimum of appropriate enforcement tools to empower the NCAs and increase the effectiveness of their enforcement.

²⁴ Unfortunately, information on appeal rates in case of fines imposed for infringements of the prohibition of anti-competitive agreements (101 TFEU and national provision) was not available for most Member States. However OECD reports and annual reports of the national competition authorities give general information on the percentages of appeal, the information often includes all types of decisions and the percentages regarding cartel fines cannot be distilled. Therefore there was an attempt to research this for each EU Member State by comparing the fining decisions and court judgments of each Member State. This has not succeeded so far for every Member State. For some Member States, the author does not have the decisions and judgments at her disposal. For other Member States, such as Luxembourg, the number of fining decisions is too small to draw valid conclusions about the percentage of appeal. See for the full analysis: A. Outhuijse, ‘Effective public enforcement of cartels: Rates of challenged and annulled cartel fines in ten European Member States’, not yet published.

²⁵ The percentages in Sweden and Finland concern the percentage of appeal to the second instance court after imposition of the fine by the first instance court, since the first instance court has the competence to impose fines and not the NCA. The time period taken differs per Member States. The reason for this is purely practical, because the period needed to draw valid conclusions differed per Member State. For some Member States, for example Belgium and Finland, the longest period available was used because of the limited number of fining decisions (from 2001 respectively 2003 until 1 July 2017. For others, for example Italy and France, sufficient cases could be extracted in a shorter period (2009 respectively 2010 until 1 July 2017), because of the large number of cases decided.

²⁶ The percentage in Belgium would be lower if all the decisions in which a settlement was concluded were also taken into account. This was however not done because appeal is not possible after a settlement. See Article IV.57 (3) Economic Law Code.

Competition Appeal Tribunal (CAT).²⁷ The low percentage of appeal following fining decisions for infringement of the cartel prohibition in the United Kingdom has already been described in the literature for various periods.²⁸ An analysis of the fining decisions for infringement of the Chapter 1 prohibition Competition Act 1998 and Article 101 TFEU and the applicable court judgements for the period from 2002 to the present confirms this conclusion. The appeal rate is around 35 percent²⁹, while the likelihood of successful appeal is quite high: the CAT reduced the fine considerably in many cases, in some cases up to ninety percent.³⁰ The percentage of appeal is even lower for the period 2012 to present: an appeal was filed with the CAT in only two cases, while fines were imposed in a total of seventeen cases in this period, which amounts to an appeal rate of eleven percent.³¹ In many of the seventeen cases, the undertakings cooperated with the CMA by means of a leniency application and/or settlement.

In Germany, very few cases concerning anti-competitive agreements are appealed to the *Oberlandesgericht Düsseldorf* (OLG).³² In the period 2001 to the present, fourteen out of 48 cases in which the Bundeskartellamt imposed fines were appealed to the OLG Düsseldorf.³³ Even though the appeal rate in Germany was already low, the percentage has fallen even further in recent years. In addition, of those fourteen appeals, only six cases so far led to judgments of the OLG, since the appeals were withdrawn by the parties in six cases before the OLG could come to a ruling.³⁴ A mentioned reason for the decreasing appeal rate is the *Liquid Gas* cartel, in which OLG Düsseldorf increased the

²⁷ CAT, Guide to Proceedings 2015; J. Mummery, 'Independent Report: Review of the Rules of Procedure of the Competition Appeal Tribunal', August 2014; I. Lianos et al, 'Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective', CLES Research Paper No. 4/2014, available via <https://ssrn.com/abstract=2542993>; D. Rose and T. Richards, 'Appeal and Review in the Competition Appeal Tribunal and High Court' (2010) 15(3) *Judicial Review* 201; A. Andreangeli, 'The changing structure of competition enforcement in the UK: the Competition Appeal Tribunal between present challenges and an uncertain future', (2015) 3 *Journal of Antitrust Enforcement* 1.

²⁸ A. Bavasso and L. Tolley, 'United Kingdom', in: M.H. Dabbah and B.E. Hawk (ed.), *Anti-cartel enforcement worldwide* (Cambridge: Cambridge University Press, 2009), pp. 1236-1241; C. Veljanovski, 'A statistical analysis of UK antitrust enforcement' (2014) 10 *Journal of Competition Law & Economics* 711-738; See for an overview of the cases R. Whish and D. Bailey, *Competition Law*, (Oxford: OUP 2015), pp. 447-451.

²⁹ The CMA imposed fines in 37 cases between 2002 and 1 July 2017. One or more undertakings challenged the fine imposed at the CAT in thirteen of the 37 cases which represents 35 percent. The CAT reduced the fine in eight of the eleven cases. Two cases were pending at the CAT at time of writing.

³⁰ Veljanovski, n 28; Lianos et al, n 27, p. 50; C. Brown, 'The CAT's construction judgments: an overview', available via: http://www.matrixlaw.co.uk/wp-content/uploads/2016/03/18_05_2011_02_32_17_Christopher-Brown-Construction-Judgments-paper.pdf.

³¹ The period analysed was 1 January 2012 – 1 July 2017.

³² Pursuant to Section 63(4) *Gesetz gegen Wettbewerbsbeschränkungen* (GWB), a decision of the Bundeskartellamt may be appealed to the *Oberlandesgericht Düsseldorf* (OLG), which is one of three OLGs located in North Rhine-Westphalia, and the only German court dealing with cases regarding cartel offences.

³³ The period analysed was 1 January 2001 – 1 July 2017.

³⁴ All appealing undertakings withdrew their appeal in the following cases: B11-17/06 (*Drogerieartikeln*); B10-102/11 (*Automatischer Türsysteme*); B11-20/08 (*Instant cappuccino*); B11-13/06 (*Mühlenindustrie*); B11-26/05 (*Dampfkessel*); B11-24/05 (*Luxuskosmetik*). Some of appealing undertakings withdrew their appeal in the following cases: B11-11/08 (*Süßwaren*); B11-12/08 (*Konsumgütern*); B11-19/08 (*Kaffee*). The OLG had not come to a judgment at time of writing in two cases: B11-13/13 (*Industriebatterien*) and B10-50/14 (*Röstkaffee*).

fine from EUR 180 to 244 million.³⁵ The publication of this judgment led to the withdrawal of appeals in several cases.³⁶ In addition, the Düsseldorf court pointed out in some of the withdrawn cases that if the allegations were confirmed in court, the court would increase the fine.³⁷ The court also increased the fine in cases in which the undertakings continued their appeal and the accusations were confirmed by the OLG.³⁸ The analysis of the cases in Germany exposed another fact which may have a relation with the decrease in appeals, which is the very high percentage of settlements reached in recent years.³⁹

To conclude, the Netherlands is among the Member States with the highest appeal rates. An intuitive response to the question of why undertakings appeal in the Netherlands is that the fines can amount to millions of Euros, the litigation costs in the Netherlands are relatively low and, as mentioned, the likelihood of success – although this will always differ per case – is generally high. Previous research has demonstrated that even though the courts are not always of one mind as to how a specific case should be decided, more than sixty percent of the cartel cases in which the ACM had imposed fines led to annulments by the Dutch courts.⁴⁰ This previous research which focused on the judgments of District Court Rotterdam between 1 January 2003 and 1 January 2013, and the subsequent judgments which followed these at the TIAT, divided the annulments due to their diverse nature into three broad categories: fine imposition, fine amount and reasonable time. The latter two categories both lead to reductions in the fine, which are usually a consequence of defective calculation of the fine for the former, and on exceeding a reasonable period as under Article 6 European Convention of Human Rights (ECHR) for the latter. The ‘fine imposition’ category is different: in such cases, the court has concluded that the ACM’s fining decision was not justified properly, for example because of insufficient evidence, insufficient economic analysis or insufficient reasoning. An analysis of the case law from 1 January 2013 until present shows that the percentage of annulments has definitely not decreased since 2013. In contrast, the court did not modify one or more fining decisions in only two out of eighteen cases.⁴¹ A small majority of the recent cases merely led to a reduction in the fines, although the courts concluded

³⁵ Oberlandesgericht Düsseldorf 15 April 2013, VI-4 Kart 2-6/10 Owi (*Flüssiggas*). Presentation Christof Vollmer, Vereniging voor Mededingingsrecht 2016, available via www.verenigingmededingingsrecht.nl/.

