ALTERNATIVE ENFORCEMENT OF COMPETITION LAW

The commercial edition of this book is published by Eleven International Publishing.

ISBN 978-94-6236-707-4
ISBN 978-94-6274-609-1 (E-book)

Cover picture: Pauline Phoa
Layout: Klaartje Hoeberechts, School of Law, Utrecht University

Published, sold and distributed by Eleven International Publishing
P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
e-mail: sales@elevenpub.nl
www.elevenpub.com

Sold and distributed in USA and Canada
International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786, USA
Tel: 1-800-944-6190 (toll-free)
Fax: +1 503 280-8832
orders@isbs.com
www.isbs.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

Printed in The Netherlands

ALTERNATIVE ENFORCEMENT OF COMPETITION LAW

Alternatieve Handhaving van Mededingingsrecht
(met een samenvatting in het Nederlands)

Méthodes Alternatives d'Exécution du Droit de la Concurrence
(avec un résumé en français)

Proefschrift

ter verkrijging van de graad van doctor aan de Universiteit Utrecht
op gezag van de rector magnificus, prof.dr. G.J. van der Zwaan, ingevolge het
besluit van het college voor promoties in het openbaar te verdedigen op
vrijdag 30 september 2016 des ochtends te 10.30 uur

door

Eva Suzanne Lachnit

geboren op 16 november 1988
te Dordrecht

Promotoren: Prof.dr. A.T. Ottow
Prof.dr. A. Gerbrandy

ACKNOWLEDGEMENTS

Some people claim that they have always known that they wanted to write a thesis. I did not. In fact, I always thought I was going to be a journalist when I grew up. It must have been a shock to my family when I ended up in law school. It must have been even more surprising that I initially chose to specialize in corporate law. During my master's degree, I gradually fell in love with European competition law, which sparked an interest in many more European law-related topics. After having completed my master's studies (yes, two – those were the days…), I even worked as junior lecturer in the field. When a Ph.D. position opened up in the field of my 'first love', however, it did not take much convincing for me to apply.

I can vividly remember the day that my supervisors, Annetje Ottow and Anna Gerbrandy, came to my office to tell me that I had got the job, walking down the hallway in a way that immediately indicated 'good news'. Now, over four years later, I look back at my thesis writing time as having been 'good news' indeed, which in no small way is due to the efforts of my two supervisors. Annetje, who has laid the foundations for this research and has shaped my way of thinking about supervision and enforcement, thank you for pushing me out of my comfort zone and into practice. It has been one of the most enriching experiences in the last few years. And Anna, your interests in and beyond competition law have encouraged me to ask more and to think more widely. Thank you for lending me your ear and your books, and for trusting me with 'your' courses and students. Both of you are an inspiration to young (female) academics and I am proud to call you my colleagues.

Competition law is both a theoretical and practical field of law, with connections to economics, to the European level and to broader questions of supervision and enforcement. All of these connections are reflected in my assessment committee, to whom I owe many thanks. Nicolas Petit, Wouter Wils, Madeleine de Cock-Buning and Laura Parret, thank you for your valuable comments on the earlier version of this book. I am honoured to have you in my committee. It goes without saying that the same is true for Sybe de Vries, who I would also like to thank for sparking (and nurturing) my enthusiasm for European law and helping me to take the first steps in my career.

In the course of this research, I have had the pleasure of meeting my 'subjects of investigation' at the Autoriteit Consument en Markt, the Autorité de la Concurrence and the Competition and Markets Authority. Unfortunately, I cannot list them here for reasons of confidentiality (as an academic reflex action, I almost added: see Annex), but I am very thankful to have had the opportunity to work with all of you. I would especially like to thank 'my team' at ACM, who made my months there an unforgettable experience. Apart from that, I am grateful to Sonya Branch, Chris Fonteijn and David

Viros for helping my idea to conduct interviews and undergo internships to become a reality.

The result of all this research and fieldwork is the book that you are now reading. This book would not have been possible without the help of the marvellous editing department of the Utrecht University School of Law. Klaartje Hoeberechts, thank you for your patience and creativity with the layout. Peter Morris, thank you for the amazingly quick and thorough language editing. Elie and Laurens, thank you for helping me with the translation and the statistics respectively. Paul, with deKeyzervanAken, thank you for your creative ideas and your help. I'm lucky to have an uncle who specializes in *grafische zaken*. Many thanks – last but not least – to Mariska Duindam with Eleven Publishing for your assistance in the publishing process and the beautiful end-result.

And with the research and the book covered, it is time to turn to the festive and ceremonial side of Ph.D. research: the defence. In Dutch thesis defences, people have two 'seconds' (*paranimfen*) to help them before and during the big day. I have had the luxury of having three seconds and a team of 'shadow seconds' (*schaduwparanimfen)* to make my thesis defence happen. Sanne, we hebben elkaar leren kennen als eerstejaars bijdehandjes en hebben daarna paden gekozen die heel verschillend zijn, maar toch ook weer veel overeenkomsten hebben. Ik ben trots op je; dat we straks ook maar mogen proosten op jouw mooie boek. Hanneke, jouw promotietraject en jouw dag zijn in veel opzichten een voorbeeld geweest. Ik ben blij dat je mijn vriendin en kamergenote bent, zelfs zonder dezelfde kamer! Fleur, mijn lieve zusje, dank je wel voor je nuchtere kijk en je relativerende humor waar ik zo veel van kan leren. Dit proefschrift is ontstaan dankzij (of ondanks…) menig samenwerk-middagje, en het thuiswerken had zonder jou niet half zo leuk geweest. Pauline, m'n roomie, brainstorm-koningin, schilderes, klusgenoot en vriendin; dank je voor de prachtige voorkant die echt het 'logo' van mijn promotie is geworden, en voor alle gezellige uren op- en buiten onze werkkamer. Janneke, mijn collega van 'mijn andere werk', maar bovenal mijn lieve vriendin, dank je voor je steun, voor alle telefoonmomentjes in lastige of saaie tijden, en de afleiding die we hebben met onze fantastische dansgroepen.

Het moge duidelijk zijn uit de dankwoorden van mijn beroemde Utrechtse voorgangers: Achter Sint Pieter is een bijzondere plek. Voor mij komt dat in de eerste plaats door de vakgroepen Economisch Publiekrecht en Europees Recht en de inspirerende en lieve collega's die ik daarbinnen (maar ook daarbuiten!) heb mogen ontmoeten. In het bijzonder wil ik Marloes, Willem, Sander en Paulien bedanken voor hun steun en het delen van 'hetzelfde schuitje'. Bas, Tony en Jotte, bedankt voor jullie hulp, commentaar en kritische vragen. Tao and Andrea, thank you for being amazing colleagues and for your support in the last few years. Ook de 'ASP-verlaters' kan ik niet vergeten, waaronder speciale dank aan Herman, Margot, Melissa en Loes. Dat er nog maar vele werk- (en niet werk-) gerelateerde etentjes mogen volgen.

Dat kritisch onderzoek het best gepaard gaat met lekker eten weten ook mijn vrienden en familie. Daarom spreek ik, naast mijn dank, bovenal de wens uit straks met jullie allemaal op dit boek te proosten en te eten. Een aantal personen wil ik in het bijzonder noemen. Lieve Marieke, Janneke en Annieke, dank jullie voor de legendarische donderdagavonden en alles daaromheen. Ik blok ze tot mijn pensioen. Lieve Yo en Lena, dank jullie voor jullie steun en het feit dat we ondanks de maanden ertussen direct weer kunnen kletsen en roddelen. Lieve Wesley en Fleur, dank jullie voor alle steun,

interesse, afleiding en de zelfgemaakte biertjes van Brouwerij Ongeduld – en voor de spelletjesavonden waarvoor we vast weer uitgenodigd gaan worden. Lieve Noortje, ik ben trots op jouw doorzettingsvermogen en discipline. Daar zou je zo een proefschrift mee kunnen schrijven. Lieve oma, ondanks dat dit nog steeds geen gelegenheid is met het hoedje met de kwast, weet ik dat u ontzettend trots bent. Ik ook op mijn hippe oma. Lieve pap en mam, dank jullie voor jullie onvoorwaardelijke steun en het feit dat jullie ons alle drie stimuleren om het beste uit onszelf te halen. Dit boek is daar het bewijs van. Ik ben blij dat ik altijd (en met alles) bij jullie terecht kan.

Liefste Sep, jij hebt het misschien wel het zwaarst te verduren gehad in de laatste fase van het onderzoek. Ondanks de last-minute stress en onzekerheden weet jij het positieve te zoeken in elke situatie. Jouw kracht, rust en onvoorstelbare stressbestendigheid inspireren en activeren mij elke dag. Ik ben trots op jou, op ons en op ons huis. Ik kijk uit naar onze verre reis samen – de bestemming kiezen we nog wel. *Je t'aime.*

Eva Lachnit
Dordrecht, juli 2016

CONTENTS

LIST OF ABBREVIATIONS

ACER	Agency for the Cooperation of Energy Regulators
ACM	*Autoriteit Consument & Markt*
ACREP	*Autorité de Régulation des Communications Électroniques et des Postes*
A-G	Advocate General (of the Court of Justice of the European Union)
BEREC	Body of European Regulators for Electronic Communications
BIS	Department for Business, Innovation & Skills
BAC	*Bezwaaradviescommissie*
CA98	Competition Act of 1998
CAT	Competition Appeals Tribunal
CC	Competition Commission
CDG	Case Decision Group
CEER	Council for European Energy Regulators
CJEU	Court of Justice of the European Union
CPC	Consumer Protection Cooperation
DGCCRF	*Direction Générale de la Concurrence, de la Consommation et de la Répression des Frauds*
DG COMP	Directorate-General for Competition
EA02	Enterprise Act 2002
ECA	European Competition Authorities
ECHR	European Convention of Human Rights
ECN	European Competition Network
ERGP	European Regulators Group for Postal Services
ERRA	Enterprise and Regulatory Reform Act of 2013
FTE	Full Time Equivalent
ICN	International Competition Network
ICPEN	International Consumer Protection and Enforcement Network
IRG-Rail	Independent Regulators Group - Rail
NAO	National Audit Office
NCA	National Competition Authority
NMa	*Nederlandse Mededingingsautoriteit*
NRA	National Regulatory Authority
NRE	*Nouvelles Régulations Économiques*
OECD	Organisation for Economic Co-operation and Development
OFCOM	Office of Communications
OFGEM	Office of Gas and Electricity Markets
OFT	Office of Fair Trading

OFWAT	Water Services Regulation Authority
SRO	Senior Responsible Officer
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UK CMA	Competition and Markets Authority

Part I

INTRODUCTION AND CONTEXT

Chapter 1

INTRODUCTION

This thesis investigates the use of alternative enforcement instruments by the competition authorities of the Netherlands, France and the United Kingdom (hereinafter: the UK). In this introduction, the topic as such is introduced and the context in which this topic has to be seen is explained. It also defines 'alternative enforcement' as a concept and presents the research question and its delineations. In that sense, the introduction has to be read in conjunction with the annex to this thesis, in which the methodological choices underlying this research are further explicated. This introduction as such determines the framework within which the research of this thesis has to be read. To that end, it also provides a number of definitions and a short overview of the contents of the thesis.

1. PRESENTATION OF THE RESEARCH TOPIC

Competition authorities are responsible for the enforcement of competition law.[1] To that end, they are equipped with enforcement instruments that allow the authorities to intervene in markets, to find infringements and to sanction the companies responsible.[2] Because they have multiple enforcement instruments at their disposal, competition authorities can choose different paths when a problem with competition presents itself. When a problem turns out to be an infringement of competition law, it is possible for the competition authority to impose a fine.

> For instance, an infringement could be found when a company with a dominant position on a given market engages in an aggressive and erroneous communication strategy to the detriment of (potential) competitors.[3] This was the case in the French pharmaceutical market, where the manufacturer Sanofi-Aventis exploited the differences between its brand-name cardiovascular medication (Plavix®) and its generic counterpart in order to discourage doctors and pharmacists from switching to cheaper substitutes manufactured by competitors.[4] This was possible, as the patents

1 They are partially responsible for its enforcement. Other actors are the national courts and the Court of Justice, either because of the way the national procedural system is designed, because of appeals or through private actions. However, neither enforcement by courts, nor enforcement through private actions are the focal point of this thesis. Attention is paid to these actors when necessary in the course of administrative enforcement.

2 The term 'company' is used throughout instead of the legally correct 'undertaking' in this respect. An undertaking is 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed', see CJEU Case C-41/90 (*Höfner*). In this thesis, company is used in the same way to avoid confusion. This is because in some national practices undertakings are comparable to commitments in the course of some enforcement procedures.

3 Such a strategy could constitute possible abusive behaviour, see Article 102 TFEU.

4 Autorité de la Concurrence, 13-D-11 (*Sanofi-Aventis*).

protecting one particular ingredient of Plavix® had been extended, as well as the patent protecting one specific type of combination treatment. Other than that, Plavix® and its generic counterparts were recognized by health authorities as being interchangeable. However, Sanofi-Aventis convinced doctors and pharmacists that Plavix® was non-substitutable, and if a generic substitution *must* be used, the generic version produced by Sanofi-Aventis would be preferable. This led to very low substitution rates and an abnormal market share for Sanofi-Aventis in the market for the generic substitute.

The French competition authority, the *Autorité de la Concurrence* (hereinafter: Autorité), investigated this particular practice from June 2010 to May 2013. Despite having refused to take interim measures upon a complaint at an earlier date,[5] the Autorité imposed a fine of no less than €40.6 million upon Sanofi-Aventis and ordered it to refrain from its strategy. During the drafting of the decision, Sanofi-Aventis put forward its views repeatedly and was granted a hearing at the office of the Autorité. After publication, the Autorité's decision was appealed before the *Cour d'Appel de Paris*, but the Court upheld the decision.[6] The Autorité has neither fined Sanofi nor Aventis since then.

This example illustrates the use of the fining decision as an enforcement instrument, which in this case was effective as it ordered the dominant firm to stop its abusive behaviour. However, fining procedures might not always be the answer to an infringement of competition law. They can be lengthy and costly, and can be extended by the possibility of an appeal before the relevant courts.[7] As a result, competition authorities have shown an interest in *alternative* procedures that meet these shortcomings.

In – again – the market for pharmaceuticals manufacturers are sometimes confronted with the expiry of a patent. If, like the example above, an extension of the patent is impossible, manufacturers might pursue a different strategy to maintain their dominant positions on the market. This was done by the pharmaceutical company Reckitt Benckiser in the UK, the producer of the anti-heartburn medication Gaviscon®. Shortly before its patents would expire, Reckitt Benckiser withdrew Gaviscon Original® from the prescription lists, leaving medical professionals to come across Gaviscon Advanced® (which was still patent protected) when searching for anti-heartburn medication. Because of the withdrawal of Gaviscon Original®, medical professionals would not be able to tell that its patents had expired and that generic alternatives had been made available. This would make it less likely for medical professionals to use a so-called open prescription, which would allow pharmacists to give patients generic versions of Gaviscon®.

The competition authority of the UK, the Competition and Markets Authority (hereinafter: UK CMA), considered this withdrawal from the prescription lists to be a deliberate move, and intended to fine Reckitt Benckiser for the abuse of its dominant position. To that end, it sent the company a statement of objections in February 2010. However, after having had informal meetings concerning a possible 'quick resolution' in both of the parties' interest, Reckitt Benckiser withdrew its earlier observations and signed a settlement agreement with the UK CMA. Within this settlement agreement, Reckitt Benckiser admitted the infringement and promised to cooperate towards a speedy resolution of the case. The UK CMA granted a 15% fine reduction in return,

5 Autorité de la Concurrence, 10-D-16 (*Teva-Santé*).
6 Cour d'Appel de Paris, no. 2013/12370 (*Sanofi-Aventis*).
7 See for a more detailed discussion of the upsides and downsides of fining procedures in section 3 below.

which brought the ultimate fine down to a little over £10 million instead of the £12 million that it was intending to impose.[8] The case took a little over a year to come to a close.[9]

Settlement-like procedures in which companies contribute to a speedier resolution of a case by not contesting or appealing the findings made by the competition authorities in return for a fine discount are examples of alternative enforcement instruments, because they incorporate an efficiency aspect that regular fining procedures do not.[10] However, it is also possible to take an alternative approach altogether.

Competition between brand-name and generic medication keeps the companies in the pharmaceutical industry rather busy (and with that, also the competition authorities). This was also noted by the Dutch competition authority, the *Autoriteit Consument en Markt* (hereinafter: ACM), which investigated the pharmaceutical company Astra-Zeneca for an abuse of a dominant position in the market for – again – anti-heartburn medication.[11] However, in the course of the investigation the ACM could not establish a dominant position for Astra-Zeneca (and its brand-name medication Nexium®) and closed the case. This left the ACM with a fair amount of knowledge about the pharmaceutical market and the strategies that manufacturers might employ to prolong their patent-driven dominant positions. Because it considered this behaviour to be undesirable from a consumer welfare point of view, ACM decided to publish its findings in a general report on the functioning of the pharmaceutical market.[12]

In this report, ACM highlights possibly abusive strategies by referring to cases of other competition authorities. It pays attention to 'evergreening' (comparable to Sanofi-Aventis' strategy in the example above), 'pay-for-delay settlements' and withdrawal strategies (comparable to the *Gaviscon®* case).[13] ACM comes to the conclusion that competition law alone might not be sufficient to prevent this behaviour by manufacturers and gives practical recommendations to improve the competitive position of generic medications, such as adaptations of the Dutch prescription system and legal limitations on the setting of prices in the pharmaceutical sector. These recommendations are, of course, not binding. However, the ACM's report fits into a broader enforcement strategy in which the pharmaceutical market has been marked as a priority for the next two years.[14] With this report, the ACM shows that it is closely monitoring developments in this market.

These examples illustrate different 'flavours' of enforcement within a specific market (in this case, the market for pharmaceuticals, which is a hot topic in competition law today).

---

8 Office of Fair Trading, CA98/02/2011 (*Reckitt Benckiser*).

9 To be precise, from the statement of objections to the final decision, it took 412 days – without further appeal. To compare, the *Sanofi-Aventis* case took 495 days from the statement of objections to the final decision, and another 583 days for the appeal.

10 See the full definition in section 3 below.

11 Autoriteit Consument en Markt, 7069/1832/OV (*AstraZeneca*). Not to be confused with the *AstraZeneca* judgment of the Court of Justice, see CJEU Case C-457/10 P (*AstraZeneca*). It is, however, very similar to the famous *Napp* case of the predecessor of the UK CMA: Office of Fair Trading, CA98/2/2001 (*Napp*).

12 ACM *Farmacie onder de Loep,* 2015.

13 Evergreening entails an extension of patents in very similar drugs (me-too medication), pay-for-delay entails a settlement with manufacturers of generic versions to enter the market at a later time and withdrawal strategies entail the de-listing of almost expired medication to the benefit of longer lasting patented work. See ACM *Farmacie onder de Loep,* 2015, fn. 14, fn. 18 and fn. 21.

14 Workplan ACM 2014-2015 and Workplan ACM 2016-2017.

In the cases of the Autorité and the UK CMA, specific action was undertaken against individual companies abusing their dominant position on the relevant market, while the ACM opted for a broader study of the market and made recommendations to the market from there. Also, where the Autorité confronted the company head-on, the UK CMA engaged in a discussion with the manufacturer in question, reached a settlement and closed the case more quickly while limiting the possibility of an appeal. All in all, these examples show that competition authorities have devised (or have been granted) a variety of enforcement instruments that they can apply at their own discretion.[15] This gives them a great deal of flexibility and enables them to tailor interventions to the circumstances of the case in order to enforce effectively. On the other hand, competition authorities form a part of the administration, and even though they serve a public goal (to protect and promote competition), any competition law case can be perceived as a public body intervening in companies' private business. This means that competition law enforcement must adhere to certain principles and respect the rights of those it corrects. Thus, there is tension between the results they desire to generate and the standards they are obliged to uphold.

The tension between effective outcomes and respecting safeguards is the central tenet of this thesis and is applied to a selection of enforcement instruments that competition authorities have at their disposal.[16] This selection comprises *alternative* enforcement instruments: negotiated procedures, markets' work, individual guidance and compliance assistance. The label 'alternative' refers to what – in any case – these instruments are not: sanctions as imposed through a fully adversarial procedure. Alternative enforcement instruments bring different aspects to the competition authorities' enforcement toolkit that fully adversarial procedures do not, such as increased efficiency, informality or prevention.[17] In that capacity, they can strike a different balance in the tension identified above, often pursuing more effectiveness, efficiency or flexibility, possibly at the cost of respect for safeguards. This thesis reviews the position of the different alternative enforcement instruments within this tension and identifies challenges for competition law enforcement by the national competition authorities.[18]

2. CONTEXT: DRIVERS OF CHANGE IN COMPETITION LAW ENFORCEMENT

The examples discussed in the introduction above are rather piecemeal and do not really explain the renewed focus on alternative enforcement instruments in the field of competition law. Competition authorities have devised alternative instruments with which to enforce the law, yes, but their use can be better explained against the backdrop of three different practical developments. On a procedural level, the decentralisation of European competition law enforcement and the abolition of the exemption regime have played an important part in streamlining enforcement on a national level. On a substantive level, the debate on the goals of competition law has had an impact on enforcement and will continue to be intertwined with the enforcement choices made by

15 This touches upon the 'drivers' of alternative enforcement as discussed below. See section 2.

16 This tension is further explained in section 2.3.2. below, and forms the dividing line in the normative framework that is used to test alternative enforcement practice. See Chapter 3 in full.

17 See the full definition of alternative enforcement in section 3 below.

18 See the more extended definition of the research question in section 4 below.

the competition authorities. On a broader political and societal level, lastly, competition authorities are faced with the difficult challenge of delivering more effective results on a smaller budget. This tension is reflected in the perception of what constitutes a 'good' competition authority and has changed the institutional design of some of the competition authorities – both of which have a close connection with the way competition law is enforced.[19] This section discusses these three developments by briefly depicting the context, after which its relevance for competition law enforcement and alternative enforcement instruments is discussed.

2.1 Driver 1: Decentralisation

When discussing the enforcement of competition law on a national level, it is impossible not to look at the European level as well. Since 2004, the competition authorities in the Member States are equally responsible for the enforcement of European competition rules – rules that are quite often applicable in the case of transnational agreements or large corporations. Apart from that, developments on the European level and on the national level often interact, both substantively and procedurally. Therefore, in order to better understand the context against which alternative enforcement instruments in the Member States can be seen, it is important to discuss one of the most impactful changes in the European competition law enforcement regime: the modernisation and decentralisation that occurred in the early 2000s. Even though this is 'ancient history' judging by how quickly competition law has evolved over the years, decentralisation is an important landmark that interacts with alternative enforcement in different ways. First of all, decentralisation has led to the adoption (and attribution) of new enforcement powers in the Member States. Secondly, the decentralisation of enforcement has set a new standard for enforcement in the Member States, as it has to comply with the requirement of the effectiveness of Union law. Lastly, the formation of the European Competition Network (ECN) has enabled an exchange between the national competition authorities and the development of best practices. These interactions are further discussed below. However, before that, some attention is paid to the modernisation process as such.

2.1.1 Background of the Modernisation

When speaking of the 'modernisation' of European competition law, one usually means the period of time between 1999 and 2003 during which the enforcement regime of the European Commission (hereinafter simply: the Commission) was reformed. It is named after the White Paper on Modernisation published by the Commission in 1999, on the basis

19 Note that these are not the only challenges competition authorities have been faced with in the last decades. All national authorities might have had to overcome political and societal challenges that are specific to that Member State or the ideas about competition, regulation and supervision at the time. Moreover, the interpretation, importance and position of competition law as such have changed greatly over the last few decades (see in more detail, for instance, Patel & Schweitzer 2013 or Kunzler & Warlouzet 2013). The Member State-specific changes and some of the historical context of competition law enforcement is discussed in Chapter 2 of this thesis. The 'drivers' discussed here are chosen for their general applicability and their connection to the different levels of enforcement (European, procedural, substantive, agency-specific and political/societal), as explained above.

of which major changes were made to the Commission's enforcement regime.[20] Before the Modernisation, European competition law was enforced on the basis of Regulation 17. This Regulation provided the Commission with the competence to investigate cartel infringements and abuses of dominance, which were prohibited by provisions similar to the ones in force today. The Commission was not the only competition authority which was competent to apply these rules. It was accepted that national competition authorities and courts could apply the prohibitions alongside their national laws, as long as the Commission had not yet formally started investigations.[21] However, the main difference was found in the exemption clause connected to the cartel prohibition (Article 81(3) of the EC Treaty). Unlike the situation today, companies had to *request* an exemption at the relevant authority – and according to Regulation 17: 'the Commission shall have sole power to declare Article 81(1) inapplicable pursuant to Article 81(3) of the Treaty'.[22] This entailed that all requests for an exemption were directed towards the Commission, which it had to review alongside its other enforcement tasks.

The centralisation of competition law enforcement (which, over the years, had become more and more unusual when compared to other fields of Union law[23]) might have been chosen in 1962 due to the vast differences in competition law enforcement in the Member States and the need for a strong, uniform application of these rules.[24] However, the consequences of this centralisation became visible rather quickly. Because the Commission was the only authority competent to grant exemptions, it soon developed a backlog of over 1000 requests – meaning that all of these companies did not receive a timely answer.[25] This caused the Commission to give preliminary answers in the form of comfort letters. These letters were informal in nature, and became more and more numerous over the years – resulting in commentators criticising the Commission for its non-transparent, lengthy and under-motivated procedures.[26] As a matter of fact, the Commission had rather become 'bogged down', as it only had scarce resources and an enormous caseload to deal with.

This changed in 1999, when the Commission presented its White Paper on Modernisation. The largest legal change was the abolishment of the exemption regime, making Article 81(3) EC (currently 101(3) TFEU) directly applicable.[27] In a speech delivered a year before the publication of the White Paper, the reasons for modernisation appeared to be threefold: the ongoing changes in which competition law operates, the prospect of the expansion of the European Union and the fact that enforcement

20 White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, May 1999. See for a general description of the Modernisation process (written with the benefit of hindsight): Wilks 2005. See for a more general discussion of the benefits and disadvantages of decentralization: Ottow 2010.

21 Ehlermann 2000, p. 539.

22 Regulation 17 of 1962, Article 9(1).

23 Ehlermann 2000, p. 540.

24 See for instance Steindorff 1983, or Ehlermann 1996. See also Chapter 2 of this thesis, in which the historical development of competition law and enforcement is discussed. Keeping in mind that the Regulation dated from 1962, it is not very surprising that the drafters chose a centralised approach over decentralised enforcement, given that at that time the enforcement of competition law was virtually non-existent in any of the Member States under investigation.

25 Number derived from Ehlermann 2000, p. 541.

26 See, very early, Kon 1982. See also Chapter 6, in which this practice of the Commission is discussed in more detail.

27 This discussion was already held much earlier. See Kon 1982 and the response by Steindorff 1983.

in the Member States had become sufficiently effective.[28] The Modernisation process was pushed through the European legislative system rather quickly,[29] and in May 2004 Regulation 1/2003 entered into application. Unsurprisingly, this Regulation did not contain an exemption clause for Article 81(3) EC, but rather made it directly applicable. This entailed that companies were, from that point onwards, responsible for a self-assessment under the competition prohibitions. Moreover, the Regulation paid more attention to the division of competences between the Commission and the national competition authorities and courts and explicitly gave them the competence to apply European competition rules.[30] It also laid down ground rules for cooperation between the different actors in competition law enforcement and ordered the instigation of a European platform on which to coordinate actions and share best practices.[31] These procedural changes led to a decentralisation of European competition law enforcement and made the Commission and the national competition authorities (and the respective judges) equally responsible for the enforcement of competition law.

2.1.2 *Interaction with Alternative Enforcement Practice*

The decentralisation of European competition law enforcement transferred the responsibility for the enforcement of competition rules to the Member States. This entailed that general requirements connected to the application of Union law suddenly became applicable to competition law enforcement as well. As a general rule, Member States can rely on their national procedural rules when applying Union law, which is known as the principle of national procedural autonomy.[32] However, established case law requires Member States to ensure that national procedural rules applicable to European substantive law do 'not render virtually impossible or, at the very least, excessively difficult the exercise of rights conferred by Union law' (effectiveness) and that 'the conditions governing Union law are not less favourable than those governing national law' (equivalence).[33] Amongst other things, this obligation entails that Member States must provide for effective sanctions, observe fundamental rights and provide for effective judicial protection. These obligations are not limited to the legislator, but to the executive power as well, meaning that the national competition authorities have to make sure that the way in which European competition law is enforced is in accordance with the principles of the effectiveness and equivalence of Union law. One the one hand, national procedural autonomy facilitates the development and diversity of enforcement instruments on a national level. On the other hand, it is imaginable that the requirements of effectiveness and equivalence could place limitations upon the use of alternative enforcement instruments. These tensions are discussed in the chapters regarding alternative enforcement instruments where necessary, and are recapitulated in the concluding chapter.

28 Speech Schaub 1998.
29 See for an overview of the timeframes: Gream 2003.
30 Articles 3, 5 and 6 of Regulation 1/2003.
31 Chapter IV of Regulation 1/2003 and Preamble to Regulation 1/2003, paras. 15-18.
32 See in more detail Chapter 3, section 2.1.2 of this thesis.
33 See in particular the judgments in CJEU 33/76 (*Rewe*) para. 5; CJEU 45/76 (*Comet*), paras. 12 to 16 – more case law is referred to in Chapter 3.

Apart from both providing a breeding ground and limiting conditions for the development of national enforcement instruments, the modernisation process itself has led to substantial changes in the national competition authorities' procedures. Suddenly being equally responsible for the enforcement of European competition law uncovered the need to align national enforcement regimes to that of the Commission and to adopt some of its best practices, such as the broad national adoption of the commitment decision as described in Regulation 1/2003. The interaction between developments on a European level and changes made in national practice is explored and discussed for all alternative enforcement instruments under review.

The final interaction between the Modernisation process and alternative enforcement practice in the Member States concerns the European Competition Network (ECN). Set up under the obligation pronounced by Regulation 1/2003 to 'form together a network of public authorities applying the […] competition rules in close cooperation,'[34] the ECN has developed into a cooperation network and a discussion forum. In this collaboration, the ECN has issued various recommendations on best practices, as well as a model leniency programme.[35] Also, the network facilitates notification, allowing the Commission to intervene if necessary and preventing double jeopardy.[36] The ECN would be an ideal platform to share ideas on enforcement, to develop common best practices and to discuss innovative approaches to common market problems.[37] This might even result in a more uniform approach to alternative enforcement instruments and prevent national competition authorities from making the 'mistakes' that others have made when introducing or developing certain instruments. As such, the ECN is continuously developing.[38] The opportunities the ECN has to offer are discussed in the concluding chapter of this thesis, particularly seen in the light of the requirements placed on the national enforcement of European rules.

The Modernisation of the system of European competition law enforcement (and the decentralisation in particular) thus has had its interaction with alternative enforcement practice and will continue to do so in the future. In that light, it is exciting to denote that the Commission has launched a consultation on how to empower national competition authorities to be more effective enforcers.[39] This consultation was launched after a review of 'Ten Years of Regulation 1/2003' and aims to find out whether there is a need to harmonise some aspects of competition law enforcement

34 Regulation 1/2003, Preamble para. 15. See also Commission Notice on Cooperation within the Network of Competition Authorities, pp. 43-53.

35 ECN Recommendation on Investigative Powers, Enforcement Measures and Sanctions in the context of Inspections and Requests for Information (2013), ECN Recommendation on the Power to Collect Digital Evidence, including by Forensic Means (2013), ECN Recommendation on Assistance in Inspections conducted under Articles 22(1) of Regulation (EC) No. 1/2003 (2013), ECN Recommendation on the Power to set Priorities (2013), ECN Recommendation on Interim Measures (2013), ECN Recommendation on Commitment Procedures (2013), ECN Recommendation on the Power to Impose Structural Remedies (2013) and ECN Model Leniency Programme: 2012 revision.

36 Article 11(2) and (3) of Regulation 1/2003 and paragraph 49 of the Commission Notice on Cooperation within the Network of Competition Authorities.

37 See for these opportunities, and more on ECN: Smits 2005, Kekelekis 2009.

38 See for a critical review of the ECN: Cengiz 2010 and Reichelt 2005 (on the rights of companies). A more positive note is given by Wils 2013 (with regard to work sharing) and earlier by Wilks 2007 (under the caveat that the ECN was only operational for a few years when the article was published).

39 Public consultation available at: http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

on a national level.[40] The deadline for submitting views is in February 2016 (after the closing date of the research), but it is important to note that the questionnaire focuses on the enforcement tools and sanctions, the investigatory powers and the independence of competition authorities in particular. The results are expected sometime in 2016, and it will be interesting to see the follow-up.

2.2 Driver 2: Debate on the Goals of Competition Law

One of the developments that have impacted enforcement policy is the goals debate, which – in a nutshell – is a discussion about the objectives that competition law should serve.[41] This debate takes place in the literature, is grounded in economic and legal theories, but is connected to enforcement practice as well. First of all, it has an interpretational function, both for competition authorities as well as for judges.[42] The content – and thereby the applicability – of competition rules are clarified when looking at the goals of competition law. Secondly, the goals of competition law can be the competition authorities' starting point in creating enforcement policy. Ideally, enforcement policy is aligned with the goals of competition law. The questions of 'what', 'how' and 'when' to enforce could, to a large extent, be answered by looking at the goals of competition law. From this line of argument, it must also be said that the goals of competition law could influence the priorities that competition authorities set for themselves and the instruments which are most suitable to achieve these goals. At the other end of the enforcement spectrum, the goal of competition law can also be used in reviewing what is effective. The effectiveness would then be measured in terms of the achievement of this goal. Finally – and depending on which goal – the goals of competition law might increase the accountability of enforcers, in the sense that the reasons behind enforcement decisions are made clear, so that they might come across as less arbitrary and more transparent.[43]

2.2.1 *Possible Goals of Competition Law*

The debate about the goals of competition law is thus intertwined with its enforcement. In academic literature, a great many objectives are mentioned as possible goals,[44] but for

40 Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014), 453.

41 In fact, it even touches upon the question whether competition law should serve one or multiple goals. The outline of the goals debate gives rise to the presumption that scholars and practitioners are looking for a single goal to give direction to competition law, as pointed out by Stucke 2012. Influential is also the work of Motta 2004. More recently the single goal has been defended by Baarsma 2010. Nevertheless, it is accepted, both by academics as well as in practice, that competition law can serve a multitude of goals (see for instance the ICN Report 2010, or Parret 2010). Either way, in case of multiple goals of competition law, solutions for applying, weighing and balancing these goals need to be identified (Monti 2002).

42 Parret 2010, pp. 360-366 and Stucke 2012, p. 558.

43 As pointed out in American Bar Association, Report on Antitrust Policy Objectives, 2003.

44 In addition to the ones mentioned below, economic freedom, efficiency and fairness are also commonly discussed. **Economic freedom** means the freedom to enter any market and to determine market strategies without being restricted by other firms, inspired partially by the ordo-liberal school of thought. See for a more extensive discussion of this goal Van den Bergh & Camesasca 2006, p. 65 and further, Gormsen 2007, p. 334 and Stucke 2012, pp. 591-593. **Efficiency** entails allocative, productive

the sake of brevity, only four of the most debated ones are discussed here – with a special focus on their relevance for competition law enforcement.

Market integration

The goal of market integration is a peculiarity of European competition law, aimed at reducing obstacles to the functioning of the internal market.[45] If competition law aims for market integration, the enforcement of competition law should be aligned with this aim as well, especially in the light of the decentralization of enforcement.[46] When striving for market integration through the enforcement of competition law, national competition authorities should beware that their sanctions and approaches do not create barriers, even though the enforcement of competition law falls under national procedural autonomy.

Perfect or workable competition

Under the goal of perfect or workable competition, competition laws protect the process of competition itself.[47] Perfect competition is connected with neo-classical economics and describes a situation in which prices are equal to marginal costs and goods are allocated in an optimal way.[48] Workable competition allows for models of imperfect competition (for instance oligopoly), as long as the markets meet a number of structural, conduct-related and performance criteria.[49] When it comes to enforcement, the goal of maintaining competition requires intervention only when competition is harmed or potentially harmed. When competition is to be understood as workable competition,

---

and dynamic efficiency. Allocative efficiency deals with the distribution of resources among the various economic players. When there is productive efficiency in a market, maximum output is generated by using minimum input. Dynamic efficiency is more of a long-term efficiency. See for a more extensive discussion of this goal Posner 1976, Motta 2004, pp. 52-53, 57-58, and for the historical foundations of this theory Smith 1776. **Fairness** as a result of competition law is the fair allocation of resources: equity. Some authors have connected this to solidarity and social responsibility (for instance Hessel 1988 and Ottervanger 2010). Mostly it has been placed among the public policy goals or subsumed in the consumer welfare standard, both discussed below.

45 See for the development and the interpretation of this goal on a European level: CJEU Case 56/64 (*Grundig/Consten*), CJEU Case C-468/06 (*GlaxoSmithKline*), paras. 65-66, Article 2 EC, first sentence, read together with Article 3(g) EC and currently Protocol 27 TFEU. However, there is a great deal of disagreement on the question whether market integration is, or should be, a goal of competition law. See for instance Van den Bergh & Camesasca 2006, p. 47 or Parret 2010, p. 343.

46 See section 2.1 above. The Treaty actually lists this goal along the goal mentioned directly below in Protocol 27 to the Lisbon Treaty as 'a system of undistorted competition, as part of the internal market established by the EU'.

47 Van den Berg & Camesasca 2006, p. 78. The Commission expresses this objective on numerous occasions as the maintenance of competitive markets, which is necessitated by the detrimental effects that unbridled competition could have (Regulation 1/2003, para. 9). However, to many, maintaining competition must be seen as an intermediate goal, because it leaves an important follow-up question unanswered: why we need competition (for instance Stucke 2012, p. 569).

48 In order to reach this perfect situation, the market must meet a number of criteria: there must be a large number of sellers and buyers and no barriers to entry, homogenous products and a perfect dissemination of information.

49 Since perfect competition is hypothetical, the Court of Justice adopted the notion of workable competition. See CJEU Case 26/76 (*Metro*) and the extensive discussion by Gerbrandy 2010. Earlier: Clark 1940, pp. 242-243.

this goal confers a large discretionary power on the competition authorities,[50] as they have to define what is *workable* and what is detrimental to workable competition.

Welfare standards

One the most debated goals of competition law is that of welfare, be it total welfare or consumer welfare. Total welfare is an economic concept indicating the maximum of welfare for society as a whole.[51] Alternatively, consumer welfare stands for the maximization of consumer surplus at the expense of producer surplus.[52] As the welfare standards are based on economics, the adoption of such a standard in competition law requires a more economic approach towards competition law.[53] Secondly, under the consumer welfare standard enforcement takes place if consumers are harmed – which means that there is a real possibility of expecting add-on civil procedures. In that light, alternative enforcement instruments will be less appropriate if they diminish the possibility for consumers to start these procedures.

Public policy goals

Public policy goals have various interpretations; sometimes as societal interests that need to be protected by government, sometimes as non-competition interests, being horizontal and flanking policy interests and sector-specific public service interests.[54] Assuming that public policy goals indeed have to be taken into consideration,[55] competition authorities are faced with the difficult task of dealing with competition law infringements and public policy interests at the same time.[56] For the enforcement of

50 Van den Berg & Camesasca 2006, p. 76.

51 This maximum of welfare is reached when there is Pareto efficiency, in which case no consumer or producer can be better off, without making anyone worse off. Many authors, amongst whom are economists of the Chicago School, agree that total welfare is the proper goal of competition law. See further Posner 1979. See differently: Bork 1978 and Cseres 2007.

52 This is not the only definition of consumer welfare. A recent ICN survey has shown that many competition authorities have named consumer welfare as a goal of competition law, but their definitions differ greatly (ICN Annual Conference 2010). The least consensus was found on who should be labelled 'the consumer'. (See in this respect the article by Cseres 2007, pp. 131-133, but also Stucke 2012, pp. 570-575). In European competition law, the goal of increasing consumer welfare is often named along the goal of ensuring an efficient allocation of resources. See Article 101(3) for instance, in which 'consumers must receive a fair share', or the importance of the pass-on rate to consumers in the Guidelines on the applicability of 101 TFEU. See also the speech by Lowe 2007.

53 Also labelled the economization of competition law. Competition policy has been the subject of a transition from a form-based to an effects-based approach. Instead of sanctioning behaviour 'because it is prohibited by law', competition authorities started focusing more on the effects of certain behaviour (see in general Kroes 2005, Cseres 2007, p. 169, Stucke 2012, pp. 570-575). See for a critical analysis the economisation of the Commission's approach to Article 102 TFEU Wils 2014, who holds that 'EU Treaties clearly specify the objective of the EU competition rules' (referencing Protocol 27 to the Lisbon Treaty) and that 'there is no room for the Court of Justice or the European Commission […] to make a different choice' (Wils 2014, p. 15.).

54 Definitions by Lavrijssen 2010, p. 641. See also Monti 2002.

55 According to some influential economists, everything that is non-economic should not be dealt with through competition law. This means that competition law is not the most suitable tool to deal with public policy goals. See for instance Motta 2004, p. 26.

56 In general, it is accepted practice to take these interests into account if they can be subsumed under Article 101(3) TFEU, the exemption clause. See for instance Lavrijssen 2010, p. 642. Others hold that there should be a rule of reason in the application of Article 101 TFEU, so that the cartel prohibition would not apply to certain agreements that promote public policy interests. More extensively in Monti 2002, pp. 1084-1090.

competition law, this balancing act poses a number of problems. There are operational difficulties (how does one decide when a public policy interest is important enough to justify an infringement of competition law?) and difficulties in terms of arbitrariness and transparency.[57] In any case, under this particular goal, there could also be an interesting role for more informal and proactive enforcement instruments, such as covenants or assisted compliance. These instruments could provide clarity about what is permitted in promoting public policy interests on a case-by-case basis.

2.2.2 *Goals as a Driver of Alternative Enforcement*

When looking at the goals of competition law – which is first and foremost a debate about the substantive interpretation of competition rules – the question arises to what extent this has been or will be a driver for changes in competition law enforcement. To answer that question, it is important to keep in mind that the debate focuses on the goals that competition law should serve, so to what end competition authorities should intervene in markets. The goals debate thereby discusses, questions and alters the objective with which competition authorities execute their tasks.

For a large part the goals debate is theoretical in nature, conducted by academics and written into case notes whenever there is case law that seems to hint at a different theoretical underpinning.[58] However, brushing off the goals debate as merely theoretical undervalues the efforts of competition authorities to intervene in markets in a way that is consistent with a changing perception of competition and the role of competition authorities therein. This means that the *substantive* goals debate has left its footprints in the *procedural* environment of competition law enforcement. A good example of such a footprint is the emergence of economists divisions within competition authorities, which – amongst many other things – calculate the expected impact and outcomes of interventions, allowing competition authorities to prioritise and use the right instruments for the right cases. These divisions are emblematic of the economisation of competition law.[59] Apart from the more economic developments, competition authorities are aware of interests besides the process of competition as such – interests like consumer protection, sustainability and fairness. However, regular enforcement instruments might not always be suitable to achieve these goals, for which reason competition authorities have started to experiment with more informal or proactive measures to promote them.[60]

The goals debate thus had its resonance within the competition authorities and is expected to be influential in the future – albeit perhaps in a more implicit way. However, the influence of the goals debate on competition law enforcement should not be overestimated either. Even though the changes identified above are undeniable, the causal connection with the goals debate is – at best – questionable. Taking up an interest

57 As is the exact point made and explained in Lavrijssen 2010. She proposes more focus on the principles of legality, transparency, proportionality, consistency and accountability.

58 Such as the consumer welfare standard that was again debated after, for instance, TeliaSonera. See CJEU Case C-52/09 (*TeliaSonera*), and Lachnit & Verduijn 2011.

59 See fn. 52 above.

60 See differently Gerbrandy 2016, who argues that some of these goals are attainable in the current substantive paradigm.

in economisation, in sustainability or 'intervention for the consumer' might well be a veil for more budgetary and political arguments, such as cost savings, reducing the size of government organisations and calculating better returns. Given that alternative enforcement instruments are potentially quicker and cheaper, they therefore fit these other objectives as well. This does not detract from the efforts undertaken within the national competition authorities (think of, for instance, extensive vision documents on sustainability, commendable actions for changes in regulated markets or working groups to incorporate a consumer focus[61]), but offers a nuance when making an all to quick connection between the substantive goals debate and changes made on the enforcement level.

2.3 Driver 3: Expectations of the 'Good Authority'

Competition authorities are usually independent authorities, responsible for safeguarding the functioning of markets and competent to intervene in the market and in the way companies conduct their businesses. They do not operate in a vacuum, but play an important role in the economy and society as a whole. In the recent years, competition authorities have experienced an increase in expectations in terms of output, impact and reach, both from the Ministry responsible for the functioning of the authorities and from the companies which are active in the market, as from the general public, who (indirectly) entrusted them with their responsibilities. Two developments have been named that underline the increase in expectations: the aftermath of the financial crisis (which has caused the public to look more critically towards supervisory authorities) and the rapid technological advancement of the market (which could render legislation outdated – a gap that supervisory authorities might be able to fill).[62] However, these high expectations are often coupled with shrinking budgets, which puts authorities in the uncomfortable position of having to do more with fewer resources.[63] In fact, it has caused competition authorities to contemplate how enforcement can be more efficient (in order to do more with a limited budget) and be more effective (to meet the expectations placed upon them). The latter is one of the developments that have incited the implementation of alternative enforcement instruments and the adoption of new enforcement strategies.

2.3.1 Effect on National Competition Authorities

The tension between higher expectations and smaller budgets is not specific to the enforcement of competition law, but is an issue for supervision and enforcement in general.[64] It has spurred a debate about what constitutes a 'good' authority and what

61 Respectively: ACM *Visiedocument mededinging en duurzaamheid* 2014, Autorité de la Concurrence, Avis n° 13-A-23 (*Uber*) and developments within the UK CMA after the merger (derived from an internship and knowledge of the working groups within the UK CMA).

62 See in more detail Ottow 2015, pp. 1-4. With regard to financial supervision and the financial crisis, this is also illustrated by Aelen 2014.

63 See in this respect also Ottow 2011, who refers to this tension as the 'Bermuda triangle' of supervision – based on a qualification given by the Chairman of the ACM.

64 See Aelen for the financial sector, and more and more so.

requirements supervisory authorities should meet in order to be able to navigate this tension properly. It has been heavily debated what actually constitutes a 'good' authority, concentrating on the requirements for enforcement agencies in particular, or general principles of good regulation and enforcement.[65] Put very broadly, some of these criteria concern the quality of regulation and enforcement (for instance requiring it to be effective, transparent or flexible), some of them condition the actions of an authority in general (for instance, requiring it to be in line with the principles of legality and proportionality) and some of them impose requirements on the authorities (like independence or accountability), but this categorisation is not always presented as clear-cut.[66] Additionally, it has been observed that there has been a development in this debate, moving away from what constitutes 'good regulation' towards what constitutes a 'good regulator'.[67] In that light, principles have been developed to guide the behaviour and design of a good authority.[68]

In practice, one of the most visible consequences of the 'good authority' debate is the compression of supervisory authorities by merging them or making them smaller

---

65 See for recommendations for better regulation and enforcement in the UK: Hampton Report 2005. Also illustrative is the Macrory Report 2006 on the principles and characteristics of an appropriate sanctioning regime, which requires sanctions to be responsive, proportionate, restorative, deterrent and aimed at changing the offender's behaviour and eliminating its financial gain. On a larger scale, see the publication by the Department of Business, Innovation and Skills: BIS 'Principles for Economic Regulation', published 12 April 2011. Much like its British counterpart, the Dutch government has ordered a number of in-depth studies on the best approach to enforcement. The first of these studies, conducted in 2001, resulted in the publication of a framework vision on inspection and supervision that declared that 'good supervision' must be independent, transparent and professional (Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, *Kaderstellende Visie op Toezicht*, 2001). In 2005, the Dutch government published an updated version of this document, which added three requirements of good supervision: selectivity, decisiveness, cooperation (Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Minder Last Meer Effect: Zes Beginselen van Goed Toezicht, 2005, pp. 30 and 36). Most recently, the WRR (Advisory Council on Governmental Policy) published a report on the supervision of public interests, see WRR Report 2013 and the commentary by Ottow & de Cock-Buning 2013.
The requirements for good regulation and enforcement have been underlined on an international level by the Organisation for Economic Cooperation and Development (OECD). See OECD, 'Recommendation of the Council on Regulatory and Policy Governance' (2012) and OECD, 'Principles for the Governance of Regulators' (2013), draft paper for public consultation. But also earlier, see OECD, 'Recommendation of the Council on Improving the Quality of Government Regulation' (1995), OECD, 'Guiding Principles for Regulatory Quality and Performance' (2005).

66 Examples of academic contributions to principles of good supervision are Hancher, Larouche and Lavrijssen, who make a separate mention of transparency, independent supervision, a clear legislative mandate, flexible powers, proportionality, consistency, predictability, accountability and respect for general principles of competition policy and Union law (Hancher, Larouche & Lavrijssen 2001). Black lists similar principles and notes that there are many other candidates for inclusion (effectiveness, fairness, helpfulness) and there are trade-offs to be made between them (Black 2001). First, Fox & Hemli describe the institutions of antitrust enforcement in the United States and test these institutions against a set of norms used to assess the operations of administrative agencies (First, Fox & Hemli 2012). Finally, the categorisation by Aelen is helpful to determine the role of this multitude of principles. She discerns principles of effective supervision (including independence), of legitimised supervision (including accountability and transparency) and of proper supervision (Aelen 2014).

67 By Ottow 2015, p. 2. She posits that in the aftermath of the financial crisis, the attention has shifted and the question of which principles independent agencies should adhere to in order to become good agencies has become more prominent.

68 Ottow has put forward a general framework for what constitutes a 'good agency', incorporating the principles of legality, independence, transparency, effectiveness and responsibility – the LITER-principles (Ottow 2015).

in size.[69] In the Netherlands, this has led to the creation of the ACM – which is a combination of the Dutch competition authority, four different sectoral regulators and the consumer protection authority. In the UK, this has led to the creation of the UK CMA, which combines two of the former competition authorities, but has – unlike the Netherlands – divested its consumer protection powers to other agencies. Both in the Netherlands and in the UK institutional mergers have led to a refocusing of enforcement priorities and changes in the ACM's and UK CMA's enforcement instruments.[70]

In the course of a reorganisation, competition authorities and the responsible Ministries are faced with the difficult task of redesigning the authorities in a way that will facilitate more efficient and effective enforcement. The decisions made with regard to the authorities' set-up are crucial to the way competition law is enforced, as 'the way in which an agency is designed can have a major influence on its work and performance'.[71] To illustrate: the decisions made with regard to independence and accountability condition the new authority's discretion, the decisions made with regard to its enforcement toolkit directly outline the instruments to be applied and the internal structure decided upon influences the smooth running of procedures, but also the way investigations are carried out with a view to procedural rights.

2.3.2 *Expectations as a Driver of Alternative Enforcement*

Budgetary decreases and higher expectations have thus led to an extensive debate on what constitutes a well-functioning authority and how such an authority should be designed. In fact, the institutional mergers of the UK CMA and the ACM have already illustrated the impact that this tension could have on enforcement practice from an institutional point of view. However, the impact of the debate upon enforcement as such should not be underestimated either. The requirements which are central to this debate are requirements *for the authorities*, prescribing how they should be organised, how they should intervene and how they should position themselves in the regulatory landscape. Authorities cannot simply disregard this debate, and the criteria discussed also condition the way in which they can carry out enforcement. Another important aspect is that the tensions under which the authorities operate could lead to the design of new enforcement instruments that are capable of attaining better results (effectiveness) in a faster way (efficiency). This means that it is not unimaginable that competition

69 This is a trend, as is noted by Ottow 2014. She discerns different kinds of institutions created as a result: multi-sector regulators, combinations of competition authorities and multi-sector regulators, combinations of competition authorities and consumer protection agencies and combinations of all of the above.

70 See Chapter 2 of this thesis in more detail.

71 Ottow 2015, referring to Baldwin, Cave & Lodge 2012, p. 53. With regard to the design of authorities, there has also been attention for successful institutional mergers in academic literature, as well as for 'recipes for success' for institutional design. See Kovacic & Hyman 2012 regarding the (then) upcoming merger of the UK CMA, or Freeman 2012. See also Ottow 2014 regarding the merger of the ACM in the Netherlands. Institutional design in general is discussed by Chisholm 1995 (who focuses on the more formal aspects of institutional design), Donaldson 2001 (on contingency theory), Trebilcock & Iacobucci 2002 (on the fundamental questions of institutional design), Barkow 2010 (on how to avoid regulatory capture through design), Fox 2010 (who looks for motivators beyond strategy in mergers), Cseres 2013 (on the question whether to integrate or separate competition and consumer protection) and Hyman & Kovacic 2013a.

authorities, under the expectations placed upon them, have looked for innovative ways to enforce competition rules that better meet these requirements.[72]

Apart from designing new enforcement instruments – a hypothesis that will most certainly be returned to in the course of this thesis – limited budgets in combination with high expectations have also strengthened the need for prioritisation and strategizing. Most competition authorities have limited resources to deploy to an infinite to-do list, which means that enforcement choices have to be made. These choices can be guided by predetermined principles or strategies, to which end many of the competition authorities under review have formulated so-called prioritisation principles, which facilitate smooth prioritisation and aid in justifying why it is (or is not) pursuing a certain case.[73] Apart from that, it is common for competition authorities to formulate enforcement strategies that pursue a certain style of enforcement.[74] The enforcement strategy or style chosen says a lot about the instruments that are likely to be deployed. For instance, a competition authority that is pursuing a deterrence-based approach to enforcement would rather impose a fine than turn to more informal measures to resolve problems in the market. On the other hand, a competition authority that is aiming to be more responsive is likely to focus more on the behaviour of the companies and will adapt the enforcement instrument accordingly. It has to be mentioned that these enforcement strategies do not merely set out to reconcile the tension between efficiency and effectiveness, but address a whole range of dilemmas: trust versus distrust, cooperation versus repression, transparency versus confidentiality or efficiency versus carefulness.[75] These dilemmas can – to some extent – be identified in the regulatory theories that have been developed in the literature to help regulators and enforcement agencies deal with the challenges they are faced with.[76]

All in all, the debate about what constitutes a well-functioning authority provides a backdrop against which the use of alternative enforcement instruments can be understood. It highlights the pressure under which competition authorities operate and shows the developments that have led to an increased focus on enforcement strategy and instruments.

---

72 In fact, an important aspect of a good authority is an effective toolkit, linking the discussion to the authorities' enforcement instruments and explaining why the use of alternative enforcement instruments can be seen in this light as well. See Kovacic & Hyman 2012, p. 10.

73 CMA Prioritisation Principles 2014, also ACM. This is not the case for the Autorité. See Chapter 2 on the particularities of the French legal system. However, on the 'darker side' of this argument, the tension might also cause authorities to leave more difficult matters aside, focussing on more straightforward cases in order to generate more output. This should be prevented by a review by the courts, see in more detail Ottow 2011.

74 For instance, the UK CMA's predecessor was explicitly recommended to implement a risk-based approach to enforcement (Hampton Report 2005, recommendation 1, p. 115). More recently, in the Netherlands, the ACM decided to adopt a strategy based on the problem-solving approach, as described above. This entails that the ACM intends to spend more time on problem definition, in order to find the right instrument (or a mix of instruments) to apply to the case.

75 Dilemmas derived from Ottow 2015, pp. 6-8.

76 The most mainstream theories are the following (the term borrowed from Baldwin & Black 2007): command-and-control, responsive regulation, risk-based regulation, smart regulation and really responsive regulation.

3. DEFINITION OF ALTERNATIVE ENFORCEMENT

The term alternative enforcement refers to a set of administrative enforcement instruments that can be used alongside or instead of a fining procedure.[77] Enforcement instruments in this sense indicate tools that are aimed at putting an end to behaviour that is detrimental to the functioning of competition or that are aimed at preventing such behaviour from occurring.[78] By using alternative enforcement instruments, competition authorities can either dispose of cases in a way that is different from their regular fining procedures, or promote measures that prevent situations in the market from even making it into a 'case' or a 'procedure'.[79] This raises the question what the 'default' instrument is, to which alternative enforcement instruments offer an 'alternative'.

3.1 Alternatives to a Fully Adversarial Procedure

Most competition authorities (including the Commission) have administrative fining procedures in place that can be qualified as fully adversarial.[80] Under these fully adversarial procedures, competition authorities have the power to open proceedings based on reasonable grounds to believe that there has been or still is an infringement of

77 Even though this section presents a unique definition of alternative enforcement, the term itself is not new to practice. In the literature, it is often referred to in Gheur & Petit 2009, because of the conference organised by the Institute for European Legal Studies of the University of Liege and the Federation of Enterprises in Belgium in June 2008. In practice, the term is used by some of the competition authorities. See for instance the Office for the Protection of Competition of the Czech Republic, ÚOHS, Annual Report 2007, p. 4 (in which alternative enforcement is defined as both 'the remedy of a competition-related problem before the administrative proceeding is launched' and 'the acceptance of commitments by the parties in the first-instance proceeding'). See also the predecessor of the ACM (NMa), Annual Report 2003, p. 29. Here the first mention of alternative enforcement dates back to 2003, where it is explained as 'an activity other than a formal decision contributing to compliance with competition law', indicating guidance, market scans and monitoring as exemplary instruments.

78 When looking at *enforcement*, a broad and a narrow definition can be distinguished. In a narrow sense, enforcement stands for stimulating compliance with the law by means of supervision and sanctioning (see Michiels & Muller 2006, p. 8). Sometimes the supervisory aspects of enforcement are disregarded as a whole, so that enforcement is defined as the mere application of policies, rules and tools on the ground (see for instance Baldwin 2012, p. 227). However, in practice, the application of rules on the ground cannot be separated from other activities, such as supervising and sanctioning. Therefore it has been held that enforcement *strictu sensu* forms just one aspect of enforcement in the broad sense, otherwise known as regulatory enforcement (see the so-called DREAM framework by Baldwin & Black 2005). Besides the application of policies, rules and tools on the ground, regulatory enforcement focuses on the gaining of information on undesirable and non-compliant behaviour, the developing of policies and tools to deal with the problems discovered, the measuring of success and failure, and the adjusting of tools and strategies in order to improve compliance. This thesis adheres to this broader definition of enforcement.

79 This delineation implies that the focus in this thesis is on antitrust enforcement (the cartel prohibition and the prohibition of an abuse of a dominant position). Enforcement of the merger regulation (and possible alternative measures to do so) are not discussed, because of its ex-ante character (which is arguably already alternative in nature and differs significantly from ex-post enforcement as is used in antitrust) and the fact that the Commission is the sole enforcer for mergers that surpass the thresholds of Regulation 139/2004 (which levels out the playing field to some extent). This does not mean that concentrations as such are not important. They are, especially when they lead to a dominant position, or markets appear to be malfunctioning because of a high concentration rate. These issues are touched upon when relevant.

80 Term borrowed from Wils 2008.

competition law. Upon opening proceedings, the competition authorities are competent to deploy investigative powers, such as sending out questionnaires, executing dawn raids or conducting interviews in order to gather evidence to support the suspicion that an infringement has occurred. When the evidence gathered is substantive enough, the competition authority drafts a statement of objections, to which the companies under investigation are allowed to respond. Taking into account the statements of the companies (submitted in writing, orally or during an organised hearing), the competition authority prepares an administrative decision, which includes the relevant facts, a legal qualification of these facts supported by evidence and the consequences attached to this qualification: an order to end the infringement, other relevant orders, a fine or a periodic penalty payment.[81] These administrative decisions can be appealed before the courts. The fact that, during this procedure, the companies are given the opportunity to react to and contest the findings of the competition authority gives it an adversarial character. In practice, not all administrative decisions are fought on every step, nor are all decisions appealed in court.

The fully adversarial procedure is considered the standard procedure in competition law enforcement, because 'it applies by default and by right'.[82] From its outline, as provided above, it can be deduced that it is formal in nature, relying on pre-existing procedures within the administrative law setting of the Member State in which it applies. The character of this instrument also presupposes a vertical relationship between the competition authority and the company, in which the first sanctions the latter for an infringement of a set of pre-existing rules. Because it concerns intervention *after* an infringement has taken place, the fully adversarial procedure can be characterised as reactive. The result of the procedure (often an administrative fine) has a punitive effect in specific cases, but depending on the severity of the sanction imposed it can also have a broader deterrent effect on other companies. The fully adversarial procedure is emblematic of an enforcement style that is said to have been a default of market supervisors for a long time: the command-and-control method of enforcement.[83] This method is defined in regulatory theory as the exercise of influence by imposing standards backed by sanctions.[84] Even though regulatory theory actually describes the process of regulation,[85] it has a clear enforcement component: a regulator using the command-

81 See Chapter 2 of this thesis for a more detailed description of the precise procedures in the different Member States.

82 Wils 2008, p. 3. This does not mean that it is the type of instrument that is applied most often. In fact, it has been noted that the Commission currently closes 3 out of 5 cases by means of a commitment decision or a settlement (see the Commission's Report on Competition Policy 2015. Since 2008, the Commission has concluded 18 settlements, 26 commitment decisions and 40 regular infringement decisions). Also, the UK CMA's predecessor in competition law enforcement has a track record of taking very few fining decisions. Between 2004 and 2014 (the closing date for the UK CMA's predecessor OFT), the OFT had taken 12 formal fining decisions.

83 See Ottow 2009.

84 Baldwin, Cave & Lodge 2012, pp. 106-107.

85 In everyday use, *regulation* equals the controlling or directing of behaviour by means of a rule or a principle. In the literature, its definitions are more divergent, given that regulation can be regarded as a specific set of commands, as deliberate state influence or as all forms of social or economic influence (see Baldwin, Cave & Lodge 2012, defining regulation on p. 3). Regulation can be used to influence activities that have a certain value to a community (see Ogus 1994, p. 1). Regulation must therefore primarily be seen as a politico-economic concept, to be divided in social regulation (e.g. health and safety, environmental protection and consumer protection) and economic regulation (competition).

and-control method would tell the undertaking what it is required to do (command), and would make sure that it does so (control). This method has certain advantages, because it establishes a clear relationship between the two parties (that is a vertical relationship), puts the enforcer at a distance from its subject and formalizes mutual rights and obligations. On the other hand, there are also a number of disadvantages: its procedures usually consume a lot of time and resources, the method takes no account of the fact that it might not always be appropriate to impose a sanction, it offers little flexibility to enforcers and it is based on punishment rather than rewards, lacking positive incentive to behave better.[86] It is not surprising that enforcers have developed tactics and instruments that better meet these needs.[87]

Alternative enforcement is a type of enforcement that is capable of attaining one or more of these goals, as it involves something other than deploying the fully adversarial procedure to impose monetary sanctions on companies that infringe the law. With that, the characteristics of the fully adversarial procedure (formal, based on a vertical relationship between companies and competition authorities, deterrence-based, punitive, reactive and case specific) can be used to deduce the characteristics of alternative enforcement instruments. This means that alternative enforcement instruments can be characterised as informal, horizontal, compliance-based, restorative, preventative or more efficient, or a combination of one or more of the above. As a result, 'alternative enforcement' is not a closed category of instruments, but a hybrid classification that can incorporate a range of different interventions. This can vary from instruments that are rather similar to the fully adversarial procedure, but incorporate measures to attain the same results more quickly (such as a settlement), to instruments that can be considered as almost its opposite (such as informal recommendations made to market parties before an infringement has taken place). Disposing of one or more of the characteristics of alternative enforcement does not make an instrument more or less 'alternative' in nature.

> Alternative enforcement entails a deviation from command-and-control style enforcement by using enforcement instruments that can be characterised as informal, horizontal, compliance-based, restorative, preventative or efficient, or a combination of one or more of the above.

In these fields, regulation can either limit behaviour by prescribing whether or not a certain activity is allowed, or it can enable or facilitate behaviour that is considered desirable (also Ogus 1994, pp. 2 and 4-5). Regulation and enforcement can be considered as synonyms for the larger part, because they both aim to influence behaviour – which usually happens by promoting compliance with a set of predetermined rules – in order to fulfil certain goals. Where regulation seems to be more concerned with determining these rules, enforcement mostly aims to secure compliance with them. However, both activities can overlap to a great extent. From a regulatory perspective, prescribing certain rules and laws cannot happen without taking into account the extent to which they will be complied with. From the other perspective, enforcement can cause a modification of the very rule it seeks compliance with, since a law or a general rule changes meaning once it is applied in a specific context.

86 See for more alternatives and a short description of the shortcomings of command-and-control: Baldwin 1997.

87 Also academics have studied this question. Famous examples of regulatory theory are responsive regulation (Ayres & Braithwaite 1992), really responsive regulation (Baldwin & Black 2007), smart regulation (Gunningham & Grabosky 1998) and risk-based regulation (Sparrow 2000).

It has to be borne in mind that alternative enforcement instruments are not *per se* replacements of the fully adversarial procedure. In some instances, they can be integrated in this type of procedure, or prevent proceedings from being opened in the first place. Instead, the increased use (or, in some Member States, design) of alternative enforcement instruments indicates a broadening of the competition authorities' enforcement toolkit, presenting it with alternatives to the fully adversarial procedure, which – taken together – might, in time, indicate a deviation from the more standard command-and-control method of enforcement.

3.2 Classification and Delineation

The definition of alternative enforcement provided above is open in nature and potentially encompasses a wide array of enforcement instruments. Moreover, the definition of 'enforcement' as such is a broad one, not just containing measures that are applied after an infringement has taken place (or is about to take place), but also the stimulation of measures that are taken proactively. This means that under the definition provided, many instruments qualify as 'alternative enforcement', such as leniency programmes, informant rewards, government advocacy, informal warnings and negotiations, round-table discussions and enforcement by means of press releases.[88] It is impossible, however, to research all of these instruments in-depth and to compare them to similar instruments used by other national competition authorities. For that reason, some categorisation is made to limit the number of instruments to be evaluated.

The first category of instruments is the set of negotiated procedures. Negotiated procedures are, as is explained further along,[89] procedures in which competition authorities and companies negotiate the procedural steps that will follow. Examples of negotiated procedures are commitment decisions (in which the companies offer commitments in return for the closing of the case without the imposition of an administrative fine) and settlements (in which companies promise not to contest certain parts of the decision in return for a small fine discount). Negotiated procedures are case-specific formal instruments, but have a degree of horizontalisation (as some negotiation is taking place) and are capable of pursuing goals of compliance, restoration and prevention in addition to their deterrent, punitive and reactive character – depending on the type of negotiated procedure and the commitments offered.

Secondly, this thesis studies various forms of markets work. When performing markets work, competition authorities engage in the analysis of an entire market with a view to learning about the market, making recommendations or – in some cases – ordering changes. The national competition authorities under review engage in different forms of markets work, with a varying degree of intensity. Examples of markets work are the UK CMA's market investigations, various forms of market studies and scans, and follow-up recommendations to improve the functioning of markets. Markets work is general in nature, in the sense that it encompasses a market in its entirety rather than singling out a certain agreement. In most cases it relies on a vertical relationship between

88 See in more detail Petit & Rato 2009 for the 'sunshine enforcement' measures of the Commission. This list is still not exhaustive, and can contain categorization errors.

89 In Chapter 4, section 1.

the competition authority and the companies, but there are phases of markets work in which companies may offer undertakings to improve the competitive situation.[90] Apart from that it can vary between advocacy and enforcement, between formal and informal and between reactive and proactive, depending on the type of markets work and the type of market studied. Markets work has in common that it has a restorative dimension to it – insofar as the recommendations made or orders given aim to improve the proper functioning of markets.

The third category of instruments discussed consists of a variety of interventions, labelled as individual guidance. This category consists of the competition authorities' individual opinions, insofar as these are addressed to companies specifically, concerning – for instance – a proposed agreement. Examples of individual guidance are informal opinions (requested by companies), warning letters or advice. Characteristic of individual guidance is the fact that it is given by competition authorities to specific (groups of) companies, while not in the course of a formal investigation. With that, individual guidance is clearly proactive in nature and might have restorative elements when it concerns a current situation.[91] In any case, individual guidance is aimed at increasing compliance in case-specific situations. It is a form of advocacy (since it is guidance), but it arguably has an informal enforcement effect.

Lastly, this thesis discusses the use of compliance programmes in an enforcement context. The set-up of compliance programmes as such is a task for companies and not enforcement *per se*, but the adoption of compliance programmes is often promoted in the course of other enforcement instruments. Moreover, some competition authorities have taken the explanation and promotion of compliance programmes as part of their broader advocacy tasks. Compliance programmes are discussed in these two contexts. As such, they have a clear preventative objective and are capable of fostering a more horizontal relationship between the company and competition authorities, as it makes companies formally take ownership of competition law compliance.

The characteristics of the different instruments are, of course, further discussed and underpinned in the relevant chapters, but they already give an impression of the variety of instruments studied. With the categories chosen, this thesis discusses alternative enforcement instruments across the spectrum, focusing on instruments that might have informal, horizontal, compliance-oriented, restorative and preventative characteristics.

4. RESEARCH QUESTION AND DELINEATION

The definition of alternative enforcement as provided above is based on the presumption that competition authorities can pursue different types of interventions (formal or informal, vertical or horizontal, deterrence-based or compliance-based, punitive or restorative, reactive or preventative), and should determine on the basis of the situation at hand which type of intervention would be more effective or efficient. However, competition authorities do not have unlimited discretion to maximize the instrumentality

90 Undertakings are commitments offered in the course of a market investigation in the UK. This immediately explains why this thesis has opted to use the more neutral 'companies' instead of the legal 'undertakings' to describe entities performing an economic activity, which are the addressees of competition rules. See also fn. 2 above.

91 As opposed to proposed collaboration, as is often the subject of informal opinions.

of their actions. They are bound by general principles of law and by fundamental rights, which form safeguards against unlimited administrative enforcement. Therefore, there might be tension between the wish to increase instrumentality, and the limitation on the methods to get there. Ideally, enforcement should strike a balance between the two: the best possible way to reach enforcement goals, while respecting the safeguards surrounding enforcement action.[92] Keeping this balance in mind, the research question that inspired this thesis can be formulated as follows.

> *How can alternative enforcement instruments be seen in the light of the balance that needs to be struck between safeguard and instrumental requirements that national and European law have placed upon enforcement and what challenges does this pose for the enforcement of competition law in the Member States?*

The use of alternative enforcement instruments should be seen in the light of the three different drivers (the decentralisation of European competition law and national procedural autonomy, the debate on the goal of competition law and the institutional reforms taking place in the Member States), which have been discussed more extensively above.[93] This has led to new, hybrid forms of enforcement that differ significantly from the fully adversarial procedure (in approach, procedure and outcomes), but which have to be applied within the legal framework that was designed for an adversarial procedure nonetheless. In other words: there has been a movement towards the use of alternative enforcement instruments, but the legal framework surrounding the application of these instruments has not changed with it. Thus, the question which is central to this thesis is whether the use of alternative enforcement instruments causes a tension between the desire to enhance instrumentality, on the one hand, and the safeguards that have to be respected, on the other.

From the way the research question is described and outlined, it seems that most of the thesis will focus on enforcement on an instrument level. This is partially true, as most of the research is geared towards enforcement *practice*, which means that it concentrates on cases closed, meetings had and documents published. However, enforcement does not happen in a vacuum, and is not just successful or unsuccessful depending on the instrument chosen. Enforcement takes place on, and is connected to, multiple levels that define the type of enforcement pursued and the possibilities that competition authorities have (the policy level, agency level and rule level).[94] In many places in this thesis, enforcement practice is explained through these levels, or the effect of enforcement instruments on these levels is discussed. These levels form the broader context against which the challenges for competition authorities dealing with alternative enforcement (which is, incidentally, the second part of the research question) should be perceived.

92 The balance between the safeguard and instrumental functions of law has its foundations in public economic law. See in more detail Chapter 3, section 1.2.

93 See section 2 of this chapter.

94 See in more detail Chapter 3, section 4.4.

4.1 Research into National Enforcement Practice

On the basis of the research question presented above, it can be concluded that this thesis is partially comparative in nature,[95] and relies on research into the practice of *national* competition authorities, which means that it does not evaluate the alternative enforcement practice of the European Commission. This is a deliberate choice, as this research initiated from a curiosity to explore the developments on a national level. The modernisation of European competition law enforcement spurred both procedural and substantive developments in the Member States, and in the literature the focus has been on convergence on these points,[96] as well as on developments on a European level.[97] Less is known about the enforcement instruments and strategies developed on a national level, which was the main driving force in limiting this research to national enforcement practice. An evaluation of the differences between the various national approaches can have a learning effect, leading to recommendations or best practices. This does not mean that the European level is of no importance in this thesis. For one thing, the modernisation of European competition law enforcement has been named as one of the main 'drivers for change' in national enforcement landscapes.[98] In fact, some of the instruments applied on a national level are clearly inspired by the instruments used by the Commission.[99] Moreover, the Commission remains the axis around which the enforcement of European competition law takes place, and remains competent to attract and open cases. Lastly, European competition law is enforced under the principle of uniform application, intended to safeguard that despite procedural differences, the interpretation of European competition rules remains the same.[100] Alternative enforcement might raise questions in this light (both with regard to competences as towel as uniform applications) and these types of questions are addressed in this thesis.[101]

For reasons of feasibility, this thesis is limited to the alternative enforcement practice of the national competition authorities of three Member States: the Netherlands, France and the United Kingdom. The choice of these particular Member States can be accounted for on the basis of a number of objective and subjective criteria, which are further discussed in the methodological annex attached to this thesis.[102] This annex also discusses the methods used to study national practice, which relies on field research

95 Although not fully comparative, see Annex I – Methodology.

96 See for instance Gerbrandy 2009.

97 See more in general the literature on the influence of Europe on supervision and enforcement (Lavrijssen & Hancher 2007, Hölscher & Stephan 2009, Ottow 2010, Ottow & De Weers 2011 and De Moor-Van Vught 2011), but see also the literature on specific European enforcement instruments (commitment decisions and Commission settlements) referenced throughout.

98 See section 2.1 above.

99 This correlation is discussed in each chapter that analyses a group of enforcement instruments, and is returned to in the conclusion.

100 See Chapter 3 section 2.1.2 in more detail.

101 See Chapter 9, section 6.

102 The reason why only three Member States are studied (instead of four or more) is because of the time constraint. As this research concerns enforcement practice, many cases have to be studied in detail. Given that most competition authorities publish around 25 case-closing decisions a year (fines, settlements, commitment decisions, etc.) and as much (or more) opinions and other publications, the 12-year timespan studied simply did not allow for more national competition authorities to be compared.

and interviews within the competition authorities in addition to more traditional legal research methods.

4.2 Relevance

Naturally, the enforcement of competition law has been debated and discussed quite often. Especially in the light of the changes on a European level, and the effects enforcement choices might have on the rights of companies and the substantive interpretation of the rules. However, the newness of this research lies within the study of *alternative* enforcement instruments. Even though several authors have commented on the desirability and viability of these instruments (especially in the light of the safeguards side of the normative framework),[103] this thesis adds to this discussion by studying alternative enforcement on a national level, by looking at the entire body of cases and by focussing on instrumentality as well as safeguards. Apart from that, this research aims to facilitate mutual learning between the national competition authorities, in which not just procedural aspects of the instruments are discussed, but are placed into the relevant national contexts as well.

On a more theoretical level, this thesis contributes to the dialogue about enforcement in general, as it presents a legal framework against which enforcement can be evaluated. This framework builds upon the divide between instrumentality and safeguards, which is prominent in the Utrecht School of Public Economic Law and indicates the tension between the goals that public bodies want to attain and the limits to which they are bound when pursuing them.[104] This tension has a long history as a leading theme in many academic publications, and is further explicated in Chapter 3 of this thesis.[105] The normative framework underlying this thesis connects to this tradition, and expands its interpretation to enforcement in particular. Testing alternative enforcement practice against this framework shows how the different instruments can be seen in the light of the balance between instrumentality and safeguards, and can indicate challenges for national practice when this balance can be improved upon.

5. STRUCTURE OF THIS THESIS

The main question that underlies this thesis is how alternative enforcement instruments can be seen in the light of the balance that needs to be struck between safeguard and instrumental requirements that national and European law have placed upon enforcement and what challenges this poses for the enforcement of competition law in the Member States. To that end, the core of this thesis consists of an analysis of the different alternative enforcement instruments as used by the national competition authorities under review. However, before such an analysis is possible, it is important to outline the different national enforcement systems in order to be able to place the

103 See for instance Waelbroeck 2008, Wagner von Papp 2012, Wesseling & Van Der Woude 2012, Lianos 2013 and Stasi 2013, but many more are referenced with regard to the relevant instruments below.

104 By Hellingman and Mortelmans (Hellingman & Mortelmans 1989). The name is coined by Ottow 2009. See also Verloren van Themaat 1968, Mortelmans 1985, Hessel 1988 and Geelhoed 1983.

105 See Chapter 3, section 1.2 in more detail.

alternative enforcement instruments in the right context. Moreover, the normative framework against which alternative enforcement is tested needs to be defined as well. For that reason, before engaging in the analysis that is the core of this thesis, Part I (of which the current chapter forms a part) introduces the context against which to perceive the following chapters. After that, Part II of this thesis outlines and discusses the different alternative enforcement instruments in four instrument-based chapters. These chapters evaluate the national practices in their own right and compare them on the main points, on the basis of which policy considerations are identified that need to be taken into account when designing or improving alternative enforcement instruments. In these four chapters, the European level plays a secondary role, but is referred to when a parallel is sought with similar instruments used by the Commission. In Part III of this thesis, a dual conclusion is reached that reflects the two parts of the research question. In these concluding chapters, recommendations are made with regard to the main policy considerations underlying alternative enforcement practice, and the bigger picture of the alternative enforcement of competition law in the Member States is discussed.

Part I – Introduction and Context

Chapter 1 is the introductory chapter, which presents the research question, the methodology, definitions and the structure of the thesis. Apart from that, the introduction describes the background against which alternative enforcement practice needs to be seen. This is important for the interpretation of the instruments in the later chapters. The introduction (especially the presentation of the research question) needs to be read in conjunction with the Methodological Annex – see below.

Chapter 2 presents an outline of competition law enforcement in the Member States, focussing on both the historical development of competition law as well as the set-up of the current authorities. The aim of this chapter is to provide a background to the differences in alternative enforcement practice, to outline differences in legal systems that might influence enforcement procedures and to offer a frame of reference for the position of competition law enforcement and the national competition authorities. The information presented in this chapter is selected with this goal in mind, but reference is made to other sources that revisit the different topics more extensively.

Chapter 3 contains the normative framework against which alternative enforcement practice is tested. In line with the division made by the Utrecht School of Public Economic Law, this chapter is composed of a part that discusses the instrumentality requirements (effectiveness, efficiency and flexibility) and a part that discusses the safeguard requirements (legality, legal certainty, proportionality, independence, accountability & transparency and the rights of defence).[106] These requirements are defined in this chapter and are discussed with regard to their relevance to enforcement. The normative framework as such underlies the analysis of the enforcement instrument in the later

106 This classification is not definitive, as many of the requirements have aspects of both sides of the framework. See Chapter 3 in more detail.

chapters. It also forms the basis of most of the conclusions and recommendations with regard to the specific enforcement instruments.

Part II – National Practice and Comparison

Chapter 4 discusses one of the main instruments of alternative enforcement: negotiated procedures. These are, essentially, enforcement procedures in which a moment is incorporated for a discussion between the competition authority and the companies under investigation outside the usual moments of contact. This chapter does not discuss all types of negotiated procedures, but focuses on settlement-like instruments and ad-hoc solutions for specific markets. These instruments are reviewed on the basis of the normative framework, which leads to observations regarding their compatibility and recommendations for future practice.

Chapter 5 discusses markets work, which is aimed at investigating, studying or scanning of markets with a view to finding aspects that are not working well. The types of markets work discussed in this chapter vary from Member State to Member State, as the UK CMA has a very evolved (and rather incomparable) system of market scans and investigations, whereas the other two national competition authorities do not. Still, the procedures and their application in practice are discussed in a uniform way, facilitating a comparison at a later stage. The observations made in this chapter are returned to in the concluding chapter as well.

Chapter 6 discusses individual guidance. This form of guidance is aimed at market parties individually and usually proactively, containing informal recommendations (or condemnations). This instrument is the most 'informal' enforcement instrument under review. Because of this informal nature, the discussion of its application in practice is rather piecemeal, based on examples rather than on a systematic approach to a body of cases. The differences between the different national competition authorities found in this analysis are included in the final chapter. Apart from that, reference is made to the differences and similarities between markets work and individual guidance – which share many characteristics, but are viewed rather differently.

Chapter 7 focuses on an instrument that – in itself – is not an enforcement instrument: compliance programmes. These are programmes adopted by companies in order to detect infringements – not just in competition law, but usually with regard to other types of regulation as well. In this chapter, the focus is not on these programmes as such, but rather on the approach of competition authorities towards them. This entails that the stimulation of compliance programmes is discussed, as well as the combination of compliance stimulation and enforcement instruments. This analysis shows a different side of competition authorities' enforcement work, which is more preventative, explanatory and cooperative.

Part III – Evaluation and Synthesis

Chapter 8 draws together the observations derived from the different instrument-based chapters and evaluates these key policy considerations against the normative framework underlying this thesis. Because of their different characteristics, the instruments reviewed provide a rounded impression of alternative enforcement in the three Member States and help identify the challenges that competition authorities are faced with when applying these instruments in practice.

Chapter 9 connects these challenges to the levels of enforcement identified earlier (policy, agency and rule) and the context sketched out in the introduction and the second chapter (drivers of change, historical context and current enforcement strategies). Due to this context, the second part of the research question (what challenges are posed by alternative enforcement for enforcement on a national level) can be answered.

The closing date for the research in this thesis was 1 February 2016. Further developments in competition law enforcement in the Member States that occurred after this date have been included only occasionally.

Chapter 2

INSTITUTIONS AND LEGAL BACKGROUND

The previous chapter introduced the research question which is central to this thesis, as well as a definition of alternative enforcement and the delineation of the research as such. Part of this delineation concerns the national competition authorities that are subject to this research: the Autorité de la Concurrence in France (Autorité), the Authority for Consumers and Markets in the Netherlands (ACM) and the Competition and Markets Authority in the UK (UK CMA). This chapter discusses the background of these authorities, as well as the legal systems in which they operate. It is necessary to have some impression of this factual and legal context in order to gain a better understanding of the possibilities that the national competition authorities have and the environment in which they operate. This discussion is connected – at least in part – to the drivers of alternative enforcement, as outlined in Chapter 1 (Introduction). Also, the institutions and procedures discussed in this chapter are referred to when exploring the alternative enforcement practice of the national competition authorities in the chapters to come.

1. INTRODUCTION

In the Netherlands, France and the UK an administrative authority is responsible for the enforcement of competition law. These authorities have the power to investigate, evaluate and sanction, and have various advocacy-related tools at their disposal as well. In the execution of these powers, the competition authorities rely on national procedural rules in addition to their obligations under European law.[1] They follow internal decision-making procedures, which can vary from Member State to Member State and from instrument to instrument. The discretion of national competition authorities is limited by their relationship with the responsible Ministry, obligations of accountability and the other obligations that national procedural law might give rise to. However, before outlining the differences in institutional design and procedures, this section first outlines the historical development of competition law and enforcement, in order to better understand how these authorities came to be. This historical development is clearly connected to the context against which alternative enforcement instruments should be understood,[2] as it shows that the different drivers identified there have played an important role in the development of competition law and enforcement as such. After that, the institutional set-up and mechanisms of the current competition authorities in the three Member States (the ACM, the Autorité and the UK CMA) are discussed,

1 See Chapter 1, section 2.1 and also Chapter 3, section 2.1.2.
2 See Chapter 1, section 2.

along with the competences entrusted to them in terms of enforcement instruments and strategies. Lastly, this chapter touches upon some peculiarities of the (administrative) legal system that might have an influence on the way in which competition law is enforcement. All of these aspects are not discussed consecutively, but with regard to each competition authority separately. This means that §2 outlines all of these aspects for the Netherlands, §3 discusses French practice and §4 reviews the situation in the UK.

2. THE NETHERLANDS

Competition law in the Netherlands is enforced by a single authority (the ACM), which is responsible for investigating competition law infringements and fining the companies and persons in violation. This authority acts independently, but is accountable to the Dutch Ministry of Economic Affairs. However, this has not always been the case. In fact, the Netherlands was considered rather tardy in introducing strict competition laws in the first place. This section briefly discusses the historical developments that led to the current situation of competition law enforcement in the Netherlands. In this historical overview, it is easy to discern the drivers for change as discussed in the previous chapter, as well as the cultural aspects and opinions that have influenced competition law enforcement in the Netherlands. After this overview, the institutional structure of the ACM is discussed, as well as its tools and strategy. Lastly, some attention is paid to the standard decision-making procedure within the ACM and the legal particularities of the Dutch administrative law system that influence day-to-day enforcement.

2.1 Development of Competition Law and Enforcement

For a long time, the Netherlands was known as a cartel haven in which cartelistic behaviour was only registered and discouraged, but almost never sanctioned.[3] This attitude was underlined by a deeply rooted belief in the freedom of enterprise, which caused the government to shy away from intervening in companies' business choices – including their agreements.[4] Any form of cartel discouragement was seen as a limitation on that freedom. For that reason, one of the first competition laws in the Netherlands (which dates back to 1935) was considered revolutionary in the sense that it made it possible for the Dutch government to intervene in companies' day-to-day business.[5] However, in practice, the law enabled the government to promote cartelistic behaviour by declaring agreements compatible (*algemeen verbindend verklaren*) rather than to discourage it by declaring them incompatible. This was not surprising, as 'for the

3 Long before the first competition rules were introduced, the dangers of cartels were discussed in the literature. See for instance d'Aulnis de Bourouill 1904, who remarked on the influence of cartels and trusts on world trade.

4 This attitude was not just characteristic of the Netherlands, but of continental Europe in general, with the exception of Germany. This conclusion was reached by Hoelen 1953, p. 668.

5 This is the *Ondernemersovereenkomstenwet* 1935, which roughly translates as the Undertaking's Agreements Act. However, public intervention in private life was seen as impossible and it was denied that this Act included such provisions. See in more detail Snijders 1966.

government, no other intervention is befitting but to prevent the excesses of cartels'.[6] Compatible and incompatible agreements were registered in a public register, but the law lacked stringent tools to sanction non-compliance.[7]

Between 1935 and 1956 some changes were made to the Dutch competition laws, giving the government the possibility to identify and prevent 'excesses' of dominant positions.[8] However, the aftermath of the Second World War – which was characterised by a period of reconstruction and economic growth – called for a more drastic revision of the Dutch competition system. A new Competition Act was implemented in 1958 (*Wet Economische Mededinging*, or WEM), which paradoxically aimed to encourage cooperation and prevent ruinous competition at the same time.[9] The act was enforced by a governmental commission (*Commissie Economische Mededinging*), which had an advisory role and left actual decision-making to the Minister of Economic Affairs.[10] Under the Competition Act of 1958, the cartel register was maintained, which informed the Minister about the existence of cartels and facilitated a declaration of invalidity if a cartel were to be investigated. This rendered the agreement void for the duration of five years and could give rise to additional implications under penal law.[11] However, in practice, there were few successful formal interventions under this Act. Because competition law enforcement required a very detailed and specialist knowledge – which the prosecutor unfortunately lacked – many cases were terminated or settled out of court to circumvent criminal proceedings.[12] The agreements that had been found to be incompatible served an important exemplary function and were often referenced as a means of informal pressure upon companies to alter similar agreements.[13] Apart from that, a serious attempt to reform the Dutch competition law system to a prohibition-based system failed,[14] resulting the Netherlands being one of the few Member States in which cartelistic behaviour was condoned and hardly condemned until well into the 1990s: it was a cartel haven.

The discrepancy between the situation in the Netherlands and the status of competition law on a European level and in other Member States led to a great deal of uncertainty on the part of international undertakings. Apart from that, the Dutch legislator had realized that its lenient approach to acting against cartels had caused economic growth to fall behind compared to the European average.[15] All in all, the legislator saw sufficient reason to realign its competition policy with that of the European Commission and introduced a new Competition Act (*Mededingingswet*) in 1998. This

6 Hoelen 1953, p. 668. Also, the interpretation of the law was strongly influenced by the economic crisis that took place before the Second World War. See Snijders 1966, p. 427.

7 This register was implemented a few years later, in 1941.

8 *Kartelbesluit* 1941, Verordeningenblad 1941, 208 and *Kartelbesluit* 1943 (Besluit van de Secretarissen-Generaal van de Departementen van Handel, Nijverheid en Scheepvaart en van Landbouw en Visserij van 12 Februari 1943, houdende wijziging en aanvulling van het Kartelbesluit).

9 Amongst the goals of combating the negative effects of cartels and the abuse of dominance. See Van Der Lijn et al., 2002, p. 20.

10 Kuenzler & Warlouzet 2013, pp. 107-109.

11 Kuenzler & Warlouzet 2013, p. 104.

12 See in more detail de Jong 1990, p. 244 or Dekker 2002, p. 8.

13 Snijders 1966, p. 432.

14 In 1977. See Kuenzler & Warlouzet 2013.

15 The main reason for maintaining a abuse system was that the reduction in consumer surplus caused by such a system was expected to be nullified by the increase in producer surplus. This eventually did not happen, leading to an error in allocative effects and a decrease in overall welfare. Bergeijk & Godfried 2002, p. 204.

proved to be the end of the Dutch cartel haven. The drafters of the new competition act had chosen not to maintain the abuse-based system and had inserted clear cartel and abuse prohibitions that were consistent with their European counterparts. Regarding procedural law, the new competition act was connected to the General Administrative Law Act (*Algemene wet bestuursrecht*) that allowed for administrative action against infringements. For that purpose, the new competition act introduced a new administrative body that was charged with the enforcement of competition law: the Dutch Competition Authority (*Nederlandse Mededingingsautoriteit,* or NMa). The NMa could command compliance with the new Competition Act by imposing binding orders, administrative fines and cease-and-desist orders.[16] In addition to its tasks under the Competition Act 1998, the NMa was the designated regulator for the energy market and the market for public transport.

Early on, the NMa had already placed great importance on the deterrent effect of its actions. In fact, one of NMa's first guidance documents stated that fines for a breach of competition law must be sufficiently high in order to create an incentive for other undertakings to comply.[17] The 2002 review of the Competition Act 1998 proved that this strategy was effective; most undertakings had indicated that they were familiar with the content of the Competition Act and that the risk of incurring a fine played an important role in their decision-making processes.[18] Even though the 2002 review was positive for the larger part, it also recommended that the NMa should focus more on guidance (explaining the law to stakeholders and providing clarity about its procedures) and that it should act more proactively.[19]

With the introduction of the Competition Act 1998 and the creation of the NMa, the Dutch legislator had completed the largest reform of competition law to date. In 2005, the NMa received the formal status of an independent administrative body (*zelfstandig bestuursorgaan*), allowing it to act independently from the Ministry of Economic Affairs.[20] The NMa enforced competition law in the Netherlands for well over a decade, until austerity measures caused yet another overhaul of the system of competition law enforcement. Consistent with the call for a 'smaller government' and 'compact supervisors',[21] it was decided that the NMa should merge with two other supervisory authorities: the telecommunications regulator (*Onafhankelijke Post en Telecommunicatie Autoriteit*) and the consumer protection authority (*Consumentenautoriteit*). By combining different types of market regulators, the Dutch legislator hoped to succeed in making budget cuts by creating synergy effects.[22]

---

16 Article 56, paras. 1a, 1b and 1c *Mededingingswet*.

17 Nederlandse Mededingingsautoriteit, Richtsnoeren boetetoemeting, met betrekking tot het opleggen van boetes ingevolge artikel 57 van de Mededingingswet, para. 4.

18 Plug 2002, p. 20.

19 Plug 2002, p. 22 and p. 59.

20 Kamerstuk 27639 no. A, 'Wijziging van de Mededingingswet in verband met het omvormen van het bestuursorgaan van de Nederlandse mededingingsautoriteit tot zelfstandig bestuursorgaan', November 2003. This status has been criticized as well. See for instance Van der Meulen 2012.

21 See in more detail Ottow 2015 and Aelen 2014 (with regard to financial supervision).

22 Kamerstukken II, 2011/2012, 33 186, no. 3, p. 1. See in more detail on the merger Ottow 2014. Some also noted that budget cuts were the main driver and synergy effects were merely named to mask the negative sound austerity has to it. See for instance De Bree 2012, p. 145. Because of the merger, the Minister of Economic Affairs hopes to save over € 3 million annually. Kamerstukken II, 2011/2012, 33 186, no. 6, pp. 3-5.

The ACM came into being in April 2013 by means of its act of establishment (*Instellingswet*) and received uniform powers for all its different divisions in September 2014 by means of a Streamlining Act (*Stroomlijningswet*). This two-phased introduction was criticized to some extent, as it led to a transition period in which the institution was already operational, but had no streamlined powers and relied on its predecessors' competences instead.[23] Like the NMa, the ACM is an independent administrative authority and enforces the different laws and regulations in accordance with Dutch administrative law. The inception of the ACM did not lead to any substantive changes in Dutch competition law, but has brought about procedural alterations – mainly through the Streamlining Act that equipped the ACM with broadly formulated competences. More generally speaking, the combination of competition authorities, sectoral regulators and consumer protection authorities is consistent with a trend in other (European) countries as well.[24]

2.2 Competition Law Enforcement by the ACM

The current national competition authority in the Netherlands is the Authority for Consumers and Markets (ACM), which was the result of the merger as described above. The ACM's mission statement is to create 'opportunities and options for businesses and consumers', in terms of competition, innovation and real choice.[25] In order to do that, the ACM is mandated to enforce Dutch competition law,[26] as well as the different sectoral regulations. The substantive law of competition in the Netherlands is the Dutch Competition Act (*Mededingingswet*). This act is very similar to the competition provisions of the TFEU, and contains a cartel prohibition, a prohibition of abuse of dominance and merger provisions.[27] The Competition Act gives the ACM various procedural powers, which are further elaborated upon in the ACM's fining guidelines, set by the Minister of Economic Affairs.

2.2.1 *Institutional Set-Up and Accountability*

The ACM is organised into six departments and two overarching offices, which all report to the board of the ACM. These departments (the consumer, competition, energy, telecommunications, transport and postal services, and the legal and corporate services department) all have teams that work on different cases.[28] The overarching offices (policy and communications and the Chief Economist's office) deliver services to all departments. During the merger, a large portion of the ACM's predecessors' former staff was reallocated and ended up working for a different department. This means that it is possible for ACM staff to move throughout the organisation, which prevents

23 See for critique for instance De Bree 2012 or Kohlen & Kuijpers 2014.
24 See in more detail Chapter 1, section 2.3 and the references given there.
25 The ACM's mission statement is available online at: https://www.acm.nl/en/about-acm/mission-vision-strategy/our-mission/.
26 Article 2 *Mededingingswet*.
27 Articles 6, 24 and 26-49 respectively.
28 With the exception of the corporate services department, which does not work on cases in the supervision and enforcement sense.

compartmentalization.[29] The only limitation on this open organisational structure is the 'Chinese Wall' that exists between the legal department and the other supervisory departments in open cases. This separation of functions, discussed in more detail below, prevents members of the legal department from interfering in current cases (and vice versa) in order to prevent bias. Currently, the ACM employs around 500 FTE.[30]

The ACM is an independent administrative authority, a special status under Dutch law that is comparable to an independent agency.[31] This entails that it is accountable to the Minister (of Economic Affairs in this case), but that it has operational independence. With regard to the ACM, the Minister of Economic Affairs is responsible for determining the ACM's budget, for approving its formal guidelines (such as the fining guidelines[32]) and for intervention in *ultra vires* situations.[33] Apart from that, the Minister has the competence to approve certain decisions, but formally never intervenes in individual cases.[34] During the merger, there was a discussion on whether the Minister should be able to set a target for the amount of fines imposed on a yearly basis. Because of the critical reception by academics and practitioners, this target is no longer formally in place. Nevertheless, the ACM still has to account for its expenses and income, including the total amount of fines.[35] It does so by way of annual reports, which are made accessible and understandable for the general public. Along those same lines, the ACM is legally obliged to publish certain fining decisions and is granted the possibility to publish other formal decisions – naturally taking into account the interests of the companies involved.[36]

In terms of positioning in the field, the ACM has collaboration protocols in place with various Dutch authorities and institutions.[37] Apart from that, it also collaborates with the Ministry of Infrastructure, the Ministry of Health, the Ministry of Education and the Ministry of Finance. Internationally, the ACM is part of the European Competition Network (ECN), the International Competition Network (ICN), the

29 Meaning that a merger between different institutions does not necessarily lead to more synergy if everybody stays within their own departments. This has been referred to as 'silos' by Hyman & Kovacic, quoted in Ottow 2014.

30 Based on the average between April 2013 and December 2013, derived from ACM Annual Report 2013, p. 119. Technically, the ACM does not employ its staff, but rather hires from the Ministry of Economic Affairs, where the staff are employed. Since the ACM is a combined agency, it is difficult to pinpoint how many FTE are deployed to competition, and how many of the supporting staff are needed to support the competition department alone. The ACM's predecessor has always been a combined agency as well (employing around 430 FTE, see NMa Annual Report 2011), making it difficult to deduce any conclusions from this number alone.

31 According to Van der Meulen 2012, p. 139.

32 Article 5a *Mededingingswet*.

33 Article 10 *Instellingswet* (*ultra vires*), but also Article 11 *Instellingswet* (negligence of duties).

34 Individual intervention is prevented by Article 9 *Instellingswet*.

35 Article 18 *Kaderwet Zelfstandige Bestuursorganen*.

36 Articles 12u-12w *Stroomlijningswet*.

37 Autoriteit Financiële Markten, Agentschap Telecom, Belastingdienst, Commissariaat voor de Media, Consumentenbond, College Bescherming Persoonsgegevens, Openbaar Ministerie, De Nederlandsche Bank, Inspectie Leefomgeving en Transport, Het Juridisch Loket, Kansspelautoriteit, Nationale Recherche, Nederlandse Voedsel- en Warenautoriteit, Nederlandse Zorgautoriteit, Staatstoezicht op de Mijnen, Staatstoezicht op de Volksgezondheid, Stichting Geschillencommissie Consumentenzaken, Stichting Infofilter, Stichting Reclamecode.

European Competition Authorities (ECA) and the Organisation for Economic Co-operation and Development (OECD).[38]

2.2.2 *Tools, Output and Strategy*

Through the Dutch Competition Act the ACM is equipped with a range of formal tools. It can impose fines, binding orders, cease-and-desist orders, conclude commitment decisions and order or execute market scans.[39] These tools can be applied throughout the ACM, so with regard to competition law enforcement as well as in a consumer protection or regulatory setting. Apart from the more formalized tools, the ACM's mandate is broad enough to engage in other types of enforcement activities, such as guidance, compliance assistance, warning calls and informal meetings. Like most other national competition authorities, the ACM has a leniency procedure in place, in which it grants immunity and two degrees of fine discounts if the conditions for leniency are met.[40] The striking aspect with regard to the ACM's toolkit is the fact that it is competent to fine natural persons for their involvement in breaches of competition law.[41] The ACM has done so on multiple occasions in the past.[42] Natural persons are also eligible for leniency, and to profit from fine discounts (or to suffer from increases) under the ACM's fining guidelines.[43]

Between 2004 and 2015 the ACM issued 56 fining decisions.[44] On average the ACM issues a little over 8 fining decisions a year, though the average number of fining decisions has declined in the last few years. In these same 12 years, the ACM issued 12 commitment decisions. The first commitment decision dates from 2008, which supports the conclusion that the ACM was relatively late in embracing this instrument. Apart from fining and commitment decisions, the ACM concluded the enormous *Construction* case between 2004 and 2006,[45] completed 33 market scans and has engaged in various informal enforcement efforts.[46]

In order to choose between the different enforcement instruments the ACM has at its disposal, the ACM makes use of an explicit and publicly available enforcement strategy

38 For the departments besides competition the ACM is also part of the Consumer Protection Cooperation (CPC), the International Consumer Protection and Enforcement Network (ICPEN), the Agency for the Cooperation of Energy Regulators (ACER), the Council for European Energy Regulators (CEER), the Body of European Regulators for Electronic Communications (BEREC), the European Regulators Group for Postal Services (ERGP) and the Independent Regulators Group – Rail (IRG – Rail).

39 These competences are found in Article 56 *Mededingingswet*, Article 12j *Stroomlijningswet*, Article 56 *Mededingingswet* again, Article 49a *Mededingingswet* and Article 2 sub. 4 *Stroomlijningswet*.

40 See ACM Leniency Guidelines 2014 in more detail.

41 Article 56 *Mededingingswet*, in combination with Article 5:1 *Algemene wet bestuursrecht* and Article 51 *Wetboek van Strafrecht*.

42 See for example: Autoriteit Consument en Markt, Case 14.0705.27 (*Azijn*) and Autoriteit Consument en Markt, Case 1528 (*Wegener*).

43 Discussed in Chapter 4 on Negotiated Procedures. Exemplary is the 2015 *Azijn* decision, in which natural persons benefited from a streamlined procedure (a settlement-like instrument). See Autoriteit Consument en Markt, Case 14.0705.27 (*Azijn*).

44 Fines for non-cooperation, fines on natural persons and fines for breaching remedies are not included.

45 In this case, the ACM's predecessor investigated 1374 cases, granting leniency in 419 cases and levying fines worth EUR 239 million. See Chapter 4, but also Gerbrandy & Lachnit 2013.

46 On an individual basis. See Chapter 6 in more detail.

and has opted for an ACM-wide 'problem-solving approach'.[47] This 'new' enforcement strategy was introduced in order to safeguard robust decision making across the board after the merger.[48] Reduced to its very core, it entails a search for causes of problems beyond the scope of the competition infringement alone, as a result of which more time will be dedicated to creating a solid problem definition or theory of harm. On the other side of a procedure, more attention is paid to the effect of the intervention. The aim is to choose the right enforcement instrument for the problem defined, whether this is a fining decision or an informal intervention.[49] By adhering to its strategy, the ACM aims to make sure that the intervention chosen effectively remedies the problems in the market. Apart from unifying the approach to cases across the board, the ACM's strategy is connected to broader public interests and places the consumer at the heart of its enforcement work.[50]

2.3 Decision-Making Process and Legal Particularities

Generally, cases at the ACM start with a pre-investigation based on complaints, signals, marketstudies or a leniency application. During this pre-investigation the ACM discusses with third parties or consults open sources. After this pre-investigation, the ACM decides whether or not to pursue the case any further, based on its prioritisation policy.[51] If the case is pursued, the ACM (more specifically, the competition department) proceeds to on-site visits, requests information and possibly engages in forensic imaging before evaluating the evidence gathered. This evidence underlies the statement of objections (in Dutch: *rapport*), which is sent to the companies involved, but also demarcates the transition between the investigation phase performed by the competition department and the legal evaluation conducted by the legal department. This transition is known as the 'Chinese Wall', which entails that cases referred to the legal department cannot be supplemented or clarified by members of the competition department, and that members of the legal department cannot involve themselves in the case when it is still being dealt with by the competition department. This strict separation of functions has been establshed to safeguard impartial decision-making, as the ACM operates as a 'judge, jury and executioner' of administrative sanctions.[52] In any case, the legal

47 Inspired by Sparrow 2000. See Strategy ACM 2013.

48 This is not a complete break from the foregoing strategy, but an elaboration upon ideas that existed earlier within the organisation. From the interviews conducted at the ACM it appeared that the new strategy streamlined existing approaches and made staff more aware of the importance of problem definition and effects. See for an extensive overview of the methodology pursued in these interviews Annex I – Methodology.

