

Effective Public Enforcement of Cartels: Rates of Challenged and Annulled Cartel Fines in Ten European Member States

Annalies OUTHUIJSE*

A substantial number of cartels in the European Union are detected and enforced by the national competition authorities (NCAs). The effectiveness of the 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 mostly limited to the number of enforcement activities, 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, despite its importance. 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 the number of cases 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 (successful) litigation and the reasons for annulments in cases of cartel fines in ten Member States (Belgium, Bulgaria, Croatia, Finland, France, Germany, Italy, the Netherlands, Sweden and the United Kingdom). Public policy makers, such as the European Commission, could benefit from this data gathered in order to analyse the effectiveness of the NCAs. Moreover, the analysis is valuable for future research, since the depiction of the 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.

1 INTRODUCTION¹

A substantial number of cartels in the European Union are detected and enforced by the NCAs.² 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.³ The current discussions are limited as they

* PhD fellow of the University of Groningen. The author wants to thank the national experts from NCAs, judiciary and legal profession for reviewing earlier versions of the paragraphs regarding the individual Member States and the student assistants for their invaluable help in collecting and translating a part of the relevant court judgments and fining decisions. Email: annalies.outhuijse@gmail.com.

¹ The term cartel and anti-competitive agreements are in this contribution used as synonyms.

² See inter alia <http://ec.europa.eu/competition/ecn/statistics.html> (accessed 14 Oct. 2018).

³ Directive (EU) 2019/1 of the European Parliament and the Council of 11 Dec. 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.

focus on the number of enforcement activities, particularly the quantity of imposed fines and their height and deterrence.⁴ 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.⁵

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.⁶ In addition, the Dutch courts have either partly or fully annulled the fining decision in almost 60% of the cases decided between 2003 and 2013.⁷ An analysis of judgments from 2013 onwards showed that the Dutch courts refrained from revising one or more fining decisions in only two out of eighteen cases in this period, leading to fine reductions or full annulments in the other sixteen cases.⁸ 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.⁹

In light thereof, this article analyses the frequency of challenged and annulled cartel fines and the reasons for annulments in ten Member States and the European

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).

⁵ A. Outhuijse, *Effective Public Enforcement of the Cartel Prohibition in the Netherlands: A Comparison of ACM Fining Decisions, District Court Judgments, and TLAT Judgments*, in *Boosting the Enforcement of EU Competition Law at Domestic Level* 26–52 (A. Looijestijn-Clearie, C. S. Rusu & M. Veenbrink eds, Cambridge: Cambridge Scholars 2017); A. Outhuijse & J. H. Jans, *Judicial Review of Decisions of the Dutch Competition Authority*, in *Mundi et Europae civis; Liber Amicorum Jacques Steenbergen* 265–79 (D. Arts, W. Devroe, R. Fogue, K. Marchand & I. Verougstraete eds, Brussels: Larcier 2014).

⁶ A. Outhuijse, *The Effective Public Enforcement of the Prohibition of Anti-Competitive Agreements: Why Do Undertakings in the Netherlands Appeal?*, 13 *Competition L. Rev.* 163–86 (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.

⁷ Outhuijse, *supra* n. 5; Outhuijse & 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 *J. Competition L. & Econ.* 711–38 (2014).

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 ten 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 are described in detail, empirical assessment of challenges to national cartel fines and their degree of success is limited to non-existent.¹⁰ 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

¹⁰ The most information is available for the United Kingdom: A. Bavasso & L. Tolley, *United Kingdom*, in *Anti-Cartel Enforcement Worldwide* vol. 3, 1236–41 (M. Dabbah & B. E. Hawk eds, Cambridge: Cambridge University Press 2009); Veljanovski, *supra* n. 9; I. Lianos, F. Jenny, F. Wagner-von Papp, E. Motchenkova & E. David, *Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective*, Cles Research Paper 3 (2014); R. Whish & D. Bailey, *Competition Law* 447–51 (Oxford: OUP 2015). For other countries see I. Simonsson, *Konkurrensverkets domstolsprocesser 1993-2004*, 2 Konkurrensverkets uppdragsforskningsserie (2005); M. Lauk, *Econometric Analysis of the Decisions of the German Cartel Office*, Technische Universität Darmstadt 680–711(2002); J. García-Verdugo, C. M. Troncoso & L. Gómez Cruz, *An Economic Assessment of Antitrust Fines in Spain*, 41 *World Competition* 335–66 (2018).

they determined at the moment of fine imposition.¹¹ 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 analyse 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 analyse 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 ten 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 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

¹¹ See European Commission, *supra* n. 4. For other literature see inter alia J. Delgado, H. Otero & E. Pérez-Asenjo, *Assessment of Antitrust Agencies' Impact and Performance: An Analytical Framework*, 4 J. Antitrust Enforcement 323–44 (2016); W. P. J. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27 World Competition 202–24 (2004); W. P. J. Wils, *Competition Authorities: Towards More Independence and Prioritisation? – The European Commission's 'ECN' Proposal for a Directive to Empower the Competition Authorities of the Member States to Be More Effective Enforcers* (2017), available at SSRN: <https://ssrn.com/abstract=3000260>; D. Geradin & H. David, *Competition Law in the New Member States – Where Do We Come from? Where Do We Go? Modernisation and Enlargement: Two Major Challenges for EC Competition Law* (Antwerpen: Intersentia 2005); J. M. Connor, *Canada's International Cartel Enforcement: Keeping Score*, 39 World Competition 557–92 (2016).

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,¹³ the factors which distinguish undertakings that go to court from those which do not, and cases and pleas which are (un)successful.¹⁴ 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.¹⁵ These studies found that 54% of cartel infringement decisions were appealed.¹⁶ 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.¹⁷ This number rose to the mid-2000s, with some years between 1998 and 2004 experiencing an appeal rate greater than 90%.¹⁸ The recent 2016 study of Hellwig et al. showed a decrease in litigation in recent years and the relationship of this phenomenon with an increase in settlements.¹⁹ The Commission has settled in almost 70% of cases

