Effective public enforcement of cartels

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Chapter three
Effective public enforcement of cartels: Rates of challenged and annulled cartel fines in ten European Member States

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1. Introduction

A substantial number of cartels in the European Union are detected and enforced by the national competition authorities (NCAs). The effectiveness of domestic enforcement has been subject to extensive review and debates, which have recently culminated and resulted in the proposal for the ECN+ Directive. The current discussions are limited as they focus on the number of enforcement activities, particularly the quantity of imposed fines and their height and deterrence. An empirical assessment of the court procedures in which those fines were challenged and the consequences thereof received minimal attention, even though the necessity of such an empirical assessment can be clearly illustrated by previous studies on the Dutch enforcement practice.

The anti-cartel enforcement in the Netherlands is characterized by high percentages of litigation and successful litigation. Litigation has been brought against over 70% of Dutch cartel fine cases and in current years, the figure has increased to 90%, which is considerably higher than normal figures for Dutch administrative disputes. In addition, the Dutch courts have either partly or fully annulled the fining

1 The terms cartel and anti-competitive agreements are in this contribution used as synonyms.
3 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.
4 The Commission seeks to strengthen the effectiveness of the NCAs’ enforcement by providing a minimum of investigative and sanctioning powers via the ECN+ Directive. One of the aspects of the Directive and underlying documents is that action should be taken to guarantee that NCAs can impose deterrent fines on companies. See: European Commission, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, (COM(2014) 453).
6 A. Outhuijse, The effective public enforcement of the prohibition of anti-competitive agreements: Why do undertakings in the Netherlands appeal?, 13 Competition Law Review 163-186 (2018). This study has also set out that previous Dutch research showed that, generally, administrative decisions other than cartel fining decisions are followed by judicial-appeal proceedings in only 10% of cases. Also in other areas of economic law in which also high fines are imposed on companies, such as banking supervision and the supervision of financial markets, only a limited number of companies submit their cases for judicial review.
decision in almost 60% of the cases decided between 2003 and 2013. An analysis of judgments from 2013 onwards showed that the Dutch courts refrained from revising one or more fining decisions in only 2 out of 18 cases in this period, leading to fine reductions or full annulments in the other 16 cases. The Dutch example, more in particular the difference between the fines as issued by the NCA and those remaining after court review, shows that the mere reference to how many cases are sanctioned paints a distorted picture and an analysis of the rates of litigation and successful litigation is indispensable for veraciously assessing the NCA’s effectiveness.

In light thereof, this article analyses the frequency of challenged and annulled cartel fines and the reasons for annulments in 10 Member States and the European Union. Relevant figures are presented for Belgium, Bulgaria, Croatia, Finland, France, Germany, Italy, the Netherlands, Sweden and the United Kingdom. This group of Member States, as will be discussed in detail in the following sections, includes an interesting variation of older and newer Member States, which all enforce the similar norm through differing jurisdictional frameworks of decision-making and court procedures.

The review of these figures serves 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 competition authorities, and thus reflect on and provide insight into the effectiveness of the authorities. In addition, this analysis is relevant as the observed appeal and annulment rates in the Netherlands gave rise to the question whether the high levels of litigation and successful litigation can be explained by either the nature of cartel fines or Dutch features of competition law enforcement. By assessing whether the appeal and annulment rates in other Member States are comparable or not, and for which reasons, this analysis offers first indications on the answer to the aforementioned question.

This article is a valuable addition to current literature as it is a first empirical assessment of the frequency of (successful) litigation in cases of cartel fines in 10 Member States. In contrast to the literature on European level enforcement, in which the practice of challenging European cartel fines and the success of such challenges

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7 Outhuijse, supra n 5; Outhuijse and Jans, supra n 5.
8 Outhuijse, supra n 6.
9 The empirical study of Veljanovski also showed a large difference between the fines as issued by the OFT and those remaining after court review. The author concludes, amongst other, that ‘in aggregate the OFT’s fines were reduced by 56% on appeal to the CAT’. See C. Veljanovski, A Statistical Analysis of UK Antitrust Enforcement, 10 Journal of Competition Law & Economics 711–738 (2014).
are described in detail, empirical assessment of challenges to national cartel fines and their degree of success is limited to non-existent. OECD reports and annual reports of the NCAs often provide some statistics about both the frequency of litigation and success rate of the competition authorities, but this information often includes all types of decisions, such as antitrust fines, antitrust commitments, merger decisions and rejection of complaints. Therefore, the rates of challenged and annulled national cartel fines could not be established. As mentioned, other studies, such as the reports underlying the ECN+ Directive, focus on the quantitative assessment of fines imposed and the value thereof, which they determined at the moment of fine imposition. The article therefore presents data which has not been covered in the literature before. Public policy makers, such as the European Commission, could benefit from this data gathered in order to analyze the effectiveness of the NCAs. 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 the percentages, trends and developments – as the author is doing for the Netherlands.

This article is structured as follows. Section 2 discusses the available literature on the European level, in which the practice and success of challenging European cartel fines during various time periods are described. The different studies show, among others, the impact which the choice of methodology has, as well as the significant


trends and changes which the European enforcement practice has undergone through the years. This discussion allows for a comparison with the assessment of national practice, and a review of whether the trends recognized on a national level originate from or may be comparable with those at European level. Section 3 presents the quantitative assessment of the domestic cases to analyze the number of cases in which cartel fines were challenged in court and the consequences thereof. Moreover, the section sets out the methods employed to gather and present this data and the methodological choices made in the process of selecting the Member States. Section 4 offers further insight into each of the 10 Member States, including information on the jurisdictional framework of anti-cartel enforcement and the nature and type of decisions, procedures and annulments. Finally, general trends and differences amongst the Member States will be highlighted before drawing conclusions in Section 5.

2. Relevant literature regarding the European enforcement

Given the dearth of scholarship on the domestic practice, it is useful to consider studies describing the enforcement of the cartel prohibition by the European Commission, amongst others, to review whether domestic trends are comparable with those at the European level. The practice of challenging European cartel fines and the success of such challenges are described in several studies considering various periods, sometimes even reaching back to the 1950s.12 These studies,
particularly when read together, provide exhaustive information on the number of appeals and their successfulness; they sometimes also offer indications of the incentives for challenging fines, the factors which distinguish undertakings that go to court from those which do not, and cases and pleas which are (un)successful. In their two studies, Carree, Günster and Schinkel considered the longest period – 1957 to 2004 – in their analysis of European Commission fines and the subsequent litigation. These studies found that 54% of cartel infringement decisions were appealed. While the authors provide figures of the proportion of cartel fines appealed for the entire period, the research also shows that different periods can be distinguished regarding the frequency of cartel fine challenges. From the beginning of European antitrust enforcement and until the 1990s, fines were usually challenged in fewer than half of the cases in which they were imposed. This number rose to the mid-2000s, with some years between 1998 and 2004 experiencing an appeal rate greater than 90%. The recent 2016 study of Hellwig and others showed a decrease in litigation in recent years and the relationship of this phenomenon with an increase in settlements. The Commission has settled in almost 70% of cases since 2010 and, according to researchers, the use of settlements lowers the incidence of litigation up to 55%.

The literature has also extensively discussed the success of appeals. In 1996, Montag stated that defects in procedure or unsubstantiated findings of facts both led to a high proportion of successful appeals in the 1980s and early 1990s, and even spoke of a “crisis in cartel infringement procedure”. By contrast, other researchers expressed that “the Court of Justice had been ‘soft’ on the Commission in reviewing

14 *Inter alia* Hüschelrath and Smuda, *supra* n 12; Günster, Carree and Schinkel, *supra* n 12; Camesasca and others, *supra* n 12; Paemen and Blondeel, *supra* n 12.
15 Günster, Carree and Schinkel, *supra* n 12; Carree, Günster and Schinkel, *supra* n 12
16 Günster, Carree and Schinkel, *supra* n 12.
19 Hellwig, Hüschelrath and Laitenberger, *supra* n 12; see also Geradin and Sadrak, *supra* n 12.
the latter’s handling of competition cases”. Partly criticizing the work of Montag, Harding and Gibbs’ analysis of the outcome of cartel appeals occurring between 1995 to 2004 indicates a lower rate of total success for cartel appellants, namely less than 10%. In addition, they set forth that the majority of fine annulments decided over the first fifteen years by the Court of First Instance concern “insufficiently proven episodes of cartel involvement and consequent small reductions to the fines”. The same is presented by Chalmers and others for the period 1998 to 2002. According to their figures, 70% of the appeals were successful in securing a partial fine reduction, which were mostly based on the fact that “the Commission failed to prove precisely the duration of the infringement”. Harding and Joshua further mentioned, with regard to cartel cases, that “the challenge of the quantum of fines has become a primary focus of appeals”. In a 2013 study, Camesasca and others noted, as more widely reported in the literature, that parties pleas against Commission cartel fines most often aim at obtaining a fine reduction rather than a full annulment of the fine and that these types of pleas are also most successful. As the pleas of the parties define the scope of the dispute and the courts will not review ex officio all parts of the decision, the scope of the pleas influence the outcome of the case and consequently the number and type of annulments. The study of Paemen and Blondeel analyzing the data between 2005 and 2017 found that applicants tend to raise as many arguments as possible in their application to the European courts. Regarding the success of the appeal, they conclude that more than one-third of these appeals resulted in the General Court reducing the amount of the fine, whereby 12% of the one-third concerns a full annulment.