49 Upon the introduction of its strategy, commentators feared that the ACM would relinquish its formal tools to the benefit of informal interventions (see for instance Schinkel 2012a and 2012b). In that light, questions arose about the impact upon legal certainty of companies and the principle of equality. The ACM emphasized that 'problem solving' would entail all of its toolkit, and not just informal tools (see Speech Fonteijn 2013 and Speech Don 2013). Since the merger, however, the ACM has taken significantly less fining decisions, but has increased its advocacy and guidance efforts.

50 ACM Strategy 2013.

51 See the press release accompanying the ACM's Agenda for 2013-2014 (ACM, Press Release 11-04-2013, Autoriteit Consument en Markt stelt consument centraal).

52 The Chinese Wall within the ACM is rather sturdy, and the ACM's predecessor was reprimanded for breaching it in the past, *College van Beroep voor het Bedrijfsleven*, Case AWB 09/983 (*ETB de Vos*).

department is responsible for assessing the statement of objections and the underlying evidence, hearing the parties involved and preparing the imposition of the sanction (if any). This happens in close cooperation with the ACM's board, which formally takes the final decisions. After the decision is made and the parties are notified, the text of the decision is usually published and is open to objections and appeal. The objection phase is a particularity of the Dutch legal system, which requires administrative bodies to review their own decisions before an appeal before an administrative court becomes possible.[53] In case of an objection, the ACM's legal department has to re-evaluate the decision on the points put forward by the complainant. This happens after the decision has been finalized and announced. In certain cases, the legal department seeks advice from an Objection Advice Committee, an external ad hoc group of academics, lawyers or consultants who write an opinion on the case.[54] An objection phase can lead to an adaptation of the first decision, to a full re-evaluation, to declaring the decision invalid or to declaring the objections invalid. More often than not, the latter happens. After the objections phase, an appeal is possible before the Rotterdam District Court and in the last instance before the Trade and Industry Appeals Tribunal. The District Court is the designated administrative court for competition issues, and the Tribunal is a specialized administrative court of last instance.

As mentioned above, enforcement by the ACM is subjected to Dutch administrative law. In the Netherlands, there is a single administrative system (introduced by the General Administrative Law Act) that governs the behaviour of administrative bodies, which – amongst other things – requires them to act carefully, proportionally and fairly. The main consequence of the application of this Act is that decisions taken by ACM are subject to objections and appeal, as set out above.[55] Apart from that, the Act prescribes transparency in procedures, requiring the ACM to offer interested parties the possibility to review the draft decision and to make their views known.[56] Lastly, as a corollary of the streamlining of procedures in mid-2014, the ACM is now required to publish its fining decisions. This is a sensitive issue in Dutch law, as it brings about connotations with naming and shaming as an added penalty, rather than being connected to transparency considerations.[57] In the current situation, companies that still wish to appeal against the decision can attempt to halt publication with an injunction procedure, in which a civil judge will give a preliminary ruling upon the legality of the decision. If this preliminary

---

Currently, however, the ACM is experimenting with having members of the legal department consulting with the competition department concerning certain cases. These members will logically not be involved in the final decision if the case transitions to the legal department.

53 See Chapter 6 *Algemene wet bestuursrecht*.

54 The Objection Advice Committee (*Bezwaar Advies Commissie,* or BAC) used to be mandatory in the case of fining decisions and cease-and-desist orders (Article 92 *Mededingingswet* before the introduction of the *Stroomlijningswet*).

55 During the merger, there was a discussion about whether or not to eliminate the objection phase, because parties often perceive it as an extra hurdle on the road to the court. In the end, the objection phase was not eliminated – possibly in order to force the ACM to be precise about its decisions – but there is a possibility to skip it if all parties agree. See *Wet Rechtstreeks Beroep* 2004.

56 Called *Uniforme Openbare Voorbereidingsprocedure*, Articles 3:10-3:18 *Algemene wet bestuursrecht*.

57 See for a practical example in the field of regulation Lachnit 2014. See more in general Van Erp 2009, Michiels 2007, Doorenbos 2003 and De Haan & Sonderegger 2011.

ruling is negative, publication is halted until the appeal is finalised. Because of the speed (or the lack thereof) of the appeals process, this can stall publication by a few years.[58]

3. FRANCE

In public perception, public law in France is characterised by a strong government and detailed regulation. Along those same lines, the development of competition law brings about connotations of protectionism and price control. However, despite having had a long period of price regulation and public intervention still being a strong component of the French economy (given the fact that the state owns shares in large companies and retains the mandate to intervene in a crisis), companies have learned to compete fairly. Competition in France is definitely described as 'open'.[59] Moreover, the French system of competition law enforcement is currently considered to be amongst the best in the world and has proven to be receptive to changes on a European and international level.[60] Over the years, French competition law and enforcement has maintained its own unique features as well, such as the emphasis on the advisory role for the competition authority and the pronounced focus on defence rights for companies. This section discusses these features of competition law in France, as well as the historical developments that have driven these changes. After that, the institutional set-up of the current competition authority (the Autorité de la Concurrence) is discussed, and its toolkit and enforcement strategy are explained. Furthermore, this section pays attention to decision-making procedures and certain features of French administrative procedure that might have an impact on the way alternative enforcement instruments are deployed.

3.1 Development of Competition Law and Enforcement

Strikingly, competition law in France developed from its Criminal Code (*Code Pénal*), which abolished cooperation resulting in higher or lower prices than would have been the result of normal competition.[61] At the time free pricing was considered to be of high importance to safeguard a steady flow of affordable food and to avoid hoarding and speculation.[62] However, after the First World War, this law was no longer in line with economic reality and supplementary laws were introduced that distinguished between good and bad cartels. A balancing act became possible, and the Criminal Code was applied with more flexibility.[63] The influence of the Second World War on competition law was even greater. The French government chose a more planning-oriented approach in order to reconstruct the economy, as resources were depleted and the country needed

58 See for instance College van Beroep voor het Bedrijfsleven, Case AWB 13/931 (*KPN*), in which publication was stalled for no less than 3 years.

59 Conclusion drawn by OECD Reviews of Regulatory Reform: France 2004, pp. 108-109.

60 Rating Global Competition Review 2014. The Autorité received a five-star rating, which it only shares with the Department of Justice (US), the Federal Trade Commission (US) and the Bundeskartellambt (Germany).

61 Article 419 *Code Pénal*, 1810. Even earlier, guilds and corporations were abolished and free trade was promoted (Loi Le Chapelier, June 1791).

62 Kuenzler & Warlouzet 2013, p. 93. See also: Wise 2005, pp. 8-15.

63 Kuenzler & Warlouzet 2013, p. 94 and 25 Years Autorite, p. 11.

to rebuild. To that end, it issued the *Ordonnance* of 1945, in which prices were regulated and maintained at the 1939 level. Competition policy played a secondary role and was aimed at preventing inflation and the emergence of the black market.[64]

During (or shortly after) the reconstruction, an institutional change in French competition law occurred. In 1953, the Concerted Practices Commission (*Commission technique d'ententes*) was set up to provide the Minister of Economy with advice on cartelistic behaviour. This Commission operated under the Decree of 1953, which contained an absolute cartel ban that rendered such agreements null and void.[65] The Commission could not enforce this law by itself, but its advice could lead to the Minister imposing sanctions upon companies. The assessment of cartels was subjected to a balancing test on a case-by-case basis. In 1963, the mandate of the Commission (and the Minister) was broadened to include abuse of dominance as well.[66] All in all, the Commission had a limited level of activity and remained mainly an advisory body. Its opinions to the Minister remained confidential.[67]

All this time, the French government maintained price regulation. However, the attitude towards competition changed in the late 1970s under the influence of international developments.[68] In 1978, the Commission de la Concurrence was established – replacing the former Concerted Practices Commission.[69] This new Commission remained a purely advisory body. A few years later, in 1986, a major reform of public economic law caused the government to abandon price control completely and to reform French competition law. In the course of this overhaul, the German and European models of competition law were looked at for inspiration. In fact, France was amongst the first Member States to align its substantive competition rules to those on a European level.[70] Under the 1986 reform, the Commission was turned into a newly established Conseil de la Concurrence – with new and broader powers.[71] It was competent to start proceedings, to impose interim measures and to impose fines without intervention by the Minister of Economy. The advisory function of the former Commission was retained, and its opinions (unlike its predecessor's) were published.

The Conseil de la Concurrence was operational for a long time and was granted even more powers during the 2001 reform of the New Economic Regulations (NRE, or

64 As through the *Ordonnance* 30 June 1945. The reason for the French government to choose a more planning-oriented approach to rebuilding the economy after the Second World War was in ancient statist traditions. See in more detail Kuenzler & Warlouzet 2013, p. 99, and the works referred to in fn. 40.

65 Décret no. 53-704 du 9 août 1953, rélatif au maintien ou au rétablissement de la libre concurrence industrielle et commercial.

66 Loi de finances n° 63-628 du 2 juillet 1963 rectificative pour 1963 portant maintien de la stabilité économique et financière.

67 25 Years Autorité, p. 11. Also: Kuenzler & Warlouzet 2013, p. 109 and Wise 2005, pp. 8-15.

68 The Autorité itself referred to the 1973 oil crisis (during which Arab countries placed an embargo on a number of trading partners for their involvement in the Yom Kippur War). 25 Years Autorité, p. 12. Domestic developments included the 'lagging' development of the French economy at the time. See the interview with Édouard Balladour (Prime Minister 1993-1995) in 25 Years Autorité, pp. 14-15.

69 Under the Act of 19 July 1977, in French: Loi no. 77-806 du 19 juillet 1977 relative au contrôle de la concentration économique et à la répression des ententes illicites et des abus de position dominante.

70 Being the Treaty of Rome at the time. See 25 Years Autorité, p. 12, but also OECD Reviews of Regulatory Reform: France 2004, p. 108.

71 Ordonnance n° 86-1243 du 1 décembre 1986 relative à la liberté des prix et de la concurrence.

Nouvelles Regulations Economique).[72] The NRE enabled the Conseil to impose interim measures of its own motion, which before that time could only be imposed upon request. Also, the NRE increased the fine ceiling up to 10% of the annual turnover and introduced a leniency procedure and the non-contestation procedure. Apart from focusing on the firmness on the Conseil alone, the NRE also streamlined administrative procedures to better align them with the requirements flowing from – for instance – the European Convention on Human Rights.[73] In the same period, the Conseil was granted budgetary autonomy, removing it even further from the influence of the Minister of Economy and its starting point as a departmental Commission.[74] Also, the Conseil's decision-making powers were aligned to those of the Commission, reflecting the changes made in the 2003 modernisation and decentralisation of European competition law enforcement.[75]

Another extensive round of reforms took place between 2008 and 2009 and transformed the Conseil de la Concurrence into the independent Autorité de la Concurrence, which has now functioned since 2 March 2009.[76] In fact, the creation of the Autorité was just one part of a larger reform of public economic law, which was aimed at having France regain its competitive position in a changing world economy.[77] It was rushed through Parliament in a little over six months, which indicates the urgency of the matter.[78] Overall, the reform aimed to give the French competition authority more independence from the Ministry, and to enhance its efficiency alongside the enhancement of fairness in procedures.[79] The Autorité was granted an independent service of investigations, which subsumed the investigation service of one of the other departments of the Ministry of Economy concerned with competition law enforcement.[80] The investigative service is, however, strictly separated from the Autorité's decision-making functions. This was deemed necessary, as the more independent status of the Autorité also implied that it would become the 'judge, jury and executioner' of its own cases.[81] With the 2009 reform, some institutional changes were made that guaranteed a more independent authority that is able to operate outside the influence of politics.[82] In terms of enforcement powers, the Autorité was granted the power to make self-referrals

72 This overhaul was considered necessary when the Conseil d'Etat extended competition law to apply to the public sector as well. See Conseil d'Etat, No. 165260 (*Société Yonne Funéraire, Société Intermarbres, Société Million et Marais*).

73 OECD Reviews of Regulatory Reform: France 2004, p. 114. See more extensively on the substantive, institutional and procedural situation after the introduction of the NRE: Wise 2005, p. 16 and further.

74 Interview with Marie-Dominique Hagelsteen, who was head of the Conseil and (partially) responsible for these changes. See 25 Years Autorité, pp. 18-19.

75 Incited by the publication of Regulation 1/2003, which was translated into Ordonnance n° 2004-1173 du 4 novembre 2004 portant adaptation de certaines dispositions du code de commerce au droit communautaire de la concurrence.

76 See for more detail Conseil de la Concurrence, Avis n° 08-A-05 (*Réforme du système français de régulation de la concurrence*). The laws underlying these changes were the Loi de modernisation de l'économie n° 2008-776 du 4 août 2008 and more importantly (in terms of powers and institutional set-up) Ordonnance n° 2008-1161 du 13 novembre 2008.

77 Due to the observation that the French economy's growth declined from 5% to 1.7% annually over the last 40 years. See in more detail the report that started this large-scale reform: Attali 2008, p. 9.

78 25 Years Autorité, p. 22, in frame.

79 See Lasserre 2009, p. 2.

80 The DGCCRF, see section 3.2.1 below.

81 25 Years Autorité, p. 25.

82 See section 2.1 below.

and to investigate markets of its own motion.[83] Until the reform, the Autorité's predecessor could only do so upon a referral by a Ministry or designated other parties. This does not mean, however, that one of the more 'classical' functions of the French competition authority has disappeared. Under the current legal framework, the Autorité is still obliged to give advice on pending legislation (when necessary) and the different Ministries can refer questions to it.

The latest reform in French public economic law is the 2015 *Macron* law, concerning growth, activity and equality in the French economy.[84] This law was primarily aimed at measures to reinforce the economy as a whole, but also granted the Autorité more robust investigatory powers and introduced some changes to its settlement regime.[85] Other than that, the *Macron* law introduced changes to the merger regime, required joint purchasing agreements in the retail sector to be notified and further regulated cooperation between the Autorité and the department of competition of the Ministry of Economy.[86]

3.2 Competition Law Enforcement by the Autorité

With the inception of the Autorité de la Concurrence, the French government has opted for a single authority responsible for competition law enforcement. The mission of the Autorité is to watch over free competition and to help the competitive functioning of domestic and European markets, all for the purpose of safeguarding the public economic order for the benefit of the consumer.[87] In order to fulfil this mission, the Autorité has a double function; it performs advisory and decisional activities. This means that it is mandated to give advice on the application of competition law to entities that represent collective interests (such as Ministries, regulators or consumer and trade organisations), and that it is competent to investigate, pursue and sanction infringements of competition law, as well as to control mergers on French territory. The Autorité operates under the French Commercial Code (*Code de Commerce*), which contains substantive competition law and certain procedural rules.[88] The *Code de Commerce* includes antitrust prohibitions similar to the ones included in the Treaty on the Functioning of the European Union and a section on merger control.[89] Also, it establishes the Autorité as such and attributes its investigatory and decision-making

83 Self-referral is based on Article L462-4 of the *Code de Commerce*.

84 Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques.

85 Articles 215 to 218 of Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques, visible in Article L.464-2(III) and Article L.450-3 of the *Code de Commerce*.

86 See Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques, visible in Article L.464-2(III) and Article L.450-3 of the *Code de Commerce* and also the blog by Roskis 2015, accessible on: http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Competition_EU_and_Regulatory/FRANCE-THE_MACRON_LAW.

87 Loosely translated from the mission statements included in the Autorité's websites. '*Au service du consommateur, elle a pour objectif de veiller au libre jeu de la concurrence et d'apporter son concours au fonctionnement concurrentiel des marchés aux échelons européen et international*' and '*L´Autorité de la concurrence est une autorité administrative indépendante, spécialisée dans l´analyse et la régulation du fonctionnement de la concurrence sur les marchés, pour la sauvegarde de l´ordre public économique*'. This mandate is derived from Article L461-1(1) *Code de Commerce*.

88 Book IV of the *Code de Commerce*.

89 Titles II, III and IV of the *Code de Commerce*.

powers. Because these powers can be applied on the basis of discretion, the Autorité has chosen to explicate its approach to fining, settlements, commitment decisions, leniency, and compliance programmes in procedural guidelines.[90]

3.2.1 Institutional Set-Up and Accountability

Generally speaking, the Autorité is divided into two parts: the Investigation Service (*Service d'Instruction*) and the Board (*le Collège*). Competition cases are launched by the Investigation Service, and in a later phase are decided by the College. There is a strict separation of functions between the two in order to prevent biased decision-making and to enhance procedural fairness.[91] The Investigation Service consists of five different Services: Competition (carrying out competition investigations or advice procedures), Investigations (which – confusingly in name – is responsible for carrying out dawn raids and collecting information), Concentrations, a Leniency Officer and an Economic Service.[92] The Investigation Service is led by a Head Case Handler (*Rapporteur Général,* but hereinafter: Rapporteur), who is responsible for the decisions made and – in some procedures – functions as an intermediary between the Investigation Service and the College. The College itself consists of a President and four Vice-Presidents, alongside 12 non-permanent members. In principle, the College decides cases on a collective basis, but for day-to-day business it is divided into a Permanent Commission (which includes the President and the Vice-Presidents) and six different sections (composed of either the President or one of the Vice-Presidents and four of the non-permanent members).[93] Apart from the two services, the Autorité also consists of three specialist services (Service of the President, Communications Service and the Legal Service), as well as a body of Administrative Services.[94] Since 2009, it also has a Hearing Officer, responsible for safeguarding fair procedures and resolving conflict on that point. Currently, the Autorité employs around 200 people.[95]

The Autorité is an independent administrative authority, which means that it can operate in the name of the State, without having to resort to the Government for the execution of its powers. As set out above, the Autorité is a collegial body, consisting of 17 members. The President of the French Republic appoints the President of the Autorité after discussions in Congress.[96] The other members are appointed by the Minister of Economic Affairs and must consist of, at least, six (former) administrative judges, five experts in the field of competition law, economics or consumer law and five people with a background in practice.[97] The Minister of Economic Affairs also appoints the Rapporteur and the Hearing Officer, but the Autorité does advise on

90 Framework Document Compliance Autorité 2012, Non-Contestation Notice Autorité 2012, Fining Notice Autorité 2011, Notice on Commitments Autorité 2009 and Leniency Notice Autorité 2015.
91 Touched upon by Lasserre 2009, but also discussed in more detail below.
92 Autorité de la Concurrence, Organisation de l'Autorité de la Concurrence (version 2015).
93 See 'Les différentes formations du collège', at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=33.
94 See Articles 3 and 11 of Règlement Intérieur Autorité de la Concurrence 2009.
95 Consisting of 187 staff members and 17 board members. It is unclear whether this concerns FTE or actual staff members. See Annual Report English Summary 2014, p. 3.
96 Lasserre 2009, p. 1. Also Article L461-1(II) *Code de Commerce*.
97 Meaning: in the market. See Article L461-1(II) *Code de Commerce*.

these appointments.[98] This shows that the Minister of Economic Affairs is – to some extent – involved in the functioning of the Autorité. However, in day-to-day practice, the Autorité can make independent decisions and intervene in markets in any way that it sees fit.[99] It is accountable for the spending of its budget and the fulfilment of its mission statement, to which end it presents extensive annual reports.

The Autorité collaborates with the Directorate General of Competition, Consumers and the Combating of Fraud of the Ministry of Economic Affairs (DGCCR, *Direction Générale de la concurrence, de la consommation et de la répression des frauds*). This Directorate is responsible for safeguarding fair competition on a local level and for the monitoring of fair public procurement. It can engage in broader competitive analyses as well, but it has to notify the Autorité if it is willing to do so. The Autorité, being responsible for the enforcement of competition law in France, can take over these investigations.[100] The other way around, the Autorité can refer cases with a local dimension to the DGCCRF for further investigation.[101] Apart from this cooperation, the Autorité has a duty to respond to referrals from different sectoral regulators, consumer protection agencies and trade organisations. The Autorité is part of the European Competition Network (ECN),[102] the International Competition Network (ICN), the European Competition Authorities (ECA) and the Organisation for Economic Co-operation and Development (OECD).

3.2.2 *Tools, Output and Strategy*

The *Code de Commerce* equips the Autorité with several investigation and decision-making powers. First and foremost, the Autorité can conduct investigations into infringements of competition law that might result in a fining decision or an injunction.[103] It is also competent to accept commitments in the course of such investigations, to take interim measures or to explore the possibility of a settlement.[104] In fact, the Autorité was one of the first national competition authorities in Europe to have gained this competence, which has resulted in a vast settlement practice developed in the last decade. As a special feature of this enforcement instrument, the Autorité can accept commitments in the course of a settlement, as long as they are aimed at restoring the competitive situation or improving competition for the future. Accepting these commitments can lead to an additional fine discount for the companies involved.[105] The Autorité also has a leniency procedure in place for companies willing to come forward and it is one of the few authorities that have strict evaluative criteria for the implementation of compliance

98 See Article L461-4 *Code de Commerce*.
99 With the exception of so-called 'public interest mergers' that the Minister can evoke, as well ruling on 'exceptional' cases without prejudice to the Autorité's competitive analysis. See Lasserre 2009, p. 4, quoting Béteille, Lamure & Marini 2008, p. 334.
100 See the website of the DGCCR on http://www.economie.gouv.fr/dgccrf/concurrence/Pratiques-anticoncurrentielles.
101 Change made under the *Macron* law 2015, visible in Articles L.464-2(III) and L.450-3 *Code de Commerce*.
102 Self-proclaimed to be one of the most active members in it. Between 2004 and 2011 it handed down 79 decisions based on European competition law. See 25 Years Autorité, p. 20.
103 Article L.464-2(I) *Code de Commerce*.
104 Respectively, Articles L.464-2(I) and L.464-2(III) *Code de Commerce*.
105 Article L.464-2(III) *Code de Commerce* and Non-Contestation Notice Autorité 2012.

programmes.[106] Apart from its decision-making functions, the Autorité also performs an advisory role through its extensive advice procedure,[107] and engages in various guidance and advocacy efforts.

Between 2004 and 2015, the Autorité took 127 fining decisions, 58 commitment decisions and 44 transaction decisions. This makes the Autorité the most active competition authority under review in this thesis in terms of output.[108] Under its advice procedure, the Autorité has published 287 advisory opinions, 10 of which were made on self-referral.[109] The advisory opinions vary from short, concise answers to examinations of markets so extensive that they resemble markets work as performed by other authorities. Currently 19 of the 287 advisory opinions qualify as such. In terms of advocacy, the Autorité organises regular round-table meetings and conferences with various stakeholders and publishes educational material on its website.[110]

The enforcement strategy of the Autorité, which is a remnant from the 2009 reform of the competition system in France, consists of two components: to enhance efficiency and to enhance procedural fairness.[111] These components are underlined by the objectives of continued deterrence, greater predictability, an effects-based approach and global guidance.[112] In terms of continued deterrence, the Autorité aims to keep up its track record in pursuing antitrust cases, both with regard to cartels and abuse of dominance. Regarding the improvement of the Autorité's predictability, the strategy set out is to formulate guidelines on the application of its enforcement powers. It appears that this part of the strategy has been fulfilled in the last few years. The Autorité is aware, however, that these guidelines do not prejudice the evaluation by an administrative court.[113] Strikingly, the Autorité itself pronounced that it would use an effects-based

106 See Framework Document Compliance Autorité 2012 and also Leniency Notice Autorité 2015.

107 For mandatory referrals by government bodies: Articles L. 410-2 and L. 462-2 *Code de Commerce*, for self-referrals: Article L.462-4 *Code de Commerce*.

108 Not having reviewed the scope of all of these decisions.

109 As discussed in Chapter 5 of this thesis.

110 Rendez-vous de l'Autorité, which it has organised since 2009. Its educational measures are called 'Collection Déclic' and comprise information about transport, culture and competition in the overseas departments. See http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=393.

111 Lasserre 2009, p. 1. This is not published as the formal enforcement strategy (the Autorité does not have one like the other two authorities do), but it does set out enforcement principles and strategic goals, for which reason it is used as a source of inspiration – though with care.

112 Lasserre 2009, pp. 4-7.

113 '*Il engage l'Autorité, qui doit déterminer les sanctions pécuniaires qu'elle impose de façon cohérente. Il lui est donc opposable, sauf à ce qu'elle explique, dans la motivation de sa décision, les circonstances particulières ou les raisons d'intérêt général la conduisant à s'en écarter dans un cas donné. Il pourra être complété ou modifié ultérieurement, au vu des développements de la pratique décisionnelle de l'Autorité et de la jurisprudence de la Cour de cassation et de la cour d'appel de Paris, mais aussi de celle du Conseil constitutionnel, du Conseil d'État, de la Cour de justice de l'Union européenne et de la Cour européenne des droits de l'Homme*.'
Which loosely translates as: 'The notice commits the Autorité, which must set the financial penalties that it imposes in a consistent way. It is therefore opposable to it, to the extent that the Autorité does not set forth, in the reasoning of its decision, the specific circumstances or the motives of general interest that lead it to depart from it in a given case. The notice may be updated or modified, in consideration of further developments in the Autorité's practice and in the case law of the *Cour de Cassation* and of the Court of Appeal of Paris, as well as of Constitutional Court, the *Conseil d'État* (the French Administrative Supreme Court), the Court of Justice of the European Union and the European Court of Human Rights.' See Fining Notice Autorité 2011, paras. 7-8.

approach to competition law with the consumer in mind. The Economic Service is responsible for the execution of this part of the strategy. Lastly, the Autorité aims to be a pioneer in the international networks in which it is active – sharing its cases and best practices. This is visible, for instance, on the website of the Autorité, on which many of its cases and guidance documents are translated into English (and, to a lesser extent, Spanish) to reach a broader public.

3.3 Decision-Making Process and Legal Particularities

Most cases at the Autorité are based on complaints, on referrals or on its own investigations. After having decided whether or not to pursue these leads, the Autorité (or, more specifically, the Investigation Service) formally opens the investigation.[114] There is not much wiggle room between the internal decision to pursue a case and the formal opening of the case. As a consequence, the Autorité has less room (than, for instance, the Commission) to engage in extended pre-opening discussions or orientations.[115] When the investigation continues, the Investigation Service proceeds to gathering information using its investigative powers. On the basis of this information a statement of objections (*notification des griefs*) is prepared and sent to the parties by the Rapporteur. At that point, it becomes possible for companies to request a settlement procedure, after which certain aspects of the procedure become more simplified.[116] If this option is not pursued, the parties concerned have the right to study the case file compiled by the Investigation Service. Two months later, the Investigation Service prepares the full report containing the qualification of the infringement and all the underlying evidence, and sends it to the parties. Again, companies have two months to respond. The drafting of the final report demarcates the end of the investigation phase and the transition into the decision-making phase. Therefore, after the parties have had the possibility to respond, the Investigation Service hands over the case to the College. They are responsible for organising an oral hearing, for reviewing the report and taking the final decision.[117]

Decisions from the Autorité are appealable before the Paris Court of Appeal (*Cour d'Appel de Paris*). This court has exclusive competence to rule on cases decided by the Autorité.[118] The Cour d'Appel reviews decisions under a judicial review standard, taking into account the discretion that the Autorité enjoyed when deciding the case. The judicial review standard in France (review for an excessive use of power, or *excès de pouvoir*) generally applies to all administrative acts that have the nature of decisions. Firstly, the court will consider whether or not a competent administrative body took the decision. If so, procedural irregularities are discussed, as well as possible violations of the law (which includes a review of legality). Lastly, the court will look for errors in

114 At that point, it becomes possible for companies to request the benefits of a commitment procedure.
115 This is due to the principle of legality. See a little further below in this section. Observation derived from interviews conducted at the Autorité in June 2014. See Annex I – Methodology.
116 See Chapter 5 below.
117 The Autorité has a flowchart of its procedures available online, at: http://www.autoritedelaconcurrence.fr/images/article/contentieuse.gif.
118 Article D. 311-9 *Code de l'Organisation Judiciaire.*

the reasoning, which are most common. These include errors in facts, errors in law or errors in qualification – sometimes also referred to as manifest errors of appreciation.[119] Based on this evaluation, the Cour d'Appel can either uphold or dismiss the appeal. After the judgment from the Cour d'Appel is delivered, parties have another two months to decide whether or not to appeal to the Cour de Cassation on points of law.

Generally speaking, the Autorité operates under French administrative law. France's administrative law system has been in place since the French Revolution in 1789, and guides the procedures and interventions of the Autorité, with the concept of legality as a leading principle.[120] To understand the functioning of this principle in the French legal order, it is important to denote that French administrative law is not aimed at protecting the individual against the administration, but rather to 'ensure that the administration adheres to law and statute'.[121] The principle of legality thus ensures that the Autorité acts in accordance with the law, explains properly and that it does not exceed the powers entrusted to it. This is not very unusual in itself, as most countries have similar principles guiding the behaviour of the state *vis-à-vis* individuals, but in France the interpretation of this principle is very strict and can lead to public liability if it has caused damage on the parties involved.[122] It is for the courts to perform this review, and for the administrative authorities to facilitate the courts in this role. Concretely, this means that the Autorité has to close all of its cases by means of a formal decision – it cannot simply 'drop' cases for reasons of opportunity. Similarly, the Autorité is obliged to formally respond to complaints and – at the very least – it has to explain sufficiently why it is not pursuing the matter. Apart from that, the Autorité is obliged to formally open cases at an early stage, in order to facilitate a review of the procedural steps taken. This leaves less room for the informal exploration of possibilities before pursuing a case.[123]

4. UNITED KINGDOM

The UK CMA (Competition and Markets Authority) is the single administrative authority responsible for the enforcement of competition law in the UK. However, this single authority was created quite recently.[124] Before that time, the enforcement of competition rules in the UK was divided between two authorities – one of which was responsible for antitrust investigations and phase 1 investigations in markets and mergers, while the other one conducted the phase 2 investigations upon referral or of its own motion. Competition law enforcement in the UK forms part of the public administration and has its own administrative procedures, under which the UK CMA has the power to investigate, to evaluate and to sanction. Such administrative

119 See on the standard of review: Auby 2002, pp. 82-84.

120 Albeit in modified forms. But different from the UK (where there is no such act) and from the Netherlands (in which the General Administrative Law Act was finalized between the 1990s and 2000s), the administrative tradition in France is older. See in more detail Addink (forthcoming), p. 25.

121 Addink (forthcoming), p. 31.

122 Auby 2002, p. 74.

123 There is some room to pursue an informal resolution, as was noted during the interviews as conducted in June 2014 (see also Annex I – Methodology), but the Autorité cannot wait until the statement of objections before formally opening a case.

124 Operating 'low-key' from October 2013, formally launched in January 2014. See Enterprise and Regulatory Reform Act 2013, section 25.

law features are unusual in common law countries (in which there is traditionally a division between civil and criminal law rather than private and public law). This section discusses the development of competition law and enforcement in the UK alongside the current enforcement system in which the UK CMA plays a central role.[125]

4.1 Development of Competition Law and Enforcement

Competition in the United Kingdom was, at least until the middle of the previous century, characterised by a *laissez-faire* approach by the government. There were no specific competition laws, but rather a 'restraint of trade' doctrine dating from the 15th century.[126] Under this doctrine, it was forbidden to limit contracting parties' freedom to trade in relation to parties that were not part of the contract. This doctrine was coupled with a presumption of unreasonableness placed on the defendant. The result was the invalidity of the agreement between the parties, but not versus third parties.[127] The necessity for implementing statutory competition laws emerged after the Second World War, fed by various societal and economic changes. It has been observed that these changes were not introduced with a predetermined policy in mind, but had evolved rather incrementally 'as a result of consensus building by a powerful civil service, heavily influenced by business lobbying, increasingly responding to developments in economic thought and operating under a benign and exceptional mantle of political bi-partisanship'.[128] This broader agenda caused the introduction of the Monopolies and Restrictive Trade Practices Act in 1948.[129] The enforcement of this act was in the hands of the Monopolies and Restrictive Practices Commission, which could not make explicit findings of illegality, but rather assessed agreements against public interest.[130] The Act itself was considered rather weak, but the Commission's advocacy efforts (in raising awareness with businesses) were a start in changing attitudes towards competition.[131]

With the establishment of the Commission, competition law enforcement in the UK became administrative in nature. This administrative character was consolidated in the 1956 Restrictive Trade Practices Act, which contained a prohibition and required certain agreements to be registered. Registration led to the presumption that the agreement was against public interest and thereby not enforceable.[132] This presumption had to be confirmed by the Restrictive Practices Court. However, companies could use certain legal gateways in order to escape registration and if such an argument was made, it was again up to the Court to assess whether or not the agreement was against the public interest. Even though the register was aimed at increasing transparency and

125 In this discussion, the focus is primarily on antitrust (cartels and abuse of dominance). See for a more extensive discussion of the development of the UK's enforcement regime (also with regard to merger control) Scott 2009, fn. 4.
126 *Dyer's case* (1414) 2 Hen. V, fol. 5, pl. 26.
127 Kuenzler & Warlouzet 2013, p. 93 and fn. 15.
128 Wilks 1999, p. 25.
129 Propelled by the 'wider reconstruction and social justice agenda of the period'. Quote from Scott 2009, p. 192.
130 Kuenzler & Warlouzet 2013, pp. 100-101.
131 Gerber 2001, p. 264 and Mercer 1995, both referred to by Scott 2009.
132 Scott 2009, p. 194.

having a deterrent effect, registration was still political in nature and cartels were not heavily frowned upon.[133]

Under the 1956 Act, the Commission had few autonomous powers and relied heavily on the judgment of the Court. Even though the registering and confirming practices had a 'slow start', the Court proceeded towards 'bold enforcement' in the late 1960s.[134] Unfortunately, this led to a situation in which the intended transparency was not at all achieved, as companies learned to hide their agreements from the public eye and cover their existence.[135] The 1973 Fair Trading Act (which established the Office of Fair Trading (OFT) and the Price Commission) did not change much in this respect, as its main purpose was to focus on price controls rather than on cartels and enforcement. In fact, the OFT's formal powers were limited and they remained that way even after the introduction of the Competition Act in 1980, which extended the OFT's powers to investigate cartels as well. Its task was 'to keep under review the carrying on of commercial activities in the [UK]' and 'to make recommendations to the Secretary of State as to any action which […] would be expedient for the Secretary of State or any other Minister to take'.[136] In other words, OFT could investigate possible infringements of competition law, but its findings had to be confirmed by the Secretary of State.[137]

In the years that followed, the UK's competition law system was reviewed because of a growing awareness of the importance of competition in a global economy.[138] Apart from that, the developments in competition law enforcement on a European level persuaded the UK government to take a close look at the effectiveness of its own enforcement system, resulting in an overhaul of UK competition law in the late 1990s.[139] The (self-proclaimed) most significant reform of UK competition law was the Competition Act of 1998, which replaced the Competition Act of 1980.[140] The reformed act gave OFT several instruments to enforce competition law, which are reviewed in more detail below. It also established a Competition Commission for the purpose of investigating mergers and markets.[141] The main difference between the 1980 and the 1998 Competition Act was that the latter enabled OFT to impose penalties for infringements of competition law, without having to request an order from the Secretary of State. This provided OFT with more independence and decisiveness.

---

133 Kuenzler & Warlouzet 2013, pp. 101 and 104.

134 The main motivation for the UK to be aggressive about its competition policy was the anxiety about the competitiveness of Britain. See Kuenzler & Warlouzet 2013, p. 109.

135 Scott 2009, p. 195.

136 Fair Trading Act 1973, Articles 2(1)(a) and 2(3)(b).

137 The Secretary of State or any other designated Minister gave so-called 'orders' after evaluating the OFT's advice. Fair Trading Act 1973, Article 56 (Monopolies), Article 73 (Mergers). Article 74 (Undertakings) and Article 89 (Interim Orders). See also Parker 2000.

138 Department of Trade and Industry, *Opening Markets: new policy on restrictive trade practices*, CM727, 1989, p. 1.

139 See for the developments on a European level more extensively Chapter 1, section 2.1. And also Scott 2009, pp. 198-201.

140 Competition Act 1980, as replaced by the Competition Act 1998 of 9 November 1998, the opening statement of which reads: '…the most significant reform of UK competition law for 25 years'.

141 The Competition Commission replaced the Monopoly and Merger Commission following the entry into force of the Competition Act 1998.

In 2002, the Enterprise Act was adopted, which created a similar regulatory independence for another branch of competition law: merger control.[142] Apart from merger control, the Enterprise Act also enabled the OFT to refer certain markets to the Competition Commission for in-depth investigation. The Enterprise Act 2002 also focused on increasing the severity of sanctions. In a 2001 White Paper, the UK Government suggested that fines alone could not provide an effective deterrent against cartels.[143] This revealed the need for an additional threat: the possibility of an individual criminal conviction and a prison sentence. The White Paper relied heavily on evidence from the United States and its experience with the criminal enforcement of competition law. Eventually, the Enterprise Act of 2002 implemented the criminal enforcement regime in the UK.[144] The combined enforcement powers of the OFT and the Competition Commission led to a competition law regime that was considered one of the best in the world.[145]

Despite such positive appraisal, the UK Government decided to merge the two-sided enforcement system in a cost-saving exercise.[146] Even though it was aware of the risks connected to 'changing a winning system', the government focused on the procedural benefits of having a single competition authority instead of two. Also, some aspects of the OFT's and Competition Commission's procedures were highlighted for improvement – such as decisional speed, deterrence and the number of cases.[147] This merger was considered an impactful change in the enforcement landscape and was executed with a view to maintaining stability and minimising distractions for the staff of both authorities.[148] All in all, it took until April 2014 for the Competition and Markets Authority to come into being, having been established formally in October 2013.[149] The UK CMA was legally established under the Enterprise and Regulatory Reform Act 2013 and physically moved to one central building, combining the staff of the two former competition authorities. Apart from the merger between the two, one of the biggest differences with the pre-2014 regime is that consumer protection (as was actively enforced by the OFT) will play an accessory role to its competition enforcement activities.[150]

---

142 Enterprise Act 2002, part 3: Mergers. Under the Fair Trading Act 1973, formal powers regarding merger control were attributed to the Director General – the head of OFT. The Enterprise Act 2002 abolished his personal influence and attributed his powers to OFT.

143 Department of Trade and Industry, *A World Class Competition Regime*, CM5233, 2001, p. 39.

144 Certain agreements between undertakings became so-called 'Cartel offences' (Enterprise Act 2002, Part 6) punishable by imprisonment for those physical persons responsible.

145 BIS Consultation 2011, quoting Global Competition Review, Rating Enforcement 2010, June 2010. There were also some concerns regarding under-enforcement. See NAO Report 2009 and Veljanovski 2014.

146 BIS Consultation 2011. Creating the CMA would result in annual benefits for the Government arising mainly from accommodation, staffing and back-office savings. This reform was driven by an earlier Growth Review, see HM Government, The path to strong, sustainable and balanced growth, November 2010.

147 KPMG Report on the performance of OFT and CC, underlying the BIS Consultation 2011 and BIS Impact Assessment 2012. See BIS Impact Assessment 2012, fn. 9.

148 Different from the merger in the Netherlands, in which the creation of ACM propelled various procedural and strategic changes. Observations derived from internships – see Annex I – Methodology.

149 On this date, the UK CMA published its draft vision and high-level strategy for consultation.

150 The enforcement of these provisions is scattered across the following: Trading Standards Services in Great Britain, Department for Enterprise, Trade and Investment in Northern Ireland, Civil Aviation Authority, the Northern Ireland Authority for Utility Regulation, Ofcom, Ofwat, Ofgem, Phonepay Plus, the Information Commissioner, Office of Rail Regulation, the Financial Conduct Authority, community enforcers under the Injunctions Directive, Secretary of State for Health, Department of Health, Social

4.2 Competition Law Enforcement by the UK CMA

The UK CMA is primarily mandated to 'promote competition, both within and outside the United Kingdom, for the benefit of consumers'.[151] It does so on the basis of the Competition Act 1998 and the Enterprise Act 2002, taking account of the Enterprise and Regulatory Reform Act of 2013. The UK CMA's mission is to make markets work well for consumers, businesses and the economy. This mission is translated into a strategic steer – set by the Minister, but due to the UK CMA's independent nature, this is merely considered as a guidance document.[152] Under this steer, the UK CMA sets out to take account of consumer behaviour, of long-term dynamic competition, to consider competition concerns in business-to-business markets, to consider growth sectors and to address competitive problems earlier and with increased speed. The UK CMA took this steer into account when formulating its own strategy and priorities.[153]

4.2.1 Institutional Set-Up and Accountability

The UK CMA consists of a board, three directorates and three overarching services.[154] The board is composed of a Chairman, a Chief Executive, four executive board members and six non-executive members. The board can delegate some of its tasks to the CMA Panel.[155] On the directorate level, there is a clear distinction between the Enforcement Directorate and the Directorate for Markets and Mergers – mimicking the former distinction between the OFT and the Competition Commission. Even though staff members from the different directorates collaborate if a case or project so requires, the division between the two remains intact, also in the procedures for markets and mergers.[156] Unlike the merger in the Netherlands, the UK CMA did not opt for a large-scale reshuffling of personnel, in line with its desire to maintain stability and minimise distractions.[157] The third directorate is Corporate Services, which is responsible for strategy, communication and the back office. The overarching services are the Legal Service (which includes Policy and International) and the Chief Economic Adviser. Apart from these divisions, the UK CMA has a Procedural Officer, who is responsible for handling complaints about the way the UK CMA has conducted investigations or handled cases.[158] Currently, the UK CMA employs around 600 staff members.[159]

Services and Public Safety in Northern Ireland (see Part 8 Enterprise Act 2002). Additionally, advice is given by Citizen's Advice.

151 Enterprise and Regulatory Reform Act 2013, section 25(3).

152 BIS Strategic Steer 2015, Annex A.

153 Strategy CMA 2014. See also section 4.2.2 below.

154 The following section is based on the CMA's Organogram as of 2015, underpinned by the experiences and interviews within the CMA in September-November 2014. See Annex I – Methodology.

155 CMA Board Rules of Procedure 2014, para. 23.

156 Meaning that the phase 1 and phase 2 investigations are still conducted by separate case teams (members of which usually originated, in fact, from the previous authority responsible for this phase).

157 See section 4.1 above.

158 Rule 8 of the Competition Act 1998 Order 2014.

159 400 of which were inherited from the former OFT and Competition Commission and 200 of which are new starters. See CMA Annual Report 2014-2015. It is unclear whether this concerns full-time equivalent or actual staff members.

The UK CMA is a non-ministerial department, which means that it has operational freedom and the freedom to apply its resources in a way that it sees fit. Its independence is safeguarded by the fact that it is accountable to Parliament only – not to the ministerial department that created it. The UK CMA has to operate within the limits of its legal mandate and internationally agreed good practice.[160] Nevertheless, the UK CMA is subjected to a number of reporting duties and can be held accountable for overall performance and the use of its resources. To that end, the government has set a target for the UK CMA to deliver 'direct financial benefits to consumers of at least ten times its relevant costs to the taxpayer'.[161] It has to annually report on this target, as well as on an assessment of its broader impact on society and the economy. Apart from that, the UK CMA delivers an annual report on its enforcement activities and on the completion (or pursuance) of its other targets – which are derived from the strategic goals of the UK CMA.[162]

The UK CMA is part of the UK Competition Network. This is a platform on which the sector regulators with competition powers and the UK CMA (being the UK's competition authority) collaborate to promote competition in regulated sectors.[163] For safeguarding the interest of consumers, the UK CMA collaborates with Citizen's Advice and the Consumer Council for Northern Ireland.[164] Internationally, the UK CMA is part of the European Competition Network (ECN), the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD).

4.2.2 Tools, Output and Strategy

Like most competition authorities, the UK CMA is competent to impose administrative penalties.[165] Confusingly, the penalties imposed by the UK CMA are sometimes referred to as 'civil enforcement action', as opposed to the criminal cartel offence that is discussed below. Apart from fines, the UK CMA can accept commitments and engage in settlements.[166] It also has a leniency procedure in place to reward those who come forward at an early stage. The fact that it can close procedures 'on administrative grounds' implies that it has the discretion to explore more informal resolutions as well.

160 According to CMA Annual Plan 2015/2016, Annex I, para. A.1.

161 Quoted from CMA Annual Plan 2015/2016, Annex I, para. A.2. This is measured over a three-year period.

162 This means that the UK CMA has to show improved performance over its predecessors in terms of delivering effective enforcement, extending competition frontiers, refocusing consumer protection, achieving professional excellence and developing an integrated performance. CMA Annual Plan 2015/2016, Annex I, para. A.5 combined with Strategy CMA 2014.

163 The regulatory agencies part of this network are the Civil Aviation Authority (CAA), the Financial Conduct Authority (FCA), the Gas and Electricity Markets Authority (Ofgem), the Northern Ireland Authority for Utility Regulation (NIAUR), the Office of Communications (Ofcom), the Office of Rail and Road (ORR), the Payment Systems Regulator (PSR) and the Water Services Regulation Authority (Ofwat).

164 It is also part of international consumer protection networks, such as the Consumer Protection Cooperation (CPC) Network and the International Consumer Protection Enforcement Network (ICPEN).

165 Section 36 Competition Act 1998.

166 See section 31A Competition Act 1998. Settlements do not have a separate legal basis, see CMA Procedural Notice 2014, Chapter 14.

One of the most striking powers of the UK CMA is the cartel offence, which enables it to imprison individuals for up to five years for the most serious cartels (hard-core cartels).[167] Because of its criminal nature, the procedure for the cartel offence differs from that of a regular administrative investigation.[168] There have been seven criminal cartel investigations, one of which is still ongoing and two of which have led to convictions.[169] Apart from the cartel offence, the UK CMA's system of market studies and investigations is novel in the world.[170] This instrument is discussed in more detail later on, but entails in-depth studying of the characteristics of a certain market with a view to finding aspects that are not working well. The UK CMA can impose obligations upon the companies to remedy this. Lastly, the UK CMA can apply to the courts for a director disqualification order, which expels company directors from their functions for a certain period of time.[171]

Between 2004 and 2015, the UK CMA took 21 infringement decisions. Four of these decisions were taken after the launching of the merged institution in 2014. Apart from infringement decisions, the UK CMA formally accepted commitments in 11 commitment decisions and settled (or has come to an early resolution) in 10 cases. Strikingly, in that same period of time, the UK CMA and its predecessors engaged in 25 market studies, 6 of which were referred for a phase-2 investigation.[172] Apart from that, 9 independent phase-2 investigations were conducted. Furthermore, the UK CMA is fairly active in publishing guidance documents for businesses and consumers. In the researched period, it published 160 of these documents, aimed at educating about the benefits of competition, the UK CMA's rules of procedure or earlier cases.

In order to fulfil its mandate (and to take account of the Minister's strategic steer), the UK CMA has formulated five strategic goals: to deliver effective enforcement, to extend competition frontiers, to refocus consumer protection, to achieve professional excellence and to develop an integrated performance.[173] These strategic goals aim to improve the robustness of enforcement, on the one hand, while maintaining an effective institution, on the other. Apart from that, the UK CMA's strategic goals seek to connect competition law enforcement with consumer protection and the regulation of markets.

---

167 Section 188 Enterprise Act 2002, together with section 47a Enterprise and Regulatory Reform Act 2013. See also: CMA Cartel Offence Prosecution Guidance 2014.

168 There are separate stages before engaging in the investigation and the evidential threshold is different. See Code for Crown Prosecutors 2013.

169 The first case in which a conviction was obtained was the *Marine Hose* case (up to 3 years imprisonment for three directors, the application of the director disqualification order and fines), see the case page on the CMA's website at https://www.gov.uk/cma-cases/marine-hose-criminal-cartel-investigation.
More recently, the UK CMA sentenced a director to 6 months imprisonment, see Competition and Markets Authority, CE/9623/12 (Galvanised Steel Tanks) and ongoing is an investigation in the construction sector, see Competition and Markets Authority, CE/9705/12 (*Construction*).

170 Copied only by the competition authority of Israel. Competence derived from Enterprise Act 2002, part 5. See in more detail Chapter 5 of this thesis.

171 Sections 9a to 9e Company Directors Disqualifications Act 1986. See also the guidance in OFT Guidance Director Disqualification 2010, which is adopted by the CMA board.

172 It has to be noted that before the CMA came into existence market studies were also conducted in the field of consumer law. However, in the total number referred to above, market studies that concern consumer law only are disregarded; market studies that combine features of competition and consumer law are included.

173 See more extensively Strategy CMA 2014.

The strategic goals of the UK CMA are reflected in its prioritisation principles.[174] These principles form the yardstick against which cases can either be pursued or dropped. The balance of the UK CMA's portfolio is mentioned as a specific aspect to be taken into account, which hints at the fact that the UK CMA's predecessors imposed relatively few administrative fines as opposed to markets work and advocacy-related activities. This might also explain the surge in infringement decisions in the last few years.

4.3 Decision-Making Process and Legal Particularities

Cases pursued by the UK CMA start with preliminary information about an infringement derived from leniency applications, complaints or its own market intelligence.[175] When these signals have reached the UK CMA, it considers on the basis of its prioritisation principles whether or not the case is to be pursued and by whom. The UK CMA has two case groups that carry out investigations: the Cartels and Criminal Group (CCG, responsible for cartel infringements under the Competition Act 1998 and the cartel offence under the Enterprise Act 2002) and the Anti-Trust Group (ATG, responsible for other competition law infringements).[176] If the case is pursued, the phase of informal evidence gathering is commenced, which is based on the voluntary cooperation of the companies involved. If there are sufficient grounds to suspect an infringement, a formal investigation is opened.[177] First, a case opening notice is issued, after which a range of investigatory tools can be applied.[178] In terms of organisation, the case is allocated a team leader, a project director and a Senior Responsible Officer (SRO) from that point onwards. If there is sufficient evidence to support the case,[179] a statement of objections is sent to the parties by the SRO, setting out the UK CMA's provisional findings, supporting evidence and proposed course of action. The parties addressed by the statement of objections have the right to reply and the right to an oral hearing.[180] If there is, in the light of the parties' arguments, still sufficient reason to find an infringement, a draft penalty statement is issued.[181] A Case Decision Group (CDG) is appointed in this final

174 CMA Prioritisation Principles 2014. These principles are: impact, strategic significance,

175 These signals might be derived from the powers under the UK CMA's markets work regime, or based on its powers under the Regulation of Investigatory Powers Act 2000. See also the OFT Leniency Guideline 2013, which is adopted by the board of the UK CMA. Complaints usually reach the UK CMA through its Cartel Hotline.

176 CMA Procedural Notice 2014, paras. 4.7 and 4.8.

177 The legal threshold is included in section 25 Competition Act 1998: 'the CMA may conduct an investigation where there are reasonable grounds for suspecting that competition law has been breached'.

178 These tools are, amongst others, written requests for information (section 26 Competition Act 1998), interviews (section 26a Competition Act 1998), dawn raids and searches (section 27 Competition Act 1998). See in more detail the OFT Guideline Powers of Investigation 2004, which has been adopted by the UK CMA board.

179 'The General Counsel and the Chief Economic Adviser are responsible for ensuring that there has been a thorough review of the robustness of, respectively, the legal and the economic analysis (and of the evidence being used to support this) before a Statement of Objections is issued or a final decision on infringement is taken', see CMA Procedural Notice 2014, para. 9.6.

180 Rule 6 Competition Act 1998 Order 2014. They also have the right to inspect the case file.

181 Rule 11 Competition Act 1998 Order 2014. Parties, again, have the right to respond and attend an oral hearing.

stage, in order to prevent bias and ensure the robustness of the decision.[182] Eventually, the CDG makes the final decision and issues the infringement decision.[183]

When the decision is issued, affected companies can appeal before a specialist court: the Competition Appeals Tribunal (or, more commonly, the CAT). The relevance of such a specialist court is generally acknowledged in the UK legal system, as it would be 'better placed to determine the complex matters of competition law than ordinary courts'.[184] An appeal is possible for the main parties of an infringement, for affected third parties and for consumer representatives.[185] If the Competition Act does not offer specific grounds for an appeal, a claim for judicial review can be brought before an administrative court.[186] In the UK legal system, the possibility of appeal cannot be excluded – for instance by means of a settlement.[187] Apart from that, the CAT performs a review on the merits, as opposed to the judicial review standard. After the CAT has given its judgment, an appeal on points of law is possible before the High Court, although permission to do so is granted sparingly.[188]

Because of the value placed on a review by a court and the high standard of review applicable to the UK CMA's actions, its decisions are drafted with care and include all possible information to support the decisions made. This means that the infringement decision sets out all the facts, all the evidence relied on, the representations made and the UK CMA's reaction, and there is an explanation as to the calculation of the fine.[189] Even though similar points are discussed in the ACM's and Autorité's decisions, the UK CMA provides the most extensive discussion, resulting in decisions varying between 200 and over 1000 pages long. This shows that the UK CMA pursues a high level of transparency in its decision-making. Other transparency obligations include formal announcements of key moments in the procedure (such as the opening of a case, when it reaches provisional findings or closes cases),[190] the timely publication of the non-confidential version of the decision, and the involvement of the parties and other stakeholders.[191]

5. FINAL REMARKS

The foregoing shows that the ACM, the Autorité and the UK CMA are similar, but also very different competition authorities. Characterised in a few words, the ACM aims for effectiveness (in the sense of broad, high-impact interventions) under its problem-solving strategy. The Autorité pursues efficiency in combination with procedural

182 The CDG is appointed by the Case and Policy Committee for the purpose of taking the decision in an individual case. CMA Procedural Notice 2014, para. 11.30.
183 Section 31 Competition Act 1998 and Rule 10(1) Competition Act 1998 Order 2014.
184 Competition Appeals Tribunal, no. 1000/1/1/01(IR) (*Napp*).
185 Sections 46-49 Competition Act 1998.
186 Administrative Court of the Queen's Bench Division of the High Court, Part 54 of the Civil Procedure Rules. See Whish and Bailey 2014, p. 449.
187 See in more detail Chapter 4 of this thesis.
188 The Competition Appeals Tribunal has to give permission for an appeal on points of law. See section 49(2b) Competition Act 1998.
189 CMA Procedural Notice 2014, para. 13.8.
190 See further CMA Transparency Statement 2014, para. 3.1 and further.
191 For instance by consultation during a commitment procedure or an order to close a case on administrative grounds. CMA Procedural Notice 2014, paras. 10.13 and 10.20.

fairness, fed by the strong principle of legality. The UK CMA aims for efficient decision-making as well, combined with the objective of increased robustness (partially understood as deterrence). These are different starting points by which to view the use of alternative enforcement instruments. However, this section has also shown that the characterisation of authorities changes as the regulatory and economic landscape changes. The current 'identity' of the ACM stems from a tradition of strict, deterrent-based enforcement in less important cases, which – in turn – was an adaptation from the Dutch *laissez-faire* approach to competition (*in extremis*, the cartel haven). The Autorité, on the other hand, has more visible traces of its past in its current set-up, as it maintains a strong relationship with the Ministry of Economic Affairs. Moreover, changes in French competition law are mostly government-driven, based on the state of the economy at that time. Lastly, the legal tradition in the UK explains the UK CMA's deference to the courts and the emphasis on transparency – a combination that leads to carefully drafted (and very complete) decisions.

To be fair, the sections above are far too short to outline the precise differences between the Dutch, French and UK competition authorities and to pinpoint all legal and cultural differences that might impact enforcement. This was never the aim of this chapter. Instead, some remarks were made regarding the historical development, the current set-up and enforcement practice and some of the legal particularities that are sufficient to place the alternative enforcement practice as discussed in the following chapters into a broader perspective. This chapter can be used as a point of reference (for instance, to find out what procedural points change in the course of a settlement, or to review the meaning of the Dutch appeals phase), but also as a contextual background that is referred to in the concluding chapter of this thesis as well.

Chapter 3

NORMATIVE FRAMEWORK

The previous chapters have introduced the main topic of this research and have discussed the backdrop against which the enforcement of competition law has developed. As is apparent from these chapters, the use of alternative enforcement instruments (enforcement instruments that do not solely rely on the vertical relationship between the competition authority and the company, and which have a sense of 'added instrumentality') is examined in three different competition authorities: the ACM, the UK CMA and the Autorité. This chapter introduces the normative framework to facilitate a comparison between the three of them. As the previous chapter showed, the legal culture of these countries differs greatly, and so do the enforcement strategies that the competition authorities use. In order to evaluate and compare the application of alternative enforcement instruments within and between these Member States, it is necessary to devise a common framework that indicates their advantages and pitfalls on a common scale. This chapter presents such a framework, drawing upon legal doctrine and European and national principles of law. The normative framework is used in the remainder of this thesis to evaluate alternative enforcement practices and to draw conclusions as to its development and desirability.

1. INTRODUCING THE FRAMEWORK

The application of alternative enforcement instruments – the central issue of this thesis – differs from competition authority to competition authority. Sometimes these differences are determined by legal culture, sometimes by the strategy of the competition authority and sometimes by the development of the instrument itself. Be that as it may, it is difficult to compare enforcement instruments – not just *alternative* enforcement instruments – without a common denominator: something to compare it with. This chapter presents a framework for the evaluation of enforcement instruments that facilitates such a comparison, which is necessary as the variety of alternative enforcement instruments is great and even within a certain instrument there can be differences in application from Member State to Member State. Something as seemingly straightforward as promoting the adoption of compliance programmes can be regulated by guidelines and rewarded by fine discounts by one competition authority, while being disregarded in fining procedures by the other. The way these differences are valued has consequences for the assessment of alternative enforcement instruments and for enforcement practice as a whole. The evaluation of differences and the comparison between the national competition authorities occurs through the normative framework

presented here. The normative framework serves as a common denominator of the different enforcement practices and facilitates interpretation on a higher level.

1.1 Factors Influencing the Normative Framework

In the search for a normative framework that is common to the various national enforcement practices, the European level is an inevitable starting point. As all national competition authorities of EU Member States are obliged to enforce European competition law alongside their national competition rules, their actions are governed by the general principles of Union law and the procedural requirements which are specific to the national enforcement of these rules. The European dimension is appealing as it is common to all Member States. The national competition authorities are obliged to comply with its requirements when acting within the scope of Union law. Moreover, the interpretation of the various principles is developed in the case law that draws upon the characteristics of the different national legal systems. In that sense, principles of Union law are closely connected to national principles of law. On the other hand, the 'aggregate' character of principles of Union law is exactly what makes them fall short as the sole evaluative criteria of enforcement practice. The principles themselves are broad and interpreted differently according to the circumstances at hand. They are a good starting point to evaluate and compare national enforcement, but they need to be supplemented by something else in order to apply to something as particular as that.[1] In addition, national competition authorities do not always act within the scope of Union law; they also enforce national competition and competition-related rules. This gives rise to the question of whether national enforcement can be evaluated properly by principles developed in Union case law only, and indicates that principles of Union law alone are insufficient to evaluate national enforcement practice.

To remedy this, it is possible to pursue a bottom-up approach to legal and enforcement principles in addition to the general principles of Union law. This approach starts from the national level, evaluates national laws and practices and identifies the main characteristics of 'proper' regulation and enforcement. These can be drawn from legal preconditions, national interpretations of general principles of law and studies and evaluations of current practices. Performing such an analysis, however, yields a fragmented set of national criteria that – in their specific interpretations – cannot be applied directly to other Member States. In other words, an analysis of the national level alone can never yield the 'common denominator' sought after in this chapter. That does not mean that the national level is of little importance – on the contrary. National laws and studies into good government offer a justification for the choice of the criteria presented here. If there were no national embedding of these criteria, their application would be pointless. Apart from the embedding of the criteria, mention is made of the national level where a specific interpretation is needed in order to obtain a better understanding of the application of a certain principle. However, there is still a significant gap between the broad general principles governing the enforcement of Union law, and the criteria that can be drawn from the analysis of the national level.

1 Note also that in specific cases, general principles of Union law are used only in addition to existing rules and case law, most notably the protection granted by the Charter of Fundamental Rights (Charter).

To fill this gap, the normative framework presented in this chapter draws on legal doctrine. Doctrine is used on two levels: to justify and embed the choice for the various criteria where they overlap with evaluative frameworks presented earlier, and to support the interpretation of the principles and criteria as such. On the first level, the normative framework connects with criteria of 'good regulation', 'good governance' and 'good market supervision', as put forward by scholars and practitioners in the past.[2] The aim is to ensure that the normative framework for enforcement presented in this thesis is thorough and is coherent with criteria and principles that come into play in a broader context. On the second level, doctrine is used to supplement the interpretation of the various criteria of the normative framework and to take account of the academic discussion about their content. The framework in itself also adds to the academic discussion, as the criteria are interpreted for the evaluation of enforcement practice in particular – which sets it apart from the general discussion about principles and criteria that surround government action.

Be that as it may, it must be mentioned that the choice for the different criteria is normative, as is their classification and their interpretation in the sphere of enforcement. Therefore, the normative framework should be perceived as a *tool* for evaluating enforcement, and not as a definitive resolution of the tensions that exist in the various interpretations, between the various principles and between the European and the national level. If anything, whenever these tensions exist for the enforcement of competition law, they are made more visible by this framework. To summarize, the normative framework for enforcement is influenced by – and devised on the basis of – principles of national law, principles of Union law and supplemented by interpretations in legal doctrine.

1.2 Functions of Public Economic Law

The criteria of the normative framework are not just presented as a long 'checklist', but hold an inherent tension within them, as they are divided into 'instrumentality requirements' and 'safeguards'. This distinction refers to the instrumental and safeguard functions of law, as identified in the Utrecht School of Public Economic Law.[3] In its instrumental function, public economic law is perceived as a tool to serve policy objectives. Enforcement of the law occurs with a view to securing these objectives. The

2 These frameworks have been highly influential for the formulation and interpretation of the normative framework which is central to this thesis and have been referenced to throughout. Most recently, Ottow has put forward a general framework for what constitutes a 'good agency', incorporating the principles of legality, independence, transparency, effectiveness and responsibility – the LITER principles (Ottow 2015). These principles are interpreted more broadly than the criteria put forward by Hancher, Larouche and Lavrijssen, who make separate mention of transparency, independent supervision, a clear legislative mandate, flexible powers, proportionality, consistency, predictability, accountability and respect for general principles of competition policy and Union law (Hancher, Larouce & Lavrijssen 2001). Black lists similar principles and notes that there are many other candidates for inclusion (effectiveness, fairness, helpfulness) and there are trade-offs to be made between them (Black 2001). Finally, the categorisation by Aelen is helpful to determine the role of this multitude of principles. She discerns principles of effective supervision (including independence), of legitimised supervision (including accountability and transparency) and of proper supervision (Aelen 2014).

3 Hellingman & Mortelmans 1989. They apply these functions of law to public economic law, but they are relevant to administrative law in general as well.

instrumental function of law is highly visible in market regulation, in which regulators have been attributed supervisory and enforcement powers on the basis of broadly formulated goals and norms.[4] This is similar where the enforcement of competition law is concerned. Even though the prohibitions themselves are relatively straightforward, the overall mandate on the basis of which competition authorities can intervene in the market is usually formulated in general terms (the 'protection of the functioning of markets' or market supervision 'to the benefit of consumers'). Enforcement action that contributes to the achievement of these goals is considered to be instrumental. The counterpart of instrumentality is the safeguard function of law, which protects the position of companies and individuals against unlimited government action. When enforcement procedures incorporate sufficient safeguards, their legitimacy is increased.[5]

There is an apparent tension between these two functions of law. A too heavy focus on the instrumental function highlights the effectiveness of enforcement only and might encroach on the position of companies and individuals *vis-à-vis* the government.[6] On the other hand, focusing on safeguards alone might hinder the effectiveness of enforcement. After all, an enforcement agency caught up in procedural requirements that limit its operations is not likely to achieve its objectives. Ideally, enforcement action should pursue a balance between the two in which a competition authority enjoys a sufficient degree of freedom to operate without losing sight of its mandate and to whom it is accountable, and in which the effectiveness of the intervention is anticipated without infringing the rights of others.

The tension between the instrumental and safeguard functions of law is not just a dividing line between the different evaluative criteria for enforcement, but is discernible within these criteria as well. For instance, the principle of independence, which *safeguards* impartial and unbiased decision-making, also creates a distance and a margin of discretion, thus contributing to the *effectiveness* of enforcement. The other way around, the principle of efficiency, for example, facilitates swift enforcement and allows the competition authority to effectuate more with the resources available to it, but it also makes sure that these resources are not used in vain, in accordance with budgetary accountability. As such, the instrumentality and safeguard functions of law are interconnected, and weakening the one will have an effect on the other. This is because government action (be it enforcement action, regulation or law-making) must be *legitimate* in order to have effect and both feeble safeguards and powerless enforcement detracts from this legitimacy.

The distinction made below between the instrumental requirements and the safeguards is – it appears – not always easy to make. For reasons of clarity, the requirements are categorized under one heading or the other and the choice for either one is arbitrary. One should bear in mind that the interpretation of the different requirements may touch upon the other heading of the framework as well. Whenever this is the case, this is mentioned in the interpretation and application of the requirement at hand.

---

4 Ottow 2010.

5 When they contribute to freedom, equality and solidarity, see Ottow 2010 referring to VerLoren van Themaat 1968.

6 See in this respect Ottow 2006, who has come to this conclusion with regard to the oversight regime in the telecommunications market.

1.3 Legitimacy as a Connecting Principle

The principle of legitimacy connects the two sides of the framework (the instrumentality side and the safeguards) and keeps the framework in balance. This is explained in more detail below. Firstly, however, it is necessary to define legitimacy as such and to distinguish the different types of legitimacy applicable to this framework. In itself, legitimacy creates general social support for the outcomes of government intervention, giving the government a 'licence to operate.'[7] Government action that lacks this licence to operate is either very ineffective, or will need to invest in full enforcement, because people (those who should comply with the law) do not do so out of their own volition. Legitimacy can thus be defined as 'a socially sanctioned obligation to comply with government policies, even if these violate the actor's own interests or normative preferences and even if official sanctions could be avoided at low cost.'[8] Legitimacy thus indicates the level of trust people have in the government and to what extent they are inclined to follow and comply with government actions.

In the literature, a distinction is made between input, output and throughput legitimacy. Input legitimacy refers to the participation of people in policy-making through representative politics. It is concerned with the democratic involvement of those affected by a policy, and is therefore often summarized as policy *by* the people.[9] Output legitimacy, on the other hand, is concerned with the effectiveness of a policy *for* the people. It requires outcomes that represent the values and opinions of those affected by a policy,[10] and is thus concerned with the problem-solving capacity of the law. Since input and output legitimacy only focus on two distinct features of law, policy or decision-making (participation and outcomes respectively), a third type of legitimacy was added that focuses on the quality of these processes: throughput legitimacy.[11] This requires the government to design processes that are efficacious, transparent and inclusive and for which they can be held accountable (institutional throughput legitimacy), while remaining in dialogue with others (constructive throughput legitimacy).[12]

The distinction between input, output and throughput legitimacy relies heavily on the democratic legitimation of government action, which for a competition authority is less direct than for an elected official.[13] For that reason it is also possible to distinguish between procedural and substantive legitimacy when reviewing government action. Procedural legitimacy is concerned with the legal basis of actions, with the appointment

7 Black 2010, pp. 302-349.

8 Scharpf 2003, p. 1. See somewhat differently Schmidt 2013 who defines legitimacy as the extent to which politics, processes and policies are acceptable to and accepted by the citizenry such that citizens believe that these are morally authoritative and they therefore voluntarily comply with government acts even when they go against their own interests and desires.

9 Schmidt 2013, p. 2.

10 Schmidt 2006. And see for a critical analysis of some of the assumptions underlying output legitimacy Schmidt 2013, p. 10 and further. However, these criticisms are less pressing on a national level, because national institutions operate more 'in the shadow' of politics.

11 Schmidt 2013.

12 Schmidt 2013, p. 15 and further. An example of constructive throughput legitimacy is further elaborated upon by Sabel & Zeitlin 2010.

13 This is due to the fact that a competition authority enjoys a degree of independence from politics and has a broad mandate to carry out its functions. However, this puts the authority at risk of contributing to a 'democratic deficit', see Levinson 2007.

of officials and the participation of the public in the decision-making process, while substantive legitimacy is concerned with the content and effectiveness of the decisions and the problem-solving skills of the actor.[14] In this typology – which overlaps with the distinction made above to a certain extent – legitimacy is closely connected with the democratic processes through which governmental bodies and the relevant rules are established and subsequently controlled by judicial review or with other mechanisms of control. After all, competition authorities are independent, but this independence is limited by the policy purposes they have to meet and the means they can employ to do this. As a consequence, their independence can be restricted.[15]

Lastly, due to the complicated (democratic) nature of market authorities, some authors establish a broader interpretation of legitimacy, which centres on 'good' internal procedures and the careful balancing of different interests.[16] In this interpretation, legitimacy is characterised by a balance of various elements of input, output, throughput, procedural and substantive legitimacy, which contribute to legitimacy in a broader sense.

Legitimacy connecting instrumentality and safeguards

In this framework, legitimacy is not perceived as an additional principle or as a counterbalance for effectiveness, but as an overarching notion that connects the safeguard requirements of the framework with the instrumental requirements. As was illustrated above with the principles of independence and efficiency, the requirements for enforcement are not merely one-sided; their fulfilment can have an effect on the other side of the framework as well. This effect can be explained through the notion of legitimacy. In the first place, legitimacy explains why the fulfilment of one set of requirements can have an effect on the other, and secondly, legitimacy safeguards the balance between both sides of the framework.

First of all, this effect is visible when reviewing the safeguard side of the framework. Whenever an enforcement agency fulfils the safeguard requirements connected to enforcement action, its legitimacy is increased. This is because safeguards in enforcement procedures are closely connected to what is argued to be part of the throughput and procedural legitimacy of a government agency. An enforcement agency that is perceived as more legitimate has a broader 'licence to operate', which creates public support for its actions and makes it more likely to achieve effective outcomes. Thus, respect for the safeguard requirements can be perceived as instrumental in enforcing action through the notion of legitimacy.

Furthermore, it is important to keep in mind that the normative framework relies on a *balance* between instrumentality and safeguards. A too heavy focus on just one side of the framework creates an imbalance in enforcement action that could cause the public to consider the interventions of the enforcement agency as illegitimate. For instance, when a competition authority is merely concerned with the outcomes of its interventions and cuts corners when it comes to the rights of the companies under review, the focus on the instrumental side of the framework is too heavy and the balance between the two is gone. In line with the broader interpretation of legitimacy (which

14 Majone 1997, pp. 160-161.
15 Scharpf 2003.
16 On the stakeholder approach see Lavrijssen 2006, followed by Aelen 2014.

centres around the careful balancing of different interests),[17] it is safe to assume that such unbalanced outcomes are no longer considered to be legitimate. In other words, a distorted balance between instrumentality and safeguards caused by a one-sided focus diminishes legitimacy. The principle of legitimacy thus connects the instrumental and safeguard sides of the framework in the sense that it ensures a balance between the two.

1.4 Presentation of the Framework

The previous sections have sketched the outlines of the normative framework. Most important in that respect is that – in line with the Utrecht School of public economic law – the normative framework as used for the evaluation of enforcement practice is composed of two sides (requirements that are 'instrumental' to the functioning of the law and requirements that 'safeguard' the rights of others), and that legitimacy serves as a connecting principle between the two. However, in order to actually use the framework for a review of enforcement instruments, the outlines have to be filled in and the actual requirements have to be listed and interpreted. As discussed above, the requirements as presented in this framework are derived from European and national legal principles and are interpreted along the lines of legal doctrine. All in all, the framework offers a set of criteria that i) facilitate the evaluation of enforcement *practice* in the Member States, ii) allow a comparison between these different practices, and iii) form a starting point to estimate the effect that these practices have on the effect and the legitimacy of enforcement agencies. The evaluation of the different criteria – which is performed in more detail below – yields the following framework:

Legitimacy	
Effectiveness	Legality
Efficiency	Legal certainty
Flexibility	Proportionality
	Independence
	Accountability & transparency
	Rights of defence

This framework is intended to be universal, which means that it can be used on the different national levels as well as on the European level. Depending on which level is at stake, the perspective of the framework changes slightly. For this particular thesis this means that when reviewing the enforcement of European competition law (as opposed to national competition law only), the European dimension is added to the framework, requiring competition authorities to take account of the principles of uniform application, effective sanctioning and effective judicial protection. The other way around, were this framework to be used on a national level in a non-comparative way, specific national requirements could colour the interpretation of the different requirements as well.

17 That balances various elements of input, output, throughput, procedural and substantive legitimacy, which contribute to legitimacy in a broader sense. See Lavrijssen 2006.

1.5 Set-Up of the Chapter

The main goal of this chapter is to present a framework against which enforcement practice can be tested. For that reason, the various principles that are presented above in the figure that represents the balance between instrumentality, legitimacy and safeguards have to be interpreted for enforcement practice in particular. This interpretation takes place in the following sections, in which the instrumentality requirements (effectiveness, efficiency and flexibility) and the safeguards (legality, legal certainty, proportionality, independence, accountability & transparency and rights of defence) are explored separately in §2 and §3 respectively. Apart from giving a concise overview of the state of the case law and legal doctrine with regard to these requirements and enforcement practice, two specific questions are asked with regard to the position of each individual requirement: 'what is the relevance of this requirement for enforcement practice?' and 'how does this requirement relate to other requirements and aspects of the normative framework?' The answers to these questions help to identify the tensions and overlaps between the different requirements and indicate at what instances the requirements will be of relevance in the remainder of this thesis when it comes to the evaluation of enforcement practice.

Having identified and interpreted the instrumentality requirements and safeguards for enforcement practice, it is important to denote that competition law enforcement often occurs in a European context. The European requirements for enforcement, limiting the notion of procedural autonomy, are therefore presented as an extra dimension to the framework in §4. Whenever European competition rules are enforced alongside national competition rules, this dimension comes into play and alters the obligations upon the competition authorities – even within this framework. Because the interpretations, connections and tensions might distract from the concise framework as depicted above, a short summary relevant to enforcement practice is presented in §5. This final section also places the framework for enforcement in a broader context, by looking at the policy level, the institutional level and the rule level. This helps to review enforcement not just from case to case and from instrument to instrument, but to touch upon the reality that competition authorities are faced with when designing their interventions.

2. INSTRUMENTALITY

National competition authorities enforce competition law in order to contribute to the effectuation of the goals that the law pursues. Their enforcement tools and strategies are used as an instrument to achieve this. Instrumentality thus refers to circumstances that have a facilitating role in enforcement, thereby increasing its effectiveness.[18] For competition authorities, their primary goal is to safeguard compliance with competition

18 Meaning, in general terms, 'doing the 'right' things, this means setting the right targets to achieve an overall goal, including the different elements in the process (the effect)'. Quote from Addink 2013, p. 119. He distinguishes this from efficacy (getting things done, outcomes) and efficiency (doing things most economically). See for a discussion of the various meanings of effectiveness Aelen 2014, p. 150 and further. It has to be distinguished from what is meant by effectiveness on a European level, which is discussed below. See for a sharp distinction Accetto and Zleptnig 2005.

rules and to prevent or sanction behaviour that is not in line with this goal. It is therefore 'instrumental' to the performance of the competition authority that its enforcement instruments – at the very least – do not diminish the probability of attaining this goal. This is further elaborated upon in the sub-section below, which discusses the various approaches to approximating the notion of effectiveness. Additionally, this section focuses on the requirements of efficiency and flexibility insofar as they are concerned with competition law enforcement. Taken together, these requirements represent the instrumentality side of the normative framework: the conditions that have to be fulfilled (to the greatest extent possible, in a balance with the safeguards) in order to pursue the goals of competition law.

2.1 Effectiveness

Whether or not an enforcement instrument can be qualified as instrumental to the achievement of the goal(s) of competition law depends on the extent to which it is considered to be effective. It is therefore relevant for the evaluation of alternative enforcement instruments to determine their effectiveness or, in other words, their capability of producing a desired result.[19] The discussion on the effectiveness of supervision, regulation and enforcement is not a new one, and also not necessarily a legal one. There are different interpretations that approximate or estimate the effectiveness of a certain intervention. In the first place, there is the interpretation of effectiveness in the field of economics (outcome effectiveness), which is of some relevance and is discussed briefly below. However, it is a *legal* normative framework that underpins this thesis, for which reason the relevant European legal dimension is discussed secondly. Another legal interpretation is the legal approximation of effectiveness, which is neither a definition of effectiveness, nor a method to determine how effective enforcement really is, but rather a collection of preconditions that – when fulfilled – facilitate effective enforcement and under which effectiveness may be presumed.[20] Lastly, some attention is paid to the different approaches to effective enforcement in particular. This normative framework does not prefer any of the interpretations of effectiveness over the others, but rather sees them as complementary tools to determine whether or not an enforcement instrument can be considered or presumed to be effective. This complementarity approach to effectiveness also means that there is a possibility that some of the interpretations will be conflicting at times – for instance when an enforcement instrument is very outcome effective, but clashes with requirements for European legal effectiveness. However, it is neither for this framework nor for this thesis to resolve this tension on a principle basis, but to indicate that such a tension exists in the application of the said enforcement instrument. For that reason, the different interpretations of effectiveness can co-exist in this framework. They are discussed briefly below, and their relevance for enforcement practice is highlighted separately.

19 Oxford Advanced Learner's Dictionary, consulted at http://www.oxforddictionaries.com/definition/learner/effectiveness.

20 Following the definition of legal effectiveness by Van Den Broek 2015. Also elaborated upon by Aelen & Van Den Broek 2014.

2.1.1 *Outcome Effectiveness*

As the definition above already shows, effectiveness is all about reaching goals and producing results, which in the field of competition are often translated into monetary values (consumer savings, efficiency gains). It is therefore not surprising that assessments of effectiveness in competition law enforcement often take the form of cost-benefit analyses or outcome measurements. For the legal approximation of effectiveness as discussed below, these kinds of analyses are important to the extent that they have a signalling function. When the calculations show that a certain intervention or an enforcement strategy is not generating the results that were expected, the argument can be made to change course. In that sense, cost-benefit analyses and outcome measurements have an important role in determining the preferred approach to enforcement and cannot be disregarded.[21]

In most Member States, national competition authorities are equipped with an economics department (the Chief Economist's Office) that is responsible for calculating the outcome of competition law enforcement. This is often done by a cost-benefit analysis, in which the costs are determined according to the time and manpower spent and the benefits are calculated on the basis of outcome measurements and impact assessments. Preferred methods are using a counterfactual criterion (calculating, with the help of economic models, what the situation on the market would be in the absence of the competition authority's interventions),[22] estimating impact ex ante (on the basis of the best information available at the time a decision is made),[23] or evaluating ex post (on the basis of surveys and interviews).[24] On the basis of these types of analyses, whenever it seems that the benefits of an intervention do not outweigh the costs, or whenever there is no actual outcome, the desirability of the application of an enforcement instrument might be re-evaluated.

Outcome effectiveness in the framework for enforcement

An economic interpretation of effectiveness is outcome effectiveness, which is concerned with the impact and outcome of enforcement action. In the normative framework that is used to evaluate alternative enforcement practice down the line, the economic interpretation of effectiveness is used with caution.[25] However, it is important to keep in mind the possible outcomes and the trade-off between costs and benefits when reviewing enforcement instruments. If there seems to be an imbalance, or the expected

21 In this thesis, economic calculations of instrument effectiveness are used on the basis of availability and relevance to the subject matter. Analyses performed by the authorities themselves are often included, economic studies and experiments to a more limited extent.

22 See for instance Autoriteit Consument en Markt, Berekeningsmethode van de outcome van ACM en resultaten voor 2013 (by Ron Kemp, Huib de Kleijn, Esther Lamboo, Daniël Leliefeld, Bas Postema en Martijn Wolthoff).

23 See for instance the former Office of Fair Trading (now CMA), Positive Impact 13/14, Consumer benefits from the OFT's work, March 2014, OFT1532, whose methods have been evaluated in Davies 2010.

24 Davies 2010, but for an example see former Office of Fair Trading (now CMA), The deterrent effect of competition enforcement by the OFT, A report prepared for the OFT by Deloitte, November 2007, OFT962.

25 Economic analyses are not always available for the specific instruments under scrutiny. Moreover, the methods of analysis have been criticized in the past (see, source). Since the focus of this thesis is a legal one, it is not the place to evaluate the validity of these studies and analyses.

outcomes appear to be very limited, the argument can be made to limit the application of the instrument at hand.

2.1.2 *Effectiveness as a Principle of Union Law*

National competition authorities do not just safeguard compliance with national competition law, but they are responsible for the enforcement of European competition rules as well. Even though the substantive provisions of Union law are uniform, procedural law governing the application of these rules in the national legal order are not prescribed on a European level. This is in accordance with the notion of the conferral of powers and the principle of subsidiarity, as enshrined in Article 5 TEU.[26] In the absence of European procedural rules, Member States can rely on their national procedural laws when applying Union law, which is known as the principle of national procedural autonomy.[27] However, established case law requires Member States to ensure that national procedural rules applicable to European substantive law do 'not render virtually impossible or, at the very least, excessively difficult the exercise of rights conferred by Union law' (effectiveness) and that 'the conditions governing Union law are not less favourable than those governing national law' (equivalence).[28] These obligations are not limited to the legislature, but are for the executive power as well.[29] Moreover, the effectiveness of Union law should not just be safeguarded when individuals exercise rights conferred on them by Union law, but it must also be taken into account when a Member State applies a European rule against an individual.[30] Accordingly, the enforcement of European competition law by national competition authorities is – in the first place – a matter of national procedural autonomy, which is limited by the principles of effectiveness and equivalence.[31]

---

26 See in particular also CJEU, Case 51-54/71 (*International Fruit Company*).

27 Some authors prefer to speak of national procedural competence instead. National procedural law is not the default setting for Union law; it is resorted to because the preferred default setting (European procedural primacy) has not yet been achieved. See Van Gerven 2000, p. 502, and also Delicostopoulos 2003.

28 See in particular the judgments in CJEU 33/76, *Rewe v Landwirtschaftskammer für das SaarLand*, para. 5; CJEU 45/76, *Comet v Produktschap voor Siergewassen*, paras.12 to 16; Case 68/79, *Hans Just v Danish Ministry for Fiscal Affairs*, para. 25 and CJEU 199/82, *Amministrazione delle Finanze dello Stato v San Giorgio*, para. 14. But also Joined Cases C430/93 and C431/93 *Van Schijndel and van Veen,* para. 17, Case C129/00 *Commission v Italy*, para. 25, CJEU Joined Cases C295/04 to C298/04 *Manfredi and Others*, paras.62 and 71, CJEU Joined Cases C222/05 to C225/05 *van der Weerd and Others*, para. 28, and CJEU C268/06 *Impact*, paras. 44-46.

29 CJEU C-42/89, *Commssion v Belgium (Drinking Water Verviers*), para. 24 and also in CJEU C-8/88, *Germany/Commission*.

30 CJEU Joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi, Adelchi, Dell'Utri and Others*, para. 63.

31 Petit has pointed out a development in the case law on this point that happens to place less importance on national procedural autonomy, and more on the principle of effectiveness. He has pointed out four movements: the shrinking of procedural autonomy (meaning that more issues, also substantive, are placed within the realm of effectiveness), the subsidiarity of this principle (in which effectiveness is no longer the exception, but the rule to which procedural autonomy plays a secondary role), the enriched value of effectiveness (in which 'uniform application' appears to have taken a guiding role) and the horizontal features of effectiveness (comparing, for instance, national measures with other measures available, or with measures imposed in other jurisdictions). See in more detail the presentation by Petit 2014.

Effectiveness

With regard to effectiveness, the Court of Justice has held that national procedural rules may not render virtually impossible or, at the very least, excessively difficult the exercise of rights conferred by Union law.[32] This imposes a negative obligation on the Member States to make sure that national procedural rules do not stand in the way of the exercise of Union rights. Apart from that, the Court has devised – under the principle of effectiveness – specific criteria for the effective sanctioning of infringements and has held that individuals should be able to enforce all rights conferred on them by Union law before their national courts. These three qualifications of effectiveness are elaborated upon below.

> The requirement of effectiveness does not only apply to the substantive interpretation of Articles 101 and 102 TFEU, but also to the enforcement measures accompanying them, as significant disparities in this respect could just as well undermine their effectiveness.[33] Thus, national enforcement measures may not render impossible, or excessively difficult the application of European competition rules. To prevent this from happening Regulation 1/2003 provides for a cooperation mechanism between the Commission and the national competition authorities. The Commission is attributed a number of powers that enable it to play a monitoring role within the system of decentralized enforcement.[34] With these monitoring powers, the Commission is expected to ensure the uniform application of the competition rules. National procedural rules or measures that undermine the Commission's powers, or call into question the system of cooperation, are not allowed as this might undermine the uniform application of competition rules and thus their effectiveness.[35]
>
> As noted above, the principle of effectiveness has resulted in the Court of Justice devising specific criteria for the effective sanctioning of infringements of Union law, stating that sanctions for the infringement of Union law must at least be equivalent to

32 So called 'Rewe-effectiveness', from CJEU 33/76, *Rewe v Landwirtschaftskammer für das SaarLand*, para. 5. As pointed out above (referring to Petit 2014), there are certain cases in competition law enforcement in which the Court holds a stricter standard. See for instance CJEU C-375/09, *Tele2 Polska*, paras. 26-28, or CJEU C-681/11, *Schenker & Co and others*.

33 CJEU C-429/07, *Inspecteur van de Belastingdienst v X BV,* paras. 36-37 and the Opinion of Advocate General Mengozzi, CJEU C-429/07, Inspecteur van de Belastingdienst v X BV, point 42. This is an example of the subsidiarity of procedural autonomy, in which this starting point takes a backseat to the objective of the effective application of competition rules. See Petit 2014 and the footnote above.

34 To facilitate this task, national competition authorities are obliged to inform the Commission of a case after the first formal investigative measure. After that, 'decisions requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation' have to be notified as well. Apart from that, national competition authorities may consult the Commission on cases involving the application of the rules and national competition authorities are relieved of their competence if the Commission takes a formal decision. See Regulation 1/2003, Article 11(3), 11(4), 11(5) and 11(6).

35 The Court has made this clear in CJEU C-375/09, *Tele2 Polska*, paras. 26-28 with regard to so-called negative decisions and in CJEU C-681/11, *Schenker & Co and others*, paras. 46-50 with regard to the non-imposition of a fine. See also the judgment of the Court in *Masterfoods*, that underlines the central role of the Commission even when national (private) litigation is taking place: CJEU Case C-344/98 (*Masterfoods*). These cases are examples of the enrichment of the principle of effectiveness and the subsidiarity and shrinking of national procedural autonomy respectively, as argued by Petit 2014. He notes (with reference to Van Gerven 2000) that uniform application as such is not a value which is comparable to supremacy and direct effect.

those on a national level, and that they must be effective, dissuasive and proportionate.[36] The Court has held that, in order to be dissuasive, sanctions must have a 'real deterrent effect'.[37] With that, the notion of dissuasiveness strongly refers to deterrence theory, which holds as a general rule that measures are deterrent as long as the expected cost imposed on the violator exceeds the expected benefits of a violation.[38] This implies that sanctions must be sufficiently severe to persuade a potential violator to comply, in which not just the nature and level of the sanction are of importance, but also the likelihood of it being imposed.

Additionally, the Court has held that individuals should be able to enforce all rights conferred on them by Union law before their national courts, which is known as effective judicial protection.[39] The case law on this point is very casuistic and does not necessarily make clear under what circumstances there would be effective judicial protection. In various cases, the Court has placed requirements upon, for instance, access to the courts, the availability of remedies, the intensity of judicial review and time limits.[40] The application of this principle to the relations in competition law is difficult, because it does not just concern a national authority and a 'victim', but also a (legal) person that infringed Union law in the first place. The rights of the infringer are dealt with in more detail in the section on the protection of the rights of defence. An interesting question would be whether a third party (a consumer, a competitor or an interest group) can derive rights from the principle of effective judicial protection.[41] If that were the case, a national competition authority would be required to pay heed to the position of third parties in enforcement procedures.

Equivalence

Equivalence requires that a national procedural rule be applied without distinction, whether the infringement alleged is of Union law or national law, where the purpose and cause of action are similar.[42] In other words, it requires national authorities to deal with infringements of Union law no less favourably than they would deal with infringements of national law. When performing an equivalence-test, it is therefore important to establish two things: which are the 'similar national actions', and whether the national rules can be regarded as 'less favourable' when applied to Union law. With regard to the first question, a rule of thumb is to compare the rules in the same field of law, so comparing rules governing the enforcement of European competition law with

36 CJEU C-68/88, *Commission v Greece (Greek Maize)*, para. 23. See for instance also CJEU Joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi, Adelchi, Dell'Utri and Others,* CJEU Joined Cases C-379/08 and C-380/08, *ERG and Others*, but the Court has repeated these criteria on many more occasions.

37 CJEU 14/83, *Von Colson & Kamann*, para. 23. The effectiveness of penalties is a precondition for the effective application of European competition rules. See CJEU Case C-429/07 (*Inspecteur van de Belastingdienst v X BV*).

38 This premise is based on the work by Becker, but elaborated upon by Polinksy & Shavell 1999.

39 CJEU 222/84, *Johnston*, paras. 19-21, although introduced as 'effective judicial control' and CJEU C-97/91, *Borelli v Commission*, paras. 14-15. This is part of the principle of effectiveness, as argued by Tridimas 2006, p. 423, referring to CJEU C-276/01, *Steffensen.* The right to an effective remedy is now codified in Article 47 of the Charter. See Prechal & Widdershoven 2011 for the relationship between Rewe-effectiveness and effective judicial protection.

40 Gerbrandy discusses these cases in more detail, and categorizes them according to their contribution to the development of the principle of effective judicial protection, Gerbrandy 2009, pp. 27-40.

41 See in this respect also Gerbrandy 2009, p. 38.

42 CJEU C-326/96 *Levez,* para. 41, CJEU C-78/98 *Preston and others*, para. 55 and CJEU C-63/08 *Pontin,* para. 45.

rules governing the enforcement of national competition law.[43] The second question can only be answered by a national court, according to the Court of Justice, 'by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies'.[44] It therefore has to be decided from case to case whether the requirement of equivalence has been complied with.

Procedural rule of reason

Lastly, in case a national measure stands in the way of the effectiveness of Union law, making its application impossible or excessively difficult, it might still be justifiable according to one of the basic principles underlying the national legal system.[45] This is called the 'balancing test' or the 'procedural rule of reason'.[46] According to the Court of Justice in *Peterbroeck*:

> '[…] a national procedural provision […] must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.'[47]

With regard to this balancing test or procedural rule of reason, two comments must be made. First, the national measures in question concerned limitations on national procedural law, such as time limits, and not so much specific enforcement measures. The conditions surrounding the application of enforcement instruments are indeed caught by this formulation, but it remains to be seen whether the application of enforcement instruments as such can be justified or balanced. Secondly, the Court has been quite strict in applying the balancing test or procedural rule of reason, and the relevant case law has developed in a rather casuistic way.[48] Even though these two factors might render its value of application unpredictable, it seems that there is some leeway to balance the principle of effectiveness against other principles.

European effectiveness in the framework for enforcement

The European principle of effectiveness demands uniform application, effective sanctions, effective judicial protection and equivalent treatment of European rules *vis-à-vis* national rules. Where the economic interpretation of effectiveness was used with caution, the European principle of effectiveness is of increasing importance in the European market. National competition authorities apply Articles 101 and 102 TFEU very often, which means that the European principle of effectiveness has to be applied with it. This requires national competition authorities to take into account whether the

43 Jans et al. 2007, who give more examples of this rule of thumb on p. 210.
44 CJEU C-326/96 *Levez,* para. 44, CJEU C-78/98 *Preston and others*, para. 61 and CJEU C-63/08 *Pontin,* para. 46, and repeated in CJEU C-246/09, *Susanne Bulicke v Deutsche Büro Service GmbH*, para. 44.
45 See, primarily, Case C-312/93, *Peterbroeck* and Case C431/93 *Van Schijndel and van Veen.*
46 Balancing test by Van Gerven 2000, p.531, Procedural rule of reason by Prechal 1998, specifically from p. 691.
47 CJEU C-312/93, *Peterbroeck,* para. 14.
48 Tridimas 2006, p.424 and Prechal 2005, p. 175.

choice for a certain enforcement instrument might have adverse effects on the possibility to apply European competition law uniformly, in all Member States, whether it can be considered an 'effective sanction', and whether this instrument might limit the judicial protection required on a Union level.

2.1.3 Legal Approximation of Effectiveness

From the law, the case law and legal principles criteria can be derived that, when fulfilled, create a situation in which a competition authority is presumed to be effective. The many studies and reports published indicate a great deal of interest for this topic by scholars as well as national and international committees.[49] This can be explained by the fact that regulation and supervision by administrative authorities is often a costly and burdensome exercise, which the government is always looking to improve upon in order to relieve pressure on the public budget. Apart from that, the public often has high expectations of the administrative authorities responsible for supervision and enforcement and holds them accountable when problems arise. This tension makes clear that the desire to have a grasp on authority effectiveness – even if it is by approximation – has led to a number of studies that yield various criteria for effectiveness.

In these studies the requirements of independence, accountability and transparency are often cited. The goal of the fulfilment of these criteria is to create a situation in which a regulator or a supervisory authority (such as a competition authority) would be capable of being effective, whilst remaining under the scrutiny of the government and the public. Independence provides an authority with the flexibility to adapt to changing circumstances, on the one hand, and to act as it sees fit, and it safeguards it from perverse incentives that might influence the choice of response, on the other.[50] Accountability provides an authority with the incentive to take the outcome of its interventions into consideration, as it requires an authority to justify its choice of enforcement actions.[51] Closely connected to that is the notion of transparency, which requires openness about the way in which administrative enforcement instruments are determined and applied,[52] which again is an important incentive for an authority to be as effective as possible. In this thesis, independence, accountability and transparency are discussed at length elsewhere, as they can also be considered as safeguards against unrestrained government interventions. In that sense, independence touches upon impartial decision-making, accountability concerning checks and balances and the relationship with stakeholders

49 There are many of these reports, sometimes geared towards different supervisory authorities or fields of supervision. For competition law enforcement in the legal context of this thesis, the following reports are illustrative: Hampton 2005, Kaderstellende Visie op Toezicht 2005, Macrory 2006, OECD (France) 2010, WRR 2013, Strategy ACM 2013, Strategy CMA 2014. Also, the ongoing OECD project on better regulation is of importance, documents of which can be accessed here: http://www.oecd.org/gov/regulatory-policy/latest-publications.htm.

50 See for the importance of independence for the effectiveness of supervision Aelen 2014. Also: Ottow 2015 and Van Den Broek 2015. This is underlined by Hampton 2005, Kaderstellende Visie op Toezicht 2005, Macrory 2006, Strategy ACM 2013 and WRR 2013.

51 See Bovens 2007 and Chapter 3, section 3.5 below. Its relevance in effective regulation, supervision and enforcement is underlined in Hampton 2005, Macrory 2006, OECD (France) 2010 and WRR 2013.

52 See Addink 2013, Harlow & Rawlings 2009 and section … below. Its relevance in effective regulation, supervision and enforcement is underlined in Kaderstellende Visie op Toezicht 2005, Macrory 2006, Strategy ACM 2013 and WRR 2013.

and transparency upon open processes and reasoned decisions. When considering these requirements later on, it should be borne in mind that they play an important part in determining the authority's effectiveness as well.

Apart from that, effectiveness is often approximated by requirements for the operational aspects of an authority. In that sense, it requires an authority to have a well thought-out vision of its activities, to have sufficient resources at its disposal, to comport itself in a professional way and to cooperate with stakeholders, fellow supervisory authorities and the government. With regard to the first requirement, the vision of enforcement, it is often recommended for an authority to publish an enforcement policy.[53] This policy should contain some sort of strategy on how to allocate its resources and – given that enforcement authorities cannot 'do it all' – a framework for the prioritization of cases. It is in this respect that the effectiveness of regulatory styles such as risk-based or problem-solving regulation have been debated, and in some cases, have publically been embraced by competition authorities.[54] All in all, an enforcement policy allows an authority to put forward a consistent view of its future activities, to prioritise and target its interventions, and forces it to act within the margins of what it has proposed. In order to carry out this strategy, adequate resources are required. An authority can only be effective when it disposes of sufficient staff and budget.[55] Even though this is more a matter of institutional design, it is the responsibility of the authority to make the most of what it is given and to manage expectations accordingly. Finally, on another note, the authority's behavioural setting is seen as a determining factor for its effectiveness, for which reason it must act in a professional and a cooperative manner.[56] Professionalism in enforcement extends to the quality of work to be delivered, the expertise and ethos of the staff and the streamlining of procedures.[57] Furthermore, cooperation requires the authority not to function in a vacuum, but to be aware of the possibilities that ongoing collaboration with other supervisory authorities has to offer.

Lastly, the legal approximation of effectiveness requires an authority to have of adequate enforcement powers and to follow up on its enforcement actions if possible. As they specifically concern requirements for enforcement, they are considered separately below.

Legal approximation of effectiveness in the framework for enforcement

From the foregoing it follows that effectiveness can be approximated by values that dictate how a competition authority should be (independent, accountable and equipped with sufficient resources and enforcement powers) and how an authority should act (transparent, professional, cooperative, following an enforcement strategy). If the criteria flowing from these values are fulfilled (or, in some cases, rather 'not hampered')

53 Required by Macrory 2006 and WRR 2013. Visible as Strategy ACM 2013 and Strategy CMA 2013. The Autorité does not have a strategy document published on its website.

54 Risk-based regulation was recommended in Hampton 2005. It seems from Strategy CMA 2014 that this recommendation is being followed. For a theoretical perspective on risk-based regulation, see Baldwin & Black 2007, p 12. The problem-solving approach to regulation is clearly adopted in Strategy ACM 2013. See for the theoretical backdrop Sparrow 2000.

55 As elaborated upon in Van Den Broek 2015. This is recognized and underlined in OECD (France) 2010, Kwink 2010, BIS Consultation 2011 and BIS Impact Assessment 2012.

56 See, for instance, Ottow 2015, incorporated in the Strategy ACM 2013 and Strategy CMA 2014.

57 Strategy CMA 2014, p. 9.

effectiveness can be presumed. However, within this framework similar criteria are found in other places. Independence, accountability and transparency, for instance, also safeguard against unrestrained and prejudiced administrative decision-making and therefore form a part of the safeguard side of this framework. On that side of the framework they are specifically interpreted as criteria for enforcement, but one should keep in mind that these criteria contribute to effective enforcement by the competition authority, as explained above. Apart from that, through the notion of effectiveness it is apparent that these criteria are not just focused on enforcement, but that they also play a part in determining the effectiveness of the competition authority as a whole. The interplay between the enforcement criteria and the role of these criteria on other levels is further discussed below.[58]

2.1.4 *Effective Enforcement*

From the foregoing it is clear that in order to be effective, competition authorities must have adequate enforcement powers to intervene in the market. An authority that is not capable of intervening when an illegal or harmful situation arises is not likely to produce effective outcomes. For that reason, competition authorities must be equipped with a toolkit that contains adequate supervisory and enforcement powers, which allow them to impose meaningful sanctions and follow up actions where appropriate.[59] From a European law perspective these sanctions should at least be effective, proportionate and dissuasive.[60] These last two criteria in particular link the European requirements for effective sanctioning to the theoretical debate, which lists proportionality, deterrence, and behavioural changes as requirements for effective sanctioning.[61]

Not every sanction or enforcement instrument is effective in any given situation. It is the task of the authority to determine which form of intervention is most appropriate in the case at hand. At the risking of overly generalising, this appraisal can be reduced to a choice between two approaches: a deterrence approach and a compliance approach. The principle of proportionality, as discussed below,[62] guides this choice, as it requires the consequences of the approach chosen to be commensurate to the severity of the infringement.

Deterrence approach

Deterrence-based enforcement focuses on punishing offenders and providing them and others with a negative incentive to comply with the law in the future. The underlying rationale of deterrence is that the decision to violate the law is based on a cost-benefit

58 See Chapter 3, section 2.1.4.

59 Hampton 2005.

60 CJEU C-68/88, *Commission v Greece (Greek Maize)*, para. 23. See Chapter 3, section 2.1.2 (above) and Chapter 3, section 4 (below).

61 Collected by Macrory as the principles for effective sanctioning. Supplemented with responsiveness, restorative and eliminating financial gain. See Faure 2010, who links the notion of dissuasiveness to deterrence.

62 In Chapter 3, section 3.3.

analysis. Assuming that companies are rational actors,[63] their decision to comply with the law will depend on whether the benefits of compliance exceed the costs of non-compliance. Vice versa, a violation will occur if the benefits of violating the law exceed the costs. National competition authorities can increase deterrence by elevating the expected costs of a violation through increasing the probability of detection and the severity of the sanction.[64] There is deterrence when the probability of detection multiplied by the possible sanction exceeds or equals the expected benefits.

> For example, in case a competition authority has a detection rate of 8% and the power to impose a fine of 10% of the relevant turnover, a company that generates €10 million would rationally assume an expected €80,000 fine. If the expected benefits of an infringement were higher, the rational firm would proceed anyway. If the expected benefits were lower or very unpredictable, the rational firm would be deterred.

Deterrence clearly appeals to the negative basis to comply: the fear of detection and punishment.[65] It has a strong retributive dimension because of its punitive character,[66] which allows a competition authority to take a firm stance, to provide clarity on the side of the companies and intends to discourage the company in question – and others – from committing infringements in the future. However, one of the problems with pursuing a deterrence approach is that not everyone reacts to deterrence in the same way, so that detection and sanctioning alone cannot lead to full compliance.[67] Deterrence as an approach to enforcement should therefore be supplemented with more compliance-based enforcement. The other way around, a deterrence approach might have affirmative effects as well, because a deterrent enforcement policy could reaffirm a commitment to compliance.[68]

Compliance approach

Although it might have its advantages, the deterrence-based approach to enforcement is also fairly inflexible and offers the regulator little discretion to ensure compliance with the law before an infringement has taken place. They might prefer to do so by

63 This is an assumption which is often made in economic literature describing deterrence theory. However, see differently the work of Thaler & Sunstein 2009 or Ariely 2008, though there are many more influential authors on behavioural sciences and their effect on economic assumptions.

64 Polinsky & Shavell 1999.

65 It has been argued that a deterrence-based approach to enforcement should also aim to repay the harm done to other parties, as a form of corrective justice. See for a more extensive discussion on distributive and corrective justice (in competition law): Robertson 1999, p. 743, Hovenkamp 1982 and Weinrib, 1990. But claiming that fines inherently have a sense of disgorgement: Van den Bergh & Camesasca 2006, p. 307-308. The Commission seems to be of the opinion that private parties are better placed to claim their own damages, Commission of the European Communities, *White Paper on damages actions for breach of EC antitrust rules*, COM(2008) 165 final, 2.4.2008.

66 Hutter 1997.

67 The degree to which a person can be deterred is called deterrability. At the one end of the spectrum are the 'incorrigible' offenders, those who will not react to deterrence, at the other end are the 'acute conformists', who do not need deterrence. The (large) middle group is the group that responds to deterrence and therefore is deterrable. See Jacobs 2010. Another factor is the 'positive punishment effect' (entailing that those who have been caught and sanctioned seem to be more likely to violate the law again), as is mentioned in Jacobs 2010, p. 419.