¹² Inter alia M. Carree, A. Günster & M. P. Schinkel, *European Antitrust Policy 1957-2004: An Analysis of Commission Decisions*, 36 Rev. Indus. Org. 97–131 (2010); A. Günster, M. Carree & M. P. Schinkel, *A Statistical Analysis of Court of Appeal Rulings in European Antitrust Enforcement 1957-2004*, https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=HOC2008&paper_id=443 (accessed 13 Oct. 2018); M. Hellwig, K. Hüschelrath & U. Laitenberger, *Settlements and Appeals in the European Commission's Cartel Cases: An Empirical Assessment*, <http://ssrn.com/abstract=2731073> (accessed 13 Oct. 2018); C. Veljanovski, *Cartel Fines in Europe – Law, Practice and Deterrence*, 30 World Competition 65–86 (2007); D. Geradin & N. Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment*, TILEC Discussion Paper No. 2011-008 (2011); D. Geradin & K. Sadrak, *The EU Competition Law Fining System: A Quantitative Review of the Commission Decisions Between 2000 and 2017*, TILEC Discussion Paper No. 2017-018 (2017), available at SSRN: <https://ssrn.com/abstract=2958317>; T. Tridimas & G. Gari, *Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review Before the European Court of Justice and the Court of First Instance (2001-2005)*, 35 Eur. L. Rev. 131–73 (2010); P. D. Camesasca, J. Ywesyn, T. Weck & B. Bowman, *Cartel Appeals to the Court of Justice: The Song of the Sirens?*, 4 J. Eur. Competition L. & Prac. 215 (2013); K. Hüschelrath & F. Smuda, *The Appeals Process in the European Commission's Cartel Cases: An Empirical Assessment*, 13 J. Empirical Legal Stud. 330–57 (2016); D. Paemen & J. Blondeel, *Appealing EU Cartel Decisions Before the European Courts: Winning (and Losing) Arguments*, 18(2) Bus. L. Int'l 155–83 (May 2017).

¹³ Inter alia D. Geradin & D. Henry, *The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments*, 1 Eur. Competition J. 401–73 (2005); Hüschelrath & Smuda, *supra* n. 12; Günster, Carree & Schinkel, *supra* n. 12.

¹⁴ Inter alia Hüschelrath & Smuda, *supra* n. 12; Günster, Carree & Schinkel, *supra* n. 12; Camesasca, Ywesyn, Weck & Bowman, *supra* n. 12; Paemen & Blondeel, *supra* n. 12.

¹⁵ Günster, Carree & Schinkel, *supra* n. 12; Carree, Günster & Schinkel, *supra* n. 12.

¹⁶ Günster, Carree & Schinkel, *supra* n. 12.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Hellwig, Hüschelrath & Laitenberger, *supra* n. 12; see also Geradin & Sadrak, *supra* n. 12.

since 2010 and, according to researchers, the use of settlements lowers the incidence of litigation up to 55%.²⁰

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’.²¹ By contrast, other researchers expressed that ‘the Court of Justice had been “soft” on the Commission in reviewing the latter’s handling of competition cases’.²² 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%.²³ 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’.²⁴ The same is presented by Chalmers and others for the period 1998 to 2002.²⁵ 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’.²⁶ 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’.²⁷ In a 2013 study, Camesasca 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 these types of pleas are also most successful.²⁸ 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 analysing the data between 2005 and 2017 found that applicants tend to raise as many arguments

²⁰ *Ibid.* See for the Dutch practice of settlement, A. Outhuijse, *Schikken met de ACM: gewenste koers of rechtsomkeerd*, 64 SEW 510–22 (2016).

²¹ F. Montag, *The Case for Radical Reform of the Infringement Procedure under Regulation 17*, 17 ECLR 428 (1996).

²² C. Harding & J. Joshua, *Regulating Cartels in Europe 189–90* (Oxford: OUP 2010) and the literature mentioned there.

²³ C. Harding & A. Gibbs, *Why Go to Court in Europe? An Analysis of Cartel Appeals 1995–2000*, 3 Eur. L. Rev. 349–62 (2005).

²⁴ *Ibid.*

²⁵ D. Chalmers, G. Davies & G. Monti, *European Union Law – Text and Materials* 940–41 (Cambridge: Cambridge University Press 2010) and reference to I. van Bael & J. F. Bellis, *Competition Law of the European Community* 1163 (The Hague: Kluwer Law International 2005).

²⁶ *Ibid.*

²⁷ Harding & Joshua, *supra* n. 22, at 216.

²⁸ Camesasca, Ywesyn, Weck & Bowman, *supra* n. 12. See also R. Whish, *Competition Law* 272–73 (Oxford: OUP 2008) and Geradin & Henry, *supra* n. 13.

as possible in their application to the European courts.²⁹ 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 fluctuation over time is probably influenced by several factors, such as specific case and party characteristics which differ over time.³⁰ 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 ten 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 behaviour 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 ten 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 eighteen 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

²⁹ Paemen & Blondeel, *supra* n. 12.

³⁰ Inter alia Hüschelrath & Smuda, *supra* n. 12; Günster, Carree & Schinkel, *supra* n. 12.

calculate valid rates.³¹ This shows that the Member States discussed in this article 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.

| <i>Member State</i> | <i>Start Research Period</i> | <i>Number of Cases</i> | <i>Appeal Rate</i> ³² | <i>Annulment Rate</i> |
|---------------------|------------------------------|------------------------|----------------------------------|------------------------------------|
| Belgium | 1 January 2001 | 9 | 60% (3 of 5 cases) ³³ | 100% (3 of 3 cases) |
| Bulgaria | 1 January 2002 | 23 | 78% (18 of 23 cases) | 56% (10 of 18 cases) |
| Croatia | 1 October 2010 | 13 | 92% (12 of 13 cases) | 42% (5 of 12 cases) |
| Finland | 1 January 2003 | 15 | 60% (9 of 15 cases) | 50% (3 of 6 cases ³⁴) |
| France | 1 January 2009 | 56 | 61% (34 of 56 cases) | 50% (17 of 34 cases) |
| Germany | 1 January 2001 | 53 | 30% (16 of 53 cases) | 17% (1 of 6 cases ³⁵) |
| Italy | 1 January 2010 | 41 | 78% (32 of 41 cases) | 63% (20 of 32 cases) |
| The Netherlands | 1 January 1998 | 52 | 81% (42 of 52 cases) | 86% (36 of 42 cases) |
| Sweden | 1 January 1998 | 15 | 53% (8 of 15 cases) | 63% (5 of 8 cases) |
| United Kingdom | 1 January 2002 | 37 | 35% (13 of 37 cases) | 67% (8 of 12 cases ³⁶) |

³¹ In Luxembourg for instance, the NCA has only made three fining decisions between 2009–1 July 2017.

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 Art. 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 ten cases.

³⁶ One case is still pending at the moment of writing.

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 analysed in which the appeal rate is below 50%. The annulment rate in the majority of these countries is above 50%, 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.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.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

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%.

³⁸ In Sweden and Finland, the first instance court has the competence to impose fines and not the NCA.

decided. This was also efficient given the context of the author's limited time and resources. For example, analysing the appeal and annulment rates in France from as far as 2000 instead of 2009 would have meant analysing an additional 154 cases. This concerns 154 cases in which fines were imposed following a breach of Article 101 TFEU/L.420-1 *Code du Commerce* (CdC) and 80 cases in which one or more undertakings 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 BCA 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

³⁹ Extending to a later date, e.g. 1 Oct. 2018, would for the Member States with a 'small' amount of cases not make much difference. It would result in zero extra decisions for, e.g. 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.

⁴⁰ *Le nouveau droit belge de la concurrence: bilan et perspectives après quatre années d'application* (N. Petit ed., Limal: Anthemis 2011).