The analysis of the European Commission’s practice illustrates that the percentages of litigation and successful litigation are fairly low in recent years, although this was clearly different in the past. As described by the studies, the

22 C. Harding and J. Joshua, Regulating Cartels in Europe, 189-190 (Oxford: OUP 2010) and the literature mentioned there.
24 Ibid.
26 Ibid.
27 Harding and Joshua, supra n 22, at 216.
29 Paemen and Blondeel, supra n 12.
fluctuation over time is probably influenced by several factors, such as specific case and party characteristics which differ over time. The studies further show some ambiguity in the results and thereby the importance of being transparent in how the percentages are calculated before drawing conclusions. Accordingly, the next section presents the rates of (successful) litigation in the 10 Member States and the methodological considerations, before the article delves into the rates of challenged and annulled cartel fines in the aforementioned Member States, the reasons for annulments and the developments per Member State in Section 4.

3. The rates and methodological considerations

This study considers the rates of challenged and annulled cartel fines in Belgium, Bulgaria, Croatia, Finland, France, Germany, Italy, the Netherlands, Sweden and the United Kingdom. As mentioned, the data on these rates could not be extracted from the OECD reports or the annual reports of the NCAs, nor could they be provided by the European Commission and most of the NCAs on request. Therefore, an attempt was made to research the litigation behavior of each EU Member State by comparing their fining decisions and court judgments. The method for the collection of the fining decisions and judgments of the competent courts differed per Member State, but mostly consisted of searching through the national databases of the competition authority and/or competent courts. The search was made easier for a few Member States because their NCAs provided a perfect overview of their fining decisions and court judgments. Sufficient data was obtained for 10 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. For the omitted 18 Member States, the author was either unable to obtain a complete overview of decisions and judgments for a certain period or the number of fining decisions was too small to calculate valid rates. This shows that the Member States discussed in this paper were chosen for mainly practical purposes. Nevertheless, the group of Member States forms a great variation of Member States with differing jurisdictional frameworks of decision-making and court procedures, as the next sections will set out. The results regarding the rates of (successful) litigation are found in the following table.

30 Inter alia Hüschelrath and Smuda, supra n 12; Günster, Carree and Schinkel, supra n 12.
31 In Luxembourg for instance, the NCA has only made 3 fining decisions between 2009 – 1 July 2017.
## Rates of challenged and annulled cartel fines in ten European Member States

<table>
<thead>
<tr>
<th>Member State</th>
<th>Start research period</th>
<th>Number of cases</th>
<th>Appeal rate</th>
<th>Annulment rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>1 January 2001</td>
<td>9</td>
<td>60% (3 of 5 cases)</td>
<td>100% (3 of 3 cases)</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>1 January 2002</td>
<td>23</td>
<td>78% (18 of 23 cases)</td>
<td>56% (10 of 18 cases)</td>
</tr>
<tr>
<td>Croatia</td>
<td>1 October 2010</td>
<td>13</td>
<td>92% (12 of 13 cases)</td>
<td>42% (5 of 12 cases)</td>
</tr>
<tr>
<td>Finland</td>
<td>1 January 2003</td>
<td>15</td>
<td>60% (9 of 15 cases)</td>
<td>50% (3 of 6 cases)</td>
</tr>
<tr>
<td>France</td>
<td>1 January 2009</td>
<td>56</td>
<td>61% (34 of 56 cases)</td>
<td>50% (17 of 34 cases)</td>
</tr>
<tr>
<td>Germany</td>
<td>1 January 2001</td>
<td>53</td>
<td>30% (16 of 53 cases)</td>
<td>17% (1 of 6 cases)</td>
</tr>
<tr>
<td>Italy</td>
<td>1 January 2010</td>
<td>41</td>
<td>78% (32 of 41 cases)</td>
<td>63% (20 of 32 cases)</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>1 January 1998</td>
<td>52</td>
<td>81% (42 of 52 cases)</td>
<td>86% (36 of 42 cases)</td>
</tr>
<tr>
<td>Sweden</td>
<td>1 January 1998</td>
<td>15</td>
<td>53% (8 of 15 cases)</td>
<td>63% (5 of 8 cases)</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1 January 2002</td>
<td>37</td>
<td>35% (13 of 37 cases)</td>
<td>67% (8 of 12 cases)</td>
</tr>
</tbody>
</table>

A first analysis of the figures reveals that the Netherlands is not unique in having high percentages of (successful) litigation, although the Netherlands is among the highest percentages for both the appeal and the annulment rate. In the majority of these countries, the appeal rate is above 50%, with percentages ranging from between 50 and 70% (Belgium, Finland, France and Sweden), between 70 and 90% (Bulgaria, Italy and the Netherlands) and over 90% (Croatia). The United Kingdom and Germany are the only countries of those analyzed in which the appeal rate is below 50%. The annulment rate in the majority of these countries is above 50%.

32 The percentages for Sweden and Finland relate to the percentages of the second instance court since the first instance court imposes the fines and not the administrative authority.
33 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.
34 Two cases are still pending at moment of writing and one case was a rejected appeal by a third person.
35 The companies withdrew their appeal in 10 cases.
36 One case is still pending at the moment of writing.
Chapter 3

with a range from 50 to 100% – 50-60% in Bulgaria, Finland and France; 60-70% in Italy, Sweden and the United Kingdom; 80-90% in the Netherlands; and 100% in Belgium.\textsuperscript{37} Only Germany has a successful appeal rate which is, in the sense of complete annulments or fine reduction, considerably low (17%). The figure is higher in Croatia, namely 40%, and it is interesting to note that all the annulments were made in the most recent judgments, as will be shown in the next section.

The figures only derive from cases in which the NCA imposed a cartel fine.\textsuperscript{38} The appeal and annulment rates are calculated per case, which means that either only one or all of the fines of the undertakings are annulled, but a partial annulment of a fine for one of the undertakings is sufficient to be counted as annulment. The same is true for the appeal rates. Annulment also includes cases in which the court concluded that no fine could be imposed, for example due to insufficient evidence or insufficient economic analysis, and cases in which the annulment is limited to a reduced fine. The calculation of the rates and the differences between them are elaborated in the individual Member State discussions below. The rates of further appeal and the conclusions by the higher court are also mentioned in the individual subsections in case of interesting findings relating to decisions by the lower courts.

Readers who were undaunted by the table will have noticed that the starting date of data collection differs per Member State. The level of enforcement of cartel cases is very unevenly spread in the EU and therefore the period needed to draw valid conclusions differs 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. For others, such as Italy and France, sufficient cases could be extracted in a shorter period because of the large number of cases decided. This was also efficient given the context of the author’s limited time and resources. For example, analyzing the appeal and annulment rates in France from as far as 2000 instead of 2009 would have meant analyzing an additional 154 cases. This concerns 154 cases in which fines were imposed following a breach of Article 101 TFEU/L.420-1 \textit{Code du Commerce} and 80 cases in which one or more undertakings

\textsuperscript{37} The mentioned percentages are limited to the cases challenged in court. To get a correct impression, the annulments should however be viewed in light of the total number of decisions. As the table shows, the appeal rates differ for the various Member States considered. Taking those percentages together and expressing the number of annulments as part of the total number of cartel fines yields the following numbers: Germany 0.02%, United Kingdom 11%, Belgium 33%, France 33%, Croatia 38%, Bulgaria 39%, Italy 50%, the Netherlands 69%, Sweden 72% and Finland 73%.

\textsuperscript{38} In Sweden and Finland, the first instance court has the competence to impose fines and not the NCA.
filed an appeal to the first instance court. The closing date of the research period for all Member States is 1 July 2017.39

Aside from the total number of cases, the types of decisions also differed significantly. For instance, some Member States, such as Germany, seem to focus on the enforcement of vertical cases. Alternatively, other Member States, such as the Netherlands, rarely prosecute vertical cases or, as was the case in Sweden, for instance, none at all via fines. In addition, while some Member States enforce decisions of associations of undertakings, this is not done in others. Moreover, whereas in some Member States, such as Italy, the cases are quite often based on national and European prohibition, others solely base enforcement on national prohibition. Finally, the manner in which cases are initiated differs per Member State. In some Member States, such as the United Kingdom, most cases start with a leniency applicant. Yet, in others, such as Bulgaria, no undertaking has ever applied for leniency, and resultantly all cases were initiated ex officio. These are a few examples of the differences between the Member States which will be elaborated – with further distinctions added, such as those between national court practices – in the discussion of the individual Member States in the subsequent sections.

4. Rates, nature of annulments and developments individual Member States

4.1 Belgium

The Belgian cartel prohibition is laid down in Book IV of the Code of Economic Law (CEL) and is enforced by the Belgian Competition Authority (BCA). Prior to legislative reform in 2013, the Belgian Competition Authority consisted of three separate bodies, with the decision-making body being a tribunal.40 To enable more efficient enforcement of competition law,41 the Belgian legislator adopted the Belgian Competition Act of 2013, which transformed the BCA into a single

39 Extending to a later date, for example 1 October 2018, would for the Member States with a ‘small’ amount of cases not make much difference. It would result in zero extra decisions for, for example, Sweden and Belgium. The end date of 1 July 2017 also has the benefit that for many cases is known whether the case was challenged in court and what the result of the procedure was.
independent administrative authority.\textsuperscript{42} It currently consists of two internal and subordinate arms, namely an investigative (l’Auditorat) and a decision-making arm (Collège de la Concurrence).