68 Wils 2006, referring to Adanaes 1971.

employing techniques such as education, advice, persuasion and negotiation.[69] When these non-punitive measures are employed in order to promote conformity with the law, a regulator takes a *compliance-based approach* to enforcement. Such a compliance-based approach can be used in either a persuasive manner – characterized by a more accommodating, open-ended attitude – or an insistent manner.[70]

Characteristic of a compliance-based approach to enforcement is the appeal to the normative commitment on the side of companies. As studies confirm that compliance may stem at least as much from a personal commitment to law-abiding behaviour,[71] enforcement agencies should seek to increase a normative commitment to the rules, by aligning the violator's objective with social objectives.[72] This requires a different view of enforcement: not so much as an opportunity-shaping policy (reducing the attractiveness of the opportunity to violate the law), but as a preference-shaping policy.[73] Shaping preferences is difficult, and requires that the desired social objective be well crystallized.[74] Behaviour that is detrimental to this objective should be qualified as bad, other behaviour as good. In order give this qualification sufficient influence in society, the enforcement agency should have a legitimate claim to authority.[75] Of course, from an enforcer's point of view, it is difficult to determine when there is a genuine normative commitment, or when companies pretend to be committed, but violate the prohibitions nevertheless. This last situation describes the problem of *window-dressing*, which indicates that normative commitment – like any normative goal – is difficult to measure or maintain. Apart from that, aligning objectives might be extra difficult when dealing with companies, as their representative agents might not share these objectives or foster objectives of their own.[76]

Effective enforcement in the framework for enforcement

In practice, the choice for a deterrence approach versus a compliance approach is not an exclusive one, as the two complement each other. It is therefore not uncommon to discern deterrence-based and compliance-based elements within a single intervention.[77] For that reason, neither the deterrence approach nor the compliance approach equals, it itself,

69 Baldwin 2012, p. 238.
70 Hutter 1997, p. 15.
71 Jackson et al. 2012, but more fundamentally: Tyler 2006.
72 Segal 2006.
73 Dau-Schmidt 1990.
74 Dau-Schmidt 1990, p. 20. Note that 'law as a preference-shaping policy' has mostly been researched in the field of criminal law. I would assume that in the field of competition law shaping preferences is even more difficult, because economic crime might have less normative value attached to it.
75 Dau-Schmidt 1990, p. 19, quoting Rawls 1971. The assumption that procedural legitimacy ('maintaining appropriate values') could contribute to people's willingness to comply is discussed further below. See Jackson et al. 2012.
76 Segal 2006.
77 In fact, there had been an ongoing academic debate about the suitability of deterrence-based or compliance-based approaches for the various enforcement situations. A revolutionary solution to this problem was offered with the introduction of responsive regulation. Based on an earlier publication by Braithwaite (Braithwaite 1985), this regulatory model offered a mixture of deterrence-based enforcement and compliance-based enforcement. Depending on the situation and the relationship between the regulator and the subjects of regulation, all enforcement action would start with compliance-based interventions (situated at the base of the pyramid) and could further escalate to more deterrent-based intervention, finally resulting in the imposition of a fine or a criminal sanction. See Ayres & Braithwaite 1992.

effectiveness (meaning that, for instance, a deterrent intervention is not necessarily and automatically an effective intervention). Whether an intervention is effective depends on whether or not the chosen approach is suitable for the situation at hand, which varies from case to case. The relationship between deterrence, compliance and effectiveness is a different one, and can be viewed when looking at the enforcement policy of an authority at a distance. When the interventions of an authority systematically chip away at the deterrent effect of its policy (for instance, when an authority threatens companies with fines but never actually imposes them, or when an authority is keen on settling cases 'under the radar' instead of pursuing them formally), the effectiveness of the authority as a whole is in jeopardy. Just as enforcement policies solely based on compliance are not likely to be effective (a carrot is not that appealing when there is no stick), policies solely based on deterrence might discourage the cooperation of companies that would intrinsically comply. In other words, compliance and deterrence complement each other, but need to be in balance in order for an authority to be fully effective.

2.2 Efficiency

Efficiency in terms of 'efficient enforcement' should be distinguished from economic efficiency that is often suggested as a goal of competition law.[78] Even though there is no denying that 'good' regulation and enforcement can contribute to efficient outcomes,[79] efficiency as an instrumental requirement is interpreted as an obligation for competition authorities to strive for the best possible performance with the least amount of resources possible. In that respect, efficiency requires a balance between the deployment of resources (in terms of budget, time and manpower) and the output (in terms of speed, numbers and effects). The outcome of this balance could decide the preference for one enforcement instrument over another, or influence the decision on whether or not to pursue a case under the given circumstances.[80] On a higher level, efficiency is often translated into prioritization and strategizing, which streamlines the enforcement choices to be made on the basis of efficiency.

The notion of efficiency underlines a number of other requirements for enforcement as well. It is very closely connected to the notion of effectiveness, and it can function as a yardstick for authority accountability. The main distinction between efficiency and effectiveness is that the first concentrates on a balance between means and outcomes, whereas the latter only indicates the desired outcome.[81] However, the two are also

78 Usually three types of efficiency are distinguished: allocative, productive and dynamic efficiency. Allocative efficiency is often expressed by the Pareto criterion, which deals with the distribution of resources among the various economic players. When there is productive efficiency in a market, maximum output is generated by using minimum input. When there is dynamic efficiency, the market is concerned with investments in education, research and development, in order to increase efficiency in time. See for a more in-depth discussion of economic efficiency as a goal the works of, for instance, Stucke 2012, Motta 2004 and Baarsma 2010.

79 See for instance Shleifer, who argues that an efficient court system might take away the need for public regulation altogether, because individuals would be capable of resolving their issues before the courts (Shleifer 2010).

80 This could contravene the general obligation to enforce. See Ottow 2006.

81 Effectiveness as a principle or requirement for enforcement has been extensively debated. See for instance Addink 2013, but dating back as early as Walker 1980. See for a more sociological interpretation Torpman & Jorgensen 2005. Effectiveness should be distinguished from EU effectiveness, see Tridimas 2006.

inherently intertwined, as efficient authorities are capable of being more effective, and the effect of an outcome (what has actually been achieved in a market) could justify the resources spent. Efficiency also relates to the more safeguard-oriented requirement of accountability, because the need for efficient enforcement is in part created by the operational budget granted by the responsible governmental body, for the spending of which the authorities can be held accountable.

Efficiency in the framework for enforcement
Efficiency influences the evaluation of enforcement instruments in the sense that it requires as much effect as possible at the cost of as few resources as possible. The most obvious way to make enforcement more efficient is by looking for instruments that reduce the time taken to complete a case, but maintain a similar outcome as the default instrument. This requires an evaluation of efficiency to ascertain that i) lead time has in fact decreased, ii) other costs have not increased and iii) the outcome is similar to what would have been achieved under the application of a default enforcement instrument. The extent to which an enforcement instrument can be regarded as more efficient therefore depends on the decrease in time and other costs (such as the deployment of staff[82]), balanced against the effectiveness of the outcomes. Enforcement instruments that alter this balance can be regarded as more efficient than others.

2.3 Flexibility

In order to pursue the different objectives listed above, and in order to choose the most efficient alternative available, competition authorities must enjoy a degree of flexibility when applying enforcement instruments. This type of flexibility refers to the discretion that competition authorities have in making the choice for the preferred instrument on the one hand, while remaining capable of adapting the said instrument to the various situations at hand.[83] Flexibility in this respect is perceived as a precondition for various regulation and enforcement styles. In responsive regulation, for instance, flexibility is needed to adapt interventions based on the relationship with the market parties (to move up and down the pyramid, so to say), while in Sparrow's problem-solving approach flexibility is needed to tailor the intervention around the problem at hand.[84] Even in the absence of such strategies, a margin of discretion is required to form the enforcement instrument to the needs of the individual case, as businesses might respond differently.[85]

Competition authorities do not just need flexibility to choose the optimal intervention based on the characteristics of the infringement and the infringer, they also need it to adapt their interventions to changing market conditions. The need

82 Arguably, one could include a calculation of the offset between the possible loss in fine revenue against the efficiency gains in terms of preventing objections and appeals as 'other costs' as well.
83 Hancher, Larouche & Lavrijssen 2004 or Black 2001.
84 Ayres & Braithwaite 2000.
85 See for instance Huisman & Beukelman 2007. In more general terms Julia Black already noticed that regulators have to be responsive to more than the relationship with the market. Baldwin and Black 2007. They must not only take account of compliance-rates, but also of firms' attitudinal settings, the institutional environment, the regulatory regime, the logistics of their tools and strategies, their own performance and changes in all of these elements.

for flexibility in enforcement instruments is most apparent in emerging and rapidly changing markets, or when a competition authority has to make complex technical assessments.[86] This is due to the fact that new markets often pose new challenges in the regulatory regime, for which the current set of rules and procedures might not always be a good fit. Especially in highly innovative (technological) markets, the competitive situation might alter rapidly, thus requiring a different approach than the one usually applied in more 'common' markets. Competition authorities should be able to address these problems with the tools that they have at their disposal.

Naturally, if a competition authority enjoys too much discretion accountability is at risk, as there would be no control of the choices that the authority makes. Assuming that the authority would operate within the limits of its legal mandate, the mandate must be very broadly formulated in order to provide for broad discretionary powers. In that way, it would be difficult for others (the government, the judiciary, the public) to scrutinize the decisions made. To remedy this, many propose to combine flexibility with a clear mandate, strict time restrictions and other procedural guarantees.[87] Additionally, a review by a court is of importance here. If a competition authority has discretion in applying certain instruments, its final choices should be contestable before a court.

Flexibility in the framework for enforcement

When evaluating an enforcement instrument on the basis of flexibility, it is important to perceive whether or not the instrument at hand is adaptable and pliable to the situation in which it is applied. Flexibility can be limited by the legal framework surrounding the application of the instrument, for instance in the case of a formal fining procedure – in which the administrative framework and the operative framework are rather strict and straightforward. Flexibility can also be limited by the interpretation given by the competition authority with regard to the application of enforcement instruments in practice. This could be the case when an authority has filled in its discretion with procedural guidelines, or when it has developed best practices that give rise to certain expectations with companies. It must be borne in mind that – even on the individual instrument level – flexibility comes at the price of the loss of accountability and legal certainty. The challenge is to find a balance between the two and to review whether the flexibility that is identified within the enforcement instrument is proportional to the safeguards surrounding its application.

3. SAFEGUARDS

Competition authorities are administrative bodies that operate with a public mandate. Their actions are primarily governed by the substantive laws they enforce, but also by the procedural rules accompanying them and the principles connected to government action in general. As a democratic society with a separation of functions requires, the government cannot exercise uncurbed powers; legal safeguards should limit their actions – a notion

86 Ottow 2015 refers to examples from the telecommunications market in the Netherlands, which are – in part – also discussed in Ottow 2006.

87 Hancher, Larouche and Lavrijssen 2004, p. 346, Ottow 2015, Black 2001. In that sense, flexibility can be counterbalanced by the requirements of legal certainty and consistency, as explained below.

commonly referred to as the rule of law.[88] The rule of law can be interpreted very literally: the rule of the law,[89] but it is most commonly associated with a political idea of how governance must proceed.[90] In the interpretation of formal legality,[91] the rule of law requires that the law is general, prospective, equal, clear and certain.[92] In a normative framework that overarches French, Dutch and UK administrative actions, this interpretation is the most practical as it connects the more Anglo-American idea of the rule of law to the more continental concept of legality. This principle is discussed first. After that, the principle of legal certainty, the principle of proportionality, the principle of independence, the principles of accountability and transparency, and the rights of defence are examined with a view to interpreting them for the purpose of the evaluation of enforcement practice. Taken together, these requirements represent the safeguard side of the normative framework: the conditions that have to be fulfilled (to the greatest extent possible, in a balance with the instrumentality requirements) in order to pursue the goals of competition law in a way that does not encroach upon the freedom and the rights of others.

3.1 Legality

The principle of legality originates from the French Revolution and means in essence that only the law can place limitations on the liberty of individuals, because it is an expression of the will of the people.[93] Like the rule of law, legality is closely linked to a democratic society. Within this society, legality can fulfil three functions: a legitimizing function (as to the existence of authority), an attributing function (of powers towards such authority) and a regulating function.[94] This last function describes how the authority should use the powers it is attributed by law.

The principle of legality requires first and foremost that enforcement action be based on the law; it must have a legal basis that is clear and certain. This not only entails the principles of *nulla crimen* and *nulla poena sine lege*, which require a law prohibiting the behaviour before inflicting a penalty, but they also imply that the administrative action sanctioning this behaviour must have a legal basis as well. This legal basis must be clear and understandable, as is elaborated upon under the requirement of legal certainty below. Even though it might seem obvious for competition authorities to intervene on a legal basis only, the matter becomes more difficult when looking at the content of competition rules. In most Member States, the competition rules contain a double prohibition (the cartel prohibition and the prohibition of an abuse of dominance) and a regime for merger control. Despite appearing to be unequivocal, there is an ongoing debate about the goals of competition law and whether competition rules should

88 'The rule of law stands in the peculiar state of being *the* prominent legitimating political ideal in the world today, without agreement upon precisely what it means', see Bennett 2007, p. 92, quoting Tamanaha 2004.
89 Raz 1979, p. 212.
90 Bennett 2007, p. 90. There is an even broader interpretation, in which the rule of law is linked to the notion of social welfare, and entails substantive equality, welfare and the preservation of the community. Tamanaha 2004, p. 91.
91 As adhered to by Fuller, Raz and Hayek, according to Bennett 2007, p. 94.
92 Tamanaha 2004, p. 91.
93 Déclaration des Droits de l'Homme et du Citoyen (1789), as quoted by Besselink et al. 2011, p. 5.
94 Besselink et al. 2011, pp. 6-7.

be enforced to the spirit or to the letter.[95] If the perception of the underlying goal of competition law changes, the enforcement of the law changes with it. The difficulty lies, however, with the situation in which certain behaviour is considered to be undesirable in the light of a certain goal, but not *per se* illegal – or the other way around, when behaviour is very much applauded, but not permitted under current competition rules.[96] The interpretations of the legal basis as such, and the enforcement actions that follow therefrom, thus have an effect on the output legitimacy of the competition authority.

Legality in the framework for enforcement

With regard to enforcement, the principle of legality has a double meaning: it requires the competition authority to take action only when there is an infringement of the law and to take action in a way that is proscribed by the law. The first meaning is concerned with the content of the law, which – as is illustrated above – might pose problems in situations in which the interpretation of the competition prohibition does not fit the perception of the market behaviour and thus leads to a perceived illegitimate outcome. Competition authorities need to be aware of this discrepancy when enforcing competition rules. They also need to be mindful of the fact that 'filling' this lacuna with alternative enforcement instruments has an effect on the legality of their actions. The question is whether it makes a difference that an authority chooses to do so by using administrative sanctions, or by 'softer' enforcement tools.

The second meaning of legality is concerned with the legal basis of the enforcement action itself, and requires that any enforcement instrument has a basis in the law. It is important for competition authorities to have sufficient powers formally delegated to them in order to be able to carry out their tasks.[97] This is the case when there is an explicit legal basis – such as with the administrative penalty – or when there is competence derived from the competition authority's more general mission or mandate. The explicitness of the legal basis required might depend on the intrusiveness of the instrument at hand. Enforcement instruments that encroach more on the freedom of the market parties need a firmer legal basis than tools that provide market parties with a recommendation or advice. This needs to be regarded from instrument to instrument, in the light of its application in practice and its consequences.

3.2 Legal Certainty

Legal certainty follows from the rule of law in its formal legality interpretation, as well as from the principle of legality itself. As a principle, it requires that the law and the rules

95 This discussion is very widespread and has had contributions from many competition law scholars all over the world. As a starting point, reference is made to Stucke 2012. Influential is also the work of Motta (notably Motta 2004). More recently the single goal has been defended by Baarsma in her inaugural speech at the University of Amsterdam, Baarsma 2010. The goals debate is also briefly touched upon below.

96 Think, for instance, of the discussion on the incorporation of sustainability values in competition law, which will be touched upon more often in this thesis. See for instance Gerbrandy 2012 or Lavrijssen 2010 and Monti 2002.

97 Lavrijssen & Ottow 2011.

explaining or applying the law are clear and understandable.[98] In that interpretation there is a clear connection between the principle of legal certainty and the principle of legality and the rule of law – as described above. In fact, the one can be seen as a specific expression of the other, or as two sides of the same coin. What is relevant to this framework is that the principle of legality proscribes the existence of the legal basis, and the principle of legal certainty places some qualitative requirements upon that legal basis and the actions flowing therefrom – namely that it is clear and understandable, and that it is not applied in a way that creates uncertainty for the addressees. In that context it has been argued that legal certainty also concerns the irrevocability of decisions,[99] the principle of the non-retroactivity of legislation and application,[100] and the protection of legitimate expectations.[101] This section first discusses the protection of legitimate expectations as a specific expression of legal certainty. The other two expressions (the irrevocability of decisions and non-retroactivity) are of equal importance, but are not examined any further. After that, the requirements which legal certainty places upon enforcement are explored. With this, it is demonstrated that legal certainty as a safeguard requirement is also instrumental to the achievement of enforcement goals, because it increases the legitimacy of the competition authority.

Legitimate expectations

Under the principle of the protection of legitimate expectations individuals and companies are protected against any arbitrary use of public power, as it requires public bodies to act in accordance with the legitimate expectations to which it has given rise earlier. Legitimate expectations can arise when specific assurances have been given in an individual case, when there is a clear indication in the law or in regulations, when a public authority has given a misleading impression, or when the expectations are based on a clear rationale inherent in a specific case.[102] However, expectations can only be considered legitimate if a competent public authority has raised them, if the beliefs on which the expectations are based are not be evidently wrong, and if the change in the

98 This is called 'procedural legal certainty'. See de Vos 2011, p. 92. The fact that the law must be clear and understandable as a part of legal certainty is also found in: Schermers and Waelbroeck 1992, pp. 52-69, Tridimas 2006, p. 244, who cites the case law stating that this is required on a European level as well, Raito 2003, p. 127 and Temple Lang 2000, p. 165.

99 The irrevocability of administrative decisions is a manifestation of legal certainty that is very closely connected to the protection of legitimate expectations. It has as a starting point that decisions taken by administrative authorities cannot be easily overturned or revoked when they confer certain rights on individuals or undertakings. For that reason, it has also been referred to as the principle of acquired rights. Accepted as a manifestation of legal certainty by Schermers and Waelbroeck 1992, pp. 52-69 and Schonberg 2000, pp. 257-298 and also recognized by the Court of Justice in Joined cases 7/56, 3/57 to 7/57, *Dineke Algera et al. v Common Assembly of the European Coal and Steel Community.*

100 Non-retroactivity entails that public bodies are, in principle, prohibited from applying new legislation or guidelines with retroactive effect. It is possible to deviate from this principle, if it is necessary for achieving the purposes of the legislation or the guidelines, and if the legitimate expectations of the parties in question are protected. The prohibition of retroactivity ensures that individuals and undertakings are able to plan their behaviour according to the rules that are valid at the time of acting. With regard to criminal measures, the prohibition of retroactive application is also embedded in Article 7 of the European Convention on Human Rights. See Schermers and Waelbroeck 1992, pp. 52-69, Temple Lang 2000, p. 165, Tridimas 2006, pp. 252-257.

101 Together called 'substantive legal certainty'. See de Vos 2011, p. 92.

102 Temple Lang 2000, pp. 171-172.

situation was not foreseeable.[103] Naturally, in order to rely on legitimate expectations, individuals or companies must act in good faith, and their expectations cannot be protected *contra legem*.[104]

There is no common constitutional tradition in the Member States as far as the protection of legitimate expectations is concerned. The most similar principle is found in the Netherlands, where there is a 'principle of trust' (*vertrouwensbeginsel*), but the precise delineation of this principle differs from the interpretation of legitimate expectations at the Union level; it is more extensive.[105] In France, the protection of legitimate expectations is not recognized as a principle, but there is some overlap with the principle of *droits acquis*, which means 'acquired rights' and protects decisions that create certain rights for the addressee.[106] In the United Kingdom, judges seem reluctant to apply the principle of the protection of legitimate expectations, and more readily resort to the 'Wednesbury unreasonableness test' to review the behaviour of public bodies.[107] Setting the interpretational differences aside, the principle of legitimate expectations requires competition authorities to value statements made previously, and to make sure that they do not contravene the expectations that parties can derive from reliable sources. It protects companies from a competition authority that does not deliver on what was promised, and forces competition authorities to contemplate the effect of their decisions (formal or factual) for future cases.

Legal certainty in the framework for enforcement

As was underlined above under the principle of legality, the law and the provisions on the basis of which competition authorities are competent to act should be clear and understandable. Companies and individuals that are subject to enforcement should be aware of what they can expect from their enforcement authority, and when they can expect it. As a consequence, competition authorities cannot reverse previous decisions and they have to be aware of the expectations that some decisions invoke in others. This is particularly relevant for enforcement, because it requires competition authorities to look at the effects of the choice for a certain instrument. Especially when it comes to alternative enforcement instruments, which – in some forms – can be perceived as less strict, less intrusive and more cooperative, companies that find themselves in similar situations as the ones who have benefited from the application of such an instrument might expect similar treatment. It is the task of the competition authority to clearly communicate why such an instrument was chosen in a specific case and which circumstances in particular have led to the adoption of the decision. In that sense, the

103 Jans et al. 2007, pp. 166-169, Tridimas 2006, p. 280, who also states that the individual or company may not have committed a manifest error of the rules in force (CJEU 67/84, *Sideradria SpA v Commission*).

104 Although there is a discussion on the extent to which *contra legem* application is possible in the Netherlands. Jans et al. 2007, pp. 169-170, and more extensively De Vos 2011, pp. 263-269.

105 De Vos 2011, pp. 241-247, but more specifically on the discrepancies between the Dutch and the EU principle pp. 310-329.

106 What kinds of decisions create rights is one of the most debated topics in French administrative law. In the case law, such a multitude of decisions have been said to create rights, that a hypothesis is that almost every decision could create rights for an individual or an company. Schonberg 2000, p. 263.

107 Wednesbury unreasonableness is explained below. Still, even though they are reluctant, the British courts have applied some form of the protection of legitimate expectations. See in more detail Craig 1996, pp. 289-312.

principles of legal certainty and the protection of legitimate expectations are intertwined with the notion of transparency, as is discussed further below.[108]

A competition authority that is consistent in its decision-making and provides certainty about the law and its application will also gain the trust of those to which the laws are addressed. Competition authorities that enjoy the trust of companies and the general public have a larger social mandate to operate,[109] and are likely to produce more results than competition authorities that do not have such a reputation. This demonstrates that the obligations flowing from the principle of legal certainty – which are first and foremost intended to safeguard against the arbitrary use of power – contribute to the legitimacy of the competition authority, which – in its turn – is instrumental in the achievement of the goals it pursues. In other words, the principles of the irrevocability of decisions, non-retroactivity and the protection of legitimate expectations and the transparency requirements flowing therefrom also contribute to the instrumentality of enforcement action through the notion of legitimacy.

3.3 Proportionality

The principle of proportionality is a general principle of Union law, which requires that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'[110] As interpreted by the Court of Justice, the principle of proportionality requires measures – including measures taken by national authorities when acting within the scope of Union law – to be suitable for pursuing a legitimate aim, to be necessary and to be proportionate to the aim pursued.[111] This interpretation bears a strong resemblance to the German principle of proportionality.[112] Even though proportionality is not recognized as a general principle of law in every Member State, most Member States apply a test that is more or less comparable with the Union's proportionality test.

In the Netherlands, proportionality is included in the General Administrative Law Act, which states that the adverse consequences of a decision may not be disproportionate to the objectives to be served by the decision.[113] In the United Kingdom, a reasonableness test is applied rather than a proportionality test. This is called Wednesbury unreasonableness (based on the famous *Wednesbury* case), which entails that a decision from a public body can be challenged if it is so unreasonable that 'no reasonable public body could have made it'.[114] In France, proportionality is not seen as a general principle of public law, but as a requirement which is strongly connected to

108 See Chapter 3, section 3.5.
109 See Chapter 3, section 1.3, and in particular footnote 6, quoting Black 2010.
110 Article 5(4) TEU.
111 The latter is proportionality in the strict sense. See Tridimas 2006, p. 139, Jans et al. 2007, p. 149. and Van Gerven 1999, pp. 107-115. The requirement that the aim must be legitimate derives from CJEU C-331/88. *Fedesa*, para. 13. The connection with national enforcement measures is made most famously in CJEU C-68/88, *Commission v Greece*, para. 23. A very detailed discussion of how the calculation of fines under Regulation 1/2003 relates to the proportionality test is given by Gilliams 2014.
112 Some even say that the Union principle of proportionality is based on the German principle. In any case, the same three-step test is applied there. Jans et al. 2007, p. 144.
113 Article 3:4(2) General Administrative Law Act (*Algemene wet bestuursrecht, Awb)*.
114 *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, at 228-30.

the principle of legality.[115] It has been commonly interpreted to mean that a cost-benefit analysis must be made when taking or reviewing an administrative decision.[116]

Apart from in the Treaty and in national law and case law, the principle of proportionality is embedded in the Charter of Fundamental Rights. According to the Charter, the principle must be respected when restricting the rights provided for in the Charter, and more specifically with regard to sanctions, in the sense that the severity of any sanction should not be disproportionate to the offence.[117] The Charter also safeguards the right to good administrative behaviour, which – amongst other things – requires a fair balance between public and private interests in the decision-making process in addition to proportionality to the aim pursued.[118]

Proportionality in the framework for enforcement

In short, the principle of proportionality requires competition authorities to perform a balancing test when reviewing which enforcement measure would be the most suitable in a given case. For the enforcement of competition law, this could mean that the instrument chosen should be proportionate to the aim pursued with enforcement,[119] or to the seriousness of the infringement.[120] The performance of this balancing test is at the discretion of the competition authority, and the considerations influencing the outcome will vary from case to case. The decision to apply an enforcement instrument in a specific case is reviewable by a court on the basis of proportionality. This can be done under both a full-merits review or under a judicial review standard. Even though this might vary from Member State to Member State depending on what interpretation of proportionality is common, a judge would usually check whether a reasonable authority would have come to the same conclusion. Competition authorities have to make sure that their enforcement decision can stand the test of this review. For the enforcement of European competition law, it has to be borne in mind that the threefold proportionality test (suitability, a less restrictive alternative and proportionality *strictu sensu*) is likely to apply.[121]

---

115 Both the French Council of State (*Conseil d'Etat*) and the Constitutional Council (*Conseil Constitutionnel*) use proportionality without calling it a principle. See in more detail Van Gerven 1999, pp. 48-51.

116 *Ville Nouvelle Est*, CE, 28 May 1971, Leb. 409, but also Van Gerven 1999, p. 49.

117 Articles 52(1) and 49(3) of the Charter. This should not be confused with the functioning of proportionality in a broader context, in which it serves as a legitimation for the restriction of the fundamental rights of the Convention. If a fundamental right is limited or restricted by an action of a public body, this action must be taken in accordance with the principle of proportionality. The ECHR reviews whether 'there existed a pressing social need for the measures in question and, in particular, whether the restriction complained of was proportionate to the aim pursued.' See ECtHR, *Open Door Counselling Ltd. & Dublin Well Woman Centre v Ireland*, Application no. 14234/88, 1992.

118 As provided for in Article 41 of the Charter, which is explained in more detail in European Commission, Code of Good Administrative Behavior: Relations with the Public (2000), page 4 and European Ombudsman, The European Code of Good Administrative Behavior (2013), Article 6.

119 Which, arguably, is generating compliance. See Gilliams 2014, pp. 436 and 437. Under this proportionality standard, the author argues that fines in particular need to be deterrent in order to be proportionate. See CJEU, Joined Cases T-56/09 and T-73/09 (*Saint Gobain*).

120 See Wils 2006. This proportionality is also visible in the Charter and Article 23(3) of Regulation 1/2003.

121 As is noted by Gilliams 2014, there is little doctrine about the proportionality of *competition law* fines, but much more so about the proportionality of sanctions in the field of free movement. See for instance Van Gerven 1999.

3.4 Independence

Competition authorities need a degree of independence to carry out their tasks properly.[122] Independence, in this sense, is a multi-faceted principle that means different things when interpreted on different levels.[123] Firstly, when looking at the position of the competition authority in its relationship *vis-à-vis* the Ministry; independence is needed to place the Minister at a distance and to allow the competition authority to enjoy actual decision-making powers. These powers should not be limited by detailed procedural guidelines drafted by the former, or be influenced by budgetary measures. Naturally, a competition authority does not enjoy complete independence – in the sense that it has no one to answer to. It is still accountable to the Minister for its decisions and the spending of its budget. The principle of accountability thus functions as a counterweight to this type of independence. Secondly, and more relevant to enforcement practice, is the type of independence that can come into play on an instrumental level in individual cases. Here, independence indicates the avoidance of undue influence in the decision-making process, both externally (impartiality) and internally (unbiased decision-making). These notions are of particular significance for enforcement, along with the safeguards that are in place to protect it.

In order to take fair and well-balanced decisions independence from stakeholders and independence from politics is required. Competition authorities should be able to take decisions on the basis of their own evaluations, without undue influence from omniscient Ministers and market parties who put their own interests first. It is a 'necessary element in providing stakeholders with confidence in the regulatory system and is linked to the principles of consistency and predictability.'[124] When there is such influence, the competition authority is 'captured'.[125] This kind of independence is thus closely connected to the value of impartiality: decision-making without undue influence, based on the available information, giving appropriate weight to the interests

122 ICN Advocacy Working Group, 'Advocacy and Competition Policy', *ICN Conference Napels*, 2002.

123 There is institutional independence, on the on hand, which implies a certain distance between the competition authority and the Ministry, and there is operational independence, on the other, which can be characterised as impartiality, requiring that enforcement should occur without undue influence from politics or the market. See Aelen 2014, p. 214 and further. She divides these categories even further by placing regulatory and supervisory independence under operational independence, narrowly interpreted institutional independence, personal independence, and budgetary independence under institutional independence. These qualifications overlap the distinction that is often made between *de jure* and *de facto* independence, in which *de jure* independence entails the legal safeguards that protect independence and *de facto independence* is more operational and concerns the agencies' behaviour and decisions in practice. Some have found that *de jure* independence in the judiciary is the most important determinant of *de facto* independence. See Hayo & Voigt 2007 and Hayo & Voigt 2010. At the time, this ran counter to the common assumption that de jure independence created a 'paper barrier' (see for instance Camp Keith, Tate & Poe 2009) or that independence increased the need to 'control' institutions (Van Thiel & Yesilkagit 2011). However, the assumption was tested by Melton and Ginsburg, who found that the reinforcing effect of de jure independence on de facto independence is limited to those provisions that are self-enforcing as a result of competition between the executive and legislative branches (Melton and Ginsburg 2014).

124 Hancher, Larouche and Lavrijssen 2004, p. 334.

125 It is assumed that both politics and the market can capture the regulator or enforcement agency. Differently: Quintyn and Taylor hold that 'freedom from regulatory capture' is the other side of the coin of 'independence from political interference', see Quintyn & Taylor 2002, p. 9. See for an extensive debate about independence, and particularly capture: Aelen 2014, p. 225 and further.

at stake.[126] Impartial decision-making is seen as a core value for enforcement in all three Member States,[127] and has a connection with the rights of defence as well, which call for an adequate opportunity to be heard by an unbiased decision-maker. Bias, however, does not just arise from outside influence on a decision, but it could arise from internal pressure as well. Given that most competition authorities have a system that combines investigation and sanctioning (and sometimes also a review by means of an objection) it is important for authorities to have safeguards in place that ensure that decision-making is free from any bias. To illustrate, investigatory teams that have dedicated months to finding enough evidence to support an infringement might suffer from the dreaded 'tunnel vision', which could cause them to adopt an unfair or biased decision. To prevent internal influences on independent decisions, the functions of investigation and decision-making should be separate and allocated to different units, teams or departments of the competition authority. The competition authorities under review have such a separation of functions for most of the enforcement procedures. The question is to what extent this is the case for alternative enforcement procedures, and to what extent this should be the case.

Independence in the framework for enforcement

The kind of independence that points to the position of the competition authority in relation to the Ministry is of relevance when looking at enforcement from a broader perspective, as it might shape decision-making as a whole. Independence in this sense is also instrumental to enforcement, because subservient authorities cannot show the decisiveness needed to intervene in the market. From this instrumental perspective, independence is closely related to the notion of flexibility, as it entails that the enforcement agency enjoys enough discretion to make swift independent decisions. This is caused by the need for the enforcement agency to act quickly and to respond to developments in the market in a way that the legislator cannot.[128] However, competition authorities cannot act completely independently from politics, as they have to operate within the boundaries of the legal mandate assigned to them.[129] This indicates an interesting tension, as it might be difficult at times to draw the line between the types of decisions that belong to the government, and decisions that a competition authority can make independently.[130]

Secondly, on an individual case level, independence means that decision-making should be free from outside pressure (capture should be avoided) and that internal bias should be avoided. The former can be accomplished by finding the right balance between cooperation and accountability, on the one hand, and independence, on the other. This balance can be under pressure when enforcement instruments rely on

126 Defined as such in Ottow 2015.

127 For the Netherlands, see WRR 2013, p. 19 and Strategy ACM 2013, pp. 3-4. For the United Kingdom, see Hampton 2005 and Consultation OFT 2013, p. 12. For France, see Avis 08-A-05, Reform of the Autorité de la Concurrence, para. 7.

128 Szydlo 2012, p. 793-820. Aelen refers to this as the 'information asymmetry' between the market and politics and the regulator. (Aelen 2014, p. 220).

129 Monti 2014.

130 Hancher, Larouche and Lavrijssen 2004, p. 345. They claim that as soon as such controversy is to be expected, it seems advisable to leave the matter in the hands of an independent administrative agency, which, if it operates well, is less prone to allegations of partiality and arbitrariness.

cooperation or deliberation with the parties involved. The latter can take the shape of an institutional divide between the investigatory and decision-making functions within the competition authority. For enforcement practice, this means that the question should be asked to what extent the instrument at hand safeguards these values. Especially when a formal procedure is lacking, the entire decision for the 'optimal approach' might rest on the shoulders of one unit, team or department. Situations such as this should be avoided, and it should be examined whether this is the case in any of the enforcement instruments under review here.

3.5 Accountability and Transparency

National competition authorities are usually characterised by their independent position from the government and a broad range of powers that they can apply to the market and market parties. This creates a tension between the operational effectiveness of competition authorities, on the one hand, and the democratic legitimation of their actions, on the other.[131] To some extent, accountability mechanisms can relieve this tension by functioning as a counterbalance for independence and wide-ranging powers, because accountability requires the competition authority to explain and justify its conduct, allowing the forum to pose questions, pass judgment and impose consequences.[132] The 'forum' in this sense can be the judiciary (legal accountability), the responsible ministry (political accountability), the court of audit (administrative accountability), other competition authorities (professional accountability) and the market, the consumers and other stakeholders (social accountability).[133] Apart from making clear *to* whom the competition authority is accountable, it is important to determine what it is accountable *for*.[134] Even though this might vary from country to country due to the accountability mechanisms chosen, competition authorities should at least be accountable to the extent that their operational independence is somewhat counterbalanced.[135]

The notion of accountability is very much intertwined with the principle of transparency. In many interpretations, transparency is seen as a precondition for the proper functioning of democracy and accountability.[136] It facilitates a review by a court and an evaluation by the government, the market and the people. Non-transparent enforcement, or enforcement behind closed doors, escapes such scrutiny. Apart from that, a transparent authority that can be held accountable for its actions is often a more

131 This tension is discussed at length in Utrecht Law Review 2006, 2(1).

132 This is the social forum definition of accountability; see Bovens 2007, p. 452. Apart from that, accountability is a broad concept that can be seen as an umbrella principle for transparency, equity, democracy, responsibility and integrity. See Addink 2013, p. 135. See somewhat differently Harlow and Rawlings, who judge the accountability of actors according to their responsiveness to participatory input demands and responsibility for output decisions (Harlow & Rawlings 2007, pp. 542-562).

133 Bovens 2007, p. 461. Bovens also distinguishes between types of accountability according to the actor (corporate, hierarchical, collective, individual), the subject of accountability (financial, procedural, operational) and the nature of the relationship (horizontal, vertical or diagonal).

134 Distinction made by Van Gerven 2008.

135 See Ottow 2015 and her references in footnote 121. Accountability is also elaborated upon concerning its application to supervision in the financial sector by Aelen 2014, Chapter 8.

136 Prechal & de Leeuw 2008, p. 205.

effective authority, as it clarifies the application of the rules through its decisions and increases the legitimacy of its actions.[137] The need for transparency in competition law enforcement is underlined by the fact that the application of competition rules is a complex, intricate matter, which is not always easy for the general public to understand.[138] To increase understanding and appreciation, national competition authorities must act in a transparent manner. Transparency in this sense means that 'the processes through which public authorities make decisions should be understandable and open, the decisions themselves should be reasoned and as far as possible, the information on which the decisions are based should be available to the public'.[139] The first part of this definition relates to 'procedural transparency', which requires procedures within a governmental body to be fair, accessible and open, while making sufficient provision for consultation and stakeholder participation.[140] Secondly, it contains the obligation to state reasons for decisions, and more importantly: to allow stakeholders to have access to the information underlying such decisions.[141] In that sense, it has a clear link with the procedural right to equality of arms, which allows those opposed to a decision to construe a reasoned argument.[142] As a more active obligation, transparency compels competition authorities to inform the public of their decisions – for instance, through understandable general press releases. Especially with regard to the latter two obligations (to grant access to documents and to inform the public) the principle of transparency can be at odds with the requirements of confidentiality and the protection of sensitive information, and even the presumption of innocence flowing from the fundamental rights catalogues.[143] This becomes even more pressing when transparency leads to 'naming and shaming', which means that public authorities use the power of publications as a leverage or as an additional punishment for the offender.[144] Apart from that, too much transparency could also lead to a culture of risk-avoidance and have a crippling effect on enforcement.[145] To avoid these negative consequences, a fair balance must be struck between the obligation to enforce in a clear, accessible and informative manner and the other interests.

Accountability and transparency in the framework for enforcement

The principle of accountability counterbalances the independence of the competition authority. The authority is responsible for its actions, not only to the Ministry and the

137 See Ottow 2015.

138 Addink 2013, p. 89. Addink also names other developments that illustrate the need for transparency: developments that illustrate the need for transparency: internationalisation, discretion and public/private partnerships. See further: Harlow & Rawlings 2009 and Roberts 2006.

139 European Ombudsman, FIDE Report 1998, The citizen, the administration, and Community Law, Stockholm 1998. In the new Ombudsman code transparency is described as follows: 'Civil servants should be willing to explain their activities and to give reasons for their actions. They should keep proper records and welcome public scrutiny of their conduct, including their compliance with these public service principles.' European Ombudsman, *The European Code of Good Administrative Behaviour*, 2013.

140 Ottow 2015 and Prechal & de Leeuw 2008, p. 225 and further.

141 Access to documents as a part of transparency was first recognized in the field of competition law in the 1960s. See Prechal & de Leeuw 2008.

142 See Chapter 3, section 3.6 below and Addink 2013, p. 90.

143 See in this respect for instance Bronckers & Vallery 2011.

144 Ottow 2015. See also Michiels 2007, Van Wingerde 2013 and Doorenbos 2003.

145 See for a more detailed discussion of the negative consequences of transparency: Birkinshaw 2006 and Lessig 2009.

companies under review, but also to the general public and to the judiciary. In order to facilitate accountability, enforcement must take place in such a way that the public can learn about it, not under the radar. This is relevant for enforcement practice when it comes to the use of instruments that do not yield some form of publicly available notifications or decisions. The fact that publicity and openness contribute to accountability also connects with the most important precondition for accountability: transparency. Under this principle, the competition authority is required to provide an insight into its processes, procedures and decision-making structures, as well as being required to state the reasons for its decisions so that they are open to scrutiny. Again, the enforcement instruments that do not yield reviewable decisions can be in tension with this principle. Apart from that, the procedures for new enforcement tactics and instruments should be sufficiently clear before applying them in practice. The boundaries of transparency are found in the fundamental rights of those under scrutiny. When transparency is used as a sword instead of a shield, tension can be created between this principle and other safeguards.[146]

Instinctively, accountability and transparency have a safeguard function, in the sense that the actions of the independent authority with wide-ranging powers are open to review by the judiciary, by politics, by the market and by consumers. It is, as was mentioned frequently above, a counterbalance to unrestrained government action. However, transparency and accountability are equally capable of increasing the effectiveness of enforcement policy, either by appealing to an affirmative basis to comply, or by explaining and illustrating the costs of non-compliance.[147] Apart from that, a competition authority that has an open attitude towards its working procedures and its outcomes and includes others in its decision-making procedures (whether it is beforehand or afterwards) is likely to have more social support, to enhance controversial procedures in the future,[148] and is likely to act more effectively because of it.

3.6 Rights of Defence

The rights of defence are part of a broader catalogue of fundamental rights, which are codified in the Charter of Fundamental Rights and the European Convention on Human Rights,[149] and they are recognized as fundamental principles of Union law.[150] What is generally called 'fundamental rights' can be divided into three categories.[151] The first consists of economic and property rights (for instance, the right to property or the freedom to trade), the second of civil and political liberties (for instance, human

146 See for some considerations about this topic Schinkel 2012.

147 This is part of the requirement of clarification, as discussed above.

148 The 'learning effect' as described by Bovens 2007. He also identifies accountability as being vital to democratic control and as a countervailing power. Apart from that, he finds an effect on legitimacy and that accountability can serve as a catharsis.

149 Charter: Article 41 (good administration), Article 42 (access to EU documents), Article 47 (effective remedy and fair trial), Article 48 (presumption of innocence and rights of defence), Article 50 (*ne bis in idem*).

150 CJEU 32-62, *Maurice Alvis v Council of the European Economic Community*, and more recently CJEU C-28/05, *Dokter*.

151 Tridimas 2006, p. 307.

dignity, the freedom of expression and the prohibition of sex discrimination) and the last category – which is central to this framework – consists of the rights of defence.

There is no definitive catalogue of what the rights of defence consist of today.[152] In the broad sense, the rights of defence entail an array of procedural rights and guarantees, such as the right to effective judicial review, the right to an effective remedy, the right to a decision within a reasonable time, protection against self-incrimination, the right to be heard, the right to legal representation and legal professional privilege, the obligation for authorities to state reasons for decisions, the principle of proportionality, the right to translation, limits on investigatory powers, the principle of *nulla poena sine lege*, the principle of *non bis in idem*, the prohibition of an abuse of information, the principle of the impartiality of decision-makers.[153]

In this framework no explicit classification of rights of defence is pursued; account is taken of all rights of defence, regardless of their categorization or label. However, the right to be heard, protection against self-incrimination and the principle of equality of arms are highlighted, as they flow from Article 6 of the Convention and Article 47 of the Charter. The right to an effective remedy, which flows from these Articles as well, is covered in different parts of this framework.[154] Before going into the content of these rights and their meaning for competition procedures, it is important to illustrate the position of rights of defence in the broader catalogue of fundamental rights and to explore – to a limited extent – the system of the protection of fundamental rights in the European Union and its Member States.

3.6.1 The Protection of Fundamental Rights in General

In the European legal order, the protection of fundamental rights was initially based on case law. Early on, the Court of Justice recognized fundamental rights as being general principles of Union law, the observance of which is required.[155] The introduction of the Charter of Fundamental Rights (the Charter) was seen as a new step towards the strengthening of the protection of fundamental rights within the Union.[156] The Charter was not intended to create new fundamental rights, but to make existing rights more visible in the European Union.[157] The Charter is only applicable insofar as Member

152 Some have interpreted the rights of defence quite strictly, close to the interpretation by the Court of Justice. See Tridimas 2006, pp. 372-373, who considers the following rights to be corollary to the rights of defence: the right to be heard, the right to be assisted by a lawyer, legal professional privilege and protection against self-incrimination. Also Jans et al. 2007, who proposes the following as 'sub-principles' of the rights of defence: the right to be informed, including access to the file, the right to the confidentiality of business secrets and other confidential information, the right to sufficient time to prepare a defence, the right not to incriminate oneself, legal assistance and legal professional privilege.

153 Kerse 2000, p. 206.

154 See sections 2.1.2 and 2.1.3 above (where the right to an effective remedy flows from the principle of effectiveness of European law, and is included in the legal approximation of effectiveness). See section 3.5, where the right to an effective remedy can be understood as part of the principle of accountability.

155 Cases: CJEU 5/88, *Wachauf*, Case C-274/99P, *Connolly v Commission* and CJEU C-94/00, *Roquette Frères*.

156 See, more in general, on the status and the strength of the Charter: De Vries 2013 or De Vries, Weatherill & Bernitz 2015.

157 Charter, preamble, p. 8. Article 6(1) TEU indicates that the rights in the Charter are indeed recognized by the Union, and that the Charter has the same legal value as the Treaties.

States implement or act within the scope of Union law.[158] Apart from the Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), to which the Member States of the European Union are contracting states, also guarantees the protection of fundamental rights.[159] National competition authorities must therefore take account of the rights as guaranteed by the Convention when enforcing competition rules and to take account of the rights as guaranteed by the Charter when it comes to the enforcement of European competition law in particular.[160] In theory, this overlap in the protection of rights does not need to be a problem. Article 52 (3) of the Charter provides that:

> 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention […], the meaning and the scope of those rights shall be the same as those laid down in the said Convention. This provision shall not prevent Union law providing more extensive protection.'

The level of the protection of fundamental rights within the European Union cannot therefore be lower than the protection provided for by the Convention.[161] For ascertaining this, account must be taken of the text of the Convention, as well as of the case law of the Strasbourg Court.[162]

When it comes to the protection of rights as guaranteed by the Convention, the most extensive protection is provided where a criminal charge is concerned. The existence of a criminal charge needs to be determined in the light of its classification

158 Article 51(3) of the Charter. When it comes to the discussion of *national* enforcement practice, there is thus a significant overlap between the Charter and the Convention, as Member States are subjected to both regimes. This makes this discussion slightly different from the doctrine that focuses on the enforcement practice of the Commission alone.

159 European Convention on Human Rights (Convention). Mainly Article 6 (the right to a fair trial), Article 7 (no punishment without a law) and Article 2 of Protocol 7 (appeal in criminal matters).

160 Article 51(1) Charter. See also CJEU C-617/10 *Åkerberg Fransson* and CJEU C-399/11, *Melloni* for the scope of application of the Charter. The question is, however, whether national competition authorities can completely disregard the Charter when applying national competition rules only. Note that some procedural rights are safeguarded by procedural rules accompanying the competition acts of the Member States. For the Netherlands: Articles 51 and 53 *Mededingingswet* (legal professional privilege and privilege against self-incrimination). The right to be heard is incorporated in the General Administrative Law Act (*Algemene Wet Bestuursrecht*), but applies to certain actions in the field of competition law in particular: Articles 55a(3), 89c(3) and 89d(3). For the United Kingdom: Articles 26, 30, 46-49 and 55-57 Competition Act 1998. For France: Rights during investigations: Titre V of the Code de Commerce, adversarial proceedings: Article L.463-1 of the Code de Commerce and the rights of objection and appeal: Chapitre IV of Titre VI of the *Code de Commerce*.

161 The ECHR made clear in its case law that it considers the level of protection as guaranteed by the Union to be equivalent to the system of the Convention. ECtHR Case *Bosphorus v Ireland*, Application no. 45036/98, 30/06/2005, paras. 165 and 155. See also De Vries 2013b.

162 See Court of Justice: CJEU C-279/09, *DEB v Bundesrepublik Deutschland*, para. 35.
Even though the national courts can address claims concerning a breach of the Convention's articles, the Court of Justice has no jurisdiction to apply the Convention directly, and therefore also has no duty to do so. The Court of Justice has, in some instances, been criticized for a failure to observe ECtHR judgments (for instance, in the case of CJEU 60/92, *Otto v Postbank*, in which the Court of Justice took no account of the ECtHR in *Funke v France* (ECtHR Case *Funke v France*, Application no. 10828/84, 25/02/1993), but adhered to its own (earlier) interpretation in Orkem (CJEU C-374/87, *Orkem*). The intended accession of the European Union to the Convention will change this (see Article 6(2) TEU, which has been stalled by the opinion of the Court of Justice, see Opinion 2/3 of the Court of 18 December 2014, pursuant to Article 218(11) TFEU, made on 4 July 2013 by the European Commission).

under domestic law, the nature of the offence, the purpose of the penalty, and the nature and severity of the penalty.[163] When the penalty in question is a fine, it is regarded as a *criminal* penalty if it is meant to punish the infringer and to deter reoffending.[164] With regard to competition law in particular, the Strasbourg Court has ruled that a distinction must be made between 'hard core criminal law' and 'cases not strictly belonging to the traditional categories of criminal law'.[165] Competition law enforcement arguably belongs to the latter category.[166] A sanction for the infringement of competition law, although being qualified as an administrative law penalty under domestic law, can constitute a criminal charge because of its severity and its deterrent effect.[167] The Court of Justice has not yet explicitly decided as such in it case law, but several AGs have.[168] Thus, competition law enforcement is regarded as being of a semi-criminal law nature, with the imposition of a severe administrative fine constituting a criminal charge. It has to be determined on an individual basis whether the alternative enforcement instruments as applied by the national competition authorities constitute criminal charges for the purpose of the Convention.

3.6.2 Right to Be Heard

The right to be heard lies at the heart of the rights of defence, and has to be respected in competition law procedures because of the adverse effects these might have on the companies and persons involved.[169] The right to be heard can be invoked as soon as it becomes clear that the procedure that is followed will lead to a decision that affects the legal position of a company or a person involved, even if they are not the addressees.[170] This implies that the right to be heard could also apply to third parties; companies and

163 ECtHR Case *Engel and others v the Netherlands*, Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8/6/1976, para. 81. But this concerns the criminal nature alone. The ECtHR has established that there is a *charge* in case there is an 'official notification given to an individual by the competent authority of an allegation that he is suspected of having committed a criminal offence', see ECtHR Case *DeWeer v Belgium*, Application no. 6903/75, 27/02/1980, paras. 42, 44 and 46.

164 ECtHR Case *Bendenoun v France*, Application no. 12547/86, 24/02/1994.

165 ECtHR Case *Jussila v Finland,* Application no. 73053/01, 23/11/2006, para. 45. See also Allena 2014, who tries to classify the scope of application of Article 6 of the Convention in administrative law.

166 Even though this can be challenged as well. See Bronckers 2012 for an overview of the development of the Strasbourg Court's case law on this point. Regulation 1/2003 denies the criminal character of infringement decisions in Article 23(5).

167 ECtHR Case *Menarini Diagnostics v Italy*, Application no. 43509/08, 27/09/2011.

168 See for instance the conclusion of AG Kokott in Case C-681/11, *Schenker.* The Court of Justice did not quote *Menarini* in comparable Union cases (C-386/10 P, *Chalkor* and C-389/10 P, *KME Germany*), nor did it admit that competition law constitutes a criminal charge in the light of the ECHR (C-681/11, *Schenker*). This could be due to the fact that Article 23(5) of Regulation 1/2003 explicitly states that decisions taken pursuant to this article are not of a criminal law nature.

169 See Case C-85/76, *Hofman LaRoche*. Before that, In the famous conclusion in the *Transocean Marine Paint* case, AG Warner made an extensive analysis of the laws of the Member States, in his search for the recognition of the most central right of defence: the right to be heard (see the Conclusion of AG Warner in CJEU 17/74, *Transocean Marine Paint*).

170 See in more detail Wils 2011 or Beumer 2014. See earlier Tridimas 2006, p. 379.

persons that are not subjected to a decision, but who are affected by it.[171] In competition law procedures, it would seem that the right to be heard could be invoked from the moment that the statement of objections is sent. From that point onwards, it is clear that the legal position of the companies involved will change in the (near) future. The objective of the right to be heard is to make sure that companies or persons can effectively and properly put forward their own case and that they can make their views known, either in writing or orally.[172] In its most basic form, the right to be heard thus requires a notification of objections, and a platform for the parties concerned to make their views known.

The right to be heard is in itself a general principle of Union law, and is safeguarded by the Charter.[173] Furthermore, the right to be heard is included in Article 27 of Regulation 1/2003, and in Chapter V of Regulation 773/2004, when it comes to the enforcement practice of the Commission.[174] The right to be heard can also be seen in conjunction with Article 6 of the Convention, the right to a fair trial. Its central element, in that respect, is the right to a public hearing for the parties concerned.[175] Other elements extend to effective access to the courts, protection against self-incrimination, equality of arms and the right to adversarial proceedings, the right to a reasoned judgment and intelligible notification at the time of the charge,[176] all of which overlap – to some extent – with the broader categories of rights discussed in this section.[177]

3.6.3 *Protection against Self-Incrimination*

Self-incrimination entails the obligation or pressure to provide information that implicates them in an infringement. In line with the rights of defence, legal and natural persons cannot always be compelled to do so, because it is usually incumbent upon

171 Third parties in competition cases have a right to defend their legitimate interests. They usually do so by filing complaints with the competent authority, which gives them a limited right to be heard or to access the files of a given case (see Regulation 773/2004, Articles 6, 7 and 8). Nevertheless, with regard to the right to be heard, the Court of Justice has recognized that it is impossible for competition authorities to follow up on every complaint. Therefore, setting priorities is allowed. Still, if a complaint is rejected because of the fact that it is not a priority, the competition authority is still under an obligation to provide a fully reasoned decision for the rejection (see General Court, Case T-24/90, *Automec II*).

172 See for instance ECtHR Case *Jussila v Finland,* Application no. 73053/01, 23/11/2006, in which the application for an oral hearing was rejected. See in more detail: O'Boyle et al. 2014. See also, but earlier Tridimas 2006, p. 386.

173 Article 41(2) Charter. This does not mean, however, that the right to be heard, as a general principle of Union law, cannot be restricted when other objectives are of overriding importance. Jans et al 2007, p. 190, and CJEU C-28/05, *Dokter*.

174 Regulation 773/2004.

175 ECtHR Case *Axen v Germany*, Application no. 54999/00, 27/02/2003. See also Mole & Harby 2006, p. 23.

176 See Mole & Harby 2006, pp. 39-60, who quote, amongst others, the following cases: ECtHR Case *Golder v UK, Application* no. 4451/70, 21/2/1975 (effective access to court), ECtHR Case *Ekbatani v Sweden*, Application no. 10563/83, 26/5/1988 (presence at the proceedings), ECtHR Case *Saunders v United Kingdom*, Application no. 19187/91, 17/12/1996 (protection from self-incrimination), ECtHR Case *Hadjiannastasiou v Greece*, Application no. 12945/87, 16/12/1992 (right to a reasoned judgment).

177 In the actual evaluation in the chapters of Part II and Part III, this categorization will not be applied so strictly. Instead, reference is made to the different elements of these rights, with which enforcement procedures might be at odds.

the administrative authority to prove the infringement.[178] The protection against self-incrimination was first dealt with, on a European level, in the *Orkem* case, which concerned the behaviour of the Commission in competition proceedings. In this case, the Court of Justice devised a 'qualified privilege against self-incrimination', entailing that the Commission can require companies or persons to produce factual information regarding an infringement, but that it cannot require them to produce information regarding their objectives, or information that would constitute an admission of involvement.[179] The protection against self-incrimination under the Strasbourg case law goes somewhat further, protecting the right to remain silent in criminal proceedings, except for information that exists independently from the will of the suspect – such as documents obtained by a warrant.[180] This means that, under the Convention, persons cannot be compelled to answer questions regarding a competition infringement, because their desire to remain silent has to be respected – assuming that a competition procedure is, in fact, a criminal charge. It seems that there is a fair amount of tension between the interpretations of the prohibition of self-incrimination and the right to remain silent. Since all Member States are contracting states to the Convention, the more extensive protection is already required on a national level. On a European level, Member States are allowed to offer a more extensive protection of procedural rights, as long as the effective application of competition rules is not jeopardized.[181]

3.6.4 Equality of Arms

The condition of equality of arms entails that 'everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage *vis*-à-*vis* his/her opponent'.[182] This means that a company or a person involved must have knowledge of the evidence or the observations filed, and that exonerating evidence must be revealed.[183] For that reason competition authorities have to grant access to the files to the companies in question, save for business secrets. Both incriminating and exculpatory evidence has to be revealed, but incriminating evidence only insofar as it is relied upon in the final

178 However, it has been argued that a distinction should be made between natural and legal persons on this point, as the protection against self-incrimination should not apply to legal persons. See Wils 2003, Wils 2011 and the Opinion of AG Geelhoed in CJEU Case C-301/04 P (*Commission v SGL Carbon*). In this thesis, however, the decision has been made to apply these rights to both categories, taking account of the different stature and position of companies in this discussion.

179 CJEU C-374/87, *Orkem*. This is a qualified right, see Tridimas 2006, p. 374.

180 ECtHR Case *Saunders v United Kingdom*, Application no. 19187/91, 17/12/1996. However, it is not the same as the right to silence. This is not absolute and negative consequence can be drawn from it in certain circumstances. See ECtHR Case *John Murray v UK*, Application no. 18731/91, 8/2/1996.

181 Article 35(1) of Regulation 1/2003. However note that the Court of Justice refuted an absolute right to silence in competition cases altogether, by stating that granting such a right would undermine the effective application of European competition rules. General Court, Case T-112/98, *Mannesmannröhren-Werke AG v Commission*, paras. 71-73. Also, the qualified privilege against self-incrimination only applies insofar as this is protected under national procedural rules. CJEU C-60/92, *Otto v Postbank*, paras. 11-12.

182 ECtHR Case *de Haes & Gijsels v Belgium*, Application no. 19983/92, 24/2/1997.

183 ECtHR Case *Ruiz Mateos v Spain*, Application no. 12952/87, 23/06/1993 and ECtHR Case *Jespers v Belgium*, Application no. 8403/78, 1981.

decision.[184] The right to access the documents in a given case also extends to third parties who are affected by a decision. In competition cases, this usually concerns competitors or (groups of) consumers, who wish to start an action for compensation of damages. The right to have access to documents for third parties in compensation cases is governed by the Directive on Antitrust Damages Actions.[185]

In addition to having access to documents, companies involved in a competition procedure must be able to oppose evidence or objections made against them. The right to adversarial procedures, as protected by the Convention, grants the right to comment on the objections or the evidence produced.[186]

Rights of defence in the framework for enforcement

The rights of defence, as part of a broader catalogue of fundamental rights, have to be taken into account when enforcing competition law.[187] They are safeguarded on a national level and they are included in the Charter (when acting within the scope of Union law) and the Convention (insofar as a criminal charge is involved). For the application of the latter, the central question is whether the instrument at hand constitutes such a criminal charge. It has to be reviewed on an individual instrument level whether or not this is the case according to the criteria mentioned above. In some cases, this will be more or less evident (for instance, when a fine is imposed), but in other cases the criminal nature of the charge will be debatable (for instance, where there is reputational damage instead of a financial penalty).

Important rights of defence are the right to be heard, the protection against self-incrimination and the principle of equality of arms. Regarding the first and the latter, the tension between the protection of these rights and the effectiveness and efficiency of enforcement could come into play when the procedures for an alternative enforcement instrument are not (yet) fixed, or the instrument relies on informal contact between the competition authority and the companies involved. Apart from their rights, the competition authority has to take account of the extent to which a certain course of action could harm the rights of third parties – for instance, where the possibility of claims for damages are concerned. The second right listed, the protection against self-incrimination, comes into play when a competition authority applies more negotiation-oriented or settlement-like tactics to enforcement. Companies should not feel pressured to incriminate themselves, and it should be reviewed whether this is the case for the application of each of these types of instruments.

---

184 These criteria come from CJEU Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission of the European Union*. Access to the files as part of the rights of defence was first recognized by the General Court in the cases of ICI and Solvay (T–30/91 and T–36/91) and by AG Leger in his opinion in BPB Industries and British Gypsum (C-310/93P). Note that, initially, the Court of Justice did not recognize the right to access the files to be an integral part of the rights of defence (see CJEU Joined Cases 43 and 63/82, *VBVB and VBBB v Commission*).

185 Directive 2014/104/EU (actions for damages). See for a discussion Hüschelrath & Schweitzer 2014, Burrows & Sanders 2015 and Wardhaugh 2013.

186 ECtHR Case *Krcmar v Czech Republic*, Application no. 35376/97, 3/3/2000.

187 With regard to the effectiveness of European law in particular, it has been held that limitations upon fundamental rights are only acceptable when provided for by the law. Regulation 1/2003 can be regarded as such. See Article 52(1) Charter and CJEU Joined Cases C-92/09 and C-93-09 (*Schecke*).

On an overarching level, the importance attributed to the rights of defence has to be weighed against the effectiveness and efficiency considerations of enforcement. In this balancing act, it should be considered that competition authorities at least respect the *essence* of the contested right – the core of which cannot be breached.[188] As a general rule, one could state that the more intrusive and compulsory the enforcement instrument is, the more weight should be attributed to the rights of defence. Account should be taken, however, of the circumstances in which an enforcement instrument is not intrusive or compulsory on paper, but is experienced in practice as such. In those cases, the balance between effective enforcement and the protection of the rights of defence should be made on an instrument level. Furthermore, it should be noted that effective enforcement does not always *come at the cost* of rights of defence, but that rights of defence can actually *contribute* to it. The protection of the rights of defence is connected with the notion of fair procedures, which could increase the legitimacy of the competition authority. With increased legitimacy, the competition authority enjoys a broader social mandate and could rely on more willingness to cooperate on the part of companies.

4. SYNTHESIS AND LEVELS OF ENFORCEMENT

This chapter has presented a framework for the evaluation of enforcement practice. This framework is derived from national and European requirements placed upon enforcement, supplemented by interpretations of these principles as put forward in legal doctrine. This framework is intended to be universal, which means that it can be used on the different national levels as well as on the European level. The main dividing line between the different requirements is the tension between the instrumental and safeguard functions of the law. It is argued that these functions are inherently intertwined and also feed into each other through the principle of legitimacy. This section presents an overview of the requirements for enforcement that can be derived from the principles as interpreted above.[189] Furthermore, it recalls the tensions and connections between the different parts of the framework, in order to facilitate the balancing act that is performed in the other chapters of this thesis. Lastly, it is recognized that a normative framework evaluating enforcement practice should not just focus on individual enforcement instruments. The enforcement choices made by competition authorities have an effect on and are affected by enforcement policy as a whole, the institutional environment of the competition authority and the rules that the authority has to enforce. The connection between the normative framework for enforcement and these other levels influencing enforcement practice is discussed concisely below as well.

188 See Article 52(1) Charter: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the *essence* of those rights and freedoms […].'

189 The list of safeguards as depicted here is not tested point for point in the following chapters, but is rather tested on an aggregate level. The next chapters will explore where the most tension is within the different alternative enforcement instruments, and whether there is a balance between both sides of the framework. Pressing points are discussed, points that are less pressing are not. Points that hold true on a more aggregate level (the policy- or agency-levels), are touched upon elsewhere. This is a methodological choice (see Annex I – Methodology in more detail), made with regard to the legibility of the text and to avoid box-ticking research (3 Member States, 4 types of alternative enforcement instruments and 11 normative requirements).

4.1 Instrumentality Requirements

Enforcement tools and strategies are used as instruments to achieve the goals that competition law pursues. Under certain circumstances, competition authorities are expected to be more effective in achieving these goals than under others. As an overall requirement, enforcement should be efficient. The more cases can be dealt with at a certain cost of resources, the more effective the competition authority can be. Lastly, when enforcing competition law competition authorities should enjoy a degree of flexibility in making decisions such as where and how to focus enforcement action. The specific requirements to be derived from these principles are depicted below in a concise manner. Their full interpretations are, of course, found above.

Effectiveness
- The outcomes of enforcement should outweigh the costs (economic effectiveness).
- European competition rules should be applied uniformly, according to the standards connected to this notion (European effectiveness).
- Competition authorities should be independent, be held accountable and be equipped with sufficient resources and enforcement powers.
- Competition authorities should act in a transparent, professional and cooperative way, following an enforcement strategy.
- On an aggregate level, enforcement policy should strive for a balance between deterrence and compliance strategies.

Efficiency
- Efficient enforcement instruments decrease costs or lead time, while maintaining similar results.

Flexibility
- Competition authorities should enjoy a degree of flexibility in selecting and targeting their enforcement actions.
- Enforcement instruments should be adaptable and pliable to the situation they are applied in.

4.2 Safeguards

Competition authorities cannot strive for effectiveness alone, without taking stock of other interests that play a role in a democratic society. Legal safeguards should limit their enforcement powers. Some of these legal safeguards are concerned with the mandate on the basis of which competition authorities can take action, such as the principle of legality and – to a certain extent – the principle of legal certainty. Other safeguards are more concerned with the procedures for decision-making, in order to ensure that they are fair and up to certain standards. These safeguards are found in the principle of legal certainty (again, but this time in its specific expressions of irrevocability, non-retroactivity and the protection of legitimate expectations), the principle of proportionality and the principles of accountability and transparency. Lastly, legal safeguards should ensure that the enforcement of competition law does not encroach upon the rights and freedoms of others, which is protected by the rights of defence. The specific requirements to be derived from these principles are depicted below in a concise manner. Their full interpretations are, of course, found above.

Legality	• Enforcement action should only be taken when there is an infringement of the law. • Enforcement action must be executed in a way that is proscribed by the law.
Legal certainty	• Competition authorities should not apply enforcement instruments in an arbitrary manner. • Decisions of a competition authority should not be altered or overturned outside of the objection and appeal phases. • Legitimate expectations derived from enforcement action should be protected, but they should be anticipated by means of an explanation and transparency in the decision-making process.
Proportionality	• A balancing test should be performed when reviewing which enforcement measure would be most suitable in a given case.
Independence	• Decision-making should be free from outside pressure: capture should be avoided. • Decision-making procedures should safeguard impartiality by taking measures that separate investigation from sanctioning.
Accountability & Transparency	• Competition authorities are required to provide an insight into their processes, procedures and decision-making structures. • When taking a decision, it is necessary to state the reasons for its decisions so that they are open to scrutiny.
Rights of defence	• Procedures should be adversarial, in which competition authorities should grant parties the opportunity to be heard. • Enforcement procedures should not compel parties to incriminate themselves, nor should the behaviour of competition authorities be perceived as pressure to do so. • Parties should have access to the documents underlying the decision. • Account must be taken of the extent to which a certain course of enforcement action could harm the rights of third parties.

4.3 Tensions between the Two and the Function of Legitimacy

It is easy to deduce from the foregoing that there is a certain tension between these different criteria. The main tension is between the set of requirements that represent the instrumental function and the safeguard function of the law. These functions can be conflicting at times. A too heavy focus on the instrumental side of the law might threaten the safeguards, but a safeguard-oriented approach might hamper instrumentality. To complicate matters even further, some of the criteria identified can be interpreted as instrumental requirements, but also as safeguards – or the other way around. There is no immediate resolution for these tensions; it should be determined on an individual basis what constitutes the ideal balance between instrumentality and safeguards. The hypothesis is that this ideal balance varies from Member State to Member State. This makes a comparison difficult, yes, but it also creates a learning opportunity, as from this balance recommendations can be drawn that might improve existing procedures in the other Member States. Apart from reviewing the alternative enforcement instruments according to the criteria mentioned above and striking a balance between the two, enforcement instruments should be considered with regard to their effect on enforcement

policy as a whole, the agency as a whole and the interpretation of competition rules. This is further elaborated upon below.

Legitimacy is considered an overarching notion that connects the safeguard requirements of the framework with the instrumental requirements. It has been argued that the fulfilment of the safeguard requirements increases procedural and throughput legitimacy, thus generating public support for its actions and makes it more likely to achieve effective outcomes. However, again the balance between instrumentality and safeguards is key. A distorted balance between instrumentality and safeguards caused by a one-sided focus diminishes legitimacy. The principle of legitimacy thus connects the instrumental and safeguard sides of the framework in the sense that it secures a balance between the two.

4.4 Interplay with Other Levels Relevant to Enforcement

As noted above, the focus on enforcement practice causes the framework to zoom in on enforcement on an instrument level, reviewing the application of a particular instrument in comparison with its international counterparts. However, there are more levels on which the decisions made on the instrument level have an effect, and which are of (indirect) importance when evaluating enforcement practice. These levels are the policy level (referring to the aggregate of enforcement instruments, including the underlying strategy), the agency level (referring to the internal and institutional design of the enforcement authority) and the rule level (formulation and current interpretation, goals).

As enforcement action does not happen in a vacuum, the choice for a certain enforcement instrument in a specific case has consequences for the execution of the overall enforcement policy, for the effectiveness and legitimacy of the agency as a whole and for the continuous interpretation of competition rules. The other way around, the rules might dictate the preferred form of enforcement action, agency effectiveness and legitimacy considerations might influence the choice for an enforcement instrument and the overall enforcement policy or strategy might indicate a preference for a certain course of action. These different levels overlap and feed into each other, for which reason it is difficult to view them separately. Even though the framework for enforcement on an instrument level will be leading for the larger part of this thesis, in the end enforcement action must be reviewed in a broader context as well. This interplay is relevant when looking at the position of alternative enforcement instruments in relation to the toolkit and goals of the competition authorities.

Dealing with the interplay between the policy level, the agency level and on the rulelevel, this section illustrates the intrinsic connection between instruments, policies, agencies and rules, and shows that choices made in specific cases could ultimately affect higher-level principles and the overall effectiveness of competition law. However, it must be noted that any distinction between these levels, even though relevant for argumentation purposes, is artificial.

Policy level

The policy level is the composite of all individual enforcement choices, viewed together as the output of the competition authority. This is not a one-way street, as enforcement policy is not just the sum of individual choices, but is usually fed by a predetermined strategy, which in its turn influences the choice of instrument in individual cases. On a policy level, alternative enforcement instruments are viewed in conjunction with other enforcement instruments in order to determine what the balance between them is (in terms of use and output) and what the effects of this balance could be. Ideally, the balance between the different enforcement instruments and the generated effects corresponds with the competition authorities' enforcement strategies. These strategies usually encompass a sense of efficiency and an approach to being effective as an authority, counterbalanced by safeguards. The individual enforcement choices taken together might paint a different picture of effectiveness and overall legitimacy, as the compound of enforcement choices has a different weight than the choices made in individual cases alone. Striving for greater policy coherence could incite a competition authority to define its aims more clearly, to set priorities and design programmes appropriately, and to develop a well-recognized brand.[190]

Agency level

The agency level concerns the institutional and internal design of competition authorities and their relationships with the government, the judiciary, the market parties and consumers. It is closely linked to the policy level because the effective functioning of an agency presumes a well thought out enforcement policy as well. The way competition authorities are organised on an agency level is intertwined with the choices they make on an instrument level. First of all, the way the authority is set up might streamline enforcement and provide for internal procedural safeguards – such as the separation of functions as discussed above. Secondly, institutional design can influence the decisiveness of a competition authority and prescribe the portfolio assigned to them. Also, the relationships with different stakeholders might influence the focus of enforcement work and might even influence the method of intervention. The other way around, the application of certain enforcement instruments might bypass existing decision-making structures or deepen the relationships with different stakeholders at the risk of capture. It is therefore relevant not only to look at the enforcement instruments by themselves or in their combined policy, but in relation to how an agency should position itself in a democratic society.[191] After having evaluated the instruments in their own right, it is therefore indispensable to review the consequences of their use in this broader perspective.

Rule level

On a rule level the performance of competition authorities is dependent on the way the rules are drafted and the room for interpretation left to them. The formulation of the rules that the authority has to enforce determines – to a large extent – the way the authority can enforce it. If the law is clear in describing the prohibition and the consequences,

190 See also Hyman & Kovacic 2013.

191 Athanassiou speaks of the 'fourth branch of government' and the reluctance to create an unelected fully independent agency that can act as such. See Athanassiou 2011, p. 5.

the authority has little choice other than to do as the law prescribes. Doing otherwise, so overstepping its room for interpretation, could lead to results that are not perceived as legitimate. When rules are drafted broadly, the authority has a lot of discretion in determining its interpretation and approach. This might increase its flexibility and responsiveness, but it places an added emphasis on the safeguards surrounding the interventions. The other way around, the enforcement choices an authority makes also influence the development of the interpretation of the law. If an authority makes use of informal instruments, or is not transparent about the application of the law, the rules are not clarified publicly. It also detracts from the authority's accountability, because it becomes harder for the judiciary, the lawmakers or the public to scrutinize its decisions. This hampers further legal development.

In competition law, the rule level is very much connected to the discussion about the goals of competition law, which is of particular importance for enforcement practice. First of all, it has an interpretational function, both for competition authorities as well as for judges.[192] The content – and thereby the applicability – of competition rules are clarified when looking at the goals of competition law. Secondly, the goals of competition law are – or should be – the competition authority's starting point in creating enforcement policy. Ideally, enforcement policy is aligned to the goals of competition law. The questions of 'what', 'how' and 'when' to enforce could, to a large extent, be answered by looking at the goals of competition law.

5. FINAL REMARKS

At the end of this chapter, it is safe to say that the normative framework (that in the remaining chapters will be the yardstick for testing national enforcement practice) is sufficiently outlined.[193] It has been discussed that this framework relies on the balance between requirements that are *instrumental* to enforcement and *safeguards* for the companies involved. This is consistent with the theory of the Utrecht School of Public Economic Law, to which the framework devised here makes a contribution.[194] In addition, this chapter has presented 'legitimacy' as a connecting principle, based on the assumption that, in an optimal balance between instrumentality and safeguards, the legitimacy of enforcement can be enhanced. This is important to keep in mind, as a too heavy focus on either side of the framework diminishes the relevance of the other, and thus decreases legitimacy. At the risk of sounding repetitive (but noting the important role that these criteria will play in the next chapters), the instrumentality requirements identified here are effectiveness (in its various interpretations: outcome effectiveness, effectiveness of European law, legal approximation of effectiveness and effective enforcement[195]), efficiency and flexibility. The relevant safeguard requirements are

192 See Parret 2010, pp. 339-376 and Stucke 2012, p. 558.

193 As is repeatedly mentioned in the following chapters of the thesis, this normative framework *underlies* the evaluation of the different alternative enforcement instruments and the practice of the competition authorities in general.

194 See section 1.2 above.

195 In the remaining chapters, explicit reference is made to the type of effectiveness meant there. In this chapter the statement is posited that these interpretations are not mutually exclusive, but rather complementary, and that in different situations different considerations may apply.

legality, legal certainty, proportionality, independence, accountability and transparency and the rights of defence.

This chapter also demarcates the end of Part I of this thesis and the transition into Part II. In this second part, alternative enforcement instruments are discussed in their national context, evaluated against the normative framework and compared with each other. This leads to the identification of certain 'policy considerations': tensions or problems that – with the normative framework in mind – are common to the use of these alternative enforcement instruments and which merit further evaluation. This evaluation takes place in Part III of the thesis, in which the national practice plays a secondary role to the overarching observations made with regard to alternative enforcement practice. The normative framework presented in this chapter therefore plays a dual role: it underlies the evaluation of the individual instruments as applied on a national level, and it facilitates a principled discussion of the most common bottlenecks within these different procedures.

It is clear that a large part of this discussion focuses on individual enforcement instruments. However, the following chapters also lead to observations that can be made with regard to the policy level, the agency level and the rule level. These levels are not disregarded, but returned to in Chapter 9. In the following chapters, the alternative enforcement practice in the Member States is discussed on an instrument level.

Part II

NATIONAL PRACTICE AND COMPARISON

Chapter 4

NEGOTIATED PROCEDURES

The previous chapter introduced the normative framework that underlies this thesis. This normative framework, which builds upon the balance between the instrumental- and safeguard functions of law, is intended as a tool to evaluate alternative enforcement instruments in the Member States. The first category of alternative enforcement instruments is discussed in this chapter: negotiated procedures. This chapter does not discuss all kinds of negotiated procedures (for instance, the commitment decision is expressly omitted – as is explained below), but rather draws from different examples of national practice. These national instruments are reviewed as to their compatibility with instrumental and safeguard requirements, on the basis of which advantages and pitfalls are indicated and recommendations are made. Also, the 'testing' of these instruments with the normative framework in mind facilitates a transnational comparison. The findings of this chapter have to be seen in conjunction with the findings of the other chapters that review alternative enforcement instruments. Together, these chapters draw a picture of alternative enforcement practice in the different Member States and help to identify how alternative enforcement instruments can be applied in a balanced way.

1. INTRODUCTION

Negotiated procedures are, essentially, enforcement procedures in which a moment is incorporated for a discussion between the competition authority and the companies under investigation other than the moments of contact that are usual in a 'regular' procedure – such as requests for information, written representations or hearings.[1] The term is derived from French practice (*procédures negociées*), where it is used to indicate the leniency procedure, the commitment procedure and the transaction. In the literature, the term 'settlement' is used as a similar overarching concept as well,[2] but because the settlement procedure is a very specific type of enforcement procedure used by different competition authorities – such as the Commission and the UK CMA below – the term negotiated procedures is used instead to avoid confusion.

Negotiated procedures are often offset against the 'fully adversarial disposal of cases' that indicates procedures in which the competition authority opens a case, carries

1 It has to be distinguished from the competitive negotiated procedures used in public procurement law as an alternative to a framework contract. See for a definition: Directive 2004/18/EC. Another definition for these types of procedures are transactional resolutions ('any resolution of competition law […] proceedings through bargaining or negotiation that results in a mutually agreed outcome […]'), see Këllezi 2014.

2 See for instance Wils 2008 or Svetiev 2013.

out an investigation, draws up a statement of objections, hears the parties and issues a final decision – often a fining decision.[3] These procedures apply by default and are only substituted with negotiated procedures at the companies' request. For that reason, in this chapter they are also referred to as 'normal' or 'regular' procedures – which, of course, has nothing to do with the frequency of their use, as it is a well-known fact that the Commission now uses negotiated procedures more often than it uses fully adversarial procedures.

1.1 Negotiated Procedures on a European Level

Also on the European level there are a broad variety of negotiated procedures. The Commission has had a leniency procedure at its disposal since 1996, allowing companies involved in a cartel to come forward, provide information about the cartel and then to enjoy immunity or a significant fine reduction in return. Apart from that, the modernisation of the enforcement regime between 2001 and 2003 incited the introduction of a new enforcement instrument, which was aimed at restoring the competitive situation on the market rather than fining the companies involved: the commitment decision.[4] In this procedure, companies would commit to certain courses of action for the future and, in return, no infringement would be found and no fine would be imposed.[5] Surprisingly, the modernisation package did not include an instrument for resolving fining procedures more quickly, even though this would increase the decision-making speed of the Commission.[6]

All in all, the Commission waited five more years to introduce a settlement-procedure to mitigate its increasing caseload.[7] Under its settlement procedure, the Commission requires a full admission of liability from the companies wishing to settle and a waiver of their right to contest the decision. This makes it unlikely for companies to appeal against the final decision on the substance, as they have themselves admitted liability.[8] In return, companies involved receive a 10% fine discount.[9] Settlement decisions are only applicable to cartel cases, 'whereas commitment decisions are appropriate in all antitrust cases except for cartels'.[10] The aim the Commission's settlement procedure

3 Distinction made by Wils 2008, p. 3.

4 This was not completely new, as the Commission already had the power to conclude ad-hoc settlements, which – in their execution – resembled commitment decisions. See more extensively Georgiev 2007 or, more recently, Wils 2015.

5 See in more detail Wils 2007, Carmeliet 2012 for the functioning of the leniency procedure. A critical review is provided in Sandhu 2007. Somewhat outside the scope of this subject the interplay between leniency and private enforcement is discussed by, for instance, Cauffman 2011 and alternatives for leniency are discussed by Abrantes-Metz & Sokol 2013. The commitment procedure and its value for enforcement is discussed in more detail by, for instance, Wils 2013 and Svetiev 2013. Schweitzer 2012 provides a general overview of national and EU case law. The developments in the field are analysed by, for instance, Cavicchi 2011, Botteman & Patsa 2013 and Lianos 2013.

6 See Chapter 2 in more detail. Admittedly, the Modernization package was not necessarily aimed at streamlining the Commission's regime, but rather at decentralising enforcement to the Member States.

7 It was stated that the Commission had become 'a victim of its own success'. See Burrichter 2006, quoting Kroes 2005 on p. 1. The legal basis for a settlement is Article 7 of Regulation 1/2003.

8 As posed by, for instance, Laina & Laurinen 2013, p. 10.

9 See more extensively Settlement Notice 2008.

10 European Commission on settlements, see: http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html.

is to create procedural efficiencies, stemming from the admission of liability and the waiver of procedural rights. The Commission states in its guidance that it explicitly does not intend to 'plea bargain', meaning that the facts and the legal qualification are not negotiable.

Since its introduction, the Commission's settlement regime has been subject to criticism. For one thing, it was expected that the procedure would not be applied very often, as its strict conditions would not be attractive enough for companies.[11] Also, it was claimed that the Commission's practice would become less transparent as a result, that there would be shift in enforcement priorities and that the Commission would actually not generate efficiencies from the application of the instrument.[12] Currently, the main criticism of the Commission's practice is that it relies too heavily on negotiated procedures. Looking at settlements only, the Commission has taken 18 settlement decisions since 2008,[13] as opposed to 40 fining decisions based on a fully adversarial procedure.[14] According to commentators, this leads to a less deterrent overall enforcement strategy, but more importantly, it might decrease the development of substantive competition law as such, as negotiated procedures are not likely to be appealed.[15]

1.2 Delineation and Set-Up

Interpreted broadly, any procedure in which there are discussions with companies on the procedural steps that follow are negotiated procedures. This means that common enforcement tools, such as leniency and the commitment procedure, are negotiated procedures as well. In the former, leniency applicants collaborate with the competition authority by providing information about a cartel in which it has been active. In the latter, companies under investigation promise the competition authorities that they will employ certain remedies – commitments – that terminate the current erroneous behaviour and improve the competitive situation for the future. Even though both procedures are used by the competition authorities under review in this thesis (the ACM, the Autorité and the UK CMA), the leniency procedure and the commitment procedure have, however, already been discussed at length in the literature and are therefore not the main focus of this chapter.[16] Whenever there is an interplay between leniency, commitments and other negotiated procedures, they are briefly discussed, as well as with regard to the competition authorities' enforcement policy as a whole.

This chapter addresses different negotiated procedures: two formalized settlement-like procedures (the French transaction and the UK settlement procedure) and a

11 Olsen & Jephcott 2010, p. 1, also Kelley 2010.
12 Georgiev 2007, pp. 1017 and further, Kelley 2010.
13 The Commission previously reached settlements with participants in cartels for DRAMs, animal feed phosphates, washing powder, glass for cathode ray tubes, compressors for fridges, water management products, wire harnesses, Euro and Yen interest rate derivatives, polyurethane foam, power exchanges, bearings, steel abrasives, mushrooms, Swiss Franc interest rate derivatives, bid-ask spreads and envelopes. See for a full list of cases: http://europa.eu/rapid/press-release_IP-15-5214_en.htm.
14 See European Commission, Report On Competition Policy 2015, p. 28.
15 For instance, Marcos 2012 and Wils 2008. This argument is returned to more extensively in Chapter 8, sections 2.5 and 2.7, or Chapter 9, section 5.
16 See footnote 6 above.

range of more informal negotiated procedures that rely on the room for discretion in rewarding cooperation under the national fining guidelines, as used in the Netherlands. The general aim of these procedures is to resolve cases in a shorter period of time, to include companies in the improvement of the competitive situation for the future, or a combination of both. The examples of negotiated procedures given in this chapter are not exhaustive, nor are they intended to be. Rather, they serve to illustrate the developments in the competition authorities under review, to compare these different approaches and to draw conclusions and recommendations from the varying national practices.

> Importantly, national practice also shows examples of fully informal contacts between competition authorities and companies. In these types of procedures, competition authorities would warn or inform companies about possible malfunctions of the market, as a result of which companies could opt to offer informal commitments to remedy them.[17] Technically speaking, this kind of enforcement action would constitute some sort of negotiated procedure as well, as companies and competition authorities deliberate on how to avoid a procedure altogether. However, as these actions are informal in nature and – more importantly – are not always published, it would be very difficult to perform an in-depth analysis like the one performed below with regard to the more formalized negotiated procedures. For that reason, informal commitments are left outside the scope of this chapter as well. Fortunately, the upsides and downsides of informal enforcement *are* addressed in this thesis with regard to individual guidance in Chapter 6.[18] To some extent, the criticism (but also the positive points) of this instrument can be connected to informal commitments as well. Additionally, attention is paid to commitments in the course of formalised procedures below.[19]

This chapter contains three main sections. Two of these describe more or less formalized negotiated procedures (the transaction of the Autorité, §2, and the settlement procedure of the UK CMA, §3) and one section explores the possibility of rewarding negotiation

17 See for instance the following informal commitments given to the ACM, on the basis of which investigations were dropped. Autoriteit Consument en Markt, Press Release 24 February 2014, 'MasterCard verlaagt tarieven voor creditcardbetalingen', concerning credit card fees. Autoriteit Consument en Markt, Press Release 25 July 2013, 'NVM vergroot transparantie op Funda', concerning the comparison website Funda. Nederlandse Mededingingsautoriteit, Press Release 13 July 2012, 'NMa accepteert maatregelen van UvA en VU', concerning University fees. Nederlandse Mededingingsautoriteit, Press Release 30 December 2010, 'NMa: meer ruimte voor concurrentie tussen verzekeraars', concerning insurance companies. Nederlandse Mededingingsautoriteit, Press Release 28 October 2008, 'NMa: toonaangevende organisaties bloembollensector stoppen advisering over productiebeperking', concerning flower bulbs. Nederlandse Mededingingsautoriteit, Press Release, 27 February 2007, 'NMa: Makelaars gaan meer werk maken van mededinging', concerning estate agents. The UK CMA also sometimes accepts voluntary commitments. See Office of Fair Trading, Case CE/9692/12 (closed on administrative priority grounds), Amazon online retailer: investigation into anti-competitive practices, October 2012. Office of Fair Trading, Press Release 39/12, 'OFT acts to boost competition in outdoor advertising', 17 May 2012. Office of Fair Trading, Visa sponsorship arrangements for Olympics 2012 (closed on administrative priority grounds), May 2011. This particular one is arguably not a voluntary assurance. Visa 'assured' that its behaviour was in line with competition law but it is unclear whether or not this was already the case. Clearer is: Office of Fair Trading, Case CE/2471/03 (closed on administrative priority grounds), Oakley Sunglasses, August 2008, which led to the adoption of a compliance programme. See on this subject also Këllezi 2014.

18 These advisory opinions are often publically available and explained more exhaustively, which makes them more suitable for the scope of this particular research. See Chapter 6, and also Chapter 8, section 4.

19 See sections 2.4.2 and 3.4.2, and also Chapter 8, section 2.4.

under the Dutch fining guidelines, without prior formalization (§4). The discussion in this last section is conducted against the backdrop of the more formalized procedures, which makes it easier to indicate the possible advantages and pitfalls of a more informal negotiated procedure. A comparison of the different practices, as well as an individual evaluation under the normative framework, is carried out in the final section (§5), which gives rise to an analysis of a number of pressing questions concerned with negotiated procedures in general (§6). These questions are transferred to the concluding part of this thesis, in which they are evaluated in their own right.[20]

2. TRANSACTION (AUTORITÉ)

The Autorité de la Concurrence in France (Autorité) devised a special tool for conducting a negotiated procedure, preceding the European Commission's commitment and settlement procedures: the transaction (*la transaction*[21]). In this procedure, a company must renounce its right to contest the substance of the objections made by the competition authority (non-contestation), in exchange for a lower fine. The curious thing about the transaction – which makes it a singular procedure in the world[22] – is that the company may offer commitments aimed at bringing the current infringement to an end and improving competition in the future in order to receive a higher fine discount. These commitments often take the shape of compliance programmes.[23]

In order to provide a background to this enforcement instrument, the development and objectives of the transaction are discussed before going into a concise overview of the procedural steps involved. After that, the exact use of the procedure by the Autorité is scrutinized, and two particular safeguards are highlighted. Attention is paid to the possible outcomes of the procedure as well, given the possibility of offering commitments in the course of the procedure, which are followed up on a regular basis.[24] Because of its singular nature and the vast body of cases that have arisen from its application, the discussion of this procedure is more detailed than some of the other enforcement instruments. Nevertheless, this discussion yields an interesting insight into the functioning of the Autorité, the values underlying its enforcement practice and the development of negotiated procedures in France.

2.1 Development and Objectives

The Autorité was one of the first European competition authorities to put this kind of negotiated procedure into place. The transaction (then called: non-contestation procedure) was introduced in 2001 through the New Economic Regulations that were

20 See Chapter 8, and on a more abstract level Chapter 9.

21 Previously called the non-contestation procedure, or *procédure de non-constestation des griefs*.

22 See OECD Roundtable Settlements 2008, p. 43 and further.

23 Of the 40 cases settled between 2004 and 2014, 24 included compliance programmes as additional commitments.

24 Providing a background to the findings made on the basis of desktop research conducted on the decisional practice are the semi-structured interviews conducted with the *Service du Président* and the *Service d'Instruction* of the Autorité, on 19 June 2014. These interviews are not referred to in particular, because of their additional interpretational function throughout.

aimed at modernising and regulating the financial market, competition in general and commercial law.[25] The first case was concluded in 2003. Since then, the transaction has had an increasing influence and has been applied over 40 times, in cases concerning over 100 companies. The use of this instrument has remained steady over the years, with an average of four non-contestation decisions per annum. With its introduction in 2001, the French transaction preceded the implementation of the Commission-mandated commitment procedure, which occurred in 2004.[26] Also before that time the Autorité was capable of pursuing outcomes in ways which were an alternative to the sole imposition of a fine, for instance through the use of interim measures.[27] The transaction was seen as an addition to this instrument.

The main objective of the transaction is to reduce the time spent on cases, mainly through shortening the phase in which the report is drafted. Because the companies in question commit themselves not to contest the facts and their qualifications, it avoids extensive legal and factual reasoning as to the infringement, as well as an appeal on these aspects. Even though commitments offered by companies aimed at ending the infringement and improving future behaviour may seem an attractive instrumental benefit, the Autorité deems them to be of secondary importance, because of the existence of the procedure for interim measures.[28] Necessary changes in the market need not to be pursued through the transaction; they can be ordered separately. For that reason, the Autorité has been very cautious in rewarding behavioural commitments in the transaction and offering commitments is no longer a mandatory element of the procedure since 2008.[29] The commitments that are accepted and rewarded usually take the form of compliance programmes. In fact, the development of the Autorité's approach to compliance has been shaped through the application of the transaction in practice.[30] Given the efficiency considerations driving the application of the procedure, non-contestation was initially intended to deal with larger, multi-party cases. However, its application has been extended to the abuse of dominance situations as well.[31]

Where efficiency is the main driving force for application by the Autorité, the reason for companies to commit themselves to a transaction is twofold. On the one hand, companies profit equally from a shorter procedure. Apart from the subsequent fine discount, they might have reasons to be eager to dispose of the case quickly, for instance when new management is installed, or to avoid high legal costs and reputational damage. However, these expected efficiency benefits are not a valid argument to have the settlement annulled when the procedure is taking longer than expected, at least not in the case when no actual harm is demonstrated.[32] On the other hand, companies might benefit from cooperation with the Autorité, as they have the opportunity to discuss the

25 Nouvelles Régulations Économiques (Loi no. 2001-420), Article 73.
26 Mandated by Regulation 1/2003, Article 9. Implemented by Ordonnance no. 2004-1173, Article 10.
27 Article L.464-2 I *Code de Commerce*.
28 Value judgment based on developments in the legal context as described above, supplemented by statements from semi-structured interviews conducted within the Autorité on 19 June 2014. See Annex I – Methodology for more detail on the embedding of these interviews.
29 Changed by Ordonnance no. 2008-1161, Article 2.
30 See section … below on compliance as a commitment, but Chapter 6, section … in particular for a discussion of the Autorité's approach to compliance.
31 Since its decision in France Télécom, see Le Conseil de la Concurrence, 07-D-33 (*France Télécom*). See in more detail section … below on the scope of application.
32 See Cour d'Appel de Paris, no. 2012/07909 (*Nestlé Purina Petcare France*).

fine and the phrasing of the facts. For that reason, provided that the Autorité presents a sufficiently strong case, cooperation with a transaction might seem an appealing alternative to a regular fining procedure.

The Autorité bases its competence to settle cases on Article L.464-2 paragraph III of the *Code de Commerce*.[33] In short, this article enables the Autorité to grant fine reductions for companies that declare that they will not contest the objections raised against them. An additional fine reduction may be granted to companies that offer commitments. In 2012, the Autorité released a procedural notice on the settlement procedure, after an extensive consultation with market parties and other stakeholders.[34] This notice formalizes the Autorité's practice as it has developed from 2001. By releasing this notice, the Autorité aimed to increase procedural transparency, in order to increase the attractiveness of the settlement procedure. However, this notice is likely to be soon updated, as the *Macron* law (adopted in August 2015) has also caused some changes in the Autorité's transaction regime. These changes are discussed (and referred to) more extensively below, but an overview is given here as well.[35]

---

33 Explicit legal text: "*Lorsqu'un organisme ou une entreprise ne conteste pas la réalité des griefs qui lui sont notifiés, le rapporteur général peut lui soumettre une proposition de transaction fixant le montant minimal et le montant maximal de la sanction pécuniaire envisagée. Lorsque l'entreprise ou l'organisme s'engage à modifier son comportement, le rapporteur général peut en tenir compte dans sa proposition de transaction. Si, dans un délai fixé par le rapporteur général, l'organisme ou l'entreprise donne son accord à la proposition de transaction, le rapporteur général propose à l'Autorité de la concurrence, qui entend l'entreprise ou l'organisme et le commissaire du Gouvernement sans établissement préalable d'un rapport, de prononcer la sanction pécuniaire prévue au I dans les limites fixées par la transaction.*" This roughly translates as: When an entity or a company does not contest the reality of the objections of which it is notified, the Rapporteur may propose a transaction that sets out the minimum and maximum amount of the fine envisaged. When an enterprise or an entity also commits itself to modify its behaviour for the future, the Rapporteur may propose to the Authority to take this into account as well when setting the amount of the fine. When, after a time period fixed by the Rapporteur, the company accepts the transaction proposal, the Authority – that hears the parties and the government commissioner without the prior establishment of a report – sets the monetary sanction provided for in paragraph I [of this article], taking into account the limits established in the transaction proposal.

34 This was actually the first time that the Autorité set out a consultation. Parties could issue reactions on a draft communication between October and December 2011, and a round-table conference was held in December 2011, after which a press release was issued in early 2012. See Press release Autorité de la Concurrence, 'Corporate compliance programmes and antitrust settlements', 2012.

35 To compare, the previous legal text was the following: "*Lorsqu'un organisme ou une entreprise ne conteste pas la réalité des griefs qui lui sont notifiés, le rapporteur général peut proposer à l'Autorité de la concurrence, qui entend les parties et le commissaire du Gouvernement sans établissement préalable d'un rapport, de prononcer la sanction pécuniaire prévue au I en tenant compte de l'absence de contestation. Dans ce cas, le montant maximum de la sanction encourue est réduit de moitié. Lorsque l'entreprise ou l'organisme s'engage en outre à modifier son comportement pour l'avenir, le rapporteur général peut proposer à l'Autorité de la concurrence d'en tenir compte également dans la fixation du montant de la sanction*". This roughly translates as: When an entity or a company does not contest the reality of the objections of which it is notified, the Rapporteur may propose to the Authority – that hears the parties and the government commissioner without the prior establishment of a report – to set the monetary sanction provided for in paragraph I [of this article], taking into account the absence of the contestation. In that case, the maximum sanction to be incurred is reduced by half. When an enterprise or an entity also commits itself to modify its behaviour in the future, the Rapporteur may propose to the Authority to take this into account as well when setting the amount of the fine.

Procedural changes after the *Macron* law:

- The procedure as such is no longer called the 'non-contestation procedure', but is referred to as a transaction.[36]
- The Rapporteur now sets out a minimum and maximum expected fine in its proposal to the companies, instead of negotiating on a fine discount.
- From the legal text, it appears that the initiative to engage in a transaction has shifted to the Autorité (instead of the companies deciding not to contest the facts). However, in practice, this might be an insignificant difference, as negotiated procedures are the result of a reciprocal process.

As described in Chapter 2, the legislative changes were incited by a broader programme to stimulate the French economy.[37] It has been argued that the transaction procedure has been altered in order to make it more attractive for companies.[38] However, judging by the number of applications, the procedure has already proven to be quite successful. Proposing a minimum and maximum fine does, in any case, increase predictability. This argument is returned to below.[39]

2.2 Overview of the Procedure

For the larger part, the transaction resembles a regular fining procedure in France. Such a procedure has three phases: an investigation (conducted by the *Service d'Instruction*), a proposal to the board (made by the *Rapporteur Général*, also referred to as the Rapporteur) and the final decision (taken by the board, or *Collège*). Any procedure starts with a reference from a ministry or an administrative body, a complaint from a stakeholder or a self-reference, after which the Autorité launches the investigation phase. If the investigation yields sufficient evidence, the Autorité lists its findings in a statement of objections, which is then sent to the companies concerned.[40]

The statement of objections forms the basis on which a transaction is conducted. From the moment the statement of objections is sent, the Rapporteur may make a transaction proposal to the companies involved.[41] This proposal includes an envisaged minimum and maximum fine, in order to give the companies an impression of the

36 In the remainder of this chapter, the French procedure is referred to as the 'transaction procedure'. However, it has to be borne in mind that the majority of the conclusions and observations derived from this procedure are based on the previous non-contestation procedure. This section should therefore be read without prejudice to future changes in the regime.

37 See Chapter 2, section 3.1. Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques (*Macron* law).

38 See the early comments on the legislative changes on the following blogposts: http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Competition_EU_and_Regulatory/FRANCE-THE_MACRON_LAW and https://www.lw.com/thoughtLeadership/LW-thoughtleadership-French-Macron-anticonpetition-law.

39 See section 2.4.1.

40 This is called a *notification des griefs*, and is required by Article L463-2 Code de Commerce. In this statement, the Autorité notifies the parties of the objections made against them, and the documents on which these objections are based. This allows companies to make their point of view known and it safeguards their procedural rights.

41 Before the *Macron* law, companies had to decide within two months whether or not to request a transaction, see: Non-Contestation Notice Autorité 2012, points 23-25.

benefits that they can expect from the transaction. In order to qualify for these benefits, companies have to decide individually whether or not to contest the objections raised against them. If a company is willing to accept the transaction proposal, it has to inform the Rapporteur of its intention not to challenge the objections and of any additional commitments it is willing to make. In this phase, negotiations take place between the company and the Rapporteur on the content of the commitments and (presumably) the amount of the fine. After the negotiations have concluded, the Rapporteur proposes the envisaged transaction to the board, which is responsible for taking the final decisions.[42] If the board agrees, the companies must sign a document (the minutes) that formalizes the non-contestation and the commitments, if offered.[43] With a view to follow-up action by a third party, these minutes enjoy the same protection as a leniency application under the Direction on actions for damages.[44] The signing of the minutes is usually followed by a hearing, after which a formal decision is issued that renders the commitments binding. This decision contains the facts as included in the statement of objections (so no further qualification or legal reasoning is involved),[45] supplemented with an evaluation of the severity of the infringement and the damage done to the economy.

2.2.1 *Non-Contestation*

An indispensable condition for the application of the transaction is the actual non-contestation of objections by the company concerned. Non-contestation means 'renouncing, without reservations, the right to contest the factual and legal analysis carried out by the Autorité'.[46] This is done by a clear and unambiguous statement, including a waiver of the right to contest the facts constituting the infringement, the alleged objectives and the effects on competition, the characteristics and the duration of the infringement and the ways in which the company has participated in them. With this non-contestation, the company implicitly accepts the validity of the statement of objections itself. However, the non-contestation is not seen as an admission of guilt, which might be an important consideration for companies that suspect that there will be follow-up actions by third parties.[47]

If a company proceeds to dispute one or more of the elements covered by the non-contestation, the Autorité may decide not to apply the procedure after all. Nevertheless, non-contestation does not mean that a company cannot argue against the analysis of

42 See in more detail on the functioning of the Autorité: Chapter 2, section 3.

43 It is not uncommon for companies to add to or alter the commitments during or even after the hearing. Even though these alterations are not included in the minutes (which by then have long been signed), the Autorité may declare that these commitments are binding in its final decision. See: Le Conseil de la Concurrence, 04-D-30 (*Transport Scolaire en Haute-Corse*), Le Conseil de la Concurrence, 07-D-21 (*Location-Entretien du Linge*), Autorité de la Concurrence, 11-D-07, (*Travaux de peinture d'infrastructures métalliques*).

44 Directive 2014/104/EU.

45 Omitting this supposedly speeds up the procedure by several months. See the contribution of France in the OECD Roundtable Settlements 2008, p. 96.

46 Definition from Non-Contestation Notice Autorité 2012, point 4. Note that the non-contestation of *objections*, as required in France, is to be distinguished from the non-contestation of *facts*, as required by the European Commission. See Waelbroeck 2008, p. 32, referring to the Commission Leniency Notice 1996, pp. 4-6.

47 See Cour d'Appel de Paris, no. 2006/07820 (*Le Goff Confort*).

the Autorité on any point. Objections that may be raised without 'losing' the benefits of a transaction concern the severity of the facts, the importance of the damage to the economy, the individual situations of the companies or arguments concerning reiteration.[48] To prepare these arguments, companies retain the right to access their files throughout the entire procedure.[49]

2.2.2 *Position of the Rapporteur*

Within the transaction, the Rapporteur holds a key position. In regular fining procedures, the Rapporteur monitors the handling of complaints, the quality of the investigation, the statements of objections and the reports.[50] However, in the transaction he functions as an intermediate between the companies and the Autorité and as a barrier between the investigative team and the board, which is responsible for the final decision.

One part of his activities is to discuss the scope of the non-contestation and the commitments with the companies, for which reason he can invite the parties to alter their commitments if they are, in any respect, not up to standard. This is sometimes referred to as the 'negotiation phase' with the Rapporteur.[51] During this negotiation phase, the Rapporteur is allowed to change his opinions and propositions with regard to the company, because it is perceived as an actual negotiation, in which no guarantees can be derived from the other party.[52] The other part of his activities is to advise the board of the Autorité on the amount of the fine, on the additional fine reduction to be granted (if any), and on the application of the transaction as a whole. Formally, the board is not required to follow this advice, but if it does not do so, and this is to the detriment of the company, it must provide solid reasoning for not having followed this advice.[53] Even though the position of the Rapporteur is considered to be a safeguard for an impartial procedure, companies may feel that the Rapporteur has treated them unfairly. In that case, companies may request the Autorité – at a later instance, the courts – to check the Rapporteur's appraisal for manifest errors.[54]

2.2.3 *Room for Negotiation and Inherent Uncertainties*

There is very defined room for negotiation within the transaction, namely after the statement of objections has been sent, but before the final decision is drafted. The object of the negotiations is the amount of the fine relative to the non-contestation and the commitments offered, and – to a certain extent – the phrasing of the objections that

48 Underlined by the Court on numerous occasions, most recently: Cour d'Appel de Paris, no. 2011/01228 (*Lacroix Signs Company*). Also codified in Non-Contestation Notice Autorité 2012, points 15-17.

49 Note that this is not the case in the Commission's transaction procedure. See Waelbroeck 2008, p. 35.

50 L.461-4 Code de Commerce.

51 For instance by Waelbroek 2008, p. 32.

52 See Le Conseil de la Concurrence, 09-D-05, (*Travail temporaire*), in which the Autorité referred to the negotiated procedure.

53 Non-Contestation Notice Autorité 2012, paras. 48-49 and the case law of the Cour de Cassation quoted in footnote 7 of this document.

54 Non-Contestation Notice Autorité 2012, para. 39. Such a review has only occurred once, and the complaint was declared unfounded.

the company promises not to challenge. There is no plea bargaining in the sense of a discussion about the content of the statement of objections.[55] Such a discussion would be made difficult by the legality principle, which compels the Autorité to formally open a case rather early in the procedure, in any case clearly before the statement of objections has been sent. As discussed above, the fact that the Rapporteur conducts the negotiations, acting as an intermediary between the board of Autorité and the companies, is another interesting feature of the negotiations.