³⁶ B11-11/08 (*Süßwaren*); B11-13/06 (*Unternehmen der Mühlenindustrie*).

³⁷ For example: Bundeskartellamt 20 July 2012, B10-102/11 (*Automatischer Türsysteme*).

³⁸ For example: Oberlandesgericht Düsseldorf 26 January 2017, Az. V-4 Kart 15.04 OWI (*Süßwaren*); B11-12/08 (*Konsumgütern*); B11-19/08 (*Kaffee*).

³⁹ The Bundeskartellamt imposed fines in 25 cases in the period 1 January 2012 – 1 July 2017 and settled with one or more undertakings in 23 cases. See for the period before 2012: C. Vollmer, ‘Settlements in German competition law’, ECLR 2011, pp. 350-6. The Bundeskartellamt also reported in the 2009/2010 annual report that most cartel fine procedures have been concluded by means of a settlement.

⁴⁰ Outhuijse and Jans, n 3; and, Outhuijse n 3.

⁴¹ The cases in which none of the fines were reduced: District Court Rotterdam 16 March 2017, ECLI:NL:RBROT:2017:1907 (*Garage Boxes*); District Court Rotterdam 26 January 2017, ECLI:NL:RBROT:2017:588 (*Bencis*). Further appeal is pending in both cases.

in several cases that no fine could be imposed for one or more undertakings.⁴² In addition, as will be discussed in more detail in a later part of this contribution, reductions of millions of Euros as a consequence of the annulments are not exceptional.

The costs of litigation in the Netherlands are relatively low compared to other countries. The court fee in administrative procedures for undertakings is a standard amount which slightly differs per year, but currently amounts €338 and before 1 January 2018 amounted €333.⁴³ Additional costs made by the undertaking are the costs for the legal assistance by a lawyer. Although the assistance of a lawyer is not mandatory under Dutch administrative law, litigation without legal assistance is uncommon in cartel cases.⁴⁴ The amount of these costs will differ per case and will depend on many factors, such as hourly rate, hours declared, number of employees that work on the case and the scope of the appeal. To give an idea, the lawyers indicated that the legal costs for appealing the fining decision at the District Court Rotterdam range between €10,000 and €100,000. The fact that the court hearings in Dutch cartel cases are most often limited to a (part of a) day limits these costs in comparison to, for example, Germany and the United Kingdom where court hearings of weeks are not uncommon.⁴⁵ In addition, any kind of fine annulment leads to full reimbursement of the court fees and partial reimbursement of the attorney costs made during the court procedure.⁴⁶ In contrast, the undertaking only has to reimburse the procedural costs made by the competition authority in the exceptional circumstance of unreasonable use of the procedures.⁴⁷ The costs to be made during the procedure are relatively clear, since the fine cannot be increased given the illegality of *reformatio in peius* in the Netherlands, in contrast to Germany for example.

The following sections will analyse whether the lawyers confirm this intuitive response to the question what motivates undertakings to file an appeal, but first insight into general decision-making theories is needed to identify the factors which could possibly influence the decision to challenge a fining decision.

⁴² The court reduced the fine for one or more undertakings in nine cases. The court concluded in eight cases that the ACM could not impose fines, which counted for all undertakings that challenged the decision in court for six cases and in two cases only for a one or two of the undertakings fined.

⁴³ Article 8:41(2) GALA.

⁴⁴ Some undertakings litigated without an attorney in *Foreclosure Auction* case, but this forms an exception.

⁴⁵ The appeal procedure at the OLG Düsseldorf is a full *de novo* trial and forms a quasi-criminal procedure in which there is a strong emphasis on assessment of the evidence, which generally causes the procedures to be quite long. For example, the *Paper Wholesalers* cartel spent twenty days in court, the *Cement Cartel* 37 days in court and in *Liquid Gas*, the oral hearing before the OLG alone took almost three years and more than 130 sessions. See: Lianos et al, n 27, 51; K. Ost, 'From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence', [2014] 3 *Journal of European Competition Law & Practice* 125 and 129.

⁴⁶ Article 8:74-75 GALA.

⁴⁷ Article 8:75(1) GALA. As far the author is aware, this has never happened in a cartel case.

3. EXPLANATION OF APPEAL BEHAVIOUR – THE THEORY

Previous research has shown that two perspectives are of particular interest when analysing appeal behaviour.⁴⁸ These are of the calculating and involved actor, which can be divided into the rational choice theory, the theory of bounded rationality and the theories of procedural and distributive justice. The first theory is the rational choice theory, on the basis of which the undertaking is a calculating entity which weighs the costs and benefits of several options and then decides what course of action to take.⁴⁹ According to the theory of bounded rationality, the rationality of the calculating entity is bounded because of environmental factors, such as lack of information.⁵⁰ The theories of procedural and distributive justice provide an alternative which entails that the entity makes its decision on the basis of its perceptions of the justice of the outcome of the procedure and the procedure itself.⁵¹

3.1 Rational choice theory

Rational choice theory assumes that an actor tries to maximise expected utility when making choices.⁵² The actor compares the possible actions to their expected outcomes based on the costs and benefits of each. The actor will then choose the action with the best outcome. The actor reviews the actions from a purely rational perspective, meaning that emotions for example will not play a role in this decision. Applied to appeal behaviour, the hypothesis is that the undertaking will compare the expected outcome of the possible actions, namely comparing litigating the fining decision with accepting the fining decision, based on the costs and benefits of either outcome. The undertaking will file an appeal if the weighing of the costs and benefits of the two options leads to the conclusion that appealing the decision would maximise utility.

Applied to cartel fines, the estimated benefits consist of costs saved. The choice to litigate the fining decision will be based on the idea that more costs can be saved through litigation than if the undertaking accepts the decision and pays the fine. If the fine is accepted, the benefits are the costs saved that would otherwise have been incurred in the appeal procedure. Costs incurred in the appeal procedure include court fees, lawyers' fees

⁴⁸ Boekema n 19.

⁴⁹ J. Coleman and T. Farraro, *Rational choice theory. Advocacy and critique* (London: Sage, 1992); J. Baron, *Thinking and Deciding* (Cambridge: Cambridge University Press, 2008).

⁵⁰ H. Simon, 'Rational choice and the structure of the environment', (1956) 63(2) *Psychological Review* 129-138.