The BCA can impose administrative fines for infringements of the Belgian or European cartel prohibition, starting at EUR 10,000. However, the number of cases in which the BCA has imposed a cartel fine is very limited, namely only 9 cases.\textsuperscript{43} Fines were imposed in 6 out of those 9 cases after the 2013 reform.\textsuperscript{44} More specifically, in 4 out of 9 cases, fines were imposed between 2015 and 2017. It is interesting to note that the BCA concluded a settlement with the undertakings in all 4 of these cases.\textsuperscript{45} The opportunity to agree on a settlement with undertakings has been provided for in Belgian law since 1 September 2013.\textsuperscript{46} The settlement procedure closely resembles the European Commission’s procedure; the company must recognize the violation, its responsibility for the violation and the duration of the violation and accept the proposed fine in exchange for a 10% fine reduction.\textsuperscript{47} What is unique to the Belgian settlement procedure is that, in contrast to the other Member States, appeal is not possible after a settlement.\textsuperscript{48} Therefore, undertakings which settle waive their right to file an appeal.

According to Article IV.79 CEL, fines imposed via the regular procedure can be appealed to the exclusively competent Brussels Court of Appeal (Hof van Beroep/Cour d’Appel). Following the 2013 reform, there are two separate chambers in the Court of Appeal which deal with appeals in competition law cases, representing the

\begin{footnotesize}


\textsuperscript{46} Article IV.54 (2) Economic Law Code (Wetboek van economisch recht).

\textsuperscript{47} Article IV.53 Economic Law Code.

\textsuperscript{48} Article IV.57 (3) Economic Law Code.
\end{footnotesize}
two major language groups in Belgium: French and Flemish. Only one bilingual chamber had such competence under the 2006 Act. Another significant change introduced in 2013 was an adversarial style of judicial review, which opened the possibility for the NCA to be a defendant during court procedure. The Court of Appeal has the competence to review both questions of law and fact. In 3 out of 5 cases in which fines were imposed via the ordinary fining procedure, at least one of the undertakings filed an appeal to the Brussels Court of Appeal. All cases can be considered successful – an annulment of the fine was achieved in all three cases. Reasons for annulments have included determinations that the companies’ behavior had not infringed competition law rules and the infringement of the rights of defence, such as the ne bis in idem principle in the *Flour* case.

### 4.2 Bulgaria

The law regulating the cartel prohibition in Bulgaria is the Law on Protection of Competition of 2008 (LPC) which replaced the LPC of 1998. Article 15(1) LPC is the national equivalent of Article 101(1) TFEU, and the breach of it is seen as an administrative offence. Article 3 LPC names the Комисия за защита на конкуренцията (Commission for the Protection of Competition (CPC)) as the enforcer of the LPC and therefore the responsible authority for the enforcement of the cartel prohibition. Since 2002, there have been 23 cases in which the CPC...
imposed fines for the infringement of the cartel prohibition. Fines had been imposed prior to 1 January 2007 – the date of Bulgaria’s accession to the European Union – in 4 cases. It is interesting to note that the Bulgarian enforcement system has had a leniency application programme since 2009, but this has so far never been applied for.

Article 64 LPC states that the Supreme Administrative Court (SAC) is the only court authorized to adjudicate a review of the CPC’s decision. The Administrative Procedure Code regulates this judicial review procedure. The possible grounds for appeal are (1) lack of competence, (2) non-compliance with the required form, (3) material breach of administrative procedural rules, (4) contravention of the provisions of substantive law and (5) non-compliance with the objectives of the law. The SAC is both the first and second instance court which reviews decisions issued by the CPC. The difference between the first and second appeal is that


62 Botta and Svetlicinii, *supra* n 60 at 287. There are amendments in the LPC which will come into force on 1 January 2019 regarding the first court instance. Accordingly, the first instance court will be Sofia Administrative Court and second and the final instance court will be SAC-3.
the case is initially heard by a three-member panel (SAC-3), and a further appeal is heard by a five-member panel (SAC-5). The SAC-3 may declare the CPC's decision void, annul the CPC's decision in whole or in part, amend the CPC's decision or uphold the CPC's decision and reject the appeal. The difference between declaring a decision null and annulling it is that in the former situation, the CPC did not have competence to act, and in the latter, the CPC made errors in fact-finding, admitted procedural irregularities or interpreted the law incorrectly. The SAC-5 may declare the ruling decision of the three-member panel invalid or inadmissible, annul the decision of the SAC-3 in whole or in part, or uphold the decision and reject the appeal. Possible grounds for further appeal are limited to nullity, inadmissibility and illegality.

Article 64 LPC states that the CPC's decisions can only be appealed against within 14 days of the publication of the decision and is the shortest time limit among the Member States. Nonetheless, this time limit can be satisfied by merely informing the court of the intention to appeal a decision. Article 163(2) Administrative Procedure Code states that only after the appeal is declared admissible and the parties have received the rapporteur judge's transcript, another 14 days period begins within which the parties must present their evidence. The court fees in Bulgaria are considerably low: The fee for appealing administrative acts is BGN 50 (around EUR 25) for legal persons and BGN 10 (around EUR 5) for natural persons. The short period to litigate the decision does clearly not hinder the filing of appeals, since the rates of appeal and further appeal are very high. Of the 23 CPC cases, an appeal was filed for 18 cases, which represents 78% of all cases. The further appeal rate is 94% and is therefore the highest among the 10 Member States studied. In only one case, no further appeal was filed.

63 Articles 165 and 217 Code of Administrative Procedure.
64 Article 172 Code of Administrative Procedure.
65 European Commission, supra n 49 at 45; Botta and Svetlicinii, supra n 60.
66 Article 221 Code of Administrative Procedure.
67 Article 209 Code of Administrative Procedure.
68 European Commission, supra n 49 at 23-26.
69 Article 149 Code of Administrative Procedure.
70 Article 163 Code of Administrative Procedure.
Of the 18 cases which appeared before the SAC-3, the court annulled the fining decisions in 10 cases. Most annulments were decided on grounds that the CPC had provided insufficient evidence of the anti-competitive behavior or insufficient evidence that the behavior was intended to restrict competition. The annulments decided by the Bulgarian court only concern complete annulments in the sense that the authority was found to be unable to impose a fine under these circumstances and did not have the chance to rectify it. In other words, none of the annulments involved a reduction of the fine. In some cases, for example the Poultry Breeders case, the parties had requested a fine reduction but were refused by the SAC-3 because the SAC-3 found that the fines imposed by the CPC were in line with the current CPC Fining Guidelines and were not in breach with any principle, such as the principle of proportionality. An abuse of dominance case, however, illustrates that the SAC-3 has the power and willingness to independently reduce fines. In this case, the SAC-3 reduced the fine from BGN 300,000 (EUR 150,000) to BGN 50,000 (EUR 25,000), because the SAC-3 held that only a small number of consumers were affected by the behavior. Finally, the SAC-3 confirmed the fining decisions in 8 cases. As mentioned, the further appeal rate is very high. In the majority of cases, namely 14 of 16 cases, the SAC-5 confirmed the judgment of the SAC-3. One case was pending before the SAC-5 at the moment of writing.

4.3 Croatia

Croatia represents the latest addition to the European Union, having joined on 1 July 2013. The Croatian Competition Agency, Agencija za zaštitu tržišnog natjecanja (AZTN), had already been established in 1995 as the enforcer of competition law. Article 8 Croatian Competition Act (CCA) embodies the Croatian cartel

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72 Judgment No. 10568 dated 15.09.2010. See A. Svetlicinii, The Bulgarian Supreme Administrative Court upholds the decision of the competition authority establishing the existence of a cartel on the market for poultry meat and eggs (Bulgarian Poultry Breeders Union), e-Competitions Bulletin September 2010, Art. N° 32777 (2010); Botta and Svetlicinii, supra n 60.

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prohibition. Pursuant to Article 9 CCA, the AZTN is competent to impose fines for infringements of the cartel prohibition. Under the old Competition Act in force before 2010, the competition authority was not competent to impose fines itself, but had to petition the Minor Offences Court of Zagreb therefore. Since receiving the competence to impose fines on 1 October 2010, AZTN has used this competence in 13 cases against undertakings regarding anti-competitive agreements. It is interesting to note that these cases include quite a high proportion of vertical cartels, especially compared to most of the other countries considered in this article. For example, 4 out of 13 cases concern resale price management.

Pursuant to Article 67(1) CCA, no appeal is allowed against decisions of the AZTN, but the involved party may bring a claim before the Administrative Court of the Republic of Croatia within 30 days from the receipt of the decision. The claim is decided by a panel of three judges, considering the following points in the decision: (1) misapplication of substantive provisions of competition law, (2) manifest errors in the application of procedural provisions, (3) incorrect or incomplete establishment of the facts in the case, and (4) inappropriate fines and other issues contained in the decisions of the Agency. Claims against the decisions of the AZTN are within the exclusive competence of the High Administrative Court (VUS). The analysis of the decisions and court judgments shows that a claim is brought before the VUS in 12 of 13 cases, thereby representing more than 90% of the cases.