⁴¹ S. Raes, *Belgian Competition Law Enforcement: Way to Go!* (20 Oct. 2015) <https://www.cdr-news.com/categories/expert-views/5910-belgian-competition-law-enforcement-way-to-go> (accessed 13 Oct. 2018).

BCA into a single independent administrative authority.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 nine cases.⁴³ Fines were imposed in six out of those nine cases after the 2013 reform.⁴⁴ More specifically, in four out of nine cases, fines were imposed between 2015 and 2017. It is interesting to note that the BCA concluded a settlement with the undertakings in all four of these cases.⁴⁵ The opportunity to agree on a settlement with undertakings has been provided for in Belgian law since 1 September 2013.⁴⁶ 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.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.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 two major language groups in Belgium: French and Flemish.⁴⁹ 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

⁴² J. Ysewyn, M. van Schoorisse & E. Mattioli, *De Belgische mededingingswet 2013: een praktische en kritische analyse* (Antwerp: Intersentia 2013); F. Tuytschaever & M. Varga, *Wegwijs in het vernieuwde Belgische mededingingsrecht*, 20 Cahier van de jurist 57–66 (2013).

⁴³ Decision 2 May 2017, ABC-2017-I/O-16-AUD; Decision 27 May 2016, ABC-2016-I/O-15-AUD; Decision 23 Feb. 2016, BMA-2016-I/O-04-AUD; Decision 22 June 2015, ABC-2015-I/O-19-AUD; Decision 23 Aug. 2013, 2013-I/O-34; Decision 28 Feb. 2013, 2013-I/O-06; Decision 20 May 2010, 2010-I/O-11; Decision 21 Dec. 2005, 2005-P/K-57; Decision 30 Mar. 2001, 2001-E/A-14.

⁴⁴ Decision 2 May 2017, ABC-2017-I/O-16-AUD; Decision 27 May 2016, ABC-2016-I/O-15-AUD; Decision 23 Feb. 2016, BMA-2016-I/O-04-AUD; Decision 22 June 2015, ABC-2015-I/O-19-AUD; Decision 23 Aug. 2013, 2013-I/O-34; Decision 28 Feb. 2013, 2013-I/O-06.

⁴⁵ The Belgian Competition Authority concluded its first settlement on 22 June 2015. See Decision 22 June 2015, ABC-2015-I/O-19-AUD. See about this: P. van Cleyenbreugel, *De transactiebeslissing van het auditoraat van het Belgische supermarktedossier: een 'hub en spoke' compromis à la Belge*, 18 M&M 205–13 (2015).

⁴⁶ Art. IV.54 (2) Economic Law Code (*Wetboek van economisch recht*).

⁴⁷ Art. IV.53 Economic Law Code.

⁴⁸ Art. IV.57 (3) Economic Law Code.

⁴⁹ European Commission, *Pilot Field Study on the Functioning of the National Judicial Systems for the Application of Competition Law Rules* (2014).

procedure.⁵⁰ The Court of Appeal has the competence to review both questions of law and fact. In three out of five 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.⁵¹ Reasons for annulments have included determinations that the companies' behaviour had not infringed competition law rules⁵² and the infringement of the rights of defence, such as the *ne-bis-in idem* principle in the *Flour* case.⁵³

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 1998.⁵⁴ Article 15(1) LPC is the national equivalent of Article 101(1) TFEU, and the breach of it is seen as an administrative offence.⁵⁵ 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.⁵⁶ Since 2002, there have been twenty-three cases in which the CPC imposed fines for the infringement of the cartel prohibition.⁵⁷ Fines had been imposed prior to 1 January 2007 – the date of Bulgaria's accession to the

⁵⁰ This was not possible before and was considered to be in conflict with Art. 35 Regulation 1/2003 and the principle of effectiveness by the European Court of Justice, see case C-439/08 *Vlaamse federatie van verenigen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC)* ECR I-12471 (2010), para. 64.

⁵¹ Decision 23 Aug. 2013, 2013-I/O-34; Decision 28 Feb. 2013, 2013-I/O-06; Decision 30 Mar. 2001, 2001-E/A-14. See J. Ysewyn & M. van Schoorisse, *Overzicht van de beslissingspraktijk van de Belgische Mededingingsautoriteit in 2014*, TBM 141–76 (2015).

⁵² Cour d'appel Bruxelles 30 June 2016, 2013/MR/11–15. See K. Bourgeois & E. Paredis, *Kroniek – Toepassing van de mededingingswet door de Belgische Mededingingsautoriteit in 2016*, 65 SEW 326 (2017).

⁵³ Hof van Beroep Brussel 12 Mar. 2014, 2013/MR/6.

⁵⁴ Law on Protection of Competition of 2008 (*Закон за защита на конкуренцията* (LPC)), Official Gazette No. 102 of 28 Nov. 2008, http://www.wipo.int/wipolex/en/text.jsp?file_id=238274 (accessed 13 Oct. 2018).

⁵⁵ Art. 99(1) LPC. See also B. Boyanov, *Detecting and Proving Price Fixing Agreements in a Bulgarian Context*, MSc EU Bus. & L. 17 (2011).

⁵⁶ European Commission, *supra* n. 49, at 39. In 2011, the CPC celebrated its 20th birthday.

⁵⁷ Decision 25 Nov. 2003, Y2003_No190; Decision 18 Dec. 2003, Y2003_No219; Decision 25 Apr. 2006, Y2006_No136; Decision 26 June 2006, Y2006_No80; Decision 27 Dec. 2007, Y2007_No1150; Decision 15 July 2008, Y2008_No576; Decision 17 July 2008, Y2008_No601; Decision 22 July 2008, Y2008_No622; Decision 24 July 2008, Y2008_No650; Decision 24 July 2008, Y2008_No651; Decision 24 Feb. 2009, 167/24.02.2009; Decision 17 Dec. 2009, 1370/17 Dec. 2009; Decision 4 May 2010, Y2010_No496; Decision 1 Mar. 2012, Y2012_No1292; Decision 10 Apr. 2012, Y2012_No220; Decision 3 May 2012, 508/03 May 2012; Decision 6 Nov. 2012, Y2012_No508; Decision 11 July 2013, Y2013_No1261; Decision 17 July 2013, Y2013_No844; Decision 25 Sept. 2013, Y2013_No898; Decision 22 Dec. 2016, Y2016_No1128; Decision 22 Dec. 2016, Y2016_No1129; Decision 4 May 2017, Y2017_No478.

European Union – in four cases.⁵⁸ 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.⁵⁹

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.⁶⁰ 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.⁶¹ The SAC is both the first and second instance court which reviews decisions issued by the CPC.⁶² The difference between the first and second appeal is that 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).⁶³ 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.⁶⁴ 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.⁶⁵ 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.⁶⁶ Possible grounds for further appeal are limited to nullity, inadmissibility and illegality.⁶⁷

Article 64 LPC states that the CPC's decisions can only be appealed against within fourteen days of the publication of the decision and is the shortest time limit

⁵⁸ Decision 25 Nov. 2003, Y2003_No190; Decision 18 Dec. 2003, Y2003_No219; Decision 25 Apr. 2006, Y2006_No136; Decision 26 June 2006, Y2006_No80.