⁵¹ C. Sabbagh, 'A taxonomy of normative and empirically oriented theories of distributive justice', (2001) 14(3) *Social Justice Research* 237-63; T.J. Burleigh and D.V. Meegan, 'Keeping up with the Joneses affects perceptions of distributive justice', (2013) 26(2) *Social Justice Research* 120-31; J. Thibaut e.a., 'Procedural justice as fairness', (1974) 26(6) *Stanford Law Review* 1271-89; J.D. Casper, 'Having their day in court. Defendant evaluations of the fairness of their treatment', (1978) 12(2) *Law & Society Review* 237-251; K. van den Bos, L. van der Velde and E.A. Lind, 'On the role of perceived procedural justice in citizens' reactions to government decisions and the handling of conflicts', (2014) 10(4) *Utrecht Law Review* 1-26; Simon, *ibid*; B.R. Newell et al, *Straight Choices. The psychology of decision making* (New York: Psychology Press, 2007); and, D. Hardman, *Judgement and decision making. Psychological perspectives* (Chichester: Blackwell, 2009).

⁵² Coleman and Farraro, n 49; and, Baron n 49.

and experts' costs. In addition, the costs consist of the time the undertaking spends on the case, for example time spent in the court hearings and in consultation with lawyers.

The costs of accepting the fine firstly consist of the amount of the fine that has to be paid. Secondly, the acceptance of the fine can have additional financial consequences through possible private enforcement actions and a possible impact on commercial relations. By successfully appealing the fining decision, the undertaking can avoid these costs. The estimated benefits of litigating are firstly the possible reduction in the fine as result of a full or part annulment. Annulment can also bring benefits in the form of avoiding the possible costs of private enforcement actions. The appeal procedure can also be beneficial for the undertaking regardless whether it succeeds, for example because the decision to appeal or not appeal impacts on commercial relations. The costs of challenging the fining decision are the litigation costs noted above.

To examine whether the incentives for the undertaking can be explained by the rational choice theory, the lawyers I interviewed were asked to describe the factors which influence the decision whether to file an appeal. Before the interviews, possible answers were anticipated which, when given, would indicate that the rational choice theory is applicable.⁵³ Possible answers include: a more favourable decision would be expected following an appeal, the impact of the fine is great because of its amount or its effect on the undertaking's reputation, the costs of appeal are low and challenging the fining decision delays the payment of the fine. Possible arguments to not appeal a fining decision which align with this theory are that the costs of appeal are too high, the chance of a better outcome is small or the undertaking tried to solve the conflict by means of another legal procedure which would be more beneficial for the undertaking.

3.2. Theory of bounded rationality

Nowadays it is commonly accepted that individual rationality is bounded mostly as a result of environmental factors, which are not included in rational choice theory.⁵⁴ Bounded rationality is the idea that when actors make decisions, their rationality is limited by the tractability of the decision problem, limited cognitive capacity and the limited time available to make the decision.⁵⁵ The actor is for example not in possession of all the information or the information is too complex to make a rational decision on. The actor however tries to make the best choice within these restrictions.⁵⁶

As described by several studies, the restrictions as a consequence of bounded rationality can lead to several types of heuristics and biases which can influence the decision-making

⁵³ Many of the anticipated answers are inspired by the research of Boekema, n 19, which focused on the question why citizens in administrative law cases further appeal after having received the judgment of the first instance court.

⁵⁴ Simon, n 50.

⁵⁵ Ibid, p. 129.

⁵⁶ W.L. Tiemeijer et al, *De menselijke beslisser. Over de psychologie van keuze en gedrag* (Amsterdam: Amsterdam UP, 2009), p. 31.

process.⁵⁷ One which could be applicable to this study, based on results of previous studies, is the availability heuristic.⁵⁸ According to this, the actor estimates certain benefits or costs, and the likelihood thereof, on basis of the ease with which a particular situation can be brought to mind which could lead to the fact that they assess the costs and benefits on basis of their own experience or striking examples, rather than all the information available. Regarding appeal behaviour, one could expect that lawyers will rely for their analysis of the likelihood of successful appeal, for example, on the cases they have handled, instead of all cases.⁵⁹ The limitation of the information used in the consideration could lead to wrong estimates of the costs and benefits, for example of the likelihood of a successful appeal.⁶⁰ In addition, the complexity of the information could lead to wrong estimates of the costs and benefits.⁶¹ This could, for example, lead to an actor under or overestimating their chances in court.

Another effect which could be applicable to this study is the sunk cost fallacy which means that the actor will not make a decision based on the best outcome, but based on the idea that past investment of money and time will be wasted otherwise.⁶² Applied to cartel fines, one can imagine that an undertaking would want to appeal a fine, since it has already spent a significant amount of money and time on disputing the alleged infringement during the decision-making procedures, which would otherwise be wasted. A response which would indicate that this is the case would be one recognising that the undertaking had already invested significantly in the procedures, and wishing to continue for that reason.

3.3 Procedural and distributive justice

According to the theories of procedural and distributive justice, individuals are constantly making justice judgments which are a strong driving force for their behaviour. Justice in the eyes of individual actors can be distinguished into two types: distributive and procedural.

⁵⁷ See the heuristics and biases approach which is a research program within the psychology that focuses on situations in which different choices are made than one would expect on the basis of the rational choice model. There are different types of heuristics and biases, such as availability heuristic, representativeness heuristic, anchoring and adjustment heuristic, affect heuristic and hindsight bias. According to Simon, the human brain has come up with these 'solutions' for the limitations of time, information and cognitive capacity: an individual will often use heuristics or rules of thumb to make decisions in everyday situations. This approach shows that heuristics and rules of thumb can be useful in making complex choices, but can also lead to an inaccurate assessment (bias). Newell et al, n 51, 22.

⁵⁸ See Boekema, n 19; Hardman, n 51, 24; Baron, n 49, 146-57.

⁵⁹ Boekema, *ibid*.

⁶⁰ D. Kahneman and A. Tversky, 'Prospect theory. An analysis of decision under risk', (1979) 47(2) *Econometrica* 263-292; Baron, n 49, 262-264.

⁶¹ Kahneman, *ibid*.

⁶² H. Arkes and C. Blumer, 'The psychology of sunk cost', (1985) 35(1) *Organizational Behavior and Human Decision Processes* 124-40.

The concept of distributive justice can be used to measure the experienced justice of the outcome of a procedure, in our case the fining decision from the competition authority.⁶³ The perceived fairness of the outcome will depend on whether the violation for which the undertaking is fined corresponds to the facts, the company considers the fine appropriate and the amount of the fine corresponds to fines received by other companies in similar cases. The hypothesis here is that the undertaking will not appeal a fining decision if the fining decision is experienced as fair. Possible answers which would indicate that the appeal behaviour can be explained by the theory of distributive justice include: the fine is not fair, because I did not commit the infringement alleged, because the amount of the fine is too high for the infringement, or because the amount of the fine is higher than what other companies received in similar cases.

The theory of procedural justice focuses on the process followed when making the fining decision.⁶⁴ What is important here is that the procedure should be experienced as fair. According to Tyler, four criteria should be fulfilled for an actor to experience a procedure as fair.⁶⁵ The criteria are voice and participation, reliability, neutrality and respectful treatment.⁶⁶ The first criterion, voice and participation, requires that the actor should have the opportunity to put across its view on the alleged infringement and be able to provide counterevidence. In other words, the decision-making procedure should contain the possibility of making corrections. Reliability of the procedures is the second criterion. The actor should have reasons to believe that the decision-making procedures into which it provided its input were not only a formality and its view plays a serious role. The authority must demonstrate that it took this view into account in the final decision. The third criterion is that the actor in the procedure should believe that he or she will be treated in a straight and respectful manner by the authority.⁶⁷ The last criterion is neutrality, which means that the decision-making authority must be unbiased, impartial

⁶³ Sabbagh, n 51; and, Burleigh and Meegan, n 51.

