Chapter one

Introduction
1. Introduction

One of the most important pillars in competition law is the prohibition of anti-competitive agreements.¹ For the Netherlands, this prohibition is enshrined in Article 6 Dutch Competition Act and Article 101 Treaty on the Functioning of the European Union (TFEU). The public law enforcement of this prohibition has been entrusted to the Authority for Consumers and Markets (ACM), which is, inter alia, empowered to impose administrative fines on both companies and individuals.

Governmental decisions, particularly those related to imposed fines, can lead to disputes. To resolve these disputes, elaborate procedures enshrined in the General Administrative Law Act (GALA) are applicable. In disputes between companies and the ACM, several stages can be distinguished. The company concerned may submit a ‘view’ (zienswijze) against the penalty report in which the infringement is established, after which an ‘objection’ (bezwaar) may be lodged against the fining decision. Subsequently, an appeal may be taken to the Rotterdam District Court, and finally, a further appeal may be filed to the Trade and Industry Appeals Tribunal (TIAT). In the first two procedures, the decisions are reviewed by the same authority that made them on the basis of the points raised by the addressed party. In the latter two procedures, an external court of law reviews the decision.

These procedures are designed as dispute-resolution procedures, and although ideally decisions of administrative bodies should only exceptionally result in legal proceedings, if such proceedings are initiated, they should have strong “filtering” effects. In theory, the objection procedure should seldomly be followed by judicial-appeal proceedings and, if it occurs, this appeal should rarely be followed by a further appeal. Research in areas other than competition law has shown this to be the case. For example, general studies showed that in only 10% of the cases the objection procedure is followed by a judicial appeal proceeding.²

Previous studies have shown that this is fundamentally different in cases regarding fining decisions for infringements of the cartel prohibition: in 70% of

¹ The terms cartel and anti-competitive agreements are used as synonyms in this study.

Other deviations from ‘the normal picture’ demonstrated by previous research are that the advisory committee in the objection procedure often advised the ACM to adapt its decision, the ACM frequently departs from the external advisory committee’s non-binding advice and the average percentage of annulled cartel fines is at least two times higher than is customary in administrative law.\footnote{Ibid; 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.}

Regarding the latter, almost 60% of ACM fining decisions led to an annulment by the District Court Rotterdam in the period 2003 – 2013.\footnote{Outhuijse and Jans 2014, n 4.} General literature described that this applies to around 30% of other Dutch administrative decisions, with only 10% of the cases actually being challenged in court.\footnote{See inter alia Boekema 2015, n 2, at 51; A.T. Marseille, Effectiviteit van bestuursrechtspraak. Een onderzoek naar het verloop en de uitkomst van bestuursrechtelijke beroepsprocedures (BJu, 2004) 19.}

Collectively, previous research has shown that the Dutch enforcement of the European and Dutch cartel prohibition is characterised by high rates of litigation and successful litigation. As a result, the legal proceedings for resolving disputes concerning imposed cartel fines seem to function differently than in other areas of administrative law. This observation attracted the researcher’s attention and formed the motive to dedicate a PhD thesis to analysing and explaining the high rates of (successful) litigation in Dutch anti-cartel enforcement and thereby the factors influencing those deviations. The proposed research therefore focuses on the following question:

Which factors influence the high rates of litigation and successful litigation against fines for anti-competitive agreements in the Netherlands?

The research question shows that the deviations of high percentages of (successful) litigation are the central focus of this research. In answering the central question, the research analyses the outcomes of the dispute-resolution procedures (objection procedure, the appeal procedure and the further appeal procedure), along with the factors which influence the outcome of these procedures. The phrase ‘outcome of the procedure’ covers two distinct elements. First, it regards whether a dispute remains unsolved. This is measured by whether the dispute continues after the...
procedure, for example through an appeal after the objection procedure and further appeal after the appeal procedure. Second, it concerns the consequences of the followed procedure for the fining decision, namely whether the fine is annulled and, more precisely, what the nature of the annulment is. For the latter, the research makes a distinction between full annulments – meaning that no fine can be imposed since the conditions for fine imposition are not fulfilled, for example because of insufficient evidence – and fine reductions. As the next section sets out, the outcomes of the procedures will be explained on the basis of an analysis of Dutch enforcement practice, two types of comparative research and interviews with legal practitioners, judges and officials from the competition authority.