Considering the research period, the VUS annulled fines in 5 cases. The court completely confirmed the decisions in all other cases. It is interesting to note that all the annulments occurred in cases from 2014 onwards, which could indicate a development. In 2 cases, the VUS concluded that the alleged behavior did not amount to an infringement of the prohibition of anti-competitive agreements. In one case,

74 Croatian competition Act 30 June 2009, no. 79/09. See in general about the Croatian enforcement system European Commission, supra n. 49.
76 Article 14(2) Administrative Disputes Act, Narodne Novine no. 20/10, 143/12, 152/14, 94/16; Article 67(1) Competition Protection Act, Narodne Novine no. 79/2009, 80/2013. European Commission, supra n 49 at 62-63.
77 Article 33 of the Administrative Disputes Act.
78 VUS 26 July 2016, UsII-22/16-11 and VUS 3 April 2015, UsII-70/14-6.
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the VUS ruled that the AZTN provided insufficient evidence to prove undertaking’s alleged price fixing or concerted practice.79 In the final case, the VUS reduced the fine to a symbolic level because of the financial circumstances of the undertaking.80

4.4 Finland

In Finland, the enforcement of the cartel prohibition is the shared responsibility of the Finnish Competition and Consumer Authority81 (FCCA) and the Market Court.82 While investigatory powers belong to the FCCA, it must request the Market Court to impose a fine. This request includes a proposal for the calculation and height of the fine. The Market Court Act states that the judges of the Court are required to have a specialization in competition or commercial law, and a judge is appointed to a case based on the subject matter.83 Moreover, the Act requires that the Court should have expert members who participate in the hearings. These experts must also have expertise in competition, procurement, economics, business or financial affairs.84

Within the 2003 – 2017 period, the FCCA had referred 15 cartel cases to the Market Court, which accepted the fine requested for by the FCCA in a total of 3 cases.85 In 4 cases, the Market Court chose not to impose a fine: In one case the Market Court did not find a violation,86 in 2 cases the court ruled that the violation was only minor and therefore did not consider a fine appropriate,87 and one case was deemed time barred.88 Finally, the Market Court imposed a lower fine than requested by the FCCA in 8 cases. Differences in fine-calculation methods often formed the reason to impose a lower fine. For instance, in one case, the Market Court assessed the extent of parties’ involvement separately, contrary to the FCCA. In 2 other cases, the Market Court ruled that the fine must be adjusted to the companies’ annual turnover, and in another it ruled that considering the duration,
profit and extent of the price recommendation, a lower fine had a sufficient preventive and punitive effect.\textsuperscript{89}

After receiving a judgment from the Market Court, the FCCA and undertakings can both make a further appeal to the Supreme Administrative Court (SAC), which has complete competence to impose a fine, annul the fine imposed and increase or reduce the fine.\textsuperscript{90} The further appeal rate is 57\% for the period considered. It is worth noting that one application to further appeal was made by a third party, albeit the Court rejected this.\textsuperscript{91} In addition to this rejection, the SAC confirmed the ruling of the Market Court in 2 cases.\textsuperscript{92} In one case, the SAC reduced the fine.\textsuperscript{93} The SAC increased the fine in two cases, but imposed lower fines than requested by the FCCA.\textsuperscript{94} Two cases are still pending.

\subsection*{4.5 France}

The\textit{ Autorité de la concurrence} (Autorité) is the independent administrative body in France empowered with the competence to take decisions in the field of competition law.\textsuperscript{95} With respect to cartel fines, decisions can be based on Article 420-1 French\textit{ Code du Commerce} (CdC) and Article 101 TFEU.\textsuperscript{96} The Autorité reached a total of 56 decisions relevant to this study in the period researched.\textsuperscript{97} In several of those

\begin{itemize}
\item \textit{Inter alia} Decision 27 June 2011, 1147/14.00.00/2009; Decision 24 June 2014, 2015/141.
\item Section 44 of the Competition Act.
\item Decision 27 June 2011, 1147/14.00.00/2009. Article 6 of the Administrative Judicial Procedure Act states that the decision may be appealed by the person to whom the decision is directed or whose right, obligation or interest is directly affected by the decision.
\item Decision 27 August 2007, 502/61/06.
\item Order n\textsuperscript{o} 2000–912 relating to the legislative part of the Code of Commerce 18 September 2000.
\item 17-D-01; 16-D-28; 16-d-27; 16-D-26; 16-D-20; 16-D-17; 16-D-05; 6-D-02; Case 15-D-19; Case 15-D-08, Case 15-D-04, Case 15-D-03, Case 14-D-20, Case 14-D-19, Case 14-D-16, Case 13-D-21, Case 13-D-14, Case 13-D-12, Case 13-D-09, Case 13-D-03, Case 12-D-27, Case 12-D-26, Case 12-D-23, Case 12-D-10, Case 12-D-09, Case 12-D-08, Case 12-D-06, Case 12-D-02, Case 11-D-19, Case 11-D-17, Case 11-D-13, Case 11-D-07, Case 11-D-02, Case 11-D-01, Case 10-D-39, Case 10-D-35, Case 10-D-28, Case 10-D-22, Case 10-D-15, Case 10-D-13, Case 10-D-11, Case 10-D-10, Case 10-D-05, Case 10-D-04, Case 10-D-03, Case 09-D-39, Case 09-D-36, Case 09-D-34, Case 09-D-31, Case 09-D-25, Case 09-D-19, Case 09-D-17, Case 09-D-07, Case 09-D-06, Case 09-D-05, Case 09-D-03.
\end{itemize}
cases, the Autorité concluded a settlement with one or more undertakings.98 The settlement procedure is distinct from the type found in other Member States. In contrast to the procedure at, for example, the European level, the company does not have to admit the infringement, but waives its right to dispute the facts alleged and the qualification thereof, and accepts liability for the infringement in exchange for a lower penalty.99 The fine reduction is in principle 10%, but an additional discount of 5 to 15% can be earned if the undertakings agree to alter their future behavior structurally.100 This type of settlement, called *non-contestation des griefs*, had been in force since 2001. It has been replaced as of 8 August 2015 by the transaction method.101 The main difference between the two procedures is how the fine is established. The Autorité previously only provided the reduction percentage for the final fine but the amount of the fine was unknown. Under the transaction procedure, the Autorité sets a minimum and maximum potential amount and the company must accept the fine range.102 The Autorité concluded a large number of hybrid settlements in the period under consideration, meaning that not all the undertakings involved in the infringements participated in the settlement.

Article 464-8 Code du Commerce stipulates that the Autorité’s fining decisions established via either the regular procedure or the settlement procedure can be appealed before the Paris Court of Appeal. To ensure unity in interpretation of competition law, it was decided that all competition cases in appeal are to be treated by the Paris Court of Appeal and no other appellate Court. In 34 of the 56 cases, the Autorité’s fining decision was challenged before the Paris Court of Appeal by one or more undertakings, which represents 61% of all the cases.

Pursuant to Article L. 464-8 Code du Commerce, the Court exercises full control over the law and the facts.103 Additionally, the Paris Court of Appeal is

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98 Case 15-D-08, Case 14-D-20, Case 14-D-19, Case 14-D-16, Case 12-D-06, Case 11-D-13, Case 11-D-07, Case 11-D-02, Case 10-D-39, Case 10-D-35, Case 09-D-31, Case 09-D-19, Case 09-D-06, Case 09-D-05, Case 09-D-03.
100 L'Autorité de la concurrence, supra n 99, at 5-6, 8; International Competition Network, Cartel Settlements: Report to the ICN Annual Conference, 32 (2008).
101 Article 464-2 III Code du commerce.
102 First settlement under the new procedure: Decision 6 July 2016, case 16-D-15.
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competent to confirm, increase or reduce the fine. The Paris Court of Appeal completely rejected the appeal in 17 of the 34 cases.\(^{104}\) Regarding the other 17 cases which are considered annulments, the annulment is often limited to a reduction of the fine or an annulment for only a part of the infringement or part of the infringers. While previous research described that the most frequent reason for reducing the fines has been the financial and economic difficulties faced by the fined entity, this only occurred in one cartel case in the period researched.\(^{105}\) The other reductions of the fine often concerned fine miscalculations by the Autorité, with reasons including the unjustified inclusion of aggravating factors, misanalysis of a company’s structure and unreasonably high fines. Another reason for fine reduction was the unreasonable duration of the procedure. The reductions of the fines in some cases reached 70% of the original fine.\(^{106}\) These instances of large fine reductions notwithstanding, the Paris Court of Appeal usually validates the cartel fines imposed by the Autorité.

4.6 Germany

The Federal Cartel Office (Bundeskartellamt) was established in 1958 to regulate competition law in Germany and has enforced competition law ever since.\(^{107}\) In addition to the Federal Bundeskartellamt, each state has its own competition authority which enforces the cartel prohibition if the effects of the forbidden conduct are restricted to one state.\(^{108}\) The Bundeskartellamt is competent when the effects of a case cross federal inter-state borders. From 2001 to 1 July 2017, the Bundeskartellamt has imposed fines in 53 cases for the infringement of the cartel prohibition. Compared with other Member States, many of these cases concerned vertical cases.

Pursuant to Section 63(4) Gesetz gegen Wettbewerbsbeschränkungen (GWB), a decision of the Bundeskartellamt may be appealed before the Oberlandesgericht Düsseldorf (OLG), which is one of three OLGs located in North Rhine-Westphalia,

\(^{104}\) Case 15-D-04, Case 14-D-16, Case 13-D-21, Case 13-D-12, Case 12-D-02, Case 11-D-19, Case 11-D-17, Case 10-D-04, Case 09-D-34, Case 09-D-07, Case 09-D-06, Case 09-D-05, Case 09-D-03.

\(^{105}\) Lianos, Jenny, Wagner-von Papp, Motchenkova and David, supra n 10 at 53-54. Case 09-D-19.

\(^{106}\) An example of very large fine reduction, which actually falls outside the scope of the research period for France was the Steel cartel case in which the Paris Court of Appeal reduced the fine from EUR 575 million to EUR 75 million. See also Lianos, Jenny, Wagner-von Papp, Motchenkova and David, supra n 10 at 54.