⁵⁹ About the introduction see M. Favart, *The Bulgarian Competition Authority Introduces a Leniency Programme*, Competitions Bulletin February, Art. No 43781 (2009); About the application see V. Penkov & S. Adrianov, *Bulgaria Chapter – Cartels & Leniency* (2013), <http://www.iclg.co.uk/practiceareas/cartels-and-leniency/cartels-&-leniency-2013/bulgaria> (accessed 14 Oct. 2018).

⁶⁰ M. Botta & A. Svetlicinii, *The Right of Fair Trial in Competition Law Proceedings: Quo Vadis The Courts of the New EU Member States?*, in *Procedural Fairness in Competition Proceedings* 276–308 (P. Nihoul & T. Skoczny eds, Cheltenham: Edward Elgar 2015); European Commission, *supra* n. 49.

⁶¹ Art. 146 Code of Administrative Procedure (*Административнопроцесуален кодекс*), State Gazette No. 30 of 11 Apr. 2006. See P. Petrov, *Bulgaria Chapter – Enforcement of Competition Law 2009* (2009), <http://www.iclg.co.uk/practiceareas/enforcement-of-competition-law/enforcement-2009/bulgaria> (accessed 14 Oct. 2018).

⁶² Botta & Svetlicinii, *supra* n. 60, at 287. There are amendments in the LPC which will come into force on 1 Jan. 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.

⁶³ Arts 165 and 217 Code of Administrative Procedure.

⁶⁴ Art. 172 Code of Administrative Procedure.

⁶⁵ European Commission, *supra* n. 49, at 45; Botta & Svetlicinii, *supra* n. 60.

⁶⁶ Art. 221 Code of Administrative Procedure.

⁶⁷ Art. 209 Code of Administrative Procedure.

among the Member States.⁶⁸ Nonetheless, this time limit can be satisfied by merely informing the court of the intention to appeal a decision.⁶⁹ 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 fourteen days period begins within which the parties must present their evidence.⁷⁰ 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 twenty-three CPC cases, an appeal was filed for eighteen cases, which represents 78% of all cases. The further appeal rate is 94% and is therefore the highest among the ten Member States studied. In only one case had no further appeal been filed.

Of the eighteen cases which appeared before the SAC-3, the court annulled the fining decisions in ten cases.⁷¹ Most annulments were decided on grounds that the CPC had provided insufficient evidence of the anti-competitive behaviour or insufficient evidence that the behaviour 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.⁷² 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

⁶⁸ European Commission, *supra* n. 49, at 23–26.

⁶⁹ Art. 149 Code of Administrative Procedure.

⁷⁰ Art. 163 Code of Administrative Procedure.

⁷¹ Decision 25 Nov. 2003, Y2003_No190; Decision 26 June 2006, Y2006_No80; Decision 27 Dec. 2007, Y2007_No1150; Decision 17 July 2008, Y2008_No601; Decision 22 July 2008, Y2008_No622; Decision 24 July 2008, Y2008_No650; Decision 24 July 2008, Y2008_No651; Decision 24 Feb. 2009, 167/24.02.2009; Decision 17 Dec. 2009, 1370/17.12.2009; Decision 4 May 2010, Y2010_No496; Decision 1 Mar. 2012, Y2012_No1292; Decision 10 Apr. 2012, Y2012_No220; Decision 3 May 2012, 508/03.05.2012; Decision 25 Sept. 2013, Y2013_No898; 22 Dec. 2016, Y2016_No1129; Decision 4 May 2017, Y2017_No478.

⁷² Judgment No. 10568 dated 15 Sept. 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 Sept. 2010, Art. No 32777 (2010); Botta & Svetlicinii, *supra* n. 60.

of consumers were affected by the behaviour.⁷³ Finally, the SAC-3 confirmed the fining decisions in eight cases. As mentioned, the further appeal rate is very high. In the majority of cases, namely fourteen of sixteen 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 prohibition.⁷⁴ 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 to do so. Since receiving the competence to impose fines on 1 October 2010, AZTN has used this competence in thirteen cases against undertakings regarding anti-competitive agreements.⁷⁵ 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, four out of thirteen 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 thirty 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

⁷³ Judgment No. 8140 dated 18 June 2009. See A. Svetlicinii, *The Bulgarian Supreme Administrative Court Confirms an NCA's Decision Fining a Heating Plant Company for Exploitative Abuse of Dominance (Heating Plant Ruse)*, e-Competitions Bulletin June 2009, Art. No 29126 (2009).

⁷⁴ Croatian competition Act 30 June 2009, no. 79/09. See in general about the Croatian enforcement system European Commission, *supra* n. 49.

⁷⁵ Decision 20 Dec. 2016, UP/I 034-03/13-01/035; Decision 28 July 2016, UP/I 034-03/2014-01/002; Decision 22 Dec. 2015, UP/I 034-03/2015-01/010; Decision 3 Dec. 2014, UPI/034/032013/01016; Decision 24 June 2014, UPI/034/032013/01034; Decision 17 Mar. 2014, UP/I 034-03/13-01/047; Decision 15 Mar. 2014, UP/I 034-03/14-01/002; Decision 30 July 2014, UP/I 034-03/2013-01/015; Decision 30 July 2014, UP/I 034-03/2013-01/017; Decision 23 Oct. 2014, UP/I 034-03/2013-01/018; Decision 27 Dec. 2012, UP/I 030-02/11-01/024; Decision 27 July 2012, UP/I 030-02/11-01/039; Decision 21 July 2012, UP/I 030-02/2010-01/018; Decision 13 Oct. 2011, UP/I 030-02/2010-01/024.

issues contained in the decisions of the Agency.⁷⁶ Claims against the decisions of the AZTN are within the exclusive competence of the High Administrative Court ((*Visoki Upravni Sud* (VUS)).⁷⁷ The analysis of the decisions and court judgments shows that a claim is brought before the VUS in twelve of thirteen cases, thereby representing more than 90% of the cases.

Considering the research period, the VUS annulled fines in five 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 two cases, the VUS concluded that the alleged behaviour did not amount to an infringement of the prohibition of anti-competitive agreements.⁷⁸ In one case, 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 fifteen cartel cases to the Market Court, which accepted the fine requested for by the FCCA in a total of three cases.⁸⁵ In four cases, the Market Court chose not to impose a fine: In one

⁷⁶ Art. 14(2) Administrative Disputes Act, Narodne Novine no. 20/10, 143/12, 152/14, 94/16; Art. 67 (1) Competition Protection Act, Narodne Novine no. 79/2009, 80/2013. European Commission, *supra* n. 49, at 62–63.

⁷⁷ Art. 33 of the Administrative Disputes Act.