The sub questions used to answer the main question are the following:

1. What are the outcomes of the dispute-resolution procedures in the case of Dutch fines for anti-competitive agreements?
2. To what extent are the percentages of (successful) litigation in the case of Dutch fines for anti-competitive agreements deviations that occur in the dispute-resolution procedures?
3. Which factors influence the percentages of litigation in the case of Dutch fines for anti-competitive agreements?
4. Which factors influence the percentage of successful litigation in the case of Dutch fines for anti-competitive agreements?

As follows from the main and sub questions, and as will be set out in more detail in following sections, the main objective of this research is twofold – to describe the outcome of the procedures and the deviations and to explain the deviations. In general, the research focuses neither on constructing a normative argument postulating that the deviations can or should be conceived as a problem, nor on formulating recommendations for the manner in which the deviations could be solved. The objective is generally far more modest and forms an attempt to explain which factors, including the nature of competition law or features of the jurisdictional setting for Dutch anti-cartel enforcement, such as the characteristics of the court procedures, influence the occurrence of those percentages.

2. Methodology and plan of approach

One of the first steps in carrying out the research was to make a full analysis of the outcome of the dispute-resolution procedures. Previous research has shown that
Rotterdam District Court, which has exclusive first-instance jurisdiction, annuls the ACM’s fining decisions on a relatively frequent basis. The conclusions from this study, and the fact that the District Court is not the highest court in these disputes, led to further questions that needed to be answered in the beginning of the research: Did one of the parties file a further appeal? What did the TIAT decide? Did the TIAT endorse the District Court judgment, and what were the consequences for the ACM fining decision? The first article of this PhD thesis answers these questions and will show that the percentages of further appeals and annulment of District Court judgments are also high. In many cases, either the ACM, the companies or both filed a further appeal to the TIAT, and, in several cases, the TIAT did not endorse the District Court judgment.

Furthermore, the research question was established on the assumed ‘deviations’ of high percentages of (successful) litigation on the basis of percentages mentioned in the general literature. However, a comparison had to be made with foreign competition authorities (NCAs) and other Dutch market supervisors to establish whether these ‘comparable’ actors also experience these rates. These comparisons provide interesting information since the foreign authorities enforce the same norm through different procedures, while the Dutch authorities enforce different norms in the same jurisdictional setting of decision-making and court procedures.

The comparisons serve two purposes. Firstly, it provides the opportunity to determine whether the Dutch trends of high proportions of (successful) litigation and the reasons for annulments can also be observed in the enforcement activities of various other enforcement authorities. In addition, the comparisons sharpen the direction in which influencing factors should be sought to explain the high percentages of (successful) litigation in the case of Dutch cartel fines. For instance, it is to be expected that should the deviations be caused by the nature of cartel fining decisions and the underlying law, then such problems should also manifest themselves in other Member States.

The initial step was to collect literature which describes percentages of litigation and the success thereof, which unfortunately was very scarce. For the NCAs, information on appeal and success rates in the case of fines imposed for infringements of the prohibition of anti-competitive agreements (101 TFEU and national provisions) was not available for most Member States. Existing literature mostly focuses on the enforcement by the European Commission. Moreover, although OECD reports and annual reports of the NCAs give general information on the percentages of (successful) litigation, the information often includes all types
of decisions and the percentages regarding cartel fines cannot be extracted. Coupled with the fact that many competition authorities and the European Commission could not provide this information, own research had to be carried out.

I was able to obtain data on the frequency and success of litigation in the 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. Although initially there was an attempt to collect this information for each EU Member State, this attempt has not been successful for every Member State. For some Member States, the author was unable to obtain a complete overview of decisions and judgments for a certain period, whereas for others, such as Luxembourg, the number of fining decisions is too small to draw valid conclusions about the rates of appeal and their success. This shows that the Member States were chosen mainly for practical purposes. Nevertheless, as the second article will show, the group of Member States form a great variation of Member States with differing jurisdictional frameworks of decision-making and court procedures, which allows for analysing the rates and setting out several trends and differences.

Further, for the internal comparison, fines imposed by four other market supervisors were analysed: the ACM for infringements of the Dutch Act on Enforcement of Consumer Protection and Telecommunications Act and the Netherlands Authority for the Financial Markets (AFM) and Dutch National Bank (DNB) for infringements of the Act on Financial Supervision. Also only limited literature was available for the internal comparison, and own research had to be conducted. This analysis was carried out by analysing the number of cases presented to and reviewed by the District Court Rotterdam and TIAT and the outcome thereof in the period 2012-2018.