⁶⁴ G.S. Leventhal, 'What should be done with equity theory? New approaches to the study of fairness in social relationships', in: K.J. Gergen, M.S. Greenberg and R.H. Willis (eds.), *Social exchange: Advances in theory and research* (New York: Plenum, 1980), pp. 27-55; T.R. Tyler, *Why people obey the law* (Princeton: Princeton UP, 2006); J. Greenberg, 'The social side of fairness: Interpersonal and informational classes of organizational justice' in: R. Cropanzano (red.), *Justice in the workplace. Approaching fairness in human resource management*, (New Jersey: Erlbaum, 1993); S. Barclay, 'Appealing (but not necessarily winning) to improve your social status', (1999) 21(4) *Law & Policy* 427-43; B.C.J. van Velthoven, 'Over het relatieve belang van een eerlijke procedure. Procedurele en distributieve rechtvaardigheid in Nederland', *RM Themis* 2011-1, pp. 7-16; K.H. Sanders, *De heroervergeving getoetst. Een onderzoek naar het functioneren van bezwaarschriftprocedures* (Groningen: Vakgroep Bestuursrecht en Bestuurskunde, 1999); and, A.T. Marseille, 'Effecten van informalisering van bestuursrechtspraak', *NTB* 2010-8, pp. 212-29.

⁶⁵ T. Tyler, 'What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures', (1988) 22(1) *Law and Society Review* 103-135.

⁶⁶ See for nice summary of the different factors: H. Winter and C. Boxum, Beter contact bij boetes? Over 'procedural justice' in boetebezwaarprocedures bij het ministerie van SZW, in: H.D. Tolsma and P. de Winter (eds), *De wisselwerking tussen recht en vertrouwen bij toezicht en handhaving*, (Den Haag: Boom Juridische Uitgevers, 2017), 153-69.

⁶⁷ G. Langendijk, *Power, procedural fairness and prosocial behavior* (Amsterdam: Kurt Lewin instituut, 2012), p. 11; Barclay, n 64, 440.

and independent. Greenberg added to these factors informative justice.⁶⁸ Informative justice concerns the extent to which active information and explanations are provided about the procedure and the resulting decision. In conclusion, this means that the evaluation of the fairness of the procedure of the NCA will depend on whether the NCA's procedure fulfils the abovementioned criteria. The hypothesis here is that an undertaking will not appeal a fining decision if the decision-making procedure is experienced as fair. Responses which would indicate that the appeal behaviour can be explained by procedural justice theory include: the procedures were not fair because I did not get the chance to provide our view on the case, the ACM did not take our view into account when formulating the fining decision, the ACM treated me disrespectfully, and the ACM was not objective. Different studies showed the independent influence of both distributive and procedural justice on the satisfaction of individuals with the decisions of administrative authorities and the acceptance thereof.⁶⁹

4. EXPLANATION OF APPEAL BEHAVIOUR – THE INTERVIEWS

To determine what motivates undertakings in the Netherlands to file an appeal after receiving a cartel fine from the competition authority, in-depth interviews were conducted with fourteen Dutch lawyers from various law firms. The decision to interview lawyers, instead of for example undertakings, was made based on the assumption that lawyers have a clearer picture of which factors influence the decision to file an appeal, play an important role in this decision as advisor of the undertaking and are easy to approach.

The lawyers were selected in the following manner. First, an overview was compiled of the lawyers who assisted undertakings in public cartel-enforcement procedures over the past fifteen years on the basis of all the relevant court judgments. This led to an overview with a total of more than seventy lawyers.⁷⁰ Subsequently, a shortlist of twenty lawyers was made by selecting the lawyers who were most frequently involved in these procedures and finally one lawyer per law firm was selected for the interview on the basis of experience and availability.⁷¹

The interviews were semi-structured and did not only concern appeal behaviour. The open-ended questions included the factors which influence the decision to lodge an

⁶⁸ Greenberg, n 64.

⁶⁹ Boekema, n 19; Tyler, n 65, 92-97; J. van der Linden, *De civiele zitting centraal: informeren, afstemmen en schikken* (Deventer: Kluwer, 2010).; Marseille, n 64, 229; Barclay, n 64, 440; Van Velthoven, n 64, 9; Sanders, n 64, 194-195; and, Boxum and Winter, n 66.

⁷⁰ Two members of ACM's external advisory committee who were regularly involved in the objection procedure reviewed the shortlist to check whether the shortlist of twenty lawyers represented the lawyers who mostly assisted the undertaking during the objection procedure.

⁷¹ The names of the lawyers and the law firms will not be made public as a consequence of the promise to guarantee anonymity. The choice to interview the lawyers with the most experience instead a random selection of the seventy lawyers falls within the research method named purposeful sampling. These lawyers are so-called key informants who were most likely to provide rich sources of information. See *inter alia* L. Webley, Qualitative Approaches to Empirical Legal Research, in: P. Cane and H.M. Kritzer. (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010); M.Q. Patton, *Qualitative research and evaluation methods* (Thousand Oaks: Sage Publications, 2002), 45.

objection, to file an appeal and to file further appeal at the exclusively competent courts, and how the undertakings experienced the various decision-making and dispute-resolution procedures, the quality of the ACM's fining decisions, and the quality of the judicial review by the specialised courts. With consent of the interviewees, the interviews were recorded after which the interviews were typed out and analysed. This section discusses the results of this research with regards to the factors which influence the decision to appeal.

After asking the lawyers 'can you describe which factors influence the decision whether to file appeal?', the factors mentioned by 13 out of the 14 lawyers included the amount of the fine, the quality of the fining decision and the likelihood of a successful appeal as a consequence thereof and other expected financial consequences of the fining decisions. Four lawyers mentioned the impact on an undertaking's reputation as an additional factor, but added that this in principle will not be the only reason to file an appeal. The answer of one of the lawyers nicely summarises the view of the vast majority. According to this lawyer, the assessment of whether to challenge the fining decision consists of two steps. The first step entails determining, after reading the fining decision, whether there is a legal argument on the basis of which an appeal could be filed. This 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. On the basis of this analysis, the lawyer will conclude whether the appeal is worth arguing, legally. According to the lawyer, this is often answered in the affirmative since the prospect of appealing successfully in the Netherlands is very high: more often than not, a serious reduction or complete annulment of the fine can be obtained. The second step includes an analysis of the financial consequences of the decision based on the legal arguments. The lawyer determines what the financial consequences of challenging or refraining from challenging the decision in court are: in other words, what can be won? Important factors here include the amount of the fine, the expected reduction of the fine at appeal and the expected costs of filing the appeal. According to the lawyers, no appeal will in principle be filed if the anticipated legal fees exceed the amount of the fine. This can vary if the decision not to appeal the fining decision has additional costs in addition to the payment of the fine.

An example of additional costs which was mentioned multiple times regarded fined undertakings working in a public procurement market. In that case, appealing a fining decision may be justified in any event because as soon as the decision becomes irrevocable – which is the case if the fine is not appealed – the undertaking has a severely greater chance of being excluded from procurement calls than before that moment.⁷² The decision does not become irrevocable during the procedures of appeal and further appeal which can take up to ten years which means that during these years the undertaking will in principle not be excluded from procurement calls.