⁷⁸ VUS 26 July 2016, UsII-22/16-11 and VUS 3 Apr. 2015, UsII-70/14-6.

⁷⁹ VUS 23 Mar. 2016, UsII-39/15-10.

⁸⁰ VUS 13 May 2016, UsII-45/15-12.

⁸¹ S. 1 Act on the Finnish Competition and Consumer Authority (*Laki kilpailu – ja kuluttajavirastosta* 661/2012).

⁸² S. 12(3) Competition Act (*Kilpailulaki* 948/2011).

⁸³ The Finnish Market Act, Ch. 2.

⁸⁴ *Ibid.*

⁸⁵ Decision 27 Aug. 2007, 502/61/06 (*Hairdressers*); Decision 21 Dec. 2006, 416/61/2004 (*Raw wood*); Decision 19 Feb. 2005, 1108/61/2001 (*Daily goods*).

case the Market Court did not find a violation,⁸⁶ in two 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 eight 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 two 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.⁸⁹

After receiving a judgment from the Market Court, the FCCA and undertakings can both make a further appeal to the SAC, which has complete competence to impose a fine, annul the fine imposed and increase or reduce the fine.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.⁹¹ In addition to this rejection, the SAC confirmed the ruling of the Market Court in two cases.⁹² In one case, the SAC reduced the fine.⁹³ The SAC increased the fine in two cases, but imposed lower fines than requested by the FCCA.⁹⁴ Two cases are still pending.

4.5 FRANCE

The *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.⁹⁵ With respect to cartel fines, decisions can be based on Article 420-1 French CdC and Article 101 TFEU.⁹⁶ The Autorité reached a total of fifty-six decisions relevant to this study in the period researched.⁹⁷ In several of those cases, the Autorité

⁸⁶ Decision 16 Apr. 2003, 99/61/2002.

⁸⁷ Decision 14 Apr. 2005, 654/68/2002; Decision 2 Dec. 2005, 4/61/2005.

⁸⁸ Decision 31 Oct. 2014, 64/KKV14.00.00/2013.

⁸⁹ Inter alia Decision 27 June 2011, 1147/14.00.00/2009; Decision 24 June 2014, 2015/141.

⁹⁰ S. 44 of the Competition Act.

⁹¹ Decision 27 June 2011, 1147/14.00.00/2009. Art. 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.

⁹² Decision 16 Apr. 2003, 99/61/2002; Decision 6 July 2006, 338/61/2004.

⁹³ Decision 27 Aug. 2007, 502/61/06.

⁹⁴ Decision 4 May 2006, 250/61/2002 and Decision 31 Mar. 2004, 1198/61/2001.

⁹⁵ B. Lasserre, *The New French Competition Law Enforcement Regime*, 5 Competition L. Int'l 15–20 (2009).

⁹⁶ Order no 2000-912 relating to the legislative part of the Code of Commerce 18 Sept. 2000.

⁹⁷ 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

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 behaviour 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 under the current procedure.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 CdC 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 thirty-four of the fifty-six 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 CdC, the Court exercises full control over the law and the facts.¹⁰³ Additionally, the Paris Court of Appeal is competent to confirm,

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.

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.

⁹⁹ L'Autorité de la concurrence, Communiqué de procédure du 10 février 2012 relatif à la non-contestation des griefs, http://www.autoritedelaconcurrence.fr/doc/communiqué_ncg_10fevrier2012.pdf (accessed 14 Oct. 2018). See also in detail about this procedure: E. Lachnit, *Alternative Enforcement of Competition law* (The Hague: Eleven International Publishing 2016).

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 Art. 464-2 III Code du commerce.

¹⁰² First settlement under the new procedure: Decision 6 July 2016, Case 16-D-15.

¹⁰³ N. Petit & R. Louise, *Judicial Review in French Competition Law And Economic Regulation – A Post-Commission V. Tetra Laval Assessment*, in *National Courts and the Standard of Review in Competition Law*

increase or reduce the fine. The Paris Court of Appeal completely rejected the appeal in seventeen of the thirty-four cases.¹⁰⁴ Regarding the other seventeen 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 Nevertheless, 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 fifty-three 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, and the only German court dealing with these cartel offences.¹⁰⁹ The period for filing an appeal is within four weeks after the decision has been issued. If an appeal is filed, the

and *Economic Regulation* 105–24 (O. Essens, A. Gerbrandy & S. Lavrijssen eds, Groningen: European Law Publishing 2009).

¹⁰⁴ Case 15-D-04, Case 14-D-16, Case 13-D-21, Case 13-D-12, Case 12-D-10, 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 & 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 & David, *supra* n. 10, at 54.

¹⁰⁷ A. Mundt, *Germany: Federal Cartel Office*, *The European Antitrust Review* (2015).

¹⁰⁸ European Commission, *supra* n. 49, at 106.

¹⁰⁹ V. Emmerich, *Kartellrecht* (München: Verlag C.H. Beck 2012); J. L. Schulte & C. Just, *Kartellrecht* (Frankfurt: Carl Heymanns Verlag 2012).

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 *Paper Wholesalers* cartel spent twenty days in court, the *Cement Cartel* thirty-seven days and in *Liquid Gas*, the oral hearing before the OLG took almost three years and more than 130 sessions.¹¹⁶ Moreover, it took seven years following the fining decision for the OLG's judgment to be made in *Roofing Tile*.¹¹⁷ From 2001 to 1 July 2017, sixteen out of fifty-three cases were appealed to the OLG Düsseldorf, representing 30% of the cases.¹¹⁸ Of those sixteen appeals, only six cases have led to judgments of the OLG; Appeals were

¹¹⁰ Art. 69(1) Gesetz über Ordnungswidrigkeiten (OWiG). See about this and the rest of procedure as described: Lianos, Jenny, Wagner-von Papp, Motchenkova & David, *supra* n. 10, at 50–53.

¹¹¹ Art. 69(2) OWiG.

¹¹² Art. 69(3) and (4) OWiG.

¹¹³ Lianos, Jenny, Wagner-von Papp, Motchenkova & David, *supra* n. 10.

¹¹⁴ There was the plan to transfer the competence to the Bundeskartellamt. See generally G. Dannecker & J. Biermann, Band 2: *GWB, Kommentar zum Deutschen Kartellrecht* (U. Immenga & E.J. Mestmäcker eds, Munich: C.H. Beck 2007).

¹¹⁵ Lianos, Jenny, Wagner-von Papp, Motchenkova & David, *supra* n. 10, at 52–53; K. Ost, *From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence*, 5 J. Eur. Competition L. & Prac. 125–36 (2014).