\(^{108}\) European Commission, supra n 49 at 106.
and the only German court dealing with these cartel offences.\(^{109}\) The period for filing an appeal is within 4 weeks after the decision has been issued. If an appeal is filed, the Bundeskartellamt receives the appeal and will review its own decision based on the appellants’ arguments.\(^{110}\) The Bundeskartellamt determines whether the appeal is inadmissible for procedural reasons and, if admissible, whether it should uphold, modify or withdraw its decision.\(^{111}\) The Bundeskartellamt has a number of options should it decide to modify a decision, including adding additional evidence to its decision or improving the reasoning. If the Bundeskartellamt decides to uphold the decision with or without possible adjustments, the case is transferred to the public prosecutor’s office, which examines whether the accusations and the decision taken by the Bundeskartellamt are well-founded.\(^ {112}\) The office may close the case, provide additional evidence or bring the case before the OLG. The OLG can subsequently, if the appeal is procedurally admissible, besides accepting the case, send the case back if it considers the investigations ‘obviously insufficient’, or order the taking of further evidence.\(^ {113}\)

The appeal procedure at the OLG constitutes a full de novo trial in which the prosecution is led by the public prosecutor and the Bundeskartellamt’s role is merely supportive.\(^ {114}\) In other words, the procedure is more than the judicial review of the administrative fine which occurs in most other Member States. It forms a quasi-criminal procedure in which there is a strong emphasis on assessment of the evidence, which generally causes the procedures’ duration to be long.\(^ {115}\) As described in the literature, the \textit{Paper Wholesalers} cartel spent 20 days in court, the \textit{Cement Cartel} 37 days and in \textit{Liquid Gas}, the oral hearing before the OLG took almost 3 years and more than 130 sessions.\(^ {116}\) Moreover, it took 7 years following


\(^ {110}\) Article 69(1) Gesetz über Ordnungswidrigkeiten (OWiG). See about this and the rest of procedure as described: Lianos, Jenny, Wagner-von Papp, Motchenkova and David, \textit{supra} n 10, at 50-53.

\(^ {111}\) Article 69(2) OWiG.

\(^ {112}\) Article 69(3) and (4) OWiG.

\(^ {113}\) Lianos, Jenny, Wagner-von Papp, Motchenkova and David, \textit{supra} n 10.

\(^ {114}\) There was the plan to transfer the competence to the Bundeskartellamt. See generally G. Dannecker and J. Biermann, in U. Immenga and E.J. Mestmäcker (eds), GWB, \textit{Kommentar zum Deutschen Kartellrecht} (Munich: C.H. Beck 2007).


\(^ {116}\) \textit{Ibid}. 
the fining decision for the OLG’s judgment to be made in Roofing Tile. From 2001 to 1 July 2017, 16 out of 53 cases were appealed to the OLG Düsseldorf, representing 30% of the cases. Of those 16 appeals, only 6 cases have led to judgments of the OLG; Appeals were withdrawn by the parties before the OLG could come to a ruling in the other cases. A regular mentioned reason for this phenomenon is the Liquid Gas cartel, in which OLG Düsseldorf increased the fine from EUR 180 to 244 million. The publication of this judgment led to the withdrawal of appeals in many other cases. In addition, the Düsseldorf Court pointed out, in some of those cases, that if the allegations were confirmed in court, the court would increase the respective fines. The OLG has also increased fines in 5 out of the 6 cases in which the undertakings continued litigation. The analysis of the cases in Germany exposed another fact that may be a consequence of the decrease in appeals, which is the very high percentage of settlements reached in recent years.

117 Case B1-200/06.
118 In general, literature described the low percentage of litigation in Germany. As described by Christof Vollmer: in Germany, very few cases are appealed to the first instance court (Higher Regional Court Düsseldorf) and even less to the second instance court (Federal Court of Justice). See presentation Christof Vollmer Dutch association for competition law 2015, available via <www.verenigingmededingingsrecht.nl/> (accessed 15 October 2018); C. Vollmer, Settlements in German competition law, 32 ECLR 350-356 (2011).
119 All appealing companies 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 companies 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).
120 Oberlandesgericht Düsseldorf 15 April 2013, VI-4 Kart 2-6/10 Owi (Flüssiggas). Presentation Christof Vollmer, supra n. 118. The increase of the fines is possible since Germany does not have a prohibition of reformatio in peius, as the Netherlands has for example. The same is true for the United Kingdom and France, where the competent courts also have the competence to increase fines, though the French courts never exercised this power and the British Competition Appeal Tribunal only once because of special circumstances.
121 For example: B11-11/08 (Süßwaren); B11-13/06 (Unternehmen der Mühlenindustrie).
122 For example: B10-102/11 (Automatischer Türsysteme).
123 For example: Oberlandesgericht Düsseldorf 26 January 2017, Az. V-4 Kart 15.04 OW1 (Süßwaren); B11-12/08 (Konsumgütern); B11-19/08 (Kaffee).
124 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: Vollmer, supra n 118. The Bundeskartellamt also reported in the 2009/2010 annual report that most cartel fine procedures have been concluded by means of a settlement.
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4.7 Italy

Law 287/90 established the Autorità Garante della Concorrenza e del Mercato (AGCM) in 1990 as the national authority entrusted with the enforcement of competition law.\(^{125}\) AGCM is an independent agency, which acts as both an investigative and decision-making body. From 2010 to present, the AGCM has imposed fines in a total of 41 cases. After France, Italy has the highest number of cases in recent years, while the AGCM is not competent to conclude settlements with undertakings, in contrast to competition authorities in many other countries, such as Germany, France and the United Kingdom. However, it can accept commitments, which it also actively does. Compared to other Member States, many fining decisions are based on Article 101 TFEU.

Pursuant to Article 33(1) of Law 287/90, the AGCM’s decisions can be subject to judicial review by the Tribunale Amministrativo Regionale Lazio (TAR Lazio). The percentage of challenged cartel fines is high – one or more undertakings have filed for appeal at the TAR Lazio in 32 out of 41 cases.\(^{126}\) The judgments of the TAR Lazio may be appealed before the Consiglio di Stato (Council of State), which exercises a full jurisdiction control.\(^{127}\) The decisions of the Council of State are usually final; however, in exceptional cases, they can be appealed before the

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125 Legge 10 ottobre 1990, n. 287 - Norme per la tutela della concorrenza e del mercato (Law 287/90).
126 Decision 24 March 2010, case 20931; Decision 23 June 2010, case 21279; Decision 3 November 2010, case 21768, Decision 15 December 2010, case 21924; Decision 15 June 2011, case 22521; Decision 22 June 2011, case 22537; Decision 4 August 2011, case 22648; Decision 22 September 2011, case 22812; Decision 28 September 2011, case 22838; Decision 22 February 2012, case 23338; Decision 30 May 2012, case 23623; Decision 2 August 2012, case 23794, Decision 28 September 2012, case 23931; Decision 13 March 2013, case 24275; Decision 23 April 2013, case 24327; Decision 30 May 2013, case 24377; Decision 30 May 2013, case 24378; Decision 30 May 2013, case 24379; Decision 11 June 2013, case 24405; Decision 27 February 2014, case 24823; Decision 4 September 2014, case 25078; Decision 22 October 2014, case 25154; Decision 28 January 2015, case 25295; Decision 3 February 2015, case 25302; Decision 25 March 2015, case 25382; Decision 25 March 2015, case 25401; Decision 22 April 2015, case 25435; Decision 27 May 2015, case 25488; Decision 27 May 2015, case 25489; Decision 10 June 2015, case 25512; Decision 29 July 2015, case 25589; Decision 18 November 2015, case 25739; Decision 16 December 2015, case 25784; Decision 22 December 2015, case 25802; Decision 22 December 2015, case 25801; Decision 24 February 2016, case 25882; Decision 19 April 2016, case 25966; Decision 8 June 2016, case 26064; Decision 26 October 2016, case 26229; Decision 21 December 2016, case 26316; Decision 30 May 2017, case 26625; Decision 19 July 2017, case 1742.
highest Italian Court (Corte di Cassazione). The further appeal rate is 91%, the highest after Bulgaria. The AGCM, one or more undertakings or both parties lodged a further appeal before the Council of State in 29 out of 32 cases.

The TAR Lazio accepted the undertakings’ appeals partially or fully in 20 out of 32 cases, which represents 63%. While literature from 2009 described the Industrial Gas case as remarkable because it constituted one of the very few instances in which a cartel fines has been annulled in its entirety upon judicial review, full annulments form a significant part of the annulments in the period from 2010 to the present. For example, in cases 11169/2016 and 12423/2015, the TAR annulled AGCM’s fining decision because undertaking’s conduct was not found to be a violation of Article 101 TFEU and did not manifestly constitute a violation of Article 101 TFEU, respectively. In other cases, for example 14281-82/2015 and 06486/2016, the TAR annulled the fine on the grounds of insufficient evidence. Other annulments are limited to the amount of the fine and, as stated by Siragusa and Rizza in 2009, “it is not uncommon for the reviewing court to reduce the original penalty imposed.” It is interesting to note here that the TAR Lazio, however, has also sent cases back to the AGCM to redetermine the amount of the fine. In 03291/2015, the Council of State also annulled a redetermination of the amount of the fine by the TAR and sent the case back to the AGCM for redetermination. In other cases, the Council of State reduced the amount of the fine itself. In general, many of the cases at the Council of State were still pending or judgments had not yet been published at the moment of writing. However, the Council of State has confirmed TAR Lazio’s judgment in at least 8 cases and fully

129 Decision 3 November 2010, case 21768, Decision 15 December 2010, case 21924; Decision 15 June 2011, case 22521; Decision 4 August 2011, case 22648; Decision 28 September 2011, case 22838; Decision 22 February 2012, case 23338; Decision 2 August 2012, case 23794, Decision 28 September 2012, case 23931; Decision 11 June 2013, case 24405; Decision 22 October 2014, case 25154; Decision 28 January 2015, case 25295; Decision 3 February 2015, case 25302; Decision 25 March 2015, case 25382; Decision 22 April 2015, case 25435; Decision 27 May 2015, case 25488; Decision 27 May 2015, case 25489; Decision 22 December 2015, case 25802; Decision 22 December 2015, case 25801; Decision 24 February 2016, case 25882; Decision 19 April 2016, case 25966; Decision 8 June 2016, case 26064.
131 Ibid.
133 Consiglio di Stato - n. 3291/2015; Decision AGCM 28 September 2012, case 23931.
134 Consiglio di Stato - 03016/2017; Consiglio di Stato - 02947/2016.
or partly annulled the judgment in 8 cases as well. In 2 of those cases, the Council of State confirmed AGCM’s decision, while the TAR Lazio annulled the decision because of insufficient evidence or wrong calculation of the fine. Other cases have also shown the opposite scenario, namely that the TAR Lazio confirmed the decision, while the Council of State fully annulled the decision, for example because of exceedance of the limitation period, or reduced the fine. Finally, there are partial annulments, which are more difficult because the Council of State modified the conclusion of the TAR Lazio for some infringers and confirmed the conclusion of the TAR for others.