In sum, a comparative analysis was made for nine countries and four other Dutch market supervisors. The research design for this phase is comparable to that used for the analysis of the Dutch practice – a literature study, an analysis of the number of decisions and subsequent court judgments to determine the rates of appeal and further appeal, and an analysis of the court judgments to determine the rates of annulments. The comparative law analysis was, however, more limited than the exhaustive account of the Dutch cartel enforcement practice. The results of the comparison with the nine other Member States are discussed in article 2. Similar to the internal comparison, the results of the external comparison are also included in the studies identifying the factors which influence the rates of

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8 See for example Mein 2015, n 2.
The identification of the influencing factors for both rates was split into two separate studies: identifying 1) the influencing factors for the high percentages of litigation (article 3 and 4) and 2) the influencing factors for the high percentages of successful litigation (article 5).

The results of the comparisons on the rates of litigation – which entail that the percentage of decisions appealed is much higher than in other areas of law in the Netherlands and in some Member States – justified questioning what motivates companies to file an appeal after receiving a cartel fine from the competition authority. Article 3 addresses this through interviews conducted with fourteen legal practitioners who regularly represented undertakings fined for anti-competitive behaviour in the last fifteen years. Although the answer seemed straightforward, since the fines and the likelihood of successful appeal are high, this research demonstrates that reasons other than the fining decision itself also influence the decision to file an appeal. This 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 the other mentioned EU Member States. The interviews and reasons for appeal are then discussed and placed in a theoretical framework. Finally, the data provided by the practitioners is verified by an analysis of recent Dutch cartel cases and conclusions are drawn.

Subsequently, in line with this, article 4 contains an analysis of the functioning of the objection procedure. This additional administrative procedure is meant for solving disputes between citizens and the government, so that lengthy, formal legal procedures before the administrative court can be avoided. This article analyses the functioning of the procedure in case of cartel fines on the basis of the relevant literature, a case analysis and interviews with parties involved. The article begins in section 2 with a description of the objection procedure applied by the ACM in cartel cases. Section 3 describes the experiences of fourteen legal practitioners and three officials from the ACM who were regularly involved in the decision-making and dispute-resolution procedures in cartel fine cases. The perceptions and experiences presented are then verified by an analysis of the decisions on objection which concludes the objection procedure in section 4. Section 5 explains the limited ability of the cartel objection procedure to resolve disputes on the basis of previous Dutch studies, which have shown that the success of the objection procedure, in the sense that the dispute was resolved, depends on the nature of the dispute, the reason that the objection is made and how the procedure is organised. In section 6, conclusion are drawn.

The aim of article 5 is to identify factors which influence the number of annulments in Dutch anti-cartel enforcement. The article starts by setting out
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the percentages of annulments and grounds for annulments, as established in
previous studies, in section 2. Subsequently, section 3 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 4 discusses the individual
factors, their assumed effect based on 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 identified in the literature can explain the Dutch
practice. Section 5 concludes that factors which 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.

Finally, the concluding chapter starts by summarising the results from the
previous articles and answers the central question of this thesis. Additionally,
the chapter discusses the relevance, implications and limitations of the research
outcomes, explores recommendations and ends with suggestions for possible
follow-up research.

3. Justification methodological choices

As is the case in most studies, before and during the study, methodological choices
were made of which the most important will be set out and justified in this section.

Choices concerning the research object

Due to the limited number of Dutch cartel fines and subsequent court judgments,
the analysis covers all cases since the establishment of the Dutch competition
authority in 1998 which consists of a total of 52 distinguishable cartel cases.
The chosen cut-off date is 1 January 2019. The judgments of the District Court
Rotterdam between 2003 and 2013 were already analysed in previous research.9
This study added the analysis of the case law of the District Court for the period
1 January 2013 to 1 January 2019 and the TIAT for the period 1 January 2003 to 1
January 2019 and the underlying documents.