> In fact, one of the reasons to alter the transaction-procedure under the Macron law was to increase predictability for the companies involved. This has taken the shape of the Rapporteur proposing fine amounts rather than a fine discount. Still, the role of the Rapporteur has been retained in the new set-up. This means that the values of impartial decision-making supersede the uncertainty that the position of the Rapporteur may cause for the companies. In practice, the Autorité has noted that it has quite a good track record of having its transaction proposals accepted by the board.[56] This knowledge might be a reassurance for companies, thereby increasing the Autorité's credibility on this point.

Like with any negotiation, a transaction holds no guarantees as to the outcome. The main uncertainty for the companies involved is that the board is not bound by the Rapporteur's proposal, so the question remains whether or not the board concurs with the result of their negotiations. To put it broadly, there are two options for dismissal by the board. The first is when the board dismisses the proposal in its entirety, because it does not agree with the choice of the enforcement instrument. This is possible because of the strict functional separation between the *Service d'Instruction* and the board, which does not allow for a deliberation beforehand. The second possibility for dismissal is when the appraisal of the non-contestation and the commitments as done by the board differs significantly from the appraisal of the Rapporteur. In that case, the procedure is referred back to the *Service d'Instruction* for a new round of negotiations. The company then has the opportunity to withdraw from the procedure.

2.2.4 *Internal Safeguards and Review by a Judge*

Even though the name of the transaction suggests otherwise (because the companies involved would not appeal a case they committed themselves not to object to), the application of this instrument does not stop at the Autorité; it allows for an appeal at the *Cour d'Appel* in Paris, and even at the *Cour de Cassation*, although a review on appeal is limited. Roughly half of the non-contestation decisions taken by the Autorité have been appealed, six of which have been partially reformed – in the sense that the fine has been reduced on appeal – and only two decisions have been overturned.[57]

---

55 See Non-Contestation Notice Autorité 2012, point 12 and further.

56 Statement based on interviews conducted with the Autorité in June 2014. The methodology behind these interviews and internships is further discussed in Annex I – Methodology.

57 These are Autorité de la Concurrence, 12-D-09, (*Farines alimentaires*) – appealed in Cour d'Appel de Paris, no. 2012/06826) and Le Conseil de la Concurrence, 08-D-32 (*Produits sidérurgiques*) – appealed in Cour d'Appel de Paris, no. 2009/00334 (*AMD Southwest*).

Companies that have opted for non-contestation can appeal against the decision of the Autorité on the same grounds that it is allowed to contest. These grounds concern the elements leading up to the imposition of the penalty, particularly the severity of the facts, the importance of the damage to the economy, the individual situations of the companies and the amount of the sanction.[58] Even though it might be surprising that the companies would contest the amount of the sanction despite the negotiations on that point, the *Cour d'Appel* has reiterated that the negotiation phase of the transaction does not give rise to a 'contract' between the Autorité and the companies, so that an appeal should be possible if companies feel that they have been judged too harshly.[59] The standard of review on all of these points is limited to a review on manifest errors of appreciation. This entails that the court does not perform a full review, but assesses whether the Autorité has remained within the margins of reasonableness. Apart from requesting a review on these points, companies that have opted for non-contestation are also allowed to appeal the grounds of the final decision, if they are inconsistent with the statement of objections on which the settlement was based.[60] Companies that have not opted for non-contestation can challenge every element of the decision before the court, and it is not unprecedented that 'non-contesting companies' support their appeals without making representations themselves.[61]

An important function of the review by the court is to assess whether the procedure has been executed in a fair manner. Irregularities that severely harm the companies' procedural rights can even lead to a nullity. An argument that is often made on appeal – mostly in larger cartel cases – is that the procedure has had a disproportional length, because of which the companies have been in a situation of uncertainty for too long, and for which reason the decision should be nullified.[62] With regard to non-contestation in particular, one could imagine that a long-lasting procedure also runs counter to the interests of the non-contesting parties, which clearly preferred a rapid resolution as well. So far, the *Cour d'Appel* has not accepted arguments to support a nullity by delay in a non-contestation case, pronouncing that the complexity of the case and the number of parties involved warranted the length of the procedure. A rapid resolution is thus seen as a circumstantial benefit for companies, and it is questionable whether any rights can be derived from it.[63]

---

58 Autorité de la Concurrence, 10-D-39, (*Signalisation routière vertical*) – appealed in Cour d'Appel de Paris, no. 2011/01228 (*Lacroix Signs Company*).

59 This makes sense, as the negotiations also do not bind the board to the advice of the Rapporteur. See Le Conseil de la Concurrence, 08-D-32 (*Produits sidérurgiques*).

60 See Le Conseil de la Concurrence, 04-D-37 (*Pompes funèbres dans le Val-de-Marne*).

61 Cour d'Appel de Paris, no. 2009/00334 (*AMD Southwest*).

62 For instance, there were delay claims in Cour d'Appel de Paris, no. 2006/07820 (*Le Goff Confort*), concerning Le Conseil de la Concurrence, 06-D-03 (*Chauffage, sanitaires, plomberie, climatisation*), Cour d'Appel de Paris, no. 2011/03298, concerning Autorité de la Concurrence, 11-D-02 (*Restauration des monuments historiques*), and the one cited in the footnote hereunder.

63 In this particular case, the Cour d'Appel noted that the companies involved also failed to pinpoint the exact benefits they might have been deprived of because of the delay. Cour d'Appel de Paris, no. 2012/07909 (*Nestlé Purina Petcare France*), concerning Autorité de la Concurrence, 12-D-10 (Alimentation *pour chiens et chats*).

2.3 Application in Practice

The transaction as used by the Autorité is well established and has been applied in 47 cases. This extensive body of cases creates the opportunity to review the transaction in its decisional context. Accordingly, the Autorité's practice of transactions is discussed with regard to the types of cases to which it applies, and with regard to the other types of instruments that have been used alongside the transaction. The aim of this analysis is not just to examine the effectiveness and efficiency of the instrument as used by the Autorité, but also to review whether there are recommendations to be derived for the use of negotiated procedures in general.

2.3.1 Scope of Application

In principle, the transaction is applicable to all infringements of competition law.[64] Neither the law nor the procedural notice limits its application to a certain type of infringement. However, this has not always been the case, as the Autorité initially felt that it would be inappropriate to apply a transaction to hard-core cartels.[65] This viewpoint changed in 2007, when the companies involved in a waste-disposal cartel (*SITA/Veolia*) requested a transaction from the Rapporteur.[66] Backing up their request, the companies cooperated with the investigation of their own free will and they offered commitments that were considered so far-reaching that the transaction was applied. The Autorité did reiterate in its decision that this case was so peculiar that it could not be considered as a precedent for application in other cartels.[67] In the very next non-contestation case, however, again concerning a hard-core cartel, the procedure was applied without further reasoning.[68] Even though the SITA/Veolia case is credited for being the first cartel case to be resolved by a transaction,[69] this development could not have been a surprise in the light of the decisional practice of the Autorité. Before 2007, it had already applied the procedure to various, sometimes quite serious, bid-rigging cases, leading up to granting the transaction to some of the companies involved in a complex case concerning various horizontal and vertical agreements.[70]

Not only does the Autorité apply the transaction to all types of infringements, the procedure is open to all types of infringers as well. For that reason, the role played by a cartel member (e.g. the 'ringleader') is of no importance for the applicability of the procedure,[71] nor is the size of the company concerned.[72] Even the fact that a company

64 Unlike, for instance, the Commission settlement procedure, which is only applicable to cartels. See Commission Settlement Notice 2008, para. 1.

65 Waelbroeck 2008, p. 33.

66 Le Conseil de la Concurrence, 07-D-02 (Élimination des déchets en Seine-Maritime).

67 Ibid, para. 25.

68 Le Conseil de la Concurrence, 07-D-21 (*Location-Entretien du Linge*).

69 Non-Contestation Notice Autorité 2012, paragraph 12.

70 Le Conseil de la Concurrence, 06-D-03 (*Chauffage, sanitaires, plomberie, climatisation*).

71 See for instance Le Conseil de la Concurrence, 08-D-32 (*Produits sidérurgiques*), Autorité de la Concurrence, 10-D-39, (*Signalisation routière vertical*) and Autorité de la Concurrence, 11-D-02 (*Restauration des monuments historiques*).

72 See for instance Le Conseil de la Concurrence, 08-D-32 (*Produits sidérurgiques*) and Autorité de la Concurrence, 11-D-07, (*Travaux de peinture d'infrastructures métalliques*). The latter case concerned a company that felt that it could not offer very far-reaching commitments, because of its small size

has committed a similar infringement before does not influence the decision as to whether or not to apply the transaction, not even if it has been applied in the previous case as well.[73] As in regular fining procedures, the Autorité takes these circumstances into account as aggravating factors in determining the sanction, as is required by the principle of proportionality.[74]

This does not mean, however, that a request for a transaction will always be honoured.[75] In fact, before 2008 the Autorité was known for denying these requests if the additional commitments offered were not substantial enough.[76] Since commitments are no longer a mandatory part of the transaction, this is now not a ground for dismissal. Instead, the main determinant for application is the willingness of the company to cooperate with the Autorité and the perceived efficiency gains to be derived from applying the procedure. These efficiency gains are – in any case – not deemed to arise if the company requests the application of the transaction for the first time on appeal. The *Cour d'Appel* confirmed this in a judgment concerning an intricate cartel case in the signage industry (road signs), where one of the companies claimed on appeal that it had *de facto* not contested the facts and the subsequent qualification and that the transaction should be applied retrospectively. The court held that a company is not entitled to seek, for the first time on appeal, the benefit of this procedure.[77]

2.3.2 *Hybrid Transaction*

The transaction is often applied in combination with a regular fining procedure, which entails that some of the companies involved in a case opt for cooperation with the Autorité, while the other companies do not (hereinafter: hybrid transaction). Two specific procedural aspects allow for this course of action. First of all, there is the fact that negotiations only start after the statement of objections is sent. This means that all the evidence is gathered and evaluated as in a 'regular' fining procedure, so that no procedural rights and guarantees are hampered. The possibility of commencing negotiations during the investigation phase is touched upon below, but for now it should be noted that this prevents the Autorité from contacting companies at an earlier stage, convincing them to cooperate in a full settlement. Secondly, hybrid transactions are possible because a single formal decision is issued. If that were not the case, the Autorité would have to draft separate decisions concerning the same case, which would be inefficient. Meanwhile in this single hybrid decision, objections that concern the facts and the legal qualification made by companies that did not opt for non-contestation

and budgetary constraints. Later on, the company offered some additional commitments anyway, and received a fine reduction. It is unclear whether the Autorité would have regarded this argument as valid.

73 See, by means of an example, the following cases. Le Conseil de la Concurrence, 07-D-33 (*France Télécom*), Le Conseil de la Concurrence, 07-D-48, (*Déménagement national et international*), Le Conseil de la Concurrence, 09-D-05, (*Travail temporaire*), Autorité de la Concurrence, 09-D-19 (*Déménagement de personnels militaires*) and Autorité de la Concurrence, 09-D-24 (*France Télécom*).

74 Fining Notice Autorité 2011, paras. 45, 46 and 51.

75 As noted before: it is not entirely clear whether companies, under the new rules, can request a transaction. This statement is therefore made with regard to the old situation in particular.

76 See for instance: Le Conseil de la Concurrence, 06-D-09 (*Fabrication des portes*).

77 Cour d'Appel de Paris, no. 2011/01228 (*Lacroix Signs Company*), concerning Autorité de la Concurrence, 10-D-39, (*Signalisation routière vertical*).

are treated separately, as well as the evaluation of the commitments offered by the cooperating companies.

An interesting question regarding the hybrid transaction concerns the probative value of the non-contestation itself: to what extent can non-contestation by the one company prove the infringement and – if so – the involvement of the other. The *Cour d'Appel* decided on this matter in an appeal case in 2010. This case – concerning a cartel between large temp agencies – resulted in a hybrid transaction decision for four out of seven of the companies.[78] In this decision, the existence of the infringement was proven by the evidence underlying the statement of objections and the non-contestation by the four settling companies. The remaining three companies appealed against the final decision and asked the Court to establish, on the basis of the facts, that there had indeed been an infringement of competition law. The *Cour d'Appel* held that the Autorité had been right to rely on the non-contestation for evidence of the existence of the infringement, and that a further review of that aspect was not necessary. The participation of each company individually did however need additional evidence. The *Cour de Cassation* left this reasoning untouched.[79]

2.3.3 *Combination with Leniency*

The Autorité's body of cases suggests that a combination of a transaction and leniency is not uncommon. Broadly put, leniency is a reward for whistleblowing about illicit activity and is a widely used instrument to uncover cartels. Even though the Autorité consistently recalls that the objectives of the transaction procedure and leniency are different (the first is concerned with accelerating the administrative procedure, while the latter is aimed at detecting the behaviour in the first place), it is not opposed to applying the two at the same time.[80] In order to do so, the Autorité will review for each company individually whether or not there are procedural gains to be derived from simultaneous application. For instance, this would not be the case when the company involved has received full immunity under the leniency procedure. However, when (parts of) the statement of objections differs from what the company already submitted under the leniency procedure, it could make sense to request the application of the transaction as well.[81] In that case, the fine reduction of the non-contestation is added to the fine reduction which the company received under the leniency-procedure.

2.4 Outcomes

Having reviewed the procedure as a whole, as well as the roles and obligations of the different parties involved therein, it is time to assess the actual outcomes of the transaction. The outcomes in this sense can be defined as the benefits derived from the procedure for the companies (the fine discount) and the market (commitments

78 Le Conseil de la Concurrence, 09-D-05, (*Travail temporaire*).
79 Cour d'Appel de Paris, no. 2009/03532 (*Adecco France*), Cour de Cassation, no. 331 F-D (*Manpower*).
80 Non-Contestation Notice Autorité, point 6.
81 Both examples are derived from Autorité de la Concurrence, 13-D-12 (*Commercialisation de commodités chimiques*).

by companies to improve it in the future). The main benefit for the Autorité (speedier resolution) has already been touched upon above and is discussed in the evaluation of the transaction below. Nevertheless, the role of the Autorité in determining and assessing the outcomes of the procedure is central to this section.

2.4.1 Fines and Discounts

The fine imposed in a transaction has to fall within the range negotiated by the Rapporteur and the companies. Additional commitments may either be discounted separately, or be taken into account when negotiating the range between the minimum and maximum fine. This proposed range is sent to the board of the Autorité, which is responsible for determining the precise fine according to the principle of proportionality. In order to do this, the board takes into account the seriousness of the facts and the harm done to the economy.[82] Any aggravating or mitigating circumstances, such as reiteration or coercion, are weighed as well.[83] It is underlined that the board is not bound by the Rapporteur's proposals, but that it might have to explain properly why it has decided to deviate from the result of the negotiations.

> To compare, under the old non-contestation procedure, the fine was constructed out of three parts: the basic fine (with a reduced fine ceiling), the reduction for non-contestation and the reduction for commitments offered. It is clear that the current transaction procedure offers more predictability for companies, as they now know what the fine they are likely to incur will be, instead of being granted a fine reduction without knowing what to deduct this reduction from.

In the years before the introduction of the transaction, the Autorité worked towards applying a standard reduction of 10% for non-contestation alone.[84] Substantial commitments were good for an additional 5% to 15% reduction,[85] and as it appears from the Autorité's decisions, a commitment involving the introduction of a whistleblowing system led to an additional fine reduction of 5%.[86] The Autorité was allowed to deviate from these percentages and it often did so in practice. In fact, the average discount granted by the Autorité was 28%. The highest discount was granted in the La Poste case (90%),[87] the lowest discounts concerned cases in which only non-contestation was

82 Fining Notice Autorité 2011, para. 25 and further.

83 Fining Notice Autorité 2011, para. 45 for mitigating circumstances, para. 46 for aggravating circumstances. The economic crisis is sometimes relevant in reviewing the proportionality of a fine. See for instance: Le Conseil de la Concurrence, 08-D-29 (*Entretien de menuiserie métallerie serrurerie*) and Le Conseil de la Concurrence, 09-D-05, (*Travail temporaire*).

84 This was a development that occurred in decisional practice, so before the procedural notice was issued. The standard reduction was appealed, but the Cour d'Appel held that the Autorité had the discretion to grant a standard reduction, and that an additional reduction should be earned by offering substantial commitments, differentiating one company from the others. See Cour d'Appel de Paris, no. 2009/00334 (*AMD Southwest*).

85 Non-Contestation Notice Autorité 2012, paras. 34-35.

86 See for instance Autorité de la Concurrence, 10-D-39, (*Signalisation routière vertical*), in which this situation is most clear.

87 Le Conseil de la Concurrence, 04-D-65, (*La Poste*). La Poste received such an enormous discount because of the very specific circumstances of the case. However, this non-contestation decision is often used as an illustration of how 'lucrative' a settlement can be for companies. See for instance Marquis 2012.

accounted for (10%). However, the *Cour d'Appel* has confirmed on multiple occasions that no rights can be derived from discounts granted in other cases, as the Autorité reviews each case on its merits. The discounts needed to be established in each case individually, taking into account the relevant legal criteria. The Autorité had no duty to justify the fine reduction in comparison to other cases.[88] As a parallel, it is expected that it will have no duty to justify the range of the fine in future cases.

If the decisions taken between 2004 and 2015 are viewed in conjunction, it is clear that the discounts granted in the procedure were gradually lowered over the years. The Autorité also became stricter in its review of commitments, as appears from the section below. Two reasons could be underlying this development. First of all, the Autorité has clearly developed its approach to this negotiated procedure in practice. The earlier cases were presumably experimental, which means that the Autorité might have had to grant higher discounts in order to persuade companies to cooperate. Once a body of cases had been established, the procedure and the discounts could 'normalize' at a certain level. Secondly – as is discussed below as well – the Autorité has become more cautious in rewarding commitments. It seems that the Autorité started to require more from companies, in return for a lesser discount.

2.4.2 *Commitments*

If a company decides to cooperate, its fine might be decreased when it offers commitments aimed at developing a real culture of competition within the company, or be aimed at safeguarding the functioning of competition in a given sector or market.[89] As noted before, the Autorité has become cautious in rewarding commitments offered with high fine discounts. This is because, on the one hand, the Autorité can remedy pressing competitive concerns with an injunction. A commitment covering the same substance matter is thus of less value. On the other hand, the Autorité is particularly weary of window-dressing (promising better behaviour, only to continue infringements behind a thicker veil), for which reason compliance programmes – that are often offered as commitments – are weighed extensively and will only yield a fine discount if they are very substantive.[90]

> The fact that these commitments go beyond the generic description of a compliance programme is demonstrated by a patent case in the pharmacy sector. In this particular case, the company involved committed itself to undergo an extensive training programme that educated all relevant personnel on the antitrust risks 24 months prior to the end of the patent. This would prevent infringements after the patent had ended, and was tailored to the situation at hand in particular.[91]
>
> Another example is a case in the pet food industry, in which multiple parties offered compliance programmes in order to be eligible for an additional discount. One of the companies omitted an element that would prevent competition law infringements

88 See the court in Cour d'Appel de Paris, Pôle 5 – Chambre 5-7, arrêt du 29 septembre 2009, no. 2008/12459 and Cour d'Appel de Paris,no 2009/03532 (*Adecco France*).
89 Non-Contestation Notice Autorité 2012, para. 4.
90 Compliance programmes are further discussed in Chapter 7 of this thesis.
91 Autorité de la Concurrence, 13-D-21, (*Buprénorphine haut dosage commercialisée en ville*).

committed by senior officials (in this case: a specific liability system). This compliance programme was evaluated as being less substantial and received a lower discount.[92]

Certainly, the commitments can sometimes have added value, especially when these commitments contain a substantial modification of anti-competitive behaviour, and the authority is well placed to check up on its effective application.[93]

In order to review the pro-competitive value of commitments, the Autorité must make sure that they are substantial, credible and verifiable. For that reason, the Autorité looks into the proportionality of the commitments in the light of the nature of the anti-competitive practices and the economic context (substantiality), the way in which the commitments can in fact contribute to a better functioning of competition (credibility) and the mechanisms designed for implementing the commitments (verifiability).[94] If the commitments appear to fall short in one of these respects, the Rapporteur may invite the parties to change them, or the Autorité may disregard the commitments in its evaluation and only offer a discount for the non-contestation, rendering the commitments binding nevertheless.[95] The evaluation of the commitments as performed by the Autorité is appealable at the *Cour d'Appel*, which checks whether the Autorité has made manifest errors in assessing the substantiality, credibility and verifiability of the commitments. Due to the nature of the transaction (which is aimed at enhancing administrative efficiency, and not the alteration of behaviour), the court cannot impose additional commitments if it feels that they are not substantial enough.[96]

Compliance with the commitments is checked periodically, hence the importance of the verifiability criterion, as stipulated above. The Autorité has carried regular check-ups since 2009, and has reportedly assigned one or two officials with the task of following up on commitments. If the company does not fulfil its obligations arising from the decision, the Autorité might impose a fine for a breach of commitments. The Autorité perceives this as particularly serious and has so far issued two fining decisions on the matter.[97]

3. SETTLEMENT (UK CMA)

The UK CMA has multiple negotiation procedures at its disposal: the commitment decision,[98] the negotiation of undertakings after a market investigation and the settlement. The first is not included in this thesis because of the reasons stated in the

92 Autorité de la Concurrence, 12-D-10, (*Alimentation pour chiens et chats*).

93 This formulation stems from Le Conseil de la Concurrence, 04-D-65, (*La Poste*), para. 65, and is often repeated in other decisions.

94 Non-Contestation Notice Autorité 2012, para. 20, but more explicated in para. 35. In some cases, the commitments are not reviewed on these points at all, in other cases they are treated more explicitly. It has occurred only once that commitments were explicitly considered to be non-verifiable: Le Conseil de la Concurrence, 09-D-03, (*Transport scolaire et interurbain par autocar*).

95 Non-Contestation Notice Autorité 2012, para. 31.

96 Cour d'Appel de Paris, no. 2009/05544 (*Expedia*).

97 See Autorité de la Concurrence, 10-D-21 (*Neopost France et Satas*), based on Le Conseil de la Concurrence, 05-D-49 (*Machines d'affranchissement postal*).

98 Note that before the introduction of the commitment decision under Article 9 of Regulation 1/2003, the former competition regime did allow for some sort of commitment procedure, which indicates that negotiated procedures had been used before (this was under the Restrictive Trade Practices Act 1976,

introduction to this chapter. The second is discussed below in the section on market studies. This section focuses on the last type of instrument: the settlement. In the last few years, the UK CMA has developed a practice of settling cases concerning competition law, otherwise known as the settlement procedure. In earlier days, this procedure was referred to as the 'early resolution procedure', but this term has become obsolete. The settlement procedure has been defined by the UK CMA as 'the process through which the UK CMA imposes a reduced penalty for a Competition Act 1998 (CA98) infringement, in response to an admission of liability and various other types of cooperation'.[99] With this definition, the application of the procedure to the criminal cartel offence under the Enterprise Act is excluded. The key elements of the settlement, which are discussed below, are cooperation with the UK CMA, the admission of liability and a fine reduction.

This section presents a detailed overview of the UK CMA's settlement procedure, with a view to comparing it with French transaction at a later stage – as the two are different on important points. To provide some context to the procedure, its historical development and its objectives are briefly discussed. After that, a concise overview of the procedure is provided, which gives an insight into the UK CMA's decision-making mechanisms as well. The use of the settlement procedure in practice is discussed by reviewing its scope of application, its 'special' features and the combinations that the UK CMA has made in the past with other instruments in its toolbox. Next, attention is paid to some procedural aspects that illustrate the role of safeguards in the settlement procedure. This connects nicely with the final section, in which observations on the instrumentality and safeguards within the settlement procedure are made.

3.1 Development and Objectives

The development of the settlement procedure in the UK was the result of an experimental process. Unlike its French counterpart, there was no clear legal provision granting the UK CMA the power to settle cases in a certain way, but following the Commission's example, the UK CMA and its predecessor devised an approach to settling cases in practice. It was only after the merger between the former OFT and the CC that the competition authority decided to formalize its practice in guidelines.[100] The UK CMA now defines a settlement as 'the process whereby a business under investigation is prepared to admit that it has breached competition law and confirms that it accepts that a streamlined administrative procedure will govern the remainder of the UK CMA's investigation of that business' conduct'.[101] The settlement procedure used to be called the 'early resolution procedure', reflecting the main goal of the instrument: to resolve cases and to involve companies at an earlier stage than in a regular fining procedure. However, this name has been abandoned in the most recent procedural notices in

see Nikpay & Walters 2009, paragraph 8). However, the main difference between commitment cases and a settlement is that the latter results in a formal infringement decision, where the former does not.

99 OECD Direct Settlement 2008, p. 63.

100 CMA Procedural Notice 2014, Chapter 14. Before that, the CMA had contributed twice to an OECD round-table conference on settlements in competition law describing its preliminary thoughts and outlining its early practice. See OECD Plea Bargaining 2007 and OECD Roundtable Settlements 2008.

101 CMA Procedural Notice 2014, para. 14.1.

order to connect with the terminology used by the European Commission and other competition authorities.[102] In the remainder of this section the term 'early resolution agreement' is sometimes used when referring to the document that contains the terms and obligations of the settlement.

The first case in which the UK CMA resorted to the settlement procedure was the 2006 *Independent Fee Paying Schools* case.[103] This concerned a case in which 50 'independent fee paying schools' (schools funded by private donations, characterized as charitable organizations under UK law) exchanged information about their tuition fees. After this came to light, the Independent Schools Council contacted the UK CMA to request an agreed resolution in order to minimize the legal costs for the schools, all of which were non-profit organizations.[104] Before *Independent Fee Paying Schools*, the UK CMA had once applied a small discount in the *West Midlands Flat Roofing* case, in which a number of companies agreed not to contest the UK CMA's findings of an infringement and received a discretionary 10 % discount in recognition of the process savings to the UK CMA's investigation.[105] Despite the application in these cases, the UK CMA initially presented itself as being rather hesitant in applying settlements on a larger scale.[106] Still, inspired by the Commission settlement procedure and (explicitly) the Dutch accelerated sanctions procedure in the construction sector, it started to view settlements in an increasingly favourable light and has applied this procedure on eight further occasions.[107]

The number of settlements in the UK CMA's practice is relatively high, considering that the UK CMA – between 2004 and 2016 – only issued 21 'regular' fining decisions. Of these decisions, more than half were issued between 2004 and 2006. After the introduction of the settlement procedure, the fining procedure has been applied on an increasingly smaller scale. This is important to denote, as one of the criticisms of the Commission's enforcement practice is that more and more cases are concluded on a negotiated basis, which would – amongst other things – hamper the development of the law through legal review.[108] The UK CMA is aware of this and has communicated on many occasions that 'establishing a body of cases is indispensable' for the future success of UK CMA enforcement in competition cases.[109] As for now, it is too early to

102 Footnote 173 of CMA Procedural Notice 2014.

103 Office of Fair Trading, Case CA98/05/2006 (*Independent Fee Paying Schools*).

104 Ibid., para. 36.

105 See Office of Fair Trading, no. CA98/1/2004 (*Flat-roofing services in the West Midlands*).

106 See OECD Plea Bargaining 2007, p. 137.

107 These cases are the following: Office of Fair Trading, Case CA98/05/2006 (*Independent Fee Paying Schools*), Office of Fair Trading, Case CE/2596-03 (*Tobacco*), Office of Fair Trading, Case CA98/03/2011, (*Dairy*), Office of Fair Trading, Case CA98/01/2011 (*Royal Bank of Scotland*), Office of Fair Trading, Case CA98/02/2011 *(Reckitt Benckiser*), Office of Fair Trading, Case CA98/01/2012 (*British Airways*), Office of Fair Trading, Case CE/9627/12 (*Medicines in Care Homes*) and Competition and Markets Authority, Case CE/9827/13 (*Property Sales and Lettings*). Depending on how the following case is characterised, it could be nine more times instead of eight: Office of Fair Trading, Case CA98/02/2009 (*Construction*).

108 See for instance Wils 2008, who describes enforcement gains and losses from both types of procedures. This argument is returned to in the conclusion of this chapter.

109 With a 'body of cases', fining decisions are indicated. The CMA would only facilitate a settlement where this is appropriate. Quote from the Speech by David Currie in 2013, available at: https://www.gov.uk/government/speeches/the-new-competition-and-markets-authority-how-will-it-promote-competition. But also see the CMA Strategy 2014, which calls for 'delivering effective enforcement' by taking 'good timely decisions that stand up to appeal', p. 1.

review whether the UK CMA has succeeded in its ambition. In any case, the relationship between fining decisions and the application of negotiated procedures is further dealt with below.

The main goal of a settlement is to save resources through efficiencies in the administrative procedure and through reducing the likelihood of an appeal.[110] These efficiencies are usually reached by limiting the parties' right to submit representations and by avoiding oral hearings. This results in an earlier adoption of a decision, and enables the UK CMA to focus its resources elsewhere. In addition, deterrence is increased by the possibility of follow-on procedures.[111] As the settlement procedure is likely to increase decisional speed, more cases will be available for redress. Because the companies are required to admit liability (see below), tort actions can be brought before a civil court. Initially, the UK CMA had expected to be able to facilitate the restitution of victims in the negotiation procedure as well.[112] So far, this has only occurred in the *Independent Schools* case, in which the schools established a trust for those who had paid increased tuition fees because of the cartel.

The UK CMA bases its power to settle cases on the discretion it enjoys when imposing a penalty. According to the UK Competition Act, the UK CMA has to publish guidance as to the appropriate amount of any penalty. This guidance document gives the UK CMA the opportunity to grant a fine discount to companies that have agreed to settle and are ready to – amongst other things – admit liability for the infringement.[113] The guidance on the appropriate amount of the penalty is supplemented by the UK CMA's procedural notice, which gives a more detailed overview of the requirements and application of the settlement procedure.[114] This procedural notice 'codifies' the UK CMA's approach in earlier cases.[115]

3.2 Overview of the Procedure

The settlement procedure as applied by the UK CMA resembles a regular fining procedure to a large extent, with the exception that from the moment of settlement some procedural aspects are altered in order to streamline the administrative procedure. These aspects are dealt with in more detail below. First, the different stages of the administrative procedure at the UK CMA are considered. This procedure can – roughly – be divided into four stages. The first is an informal stage, in which the case is considered for the first time and informal requests for information are made. This is dubbed 'stage 0' for that reason. Stage 1 represents the start of the formal investigation and the stage in which the UK CMA's investigative powers are used. The Statement of Objections (or: SO) demarcates the transition into stage 2, in which companies are granted a right to

110 Nikpay & Walters 2009, paragraph 11. Now underlined in CMA Procedural Notice 2014, para. 14.2.

111 See for instance the reflections by Burrichter 2006, under section 3.3.

112 OECD Plea Bargaining 2007, p. 139.

113 OFT Penalty Guidance 2012, para. 2.26. According to the CMA website: 'this guidance was originally published by the Office of Fair Trading (OFT) and has been adopted by the CMA Board. The original text has been retained unamended, therefore it does not reflect or take account of developments in case law, legislation or practice since its original publication'.

114 CMA Procedural Notice 2014, Chapter 14.

115 The settlement agreement in the *Tobacco* case, for instance, contains the same requirements as are prescribed in the Procedural Notice. See Office of Fair Trading, Case CE/2596-03 (*Tobacco*).

reply and in stage 3 the final decision on the case is issued.[116] Procedurally speaking, the settlement procedure goes through the same phases but adds a 'negotiation' stage to it. A settlement can be concluded before the issuing of the SO – so in stage 1 – or after the companies have received the SO – between stages 2 and 3.[117]

The settlement procedure deviates from a regular investigation in the sense that companies can request the UK CMA to engage in settlement negotiations with them. In accordance with developments in practice,[118] the UK CMA allows for such negotiations to occur before the formal SO is sent, but does not engage in a settlement before the 'evidential standard for giving notice of its proposed infringement decision' is met.[119] This could indicate that the UK CMA still subscribes to earlier views that state that a settlement is only opportune in case of sufficient certainty of a breach of competition law, corroborated by strong and compelling evidence.[120] If such certainty is reached in stage 1, so pre-SO, companies interested in a settlement can consider their positions on the basis of a Summary Statement of Facts, which indicates the evidence relied on by the UK CMA.[121] Naturally, it also possible for the companies to consider their positions on the basis of the SO itself and request a settlement at a later stage. There is no substantive difference between the two types of settlement, except for the additional efficiency gains expected to be derived from a settlement at an earlier stage. These gains are reflected in the fine discount.

Apart from the process of a settlement, as set out above, it is important to note that the UK CMA holds that it is possible to revert to a regular procedure if settlement negotiations should fail, or if companies do not comply with the conditions for a settlement as set out below. Likewise, a company can withdraw from a settlement if new evidence comes to light.[122] Any admissions made to the UK CMA during the negotiations are not disclosed in a further stage and any notes of these discussions are protected under the legislation on the disclosure of information in competition cases.[123]

3.2.1 Conditions for a Settlement

The nature of the settlement procedure is voluntary, which means that companies and the UK CMA may mutually accept or decline the procedure. If the UK CMA would prefer a settlement in a given case, it would make this known by sending a cover letter along with the statement of objections, explicitly outlining this possibility. Companies may also request a settlement of their own motion. The only limitation to this voluntary process is the fact that the UK CMA expects the negotiations on the terms of the settlement to be speedy, because of the efficiency gains it wishes to accomplish. Since settlement discussions 'stop the clock' on the timetable for the investigation at hand,

116 See CMA Procedural Notice 2014, p. 7.
117 CMA Procedural Notice 2014, para. 14.13.
118 Office of Fair Trading, Case CA98/01/2011 (*Royal Bank of Scotland*), and Office of Fair Trading, Case CA98/01/2012 (*British Airways*).
119 CMA Procedural Notice 2014, para. 14.4.
120 Nikpay & Walters 2009, paragraph 28.
121 CMA Procedural Notice 2014, footnote 179.
122 CMA Procedural Notice 2014, paras. 14.28-14.29.
123 Enterprise Act 2002, part 9.

the negotiations should not be protracted. For this reason the UK CMA sets out a timetable for the negotiations, which may vary according to the circumstances of the case.[124] The main reason for the UK CMA to accept a settlement is the likelihood of procedural efficiencies and resource savings. These are estimated on the basis of the procedural stage in which the settlement is conducted (pre-SO or post-SO), the number of companies involved, the number of alleged infringements and the time it would take for the UK CMA to conclude the settlement within the timetable as set out above.[125]

The efficiency gains to be derived from a settlement are generated by applying a so-called streamlined administrative procedure. Listed in the UK CMA's procedural guidance, this procedure is considered a minimum standard and a non-negotiable condition for a settlement.[126] In principle, a streamlined administrative procedure entails that companies must limit their right to access the file to only accessing key documents, that companies must renounce their right to make written representations after the SO has been sent, that there will be no oral hearing and that there is no involvement by the Case Decision Group.

3.2.2 *Streamlined Administrative Procedure*

The streamlined administrative procedure as pursued by the UK CMA in a settlement is characterised by the requirement for the companies to waive certain procedural rights in order to come to an earlier resolution of the case. The first waiver concerns the right to make representations, which – in a settlement – is limited on a voluntary basis. The companies involved renounce their right to an oral hearing and can only make particular written representations upon the issuing of the statement of objections. In fact, the UK CMA will only accept a concise memorandum indicating factual inaccuracies. If the memorandum exceeds this scope – so if the representations 'amount to a wholesale rejection'[127] – the settlement agreement will cease to have effect. This seems to be rather harshly formulated, but the UK CMA feels that companies in an settlement procedure have already had the opportunity to present their opinions during the negotiation phase.[128]

Secondly, companies are required to waive their right to fully access the documents. They are expected to only request access to 'key documents' (those documents underlying the statement of objections) and to use a confidentiality ring to speed up the process.[129] A request to access other documents will not result in the settlement being discarded,

124 How much time the companies are granted to reflect upon the statement of objections is not clear from the decisions. However, the four months it took for the parties in the *Independent Fee Paying Schools* case to reach a resolution is considered to be excessively lengthy. In another case, slow decision-making on the part of the company even led to a reduced fine reduction (of 5%), because of the procedures being obstructed. See: Office of Fair Trading, Case CA98/03/2011, (*Dairy*), in which the company McLelland settled two months later than the other settling companies and therefore received a 30% reduction instead of 35%.

125 CMA Procedural Notice 2014, para. 14.6.

126 CMA Procedural Notice 2014, paras. 14.8 and 14.15.

127 CMA Procedural Notice 2014, para. 14.13.

128 Nikpay & Walters 2009, paragraph 20.

129 CMA Procedural Notice 2014, para. 14.13.

but it will affect the evaluation of the efficiency gains that the UK CMA expects to be derived from the procedure.

The third and final waiver concerns the renunciation of the right to have the Case Decision Group involved. This is rather technical aspect of the procedure, which requires some background information to understand it fully. In any procedure, the decision to formally open an investigation is made by a 'Senior Responsible Officer' (or: SRO). The SRO also considers whether there is sufficient evidence to issue a statement of objections.[130] Usually, after the statement of objections has been sent, the decision-making role is transferred to a Case Decision Group in which the SRO plays no part. The Case Decision Group will determine whether or not an infringement decision will be issued, and what the appropriate amount of the penalty will be.[131] However, in a settlement, no Case Decision Group is appointed. Instead, the SRO remains responsible for conducting the negotiations and taking the settlement decision. Before taking these actions, the SRO needs approval from the Case and Policy Committee (the board-delegated committee that formally takes the decisions[132]), but the additional check performed by the Case Decision Group is left out of the settlement procedure with a view to securing efficiencies from a more streamlined procedure. Omitting the Case Decision Group and increasing the role of the SRO is particularly interesting in comparison with the French transaction, where the Rapporteur plays a key role in safeguarding various procedural rights.

The three points described above (the waiver of the right to make representations and to access documents, and the non-involvement of the Case Decision Group) are considered as minimum requirements for a settlement and are not negotiable during settlement discussions. To counterbalance all of these obligations, the UK CMA often underlines the voluntary nature of the settlement procedure. Apart from that, the UK CMA is explicitly required to ensure that companies have seen the key evidence underlying the statement of objections, that they know the maximum fine to be imposed and that they understand the consequences of the settlement – in particular that follow-on action might be an option.[133]

3.2.3 Settlement Agreement

The obligations upon the companies and the fine and discount agreed upon are formalized by means of a settlement agreement (formerly called 'early resolution agreements', or ERAs). These agreements are usually published as annexes to the final decision, which is fully reasoned in order not to undermine the appeal process and to facilitate follow-on procedures.[134] By signing the settlement agreement the companies admit liability

130 See for more detail on the function of the SRO the CMA Procedural Notice, para. 9.10.

131 See for more detail on the role of the Case Decision Group the CMA Procedural Notice, para. 11.30 and further.

132 'The Case and Policy Committee operates under delegated authority from the CMA Board. The purpose of the Case and Policy Committee includes overseeing and scrutinising the development of CMA casework, projects, decisions and policy relating to the CA98 and the equivalent provisions of the TFEU'. Quote from CMA Procedural Notice 2014.

133 CMA Procedural Notice 2014, para. 14.9.

134 Nikpay & Walters 2009, paragraph 27. The appeal process in the UK is 'full merits-based'; entailing that CMA decisions imposing penalties must be properly and fully reasoned.

for the nature, the scope and the duration of the infringement, as well as for their participation therein. A mere non-contestation of the facts is insufficient. However, the companies do not have to admit to the effect that the infringement might have had on the price levels.[135] The fact that the companies have to admit liability is preferable to non-contestation from the perspective of injured parties that wish to initiate follow-on procedures. Because of the admission of liability, the settlement decision issued by the UK CMA has evidential value for actions for damages. From the perspective of the companies, this feature in particular might make the settlement procedure less attractive. This argument is returned to below. Lastly, it is important to denote that there is no plea bargaining on the infringements, meaning that the companies cannot negotiate which alleged infringements listed in the SO or the summary statement of facts they will admit to, and to which they will not. The admission of liability is a 'take it or leave it' deal.[136]

3.2.4 Review of Settlement Decisions

Despite the broad waiver of procedural rights in the administrative phase, the right to appeal is not explicitly waived by companies. However, if settling companies do wish to appeal against the settlement in court, there is a good chance that the negotiated fine discount will be annulled, as the court (the Competition Appeal Tribunal in this case, hereinafter: CAT) has full jurisdiction to review the fine imposed. In these cases, the UK CMA is likely to make an application to have the fine and the discount reconsidered in the light of the appeal. The appeal process itself is fully merits-based, which means that the CAT may review every case in full, without having to limit itself to a review on manifest errors or procedural mishaps. In the relatively youthful practice of settlements by the UK CMA, there has only been one appeal in which the settling companies sought a review by a judge.[137] The other way around, when non-settling companies appeal, the decisions remain binding with regard to the settling companies, even if the decision is overturned.[138] This last situation was the reason for the appeal in the *Tobacco* case, which is the only settlement case in which the position of settling companies *vis-à-vis* non-settling companies was under scrutiny.

> The case concerned two tobacco manufacturers and eleven retailers, which engaged in price fixing. The infringements spanned different periods between 2001 and 2003 for different parties, and related variously to the markets for UK duty-paid cigarettes, hand-rolling tobacco, pipe tobacco, and cigars and cigarillos. Initially, the UK CMA (then the OFT) found that 'each Manufacturer was involved in an agreement and/or concerted practice with each Retailer which restricted each Retailer's ability to determine its retail prices for the Manufacturer's products and thereby had the object and/or effect of preventing, restricting or distorting competition in the supply

135 This is because, in general, the CMA is not required to demonstrate any effect on prices in order to establish a breach of the Chapter I prohibition.

136 CMA Procedural Notice 2014, para. 14.15.

137 Competition Appeal Tribunal, Case no. 1160/1/1/10 – 1165/1/1/10, Imperial Tobacco v Office of Fair Trading, 12 December 2011, [2011] CAT 41. It is true that there was an appeal in the *Dairy* case as well, but this concerned a non-settling company with respect to the status of the settlement agreement. This case is dealt with above. See: Competition Appeal Tribunal, Case no. 1188/1/1/11, Tesco v Office of Fair Trading, 20 December 2012, [2012] CAT 31.

138 CMA Procedural Notice 2014, para. 14.8.

> of tobacco products'.[139] It was for this finding that the settling companies admitted liability in the settlement agreement. In the final decision the UK CMA further narrowed this finding by putting forward in the theory of harm that 'if the retail price of […] brand [X] increases, then the retail price of […] rival brand [Y] must also increase' and vice versa.[140] Six of the companies involved in the decision (including four settling companies) appealed against the final decision because they felt that there was not enough evidence to support the aspect of relative pricing in the theory of harm. During this appeal, the UK CMA tried to introduce a new theory of harm, leaving out the relativity aspect. Because of this proposed alteration, the CAT quashed the decision with regard to the appealing companies, but the decision remained in force against the two settling companies that did not appeal.[141]
>
> Understandably, this did not sit well with these two companies (they held that the 'basis on which the [companies] entered into the [settlements] had been fundamentally undermined'[142]), and they applied for an extension of time to lodge an appeal against the decision of the UK CMA as well. The CAT granted this extension, but the UK CMA lodged an appeal at the Court of Appeal to overturn this decision. It is this final appeal that is the most interesting with regard to the relationship between settlements and possibilities for appeal. The Court of Appeal held, in essence, that the need for legal certainty and finality in these cases was greater than the interest of the companies,[143] especially since the finding that the companies admitted liability in the settlement agreement was so broad that it could have included both the relativity aspect as well as the 'new' theory of harm put forward in the appeal stage. The fact that the UK CMA narrowed the theory of harm in the first place, and tried to change it at a later stage was not considered to be misleading or against legitimate expectations. The Court of Appeal stated: 'the [companies] are grown-up commercial parties. They knew what evidence was relied upon in the Statement of Objections. They knew what evidence was available to them as to their own infringements. They could evaluate both when they concluded the [settlement]. It would be quite impossible for the OFT to conduct such an investigation and bring it to a timely conclusion if it were to be taken as representing at the time of an early resolution agreement that it would in the future have a "proper evidential basis" for its decision'.[144]

The *Tobacco* appeals underlined the premise now codified in the UK CMA's guidelines that a decision remains in force against settling companies, even though it has been overturned on appeal. The principles of finality in administrative decision-making and legal certainty are considered to be of overriding importance in that respect. Moreover, the Court of Appeal firmly stated that companies involved in a settlement are aware of the consequences of their actions and should not seek to annul them if the tables have turned against them. This does not mean that in a different situation the outcome would have been the same. This judgment in itself does not exclude the possibility of

139 OFT's Statement of Objections of April 2008, as quoted in Court of Appeal (Civil Division), Case no. C3/2013/1680 (*Somerfield and Gallaher*).
140 The theory of harm advanced in Office of Fair Trading, Case CE/2596-03 (*Tobacco*).
141 Competition Appeal Tribunal, Case no. 1160/1/1/10 – 1165/1/1/10 (Imperial Tobacco).
142 Competition Appeal Tribunal, Case no. 1160/1/1/10 – 1165/1/1/10 (Imperial Tobacco).
143 Competition Appeals Tribunal, no. 1000/1/1/01(IR) (*Napp*).
144 Competition Appeal Tribunal, Case no. 1160/1/1/10 – 1165/1/1/10 (Imperial Tobacco), para. 51.

interests on the companies' side that would override the principles of finality and legal certainty.[145]

3.3 Application in Practice

The UK settlement procedure has been developed in practice and has been applied on 10 occasions so far. Five of these cases were settled post-SO, four of them were pre-SO cases.[146] Despite this limited number of applications, it is possible to make some remarks about the types of cases a settlement is usually applied to, as well as its position in the UK CMA's toolkit in relation to other enforcement instruments. This facilitates a comparison with other negotiated procedures later in this chapter, and allows for a review of the effectiveness and efficiency of the settlement procedure.

3.3.1 Scope of Application

According to the UK CMA's procedural notice, the settlement procedure could be applied to any Chapter 1 or Chapter 2 infringement of the Competition Act 1998, as long as the evidential standard for giving notice of the proposed infringement decision is met.[147] This means that a settlement can be used in both cartel and abuse of dominance cases, but does not extend to the prohibitions under the Enterprise Act 2002 (such as the criminal cartel offence). Based on the goals discussed above, one could say that the UK CMA would conclude a settlement only if resource savings are likely. Infringements involving a large number of parties, for instance, are particularly suitable for a settlement because it decreases the administrative burden of dealing with all of these companies in full. In fact, the first four settlement cases concerned large cartels only (sometimes combined with illicit vertical agreements). The *Royal Bank of Scotland* case, however, was the first case in which a bilateral horizontal agreement was resolved by settlement, and in the same year an abuse case (*Reckitt Benckiser*) was resolved in this way as well.[148] Apart from being applied in all kinds of infringements, the body of settlement cases suggests that all kinds of companies can be eligible for a settlement. However, companies have no absolute right to settle, and the UK CMA will review the appropriateness of a settlement on a case-by-case basis.[149]

The two main determinants for applying a settlement procedure are therefore the evidence gathered by the UK CMA beforehand, and the resource savings likely to occur if a settlement is used. However, there are other considerations as well. Because a fining

145 The situation could have been different if the theory of harm put forward in the settlement agreement would have been narrower, so that it would not have been possible for the Court of Appeal to 'read' the altered theories of harm into the settlement agreement.

146 The other one (*Construction*) is of an irregular nature. See: Office of Fair Trading, Case CA98/02/2009 (*Construction*). The pre-SO settlements are: Office of Fair Trading, Case CA98/01/2011 (*Royal Bank of Scotland*), Office of Fair Trading, Case CA98/01/2012 (*British Airways*), Office of Fair Trading, Case CE/9627/12 (*Medicines in Care Homes*) and Competition and Markets Authority, Case CE/9784-13 (*Ophthalmology*).

147 CMA Procedural Notice, para. 14.4.

148 Office of Fair Trading, Case CA98/01/2011 (*Royal Bank of Scotland*), Office of Fair Trading, Case CA98/02/2011 *(Reckitt Benckiser*).

149 CMA Procedural Notice, para. 14.5.

decision involving a settlement tends to be less comprehensive, the UK CMA has held in the past that using this procedure would be less appropriate in case a precedent needs to be set or the law needs to be clarified. In these cases, there are more benefits to be derived from a formal discussion between the companies and the UK CMA by means of representations.[150] Finally, the impact of the settlement procedure on leniency and overall deterrence must be reviewed.

3.3.2 Hybrid Settlement

Initially, the UK CMA was unsure whether it would allow a settlement with some of the companies involved, while pursuing a regular procedure with the remaining companies.[151] The resource savings in such a procedure were expected to be quite limited. However, the 2009 *Construction* case, but more clearly the 2011 *Tobacco* case did allow for this course of action, which the UK CMA calls 'hybrid settlements'.[152] In the view of the former OFT at the time, allowing some of the companies participating in the settlement to make savings already saves resources in the administrative phase, while adopting a strong approach towards the remaining, non-cooperating companies maintains effective competition law enforcement.[153]

In a hybrid settlement, an important issue concerns the probative value of the settlement agreement. Especially if not all of the companies involved in an infringement opt for a settlement, to what extent can the settlement agreement of one company serve as evidence in relation to the conduct of another? In a judgment concerning a settlement in the dairy sector, the Competition Appeal Tribunal (CAT) reviewed this question in detail.[154]

> The *Dairy* settlement concerned a large cartel in the dairy sector, sometimes also referred to as the 'Milk' or 'Cheese initiative'. Large supermarkets and retailers colluded to increase the retail prices of milk and cheese through the sharing of commercially sensitive information in 2002 and 2003. This case involved 10 companies, 6 of which opted for a settlement.[155] The supermarket Tesco, being one of the companies that did not settle with the UK CMA, appealed against the final decision and asked the question as to what extent the settlement agreement of the other companies could implicate Tesco in the infringement.
>
> The CAT noted in this respect that the UK CMA's settlement agreements differed significantly from the Commission's practice, as parties settling with the European Commission are required to provide a detailed submission, while settlement agreements as used by the UK CMA are brief and formulaic in nature.[156] In that light, the CAT held that the agreements prove the *existence* of the infringement and the

150 Nikpay & Walters 2009, para. 18.
151 For instance, in the *Independent Schools* case, the settlement could only be concluded if all the schools agreed to it. Office of Fair Trading, Case CA98/05/2006 (*Independent Fee Paying Schools*) p. 454.
152 Office of Fair Trading, Case CA98/02/2009 (*Construction*). This case is however very a-typical, and is discussed separately below. See also: Decision of the Office of Fair Trading, Case CE/2596-03 (*Tobacco*).
153 OECD Plea Bargaining 2007 p. 77.
154 Competition Appeal Tribunal, Case no. 1188/1/1/11 (*Tesco*).
155 The undertakings in the early resolution agreement were: Asda, Dairy Crest, Safeway, Sainsbury's, The Cheese Company and Wiseman. See Office of Fair Trading, Case CA98/03/2011, (*Dairy*).
156 Competition Appeal Tribunal, Case no. 1188/1/1/11 (*Tesco*), para. 114.

> involvement of the company admitting liability, but not the involvement of other parties. To come to that conclusion, the CAT considered that admissions under a settlement are 'unsworn' and not open to cross-examination by other parties. Apart from that, the CAT found that settlement agreements are often concluded on the basis of commercial considerations (penalty reductions and avoiding protracted legal procedures) and that the companies involved only have the right to make limited representations. Even though the CAT held that commercial decisions sometimes have legal consequences, these circumstances detracted from the probative value of the settlement agreement, which was considered to be less for these reasons.[157]

In short, the CAT confirmed the UK CMA's view that a settlement can serve as evidence as to the existence of the infringement itself, but not as to the involvement of other parties.[158]

3.3.3 Combination with Leniency and Other Procedures

Regardless of the administrative benefits for the agency, a settlement may not interfere with the goals of leniency, which is the UK CMA's main detection mechanism.[159] The fine discount in settlement cases cannot therefore be more attractive than the fine discount for leniency, because this could trigger companies to sit and wait, thereby hampering the influx of new cases. Even though the UK CMA is very careful with regard to not affecting the leniency procedure negatively, it is possible that a leniency applicant requests a settlement as well. In fact, in five out of seven cases the UK CMA has concluded settlement agreements with leniency applicants as well as with other parties.[160] For the leniency applicants, the UK CMA has granted cumulative fine reductions. The UK CMA views leniency and settlement as two different instruments (the former being an information gathering tool, the latter increasing administrative efficiency), and therefore wishes to persuade companies to cooperate in both.[161] This is only possible for leniency applicants that have not been granted full immunity, as there is no administrative benefit for such a company to engage in a settlement as well. In the case of a combined leniency/settlement procedure, this company is asked as part of the leniency process to accept that there is no involvement of the Case Decision Group – as is common in settlement procedures.[162]

Due to the nature of the settlement procedure, there is no way in which a settlement can be combined with a commitment decision. The latter leads to an early closing of the case, while the first leads to a formal decision. There have been cases in which some of the participants in the settlement agreement initially applied for a commitment

157 Ibid, para. 110.

158 See paras. 97-98 and para. 110 of the judgment in particular. The reasons the CAT lists here for attributing little probative value to the settlement agreements also raise the question of what their value would be in follow-on cases.

159 Nikpay & Walters 2009, paragraph 14. Now underlined in CMA Procedural Notice 2014.

160 Office of Fair Trading, Case CE/2596-03 (*Tobacco*), Office of Fair Trading, Case CA98/03/2011 (*Dairy),* Office of Fair Trading, Case CA98/01/2011 (*Royal Bank of Scotland*), Office of Fair Trading, Case CA98/01/2012 *(British Airways)*, Office of Fair Trading, Case CE/9627/12 (*Medicines in Care Homes*).

161 Nikpay & Walters 2009, paragraph 23.

162 CMA Procedural Notice 2014, para. 14.11.

procedure, but due to the seriousness of the case, their application was rejected.[163] This implies that the UK CMA finds the settlement procedure to be more appropriate than the commitment procedure when it comes to the completion of serious cases.

3.4 Outcomes

The application of the settlement procedure results in a formal decision, which includes the UK CMA's findings, an evaluation of the parties' (limited) representations and a decision as to the fine to be imposed.[164] The formal decision also contains the parties' admission of liability to the UK CMA's findings, which can facilitate civil follow-on actions. In return for an admission of liability and cooperation in a streamlined administrative procedure, the UK CMA grants certain rewards. Also, in some cases, companies take additional steps to restore the competitive situation for the future. The possible rewards for a settlement and the additional commitments offered to, or requested by parties are discussed in more detail below.

3.4.1 Fines and Discounts

In the settlement agreement parties commit themselves to paying a maximum fine, which is composed of a total penalty minus a fine discount for the settlement.[165] These discounts are capped at 20% for a pre-SO settlement and at 10% for a post-SO settlement. The – now capped – penalty discounts vary slightly from the discounts the UK CMA used to grant before its procedural notice was published. For instance, in the *Barclays* and *Gaviscon* cases,[166] the discounts granted were both set at 15%, even though the first concerned a pre-SO settlement and the latter a post-SO settlement.[167] These variations are not surprising, because the UK CMA was still developing its settlement procedure at the time. Moreover, despite the cap, the UK CMA still considers the proportionality

163 Office of Fair Trading, Case CA98/05/2006 (*Independent Fee Paying Schools*).

164 A formal decision is required in order to impose a penalty, see Competition Act 1998, section 36.

165 Also in settlement cases the UK CMA applies its normal method for setting fines. This entails that the so-called six-step procedure will be followed. The first step in this procedure is calculating the basic fine according to the seriousness of the infringement and the turnover of the company. Then (step two to six) adjustments are made for the duration of the infringement, for aggravating or mitigating factors, for deterrence or proportionality, in case the total fine amounts to more than 10% of the relevant turnover and for leniency and/or settlement. Under the sixth step, the UK CMA grants the fine reduction for settlement. Even though the agreement contains the maximum amount of the fine, the UK CMA is free to adjust the calculation according to the six steps, as long as the total amount remains the same. Additional fine reductions may be granted without further notification, implying that fine increases must be notified and explained. In cases involving multiple companies, including hybrid procedures, the UK CMA will calculate the fine for each company individually. For making the process of calculation more transparent, a table is used that visualizes which 'steps' call for which adjustments. See OFT Penalty Guidance 2012.

166 Office of Fair Trading, Case CA98/01/2011 (*Royal Bank of Scotland*), Office of Fair Trading, Case CA98/02/2011 *(Reckitt Benckiser*).

167 Other differences are found in the *Independent Fee Paying Schools*-case, in which a lump sum was paid, see Office of Fair Trading, Case CA98/05/2006 (*Independent Fee Paying Schools*). In the Diary case higher reductions were granted: between 30% and 35% (Office of Fair Trading, Case CA98/03/2011 (*Dairy*) and in Tobacco a 20% discount was granted in a post-SO settlement, see Office of Fair Trading, Case CE/2596-03 (*Tobacco*).

of the fine on a case-by-case basis and can increase the fine discount if there is extended cooperation beyond what is required under the streamlined administrative procedure. As noted earlier, the CAT is competent to review the proportionality of the fine and the discount if the company decides to appeal.

A fine discount is not the only reward for a settlement that the UK CMA can bring to the table. The procedural notice also explicitly lists the possibility of refraining from requesting a competition disqualification order.[168] This means that – under certain circumstances – the UK CMA might decide not to request the court to disqualify the director of a company for its involvement in competition law infringements as a result of a settlement.[169] Refraining from requesting a competition disqualification order is explicitly not part of the standard settlement procedure.

3.4.2 *Commitments*

In some cases, the settlement agreement contains additional remedies, imposed by the UK CMA or offered by the parties. These remedies can vary from compensation to compliance-based and behavioural commitments. Offering remedies is not mandatory, but may lead to additional fine discounts.[170] So far, three different types of remedies have been offered in the course of a settlement. Firstly, in the *Independent Schools* case, the schools agreed to set up a trust to compensate damages of students who had suffered from the increased fee levels due to the cartel. The schools made an ex-gratia payment of £3 million into this trust.[171] Another type of remedy concerns the implementation or improvement of a compliance programme. In the *Tobacco* case, for instance, some of the companies involved committed themselves to focusing more on compliance systems within their organizations.[172] This was rewarded with a 5-10% additional discount. More recently, in the *Property Sales and Lettings* case, some of the parties implemented company-wide compliance programmes. The UK CMA treated this as a mitigating factor, meriting a 5% discount in the fine.[173] Finally, there has only been one case in which a behavioural commitment was suggested (the *Reckitt Benckiser* case), but market parties discouraged the UK CMA from incorporating it. It concerned an abuse of dominance case in which a certain medicine was withdrawn from the prescription list, and the UK CMA wanted the drug company Reckitt Benckiser to relist this medicine. Competitors, however, informed the UK CMA that this would only reinforce the dominant position of Reckitt Benckiser. The UK CMA then withdrew this demand.[174]

168 CMA Procedural Notice 2014, para. 14.30.
169 OFT Guidance Company Directors 2011.
170 As a mitigating factor in the calculation of the fine. Office of Fair Trading, *OFT's guidance as to the appropriate amount of a penalty*, OFT423, September 2012, paragraph 2.15.
171 Office of Fair Trading, Case CE/2890-03 (*Independent Fee Paying Schools*), Annex 1, p. 452.
172 Office of Fair Trading, Case CE/2596-03 (*Tobacco*). The other cases in which compliance efforts were taken into account are: Office of Fair Trading, Case CE/2890-03 (*Independent Fee Paying Schools*), Office of Fair Trading, Case CE/8931-08 (*Reckitt-Benckiser*) and Office of Fair Trading, Case CE/3094-03 (*Dairy*).
173 Competition and Markets Authority, Case CE/9827/13 (*Property Sales and Lettings*).
174 Office of Fair Trading, Case CA98/02/2011 (*Reckitt Benckiser).*

4. FINING GUIDELINES AND AD-HOC SOLUTIONS (ACM)

The previous sections discussed two rather formalized procedures that deal with negotiation and cooperation with companies. These procedures have been adopted in France and the UK, but up until this point, the Dutch practice on similar negotiated procedures has not evolved to such an extent. Like the UK CMA and the Autorité, the ACM makes use of the leniency procedure and takes commitment decisions on a regular basis. However, the Dutch Competition Act does not provide for a formal settlement.[175] A settlement or transaction is not entirely alien to the Dutch legal system though, as it does exist in the field of criminal law.[176] In general, however, the ACM feels that there is little need for a settlement procedure alongside its regular procedures combined with its leniency programme and flexible fining guidelines.[177] This section therefore discusses negotiated procedures (or rather: negotiated aspects of procedures) in the light of the flexibility that the ACM's guidelines have to offer. As there is only a small body of cases to refer to – different from the previous sections – the discussion of these possibilities is based on examples or hypothetical situations. These examples are evaluated in the light of the normative framework, and they are also put in contrast with the more formalized procedures discussed above. In particular, this section discusses the procedure for a simplified resolution and the acceptance of commitments (as mitigating circumstances under the fining guidelines), as well as ad-hoc resolutions to remarkable competition issues. However, before that, the room for discretion which is available under the ACM's fining guidelines is discussed in more detail.

4.1 Room for Discretion in Fining Guidelines

The way in which a fine is imposed is predetermined by the ACM's fining guidelines.[178] Like most national competition authorities, the ACM has the power to reward a cooperative attitude in companies under the fining guidelines. If companies contribute to a swift conclusion of the case or propose ways to improve the competitive situation for the future, their behaviour is likely to be rewarded with a fine discount at a later stage. The Dutch fining guidelines speak of 'mitigating factors' in this respect.[179] As such

175 The possibility of a settlement procedure has been rejected, see the Parliamentary documents on the additions to the *Algemene wet bestuursrecht*, available in Dutch only under Kamerstukken II, 2003/04, 29 702, no. 3, p. 130.

176 See Article 74 of the Dutch Criminal Code (*Wetboek van Strafrecht*) or Article 37 of the Law on Economic Offences (*Wet economische delicten)*. In this field, cases concerning minor offenses may be resolved by means of a payment (a transaction), so that a trial can be avoided. The introduction of the criminal law transaction has met some criticism and is not always seen as a step forward, because it is said to increase arbitrariness and gives an incentive to the public prosecutor to avoid a trial in the 'hard cases'.

177 See for instance Kalbfleisch 2009, confirmed in Kamerstukken II, 2012/2013, 33622, no. 3 (Memorie van Toelichting).

178 Fining Guidelines ACM 2014.

179 Fining Guidelines ACM 2014, Article 2.10. The UK CMA applies a six-step procedure to calculate the fine, in which step 3 is reserved for aggravating and mitigating circumstances. These latter circumstances include the situation in which a company has taken adequate steps to ensure compliance with competition rules. Cooperation is not specifically mentioned, but the phrasing suggests ('the mitigating factors include') that the circumstances mentioned in the fining guidelines are not exhaustive. Penalty Guidance 2012, para. 2.15. See in more detail Chapter 6 below. In the French fining guidelines, however,

is considered the situation in which a company has provided extensive cooperation beyond the scope of the leniency procedure and beyond the scope of the 'normal' obligations resting on companies. This entails that it should be determined objectively that a company has cooperated beyond its legal duties, and that this cooperation has made the establishment of an infringement easier.[180] Apart from that, the voluntary compensation of victims of the infringement is considered a mitigating circumstance. On the other hand, intentionally delaying the ACM's investigation is considered to be an aggravating circumstance.[181] Naturally, the aggravating and mitigating circumstances are not the only room for discretion for national competition authorities to take special circumstances into account under the fining guidelines. For instance, the ACM makes use of a multiplier for seriousness (*ernstfactor*) that can be adapted if needed,[182] or the scope of the infringement can be extended or limited in order to adapt the amount of the basic fine. In fact, all competition authorities under review have a reasonable margin of discretion when determining the fine, which means that they have a reasonable amount of freedom to adjust the fine according to the specific circumstances at hand.[183]

It is very much dependent on the other instruments in the competition authorities' enforcement toolbox whether the room for discretion to apply a fine discount in certain circumstances is formulated broadly – or not, as the case may be.[184] In the Netherlands, the ACM has wide discretion to take cooperation, commitments and non-contestation into account under mitigating factors in the fining guidelines. The way the national competition authorities use this room for discretion is difficult to determine, because the application of the different adjustments and discounts is not always transparent, and neither are the commitments or the scope of the cooperation provided. Even though in some cases the calculation of the fine is made transparent in the final decisions, it is not always clear what weight has been attributed to the different factors that have affected the basic amount of the fine and the discounts granted. The examples given below are therefore limited to an outline of the relevant legal and institutional framework and a review of their application in the light of instrumentality and safeguard requirements, as underlies this thesis.

---

no such circumstances are considered as especially mitigating or aggravating in nature. Even though the phrasing of these provisions is equally non-exhaustive, the exemplary mitigating and aggravating circumstances are of a different nature than the ones mentioned in the Dutch or UK guidelines. For instance, that the company under investigation has always shown competitive conduct, that it was coerced to partake or that the infringement had been encouraged by the public authorities. See Fining Notice Autorité 2011, para. 45. This indicates that, as a result, if a company wishes to cooperate and to offer commitments for the improvement of the competitive situation, it has to do from the offset and follow a formal procedure, instead of opting in when the case has almost come to a close.

180 See Rechtbank Rotterdam, 6-5-2010 (*Rendon B.V*), quoting Court of Justice, Case T 13/89 (*Imperial Chemical Industries/Commission*).

181 See Fining Guidelines ACM 2014, Article 2.9 sub. b, this is also the case in the UK. See OFT Penalty Guidance 2012, para. 2.15.

182 Fining Guidelines ACM 2014, Article 2.2 for the multiplier for seriousness.

183 The Autorité lists so-called other factors of individualisation, and the UK CMA reserves an additional step for a proportionality review. See OFT Penalty Guidance 2012, steps 5 and 6, and Fining Notice Autorité 2011, paras. 47-49.

184 Clearly, in France, the Autorité relies on its formal tools to take cooperation and non-contestation into account. In the UK, the UK CMA explicitly deducts a percentage for non-contestation at a later stage of the calculation of the fine, but leaves room for other commitments.

4.2 Simplified Resolution

The first example of using the room for discretion in the fining guidelines concerns a very specific form of cooperation that could be introduced with a view to speeding up procedures at a later stage: the simplified resolution. The term is derived from the ACM's practice,[185] and is reminiscent of the UK CMA's previous terminology for a settlement ('early resolution'). However, the possibilities of the procedure in practice have more in common with the French transaction, because a simplified resolution is likely to be agreed upon after the statement of objections has been sent. In any case, to avoid confusion between the different types of procedures, the term 'simplified resolution' is used from here on to indicate the ACM's settlement of a formal procedure at a later stage of the decision-making process, under the general fining guidelines.

To date, the ACM has applied a simplified procedure in just one case: that concerning the market for vinegar. This is the first time in which the ACM clearly labelled the use of the room for discretion in the fining guidelines as a 'simplified resolution' and in which criteria for eligibility were clearly listed.[186] This case shows that the ACM might be willing to negotiate in the post-SO phase, to grant a fine reduction for such cooperation and to extend the use of these kinds of procedures to individual fines. The Vinegar case also gives rise to a number of questions for future practice, which are returned to below.

> In the Vinegar case, two producers of vinegar (Kühne and de Burg) were fined for an infringement of Article 6 Mw (the Dutch equivalent of 101 TFEU). In this particular case, the companies had divided customers amongst them by some form of no-poaching agreement, as well as coordinating the offer prices. For this infringement, five individuals (the *de facto* decision makers) were fined as well.[187] The statement of objections was sent in January 2014, and both companies requested a simplified procedure by means of a letter in June 2014. After a year of discussions, the final decision was published in August 2015. In this final decision, both companies agreed not to contest any of the factual findings or the application of the fining guidelines. In return, the companies received a 10% discount.

The final decisions in the Vinegar case list the requirements for a simplified resolution.[188] First of all, companies have to acknowledge the facts and circumstances of the case, as well as the legal qualification of those facts as given in the final decision. Secondly, companies have to admit to having infringed the law and that the infringement can be attributed to them. This formal declaration is consistent with Dutch administrative law,[189] which might facilitate add-on claims on the basis of the decision. In the third place,

185 'Simplified procedures' has been proposed as a preferred term to 'settlement' in the interviews conducted at the ACM between January and April 2013. This term was used for the first time in Autoriteit Consument en Markt, Case 14.0705.27 (*Vinegar*).

186 Outside the *Construction* cases, which are of a special nature and are discussed at length below. See section 4.4.1 below.

187 Autoriteit Consument en Markt, Case no. 14.0705.27 (*D*) and Autoriteit Consument en Markt, Case no. 14.0705.27 (*E*).

188 As is discussed below, the ACM also fined five natural persons, who settled by means of a simplified resolution as well. The conditions listed in the fining decision for the company are identical to the ones listed in the other decisions, hinting at the fact that this may be a new standard formulation for the ACM in these kinds of cases.

189 Article 5:1 *Algemene wet bestuursrecht*.

companies have to agree to the calculation of the fine as applied in the final decision, and lastly, they have to declare that they have had ample opportunity to make known their views and access their files.[190] These criteria are relatively similar to the ones applied by the UK CMA and the Autorité. However, a peculiarity of this Dutch decision lies in the paragraph in which the ACM stipulates that 'the final decision has been drafted on the basis of the cooperation of the parties with the simplified procedure'.[191] It is unclear from this case what this means, but it might indicate that there is room for negotiation on the phrasing of the final decision. The consequences of such a possibility are further discussed below. The fact of the matter is that, in this particular decision, the ACM limits itself to a brief description of facts and a legal qualification, and often relies on the acknowledgement of the parties in order to corroborate its findings.[192] This renders the final decision rather concise (18 pages).

The specific criteria for the simplified resolution were agreed upon after the statement of objections was sent. This is consistent with the institutional functioning of the ACM, in which there is a separation between the competition department and the legal department (Chinese Walls[193]). Because the legal department is responsible for the imposition of the fine, only the legal department is competent to grant fine discounts for a simplified resolution. Even if discussions would have taken place at an earlier stage, the competition department would formally not be competent to give any guarantees about the fine discount, as it cannot bind the legal department with commitments towards the parties. Different to, for instance, the Rapporteur at the Autorité, there is no intermediary that negotiates between the competition and the legal department. However, since the institutional merger that created the ACM, there is a practice of personnel of the legal department consulting on cases in the investigative phase.[194] This increases the likelihood of the competition department compiling a case file that satisfies the scrutiny of the legal department and it could aid the competition department in preparing a case 'with a view to' pursuing a simplified resolution if the companies involved have indicated their interest in pursuing this option. In the end, the legal department is responsible for drafting the final decision and imposing the fine, taking into account any possible waivers and commitments undertaken by the companies.

In the Vinegar case, the companies and the individuals were all granted a fine discount of 10% in return for their declarations and acknowledgements. In general, the ACM's fining guidelines do not specifically prescribe a fine discount to 'reward' cooperation; this remains at the discretion of the ACM. Based on its earlier practice, it seems that a 10% reduction is not out of the ordinary,[195] but the exact fine discount

190 All requirements, see Autoriteit Consument en Markt, Case 14.0705.27 (*Azijn*), para. 15.

191 *'Het onderhavige besluit is mede opgesteld aan de hand van de medewerking van partijen aan de vereenvoudigde afdoening van het rapport'*. Autoriteit Consument en Markt, Case 14.0705.27 (*Azijn*), para. 16.

192 *'Partijen hebben dit ook erkend',* See Vinegar, paras. 34, 38, 44, 47, 50 and 60.

193 See Chapter 2, section 2.2.1 for a more extensive description of the institutional design of the ACM and the way that plays a part in decision-making.

194 As long as these persons are not involved in the handling of the case after the statement of objections has been sent, this course of action does not breach the 'Chinese Walls'. See Article 10:3 sub 4 *Algemene wet bestuursrecht* and Article 54a *Mededingingswet*.

195 See Nederlandse Mededingingsautoriteit Case no. 6929 (*Zeescheepsafval*), para. 370 and the Dutch *Construction* cases (not referenced in full, see the list of cases). This percentage was also repeatedly

would have to depend on the circumstances of the case. In the past, the ACM has been quite reticent when it comes to granting a fine reduction for an acknowledgement of the facts alone,[196] as it repeatedly held that there would only be a fine reduction if the 'establishment of the infringement was made easier' by the cooperation of the companies involved.[197] It is unclear in what way the companies involved in the Vinegar case contributed to an easier establishment of the infringement, but it is possible that the ACM now interprets this starting point beyond the fact-finding phase, entailing not just cooperation before the statement of objections is sent, but extended cooperation in the phase that follows as well.[198]

Lastly, the Vinegar case is an interesting example of a negotiated procedure, because the ACM has decided to extend the application of the simplified resolution to individual fines.[199] The individuals fined were the *de facto* decision-makers involved in the infringement, or the ones responsible for the decisions made. The ACM imposed fines on five individuals, who all requested to be treated under the same simplified procedure as was applied to the companies. In the final decisions – that were published alongside the final decision involving the companies – the ACM used similar formulations in order to apply a simplified procedure. Amongst the competition authorities under review, the ACM is the only one that applies some form of negotiated procedure (albeit guided by the general fining guidelines) to individuals as well.

The Vinegar case and questions for future practice

Apart from these observations that show that a simplified resolution can have a place in the ACM's toolbox for the years to come, the Vinegar case also gives rise to a number of questions with regard to negotiated procedures in the Netherlands. The most important question of them all is whether this case indicates that the ACM is willing to accept a simplified resolution in other cases as well, and that it is currently developing its own settlement procedure. The standard formulations used in the final decisions seem to indicate that it is, but during the research conducted at the ACM in 2014 directors and staff still seemed to be hesitant and divided on this point.[200] Further practice on this point will indicate whether the ACM will make more frequent use of its room for discretion under the fining guidelines in order to reach a simplified resolution.

The second question that arises is whether or not this type of resolution is actually simpler than a fully adversarial procedure. It has been pointed out above that the

---

referred to in a series of interviews conducted at the ACM between January and April 2014. See Annex I – Methodology for a more precise description of this methodology.

196 Nederlandse Mededingingsautoriteit Case no. 6306 (*Meel*), para. 479.

197 See Rechtbank Rotterdam, 6-5-2010 (*Rendon B.V*), quoting Court of Justice, Case T 13/89 (*Imperial Chemical Industries/Commission*). See also the ACM in its decision in *Leesmappen* (Autoriteit Consument en Markt, Case no. 7244 (*Leesmappen*)).

198 As was not the case in the *Wasserijen* case. See Adviescommissie bezwaarschriften Mededingingswet, advies in zaak 6855, 2 juli 2014 (*Wasserijen*). Alternatively, the ACM could – on the basis of this case law – require companies to indicate their interest in an accelerated procedure at an earlier phase, which would require them to cooperate with the ACM's competition department towards drafting the SO. In this scenario, the relation between leniency and an accelerated procedure becomes more blurred.

199 These decisions are quite concise as well, with only a few paragraphs being dedicated to the legal evaluation of the facts underlying the case.

200 Series of interviews conducted at the ACM between January and April 2014. See Annex I – Methodology for a more precise description of this methodology.

Vinegar case took almost 20 months to complete after the statement of objections was sent. This does not mean that simplified procedures will always take this long (after all, this was the first one, and there were five different decisions concerning individuals to be concluded in the same timeframe), but the final decision does not make clear what happened between the written request of the parties to qualify for a simplified procedure and the publication of the final decision. Also, it is unclear whether the parties involved retain the right to object to the final decision,[201] or to appeal against it in court. Again, further practice will have to show these procedural steps in more detail.

4.3 Commitments in Fining Decisions

Another possibility for 'rewarding' companies for cooperating with the competition authority is accepting formal commitments aimed at remedying an existing competition problem or improving the competitive situation for the future. Of course this is possible under the commitment procedure of the various competition authorities,[202] but the main downside of a commitment decision is that it does establish an infringement of competition law. Because of this, competition authorities are reluctant to apply a commitment procedure in cases in which there is a serious infringement of competition law, such as hard-core cartel cases. If that were the case, commitment decisions would diminish the deterrent effect of an authorities' decision, as a result of the absence of a fine and the possibility for civil follow-on procedures. However, this does not take away from the fact that in some cases it would be very desirable for companies to propose commitments that remedy or improve the competitive situation. If anything, these companies are well placed to determine what would be necessary in a given market and their cooperation on the matter would be preferable to a situation in which such remedies were imposed in a top-down manner.[203]

In the previous sections, examples have been put forward that illustrate that – in fact – accepting commitments in the course of a formal procedure is an existing practice with the UK CMA and the Autorité. With regard to the UK, there have been examples of a compensation fund established by parties to a settlement agreement,[204] of companies proposing to develop an extensive compliance programme,[205] and even of a negotiation concerning a behavioural remedy – which was ultimately discarded.[206] With regard to France, it has been argued that the transaction has been the main vessel

201 Under Dutch administrative law, all formal decisions are subject to an objection phase, meaning that objections can be raised at the relevant administrative body. As a consequence, the decision-maker has to review its original decision and issue a reasoned decision as to why these objections are (or are not) well founded. Only after the objection phase is the decision open to an appeal at a Court. See Article 1:3 *Algemene wet bestuursrecht* and Chapters 3 and 4 of this act. See also Chapter 2, section 2.3 of this thesis in more detail on the Dutch objection system.

202 In the Netherlands, the commitments procedure is based on Article 49a *Mededingingswet*. In France, this is Article L.464-2 *Code de Commerce*. The CMA has a commitment procedure under Article 31A Competition Act 1998. This has been inspired by the Commission's commitment procedure under Article 9 of Regulation 1/2003.

203 Cf. the French injunction procedure, Article L.464-2 I Code de Commerce.

204 Office of Fair Trading, Case CA98/05/2006 (*Independent Fee Paying Schools*).

205 Office of Fair Trading, Case CE/2596-03 (*Tobacco*), and later Competition and Markets Authority, Case CE/9827/13 (*Property Sales and Lettings*).

206 Office of Fair Trading, Case CA98/02/2011, (*Reckitt Benckiser).*

for the development of an approach to evaluating compliance programmes, and in fact, there was an obligation to propose commitments in the course of a transaction up until 2008.[207] These commitments proposed by the companies (or, to be fair, proposed by the competition authorities but accepted and further elaborated upon by the companies) are formalised in the final decision and a breach of these commitments is punishable by a sanction. The formalisation of proposed commitments is rewarded by a fine discount ranging from 5% to 20% in the different Member States, depending on how effective and credible the commitment is estimated to be. Judging by these discounts, commitments aimed at remedying the harm done and restoring the current competitive situation are preferable to commitments aimed at the future alone. To illustrate this, offering an extensive compliance programme as a commitment would yield a lower fine discount than the establishment of a compensation fund for cartel victims.

Judging by the room for discretion in the fining guidelines, the ACM would be capable of accepting similar commitments as mitigating factors. The Dutch fining guidelines are formulated broadly, leaving enough room to accept mitigating factors other than the ones listed. Moreover, the situation in which a company compensates, of its own volition, those who have suffered loss because of a competition law infringement is considered a specific mitigating circumstance.[208] However, to date, no formal commitments have been accepted in the course of a fining procedure, and no specific fine discounts have been granted for steps undertaken by the companies to remedy or improve the competitive situation. In fact, there are two recent examples in which the companies designed compliance programmes in the course of the procedure in order to prevent competition law infringements in the future, but the ACM did not consider them among the mitigating circumstances.[209] There are, however, examples of cases in which the ACM decided not to pursue the investigation any further in light of the steps taken by the companies to discontinue the alleged infringement and to improve competition for the future. An early example of this was the 2004 *Interpay* case concerning payment processing by banks and their intermediate partners.[210]

> In the Netherlands, the consumer system for paying by debit card is called a Personal Identification Number, which in everyday Dutch parlance is called the 'pin' system. Eight Dutch banks had devised a system for facilitating these pin transactions, which was operated by their joint venture Interpay. This joint venture was the only supplier of pin systems and companies had to subscribe to it in order to enable their customers to perform pin transactions. After an investigation initiated by numerous complaints by subscribers to the pin system, the ACM fined Interpay for charging exceptionally high prices to their subscribers and it fined the eight banks for devising the pin infrastructure in such a way that created a market with just one player.[211] The eight banks and Interpay raised objections against the ACM's decision. During the objection phase, the banks effectuated a better distribution of market power on the market for pin transactions, they set up a fund for innovation in the field of efficient

207 See section 2.1 above.
208 Fining Guidelines ACM 2014, Article 2.10.
209 See for instance Nederlandse Mededingingsautoriteit, Case no. 6929 (*Zeescheepsafval*), or Nederlandse Mededingingsautoriteit, Case no. 6855 (*Wasserijen*). Whether a competition authority should reward the design of a solid compliance programme is discussed further in Chapter 7 and Chapter 8.
210 Nederlandse Mededingingsautoriteit, Case no. 2910 (*Interpay*).
211 Nederlandse Mededingingsautoriteit, Case no. 2910 (*Interpay*).

> financial transactions and they negotiated with market parties in order to compensate damages and to set up a long-term plan for a better functioning pin market. The latter negotiations resulted in an agreement, which was signed in 2005 and renewed in 2009. After a review by the legal department, the ACM then decided to decrease the fines for the banks and to dispense with the fine for Interpay because of two reasons. First of all, the ACM agreed that proving the abuse charges made against Interpay would call for additional research into the pin market. This research would be time-consuming and would bring long-lasting uncertainty for the companies involved. Secondly, the initiatives taken by the banks were received positively and they were considered to have at least the same effect as a fine.[212]

This example shows that as a consequence of remedying competition concerns, a case can be reviewed during the objection phase to the benefit of the companies. Also, if the companies under investigation would take such steps at an earlier phase, investigations could be halted, although this does not prevent the ACM from taking further action if the commitments were to be disregarded.

A possible reason why the ACM neither accepts nor rewards formal commitments in the course of a regular fining procedure is that is has no realistic opportunities to render such commitments binding – in contrast to the UK CMA and the Autorité, where it is part of the settlement agreement and the non-contestation minutes respectively. The ACM can probably exert pressure upon the companies by the possibility of reopening formal investigations, but other than that there is no formalisation possible that intermediates between a commitment decision and a fining decision. Using private law to formalize an agreement is not a realistic option either, because under Dutch law a contract between a private entity and a public body could be considered an encroachment upon administrative law. If a public body is equipped with specific formal powers under administrative law to deal with a certain situation, it cannot revert to general private law provisions to do the same.[213] Given that the ACM has separate powers under administrative law to impose fines and to accept commitments, it is not likely that it can make use of private law provisions, such as contract law,[214] to combine the two.

4.4 Ad-Hoc Solutions

The exploration of the possible interpretations of competition authorities' discretionary powers under the fining guidelines so far has been quite theoretical and based on piecemeal examples. This almost distracts from the fact that the ACM has – in the past – made very creative use of its enforcement toolkit to deal with extraordinary cases in so-called 'ad-hoc solutions', designed to tackle the specific market problems it was faced with. Taking into account the exceptional circumstances in which these cases have been concluded, the aim of this section is not to evaluate these cases on the merits

212 Press release Nederlandse Mededingingsautoriteit, 'NMa herziet boetes banken en Interpay', 22 December 2012. But this statement is probably based on previous research carried out by the ACM. 'Effecten van de overdracht van pincontracten', Monitor Financiële Sector, 2005.

213 Hoge Raad der Nederlanden, 26 januari 1990 (*Windmill*).

214 A civil settlement (*vaststellingsovereenkomst*) has been proposed in this respect. Article 7:900 Dutch Civil Code.

or the advocated general adoption of such enforcement actions, but to illustrate what kind of results the combination of multiple negotiated procedures can generate, and what happens in terms of instrumentality and safeguards if these kinds of solutions are applied on a very large scale. To these ends, this section discusses the famous and successful *Construction* case in the Netherlands, as well as the less successful – and thereby also less famous – *Homecare* case.

4.4.1 Fast-Track Procedures in the Construction Sector

In the early 2000s, when competition culture only just started to develop in the Member States (the Netherlands, for example, has only had an independent competition authority since 1998), the predecessor of the ACM was faced with a large number of competition cases dealing with public tenders in the construction sector. The way in which the ACM dealt with these cases is considered to be a unique approach to such large cases and is discussed at length below.[215] Some observations are made with regard to the specific aspects of the procedure, allowing for a comparison to be made later.

> In 2001, the airing of a Dutch television show appeared to be the unveiling of a widespread scheme of bid rigging, encompassing virtually the entire construction sector in the Netherlands. The practices (organizing pre-meetings prior to tenders and dividing the markets through a system of parallel bookkeeping) came to light by a whistle-blower who proved his allegations by showing examples of parallel bookkeeping. The public reaction to this broadcast justified the initiation of a Parliamentary Inquiry, which revealed serious problems with public procurement in the construction sector, providing the ACM with a strong incentive to investigate. However, judging by the *prima facie* evidence provided, it was indicated that more evidence was likely to come to light. In order to precisely determine the size of the task it was facing, the ACM publically advised companies to 'come clean' and to report cartel offences voluntarily under the protection of the Dutch Leniency Notice. Additionally, the government issued a warning stating that companies not coming forward before a certain date would face exclusion from future tenders. This triggered the filing of over 400 reports,

215 The ACM is not the only authority that has done so. Later, the UK CMA drew inspiration from the ACM's approach when it was faced with its own construction case. Different from the ACM, the UK CMA closed the possibility for leniency at a later stage and offered only the fast-track procedure after that. Also, the UK CMA required an admission of liability for qualifying for the fast-track procedure, while the ACM focused more on the procedural aspects of the waiver. Lastly, the UK CMA was open about the way it treated evidence and targeted the cartels it dealt with. This is harder to derive from the Dutch procedure. In that respect, it has to be remarked that scope of the UK *Construction* case was less broad than the case with which the Dutch competition authority was faced (113 decisions *vis-à-vis* 1300 decisions). See Office of Fair Trading, Case CA98/02/2009 (*Construction*). In France, there has been no large-scale construction case. This does not mean that the French competition authority has never encountered larger cartel or bid-rigging cases, or competition issues in recently deregulated markets. In fact, the Autorité has named the number of companies involved as one of the main reasons for applying a transaction, and cultural and contextual factors one of the main reasons to provide early advice or to strive for a swift commitment decision (Conclusion drawn from a series of interviews conduction at the Autorité de la Concurrence on 9 June 2014. See for a more detailed description of this methodology Annex I – Methodology). Although this could indicate that the Autorité is less likely to combine such instruments in an ad-hoc procedure, it also has to be remarked that the transaction already allows for a combination of several enforcement instruments as it is (leniency, fast-track decision-making and commitments). This could also indicate that, until now, the Autorité has never needed to interpret the room for discretion in its enforcement toolkit to fit a certain situation better.

which generated large amounts of substantial evidence.[216] Based on this evidence, the ACM sent sector-specific statements of objections to over 1300 companies, stating the presumed infringements of competition law in their sectors. Given the number of companies involved, the ACM designed a fast-track procedure that increased the possibility of a speedier resolution of the cases at ACM level.

Companies choosing the fast-track procedure waived the right to individually review the evidence and the right to challenge the underlying facts and legal analysis. This procedural waiver also affected judicial review, which had as a consequence that companies could only object and appeal against issues besides the facts and legal analysis. The fast-track procedure also involved a waiver of the right to individually put forward a point of view. Instead, companies collectively appointed one representative for the entire sector, who was allowed to raise sector-specific arguments against the imposition of the sanction, but not against the ACM's legal and factual analysis. Choosing the fast-track procedure qualified as a form of cooperation with the ACM, for which the companies would receive a fine reduction of 15%. The fast-track procedure was optional; all companies were allowed to refuse it in the first place, or to switch back to the regular procedure at a later stage. This reversal was possible until the moment when the ACM drafted the final decision, but led to the non-application of the 15% fine reduction. Although the majority of the companies eventually chose the fast-track procedure, still more than 100 cases were concluded following the regular procedure. Notwithstanding the procedural waiver, a number of special circumstances allowed for individual objections to be raised, such as if the imposition of a fine would inevitably lead to bankruptcy on the part of the company, if the company could conclusively prove that the benchmark year did not apply in their individual case,[217] or in case the company had already paid some form of damages to the injured parties.[218] The companies could add these issues to the file as 'individual circumstances'. At a later stage, the companies would then be allowed to object to or appeal against the ACM's appraisal of these individual circumstances, although they would have to do so with care: objecting to or appealing against the appraisal of other facts and circumstances would be considered a reversal of the 'regular' procedure.

The fast-track procedure was seen as an innovation in Dutch competition law enforcement, but an unwelcome one, according to some companies. Referring to Article 6 ECHR, encompassing the right to a fair trial, they complained that it would be legally impossible to renounce rights of defence, that there had been undue pressure to engage in the fast-track procedure, that changing their minds would put them in a worse position than before (*reformatio in peius*), that they should be allowed to contest the facts of the case on appeal and that the courts were obliged to fully review the fine anyway. In a series of judgments in 2010 the Trade and Industry Appeals Tribunal set these objections aside and approved the systematics of the fast-track procedure that the ACM had devised, as long as the conditions for opting into the fast-track

216 *Construction* case, referring to over 1300 fining decisions concerning widespread bid-rigging in the following 7 sectors: concrete, civil utilities, parks and recreation, roads, installations, cables and ducts, traffic control. The ACM has an archive of all formal decisions and their reference codes, accessible at https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/kartels/archief-bouwfraude/.

217 The ACM used 1998 as a benchmark year, because that was the year in which bid rigging became illegal with the introduction of the Competition Act. Companies that could prove that their bid-rigging activities started much later, had to do so by means of a declaration made by an accountant.

218 There was, for instance, a collective settlement agreement between the companies and the injured parties. See Brief van de d-g NMa aan de Minister van EZ d.d. 22 januari 2005, Handelingen TK 2004-2005, 28244 nr. 89.

> procedure were communicated clearly and the findings underlying the statements of objections had in fact delineated the final decisions.[219]

The evaluation of this case leads to a number of observations. The first thing that stands out in this respect is the sheer magnitude of the case. Competition authorities (depending on their size, the markets they oversee and their other activities) generally issue somewhere between 5-10 infringement decisions a year. This case contained 130 times that many. The second detail which should be highlighted is the accumulation of fine discounts made possible by combining a leniency application with a fast-track procedure. Under the old leniency rules in the Netherlands, companies coming forward at a later stage could receive between a 10% and 50% discount depending on the added value of their information. Add to that a 15% discount for accepting the fast-track offer and another 10% for making compensation payments to a ministerial fund, then companies could receive a discount of up to 85%. Procedurally, the ACM took an unprecedented approach by designing a fast-track procedure, dividing the case into different sectors and sending a standardized statement of objections per sector. Lastly, in this case, the media played an interesting part: a television broadcast was the incentive to investigate, and the ACM's call to 'come forward and come clean' was widely publicized.

This example illustrates the possibility of using existing formal enforcement instruments (leniency and the administrative fine) and the margin of discretion in their application to tackle a multitude of market problems at once. The ACM turned to its existing toolbox to find enforcement instruments to deal with these cases and because the ACM saw the need to deal with the competition concerns in a broad, all-encompassing manner, the solution was different from its previous practice. In fact, the ACM has never used such an explicit fast-track procedure since then. This is because the *Construction* case was considered to be a once-only deal, designed specifically to fit the situation at hand: an ad-hoc procedure. What also stands out is that the ACM saw the need to address the competition concerns in a broad manner, instead of relying on the setting of one example and hoping for the bid rigging to cease. The reason behind this is largely factual (intricate systems of parallel bookkeeping and cover pricing would not go away by fining one bookkeeper), but the role of the media might have had something to do with this as well. In any case, the media aided the ACM in communicating and executing its enforcement strategy, which – in the absence of previous experience

219 The cases are: College van Beroep voor het Bedrijfsleven, LJN BM2423 (*Imtech N.V./NMa*), College van Beroep voor het Bedrijfsleven, LJN BN0545 (*[A] B.V./NMa*), College van Beroep voor het Bedrijfsleven, LJN BN0540 (*[A] B.V./NMa*), College van Beroep voor het Bedrijfsleven, LJN BN6707 (*[A] B.V. en [B] B.V /NMa*), College van Beroep voor het Bedrijfsleven, LJN BN6711 (*[A] B.V. en [B] B.V /NMa*), College van Beroep voor het Bedrijfsleven, LJN BN06716 (*[A] B.V./NMa*), College van Beroep voor het Bedrijfsleven, LJN BN6911 (*[A] e.a./NMa*), College van Beroep voor het Bedrijfsleven, LJN BN9349 (*[A] B.V./NMa*), College van Beroep voor het Bedrijfsleven, LJN BN9357 (*[A] B.V. en [B] B.V /NMa*), College van Beroep voor het Bedrijfsleven, LJN BO0866 (*[A] B.V. en [B] B.V /NMa*), College van Beroep voor het Bedrijfsleven, LJN BN6925 (*[A] B.V./NMa*), College van Beroep voor het Bedrijfsleven, LJN BO0952 (*[A] B.V./NMa*), College van Beroep voor het Bedrijfsleven, LJN BO0961 (*[A] B.V. en [C] B.V /NMa*), College van Beroep voor het Bedrijfsleven, LJN BO0973 (*[A] B.V./NMa*), College van Beroep voor het Bedrijfsleven, LJN BO0990 (*[A] B.V. en [B] B.V /NMa*), College van Beroep voor het Bedrijfsleven, LJN BO4962 (*[A] e.a./NMa*), College van Beroep voor het Bedrijfsleven, LJN BO5193 (*[A] N.V./NMa*), College van Beroep voor het Bedrijfsleven, LJN BO5197 (*Beheersmaatschappij [A] B.V./NMa*).

with settling cases or procedural waivers – could have been considered quite an interpretational stretch. From a safeguard perspective, this has always been the main criticism of fast-track procedures.[220] From an instrumentality perspective, the question can be raised whether a deduction of the maximum discounts for cooperation left a fine that could still be qualified as a deterrent. The large reduction could have been the main reason for the companies to cooperate and – to put it bluntly – to be done with it.[221] It is always easy to comment on cases with the benefit of hindsight, but bearing the loss of deterrence in mind it can be questioned whether the *Construction* case has had the desired effect. Even though initial follow-up research showed promising results,[222] the construction sector is still a priority and every so often is subject to new investigations. It remains to be seen whether in future cases that involve this many companies the competition authorities would take a similar approach.

4.4.2 *Alternative Resolution in the Homecare Sector*

From time to time it might occur that a competition authority finds itself faced with a competition concern that is so intertwined with the characteristics of a given market that it would be undesirable to open an investigation, but at the same time so widespread that it is unwise to 'let it go'. Especially when this concerns markets in which competition has been newly introduced, such as the healthcare market, a special approach to remedy these concerns could be advisable. This was the backdrop against which the ACM pursued an ad-hoc solution in the market for homecare, attempting to address almost all homecare providers at once.

> The case started in 2008, when the ACM fined a number of homecare providers for infringing competition law.[223] The way in which they worked together to provide special care (a so-called chain mechanism) was money-saving and therefore more efficient, but possibly threatened competition on the market. Because it appeared – after deliberation with the fined companies' representatives – that this type of cooperation was very common throughout the entire sector, the ACM set out to find a faster and more efficient way to deal with past infringements and aim for compliance in the future. An arrangement was proposed on the basis of which homecare providers would report their cooperative agreements to an independent evaluation committee that would evaluate whether the agreements would be allowed in terms of competition law. If not, homecare providers would have to suspend the cooperation and pay a certain amount of money to a newly established fund to support healthcare innovation. If this procedure were followed, the ACM would not launch an investigation. Additionally, the ACM would help the homecare providers to design a compliance programme

220 See further Gerbrandy & Lachnit 2013.

221 This could also mean that companies faced with the objections raised against them and their sectors opt for the fast-track procedures in fear of significantly higher fines if they would not. Bear in mind, however, that the high discounts mentioned here concerned a combination of leniency and a fast-track procedure. The fast-track procedures alone accounted for 15% and 25% of the discounts respectively, which presumably constitutes a lot less pressure than the 65% to 85% mentioned earlier.

222 See Foekema & Nikkels 2008 for the ACM case and Office of Fair Trading, Evaluation of the impact of the OFT's investigation into bid rigging in the construction industry, Europe Economics, OFT1240, June 2010.

223 Nederlandse Mededingingsautoriteit, Case no. 5851 (*Thuiszorg 't Gooi*) and Nederlandse Mededingingsautoriteit, Case no. 6168 (*Thuiszorg Kennemerland*).

> and to set up training and education for their personnel. Apart from that, the ACM would issue extra guidance on cooperation in the healthcare sector if that proved to be necessary. One of the conditions for the implementation of the arrangement was that at least 75% of the homecare providers would agree to it. However, the arrangement was rejected at the general meeting of one of the largest professional organizations for homecare, which meant that the threshold would most likely not be met. The homecare providers were sympathetic towards the implementation of a compliance programme, but were not enthusiastic towards the special arrangement as long as the ACM's earlier fining decisions would not be revoked.[224] Despite the attempts to design an innovative tool to address competition concerns 'across the board', the arrangement was discarded, and later on appeal, the fining decisions were overturned as well.[225]

To summarize, the ad-hoc solution in the homecare sector would entail an informal resolution in which homecare providers would report their current methods of collaboration to an external committee composed of experts, who could decide that a 'retribution payment' would have to be made to a fund that promoted innovation in the healthcare sector. In return, the ACM would make no further use of its formal powers to pursue action against possibly unlawful cooperation in the homecare sector. This informal resolution would only be enforceable by pursuing formal legal action (a competition law investigation) if the terms of the agreements would not be complied with. With a view to improving the competitive situation in the homecare sector, the ACM proposed to apply a range of its other informal tools: competition advocacy and promoting the adoption of compliance programmes with the help of a prominent trade organisation.

The main legal issue with this particular resolution to addressing competition concerns across the board is the fact that an external panel of experts would have been used to review competition decisions. Even though mutually agreed upon by the ACM and the parties – which would thus qualify as a form of dispute resolution or mediation – the decisions of such a committee would not have the standing of a formal administrative decision. This would entail that an objection and an appeal would not be possible. Eventually, a case in which none of the parties would agree with the committee's decision could make it to the courts (assuming that a formal investigation would have been opened, a decision would have been issued and the companies involved would have objected and appealed), but this is not a preferable route and would undermine the very nature of the alternative resolution proposed here. Also, at the time of the negotiations between the ACM and the homecare providers, no legal review had yet been performed on the validity of the original fining decisions condemning specific forms of cooperation in the sector. If these decisions would be overturned – which indeed they were – this could call into question the legality of the entire arrangement as such. Besides the considerations for the parties to the arrangements, this form of alternative dispute resolution threatens the position of third parties who possibly suffered harm as a result of the presumed infringement.

---

224 As is apparent from Actiz Jaarkrant 2010, 'Succes, vernieuwing en vertrouwen in de zorg', p. 6, as well as the discussion in the Dutch Lower House that followed. See: Tweede Kamer der Staten Generaal, 'Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden', Vergaderjaar 2010-2011, Aanhangsel der Handelingen, no. 553.

225 Rechtbank Rotterdam, LJN: BW1327 (*Stichting Zorgbalans en Stichting Viva v NMa*).

The main factual reason why this particular form of addressing competition concerns has never been put into practice has more to do with the nature of the market and the market parties involved. Homecare was a market in which competition was introduced relatively late. There was a great deal of uncertainty about the application of competition rules and the homecare providers had not realised that their behaviour could be considered as anti-competitive. The fact that the ACM had already fined two homecare providers for the same type of cooperation for which the alternative resolution was designed would have put a strain on the negotiations.[226] It is very likely that this would have been the underlying reason for a wholesale rejection of the ACM's proposition.

This brings a wider problem with these types of arrangements into view: the fact that the main reason for a competition authority to act in these cases is the fact that there is a competition concern – possibly an infringement – to begin with. There are very compelling reasons to pursue an alternative resolution if that would mean that these concerns were to be addressed sector-wide, but that also entails that a competition authority would purposely 'overlook' possible infringements in order to achieve these results. This yields an interesting, but difficult choice: either pursuing an alternative, informal, resolution that meant cooperation with the sector itself, or pursuing cases with formal enforcement instruments, while hoping to effectuate this change in the slipstream of these decisions. There are broader considerations connected to these choices, which are returned to below.

5. PRELIMINARY EVALUATION OF NEGOTIATED PROCEDURES

In this chapter, three different regimes of negotiated procedures have been discussed in their own right: the French transaction regime, the UK CMA's settlement procedure and the ACM's simplified resolution and ad-hoc procedures. Consistent with the aim of this thesis, these procedures are tested below against the normative framework consisting of instrumentality and safeguard requirements.[227] This evaluation reveals the problems with negotiated procedures in the Member States; either major differences in procedures, or issues that all national competition authorities encounter when pursuing a negotiated procedure. In this section, these problems are identified and assembled for further discussion in the final chapters of this thesis.

5.1 Transactions by the Autorité

The most striking observation from the non-contestation practice is that the Autorité has placed safeguards at the forefront of the procedure, even though its own aim is to enhance procedural efficiency. This is illustrated by a number of features of the procedure. First of all, procedural rights of companies are safeguarded by the fact that the Autorité conducts a full investigation in the first stage, and the fact that there is consequently no bargaining on the content of the infringement. This is in line with the principle of

226 See for instance van Erp 2005 and Denkers 2013.
227 This framework is set out in detail in Chapter 3 of this thesis.

legality – which, in France, requires a formal investigation after opening a case – and shields the companies and the Autorité from the influence they might exert on each other (capture or undue pressure respectively). In line with the full investigation, access to documents remains guaranteed throughout the procedure, which safeguards equality of arms. Contributing to legal certainty and transparency, and thus an additional safeguard within the procedure, is the fact that the Autorité has published guidelines on the application of the non-contestation procedure. Set out against its standing practice of publishing guidance,[228] it is expected to update this document to reflect its new competences. Apart from that, the role of the Rapporteur demarcates an important institutional safeguard within the procedure, separating the investigative teams from the decision-makers. This protects impartiality within the decision-making structures and provides for internal review. Lastly, external review is guaranteed because of the fact that companies engaged in a transaction may still opt for an appeal on procedural points. Because all of these safeguards are in place, the objections commonly raised against negotiated procedures and settlements in particular are not as pressing when it comes to the practice of the Autorité.[229] The only exception might lie in the standard of review as applied by the courts, which is currently limited to manifest errors of appreciation.

The explicit emphasis on safeguards in the transaction furthermore generates trust in the procedure by the companies, because it removes important uncertainties regarding the value of their cooperation and the conduct of the Autorité. In other words: trust is generated by the enhanced throughput or procedural legitimacy. Furthermore, trust and a willingness to cooperate – in turn – gives the Autorité a mandate to operate, ensuring that the transaction can be applied effectively. In fact, these two statements are mutually reinforcing: the more the Autorité has the opportunity to apply its procedure (provided that it does so in a way that respects safeguard requirements), the larger the body of cases that show the legitimacy of its actions, for which the more companies would be willing to cooperate, and – again – the more the opportunity to apply the procedure would arise. This demonstrates how a focus on safeguards could have an effect on the instrumental side of the enforcement action through the notion of legitimacy.

Different to what may be expected, the focus on safeguards does not hamper instrumentality; it seems to promote it, as is also proven by its large-scale application (in roughly 1 in 5 cases) and its steady usage over the years (around 4 *per annum*). With a few exceptions, the transaction is also more efficient than a regular fining procedure, with an average duration of 12 months instead of the 18 months that a regular fining procedure takes on average.[230] Of course, these numbers are rough averages, which do not in any way presume effectiveness. However, it does give an indication of the perceived suitability of the instrument by the competition authority itself, and it corroborates the efficiency argument to a certain extent.[231]

---

228 The Autorité has guidance documents on almost all enforcement instruments. See its database online at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=260.