¹¹⁶ *Ibid.*

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, www.verenigingmededingingsrecht.nl/ (accessed 15 Oct. 2018); C. Vollmer, *Settlements in German Competition Law*, 32 ECLR 350–56 (2011).

withdrawn by the parties before the OLG could come to a ruling in the other cases.¹¹⁹ 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.¹²⁰ The publication of this judgment led to the withdrawal of appeals in many other cases.¹²¹ 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.¹²² The OLG has also increased fines in five out of the six cases in which the undertakings continued litigation.¹²³ 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.¹²⁴

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 forty-one cases.¹²⁶ After France, Italy has the highest number of cases in

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 (*Dampfkesseln*); 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 Apr. 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 Jan. 2017, Az. V-4 Kart 15.04 OWI (*Süßwaren*); B11-12/08 (*Konsumgütern*); B11-19/08 (*Kaffee*).

¹²⁴ The Bundeskartellamt imposed fines in twenty-five cases in the period 1 Jan. 2012–1 July 2017 and settled with one or more undertakings in twenty-three 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.

¹²⁵ Legge 10 ottobre 1990, n. 287 – Norme per la tutela della concorrenza e del mercato (Law 287/90).

¹²⁶ Decision 24 Mar. 2010, case 20931; Decision 23 June 2010, case 21279; Decision 3 Nov. 2010, case 21768, Decision 15 Dec. 2010, case 21924; Decision 15 June 2011, case 22521; Decision 22 June 2011, case 22537; Decision 4 Aug. 2011, case 22648; Decision 22 Sept. 2011, case 22812; Decision 28 Sept. 2011, case 22838; Decision 22 Feb. 2012, case 23338; Decision 30 May 2012, case 23623; Decision 2 Aug. 2012, case 23794, Decision 28 Sept. 2012, case 23931; Decision 13 Mar. 2013, case 24275; Decision 23 Apr. 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 Feb. 2014, case 24823; Decision 4 Sept. 2014, case 25078; Decision 22 Oct. 2014, case 25154;

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 thirty-two out of forty-one cases. 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 highest Italian Court (*Corte di Cassazione*).¹²⁸ 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 twenty-nine out of thirty-two cases.

The TAR Lazio accepted the undertakings' appeals partially or fully in twenty out of thirty-two cases, which represents 63%.¹²⁹ 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,¹³⁰ 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

Decision 28 Jan. 2015, case 25295; Decision 3 Feb. 2015, case 25302; Decision 25 Mar. 2015, case 25382; Decision 25 Mar. 2015, case 25401; Decision 22 Apr. 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 Nov. 2015, case 25739; Decision 16 Dec. 2015, case 25784; Decision 22 Dec. 2015, case 25802; Decision 22 Dec. 2015, case 25801; Decision 24 Feb. 2016, case 25882; Decision 19 Apr. 2016, case 25966; Decision 8 June 2016, case 26064; Decision 26 Oct. 2016, case 26229; Decision 21 Dec. 2016, case 26316; Decision 30 May 2017, case 26625; Decision 19 July 2017, case 1742.

¹²⁷ OECD, *Judicial Perspectives on Competition Law, Contribution from Italy* (2017), DAF/COMP/GF/WD (2017)24.

¹²⁸ *The International Comparative Legal Guide to: Cartels & Leniency* (S. Holmes & P. Girardet eds, London: Global Legal Group 2017).

¹²⁹ Decision 3 Nov. 2010, case 21768, Decision 15 Dec. 2010, case 21924; Decision 15 June 2011, case 22521; Decision 4 Aug. 2011, case 22648; Decision 28 Sept. 2011, case 22838; Decision 22 Feb. 2012, case 23338; Decision 2 Aug. 2012, case 23794, Decision 28 Sept. 2012, case 23931; Decision 11 June 2013, case 24405; Decision 22 Oct. 2014, case 25154; Decision 28 Jan. 2015, case 25295; Decision 3 Feb. 2015, case 25302; Decision 25 Mar. 2015, case 25382; Decision 22 Apr. 2015, case 25435; Decision 27 May 2015, case 25488; Decision 27 May 2015, case 25489; Decision 22 Dec. 2015, case 25802; Decision 22 Dec. 2015, case 25801; Decision 24 Feb. 2016, case 25882; Decision 19 Apr. 2016, case 25966; Decision 8 June 2016, case 26064.

¹³⁰ M. Siragusa & G. Cesara Rizza, *Italy*, in *Anti-Cartel Enforcement Worldwide* 656–57 (M. H. Dabbah & B. E. Hawk eds, Cambridge: Cambridge University Press 2009).

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’.¹³¹ 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.¹³² 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.¹³³ In other cases, the Council of State reduced the amount of the fine itself.¹³⁴ 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 eight cases and fully or partly annulled the judgment in eight cases as well. In two 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 1998.¹³⁵ The ACM can impose a fine for any infringement of the prohibition of anti-competitive agreements

¹³¹ *Ibid.*

¹³² Consiglio di Stato – 03170/2014, TAR Lazio – 05887/2012; TAR Lazio – 10309/2016.

¹³³ Consiglio di Stato – n. 3291/2015; Decison AGCM 28 Sept. 2012, n. 23931.

¹³⁴ Consiglio di Stato – 03016/2017; Consiglio di Stato – 02947/2016.

¹³⁵ See about this J. H. Jans & A. Outhuijse, *Advisory Objection Procedures in the Netherlands. A Case Study on its Usefulness in Dutch Competition Law*, in *On Judicial and Quasi-Judicial Independence* 179–94 (S. Comtois & K.J. de Graaf eds, The Hague: Eleven Publishing 2013); A. T. Ottow, *Erosion or Innovation?: The Institutional Design of Competition Agencies – A Dutch Case Study*, 2 J. Antitrust Enforcement 25–43 (2014).

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 fifty-two 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

Between 2003 and 2013, undertakings have filed for appeal at the Rotterdam District Court in more than 70% of cases.¹³⁷ Since 2010, the ACM has imposed a fine in twenty-two cartel cases, and at least one or more undertakings have filed for an appeal in nineteen of the twenty-one cases, which represents 90%.¹³⁸ As in the German system, the ACM has the opportunity to review its decision before the companies can challenge it in court.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.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,¹⁴¹ has shown that in general the objection procedure is followed by judicial appeal proceedings in only 10% of cases.¹⁴² As the figures showed, this trend is however 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.¹⁴³

¹³⁶ Outhuijse, *supra* nn. 5 and 6.

¹³⁷ Outhuijse, *supra* n. 5. This percentage was calculated on the basis of the cases before 2010. Including all cases in which the ACM imposed fines for anti-competitive agreements (1999–present) leads to percentage of 81% of cases: an appeal was filed to the Rotterdam District Court in forty-two out of fifty-two cases. In the parliamentary papers for establishing the ACM in 2013 is mentioned a percentage of 87% between the years 2000 and 2011, although it is not clear what is included in this percentage. *Parliamentary papers II* 2012/13, 33622, nr. 3, at 12.

¹³⁸ Outhuijse, *supra* n. 6. Commencing an appeals procedure remains possible in one more case.