9 Outhuijse and Jans 2014, n 4.
The research object are cartel fines. It is acknowledged that there is much heterogeneity among cases, and the economic misconduct may differ substantially from one case to another with regard to the type of behavior, the scope and duration of the behavior and the number of companies involved. Nevertheless, as a benefit, especially in recent years, the Dutch cartels mainly cover horizontal restrictions by object, which facilitates drawing general conclusions about factors influencing the rates of (successful) litigation. Fines imposed on natural persons were excluded due to the different nature of these fines which would make it difficult to draw valid general conclusions. For instance, it was expected that what motivates companies to file an appeal after receiving a cartel fine differs from what motivates a natural person to challenge a cartel fine in court and would thereby impact the outcome of the factors which influence the high rate of litigation. The same is possible for factors which influence the number of annulments.

Choices concerning the interviews

As aforementioned, in addition to the document analysis for analysing the Dutch practice, interviews were conducted with ACM officials, legal practitioners and judges who were regularly involved in cartel cases. The decision to interview practitioners, rather than, for instance, the companies, was made based on the assumption that practitioners have a clearer impression of the functioning of the procedures, play an important role in the decision on how to proceed as advisors of the company and are easy approachable.

The legal practitioners were selected as follows. First, an overview was compiled of the practitioners who assisted undertakings in public cartel-enforcement procedures over the past fifteen years on the basis of all the relevant court judgments. This yielded overview included a total of more than 70 practitioners. Subsequently, a shortlist of 20 practitioners was prepared by selecting the practitioners who were most frequently involved in these procedures, and finally one practitioner per law firm was selected for the interview on the basis of experience and availability. With regard to the ACM, interviews were conducted with three officials with years of experience with the decision-making and dispute-resolution procedures (objection, appeal and further appeal) in cartel fines case. The ACM decided which officials were interviewed. The judges were approached in a more informal setting and were selected on the basis of already existing contacts.

The interviews were semi-structured and included open-ended questions about the factors which influence the decision to lodge an objection, to file an appeal and to file a further appeal at the exclusively competent courts. They also involved
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how the companies and officials experienced the various decision-making and dispute-resolution procedures, the quality of the ACM’s fining decisions, and the quality of the judicial review performed by the specialised courts. The interviews were recorded with the interviewees’ consent, after which the interviews were transcribed and analysed.

Finally, the interviews were complemented by organising expert meetings with members of the stakeholder groups, such as the District Court Rotterdam, TIAT and ACM, in which the most important research findings were discussed.

*Choices concerning the comparisons*

As regards the external comparison, the choice of these countries was made on the basis of availability of sufficient decisions and their transparency, as well as the transparency of whether appeals and further appeals were initiated and the outcome of those procedures. Sufficient data was obtained for nine Member States, allowing for their appeal and success rates to be examined. Language barriers had to be overcome when researching certain Member States, for which invaluable collaboration was held with a number of student assistants and national experts from the NCAs, judiciary and legal profession, making this study possible.

As concerns the internal comparison, the choice of these Dutch market supervisors (ACM, AFM and DNB) and these type of fines (consumer protection, telecommunication and financial market supervision) were made on the basis of the degree of comparability with cartel fining decisions. These types of fines bear interesting similarities with anti-cartel enforcement: they concern market supervision, concern high fines imposed on companies by independent authorities, have close connections with European law, consist of only a limited number of decisions per year and are reviewed by the District Court Rotterdam and the TIAT. The choice was inspired by the advice given by two judges from the Rotterdam District Court, who were questioned on which areas of law they experienced as comparable to cartel fines from a judicial perspective.

A common question raised is why a comparison is not made with fines imposed for abuse of dominance. The answer is that such fines are hardly imposed by the Dutch competition authority in recent years, which would make the comparison an empty exercise.
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*Choices concerning the outcomes*

The rates of (successful) litigation in this research are mainly calculated per case, which means that only one of the fines of the undertakings is annulled or all the fines are annulled. However, a partial annulment of a fine for one of the undertakings is sufficient to be counted as annulment. The same method is applied for the litigation rate. In several parts of the research, the outcomes are also reviewed per company to supplement the limitation following from this percentage calculation method. Further justifications are provided in the respective articles.

Due to the diverse nature of the annulments, the research divides the annulments into three broad categories: fine imposition, fine amount and reasonable time. The latter two categories both lead to reductions in the fine, which are the result of defective fine calculation for the former and exceedance of the reasonable time as under Article 6 European Convention of Human Rights for the latter. The ‘fine imposition’ category is different: in such cases, the court has concluded that conditions for imposing a fine were not fulfilled, for reasons such as insufficient evidence, insufficient economic analysis or insufficient reasoning. The ‘fine amount’ category is further subdivided in 1) incorrect basis for the fine (incorrectly calculated turnover), 2) incorrect classification of the offence and incorrect severity factor, 3) disproportionately high fines, and 4) defects in the grounds for the amount of the fine.