229 These objections concern the waiver of procedural rights, the possible pressure exerted on companies to incriminate themselves and uncertainty for the parties involved. See in more detail Chapter 8, section 2.

230 Average calculated from the non-contestation cases in the past. The average duration of a regular fining procedure is derived from Lasserre 2009.

231 Efficiency is interpreted in this thesis as the decrease in costs or lead-time, while maintaining similar results. This number only establishes the decrease of lead-time and is thus an indication of efficiency. For

To better underpin this claim of effectiveness, it should be highlighted that the requirements flowing from the legal approximation of effectiveness are visible in the way that the French transaction is designed. The accountability mechanisms, decisional impartiality and transparency in the transaction have already been discussed above, but apart from that it appears that the Autorité is aware of the place that the procedure holds within its catalogue of enforcement instruments, and has strategized its application accordingly. The Autorité uses the procedure in combination with other instruments (such as leniency, or a regular fining procedure when it comes to a hybrid transaction) and assesses the added value of non-contestation and commitments in relation to its broader enforcement catalogue. Overall, the fulfilment of the criteria approximating effectiveness in a legal sense supports the conclusion that the transaction has, at least in theory, the possibility of generating effective outcomes.

5.2 Settlements by the UK CMA

The feature of the UK CMA's settlement practice that stands out the most is the focus on procedural efficiency and the pronunciation of a very clear view of how to achieve it. This indicates that the settlement procedure is very much focused on the efficiency aspect of instrumentality: generating as much effect as possible at the cost of as few resources as possible. Illustrative in this respect is that one of the main requirements for engaging in a settlement is cooperation in a streamlined administrative procedure, which entails the waiver of a number of procedural rights in order to facilitate speedier decision-making and as few procedural delays as possible. The fine discount that is granted is directly dependent on the efficiency gains to be expected from the cooperation of the companies. If they would conclude a settlement agreement with the UK CMA at an early stage, their discount will be higher than if they would conclude the same agreement at a later stage of the procedure. For that reason, it is possible to conclude a settlement before the formal statement of objections is sent. The UK CMA is very straightforward in formulating these requirements. They are considered the minimum requirements for a settlement and they are not negotiable, which indicates that the UK CMA strives for these efficiency gains in all of its settlement procedures. Another aspect that underlines this is the timetable for negotiations. These are planned out beforehand in order to prevent protracted negotiations. Although, as yet, there is little evidence concerning the actual efficiency of the procedure, the first results are promising.[232] In any case, the UK CMA has designed the procedure with the preconditions for efficiency in mind. A final aspect that contributes to instrumentality, though not so much to efficiency as to effectiveness in terms of outcomes, is that the UK CMA is experimenting to combine a settlement procedure with the adoption of other commitments. This resembles the voluntary commitments in the French transaction and would have the same benefits as remarked there.[233]

---

a full assertion, is has to be established whether or not the results are similar. This has to be viewed in a broader perspective, including the enforcement policy as a whole.

232 Speech by David Currie in 2013, in which he claimed that the *Property Sales and Lettings* case was concluded in 15 months.

233 See, in summary, section 5.1 above.

However, from an instrumentality perspective it is surprising that the UK CMA has closed seven settlement cases in the last few years, compared to a relatively low number of 'regular' fining decisions. With regard to the French transaction, the hypothesis was posed that the large body of cases built up over the years contributed to the effectiveness of the procedure and the Autorité being convinced that the way forward was to get companies to cooperate and to waive some of their procedural rights. As this proposition does not hold true for the UK CMA, there must be other factors contributing to the UK CMA's credibility that persuades companies to cooperate. One of these factors could have to do with the overall reputation of the UK CMA, which is perceived as a high-quality and trustworthy authority,[234] but it is possible that the UK CMA has struck a good balance between instrumentality and safeguards within the settlement procedure as well.

As noted in the normative framework, a one-sided focus on the instrumentality requirements would not lead to optimal outcomes. The key is to balance instrumentality with safeguards, in order to generate outcomes that are perceived as legitimate. Translated into the situation at hand, this would require sufficient procedural safeguards within the settlement procedure itself, without hampering the efficiency goals. The most important in that respect is the fact that the main criterion for engaging in a settlement is that the evidential standard for giving notice of a proposed infringement decision is met. The UK CMA has to draft and send either a statement of facts or a statement of objections before starting negotiations. This standard prevents 'fishing expeditions' (informal contact with companies with a view to discovering new infringements or new evidence) and ensures that the companies are 'aware of the house rules before they join the table'. In other words, the fact that the UK CMA has already gathered enough information to build a case before the initiation of settlement discussions can help to perceive the procedure as more legitimate.[235] Apart from the evidential standard, the settlement procedure has retained the features of an adversarial procedure, albeit to a more limited extent. Parties to a settlement can make limited representations, have limited access to documents, and they are capable of making their views known during the negotiation phase. Adversarial procedures are in line with the rights of defence, and the fact that these features are limited and have not been completely waived form an additional safeguard to the settlement procedure.[236] In that respect it has already been noted that the possibility of an appeal remains intact – at the cost of a probable loss of discount. Lastly, the publication of a guidance document on the UK CMA's approach to settlement cases helps to prevent (the perception of) the arbitrary application of the procedure and makes the UK CMA's approach more transparent. This transparency

234 See the ratings of the Global Competition Review in 2011, in which the Competition Commission had been given 5 stars while the OFT had been given 4.5 (see http://globalcompetitionreview.com/features/article/28599/). The UK CMA currently has a four-star rating, which is still considered very good. By comparison, the Autorité has a five-star rating (elite) and the ACM has a rating of 3.5 (good). See Global Competition Review 2015, available on: http://globalcompetitionreview.com/surveys/article/38900/star-ratings.

235 Whether there is anything in the procedure preventing the settlement discussions from taking place at an earlier stage is discussed below. This could, naturally, decrease the perceived legitimacy of the procedure.

236 See Chapter 8, section 2.1.1 for a discussion of the legality of a waiver of procedural rights in general.

enhances the trust companies have in the procedure, as they can predict the UK CMA's behaviour, and thus its effectiveness.

There is, however, one element of the procedure that is not explicitly remedied by any of the safeguards in place. As noted above, the UK CMA uses timetables from the formal opening of the case onwards. These timetables prescribe the time that can be taken for investigation, negotiation and decision-making. Timetables increase expeditiousness, but also increase pressure upon the case teams. A possible consequence of this pressure is to push back elements of the procedure that take a lot of time – such as the negotiations – to the 'informal phase': phase 0. According to the procedural notice, this is a pre-investigative phase in which only informal information-gathering techniques may be used. But the question is: what prevents the UK CMA from exploring a settlement in this early stage? How does that relate to the safeguards, such as the minimum standard of evidence before engaging in negotiations? And would, in that case, efficiency even be increased? Even though this situation has not yet presented itself in practice, it is a risk which is inherent in the settlement procedure – even more so because the UK CMA has an explicit 'informal phase' before opening investigations. This point is dealt with in terms of pressure upon companies in the instrumental and safeguard aspects of the various negotiated procedures below.

5.3 Flexible Fining Guidelines and Ad-Hoc Solutions by the ACM

Because Dutch practice is not yet as extensive on this point, it is difficult to position simplified resolutions and ad-hoc solutions on the scale between instrumentality and safeguards. When it comes to implementing a simplified resolution (from an instrumental point of view) there are definitely efficiency gains to be derived from an acknowledgement of the facts and the subsequent legal qualification, if – at least – this means that companies will not lodge formal objections after the final decision has been issued. Especially in situations like the Dutch legal system, where there is a separate objection phase that requires a re-evaluation of the previous decision, this could speed up decision-making by several months. Given that the relationship between the competition authority and the companies involved becomes less adversarial as a result, other procedural aspects can be discussed as well, such as – for instance – the press releases surrounding the closure of the case.[237] The efficiency gains derived from an accelerated procedure could give the ACM the opportunity to 'do more' with the resources available, but only depending on the case itself and the execution of the waiver in practice. Not having procedural guidelines prescribing the conduct of the competition authority in a simplified resolution procedure makes it a very flexible tool, which can be adapted to the circumstances at hand and the attitude of the companies involved. Because this procedure is likely to be initiated only after the statement of objections has been sent, it safeguards the competition authority from the risks of regulatory capture

237 This becomes more difficult if the negotiations also include the text of the final decision. From the viewpoint of independence and transparency, the ACM should be able to draft its own decisions and to provide clarity on certain points of law, even if this means that companies involved in a negotiated procedure will become liable for follow-on actions as a result. Because it is unclear whether this is the case in Dutch practice, this point is not further explored.

and bias in an earlier phase. Engaging in a simplified resolution in a later phase makes sure that the case file is compiled in a robust way that does not involve the companies' interference. This connects to the last advantage of simplified resolution as opposed to an early settlement: it safeguards procedural fairness. This ensures that any negotiations take place on the basis of a reasoned statement of objections, so that companies are aware of the full content of the decision before signing away their rights.

On the downside, however, the room for discretion under the fining guidelines raises questions with regard to arbitrariness. The conditions for qualifying for a simplified resolution are not clear and, in the absence of a broader body of cases, the possibility of requesting one cannot be considered to be general knowledge in the Netherlands. Apart from that, in the absence of procedural guidelines or sufficient precedent, the companies involved are left in a position of uncertainty about the consequences of a simplified resolution procedure, especially with regard to the status of their procedural waiver, with regard to the possibility of facing civil follow-on actions and the situation in which other parties have been fined but have the decision overturned on appeal. These uncertainties could be remedied – in part – by transparent decision-making and a clear calculation of the fines. The *Azijn* case does not provide such reasoning. In fact, it is rather concise and lacks an explanation about the details of the procedure. Such uncertainty could – in the end – lead to a less effective application of the instrument, as companies could be unwilling to cooperate or could use the room for discretion *against* the competition authority in order to extract more benefits.

Apart from the simplified resolution, the room for discretion room under the fining guidelines can also be used to devise ad-hoc solutions for larger market problems. The *Construction* case shows that doing so can be considered efficient and possibly successful, the *Homecare* case shows that – unfortunately – such enforcement efforts can also go wrong. The main risk in devising such ad-hoc solutions presents itself when the stakes are raised too high – in the sense that the competition authority tackles problems beyond the scope of the presumed infringements in the markets. Whether this is considered legitimate depends on how the role of a competition authority in society is perceived. Depending on that role, ad-hoc solutions could be applauded for their innovation, or condemned as being market shaping. It is difficult to determine whether the ACM's efforts would qualify as the one or the other. In any case, the transparency pursued in the *Construction* case (illustrated by the role of the media and the multitude of information still available in public records) facilitates a discussion and a review on this point. Especially when an ad-hoc solution escapes legal review because of the way it is designed, the need for transparency increases. If the legality of the instrument is not reviewable in court, its legitimacy should be able to be discussed on another forum.

6. COMPARATIVE OVERVIEW AND FINAL REMARKS

In the previous sections, the different negotiated procedures have been assessed in the light of instrumentality and safeguards with regard to the particularities of the national application. The evaluation of the French transaction, for instance, has given an impression of how the Autorité applies negotiated procedures and what it

finds important in terms of balancing instrumental requirements with safeguards.[238] The evaluation of the UK CMA's settlement practice has done the same, albeit with a different outcome.[239] With regard to the ACM's practice, the evaluation has been more tentative, focussing on possible outcomes, advantages and pitfalls in the absence of a formal procedure.[240] From this evaluation it appears that there are many key procedural points that indicate the different nature of negotiated procedures. Broadly speaking, these key procedural points concern the legal and institutional set-up surrounding the procedures, the possible points of negotiation, and the consequences of the procedure in terms of the protection of rights and judicial review. An overview that summarizes the findings with regard to the competition authorities' practice on these key points is provided below.

	Transaction	**Settlement**	**Discretion in guidelines***
Specific legal basis**	Yes	No	No
Use of guidelines	Yes	Yes	No
Internal separation	Yes + Rapporteur	No	Yes
Pre-SO/Post-SO	Post-SO	Both possible	Post-SO (?)
Hybrid forms	Yes	Yes	Presumably yes
Plea bargaining	Not possible	Formally not accepted	Presumably no
Liability	Only non-contestation	Yes	Not likely
Commitments	Accepting & rewarding	Additional cooperation	No
Fine reduction	No, but minimum and maximum level set	10%-20%	10%
Procedural waiver	Cooperation implied	Yes, on specific points	Yes
Judicial review	Specific points	Discouraged, but retained	Waived

* As exercised by the ACM. Guidelines being regular fining guidelines. See: Fining Guidelines ACM 2014.

** Not being the general legal basis for fining infringements of competition law, but a specific legal competence to use a settlement or a non-contestation procedure as an alternative to a fully adversarial procedure.

As is apparent from this overview, the choices made in the design of negotiated procedures vary to quite a degree from competition authority to competition authority. This indicates that there are a number of procedural choices that a competition authority can make when designing or pursuing a negotiated procedure (or, similarly, the choices that the legislator makes when there are specific provisions in place regulating the behaviour of the competition authority). These are further referred to as 'policy considerations', because they influence the authorities' approach to alternative enforcement policy.

238 See section 5.1 above.

239 See section 5.2 above.

240 See section 5.3 above. With regard to the Dutch practice in particular, the complete absence of procedural guidelines (save for its fining guidelines, which are drafted and approved by the Minister of Economic Affairs) is what sets its simplified resolutions and ad-hoc solutions apart from the rest. This issue arises in other enforcement instruments as well, for which reason it is discussed in the concluding chapters of this thesis.

Judging from the comparative overview above, the policy considerations for negotiated procedures concern the moment of negotiations, the status of hybrid procedures, the use of procedural guidelines, the formalization of commitments and the internal separation of functions.[241] Not necessarily derived from the differences between national procedures, but still relevant as policy considerations, are the facts that negotiated procedures also touch upon the interplay with leniency and civil add-on procedures and could generate enforcement losses in terms of deterrence and clarification.

With regard to these policy considerations, the questions are what the underlying reasons could be for a competition authority to choose the one answer over the other, and which is more desirable from the point of view of the normative framework.[242] These questions are returned to in the concluding chapters of this thesis. However, before it is time to turn to this final evaluation, attention is paid to the other types of alternative enforcement instruments: markets work, individual guidance and compliance programmes. The analytical steps in these chapters is similar to this one, and lead to the identification of policy considerations for these instruments as well.

241 Technically, the fact that the Autorité now applies a minimum and a maximum fine instead of a discount would be a policy consideration as well. However, in the absence of many cases concluded after the *Macron* law came into effect, as well as limited points for comparison (since the other authorities have either very limited practice or employ fixed fine discounts), this point is not further touched upon. As noted above, the explanation that the changes are made in order to make the transaction procedure more attractive seems at odds with its high application rate. A balanced application of negotiated procedures *vis-à-vis* fully adversarial procedures would most likely not lead to a much higher (or broader) application rate (see in more detail on this point Chapter 9, section 3). Perhaps the changes are made to increase attractiveness for *all* companies involved, judging by the relatively high number of hybrid transactions. The point is that negotiating on the basic fine can interfere with the deterrent effect of competition law enforcement on the policy level (see in more detail Chapter 9, section 3), but the question is whether or not this effect is greater or smaller compared to the use of percentages (discounts). In any case, negotiating on the basic fine instead of on the discount makes it more difficult to pinpoint the relationship with the leniency programme. This particular point *is* touched upon, in Chapter 8, section 2.6.

242 For the ACM, the room for discretion in the fining guidelines to account for mitigating circumstances, such as cooperation and compensation, has to be seen against the backdrop of the ACM's enforcement strategy. As set out extensively earlier (see Chapter 2) this problem-solving approach to competition law enforcement aims to tackle market problems from a broad perspective, taking underlying problems into account and stimulating companies to cooperate towards remedying them. In that light, it is surprising that there is little possibility to formalize such remedies under the existing legal framework.

Chapter 5

MARKETS WORK

In the previous chapters, the topic of alternative enforcement has been introduced alongside a normative framework by which to test it against. After that, the national practice in negotiated procedures as alternative enforcement instruments has been described and evaluated on the basis of the normative framework. This has led to a first insight into the alternative enforcement practice of the UK CMA, the Autorité and the ACM. Where negotiated procedures focused on the course of action of national competition authorities during or shortly after an investigation, here the focus is on a different part of enforcement practice, which is executed before or instead of an investigation into a specific infringement. These instruments can focus on the functioning of markets in their entirety, or on individual agreements. The result of the application of these instruments is – in most cases – a set of recommendations to be followed by the market parties.[1] This thesis discusses these instruments on both scales (market-wide and on an individual level), but in this chapter only markets work is discussed. When conducting markets work, competition authorities are investigating, studying or scanning markets with a view to finding aspects that are not working well. This chapter describes the practice of the three national competition authorities under review and evaluates this practice on the basis of the normative framework. On the basis of this evaluation, recommendations can be made for future practice – and because it concerns a different part of the enforcement process, more insight is given into the alternative enforcement practice of the national competition authorities as a whole. This chapter has to be read in conjunction with the next chapter, which discusses the investigating, studying or scanning of situations on an individual level.

1. INTRODUCTION

According to their mission statements, competition authorities aim to 'promote chances and choices for businesses and consumers',[2] to 'make markets work well in the interests of consumers, businesses and the economy',[3] to ensure free competition and to improve the competitiveness of the market,[4] or something similar. In order to do

1 Why markets work is considered to be a part of alternative enforcement and is discussed in Chapter 1, section 4.2.

2 Mission statement ACM, available at: https://www.acm.nl/nl/organisatie/missie-visie-strategie/onze-missie/.

3 Mission statement UK CMA, see Strategy CMA 2014, p. 1.

4 Loose translation of the mission of the Autorité, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=167.

that, competition authorities are entrusted with various instruments to look into the competitive situation in a given market and to express its opinion on competition law issues. In the literature, such instruments have been labelled 'sunshine enforcement', after the US railway regulator that published reports and press releases about the functioning of the market and thereby 'shone a bright light on the behaviour it wished to influence'.[5] Such a catchy name, however, does tend to downplay the procedurally embedded character of some of the instruments, as well as the resources dedicated to it and the seriousness of the results.

This chapter focuses on one of these instruments in particular: markets work, in the sense of market studies, investigations and scans. Markets work can be defined as an investigation into the functioning of (certain aspects of) markets outside the scope of an infringement procedure, on the basis of which the competition authority can take various steps to improve the competitive situation in the market.

Terminology used in this chapter:

- **Markets work**: the collective noun for all types of activities that fall within the definition as provided above.
- **Market scan**: collective noun for the specific types of markets work performed by the ACM.
- **Advice/advisory opinion**: the result of the procedure used by the Autorité to make recommendations to the market or to individual market parties.
- **Self-referral**: an advice that is given by the Autorité of its own motion.
- **Sector inquiry**: markets work performed by the Commission. Sometimes, the Autorité translates its advice based on self-referrals as such, but to avoid confusion, this term is not used throughout.
- **Market study**: the first phase of the UK CMA's markets work regime, also referred to as a phase 1 study.
- **Market investigation**: the second phase of the UK CMA's markets work regime, also referred to as a phase 2 investigation.

This chapter has to be read in conjunction with another type of 'sunshine enforcement instrument' discussed in the next chapter: individual guidance. In individual guidance, the competition authority makes recommendations concerning how to improve the competitive situation with regard to an individual agreement or idea, outside the scope of an infringement decision. The hypothesis is that these two instruments are two sides of the same coin and that the evaluation under the normative framework would yield similar points. This hypothesis is returned to later.[6]

1.1 Markets Work on a European Level

The national competition authorities are not the only ones applying forms of review to markets or market problems. The Commission currently has a practice of carrying out

5 Quote from Petit & Rato 2009, p. 185.
6 In Chapter 6, section 6.

studies into the functioning of markets, called sector inquiries. These are investigations carried out into specific sectors in which the Commission has reason to believe that 'the market is not working as well as it should' and to which 'breaches of the competition rules might be a contributory factor'.[7] The Commission derives this competence from Article 17 of Regulation 1/2003, on the basis of which it may also publish a report of its findings. Before the entry into force of this Regulation, the Commission had similar powers under Regulation 17/62,[8] but only really made use of them until the late 1990s. Possibly discouraged by two long-lasting and very complex sector inquiries in the early 1960s,[9] the Commission did not see fit to apply its powers of inquiry until the rapid developments in the market for telecommunications required it to do so. Since then, the Commission has completed eight sector inquiries and has announced that it will be conducting two more inquiries, the results of which are expected in the summer of 2016 and the first quarter of 2017 respectively.[10] Apart from the above-mentioned studies of the market for telecommunications (with inquiries into 3G, roaming, leased lines and local loop),[11] the Commission has investigated the healthcare market (pharmaceuticals),[12] the energy market,[13] and the market for financial services (retail banking and business insurance).[14]

Apart from the general rules laid down in Regulation 1/2003, there are no specific rules of procedure that guide the sector inquiry. The Commission can initiate an inquiry whenever the threshold ('markets are not working as well as they should') is met. This is a broad criterion, which can be met when there is limited trade between Member States, a lack of new entrants on the market, price rigidity or other factors that distort competition.[15] Once the inquiry is initiated, the Commission can apply almost its full array of investigatory powers in order to gather information on the functioning of the market. It may request information, take statements, use its powers of inspection (such

7 See the definition of sector inquiries as formulated by the Commission on: http://ec.europa.eu/competition/antitrust/sector_inquiries.html, based on Article 17 of Regulation 1/2003.

8 See Article 12 of Regulation 17/62, referring to Articles 10(3) to 10(6), 11, 13 and 14.

9 Into the margarine and beer markets. As illustrated by Buigues & Rey 2004, pp. 269-270.

10 See the e-commerce inquiry's status page on: http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

11 Not all inquiries lead to similar results. However, they can be traced back to the following sources. European Commission, Directorate General for Competition, Working Document on the initial results of the Leased Lines Sector Inquiry, Brussels, 08/09/2000. European Commission, Directorate General for Competition, Working Document on the initial results of the sector inquiry into Mobile Roaming Charges, Brussels, 13 December 2000. European Commission, Unbundling of the local loop: Commission calls public hearing, Brussels, 12 June 2002, IP/02/849. European Commission, Directorate General for Competition, Issues Paper On the preliminary findings of the Sector Inquiry into New Media (3G), Brussels, May 2005.

12 European Commission, Directorate General for Competition, Pharmaceutical Sector Inquiry (Final report), 8 July 2009.

13 European Commission, Directorate General for Competition, Report on Energy Sector Inquiry, 10 January 2007, SEC(2006) 1724.

14 Communication from the Commission – Sector Inquiry under Article 17 of Regulation (EC) No. 1/2003 on retail banking, COM/2007/0033 final. And: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Sector Inquiry under Article 17 of Regulation (EC) No. 1/2003 on business insurance, COM/2007/0556 final.

15 Examples derived from the explanation provided online, on: http://ec.europa.eu/competition/antitrust/sector_inquiries.html.

as dawn raids) and cooperate with national competition authorities.[16] Different from fully adversarial proceedings, the Commission may not investigate premises other than businesses premised. However, it is competent to impose fines or periodic penalty payments for non-cooperation,[17] which makes the Commission's powers under a sector inquiry potentially rather compulsory. In practice, the Commission gathers most information by means of informal requests and questionnaires. The exception to this is the 2009 inquiry into the pharmaceuticals market, which started with a coordinated dawn raid at the premises of no less than 70 pharmaceutical companies.[18]

After a sector inquiry has been completed, the Commission drafts a final report, which is open to comments from market parties and other stakeholders.[19] The Commission does not have the power to impose remedies as such, but the report can cause stirrings within the market that drives changes on other fronts. The inquiries into the market for telecommunications in the late 1990s, for instance, led to five *ex-officio* investigations into suspected abuse of dominance. Apart from that, incumbents in various Member States reacted to the inquiry with a different pricing strategy. In other Member States, the legislator took steps to mitigate the problems found.[20] Another example is the 2007 inquiry into the energy market, which stirred debate about multiple regulatory issues in the sector as well.[21] Lastly, the inquiry into the pharmaceuticals market is said to have influenced a large antitrust settlement a few years later.[22] This shows that, despite not having formal consequences, sector inquiries can form the basis of debate, reform and even follow-up cases.

1.2 Delineation and Set-Up

National competition authorities have instruments at their disposal that are similar to the sector inquiry used on a European level. However, the design and use of these instruments varies greatly from Member State to Member State. At the one end of the spectrum, there is the strict and formal market study and investigation procedure of the UK CMA, which has yielded extensive reports on the functioning of various markets in the United Kingdom. At the other end of the spectrum, there are the market scans of the ACM, which are applied on an irregular basis and yield more informal recommendations. The Autorité has a rather different instrument at its disposal, which combines market studies, informal guidance and government advocacy. This instrument, the advice procedure, is therefore hybrid in nature and has to be divided (albeit somewhat artificially) over the two chapters.

16 Article 17(2) Regulation 1/2003, in accordance with Articles 18, 19, 20 and 22.
17 Articles 17(2) together with 23 and 24 of Regulation 1/2003.
18 European Commission, Directorate General for Competition, Pharmaceutical Sector Inquiry (Final report), 8 July 2009.
19 The final reports of the studies conducted are not easily found on the Commission's websites. There are working documents, comments and press releases, but only in a few studies have the final reports been fully published.
20 See Choumelova & Delgado 2004, particularly p. 274 for the outcomes.
21 European Commission, Directorate General for Competition, Report on Energy Sector Inquiry, 10 January 2007, SEC(2006) 1724. See further Diathestopoulos 2010.
22 European Commission, Directorate General for Competition, Pharmaceutical Sector Inquiry (Final report), 8 July 2009. See further Drexl 2012.

The chapter on markets work is structured as follows. In §2, the advisory practice of the Autorité is discussed, with a special focus on markets work. The following two sections deal with different forms of markets work as used in the UK and the Netherlands. In §3, the market studies and investigations as performed by the UK CMA are discussed, while §4 pays attention to the market scans as performed by the ACM. A comparison of the different types of markets work as well as its evaluation under the normative framework is performed in §5. This section refers back to the Autorité's advisory practice insofar as it contains aspects of markets work.

2. HYBRID INSTRUMENT: THE ADVICE PROCEDURE (AUTORITÉ)

The market and advisory competences of the Autorité are discussed first, because they are grouped together in one instrument: the advice-procedure (called *compétences consultatives*, with an *avis* as an outcome). This instrument is hybrid in nature, showing characteristics of government advocacy, market scans, and informal opinions, which might support the hypothesis posed in the introduction to this chapter – that markets work and individual guidance are two sides of the same coin. Even though advisory opinions are frequently used as a form of government advocacy, this chapter only focuses on the advisory opinions that can be qualified as market scans.[23] With its advice procedure, the Autorité is the only national competition authority under review that has a legal obligation to give advice when requested (under specific circumstances of course), but with that it is also the only national competition authority under review that does not have a separate procedure for conducting markets work at its disposal. The question is to what extent the different presences of the advice procedure resemble markets work as carried out by the UK CMA and the ACM, and whether there are specific advantages and disadvantages of applying a hybrid instrument.[24]

2.1 Development and Objectives

According to the mission statement of the Autorité, it is competent to give advice on every question regarding competition law and to make recommendations for the improvement of the competitive situation where necessary.[25] By doing so, the Autorité aims to provide a background for reflection, to propose an improvement to the competitive situation, but also to encourage greater awareness and to take part in the public debate regarding the subject of the advice.[26] In its own words, the advisory powers of the Autorité are seen

23 Government advocacy, in which national competition authorities advise governmental bodies about the impact of certain laws and regulations on competition, falls outside the scope of this chapter, which focuses on advice to market parties in particular. The advisory opinions chosen to be discussed in this section qualify because of their extensive nature and their focus on an analysis of the functioning of the market instead of a specific competitive issue (referred to the Autorité by a governmental body).

24 This question is answered in Chapter 6, as it is necessary to view all sides of the hybrid instrument before forming an opinion on the advantages and disadvantages.

25 See Article L.462-4 (I) *Code de Commerce*. See also the mission statement of the Autorité, available online at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=167.

26 These reasons are derived from 25 Years Autorité.

as truly complementary to the repressive enforcement instruments the Autorité has at its disposal, allowing it to be an advocate of competition policy.[27]

Historically, giving advice regarding competition issues was seen as one of the main tasks of the predecessors of the Autorité.[28] Being part of the government, the Autorité's predecessors were regularly asked to review the impact of pending legislation or regulation, or to advise on a new course for market intervention. This type of advice can be characterised as government advocacy, and specifically concerns impact assessments of pending legislation. In the present day, this part of the Autorité's advisory task remains, but the advice procedure itself has developed into an instrument through which the Autorité can make known its views on a broader spectrum of competition issues, addressing other parties than government bodies alone and even recommending a course of action on the basis of its own research. It is this latter aspect of its advisory role that is under review in this chapter. The transition from government advocacy to a broader advice procedure can be explained by looking at the development of competition law enforcement in France. In the period between 2004 and 2008, advisory opinions were generally requested by public bodies, but consumer organisations and trade organisations gradually started to request advisory opinions as well. In 2008, the year in which an overhaul of French competition law (and enforcement) took place, the Autorité was granted the competence to give advice of its own motion, without a request from a public body or a designated organisation (called 'self-referral'). This development underlined the Autorité's transition towards becoming an independent public body.

The legal basis for the advice procedure is – to a certain extent – included in the *Code de Commerce*.[29] These articles do not explicitly prescribe a procedure for giving advice, but denote the public bodies which are competent to request an advice, and grant the Autorité the competence to give advice upon self-referral. The legal basis for requesting advice is supplemented by the Autorité's mission statement, which implies that the Autorité is the designated authority for giving advice on competition-related issues.[30] After the Autorité has researched the question put before it, the Autorité publishes its advice in the form of a brief report, called an *avis*. This document does not have the same legal status as a formal decision, which means that it is – as such – not appealable before the courts.[31] However, the Autorité strives for a transparent approach to its advisory opinions, illustrated by the fact that upon publication they are often accompanied by an official press release, or even translated into English. Apart from outlining its approach in these particular publications, the Autorité has not published guidelines on the functioning of the advice procedure. This could be due to the hybrid

27 Own words from the description of the instrument on: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=294. Original text: '*Cette faculté est fondamentale dans la mesure où elle permet à l'Autorité de se faire l'« avocat de la concurrence » auprès des acteurs publics et des décideurs économiques, et d'exercer un rôle de conseil et d'alerte, bien en amont de la mission répressive qui est aussi la sienne*'.

28 See Chapter 2 for a more detailed overview of the development of competition law in France.

29 For mandatory referrals by government bodies: Articles L. 410-2 and L. 462-2, for self-referrals: Article L.462-4. Logically, there is no legal basis for the optional referrals.

30 See Article L.462-4 (I) *Code de Commerce*. See also the mission statement of the Autorité, available online at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=167.

31 To underline this, advisory opinions are numbered with A-numbers instead of D-numbers, which indicate the various types of formal (appealable) decisions.

nature of the procedure as such, which makes it difficult to predict what form or shape the advice will take in practice.

2.2 Overview of the Procedure

Regardless of the type of advice given, the advice procedure is initiated on the basis of a referral. Only Ministers, governmental bodies, a number of sectoral regulators,[32] and professional and consumer organisations can make referrals. In this, there is a distinction between mandatory and optional referrals. In case public bodies are working on legislation or rules that might impact competition, requesting advice is mandatory.[33] In other cases, referral for advice is optional. Apart from having questions referred to it, the Autorité is competent to make self-referrals, which means that it can investigate market problems of its own motion. When the Autorité decides to make a self-referral, it publishes a formal announcement of the proposed inquiry, outlining the market and the market parties it intends to investigate.[34] When the Autorité is investigating a market on referral by another body, it makes no such announcement.

It is not entirely clear which criteria the Autorité applies when deciding whether or not to issue an advice. Where advocacy is concerned (regarding the competitive impact of pending regulation and legislation), the Autorité is held to issue an advice because of its mandatory character, but it is imaginable that the scope of the questions referred to it under the non-mandatory procedure for referral are not always feasible or relevant. If the same rules apply to the advice procedure as to the investigation procedures, a request for advice cannot simply be declined on the basis of prioritization. The Autorité has to give a reasoned statement as to why it feels that it cannot give the advice requested. From its decisional (or, in this case, advisory) practice, a few starting points can be derived. Firstly, as is explained in more detail in the next chapter, the Autorité does not express itself on the legality of a proposed agreement. Secondly, the Autorité also refrains from giving advice on matters that it has already dealt with in the past, whether that concerned another advice or a formal decision. Furthermore, the Autorité does not answer questions that are merely hypothetical, or concerning which the European Commission has opened an investigation.[35] In most cases, even when not fully answering the questions referred to it, the Autorité publishes the advice with reasoning as to why it will not give any further guidance, referring to its previous advice and decisions where necessary.

---

32 *Le Conseil Supérieur de l'Audiovisuel* (CSA), *la Commission de régulation de l'énergie* (CRE) et *l'Autorité de régulation des communications électroniques et des postes* (ARCEP). These are the media regulator, the energy regulator and the telecommunications regulator respectively.

33 Articles L. 410-2 and L. 462-2 Code de Commerce.

34 In that case, it publishes its intention to conduct an investigation on the basis of a self-referral as a SOA number. See, most recently, Autorité de la Concurrence, 16-SOA-01 (*Audioprothèses*), for a self-referral into the market for hearing aids. Here, the Autorité indicated that it intends to focus on the degree of competition between market parties, margins earned by instrument providers, the appropriate *Numurus Clausus* for specialist education, the information for consumers, and the possibilities to increase competition between hearing-aid providers.

35 These general starting points are outlined in, for instance, Autorité de la Concurrence, 11-A-17 (*Déchets de l'Eau*), paras. 22, 26 and 28. With regard to the competence of the European Commission, see also Article 11(6) of Regulation 1/2003.

The approach adopted by the Autorité with regard to the advice procedure differs based on the substance of the request.[36] After the referral or self-referral, the Autorité gathers information by requesting companies to cooperate, by relying on earlier research or studies from external bureaus or by interviewing companies and stakeholders. The Autorité can also send out questionnaires, to which companies are obliged to reply.[37] Companies under review can scrutinize the nature of this questionnaire if they feel that the questions are – in some way – drafted or formulated unfairly.[38] The Autorité has to respond to these criticisms in its final advice. However, it is unclear if any review is possible – for instance by the Court, or by another division of the Autorité – on the methodology that the Autorité pursues. After the relevant information has been gathered, the Autorité engages in a comprehensive examination of the market under investigation, referring to the relevant economic data, identifying the main operators on the market, establishing the market concentration, describing current developments and identifying possible barriers to entry. After this examination, the Autorité proceeds to reviewing potential obstacles for competition. These obstacles could be found in the behaviour of companies on the market, in existing arrangements, in hindering or facilitating legislation or in the structure of the market. In some cases, the Autorité summarizes its findings in a draft advice, which it issues for consultation.[39] This consultation is usually performed midway through the advice procedure, and the comments given in the draft advice are incorporated in the final version. In total, an advice procedure takes somewhere between 9 and 15 months. Most 'longer' advice procedures include a consultation, but advisory opinions without consultation are issued and they take just as long.[40] The duration of the procedure depends, of course, on the scope of the market analysed and the ease with which information is gathered. On the basis of its findings flowing from the analysis, the Autorité proceeds to making its recommendations – usually to the legislator, sometimes also to the market itself with a view to warning it about the risks for competition. These outcomes are discussed further below. When preparing advises or carrying out a self-referral, the Autorité does not apply the separation of functions like it does in a fully adversarial procedure.

36 Given that many types of organisations can request an advice concerning many topics related to competition law, it is understandable that the Autorité does not apply a fixed procedure to each request. This underlines the hybrid nature of the instrument and explains why some of the advisory opinions can – in fact – be qualified as market scans, while others strongly resemble informal or short-form opinions. In that light, some of the procedural steps described hereafter are not always taken in every advisory procedure. It does, however, give an impression of the possible extensiveness of the advice procedure and the care with which advisory opinions are prepared.

37 See Article L. 450-8 *Code de Commerce*, in conjunction with Article L. 450-1 *Code de Commerce*.

38 This happened in a case concerning online advertising, in which Google found the questionnaire to be too direct, too transparent, too biased, too restrictive and too closed. See Autorité de la Concurrence, 10-A-29 (*Publicité en Ligne*), Annex.

39 This happened in Autorité de la Concurrence, 13-A-24, (*Distribution du Medicament*), Autorité de la Concurrence, 12-A-21 (*L'Entretien de Véhicules).*

40 Compare, for instance, Autorité de la Concurrence, 12-A-21 (*L'Entretien de Véhicules)* with Autorité de la Concurrence, 12-A-20 (*Commerce Électronique*).

2.3 Application in Practice

Between 2004 and 2015, the Autorité issued 287 advisory opinions. The majority of the advisory opinions given concern draft legislation or draft regulation, and can therefore be qualified as government advocacy.[41] Because of its advocacy character, it is not surprising that Ministers, public bodies and other sectoral regulators have requested most of the advisory opinions. In a number of cases, however, the Autorité is asked to give its views on the competitive situation in a given market, or to review a proposed form of cooperation. These types of advisory opinions are often requested by professional and consumer organisations, or on the basis of self-referrals.[42]

In some instances, the analysis of the relevant market is so extensive that the final advice resembles a sector inquiry, comparable to the sector inquiries the Commission performs, the ACM's market scans, or the market study phase of the UK CMA's markets regime. This holds particularly true for advisory opinions based on a self-referral by the Autorité, which are even announced as sector inquiries (or *enquêtes* in French).[43] Just under 20 of these advisory opinions would qualify as such, including 10 self-referrals that the Autorité has made.[44] These advisory opinions are listed below, along with the referring party and their outcomes.[45]

2008	Mobile internet	Economic Affairs*	Recommendations to the market.
2009	Railway stations	Self-referral	Recommendations to market and regulator.
2009	Dairy products	Senate	Recommendations to government.
2010	Supermarkets I	Self-referral	Analysis, Autorité indicates risks.
2010	Supermarkets II	Self-referral	Recommendations to market.
2010	Cross-selling telecom	Self-referral	Analysis, recommendations to government.
2010	Online advertising	Economic Affairs	Recommendations to market and government.

41 The government advocacy is disregarded in the remainder of this chapter, because this is not the focal point of this thesis. Whenever a government body requested advice that has resulted in a market scan or an informal opinion, the advisory opinions are taken into account.

42 This does not happen exclusively, as there are also situations in which public bodies request the review of a proposed agreement or a specific market, or situations in which the professional or consumer organisations request the review of certain rules, because it impacts on them.

43 See for instance the press release of 19 December 2013, entitled '*Sector Inquiry* into the distribution of medicinal products' or in French 'Enquête *sectorielle médicaments*'.

44 The benchmark for deciding whether or not an advice is comparable with a market study is the extensiveness of the analysis of the market. For this purpose, the self-referrals of the Autorité formed the baseline, because the Autorité considers them to be and labels them as 'sector inquiries'. All the opinions that i) did not concern the implementation of new rules and regulations and ii) were as extensive as these self-referrals are listed here. It is possible that some of the qualifications made in the list below are debatable, or that equally extensive publications are left out. However, this list has been compiled with due care and forms a proper illustration of the markets work regime of the Autorité. Excluded from this list are the requests made by the telecom regulator ACREP, which are numerous and in some cases also resulted in a market scan, but for a different purpose.

45 A full list, including case numbers, is presented in the references pages of this thesis.

2010	Airports	AMCRI**	Hypothetical, recommendations to regulator.
2011	Online betting	Self-referral	Recommendations to government.
2012	Supermarkets in Paris	Municipality of Paris	Recommendations to municipality.
2012	Online sales	Self-referral	Further monitoring, implicit warning.
2012	Vehicle repair	Self-referral	Recommendations to market and government.
2013	Mobile telecom	Product org.	Recommendations to regulator.***
2013	Medical products	Self-referral	Recommendations to companies.
2014	Autocar transport	Self-referral	Recommendations to government.
2014	Propane gas tanks	Consumer org.	Recommendations to consumers.
2014	Motorway toll	Finance committee	Recommendations to government.
2015	Bank guarantees	UFC-Que Choisir****	Analysis, recommendations to market.
2015	Standardisation	Self-referral	Recommendations to the market.

* Minister of Economic Affairs, who is responsible for the larger part of the requests for advice.
** *Association pour le Maintien de la Concurrence sur les Réseaux et Infrastructures,* which is an association for the continuation of competition in networks and infrastructures.
*** Seen in connection with earlier advice: Autorité de la Concurrence, 08-A-16 (*Reseaux Mobiles Virtuelles*).
**** UCF Que Choisir is a consumer organization in France. See online: http://www.quechoisir.org/.

As is apparent from this overview, the advisory opinions that resemble markets work are not always initiated on the basis of self-referral. It is equally possible that a referred market yields an examination that closely resembles a sector inquiry. In these cases, it is not as clear from the offset that it concerns an extensive analysis of the functioning of the market, but the outcome is similar.

> A good example of an advice that strongly resembles a market scan is the 2010 inquiry into the online advertising market.[46] The Minister for the Economy, Industry and Employment referred this market to the Autorité because of the volatile nature of the market and the fact that the two main players (Google and *Pages Jaunes*) continued to grow. The Autorité reviewed the relevant markets and the barriers to entry by conducting multiple interviews with market players and sending out questionnaires. In its conclusion, the Autorité makes recommendations to the Government on how to regulate the market. It also comes to the preliminary conclusion that Google holds a dominant position on the market, and warns that it should behave itself accordingly. The Autorité makes no further recommendations to the companies involved.

The example above is representative of the types of markets typically referred to the Autorité for further examination: emerging, rapidly evolving or subject to change due to outside factors. Where it concerns a self-referral, the Autorité engages in a sector inquiry on the basis of similar considerations: recent developments in the market,[47] signals from

46 Autorité de la Concurrence, 10-A-29 (*Publicité en Ligne*).
47 See for instance Autorité de la Concurrence, 14-A-05 (*Autocar*), Autorité de la Concurrence, 11-A-02 (*Jeux d'Argent et de Hasard en Ligne),* Autorité de la Concurrence, 10-A-13, (*Utilisation Croisée des Bases de Clientele*), and Autorité de la Concurrence, 09-A-55 (*Transport Public Terrestre*).

the market itself regarding a disturbance of competition,[48] or reviewing a market in which it has taken enforcement action earlier.[49] The Autorité explains that it finds the advice procedure particularly suitable for these types of markets. It has argued that there are two options when dealing with new markets or new competitive problems: waiting for an infringement and acting accordingly, or engaging with the market players pre-emptively and avoiding the costs of investigation and fines.[50] In some cases, the Autorité indeed chooses to do the latter. Another striking aspect is that some of the self-referrals contain an analysis of a certain type of behaviour in the market, rather than the market itself.[51] These kinds of inquiries are truly hybrid in nature, encompassing the extensive analysis of markets work as well as the limited scope of opinions.

2.4 Outcomes

After having investigated the specific characteristics of a market, the Autorité generally makes recommendations to the requesting parties. When this is a part of the government, the recommendations will outline how this particular public body can contribute to the functioning of competition in the market under review. When this is a trade or consumer organisation, recommendations are specifically made to them. When an advice is given upon self-referral, the Autorité usually addresses the market as such. Sometimes it even goes as far as recommending closer monitoring (to itself),[52] thereby warning market parties to make changes to facilitate the better functioning of competition.

Recommendations to market parties are not provided for by law and are therefore not binding or appealable. In fact, the *Conseil d'Etat* confirmed in a judgment in 2012 that advisory opinions do not produce any legal effects, as they cannot be considered as decisions with an adverse effect on the parties. These adverse effects could possibly be said to exist when an advice would contain statutory provisions or individual instructions.[53] This means that there is a natural limit (well, actually a legal limit, but as a figure of speech) to the kinds of recommendations that the Autorité can make.[54] It will,

48 See for instance Autorité de la Concurrence, 12-A-21, (*L'Entretien de Véhicules*), Autorité de la Concurrence, 10-A-26, (*Distribution Alimentaire II*), and Autorité de la Concurrence, 10-A-25, (*Distribution Alimentaire I*).

49 See for instance Autorité de la Concurrence, 13-A-24, (*Distribution du Médicament*) and Autorité de la Concurrence, 12-A-20 (*Commerce Électronique*).

50 Interview with the *Service du Président* and the *Service d'Instruction* of the Autorité de la Concurrence, conducted on 19 June 2014 by Eva Lachnit in the course of this thesis. See Annex I – Methodology for the embedding of these interviews.

51 See Autorité de la Concurrence, 10-A-13, (*Utilisation Croisée des Bases de Clientele*) and Autorité de la Concurrence, 10-A-25, (*Distribution Alimentaire I*).

52 Autorité de la Concurrence, 12-A-20, (*Commerce Électronique*).

53 Conseil d'Etat, No. 357193 (*Casino*). A noteworthy detail in this case was that the advice concerned an analysis of the market for food distribution (supermarkets) in Paris. The Autorité came to the conclusion that one supermarket in particular (Casino) had a dominant position of more than 60%, which constituted a significant barrier to entry. However, the Autorité also concluded that it had no power to interfere in a market that suffered from structural problems only, and that it had to limit itself to making recommendations to local government. In its conclusions, the Autorité refers to the structural injunction powers of the UK CMA, which would have been useful in this particular case. See: Autorité de la Concurrence, 12-A-01 (*Distribution Alimentaire à Paris*).

54 See in more detail Chapter 6, section 2.2.

in this light, usually restrict itself to making non-binding recommendations or general observations. Because of this lack of legal standing, the effectiveness of the advice and subsequent recommendation is – to a large extent – dependent on the entities it addresses.

> In 2009, the Autorité issued recommendations to the Ministry of Economic Affairs on the basis of a market scan of the fuel prices in the *Départements d'Outre-Mer* (the French overseas departments).[55] In 2013, the Autorité received a request from the same Ministry to review a draft decree that implemented some of the recommendations of the Autorité.[56]

Of course, the motivations on the part of the different stakeholders are driven by political considerations, particularly if it concerns Ministers or regulators that have to take other interests into account besides the competition law-related recommendations. In fact, the Autorité admits that the results of its advice procedure are – at times – highly political.[57] Nevertheless, the Autorité's advice sometimes generates far-reaching effects, as was the case in the 2013 advice concerning private taxi services.[58]

> In this case, regarding the controversial private taxi service Uber, the *Conseil d'Etat* cancelled a governmental decree that made it difficult for Uber-style start-ups to compete with regular taxi services.[59] In coming to that conclusion, the *Conseil* made use of an earlier advice by the Autorité on the same decree, in which the Autorité saw some competition-related problems with what the government proposed.

This is not the only example in which advisory opinions of the Autorité have played a part in legal procedures.[60] Therefore, even though they are not capable of producing legal effects on their own, advisory opinions can be viewed as a frame of reference for any follow-up action – whether this is the adoption of new rules by the legislator or regulator, an investigation launched by the Autorité or an action launched by a private party.

3. STUDIES AND INVESTIGATIONS (UK CMA)

The markets regime of the UK CMA is the most formalised example of market interventions, and is coveted and copied by competition authorities around the world.[61] Under this regime, the UK CMA is competent to study market problems, engage with market parties, refer markets for further investigation and even to impose remedies if

55 See Autorité de la Concurrence, 09-A-21 (*Carburants dans les DOMs I*).
56 See Autorité de la Concurrence, 13-A-21, (*Carburants dans les DOMs II*).
57 Interview with the *Service du Président* and the *Service d'Instruction* of the Autorité de la Concurrence, conducted on 19 June 2014 by Eva Lachnit in the course of this thesis. See Annex I – Methodology for the embedding of these interviews in this thesis.
58 Autorité de la Concurrence, 13-A-23 (*Uber*).
59 Conseil d'Etat, No. 374525 (*Allocab*).
60 For instance, Autorité de la Concurrence, 10-A-26 (*Distribution Alimentaires II*) was followed in Cour d'Appel de Paris, No. 09/16817 (*Prodim & Champion v Segurel*). Also, Autorité de la Concurrence, 13-A-11 (*Assurance Santé*) was followed in Conseil Constitutionnel, Décision no. 2013-672 DC du 13 juin 2013.
61 As is shown by the report of the Department for Trade and Industry, Peer Review of Competition Policy, performed by KPMG, 2007.

it finds that there are circumstances that have an adverse effect on competition. The UK CMA's markets regime is characterised by a two-phased approach. Phase 1, the market *study*, gives an assessment of a specific market, after which phase 2, the market *investigation,* can take place.

This section is dedicated exclusively to the UK CMA's markets work regime, because of its important position in the UK CMA's toolkit, but also because of its characteristics, which makes the regime a 'one of its kind' compared to the market-scanning powers of other competition authorities. To this end, this section gives a brief overview of the procedure, after which its application in practice is discussed. Finally, the main outcomes of both the phase 1 study and the phase 2 investigation are explored. Throughout this section, the main focus is on the phase 1 study, because of its connection to similar instruments under the French and Dutch competition enforcement regime. However, separate attention is paid to the phase 2 investigation as well, as it constitutes a distinguishing feature of the UK CMA's markets regime and has consequences for the way in which the UK CMA's regime can be viewed in the light of the normative framework underlying this thesis.

3.1 Development and Objectives

The UK CMA's system of markets work is a heritage from the pre-merger situation of competition supervision in the UK and comprises a two-phased procedure in which specific markets are analysed.[62] These two phases represent the pre-merger enforcement landscape, in which the Office of Fair Trading (OFT) was responsible for conducting the phase 1 studies and would refer them to the Competition Commission (CC) for phase 2 investigations in case aspects of the market appeared to be not functioning well. Also before the OFT/CC enforcement regime the UK was no stranger to having markets work performed by its competition authorities. Already as early as in 1950, the first market investigation was conducted under the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948.[63] Even though these early studies were considered largely educational due to the tentative nature of the underlying act, they helped to change the attitudes of businesses towards competition.[64] When the OFT and CC merged in 2014, it was decided that the markets regime should remain a two-phased system. This

62 The division between the two phases originates from the competition regime before the CMA was created. In this regime the Office of Fair Trading (OFT) was responsible for conducting market studies. If these studies showed that there were reasonable grounds to suspect that competition was restricted, distorted or prevented, a reference was made to the Competition Commission (CC) for further investigation. Since the OFT and the CC ceased to exist after the merger, market studies are not referred to another organisation for further investigation. Instead, a new case team is appointed within the CMA to conduct the second phase. However, the market study and investigation regime has undergone a few other changes since the merger: the introduction of statutory timeframes, the obligation to publish a market study notice, the expansion of investigation powers in the first phase, the power to impose a fine for non-cooperation and the power to make a cross-section reference or a public interest reference.

63 The Monopolies and Restrictive Practices Commission completed this investigation. After that, market investigations were carried out under the Monopolies and Restrictive Practices Commission Act 1953, the Monopolies and Mergers Act 1965 and the Fair Trading Act 1973 respectively. The market studies conducted between 1950 and 2002 are available in the UK's National Archives. For a more extensive historic overview of competition law in the UK, see Chapter 2.

64 Scott 2009, pp. 192-193.

was partially motivated by practical reasons,[65] and partially by the fact that the markets regime was one of the most celebrated features of UK competition enforcement. The two different phases were thus retained, albeit with a few adjustments to remedy any shortcomings that companies identified during the consultation on the merger.[66]

In the present day, the markets regime of the UK CMA is nothing if not thorough. Due to its two-phased regime, the UK CMA is capable of studying markets and imposing remedies if necessary. With that, it is the only national competition authority under review that is capable of attaching formal consequences to its markets work. The legal basis for markets work is connected to the UK CMA's general function, which is 'obtaining, compiling and keeping under review information about matters relating to the carrying out of its function.'[67] Because of this broad mandate, the UK CMA's predecessor published extensive guidelines to regulate the application of the instrument, which were adopted by the UK CMA board as well.[68] Apart from that, phase 2 investigations are regulated under Part 5 of the Enterprise Act 2002.

The purpose of markets work is to examine markets that are not working well and to impose remedies when an adverse effect on competition is found.[69] The objective of phase 1 studies is to perform 'examinations into the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour'.[70] By contrast, the objective of a phase 2 investigation is to find adverse effects on competition in the markets referred, and to take remedial action where necessary.[71] Contrary to other procedures, such as fining or commitment procedures, the goal is to look at the general competitive situation in a market, instead of focussing on individual aspects of behaviour.[72] The UK CMA does not engage in markets work where there is a clear breach of competition law. As market studies are geared towards identifying aspects of the markets that are not working well, the UK CMA cannot establish an individual infringement of competition law – as is discussed further below. This suggests that in the case of harmful individual behaviour, fining decisions, settlements or commitment decisions could be considered more appropriate. Instead, market studies are used to 'tackle the root of a problem' or 'behaviour across a whole market',[73] and to 'identify a remedy to a perceived problem.'[74]

65 Practical reasons were that the merger regime was retained in two phases as well, reflecting the pre-merger situation of two different enforcement bodies. This means that former OFT and CC staff would be able to apply their acquired expertise under the UK CMA's umbrella.
66 BIS Consultation 2011, pp. 20-21.
67 Enterprise Act 2002, section 5.
68 See CC Market Investigation 2013, OFT Guidance Market Studies 2010 and OFT MIR Guidance 2006. See its validation in CMA Guidance Markets 2014, Annex.
69 BIS Consultation 2011, § 2.1.
70 CMA Guidance Markets 2014, para. 1.5.
71 CMA Guidance Markets 2014, para. 1.11.
72 BIS Impact Assessment 2012, p. 77.
73 Ibid.
74 See OFT Guidance Market Studies 2010, paras. 2.14 and 2.15.

3.2 Overview of the Procedure

The UK CMA engages in markets work on the presumption that there are features of a given market that are not 'working well for consumers'.[75] This presumption can be based on the UK CMA's own research, intelligence gathered from publicly available sources, suggestions made by other public bodies, or Supercomplaints.[76] This information is gathered and evaluated in what is called 'phase 0', the phase before either a market study or a market investigation takes place. In phase 0, the UK CMA decides whether or not to pursue the market with further action. This decision is mostly influenced by the characteristics of the market, which are reviewed on the basis of proportionality and the UK CMA's prioritisation principles.[77] These principles – impact, strategic significance, risks and resources – guide the choice between the possible target markets by balancing the expected outcome of the intervention with the estimated costs and risks.[78] Most notably, the principles of impact and strategic significance are often reflected in the choice foror initiating markets work.[79]

3.2.1 Phase 1 Study

After having reviewed the suitability for further action in phase 0, the formal initiation of a phase 1 study is the issuing of a market study notice. This notice must contain the scope of the proposed study, the period in which representations may be made and the timescales applicable to the study.[80] From the moment the notice is issued, the UK CMA has twelve months to conduct a market study and to make use of its investigatory tools.

> In 2008, the UK CMA conducted a study into the homebuilding sector, in response to signals that the companies active in the market would respond slowly to price developments. This study was conducted before the economic downturn in 2008, when the UK housing market was still growing. The study was executed by means of an extensive questionnaire (sent to over 7000 companies), interviews with pro, mystery-shopping and detailed surveys addressing the top 10 companies in this market. While conducting the study, the UK CMA found little evidence of competition problems within the sector and found no homebuilding companies with sufficient market power to inflate prices. The UK CMA thus gave the sector a clean bill of health, but made a

75 Quoted from CMA Guidance Markets 2014, para. 1.5.

76 See OFT Guidance Market Studies 2010, para. 3.1. A Supercomplaint is a formal complaint by a consumer body (acting collectively on behalf of consumers), which has been designated by Ministers. See section 11, Enterprise Act 2002.

77 The principle of proportionality in this respect is discussed above and means that in case other enforcement instruments are more suitable because of the way in which the market is not working well, those instruments should be applied instead of a market scan or investigation.

78 CMA Prioritisation Principles 2014, paras. 3.1-3.8.

79 For instance, the CMA explained in the market study concerning *Corporate Insolvency Practitioners* that 'the strategic significance of the market, the size of the market, public reports on market performance, and concerns raised in the media, government and academia' were particular factors to be taken into account. Office of Fair Trading, OFT1245 (*The market for corporate insolvency practitioners*), para. 2.1.

80 Section 130A(3), Enterprise Act 2002. The issuing of a market study notice was one of the changes made to the markets work regime after the merger between the OFT and the CC.

> few suggestions for the improvement of transparency in the sector as well – allowing new homeowners to discern between homebuilders with a good or bad reputation.[81]

As this example shows, the range of tools that the UK CMA can apply in a phase 1 study is quite diverse. Besides these more voluntary measures, the UK CMA is given specific investigatory powers in the course of the institutional merger and the subsequent procedural reforms. It can now request any person to be at a specified place to produce specified documents or testimonies. Also, it can request certain business information, such as turnover figures and business forecasts.[82] Non-compliance with these requests is punishable by a fine of £30,000.[83] Section 9 of the Enterprise Act 2002 protects information collected using these tools, insofar as it concerns sensitive information and business secrets.

The main objective of the information gathering in phase 1 is the mapping of the market and the competitive problems therein, in order to determine what kind of action should be pursued next. If, on the basis of this information, the UK CMA finds that competition in the market is working relatively well, the UK CMA is able to give the market a clean bill of health. However, if it finds that competition in the market is not working well, the UK CMA can take further enforcement action, either by initiating a fully adversarial procedure, or by proceeding to a phase 2 investigation. Lastly, the UK CMA can make recommendations to businesses and the government to improve the competitive situation. The UK CMA could choose to do so in case the issues are minor enough to be resolved in this way, or in case that none of the more formal instruments are considered suitable or appropriate.

3.2.2 *Market Investigation Reference (MIR)*

In case the UK CMA would like to proceed to a phase 2 investigation, it must make a market investigation reference (or MIR).[84] The decision as to whether or not to make a reference is a formal decision, which is appealable at the Competition Appeal Tribunal. Strikingly, the decision to make a MIR has to be prepared in a rather early stage of the phase 1 study. If, during this study, the UK CMA receives 'non-frivolous representations' that suggest that a phase 2 investigation would be warranted, the UK CMA has to make known within six months from the publication of the market study notice that it intends to make a reference for a market investigation.[85] This six-month mark is also the start of a consultation with stakeholders, which can voice their opinions about the UK CMA's proposed MIR. In general terms, a MIR can only be made in case there is a 'suspected significant adverse effect on competition, it is probable that there are remedies available to counter this, and the companies involved have not yet offered undertakings in lieu

81 See Office of Fair Trading, OFT1020 (*Homebuilding in the UK*).
82 See sections 174(3) to (5), Enterprise Act 2002. These competences were only recently extended to apply to phase 1 as well.
83 When it concerns a fixed fine. For a daily fine, the maximum amount is £15,000. See section 174A(1) to (3), Enterprise Act 2002.
84 OFT Guidance Market Studies 2010, para. 5.1.
85 These statutory timeframes were also newly introduced after the merger. See CMA Guidance Markets 2014, para. 2.9.

of a reference'.[86] This holds three different criteria that need to be fulfilled before the UK CMA can proceed to a phase 2 investigation. First of all, it has to be established that there is a suspected 'adverse effect on competition' (AEC). An AEC is the main finding of a market investigation and the threshold that needs to be met in order to take further action. The UK CMA can thus only proceed to a market investigation if it suspects, on the basis of the phase 1 evaluation, that there is an AEC. Secondly, a market investigation can only be performed in case the UK CMA has a possible solution for the market problems that it presumes it will encounter. The tools that the UK CMA has at its disposal to this end are further discussed below. If none of these tools are – at least in theory – capable of remedying the AEC, the UK CMA cannot proceed to making a MIR. Lastly, as the intention to make a MIR is made known somewhere halfway through the market study phase, the companies in the market are placed in a position that allows them to take matters into their own hands, and to offer 'undertakings' to remedy the presumed competitive problems. If this is the case, and the undertakings offered are sufficient to remedy the presumed adverse effect on competition, it is no longer considered opportune for the UK CMA to make a MIR.

3.2.3 Phase 2 Investigation

In phase 2, the UK CMA investigates the market in more detail in order to find an adverse effect on competition. If the phase 2 investigation is initiated on the basis of a MIR, the UK CMA appoints a new case team to carry out the investigation. However, a phase 1 study is not the only way for the UK CMA to commence a market investigation. After a reference by a competent sector regulator or a Minister, the UK CMA can investigate any aspect without having to go through a phase 1 study first.[87] After the start of the investigation has been announced, the UK CMA has 18 months to complete the investigation. This time limit may be extended once only when there are special reasons warranting an extension.[88] During these 18 months, the UK CMA can make use of its information-gathering powers, as referred to earlier with regard to the market study phase.

The investigation in phase 2 is more extensive than in phase 1, because of the threshold to be met. In order to take further action, the UK CMA must find an 'adverse effect on competition', entailing the finding that 'there is a feature, or combination of features, of a relevant market that prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or part of

86 See OFT MIR Guidance 2006.

87 Apart from these external references, new types of references, introduced after the merger between the OFT and the CC are the cross-section reference and the public interest reference. A cross-section reference occurs when the CMA refers a market study to phase 2 in which the competitive problems to be investigated do not neatly fit one market. It is also possible to make a cross-section reference in case of recurring consumer complaints with effects in different markets (See CMA Markets Guidance 2014, para. 3.20). A public interest reference is made when a market study gives rise to public interest concerns. In that case, the market can be investigated in conjunction with issues of public interest. This is particularly useful for references made by bodies other than the CMA itself (see CMA Markets Guidance 2014, para. 3.12).

88 CMA Guidance paras. 3.5 and 3.6.

the UK'.[89] This is not the same as finding an infringement, which is specifically not the aim of markets work in general. If an adverse effect on competition is found, the UK CMA is competent to impose remedies or to accept undertakings.[90] The provisional findings of the investigation and the proposed remedies or undertakings are made available for consultation and the UK CMA reacts to statements made during the consultation period. The final report – which is published thereafter – can be appealed before the Competition Appeals Tribunal (CAT).

3.3 Application in Practice

Between 2004 and 2015, the UK CMA and is predecessors engaged in 25 market studies, 6 of which were referred for a phase 2 investigation.[91] Apart from that, 9 independent phase 2 investigations were conducted, either after a preliminary assessment, a Supercomplaint or a consultation. This means that within the investigated period of time, the UK CMA and its predecessors completed 25 phase 1 studies and 15 phase 2 investigations. This contrasts greatly with the number of 'regular' fining procedures within the same timeframe (12), the number of settlements (7) and the number of commitment decisions (5), and suggests that markets work has been at the forefront of the UK CMA's intervention arsenal.[92]

2004	Estate agency (*phase 1*)	Recommendations made to government.
2006	Payment protection insurance (*phase 1*)	Market investigation reference.
2006	Grocery market (*phase 1*)	Market investigation reference.
2006	UK airports (*phase 1*)	Market investigation reference.
2006	Supply of school uniforms (*phase 1*)	Recommendations made to the market.
2006	Commercial use of public info (*phase 1*)	Recommendations made to government.
2006	Liquefied petroleum gas (*phase 2*)	Remedies imposed.
2006	Home credit (*phase 2*)	Remedies imposed.
2006	Store cards (*phase 2*)	Remedies imposed.
2006	Classified directory advertising (*phase 2*)	Remedies imposed.
2007	Medicines distribution (*phase 1*)	Recommendations to market and government.
2007	Northern Ireland banking (*phase 2*)	Remedies imposed.
2008	Homebuilding in the UK (*phase 1*)	Clean bill of health.

89 CC Market Investigation 2013, para. 319.

90 Undertakings in this sense are commitments from companies to remedy the adverse effect on competition and to prevent the UK CMA from imposing measures top-down.

91 It has to be noted that before the UK CMA came into existence market studies were also conducted in the field of consumer law. However, in the total number referred to above, market studies that concern consumer law only are disregarded; market studies that combine features of competition and consumer law are included. It is possible that in this qualification errors of appreciation have occurred. However, this list has been compiled with due care and forms a proper illustration of the markets work regime of the UK CMA and its predecessors.

92 The list provided below is included, with full references, in the case references in this thesis.

2008	Groceries (*phase 2*)	Remedies imposed.
2009	Isle of Wight Ferry Services (*phase 1*)	Decision not to make a MIR.
2009	Property managers in Scotland (*phase 1*)	Recommendations made to government.
2009	Northern Rock (*phase 1*)	Clean bill of health.
2009	BAA Airports (*phase 2*)	Remedies imposed (divestiture).
2009	Payment protection insurance (*phase 2*)	Remedies imposed.
2009	Rolling stock leasing (*phase 2*)	Remedies imposed.
2010	Local bus services (*phase 1*)	Market investigation reference.
2010	Home buying and selling (*phase 1*)	Recommendations to market and government.
2010	Insolvency practitioners (*phase 1*)	Recommendations made to government.
2011	Aggregates (*phase 1*)	Market investigation reference.
2011	Off-Grid Energy (*phase 1*)	Decision not to make a MIR.
2011	Equity underwriting (*phase 1*)	Decision not to make a MIR.
2011	Organic waste (*phase 1*)	Decision not to make a MIR.
2011	Outdoor advertising (*phase 1*)	Decision not to make a MIR.
2011	Local bus services (*phase 2*)	Remedies imposed.
2012	Private Healthcare (*phase 1*)	Market investigation reference.
2012	Private Motor Insurance (*phase 1*)	Market investigation reference.
2012	Dentistry (*phase 1*)	No MIR, recommendations to government.
2012	Movies on pay-tv (*phase 2*)	No adverse effect on competition found.
2013	Statutory audit services (*phase 2*)	Remedies imposed.
2014	Payday lending (*phase 1*)	Decision to make a MIR.
2014	Joint assessment energy market (*phase 1*)	OFGEM may make a MIR.
2014	Banking for SMEs (*phase 1*)	Market investigation reference.
2014	Aggregates (*phase 2*)	Remedies imposed.
2014	Private motor insurance (*phase 2*)	Remedies imposed.
2015	Payday lending (*phase 2*)	Remedies imposed.

The review of the UK CMA's markets work suggests that the majority of markets under investigation are complex markets that are the 'usual suspects' in terms of competition law enforcement, such as financial products, health, construction and regulated markets. Given that these markets are often under scrutiny on a national and a European level, it is safe to say that these markets might not have been 'working well for consumers', thus warranting a market study or investigation. Apart from that, many of the market studies and investigations were initiated against the backdrop of a certain 'stirring' in the market, for instance by a proposed reform, recurring complaints or, occasionally, requests by Members of Parliament.

Before the merger transforming the OFT and CC into the UK CMA, the average market study took 10.4 months to complete, while the average time spent on market

investigations (including preliminary studies and appeals) was 36.6 months.[93] This work resulted in market studies averaging roughly 150 pages, and market investigation reports being anywhere between 200 and 500 pages in length. It is not surprising in that respect that markets work has been quite a strain on the budget of the UK CMA. In 2008, these costs were estimated at £16 million. On the other hand, the estimated impact in terms of consumer savings was estimated to range from £345 million per annum between 2007 and 2010 to £437 million per annum between 2010 and 2013.[94]

3.4 Outcomes of Markets Work

As illustrated by the overview above, phase 1 studies allow the UK CMA to give a clean bill of health to the market, to make recommendations to the government or to businesses, to proceed to enforcement action or to refer the market for a phase 2 investigation (or not).[95] Phase 2 investigations allow the UK CMA to impose remedies (either behavioural or structural) on market parties, in order to 'correct' any adverse effects on competition found. It is noted above that the UK CMA can only revert to a phase 2 investigation on the basis of a Market Investigation Reference (a MIR). The decision to make such a reference is appealable before the courts. This section discusses these outcomes in procedural order, so from the phase 1 outcomes (a clean bill of health, recommendations, follow-up action) through the decision to make a MIR to the phase 2 remedies.

Clean bill of health

If there are no significant concerns for competition, a clean bill of health seems to be the most appropriate. So far, this has only occurred in two cases.[96] The issuing of a clean bill of health would be desirable from the market participants' point of view, because it would mean that there are no significant impediments to competition (or the existing ones have remained well hidden – a cynic would add). From the point of view of the UK CMA, a clean bill of health is less desirable, because it would mean that it had invested time and resources into a market that was working well to begin with.

Recommendations

Another possible outcome of a market study is that the UK CMA makes recommendations to the government or the market itself. If there are legal or regulatory constraints causing the market to malfunction, recommendations to the government are most likely. If the behaviour of companies results in constraints on competition, and this would be easily remedied by a number of behavioural remedies, the UK CMA is more likely to urge companies to do so, for instance by the improvement of transparency or the adoption

93 BIS Consultation 2011, pp. 148-149. Now, after the merger, the statutory timeframes are fixed, suggesting a shorter amount of time spent on markets work.

94 First set (2007-2010) from BIS Consultation 2011, para. 3.4. Second set (2010-2013) from Office of Fair Trading, Positive Impact 12/13 Consumer benefits from the OFT's work, June 2013, OFT1493, para. 3.21.

95 OFT Guidance Market Studies 2010, para. 5.1 and CMA Markets Guidance 2014, para. 2.19.

96 See Office of Fair Trading, OFT1020 (*Homebuilding in the UK*) and Office of Fair Trading, OFT 1068 (*Northern Rock*).

of a code of conduct.[97] With these recommendations, the UK CMA aims to change behaviour in the market through 'softer' tools. Only in 8 out of 25 market studies were recommendations made – most often to the government, and most of them before 2010.

> The 2012 *Dentistry* study, which was initiated on the basis of consumer complaints, concerned the relationship between the conditions of the National Health Service's dental contracts and the possibilities for consumers to switch between dentists and other oral hygienists and dental specialists.[98] While studying the market, the UK CMA found that the NHS' dental contracts formed a barrier to entry, because they restricted the consumer's choice of dental care provider. The UK CMA thus recommended the government to revise the NHS' dental contracts to make it possible for consumers to choose 'any qualified provider'. Apart from that, the UK CMA recommended to increase transparency by supplying more information about the market and the dental care providers.[99]

As this example illustrates, recommendations to the government often concern alterations in rules or regulations that have a negative effect on competition. Also, the UK CMA may recommend improving supervision over a certain (group of) businesses.[100] These recommendations – either to businesses or to the government – are not binding, which means that their implementation is largely dependent on the willingness of the parties to follow up on them. For the government, this will depend on political considerations surrounding the particular topic. In order to safeguard the implementation of its recommendations, the UK CMA works together with the BIS (the Department for Business, Innovation and Skills), which monitors the actions that the government takes on the basis of the UK CMA's recommendations.[101] For the companies, on the other hand, the most important incentive to follow the UK CMA's recommendations is the fact that a phase 1 study does not preclude further enforcement action. Depending on the type of distortions of competition found and the types of recommendations made, it is imaginable that companies are more likely to follow the UK CMA's recommendations if they were directed towards them.

Follow-up enforcement action

This connects to another possible outcome of a phase 1 study: the possibility of further enforcement action. In principle, the recommendations made after a phase 1 study do 'not preclude the possibility that the UK CMA might take action under CA98 in the future, in particular if there are agreements which give rise to significant competition concerns which are not covered and/or addressed by our recommendations.'[102] Of course, not all market studies are stepping-stones for enforcement action. In fact, in most cases where enforcement action would seem necessary, it is not considered appropriate to conduct a market study first.[103] However, it is imaginable that the study reveals new

97 OFT Guidance Market Studies, paras. 5.6 to 5.9.
98 The National Health Service is the UK's mandatory health care insurance.
99 See Office of Fair Trading, OFT1414 (*Dentistry*).
100 See for instance Office of Fair Trading, OFT1245 (*Insolvency Practitioners*).
101 OFT Guidance Market Studies 2010, para. 5.11.
102 Quote from Office of Fair Trading, OFT967 (*Medicines Distribution*), p. 3.
103 See OFT Guidance Market Studies, para. 5.12.

information that warrants enforcement action, or that the alternatives sought by the market study have failed.

> The settlement in the *Property Sales and Lettings* case, for instance, concerned an agreement between estate and lettings agents not to mention their rates or fees in advertisements in the local newspaper. They had previously collectively bargained on the rates of such advertisements, and had agreed not to (openly) compete on price. In order to understand how competition works in this market, the UK CMA frequently referred to the *Home Buyers and Sellers* study it conducted in 2010.[104] Based on this information, it was able to conclude that the agreement included *de facto* mechanisms not to compete on price.[105]

This example shows that enforcement action does not always need to flow from the phase 1 study, but that the study can substantiate and underline findings in later cases.

MIR in the light of appealing against phase 1 outcomes

The outcomes of a phase 1 study are not appealable before the Competition Appeals Tribunal. This does not mean that there is no mechanism of accountability in place. As is discussed above, the UK CMA applies very stringent transparency standards during its markets work, and engages in an informal consultation during the market-study phase.[106] Naturally, if the UK CMA would pursue follow-up enforcement action, the result of this fully adversarial procedure would be appealable. Apart from that, the decision not to make a MIR constitutes a formal decision against which an appeal can be lodged. If stakeholders (notably those individually affected by the consequences of a formal decision) feel that the UK CMA has erred in evaluating whether or not a MIR should be made, an appeal can be lodged at the CAT, on the basis of which the UK CMA might decide to re-evaluate its previous decision.

> In 2005, the UK CMA's predecessor conducted a market study into the market for groceries, investigating – amongst others – a number of large supermarkets. From this market study, it appeared that consumers had benefited from falling prices, an increase in product range within stores and an improvement in service. For that reason, the UK CMA decided not to make a MIR. However, the Association of Convenience Stores (representing smaller, local stores) appealed against this decision, on the grounds that the disappearance of local stores had contributed to less local competition, and that the UK CMA had failed to take this into account. Before the CAT could decide on the matter, the UK CMA indicated that it would review its earlier decision not to make a MIR, resulting in the CAT quashing this decision on these grounds.[107] After reconsideration, the UK CMA indeed decided to make a MIR,[108] resulting in the imposition of remedies after the phase 2 investigation.[109]

The example shows that in the past the UK CMA has been known to revoke its decision to make a MIR, and also underlines the value of targeted consultation. In fact, in the

104 See Office of Fair Trading, OFT1168 (*Home Buying and Selling*).
105 Competition and Markets Authority, Case CE/9827/13 (*Property Sales and Lettings*).
106 See OFT Guidance Market Studies 2010, paras. 4.18-4.20.
107 Competition Appeal Tribunal, Case 1052/6/1/05 (*Association of Convenience Stores v Office of Fair Trading*).
108 See Office of Fair Trading, OFT845 (*MIR Grocery Market*).
109 See Competition Commission, 30 April 2008 (*Groceries*).

current situation, the intention to make a MIR is communicated to the market at an earlier phase, allowing stakeholders to give their views earlier and preventing an appeal at a later stage.

Phase 2: remedies

If a case is referred for a phase 2 investigation, the UK CMA's aim is to find an adverse effect on competition and to remedy it if possible. This explains why the outcomes of a phase 2 investigation are more far-reaching, also in terms of intrusiveness for companies. The possible remedies – on a scale from 'light' to 'intrusive' – include recommendations, outcome remedies (such as price caps), behavioural remedies (such as market-opening remedies or informational remedies), intellectual property remedies and divestiture.[110] Which remedy is chosen depends on its suitability for remedying the adverse effects on competition. However, it appears that the UK CMA (or theformer CC) has expanded the use of remedies gradually, using the most intrusive ones only in the most recent cases. The first time a divestiture order was given was in 2009, where the former CC required, amongst other remedies, the divestiture of Gatwick and Stansted Airports in its *BA Airports* investigation.[111] It gave a similar order in the 2014 *Aggregates* investigation, in which the cement manufacturer Lafarge Tarmac was ordered to divest any of two cement plants identified by the former CC.[112]

> The market for aggregates is a complicated market, as it involves a limited number of international players that operate on very local markets. The end-products for which aggregates are used (cement, ready-mix concrete) limit the scope of this market, as the finished product can only be transported for a few hours before it sets. This means that cement or ready-mix concrete has to be prepared almost on the spot, resulting in many cement plants throughout the UK, all with a limited geographical reach. As an additional difficulty, these plants are commonly co-owned by the companies which are active in this market. This makes competition opaque and could increase the risks of an exchange of information. With its market investigation, the UK CMA addressed the complicated structure of the market, because it had found an adverse effect on competition in these particular areas (which, given the characteristics of the market, is not surprising). Apart from negotiating informal commitments, there would be no other way to address competition concerns in this market, except for making the conscious decision not to address them.[113]

The market investigations and the remedies imposed are formal decisions, against which an appeal can be lodged at the CAT. If this is the case, the CAT applies the same principles as would be applied by a court on an application for judicial review. Under this judicial review standard, the CAT will have to consider whether the UK CMA had 'a sufficient

110 See CC Market Investigations 2013, paras. 371-380.

111 Competition Commission, 19 March 2009, (*BAA Airports*).

112 Competition Commission, 14 January 2014 (*Aggregates*). Especially this last order might have sparked the envy of fellow competition authorities, which are also in the course of investigating the aggregates sector, but which lack the tools to deal with personal and economic interconnectedness that might have an adverse effect on competition. For instance, the ACM is active in this market as well. See the speech by Chris Fonteijn on 2 October 2014, at Congres Ontwikkelingen Mededingingsrecht 2014 Amsterdam, p. 14, but it has not yet presented a case or a procedural decision.

113 This connects to the discussion whether or not a 'broad approach' to competition law issues is desirable. See Chapter 9, section 5.2.

basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did'.[114] This means that – whenever the remedies imposed are appealed against – the CAT will review whether the remedy imposed is appropriate, necessary, the least onerous and does not produce effects that are disproportionate to the aim pursued.[115] In order to ensure that the remedies imposed meet these criteria, the UK CMA reviews whether or not the remedy imposed is expected to be effective, and whether or not it can include 'sunset clauses' after which the remedy would cease to have effect.[116]

4. MARKET SCANS (ACM)

Much like its British counterpart, the ACM also has tools at its disposal to examine broader market problems, but uses less clear terminology to indicate the reports that they may yield. The term 'market scan' is explicitly used at times, but the ACM publishes similar documents labelled 'report', 'study' or 'analysis'. To avoid confusion, the formal label is disregarded and the publications are all referred to as 'market scans', in order to distinguish them from the UK CMA's market studies and investigations. A market scan, as referred to in this chapter, is an examination of the functioning of a specific market or a specific feature of a given market, conducted by (or under the authority of) a competition authority, acting of its own motion or upon a request by a third party. Such an examination, that has the aim of finding risks for competition or analysing specific problems within a given market, is published upon completion and forms the basis for observations, recommendations or further action by the competition authority. However, it is not conducted in the course of an investigation for an infringement.

This section briefly discusses the ACM's practice with regard to market scans. Because there is no formal 'line of application', the discussion of the instrument will be rather topical, jumping from example to example in order to illustrate the possibilities that the ACM has at its disposal. First, a short overview of the procedure is provided, with attention being paid to the ACM's new information-gathering competences. After that, an overview is given of the number of market scans performed in the past. Lastly, special attention is given to the possible outcomes of market scans and the changes effectuated in the market due to them.

4.1 Development and Objectives

The objective of a market scan is to explore and outline the competitive situation in a given market, with a view to ascertaining whether follow-up enforcement action is required, facilitating a discussion on the functioning of the market amongst the market players or effectuating change by means of recommendations. After its inception in 1998, the ACM's predecessor commissioned market scans in order to better understand

114 Competition Appeals Tribunal, Case no. 1110/6/8/09 (*BAA Ltd v Competition Commission*), point 20.
115 Competition Appeals Tribunal, Case no. 1104/6/8/08 (*Tesco plc v Competition Commission*), point 137, drawing on the formulation by the Court of Justice in CJEU Case C-331/88 (*Fedesa*), para. 13.
116 See CMA Markets Guidance 2014, paras. 4.14 to 4.25.

the functioning of certain markets or to anticipate technical or economic changes.[117] However, the ACM started to conduct similar research in-house when the Dutch Minister of Finance requested the competition authority to structurally keep an eye on competition in the financial market. On the basis of this request, the ACM established the ' Financial Sector Monitor' in 2003, which has – since then – been quite active in publishing reports on various aspects of competition in the financial market.[118] In the wake of this working group, the ACM gradually started to engage in more markets work, resulting in a patchwork of market studies with – as remarked above – varying labels. These market scans were conducted without a specific legal basis under the ACM's general function, which meant that it was implied that the ACM was competent to gather information in a way that it seems fit in order to carry out its enforcement tasks.[119] This implicit legal basis for conducting market studies also meant, however, that the ACM was not competent to compel information from companies in preparation of a market study and had to rely on their cooperation and publicly available sources.

In the current situation, the merger between the previous market supervisory agencies that resulted in ACM also spurred a review of the Dutch Competition Act. Because of this streamlining, the ACM has now received an explicit legal basis to analyse markets in the light of competition law, telecommunications, postal, energy and transport regulations and consumer protection law, as long as these analyses promote the functioning of markets, orderly and transparent market processes and the fair treatment of consumers.[120] The Streamlining Act also provides the ACM with the competence to compel cooperation from companies with ongoing market scans, which gives markets work a more prominent place in its enforcement toolkit. As yet, the ACM has not published procedural guidelines about its approach to market scans and it is unclear whether it will do so in the foreseeable future.

4.2 Overview of the Procedure

In general,[121] the ACM decides to engage in a market scan on the basis of complaints from consumers or other stakeholders, on the basis of its own economic research, or sometimes because of pressure from outside – such as media attention or political debates.[122] The decision as to whether or not to engage in a market scan is often

117 The following studies were commissioned or executed by the ACM's predecessors before 2004: NEI Kenniscentrum Markt en Mededinging, July 2000 (*Instrument Fusies Bankwezen*). Cap Analysis, June 2002 (*Scan Bouwsector*). ECORYS NEI, August 2003 (*Vraagfactoren Ziekenhuizen*).

118 The activities of the Financial Market Monitor are discussed in section 4.3 below.

119 Algemene Rekenkamer, *Normenkader – Deel functioneren NMa*, 14 April 2006, p. 17.

120 Article I-B sub 4 en 5, *Stroomlijningswet* 2014.

121 The ACM has no guidelines or fixed protocol in place that determines how market scans should take place, nor is there any standard to be derived from practice. For that reason, the ACM's practice varies greatly on this point. In fact, the scope, the approach and the outcomes of market scans vary almost from publication to publication. However, in order to give a general impression of the ACM's approach to markets work, some general observations with regard to procedural issues and steps to be taken are discussed below. Whenever there are obvious exceptions, reference is made to these.

122 This statement is based on interviews conducted within the ACM between January and April 2014. See Annex I – Methodology for the embedding of these interviews in this thesis. This statement can be illustrated by the following studies: Regioplan Beleidsonderzoek, October 2009 (*Eindrapport Kinderopvang*), or Nederlandse Mededingingsautoriteit, December 2009 (*Report Agrifod*), which

influenced by the ACM's Agenda, which is a list of its focal points for the next two years. With its Agenda, the ACM determines which sectors merit special focus, and to which competition-related issues it will pay attention. Some – but not all – of the market scans conducted are indeed in line with the enforcement priorities as set out in the ACM's Agenda for that time.[123] Others were inspired by other developments, such as changes in the regulatory landscape,[124] or conducted in the course of a broader market-monitoring project.[125] In most cases, the decision to scan a market is published on the website of the ACM, in which case a press release outlines the scope of the scan that the ACM wishes to effectuate, as well as the expected timeframe within which the ACM hopes to conclude the market scan.[126] Such a press release is, however, not rendered mandatory.

Once the scope of the research is determined by the ACM (either publically or internally), relevant data are collected by means of consultations, interviews, questionnaires, data collection, consumer interviews, econometric analysis and/or external advice. Under the new legal framework, the ACM is competent to gather the information to complete the market analysis and to compel this from companies if necessary.[127] A failure to cooperate with such a request is punishable by a maximum fine of €450,000.[128] The information that the ACM receives under the application of this article can be used for the exercise of all of its legal functions,[129] which entails that information collected in a market scan could also be used to start a fully adversarial procedure (or regulatory action). Occasionally, data collection is commissioned to external research bureaus. In that case the external bureau would draft a report or preliminary study, usually directed by specific research questions as formulated by the ACM. In some cases, the external report is the only publication available on the ACM website (in other words: the ACM did not add its own evaluations to the report), but in other cases the external research is added to the final publication as an annex only.[130]

---

combines with LEI Wageningen, Nota 09-074 (*Prijsvorming Voedingsproducten*). The latter was even repeated five years later, in LEI & UU, December 2014 (*Quickscan Prijsvorming Voedselketen*), which led to a discussion in Parliament. See Ministerie van Economische Zaken, Kamerbrief over Onderzoeksrapport Prijsvorming van Voedsel, 18 December 2014.

123 Conclusion drawn from a comparison between the topics listed below (in section 4.3) and the ACM Agenda's between 2004 and 2016.

124 See for instance Nederlandse Mededingingautoriteit, November 2006 (*Schoolboekenscan*), that explicitly lists the effects of the regulatory changes, and Nederlandse Mededingingsautoriteit, December 2010 (*Visiedocument Betalingsverkeer*). Admittedly, these examples do resemble government advocacy which – in the study of the Autorité's markets work – was left out of the scope of this research. However, in this case, the study performed is very extensive, and lists characteristics and problems of the market that go beyond the mere competitive assessment of proposed regulation or legislation.

125 The Monitor Financial Sector, see para. 4.3 below.

126 See for instance Press Release Nederlandse Mededingingsautoriteit, 'NMa start studie naar overstapdrempels financiële producten', 15 June 2012. This press release was accompanied by a document outlining the scope and objective of the study, as well as the proposed methodology. See Nederlandse Mededingingsautoriteit, 'Omschrijving van de studie Overstapdrempels', 15 June 2012.

127 Article 6B, *Stroomlijningswet* 2014.

128 Article 12M, *Stroomlijningswet* 2014.

129 Articles 7 and 1B 3 to 6, *Stroomlijningswet* 2014.

130 For instance in the 2005 report on PIN Contracts, the former NMa consulted Ecorys for a survey. See ECORYS-NEI, February 2005 (*Eindrapport Pin-contracten*). Other examples are the 2011 Fisheries study and the 2013 analysis of the Beer market. See EIM, Sectorstudy 7080 (Visserijketen) and Autoriteit Consument en Markt, 6308-15/34 (*Analyse Horeca Biermarkt*). This analysis is supported by two independent research reports: EIM, June 2012 (*Overstapgedrag Biermarkt*) and SEO, January 2013 (*Analyse Verticale Afspraken Biermarkt*).

After the information is collected and the report is drafted, the ACM could issue a draft version of the document for consultation. This allows stakeholders to share their views and allows the companies concerned to have the opportunity to offer informal commitments to remedy any concerns that the ACM might have put forward. The ACM can take these views and commitments into account when issuing the final report (or 'market scan'). Typically, this document contains an outline of the general approach that the ACM has taken to scanning the market, a description of the functioning of the market, a reasoned conclusion on whether or not the ACM has found any competition concerns, and a list of possible consequences. These are either recommendations (to the government or to market parties), or commitments offered by parties earlier. The ACM has not always shown a consistent line in the publication of market scans. This ranges from the publication of the background report (as drafted by an external bureau) only, to the publication of the observations of the ACM without any background studies, to a full publication including all observations and analyses.[131] Notwithstanding its form, a published scan or analysis is not considered to be a formal decision for the purpose of an objection and an appeal.[132] Apart from that, the publication of a market scan does not preclude the ACM from taking follow-up enforcement action. If the outcomes call for action besides the scope of the ACM's powers, it will enter into a discussion with the responsible supervisory authorities, the stakeholders and professional organizations.

4.3 Application in Practice

Between 2004 and 2015, the ACM published 33 documents that would qualify as a market scan in the definition given above.[133] In making this distinction, the deciding factor has been whether or not the ACM has performed a full analysis of the functioning of competition on the market under review, and has published the outcome on its website.[134]

131 An example of a background study alone is: EIM, March 2009 (*Report Industrywater*). An example of the ACM's conclusions alone is: Autoriteit Consument en Markt, February 2015 (*Farmacie*). And a larger study is illustrated by: Nederlandse Mededingingsautoriteit, Maart 2012 (*Marktscan Woningmakelaardij*), which draws on conclusions from Blauw & Nederlandse Mededingingsautoriteit, B13552-4 (*Concurrentie Woningmakelaardij*), EIM, March 2011 (*Consumentengedrag op Makelaarsmarkt*) and Blauw & Nederlandse Mededingingsautoriteit, B13552-4 (*Gedrag van Makelaars*).

132 See Article 1:3 *Algemene wet bestuursrecht*. Underlined by the ACM's predecessor NMa in Nederlandse Mededingingsautoriteit, Monitor Financiële Sector 2003, p. 4.

133 The objective of a market scan is to explore and outline the competitive situation in a given market, with a view to ascertaining whether follow-up enforcement action is required, facilitating a discussion on the functioning of the market amongst the market players or effectuating change by means of recommendations. See section 4.1 of this chapter.

134 This is the same benchmark as applied with regard to the Autorité's advisory opinions above. It is possible that some of the qualifications made in the list below are debatable, or that equally extensive publications have been omitted. However, this list has been compiled with due care and forms a proper illustration of the markets work regime of the ACM. The list provided below is included, with full references, in the case references in this thesis.

2005	Report PIN Contracts	Outlines structure & problems of the market.
2006	Schoolbooks	Lists effects of regulatory change.
2007	Index of free professions: notaries	Companies adapted voluntarily.
2008	Funeral insurance	Outlines structure & problems of the market.
2008	ICT of ProRail	Recommendations to company.
2008	Inland shipping	Outlines structure & problems of the market.
2009	Windshield repair insurance	Lists problems, implicit recommendations.
2009	Credit for SMEs	Recommendations to companies.
2009	Daycare	Recommendations to municipalities.
2009	Pricing in food and agriculture	Explains developments, no further action.
2009	Internet sales	Explains developments, no further action.
2009	Industry water supply	Outlines structure & problems of the market.
2010	Tying in banking for SMEs	Explains developments, no further action.
2010	Financial transactions	Outlines structure & problems of the market.
2010	Mortgage rates	Outlines structure & problems of the market.
2010	Market power Schiphol	Explains developments, no further action.
2011	Fisheries	Outlines structure & problems of the market.
2011	Railways	Recommendations to government and companies.
2011	Financing real estate	Outlines structure & problems of the market.
2011	Schoolbooks	Recommendations to companies.
2011	Medical supplies	Recommendations to companies.
2012	Estate Agents	Recommendations to companies.
2012	Co-insurance	Lists problems, implicit recommendations.
2013	Beer	Few recommendations, no further action.
2014	Barriers to enter banking	Recommendations to government.
2014	SMS services	Recommendations to companies.
2014	Market power in overdrafts	Explains developments, no further action.
2014	Gym rental by municipalities	Recommendations to municipalities.
2014	Pricing in the food industry	Outlines structure & problems of the market.
2015	Pharmacy	Recommendations to government and companies.
2015	IP Interconnection	Outlines market, recommendation to government.
2015	Financing for SMEs	Outlines problems and makes recommendations to companies.

A large percentage of the market scans listed (9 out of 33) concern financial products, or market scans into the functioning of the financial sector. This is because the ACM operates a so-called 'Financial Sector Monitor' alongside its regular scanning and enforcement activities. The Financial Markets Monitor consists of a group of specialists within the ACM that structurally monitor this sector (unfortunately, the 'Financial Sector Monitor' is both the name of the working group, as well the title of the series in which its reports are published). The Minister of Finance, who asked the ACM to pay

special attention to competition in the financial sector, supports the Monitor financially. With the Financial Markets Monitor, the ACM investigates competition in financial markets on a structural basis, supplementing the supervision of the financial markets as carried out by the two Dutch financial regulators.[135] Other examples of 'market monitors' within the ACM are the Railway Monitor and the Energy Roadmap.[136] Because these two monitors largely concern regulated markets and regulatory issues, they are disregarded in the remainder of this study.

From the analysis of the publications, it appears that market scans are not as extensive as market studies under the UK regime for markets work. Instead of consistently analysing competition on a given market, the ACM applies are more piecemeal approach to each market scan. This means that the scope of the market scans differs greatly from publication to publication. On average, an ACM market scan is somewhere around 30 pages long, giving a short description of the market, the relevant legal framework and the ACM's preliminary analysis of potential market problems. Where an external research bureau is used, reference is made to these publications, which are somewhere between 50 and 100 pages long. There are no estimates available about the costs or impact of market scans.

4.4 Outcomes

In analysing the outcomes as included in the overview provided in the previous section, it can be inferred that the ACM only connects a limited number of outcomes to its market scans. The ACM either takes a descriptive approach (outlining the market structure, effects of changes in legislation or competition-related issues) or a declaratory approach (stating that there is no need for a further investigation). In only a few cases does the ACM make explicit recommendations to the companies active in the market under investigation, or the relevant governmental bodies.

The most common outcome of a market study – at least in the earlier half of the time period under research here – is the descriptive approach, in which the ACM outlines its findings on the market, but does not attach any further consequences to it. This description either contains an analysis of the structure of the market and the presumed competitive problems, or an analysis of the effect of certain regulatory changes to the market. The descriptive approach does not mean that the markets investigated all received a 'clean bill of health'; in fact, in most of them the ACM was capable of pinpointing risks to competition, or to make forecasts about the future developments on the market. This could indicate that the ACM performed these studies with the main objective of increasing its own knowledge about the market, which it published out of transparency considerations. Another option is that the ACM published these market scans with a view to warning the market about possible competition-related problems, facilitating a discussion about the issues it uncovered and urging the parties – without

135 De Nederlandsche Bank (DNB) and Autoriteit Financiële Markten (AFM). See Nederlandse Mededingingsautoriteit, Monitor Financiële Sector 2003, p. 4.

136 See for instance NMA DTe, CREG and CRE, December 2005 (*Roadmap Energy Regulation*), Nederlandse Mededingingsautoriteit, March 2007 (*Tweede NMa Spoormonitor*).

making any explicit recommendations – to take these into account in their market behaviour.

Secondly, the ACM often declares that it sees no grounds for further action in the market based on the analysis performed. Such a declaration suggests that the ACM did not initiate the market scan of its own motion, but – for instance – in answer to recurring consumer complaints or signals from the market that competition might not have been working well. Whenever the ACM makes such a declaration, it does so on the basis of the information available at that time. If circumstances were to change, or new information would come to light, the declaration would not be likely to prevent the ACM from taking enforcement action. In some cases, the ACM could make a declaration that it will not take any action, because it is simply not well placed to deal with the market problems that it uncovered. An example of this is the 2013 *Beer* analysis.[137]

> The beer market has been under the scrutiny of the European Commission and the ACM for some time now, because of suspected breaches of competition law by the larger breweries in the Netherlands. Earlier, the predecessor of the ACM ceased an investigation into this market, as there were no concrete leads for an infringement procedure. However, the complaints persisted, so to provide more clarity to the market parties, the ACM conducted a thorough analysis that it published in 2013. The complaints focussed in particular on the leasing contracts which breweries had with bars and restaurants, lending them beer taps and fridges in return for brand exclusivity. The ACM found no competitive problems with the contracts, but also indicated that something could be done about the bargaining position of bar and restaurant owners. The ACM made concrete recommendations for doing so, but explicitly placed the responsibility for attaining this result with the market.[138] Since there was no apparent issue regarding competition law, the ACM felt that it was not the designated authority to initiate or lead these negotiations.

This example illustrates the restraint that the ACM sometimes exercises when making recommendations to market parties. However, the ACM does not always refrain from making explicit recommendations. This is best illustrated by the 2012 market scan into the real estate sector.[139]

> The housing market, and the role of real estate agents in particular, has been a focal point for the ACM and its predecessor because of its economic value. In 2012, the ACM published an extensive report on the functioning of the housing market, examining the role of real estate agents and the number-one website for comparing houses and housing prices: Funda. Funda is owned for the largest part by the main trade association for estate agents, the *Nederlandse Vereniging voor Makelaars* (NVM). For that reason, Funda listed search results for NVM members above search results for non-NVM estate agents. Also, the non-NVM estate agents paid a higher fee for

137 See Autoriteit Consument en Markt, 6308-15/34 (*Analyse Horeca Biermarkt*). This analysis is supported by two independent research reports: EIM, June 2012 (*Overstapgedrag Biermarkt*) and SEO, January 2013 (*Analyse Verticale Afspraken Biermarkt*).

138 See Press Release Autoriteit Consument en Markt, 'Meer duidelijkheid in brouwerijcontracten gewenst', 7 June 2013.

139 Nederlandse Mededingingsautoriteit, March 2012 (*Marktscan Woningmakelaardij*). Three reports support the market scan: Blauw & Nederlandse Mededingingsautoriteit, B13552-4 (*Concurrentie Woningmakelaardij*), EIM, March 2011 (*Consumentengedrag op Makelaarsmarkt*) and Blauw & Nederlandse Mededingingsautoriteit, B13552-4 (*Gedrag van Makelaars*).

> adding full advertisements (including all the relevant specifications of the houses) to the Funda website. In a press release accompanying the market scan, the ACM warned against the risks of unfair competition by the NVM through Funda. It recommended that the NVM should increase transparency on the website and even to 'keep Funda at a distance' – presumably hinting at divestiture.[140] Twelve months later, it appeared that the NVM had indeed increased transparency on its website, placing a clear disclaimer above its search results and thus making clear to consumers that more relevant search results could be found on subsequent pages. Even though no further measures were adopted, the ACM called it a step in the right direction and aimed to evaluate the measure within a year.[141]

With this case, the ACM effectuated change in the market by making recommendations on the basis of market scans. In fact, the proposed changes are now visible in practice.[142] It is unclear where the ACM draws the line between leaving the solution to the market parties (as it did in the *Beer* analysis) and intervening in order to remove obstacles to competition (as it did in the *Estate Agents* scan). The distinguishing factor between these two examples is that the ACM found actual obstacles to competition in the market for real estate, whereas competition in the beer market suffered from a lack of practical skills on the part of the companies involved. It could thus be inferred as a starting point that the ACM is likely to make recommendations where it identifies clear impediments to competition, which are easily remedied by action on the part of the companies. Where the issues with competition are unclear or are not present, or where the impediments found are serious enough to warrant a different type of enforcement action, it will be less likely for the ACM to make recommendations. As was the case with regard to the UK CMA's phase 1 studies, the 'success' of the ACM's market scans is largely dependent on the willingness of companies to cooperate and to implement the recommendations made.

5. COMPARISON AND EVALUATION OF MARKETS WORK

This chapter started with making a distinction between two types of instruments that competition authorities might use to advise the market: the market study (scan or investigation) and the individual advice. The instrument that gives a more general impression of the functioning of markets – the market study, scan or investigation – is central to this chapter. As it turns out, all three national competition authorities apply instruments that can be categorized under this heading. However, the design and application of the instruments vary greatly, particularly in their level of formality and application. At the one end of the spectrum, there is the very formal and possibly far-reaching system of UK CMA markets work, while at the other end, there is a hybrid advisory tool used by the Autorité and the newly granted power of conducting market scans in the Netherlands for the ACM. All of these instruments have to be evaluated

140 See Press release Nederlandse Mededingingsautoriteit, 'Geef alle makelaars dezelfde behandeling op Funda', 8 March 2012.

141 See Press release Autoriteit Consument en Markt, 'NVM vergroot transparantie op Funda', 25 July 2013.

142 Although it could still be considered very frustrating for consumers that non-NVM estate agents cannot publish full information about their properties on the *Funda* website, and that their search results are listed last.

under the normative framework underlying this thesis in their own right,[143] in order to pinpoint where the advantages and weaknesses of the existing regime lie. After this evaluation, national practices are compared with each other in order to see where the greatest differences lie. This exercise facilitates the evaluation of markets work as such on a more overarching level, pinpointing issues with regard to the requirements flowing from the instrumental and safeguard requirements of the normative framework and the way the different procedures can be viewed in this balance. This leads to a number of recommendations with regard to negotiated procedures that conclude this chapter.

5.1 Evaluation of the Different National Practices

In this chapter, it has been stated repeatedly that the procedural framework for studying markets in the three Member States is very different. This section aims to encapsulate these differences by qualifying them in the light of the normative framework. This shows that the Autorité applied an advice procedure characterised by 'bound flexibility': versatile in nature, but limited by either the referral or the notice accompanying a self-referral. By contrast, the UK CMA operates under a very strict procedural framework, combining the search for effectiveness with an important focus on safeguards. Lastly, the ACM's practice can be characterised as flexible, but currently in a state of development. Having only recently received formal powers, it is interesting to see how the ACM will deal with the objections that may arise from evaluating its practice under the normative framework.

5.1.1 Advisory Opinions of the Autorité

When looking at the advice practice of the Autorité from the perspective of the balance between instrumental requirements and safeguards, the aspect that stands out most is the versatility and flexibility of the advice-procedure. This differs from some of the Autorité's other enforcement instruments, which have a firm legal basis, are elaborated upon in procedural guidelines and can be characterised as rather formalistic (such as the non-contestation procedure discussed in the previous chapter). In many ways, the advice procedure can be regarded as geared towards instrumentality, whereas some of the other enforcement instruments are more safeguard-oriented in nature. This instrumentality is illustrated in the first place by the hybrid nature of the instrument. The advice procedure is pliable to the specific request put before the Autorité, and when there are no external referrals but there is a market situation that merits attention, the Autorité is competent to investigate any market of its own motion. The scope of the study, as well as the depth of the investigation, can be determined by the Autorité on a case-by-case basis. This, coupled with the obligation for companies to reply to the requests for information, makes the advice procedure a potentially powerful market tool, which is applied very often. In fact, the Autorité has managed to produce several hundred advisory opinions since 2004,[144] while maintaining a steady output of fining

143 This framework is extensively elaborated upon in Chapter 3.

144 298 to be precise. Since 1991 (which is as far as the digital archives date back), the Autorité has issued 528 advisory opinions.

decisions, commitment decisions, injunctions and non-contestation decisions as well. Even though these numbers are not an indication of the actual effectiveness of the Autorité's policy, it does imply that on an aggregate level, the advisory function of the Autorité seems not to take away from its capacity of taking formal decisions.[145]

Even though the advice procedure is hybrid in nature and leaves a great deal of flexibility for the Autorité, it should not be forgotten that the majority of the markets studied and the advisory opinions given are placed before it on the basis of a referral. This means that a referring body (whether this is a Minister, a regulator, a consumer body or a product or trade organisation) determines the scope of the Autorité's study by means of its referral. Before 2008 (so before the Autorité was competent to make self-referrals), this put the Autorité in a rather interdependent relationship with the referring parties. Even now, despite the fact that the Autorité can study markets of its own motion, the ratio between referred markets and self-referrals is still very unequal and the vast majority of advisory opinions still concern government advocacy.[146] This denotes that even though the advice procedure might be a very flexible tool, its use as a markets tool is still rather limited – and when markets are not self-referred, the major downside of it is the fact that the referring party determines the scope of the investigation.

From a safeguard point of view, the main issue with the advice procedure lies in the absence of predetermined procedural rules, combined with the compulsory nature of the requests for advice and the unintended binding effect of the recommendations.[147] The Autorité remedies this in three different ways. First of all, the requests for advice can be contested if the receiving party (usually companies) feels that the questions are formulated too broadly or have nothing to do with the goal of the inquiry. Secondly, self-referrals are announced on the website by means of a formal press release, which outlines the goal of the investigation, its scope and a preliminary timeframe. This limits the Autorité's actions beforehand. Lastly, even though the outcomes of the advice procedure are not appealable (they are merely advice, and are not binding in nature), the Autorité sometimes issues its final reports for consultation and always publishes its advisory opinions on its website, usually along with a press release and a summary of its most important findings and recommendations. This indicates that despite the flexible nature of the instrument, the Autorité has established some forms of alternative accountability and is willing to engage with stakeholders about its markets work.