¹³⁹ A. Outhuijse, *The Effective Public Enforcement of the Cartel Prohibition: Perceptions About the Functioning of the Objection Procedure and the Reality*, 39 *RdW* 38–58 (2018); Jans & Outhuijse, *supra* n. 135.

¹⁴⁰ Art. 7:11 General Administrative Law Act (GALA).

¹⁴¹ See Outhuijse, *supra* nn. 6 and 139 for the design of the objection procedure.

¹⁴² See Outhuijse, *supra* nn. 6 and 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.

¹⁴³ See Outhuijse, *supra* n. 20.

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.¹⁴⁴ In one of the older cases, the construction fraud case which concerned a national price-fixing system involving 1,300 undertakings, 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.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.¹⁴⁶ An analysis of the case law from 1 January 2013 onwards has shown that the proportion of decisions annulled has not decreased since 2013.¹⁴⁷ On the contrary, the court refrained from revising one or more fining decisions in only two out of eighteen cases for the same period.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 behaviour took place, but were not convinced of the capability of the behaviour 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.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.

¹⁴⁴ *Ibid.*

¹⁴⁵ Outhuijse, *supra* n. 6.

¹⁴⁶ Outhuijse, *supra* n. 5.

¹⁴⁷ Outhuijse, *supra* n. 6.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*; Outhuijse, *supra* n. 5.

4.9 SWEDEN

The Swedish Competition Authority (*Konkurrensverket* (KKV)) is the central administrative authority applying the Swedish Competition Act, which also incorporates the prohibition of anti-competitive agreements.¹⁵⁰ 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 eighteen cases.¹⁵¹ 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 is one of the new additions to the Swedish Competition Act as of 2008.¹⁵² 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.¹⁵³ If these requirements are met, the authority can impose a fine. If not, the KKV is directed to appeal the case to the Market Court. 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.¹⁵⁴ 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 three out of eight cases since it received this competence in 2008.¹⁵⁵

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

¹⁵⁰ Swedish Competition Act Konkurrenslag (2008:579), English version available via: http://www.wipo.int/wipolex/en/text.jsp?file_id=290554

¹⁵¹ Case 184/2014; Case 848/2014; Case 511/2014; Case 483/2013; Case 327/2010; Case 605/2010; Case 645/2010; Case 237/2007; 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.

¹⁵² N. Parr & C. Hammon, *Cartels Enforcement, Appeals & Damages Actions* 200 (London: Global Legal Group 2016).

¹⁵³ Proposition 2007/08:135, at 261–63.

¹⁵⁴ P. Forsberg, *Sweden*, <https://www.globallegalinsights.com/practice-areas/cartels/global-legal-insights---cartels-5th-ed./sweden#chaptercontent1> (accessed 14 Oct. 2018).

¹⁵⁵ KKV 9 Nov. 2016, dnr 184/2014 (*Ragn-Sells and Cr Freight*); KKV 10 Dec. 2011, dnr 327/2010 (*Uppsala asfaltanlägg and Björn Hägglands Maskiner*); KKV 30 June 2009, dnr 237/2007 (*Rundvirke Poles AB*).

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.¹⁵⁶ 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 fifteen cases to request the court to impose a fine,¹⁵⁷ and the PMD has accordingly fined the undertakings in only two cases.¹⁵⁸ In eight cases, the PMD imposed a fine, but at a lower rate than requested, especially in recent years.¹⁵⁹ For example, in *Telia Sonera & Göteborg energy*, the PMD imposed a fine of SEK sixteen million even though a fine of SEK thirty-five million was proposed by the KKV.¹⁶⁰ 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 five cases that no fine could be imposed because of insufficient evidence.¹⁶¹ 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

¹⁵⁶ European Commission, *supra* n. 49.

¹⁵⁷ Case 848/2014; Case 511/2014; Case 483/2013; Case 605/2010; case C45/2010; 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.

¹⁵⁸ PMD 4 June 1998, T 8-370-98 (*Bygplast & båtprylar Sverige AB och AB Hermann Gotthardt*); PMD 30 Sept. 1999, T 8267-99 (*Lundgrens Maskinförmödenheter AB, Tricoflex S.A. Tricoflex Scandinavia AB*).

¹⁵⁹ PMD 21 Dec. 2016, PMT 17299-14 (*Telia Sonera & Göteborg energy*); PMD 18 Dec. 2015, T 12305-13 (*Aleris Diagnostics AB, Capiro St Görans Sjukhus AB and Hjärtkärgruppen i Sverige AB*); PMD 21 Jan. 2014, T 18896-10 (*Däckia Euromaster*); PMD 24 Feb. 2012, T 19974-10 (*Scandorama AB och Ölveemarks Holiday AB*); PMD 10 July 2007, T 5467-03 (*Asfaltkartellen*); PMD 15 Mar. 2005, T 11660-03 YIT Building Systems AB and Keyvent AB (*Ventilation Cartel*); PMD 29 Apr. 2003, T 9902-00 (Norsk Hydro AB, OK-Q8, Preem Petroleum AB, AB Svensk Shell and Statoil Detaljhandel AB (*Benzinkartellen*)); PMD 18 Dec. 2001, T 10594-99 (*Uponor Sweden, Svenska Wavin, KWH Pipe Sweden*). See for a nice overview of all the Swedish cases and the outcomes: <http://www.konkurrensverket.se/konkurrens/avgoranden/horizontella-konkurrensbegransande-samarbeten/>

¹⁶⁰ PMD 21 Dec. 2016, PMT 17299-14 (*Telia Sonera & Göteborg energy*).

¹⁶¹ 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, Bilia Personbilar AB, Bil Månsson i Skåne AB, Göinge Bil AB, Johan Ahlberg Bil AB, Kristianstads Automobil AB and Skånebil Personbilar AB*); PMD 1 Sept. 2006, T 15163-04 (*Assistancekåren Sweden AB and the Association MRF-Bärgarna*); PMD 1 Dec. 2006, T 3104-04 (*TDC i Uppsala AB och Uppsala Taxi 100 000 AB*); PMD 27 Oct. 1999, T 19576-98, partly (*HB Ivars Trafikskola, Tage Vågelinds Trafikskola AB, Börjes Trafikskola Ejfr., Ninas Trafikskola AB, PO Trafikskolan i Luleå AB*).

¹⁶² Simonsson, *supra* n. 10.

the fines. In total, eight cases have been appealed.¹⁶³ The KKV appealed in two, the undertakings in three and both also in three 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 enough 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 sixteen 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 three 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 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 thirty-seven cases for the infringement of the prohibition of anti-competitive agreements.¹⁶⁹

¹⁶³ Case 848/2014; Case 511/2014; Case 483/2013; Case 605/2010; Case 341/2003; Case 331/2004; Case 895/2004; Case 608/2000; Case 633/1999.

¹⁶⁴ PMÖD 13 Feb. 2018, PMT 761-17 (*Telia Sonera & Göteborg energy*).