⁷² Articles 4.7(1) sub c and d and 4.10(1) sub c Public Procurement Act. The companies cannot be excluded from the procurement calls if the company received leniency. Parliamentary papers II 2009/10, 32440, 3, p. 111.

Another example of additional costs mentioned which is important for the second step of the assessment is the chance of private damages claims. As expressed by multiple lawyers, if lawyers have reason to believe that the finding of an infringement can result in large damages claims, it is wise to lodge an appeal even if the fine is lower than the expected litigation costs, since there is a chance that the court will annul the fining decision, which makes private enforcement more difficult. In addition, the fact that public enforcement procedures take years is beneficial for possible private enforcement, since it will delay the private claims and can demotivate private enforcers.

A final example mentioned was delaying the payment of the fine. Until 1 August 2014, litigating a decision delayed the payment of the fine, which is financially beneficial for the undertaking.⁷³ In practice, this meant that the fine would have to be paid many years later, albeit with interest. The legislature felt this was undesirable and changed the law to state that litigation can only delay the payment obligation by 24 weeks.⁷⁴

In short, no appeal will in principle be filed if the anticipated legal fees exceed the amount of the fine. This is different if additional costs, as a consequence of being excluded from procurement calls or follow-on damages claims, are expected which make litigating more attractive.

While the lawyers largely agreed about what to do in case of a low fine with either low or high prospect of successful appeal, opinions differed regarding what to do in case of a high fine with a low prospect of successful appeal. Some lawyers stated that appeal can still be worthwhile, since, because of the large proportion of decisions which are annulled, there is always the chance that the appeal will be successful and will lead to a reduction in the fine which often exceeds the costs made. In addition, there is little to lose as a higher fine cannot be imposed as a result of filing an appeal, because of the *reformatio in peius* ban, and the litigation costs can be limited by the lawyer by adjusting the scope of the appeal and number of pleas. Other lawyers, an absolute minority, did not agree and argued that ‘useless’ appeals should not be filed, including because it undermines the lawyer’s reputation. In addition, on this point several lawyers mentioned that if the ACM has a strong case, this encourages defendant actions at the early stages of procedures in order to try to resolve the case via a commitment decision, leniency application or settlement which can be more financially beneficial than challenging the decision in court.⁷⁵

In light of the theories discussed, we can conclude from the lawyers’ answers that the assessment of whether to litigate a fining decision in the Dutch cartel enforcement practice boils down to an analysis of the costs and benefits, and therefore fits the perspective of the calculating actor. The fact that some lawyers mentioned that assessment of the likelihood of a successful appeal and the consequences thereof is not an exact science and includes a lot of uncertainties which make quantifying the costs and

⁷³ Article 63 Competition Act (old).

⁷⁴ Article 12p Establishment act ACM.

⁷⁵ The ACM is however not always open for this. ACM policy guidelines for example describe that commitment decisions are in principle not possible in case of hardcore infringements.

benefits merely an educated guess illustrates that the theory of bounded rationality is applicable to the decision whether to challenge a fining decision in court together with the rational choice theory.

A question arises whether the theories of distributive and procedural justice theory apply at all to cartel enforcement in the Netherlands. Regarding the choice to file an appeal, only one lawyer argued that it depends on whether the fine reflects the occurred and is appropriate. According to this lawyer, an undertaking should just pay its fine if it was guilty of the infringement. From the other lawyers' responses, the undertakings appear to feel strongly about the distributive and procedural justice of the enforcement practice, but this does not appear to play a role in deciding whether to appeal the fining decision. The lawyers explained that many undertakings find the procedures and the outcomes of the procedures to be unfair in their responses to other questions, such as those regarding the ACM's approach during the decision-making procedures and the quality of the fining decisions. For example, many lawyers stated that undertakings do not recognise themselves in the allegations made about their behaviour and the infringement as outlined by the ACM, and consider the fining decisions taken on this basis as unjust. The fairness of the procedures and their outcomes are however in the absolute majority of cases only a part of the assessment of whether to file an appeal when this can impact the prospects of a successful appeal. In addition, the amount of the fine must be high enough for an appeal to be profitable. As mentioned by one lawyer: 'issues of principle are very expensive lawsuits', and by another: 'it is no one's hobby to appeal if it does not have financial benefits'. One lawyer mentioned however that there are specific types of cartelists, for example very small business owners and healthcare companies, which are more emotionally involved, and might want to appeal out of principle. This lawyer however added that these clients also often discontinue or refrain from litigation because a lack of money or resources or because they find the procedures burdensome, despite having strong cases. These cases however are more of an exception than the rule.

To conclude, the interviews indicate that the appeal behaviour can mostly be explained by the perspective of the calculating actor, since almost all lawyers described that the assessment of whether to file an appeal comes down to a cost benefit analysis of the litigation per se, and not to whether the infringement was actually committed and whether the alleged infringement, the fining decision and the decision-making procedures were perceived as unfair.

5. THE EXPLANATION OF APPEAL BEHAVIOUR – THE PRACTICE

The interviews with the lawyers provided valuable insights into the factors which influence the decision to challenge a fining decision. This section verifies the results of the empirical survey by analysing the distinguishing characteristics between the cases in which the fine is challenged and the limited number of cases in which the fines are accepted⁷⁶ and the outcome of recent appeals to evaluate the successfulness of the appeals.

⁷⁶ Example of cases in which undertakings accepted the fine: NTG (2004); Window Washers (2011); Tender Aambeeldsstraat and Mokerstraat (2003); Nature Vinegar (2015); Painters Meiveld (2009).

5.1. Case characteristics accepted fines

The analysis of the cases shows that in several cases in which the companies did not challenge the decision in court after following the objection procedure, the ACM had ruled in the objection procedure that it would not impose a fine anymore.⁷⁷ Other cases in which the undertaking did not dispute the decision in court include cases in which the fines varied between very low (€1,000) and relatively low (€21,000-34,000).⁷⁸

In many of the other cases in which the fining decision was not challenged by one or more undertakings, the undertakings collaborated with the ACM in some shape or form. In a number of such cases, for example, one or more undertakings were granted a leniency request.⁷⁹ Other forms of collaboration include cases in which the ACM offered the undertakings an accelerated-fine procedure or in which the ACM settled the cartel case.⁸⁰ As settlements in cartel cases are new to the ACM, the instrument is still being developed, but current practice includes that the undertaking must acknowledge the infringement and the qualification thereof, accept the amount of the fine and confirm that it had sufficient opportunity to give its view and to gain insight into the file in exchange for a ten percent fine reduction.⁸¹ In the construction fraud case, which concerned a national price-fixing system involving 1,300 undertakings, the ACM offered the undertakings the option of an accelerated-fine procedure to simplify and accelerate the prosecution of these undertakings. In exchange for a fine discount of 15 percent, the undertakings could renounce their right to individual access to the file, the right to be heard individually and the right to object and appeal the alleged facts and their qualifications. This procedure had several similarities to a settlement, but unlike a settlement, the undertaking did not have to recognise its infringement of the cartel prohibition. The number of appeals was much lower among the undertakings who accepted the accelerated procedure compared to those following the regular procedure. Cooperation with the ACM naturally significantly limits the grounds for the undertaking to file appeal, and appeal is unlikely considering its own, previous cooperation with the ACM, especially in cases in which the fine is low and the undertaking does not want to dispute the leniency or settlement terms.⁸²

⁷⁷ Examples of cases in which the ACM withdrew its decision are Nozema and Broadcast (2005) and Caraat (2011). The ACM withdrew the decisions in those cases because ACM concluded that was insufficiently established that there has been a (appreciable) restriction on competition respectively that the companies had committed an infringement of Article 6 of the Competition Act.