5.1.2 Markets Work Regime of the UK CMA

The main characteristic of the markets work regime of the UK CMA is its procedural embedding, in other words: its strictness. Studying and investigating markets is considered one of the core tasks of the UK competition authority and the competences to do so are granted accordingly. With that, the UK CMA is the only competition authority that applies a two-phased system and can impose actual measures on the market instead

145 Even though it is impossible to determine how many decisions the Autorité would have taken in the absence of its advisory function, or how effective it would be if it were not held to give advice upon referral.

146 On a ratio of 1/29.8, meaning that the Autorité engaged in 10 self-referrals.

147 These points are also touched upon in Chapter 8, section 4.3.

of merely making recommendations. Translated into terms of the normative framework, it is safe to say that the markets work regime of the UK CMA strives for effectiveness. This qualification is, of course, influenced by the substantial powers that the UK CMA enjoys, but also by the fact that the procedural embedding of these powers are consistent with what is labelled as the legal approximation of effectiveness. In the first place, the markets work regime is executed independently, has permanent resources dedicated to it,[148] and can lead to actual intervention in the market. Secondly, the UK CMA is subjected to a duty of transparency, having to publish information about key moments in the investigation, as well as providing extensive reasoning as to why certain procedural decisions have been taken.[149] Furthermore, markets work is performed in a cooperative way, involving market parties and other stakeholders in various steps of the procedure and notifying the parties concerned of the next steps in due time. Lastly, markets work is explicitly encompassed in the UK CMA's enforcement strategy, which strives for a better balance between fully adversarial procedures and – amongst other things – markets work.

Apart from the fact that the UK CMA's markets work regime is harnessed in accordance with the legal approximation of effectiveness, it explicitly takes account of all the safeguard requirements. The UK CMA performs market studies and investigations in accordance with the Enterprise Act and has explicated its approach in procedural guidelines. This is in line with the principle of legality and protects companies from an arbitrary application of the instrument – contributing to legal certainty. With regard to proportionality, the UK CMA has included moments to determine the best course of action, taking into account the situation on the market and the seriousness of the problems found. Furthermore, the two-phased structure of the regime indicates that the investigation is separated from sanctioning (or, at least, taking measures against companies), thereby safeguarding impartiality. Because the outcomes of the phase 2 investigations can be appealed before the courts, the UK CMA can be held accountable, but there are alternative mechanisms in play as well, facilitated by the transparency obligations flowing from the procedural guidelines. Lastly, the rights of defence are respected by giving companies the opportunity to be heard at various stages of the investigation. All of these aspects underline the UK CMA's rigorous procedure, which sets it apart from the other markets work regimes that are much more characterised by informal contacts and recommendations.

Be that as it may, the 'heavy' character of the UK CMA's markets work regime makes it inflexible in its application. This lack of flexibility is illustrated by the guidelines governing markets work, which include statutory timeframes, transparency obligations and strict thresholds for further action. This puts a strain on the resources of the UK CMA, and makes its markets work (particularly the phase 2 investigations) rather time-consuming. In fact, the statutory time limits indicate that a fully-fledged market investigation can take up to 30 months (which is almost 3 years), if no 'stop-the-clock' mechanism is executed and the procedure is not extended. For the companies involved, this must be a source of uncertainty, as they are made aware of the possible consequences

148 The 'markets' division of the UK CMA.

149 Examples of these are the decision to refer a market for a second phase (or not), the decision to find an adverse effect on competition (or not) and lastly, the decision to accept undertakings or propose remedies, or – again – not. See CMA Markets Guidance 2014.

in month 6, but have to wait until month 30 to find out what the UK CMA has in mind.[150]

It is true that the stringent character of the regime is consistent with the consequences attached to it (after all, the phase 2 investigations make it possible for the UK CMA to order companies to divest part of their businesses, or take other far-reaching structural or behavioural measures), which gives the markets work regime of the UK CMA a definite enforcement character and increases the pressure upon the competition authority not to hamper any safeguards in the process. As a general rule, the more far-reaching the consequences, the more weight should be attributed to safeguards. In the light of the consequences attached to the phase 2 investigation, it is difficult to see how the UK CMA could design its procedure in another way.[151] However, looking at the two-phased system as a whole from the point of view of instrumentality, it seems that in the UK the possible consequence of initiating a phase 2 investigation sometimes somewhat overshadows the phase 1 study – which could be a useful instrument in its own right.

5.1.3 Market Scans by the ACM

From an instrumental point of view, the main characteristic of the markets work regime of the ACM is flexibility, due to the fact that the instrument is currently still under development. The ACM has received more compulsory investigatory powers, but has not yet provided more clarity about its use or application. This means that the market scan is pliable to the situation in which it is applied, varying from extensive commissioned studies to quick questionnaires and resulting in reports that range from descriptive overviews to a list of recommendations to the government and to market parties. This flexibility gives the ACM the opportunity to field test the instrument of market scans, before committing itself to a fixed procedure.

The question is whether such a fixed procedure is necessary, as it comes at the cost of the flexibility that the ACM enjoys. From a safeguard perspective, the main characteristic of the ACM's regime is legal uncertainty. Even though the investigatory powers of the ACM and the corresponding duties of the companies are now codified, companies are still uncertain to what end the information will be used. Because of the provision that enables a 'free flow of information' throughout the ACM, it is possible that information provided in a regulatory setting can be used to incite a competition law investigation – or vice versa. The general rights of defence might prevent this from happening to a certain extent – in the sense that information collected under the veil of a market scan cannot be used in a formal investigation – but this aspect of the procedure might result in hesitance on the part of companies and thus diminish its

150 This statement is, of course, somewhat dramatized, but the point remains that there is a great deal of uncertainty for companies, during which they also have to comply with information requests and to cooperate accordingly.

151 No, the question can be asked whether or not the application of such an instrument is desirable at all. In some markets, such as in the *Aggregates* case, the imposition of structural remedies is the only solution to a market that is not working well. And, after all, the objective of a competition authority is to make sure that markets *are* working well. How far this obligation goes, however, is debatable in its own right. In the case of phase 2 investigations, luckily, the decisions made by the UK CMA are reviewable in Court, increasing the accountability of the authority and diminishing the risks of stepping out of bounds.

potential effectiveness.[152] Apart from a lack of legal certainty, there seems to be a lack of accountability and transparency as well. Market scans are generally not announced publicly, and there is no fixed duty for consultation. Such measures could remedy the shortcomings of a flexible instrument and can aid its development towards a more consistent tool.

In terms of outcomes, the markets work regime of the ACM appears to be used for informational purposes, with limited recommendations and directions to market parties and the government. It seems to be aimed at increasing the ACM's knowledge of the market, instead of effectuating changes in the slipstream.[153] The question is whether this educational aim is still proportionate to the rather far-reaching investigatory powers. The fact that the ACM has these powers at its disposal, but does not utilize their full potential, nor substantiate their intended use, gives the impression of an imbalanced instrument – an instrument, well, under construction. The second question is whether the seemingly educational aim of market scans merits the costs connected with executing them, both in terms of the resources expended by the ACM and the effort required from the companies.[154]

5.2 Comparison between the Different Types of Markets Work Regimes

As noted above, the most striking difference between the practices of the UK CMA on the one hand and the Autorité and ACM on the other is the degree of formalisation of the procedure for conducting markets work. In the UK, the UK CMA has a formal procedure for this, separating the process into a phase 1 study and a phase 2 investigation and explicating its approach in procedural guidelines. This has yielded a consistent practice of market studies and investigations with a fixed range of possible outcomes. In the Netherlands, no such procedure exists, and the legal basis for conducting market scans has only recently been introduced. In France, the legal basis has been more fixed from the beginning, but the instrument used to yield market scan-like results is hybrid and flexible in nature. This generates into a more fragmented practice of market scans, with different scopes, different labels and different outcomes. Another consequence of the difference in the degree of formalisation is that the UK CMA operates under strict transparency obligations and statutory timeframes. It has to publish certain key documents representing landmark moments in the markets work procedure and has to adhere to strict deadlines. The ACM and the Autorité do not operate under such conditions and has no statutory duty to publish its markets scans within a certain period of time, although it seems like the Autorité is more consistent on this point when publishing its advisory opinions, for instance with the announcements of self-referrals – much like the UK market study notice.

The main reason why the UK practice differs so much in terms of the degree of formalisation lies in the character of the phase 2 investigation. Where in the Netherlands and in France, the most 'stringent' outcome of a market scan is a stern recommendation;

152 This spill-over effect is discussed in Chapter 8, section 3.4.

153 Although there have been cases in which change has been effectuated, see section 4.4 above.

154 The cost-effort ratio of markets work is touched upon in Chapter 8, sections 3.2 and 3.3, and to some extent also in section 3.6.

the UK CMA has the power to apply a market investigation after its initial study, which can result in far-reaching binding remedies to be imposed upon the companies under investigation. The second phase of the UK CMA's markets work regime is thus not so much characterised by the objective of 'researching markets and mapping possible obstacles for competition' (as is, broadly speaking, the objective in the first phase, as well as in the ACM's market studies and the Autorité's self-referrals), but is defined by the goal of finding characteristics of the markets that have 'adverse effects on competition' and remedying them. Therefore, the phase 2 investigation has a clear enforcement character, and is treated as such by the UK CMA. This is underlined by the fact that the decision to proceed to a phase 2 investigation (a MIR) can be appealed before the courts, as well as the declaration of an adverse effect on competition and the subsequent remedies imposed.

Setting aside the more formal character of the phase 2 investigation, the phase 1 study, the French market scan-like advice and the Dutch market scan actually have quite a lot in common when it comes to the investigatory approach and the possible outcomes. First of all, the phase 1 study, the advice and the market scan all have a guidance character. Their respective objectives are to examine markets with a view gaining interest about the functioning of the market and pinpointing risks for competition within it. Furthermore, all these types of markets work yield 'informal' results, such as recommendations to the government and the companies, and all three of the competition authorities may decide to take further enforcement action (or not) on the basis of their findings. Apart from that, all three of the competition authorities can – since recently – require cooperation by the companies in gathering information to support the study or scan. However, in the UK the use of these powers is explicitly limited to the period of time between the issuing of a market study notice (which is the formal announcement of the study) and the statutory deadline for the completion of the study 12 months later. The similarities between the three types of instruments (phase 1 studies, advice procedures and market scans) contrast with the difference in the degree of formalisation of the procedures – as set out above. This suggests that in the UK the possibility of the phase 2 investigation somewhat 'overshadows' the procedure in the first phase. If the UK CMA indeed comes to the conclusion that a MIR is desirable in a given situation, thus changing the character of the markets work from 'guidance' to enforcement, the pursuit of a phase 2 investigation should not have been rendered impossible by procedural irregularities at an earlier stage.

On an instrument-specific level, the main difference between the Autorité's advice procedure and the UK CMA's and ACM's markets work and individual guidance instruments is the fact that regardless of the content of the request, the markets are referred to it. In the majority of cases, the Autorité does not investigate markets of its own motion, but rather on the basis of requests by designated bodies. Of course, the majority of these requests concern governmental advocacy (regarding the competitive impact of pending regulation or legislation), but also where markets work is concerned, some of the markets are investigated on the basis of a reference. This need not be very different from the situation in the Netherlands or the UK, where market studies and scans are sometimes also initiated on the basis of complaints or outside information, but the fact that the Autorité has a duty to give advice when a market is referred to it somewhat binds the Autorité to the referring parties. However, the self-referral (which

makes up most of the market scan-like instruments) functions in a way similar to Dutch and UK practice on this point.

The final difference between the UK CMA's, the Autorité's and the ACM's approaches to markets work are found on a more general level – in connection with their broader enforcement strategy. It has been discussed that, historically, the UK CMA has placed a great deal of emphasis on its markets work, pursuing relatively few fining or commitment decisions in comparison.[155] Now, having merged the two former competition authorities into one, the UK CMA has proposed to strive for more 'robustness' in its decision portfolio, possibly indicating that it will pursue more fining or commitment decisions instead of broader market studies or investigations. Differently, the ACM comes from a tradition of pursuing lots of smaller enforcement cases,[156] and has now arrived at a point where it wishes to use its influence in a broader context. The ACM's strategy document is a deciding factor in this, promising to tackle market problems in the broad sense, using all of the ACM's toolkit. This – in combination with the formalisation of the market-scanning power and the investigatory powers – suggests that the market scan could be put to use more often in the future. Regarding this aspect, the developments in enforcement practice in the UK and the Netherlands go in opposite directions. The Autorité, lastly, has a strategy unlike the other two. Because its advisory role has played such an important part, the advice procedure has been central to its activities. Despite that, the enforcement side of its work has remained steady over the years (in terms of numbers). This indicates that, in terms of strategy, there does not have to be a choice between advisory and enforcement practice.

To conclude, the main similarities between the UK CMA's markets work regime, the Autorité's advice procedures and the ACM's market scans are in the application and the outcomes of the first phase, while the main differences lies in – and stems from – the possibility of applying the formalised phase 2 investigation. On a more general level, the UK CMA seems to move towards more focused enforcement action, while the ACM envisages a broad approach to market problems and the Autorité combines both while retaining output.

6. FINAL REMARKS

The main question answered in this chapter is how the different procedures for markets work can be seen in the light of the balance that needs to be struck between safeguard and instrumental requirements. It is illustrated that in the UK the emphasis is clearly more on the safeguard requirements than on instrumentality. An important observation flowing from this finding is that that the phase 2 investigation overshadows the possible effectiveness of the phase 1 study. This leads to the conclusion that, within the phase 1 studies, the balance shifts towards safeguards (somewhat hampering its effective application), whereas in the phase 2 investigations – due to their more extensive consequences – the balance is more even. The situation in France and the Netherlands

155 This statement should be somewhat more nuanced, since the Competition Commission did not have the power to take fining decisions or commitment decisions. Instead, it focused solely on phase 2 investigations, merger inquiries, regulatory references (and appeals) and a review of undertakings.

156 See for instance Nederlandse Mededingingsautoriteit, Case 6901 (*Zwembadchloor*) or, famously, Nederlandse Mededingingsautoriteit, Case 6425 (*Glazenwassers*).

is similar, as the instruments applied in these Member States are comparable as well. All in all, the balance between safeguards and instrumentality is struck fairly well; both competition authorities have published effective markets work reports (either informational, or having effectuated changes in the market) and strive for flexibility, without encroaching upon companies' safeguards.

The comparison between the different types of markets work, as performed above, has indicated that it might be difficult to compare the markets work regime of the UK CMA with that of the ACM and the Autorité, due to its unique two-phased character and the consequences this has for the application of the two instruments. However, if one would 'decouple' the phase 1 study from the phase 2 investigation, this comparison becomes slightly easier, and shows that there are general questions with regard to instrumentality and safeguards that have not yet been answered in this chapter. Most importantly: what place does markets work hold in the competition authorities' enforcement toolkit? What objectives does it pursue, and what are the risks of pursuing them by means of markets work in particular? Also, in which situations should markets work be applied, and how can competition authorities limit the spill-over effect into other enforcement instruments (as identified at some points above)? Apart from that, the question is to what extent competition authorities should take procedural and internal safeguards into account, and whether or not it is problematic that there is such a limited review of the outcomes. All of these questions have been introduced (and sometimes even touched upon) in this chapter with regard to the individual practices of the ACM, the Autorité and the UK CMA, but they have not yet been seen in the light of the instrumentality and safeguard criteria that guide the evaluation of alternative enforcement in this thesis. This evaluation is performed in depth, and in its own right, in Chapter 8.

This means that this chapter has performed a double function: it has reviewed the national markets work regimes and has characterised them on the scale of the normative framework. Also, it has identified the policy considerations to be taken into account when designing (or improving) markets work regimes. These considerations are discussed in the concluding part of this thesis. Apart from that, this chapter can be read in conjunction with the next chapter, in which individual guidance is discussed. The main question underlying the connection between the two is whether or not recommendations on an individual level (what individual guidance basically is) will lead to similar policy considerations, or will have a position on the balance between instrumentality and safeguards in its own right.

Chapter 6

INDIVIDUAL GUIDANCE

It is explained that this chapter and the previous chapter (on markets work) have to be read in conjunction, because they concern the same type of alternative enforcement instrument – the type that is executed before or instead of an investigation into a specific infringement. Where the previous chapter focused on researching, mapping and making recommendations to markets as a whole, this chapter focuses on individual advisory opinions given to market parties. The underlying hypothesis is that these instruments are two sides of the same coin. Where markets work investigates and gives recommendations on a general level, individual guidance does the same on a specific level. This should mean that the evaluation under the normative framework gives rise to similar advantages and objectives. In this chapter, this hypothesis is tested on the basis of national practice in giving individual guidance. This connects this chapter with the chapter on markets work. Together, these two chapters paint a picture of a different type of instrument that is applied proactively and which – in most cases – is characterised by a more informal relationship between companies and the competition authority. All in all, this contributes to answering the question of how various kinds of alternative enforcement instruments can be seen in the light of safeguard and instrumental requirements placed upon enforcement, and whether this has had any influence on how national practice as a whole can be characterised in terms of this normative framework.

1. INTRODUCTION

In the previous chapter, reference was made to 'sunshine enforcement' – after a US railway regulator that would comment on desirable and unwanted practices in order to influence the behaviour of market parties.[1] One of these sunshine enforcement tools concerns individual guidance, in which the competition authority gives advice to market parties about specific practices. More in general, individual guidance can be defined as the advice given to (groups of) companies with regard to competition concerns about their proposed collaboration or other market behaviour. When providing individual guidance, competition authorities analyse the characteristics of a certain form of market behaviour with a view to determining whether there are aspects of that particular behaviour that could be of concern in the light of the proper functioning of competition. This is similar to their course of action under markets work, in which competition authorities analyse the characteristics of a certain market with a view to determining whether there are aspects of that particular market that could be of concern in the light

1 Label from Petit & Rato 2009, p. 185.

of the proper functioning of competition. In theory, the evaluation performed in both instruments is similar, but with a different scope and context.

This chapter discusses individual guidance only. This can be considered an alternative enforcement instrument, because it – at first glance – deviates from a command-and-control approach to competition law enforcement, but mostly because it is characterised by a more informal relationship between market parties and competition authorities. Even though it can be argued that individual guidance is not an enforcement instrument as such (because the guidance given is informal, and therefore not enforceable), it might have enforcement effects.[2] Apart from that, individual guidance might prevent enforcement by changing a potentially harmful course of action that would warrant intervention at a later stage, or it can be followed by enforcement if competition concerns are insufficiently remedied.

However, before going into the national practices on individual guidance and discussing the advantages and pitfalls under the normative framework, it is important to discuss the practice of the Commission on this point. The development of competition law on a European level might have influenced the design of guidance instruments on a national level and explains – to a certain extent – the criticism and hesitance that these instruments sometimes attract.

1.1 The European Level: From Comfort Letters to Guidance

The history of European competition law teaches us that individual guidance (in the form of comfort letters) holds a very important place in the development of the current system of enforcement. In a way, the development of enforcement practice on this point can be said to have occurred in a top-down fashion, with the Commission's practice as a starting point, and the Member States adopting, adapting and improving. This is evident from the Commission's practice on the point of comfort and guidance letters, and the carefulness with which most national competition authorities now handle requests for individual guidance. However, as appears from the analysis below, national practice sometimes exceeds the boundaries of the Commission's previous work, or seems to have moved in a completely different direction. The exact dynamics between the two levels of enforcement are further touched upon in the concluding sections of this chapter.

The more individual form of investigating and advising market parties that is under review in this chapter is not alien to the European level either, as the Commission used to have a long-standing practice of sending comfort letters to individual market parties. In the 40 years prior to the current system, European competition law operated under an exemption system facilitated by Regulation 17/62, in which the European Commission had an exemption monopoly. This entailed that the Commission was responsible for reviewing notified agreements on compatibility with competition rules, which understandably created a huge workload for the Commission.[3] In order to reduce this workload and to tackle the backlog of pending cases, the Commission decided to

2 See Chapter 8, sections 4.1 and 4.3.

3 Most authors referred to this as the main reason for the introduction of the comfort letter, in combination with the narrow block exemption regulations. See, amongst others, Montag 1998, Ehlermann 2000, Appeldoorn 2001 and Pirrung 2004.

attempt to handle notifications informally, by means of a comfort letter. The legal status of these comfort letters was challenged in the famous *Perfume* cases in 1976,[4] with which the Commission closed investigations into several large players in the market for luxury perfumes. These cases were seen as 'test cases' for the entire perfume sector.[5] After that, the Commission started issuing these comfort letters more frequently, stating that it did not see a reason for further investigations and would close the file as it was. The Commission could choose to send a comfort letter when it assumed – on a first review – that a certain agreement did not affect trade, did not appreciably restrict competition or qualified for an exemption.[6] In other words, a comfort letter could give preliminary clearance, or it could grant a preliminary exemption. However, these comfort letters were not binding upon the Court of Justice or the national courts, and would not preclude further investigations in the light of changing circumstances.[7] Companies would have to indicate on their notification form whether or not they would agree to a comfort letter instead of a formal decision. After being sent to the parties, a notification (and sometimes a short description) would be published in the Official Journal.[8] The use of comfort letters rendered formal clearance and exemption decisions very rare. At the time, an estimated 90% of applications remained unaddressed,[9] and the Commission stated that comfort letters were important to settle cases 'with a minimum of administrative intervention'.[10] On the other hand, comfort letters had less legal value than formal decisions, because of their preliminary and non-binding nature. Despite the notifications in the Official Journal, the procedure was not very transparent and most letters contained insufficient reasoning.[11] Companies would indeed 'opt into' the procedure, but they would do so out of efficiency considerations, requiring more certainty 'rather sooner than later'.[12]

These objections disappeared in the early 2000s when the Commission introduced the Modernization package, abolishing the exemption-system in favour of a notification system. This rendered the comfort letter superfluous, as it was no longer necessary to clear or exempt cases on a preliminary basis. Surprisingly, at that same moment, comfort letters were suddenly praised for their insight into the Commission's position

4 CJEU Case 37/79 (*Anne Marty SA v Estée Lauder SA*), CJEU Case 253/78 (*Procureur de la République v Giry and Guerlain SA and Others*). In the latter case, the Court decided that comfort letters were 'merely administrative letters informing the undertaking concerned of the Commission's opinion' (at para. 12).

5 Kon 1982, p. 549.

6 Van Bael 1986, pp. 63-64.

7 The binding nature of comfort letters was denied by the ECJ on more than one occasion (see footnote 4 above, and also the cases mentioned by Stevens 1994 p. 82), although it has been argued that comfort letters could have been qualified as an 'administrative act' in the sense of the ERTA case, which means that it would have been susceptible to judicial review. See Stevens 1994, p. 84, referring to CJEU Case 22/70 (*Commission v Council* – or *ERTA*).

8 Called a 'Carlsberg notice', after the first notification published. Some comfort letters attracted more attention through press releases, see Montag 1998, p. 827. Publication also notified third parties of the closing of the case, see Van Bael 1985, pp. 79-80.

9 Comfort letters were intended to give negative clearance or exemptions. Apart from that, the Commission used informal settlements where it proposed to take enforcement action (Van Bael 1986, p. 85).

10 European Commission, 5th Report on Competition Policy (1975), para. 9.

11 See for criticism of the regime Ehlermann 2000, p. 541. Even in the earlier days, a discussion took place about the desirability of the comfort letter practice. See Kon 1982 and, in answer to that, Steindorff 1983.

12 Stevens 1994, p. 82. See also Montag 1998, p. 827.

on certain issues.[13] This is one of the reasons why the Commission retained the power of issuing 'guidance letters' on novel and unresolved questions of competition law.[14] These guidance letters are intended to facilitate self-assessment under the competition rules, and do not clear or exempt certain behaviour – which makes them of a different nature than the earlier comfort letters.[15] To date, the Commission has not yet issued any guidance letters. It is unclear whether the standard for requesting guidance is too high, or whether there might be a fear of a return to the notification system through the back door.[16]

1.2 Delineation and Set-Up

National competition authorities have instruments at their disposal that are rather similar to what the Commission now calls 'guidance letters'. In fact, the differences between the UK CMA's short-form opinion and the ACM's informal opinion are slight and mimic the Commission's guidance letter procedurally. Before going into those practices, however, the Autorité's advice procedure is revisited, this time with a view to determining to what extent the Autorité makes use of its advisory opinions to guide individual market parties. This section (§2) again underlines the hybrid nature of the Autorité's procedures and refers back to the previous chapter where necessary. Even though these two sections can be read in conjunction, the content of the advisory opinions discussed is rather different. Then, in §3, the practice of the UK CMA is discussed, which is – up until this point – rather limited. By contrast, the ACM has been rather active in issuing opinions, both in the past and now. The section evaluating the ACM's practice (§4) actually focuses on two different kinds of instruments: the informal opinion (which is the Dutch counterpart of the Commission's guidance letter and the UK CMA's short-form opinion) and guidance that is even more 'informal' than informal opinions. Having emerged in practice in the last few years, this instrument raises some interesting questions with regard to the normative framework. These questions are discussed alongside an evaluation and comparison of national practice in §5. Hereafter (in §6), the question of whether the hybrid advice instrument of the Autorité has particular benefits in terms of the normative framework will be revisited, and the hypothesis of whether or not markets work and individual guidance can be considered 'together but apart' is also revisited. The final section (§7) briefly characterizes the national approaches and identifies policy considerations for further discussion in Part III of this thesis.

2. HYBRID INSTRUMENT: THE ADVICE PROCEDURE (AUTORITÉ)

As was discussed more extensively in the previous chapter, the advice procedure of the Autorité is hybrid in nature, showing characteristics of government advocacy, market scans, and informal opinions. To recall, under French law certain designated public bodies have an obligation to refer questions to the Autorité insofar as their plans (laws,

13 Ehlermann 2000, p. 564.
14 Commission Notice Informal Guidance 2004, para. 5.
15 Commission Notice Informal Guidance 2004, paras. 22-25.
16 Suggestions made by Ehlermann 2000, p. 566.

regulations) might have an impact on competition. Apart from that, public bodies, trade associations and consumer organisations have the possibility to refer questions to the Autorité, and the Autorité can investigate markets of its own motion.[17] After a question is referred, the Autorité is competent to make use of its investigatory powers and companies addressed are obliged to respond. However, the exact approach of the Autorité depends on the scope of the question put before it.[18]

Despite the hybrid character of the instrument, this section focuses as much as possible on the advisory opinions in which the Autorité has reviewed an individual situation or agreement. Because the development and objectives, as well as an overview of the procedure are given in the previous chapter, this section only discusses the Autorité's practice and the possible outcomes.

2.1 Application in Practice

Apart from performing an extensive analysis of the competitive situation in a given market (which is discussed in the previous chapter), the Autorité sometimes also uses the advice procedure to make recommendations to market parties, on the basis of – for instance – an intended agreement referred to it, or an alteration in the rules for professional organisations. These advisory opinions do not qualify as a sector inquiry, because they are not nearly as extensive as the examples referred to in that section, but they can be compared to the individual advisory tools that the Commission uses and their national counterparts as discussed further below. In fact, most of these advisory opinions address existing or envisaged cooperation between companies, or they address the effect of a proposed arrangement (not purely legislative or regulatory) on a given market. Currently, there are 15 advisory opinions comparable to informal opinions, which are listed below.[19]

2004	Conditions of France Télécom	Recommendations to companies.
2005	Basic banking services	Analysis and looking at alternatives.
2006	Export of fruit and vegetables	Analysis, implicit finding of compatibility.
2007	Quality label	Analysis, implicit finding of compatibility.
2009	Networks of licensed healthcare professionals	Recommendations to companies and government.
2009	Sales of wood	Analysis, no explicit findings as to compatibility.
2010	Opticians' syndicate	Analysis, implicit finding of compatibility.
2011	Eggs	Analysis, implicit finding of compatibility.

17 See Chapter 5, sections 2.1 and 2.2.

18 See Chapter 5, section 2.2.

19 The benchmark for deciding whether or not an advice is comparable to an opinion is based on the subject-matter of the advice. If this concerned the evaluation of a proposed agreement or another proposed course of action, the advice is listed here. Although the list is compiled with care, errors of appreciation may have occurred.

2011	Negotiating in agriculture	Analysis, no explicit findings as to compatibility.
2011	Turkeys	Analysis, implicit finding of compatibility.
2012	Waste management	Recommendations to companies and government.
2013	Roaming agreements	Recommendations to companies.
2013	Collective insurance and pensions	Recommendations to companies and government.
2014	Promotion of business abroad	Recommendations to semi-public companies.
2015	Joint purchasing in retail	Providing example for further self-assessment.

This overview shows that most of the advisory opinions resembling opinions concern proposed forms of cooperation in markets under special circumstances. This is illustrated by, for instance, the advisory opinions given in the agriculture sector, in which members of the product board started working together in order to face the economic downturn.[20] The outcomes, which are discussed below in more detail, vary from an exemplary analysis of the market situation to making specific recommendations or proposing alternatives. Whenever 'an implicit finding of compatibility' is listed, the Autorité has given no specific instructions to alter the market situation and has not indicated specific risks for competition.

Although it might appear so from the phrasing of the previous paragraph, the Autorité is formally not allowed to engage in an analysis of proposed cooperation with a view to classifying this conduct under the applicable competition rules. In order to give a value judgment on the compatibility of the behaviour under review, the Autorité is obliged to follow a fully adversarial procedure as provided for in Article L. 463-1 of the Commercial Code. The Autorité is quite strict in making this distinction, as is apparent from its advisory opinions in the farming industry.

> In 2011, the Autorité issued an advice on an agreement concluded by the professional organisation for professionals in the pork, poultry and cattle industries. Faced with a high price volatility in the market for animal feed (caused by a fluctuation in price of 'raw agricultural materials', such as cereals, seeds and soy), the signatory parties agreed to reopen the negotiation on the prices of animal feed, if the price differences between them appeared to be excessive. However, the validity of this agreement was made dependent on the approval of the Autorité. Simultaneously, the Ministry for Economic Affairs requested advice on the question whether or not it would be allowed for companies in this market to introduce 'price-smoothing agreements' in their existing contract, minimalizing price differences in case of high volatility. In response to the questions of the market parties, the Autorité answered that it was not competent to review the agreement, as the request for advice concerned no general questions of competition, but merely a request for a review of compatibility. It could answer the question of the Minister, however, and indicated that – in general – contractual

20 See the list above, exports of fruit and vegetables, eggs, turkeys. See Le Conseil de la Concurrence, 06-A-09 (*Fruits et Légumes*), Autorité de la Concurrence, 11-A-03 (*Secteur Ovin*), and Autorité de la Concurrence, 11-A-12 (*Dinde*).

> action was a suitable way of dealing with price volatility in the farming sector, but that companies should remain free to negotiate their own contracts.[21]

In this example, it is clear that the Autorité stays within the limits of its mandate – refusing a specific review of an agreement, but giving advice on general questions of competition law. This is consistent with its general stance towards the advice procedure: the Autorité does not express itself on the legality of a proposed agreement; the Autorité also refrains from giving advice on matters that it has already dealt with in the past; the Autorité does not answer questions that are merely hypothetical; and the Autorité will not engage in an analysis of a situation in which the European Commission has opened an investigation.[22] In most cases that can be arrayed under these conditions, the Autorité publishes the advice with sufficient reasoning as to why it will not give any further guidance, referring to its previous advice and decisions where necessary.

That does not mean, however, that the Autorité never gives recommendations to market parties regarding competition law-related problems that are definitely narrower than 'general matters of competition law'.

> In 2007, the Autorité's predecessor was referred a question by the trade organisation for chicken of the *Bresse* region. In the culinary world, *Bresse* chicken is highly regarded and has a quality label guaranteeing its origin. The professional organisation wished to know whether it could reserve the sales of chicks from *Bresse* chicken to farmers with a quality label, thus eliminating sales to farmers who did not have such a label. The Autorité redrafted this question to apply to all quality labels, in order to shed some light on how these labels can be protected under competition law. The Autorité found that in the *Bresse* case a serious destabilisation of the brand could occur if the chicks were sold to non-labelled farmers.[23]

Even though the question in this example was purposely redrafted to be applicable in a broader context, the advice must have given a clear guideline as to how to behave in situations like the one at hand. This was the objective of the Autorité in this particular case: to provide more insight into the functioning of competition law with regard to these specific questions.[24] Most of the other advisory opinions resembling informal or short-form opinions are drafted with a similar objective in mind.

2.2 Outcomes

The situation of the *Bresse* chickens touches upon the important questions of what the possible outcomes of an opinion could be, and to what extent these outcomes can be considered binding. First and foremost, the Autorité is competent to formulate recommendations on the basis of its advisory opinions as to improve the competitive

21 See Autorité de la Concurrence, 11-A-11 (*Matières Premières Agricoles*), para. 4.
22 See for these starting points Autorité de la Concurrence, 11-A-17 (*Déchets de l'Eau*), paras. 22, 26 and 28. The competence of the Commission is also outlined in Article 11(6) of Regulation 1/2003.
23 Conseil de la Concurrence, 07-A-04 (*Filière de Qualité Bresse*).
24 See Press Release by the Autorité de la Concurrence, 'Quality label farm and food industry', of 18 June 2007.

situation.[25] These recommendations are not binding,[26] but provide a basis for reflection, to evaluate the competitive impact of current or draft legislation or to incite others to take measures in order to improve the competitiveness of a given market.[27] To recall, the *Conseil d'Etat* in France confirmed that these recommendations do not have legal standing as long as they do not produce adverse effects (which might be created by individual instructions).[28] This immediately reveals a tension between reviewing a specific agreement with a view to providing guidance, and the risk of giving individual instructions and producing adverse legal effects. For that reason, the Autorité often reiterates that its role is 'not to qualify the specific conduct of a given economic actor in a market', and that it 'looks at the general functioning of an economic sector', where it can 'formulate general observations enabling it to effectively make known its opinion and, if necessary, make proposals.'[29] In fact, whenever a question referred to it comes down to an analysis of specific compatibility with competition law, the Autorité disregards these parts of the request by stating that it is not its task to engage in such an analysis.

Because of the lack of legal standing, the effectiveness of the advice and subsequent recommendation is – to a large extent – dependent on the entities it addresses.

> In 2015, the Autorité issued a decision with regard to professional cooperation in the poultry sector (chickens, turkeys, ducks and rabbits[30]) in which it fined 9 companies, 2 societies and 2 professional organisations for anti-competitive cooperation. This market had been referred to the Autorité on an earlier occasion, in which advice it had laid out recommendations that could have prevented the behaviour of the companies. The Autorité quoted its earlier advisory opinions on multiple occasions,[31] and reminded the parties of the necessity of critical self-evaluation on the basis of this guidance.

Recalling the example given in the previous chapter (in which the Ministry of Economic Affairs had implemented a recommendation made by the Autorité[32]), the conclusion can be drawn that it is difficult to predict the effect of the Autorité's recommendations on the market. It is dependent on the attitude of the recipients and the possible pressure that companies feel to follow the Autorité's recommendations – despite its informal character. The fining decision in the poultry sector also shows that advisory opinions do not preclude the Autorité from pursuing follow-up action where it deems it necessary. Therefore, even though they are not capable of producing legal effects on their own,

---

25 When this concerns recommendations to the legislator, this competence is provided for by Article L.462-4 *Code de Commerce*.

26 Advisory opinions by the Autorité are not formal decisions like the decisions under the *Code de Commerce*. They have an A number (for *avis*), whereas settlement or fining decisions have a D number (for *décision*).

27 Autorité de la Concurrence, Synthesis Annual Report 2008 (English version), pp. 44-45.

28 See Conseil d'Etat, No. 357193, 11 December 2012 (*Casino*).

29 Like it has done in Autorité de la Concurrence, 12-A-21, English translation (*Vehicle Repair and Maintenance*), para. 9.

30 Yes, rabbits. Not because they supposedly 'taste like chicken', but possibly because of a legal classification issue, which makes it possible to slaughter rabbits without sedation.

31 Notably Autorité de la Concurrence, 09-A-48 (*Secteur Laitier*), Autorité de la Concurrence, 10-A-28 (*Contractualisation dans des Secteurs Agricoles*), Autorité de la Concurrence, 11-A-11, (*Matières Premières Agricoles,* Autorité de la Concurrence, 11-A-12 (*Dinde*) and Autorité de la Concurrence, 11-A-14 (*Viticole*).

32 See Autorité de la Concurrence, 09-A-21 (*Carburants dans les DOMs I*).

advisory opinions can be viewed as a frame of reference for any follow-up action – whether this is an investigation launched by the Autorité, the adoption of new rules by the legislator or regulator,[33] or an action launched by a private party.[34]

3. SHORT-FORM OPINIONS (UK CMA)

The UK CMA uses the short-form opinion in order to provide individual guidance to market parties. This type of opinion has not been used in practice very often and has been adopted by the UK CMA on a trial basis only. This section discusses the procedure for issuing short-form opinions, as well as a brief description of the short-form opinions issued so far in practice. Lastly, the outcomes of a short-form description are discussed. The discussion of the UK CMA's approach to giving individual guidance is – in a later section – compared with the Dutch and French practice on this point. Due to the limited application of this instrument in practice, this section is somewhat shorter compared to the other sections.

3.1 Development and Objectives

The UK CMA's predecessor introduced the short-form opinion in 2010, after concerns raised by certain stakeholders indicated that some forms of cooperation that could be beneficial to competition were not taking place as a result of uncertainty about the applicability of competition rules.[35] Under a procedure for a short-form opinion, companies could request advice on such matters, but only with regard to prospective horizontal agreements. The short-form opinion was adopted on a trial basis, meaning that it would be available to only a number of cases each year. By doing so, the UK CMA's predecessor explicitly field tested short-form opinions, in order to 'evaluate whether they achieve their objectives and are an efficient use of […] limited resources',[36] but also to avoid a return to the notification regime.[37] During the merger that ultimately created the UK CMA, a consultation was issued that requested views on retaining the short-form opinion.[38] This led to the UK CMA formally adopting the short-form opinion in 2014 and issuing a guidance document on its approach.[39] Different from its predecessor, the UK CMA has extended the use of short-form opinions to prospective vertical agreements as well. In accordance with its predecessor, the UK CMA also adopted the

33 Recalling Autorité de la Concurrence, 13-A-21 (*Carburants dans les DOMs II*).
34 Recalling Autorité de la Concurrence, 13-A-23 (*Uber*).
35 Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998, Consultation document, para. 4.1.
36 OFT's comment on short-form opinions, see the OFT's page in the UK Web Archives, accessible on: http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions/;jsessionid=6A7FF4882DECE807EEDB7FA066727239.
37 See section 1.1 above, this concern is discussed in Chapter 8, section 4.1 and Chapter 9, section 6 as well. Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998, Consultation document, para. 4.2.
38 See Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998, Consultation document.
39 CMA Short-Form Guidance 2014.

short-form opinion on a trial basis. However, the consultation mentioned that there is – as yet – no proposed end-date for the trial phase.[40]

The goal of a short-form opinion is to clarify novel and unresolved questions regarding competition law which is beneficial to a wider audience.[41] This means that, by using a short-form opinion, the UK CMA will provide some sort of guidance – not just to the market parties requesting it, but also to the market in general. The short-form opinion is therefore considered to be part of the UK CMA's advocacy and guidance tools, aimed at assisting the future development of competition law and policy in the UK.[42]

3.2 Overview of the Procedure

The procedure for a short-form opinion is initiated at the request of market parties that are (about to be) engaged in a form of cooperation, but have doubts as to the compatibility of this cooperation with the competition rules. This cooperation can concern both horizontal and vertical relationships, cannot be purely hypothetical, but should preferably also not yet be implemented. In order to qualify for a short-form opinion, companies must establish that their situation raises novel questions, the answer to which can be beneficial to a broader public.[43] Even if all of these criteria are met, the UK CMA has the discretion to decide on the basis of its prioritisation principles whether it will honour the request.[44] Under these principles, the UK CMA considers the impact of providing a short-form opinion, the strategic significance of giving guidance in this particular case, the risks connected to providing an opinion and the costs (in terms of staff and budget) that are associated therewith.

Companies can request a short-form opinion by issuing a joint statement of facts. This joint statement of facts must be signed by all parties and must contain a description of the relevant facts, a detailed discussion of the proposed agreement, an explanation as to why the agreement qualifies for a short-form opinion, an outline of the novel and unresolved questions raised by the agreement, sufficient information to assess the agreement under the competition rules (and, if necessary, background reports drafted by an external bureau) and an identification of the confidential information that might be included in the formal request.[45] Given that these requirements are quite extensive, the UK CMA offers the possibility of engaging in pre-request discussions, in order to mitigate the risk of companies investing resources in vain.

If the UK CMA decides to issue the short-form opinion, the goal is to do so within two to three months following the formal request.[46] During the assessment of the proposed agreement, the UK CMA can contact the companies or other entities in

40 CMA Short-Form Guidance 2014, para. 1.5: Any such review will determine whether the SfO process achieves its objectives and is an efficient use of the CMA's resources, and whether or not the SfO process should be continued as a trial, adopted permanently, withdrawn, or amended.

41 CMA Short-Form Guidance 2014, para. 1.2.

42 Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998, Consultation document, para. 4.3.

43 For both conditions, see CMA Short-Form Guidance 2014, Chapter 4.

44 CMA Prioritization Principles 2014.

45 CMA Short-Form Guidance 2014, Chapter 5.

46 CMA Short-Form Guidance 2014, para. 3.1. The only exception is the *Newspaper* opinion, which took nearly three years to conclude. Office of Fair Trading, OFT 1025 (*Newspaper and Magazine Distribution*).

order to 'develop a better understanding' of the agreement or the market.[47] The short-form opinions are published in a non-confidential version with a view to their guidance purposes, but they are not issued for consultation.[48]

3.3 Application in Practice

As explained above, the UK CMA's predecessor introduced the short-form opinion on a trial basis, meaning that it would only be available for a limited number of cases each year.[49] So far, the procedure for short-form opinions has only been applied twice. Before the first application, however, the UK CMA issued a regular opinion.[50] This regular opinion differed somewhat in its procedure, as it contained a consultation period upon the draft opinion, but not on the scope or the findings.

> This first opinion was issued in 2008 and concerned the market for newspaper and magazine distribution. Due to its opaque nature, this market was under review for a longer period of time, during which time the companies involved in the market offered undertakings in order to remedy competition concerns. Together with the opinion, the UK CMA issued a review of these undertakings and a decision not to make a Market Investigation Reference (MIR).[51] The guidelines for short-form opinions had not, at that time, been published, so the Newspaper case is the first one in which the UK CMA formulated an opinion on a certain matter. It issued this opinion for consultation in 2005 and in 2006. After that, it took two more years for the entire package of documents to be published. The scope of the findings did not differ significantly from what the UK CMA currently envisages as the outcome of a short-form opinion. The UK CMA limited itself to explicating the exceptions under Section 1 of CA98 in relation to the specific circumstances in the market, which still took 114 pages.

By contrast, the first short-form opinion was published in 2010 and counted 17 pages. Thus, they are not just shorter in name, but also in execution. The main difference, procedurally, between the short-form opinions and the *Newspaper* opinion is the omission of a consultation period. The issuing of a short-form opinion is explicitly not commented upon.

Note that this concerned a regular 'opinion' instead of a short-form opinion, indicating that the difference between the two is – mostly – in the possibility of consultation. This practice has not been repeated since.

47 CMA Short-Form Guidance 2014, paras. 6.4 and 6.5.

48 With the exception of, again, the *Newspaper* opinion (see footnote 46 above). The fact that two draft versions of the opinion were drafted before final publication was the main reason why the opinion was not issued within the short timeframe.

49 CMA Short-Form Guidance 2014, para. 1.2. The UK CMA continued the trial phase.

50 Twice, if one would distinguish between short-form opinions and regular opinions. In the original guidance regarding this topic, the former OFT spoke of opinions only. The first case (*Newspaper and Magazine Distribution*) concerned an opinion. In the more recent guidance, this distinction is no longer made, and there is no evidence to suggest that the CMA is using regular opinions alongside short-form opinions. Compare OFT Modernization Guideline 2004 with CMA Short-Form Guidance 2014.

51 The opinion is, as quoted above: Office of Fair Trading, OFT 1025 (*Newspaper and Magazine Distribution*). The review of the undertakings is: Office of Fair Trading, OFT 1026 (*National Newspapers – Review of Undertakings*). The decision not to make a MIR can be found here: Office of Fair Trading, OFT 1121 (*Newspaper and Magazine Distribution – Decision not to Make a MIR).*

> The first actual short-form opinion concerned a joint-purchasing agreement between the famous wholesalers Marko and Palmer & Harvey. In this opinion, the UK CMA reiterated on multiple occasions that its goal is to 'facilitate self-assessment' under the applicable competition rules. In order to do so, it clearly stated the facts underlying the purchasing agreement and the relevant legal framework including its earlier guidance on the matter. After that, it applied the facts to the framework and evaluated whether the agreement was likely or unlikely to raise concerns.[52]

In the second short-form opinion, the UK CMA took a similar approach. The striking thing about these opinions is the fact that it does not concern markets that are typically highlighted under competition law (such as technology, healthcare or the financial sector), but rather forms of cooperation that are not commonly dealt with. The *Newspaper* opinion concerned a distribution agreement, the *Makro* opinion concerned a joint purchasing agreement, and the *Broadband Wayleaves* opinion concerned the joint negotiation of landowners (farmers) with a large corporation.[53]

3.4 Outcomes

The goal of a short-form opinion is to facilitate self-assessment under the cartel prohibition.[54] This suggests that the UK CMA would not give a value judgment of the compatibility of the proposed agreement with the competition rules, but rather indicates potential competition risks and makes recommendations for the companies on how to further review the agreement. Although there is a seemingly fine line between assessing an agreement with a view to pinpointing competition concerns and judging the legality of the agreement itself, the UK CMA frequently stresses the provisional character of its opinion by using hypothetical situations and estimates, and by underlining the companies' own responsibility with regard to the completion of the agreement. To illustrate this, the UK CMA held in its *Rural Broadband Wayleave Rates* opinion that:

> **'On the basis of the available facts**, it **appears** that there is no less restrictive alternative that **could** generate the benefits identified. In the absence of any such alternative, the [agreement] **could be considered** indispensable. Whether or not the [agreement] **may** lead to an elimination of competition in some local markets will depend on the level of the rate and other factors influencing the ability of and incentives for landowners to compete or collude, which will need to be the **subject of self-assessment** by the Parties' [emphasis added].[55]

In general, the UK CMA sets out the relevant legal framework, considers the companies' statements, and assesses whether it is likely or unlikely that there are competition concerns regarding the implementation of the proposed agreement. This assessment occurs solely on the basis of the information that the companies have provided; the

52 Short-Form Opinion of the Office of Fair Trading, 27 April 2010 (*P&H/Makro*).
53 Short-Form Opinion of the Office of Fair Trading, 23 August 2012 (*Rural Broadband Wayleave Rates*).
54 CMA Short-Form Guidance 2014, para. 3.4.
55 Short-Form Opinion of the Office of Fair Trading, 23 August 2012 (*Rural Broadband Wayleave Rates*), paras. 9.7-9.8.

UK CMA does not engage in an investigation to establish the truthfulness of the facts presented to it.

The outcome of a short-form opinion is essentially an example of self-assessment under the competition rules, which should shed more light on the novel issue raised by the proposed agreement. Therefore, the short-form opinion points out circumstances and considerations to be taken into account when performing a self-assessment under these circumstances. Where the UK CMA concludes that it is not likely that the agreement raises concerns, the short-form opinion might have some 'comforting' effects – in the sense that their agreement is considered compatible *prima facie*. However, short-form opinions do not preclude further action by the UK CMA, nor can it prejudge the assessment of the Commission and other competition authorities, nor the courts, either national or European.[56] In fact, the UK CMA proceeded to further investigate the relevant market after issuing the *Newspaper* opinion, but it decided not to take enforcement action or to make a market investigation reference.[57] When the UK CMA decides to take further action, it has to take its preliminary assessment into account – except where there are factual changes, or the information provided appears to be incomplete. Besides the 'comforting effect' and the possibility of further action, the UK CMA can also decide to recommend minor alterations to the existing agreement, which would relieve some immediate competition concerns. These recommendations can even be made during the drafting of the opinion.[58] Lastly, the UK CMA does not need to adhere to the scope of the questions raised by the companies. If it finds other novel questions in need of guidance on the basis of the information provided, it can address these as well.[59]

4. INFORMAL AND IRREGULAR OPINIONS (ACM)

The ACM has a rather formalised tool at its disposal to give advice in individual cases: the informal opinion (or: *informele zienswijze* in Dutch). Over the last decade the application of this opinion has been, in contrast with the UK CMA's short-form opinion, more frequent. In the last few years the number of occasions on which the ACM has given an informal advice has fallen slightly in comparison with earlier years. The number of publications in which the ACM has given advice in individual cases has not decreased, however. This paradox is explained by the fact that the ACM sometimes makes use of different kinds of informal advice that are not qualified as informal opinions as such, but do provide guidance for the parties involved and sometimes even reach conclusions with possibly significant consequences (hereinafter: irregular opinions). This section pays specific attention to the advisory opinions and opinions of the ACM that are not formally considered to be informal opinions, but have a similar character nonetheless. Before going into that, this section outlines the ACM's practice when it comes to the issuing of informal opinions. To that end, the procedure as formalised by the guidelines is explored in more detail and is illustrated with examples.

56 CMA Short-Form Guidance 2014, para. 3.5.
57 Office of Fair Trading, OFT 1025 (*Newspaper and Magazine Distribution*).
58 CMA Short-Form Guidance 2014, para. 6.7.
59 See for instance: Short-Form Opinion of the Office of Fair Trading, 27 April 2010 (*P&H/Makro*), paras. 7.4 & 7.9.

4.1 Development and Objectives

The ACM's practice of giving guidance in individual cases originates from its merger control regime. Already since its inception in 1998, the ACM's predecessor has provided clarity about the applicability of the merger rules by means of informal opinions. In fact, these latter types of opinions are requested far more often than opinions on matters of antitrust. Apart from that, the transitory regime that demarcated the creation of the ACM's predecessor (from a notification system to a prohibition system) has led the ACM to be more 'lenient' about explaining the meaning of competition rules to companies.[60] There is no explicit legal basis for providing individual opinions outside of its more general function of giving guidance to market parties and despite its longstanding practice, it took until 2010 for the Ministry of Economic Affairs (which is the responsible Ministry for the competition authority in the Netherlands) to present guidelines on the procedures for requesting individual advice. The publication of these guidelines was inspired by an evaluative report on the functioning of the ACM's predecessor that indicated that there was a great deal of uncertainty about the application of this instrument in practice.[61] In the years preceding this evaluation, the ACM had refused to give individual advice on a regular basis, due to the fact that doing so had been too resource-intensive. Still, the need for market parties to gain an insight into certain difficult aspects concerning the application of competition rules persisted and led to the introduction of a more streamlined regime under the guidelines.[62]

With this in mind, it is easy to deduce that the main objective of the ACM's informal opinions is to provide clarity to the market about the application of competition rules. This gives more certainty for the parties involved and could incite other market parties to make an informed choice about their behaviour. In this respect, the informal opinion can be seen as complementary to guidelines, informational brochures, vision documents and consultations. Apart from these more common tools, the ACM sometimes also provides irregular opinions, in which it reviews certain agreements or competitive situations outside the scope of the guidelines. These irregular opinions seem to be more focussed on the particular circumstances of the case, instead of serving more general guidance purposes.[63]

4.2 Overview of the Procedure

The procedure for requesting an informal opinion starts at the initiative of market parties in need of advice concerning the application of competition law to their behaviour. This can concern proposed cooperation that could be caught under the

60 See, for instance, Annual Report ACM 1999, para. 3.7.

61 See the evaluation of the ACM's predecessor: Kwink Groep, Evaluatie van de Raad van Bestuur van de Nederlandse Mededingingsautoriteit, 2010, p. 13. Also: ACM Annual Report 2010, p. 15.

62 These guidelines are formalized: Vuistregels Informele Zienswijzen 2010. In the evaluative report, the great comment was made that informal advice by competition authorities was not intended as a 'cheap substitution for advice of competition lawyers'. Kwink Groep, Evaluatie van de Raad van Bestuur van de Nederlandse Mededingingsautoriteit, 2010, p. 8.

63 This is a very general deduction made from a limited number of cases. An obvious exception is the 'Chicken of Tomorrow' case, which the ACM published in order to show how it would deal with sustainability issues in the future. See para. 4.4 below.

Dutch or European cartel prohibition, but it can concern individual measures as well, which could fall under the abuse of dominance provisions. In order to qualify for the issuing of an informal opinion, the cooperation or the behaviour that the opinion would concern must not yet have been executed, but cannot be merely hypothetical in nature either. The market parties must provide sufficient reasoning as to why their cooperation or behaviour poses a novel question of competition law. To this end, they must have regard to the economic and societal importance of the proposed actions, for instance large financial interests, certain macro-economic interests or a proposed guidance effect if similar agreements are deemed to arise more often.[64] With these criteria, the Dutch procedure for requesting an informal opinion is remarkably similar to the UK CMA's procedure for short-form opinions.

Even if all the above criteria are met and sufficiently reasoned by the companies involved, it is possible for the ACM to reject an application on the basis of its prioritisation criteria. Apart from that, the ACM might not give an informal opinion if the same case is under investigation on a European level.[65] The ACM will not provide an informal opinion either if there is a better placed instrument available to provide the clarification which the parties have requested, such as through a request for formal enforcement. In the light of the earlier requirements for an informal opinion (concerning behaviour that has 'not yet been implemented') it is surprising that the guidelines name a request for enforcement as a better placed instrument, since at the time of requesting an informal opinion, there is, as yet, nothing to enforce.

The ACM evaluates the proposed form of cooperation or behaviour on the basis of the information which the parties have submitted. This means that the evaluation performed is not comparable to a market scan as discussed earlier. Having analysed the facts in the light of the relevant competition rules, the case law and additional guidance, the ACM indicates whether there are parts of the proposed actions that particularly raise concern in the light of the competition rules, and if so, whether these parts are likely to qualify for an exemption. The informal opinion is – usually – published on the ACM's website and does not amount to a formal decision for the purposes of an objection and an appeal to an administrative judge. Apart from reviewing proposed forms of cooperation or behaviour under the relevant competition rules, the ACM can provide an informal opinion about the admissibility of a proposed merger. If such an opinion is requested, the criteria for application as mentioned above do not apply.[66]

4.3 Application in Practice

Between 2004 and 2015 the ACM issued over 80 informal opinions, 14 of which concerned the evaluation of joint or individual behaviour under the cartel or abuse prohibitions in particular. The majority of the informal opinions published concerned

64 Vuistregels Informele Zienswijzen 2010, para. 1, rules 1-5.

65 This request was rejected because of the exclusive competence of the European Commission on the matter, see Nederlandse Mededingingsautoriteit, Opinion 6672/12 (*Kompany*).

66 Vuistregels Informele Zienswijzen 2010, p. 1 last para.

merger control (over 60) and some of the informal opinions are more general guidance documents, outlining the ACM's approach to a certain issue of competition law.[67]

2005	Preferential treatment in healthcare	Deemed compatible, guidance for self-assessment.
2005	Certification in payment systems	Deemed compatible, though risks indicated.
2005	Product board for shrimps	Risks indicated.
2005	Transactions payment systems	Deemed compatible, though risks indicated.
2005	Broadcasting of Dutch football pt. 1	Unclear situation, probably no action.
2006	Negotiations in the healthcare sector	Competition law not applicable, though risks indicated.
2008	Castrating piglets	Deemed compatible, though risks indicated.
2010	Inland shipping	Deemed incompatible.
2011	Management plan shrimps	Partially deemed incompatible, suggested alterations.
2012	Broadcasting of Dutch football pt. 2	Largely compatible, suggestions for alterations made.
2013	Cooperation between pharmacies	Deemed compatible, supports further implementation.
2013	Flooding insurance	Deemed incompatible.
2014	Cash withdrawals*	Deemed compatible, supports further implementation.
2015	Proton therapy	Partly compatible, still risks, so alternatives suggested.
2016	Joint purchasing of medication	Deemed compatible, suggestions made for broader application.**

* This publication is not explicitly labelled an informal opinion, but has the same approach and characteristics.

** This advice dates from 2014, but was published in 2016. See Autoriteit Consument en Markt, Opinion ACM/DM/2014/204334 (*Gezamenlijke Inkoop Cluster TNFi's*).

Most of the informal opinions concerning the application of competition law to a certain agreement or behaviour were issued before the formal guidelines concerning informal opinions had been published. In fact, there is a hike in the number of informal opinions published in 2005, but this is presumably due to the legislative changes and the abolition of the possibility for requesting an exemption. In some opinions, the ACM explicitly refers to these circumstances as an explanation as to why it offers guidance in this case.[68] After the publication, the ACM has issued approximately one informal opinion a year. The practice of the ACM is too narrow to draw general conclusions, but it is possible that with the guidelines in hand, the ACM has approached the publication of informal opinions with more apprehension.

67 For instance a vision document regarding competition and sustainability, such as Autoriteit Consument en Markt, Visiedocument Mededinging & Duurzaamheid, Mei 2014.

68 Nederlandse Mededingingsautoriteit, Opinion 4237 (*Exploitatie Eredivisierechten*).

It also stands out that around a third of the informal opinions concerned cooperation in the healthcare sector. This is not surprising, as the majority of healthcare providers have indicated that they are under the impression that the ACM is very critical of cooperation in this market.[69] It is possible that by issuing these opinions, the ACM aimed to clarify its position towards cooperation in the healthcare sector, in order to get more healthcare providers to work together.

4.4 Outcomes

After having reviewed the proposed agreement or proposed course of action under the relevant rules and precedents, the ACM reaches a conclusion as to their compatibility on the basis of the information provided. These conclusions range from compatible (where the ACM finds no significant problems in the light of competition law), to largely compatible (where the cooperation as such is presumably allowed, but the ACM finds room for improvement) or plainly incompatible (where there is a presumed breach of competition law and no exceptions or exemptions apply). Besides these findings, the ACM sometimes also makes suggestions for alterations to the proposed agreement or the course of action. These suggestions would aid the companies in keeping their actions in line with competition rules. Apart from that, the ACM occasionally also denotes that it is not likely to take enforcement action in the future. Only in one informal opinion has the ACM clearly provided guidance on how to perform a self-evaluation in the light of the information provided.

When issuing informal opinions, the ACM makes it clear that it concerns provisional findings, which do not prevent the ACM from taking enforcement action in the future. It also points towards the responsibility that companies have to comply with competition rules on the basis of self-assessment. Nevertheless, companies presumably derive a comforting effect from an informal finding of compatibility, particularly if it is combined with the statement that it is 'not likely for the ACM to take further action'. Whenever there is a finding of incompatibility and the ACM has made recommendations for improvement, it is difficult to imagine that companies will take the advice of the ACM lightly, and that they would disregard it in the future. In that respect, the recommendations following informal opinions are certainly capable of having a binding effect. This puts the companies involved in a tough position, especially when they do not agree with the substantive evaluation of the ACM. This struggle is very visible, for instance, in the 2011 opinion concerning a management plan for shrimp fishing.[70]

69 This concern was pointed out and addressed in a blog by the ACM Chairman. See Chris Fonteijn, 'De politiek heeft wat te kiezen in de zorg', 22 April 2015, available at: http://www.skipr.nl/blogs/id2249-de-politiek-heeft-wat-te-kiezen-in-de-zorg.html.

70 Nederlandse Mededingingsautoriteit, Informele Zienswijze 7011/23.B27 (*Managementplan MSC Garnalenvisserij*). Compare this case to Autorité de la Concurrence, 15-A-19 (*Quotas de Pêche*), in which the Autorité reviewed (legally imposed) catch control quotas and made recommendations to the relevant authorities. The difference is the source of the initiative, and the effects this has on the evaluation.

> In 2011, the ACM issued an informal opinion on the Management Plan for Sustainable Shrimp Fishing. The shrimp sector had been under scrutiny previously,[71] and to make things more complicated, the sector struggled with overcapacity that could cause ecological problems in the North Sea. To combat this, the Management Plan proposed by the product board aimed to protect a healthy level of shrimps, to catch with minimal effects on the eco-system and to pursue effective management. The ACM reviewed the proposed provisions in the light of Article 6 of the Dutch Competition Act and Article 101 TFEU, including the possibility of exceptions. Using information provided by the product board, the ACM came to the conclusion that one of the provisions (the 'catch control rule') would probably not qualify for an exemption, as it was not evident that this rule was necessary to attain the objectives pursued by the Management Plan. The ACM proposed an alternative that would be less restrictive.
>
> The evaluation by the ACM was met with a great deal of criticism by the sector.[72] Still, the shrimp fishermen did not dare to defy the ACM's opinion in public and published a version of the management plan with the contested sections (literally) crossed out and the words under construction next to it.[73] However, developments in the market indicated that even though the shrimp fishermen did not apply the contested rule to the letter, they still followed it in spirit. In October 2014, the ACM announced that it would pursue enforcement action in the sector.[74]

This example illustrates two different issues with regard to the outcome of informal opinions. First of all, it shows that an adamant rejection by the ACM of a proposed action can lead to confusion on the part of companies, especially if they do not subscribe to the substantive evaluation or have pressing reasons to believe that there are overriding interests justifying their behaviour. Since these informal opinions are not considered to be formal decisions, there is no way of appealing against the ACM's reasoning before an administrative judge.[75] Companies thus have to 'take their chances' or comply with the ACM's recommendations against their own points of view. Secondly, the example illustrates that the ACM in fact does take follow-up action if companies maintain (the

---

71 Nederlandse Mededingingsautoriteit, Zaak 2269 (*Noordzeegarnalen*). The fine was imposed on different product boards and on 8 wholesalers for catch control and installing minimum prices.

72 For instance, the shrimp fishermen organised a strike with the objective of selling their supply of frozen shrimps in order to influence the price level of shrimps. See http://dirkzwagerams.nl/2011/04/28/mogen-ondernemers-staken-van-de-nma/.

73 See the version of the agreement of 2011 at: http://www.garnalenvisserij.com/wp-content/uploads/2012/01/MANAGEMENTPLAN-versie-10-februari-2011-ccr-under-construction.pdf.

74 Financieele Dagblad, 'ACM onderzoekt afspraken garnalenvissers', 23 October 2014, on: https://fd.nl/frontpage/economie-politiek/899732/acm-onderzoekt-afspraken-garnalenvissers.

75 The word administrative should be emphasised here, as there is a precedent in which an association requested a civil judge to give a declaratory judgment concerning an issue that was dealt with in a general guidance document drafted by the ACM. In this particular case, the ACM declared competition law to be applicable to a certain type of collective labour agreement – negotiations, which the association held as wrongful in the light of the case law of the Court of Justice. The Dutch district court that was requested to make the declaratory judgment held that the association was entitled to make such a request, because the guidance document prevented the association from collectively negotiating labour contracts. It requested a preliminary ruling regarding the substance of the case (so whether or not European competition rules applied to this type of negotiations). In this case, the Court of Justice sided with the association, meaning that the ACM had erred in its guidance. The case is still pending before the Dutch district court. See Gerechtshof Den Haag, ECLI:NL:GHDHA:2013:5381 (*FNV Kunsten, Informatie en Media*) and CJEU Case C-413/13 (*FNV Kunsten en Media v Staat der Nederlanden*). On the basis of this precedent, it might be possible for parties to request a declaratory judgment concerning their legal positions in the light of informal opinions as well. This argument will be returned to in Chapter 8.

contested parts of) their agreement or behaviour. This could be a solution to the tension described above, as enforcement action leads to a formal decision that can be challenged before the courts. Companies willing to contest the ACM's evaluation could provoke enforcement action by maintaining their agreement or behaviour as it is. However, in this particular case, the decision to take enforcement action was made public over two years after the publication of the informal opinion. This means that the companies involved are now liable for at least two years of cartelistic behaviour if an infringement is found.

Something that, presumably, contributes to the presumption of the binding nature of informal opinions is the language that the ACM uses within the opinion, as well as in its press releases. Where the UK CMA expressly used language that underlined the provisional character of its opinions, the ACM is – at times – rather bold in its determinations. For instance, the press release accompanying the 2015 *Protone therapy* opinion held that:

> 'Health insurance providers are **not allowed** to jointly contract with one centre for cancer treatment by proton therapy.'[76]

Even though the message also conveyed the informal nature of the opinion and explained the alternatives that the ACM suggested, the phrasing suggests that the evaluation of the compatibility of the underlying agreement cannot be contested. This shows that the informal opinions by the ACM can in fact have a binding effect upon the parties.

4.5 Irregular Opinions

Besides the informal opinions that are issued on the basis of its guidance document, the ACM has provided individual guidance on various topics of competition law on a number of other occasions. In some cases, this guidance is directed towards companies, or larger groups of companies, while in other cases it concerns advocacy documents concerning the competitive impact of proposed Dutch or European legislation. The latter category of documents is disregarded here.[77] The individual guidance documents directed towards companies (hereinafter: irregular opinions) are subject to further discussion, because they appear to differ from 'regular' informal opinions in their scope and the type of analysis performed. To that end, a typology is made of the subjects of these irregular opinions and a hypothesis is formed with regard to their purpose. Lastly, their possible effects on the market parties are illustrated by an example.

76 Press release 3 March 2015, 'ACM ziet kansen voor centra voor protonentherapie voor behandeling kanker' on https://www.acm.nl/nl/publicaties/publicatie/13929/ACM-ziet-kansen-voor-centra-voor-protonentherapie-voor-behandeling-kanker/.

77 There is a legal basis for performing such an impact analysis, see Article 5 sub c, section 2 *Mededingingswet*.

Report (Collective bargaining)	**2009**	Regarding collective negotiations of healthcare professionals with insurance companies. Deemed incompatible based on earlier studies (performed by itself or by other regulators).
Analysis (Closing of coal plants)	**2013**	Evaluation of a specific part of an agreement, based on information provided to ACM as well as its own research. Deemed incompatible.
Market advice (Execution auctions)	**2013**	Recommendations to increase competitiveness in the sector. Can be viewed in connection with fining decisions in same sector.* Published before these decisions were published, possibly with a view to giving guidance, as the publication of these decisions was stalled by an injunction procedure.
Guidance (Renovating rental properties)	**2013**	Given after a request for an informal opinion was declined, because of the societal importance of the initiative. Initially deemed compatible, though in later stages of the project renewed evaluation would be recommended.
Letter (Charcoal)	**2014**	Subscribes to earlier advice from Ministry of Economic Affairs, but finds the proposed transparency about the origin of charcoal incompatible with competition rules.**
Letter (Capacity of hospitals)	**2014**	Review of the applicability of exceptions to the cartel prohibition, at the request of the parties. Limited analysis (2 pages in length), agreement deemed incompatible.
Analysis (Sustainability initiative: poultry)	**2015**	Full analysis of the compatibility of this initiative with competition law in order to facilitate self-assessment under newly issued guidelines. ACM proposes less restrictive alternatives.

* Autoriteit Consument en Markt, Case 7237 (*Executieveilingen*).

** This proposal aimed to prevent the purchase of 'blood coals', named as such to resemble the reprehensible practice of mining for 'blood diamonds'. See Autoriteit Consument en Markt, Case ACM/DM/2014/206176 (*Herkomsttransparantie in de Steenkolenketen*).

The main common characteristic of these documents is the fact that they contain the opinion of the ACM on a certain topic of competition law, as requested by the parties it concerned. The labels given to these opinions ('analysis, report, letter, guidance, market advice') are very different, but are of little consequence given the determination of what they are not, namely informal opinions for the purpose of the ACM's guidelines. For some reason, the question put before the ACM by the companies in these cases did not meet the criteria for the issuing of an informal opinion, but were still considered of such importance that the ACM saw the necessity of giving its opinion in a different form.[78]

78 The most explicit support for this hypothesis is found in the ACM's opinion on the renovation of rental properties. Here, an informal opinion was requested and declined, but additional guidance was provided, because the ACM thought the initiative to be of societal importance (it concerned the sustainable renovation of rental houses). See Autoriteit Consument en Markt, Guidance 13.0614.15 (*De Stroomversnelling*).

This could be the case when a proposed form of cooperation or a certain proposed behaviour does not really amount to a novel question of competition law, but could have far-reaching consequences in terms of societal impact. The fact that almost all of the irregular opinions concern certain 'hot topics' of competition law (such as healthcare and sustainability) underlines this tension.

In some of these markets, the ACM had already published general guidance concerning the application of competition rules in different situations, but explicitly used the irregular opinion to explicate its previous guidance with regard to a specific example.

> In 2014, the ACM published a guidance document on how it intends to deal with sustainability issues in competition law.[79] This guidance document is a further execution of a ministerial policy rule on the same issue.[80] In the romantically named advice 'the Chicken of Tomorrow' the ACM engaged in an analysis of an agreement between supermarkets, the poultry processing industry and chicken farmers, aimed at improving the living conditions of chickens by, for instance, using a breed that grows more slowly and allowing less chickens per square meter. This agreement would cover the entire poultry sector, pushing out poultry that is not produced in this way by 2020. The ACM announced that the aim of this evaluation was to provide an additional example on how to deal with sustainability issues.

As is discussed more at length below, this type of guidance could be very informative for market parties, because it gives the ACM an opportunity to show – in more detail and in relation to an actual agreement – how it intends to apply competition rules to a given sector. This could aid companies in their self-assessment if they are faced with a similar issue. The guidance provided in the 'Chicken of Tomorrow', however, might not have been that instructive.

> On the basis of a rather short analysis of the agreement itself (two paragraphs), the ACM comes to the conclusion that the agreement infringes competition rules and that it does not qualify for an exemption. In doing so, the ACM relies heavily on a report by the Chief Economist on the economic effects of the agreement.[81] It holds that, although it is a beneficiary to the well-being of chickens, the agreement does not contribute to improving economic progress (Article 101(3) TFEU and 6(3) Dutch Competition Act) because the consumer does not show a willingness to pay. In the eyes of the ACM, a less restrictive measure would be for the parties to 'Chicken of Tomorrow' to invest in measures to increase awareness amongst consumers, which would increase their willingness to pay.[82]

The analysis itself is rather short, and economic theory is used to weigh the competitive disadvantages against the possible monetary or societal gains. Moreover, the irregular opinion does not deal with each provision on its own merits, but groups them together on an effects basis, which rather detracts from any explicating or clarifying effect that

79 Autoriteit Consument en Markt, *Visiedocument Mededinging en Duurzaamheid*, May 2014.

80 Autoriteit Consument en Mart, Beleidsregel Duurzaamheid 2014.

81 Economisch Bureau Autoriteit Consument en Markt, Economische Effecten van 'Kip van Morgen', October 2014.

82 See Autoriteit Consument en Markt, Analyse ACM van duurzaamheidsafspraken 'De Kip van Morgen', Kenmerk: ACM/DM/2014/206028 (*Chicken of Tomorrow*).

might have been intended. Also, it raises the question whether market parties are required to engage in similar economic research in order to determine whether the costs of their agreement are outweighed by the possible societal benefits it generates. This kind of research is difficult to execute – even if one assumes that all values can be expressed in monetary terms – and its place in competition law is debated.[83]

The conclusions reached in irregular opinions are capable of having far-reaching consequences. These are similar to the concerns raised with regard to recommendations under the informal opinion regime, but are even more pressing in this context because the conclusions which the ACM puts forward are formulated in a more insistent manner. The fact that these opinions escape review by an administrative judge could bring about a difficult situation if the companies involved cannot subscribe to the ACM's views. Apart from that, because the ACM can rely on its own research when reviewing the agreement or the behaviour referred to it, not just the competitive evaluation and the possible recommendations escape review, but also the methodology and the sources on the basis of which these conclusions are reached. To refer back to the Chicken of Tomorrow, a judge will not review the probative value of the economic analysis performed by the Chief Economist, despite its possible far-reaching consequences.[84]

The extensiveness of these consequences is best illustrated by referring to the opinion which the ACM published regarding the closing of a number of coal-powered energy plants.[85]

> September 2013 marked the signing of the Energy agreement, an ambitious document outlining measures to improve the sustainability of the Dutch energy market and the economy as a whole. The agreement was signed by over 40 parties (amongst which were trade, labour and environmental organisations) and was concluded under the mediation of the Social and Economic Council of the Netherlands (SER). The agreement contained many initiatives aimed at increasing the use of sustainable energy, amongst which was the closing of five coal-powered energy plants in the Netherlands. Because the agreement to close these plants could amount to an infringement of competition law, the ACM was called upon to provide informal advice.[86] The ACM reviewed this particular part of the Energy agreement in an informal 'analysis', outlining the contents of the agreement and the applicable competition rules, relying on calculations commissioned from an external economic bureau. On the basis of this analysis, the ACM held – provisionally – that 'a private agreement to withdraw production capacity

83 See for a portrayal of this debate Gerbrandy 2015, Gerbrandy 2015b, Claassen & Gerbrandy 2015, and a different placement of sustainability issues (when multi-party agreements and 'civil society' are involved), Gerbrandy 2016. These authors have also published on these issues for a broader public, such as R. Claassen and A. Gerbrandy, 'Bredere kijk op mededingingsrecht gewenst', MeJudice, 24 February 2015, online here: http://www.mejudice.nl/artikelen/detail/bredere-kijk-op-mededingingsrecht-gewenst.

84 Leaving aside the question – for now – whether or not a judge would review this matter, because this might encroach upon the margin of discretion that competition authorities have when making complex technical assessments.

85 Autoriteit Consument en Markt, 'Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er jaren kolencentrales in het kader van het SER Energieakkoord', 26 September 2013.

86 One of the parties to the agreement signed contingent upon its compatibility with competition rules, for which reason the ACM needed to be consulted for a review on this point. Strictly speaking, private parties might have performed this analysis, but because of the high-level deliberation and the interests involved, it is understandable that the competent administrative authority was called upon.

> from the market constitutes a restriction of competition'.[87] The ACM paid attention to the societal benefits of closing the coal plants, but held that, under the current legal framework, it could not take these into account in its analysis.

The publication of this opinion was met with a great deal of criticism.[88] Even though from a competition law point of view the ACM's evaluation might have been defendable, the result of the opinion – which could imply a renegotiation of some of the terms of the Energy agreement – must have been a difficult pill to swallow, especially in the light of the interests at stake and the energy (no pun intended!) dedicated to reaching a compromise in the first place. This raises a number of interesting questions. First of all, should the ACM be asked to advise in these high-stake cases? And if not, who should provide such advice on competition law in its place? Secondly, when reversing the point of view, should the ACM agree to advise in these ways, even if the evaluative framework is heavily debated and the outcome could generate 'bad press'? Which leads to the third question: how should issues at the crossroads of competition law and sustainability be addressed? Should these issues be left to the market or should the government play a more prominent role? Especially the latter two are rather fundamental in nature, and raise the final question of whether or not an informal or irregular opinion is the preferable method of providing more insight or facilitating a discussion on the matter.[89] These questions are touched upon in a broader context in Chapters 8 and 9.[90]

5. COMPARISON AND EVALUATION OF INDIVIDUAL GUIDANCE

The sections above have shown that both the UK CMA and the ACM have been active in issuing individual informal guidance to market parties, though the one has been somewhat more active than the other. The formal approach of both of the competition authorities seems not to differ that much, but the execution in practice is very distinctive. This section compares both approaches in order to pinpoint these differences and evaluates the instrument of individual guidance against the normative framework. This evaluation indicates issues with a lack of application, unintended binding effects and accountability (in a broad sense), which are – broadly speaking – similar to the issues indicated with regard to markets work. This correlation is further touched upon in the conclusion of this chapter.

87 See Press Release ACM, 'Private arrangement in Energy Agreement to withdraw production capacity from the market restricts competition', 25/10/2013.

88 See for instance Financieele Dagblad, 'ACM verbiedt sluiten kolencentrales in energieakkoord' 26 September 2013, Business News Radio, 'Donkere wolken boven Energieakkoord', 26 September 2013 or (strongly) Energie Overheid, 'ACM breekt pijler Energieakkoord af: Sluiting kolencentrales nadelig', 30 September 2013, available online: http://www.energieoverheid.nl/2013/09/30/acm-breekt-pijler-energieakkoord-af-sluiting-kolencentrales-nadelig-voor-consument-en-milieu/.

89 Question raised earlier by Gerbrandy 2015b.

90 See Chapter 8, section 4.5 and Chapter 9, section 5.

5.1 Evaluation of the Different National Practices

Before comparing the national practices of the Autorité, the UK CMA and the ACM in more detail, their respective instruments have to be evaluated on the basis of the normative framework that underlies this thesis. On the basis of this evaluation, points for comparison can be easily identified and can lead to general objections, challenges and recommendations further below. The evaluation of the Autorité's practice is limited to advisory opinions that resemble informal opinions. Despite its limited application in practice, the UK CMA's short-form opinions are discussed as well (in fact, this is the main criticism discussed in the light of instrumentality). For the ACM, both informal and irregular opinions are discussed. In that sense, informal opinions indicate the guidance given under the pre-existing framework for individual opinions, and irregular opinions indicate the other types of publications, which are more informal and also more far-reaching in nature.

5.1.1 Advisory Opinions by the Autorité

Naturally, the observations raised under the normative framework with regard to the practice of the Autorité have to be read in conjunction with this section in the previous chapter. To recall them, the advice procedure is characterised as a procedure of bound flexibility. This means that, even though the Autorité is rather flexible in applying it (in the absence of procedural guidelines, but also because the one instrument can take multiple forms and shapes), it remains bound by the request put before it by the referring party. Since the principle of legality prescribes that the Autorité should – at least – give a reasoned statement as to why it believes it should not give advice in a particular situation, there is a risk that the advice procedure consumes a major part of the Autorité's resources at the cost of other enforcement tools. This is mitigated by the fact that only a limited number of bodies can request advice from the Autorité. Furthermore, the advice procedure is one of the few tools applied by Autorité that has no fixed procedural guidelines, possibly also caused by its hybrid character. Instead, the Autorité pursues a policy of transparency and sometimes seeks alternative forms of accountability, such as consultations. This double characterisation of the advice procedure holds true when it comes to individual guidance as well.

First of all, with regard to bound flexibility, the situation within the Autorité is no different from referrals for individual guidance in the other Member States. These national competition authorities are equally bound by the requests of the parties – even more so, because the procedural guidelines demand that the companies themselves must provide all the information necessary for the competition authority to make an assessment.[91] From a safeguard point of view, the absence of guidelines or clear rules on the requests for individual advice creates a situation of legal uncertainty for companies. It is striking that the Autorité has not formulated such guidelines, since it has remedied

91 This statement is not true for the irregular opinions provided by the ACM, for which reason they are labelled as such.

uncertainties with regard to other enforcement instruments at quite an early stage.[92] However, one could argue that this uncertainty is remedied by the clear viewpoints communicated by the Autorité about the admissibility of questions, thereby making the outcomes of such requests for advice more predictable. The practice of the Autorité does not show any signs that it intends to deviate from these viewpoints in the future.

From an instrumentality point of view, the Autorité has to navigate a difficult tension between giving helpful advice (which could be considered effective) and refraining from giving individual instructions (which could produce legal effects, as was clarified in the case law).[93] This tension was already apparent with regard to market scan-like advisory opinions, but becomes even more pressing now that the Autorité is responding to *individual* questions. To remedy this, the Autorité sometimes extends the scope of the question to a more general, market-wide issue.[94] This should give companies enough information to conduct a self-assessment, but does not result in an individual instruction in a given case. Even though this is a good solution from a legal point of view (as it circumvents a review by an administrative judge under French case law), it is questionable whether it makes any difference in practice. Any unwanted binding effects would most likely still arise despite the broader formulated answer, and the advice remains unchallenged before a judge. This tension is discussed further in Chapter 8.

5.1.2 Short-Form Opinions of the UK CMA

The clearest characterisation of the approach of the UK CMA towards providing guidance in individual cases is 'ambiguity'. One the one hand, the UK CMA has invested in making the procedure more transparent by issuing procedural guidelines, which make the criteria for eligibility more evident. It has also expanded the scope of the short-form opinion to encompass proposed vertical agreements and it has established a system of pre-request (informal) meetings in order to make the procedure more attractive. On the other hand, it has retained the procedure on a trial basis, which means in practice that there will be a cap on the number of short-form opinions given each year. This is a contradiction, as there are measures in play that would increase the demand for opinions, while restricting the output for policy reasons. This means that the main issue with the procedure for short-form opinions does not arise from a tension between instrumentality requirements and safeguards, but from an intra-instrumentality perspective.

The procedure for short-form opinions has the potential of being a very efficient instrument for giving guidance in individual cases. It is intended to be quick (delivering answers in a matter of months), most of the costs are passed on to the companies requesting the opinion (as they are responsible for the drafting of the question, as well

92 Think of the guidelines for transaction procedures, commitment decisions and compliance programmes: Non-Contestation Notice Autorité 2012, Notice on Commitments Autorité 2009 and Framework Document Compliance 2012 respectively.

93 Conseil d'Etat, No. 357193, 11 December 2012 (*Casino*).

94 Conseil de la Concurrence, 07-A-04 (*Filière de Qualité Bresse*).

as the gathering of evidence that facilitates an evaluation and an answer),[95] and there are measures in place to safeguard the UK CMA from investing resources in futile requests (by means of pre-request discussions, provided that these do not occur too often and are not protracted – thus 'secretly' taking up resources at the UK CMA). However, its main goal – giving guidance on unresolved competition law issues to a broader public – has not been accomplished, as there are simply no cases that have made it to the publication stage. In other words, there is tension between potential effectiveness and effectiveness in practice. The main question therefore is what is keeping the UK CMA from publishing short-form opinions. It can be argued that, due to the recent date of the changes, there is simply more to be expected from the UK CMA at this point in time. However, it has also been suggested that the criteria for requesting an opinion are simply too strict.[96] As is noted above, the costs for requesting an advice are borne by the requesting parties, which might be dissuaded due to the limited success rate to date.[97] The fact of the matter is that it is not known what is keeping the UK CMA from issuing more short-form opinions. This also connects to a downside (from a safeguard perspective) of the pre-request discussions. Because of their informal nature, they are invisible to the general public. Therefore it is unclear whether requests are rejected, or whether there is simply no demand. Other than this one objection, there are no other issues to be raised with regard to the safeguard requirements of the normative framework. This is due to the fact that the UK CMA does not (intend to) use its own investigatory powers, but limits itself to the issues and information placed before it by the companies, but partially also due to the fact that there is too little practice from which to draw conclusions.[98]

5.1.3 Informal and Irregular Opinions by the ACM

The practice of the ACM is to be divided into two types of opinions: those based on the ACM's guidelines (informal opinions) and those published besides this scope (irregular opinions). For informal opinions, the advantages in terms of instrumentality and safeguards are similar to the ones concerning the UK CMA's practice. First of all, an informal opinion is an efficient way of giving guidance in individual cases, since they are quick in nature and the parties involved provide most of the information. The ACM can retain flexibility in its application, because it may decline requests on the basis of its prioritisation principles, and there is a proportionality test included in the review before application (compelling the ACM to consider whether other instruments would be better placed). Lastly, the informal opinion's procedure is explicated in procedural guidelines, which increases transparency and legal certainty.

95 Note that this can be a downside from the companies' point of view. However, individual guidance is *for the benefit* of companies, and if they were to consult specialized practitioners, legal advice would not come cheap either.

96 Harrison 2005, who made this remark with regard to the Commission's guidance letters, which have not been issued as yet, and have similar requirements attached to them.

97 Measuring success in the outcome of other requests for advice. In other words: there are only a few precedents.

98 There are of course objections to be raised against the use of individual guidance in general. These are discussed in Chapter 8, section 3.2.

However, these procedural criteria are rather inflexible, limiting the application of the informal opinion to very specific circumstances. It has been suggested above that this has given rise to the irregular opinions, which seem to deal with questions that are not necessarily novel under competition law, but are of importance in a different respect. With the irregular opinions, the ACM surely acts beyond the scope of its guidelines, which might cause a problem with the legality and legitimacy of the instrument. Despite the fact that the ACM remains within the boundaries of its general mandate (focussing on competition-related aspects only and referring back to other guidance documents where possible), the question is whether it is desirable for competition authorities to give advice in such matters. In general, acting beyond a predetermined scope makes enforcement practice less predictable and for the ACM in particular it has already been remarked that it is not transparent on the basis of what information the ACM comes to a conclusion. These negative effects can be mitigated as such, but the underlying question still remains. Whether or not irregular opinions can be considered legitimate therefore depends on the perceived role of a competition authority in society.[99]

In both its informal and irregular opinions, the ACM pronounces itself quite clearly on the compatibility of the proposed agreement with competition rules – something other national competition authorities generally refrain from doing. This could, at first glance, increase legal certainty for companies, because it gives a clear insight into how the ACM views the compatibility of the proposed agreement or behaviour, and also because the ACM is bound by, to a certain extent, advice given in the past.[100] However, such a firm stance communicated by a competition authority could give the impression that the evaluation by the competition authority is in fact binding. At the very least, companies involved would think twice of acting against the advice of the authority capable of investigating and fining their behaviour in the future (which, incidentally, is already in possession of some of the information underlying the proposed agreement or behaviour). Apart from that, a clear pronunciation on compatibility is also more problematic in terms of accountability. As there is no review by an administrative judge of any kind of opinion, the evaluation of the ACM is hardly challengeable by companies that disagree. They could act against the ACM's recommendations and await enforcement action, but that does not seem to be a very effective way of challenging an opinion. Instead, it seems that accountability should be shaped in a different way. This holds true for both informal and irregular opinions, and is discussed in more detail in Chapter 8. However, with irregular opinions in particular, the lack of accountability only increases issues with transparency and predictability as identified in the section above.

All in all, the practice of the ACM with regard to providing individual guidance can be characterised as being more pronounced than the other competition authorities. The ACM is clearer in its answers to the questions asked and has started to give guidance on issues other than novel and unresolved questions of competition law alone. With that, the ACM leans more towards an instrumental approach to opinions, which encroaches upon certain safeguards. This tension does not contribute to the procedural legitimacy of the opinions,[101] which – for irregular opinions – is already questionable as such.

99 See Chapter 8, section 4.5, but also – to some extent – Chapter 9, section 5.2.
100 See Chapter 8, section 4.3
101 See Chapter 3, section 1.3 for the role of legitimacy in this normative framework.

5.2 Comparison Between the Different Types of Individual Guidance

When it comes to the different procedures for issuing opinions, the similarities between them are easy to discern. The competition authorities apply a similar kind of procedure in which the companies are responsible for requesting the advice, thus outlining the scope of the analysis. The UK CMA has the strictest approach in this respect: the companies themselves are responsible for providing the information necessary to complete the evaluation, and the opinion can only concern proposed forms of cooperation. In its formalised procedure for informal opinions, the ACM already extends this scope to individual behaviour and mergers, but remains on the same page as the UK CMA when it comes to the provision of relevant information. In its later irregular opinions, the ACM also engages in research of its own motion – like the Autorité does under its advice procedure. The difference there is that the Autorité limits itself to general recommendations, while the ACM sometimes explicitly finds certain behaviour or proposed forms of cooperation to be incompatible with competition. Lastly, both the UK CMA and the ACM have the flexibility to use their prioritisation principles in order to determine which cases to pursue, which the Autorité presumably has not. Different to what may have been expected, this has not led to a backlog of requests for individual advice, possibly due to the statutory limitation on parties competent to request advice.[102]

In fact, the practice of the Autorité has been rather steady in terms of advisory opinions requested and answers given. Although the outcomes vary slightly from time to time (sometimes being more insistent than at other times), there is no clear development towards either a more interventionist or careful approach. The Autorité has stuck to its principles formulated in earlier advisory opinions and appears not to deviate from them in practice. The same cannot be said for the UK CMA and the ACM, where the practice of giving individual guidance is in transition. In the case of the UK CMA, the limitations upon the issuing of a short-form opinion have had a chilling effect on its practice: only two short-form opinions have been issued, and only one opinion before the guidelines were published. This could mean that the strict requirements have dissuaded companies from requesting an opinion, but it could also mean that the UK CMA has taken a careful approach to the instrument as such. The latter hypothesis is somewhat underlined by the text of the short-form opinions, in which the UK CMA conscientiously phrases its findings in order to underline their provisional character. The UK CMA possibly aims to prevent any unintended consequences of its short-form opinions, such as a comforting or a prohibiting effect. By contrast, the strict criteria surrounding the informal opinion procedure in the Netherlands have caused the ACM to develop a practice in addition these guidelines (the irregular opinions). Granted that the ACM was more active in issuing informal opinions to begin with, the ACM seems less hesitant in voicing its opinion in a more insistent manner. A possible explanation for this difference in application is that the procedure for short-form opinions and the procedure for informal opinions have slightly different objectives. To recall, the objective of the short-form opinion is to facilitate self-assessment. At its most extensive, the UK

102 There could, of course, be other reasons for this that fall outside the scope of this thesis – such as the reluctance of parties to request advice, the quality of legal advice in France, or other political or cultural reasons. This would require a further investigation into the mind-set and motivations of the companies (and trade associations, consumer organisations), which undoubtedly would yield fascinating results.

CMA would pinpoint the risks for competition and propose slight modifications, but at all times the UK CMA would refrain from making findings as to the compatibility of the proposed cooperation with competition law. This contrasts with the ACM's individual opinion, which is issued for this purpose in particular.[103] The ACM does underline the fact that its opinion does not relieve parties from their duty to self-assess their positions under the relevant competition rules, but in general, this objective makes the ACM less hesitant to draw conclusions – albeit provisional – from the assessments it conducts.

Nevertheless, apart from this difference in objective, there is no clear explanation to be derived from the instrument itself as to why the UK CMA's practice would differ from the ACM's practice. When looking at the differences from a broader policy perspective, it is possible that the enforcement strategies of both competition authorities have fed into the variation in approaches, especially in the last few years. For the ACM, its enforcement strategy propagates a broad approach to competition problems while making use of its *full range* of enforcement instruments. Also, the ACM's oversight philosophy includes the intention to keep an eye out for public interests, which could explain why it has been eager to engage in the discussions on healthcare and competition and sustainability in competition law.[104] The UK CMA's strategy, by comparison, is currently aimed at improving the efficiency and robustness of the system itself, which suggests a more internal focus.[105] In the light of its own enforcement principles (that highlight robust discussion-making and safeguards for the parties involved[106]) it is surprising that the Autorité has maintained its advice procedure for giving individual advice, as it could raise some objections with a view to legality.[107]

Lastly, the question can be posed whether there are specific benefits or disadvantages in applying a hybrid instrument like the advice procedure. In other words, does the practice of the Autorité offer different possibilities in comparison with the separated markets work and opinion practice of the UK CMA and the ACM? After having reviewed both markets work regimes and informal guidance practice, this question must be answered in the negative. This is because there is a natural division in the Autorité's practice that sets apart a market scan-like advice from an advice that resembles individual guidance. Self-referrals often signify a more thorough investigation of the market, while questions from trade associations or consumer organisations often lead to individual advice. Even though the exact requirements for the latter could be more explicated, the Autorité has similar powers at its disposal and has limited its answers

103 '*De Nederlandse Mededingingsautoriteit (NMa) ontvangt regelmatig verzoeken van partijen om schriftelijk een oordeel te geven over de toepassing van wetten die de NMa uitvoert en waarop door haar toezicht wordt gehouden. Een dergelijk oordeel wordt ook wel informele zienswijze genoemd en is een voorlopig oordeel van de NMa*'. Which loosely translates as: 'The Dutch Competition Authority (NMa) often receives requests to give a written opinion about the application of the laws enforced by the NMa. These opinions are called informal opinions and hold a preliminary judgment.' See Vuistregels Informele Zienswijzen 2010, p. 1.

104 See Strategy ACM 2014.

105 However, any inferences to be made from these statements in relation to the practice of informal opinions should be met with scrutiny, because the strategies of both authorities are both relatively in their infancy, and there is no way of measuring just yet whether these strategies will actually have the effects contributed to them here.

106 See Chapter 2, section 4.2.2 for a characterisation and a further discussion of this strategy.

107 As is discussed in Chapter 8, section 4.3.

and recommendations in a way that is similar to what the UK CMA and ACM pursue.[108] There is no indication that the hybrid nature of the instrument allows the Autorité to 'do more' than the other authorities are capable of doing under their respective procedures. If anything, the danger exists that the Autorité is actually doing more (in terms of output), because its market scans and individual guidance is connected to its more general advocacy function – which is not taken lightly. All in all, the Autorité seems to achieve similar results using a different type of instrument.

6. MARKETS WORK AND INDIVIDUAL GUIDANCE: TWO SIDES OF THE SAME COIN?

In this chapter and the previous one, the hypothesis has been posed that the main activity performed under both markets work and individual guidance is similar, albeit on a different level. This hypothesis was underlined by the fact that the Autorité uses one and the same tool for producing both individual and market-wide advisory opinions. However, a closer examination of all the instruments that the national competition authorities have at their disposal leads to the conclusion that this hypothesis can only partially be corroborated by national practice.[109]

When looking at the evaluation of the different instruments under the normative framework, there are a number of striking similarities in both advantages and objectives. First of all, both markets work and individual guidance contribute to the effectiveness of enforcement by means of a clarification of competition rules and pinpointing competition risks in the current situation. In this respect, the effect of markets work and individual guidance is indeed a matter of scale. Moreover, the risks connected to increasing effectiveness with these tools are similar. In that respect, under-enforcement by the competition authority is a risk on both levels, especially when more serious (possible) infringements are overlooked or resolved in an informal way. Secondly, an over-commitment by the parties is a risk on both levels, as companies might commit themselves to making changes (in the case of markets work) or follow the advice of the competition authority even though they do not subscribe to its views (in the case of individual guidance) out of fear of further consequences. This immediately indicates a similarity from a safeguard point of view, namely that there are spill-over effects between the more informal tools discussed here and the competition authorities' more repressive tools. For the UK CMA, this effect is visible *within* the markets work regime, as the phase 2 investigation might have far-reaching consequences. The most pressing concern from a safeguard perspective is, however, the lack of review by an administrative judge. Apart from the phase 2 investigation, neither markets work nor individual guidance would be reviewed on the merits in none of the jurisdictions studied. The solution on both levels would be to establish alternative measures of accountability, which would have to become more stringent the more specific the recommendations are. Lastly, it

108 Save for phase 2 investigations (UK CMA) and irregular opinions (ACM), which are notably different in their own right.

109 For this evaluation, the phase 2-investigations of the UK CMA are largely left out, because they are unique in their own right, not comparable to the instruments used under the French legal framework. Reference is made to these instruments specifically when necessary. Incidentally, this is another reason for not regarding the two types of instruments as similar.

has been remarked that broad market studies pose a risk of competition authorities engaging in an evaluation of issues beyond mere competition aspects. This risk presents itself with regard to the ACM's irregular opinions as well, as is discussed in more detail above.

The main difference between the two instruments lies in the fact that individual guidance is issued *upon request*, while markets work is typically conducted *of its own motion*.[110] This particular feature of individual guidance renders some of the concerns raised with regard to market studies inapplicable. For one thing, the issue with naming and shaming – that could make the publication of markets work questionable from a safeguard perspective – is non-existent with regard to individual guidance, as the companies themselves request the advice and consent beforehand to its publication.[111] Apart from that, the point of cost-effectiveness is less pressing, as the companies involved would typically present the competition authorities with enough information on which to base an advice, thus avoiding investigation costs and a lengthy procedure.[112] However, it is most significant that the feature of market parties *requesting* individual guidance is exactly the feature that is the source of most of the criticism and hesitance surrounding the application of the instrument. From an instrumentality point of view, individual guidance has connotations with 'introducing the notification system through the back door', and is approached with care by most competition authorities. This concern is not discernible with regard to markets work.

All in all, there is a significant overlap between markets work and individual guidance, but only where the edges of the different instruments become 'blurred'. In their purest forms, markets work and individual guidance pursue different objections. Markets work intends to increase the competition authorities' knowledge of the market on the basis of which further action can be taken, while individual guidance is beneficial for companies and either facilitates self-assessment or gives a preliminary finding of compatibility in individual situations. However, in practice, markets work leads to market recommendations (aimed at the market, and companies in particular), while certain individual opinions give the competition authority the opportunity to commission or carry out more extensive research into a certain market. It is not surprising that these 'blurred edges' are found in the Autorité's practice, but given the analysis above, a similar overlap is identifiable in the ACM's practice as well.[113] In principle, such an overlap is not problematic, as long as there are safeguards in place to remedy an overlap in competences as well and there is sufficient transparency surrounding the application of the one or the other.

110 Possibly based on complaints or for political reasons, but not specifically requested by the market itself. Although it is true that this difference is somewhat less apparent at the Autorité (where advisory opinions are requested as a general rule), the introduction of the self-referral has also caused a distinction between markets investigated at request, or out of its own motion.

111 If they would wish to avoid that, there are very competent competition lawyers to give advice in individual cases. Legal professional privilege would then protect any naming and shaming.

112 There are costs, though. Requests have to be evaluated, discussions have to be held and some staff have to be deployed for drafting the actual advice.

113 With regard to the UK CMA, it is difficult to maintain that its unique but stringent markets work regime shares characteristics with its short-form opinion that is still in a trial phase.

7. FINAL REMARKS

In this chapter, national procedures for giving advice in individual cases have been reviewed. This has yielded the general conclusion that these procedures are – in fact – available, but that they might not be working well. This has led to a careful application or disapplication on the one hand (France and the UK), or the development of a new, less formalised, type of advice instrument on the other (the Netherlands). More in detail, national procedures have been reviewed in the light of the normative framework underlying this thesis. With regard to the Autorité's practice, this evaluation has been conducted in close connection with the previous chapter, as the Autorité has one instrument at its disposal (the advice procedure) to perform markets work, government advocacy and individual guidance. Within this instrument, which has been characterised before by its bounded flexibility,[114] the Autorité needs to strike a balance between providing effective advice, on the one hand, while avoiding giving individual instructions that can produce legal effects. As the comparison has shown, the UK CMA and the ACM both struggle with this balance as well. The UK CMA's practice is mostly characterised by its lack of application, which contradicts the efforts gone through during the merger creating the UK CMA to retain and redesign its advice instrument. There is simply too little practice by which to draw any general conclusions, but this fact in itself indicates that there is an issue from an instrumentality perspective. To a certain extent, these issues play a role within Dutch practice as well. Apart from that, the ACM is the only competition authority out of the three that pronounces itself on the compatibility of the proposed agreement or behaviour with competition rules. As is discussed above, this could have implications from a safeguards point of view as well.[115]

Having characterised the national practice of individual guidance, it is clear that the main problem is a fundamental question about the role that individual guidance instruments should play in an enforcement toolkit, and how these instruments can be designed in order to be as effective as possible, without encroaching upon safeguards (or hampering its own instrumentality). Of all the alternative enforcement instruments under review, none are as fundamentally debatable as this particular instrument. However, before being able to answer (or even discuss) this question, some specific policy considerations have arisen from the above evaluation and comparison. First of all, it is perceived that individual guidance is potentially an effective and efficient way of providing an insight into the competition authorities' evaluation, but is not applied very often across the board. The reasons behind this lack of application are further explored in Chapter 8. As it appears from the introduction to this chapter, at least one of these reasons could lie in the Commission's not so practical system of individual guidance (through comfort letters) in the pre-Modernisation period. The consequences of this experience are discussed in Chapter 8 as well. On another note, the most pressing policy considerations in terms of safeguards concern the legitimate expectations and possible binding effects arising from individual guidance, in combination with a lack of accountability in the absence of a review by a judge. These issues are discussed in Chapter 8, before answering the question of how individual guidance can play a role

114 See Chapter 6, section 5.1.1.
115 See section 5.1.3 above.

in day-to-day enforcement practice, and what the improvements to the national approaches should be.[116]

All in all, this chapter has given an overview of the (sometimes rather fragmented) practice of the UK CMA, the Autorité and the ACM with regard to individual guidance instruments. It has also explored the relationship between individual guidance and markets work, which – despite its dual character under French practice – pursue rather different objectives,[117] except on the 'fringes' of each instrument (individual guidance that addresses broader market problems, or markets work that focuses on a single type of behaviour, or a small slice of the market) where the two tend to overlap. This shows that it is necessary to make this distinction, as the instrumentality and safeguards concerns can sometimes be overlapping as well. These concerns are further addressed in the concluding part of this thesis, along with the fundamental question as to whether or not individual guidance should play a role in any competition authority's enforcement toolkit.[118]

116 See Chapter 8, section 4, and more specifically section 4.5.

117 See section 6 of this chapter in more detail.

118 See Part III of this thesis, particularly Chapter 8, section 4.5. In this particular section (spoiler alert) it is suggested that they should.

Chapter 7

COMPLIANCE PROGRAMMES

The previous chapters have dealt with negotiated procedures, markets work and individual guidance as applied by the UK CMA, the Autorité and the ACM. The chapter on negotiated procedures has shown different ways of finalizing cases once an infringement is found, relying on a more cooperative attitude of the companies involved. In the chapters about markets work and individual guidance the way in which competition authorities can provide guidance to markets and market parties has been discussed – whether this concerns individual remedies imposed in the course of a formal procedure, broad-scaled recommendations to be adopted by the market voluntarily or informal recommendations to companies in particular. This chapter deals with another topic entirely: the promotion of compliance programmes as is done by national competition authorities.[1] This differs from the previous topics in two ways. First of all, compliance programmes are best promoted preventatively. This means that when competition authorities promote the use of compliance programmes, they are dedicating resources to preventing anti-competitive situations on individual company-level from occurring beforehand – not resolving current infringements or investigating potentially dangerous market situations. The second difference with the other topics is that the promotion of compliance programmes is not so much an instrument to be applied by national competition authorities, but an effort to be made by companies, which can be stimulated or rewarded by using the procedures of other enforcement instruments. This chapter deals with these characteristics of compliance programmes, how national competition authorities promote them and how this practice holds up in the light of the balance between instrumental and safeguard requirements. The findings of this chapter have to be seen in conjunction with the findings of the other chapters that review alternative enforcement instruments. Together, these chapters draw a picture of alternative enforcement practice in the different Member States.

1. INTRODUCTION

As instruments of competition law enforcement, compliance programmes are – more or less – an odd one out. Even though all competition authorities under review promote the use and implementation of compliance programmes, a compliance programme cannot be imposed vertically; true commitment from market parties is necessary. It is therefore one of the few actions whose success, even from the offset, is largely dependent on the cooperation and commitment of businesses. This immediately explains why compliance

1 Parts of this chapter have been published before in the form of an article. See Lachnit 2014.

programmes can be viewed as alternative enforcement instruments: the dependency on companies suggests a cooperative relationship between the competition authorities and those being supervised, while the preventive aspects of compliance programmes are instrumental to the achievement of the goals of competition law enforcement.[2]

Even though this chapter focuses on the domain of competition law, compliance programmes are certainly not specific to this field. In fact, businesses usually have to comply with a wide range of rules and prohibitions, for which the use of compliance programmes is not unusual (think, for instance, of environmental law, safety regulations or food and health regulations). In its most basic form, a compliance programme is a way for a company to publically announce that it intends to follow all of these rules, and they have to be taken into account in day-to-day business. Often, but not always, compliance programmes are coupled with the company's corporate governance code or another code of conduct. This makes compliance programmes examples of 'voluntary governance', whereby companies or organizations express their commitment to certain rules and to the values or objectives on which they are based. Such programmes generally also include a set of actions intended to assist companies in building a genuine culture of compliance with those rules, but also in detecting likely misconducts, in remedying them and in preventing recidivism.