4.8 The Netherlands

Competition law in the Netherlands is enforced by the Autoriteit Consument en Markt (Authority for Consumers and Markets (ACM)). It came into existence in 2013 through the merger of three authorities that enforced consumer protection, telecommunications and competition law respectively (Consumentenautoriteit, Onafhankelijke Post en Telecommunicatie Autoriteit and Nederlandse mededingingsautoriteit). National rules on competition law are laid down in the Mededingingswet (Competition Act), which entered into force in 1998. The ACM can impose a fine for any infringement of the prohibition of anti-competitive agreements which is laid down in Article 6 Dutch Competition Act and Article 101 TFEU. The ACM and its predecessor have imposed fines in a total of 52 cartel cases since 1998.

Undertakings can apply for judicial review after receiving a fining decision at two exclusively competent courts – the District Court Rotterdam as a first instance court and the Trade and Industry Appeal Tribunal (TIAT) as a second and last instance court. Although the name would suggest that the TIAT is a tribunal and not a court, this is not the case. The judicial review performed by the courts concern facts and law. As mentioned in the introduction, own previous studies have shown high percentages of (successful) litigation and an increase of those percentages in recent years.


136 Outhuijse, supra n 5 and 6.
Between 2003 and 2013, undertakings have filed for appeal at the Rotterdam District Court in more than 70% of cases.\textsuperscript{137} Since 2010, the ACM has imposed a fine in 22 cartel cases, and at least one or more undertakings have filed for an appeal in 19 of the 21 cases, which represents 90%.\textsuperscript{138} As in the German system, the ACM has the opportunity to review its decision before the companies can challenge it in court.\textsuperscript{139} Under this so-called objection procedure, the ACM has to completely review its original fining decision on the basis of the undertaking’s objections and can decide to confirm, amend or withdraw its original fining decision in its decision on the objection.\textsuperscript{140} This additional administrative procedure is meant as a procedure for solving disputes between citizens and the government, so that lengthy, formal legal procedures before the administrative court can be avoided. Dutch research of administrative law cases other than competition law, in which the same objection procedure is used,\textsuperscript{141} has shown that in general the objection procedure is followed by judicial appeal proceedings in only 10% of cases.\textsuperscript{142} As the figures showed, this trend is fundamentally different in cartel fine cases.

The option of settlement does not seem to be a very attractive option for companies fined in the Netherlands and occurred in only a few recent cases.\textsuperscript{143} Comparable to the European procedure, the current practice of settling with the ACM 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 10% fine reduction.\textsuperscript{144} In one of the older cases, the construction fraud case which concerned a national price-fixing system involving 1300 undertakings,

\begin{itemize}
\item \textsuperscript{137} This percentage was calculated on the basis of the cartel cases in which fines were imposed in the period 1998-2010. The analysis of the cases between 1998 and 2018 leads to a proportion of 81%: An appeal was filed to the Rotterdam District Court in 42 out of 52 cases. The legislative bill establishing the ACM in 2013 mentioned a proportion of 87% between the years 2000 and 2011, although it is unclear which type of cases are included in this calculation. \textit{Parliamentary papers II} 2012/13, 33622, nr. 3, p. 12.
\item \textsuperscript{138} Outhuijse, \textit{supra} n 6. Commencing an appeals procedure remains possible in one more case.
\item \textsuperscript{139} A. Outhuijse, The effective public enforcement of the cartel prohibition: perceptions on the functioning of the objection procedure and the reality, 39 RdW 38-58 (2018); Outhuijse and Jans, \textit{supra} n 135.
\item \textsuperscript{140} Article 7:11 General Administrative Law Act (GALA).
\item \textsuperscript{141} See Outhuijse, \textit{supra} n 6 and n 139 for the design of the objection procedure.
\item \textsuperscript{142} See Outhuijse, \textit{supra} n 6 and n 139 and the literature mentioned there. Also in other areas of economic law in which high fines are imposed, such as banking supervision and the supervision of financial markets, only a limited number of companies submit their cases for judicial review.
\item \textsuperscript{143} See Outhuijse, \textit{supra} n 20.
\item \textsuperscript{144} \textit{Ibid}.
\end{itemize}
a substantial part of the companies accepted the option of an accelerated-fine procedure. In exchange for a fine discount of 15%, the undertakings had to 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. The number of appeals was much lower among the undertakings who accepted the accelerated procedure compared to those following the regular procedure.\textsuperscript{145}

High rates of annulled cartel fines in the 2003 – 2013 period have also been reported, which entailed full annulments, fine reductions resulting from miscalculations, and reductions in fines because of the unreasonable duration of the enforcement or court procedures.\textsuperscript{146} An analysis of the case law from 1 January 2013 onwards has shown that the proportion of decisions annulled has not decreased since 2013.\textsuperscript{147} On the contrary, the court refrained from revising one or more fining decisions in only 2 out of almost 18 cases for the same period.\textsuperscript{148} The main grounds for the annulment of fines in recent years include insufficient evidence, insufficient regard for the economic context and the application of an incorrect severity factor which is a part of the fine calculation. Insufficient regard for the economic context concerns cases in which the courts were convinced that certain behavior took place, but were not convinced of the capability of the behavior to restrict competition. Reductions of the fines among older annulments were often based on the proportionality of the fine and therefore the grounds for annulments have changed over time. Although there has been a general trend for both courts to impose lower fines, it is interesting to remark that the courts also have disagreements about the amount of factual and economic evidence needed and the correct severity factor in certain cases.\textsuperscript{149} There are examples in which the Rotterdam District Court upheld the fine while the TIAT reduced the fine, or the Rotterdam District Court reduced the fine whereas the TIAT fully annulled the fine on the basis of insufficient evidence, with the converse situation similarly having occurred.

4.9 Sweden

The Swedish Competition Authority (Konkurrensverket (KKV)) is the central administrative authority applying the Swedish Competition Act, which also

\textsuperscript{145} Outhuijse, supra n 6.
\textsuperscript{146} Outhuijse, supra n 5.
\textsuperscript{147} Outhuijse, supra n 6.
\textsuperscript{148} Ibid.
\textsuperscript{149} Ibid; Outhuijse, supra n 5.
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incorporates the prohibition of anti-competitive agreements. As in Finland, the KKV conducts the investigations but has to apply to a specialized court for fine imposition. Pursuant to Chapter 3, section 5 of the Swedish Competition Act (Konkurrenslag 2008:0579) (KKL), only the courts may impose fines on parties accused of an infringement, with the settlement procedure forming an exception to this rule. Fines were imposed in a total of 18 cases. All the cases concerned horizontal anti-competitive cooperation. There have been vertical cases, but the KKV neither applied for fines, nor did it apply the settlement procedures to these cases.

The settlement procedure was one of the new additions to the Swedish Competition Act as of 2008. As stated in Chapter 3 Sections 16-19 KKL, the KKV can settle a case with an undertaking if (1) the undertaking accused of the infringement voluntarily admits to an infringement of the Competition Act and accepts the fine, (2) there is no disagreement as to whether the undertaking has infringed the prohibition and (3) the material circumstances of the case are clear in the sense that no precedential ruling is needed on this point. If these requirements are met, the authority can impose a fine. The amount of the fine is decided by applying the fine calculation method which is identical to the one used when the KKV applies for a court ruling. Additionally, it is worth noting that the administrative settlement is explicitly not a 'plea bargain' procedure. The legislator has elaborated that the same degree of fines must be imposed regardless of whether the company concerned has admitted to the infringement or not. The KKV has settled 3 out of 8 cases since it received this competence in 2008.

In other cases, the KKV has to apply to the Patent and Market Court (PMD), formerly the Stockholm District Court, to request a fine. The court holds exclusive competence and deals with cases concerning intellectual property, marketing and competition law. A special law, lag om patent- och marknadsdomstolar (law on patent
and market courts (2016:188)), regulates the competences and expertise. According to Chapter 2, Section 1, the court consists of legally qualified judges and specialized experts in the fields that the court rules on. The currently appointed team of judges is a combination of legal, financial and technical experts.\footnote{European Commission, supra n 49.} The court performs a full review based on the KKV’s request, which includes a proposal for the amount of the fine, and decides on whether a fine should be imposed and what its amount should be.