⁷⁸ Examples include Window Washers (EUR 1000); Tender Aambeeldsstraat and Mokerstraat (€2,600, 8,900 and 14,000); Painters Meiveld (€21,000-34,000).

⁷⁹ Tender Aambeeldsstraat and Mokerstraat (2003); Insulating double glazing (2010); Garage boxes (2016).

⁸⁰ Nature Vinegar (2015).

⁸¹ See Outhuijse, n 8.

⁸² Vialis is an example of an undertaking that disputed the leniency conditions in court: the undertaking wanted immunity instead of merely a fine reduction. District Court Rotterdam 5 March 2010, ECLI:NL:RBROT:2010:BL6819 (*Vialis*). Same counts for one of the undertakings in the *Flour* case, see District Court Rotterdam 17 July 2014, ECLI:NL:RBROT:2014:5822. Immunity was granted by the court in both cases.

In conclusion, the characteristics of a low fine and collaboration with the competition authority form shared characteristics among the decisions that were not challenged in court which can also be illustrated by analysis of the recent cases.⁸³ As mentioned, the ACM imposed fines in 21 cartel cases since 2010.⁸⁴ In only two cases, all involved undertakings accepted the fining decision without disputing it in court. One of the cases was the *Window Washers* case in which the ACM imposed symbolic fines of €1,000 on ten small undertakings.⁸⁵ The other was the *Nature Vinegar* case in which the ACM settled a case for the first time, which occurred after leniency application by one of the involved undertakings.⁸⁶ In sum, the analysis of the accepted fines confirms the answers of the lawyers: many fining decisions seem not to be challenged when the estimated benefits of litigation are either very small or not existing as a consequence of cooperation with the competition authority or low amount of the fine.

5.2. Successfulness and characteristics challenged fines

From an analysis of the eighteen most recent cases in which the fines were challenged at court follows that the litigation in general is successful, although the level of success differs per case. As mentioned, the analysis of the cases since 2010 shows that most cases that go to court lead to an annulment for one or more undertakings: the court did not revise one or more fining decisions in only two out of eighteen cases.⁸⁷ The annulments include annulments in which the court concludes that no fine can be imposed, because of for example insufficient evidence or insufficient economic analysis, and annulments which are limited to a reduction in the fines. The court reduced the fine for one or more undertakings in nine cases. The court concluded in eight cases that the ACM could not impose fines, which counted for all undertakings that challenged the decision in court

⁸³ This finding is in line with literature on this topic regarding the enforcement of cartel cases by the European Commission. For example, Hüschelrath and Smuda analysed the distinguishing characteristics of cases in which the undertakings decided to file an appeal against a imposed cartel fine by the European Commission in comparison to cases in which the undertakings accepted the fine between 2000 and 2012. They found, inter alia, that the size of the fine imposed, in connection with characteristics of the undertaking such as being a ringleader, repeat offender, or leniency applicant, influence both the probability and the success of an appeal. K. Hüschelrath and F. Smuda, 'The Appeals Process in the European Commission's Cartel Cases: An Empirical Assessment', (2016) 13(2) *Journal of Empirical Legal Studies* 330-57. The recent study of Hellwig et al. of 2016 showed a decrease in litigation rate in recent years at the European level and the relationship of this phenomenon with an increase in settlements. Around 60 percent of regular cartel cases were litigated between 2000 and 2015, while undertakings filed appeals in only 10.5 percent of settled cases. The Commission has settled in almost 70 percent of cases since 2010. See M. Hellwig, K. Hüschelrath and U. Laitenberger, 'Settlements and Appeals in the European Commission's Cartel Cases: An Empirical Assessment', 2016, available via: <<http://ssrn.com/abstract=2731073>>.

⁸⁴ The period analysed is 1 January 2010 – 1 May 2018.

⁸⁵ *Window Washers* (2011).

⁸⁶ *Nature Vinegar* (2015).

⁸⁷ The cases in which none of the fines were reduced: District Court Rotterdam 16 March 2017, ECLI:NL:RBROT:2017:1907 (*Garage boxes*); District Court Rotterdam 26 January 2017, ECLI:NL:RBROT:2017:588 (*Bencis*). The two cases are pending at the courts at the time of writing.

for six cases and in two cases only for a one or two of the undertakings fined.⁸⁸ Analysed per undertaking, ten percent of the undertakings who challenged the decision at court (12 out of 122) were not successful in obtaining a fine reduction⁸⁹ and 14 percent (17 out of 122) merely received a small fine reduction ranging from €5,000 to €15,000 ex Article 6 ECHR. Additionally, the courts reduced the fine of 13 percent of the undertakings (16 out of 122) as a consequence of defective calculation of the fine which led in some cases to reductions of up to 60 percent of the original fine. Finally, the courts fully annulled the fine for 76 undertakings which represents 62 percent of the undertakings.⁹⁰

An example of a case in which one of the courts concluded that the ACM was not competent to impose a fine is the *LHV* case from 2015.⁹¹ In *LHV*, the Rotterdam District Court annulled the fine of €5.9 million imposed on the National General Practitioners Association by the ACM for making recommendations about the establishment of new GPs. The court ruled that the recommendations were not capable of influencing the establishment of new GPs and therefore, according to the Court of Rotterdam, the recommendations did not constitute a proper means of restricting competition and the court fully annulled the fine. The ACM has not initiated further appeal. Other examples include *Homecare organisation Midden-IJssel* and *Insulating double glazing* in which the District Court Rotterdam annulled fines ranging from one to four million because of insufficient evidence.⁹² In such cases, because of the great benefits of the court judgment, one could say in hindsight that the decision to litigate the fine was indeed the option which maximised the undertakings' utility.

A recent example in which one of the courts concluded that the ACM was not competent to impose fines was the *Foreclosure auctions* case.⁹³ Here, the ACM had fined more than 70 real estate traders for their participation in a complex of anti-competitive practices prior to, during and after the completion of 2,328 foreclosure auctions, aiming to obtain the lowest possible auction price for properties. The TIAT concluded that the ACM had not provided sufficient evidence to qualify the alleged conduct as a single and continuous infringement and annulled all the fines imposed on the sixty real estate traders that

⁸⁸ Fine annulment for only part of the companies: Laundries (2011); Flour (2010). For all the appealing companies: Homecare Midden-IJssel (2010); Insulating double glazing (2010); Foreclosure Auctions (2011); LHV (2012); Taxi (2012); Coldstores (2016).

⁸⁹ Although seven undertakings had successful grounds of appeal with regard to the fine calculation, this did not lead to fine reduction because the fine was topped due to exceedance of the maximum fine. Examples of these successful grounds of appeal include wrong starting date of the infringement, adjustment severity factor and exceedance of the limitation period with the consequence that a part of the turnover could not be taken into account by the ACM.

⁹⁰ The real estate traders of the *Foreclosure Auctions* case form with a total of sixty undertakings an important part of these numbers. The percentages without these undertakings are: 20% no fine reduction, 55% fine reduction (28% reasonable time and 27% fine reduction) and 25% no fine.

⁹¹ District Court Rotterdam 17 December 2015, ECLI:NL:RBROT:2015:9352 (*LHV*).