1.1 Promotion of Compliance Programmes on a European Level

Businesses' compliance with European competition rules serves the goals of competition law. On a European level, compliance with competition law would – amongst other goals – result in a better functioning internal market.[3] In that light, the Commission underlines the importance of compliance and stresses that not infringing the competition rules to begin with is the best compliance strategy a company can have. To quote former Commissioner Almunia: 'The ultimate aim of our cartels and antitrust policies is not to levy fines – the objective is to have no need for fines at all'.[4] Other than that, compliance plays little or no role in the Commission's enforcement strategy. The existence of a compliance programme does not, in any case, give rise to a fine mitigation if an infringement is found,[5] but it will also not be considered an aggravating circumstance.[6] On the other hand, it does seem that the commitment to set up a credible compliance programme to prevent any repetition of an infringement can, in certain circumstances, lead to a fine reduction.[7]

2 Stemming from the definition of alternative enforcement as provided in Chapter 1: Alternative enforcement entails a deviation from command-and-control style enforcement by using enforcement instruments that can be characterized as informal, horizontal, compliance-based, restorative, preventative or efficient, or a combination of one or more of the above. In Chapter 1 compliance programmes are also defined as part of alternative enforcement, see Chapter 1, section 4.2.

3 See for a discussion of the goals of competition law (and an overview of the references with regard to the internal market as a specific goal of European competition law) Chapter 1, section 2.2.

4 Speech Almunia, 'Compliance and Competition policy', SPEECH/10/586, 25 October 2010.

5 See, for example, CJEU Case C-189/02 P (*Dansk Rørindustri*), para. 373.

6 See, for example, CJEU Joined Cases T-101/05 and T-111/05 (*BASF and UCB*), para. 52, and CJEU Case T-138/07 (*Schindler Holding*), para. 282.

7 European Commission, Compliance Matters 2012, p. 20.

Despite this rather reserved approach to compliance assistance, the Commission has published a guidance document in order assist companies in developing a proactive compliance strategy.[8] This publication summarizes the interpretation of European competition rules and gives an overview of some acknowledged approaches to compliance – such as clarifying competition rules, having key staff members acknowledging their importance, monitoring and auditing compliance strategies and updating them consistently.[9] Apart from that, the Commission's website refers to compliance guidance from national competition authorities.[10] Giving guidance on this matter is, however, not the Commission's core business. Instead, the Commission would rather disseminate a compliance culture by providing extensive information about substantive competition rules, remaining in dialogue with stakeholders (also with a view to improving its guidance documents) and encouraging companies to develop *their own* compliance programme, tailored to the needs of each company individually.

1.2 Delineation and Set-Up

This chapter describes the approach of the ACM, the Autorité and the UK CMA to promoting, monitoring and evaluating compliance programmes. Naturally, the review of the authorities' approach is limited to the information that is publicly available and verifiable.[11] Because of the nature of compliance programmes, the focus in this chapter is a little different from that in the previous chapters. Even though the starting point is the approach of *competition authorities* to compliance initiatives, it is inevitable to touch upon the approach of *companies* to them as well. The relationship between the two is reciprocal: the way companies design and implement their compliance programmes affects the review by competition authorities, and the way competition authorities promote compliance programmes influences the way in which they are implemented on a company level. Moreover, an understanding of business culture and processes is pivotal to the proper functioning of compliance programmes, for which reason the focus sometimes needs to be on the companies. In the end, however, the central tenet remains to what extent competition authorities can promote compliance programmes using these insights, so the final question is always focussed on the tools that the competition authorities have at their disposal.

Another difference between this chapter and the foregoing chapters is the fact that this chapter deals with different national approaches to one instrument: compliance. The previous chapters have dealt with categories of instruments (negotiated procedures, markets work and informal guidance), within which national competition authorities have different and specific instruments at their disposal. An illustration of this is found in the differences between the UK CMA's markets work regime, the hybrid advice

8 By means of a brochure: European Commission, Compliance Matters 2012.

9 Compliance Matters 2012, pp. 16-20.

10 With the disclaimer 'that these materials can in no way be taken to have been endorsed by, or reflect the views of the Commission, which accepts no responsibility or liability for them'. See online: http://ec.europa.eu/competition/antitrust/compliance/index_en.html.

11 This means that informal contact and guidance concerning compliance programmes is not explicitly included in this chapter, although the findings here could apply *mutatis mutandis* to informal practice as well.

procedure of the Autorité and the ACM's developing market scans. This chapter, however, focuses on compliance programmes only – and even though competition authorities might have adopted different strategies to promote and reward them, the central instrument remains the same. This difference in subject matter is reflected in the way this chapter is structured, the concluding sections in particular. Instead of first evaluating and characterising national practice under the normative framework and then comparing the different approaches on a general level (which is required because it concerns different instruments), this chapter can be more specific and therefore focuses on the various aspects of compliance promotion.

That being said, the aim of this chapter to compare the approaches that the different national competition authorities take in promoting them and set them off against what others have perceived as being effective compliance initiatives. To that end, the practices of the Autorité, the UK CMA and the ACM are discussed in §2, §3 and §4 respectively, focusing on their general approach to the promotion of compliance programmes, the requirements of what they consider to be effective compliance programmes and the treatment of compliance programmes in the course of the application of other enforcement instruments. The various approaches to compliance programmes are evaluated and compared in §5, after which several issues in the light of instrumentality and safeguards are highlighted and recommendations are made for future practice.

2. PRACTICE OF THE AUTORITÉ

It has been referred to on multiple occasions in this thesis that the approach of the Autorité to compliance programmes has been developed along the lines of its transaction procedure. This development is explained and discussed below, but the practice of the Autorité with regard to compliance programmes is more extensive than non-contestation only. This section discusses the Autorité's general impression of the value of compliance programmes, the basis on which it promotes compliance and the tools it uses to do this. After that, the Autorité's requirements for an effective compliance programmes are discussed. Lastly, the Autorité's decisional practice is discussed insofar as compliance programmes have played a part therein. This last part also contains a more extensive look at the development of the evaluation of compliance programmes under the transaction procedure.

2.1 General Approach to Compliance Initiatives

The Autorité considers compliance programmes to be particularly useful tools in the promotion of conformity with competition law and has committed itself to developing compliance awareness among companies. The Autorité derives this competence from its mission statement, which includes the objective of safeguarding the functioning of the French competitive economy, implying a policy of preventing, detecting, correcting and sanctioning, and to which pedagogic activities are essential.[12] Especially because of

12 Framework Document Compliance Autorité 2012, para. 14, but also see its mission statement online at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=12.

the policy goals of prevention and education, the Autorité has indicated that it enjoys an implicit competence to promote compliance and to disseminate a compliance culture. Stimulating the adoption of compliance programmes by companies is seen as a particularly suitable way of doing so.[13] The most particular feature of the Autorité's approach towards compliance programmes is its competence to render compliance programmes binding when offered as a commitment in the course of a settlement procedure.[14] This is done on such a scale (see below) that it is safe to say that the development of compliance programmes in France has happened along the lines of the settlement procedure.

In general, the Autorité perceives the stimulation of compliance programmes as a useful tool in its enforcement policy, but underlines that this must be seen in conjunction with its other enforcement instruments. This means that the Autorité sees an interplay between compliance programmes and more compulsory enforcement instruments. Whenever the Autorité pursues a sufficiently deterrent enforcement policy, companies are more likely to implement compliance programmes in order to prevent infringements. Also, whenever the companies' compliance programmes fall short, the Autorité has its enforcement toolkit at its disposal to sanction the infringement in an appropriate way. In other words, the Autorité is aware of the potential of stimulating the adoption of compliance programmes, but only in connection with its other enforcement instruments, in order to prevent the impression that they form an 'all-risk insurance policy' for companies.[15]

In order to stimulate the adoption of compliance programmes by companies, the Autorité underlines the importance of giving sufficient guidance on compliance.[16] To that end, the Autorité is quite active in promoting and stimulating corporate compliance in general. Most of the annual reports contain sections on the importance of compliance, or sometimes even use 'faming' to applaud companies who implemented a particularly extensive or innovative compliance programme.[17] The Autorité also dedicates a section of its website to corporate compliance, from which relevant documents can be downloaded.[18] Apart from these general initiatives to increase awareness concerning the value of compliance, the Autorité has also issued a guidance document on what compliance programmes should look like.[19] In the preparation of this guidance document, the Autorité launched a consultation with market parties and used the input to make its recommendations to companies more realistic and practical.[20] The results

13 *Nouvelles régulations économiques* (NRE, or new economic regulations), *Loi* 2001-420, Article 73, and Fining Notice Autorité 2011, para. 5.

14 Framework Document Compliance Autorité 2012, footnote 12.

15 Chairman Bruno Lasserre in the Autorité's annual report summarized in English (Annual Report Autorité 2010, English version), p. 7.

16 Compliance Study France 2008, para. 31.

17 Autorité de la Concurrence, Annual Report 2008 (English version), p. 37. This was the Autorité's decision 07-D-21, (*Professional Laundry*).

18 This website can be accessed here: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=421. However, this section has not been updated since 2012.

19 Framework Document Compliance Autorité 2012.

20 Autorité de la Concurrence, La Consultation Publique Menée Fin 2011 (the public consultation of 2011), available online here: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=427. Even though there is no legal obligation for the Autorité to consult market parties and other stakeholders about its publications, the Autorité felt that is was necessary to do so from the point of view of legitimacy. Consultation would help the Autorité to gain as much information as possible, while the participative side of it would reinforce the legitimacy of the outcome. See Autorité de la Concurrence, Annual Report 2010 (English version), p. 27.

of the consultation and the most important reactions are all published online.[21] The consultation yielded enough information for the Autorité to proceed to the drafting of a framework document on compliance programmes. This document was published in 2012 and provides an insight into what the Autorité considers to be substantial, credible and verifiable compliance programmes.[22] To this end, the framework document offers an overview of the Autorité's procedures and it explains how it reviews compliance programmes. In principle, this document is binding upon the Autorité, but it can deviate from it if there is sufficient reason to do so.[23] Apart from the framework document, the Autorité published a guidance document on competition which specifically addressed companies.[24] This document explains, in non-legal terms, why compliance matters, why companies should implement a compliance programme, how to structure such a programme and what can be expected from the Autorité.

2.2 Requirements for Compliance Programmes

According to the Autorité, compliance programmes must be substantial, credible and verifiable. Compliance programmes are only considered as such if they diminish the risks of infringements on the one hand, and form mechanisms to detect infringements that could not be prevented on the other. It is only with the combination of these two objectives that compliance programmes are believed to be effective.[25] To meet these objectives, the Autorité has put forward five elements that it expects to be a part of substantial, credible and verifiable compliance programmes.[26]

First of all, the introduction of a compliance programme must go hand-in-hand with a clear, firm and public position adopted by the company's management bodies and, more broadly, by all managers and corporate officers. By doing so, companies underline the importance of competition law and publicly commit themselves to ensuring compliance across the board, with a special focus on management. Secondly, a compliance programme must provide for the appointment of a corporate compliance officer, who will be responsible for the implementation of the compliance programme in practice and who will form the link between the company and the Autorité in the

21 The following reactions have been published online: Association Cercle Montesquieu, Association des Avocats Pratiquant le Droit de la Concurrence (APDC), Association Française d'Études de la Concurrence (AFEC) Sous Groupe PC, Association Française des Entreprises Privées (AFEP), Association Francaise des Juristes d'Entreprise (AFJE), Chambre de Commerce et d'Industrie de Paris, CMS Bureau Francis Lefebvre, Commission de la concurrence du comité français de la Chambre de Commerce Internationale (ICC France), De Gaulle Fleurance & Associés, Groupe EDF, Intesa Sanpaolo S.p.A. – International Regulatory and Antitrust Affairs, La Poste, Les entreprises du médicament (LEEM), MEDEF, MG Avocats – Grall & Associés, UFC-Que Choisir. Autorité de la Concurrence, La Consultation Publique Menée Fin 2011 (the public consultation of 2011), available online here: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=427.

22 This is the benchmark that the Autorité applies to the evaluation of compliance programmes. See Framework Document Compliance Autorité 2012, para. 4.

23 Framework Document Compliance Autorité, para. 6.

24 Autorité de la Concurrence, Antitrust Compliance and Compliance Programs: Corporate Tools for Competing Safely in the Marketplace, English version, 2011.

25 Framework Document Compliance Autorité 2012, para. 11.

26 These features, also dubbed the 'five-step programme', are not just elaborated upon extensively in the Autorité's framework document on compliance, but also have an exemplary function in the OECD report on competition law compliance. See OECD Compliance 2012.

future. The compliance officer must have sufficient resources and powers in order to be effective. Thirdly, the company has to make sure that – along with its compliance programme – it puts in place effective processes for the dissemination of information, for creating awareness of the importance of competition law among its employees and for giving extensive competition law training to personnel who are most likely to encounter competition law-related issues. These measures have to be taken across all layers of the organisation. Fourthly, compliance programmes must facilitate the design of effective control, auditing and whistle-blowing systems, in order to make sure that the programme does not become a 'dead letter', but has an effective enforcement system behind it on the company level. The last requirement for compliance programmes is closely connected to this enforcement system and proscribes an effective oversight and monitoring system, in which the treatment of information obtained and the sanctions to be imposed have to be determined beforehand.[27] This should ensure that companies are not only prepared for monitoring compliance and finding irregularities in their own business, but know what to do with this information if it would ever come to the finding of an infringement.[28]

According to the Autorité, these requirements for a substantial, credible and verifiable compliance programme cannot simply be copy-pasted into a legal document. The compliance programme has to create a culture of real and determined respect for competition rules amongst all levels of the hierarchy and must fit the size of the company and the nature of its activities, along with its organizational structure, mode of governance and business culture.[29] In other words, companies have to show that it is plausible that the compliance programmes they have designed meets the requirements in way that fits the company and its way of doing business.

The requirements explicated by the Autorité are *ex-ante* indicators of effective compliance programmes, representing the features that compliance programmes should contain in order to be effective. The Autorité can use these indicators to evaluate the effectiveness of compliance programmes before they are put into practice. However, in some cases, it is possible that a competition authority is faced with reviewing a compliance programme when it has already been put into practice, but has failed – for instance, if the existence of a compliance programme is considered to be a mitigating factor under the fining guidelines. To evaluate the effectiveness in that case, the Autorité uses a single *ex-post* criterion. If a compliance programme, in case of an infringement, contributes to the fact that the company is able to detect this at an early stage within its own organization, and the company is able to apply the right consequences to the infringement because of it, the programme is considered to be effective nevertheless.[30]

27 Here in a very short form, but described very extensively in the Framework Document Compliance Autorité 2012, para. 22.
28 See Framework Document Compliance Autorité 2012, para. 22.
29 Framework Document Compliance Autorité 2012 paras. 11, 16 and 19.
30 Framework Document Compliance Autorité 2012, para. 18.

2.3 Application in Practice

The requirements listed in the Autorité's guidance document on compliance are based on a little less than fifteen years of experience of evaluating compliance programmes in the course of formal procedures.[31] The first case in which such an extensive compliance programme was discussed was the 2007 *SITA/Veolia* case, which concerned a transaction procedure.[32]

> In this case (revolving around waste disposal), four companies active in the region of Seine-Maritime had engaged in systematic market sharing and price fixing facilitated by the exchange of information by its employees. The Minister of Economic Affairs referred the case, and the Autorité quickly came to the conclusion that there had been an infringement of competition law. Interestingly enough, the four companies involved in the infringement already had a compliance programme in place, but admitted that it had not been working well – as demonstrated by the exchange of information, the price fixing and the market sharing that had slipped through the cracks. Instead of allowing the programme to go to waste, the companies offered an extensive improvement to the existing programme as a commitment under the transaction procedure. The improvements included incorporating new forms of learning (such as e-learning) for training purposes, carrying out an audit to measure compliance awareness within the companies, inserting a strict control mechanism to monitor compliance, explicitly informing new employees about competition law compliance and storing relevant information about compliance for at least five years (enabling the Autorité to perform check-ups). The Autorité saw these improvements as very favourable and granted the companies a fine discount of 35%, meaning that the discount for the commitments (including the improvements to the compliance programme) was as high as 25%.

This example, derived from the Autorité's practice of accepting compliance programmes as binding commitments in a transaction procedure incorporated many the elements of what would later be known as the five-step programme. After this decision had been published, it became more standard practice for companies to commit themselves to more extensive compliance programmes, not only incorporating educational measures, but also forms of internal control and monitoring. In some cases, compliance programmes even contained detailed codes of conduct, in order to regulate contact with clients, competitors and professional organizations.

Today, the Autorité evaluates compliance programmes on the basis of its procedural guidelines, for which previous practice has been an inspiration. The Autorité engages in such an evaluation only if the case so requires, so if a compliance programme has been offered as a remedy, or when a compliance programme has led to an early detection of the infringement. The most important procedure in which it is possible to include a compliance programme is the transaction procedure.[33] Apart from that, the Autorité sometimes weighs the existence of a compliance programme in a fully adversarial fining

31 And, of course, they are based on the consultation the Autorité issued to prepare for the drafting of its guidance document, see Autorité de la Concurrence, La Consultation Publique Menée Fin 2011 (the public consultation of 2011), available online here: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=427.

32 Le Conseil de la Concurrence, 07-D-40 (*Déchets Ménagers dans lesVosges*).

33 See Chapter 4, section 2 in more detail.

procedure, or accepts the design or amelioration of a compliance programme as a remedy in a commitment decision.

2.3.1 *Application in the Transaction Procedure*

The main procedure, in which the Autorité is capable of rendering a binding commitment to set up a compliance programme, is the transaction procedure. Under this procedure, the Autorité may accept commitments offered by companies in return for an additional fine discount.[34] These commitments are rendered binding by their inclusion in the final decision, which means that the Autorité is one of the few authorities that is able to make the implementation of a compliance programme formally binding under a procedure other than a commitment decision. This is important, as the binding power of the commitment makes it possible for the Autorité to impose a penalty if the commitment is not fulfilled or breached. The Autorité has in the past indeed imposed a penalty on companies that breached different behavioural or structural commitments after the transaction procedure, but not yet upon companies which have not set up a committed compliance programme.[35]

Compliance programmes are quite common as a commitment in a transaction procedure. Between 2004 and 2014 over 40 transaction decisions were taken, of which more than 25 contained the commitment to design a new compliance programme or to improve an existing one. This is impressive considering the fact that the law underlying the transaction procedure does not mention compliance programmes in particular. Therefore, the extensive presence of compliance programmes in transaction cases is a development that (largely) took place in practice. Presumably because of this extensive practice, the Autorité has grown rather critical in its evaluation of what can be considered an effective compliance programme.

> In 2007, so roughly six years after the Autorité was given the competence to settle cases under the transaction procedure, the Autorité investigated a cartel case concerning high voltage cables. In particular, this concerned a tender organised by Electricité de France, in the course of which the five largest suppliers of aerial and land-based high-voltage cables engaged in a highly sophisticated form of bid rigging using electronic applications to manipulate and monitor the bidding. Having previous experience with resolving bid rigging cases under the transaction procedure, the Autorité was not impressed when the five *large* companies committed themselves to implement (or improve upon) a compliance programme by focusing merely on a number of educational measures, such as handing out leaflets and organising an informational session to instruct employees about this particular infringement and the consequences thereof. The Autorité held with respect to these commitments that 'such commitments, even if they are not devoid of importance, are nevertheless not likely to make improvements, substantial and verifiable, to the operation of competitive

34 When a company already has a compliance programme in place, and it opts for a transaction procedure nonetheless, it is sufficient for the company to improve the current system. Framework Document Compliance Autorité 2012, para. 30, as was done in Le Conseil de la Concurrence, 07-D-40 (*Déchets Ménagers dans les Vosges*) and Autorité de la Concurrence, 09-D-24 (*France Télécom*).

35 See for instance Autorité de la Concurrence, 10-D-21 (*Neopost et Satas*), referring to the decision of Le Conseil de la Concurrence, 05-D-49 (*Neopost*).

markets affected by the practices'.[36] The Autorité disregarded the compliance initiatives and granted a 10% discount for non-contestation alone.

This example shows that the Autorité has become more demanding in terms of compliance programmes. Where the earlier compliance programmes established under the transaction procedure were rather short, focussing on educational measures and a declaration to be more careful in the future, the example above clearly shows that such 'minor-impact' commitments were not considered substantial enough to warrant a fine reduction. Also in later cases that offered less substantial compliance programmes, the Autorité decided to disregard the programmes as such and to treat the case as if no commitments had been offered.

However, when companies do agree to set up such a substantial, credible and verifiable compliance programme, the Autorité can reward this with a 10% fine discount under the transaction procedure. Additionally, compliance programmes that include the implementation of a whistle-blowing system can count on an additional 5% discount when offered in the course of a transaction procedure. The inclusion of a whistle-blowing system is a development that largely took place in practice.[37] Whistle-blowing systems (*procédures internes dite d'alerte*) facilitate employees to inform on their co-workers or superiors if they suspect a breach of competition law. A whistle-blowing system requires the involvement of a neutral person, such as a compliance officer. Sometimes companies already had these systems in place, but they were limited to internal misconduct (detrimental to the financial position of the company) or the violation of the rights of employees. Adding violations of competition law to the scope of the whistle-blowing systems was considered an innovation in France.[38]

2.3.2 *Application in a Fining Procedure*

Even though compliance programmes can lead to a fine reduction under the transaction procedure, the Autorité is careful towards the weighing of compliance programmes in fining decisions. Having a compliance programme in place at the time an infringement is committed is neither seen as a mitigating or an aggravating factor in the determination of the fine, as the proper functioning of compliance programmes is in the best interest of the companies themselves, and should therefore be their responsibility only.[39] In other words, the Autorité has stated that the existence of a compliance programme does not alter the reality of the infringement itself.[40] If companies have a compliance programme in place at the time the infringement is discovered, they are under a special responsibility to end the infringement immediately and – in case it concerns a cartel – to apply for leniency.[41]

36 Le Conseil de la Concurrence, 07-D-02 (*Élimination des Déchets en Seine-Maritime*).
37 See, most clearly, Autorité de la Concurrence, 11-D-02 (*Restauration des Monuments Historiques*), in which the companies received a 10%, 15% and 25% discount for their compliance programmes.
38 Le Conseil de la Concurrence, 07-D-21 (*Location-Entretien du Linge*), paras. 62 and 132.
39 See in particular Autorité de la Concurrence, 13-D-12 (*Commercialisation de Commodités Chimiques*).
40 Case law of the Cour d'Appel de Paris, no 2009/03532 (*Adecco France*). This is in line with the Court of Justice: CJEU, Case C-189/02 (*Danske Rørindustrie*). This viewpoint is repeated in the Framework Document Compliance Autorité 2012, paras. 23-26.
41 Framework Document Compliance Autorité 2012, paras. 27-28.

This starting point formulated by the Autorité gives rise to the question of whether or not this is only applicable in cartel cases – as the leniency only applies to the companies notifying a cartel.[42] Would the Autorité therefore be able to reward the existence of compliance programmes in abuse of dominance cases, or more procedural fines? Neither its practice nor its guidelines give a definitive answer. Another issue is the appraisal of compliance programmes that are implemented after an infringement is discovered. The Autorité seems to be willing to see the adoption or amelioration of compliance programmes as a mitigating circumstance in that respect, especially if existing programmes are reinforced on the points that (in the light of the infringement) have shown themselves not to suffice.[43]

The Autorité does not find it appropriate to take the intention to create a compliance programme into account in a regular fining decision, because the infringement might not have taken place if such initiatives had been developed earlier.

2.3.3 Application in Commitment Decisions

In France, compliance programmes do not play a major part in commitment decisions. Since 2004 the Autorité has taken no less than 58 commitment decisions, but compliance programmes have only been agreed to in three of them.[44] More often the commitments have an objective of adapting standard agreements, contracts or the trade association's codes of conduct. This could be explained by looking at the goals of commitment decisions: accelerating procedures in combination with restoring competition in the market.[45] It is possible that the cases suitable for being closed by a commitment decision are the cases in which relatively simple behavioural commitments remedy the competitive distortions better than a fully-fledged compliance programme.

In the cases in which a compliance programme had been agreed to, the Autorité's appraisal of the programmes was rather limited. In one case, the compliance programme had not even been mentioned in the press release or the summary, and in another case the programme was merely reviewed as 'adequate'. Only in the most recent case – which, admittedly, also contained the most extensive compliance programme – did the Autorité perform a more thorough review of the commitment, though it was rather strict on finding 'actual improvement' compared to the compliance programme that was already in place.[46]

---

42 See Leniency Notice Autorité 2015.

43 See Framework Document Compliance Autorité, para. 28: 'In the event that a company that has implemented a compliance programme fitting the good practices laid out above comes to discover on its own a misconduct that is not eligible to the leniency programme, before any inspection or investigation is conducted by a competition authority, the Autorité considers it is the undertaking's responsibility to cease and redress this misconduct immediately (e.g. by amending a strategy or contracts that could be considered an abuse of dominance or a anticompetitive vertical agreement). If the undertaking can prove, based on objective and verifiable evidence, that it has ceased and redressed the practice on its own volition before any inspection or investigation is conducted by a competition authority, such a circumstance may considered a mitigating circumstance in the event that the Autorité comes to handle the case and impose a penalty.'

44 These are Le Conseil de la Concurrence, 07-D-30 (*La Société TDF*), Autorité de la Concurrence, 10-D-29, (*Eco-Emballages et Valorplast*) and Autorité de la Concurrence, 12-D-22 (*PagesJaunes*).

45 Notice on Commitments Autorité 2009, paras. 7 and 8.

46 See in more detail: Autorité de la Concurrence, 12-D-22 (*PagesJaunes*).

3. PRACTICE OF THE UK CMA

The UK CMA is one of the more active competition authorities when it comes to promoting compliance with competition law and the implementation of compliance programmes by companies. It pursues a mix of guidance documents, corporate compliance overviews, examples of risk assessment and the publication of lessons learned from earlier competition cases. Apart from that, the UK CMA is one of the few competition authorities that reward (committed) compliance efforts with a fine discount in a fining or settlement procedure. In order to gain a more extensive impression of the UK CMA's approach towards promoting compliance, this section discusses the motivation for the UK CMA to engage in this activity and the guidance the UK CMA has given on the subject so far. Next, the requirements for effective compliance programmes are discussed, with a special focus on the risk-based approach that the UK CMA propagates. Lastly, the interplay between compliance programmes and other enforcement instruments (such as fines and settlements) is discussed.

3.1 General Approach to Compliance Initiatives

The UK CMA believes that promoting a culture of compliance is essential to achieving the greater goal of competition law enforcement: ensuring vibrant competition that delivers benefits to consumers and economic growth.[47] Even though the UK CMA underlines that fines are an effective deterrent against infringements, it understands that in order to get better results, different drivers of non-compliance need to be targeted as well.[48] In order to map these drivers, the UK CMA conducted a research about drivers of compliance and non-compliance and performed a survey of competition law compliance in general. These studies show that still a large percentage of businesses are partly or largely unaware of what constitutes a breach of competition law.[49] The UK CMA recognizes that, as a competition authority, it is particularly well placed to address this problem by pursuing advocacy and promoting compliance.[50] Therefore, the UK CMA places high importance on assisting businesses in achieving compliance.[51] However, despite its focus on the importance of compliance, the UK CMA stresses that the deterrent effect of its interventions remains of the utmost importance.[52] In the first place, naturally, to deter companies from infringing the law again or to deter other companies from infringing the law as well. Secondly, however, the UK CMA recognizes

47 This is consistent with the CMA's mission statement: 'The CMA makes markets work well in the interests of consumers, businesses and the economy,' quoted in Strategy CMA 2014, p. 1. This statement held true for the OFT as well, see for instance Speech Collins 2011, p. 1.

48 This is what the CMA believes to be a part of effective enforcement. See Strategy CMA 2014, para. 2.19. In the era of the OFT, Chairman Collins pursued the same goal. See: Speech by Philip Collins in 2011, p. 2.

49 This, of course, also depends on the size of the business. The studies show that larger companies are more concerned with competition rules than smaller companies. See Synovate Compliance Survey 2011, para. 1.3 and OFT Drivers of Compliance 2010. See for an example of similar research in the United States: Sokol 2012.

50 According to its contribution to an OECD round-table conference, the CMA (then the OFT) is keen to help businesses achieve compliance. OECD Compliance 2012, p. 181.

51 Synovate Compliance Survey 2011, para. 2.2, also: Speech by David Currie in 2014.

52 Speech by Alex Chisholm in 2014 and Speech by David Currie in 2014.

that a successful compliance strategy requires more than a box-ticking approach; it needs companies to embed a 'fair competition mind-set' into their corporate culture.[53] One of the ways to achieve this is to maximize the visibility and effectiveness of enforcement work. The stance taken by the UK CMA shows that it considers compliance programmes as a means to a bigger end: promoting and disseminating a compliance culture across businesses. In that sense, the UK CMA views compliance programmes as an addition to its enforcement toolkit, as it recognizes that a deterrent effect alone will not create this desired compliance culture. For the UK CMA, the focus is not on using compliance programmes as monitoring tools,[54] even though this would fit well within its intended broader approach to gathering and analysing intelligence.[55]

The aim of promoting compliance with competition law is perceived as important by the UK CMA, and this is mentioned repeatedly in the UK CMA's annual reports. In these reports, concrete efforts to improve compliance are communicated as well. Examples of these efforts are compliance talks (such as at the Confederation of British Industry meetings[56]), the setting up of a working group on compliance,[57] and collaboration with other media outlets.[58] The UK CMA does not just mention successes in the promotion of compliance, but recognizes and communicates its difficulties as well. In 2007, for instance, the chairman of the former Office of Fair Trading acknowledged that the authority had difficulties in getting competition law compliance on the company boards' agendas.[59] For that reason, a working group was set up in collaboration with business representatives, and an extensive research on the drivers of compliance was carried out.[60] This research indicated, amongst other things, that businesses were in need of more guidance on competition law and compliance.[61] Acknowledging the importance of the companies' request, the UK CMA published various compliance guidance documents, created a series of short films on competition law and dedicated a specific section of its website to compliance.[62] In order to measure the effectiveness of these actions, a baseline assessment on corporate compliance was commissioned in 2011.[63] Additionally, promoting compliance programmes has been the main topic of numerous public speeches.[64]

---

53 Speech by Alex Chisholm in 2014, p. 10.

54 As is suggested by Abrantes-Metz & Sokol 2013b.

55 Strategy CMA 2014, section 2.19.

56 Office of Fair Trading, Annual Report and Resource Accounts 2008-2009, p. 44.

57 Office of Fair Trading, Annual Report and Resource Accounts 2009-2010, p. 8.

58 Such as collaboration with business magazines. See for instance the OFT's (now the CMA's) work in the online business magazine 'The Director': Office of Fair Trading, Annual Report and Resource Accounts 2012-2013, p. 33.

59 Office of Fair Trading, Annual Report and Resource Accounts 2007-2008, p. 7.

60 This was OFT Drivers of Compliance 2010. The working group on compliance consisted of OFT employees, in collaboration with the Confederation of British Industry, the Institute of Directors, the Trade Association Forum and the Federation of Small Businesses.

61 OFT Drivers of Compliance 2010, para. 5.29 in particular. Although, at the time, a quick guide on competition law compliance was already available. OFT Compliance Quick Guide 2009.

62 See for instance: OFT Wheel of Compliance 2011, OFT Guidance Company Directors 2011, OFT Business Compliance Guidance 2011, and the films available at the former OFT's Corporate YouTube channel: Understanding Competition Law, available here: https://www.youtube.com/user/OFTcorporate#p/u/10/ACA9vdlNqek.

63 Synovate Compliance Study 2011.

64 The speeches are the following: Speech by Phillip Collins in 2010, Speech by Philip Collins in 2011, Speech by John Fingleton in 2011, Speech by Alex Chisholm in 2014.

Apart from publishing about compliance, the UK CMA has placed a great deal of emphasis on competition law guidance. Since 2004, it has published a tremendous amount of guidance materials, including quick guides on substantive issues, explanations about the application of the rules in specific sectors and guidance on procedures at the UK CMA.[65] For giving guidance in specific cases, the UK CMA could use the so-called short-form opinion, though this process is only available for a limited number of cases per year in order to avoid a return to a notification regime.[66] Additionally, the UK CMA has announced a new way of promoting compliance in the future, by way of publishing 'lessons learned' about its most important cases.[67] Companies which are active on the same market as the violators will receive a briefing on the case and the dangers of infringing competition law. After that, this briefing is published online as well.

The way the UK CMA communicates about competition law and compliance supports the conclusion that promoting compliance is well embedded in the UK CMA's work. Particularly the developments after the research on drivers for compliance indicate that the UK CMA recognizes the difficulties companies might have, and that it is willing to dedicate resources to helping them along. Giving guidance about compliance and competition rules seems to be an important part of the UK CMA's communication strategy, and remains so, as the UK CMA has committed itself to adding to its existing body of guidance and research.[68]

3.2 Requirements for Compliance Programmes

In order to inform businesses about the adequate steps required to ensure compliance, the UK CMA takes a risk-based approach that allows for a compliance programme to be tailored to company-specific risks and problems.[69] This is in contrast to a rule-based approach, which, according to the UK CMA, could evoke box-ticking behaviour on the part of the company.[70] As explained above, the UK CMA uses guidance documents to explain the use of compliance programmes and their treatment by the UK CMA. However, it is stressed that the steps mentioned in these documents are not compulsory; it is up to the companies involved to transform these suggestions into a compliance programme that fits the competition law risks of the company.[71]

The core of the UK CMA's approach to compliance is commitment, in the sense of an unequivocal managerial commitment. Senior managers and directors are deemed to be key to promoting a compliance culture top-down, and their importance is underlined by the fact that they may face a disqualification order in case of an infringement.[72] The

65 All competition guidance is available at the CMA's webiste, for which it has dedicated a specific section. This is accessible here: https://www.gov.uk/government/collections/CMA-ca98-and-cartels-guidance.
66 See CMA Short-form Guidance 2014, para. 1.2.
67 Speech by Alex Chisholm in 2014, p. 11. This has happened in one case so far. See Competition and Markets Authority, Cartel Enforcement: Lessons from the Commercial Vehicles Case, Competition Law Compliance Briefing, June 2014.
68 Speech Alex Chisholm 2014, p. 11.
69 OFT Business Compliance Guidance 2011, paras. 1.13-1.14.
70 OFT Drivers of Compliance 2010, para. 1.5.
71 OFT Business Compliance Guidance 2011, para. 1.2.
72 Competition Disqualification Order provisions (9A-9E) of the Company Directors Disqualification Act 1986, as amended by the Enterprise Act 2002.

Competition Disqualification Order (CDO) could be seen as a direct incentive for directors to ensure compliance with the law, for if adequate steps to ensure compliance have been taken, no CDO will be imposed.[73] In this respect, the UK CMA explains what it perceives to be adequate steps, for instance showing a commitment at all levels of the management chain, giving one senior officer the role of driving compliance or challenging the effectiveness of any compliance measures already taken.[74] After dealing with commitment, the UK CMA proceeds to outlining its risk-based approach to compliance, which consists of risk identification, risk assessment, risk mitigation and review.

With regard to risk identification, the UK CMA urges companies to look closely at their business models, in order to indicate competition law compliance risks. To that end, it provides a list of 'model questions' that can be used to identify signs of cartels, other anti-competitive agreements and abuse of dominance.[75] This list is not exhaustive, in the sense that the UK CMA expects companies to tailor the risk identification around their own business models. After risk identification, risks need to be assessed before addressing them. In some guidance documents, the UK CMA promotes a system in which the level of the staff involved determines the level of competition risk. The involvement of senior management constitutes a high-risk profile, middle management medium risk and lower staff a lower risk profile.[76] In other documents, the UK CMA urges companies to focus on the character of the employees involved in the risks. Employees who are in touch with competitors or fulfil marketing and sales roles are more likely to be a higher risk.[77] Apart from that, the UK CMA points towards the reputational risks connected to a competition law investigation.[78] For addressing competition risks – risk mitigation – the UK CMA proposes two methods: training and reinforcing compliance culture through policies and procedures. The intensity of the training depends on the level of risk determined, while the policies and procedures must make sure that there are clear ways of dealing with cartel risks and infringements, the people committing them and those reporting them.[79] The UK CMA makes various suggestions as to how companies can achieve this.[80] Finally, these steps must be reviewed occasionally. Some companies might choose to do this annually, but the UK CMA advocates a review of a

73 OFT Guidance Company Directors 2011, paras. 1.5 and 2.8. 'Company directors will face a disqualification order in case the director's conduct contributed to the breach of competition law, the director had reasonable grounds to suspect an infringement but did nothing to prevent it or in case the director did not know of the infringement, but ought to have known that the company's behaviour constituted a breach' (Quote from OFT Guidance Company Directors, para. 5.1).

74 More examples in OFT Business Compliance Guidance 2011, para. 2.2 and CMA Risk Guide 2014, p. 19.

75 Such as 'Are you at risk because your employees lack awareness and knowledge about competition law, the behaviours it covers and the associated risks?' 'Do your employees seem to have information about your competitors' prices or business plans?' 'Are your customers also your competitors?' and 'Do you ever work in partnership with your competitors?' See CMA Risk Guide 2014, p. 22.

76 OFT Business Compliance Guidance 2011, paras. 4.4-4.6.

77 CMA Risk Guide 2014, p. 23.

78 Speech by David Currie in 2014.

79 OFT Business Compliance Guidance 2011, paras. 5.3, 5.5, 5.6 and 5.12.

80 For instance: 'implementing a system where all contact with competitors is logged', 'establishing a system so that employees can get advice before action (for example, legal advice on a contract)' or 'making anti-competitive behaviour a disciplinary matter in employment contracts and ensuring that it is covered in the company's disciplinary policy'. See CMA Risk Guide 2014, p. 25.

compliance programme at least when there has been an infringement, an unidentified risk, a new business strategy or a merger or takeover.[81]

3.3 Application in Practice

The guidance given by the UK CMA shows that it has a clear view of what it perceives to be adequate steps to ensure compliance, and has communicated this on a broad scale. However, apart from publishing guidance documents, addressing the topic in speeches or otherwise engaging in promotion, the UK CMA has dealt with compliance programmes in some of its enforcement procedures as well. In fact, the UK CMA is one of the few competition authorities that consider an effective compliance programme as a mitigating factor in the determination of a fine. Therefore, this section discusses the UK CMA's approach to compliance programmes in fining decisions to some extent, after which the role of compliance in commitment decisions, early resolution procedures and markets work is outlined.

3.3.1 Application in Fining Decisions

Despite the clear picture which the UK CMA has of its own role in promoting compliance, the implementation of a compliance programme by businesses is considered to be a suggested, and not a mandatory practice.[82] If companies do follow this suggested practice, the UK CMA may reward this effort with a fine discount of up to 10%. This discount can be granted if the companies under investigation commit themselves to implementing a compliance programme for the future, but also if they already had a compliance programme in place, provided that they will take appropriate steps to ensure compliance in the future. The UK CMA generally does not consider failed compliance programmes to be an aggravating factor in determining the amount of the fine, though it would be possible to do so if a company had intentionally used the programme to conceal the infringement.[83]

The UK CMA's decisional practice supports these starting points. In fact, out of the 21 fining decisions published since 2004, compliance programmes played a part in nine of them.[84] Given that no monetary penalty was imposed in the other three cases, it can be said that compliance efforts – if undertaken by companies – figure prominently in the UK CMA's fining decisions. However, not all companies involved in these

81 OFT Business Compliance Guidance 2011, para. 6.3.

82 OFT Business Compliance Guidance 2011, section 1.2. This document is acknowledged by the CMA as well.

83 Starting points taken from OFT Business Compliance Guidance 2011, paras. 7.1-7.5.

84 The cases in question are the following: Office of Fair Trading, Case CP/0001-02 (*Flat Roofing West Midlands*), Office of Fair Trading, Case CE/2464-03 (*Desiccant*), Office of Fair Trading, Case CE-1777-02 (*Flat Roofing North East England*), Office of Fair Trading, Case CE/1925-02 (*Flat Roofing Scotland*), Office of Fair Trading, Case CE/3344-03 (*Single Ply Roofing Scotland*), Office of Fair Trading, Joined Cases CE/3123-03 & CE/3645-03 (*Car Park Roofing*), Office of Fair Trading, Case CA98/06/2006 (*Spacer Bars*), Office of Fair Trading, Case CE/3861-04 (*Stock Check Pads*), Office of Fair Trading, Case CE/7510-06 (*Construction Recruitment Forum*). Before 2004, there were another three cases in which a discount was granted for compliance efforts: Office of Fair Trading, Case CA98/9/2002, (*Arriva/First Group*), Office of Fair Trading, Case CA98/18/2002 (*Hasbro and Distributors*), Office of Fair Trading, Case CA98/6/2003 (*Replica Kit*), CA98/8/2003 (*Toys*).

decisions opted to commit themselves to implementing a compliance programme. For improving an existing compliance programme or implementing a new programme if none existed the UK CMA typically grants a fine reduction of no more than 10%. The exact percentage is considered confidential, although in most cases a margin of between 5 and 10% is mentioned.[85] However, a fine discount for compliance efforts will typically only be granted once. If the same company is active in a similar market, for instance a different geographical market, the UK CMA does not consider it appropriate to reward the same compliance efforts twice.[86]

The early cases are somewhat more extensive in describing the steps taken by companies to qualify for the discount. In most of these cases a discount is granted if a company has taken remedial action at the time of the decision, consisting of committing itself to a compliance programme and educating staff and management with a compliance handbook or leaflet. Furthermore, some companies have conducted an internal investigation and have committed themselves to take disciplinary action in the future.

> One fining decision in which compliance initiatives played a role was the 2004 *Desiccant* case. This case concerned five companies involved in a cartel that enforced minimum prices for the desiccant (a chemical drying agent) produced by one of them. The UK CMA investigated the case and imposed a fine, while three companies involved in the infringement benefited from the application of the leniency procedure. Two companies, one of which was a leniency applicant, explicitly committed themselves to taking compliance initiatives in order to prevent future infringements. The first company acknowledged 'that the conduct which took place highlighted deficiencies in the compliance programme',[87] and ensured that it would take disciplinary actions against those responsible. The other company concentrated more on educational measures and issued a compliance booklet for all of its employees. The fine reduction granted to these companies remained confidential.

This case illustrates the range of compliance initiatives that can be considered as mitigating circumstances and thus warrants a fine reduction in the course of a formal investigation. Unfortunately it cannot be derived from decisional practice whether more extensive compliance efforts are generally reflected in more extensive discounts, because the exact fine discount remains confidential. Even more so, in later cases the UK CMA tends to refer to its standardized phrase only when discussing the compliance efforts undertaken by the companies: 'the company has demonstrated that it has taken adequate steps to ensure compliance.' This gives little insight into which steps need to be taken in order to qualify as 'adequate'.

---

85 Except for the early resolution case of Reckitt-Benckiser, in which it was clear that the company received a 5% discount only. See Office of Fair Trading, Case CA98/02/2011 (*Reckitt Benckiser*), para. 8.51. This case is also discussed at length in Chapter 4, para. 3.

86 See Office of Fair Trading, Joined Cases CE/3123-03 & CE/3645-03 (*Car Park Roofing*), paras. 786 and 883.

87 Office of Fair Trading, Case CA98/08/2004 (*Desiccant*), para. 388.

3.3.2 *Application in Negotiated Procedures and Markets Work*

As for negotiated procedures, compliance efforts are not taken into account in commitment decisions, but almost always play a part in settlement decisions.[88] Out of the eight settlements since 2004, compliance has been mentioned in five of them: four times as a mitigating factor because of a commitment on the part of the company, and once as a remedy for which no specific discount was granted.[89] The process of granting a discount in early resolution procedures is similar to the fining procedure depicted above.

With regard to the UK CMA's markets work regime, compliance programmes have never been recommended or imposed in a phase 1 study or a phase 2 investigation. This finding is particularly relevant for the market investigations as performed by the former Competition Commission, as behavioural or monitoring remedies could be subsequently imposed.[90] Undoubtedly, the set-up of a compliance programme could constitute one of these remedies. However, in the Competition Commission's investigations, compliance programmes have never been imposed as such. There are two possible explanations for this. First of all, it is presumed that compliance programmes function best if the company involved implements them voluntarily and is fully committed to the execution of the programme. In markets work, the remedies are usually imposed top-down, which could mean that a compliance programme would have less chance of success. The other reason for the absence of compliance programmes in markets work is that the aim of market investigations is to address adverse effects on competition in an entire (part of a) market. This is a different starting point from finding an infringement within a single company. The remedies imposed after an investigation address these broader effects in particular. Corporate compliance programmes might just not fit the goal of these investigations.

4. PRACTICE OF THE ACM

Of the three competition authorities under review in this thesis, the ACM has been the most silent on the topic of compliance. The topic has been the subject of debate in professional conferences and the ACM has spoken out about compliance in speeches, but has not – as yet – published guidelines explicating the ACM's evaluation of compliance programmes and the role they can play in formal procedures. This section strives to answer these questions nonetheless by looking at the ACM's practice and press outings on the matter. First, the ACM's general approach to compliance is explained by looking at the ACM's predecessors, the NMa and the OPTA, and by carefully outlining

88 The settlement cases in which compliance efforts were taken into account are: Office of Fair Trading, Case CA98/05/2006 (*Independent Fee Paying Schools*), Office of Fair Trading, Case CE/2596-03 (*Tobacco*), Office of Fair Trading, Case CA98/03/2011 (*Dairy*), Office of Fair Trading, Case CA98/02/2011 (*Reckitt Benckiser*) and Competition and Markets Authority, Case CE/9827/13 *(Property Sales and Lettings)*. Although it was not formally a settlement, the fast-track procedure in the construction sector also took compliance efforts into consideration: Decision of the Office of Fair Trading, no. CA98/02/2009, Bid rigging in the construction industry in England (Case CE/4327-04), 21 September 2009.

89 In this case the fine had already been reduced because of the charitable character of the companies. See Office of Fair Trading, Case CA98/05/2006 (*Independent Fee Paying Schools*).

90 CC Market Investigations 2013, para. 4.15.

the ACM's current opinion on the matter. After that, the requirements for an effective compliance programme are discussed, which are based on the (scarce) examples in ACM practice and its more enlightening speeches. Lastly, the interplay between compliance programmes and other instruments is discussed, with a focus on fining and commitment decisions in particular.

4.1 General Approach to Compliance Initiatives

The ACM's attitude towards compliance programmes can best be described as moderately positive, as the ACM recognizes the importance of compliance, but places the responsibility for devising compliance systems with the companies. Even though compliance initiatives are said to be welcomed,[91] the ACM has not yet put the stimulation of compliance programmes into practice.

The ACM's current approach to compliance programmes can be explained by looking at its practice in the past. The ACM's predecessor in competition law (the NMa) only scarcely underlined the importance of compliance in its publications and annual reports. In general, the NMa used to be quite hesitant about giving guidance on the contents of what it believed to be a good compliance programme. On the other hand, the ACM's predecessor in telecom regulation (the OPTA) used to be more active in stimulating compliance programmes, an activity which it labelled 'compliance assistance'. In its vision document on enforcement, the OPTA stressed the importance of compliance programmes in the high trust approach that it pursued. In that sense, compliance assistance was not intended as a substitute for enforcement, but as a means to developing a more efficient style of supervision.[92] The OPTA's attention to compliance programmes has clearly had its effect on the ACM. In recent publications, the Dutch authority seems to have become a little more forward on the subject.[93] The objective of stimulating desirable behaviour in companies is also a central topic in a vision document that the ACM devised in collaboration with other market supervisors. This document states that stimulating good behaviour in companies is an important aspect of a supervisor's job. Even though it is not clearly explained what this means for a supervisor, it is considered important to empower businesses in their self-learning abilities. This could entail the stimulation of well-designed compliance programmes.[94]

The ACM has no legal obligation to engage in or actively promote businesses' compliance programmes. There is no model of what compliance programmes should look like, and no regulation on what the ACM is supposed to do with them. Still, the ACM views it as part of its task to promote the use of compliance programmes in general, and sometimes even in specific cases.[95] It derives this competence from its vision on enforcement ('using all instruments and approaches necessary to solve a

91 Nederlandse Mededingingsautoriteit Agenda 2006, p. 8.
92 OPTA, Visie op Toezicht en Handhaving, 2008, p. 1.
93 In an interesting speech, the ACM chairman – who incidentally was also the chairman of the OPTA – has shed more light upon the importance and the content of compliance programmes, referring to international toolkits to illustrate the idea of a *bona fide* compliance programme. See Speech by Fonteijn in 2014.
94 Criteria for good supervision, derived from: Visie Markttoezichthoudersberaad: Criteria voor Goed Toezicht, ACM, AFM, CBP, DNB, Kansspelautoriteit en NZa, particularly section B1.
95 Speech by Fonteijn in 2014. This speech is commented upon by Elkerbout 2014.

problem') and its mission statement ('creating opportunities and choices for businesses and consumers').[96] This strategy allows the ACM to use its entire toolkit to address problems in a given market and to provide more clarity about the way competition law applies to any problems identified. More specifically, the ACM can act *ex ante* by helping to prevent competitive problems and misunderstandings about the application of the law and it can review *ex post* whether companies have indeed been compliant with competition law. With regard to the *ex-ante* assistance, the ACM has been quite active in issuing guidance documents regarding the application of competition law in general, or vision documents regarding the application of competition law to specific markets.[97] In some cases, the ACM has even issued informal opinions about the compatibility of certain specific agreements (or other proposed behaviour) with competition law.[98] In terms of an *ex-post* review of compliance, the ACM is of the opinion that companies can benefit from the publication of fining and commitment decisions for which reason the ACM strives for transparent reasoning and decision-making.[99] Between *ex-ante* assistance and *ex-post* review, the ACM holds the companies responsible for a proper translation of the rules into a compliance programme.[100] The main reason behind this – according to the ACM – is that every sector has different risks, problems, cultures and products upon which the ACM could not anticipate in a general guidance document. The focus in the ACM's publications regarding compliance programmes is therefore on the benefits they may give rise to for companies: a clear view of competition risks, the prevention of infringements and the prevention of reputational damage.[101]

The ACM's hesitance towards active compliance assistance is reflected in the opinions of its staff. The majority of staff members stress that compliance programmes can be very valuable for companies, but that it is their own responsibility to comply with the law in the end. The dangers of a box-ticking or window-dressing approach to compliance are underlined frequently. On the other hand, some staff members recognize the benefits of compliance programmes for a competition authority – particularly in the form of being able to keep tabs on certain markets.[102]

4.2 Requirements for Compliance Programmes

According to the ACM compliance programmes have to be tailored to each company individually. For that reason, the ACM will not give prior approval to compliance programmes.[103] However, in some cases compliance programmes have played a role in

96 The ACM advocates a problem-solving strategy, based on the work of Malcolm Sparrow, see Strategy ACM 2013.
97 For instance healthcare or sustainability initiatives. See for instance: Autoriteit Consument en Markt, Visiedocument Mededinging en Duurzaamheid, 2014 and Nederlandse Mededingingsautoriteit, Richtsnoeren voor de Zorgsector, Maart 2010.
98 See Chapter 6, section 4.
99 Speech Fonteijn 2015, p. 8.
100 See, for instance, former chairman Pieter Kalbfleish in the director's statement of the NMa's (now ACM's) Annual Report of 2006. But also both speeches by Chris Fonteijn (Fonteijn 2014 and Fonteijn 2015).
101 Speech by Fonteijn in 2014, closing remarks. Speech by Fonteijn in 2015.
102 The findings in this section are based on a series of semi-structured interviews at the ACM, taking place between January and March 2014. This methodology is explained in Annex I – Methodology.
103 Speech by Fonteijn in 2014.

the ACM's evaluation of a given case, or were committed to in the course of another procedure.[104] These compliance programmes, together with the ACM's press outings on the subject, give a first impression of what the ACM considers to be effective compliance programmes.[105]

The ACM stresses that competition law is a complex matter, which means that drafting some basic code of conduct or making a list of good and bad behaviour will simply not suffice.[106] Instead, the ACM believes that the effectiveness of compliance programmes is determined to a large extent by the tone at the top. A starting point for showing the tone at the top is a firm declaration of compliance from the company's management, but compliance has to be rooted in the business model as well.[107] In the absence of such a commitment, it is unlikely that other employees would comply. However, it is not just the management that needs to be involved, all employees who could come into contact with competition law have to participate actively in the compliance programme and they must receive permanent training. For that reason, the company must provide a clear explanation of what constitutes illegal behaviour, along with practical examples that illustrate this behaviour in the various branches of the company. Employees receiving this training must declare their compliance on a regular basis, not just when signing a declaration of integrity at the beginning of the introduction of the programme. In other words, compliance must have the company's continuous attention. Furthermore, the systems established to safeguard compliance need to be monitored or audited. At this point, the ACM has referred to a process of risk management, comprising of comprehensive risk identification, thorough risk assessment, measures to ensure risk mitigation and a continuous review of this process.[108] Finally, the compliance programme must contain a protocol for the handling of infringements, and must be updated on a regular basis.

The limited number of publicly available examples in which the ACM granted compliance assistance contain most of these elements, but none of the compliance programmes are particularly extensive or descriptive.[109] However, there is an example of a compliance programme concluded by one of the ACM's predecessors that not only illustrates the elements of an effective compliance programme in the view of the ACM – as explained above, but also shows how thorough and extensive a compliance programme can be.

> In 2008, the ACM's predecessor in telecommunications regulation (the OPTA) concluded a 'Memorandum of Compliance' with the incumbent KPN.[110] This compliance programme was established in a regulatory setting, and was drafted in

104 These cases are further discussed in section 4.3 below.

105 In Speech Fonteijn 2014, the chairman of the ACM referred to the ICC Compliance Toolkit 2013 and the United Kingdom's Wheel of Compliance 2011.

106 Speech Fonteijn 2015.

107 The ACM seems to hint here at the incentives given to employees (generating revenue or complying with the rules), but this is not explicated any further. See Speech by Fonteijn in 2015, p. 5.

108 OFT Wheel of Compliance 2011.

109 KNMP Compliance programme (2011), Compliance rules of the association of insurance companies (Verbond van Verzekeraars, 2004).

110 Memorandum of Compliance between KPN and ACM, renewed version of June 2014, available in Dutch here: https://www.acm.nl/nl/publicaties/publicatie/13072/Vernieuwd-Compliance-Handvest-KPN-en-ACM/.

order to address the many disagreements on the interpretation of the relevant laws.[111] The implementation of the Memorandum of Compliance meant the end of a period of closer supervision (*verscherpt toezicht*) upon KPN, which it was subjected to in the aftermath of a large investigation into a discriminatory discount practice in 2005.[112] With the aid of the Memorandum, KPN and OPTA aimed to strive for a more productive relationship, in which KPN would come forward with interpretational questions and possible infringements, and the OPTA would keep 'an open mind' concerning the violations reported to it. In promoting compliance within KPN, the Memorandum is quite detailed and has far-reaching consequences for KPN's business structure. For instance, through this Memorandum, KPN commits itself to the introduction of a whistle-blowing system, efforts to achieve a change of culture within KPN and the obligation to perform an internal or external audit annually. The Memorandum includes performance indicators, in order to measure whether the measures taken have yielded results. Moreover, the Memorandum allows for the ACM to keep tabs on business processes and to keep KPN aware of its responsibilities under the relevant laws. The Memorandum was adopted by the ACM after the merger, and updated accordingly.

Despite the fact that this is an example of a far-reaching compliance programme, the ACM has underlined that the adoption of this programme was specific to the regulatory relationship between KPN and the telecommunications department of the ACM. The specific reporting aspects of the compliance programme are therefore not likely to be expected in competition law compliance programmes. Moreover, the ACM has stated that – in general – it does not conclude compliance agreements with companies in 'regular' supervisory relationships.[113]

4.3 Application in Practice

The ACM takes a neutral stance towards compliance programmes: a company should neither be rewarded nor punished by the ACM for having such a programme in place. Instead, the ACM holds that any fine a company may incur will be reduced as a consequence of an effective compliance programme, as having such a programme in place will lead to the early discovery of an infringement. For the early reporters (those who find an infringement and report it to the ACM voluntarily) there is leniency, which can lead to a 100% fine reduction. For others, who have detected an infringement and have ended it quickly, there are benefits to be reaped from reporting a short-lived infringement instead of a long-lasting one. Nevertheless, the ACM's Fining Guidelines do not completely exclude a compliance programme from the realm of fine mitigation or aggravation. When a company uses a compliance programme for window-dressing purposes only, an increase in the fine is possible – at least in theory.[114] However, when

111 Annual Report OPTA 2008, p. 15.

112 Rapport van de toezichthoudend ambtenaar van de Onafhankelijke Post en Telecommunicatie Autoriteit, als bedoeld in artikel 15.8 van de Telecomunicatiewet, 18 november 2005, available online: https://www.acm.nl/nl/publicaties/publicatie/9086/Definitieve-openbare-versie-van-het-boeterapport-van-het-zogenoemde-kortingenonderzoek/.

113 Meaning the relationship that competition authorities have with market parties under generic market law (competition law). See Speech by Fonteijn in 2015, p. 10.

114 This is not merely theory, as the predecessor of the ACM's telecom branch (OPTA) had once increased a fine on KPN, which had a Memorandum of Compliance in place. In an interim procedure, this reasoning

a compliance programme is a basis for proactive participation with the procedure, fine mitigation must be possible as well.[115] This section discusses an alteration of the fine because of compliance, the role of compliance programmes in commitment decisions and a number of compliance programmes that have been initiated after ACM investigations.

4.3.1 Application in Fining Decisions

As explained above, the ACM generally does not take compliance programmes into account when determining the amount of the fine. However, a well-functioning compliance programme could be regarded as a form of cooperation and therefore a mitigating factor, while window-dressing could be seen as an aggravating factor. In practice, the ACM has mentioned these possibilities only occasionally. For instance in 2004, it explicitly rejected an argument in favour of a fine discount for compliance. In this given case, one of the companies under scrutiny held that its fine should be reduced because of the compliance efforts it undertook.[116]

> This case concerned four bike producers in the Netherlands that had implemented a system to collect market information and had organised meetings about their pricing policies back in 2001. These four companies held a joint market share of more than 75% of the Dutch market. For that reason, the ACM considered the concerted practice to be a very serious agreement and imposed a fine of €12 million upon the companies involved. In the course of the investigation, one of the companies implemented a compliance programme aimed at preventing similar systems and meetings for the future. With regard to this compliance programme, the ACM held that in order to qualify for a fine mitigation 'it has to concern a previously implemented, well functioning and sufficiently effective monitoring system with stringent internal procedures that stimulate compliance with competition rules. Apart from that, no high-level staff should have been involved in the infringement.'

The ACM has never communicated its viewpoint regarding a fine mitigation as clearly since then. In fact, this case seems to hint at a possibility to grant fine reductions if a 'rogue employee' was involved in the infringement despite the existence of an effective compliance programme. However, the only case in which the ACM reaffirmed its viewpoint regarding fine mitigation for compliance efforts concerned a case in which the company involved committed itself to a compliance programme only after the imposition of the fine, causing the ACM to dismiss the argumentation concerning a fine discount as well.[117] On a different note, in the 2004-2006 construction cases, a fast-track procedure was devised in which companies could receive fine discounts of up to 15% for a non-contestation of the facts and additional compliance efforts.[118] Unfortunately, the calculation of the fines in these cases is confidential, so there is no way of knowing

---

was untouched. See Rechtbank Rotterdam, ECLI:NL:RBROT:2013:8216 (*KPN v OPTA*). In competition law, such a fine increase has not yet been imposed.

115 ACM Fining Guidelines, Articles 3.13 and 3.15.

116 Nederlandse Mededingingsautoriteit, Case 1615 (*Gazelle*), para. 235.

117 Nederlandse Mededingingsautoriteit, Case 103661/288 (*Greenchoice*), para. V.8.

118 See Chapter 4, section 4.4.1 above and in more detail Gerbrandy & Lachnit 2013, pp. 203-231.

what kind of efforts led to what discount. Presumably, due to the sheer number of cases, non-contestation was considered of overriding importance (also in terms of fine discounts), but the ACM repeatedly underlined the importance of compliance in this sector afterwards.[119]

An example of how compliance could increase the fine is found in a case regarding telecom regulation and the incumbent KPN. This telecom company had signed a Memorandum of Compliance with the ACM, but neglected its responsibilities as an incumbent nevertheless. When the infringement was discovered, the ACM chose to increase the fine, as it feared that not sanctioning a breach of the Memorandum would lead to it being further disregarded.[120] This case is the only instance in which an ineffective compliance programme has indeed amounted to a fine increase, and a similar case has not yet presented itself in competition law.

4.3.2 Application in Commitment Decisions

Even though there is little attention to compliance programmes in regular fining decisions, the ACM seems to be more inclined to take them into account in commitment decisions. In these decisions (in which no infringement is declared, but companies offer commitments to remedy illicit behaviour[121]) compliance programmes can be offered as commitments, possibly increasing the future preventive effect of the decision. In the Netherlands, where 12 commitment decisions have been taken since the introduction of the instrument in 2008, three decisions contain specific compliance commitments.[122] In the other commitment decisions, mostly other behavioural remedies were offered that could better remedy the competition concerns in question.

> One of the commitment decisions in which a compliance programme was included was the 2012 *General practitioners* case. In this case, the professional organisation for general practitioners (*Landelijke Huisartsenvereniging,* or *LHV*) had engaged in issuing advice to its members in the course of contract negotiations with health insurance companies. This advice was experienced as binding by the general practitioners involved and could have a negative effect on competition. Because of the nature of the case and the constructive attitude (*sic*[123]) of the LHV, the ACM opted to deal with this case by means of a commitment decision. One of the commitments was to implement a compliance programme with the following elements. The LHV would have to commission a competition law expert to draft a manual about competition law compliance and this expert would have to give a seminar on competition law to members in high-risk categories (meaning that it would be likely for them to come into contact with the restriction that competition law imposes on their actions). Apart from that, the LHV would have to appoint a compliance officer and design

119 Making the construction sector a priority in 2006. Nederlandse Mededingingsautoriteit, Agenda 2006.

120 Onafhankelijke Post en Telecommuncatieautoriteit, Case 11.0183.29 (*OT2010*), paras. 155-158, 182. In an interim procedure, this reasoning was untouched. See Rechtbank Rotterdam, ECLI:NL:RBROT:2013:8216 (*KPN v OPTA*).

121 Article 49a *Mededingingsawet* and Regulation 1/2003, Article 9.

122 Nederlandse Mededingingsautoriteit, Case 7191 (*Landelijke Huisartsenvereniging)*, Nederlandse Mededingingsautoriteit, Case 7138 (*Thuiszorg Midden-Brabant*) and Autoriteit Consument en Markt, Case 13.0612.53 (*Mobiele Operators*).

123 Press release ACM, 'NMa zet samen met LHV nieuwe stappen in huisartsenzorg', 15 October 2012.

> a monitoring system that facilitated the reporting of possible infringements to this officer. Lastly, the LHV would have to report back to the ACM on the execution of this compliance programme once a year.[124]

As is illustrated by the example above, the commitment decisions that mention compliance programmes have in common that the companies have offered to report on their compliance efforts annually. The ACM held that this contributed to the verifiability of the commitments, which is a prerequisite for taking a commitment decision over a regular fining decision.[125] Apart from that, the ACM's practice seems to be in line with the indicators for a successful compliance programme established above. All of the companies involved in the commitment decisions still have their committed compliance programmes in place.[126] None of the companies involved in the other eight cases have given public attention to the question of whether or not they have set up a compliance programme.

4.3.3 Other Instruments

The ACM has encountered compliance programmes while using other instruments as well. Between 2004 and 2015, the ACM has published about compliance programmes in eight different instances. In four cases, companies under investigation set up a compliance programme voluntarily. This caused the ACM's investigation to come to a halt, as the most pressing competition concerns had been remedied by the implementation of the compliance programme.[127] On one occasion, the ACM applauded the initiative of setting up a compliance programme by means of an informal opinion.[128] In the remaining three cases, enforcement actions elsewhere in the market had caused the companies to implement a compliance programme.[129]

> For instance, in 2012, the ACM published that it had entered into a discussion with the professional organisation for demolition companies (*Vereniging voor Aannemers in de Sloop,* or *Veras*). In this particular sector, the ACM had already imposed fines for bid rigging, and was investigating five more companies that had allegedly engaged in cover pricing in tenders for building projects in Rotterdam. The presence of the ACM in the sector resulted in Veras consulting with the ACM about measures it could take

124 Nederlandse Mededingingsautoriteit, Case 7191 (*Landelijke Huisartsenvereniging)*, para. 4 on p. 4.

125 Article 49a *Mededingingswet*.

126 However, the companies involved in the *Thuiszorg Midden-Brabant* case opted to refer to the compliance programme of their joint association: Actiz. This association decided to introduce a general compliance programme as a response to the ACM's (then the NMa's) activities in the sector. See Nederlandse Mededingingsautoriteit, Case 7138 (*Thuiszorg Midden-Brabant*).

127 Verbond voor Verzekeraars (2004), NMa Agenda 2004, para. 4.2. KNMP (2006), Annual Report NMa 2006, p. 54. Publishers (2007), Annual Report NMa 2007, p. 30. Realtors (2007), Annual Report 2007, pp. 26-27.

128 Nederlandse Mededingingsautoriteit, Informele Zienswijze no. 4268 (*TVPO Shrimp Fishers*), p. 6.

129 Dutch Association of Banks (2005), after the sector had been monitored by means of the Monitor Financial Sector. See Speech Tjin-a-Tsoi 2005, p. 6. Also: Veras (2012), after a fine had been imposed in the sector (see online: https://www.acm.nl/nl/publicaties/publicatie/10980/NMa-beboet-Rotterdamse-sloopbedrijven-wegens-verboden-afspraken/). Another example is the Memorandum of Compliance between the OPTA and KPN, however bear in mind that this is telecom regulation and not competition law in particular.

> to improve competition law compliance in the sector. As yet, there is no information about the status of these discussions. However, the ACM proceeded to fining the five companies involved in cover pricing one year later.[130]

This example shows that, at least in the ACM's practice, compliance goes hand-in-hand with enforcement action. The pressure of an investigation could cause companies to remedy potentially harmful practices voluntarily (or, indeed, semi-voluntarily) and the presence of the ACM in the sector could incite broader-scale compliance talks. In all of these cases, the ACM is quite positive about compliance programmes, and even encourages their implementation in certain markets. However, it leaves the responsibility for drafting one to the companies primarily. Only in one case has the ACM been involved in the drafting of the programme, presumably because this was the first time in which the ACM had had the opportunity to leave its mark on the issue of compliance.[131]

5. COMPARISON AND EVALUATION OF APPROACHES TO COMPLIANCE

As was explained in the introduction, the structure of this chapter differs somewhat from the previous chapters, in the sense that this depicts the approach of the national competition authorities to one and the same instrument: compliance programmes. The comparison and evaluation of this national practice is therefore structured in a slightly different way. Instead of evaluating the national instruments in their own right before turning to a comparison, the national approaches to compliance are compared and evaluated contemporaneously on a number of aspects. Despite the fact that this chapter focuses on the approach of *competition authorities* towards compliance programmes, this concluding section incorporates a short discussion on the requirements for compliance programmes on a company level. Partly because the competition authorities list these requirements in their guidance documents as well, but partly also because this aspect has received a great deal of attention in the literature. The last part of this section contains some final remarks and connects this chapter to the more general discussion in Chapter 8.

5.1 Extensive Comparison of Key Aspects

The discussion of national approaches to compliance assistance – as discussed in the sections above – has already pinpointed the main issues for comparison. These are mirrored in this comparative exercise. First, it is discussed what role compliance initiatives play with regard to the competition authorities' toolkits, focusing on the extent to which the different competition authorities are obligated to promote compliance with companies and how this relates to the other enforcement activities that the authorities undertake. After this, a separate section compares the communication strategies as performed by the UK CMA, the ACM and the Autorité, as their intensity and clarity of communication on the topic varies greatly and might have consequences for the

130 Nederlandse Mededingingsautoriteit, Joined Cases 7400, 7401 and 7403 (*Rotterdamse Sloopbedrijven*).
131 Verbond voor Verzekeraars (2004), NMa Agenda 2004, para. 4.2.

effectiveness of compliance efforts as a whole. Furthermore, this section discusses the requirements for effective compliance programmes as perceived by the different competition authorities, as well as the way in which the evaluation of compliance programmes is weighed in fining and commitment decisions, settlements, transaction procedures or other enforcement instruments.

5.1.1 Role of Compliance Initiatives in the Enforcement Toolkit

The main similarity between the three competition authorities is that none of them operates under the legal obligation to promote the implementation of compliance programmes in particular. Even though it is accepted practice in France that the transaction procedure provides a legal basis to render compliance programmes binding in the form of a commitment, none of the authorities is legally obliged to impose or review compliance programmes. Generally speaking, this is seen as the responsibility of businesses: compliance with the law is standard, and compliance programmes help to achieve this standard. Nevertheless, the competition authorities regard the promotion of compliance programmes (helping companies to achieve the standard of compliance) as a part of their mission statements. In the Netherlands, promoting the implementation of compliance programmes can be viewed as a tool in the ACM's problem-solving approach to enforcement. In France, the mission statement of the Autorité explicitly includes educational activities to underline the importance of competition law. Compliance programmes are viewed as a part of these activities. In the United Kingdom, the UK CMA commissioned a research that showed the necessity of driving compliance next to measures aimed at deterrence and therefore committed itself to the task of disseminating a compliance culture. The main difference between the competition authorities lies in the role that they have attributed themselves in the promotion of compliance programmes. The most pronounced competition authority in this respect is the UK CMA, which holds that it is responsible for driving compliance on the one hand, while maximizing the visibility and the effectiveness of its other enforcement work on the other. Likewise, the Autorité perceives a specific task in advocating compliance. Based on its mission statement, it is its duty to educate businesses about the law, the Autorité's activities and compliance. Lastly, the ACM is the least explicit about its role in promoting compliance; it is mostly seen as the responsibility of businesses to comply with the law.

In all cases, the promotion of compliance programmes is coupled with a broader enforcement strategy. The ACM supports a problem-solving approach to enforcement, in which the adoption of a compliance programme is seen as the 'missing link' between educational activities that the ACM carries out and the decisions it takes *ex post*. The ACM sees the translation of its guidance and decisions into a compliance programme as the responsibility of the companies. The Autorité explicitly mentions that it sets out to use certain tools for the promotion of compliance in conjunction with other tools and the UK CMA consistently holds that driving compliance by proactive measures must go hand in hand with another important driver of compliance: deterrence. A reason for this explicit combination of compliance and deterrence strategies could be that all three of the competition authorities recognize the pitfalls of compliance programmes. Terms such as 'box ticking', 'window-dressing' and 'all-risk insurance policy' are used to warn

companies that merely having a compliance programme in place does not create a safe haven from enforcement action.

5.1.2 *Communication Strategy*

An analysis of national practice on the point of guidance and promotion shows that there are roughly three degrees of intensity with which the national competition authorities publish about compliance programmes and their successes in this field. The least intense communication strategy on this point is found in the Netherlands. There are only a few instances of the mentioning of compliance efforts in the ACM's annual reports, there is no website section dedicated to corporate compliance and the ACM offers almost no guidance on the content of compliance programmes. However, since the institutional merger, the ACM has been a little more forward in communicating about compliance, possibly under the influence of the experiences of its predecessor in telecom regulation, the OPTA, which had a much more pronounced opinion about compliance assistance. A more forward communication about compliance is to be found in France, where the Autorité has been very forward in releasing guidance documents. The annual reports of the Autorité often contained sections dedicated to successes in the field of compliance, and its webpage underlines the importance of compliance as well. However, no significant additions have been made since 2012. The UK CMA has an active communication strategy about compliance as well, including the issuing of general and specific guidance documents and a comprehensive guide on how to conduct a risk assessment of competition law compliance. Apart from that, it has started sending out 'lessons learned' from recent cases to similar companies in the field, in order to warn them about the dangers of non-compliance and to stimulate them to adopt or improve their compliance programmes. For that reason, the communication strategy of the UK CMA on compliance is deemed to be the most extensive.

What is striking about the French and UK guidance on this point is that both authorities have reached out to companies in order to develop best practices. In France, a consultation was executed before publishing its framework document on compliance and in the UK a working group on compliance was set up in collaboration with important business representatives. Before choosing to publish anything about compliance, both competition authorities conducted a study on the state of compliance, on what drives businesses to comply with the law and how the authorities' approach could be improved. The UK CMA and the Autorité both followed up on the suggestions made in the studies. On a final note, it is interesting to see that both the Autorité and the ACM make use of 'faming' in order to promote compliance. This entails that they have praised companies for their compliance programmes, or at least have mentioned compliance efforts by individual companies on their websites or in their annual reports. This could be a stimulus for other companies to do the same.

5.1.3 *Requirements for Compliance Programmes*

At first sight, the differences between the programmes that are described by the authorities seem to be significant. However, upon closer inspection it seems that the

three programmes have quite some elements in common. First and foremost, all three of the competition authorities stress that their guidance on the content of compliance programmes is not exhaustive, but that it is meant as an indication of what could constitute a well-functioning compliance programme. In order to be truly effective, compliance programmes need to be company-specific. All competition authorities speak of 'tailored programmes' and a 'not one size fits all' approach to compliance. To that end, the ACM holds that 'competition rules must be explained using practical examples in the sector', the Autorité encourages companies to make use of general competition guidance to identify competition risks specific to their companies and the UK CMA's guidance provides lists of questions that might reveal signs of cartels, other anti-competitive agreements and abuse of dominance within a company. Moreover, the UK CMA's guidance on effective compliance programmes is completely risk-based, which means that it does not concentrate on prescribing specific minimum requirements for the companies to adhere to, but rather formulates starting points for a proper risk assessment at the company level.

In general, the three competition authorities have a rather similar view of what they perceive to be effective compliance programmes. Central to this is the commitment of higher-level personnel, which could have a signalling function throughout the company. Apart from that, the Autorité, the ACM and the UK CMA all point towards the importance of continuous education, monitoring systems, a protocol for how to deal with infringements, audits of the effectiveness of the system and regular updating.

Autorité **Five-step programme**	**UK CMA** **Risk-based approach**	**ACM** **Indicators of successful compliance**
Public statement	Commitment	Commitment of management
Compliance officer	Risk identification	Explaining the rules
Training & education	Risk assessment	Participation & education
Audit & alert	Risk mitigation	Regular declaration of compliance
Monitoring	Monitoring & review	Risk management
		Protocol for infringements
		Updating

5.1.4 Application in Practice

It is apparent from the analysis above that all three of the competition authorities have different approaches to compliance programmes when it comes to determining their value in a specific case. When it comes to the question whether a compliance programme could be considered an aggravating or a mitigating factor in determining a fine, the ACM is said to take a neutral approach. The fine will neither be increased nor decreased when a compliance programme is in existence. The UK CMA, on the other hand, does take into account the value of compliance programmes when determining the amount of the fine, and usually grants a 5-10% discount if the programme is substantial enough. The Autorité has an approach that is the middle of the two: in fining decisions, a compliance programme will not be considered to be a mitigating or aggravating factor, but in settlement decisions a commitment to set up a compliance programme can lead to a 10-15% discount for the company.

However, looking at the consistency of these viewpoints when analysing the cases of the national competition authorities, a number of remarks can be made. In the first place, even though the ACM does not consider compliance programmes to be a determining factor in the amount of the fine, the Dutch fining guidelines give the authority the discretion to apply a fine discount or fine increase nevertheless. In one case it was suggested that a company would be eligible for a fine discount if a compliance programme were fully implemented with effective monitoring procedures, and if senior management were not involved in the infringement.[132] In another case, a fine had been increased because the infringement violated an existing Memorandum of Compliance.[133] In other words, the ACM does not seem to have turned its back entirely on the idea of taking into account compliance programmes when determining the amount of the fine. In France, even though the Autorité is completely consistent in applying a fine discount in its settlement cases, there is some uncertainty with regard to the status of pre-existing compliance programmes in cases other than cartel cases. Naturally it is the responsibility of businesses to safeguard compliance within their organizations, and after competition law has been breached, a compliance programme does not detract from the reality of this infringement.[134] However, it is difficult to see why a compliance programme that is valued as substantive, credible and verifiable deserves no acknowledgement if the main mechanism for reporting infringements (leniency) would not be available. In that respect, the UK CMA is more consistent in its approach. It considers compliance programmes to be mitigating factors in determining the amount of the fine, because it feels that the companies' steps which they have taken to ensure compliance – if adequate – deserve acknowledgement in the form of a monetary advantage. The UK CMA follows the same reasoning in its early resolution procedures.

Besides decisions involving the imposition of a fine (fining decisions and settlements/early resolution) compliance programmes play a relatively small part in the other aspects of the competition authorities' work. Compliance programmes are rarely a commitment in commitment decisions and they are never imposed in market studies or investigations. This can be explained by looking at the goals of these various procedures: market studies and investigations tend to focus on the market as a whole, and commitment procedures are intended to remedy existing competition problems in an appropriate and verifiable way without declaring an infringement. With regard to the latter, the practice in the Netherlands forms an exception. In a number of Dutch commitment decisions, the commitment to set up a compliance programme combined with an annual reporting duty has been reviewed as a particularly verifiable way of remedying competition concerns.[135]

---

132 Nederlandse Mededingingsautoriteit, Case 1615 (*Gazelle*), section 235.

133 Memorandum of Compliance between KPN and the ACM, renewed version of June 2014, available in Dutch at: https://www.acm.nl/nl/publicaties/publicatie/13072/Vernieuwd-Compliance-Handvest-KPN-en-ACM/.

134 Cour d'Appel de Paris, no 2009/03532 (*Adecco France*). This is in line with the Court of Justice, CJEU Case C-189/02 (*Danske Rørindustrie*). This viewpoint is repeated in the Framework Document Compliance Autorité 2012, paras. 23-26.

135 Nederlandse Mededingingsautoriteit, Case 7191 (*Landelijke Huisartsenvereniging)*, Nederlandse Mededingingsautoriteit, Case 7138 (*Thuiszorg Midden-Brabant*) and Autoriteit Consument en Markt, Case 13.0612.53 (*Mobiele Operators*).

5.2 Intermezzo: Elements of Successful Compliance Programmes

In the larger part of this chapter, the focus has been on the way national competition authorities deal with compliance programmes and how this approach can be improved in procedural terms. However, as was remarked in the introduction as well, much of the literature published on the subject also deals with the most effective form of compliance programmes themselves, listing substantive criteria and issues for improvement. Because this primarily addresses companies, these topics have not yet been dealt with. However, since some of the competition authorities have also listed the substantive requirements of compliance programmes, it could be helpful to see which criteria are said to contribute to compliance that have – up until now – not been included in the examples of what constitutes a solid compliance programme in the eyes of the national competition authorities.

5.2.1 Internal Incentives

To align company objectives to the socially desirable objective of compliance, competition authorities should first get a better understanding of what the objectives within a company are. Employees tend to focus on the threats and rewards within the organization, instead of focusing on external threats.[136] Mechanisms such as profit-linked bonus schemes fuel temptation for collusion,[137] because antitrust violations are typically committed by people with substantial authority, who are primarily motivated by company interest or by incentives set by management.[138] For this reason it seems that the incentives set by companies might be one of the main reasons why infringements of the law occur, and why compliance programmes – despite best efforts – might remain ineffective.

This is understandable. If a company explains the importance of compliance, but sets impossible sales targets or promises bonuses for extreme results, the company sends mixed messages to employees. Given that companies are mostly insular (meaning that decision-making is mostly driven by internal motivations instead of external threats), and the responsibility for infringements is dispersed, it is to be expected that the benefits of reaching a target or earning a bonus will outweigh the negative consequences of a competition law infringement.[139] When setting up a compliance programme, companies must be aware of this, review their targets and bonuses in order to make sure that these do not inspire cartelistic behaviour, and downscale their targets and bonuses accordingly.[140] Apart from that, compliance programmes should ensure that the responsibility for competition law infringements is not dispersed across a division or the entire corporation, but that the detection of unwanted behaviour becomes likely and that disciplinary action is possible against the employee involved in

136 Murphy & Boehme 2009, p. 10.
137 Stephan 2009, p. 2.
138 Wils 2013, p. 8-9.
139 Murphy & Kolasky 2012, p. 3.
140 This does not mean that financial incentives for better performance are all bad, but they should be handed out with care and not be too high. Abrantes-Metz & Sokol 2013, p. 5. There is a role for a compliance officer there. See Murphy 2012.

cartelistic behaviour. Employees contemplating committing an infringement might be dissuaded from doing so, because there is a risk they might get caught under a corporate compliance programme. Even the expected fine could be increased when disciplinary measures – and possibly dismissal – are included in a compliance programme. The Autorité has applauded compliance programmes in the past that included strict internal control mechanisms,[141] and the UK CMA underlines this in its guidance as well.[142] Nevertheless, these mechanisms are only likely to be effective if the infringement is likely to be committed by an individual employee (a rogue employee) or a small number of employees who are not regarded as key to disseminating compliance culture.[143] If this is the case, companies should make sure that internal incentives are pointing towards compliance. A consistent approach to this increases internal commitment, thus increasing the instrument's effectiveness.

5.2.2 *Managerial Commitment*

Studies have shown that those who are most important to creating a sense of compliance culture within the company (senior managers or executives) are most likely to engage in competition law infringements.[144] It is therefore not just the internal incentives that have to be set in the direction of compliance, but also the ones who set them must be committed to following the rules. In fact, difficulties with internal incentives can be reinforced by a lack of true managerial commitment, because in competition law individuals commit infringements, but companies pay the fines. Even though this might seem like a good reason for companies to monitor their employees' behaviour by means of a compliance programme, which is something competition agencies benefit from as well, there is a lack of any alignment of interest between the companies and the enforcement agencies on this point: the companies benefit from the infringements. Different from, for instance, embezzlement or corruption, the companies initially do not suffer from employees' bad behaviour.[145] This could be a reason why company-based compliance programmes might not work as effectively as suggested. Other reasons why compliance programmes might be ineffective is that cartelists – usually senior managers or those who enjoy more discretion and authority within the company – typically know what they are doing, and go to great lengths to prevent discovery.[146] A compliance programme based on educating employees and the self-discovery of infringements

141 See Chapter 4, section 2.5.2.

142 OFT Penalty Guidance 2012.

143 Unfortunately, the situation of a single rogue employee is not presumed to be very likely. See Murphy & Boehme 2009, footnote 14 (it is not that easy to set up a cartel, let alone on one's own), and Sokol's compliance study in which a rogue employee was not considered to be a big problem.

144 Stephan 2009, p. 1, Murphy and Kolasky 2012, p. 3 (a key characteristic of management is arrogance). Also Sokol 2012 and Synovate Compliance Survey 2011.

145 See in more detail Wils 2013, p. 9. Geradin has rebutted this objection in his reply to Wouter Wils, by stating that this characteristic is in no way particular to competition law. For instance in the field of corruption, the company benefits as well, but compliance programmes are created and upheld nevertheless (see Geradin 2013), pp. 4-5.

146 Stephan 2009, pp. 6-10. But see also Leslie 2008.

might therefore be ineffective.[147] In fact, many infringements have been committed in spite of the existence of a compliance programme.[148]

For these reasons, managerial commitment is by far the most important factor in the successful implementation of compliance programmes. Unfortunately, a normative commitment to the rules cannot be coerced. Therefore it is important to pay attention to the circumstances in which senior management are more likely to abandon their commitment to the rules. It seems that this could be the case when financial reports are often revised, when the board of directors does not closely monitor management, and when the board of directors and the external auditor are not regularly replaced.[149] Consequently, merely saying that management are committed to the compliance programme is not enough; processes monitoring this commitment must be in place as well and these processes must take account of the circumstances mentioned above. Apart from contributing to success on an individual firm level, managerial commitment is important to business culture as a whole. With antitrust violations it is an additional difficulty that cartel behaviour is accepted as normal business in many industries.[150] Compliance programmes should pay attention to this problem, and if they do, they can have an important external learning effect as well. Some authors have raised the 'part of normal business' argument in order to illustrate that compliance programmes will not be effective,[151] but the argument can also be made that an aggressive compliance programme can be used to attack this kind of business culture. In that case, a real commitment by the company as a whole is indispensable.

The fact that commitment from management is indispensable for the success of a compliance programme is strongly emphasized by all three of the competition authorities.[152] However, save for mentioning that the business as a whole must be taken into account and that managers must make a 'true commitment', none of the competition authorities illustrates what kind of business culture or organizational defects can play into the hands of cartelisation. It could be considered a task of a competition authority to point towards certain 'red flags' that might incite cartelistic behaviour, such as restatements of financial reports, little oversight of managers and few changes to the board and the auditors. The red flagging of these negative factors in management commitment can improve the managerial approach to compliance and increase normative commitment as a whole.

147 This is rebutted by the survey carried out by Sokol, which has shown that in many businesses there is a lack of awareness concerning competition law. Even where employees were aware of the rules, they were sometimes disregarded, because the consequences were perceived to be minimal. Sokol 2012, p. 28.

148 Wils 2013, p. 14.

149 Abrantes-Metz & Sokol 2013, p. 7-8. Yet, it appears from this same article that middle management seems to take compliance programs more seriously than senior management.

150 Stephan 2009, p. 11. It seems that in many industries the illegality of cartel behaviour is dismissed or not perceived as something really serious. Abrantes-Metz & Sokol 2013, p. 8.

151 See Sokol 2012 in particular.

152 Speech Fonteijn 2014 and Framework Document Compliance Autorité 2012, para. 22, sub 1. OFT Business Compliance Guidance 2011 and OFT Wheel of Compliance 2011.

5.2.3 Role of the Compliance Officer

Finally, but very importantly, compliance programmes might have two unintended side-effects: the learning effect and the monitoring effect. The learning effect stems from the educational focus of compliance programmes. Employees unaware of competition problems might become aware of the opportunities that cartel behaviour has to offer. Instead of focusing on the prevention of infringements, they might be tempted to infringe the law themselves.[153] The monitoring effect is more serious – and probably more likely.[154] It entails that those responsible for monitoring compliance within the company are also particularly well placed to hide non-compliance. In other words, if you would know where to look for signs that things are going wrong, you would also know how to hide them or to erase them.[155] In order to mitigate both side-effects of compliance programmes, it is important that the person responsible for educating personnel about compliance and for handling complaints and infringements is selected with care, does his job with integrity and has the independence (coupled with sufficient powers) to play a central role. In other words, the learning and monitoring effect can be mitigated with the careful selection of a compliance officer and a detailed outline of his tasks and powers.

First of all, a compliance officer must have a central role within the organization. It has to be someone – or a group of people – who is visible to all employees, and who is knowledgeable not just of the law, but also of the technical aspects of the work, of the market and of the functioning of the organization. A compliance officer does not operate in a vacuum, but must keep track of economic, social and political trends that might influence behaviour in the company.[156] Briefly stated: a compliance officer must be in sight and informed. To meet this requirement, a compliance officer must be equipped with sufficient resources and independence to move around the company. Apart from overseeing compliance, a compliance officer is also responsible for handling complaints and tip-offs. For that reason, it is important that the compliance officer is a person who can be trusted by the employees. Studies show that the main reason that misconduct or grey-area behaviour is not reported is the mistrust of the person in charge of handling this report and subsequent retaliation, even more so than a lack of financial reward or company loyalty.[157] Companies must be aware of this, and be very careful when it comes to the impartiality and reputation of the compliance officer. If a compliance officer is appointed, he should be central to the organization, and knowledgeable of its functioning. He must be equipped with sufficient resources, powers and independence to oversee compliance. Additionally, employees must trust their

153 See in more detail Schinkel 2011, p. 2.

154 Geradin compares the learning effect argument to the argument that drugs education in schools incites young children to experience with drugs, instead of being aware of the dangers of taking drugs. Geradin 2013, p. 7.

155 This particular effect is addressed by Martijn Han in an econometric experiment. Angelucci & Han 2010.

156 Anderson 1963, p. 4.

157 Murphy & Boehme 2009, p. 8. Another reason why people could be reluctant to report to the compliance officer is the lack of legal professional privilege in the European Union. The Court of Justice has decided that LPP is not applicable to in-house counsel (CJEU Case C-550/07 P, *Akzo Nobel v Commission*), which means that complainants can rightfully fear for their privacy. However, a study shows that many employees are unaware of this distinction, see Murphy & Kolasky 2012, p. 16.

compliance officer, and have faith in the mechanisms handling complaints and tip-offs. Out of the three competition authorities, the Autorité is the only one that stresses this aspect of compliance in particular. The appointment of the compliance officer receives attention in its guidance on compliance, including his need for resources, powers and independence.[158] It is underlined that this person must have unquestionable skills and authority in the company, suggesting that the issue of trustworthiness is something that should be thought about. The ACM and the UK CMA are less explicit about the role of the compliance officer, although they have both stressed the importance of having a protocol for infringements.[159]

However, despite the possibilities of surrounding the selection of a compliance officer with more safeguards, it has been argued that one of the main practical difficulties is that compliance officers cannot rely on legal professional privilege when it comes to advising companies about compliance. The requirement of legal professional privilege is seen as a part of the fair trial rights, and ensures secure and private correspondence with legal counsel. For that reason, communications between companies and their lawyers cannot be accessed by competition authorities and can never be used as evidence in a sanctioning procedure.[160] Nevertheless, legal professional privilege is often not extended to in-house counsel.[161] This means that information that an in-house lawyer might have is accessible to a competition authority in the course of a procedure, which could have negative consequences for the company and the employees involved. When applying this issue to the functioning of compliance programmes, it is clear to see that this could form a barrier for an open, self-reporting business culture, given that those responsible for overseeing compliance do not enjoy legal professional privilege. This could be a disincentive for employees to report behaviour, or to discuss possible problems in a confidential matter.[162] This could be out of fear of implicating themselves or close co-workers, but more specifically it is born out of fear of retaliation from co-workers or dismissal in the future. Extending legal professional privilege to compliance officers could remedy this to a certain extent.[163] On the other hand, the extension of legal professional privilege to in-house counsel could reinforce the negative effects remarked above (the learning effect and the monitoring effect), because it gives the compliance officer a legal tool to 'hide' any infringements. If legal professional privilege is extended to in-house counsel, then the requirements of the impartiality, integrity and independence of the compliance officer become even more pressing.

158 Framework Document Compliance Autorité 2012, para. 22, sub 2.

159 See section 5.2 in conjunction with section 3 of this chapter.

160 The basis for this doctrine was defined in CJEU Case 155/79 (*AM & S v Commission*). See for an overview of this development, for instance Bellis 2011.

161 Legal professional privilege applies to in-house counsel under UK law. However, when the enforcement of European competition law is concerned, in-house counsel are not protected. See CJEU Case C-550/07 (*Akzo Nobel v Commission*).

162 It has been seen in research that employees experience this as such, see Sokol 2012.

163 Even though it is true that the competition authorities are careful with redacting documents and evidence of confidentiality, often it is clear to those in the industry who the 'whistle-blower' was.

6. FINAL REMARKS

As instruments, compliance programmes are 'the odd ones out' in this thesis, as they are not strictly enforcement instruments for the competition authorities themselves, but rather tools for companies to secure compliance that have proven to have some interplay with the procedures at the authority level. In that sense, this chapter in particular can be read in conjunction with the previous chapters, as compliance programmes are supplementary to the authorities' other enforcement efforts. Because of its different nature, the structure of this chapter has diverged from the others in Part II of this thesis, but nevertheless has evaluated national practice on the balance between instrumentality and safeguard requirements.

This analysis has led to the conclusion that the Autorité has the most formalised approach to compliance programmes; the UK CMA is the most active in promoting and rewarding these programmes and the practice of the ACM is the most tentative, and presumably still under development. Within the Autorité, the promotion of compliance programmes is being developed along the lines of its transaction procedure.[164] This procedure enables the Autorité to make compliance programmes binding and to fine companies for a poor execution or implementation, consequences that are not possible in the other Member States. For the other two competition authorities, driving compliance is largely seen as a corollary of their broader mission statements. Of the two, the UK CMA is the most outspoken in its role of driving compliance, having published numerous guidance documents to explicate preferable approaches and granting fine discounts for well-functioning programmes.

Having discussed that, the differences between the national competition authorities lead to the identification of a number of 'policy considerations' to be taken into account when reviewing compliance initiatives on a more aggregate level. In the first place, an important question concerns the place that compliance programmes have vis-à-vis the authorities' broader enforcement policy. If a choice is made in that respect, the competition authority must determine its level of guidance on the content (and evaluation) of compliance programmes. Thirdly, a recurring issue has been whether or not to reward the existence, improvement or implementation of compliance programmes in the course of other procedures under the authorities' fining guidelines. All of these issues are touched upon from a broader perspective in Chapter 8. Apart from that, attention is paid in this chapter to the risk of capture (influencing by – in this case – market parties), since the monitoring duties-connected compliance programmes could bring competition authorities and companies closer together. The elements of compliance programmes outlined above are translated into recommendations for competition authorities in Chapter 8 as well.[165]

---

164 Because compliance programmes were regularly offered as commitments, the Autorité had to verify on a regular basis whether these were sufficiently credible, substantial and verifiable. This has resulted in the publication of a guidance document, which outlines the main criteria that compliance programmes have to meet before being considered as such. See Chapters 4 and 7 of this thesis on the practice of the Autorité.

165 The points outlined in section 5.2 above are translated to reflect policy considerations for competition authorities in Chapter 8, section 5.

Part III

EVALUATION AND SYNTHESIS

Chapter 8

EVALUATION AND POLICY CONSIDERATIONS

The chapters before this one have set out national practice in alternative enforcement by looking at negotiated procedures, market studies, informal opinions and compliance assistance. The legal framework and the national competition authorities' choices in applying these instruments have been tested against the normative framework that underlies this thesis. As is explained repeatedly, this framework hinges upon the balance between instrumental requirements of enforcement and procedural safeguards surrounding public interventions. The balance between the two ultimately leads to legitimate outcomes.[1] Apart from describing national enforcement practice and evaluating it accordingly, the previous chapters have compared the different approaches of the national competition authorities. In this chapter, these evaluations and comparisons are further relied upon in order to identify the main challenges for applying alternative enforcement instruments.

1. INTRODUCTION

The analysis of national practice has shown that the Autorité, the ACM and the UK CMA become very inventive in adopting different instruments to enforce competition law. They have adopted a negotiating stance, improved their understanding of the market situation, informally warned (or applauded) companies preventatively and made them responsible for the levels of compliance in their organisations. However, alternative enforcement as such has been subject to critique. This held particularly true

1 See in more detail the presentation of the normative framework in Chapter 3. The criteria of the normative framework are not just presented as a long 'checklist', but hold an inherent tension within them, as they are divided into 'instrumentality requirements' and 'safeguards'. This distinction refers to the instrumental and safeguard functions of law, as identified in the Utrecht School of Public Economic Law (Chapter 3, section 1.2). In its instrumental function, public economic law is perceived as a tool to serve policy objectives. Enforcement of the law occurs with a view to securing these objectives. The counterpart of instrumentality is the safeguard function of the law, which protects the position of companies and individuals against unlimited government action. When enforcement procedures incorporate sufficient safeguards, their legitimacy is increased. See for the place of legitimacy in this framework Chapter 3, section 1.3.
The list of safeguards as depicted in Chapter 3 is not tested point for point in this chapter and the next, but is rather tested on an aggregate level. These chapters will explore where the most tension is within the different alternative enforcement instruments, and whether there is a balance between both sides of the framework. Pressing points are discussed, points that are less pressing are not. Points that hold true on a more aggregate level (the policy- or agency-levels), are touched upon elsewhere. This is a methodological choice (see Annex I – Methodology in more detail), made with regard to the legibility of the text and to avoid box-ticking research (3 Member States, 4 types of alternative enforcement instruments and 11 normative requirements).

for the competition authorities that have increased their use of alternative enforcement instruments over the last few years – such as the Commission, which now applies more negotiated procedures than fully adversarial procedures. The perceived risks connected with the application of (some of the) alternative enforcement instruments is that these take less account of safeguards surrounding administrative actions, or that the application of these instruments would lead to a situation of wheeling and dealing with market parties. On a more fundamental basis, alternative enforcement could give competition authorities the opportunity to apply thir power to influence the market beforehand in order to shape markets instead of watching over the boundaries of fair competition.[2] The research question underlying this thesis therefore took account of these criticisms and set out to investigate national enforcement practice on exactly this point.

> *How can alternative enforcement instruments be seen in the light of the balance that needs to be struck between safeguard and instrumental requirements that national and European law have placed upon enforcement and what challenges does this pose for the enforcement of competition law in the Member States?*

This concluding part (Part III) of this thesis depicts the final observations that can be made on the basis of this research question, as well as recommendations for national practice. It is – in fact – a conclusion that consists of two different chapters, mirroring the division in the research question. This chapter (Chapter 8) discusses how the different alternative enforcement instruments can be seen in the light of the balance that needs to be struck between safeguard and instrumental requirements that national and European law have placed upon enforcement.[3] This part relies heavily on the evaluation of national enforcement practice as performed in the previous chapters. In §2 of this chapter, the main findings and recommendations are made with regard to the application of negotiated procedures. This analysis relies on the differences between the Member States as pointed out in the previous chapters, as well as on the bottlenecks in application that flow from an analysis against the normative framework underlying this thesis. The same is done in the next three sections for markets work (§3), individual guidance (§4) and compliance assistance (§5).

2. NEGOTIATED PROCEDURES

Enforcement practice on the point of negotiated procedures varies fairly substantially from competition authority to competition authority. The Autorité has had a legal basis to settle cases on a negotiated basis since 2001, has applied the procedure in many cases

2 These criticisms were voiced in particular towards the practice of the Commission. See Chapter 4, section 1.1, Chapter 5, section 1.1, Chapter 6, section 1.1 and Chapter 7, section 1.1 for the criticisms with regard to the specific instruments.

3 Next, Chapter 9 discusses the challenges that alternative enforcement (in general) poses for the enforcement of competition law in the Member States. In this next chapter, the emphasis is on the interplay between the instrument-specific level and broader levels of enforcement.

and already elaborated upon its approach in procedural guidelines back in 2008. By contrast, the ACM does not enjoy a formal legal basis, does not make use of procedural guidelines and has a limited body of cases on this point – though it is contemplating innovative approaches to competition law enforcement and has shown some movement in the direction of settlement-like instruments. Somewhere in between is the practice of the UK CMA, which has developed an approach to negotiated procedures in practice without a specific legal basis and has only recently formalized its approach in a procedural notice.

In Chapter 4, the different negotiated procedures have been assessed in the light of instrumentality and safeguards with regard to the particularities of the national application. For the practice of the Autorité, this has led to the conclusion that the French transaction practice has placed safeguards at the forefront of its procedure, without significantly hampering instrumentality. The feature of the UK CMA's settlement practice that stands out the most is the focus on procedural efficiency and the pronunciation of a very clear view of how to achieve it. The ACM's practice, lastly, is still in an experimental stage characterised by flexibility on the part of the competition authority, but the rights of companies are safeguarded by its decision-making structures.

However, Chapter 4 has also indicated that there are still significant differences in the design and application of negotiated procedures between the national competition authorities. These differences can be seen as 'policy considerations': issues or questions to be taken into account when designing or redesigning procedures. For negotiated procedures, the policy considerations concern the moment of negotiations, the status of hybrid procedures, the use of procedural guidelines, the formalization of commitments, and the internal separation of functions. Not necessarily derived from the differences between national procedures, but still relevant as policy considerations, are the fact that negotiated procedures also touch upon the interplay with leniency and civil add-on procedures and could generate enforcement losses in terms of deterrence and clarification. All of these policy considerations are discussed below. They are evaluated against the normative framework underlying this thesis in order to come to recommendations for a balanced design of negotiated procedures.

2.1 Moment of Negotiations

One of the main procedural questions raised with regard to negotiated procedures concerns the moment of negotiations: at what point should a competition authority commence settlement, transaction or simplified resolution discussions? The answer to this question makes a difference, as the subject of negotiations is largely dependent on this decision. If competition authorities negotiate after the statement of objections has been sent, the statement itself becomes the basis for negotiations – meaning that the case file is already compiled and the investigation is completed. In a pre-SO stage, such a basis for negotiations is lacking. To recall national practice, the Autorité has currently opted for a model without preliminary meetings. Influenced by the legality principle, the Autorité now follows a regular procedure until the moment the statement of objections is sent. It is likely that the ACM will follow the Autorité's practice on this point due to the strict separation of functions within the ACM, which – formally – only makes

discussions on the outcome of the case possible after the statement of objections has been sent.[4] Conversely, the UK CMA allows both a pre-SO and a post-SO settlement, as long as the evidentiary threshold for giving notice of the proposed infringement is met and a statement of facts is drafted.

At first glance, post-SO negotiations seem to be preferable from the point of view of the safeguard requirements flowing from the normative framework. Negotiating after the SO has been sent serves transparency,[5] limits undue pressure on the companies under investigation and prevents the competition authority from taking shortcuts in the investigation phase. This warrants a fair procedure, as the companies can choose a defence strategy on the basis of the evidence put before them, instead of on the basis of what they fear might come to light. However, the benefits of *pre-SO* negotiations are many, particularly from an instrumental perspective. Pre-SO meetings and negotiations could be useful in uncovering evidence and infringements that would otherwise remain hidden. In that way, the duration of the investigation could be reduced significantly. Preliminary meetings could also be used to sway all companies involved in the infringement to opt for non-contestation, thus avoiding hybrid cases. It has even been recommended in literature that competition authorities should start negotiations in the fact-finding phase in order to circumvent protracted discussions.[6] Be that as it may, there are risks connected to pre-SO negotiations when looking at it through the normative framework underlying this thesis.

2.1.1 *Safeguards in Pre-SO Negotiations (Procedural Waiver)*

First and foremost, it has to be borne in mind that negotiated procedures rest on a waiver of procedural rights by the companies involved. In this waiver, companies give up their rights to make further representations, to contest the facts and their appraisal by the competition authority and – in some jurisdictions – to appeal against the final decision.[7] In principle, companies are free to do so, provided that rights are waived of their own free will and the waiver is 'established in an unequivocal manner and […] attended by minimum safeguards commensurate with its importance'.[8] Companies should thus only waive their rights after 'informed consent', which can be interpreted to mean that they should be aware of the facts they are not contesting,[9] that they should understand the possible consequences of the legal analysis to be carried out by the competition authorities, and that there should be no adverse consequences to reverting to a fully

4 Informally, the ACM is exposed to the risk of having negotiations being pushed back to the fact-finding or preliminary phases. In that case, the concerns formulated with regard to pre-SO settlements apply. See sections 2.1.1 and 2.1.2 below, or Chapter 6, section 4 in more detail.

5 See Georgiev 2007.

6 Vascott 2013. Differently: Georgiev 2007.

7 See for the differences between the national competition authorities Chapter 4.

8 ECHR, Application no. 18114/02 (*Hermi v Italy*), para. 73.

9 It should be pointed out that in the case of an admission of liability, there is not just a waiver of procedural rights, but companies are also engaging in self-incrimination. On this point, the case law underlines even more the importance of voluntariness, entailing that companies engaging in self-incrimination must have adequate knowledge of the consequences and should not have to face undue pressure to do so. See ECHR, Application no. 19187/91 (*Saunders v United Kingdom*), or CJEU, Joined Cases C-65/02 P and C-73/02 P (*ThyssenKrupp Stainless and others v Commission)*.

adversarial procedure if negotiations fail.[10] These safeguards are easier to adhere to in post-SO negotiations, as the statement of objections has already been drafted, which – at least – fulfils the informational requirements.[11] In pre-SO negotiations, there is a risk that the facts of the case are not yet sufficiently clear, or that companies are even involved in the fact-finding phase. In the light of the foregoing, such a course of action would not likely constitute a lawful waiver of rights for the purpose of the Convention. Adverse consequences following a reversal to a fully adversarial procedure, lastly, can be deemed to arise in case the company's non-contestation or admission of liability is used as evidence against it, or in case a fine increase is applied for non-cooperation.[12] Such consequences should be avoided, regardless of whether it concerns a pre- or post-SO negotiation.

Companies can lawfully waive procedural rights in case the facts of the case are sufficiently clear (and communicated to the parties accordingly) and a reversal to a fully adversarial procedure does not lead to adverse consequences. Pre-SO negotiations can be pursued under these same requirements.