4. Relation research to previous research

The aim of this research is to the explain the high percentages of litigation and successful litigation. In order to achieve this, the research may partly rely on previous studies. Studies have been published on, for example, the theoretical framework and empirical data. In addition, new information has to be collected and new theories have to be build.

For example, a model for examining appeal behaviour could be borrowed from previous Dutch and international literature. Previous research has shown that two perspectives are of particular interest when analysing appeal behaviour, which are ‘the calculating actor’ and the ‘involved actor’. The two perspectives can be further divided into four theories: the rational choice theory, the theory of bounded rationality and the theories of procedural and distributive justice. On the basis of the rational choice theory, the actor is a calculating entity which weighs the costs and benefits of several options and then decides what course of action to take. According to the theory of bounded rationality, the rationality of the calculating entity is bounded because of environmental factors, such as lack of information...
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... or time. The theories of procedural and distributive justice provide an alternative which entail 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. This study will analyse and test this theoretically founded and widely applicable model to discover what motivates companies to challenge cartel fines in court and thereby identify the factors influencing the high rate of litigation on basis of interviews with stakeholders and case-analysis. The interviews with the involved stakeholders will be an important addition to the competition literature, as many previous studies work with assumptions instead of questioning the involved parties.

Further, for analysing the success of the litigating companies and identifying factors which influence the outcome of cases, many studies are available which describe factors influencing the outcome of cases. However, a model as existing for analysing the appeal behaviour is not available for the analysis of factors influencing high rates of successful litigation. Existing literature either focused on case and party characteristics as determinants for successful appeals, or the process of judicial decision-making and factors which influence this process. This study combines both perspectives in order to explain the occurrence of the annulments and factors influencing this as accurately as possible. The addition to the literature is the development of a widely applicable model which can be used in other studies to examine factors influencing the rate of successful litigation.

Moreover, to place the Dutch percentages in perspective and to analyse whether the high percentages of (successful) litigation and the reasons for annulments can also be observed in the enforcement activities of various enforcement authorities, this study can partly rely on previous studies analysing these rates in the Netherlands in other areas of law. For example, general literature described that around 30% of other Dutch administrative decisions are annulled, with only 10% of the cases actually being challenged in court. To explain the high rates of (successful) litigation, also new empirical data has to be collected. In addition to the outcomes of the dispute-resolution procedures in cartel cases which has to be collected and analysed to explain the rates, data regarding the enforcement by other NCAs and other Dutch market supervisors has to be collected to answer, amongst other, the question whether the high levels of (successful) litigation can be explained by either the nature of cartel fines or Dutch features of competition law enforcement. This data is currently missing in the literature.

With regard to competition law literature, in contrast to the literature on European-level enforcement, in which the practice of challenging European cartel fines and the success of such challenges are described in detail, empirical assessment of challenges to national cartel fines and their success rate is limited to...
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non-existent. This while a substantial number of cartels in the European Union are detected and enforced by the NCAs and the importance of NCA effectiveness is emphasized. Current discussions are limited as they focus on the number of enforcement activities, particularly the number of imposed fines, their size and deterrent effect, while the empirical assessment of the court procedures in which those fines were challenged and the consequences thereof have received minimal attention. This research is the first empirical assessment of the litigation and success rates of cartel fines cases in ten European Member States. Public policymakers, such as the European Commission, could benefit from this data gathered to analyse the NCAs’ effectiveness. Moreover, the analysis is valuable for future research, since the depiction of these trends and differences can form the basis for further research to explain national rates, trends and developments – as this research does for the Netherlands.

Finally, in general, the research is a valuable addition to the current literature because it can provide greater insight into the relationship between several factors, such the nature of a law and a procedure’s characteristics, and the (successful) litigation rates. This knowledge is valuable beyond the field of Dutch competition law, for example, in considering similar phenomena in other areas of law, or where a government considers deploying the instrument of administrative fines, or designing administrative procedures in other areas of law.

10 The effectiveness of domestic enforcement has been subject to extensive review and debate, which have recently culminated in the proposal for the ECN+ Directive. Directive (EU) 2019/1 of the European Parliament and the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.