⁹² District Court Rotterdam 3 April 2014, ECLI:NL:RBROT:2014:2273 (*Insulating double glazing*); District Court Rotterdam 14 March 2013, ECLI:NL:RBROT:2013:BZ4169 (*Homecare organisation Midden-IJssel*); CBb 18 December 2014, ECLI:NL:CBB:2014:457 (*Homecare organisation Midden-IJssel*).

⁹³ CBb 3 July 2017, ECLI:NL:CBB:2017:204 (*Foreclosure auctions*). See A. Outhuijse and J.J.A. Waverijn, case note *Foreclosure auctions*, AB 2017/34.

appealed the fine. Although the fines were relatively low compared to other cases,⁹⁴ the litigation costs were also lower, because some undertakings were not represented by a lawyer and many other undertakings shared one lawyer and could therefore split the costs. Also in other cases in which relatively lower fines were imposed (€100,000-€300,000), multiple undertakings shared a lawyer so they could share the lawyer's fee which therefore lowers the costs.⁹⁵ The reading of the *Foreclosure Auction* judgment also showed that the fining decision had other financial consequences for some of the undertakings, which could form an incentive to challenge the decision in court. Firstly, the companies suffered damages because of the termination of banking relations as consequence of the alleged infringement. The suffered damages are eligible for compensation in case of annulled fines, since many requirements for compensation do not have to be proven in case of an annulled fine.⁹⁶ Secondly, it is possible that the fact that the consumer association participated in the court procedure as a third party gave the undertakings the expectation that private follow-on litigation could follow after the fining decision would become irrevocable, which provided them with an additional incentive to appeal.⁹⁷

In other cases, the annulment was limited to a reduction of the fine. A reduction of the fine can be in the order of millions of Euros, although in recent cases the reductions are relatively modest, and have been up to 60 percent of the original fine. For example, the TIAT lowered the severity factor in *Wmo Friesland*, which is one of the elements used for calculating the fine, from 1.5 to 0.5 because of the limited intensity of the concerted practice during public procurement procedures. The correction lowered the fine by almost €1 million from €1,757,000 to €767,000.⁹⁸ Another example is the *Limburg construction* case, in which the Rotterdam Court reduced the fine of €3 million of the appealing undertaking by €500,000.⁹⁹ These fine reductions are modest in comparison to some fine reductions that have occurred in the past, but are probably still a positive result for the undertaking from a cost-benefit perspective.

⁹⁴ The statement cannot be made here that these fines are 'low' because this depends on companies' perspective and size.

⁹⁵ An example is provided by the *Reading Folders* case in which multiple undertakings shared a lawyer. See District Court Rotterdam 27 July 2017, ECLI:NL:RBROT:2017:5744 and 5765 (*Reading Folders*).

⁹⁶ A total of seven requirements, such as unlawfulness, accountability, causality and damage, have to be fulfilled for a successful damage claim. The requirements of unlawful behaviour and accountability are given in case of an annulled administrative decision. The traders tried to prevent or suspend the publication of the fining decision because of the fear that banks would respond prematurely. See District Court Rotterdam 1 August 2013, ECLI:NL:RBROT:2013:5927.

⁹⁷ Pursuant to Article 93(1) Competition Act, consumer authorities are assumed to be stakeholder in cases concerning the competition act which makes it possible for them to participate in disputed concerning decision made on the basis of the competition act.

⁹⁸ CBb 11 January 2017, ECLI:NL:CBB:2017:1 (*Wmo Friesland*).

⁹⁹ District Court Rotterdam 23 June 2016, ECLI:NL:RBROT:2016:4738 (*Construction cases Limburg*).

There are however also examples, although more limited, in which the courts did not reduce the fine or the reduction is very limited in relation to the fine.¹⁰⁰ For example, in the *Laundries* case, the District Court Rotterdam merely annulled the fine on the basis of exceedance of the reasonable time for three of the four appealing undertakings which only led to a reduction in the fine by €5,000 while the fines exceeded €1 million.¹⁰¹ In such cases, a conclusion one could jump to is that the decision to appeal was not rational as in hindsight the costs presumably outweighed the benefits. Such a conclusion would disregard the fact that the undertaking may have received other benefits from appealing the fine, such as described above. Moreover, relying on the results in hindsight to draw conclusions is problematic in general. It is as possible that in a case in which the undertaking and its lawyer estimated the chances of successful appeal to be low was in fact successful as the other way around. In this context it should also be recalled that the decision to appeal a high fine could be deemed to be rational in light of the litigation costs even when the chance of a successful appeal is estimated to be relatively low. In sum, it is impossible for an outsider to establish whether the decision to appeal was rational, because knowledge is required of the litigation costs (amongst others the lawyers' fees), the expected benefits, and the expected costs if the fine was accepted. A conclusion about the correctness of the cost benefit analysis can be drawn once all the procedures have ended since at this moment the costs and benefits can be quantified with certainty if one has the information. Evidently, in practice the decision has to be made at the beginning of the procedure at a moment when there are many uncertainties, such as the success of the case and the possibility of private enforcement.

Although the prospect of success is high in the Netherlands, practice shows that it is difficult to predict what the exact result of challenging a certain decision will be; and thus, quantifying the costs and benefits is also mentioned by some of the lawyers. Previous research also demonstrated that even though the percentage of annulments of the fining decisions is high, the courts are not always in agreement on how a specific case should be decided and in some cases, for example, come to annulments on different grounds.¹⁰² The *Foreclosure Auction* case can provide an example here. The TIAT concluded that the ACM has not provided sufficient evidence to qualify the alleged conduct as a single and continuous infringement while the District Court Rotterdam only reduced the amount of the fine by ten percent in its judgment.¹⁰³ In contrast, the TIAT reversed the conclusion of the District Court Rotterdam in *Flour*, which stated that there was insufficient evidence for one of the undertakings.¹⁰⁴ The TIAT found, differently to the

¹⁰⁰ The cases in which none of the fines were reduced: District Court Rotterdam 16 March 2017, ECLI:NL:RBROT:2017:1907 (*Garage boxes*); District Court Rotterdam 26 January 2017, ECLI:NL:RBROT:2017:588 (*Bencis*).

¹⁰¹ District Court Rotterdam 12 May 2016, ECLI:NL:RBROT:2016:3477 (*Laundries*). Other example: District Court Rotterdam 27 July 2017, ECLI:NL:RBROT:2017:5744 and 5765 (*Reading Folders*).

¹⁰² Outhuijse 2017, n 3.

¹⁰³ District Court Rotterdam 18 December 2014, ECLI:NL:RBROT:2014:10173 (*Foreclosure Auction*); CBB 3 July 2017, ECLI:NL:CBB:2017:204 (*Foreclosure Auction*).

¹⁰⁴ District Court Rotterdam 17 July 2014, ECLI:NL:RBROT:2014:5823 (*Flour*); CBB 14 July 2016, ECLI:NL:CBB:2016:187 (*Flour*).