From 1998 onwards, the KKV has applied to the PMD in 15 cases to request the court to impose a fine,\footnote{Case 848/2014; case 511/2014; case 483/2013; case 605/2010; case 645/2010; case 341/2003; case 331/2004; case 895/2004; case 1097/2004; case 635/2003; case 608/2000; case 633/1999; case 913/1998; case 505/1999; case 351/1998.} and the PMD has accordingly fined the undertakings in only 2 cases.\footnote{PMD 4 June 1998, T 8-370-98 (Byggplast & båtprylar Sverige AB och AB Hermann Gotthardt); PMD 30 September 1999, T 8267-99 (Lundgrens Maskinförnödenheter AB, Tricoflex S.A. Tricoflex Scandinavia AB).} In 8 cases, the PMD imposed a fine, but at a lower rate than requested, especially in recent years.\footnote{PMD 21 December 2016, PMT 17299-14 (Telia Sonera & Göteborg energy); PMD 18 December 2015, T 12305-13 (Aleris Diagnostics AB, Capio St Görans Sjukhus AB and Hjärtkärlgruppen i Sverige AB); PMD 21 January 2014, T 18896-10 (Däckia Euromaster); PMD 24 February 2012, T 19974-10 (Sandorama AB och Ölvemarks Holiday AB); PMD 10 July 2007, T 5467-03 (Asfaltkartellen); PMD 15 March 2005, T 11660-03 YIT Building Systems AB and Keyvent AB (Ventilation Cartel); PMD 29 April 2003, T 9902-00 (Norsk Hydro AB, OK-Q8, Preem Petroleum AB, AB Svensk Shell and Statoil Detaljhandel AB (Benzinkartellen)); PMD 18 December 2001, T 10594-99 (Uppon Svemden, Svenska Wavin, KWH Pipe Sweden). See for a nice overview of all the Swedish cases and the outcomes: <http://www.konkurrensverket.se/konkurrens/avgoranden/horisontella-konkurrensbegransande-samarbeten/>.} For example, in \textit{Telia Sonera & Göteborg energy}, the PMD imposed a fine of SEK 16 million even though a fine of SEK 35 million was proposed by the KKV.\footnote{PMD 21 December 2016, PMT 17299-14 (Telia Sonera & Göteborg energy).} According to the Court, the KKV’s calculation of the fines was essentially correct, but they did not share the KKV’s view of the value of the contracts in question. According to the Court, the fine must be calculated based on the value of the contract and in this case the Court found the value to be SEK 100 million less than what the KKV estimated. The PMD concluded in 5 cases that no fine could be imposed because of insufficient evidence.\footnote{PMD 16 May 2016, T 10057-14 (Alfa Quality Moving AB, NFB Transport Systems AB and ICM Kungsholms AB); PMD 7 June 2006, T 4231-04 (AB Bil Bengtsson, Bildeve AB, Bilja Personbilar AB, Bil Månsson i Skåne AB, Göinge Bil AB, Johan Ahlberg Bil AB, Kristiansands Automobil AB and Skånebil Personbilar AB); PMD 1 September 2006, T 15163-04 (Assistancekåren Sweden AB and the Association MRF-Bärgarna); PMD 1 December 2006, T 3104-04 (TDC i Uppsala AB och Uppsala Taxi 100 000 AB); PMD 27 October 1999, T 19576-98, partly (HB Ivars Trafikskola, Tage Vågelinds Trafikskola AB, Börjes Trafikskola Eftt, Ninas Trafikskola AB, PO Trafikskolan i Luleå AB).} Three
of those cases date back to 2004. Ingeborg Simonsson pointed out as early as 2004 that the success rate in the court was highly unsatisfactory.162

After the judgment of the PMD, both the KKV and the undertakings can file an appeal with the Patent and Market Court (PMÖD), formerly the Market Court. The PMÖD is completely competent to impose, annul, raise or lower the fines. In total, 8 cases have been appealed.163 The KKV appealed in 2, the undertakings in 3 and both also in 3 cases. The appeal rates in both Sweden and Finland show that the litigation percentage is not necessarily lower in case of fines imposed by a court instead of an administrative authority. The PMÖD quite often does not agree with the PMD on how a specific case should be decided, for example, what the amount of the fine should be or whether there is sufficient evidence to impose a fine. For example, in Telia Sonera & Göteborg energy, the PMÖD found, contrary to the PMD, that the KKV could not prove that the contract was harmful and annulled the fine of SEK 16 million imposed by the PMD.164 In other cases, the PMÖD concluded that there was insufficient evidence in cases where the PMD had found sufficient evidence,165 and vice versa.166 The PMÖD has also once imposed a lower fine, while imposing a higher one in another case.167 The PMÖD has confirmed the PMD’s judgment in 3 cases.168

4.10 United Kingdom

Competition law in the United Kingdom is monitored and enforced by the Competition and Markets Authority (CMA), which was established in 2013. Competition law was previously enforced by the Office of Fair Trading and the Competition Commission, which were established by the 1998 UK Competition Act. The Enterprise and Regulatory Reform Act 2013 merged these two authorities

162 Simonsson, supra n 10.
164 PMÖD 13 February 2018, PMT 761-17 (Telia Sonera & Göteborg energy).
165 Inter alia PMÖD 28 April 2017, PMT 7497-16 (Aleris Diagnostics AB, Capio St Görans Sjukhus AB and Hjärtskärgruppen i Sverige AB).
166 Market Court 11 September 2008, MD 2008:12 (AB Bil Bengtsson, Bildeve AB, Bilia Personbilar AB, Bil Månsson i Skåne AB, Göinge Bil AB, Johan Ahlberg Bil AB, Kristianstads Automobil AB and Skånebil Personbilar AB).
167 Market Court 22 February 2005, MD 2005:7 (Norsk Hydro AB, OK-Q8, Preem Petroleum AB, AB Svensk Shell and Statoil Detaljhandel AB (Benzinkartellen)).
into the CMA in 2013. The prohibition of anti-competitive agreements is laid down in Chapter 1 Competition Act 1998. From 2002 onwards, the competition authorities in the UK have imposed fines in 37 cases for the infringement of the prohibition of anti-competitive agreements.169

The Competition Appeal Tribunal (CAT) is the primary judiciary dealing with cartel fines in the United Kingdom. The CAT is a cross-disciplinary body with expertise in law, economics, business and accountancy; It has the mandate to determine cases which involve competition or economic regulation matters.170 Cases are typically heard by a tribunal of three persons and chaired by either the CAT President or a chairman.171 The other two members are selected from the chairmen or the ordinary members, who can have different backgrounds such as law, but also business or accounting. The Tribunal hear appeals on the merits in respect of decisions applying the competition rules found in Article 101 TFEU and Chapter I 1998 Act.172

An array of literature has already described low rates of appeal against fining decisions for infringements of the cartel prohibition for different periods.173 This study confirms this conclusion; an appeal is filed in 35% of cases in the period from 2002 to July 2017. The percentage is even lower for the period from 2012 onwards. An appeal was filed with the CAT in only 2 cases, while fines were imposed in

169 Fines were imposed in the following cases: Case CP/1163-00; case CP/0717/01; case CP/0239-01; case CP/0809-01; case CP/0871/01; case CP/0480-01; case CP/0001-02; case CE/2464-03; case CE/1777-02; case CE/1925-02; case CA98/01/2006; case CE/3861-04; case CA98/04/2006; case CA98/05/2006; case CA98/04/2005; case CE/4327-04; case CE/7510-06; case CE/2596-03; case CE/8950/08; case CE/3094-03; case CE/7691; case CE/9161-09; case CE/9578-12; case CE/9627/12; case CE/9784-13; case CE/9531/11; case CE/9827/13; case CE/9857-14; case CE/9856-14; case 50223; case CE/9859-14; case CE/9691/12; case CE/9691/12; case CE/9882-16; case 50343.


171 CAT, supra n 170, at 6.

172 Ibid, at 5; Andreangeli, supra n 170.

173 Bavasso and Tolley, supra n 10, at 1236-41; Veljanovski, supra n 9; Whish and Bailey, supra n 10, at 447-451.
a total of 17 cases in this period, which amounts to an appeal rate of 11%. Both appeal cases concern fines imposed in 2016 and are pending before of the CAT at the time of writing. In many of the cases in which the companies accepted the fines, the companies also cooperated with the CMA via a leniency application and/or settlement.

As also described in the literature, the cases which are handled by the CAT are quite successful – of the 11 heard cases, the CAT annulled one or more fines in 8 cases, which represents 73% of the cases. Important to note is that the annulment for most companies was limited to a reduction of the fine. The court concluded in 2 cases that no fine could be imposed for one or more undertakings. This concerns the Construction Bid-Rigging case and the fine for Tesco, which was annulled in the Tobacco case. In the Construction Bid-Rigging case, the CAT concluded that no fine could be imposed for some undertakings, while the fine should be reduced for others. In case the CAT reduced the fine, it often did this substantially, in some cases up to a 90% reduction. The CAT can vary the amount of the fine and is in principle not bound by the competition authority’s Guidance on penalties. The CAT, however, mentioned in Kier Group PLC & others v OFT that it will not disregard either the Guidance or the CMA’s approach and reasoning in specific cases.

174 Fines were imposed in the following cases: case CE/7691; case CE/9161-09; case CE/9578-12; case CE/9627/12; case CE/9784-13; case CE/9531/11; case CE/9827/13; case CE/9857-14; case CE/9856-14; case 50223; case CE/9859-14; case CE/9691/12; case CE/9691/12; case CE/9882-16; case 50343.