¹⁶⁵ Inter alia PMÖD 28 Apr. 2017, PMT 7497-16 (*Aleris Diagnostics AB, Capio St Görans Sjukhus AB and Hjärtkärlgruppen i Sverige AB*).

¹⁶⁶ Market Court 11 Sept. 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 Feb. 2005, MD 2005:7 (*Norsk Hydro AB, OK-Q8, Preem Petroleum AB, AB Svensk Shell and Statoil Detaljhandel AB (Benzinkartellen)*).

¹⁶⁸ Market Court 1 Nov. 2007, MD 2007:23 (*Assistancekåren Sweden AB and the Association MRF-Bärgarna*); Market Court 24 Jan. 2003, MD 2003:2 (*Uponor Sweden, Svenska Wavin, KWH Pipe Sweden*).

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/17777-02; 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;

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 two cases, while fines were imposed in a total of seventeen cases in this period, which amounts to an appeal rate of 11%.¹⁷⁴ Both appeal cases concern fines imposed in 2016 and are pending before of the CAT at the time of writing.¹⁷⁵ 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 eleven heard cases, the CAT annulled one or more fines in eight cases, which represents 73% of the cases.¹⁷⁶ Important to note is that the

Case CE/9856-14; case 50223; Case CE/9859-14; Case CE/9691/12; Case CE/9691/12; Case CE/9882-16; case 50343.

¹⁷⁰ Competition Appeal Tribunal, (2015) *Guide to Proceedings 2015*, https://www.cattribunal.org.uk/sites/default/files/2017-12/guide_to_proceedings_2015.pdf (accessed 14 Oct. 2018); J. Mummery, (2014) *Independent Report: Review of the Rules of Procedure of the Competition Appeal Tribunal*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/401696/bis-15-73-independent-report-review-of-rules-of-procedure-of-competition-appeal-tribunal-cat.pdf (accessed 14 Oct. 2018); Lianos, Jenny, Wagner-von Papp, Motchenkova & David, *supra* n. 10; D. Rose & T. Richards, *Appeal and Review in the Competition Appeal Tribunal and High Court*, 15 *Jud. Rev.* 201–19 (2010); A. Andreangeli, *The Changing Structure of Competition Enforcement in the UK: The Competition Appeal Tribunal Between Present Challenges and an Uncertain Future*, 3 *J. Antitrust Enforcement* 1–30 (2015).

¹⁷¹ CAT, *supra* n. 169, at 6.

¹⁷² *Ibid.*, at 5; Andreangeli, *supra* n. 169.

¹⁷³ Bavasso & Tolley, *supra* n. 10, at 1236–41; Veljanovski, *supra* n. 9; Whish & Bailey, *supra* n. 10, at 447–51.

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 & David, *supra* n. 10, at 50.

annulment for most companies was limited to a reduction of the fine.¹⁷⁷ The court concluded in two 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.¹⁷⁸ 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.¹⁷⁹ In case the CAT reduced the fine, it often did this substantially, in some cases up to a 90% reduction.¹⁸⁰ The CAT can vary the amount of the fine and is in principle not bound by the competition authority's Guidance on penalties.¹⁸¹ 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.¹⁸²

5 SUMMARY AND CONCLUDING OBSERVATIONS

This article was an empirical assessment of the frequency of litigation and success in cases of cartel fines in ten 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%.¹⁸³ The rates in Germany and the United Kingdom are lower, ranging between 30% and 40%, with even lower percentages when analysing 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

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*).

¹⁷⁹ CE/4327-04 (*Construction bid-rigging*). See also C. Brown, *The CAT's Construction Judgments: An Overview*, http://www.matrixlaw.co.uk/wp-content/uploads/2016/03/18_05_2011_02_32_17_Christopher-Brown-Construction-Judgments-paper.pdf (accessed 14 Oct. 2018).

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

¹⁸¹ *Kier Group PLC & others v. OFT* [2011] CAT 3, paras 74 & 77; *Argos Limited and Littlewoods Limited and JJB Sports plc v. Office of Fair Trading* [2006] EWCA Civ 1318, para. 160.

¹⁸² *Kier Group PLC & others v. OFT* [2011] CAT 3, para. 74.

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.

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.¹⁸⁴ 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.¹⁸⁵ Naturally, cooperation with the competition authority significantly limits the grounds for the undertaking to file an appeal.¹⁸⁶ 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.

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 eight out of ten countries is above 50%.¹⁸⁷ Germany is an exception where the successful appeal rate, in the sense of complete annulments or fine reduction, is considerably low – 17%. By contrast, the German practice has examples where the Düsseldorf Court has increased the fine on appeal. 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.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

¹⁸⁴ The same trend is visible in the American enforcement of cartels. D. H. Ginsburg & J. D. Wright, *Antitrust Settlements: The Culture of Consent*, 1 *Liber Amicorum Bill Kovacic* 13 (2013); G. S. Georgiev, *Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law*, *Utah L. Rev.* 971–1037 (2017); J. C. Gallo, J. L. Craycraft & S. C. Bush, *Guess Who Came to Dinner: An Empirical Study of Federal Antitrust Enforcement for the Period 1963-1984*, 2 *Rev. Indus. Org.* 106–30 (1985).

¹⁸⁵ Hellwig, Hüschelrath & Laitenberger, *supra* n. 12.

¹⁸⁶ Outhuijse, *supra* n. 6.

¹⁸⁷ 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 appeal between the first and second instance court. The percentages of cases in which the first instance court in Sweden and Finland did not impose a fine while requested for by the authority or a lower fine than requested for by the competition authority is very high.

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 than the competition authority requested for. See: C. Y. Beaton Wells & J. N. Clarke, *Corporate Financial Penalties for Cartel Conduct in Australia: A Critique* (2018), available at SSRN: <https://ssrn.com/abstract=3149143>

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 behaviour 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 made 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 the *Industrial Gas* case as remarkable since it constitutes one of the very few 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 2017.¹⁸⁹ 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.¹⁹⁰

¹⁸⁹ Siragusa & 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 twenty out of thirty cases, one of the parties appealed the judgment of the Paris Court of Appeal.

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.¹⁹¹ 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 change over time. Furthermore, the literature regarding the EU enforcement noted that party characteristics and party behaviour 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 analysing 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

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.

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.¹⁹² 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 fourteen practitioners who regularly represented undertakings fined for anti-competitive behaviour however showed that the decision to file an appeal is influenced by several reasons other than the fining decision itself.¹⁹³ 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, whether or not in combination with a settlement, can differ per Member State and therefore require 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.¹⁹⁴ In sum, an in-depth empirical study is required to explain practice within the Member States, but an analysis for all ten Member States falls outside the scope of author's current study.

¹⁹² Outhuijse, *supra* n. 6.

¹⁹³ *Ibid.*

¹⁹⁴ A. Outhuijse, *The Effective Public Enforcement of the Prohibition of Anti-Competitive Agreements: Why Do Dutch Cartel Fines Get Annulled?*, not yet published.