District Court, that the ACM may impose fines based on leniency declarations as the sole evidence of the participation of companies as long as these statements are accurate and correspond to each other. Another debated issue among the parties and courts, and also in the academic literature, was whether the *Expedia* judgment of the Court of Justice fully eliminated the separate appreciability test which was conducted in the Netherlands after qualifying behaviour as a restriction by object or whether it is part of the analysis of whether the behaviour can be qualified as a restriction by object.¹⁰⁵ Although the District Court Rotterdam held that restrictions by object automatically have an appreciable effect on competition in its judgments shortly after *Expedia*,¹⁰⁶ it reintroduced a separate assessment of quantitative appreciability after *Cartes Bancaires*.¹⁰⁷ In 2016 this led to 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 behaviour alleged was capable of restricting competition appreciably.¹⁰⁸ The TIAT finally had the opportunity to opine on this issue in 2016, and in two rulings, one in 2016 and one in 2017, the TIAT has decided that the appreciability test forms part of the analysis of whether the behaviour can be qualified as a restriction by object.¹⁰⁹ In short, the Dutch practice shows that because of the nature of competition law, much discussion is possible – which also can be seen amongst the courts – about how much evidence is required, what the requirements are for the assessment of the appreciability, and what the correct severity factor is. This indicates that it is difficult to predict what the exact result of a certain case will be.¹¹⁰

The reading of the judgments also gives the impression that the lawyers experience this uncertainty and can also not exactly pinpoint which grounds will be successful. Many elements of the fining decision, and sometimes all possible elements, are disputed during

¹⁰⁵ Case C-226/11 *Expedia* ECLI:EU:C:2012:795. See for the discussion A. Outhuijse, 'Kroniek – Bestuurs- en civielrechtelijke rechtspraak mededingingsrecht 2016', *SEW* 2017-5, pp. 199-210 and literature mentioned there.

¹⁰⁶ E.g. District Court Rotterdam 20 March 2014, ECLI:NL:RBROT:2014:2045; District Court Rotterdam 12 June 2014, ECLI:NL:RBROT:2014:4689.

¹⁰⁷ Case C-67/13 *Cartes Bancaires* ECLI:EU:C:2014:2204. For example, 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*).

¹⁰⁸ District Court Rotterdam 13 October 2016, ECLI:NL:RBROT:2016:7659-7664 (*Taxi drivers*).

¹⁰⁹ CBb 14 July 2016, ECLI:NL:CBB:2016:184 and 187 (*Flour*); CBb 11 January 2017, ECLI:NL:CBB:2017:1 (*Wmo Friesland*).

¹¹⁰ The difficulty to predict the outcome of cases is however not limited to competition law cases. Research from Malsch concerning 350 criminal lawyers showed that these lawyers could not make a good estimation of the outcome of a case. M. Malsch, *Advocaten voorspellen de uitkomst van hun zaken* (Lisse: Swets & Zeitlinger, 1990), 36. Similar results were found in an American study analysing lawyers in civil and criminal matters. See J. Goodman-Delahunty e.a., 'Insightful or wishful: lawyer's ability to predict case outcomes', (2010) 16(2) *Psychology, Public Policy, and Law* 133-157. According to the research of Malsch, professional lawyers do make better assessment of the likelihood of success than ordinary citizens - Malsch, *ibid*, 75. See also P.O. de Jong, *Beroep op tijd. Een onderzoek naar het tijdsbeslag van beroepsprocedures in eerste aanleg in het bestuursrecht* (Den Haag: BJU, 2004), 118; S. Bonaccio en R.S. Dalal, 'Advice taking and decision-making: an integrative literature review, and implications for the organizational sciences', (2006) 101(2) *Organizational Behavior and Human Decision Processes* 129-131; and, Boekema, n 19.

the court procedures while most are not successful.¹¹¹ The undertakings for example often plead that the facts established by the competition authority are not correct, because the infringement was not committed, the undertaking was not involved in the infringement, or that the infringement was shorter than established by the ACM. In addition, the explanation of the appreciability criterion is often disputed and the quantity of evidence or economic analysis needed. The undertakings also often dispute the qualification of the facts in light of the law: they, for example, dispute that the behaviour is a restriction by object or that the severity factor is disproportionate for the alleged behaviour. In short, it is more the exception than the rule that the appeal focuses on certain elements of the fining decision, such as the amount of the fine.¹¹²

In sum, the analysis of the case law shows that quantifying the costs and benefits is difficult because of the impossibility of predicting the exact result of challenging a certain decision making the theory of bounded rationality applicable. The fact that the companies more often than not can obtain a serious reduction or complete annulment of the fine in court makes litigation, especially in case of high fines, the attractive option. This is stimulated by examples of cases in which not all undertakings appealed and the companies who accepted the fines found themselves in a disadvantageous position compared to the appealing companies because they were left with fines of millions of Euros in contrast to the undertakings who challenged the decision and received a full annulment.¹¹³

6. CONCLUDING REMARKS

Dutch competition law enforcement is currently characterised by very high rates of challenged and annulled fining decisions. Research into the other Member States shows that a high litigation rate is not inherent to the enforcement of the prohibition of anti-competitive agreements in general, but most of the countries researched do have high appeal rates. This article considered why undertakings file an appeal after receiving a fine from the Dutch competition authority on the basis of interviews with the fourteen lawyers who regularly represented undertakings fined for anti-competitive behaviour in the last fifteen years. Two perspectives were applied to explain the answers they provided, namely the calculating actor and involved actor, based on the rational choice theory, the theory of bounded rationality, and the theories of distributive and procedural justice.

The interviews with the fourteen Dutch lawyers show that the factors which undertakings consider when deciding to file an appeal fall within the perspective of the calculating

¹¹¹ Cases are known in which the companies brought forward more than thirty grounds of appeal.

¹¹² Example of a case in which this occurred: District Court Rotterdam 16 March 2017, ECLI:NL:RBROT:2017:1907 (*Garage boxes*).

¹¹³ For example: Soletanche Bachy/Heijmans (2003). In this case, the ACM concluded that Soletanche Bachy, a construction company, had concluded a framework agreement with another construction company, Heijmans, which excluded competition. The ACM imposed fines on both undertakings. Only Soletanche Bachy challenged the decision in court. The District Court Rotterdam ruled that the ACM had failed to investigate adequately whether the parties were in fact competitors and fully annulled the fine of Soletanche Bachy. Heijmans requested the ACM to modify an irrevocable sanctions decision, but did so unsuccessfully and had to pay the fine. Other examples include Insulating double glass (2010).

actor. Undertakings compare the expected outcome of the possible actions, namely litigating or accepting the fining decision, based on the costs and benefits of each outcome. An undertaking will file an appeal if the costs and benefits of appealing the decision maximises utility. Even though the undertakings can feel strongly about the justice of the outcome of a procedure and the procedure itself, these feelings in principle do not influence the decision to file an appeal. The interviews and analysis of the Dutch practice demonstrate that the consideration to litigate occurs under bounded rationality, because of the many uncertainties, such as the likelihood and consequences of a successful appeal, which obstructs exact quantification of the costs and benefits and therefore a fully rational decision. The actor however tries to make the best choice within these restrictions.

The high rates of challenged and annulled fining decisions in the Netherlands obstruct the effective enforcement of the prohibition of anti-competitive agreements. Although studies in other areas show the independent influence of both distributive and procedural justice on the satisfaction of individuals with the decisions of administrative authorities and demonstrate that the improvement thereof can increase the acceptance of these decisions, this study shows that Dutch cartel-enforcement practice would not benefit from this. The acceptance of Dutch cartel fines could, however, be enhanced by acknowledging that appeal behaviour is mainly driven by a cost-benefit assessment and therefore fits the calculating actor perspective, and anticipating that assessment by either increasing the costs or reducing the benefits. Summing up possible solutions seems simple, such as improving the persuasiveness of the fining decision and the quality of the underlying investigations, lowering the level of the fines, making settlements more attractive, or increasing litigation costs. Further research, including an in-depth assessment of the possibility, desirability and negative consequences of these options, is however needed to formulate sustainable solutions.