175 Case CE-9531/11 and case CE/9691/12.

176 Veljanovski, supra n 9; Lianos, Jenny, Wagner-von Papp, Motchenkova and David, supra n 10, at 50.

177 Case CE/3094-03 (Diary); case CE/7510-06 (Recruitment Agencies); case CE/4327-04 (Construction bid-rigging); case CA/98/01/2004 (Desiccants); case CP001-02 (West Midlands Roofing Contractors); case CP/0871/01 (Replica Football Kits); case CP0480-01 (Toys and Games).

178 CE/4327-04 (Construction bid-rigging); CE/2596-03 (Tobacco).


180 Inter alia case CE/7510-06 (Recruitment Agencies); case CE/4327-04 (Construction bid-rigging); case CA/98/01/2004 (Desiccants).


5. Summary and concluding observations

This article was an empirical assessment of the frequency of litigation and success in cases of cartel fines in 10 Member States: Belgium, Bulgaria, Croatia, Finland, France, Germany, Italy, the Netherlands, Sweden and the United Kingdom. The first purpose of the study was 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 competition authorities. In light of this purpose, the study revealed both general trends and eye-catching differences.

A first general trend is that a large number of the researched countries experience high rates of challenged and annulled cartel fines. The appeal rate in the vast majority of these countries is above 50 percent. The rates in Germany and the United Kingdom are lower, ranging between 30 and 40%, with even lower percentages when analyzing the data of recent years. As is the case for the last mentioned Member States and on the European Union level, a shift towards a more consensus-oriented and less litigation-oriented regime of antitrust enforcement can also be observed in several other Member States, such as Belgium and Sweden.

In recent years, more cases are being settled which has consequences for the rates of litigation in those Member States, as described by Hellwig and others in the context of the European Commission. Naturally, cooperation with the competition authority significantly limits the grounds for the undertaking to file an appeal. Moreover, litigation is unlikely given its own, previous cooperation with the competition authority, especially if the undertaking does not want to dispute the settlement terms. However, there are also countries where this is not a possibility, such as Italy and Finland, or countries in which a settlement agreement is generally not the most attractive alternative for the undertakings, such as the Netherlands.

183 The percentages range between 50 and 70% (Belgium, Finland, Sweden and France), 70 and 90% (Bulgaria, Italy and the Netherlands) and over 90% (Croatia). For Sweden and Finland, this is the percentage of appeal between the first and second instance court.


185 Hellwig, Hüschelrath and Laitenberger, supra n 12.

186 Outhuijse, supra n 6.
Another general trend is that the domestic courts regularly lower the fines imposed by the authority or impose lower fines than those requested by the authority. The annulment rate of the fines imposed in 8 out of 10 countries is above 50 percent.\textsuperscript{187} Germany is an exception where the successful appeal rate, in the sense of complete annulments or fine reduction, is considerably low – 17%. Moreover, the Düsseldorf Court has increased the fine on appeal in several cases. The percentage is higher in Croatia, namely 40%, although it is notable that all the annulments were made in the most recent judgments. In aggregate, the data shows that almost all competition authorities experience annulment of their cartel fines, either partially or fully, on a very regular basis.\textsuperscript{188}

Differences are visible among the nature and reasons for annulment. While annulments are mostly limited to fine reductions in the United Kingdom and France, Bulgaria is one of the few countries in which the courts did not reduce fines but only completely annulled them. The other Member States (the Netherlands, Italy, Sweden and Finland) have combinations of fine reductions and complete annulments. Among the Member States, there are also differences in the reasons for either fine reductions or complete annulments. For example, some courts fully annulled fining decisions on the basis of insufficient analysis of the economic context. The Netherlands is an example of this type: The Dutch courts concluded in several cases that they were not convinced of the capability of the behavior to restrict competition and thereby doubting the correctness of authority’s economic analysis, for instance, regarding the established relevant market. Meanwhile, the economic analysis supporting the decision is rarely or only marginally reviewed in other Member States and thus annulments are seldom based on these grounds.

Another interesting trend is the evolution of the number and type of annulments within several Member States. The situation in Croatia has already been mentioned, where the annulments have concerned only the most recent decisions. In addition, in the Netherlands, Italy and France, the nature of the annulments evolved. For Italy, an interesting development is observed that, while earlier literature described that the Industrial Gas case is remarkable since it constitutes one of the very few

\textsuperscript{187} The annulment rate in these countries are: 50-60% in Bulgaria, Finland and France, 60-70% in Italy, Sweden and the United Kingdom, 80-90% in the Netherlands and 100% in Belgium. For Sweden and Finland, this is the percentage of annulments by the second court instance since the first court instance imposes the fine.

\textsuperscript{188} The fact that this not merely an European problem is shown by the fact that the Australian competition authority for example also faces the problem that the courts impose much lower fines that the competition authority requested for. See: C.Y. Beaton Wells and J.N. Clarke, Corporate Financial Penalties for Cartel Conduct in Australia: A Critique (2018), available at SSRN: <https://ssrn.com/abstract=3149143>.
instances in which a cartel decision has been annulled in its entirety upon judicial review, full annulments form a significant part of the annulments in the period from 2010 to 1 July 2017. In the Netherlands and France, changes concern the basis for fine reduction. For example, in the Netherlands, the courts reduced the older fines regularly on the basis of the principle of proportionality, while more recent cases are often reduced on basis of the severity factor which concerns a more substantive analysis of the fine calculation.

Final interesting observation is that in the countries where both court instances review questions of law and fact, the courts regularly differ on whether sufficient evidence was submitted in a specific case and what the amount of the fine should be. The first instance courts’ rulings are quite regularly annulled in, for example, the Netherlands, Italy, Finland and Sweden. In other Member States, such as Bulgaria, the second instance court usually confirms the ruling of the first instance court and annulment is exceptional. In aggregate, the differences between the two court instances are far smaller if the second court instance merely reviews questions of law. The rate of further appeals is, however, often also much lower than in countries where the second court instance also reviews questions of law and fact.

The second purpose of this study was analysing whether first indications can be provided about whether the high levels of litigation and successful litigation in the Netherlands can be explained by either the nature of cartel fines or Dutch features of competition law enforcement. In light thereof, the first conclusion can be drawn that the high percentages of (successful) litigation among the Member States support the idea that the nature of cartel fines is an important influencing factor. The differences in litigation rates and the number and type of annulments, which can evolve over time, however indicate that the nature of the cartel fines is merely one of the influencing factors and that country-specific characteristics also influence procedure outcomes and whether and why annulments are made. This evidently concerns the type and the quality of the cases but also the court-specific characteristics seem to play a role. For instance, in addition to the trend noted for jurisdictions where both court instances review questions of law and fact, this is also indicated by the fact that the types of annulment changed over time in several Member States. Furthermore, the literature regarding the EU enforcement

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189 Siragusa and Cesara Rizza, supra n 130.
190 France is the exception. The second instance court in France only reviews questions of law, but nevertheless the percentage of further appeal is 67%. In 20 out of 30 cases, one of the parties appealed the judgement of the Paris Court of Appeal.
191 It is obviously acknowledged that there is great heterogeneity among cases and that the economic misconduct may differ substantially from one case to another.
noted that party characteristics and party behavior influence the proportion of successful litigation, such as the type of pleas which are brought forward and whether they focus at obtaining a fine reduction rather than a full annulment of the fine. Although further research is needed, the review of the enforcement by other authorities gives the first indication that the reasons for why annulments are recurrent in the Netherlands should be sought in a combination of the nature of cartel fines, the features of the Dutch court procedure, and the characteristics of the cases and actors involved in this procedure.

The article provides an important addition to the current literature by making an empirical assessment of challenges of national cartel fines and the success thereof which can provide valuable information to scholars and public policy makers. As expressed in the ECN+ Directive, the NCA’s effectiveness is amongst other measured by the fines issued by the NCAs and the height thereof. This article however showed that using the numbers of the cartel fines as they were issued by the NCAs does not paint a complete picture. In fact, the figures and judgment analysis show that the difference between the fines as issued by the NCA and those remaining after court review is large. Public policy makers, but also scholars, should take this into account when analyzing NCA effectiveness.

The depiction of the general trends among the Member States, as well as the distinctions, can form the basis for further research to explain the figures, trends and developments. The explanation of what motivates companies to challenge cartel fines in courts and the success of these companies for one or more Member States requires an in-depth empirical review of the practice of competition authorities, practitioners, undertakings and judges, as shown by author’s studies for the Netherlands. For instance, a previous study answered the question of what motivates companies to challenge their cartel fine in Dutch courts. The answer seemed simple on the basis of the case analysis, considering that the fines and the likelihood of successful appeal are high. Interview with 14 practitioners who regularly represented undertakings fined for anti-competitive behavior however showed that the decision to file an appeal is influenced by several reasons other than the fining decision itself. In addition to, for example, the quality of the decision, the height of the fine and the likelihood of successful appeal, important is that litigating the decision prevents exclusion from future public tenders, delays follow-on damages claims and in the past also delayed the payment of the fine. The research indicates that the factors influencing the decision to accept the fine,

192 Outhuijse, supra n 6.
193 Ibid.
whether or not in combination with a settlement, can differ per Member State and therefore requires an in-depth assessment per Member State. The same counts for explaining the success rate in court which requires a full review of the fining decisions and courts judgments as well as interview with the involved stakeholders: practitioners, companies, authority officials and judges. In sum, an in-depth empirical study is required to explain the practice within the Member States, but an analysis for all 10 Member States falls outside the scope of author’s current study.

194 A. Outhuijse, The effective public enforcement of the prohibition of anti-competitive agreements: which factors influence the high percentage of annulments of Dutch cartel fines?, not yet published.
Rates of challenged and annulled cartel fines in ten European Member States