The conditions for a procedural waiver are of importance from a safeguard perspective, as in practice companies are giving up some of *their* rights in order to accelerate procedures for the benefit of – also – the competition authority.[13] The practice of the UK CMA, which is – as yet – the only national competition authority under review that formally conducts pre-SO negotiations, seems to be in accordance with this recommendation, as pre-SO settlements are conducted on the basis of a draft statement of facts, and only when the UK CMA is convinced that the 'evidential standard for giving notice of its proposed infringement decision' is met.[14] Apart from that, the UK CMA indicates that it does not use companies' earlier admission of the facts when companies have withdrawn from the settlement procedure.[15]

2.1.2 *Instrumentality Considerations of Pre-SO Negotiations*

Discussions on negotiated procedures typically start after the statement of objections has been sent, which means that the subject of negotiations will be the precise terms of the non-contestation (or the admission of liability), the percentage of fine discount and

10 Arguments derived from an extensive evaluation of Dutch case law (referring to ECHR case law) with regard to the *Construction* cases. See Chapter 4, section 4.4.1, but see in more detail Gerbrandy & Lachnit 2013. See also Wils 2008, pp. 19-20.

11 Connected to this safeguard requirement is, actually, an instrumentality consideration as well. If the facts of the case are not sufficiently clear, the competition authority runs the risk of engaging in either under-enforcement (if the infringement appears to be more serious than expected) or over-enforcement (in case the company settles on futile issues in fear of worse consequences). See Wils 2008 and Cengiz 2010.

12 There are more adverse consequences (also more practical, concerning publicity, naming and shaming and the working relationship with the authority), but the ones named here are derived from the CMA Procedural Notice 2014, para. 14.

13 As Waelbroeck 2008 puts it nicely: 'it is a reward for not seeking recourse', p. 30.

14 CMA Procedural Notice 2014, para. 14.4.

15 CMA Procedural Notice 2014, para. 14.28.

possible additional commitments. Both the Autorité and the UK CMA communicate clearly that there is no bargaining on the content of the decision, which is investigated and drafted by the competition authority alone. However, pre-SO negotiations and negotiations in the preliminary stage (so before any evidence is uncovered) might invite competition authorities and companies to explore different negotiation points as well, such as the gathering of additional evidence, the revealing of other infringements in the sector or exerting an influence on the drafting of the decision.

From the perspective of the normative framework against which negotiated procedures are tested, such extended negotiations are not recommended. In terms of instrumentality, broader negotiations exceed the main goal of negotiated procedures as such, which is efficiency. These efficiency gains should be in shortening or eliminating the objections and appeals phases, and not in collaborating in the investigative phase. Even though it might be appealing to negotiate with companies when they are at the table (for instance to secure the supply of evidence for the case under investigation, having them reveal the existence of other cartels known to them or minimising the risk of an appeal at a later stage), such negotiations do not just exceed the goal which the instrument pursues, it could actively hamper it if negotiations take a very long time to conclude. In fact, practice has shown that organising meetings and conducting negotiations run the risk of being very time-consuming.[16] The duration this phase – especially if the subject matter is not limited to the infringements found by the competition authorities – should not be underestimated and can last longer than a fully-fledged investigation would. This reduces efficiency gains compared to fully adversarial procedures.

Competition authorities need to clearly communicate the subject matter of the negotiations, to limit their scope and to review timely whether or not the negotiations are still in pursuit of their main goal: increasing efficiency.

Apart from that, using negotiations as a tool to uncover more evidence could create tension with the parties' rights of defence (and possibly also those of third parties) and intersects with the goals of other instruments that competition authorities have at their disposal (such as leniency). If practice shows a need for more tailored and deliberative approaches to certain cases, it is recommended to think about a way to optimize the interplay between these different existing instruments instead of exploring (or even expanding) the boundaries of discretion.

Negotiations have to be conducted on the basis of a preliminary assessment of the uncovered evidence, not with a view to securing more evidence, as pre-SO negotiations should not interfere with the goals of, for instance, leniency. Instead, the interplay between different instruments should be optimized.

16 Statement made based on interviews with the ACM, the UK CMA and the Autorité, the methodology of which is explicated further in Annex I – Methodology. This statement can also be deduced from – for instance – the duration of the settlement procedures at the European Commission.

The way the practice of the competition authorities is executed seems to be compliant with the recommendations made above. The settlement procedure of the UK CMA is, formally, the only one in which pre-SO settlements are possible, and the UK CMA is very clear in pronouncing that these will only occur after a draft statement of facts is sent. Additionally, companies have the option of accessing the competition authorities' case files (though with some restrictions) and there are safeguards in place to prevent disproportionality between a negotiated procedure and a regular procedure if companies would withdraw from negotiations. Similar starting points are recommended for the developing practice of the ACM, which theoretically could engage in both pre- and post-SO negotiations. In its latest simplified resolution, however, negotiations were concluded in the post-SO stage, which makes the concerns raised here less pressing, as the case file is already compiled and regular safeguards (those commensurate with the fully adversarial procedure) apply until the statement of objections is sent. Be that as it may, the Autorité (the only authority that explicitly does not engage in pre-SO negotiations) does pay attention to a possible reversal to a regular procedure, which is possible until the transaction agreement is signed (underlining its voluntary character).

2.2 Hybrid or Full Negotiated Procedures

Hybrid cases (decisions or procedures) are forms of negotiated procedures in which some of the companies involved agree not to contest the findings of the competition authorities, whereas others remain in a fully adversarial stance. Given the goals of the negotiated procedures discussed in Chapter 4 (efficiency gains and speedier resolution beneficial to both sides), it is surprising that the UK CMA and the Autorité allow for hybrid procedures, combining negotiation with some of the parties with a fully adversarial procedure vis-à-vis the others.[17] It would seem that the most benefits would be derived from non-contestation by all the parties involved, whereas a hybrid non-contestation entails that the competition authority has to complete the final report with regard to the other companies and that it can expect objections and appeals on every aspect of its reasoning.[18] In order to prevent an extended procedure despite the efficiency goals pursued with a settlement, it would be more efficient to pursue successful negotiations with all the parties to an infringement.[19]

Apart from the efficiency losses concerned with a hybrid settlement, it is likely that the possibility of having to go through all the phases of an adversarial procedure has consequences for the bargaining power of the competition authority as well. After all, in order to keep the negotiated procedures as attractive as possible, the competition authority has to make sure that 'settling parties' are, in the end, better off than 'non-

17 It is unclear whether the ACM would allow for such a procedure. Experiences from the past seem to point towards a negative answer. In fact, the ACM is the only competition authority to extend the use of a simplified procedure to individual fines. The ACM has not given any indication that it is contemplating hybrid procedures at this point.

18 Even though it is confirmed in multiple cases that non-contestation or the admission of liability has probative value with regard to the existence of the infringement, the other aspects still have to be proven and discussed.

19 See Kelley 2010, who also notes that companies might act out of bad faith, purposely delaying the procedure by pursuing a settlement and dropping out at the last instance.

settling' parties. In that sense it should be noted that there is a longer waiting period between the conclusion of the negotiations and the issuing of the final decision, and that the settling companies could demand an influence in the drafting thereof.[20] Apart from that, the companies involved in a hybrid settlement face the uncertainty of seeing the final decision overturned on appeal with regard to non-settling companies only, leaving the settling companies left with a fine and, depending on the Member State, subsequent liability. This makes the hybrid negotiations debatable from the point of view of instrumentality.

From the point of view of procedural fairness and legal certainty, however, the hybrid form is more or less inherent in the procedural steps taken in negotiated procedures, in which the competition authority usually carries out a 'regular' investigation until the evidentiary threshold is met or the statement of objections is sent. This means that negotiations occur in a relatively late stage, after an important procedural landmark, which means that every company should be able to determine its own position with regard to the findings communicated to it. If it were common practice to negotiate every aspect of the settlement in a pre-SO stage, there would be a possibility to strive for non-contestation by all the parties involved. As this is not the case, it would not be fair to have the treatment of the one company dependent on the willingness to cooperate of the other. In a hybrid negotiation, the resolution of a case depends on the company's own behaviour, instead of on the attitude of others. This is more in line with procedural fairness and shields companies from undue pressure.

Hybrid settlements are undesirable from an instrumentality perspective, but inevitable from a safeguard point-of-view. Denying hybrid settlements would increase pressure upon companies in the negotiation phase.

Both the UK CMA and the Autorité have applied hybrid settlements in the past, and seem to be willing to accept them in the future. The ACM has not yet concluded hybrid settlements (simplified resolutions in a hybrid form), but should not deny this possibility based on the evaluation made above.

2.3 Using Procedural Guidelines

Procedurally, one of the biggest differences between the national competition authorities is their use of guidelines. Currently, both the Autorité and the UK CMA have devised guidelines, which are not binding and from which no rights can be derived, from which these authorities can only deviate with a proper explanation. Both competition authorities drafted these guidelines after having first 'experimented' with their respective negotiated procedures in practice. The ACM, by contrast, is still in the development phase and has not (yet) drafted any guidelines.

20 See Schinkel 2010 and Vascott 2013.

Procedural guidelines can be defined as documents that provide an insight into the authorities' decision-making structures,[21] and since negotiated procedures come with quite some discretion for the competition authority, the guidelines can provide some legal certainty for the companies involved. From this safeguard perspective, a parallel can be sought with the early days of the Commission's settlement practice, during which many commentators expressed their concerns regarding the lack of transparency surrounding the application of the settlement instrument. It was argued that this would decrease legal certainty, and increase the chances of arbitrary application.[22] Companies involved in a settlement deserved legal certainty with regard to the amount of the fine to be imposed and predictability with regard to the contents of the final decision. Apart from that, it was argued that the absence of procedural guidelines increased uncertainty, and thus made the settlement procedure less attractive.[23] However, from an instrumentality perspective, procedural guidelines create a 'bounded discretion', because competition authorities cannot deviate from their own procedural rules without a proper explanation. From that line of argument, the more competition authorities publish about their policies, and the clearer the outlines of negotiated procedures become, the less flexible these procedures will be.

2.3.1 *Role of Transparency*

The decision to publish procedural guidelines is, however, not the only solution to provide more legal certainty and to avoid accusations of arbitrary application. If there are overriding reasons not to publish guidelines (for instance, if national legal culture is not accustomed to the use of guidelines, or drafting them is simply not a priority), competition authorities can pursue a policy of transparency in their decisions, outlining procedural choices, evaluation and – very importantly – the obligations upon the different companies involved in the procedure.

When looking at the procedure as a whole, it is striking that quite a lot of the negotiation happens 'behind closed doors'. This makes sense, because such negotiations are most likely to be successful if there is confidentiality surrounding their contents. Even though the results are visible in the final decisions, it is not clear from the offset what is expected from companies, and what competition authorities have 'sacrificed' in order to achieve this result.[24] Returning to the point raised above, such uncertainty makes the procedure as a whole less attractive. Apart from that, the majority of negotiated procedures do not make it to court, as a standard part of the procedure consists of non-contestation or an admission of liability – which makes it unlikely that settling companies would appeal.

---

21 Note that throughout this thesis, the term 'procedural guidelines' is used to identify both the UK CMA's and the Autorité's explanatory notices on how it intends to use its power, as well as the ACM's '*beleidsregels*' (policy guidelines), that are drafted by the Minister of Economic Affairs. These documents have in common that they explicate procedural steps to be taken and set (some form of) criteria for the applicability of the instruments they concern.

22 See for instance Burrichter & Zimmer 2006 and Waelbroeck 2008, p. 30.

23 Kelley 2010, p. 714.

24 See Schinkel 2010.

This means that a procedural review by another institution is not often performed.[25] Combined together, these factors render the concerns raised with regard to legal certainty and predictability all the more pressing. Issuing procedural guidelines is one way to relieve this pressure, as it gives an insight into the principles on the basis of which a competition authority enters into negotiations. If that is not possible or desirable, the final decisions themselves should become more transparent with regard to the steps taken in that particular case. This prevents accusations of arbitrary enforcement choices and facilitates a discussion on the validity of the decision in the public eye.[26]

> *When competition authorities' discretion is broad, procedural uncertainty can be remedied by the publication of procedural guidelines. If there are overriding reasons not to do so, transparency should be increased in the final decisions.*

Because of their further stage of development, the practice of both the Autorité and the UK CMA are in line with this recommendation. Both authorities have published procedural guidelines on their respective practices and pursue a high level of detail in their final decisions. In the Netherlands, however, it appears that the ACM does not have clear guidelines in place, nor is its first simplified resolution case very informative in terms of the procedural steps taken. If the ACM chooses not to publish guidelines any time soon, it will have to pursue a transparent approach in its next few cases, whereby it prevents accusations of arbitrary enforcement choices and persuades other companies to cooperate in the future.

2.3.2 *Experimental Phase*

Neither the Autorité nor the UK CMA had published its procedural guidelines from the offset. Instead, they have devised their approaches to negotiated procedures after 'field testing' or 'experimenting' in a number of cases. Again, in these circumstances, the maxim holds true that the less flexible the procedure, the less capable the authority will be of fine-tuning the procedure in practice. The ACM – currently the only authority still developing its approach to negotiated procedures – seems to share this concern.[27]

---

25 From an enforcement perspective, this is problematic as well. Because cases are settled and not likely to be appealed, there is a fear that decisions resulting from negotiated procedures will lack learning effect. For that reason it has been argued by some that in cases that concern a novel issue, the objective of clarification by means of precedent setting should be of overriding importance, meaning that a negotiated procedure should not be applied. However, an analysis of the practice shows that the extensiveness of the decisions currently published actually does warrant a certain learning effect. This is partially due to the fact that most negotiated procedures are of a hybrid nature, which means that the infringement, its seriousness and its damaging effects on the economy are elaborated upon. A negotiated procedure that yields a decision containing sufficient detail cannot be said to be undermining clarification objectives. See on this point also Wils 2008, p. 13. And Svetiev, who argues that the widespread use of settlements in difficult cases leads to concerns about procedural fairness, constitutional competence and the broader value of legal certainty, Svetiev 2013, p. 5.

26 Svetiev 2013 proposes a system of peer review and learning in that respect.

27 Statement derived from a series of interviews conducted at the ACM between January and April 2014. More information about this methodology is found in Annex I – Methodology.

It appears that the ACM is left with what can be described as a 'chicken and egg' situation: should the ACM first build a body of cases and experiment with its room for discretion before producing guidelines formalizing its trials and errors? Or should the ACM first provide transparency on the way it intends to use its discretionary powers before applying them in practice and building a body of cases? An analysis of the French transaction practice and the UK settlement practice leans towards the conclusion that the first option is most viable.[28] If the ACM would wish to make more use of its room for discretion to reward cooperation, commitments or other forms of resolutions, policy choices have to be made in this respect.

However, the practice of the Autorité and the UK CMA also shows that transparency is an indispensable condition in an experimentation phase. As the precise procedure is not yet crystallised, the competition authorities have to be clear about the benefits and obligations for companies under the negotiated procedure by making them visible in the final decision.

2.4 Extracting Commitments in Negotiated Procedures

The overall aim of the negotiated procedures discussed in this chapter is to enhance the decision-making speed by relying on a non-contestation (or an admission of liability) on the part of the companies. By contrast, the negotiated procedures discussed in this chapter do not primarily aim for a restoration of the market situation or a reimbursement of injured parties, as commitment decisions do. Despite this primary efficiency aim, accepting and rewarding commitments under a negotiated procedure is standard practice in France, it has happened in a settlement in the UK and is – theoretically – possible in the Netherlands. This practice shows that there could be an overlap between both types of negotiated procedures, in which there is the imposition of a fine discount *and* formalized commitments.

Generally speaking, commitments aim to improve competition in the market in a way that fining decisions alone cannot. The main advantage of incorporating these commitments into a *formal* procedure lies with the fact that they become enforceable, as opposed to informal commitments the execution of which cannot be legally demanded.[29] Apart from that, as opposed to remedies, commitments are not imposed, but are proposed by the companies themselves. This could make sure that fining decisions also serve other purposes for improving markets and ensures that the companies are involved in executing them. Formalizing commitments also creates an

28 Even though national solutions are not readily transferrable to another jurisdiction, particularly not in the field of administrative law, where national differences in legal culture are great. However, given the fact that – under Dutch law – the Minister of Economic Affair is responsible for drafting the ACM's formal guidelines and the ACM has not given interpretational notices on its remaining discretion, the conclusion that experimentation can take place before providing more certainty seems to be encouraging for the path that the ACM has already taken.

29 Competition authorities do sometimes accept informal commitments, as a result of which a formal investigation can be avoided or even aborted. As explained in Chapter 4, this would make a tremendously interesting topic of research, but due to their informal nature and the limited publicity surrounding these commitments (varying from case to case), this would require a different methodology than the one pursued in this thesis. Examples of these types of commitments are given (on the basis of availability) in Chapter 4, section 1.

opportunity to increase input legitimacy, as stakeholders could be involved in the design of the commitments by means of consultation. This ensures fitting solutions to certain market problems.[30]

The drawbacks of a system in which commitments are formalised and rewarded under the room for discretion in the fining guidelines are partially theoretical and partially practical. From a theoretical perspective, there are objections to be raised with regard to legal certainty, as in the absence of predetermined evaluative criteria it is difficult to predict what will be considered 'good' commitments that warrant a fine reduction, and if so, what this fine reduction should be. Compared to a simplified resolution under the fining guidelines, where the conditions are relatively unequivocal, the question is to what extent a competition authority is even capable of giving such certainty with regard to commitments, as they are expected to vary from case to case. More fundamentally, it might very difficult for competition authorities to determine which commitments will prove to be effective in the market. This is particularly problematic as the decisions flowing from negotiated procedures have formal standing and can be looked upon for inspiration in similar cases. In fact, it has been argued that the 'danger' of commitments in negotiated procedures (including the commitment decisions themselves) is that they become 'standard commitments' in similar cases, without their effectiveness being tested or addressed beforehand.[31] This puts an additional emphasis on the role of the judiciary in these cases, as there will need to be a possibility to determine whether or not the commitments formalized are proportional to the aims pursued and do not extend beyond that scope.[32] From a more practical perspective, in order to determine the benefits of commitments, the competition authority has to take into account the costs of following up on the execution thereof. This costs resources, which has to be offset against the possible gains flowing from the proposed commitments. Lastly, the analysis in Chapter 4 has shown that the formalization of commitments under national law could be problematic.[33] If that were the case, the legal status of these commitments would be uncertain and the question would arise whether there is an incompatibility with the principle of legality, as it stretches an existing formal power to a new kind of application.

30 To recall, in the UK CMA's *Reckitt Benckiser* case, this involvement led to the disapplication of a commitment that was generally considered to be counter-competitive. Lastly, combining the formalization of commitments with a fining decision could resolve the tension between the benefits of adopting a formal fining decision (clarification by precedent, punishment and deterrence) and the benefits of a commitment decision. See Office of Fair Trading, Case CA98/02/2011 (*Reckitt Benckiser*).

31 See the sharp comment by Pablo Ibanez Colombo in the competition law blog that needs at least one citation in a competition law-related Ph.D. thesis, available here: http://chillingcompetition.com/2016/02/11/. This concerned commitments offered in European Commission, Case COMP/C-2/38.173 (*Premier League*), noting that this 'is a decision that not only ignores the features of the relevant markets but is expressly designed to harm consumers.'

32 The question is also whether a judge will engage in such an analysis. Analogously, in commitment decisions, judges are quite deferential to the competition authorities' room for discretion. See for instance CJEU Case C-441/07 P (*Commission v Alrosa*). See also the case discussion by Cavicchi 2011 focusing on this point in particular, and the critical comments made by, for instance, Lianos 2013, pp. 66 and further.

33 This holds true, at least, for the Dutch practice. See Chapter 4, section 4.3.

If the possibility exists under national law, accepting and rewarding commitments under negotiated procedures are to be applauded as long as their benefits in the market outweigh follow-up costs. When these commitments are rewarded with a fine discount, pre-existing and clear evaluative criteria are necessary, as well as a review by a judge.

In the practice of the Autorité, commitments accepted under the transaction procedure are usually behavioural, in the form of compliance programmes. The viability of these types of commitments in terms of the cost-effect ratio is further discussed below. For the remainder, the Autorité has devised clear evaluative criteria and has communicated these in its procedural guidelines. Additionally, the evaluation of the Autorité remains open to appeal, as it concerns the calculation of the fine (and the discount). Therefore, the practice of the Autorité can be considered well balanced in terms of instrumentality and safeguards, and in line with these recommendations. For the competition authorities that do not have standing practice on this point, formalizing and rewarding commitments can be considered an extra feature, not a necessary one, of negotiated procedures. Even though there are some benefits when executed properly, it is not a means of achieving the main goal of negotiated procedures.

2.5 Separation of Functions (and Review of Decisions)

In the previous sections, it has already been discussed that the internal set-up of the authorities (mainly the question whether or not they have a separation of functions) has had an influence on the way negotiated procedures are designed. This set-up influences the decision of allowing for pre-SO negotiations, and the decision of allowing for hybrid settlements. This gives rise to the question whether or not it is at all desirable for competition authorities to retain the separation of functions within negotiated procedures.

Both the Autorité and the ACM operate under a system in which there is a strict separation of functions between departments responsible for conducting investigations and departments responsible for the final decision. The UK CMA has a slightly different set-up, in which a Case Decision Group is formed to decide on the imposition of a fine separate from the officials responsible for the investigation.[34] A strict separation of functions safeguards impartial decision-making (both internally and externally – regarding the danger of capture) and provides an additional moment of review ('a fresh set of eyes'). Such an emphasis on fairness could increase trust in the procedure, and thus the willingness of parties to cooperate – making its application more frequent. On the other hand, this separation of functions could also have a protracting effect, or could make the procedure as a whole less attractive for companies. For instance, receiving a far lower fine reduction than expected (because the final discount is not decided by the

34 See also Chapter 2, section 4.2.1.

case handlers at the negotiating table), might severely damage the companies' trust in the procedure in the future.[35]

The main characteristic of the negotiated procedures discussed in Chapter 4 is that the companies involved in them agree to a waiver of procedural rights. Apart from renouncing the right to make representations and to limit access to documents, such a waiver typically also implies that many cases will not be reviewed on appeal.[36] This puts additional pressure on the internal safeguards surrounding enforcement procedures, such as those protecting impartiality and the quality of decision-making. For that reason, it would be preferable to retain an internal separation of functions – in which one team would be responsible for conducting the investigation and the preliminary negotiations, and another for the additional review and final decision-making. In order to facilitate a smooth transition and minimize the risk of failure at the later stage, it would be possible to appoint an intermediary or to have a member of the decision-making team consulting on the case at an earlier stage – provided that this person is not involved in taking the final decision.[37]

In the light of the procedural waiver and the improbability of review by a judge, the separation of functions is also advisable in negotiated procedures. The appointment of an intermediary or an advisor can increase the smooth transition from one phase into the other.

In most of the competition authorities, the position of the companies during negotiated procedures is also safeguarded by the internal design of the authority. In the Autorité, the Rapporteur functions as an intermediary between the investigative service (preparing the case) and the *Service du Président* (taking the final decision). The Rapporteur is the one in contact with the parties about the transaction, negotiating with them a proposal to put before the *Service du Président.* In the Netherlands, there is a similar separation of functions due to the ACM's Chinese Walls. It is most likely for the legal department (responsible for the imposition of the fine) to negotiate the terms of a simplified resolution, since the competition department (responsible for preparing the statement

35 Waelbroeck 2008, pp. 32-33.

36 Even though it seems as such from national practice, the waiver of the right to appeal cannot be legally enforced. In order for sanctions to be lawful for Convention purposes, they must be reviewable by a Court having full jurisdiction. See ECHR, Application no. 43509/08 (*Menarini Diagnostics v Italy*). This means that courts do not need to be deferential to an agreement between competition authorities and companies with regard to the grounds of appeal. However, there is no duty to extend an appeal beyond the grounds presented by the appealing parties (as argued by Wils 2010 on the basis of ECHR, Application no. 34619/97 (*Janosevic v Sweden*)). In case of negotiated procedures, competition authorities could therefore incite companies to limit the grounds of appeal (compare Chapter 4, sections 2.3.4 and 3.2.4), which the courts can lawfully asses without extending the scope. This is criticised by Waelbroeck 2008. Cengiz notes that even if cases would eventually make it to the court, there is not yet an appropriate standard of review. The *Alrosa* cases have demonstrated the effects of a too intrusive approach at first instance and a weaker approach on appeal. Cengiz proposes that the courts take notice of the context of the decision as well, instead of relying on the appropriateness of the authorities' margin of appreciation. See Cengiz 2010, pp. 1-6 and 28-30.

37 This is possible in the institutional setting of the ACM, as argued before, but would be difficult with regard to the UK CMA. See Chapter 2, sections 2.2.2, 2.3, 3.2.2, 3.3, 4.2.2. and 4.3 on the authorities' design and decision-making processes.

of objections) cannot prejudge the legal department's final decision. There is, however, nothing to prevent the competition department from pre-discussing the option of a simplified resolution.

By contrast, the UK CMA has chosen to leave its reviewing body (the Case Decision Group) out of the settlement procedure for the benefit of a streamlined administrative handling of the case. Instead, a single officer is responsible for conducting the negotiations and taking the final decision. This is counterbalanced by the fact that, out of the three authorities, an appeal is not explicitly excluded under the UK settlement procedure.[38] Doing so would be incompatible with the UK legal system, which requires that the possibility of a review by a judge remains intact. Because of this feature of the UK settlement procedure, the absence of a separation of functions is less pressing from a safeguards perspective.[39]

2.6 Interplay with Leniency and Add-On Procedures

Reaching a resolution in a negotiated procedure is only possible if there is a real incentive for the companies to negotiate. This incentive determines the attractiveness of the procedure and thus its success. Besides the mutual gains in efficiency and time (and a better working relationship), the UK CMA, the Autorité and the ACM increase the attractiveness of negotiated procedures by rewarding cooperation with a fine discount. Such a discount can however have an adverse on the attractiveness of other procedures, such as the leniency procedure.[40] If the discount for a negotiated procedure would supersede the lower discounts for leniency (non-immunity discounts), the incentive would be given for companies to 'sit and wait' instead of coming forward with new information. Since leniency is one of the main detection mechanisms of competition authorities, it is not surprising that this has been taken into account in the design of the negotiated procedures. This connects to the normative framework on the instrumental side, as a disturbance in the influx of new cases would hamper the output and effectiveness of the competition authority as a whole.

Fine discounts should be capped to prevent interference with the goals of leniency.

38 However, the UK CMA may make an application for the CAT to revoke the fine discount if a company appeals on the facts or the qualification. The strictness of a legal review varies from Member State to Member State, but it is unlikely that there would be no review at all. In the Netherlands, the simplified *Azijn* case indicates that the right to object or appeal is waived, making it impossible for the companies to seek a review of the final decision (see Autoriteit Consument en Markt, Case 14.0705.27 (*Azijn*)). If its ad-hoc practice is any indication, this waiver is not enforceable, at least not with regard to procedural irregularities (see Chapter 4, section 4.4.1). In France, the right to appeal is not waived, but is limited to a number of procedural points. The existence of the infringement and the legal appraisal by the Autorité fall outside this scope. Moreover, it is likely that the French judges would revoke the fine discount if these points were appealed anyway (see Chapter 4, section 2.3.4).

39 The fact that the possibility of a review is retained (despite the fact that the UK CMA will likely apply for a lower fine, and there is a risk that companies involved 'lose' their fine discount as the Competition Appeals Tribunal has jurisdiction to review the fine in full) could be considered a 'minimum safeguard […] commensurate with […][the] importance [of the settlement procedure]' as required by the ECHR. See ECHR, Application no. 18114/02 (*Hermi v Italy*), para. 73.

40 The effect of negotiated procedures and fine discounts on enforcement as a whole is touched upon in the concluding remarks of this section.

In France, the possible concurrence between leniency and negotiated procedures is mentioned in the procedural guidelines on the transaction procedure,[41] while in the UK the UK CMA's procedural notice specifically mentions that leniency should remain attractive as a cartel detection mechanism. Partly for that reason, in both Member States the discounts for negotiated procedures are capped. The ACM seems to follow suit by applying a similarly moderate fine discount in its *Azijn* case.[42] It has to be remarked that in the 'new' French transaction procedure (for which the aforementioned procedural guidelines are not yet updated), difficulties with the interplay with leniency might be expected. Since the Autorité no longer negotiates on the percentage of the discount, but on the amount of the fine itself, it will be more difficult to determine whether or not the sum agreed upon is deferential to the leniency procedure (particularly the type 2 leniency, that can be obtained after immunity has been granted to a first reporter).

Another way of making negotiated procedures more attractive is by limiting the possibility of adverse consequences, such as civil add-on procedures. These add-on procedures aim to facilitate claims for damages by third parties, relying on the findings of the competition authority in the administrative case. In fully adversarial procedures, the competition authority usually finds the infringement and attributes it to the companies fined. In some negotiated procedures, however, companies only declare not to contest the findings – which is not the same as a finding of liability. This leaves possible claimants with the difficulty of proving liability. In this thesis, the private enforcement of competition law is specifically placed outside the scope of analysis, for which reason no conclusions can be drawn from the choices made on a national level. The consequences of negotiated procedures for civil add-on procedures thus need further research. Still, it is clear that the interests of the companies involved in the procedure should be weighed against the importance of actions for damages.

The interests of the companies involved in the negotiated procedure should be balanced against the interests of third parties in follow-on procedures. This aspect requires further research.

National practice on this point differs. The Autorité and the ACM distinguish a non-contestation from an admission of guilt, potentially limiting companies' liability for follow-up actions. Moreover, the Autorité has extended the protection of confidentiality that is in place for leniency applications to the minutes of the transaction procedure. There is a possibility that this makes actions for damages more difficult, as the involvement of the companies is not specifically proven in the final decision and the document showing an explicit non-contestation is marked as confidential. The situation in the UK is rather different, as a settlement agreement requires an admission of liability. This admission makes add-on procedures easier (safeguarding deterrence on a higher policy level), but also decreases the attractiveness of the settlement procedures for companies.[43] Because

41 The importance of leniency over non-contestation to the enforcement process is also confirmed by the *Cour d'Appel*. See Cour d'Appel de Paris, no. 2009/00334 (*Arcelor*).

42 Autoriteit Consument en Markt, Case 14.0705.27 (*Azijn*).

43 See for instance Georgiev 2007, p. 1033.

of their settlement agreement, they are now vulnerable to civil actions, even if the decision underlying the settlement agreement is overturned in court. Nevertheless, the UK CMA has indicated that it found the mere non-contestation of facts insufficient to grant a discount, and has opted for this system of admitting liability.[44]

2.7 Main Points and Future Challenges

The differences in design between the three competition authorities have pinpointed some pressing issues for the application of negotiated procedures. After an evaluation against the normative framework, recommendations have been with regard to the place, content and shape of the negotiations, the use of procedural guidelines, the extraction of commitments, the separation of functions, the interplay with leniency and civil add-on procedures as well as the broader enforcement considerations of deterrence and clarification. Following these recommendations, there is no need to limit the application of negotiated procedures to certain types of cases or to certain markets.

This does not mean, however, that a negotiated procedure that complies with these recommendations is capable of becoming the default enforcement mechanism, replacing the fully adversarial procedure along the way.[45] Besides the fact that there are many benefits to be derived from an adversarial procedure,[46] the concerns that play a role when applying a negotiated procedure on an individual case level, become even more pressing on a policy level – such as the limits on a legal review and legal 'learning', the possible decrease in deterrence and the perceived loss of safeguards. Negotiated procedures are only possible when they are built on the 'trust' of companies earned earlier. This trust is directly connected to the perceived legitimacy of the competition authority. Negotiated procedures work because competition authorities are perceived as credible and deterrent institutions, with a reputation that their decisions generally hold up in the courts. If that would be constantly chipped away on a case level, in the end there would no longer be any credible basis for a settlement, despite the competition authorities' best efforts to create a negotiated procedure that is as balanced as possible.

For that reason, it can be argued that negotiated procedures that are compliant with the recommendations made above can only lead to effective outcomes if they are applied in balance with the other enforcement instruments which a competition authority has at its disposal. This means that, from time to time, the competition authority should confirm its credible reputation by winning appeals; that it should deter

44 However, note that the UK CMA usually does not make any findings regarding the effect of the infringement on the market, while the Autorité does. This might soften the conclusion reached above, as the Autorité's appraisal could be valuable for third-party claims as well.

45 This is underlined by Georgiev 2007, p. 1028 and by Vascott 2013, who remarked that 'on the basis of its success and the general confidence that procedural rights and confidentiality are safeguarded, it [a settlement] is clearly becoming a mainstream way of arriving at decisions with fines'.

46 A fully adversarial procedure is a tried and tested procedure that incorporates fixed moments for parties to respond (safeguarding the right to be heard), has known procedural milestones, creates obligations for the competition authority to inform the parties (safeguarding equality of arms and intelligible notification), is reviewed on multiple occasions (preventing bias) and generates a formal decision that is appealable in court. These procedures thus safeguard legal certainty and create a clear relationship between the competition authority and the companies under review. Moreover, one of the results of a fully adversarial procedure (a non-discount fine) serves as a deterrent for the company on which it is imposed, and others.

possible offenders by the imposition of a fine; and that it should reaffirm the importance of law-abiding behaviour by the use of advocacy-related tools. Just as was underlined with regard to companies in a leniency procedure, a competition authority should not 'sit and wait', but should be actively engaged in pursuing the best enforcement outcome possible – not just with regard to efficiency and short-term effects on the market, but with a view to its enforcement policy as a whole.

3. MARKETS WORK

Markets work is a collective noun for investigations into the functioning of (certain aspects of) markets outside of the scope of an infringement procedure, on the basis of which the competition authority can take various steps to improve the competitive situation in the market. From the analysis of national practices, it appeared that there are quite some differences between approaches within this category. The UK CMA operates under a fully-fledged 'markets work regime', formalised in law and explicated in legal guidelines, whereas the Autorité gives advice on the basis of a self-referral (or a referral by other bodies) and the ACM enjoys a more flexible power to conduct market research.[47] The main differences therefore lie in the degree of formalisation in the regime and the flexibility enjoyed, but also in the character of the instrument itself.

The markets work regimes of the Autorité and the ACM are clearly more guidance-oriented instruments, through the application of which the authorities can make non-binding recommendations to the market. The procedures of the Autorité are unique in the sense that they originate from a power to give advice to governmental bodies, traces of which are still visible in its current set-up. The ACM's practice can once again be characterised by its flexibility and desire to pursue a broad approach to market problems. However, its investigation powers are quite broad as well and can have far-reaching effects for market parties.[48] The markets work regime of the UK CMA – from whom the term 'markets work' as such is borrowed – has both a guidance and an enforcement character. This is due to the fact the UK CMA uses two distinctive procedures: a phase 1 study (with a guidance character, similar to the ACM's and the Autorité's powers) and a phase 2 investigation (in which far-reaching remedies can be imposed and strict procedural safeguards apply).[49] This duality in the UK CMA's markets work regime makes it incomparable with the market studies and scans performed by the other national competition authorities.

---

47 See the comparison between the different regimes in Chapter 5, section 5.5. Note that the Autorité's competence to study markets is derived from its more general competence to give advice on the basis of a referral. With that, there is a significant overlap between its markets work and individual guidance competences.

48 The ACM is legally allowed to share information within its organisation. Because the ACM is a multi-sectoral regulator, this power can have consequences for companies active on regulated markets as well. The characterisation of the ACM (in which the markets work regime is labelled in a somewhat imbalanced fashion) is discussed in Chapter 5, section 5.1.3.

49 It has been remarked in Chapter 5 that the possibility of engaging in a phase 2 investigation somewhat overshadows the functioning of the phase 1 study, because of, for instance, the early stages in which the intention to make a market investigation reference has to be notified to the parties in that particular market. See in more detail Chapter 5, section 5.1.2.

This section aims to give a uniform overview of policy considerations that competition authorities can be faced with when designing markets work procedures. Where necessary, regard is had to the particular character of the UK CMA's regime, and in some instances references are made to phase 1 studies or phase 2 investigations alone. Having said that, the policy considerations discussed here flow from the evaluation and comparison of national practice – as performed in Chapter 5. Most importantly, the enforcement aim of markets work is discussed, as even the limited recap above indicates that the objective of markets work differs from Member State to Member State. Markets work can, however, also have a negative effect on enforcement and the credibility of competition authorities. These risks are discussed below, and can (in part) be limited by making choices as to the application of markets work in a balanced toolkit. Engaging in markets work does not preclude further enforcement action, which can have spill-over effects onto the application of other procedures. National competition authorities should therefore take stock of this risk and aim to prevent this from happening. Lastly, it is reviewed to what extent a legal review (or alternative forms of accountability) is necessary. As far as terminology is concerned, the collective noun 'markets work' is used to refer to all types of instruments, whereas 'market scan' describes the ACM's regime and the Autorité's more extensive advisory opinions. Market study and investigation are used with regard to the UK CMA's practice only.[50]

3.1 Objectives to Be Pursued with Markets Work

The evaluation and comparison of national practice has shown that markets work as performed by the UK CMA, the Autorité and the ACM are very different in their nature and legal embedding. Because of this variation in approach, it has been difficult to take a step back and to review what purposes markets work could actually serve. From national practice, it appears that competition authorities strive for three different objectives: inducing compliance by clarification, gathering insight for the competition authority itself and generating publicity. These objectives are set out and explored below.[51] However, these objectives come with a number of risks, which – for reasons of clarity – are discussed separately (§3.2). Naturally, attention is also paid to a possible resolution to the tension between objectives and risks (§3.3). These three sections therefore have to be read in conjunction.

3.1.1 Compliance by Clarification

Well-executed markets work provides clarity on the functioning of a certain market and the risks for competition in it. For the companies active on the market, this educates them about the way in which competition rules apply to their sector and to what extent their current behaviour forms a risk for competition. Competition authorities might even make recommendations to improve the competitive situation, which companies can take into account. Markets work therefore has a 'clarification effect', which in the

50 See for an overview of the correct terminology Chapter 5, section 1.

51 The objective of the phase 2 investigation (enforcement by the imposition of remedies) is left outside this scope, because it is not comparable to the objectives that any of the other competition authorities pursue.

literature has been said to induce compliance.[52] Through clarification, competition authorities are able to warn companies engaged in potentially risky market behaviour that their approach might be harmful and that the competition authority is aware of their behaviour. Reports resulting from markets work thus show that the competition authority is watching the market and that their market behaviour is now on the radar (the 'radar effect'). For compliant companies (companies that are not engaging in potentially harmful behaviour or do not contribute to a disjointed functioning of competition), this radar effect reaffirms law-abiding behaviour, as they are strengthened in their beliefs that compliance is in fact the best strategy. If markets work is well executed, it could appeal to both of these bases for compliance. However, the radar effect does not have any effect if companies do not fear the consequences of possible follow-up enforcement action. To this end, competition authorities must maintain a sufficiently credible reputation in order to induce a deterrent effect from merely watching a market and the markets work itself must contain enough information in order to give sufficient guidance to companies involved and others.

3.1.2 Gathering Insights

Apart from the clarification effects, markets work is an outstanding informational tool for competition authorities, as it allows them to gain knowledge of the functioning of potentially problematic or difficult markets. In that light, it is not surprising that the UK CMA, the Autorité and the ACM often use markets work with regard to complex markets, such as healthcare, financial products or evolving technology. Even if there were no recommendations to be made on the basis of the markets work, no further enforcement action would be required, or the UK CMA would see no grounds to refer the market for a phase 2 investigation, the competition authority would still have extensive information about the functioning of a market at its disposal, which could form the backdrop of new investigations into the same or similar markets in the future. The possession of such information, however, poses challenges of its own – particularly if it is used in follow-up action. This is referred to as the spill-over effects of markets work and is discussed a little further below (§3.4).

3.1.3 Generating Publicity

Markets work generates publicity, which – in turn – could increase the effectiveness of enforcement. In a positive sense, publicity concerning markets work can create a 'buzz' around a certain market (or in less media-influenced terms: it can increase pressure upon market parties), so that more attention is given to the value of competition law compliance in that particular sector. More generally, markets work can contribute to the visibility of the competition authority and its work, especially when it concerns markets that touch upon consumer interests directly. This does not mean that a competition authority should only pursue markets work in markets that generate 'good stories' for the media, but the publicity

52 Van Erp calls this a cognitive reason for compliance (Van Erp 2002), and Wils refers to clarification as a 'task of enforcement', see Wils 2009, pp. 5 and further.

surrounding markets work can be taken into account when deciding whether or not to pursue a study or a scan.[53] In a negative sense, however, public reactions to markets work could undermine the reputation of a competition authority if these reactions are negative.

However, from the perspective of the companies, the publication of markets work can be perceived as an additional sanction.[54] Especially when press releases hint at the involvement of market parties in infringements, publications can quickly take the form of naming and shaming. Where the publication of market studies, scans or investigations result in naming and shaming, it could be argued that the publication itself can be considered a criminal charge. However, it should be noted that this qualification is heavily debated even when it comes to the publication of fining decisions, which are much more declaratory in nature.[55] Markets work does not – or at least should not – make such declarations, and their publication serves informational and transparency purposes rather than a 'shaming' purpose. The publication of markets work should not, for that reason, be perceived as naming and shaming – provided that the competition authority refrains from suggesting that individual companies are involved in infringements. This might be difficult in monopolized markets or oligopolies, or in markets in which the structure of individual companies is perceived as a reason why competition is not working well.[56] For that reason, competition authorities should focus on the functioning of markets and the obstacles to competition as such.

Markets work should be published to achieve benefits of clarification and to pursue transparency. However, the reports should focus on (obstacles to) the functioning of markets and refrain from implicating individual companies where possible. Moreover, sensitive information should be protected.

Under Dutch law, the ACM is required to notify its intention to publish a market scan to the parties it may concern. If they fear reputational damage by publication, or have other reasons why the final report should not be made public, they have the right to start an injunction procedure to try and halt publication.[57] In France, the same holds true for the publication of decisions,[58] but it is unclear whether the publication of an advice can

53 Note that a positive side of media attention for the competition authority could be a negative side for the companies. See the remarks on naming and shaming directly below.

54 This is in line with Van Erp's distinction of different perspectives on publication. She distinguishes a consumer perspective (served by the warning and informational function that publication might have), a punishment perspective (caused by the reputational damage incurred by the publication of a company's name), a legitimising perspective (served by transparency about the functioning of an authority) and a prevention perspective (served by the deterrent effect that publication might have on potential infringers of the law). Van Erp 2009, pp. 145 and further.

55 See for instance the following literature, which is (due to the nature of the discussion) mostly in Dutch: Doornbos 2003, Michiels 2007, Bronckers & Vallery 2011, Schinkel 2012 and Van Wingerde 2013.

56 See, for instance, Office of Fair Trading, Case CA98/01/2012 (*British Airways*) or Office of Fair Trading, Case CA98/02/2009 (*Construction*).

57 Article 12u sub. 3 *Stroomlijningswet* in combination with Article 8:81 *Algemene wet bestuursrecht*. This has not yet happened with regard to market studies, but it has with regard to fining decisions. See Lachnit 2014b.

58 For formal decisions, the Autorité can issue an injunction for publication, which can be appealed by the parties concerned. See L.464-2 I (5) *Code de Commerce*.

be halted. The issues of reputational damage and naming and shaming seem to be less of an issue under UK law, as the value of transparent administrative decision-making seems to be generally considered of overriding importance. In fact, the Enterprise Act even prescribes the publication of certain key moments in the markets work regime.[59] This does not mean, however, that the UK CMA does not have to be cautious about the tone of its publications. Especially where certain claims are not yet substantiated, the UK CMA has to be careful not to make unfounded allegations.[60] More in general, it should be noted that this discussion does not extend to the publication of sensitive or commercial information, which is protected under French, UK and Dutch law.[61]

3.2 Enforcement Risks Connected to Markets Work

Besides these largely positive contributions that markets work is capable of making to the enforcement of competition law, its use also has a number of drawbacks in that respect, as it can lead to over-involvement, over-commitment or under-enforcement. In the first place, a market scan (or a similar instrument) can cause a perception of over-involvement in a certain market. This is most likely the case when competition authorities are already present in that said market, for instance by pursuing enforcement action on a different practice, or by having concluded similar markets work in the past. Over-involvement is thus the negative consequence of the 'radar effect' as perceived above and can have negative effects on the relationship between companies and the competition authorities. Admittedly, this relationship is often adversarial, but where markets work is concerned, the effectiveness of the instrument might actually benefit from a less confrontational stance, given that the outcomes are often not binding. Perceived over-involvement does not contribute to the voluntariness with which companies would cooperate towards a better-functioning market.

> *Competition authorities have to take into account their other enforcement efforts in the same market when deciding whether or not to engage in markets work in order to avoid the perception of over-involvement.*

A second drawback of the use of markets work is the risk of over-commitment on the part of the companies, which holds particularly true where it concerns the kind of market studies and scans that lead to recommendations to the market. Over-commitment can occur where the recommendations made by competition authorities are experienced as particularly stringent or pressing, or where the companies have a reason to fear follow-up action by the competition authority. Over-commitment by market parties could, at least in theory, even be harmful for competition, because it remedies situations in a market that are (not yet) of concern and could limit companies' freedom to conduct

59 Consistent with the more far-reaching character of markets work under the UK CMA's regime.

60 Illustrative in this respect is the press release which the OFT issued in 2007, hinting at Morrison's involvement in a dairy cartel. The OFT suffered a claim for defamation and had to renounce its statement publicly. Office of Fair Trading, Press Release 'Morrison Supermarket plc: an apology', of 23 April 2008.

61 In the UK: Enterprise Act 2002, part 9. Under Dutch law: Article 10 *Wet Openbaarheid van Bestuur*, as mentioned in Article 12u *Stroomlijningswet*. The French publication strategy is set out in Article L.465-2 *Code de Commerce*, of which point VIII in particular protects sensitive information.

business.[62] With regard to recommendations made in the course of a market study or scan as performed by the UK CMA, the Autorité or the ACM, it is imaginable that companies are likely to follow up on the recommendations made in fear of follow-up enforcement action, since this is not precluded by the market study or scan.[63] This leaves the possibility of follow-up enforcement action as a 'big stick' for both of the competition authorities, enforcing the execution of their informal recommendations.[64] Especially since there is no legal review of the recommendations made, the competition authorities' perceived legitimacy could suffer if they make far-reaching or unreasonable recommendations. The recommendations made in the context of the UK CMA's market study or investigation should therefore be proportionate and should not go beyond the objective of the instrument itself.

The prerequisites for achieving benefits under markets work are a strong reputation and a credible 'big stick' to effectuate results. However, to avoid undue pressure, competition authorities should exercise restraint with regard to their recommendations and should not make recommendations that are not proportional to the competitive issues identified, or that go beyond the nature of its markets-work instrument.

A final drawback lies in the risk of under-enforcement, meaning that a market study or scan is performed where a fully adversarial procedure would be preferable in the light of the market situation and the problems found. The fact that competition authorities could engage in a 'lighter' market study or scan could give the general public the impression that the market and the companies under investigation get an easy way out, instead of facing enforcement action under a fully adversarial procedure. For the ACM, the Autorité and the UK CMA the risk of under-enforcement is mitigated by the fact that the possibility for formal action is not precluded by the exercise of markets work. However, switching to a fully adversarial procedure brings about its own difficulties, as is further discussed below.[65] Apart from that, it has to be noted that in the UK the markets work regime is not necessarily 'lighter' than a fully adversarial procedure. The threshold for imposing remedies is different (an adverse effect on competition, instead of an infringement of competition law), but the investigation, the consultation procedure and the final report can still be considered extensive, both for the competition authority and the companies in question.

62 Which connects, in part, to the argument made in section 2.4 above with regard to commitments offered in the course of a negotiated procedure.

63 In the UK CMA's practice, it would seem that the possibility of a phase 2 investigation would advance the execution of recommendations, or would cause companies to offer undertakings. It should however be noted that the UK CMA is required to publish its intention to make a MIR at an early stage, which somewhat alleviates this pressure on the companies under investigation.

64 This also underlines the importance of having a 'big stick' ready to use. This could be problematic in the UK, where the number of studies and investigations performed in the past contrasts greatly with the number of fully adversarial procedures, settlements and commitment decisions. However, the UK CMA is looking to alter this balance. In its proposals for reform it has consistently stated that it strives for an increase in speed and robustness, which gives rise to the expectation that the UK CMA will publish more enforcement decisions in the future.

65 See sections 3.4 and 3.5 below.

3.3 Selectiveness

Markets work thus pursues different goals (clarification, information gathering), but involves a number of risks from an enforcement perspective (over-involvement, over-commitment and under-enforcement). Competition authorities therefore seek to maximize the effectiveness of markets work in the light of the goals pursued, while keeping the perceived risks at a minimum. To that end, competition authorities must have a clear view of when to pursue markets work, and when the application of other enforcement instruments seems more opportune. In other words: competition authorities should increase selectiveness in order to better define in what circumstances market research should be used. The practice of none of the competition authorities is very clear on this point. From the analysis of the cases pursued, market studies, investigations or scans are used because of political reasons, because a given market is a priority sector (the denomination of which often also has a political motivation) or because a market is too complex to tackle with a straightforward investigation. Given the nature of markets work (gaining knowledge about the functioning of markets and finding areas of competition that might not be working well), there are a number of specific situations in which mapping or correcting the market by means of markets work could be beneficial, such as in complex markets, markets with multiple competition, consumer and/or regulatory issues, or emerging markets, as remarked above. If competition authorities would provide more clarity about the possible application of markets work, the selection of markets to investigate would concentrate more on the possible effects and would be less prone to political influence.[66] Apart from that, the use of economic market screens (collecting metadata on markets) to flag potential competition problems could lead to more focused market research.[67] Based on economic and statistical data that is freely available, competition authorities could identify a risk profile for markets and decide which markets to deploy resources to, resulting in a more targeted application of the instrument.[68]

> *Competition authorities should state a clear view on when to apply markets work. It is recommended that the instrument be applied in complex or emerging markets, or in the presence of broader competitive issues that can be identified by economic market screens.*

Increasing selectiveness has as an additional benefit that it might mitigate the concerns raised with regard to the costs of markets work in relation to actual effects in the market.[69]

66 The question is whether this type of political influence is a bad thing. It could also be considered a sign of relevance when a particular issue is referred to the competition authority (an authority that is still – as is explained in Chapter 2 – accountable to a Minister for its functioning. This is the political accountability, as defined by Bovens). This point is further discussed in Chapter 9, section 4.2.

67 See, for instance, Abrantes-Metz 2013.

68 Note that this already happens, to some extent, at the ACM, where the Chief Economist is consulted while preparing the enforcement agenda for the years to come. The link with the use of market scans for further action is as yet not that explicitly made.

69 Note that apart from the few numbers listed in the section concerning the application of the UK CMA's markets work regime, there has been no research on this part, and this evaluation does not presume

It has been noted in Chapter 5 that in some cases the balance between input and output (so, time and resources vis-à-vis results) appears to be somewhat distorted. Conducting proper market research takes a lot of time, could possibly take up a lot of resources, while actual results in the markets are not always visible.[70] To somewhat limit the resources spent on markets work (and also to facilitate a quicker investigation), the UK has now adopted statutory timeframes that prescribe the deadlines for certain key procedural steps. As appears from the other subjects of analysis, these statutory timeframes might have unintended side-effects,[71] for which reason it is difficult to determine whether the adoption of deadlines is the only solution to increasing cost-effectiveness. Therefore, the recommendation made here (to increase selectiveness) could lead to a more targeted application of the instrument and could prevent the use of resources in vain.

3.4 Limiting Spill-Over Effects and Information Requests

In all three of the competition authorities under review, markets work does not preclude follow-up enforcement action if there are grounds to believe that an infringement of competition law has taken place. Most likely, competition authorities would decide to launch a full investigation when the information yielded by a market study or scan indicates that there might be an infringement of competition law. In this situation the question arises whether the information gathered under the markets work could be used as evidence in the formal investigation, which – in fact – constitutes a criminal charge.[72]

to concern the actual effect (in terms of monetary value) of enforcement instruments. It is difficult to determine the 'results' of market research, as they – by their very nature – are not always aimed at achieving measurable outcomes. Much can be gained by the signalling function of market research, or their supposed preventative effect. Merely comparing the impact (gains) to the costs is difficult, as there is no telling what gains could be achieved if the resources would have been directed elsewhere. Also, such an evaluation would only take into account the costs of running the market research within the competition authorities, and not the burden on the companies involved.

70 There are numerous examples of markets work that has led to little or nothing, think for instance of the market scans in which the ACM decided that there were no grounds for further action and made no further recommendations. Apart from that, the willingness to follow up on recommendations made on the basis of markets work is often a balanced choice for the parties under review, influenced not only by the recommendation of the authority, but also by other market and political factors (as remarked by the Autorité in the interviews with the *Service du Président* and the *Service d'Instruction* of the Autorité de la Concurrence, conducted on 19 June 2014 in the course of this thesis). The balance between input and output is even of more importance in the UK, where the number of market studies and investigations has historically been larger than the number of fully adversarial procedures, settlements or commitment decisions.

71 The statutory timeframes may limit the intrusiveness of the competition authorities' investigatory powers, but they also create the risk of 'pushing back' a great deal of preliminary work to the so-called phase 0, the informal phase.

72 Markets work does not constitute a criminal charge for the purposes of the Convention. In order to determine this, it has to be reviewed what the classification of the procedure is under national law, what the nature of the offence is and for what purpose sanctions are imposed and how severe they are. These criteria are derived from ECHR, Application no. 5100/76 (*Engel and others v the Netherlands)*, para. 81. Under UK, French and Dutch law, the provisions guiding the markets work regime are classified under administrative law; the Enterprise Act 2002, the Code de Commerce and a combination of the Dutch Competition Act and the General Administrative Law Act respectively. Secondly, phase 1 studies, phase 2 investigations, advisory opinions and market scans are not aimed at finding individual offences (that is, infringements), but rather allow the competition authorities to investigate a combination of features that distort the market or have adverse effects on competition at its heaviest. Furthermore, under phase 1 studies, French advisory opinions and the Dutch market scans no further sanctions are

This question does not just arise when a market study or scan yields information about a possible infringement 'by accident', but also when competition authorities would use the markets work regime as a veil to engage in 'fishing expeditions' for possible infringements. From a legal perspective, such a course of action blurs the lines between an informal and a formal investigation, which is relevant with respect to the prohibition of self-incrimination.[73] At the very least, competition authorities should warn companies if the objective with which information is gathered changes during the procedure.[74] But even if the actual statements (and answers to questionnaires) provided under markets work mean that information-gathering powers were not used in other formal procedures, this does not take away from the fact that the knowledge of the market and its problems 'exists' within the competition authority, and that the simple possibility of being subject to further investigation might deter companies from fully cooperating with market studies and investigations. Besides the risks of over-commitment under undue pressure, which are discussed above, this might also detract from the possible effectiveness of market studies and investigations. These issues cannot be remedied completely, which underlines the necessity for competition authorities to provide clear guidance on the use of information yielded in market studies. This means that competition authorities should communicate clearly to what end information is requested, and which safeguards apply as soon as the information is transferred. Such a course of action also allows companies to review the proportionality of the request.[75]

---

imposed, and the consequences are of an informal nature to be adopted on a voluntary basis. If any action is taken, these consequences are aimed at restoring or improving competition. The same holds true for phase 2 investigations, where the remedies imposed are aimed at restoring the market, not at punishing the offenders. And finally, even though the most severe remedy available to the UK CMA might have far-reaching consequences for the companies involved, the possible consequences of an investigation cannot be equated with severe penalties. However, it should be noted that even without the full application of Article 6 ECHR, competition authorities still act under the obligation to behave in an appropriate manner, with due care for procedural rights and fair administration. When implementing or enforcing EU law, they are still bound by the rights comprised in Article 51(1) of the Charter. Apart from that, national administrative (or constitutional) law recognizes similar rights and principles of good administration. See Chapter 3, section 3.6. See in more detail on the principles of good administration Addink (forthcoming).

73 See – most fundamentally – ECHR, Application no. 10828/84 (*Funke v France*), ECHR, Application no. 19187/91 (*Saunders v United Kingdom*), and with regard to European competition law CJEU C-374/87 (*Orkem*), but this right has been touched upon in many cases. See in more detail Chapter 3, section 3.6.3.

74 In order to indicate that the procedure has changed and different standards (such as the right to remain silent, insofar as they are protected under national law – see Chapter 3, section 3.6) might apply. See ECHR, Application no. 39660/02 (*Zaichenko v Rusland*).

75 Note that limiting spill-over effects (with a view to preventing self-incrimination) is not the only reason to limit the far-reaching investigative powers by the competition authorities. Complying with requests for information can be very burdensome for companies, and should not be a way of shifting the 'burden of investigation' from the competition authorities onto them. In a very recent case, the Court of Justice commented on the information requests sent out by the Commission in the infamous *Cement* cases. In these cases, the Commission conducted a formal investigation into an infringement and sent out extremely extensive information requests. These requests were appealed against on grounds of a lack of sound reasoning, as the Commission's explanation for the requests did not allow the companies to evaluate what information would have been necessary for the purpose of the investigation. In the *Cement* cases, the Court of Justice implicitly subscribed to the AG's view that in the absence of reasonable grounds for suspicion, requests for information may be considered arbitrary. See CJEU Case C-247/14 P (*HeidelbergCement/Commission*), CJEU Case C-248/14P (*Schwenk Zement/Comission*), CJEU Case C-267/14P (*Buzzi Unicem/Comission*) and CJEU Case C-268/14P (*Italmobiliare/Commission*) and the Opinion of AG Wahl to CJEU Case C-247/14 P (*HeidelbergCement/Commission*) of 15 October 2015.

The purpose of the information gathering should be made clear with a view to preventing self-incrimination and reviewing proportionality. In addition, competition authorities should give clear guidance on the use of information yielded by the markets work regime.

Within the UK CMA, spill-over effects are mitigated by the fact that the law limits the powers to request information in the course of a market study or investigation. In fact, the UK CMA has the power to require any person to be at a *specified* place to give *specified* (categories of) documents, including *specified* business information.[76] Within the ACM and the Autorité, the investigatory powers are less specific and are therefore more prone to criticism on the points raised above. In France, this is somewhat remedied by the fact that the Autorité's questionnaires can be objected to. On the other hand, the Dutch provision warranting a 'free flow of information' throughout the ACM has given rise to some scepticism.[77] In the light of the concerns raised above and the possible subsequent effects on the effectiveness of the instrument, the scope of the requests for information and the timeframe within which they can be applied could benefit from more clarification.

Another option to somewhat limit the extensive information-gathering powers of the competition authority is to limit them in time. This would mean that the period for information gathering becomes fixed, either by law or by guidelines. Such a time limitation safeguards companies against the excessive use of investigatory powers, and also urges competition authorities to complete markets work more quickly. However, such time limitations present their own danger. Because of the pressure to come to a timely decision, there is a risk of pushing back a lot of preparatory work (such as informally consulting companies, informally requesting information from stakeholders) to a preliminary stage, in which there are no time limits, but also no safeguards for companies. This is undesirable, because it increases the enforcement risks discussed above and deprives the companies of clarity about the way information is used and creates the risk of extending preliminary information gathering at the cost of efficiency.

The possibility of using formal investigatory powers should be limited in time. However, this limit should not push back the majority of preliminary work to an informal pre-stage.

For the UK, the limitation in time to perform a market study is captured in statutory timeframes. However, the latter risk is not dealt with in the UK CMA's procedural

Even though the requests for information were unusually extensive, and concerned a formal decision to request information by the European Commission, there are some analogies with markets work on a national level. At the very least, it shows that competition authorities have to take care that they provide a sufficient explanation regarding the application of information-gathering powers, allowing companies to assess their position accordingly.

76 Section 174 Enterprise Act 2002 and Section 176 Enterprise Act 2002, referring to Section 109 of that same law.

77 See in more detail Chapter 2, section 2.1.

guidelines. For this reason, it could be preferable for the UK CMA to make clear what the purpose of a preliminary phase is, and at which moment the transition should be made into the formal phase 1 study. Even though the Dutch markets work regime does not require a formal initiation of a market scan, the companies under review should be aware for what purpose they are consulted and what the consequences of their cooperation could be. In France, there seems to be no stage similar to phase 0, as advisory opinions are either referred to it, or initiated by a self-referral and the accompanying press release, informing the market about the upcoming investigation.

3.5 Review or Alternative Forms of Accountability

For determining whether or not the review possibilities for the markets work regimes of the UK CMA, the Autorité and the ACM are sufficient, a distinction has to be made between the phase 1 studies, the advisory opinions and the market scans on the one hand (which are more informal in nature), and the phase 2 investigations on the other. With regard to the latter, it has been noted before that an appeal is possible with regard to the decision whether or not to refer a market (the MIR) to the finding of an adverse effect on competition in the market investigation and to the remedies imposed.[78] These appeals are lodged at the UK Competition and Appeal Tribunal (CAT), which can be considered an independent and impartial tribunal with full jurisdiction for Convention purposes.[79] As is discussed above, the CAT reviews the UK CMA's actions according to a judicial review standard, meaning that it will review whether the UK CMA had 'a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did'.[80] Because the competitive analysis in market studies and investigations entails a 'complex and technical assessment',[81] this might be sufficient for the purposes of Article 6 ECHR.[82] Since there is only a small body of cases, it is difficult to say whether the review of the actions of the UK CMA by the CAT is sufficiently critical.[83]

However, the situation is different where phase 1 studies, advisory opinions or market scans are concerned. Because of their non-binding nature, the reports published

78 In accordance with Section 179 Enterprise Act 2002.

79 As required in ECHR, Application no. 43509/08 (*Menarini Diagnostics v Italy*), paras. 41-42.

80 Quote from: Competition Appeals Tribunal, Case 1185/6/8/11 (*British Airways*), at para. 20. This standard is also embedded in Section 179(4) Enterprise Act 2002.

81 See CJEU Case C-12/03P (*Commission v Tetra Laval*), CJEU Case T-201/04 (*Microsoft v Commission*), CJEU Case T-301/04 (*Clearstream v Commission*), CJEU Case T-398/07 (*Spain v Commission*), and CJEU Joined Cases T-29/10 and T-33/10 (*Netherlands and ING v Commission*).

82 ECHR, Application no. 19178/91 (*Bryan v the United Kingdom*), para. 45. This is repeated in CJEU, Case C-389/10 P (*KME*) and CJEU Case C-386/10 P (*Chalkor*). BIS also refers to these judgments, see BIS Impact Assessment 2012, Annex A, para. 45. See more in general about the review of decisions (at Commission level): Schweitzer 2012. The standard of 'complex and technical assessments' as such is explained (and defended) by Laguna de Paz 2014. See differently, for instance, Allena 2014 or Nazzini 2012.

83 So far, three market investigations have been appealed and one decision not to refer a market study. The non-referred market study was appealed before the Competition Appeals Tribunal, Case 1052/6/1/05 (*The Association of Convenience Stores v Office of Fair Trading*), which resulted in a referral on remittal. The appealed market investigation ares: Competition Appeals Tribunal, Case 1110/6/8/09 (*BAA Limited v Competition Commission*), Competition Appeals Tribunal, Case 1104/6/8/08 (*Tesco PLC v Competition Commission*), and Competition Appeals Tribunal, Case 1109/6/8/09 (*Barclays Bank PLC v Competition Commission*).

on the basis of these investigations are not considered to be formal decisions and cannot therefore be appealed before a judge. With regard to procedural irregularities, this is somewhat remedied by the possibility of an *ultra vires* claim where the behaviour of the competition authority results in something that could be qualified as an abuse of power – or something similar under specific national law provisions.[84] With regard to the substantive evaluation of the market and the possible recommendations made, this situation is more problematic. It has already been established above that in some cases companies might experience the recommendations of a competition authority as a rather binding instruction, instead of an informal comment on how to improve competition in the market. If this is the case, and the companies addressed do not share the views of the competition authority on the matter, they are faced with the choice of either following the recommendations against their will or better insight, or to wait whether or not the competition authority will pursue further action under the competition rules.[85]

For the competition authority, however, a review by a judge would have an important function as well; namely to find out whether or not the recommendations that it has made can be considered proportionate in the given case and do not exceed the goal of markets work. In the absence of such review, competition authorities can resort to alternative forms of accountability – for instance, by issuing draft reports for consultation. By means of such a consultation, all stakeholders have the opportunity to comment on the competition authorities' assessment and the proposed recommendations. The competition authority has to take these views into account when drafting and publishing the final report. Even though this still does not remedy the fact that there is no review of the market study and scanning process by a court, it does offer an alternate form of accountability, which could increase the robustness of the final report and the legitimacy of the markets work regime.

When there is no legal review, alternative forms of accountability have to be established in order to safeguard the legitimacy of the markets work regime. This can take the form of public consultation.

The Autorité is currently the only competition authority under review that issues its draft self-referrals for consultation. As it appears from its practice, these consultations do not significantly lengthen the procedure as a whole if they are conducted swiftly,

84 It has also been remarked that parties could seek a declaratory judgment under civil law, or launch a tort claim before a civil court. See Chapter 6, section 4.4 (with regard to Dutch practice).

85 This is a difficult matter, as is remarked in Gerbrandy 2015b as well. On the one hand, one could argue that no one is better placed to evaluate its position under the competition than the companies themselves. The knowledge that they have regarding possible punishable behaviour, combined with the insight into the competition authorities' knowledge that they have gained through the market study or scanning process gives them the opportunity to assess their chances carefully and to act accordingly. On the other hand, waiting for competition authorities to *possibly* take action can hardly be considered an optimal route and creates legal uncertainty for companies. This tension underlines the need for alternative forms of accountability to give recommendations provided by the authorities more 'grounding' in practice. See the recommendation made below.

but increase the legitimacy of the output.[86] The ACM tends not to issue its reports for consultation, and the UK CMA publishes strict phase 1 studies as is. However, the UK CMA has a consultation phase in place for phase 2 investigations *and* market investigation references.[87]

3.6 Main Points and Future Challenges

The differences in the design of markets work regimes between the three competition authorities have pinpointed some pressing issues for the application of this instrument. As discussed above, markets work can serve several goals (clarification, information and publication), but can have negative effects on enforcement (over-involvement, over-commitment and under-enforcement). Competition authorities can maximise the effectiveness of the instrument while steering clear from its pitfalls by formulating criteria for selectiveness. From the analysis of national practice it follows that this instrument is best applied in complex or emerging markets, or in the presence of broader competitive issues. Apart from that, competition authorities should be aware of the effects that markets work can have on its other enforcement tools. From a further safeguards perspective, recommendations have been made with regard to the separation of functions and using alternative forms of accountability in the absence of legal review.

The main challenge for competition authorities when further developing an approach to markets work is to balance the deployment of resources against the results to be expected. The main tension with markets work is therefore intra-instrumental, between cost-effectiveness and effectiveness in terms of outcomes. A solution for this counter-position is to better define in what circumstances market studies should be used. The current national practice is not very clear on this point, which is possibly due to the fact that market studies are used because of political reasons, because a given market is a priority sector (the denomination of which often also has a political motivation) or because a market is too complex to tackle with a straightforward investigation. Based on the evaluation, it seems that there are a number of specific situations in which mapping or correcting the market by means of a study could be beneficial, such as, indeed, in complex markets, markets with multiple competition, consumer and/or regulatory issues, or emerging markets. Markets work should be geared towards application in markets with certain, predetermined characteristics like the ones suggested above. In order to target interventions even better, the use of economic market screens can be promoted. This means that within these markets metadata should be collected and analysed before engaging in a more qualitative study of the market. Doing this could lead to more focused market studies, thereby preventing using resources in vain.

In these markets, markets work is a particularly useful tool to form an impression of a given market and to address concerns regarding competition that might not amount to infringements of competition law, but might have a detrimental effect on competition as a whole. With that, however, there is a risk of the competition authority intervening

86 Naturally, the procedure is lengthened by a consultation. It is a step that would otherwise not have been taken. In the Autorité's practice, however, there is but a small difference between markets work with and without consultation. See Chapter 5, section 2.2.

87 See Chapter 5, section 3.2.

beyond its mandate. This could be frowned upon with regard to recommendations (especially in the light of their perceived binding effect), but becomes even more pressing where the formal imposition of remedies is concerned.[88] Thus, the question is to what extent a competition authority can concentrate on market issues that are not illegal *per se*, but create unwanted effects on the markets and/or could pose a threat to the competitive situation in the future. There is no 'single right answer' to this question, as the scope of the functions of a competition authority depends on its perceived function in society. If this function is interpreted narrowly, to the letter of the law, it could be considered inappropriate for the authority to concern itself with broader market issues. Competition authorities could be criticised for using their powers to shape markets *ex ante*, instead of correcting them *ex post*. In this interpretation, it is not considered the task of the competition authority to deal with the identified competitive problems on an ad-hoc basis, where regulation or other Government intervention would be preferable. However, if this function is interpreted more broadly, to the spirit of its objectives, attempts at effectuating broader changes in the market could be met with more enthusiasm. In other words, there is tension between the broader approach to market problems that markets work pursues and the perception of the function of a competition authority, which might influence the perceived legitimacy of these interventions. For that reason, it is important to facilitate a discussion about these boundaries, also with regard to the limits of intervention under markets work.

4. INDIVIDUAL GUIDANCE

Individual guidance is defined as the advice given to (groups of) companies with regard to competition concerns about their proposed collaboration or other market behaviour. For the Autorité, individual guidance is given in the course of its advice procedure, which is hybrid in nature and shows characteristics of government advocacy, market scans, and informal opinions. The UK CMA gives individual guidance by means of the procedure for short-form opinions, which has been retained in the merger, but on a trial basis only. The ACM, lastly, applies two different instruments to give individual guidance: the more procedurally embedded informal opinion and the irregular opinion. The latter results in a variety of reports, opinions and advisory opinions directed at market parties concerning competition law-related topics.

Chapter 6 of this thesis has discussed, compared and analysed informal guidance, which has led to the conclusion that – even within this informal instrument – significant differences exist. In France, individual guidance is given on the same legal basis as its markets work, which means that it also can be characterized as a procedure of bounded flexibility.[89] With its individual guidance, the Autorité pursues the objective of facilitating self-assessment under the competition rules. This objective is the same

88 In fact, within the UK CMA it has been noted that most of the determined adverse effects on competition concern conduct that cannot be addressed through the prohibition system and led to the imposition of remedies that are otherwise not possible to impose. See Brown 2009, p. 173-174.

89 See Chapter 5 on Markets Work at the Autorité and the concept of bounded flexibility. This concept refers to the freedom which the Autorité enjoys in determining the precise scope and outcome (which, unlike its other instruments, is not delineated in guidelines), while simultaneously being bound – in the referred advisory opinions – to the questions asked by the referring parties.

in the UK, where the UK CMA provides for individual guidance by means of short-form opinions. This instrument is ambiguous in nature, as the UK CMA has invested in increasing its efficiency and transparency, but has not applied it in practice. Different to the other two competition authorities, the ACM provides individual guidance with the objective of providing clarity about the compatibility of proposed agreements with competition rules. This means that by its very nature, the ACM's individual guidance is more concrete and contains findings rather than recommendations.

This section transcends the national characters of the individual guidance instruments and discusses a number of policy considerations that – on the basis of the comparison in Chapter 6 – have appeared to be of importance when designing individual guidance instruments. These policy considerations are reviewed in the light of the normative framework underlying this thesis. In the first place, attention is paid to the possible efficiency of individual guidance in the light of its limited application. This tension is visible in all three of the Member States, and points towards a fear of unintended consequences with its application. From a policy point of view, a possible consequence is the floodgate argument (an over-application of the instrument), and, on an individual level, competition authorities might be hesitant to create (unintended) binding effects. These considerations are discussed separately. Apart from that, this section discusses the accountability problem inherent in these types of individual (but informal) guidance. These objections merit the question whether individual guidance should – at all – be an instrument that competition authorities should have at their disposal, and if so, under which conditions. This question is answered in the last section below, with special attention being given to the instrumentality and safeguard considerations discussed earlier. Different to the other sections in this chapter, the recommendations for individual guidance practice are made in the final chapter only, but address topics that have been touched upon in the sections before that. This is due to the fact that a position needs to be taken with regard to the desirability of individual guidance as such, before recommending features to improve upon. Throughout this section, the word 'opinion' is used to refer to the Autorité's individual advisory opinions, the UK CMA's short-form opinions and the ACM's informal and irregular opinions.

4.1 Potential Effectiveness, But a Lack of Application

One of the tasks of a competition authority is to provide clarity as to the application of the law through the issuing of clarification notices (general guidance) or by setting precedents. An alternative way of providing such clarity could be through giving individual guidance if parties so require. When looking at it from the point of view of instrumentality, opinions could be effective tools to give more guidance to companies and to generate more clarity on the application of competition law to a certain topic. In that sense, general guidance documents and guidance given in individual cases could be of a complementary nature, explaining the approach competition authorities might take if similar cases were under investigation.[90] When pursued in an effective way, such guidance instruments are a form of 'clarification', which could contribute to or reaffirm

90 Underlined by the presentation by Petit in 2015.

companies' compliance with competition rules.[91] Besides this clarification effect, the issuing of an opinion gives competition authorities the opportunity to make their views known on a certain situation *ex ante*, so before the behaviour has been implemented in practice. If, in the light of the applicable rules and case law, the proposed behaviour contains elements that could pose a threat to competition, the competition authority could make recommendations for adaptation, thus preventing harm from competition.[92] Both of these possibly positive effects on enforcement are reinforced by the rapidity of the procedure as such. Opinions, both from the ACM and the UK CMA, have to be issued within a short time frame, enabling (or requiring) competition authorities to guide or intervene quickly.

Opinions are thus potentially powerful tools, but the practical application up until this point is so limited that their effectiveness in terms of their use by the UK CMA, the Autorité and even the ACM is questionable. National practice has not given a clear explanation for this finding, but logically, a lack of application can be caused by a lack of requests, or by hesitance on the part of the competition authorities.

4.1.1 Lack of Requests

From the companies' point of view, there could be a number of reasons why requesting an opinion would be an unattractive option. First of all, it has been suggested that the criteria that the competition authorities apply for determining whether or not an opinion will be issued are too strict, and that the procedure for requesting one is too extensive.[93] In short, the company has to evaluate whether its proposed agreement raises a novel issue, and support this evaluation with sufficient background information. Even after having invested resources in a request for an opinion, the competition authority might nevertheless discard the request on grounds of prioritisation. In the UK, this situation is somewhat remedied by the possibility of pre-request discussions, but the question remains whether the informational requirements are too broad to be considered a viable option. Secondly, the amount of information provided to the competition authorities in the course of a request for an opinion might cause uncertainty as to the treatment of this information. For one thing, none of the competition authorities is barred from taking enforcement action, which, through the information provided, could be facilitated by the request. Also, the documentation provided might include confidential information,

91 See Van Erp 2002, Van Erp 2005 and Wils 2006. Other mechanisms include the setting of precedents (see Shavell 1997), a route that is most likely prevented after a short-form opinion has been issued. See differently: Schinkel 2010. He argues that indeterminacy has a deterrent effect on companies, possibly swaying the cost-benefit analysis of law-abiding behaviour in favour of compliance. In turn, Petit 2015 argues that guidance given by competition authorities reduces counselling costs incurred by companies. As compliance is often an economic consideration, these cost-savings might as well persuade companies to pursue compliance anyway.

92 However, this preventative effect raises the question of whether or not competition authorities should have the opportunity to voice their concerns *ex ante*. This argument is returned to below. Also, it should be borne in mind that opinions are issued on the basis of limited information. The *ex-ante* alteration of an agreement or other behaviour might constitute a form of over-enforcement. For companies, this means that they must be prepared to run the risk of being told beforehand to desist from entering into arrangements when they might have stood a better chance of defending them retrospectively.

93 Harrison 2012. This, of course, does not hold true for the Autorité, where there are no such requirements, but only a number of predetermined bodies that can make referrals.

which companies would not wish to have published along with the opinion itself. This last concern is remedied by the applicable rules on confidentiality – but only after the company has indicated which parts of the documentation are confidential and why.[94] Taken together, these uncertainties might explain the limited application of the short-form opinion in practice from the companies' perspective.

4.1.2 Hesitant Application

From the competition authorities' perspective, the lack of opinions issued in practice indicates a reluctance on their part, possibly caused by a fear of unintended consequences. As noted before, opinions might have a comforting or prohibiting effect on the parties requesting them, despite their informal nature.[95] This means that competition authorities have to navigate a difficult line between giving sufficient information to clarify their positions while preventing an actual 'comforting' or 'prohibiting' effect. However, it is also possible that under the current procedures, the provision of opinions is simply not an attractive instrument by which to provide guidance. There are strict limitations upon the situations in which an opinion can be issued, and perhaps these situations do not meet the developments in practice that raise the current 'novel and unresolved questions'. Apart from that, the possible negative consequences of individual guidance might play a role in the disapplication of the instrument. These are discussed at more length below.

For the UK CMA, the strict procedures for short-form opinions have led to the disapplication of the instrument altogether. Merely three opinions were published between 2004 and 2015, one of which was not even characterised as a short-form opinion.[96] In the Netherlands, however, the guidelines for the provision of informal opinions, which also limit application to novel and unresolved questions of competition law, have led to the development of a new instrument: the irregular opinion. Under this type of opinion, the ACM voices its concern (or praise) for proposed agreements in practice – the social significance of which is, coincidentally, substantial. Lastly, the Autorité might be dissuaded from giving guidance in individual cases, because it has to walk a tightrope between giving some sort of useful guidance, while refraining from giving individual instructions – as these might have legal consequences under French case law.[97]

In short, there are potential benefits to providing opinions in individual cases, but there are explanations as to why the application in practice has – up until now – been quite limited. This indicates that there is a tension between the presumed effectiveness

94 In the UK: Enterprise Act 2002, part 9. Under Dutch law: Article 10 *Wet Openbaarheid van Bestuur*, as mentioned in Article 12u *Stroomlijningswet*. The French publication strategy for decisions is set out in Article L.465-2 *Code de Commerce*, of which point VIII in particular protects sensitive information.

95 With regard to comforting effects, competition authorities might have connotations with the Commission's practice of sending comfort letters, and would want to prevent that at all cost. Apart from that, it is questionable that where European competition law is concerned national competition authorities are capable of giving 'comfort'. With regard to prohibiting effects, there is a concern for over-enforcement *ex ante*, without possibilities for review by an administrative court. All of these effects are discussed separately below.

96 See Chapter 6, section 3.3.

97 Conseil d'Etat, No. 357193 (*Casino*) and Chapter 6, section 2.2.

of the instrument and the negative consequences that might arise from a broad application. These negative consequences should be mitigated by the strict requirements for application and the extensive procedures surrounding opinions, but these might have led to disapplication in the UK and France and application besides the formal scope of the informal opinion in the Netherlands.

4.2 Floodgate Argument

In terms of instrumentality, one of the main concerns that may arise with the practice of issuing opinions is that they resemble the comfort letters that the European Commission used to send in the system before the entry into practice of Regulation 1/2003 and would – in line with the Commission's experience – open the floodgates to guidance requests and subsequently clog the competition authorities' enforcement practices.

The criticisms that applied to the Commission's practice of sending comfort letters could have caused the national competition authorities to approach the issuing of opinions with caution, only applying them on a small scale. As the Commission's earlier practice showed, a broader application of opinions could put a strain on the enforcement capacity of competition authorities, and the opinions themselves have less precedential value and are often shorter and less thoroughly reasoned. Moreover, the analysis underlying the opinions is based on the information provided by the market parties, not on investigation by the competition authorities themselves. This might also be the reason why the competition authorities have attached such stringent conditions for the request, and the reason why companies have to engage in an extensive self-assessment even before providing the relevant information.

However, the practice of comfort letters at a European level also shows that the downsides were closely connected to the scale on which they were applied. As 90% of the cases at the time were left unaddressed (as a result of which the informal comfort letter was designed), it is understandable that the legal value of the Commission's enforcement practice was criticised. Given that the Commission was faced with an enormous backlog of notifications, it is understandable that the comfort letters issued were not thoroughly investigated and reasoned. The situation in the current system of competition law is different, because all of the European national competition authorities operate under a prohibition system instead of a notification system.[98] As a result, it is unlikely that national competition authorities will be faced with a backlog of requests for opinions. On the basis of prioritisation, most competition authorities enjoy the discretion to choose the cases in which to issue opinions and to dismiss the others. Because they are not under the same pressure as the Commission was at the time, competition authorities should be capable of addressing the criticisms that were raised with regard to transparency and the quality of the reasoning provided. For the present-day competition authorities, the challenge – at least with a view to instrumentality – is in finding the right balance between (informal) opinions and (formal) investigations. Therefore, even though the practice of issuing opinions might bring about negative

98 There are, of course, exceptions and exemptions, but the legal route is that companies have to self-assess their applicability. Competition authorities can refer to this legal obligation and do not need to alleviate that burden by means of providing individual guidance.

connotations with the Commission's comfort letters, the circumstances in which national competition authorities operate today are different, which means that they are faced with different challenges as well.

4.3 Legitimate Expectations and Binding Effects

Another argument that might explain a lack of application (and which advocates against applying the instrument altogether) is the binding effects that individual recommendations might have on market parties. Opinions provided by the Autorité, the UK CMA and the ACM give an insight into the approach that the competition authorities are likely to take in a certain situation, or indicate whether certain agreements or behaviour are likely to be considered compatible with competition rules. Because the authorities publically explicate their positions on these questions, market parties are bound to take account of these evaluations. This could result in some form of legal bindingness (legitimate expectations derived from the statements), but also cause companies to comply in practice, without legal pressure (unintended binding effects).

4.3.1 Legal Perspective

From a safeguards perspective, one of the main questions to be asked with regard to this practice is whether or not companies can derive legitimate expectations from this guidance. Legitimate expectations are deemed to arise when there is a clear indication in law or in regulations, when a public authority has given a misleading impression, or when the expectations are based on a clear rationale inherent in a specific case.[99] To answer this question, a parallel can be drawn with the legitimate expectations that are deemed to arise from oral statements, press releases or general procedural statements. The European Court of Justice has held with regard to the Commission's practice that in some circumstances such statements may produce legal effects and may give rise to legitimate expectations that limit the enforcement discretion.[100] However, in the case of opinions and advice, the competition authorities are very clear in stating that their publications concern preliminary opinions that are of a provisional nature and do not relieve the companies from their duty to perform a self-assessment. It would therefore be difficult to claim that the competition authorities give a misleading impression concerning the status of the advice. Also the procedural guidelines and the opinions issued make clear that they do not preclude follow-up enforcement action and do not prejudge the assessment of a competent court, making it clear that no expectations should be derived from them. Moreover, where European competition law is concerned, national competition authorities are not competent to 'comfort' companies regarding the application of Articles 101 and 102 TFEU. Firms relying on the preliminary opinion

99 Temple Lang 2000, pp. 171-172. See in more detail Chapter 3, section 3.2.

100 CJEU Case T-3/93 (*Air France v Commission*), paras. 46-48, CJEU Case T-62/98 (*Volkswagen AG v Commission)*, CJEU Case T-25/99 (*Roberts & Roberts*), para. 124 and para. 130, CJEU Case T-201/01 (*General Electric*) and CJEU Case T-528/93 (*Metropole*). See for a more extensive review of this case law Petit & Rato 2009, pp. 187-201.

of national competition authorities before the European Commission or the Court of Justice are not likely to succeed.[101]

For these reasons, it is not likely that opinions will give rise to legitimate expectations to be relied upon in court. However, this does not mean that opinions are completely devoid of any legal effect. Even though the analysis performed in an opinion does not preclude follow-up enforcement action, the competition authority should – on the basis of principles of good administration – take account of its previous opinions when pursuing follow-up action, much like the Commission does with regard to guidance letters.[102] Especially when a certain practice is deemed 'likely to be compatible' with competition rules, the competition authority has to reason carefully which circumstances have led it to consider that the practice is no longer compatible. Also, when similar cases are investigated in the future, the competition authority should take account of its previous opinions to maintain a consistent approach. For these reasons, opinions are not completely devoid of binding legal effects.

4.3.2 Practical Perspective

However, the main difficulty with opinions lies not in their legal effects, but their actual effect on the market. Through opinions, competition authorities can praise behaviour as unlikely to raise competition concerns or condemn it as creating a risk in terms of competition. Apart from that, competition authorities might make recommendations to improve the proposed agreement or practice for the future. In this way, opinions are capable of having a binding effect upon the companies, as they are not likely to take the evaluation of a competition authority lightly and to deviate from it at the risk of incurring a fine in a later procedure. If companies do not follow the competition authorities' recommendations, there is a possibility that the competition authority pursues enforcement action, and given that the information underlying the proposed agreement is already in the possession of the competition authority at that time, this might not be considered desirable. This means that whenever an informal opinion sends parties 'back to the drawing board', it is to be expected that the companies involved will listen – even when the stakes are high.

The question is to what extent the national competition authorities can remedy these (unintended) binding effects. As observed above, the UK CMA is very cautious in its formulations and does not make statements regarding the compatibility of the agreements under review with competition rules. This holds true for the Autorité as well, though in some instances implicit findings of compatibility can be deduced from the lack of issues found or recommendations made. The ACM is more pronounced in its opinions and press releases, and is more active in making recommendations for improvement. Apart from the suggestion that the binding effect of the evaluation is probably less unintended where the ACM is concerned, this does not really answer the question of whether the competition authorities themselves are capable of remedying the binding effects. If the advice from competition authorities would not be considered

101 As was the case in CJEU Case C-681/11 (*Schenker*) and CJEU Case C-375/09 (*Tele2 Polska*).
102 Argued by Petit & Rato 2009, quoting from CJEU Case C-189/02 P (*Danske Rørindustri*).

authoritative, companies would not request it. Binding effects are therefore inherent in the system of opinions, which means that the question should not be whether they could be avoided, but whether they can be considered legitimate. This question is returned to below.

4.4 Accountability and Review by an Administrative Court

From the point of view of safeguards, the apparent lack of review by an administrative court is one of the most worrisome features of opinions – especially in the light of their binding effect as set out above. Because of its informal nature, the possibilities for review are rather limited. First, if the practice of the competition authorities would exceed the limits of legality, an *ultra vires* claim (or similar claims under national law) could cause an administrative court to 'quash' an opinion.[103] Secondly, if the analysis performed by the competition authority were evidently wrong, companies could seek a declaratory judgment before a civil court.[104] Lastly, if companies would disagree with the analysis performed by the competition authority, they could provoke a formal investigation. Opinions do not preclude enforcement action, but they do not preclude a continuation by the parties either. If, in the case of continuation, the competition authority would open a formal investigation, the case would eventually come before an administrative court.[105]

These options for review are either quite rare or are rather impractical and, as a consequence, a large part of the opinions issued remain unchallenged and untested. The question is whether that is something that needs to be remedied, or whether this is 'collateral' to the system of giving guidance in individual cases. One the one hand, it seems unfair for companies to be faced with a burden of altering an agreement that – in the eyes of a judge – might not even be a problem in the light of competition law. On the other hand, the opinion is informal, by its very purpose and nature. The possibility of an objection and an appeal would take away any incentive that competition authorities might have had for issuing them in the first place. Again, the difficulty here lies in the legitimacy of the outcome of informal opinions, which, in this case, seems to be diminished because the competition authorities cannot be held accountable for the outcomes.

In this situation, a compromise could be to enable a system of alternative accountability, for instance by opening opinions up for consultation by market parties

103 In the light of the guidelines published and on the basis of the opinions issued, it is not likely that these can be considered *ultra vires*. However, it would be interesting to see whether the irregular opinions issued by the competition authority could be considered *détournement de pouvoir* (abuse of power, which in the Netherlands is embedded in Article 3:3 *Algemene wet bestuursrecht*).

104 There is one precedent in Dutch law, see Chapter 6, section 4 in more detail. See also Gerechtshof Den Haag, ECLI:NL:GHDHA:2013:5381 (*FNV Kunsten, Informatie en Media*) and CJEU Case C-413/13 (*FNV Kunsten en Media v Staat der Nederlanden*). Personally, I doubt this, because the standard for requesting a declaratory judgment is that the legal uncertainty created precludes one of the parties from pursuing its actions. Opinions do not explicitly preclude any action, not by the companies nor by the competition authorities. Another option would be for the companies to seek redress under civil law by instigating a tort claim. This would mean that the company would have to prove that the competition authority has violated a law, and that the company has suffered damage *as a consequence*.

105 Not the most practical route, as remarked by Gerbrandy 2015. Similarly, third parties could submit a request for enforcement action or lodge a formal complaint.

and other stakeholders. In that way, some input and review is given, without having to formalise an instrument that – from the outset – was intended to be quick and informal. However, if this alternative mechanism of accountability is pursued, there is a trade-off to be made here between accountability and efficiency, because consultation could slow down the process by several months.[106] This trade-off is perceived in a broader context below.

4.5 Main Points and Future Challenges

National competition authorities are capable of being well-placed institutions to provide guidance about the application of competition law. After all, applying and enforcing competition law is their day-to-day business and it is their general task to promote competition across the board. In this light, it should make sense for competition authorities to provide guidance in complex or novel cases as well, because they seem the most well placed to do so.[107]

However, before making such statements, the preliminary question must be asked whether or not individual guidance is an instrument that competition authorities should have at their disposal and whether its application is desirable. In other words: will the expected benefits of individual guidance ever be enough to outweigh its possible negative effects? If this question were to be answered negatively, there is no place for individual guidance instruments in competition law enforcement. In that case, no alterations to the existing procedures could tip the scales of negative versus positive effects. It should therefore be determined first whether giving informal advice is a path that competition authorities want to go down, before discussing the conditions under which informal advice should be granted. If there were disagreement to the core of the instrument (in other words, a presumption that the benefits of guidance would never outweigh possible negative consequences), any alterations proposed would focus so much on limiting these negative effects that they might have a stifling effect on the use of the instrument itself.[108] Moreover, this would not prevent situations from arising in which competition authorities would like to give guidance, but cannot do so due

106 This is demonstrated by the difference between the UK CMA's *Newspaper* opinion and its other two short-form opinions. Note that the consultation was not the only difference between these cases. See in more detail Chapter 6, section 3. Office of Fair Trading, OFT 1025 (*Newspaper and Magazine Distribution*), compared to the Short-Form Opinion of the Office of Fair Trading, 27 April 2010 (*P&H/Makro*) and the Short-Form Opinion of the Office of Fair Trading, 23 August 2012 (*Rural Broadband Wayleave Rates*).

107 It could also be argued that competition lawyers should be considered better placed to do so, because it is their task to provide companies with advice on the application of the law. On another level in this discussion, a middle ground can be sought by looking at the subject matter upon which advice would be given. If this indeed concerns one single agreement or strategy, competition lawyers seem equally well placed. Dutch practice has shown, however, that sometimes (and increasingly so over the last few few years) advice is sought on delicate issues concerning competition law and other – let us call them public – interests. In these matters, it is not unusual for high level parties to have a place at the negotiating table, and sometimes even for the government to be involved. It is not surprising that, in these circumstances, advice is sought from the national competition authority. Note that these situations might be typical for Dutch governance culture. See in more detail Chapter 9, sections 2.1 and 5.2.

108 This was perceived in the UK (and to some extent also in the Netherlands), where the conditions for requesting an informal opinion are quite strict, and the competition authority is very cautious in framing its advice, so that there is a very limited application of the instrument itself.

to these restrictions, pushing informal opinions even more into informality.[109] On the other hand, if the issuing of an informal opinion is considered useful and desirable, the analysis conducted above gives rise to a number of recommendations that could make its use and outcomes more legitimate.

From an instrumentality point of view, clogging the system (which is one of the most heard objections on the basis of the Commission's past experience) can be prevented by strict capacity limitations and a flexible approach to the application of the instrument, or – alternatively – by limiting the number of bodies capable of requesting advice. Apart from that, any decrease in deterrence and formal declarations can be remedied by maintaining a careful balance between informal opinions and formal decisions.

Competition authorities must have flexibility in issuing individual guidance and must enjoy discretion to disengage on the basis of prioritisation or capacity. Alternatively, the number of bodies competent to request advice should be limited.

With regard to the unintended binding effects, it has to be remarked that these effects are more or less inherent in the system of individual guidance. As remarked above, if the opinion of the competition authority would not be considered authoritative, companies would not request one. For that reason it is unlikely that any comforting or prohibiting effects can be prevented, not even by careful formulations and disclaimers about the provisional nature of the opinion. However, the main issue is not that there could be comforting or prohibiting effects with the issuing of informal opinions. The main issue is the fact that these effects remain unchallengeable and competition authorities cannot be held accountable for them. If informal opinions are considered a beneficial attribute to the enforcement toolbox, the main challenge for competition authorities is thus not to mitigate any side-effects, but to increase accountability when such effects arise.

However, it is difficult to have an informal opinion reviewed by a court. Instead, it can be proposed to establish alternative mechanisms of accountability, such as the consultation of market parties. This might give the competition authority enough input for a well-rounded advice that is perceived as legitimate, but it might also be an indication for competition authorities to refrain from giving advice – for instance because the issue under review is connected with broader concerns that fall outside the scope of competition law, or because there is too much debate and uncertainty to justify an informal approach to the subject. However, alternative accountability mechanisms involve a trade-off between accountability and efficiency considerations. Consultations inevitably take more time and resources and must be launched and limited with care.

When issuing informal opinions, competition authorities must consider whether or not there is a need for alternative accountability mechanisms, such as consultation.

109 As perceived in the Netherlands, where the ACM occasionally explicitly mentioned the issuing of an informal-informal advice, because the set procedure would not allow for answering the question put before it. See Autoriteit Consument en Markt, Guidance 13.0614.15 (*De Stroomversnelling*).

Lastly, some remarks can be made with regard to the desired scope of informal guidance; especially where the UK and Dutch practice is concerned. In its current form, short-form opinions and informal opinions are issued in the case of 'novel and unresolved questions of competition law', mirroring the Commission's approach to individual guidance. However, this condition might be too narrow, as indicated by the lack of application in the UK and the issuing of irregular informal opinions in the Netherlands. Especially the latter types of opinions show that there might be a need for competition authorities to formulate an opinion or give advice about situations that are not necessarily novel in terms of competition law (in the sense that they do not raise questions with regard to new forms of cooperation or unprecedented conduct), but are more novel in the sense of the interplay of competition law with other interests. Especially where competition in regulated markets is concerned, or competition in emerging or rapidly changing markets, or even the interplay between competition law and other interests (such as sustainability), competition authorities can find themselves consulted about the application of competition law in these cases.[110] Moreover, competition authorities might desire to engage in a discussion about these topics beforehand, instead of remedying problems with competition afterwards. The desirability of such a course of action connects with the desirability of a 'broad approach', as was indicated with regard to markets work earlier.[111] Also with regard to individual guidance, there might be tension between the topics addressed and the perception of the function of a competition authority, which might influence the perceived legitimacy of these interventions.[112] If one would argue that the scope of individual guidance instruments is to be extended to cover these situations as well, it is imaginable that the requirement of providing for mechanisms of accountability becomes even more pressing.

Individual guidance should be extended to cover situations which are broader than merely 'unresolved and novel questions', but when giving guidance on the interplay of competition law with other (pubic) interests, alternative forms of accountability are necessary to safeguard a legitimate outcome.

Under these recommendations, the use of individual guidance can be considered legitimate and minimizes the risks of over-use or creating side-effects that are difficult to overcome. It seems that in current national practice, the ACM is most advanced in exploring an extension of the scope of individual guidance. Based on the recommendations made here, the main challenge for the ACM would be to explore alternative forms of accountability and to lift the formal distinction between informal and irregular opinions (since this now has little practical use). For the other two authorities, the main challenges lie in increasing the use of the instruments altogether – if, of course, individual guidance is considered an asset in the enforcement policy. This

110 See Chapter 6, sections 2.1, 3.3 and 4.3.
111 See section 3.7 above.
112 Compare with, for instance, the criticisms of the ACM's individual guidance on the Energy Agreement, Chapter 6, section 4.5.

means that the scope of guidance could be broadened, but that the authorities should have the discretion not to issue guidance if there are reasons not to do so.

5. COMPLIANCE PROGRAMMES

Compliance programmes are policy documents drafted by companies, underlining the importance of abiding by the law and setting up a procedure to safeguard this across the board. For companies, the benefits of having a compliance programme in place are in the mitigation of the risks and costs of non-compliance. If a compliance programme functions well, infringements can be detected and ended at an early stage, thus preventing further damage to the company and to the market. Also, compliance programmes aid companies in being seen as 'ethical businesses', which can increase positive branding.[113] Because compliance programmes are often publicly available, they serve an important external signalling function by stating that a company is aware of the law, and intends to comply with it. For competition authorities, compliance programmes are a method of disseminating a compliance culture, to keep tabs on the market, and to somewhat share the burden of detecting infringements.[114]

Promoting the adoption of compliance programmes is not a legal task of any of the competition authorities, but it is seen as a flanking policy to its broader enforcement strategies. The UK CMA, the Autorité and the ACM all have a way of promoting the implementation of compliance programmes in companies – although their approaches are rather different. In Chapter 7, these different approaches have been discussed and compared extensively. In summary, this has led to the conclusion that the Autorité has the most formalised approach to compliance programmes; the UK CMA is the most active in promoting and rewarding these programmes; while the practice of the ACM is the most tentative, and is presumably still under development.[115]

This characterisation already shows that there are significant differences between the competition authorities. These differences are reflected in the way the three competition authorities deal with compliance programmes; whether they provide guidance, for instance, or whether they reward full and *bona fide* compliance programmes with a fine discount. Both issues are policy choices, which can be considered with the aid of the normative framework underlying this thesis. Apart from that, the evaluation of compliance programmes under the normative framework has given rise to the question of what the potential effect of the promotion of compliance programmes is on the effectiveness of enforcement. Also, because the compliance assistance presumes cooperation between the competition authorities and companies, the question of impartiality and the risk of capture are addressed. In this section, these policy considerations are evaluated under the normative framework in order to pinpoint best practices on the matter.

113 These drivers of compliance are mentioned by the Commission, and by the UK CMA. See European Commission, Compliance Matters 2012 and OFT Speech by Preece in 2012.

114 Assuming that infringements are indeed detected.

115 See Chapter 7, sections 4 and 5.

5.1 Place in Enforcement Toolkit

The national practice of promoting the implementation of compliance programmes shows that this not an enforcement instrument as discussed in the other chapters, which aim to address specific market problems or infringements. Compliance programmes are more preventative in nature and aim to ensure that market problems and infringements are less likely to arise. From an instrumental point of view, the question is in what way the promotion of compliance programmes contributes to the effectiveness of enforcement as a whole. In other words, the question is what positive effects can be derived from stimulating compliance in companies in a proactive way. This question is answered by looking at the shortcomings of the predominant way of enforcing competition law, by deterrence-based instruments.

5.1.1 Role and Shortcomings of Deterrence-Based Enforcement

Intervening in markets in such a way that it has a deterrent effect can induce compliance with competition rules. By doing so, the companies which had infringed the law are repelled from repeating their behaviour in the future, while the other companies learn that infringements of the law have negative side-effects. Assuming that companies make their business decisions on the basis of a cost-benefit analysis,[116] the costs of non-compliance might increase because of the competition authorities' previous interventions.[117] In past years, many competition authorities invested in increasing the deterrent effect of their actions, for instance by increasing the maximum amount of the fine.[118] Apart from that, criminal and civil liability have increased the perceived cost of infringement, as they lead to the conviction (and possibly incarceration) of cartelists and civil follow-on or stand-alone claims respectively. On the other part of the equation, the detection rate has surged since the introduction of national and European leniency programmes, which are intended to destabilize cartels through self-reporting. Apart from that, some competition authorities have even implemented procedures for granting informant rewards, in order to incite private persons (such as employees or former employees) to come forward in the case of an infringement.[119]

However, even with this expanding focus on deterrence, competition law infringements are still taking place: durable cartels are found and fined every year, as well as long-standing abusive behaviour. Moreover, in many industries certain behaviour amounting to a competition law infringement is not perceived as 'breaking the law', but

116 This cost-benefit analysis is based on the following equation: if detection rate x expected sanction < benefits from violation, then an infringement is likely to occur. Say, for instance, that a company could gain €5 million from a cartel agreement, the detection rate is 30% and the expected sanction is €9 million, the company is likely to violate the law because $0{,}3 \times 9 < 5$.

117 See for the role of deterrence in enforcement more extensively Chapter 3, section 2.1.4.

118 See for another signalling of this trend Van Hasselt & Urlus 2014. They refer to the intention of the Dutch Minister to raise the fine ceiling. See Minister H.G.J. Kamp, Kamerbrief over Boetebeleid Autoriteit Consument en Markt, 27 August 2013.

119 UK CMA. Other possibilities to increase the amount of cartels detected, such as *qui tam* provisions and structural market screens have been debated in the literature, but have yet to be implemented in many jurisdictions. See for a discussion of *qui tam* provisions Kovacic 1996, an analysis of the possibilities of informant rewards and market screens is done by Polanski 2013.

as business culture,[120] and those who have been caught and sanctioned seem to be more likely to violate the law again.[121] Somehow, despite its undeniable possible effects on companies and individuals who do make a deliberate cost-benefit analysis, increasing the deterrent effect of enforcement alone is not enough to induce compliance.[122] Instead, competition authorities might attempt to increase the understanding of and a commitment to the rules beforehand. This approach, which is sometimes referred to as the increase of normative commitment,[123] is based on the assumption that compliance may stem at least as much from a personal commitment to law-abiding behaviour as from the fear of punishment.[124] However, it is difficult to imagine how competition authorities could increase normative commitment or change companies' objectives on their own. 'Imposed commitment' is almost a *contradictio in terminis*, and immediately indicates the necessity of involving the companies in the process. In other words, if competition authorities wish to appeal to the normative commitment of companies, these companies will have to participate in this actively.

5.1.2 *Balanced Policy with Compliance Stimulation*

One of the ways in which companies can contribute to the level of normative commitment in their organizations is by designing and implementing compliance programmes.[125] However, setting up such a compliance programme could be a difficult task. Competition law consists of two broadly formulated prohibitions, which go hand in hand with an impressive body of case law, making it complicated to determine when an agreement could be regarded as anti-competitive, or when market behaviour could qualify as abusive. Committing oneself to comply with these rules is one thing, transferring their meaning in its full width is something else. Competition law compliance programmes therefore need some special attention, and competition authorities should play a role in the design or implementation of these programmes – as is discussed further below. However, this does not mean that focussing on the implementation of compliance programmes alone would suffice as an enforcement strategy. For companies, the risks of incurring a fine demonstrate the importance of substantial internal procedures to nip infringements in the bud, urging executives to put compliance higher on the corporate agenda. Thus, compliance programmes operate in parallel with deterrence-strategies, and should be seen as complementary.

120 Sokol 2012.
121 This is the 'positive punishment effect' as is mentioned in Jacobs 2010, p. 419.
122 However, it has also been argued that it might have affirmative effects as well, because a deterrent enforcement policy could reaffirm a commitment to compliance. Wils 2006, referring to Adanaes 1971.
123 Van Erp 2005, p. 16.
124 Jackson et al. 2012, but more importantly: Tyler 2006.
125 This is not a new realization, certainly not in the field of competition law. Some of the debate on compliance programmes in competition law took place in the late 1950s and early 1960s and is relevant even today. See for instance Anderson 1963 and Geis 1994, studying cases from 1961.

Even though the responsibility for compliance lies with companies, stimulating compliance programmes should be seen as a flanking policy, appealing to affirmative bases for compliance by increasing normative commitment and clarifying applicable rules on a smaller scale. Still, when promoting the use of compliance programmes, it is necessary to have a deterrent enforcement policy to hand.

This observation is in line with a study commissioned by the Autorité to research the perception that market parties have of competition law enforcement in France. The underlying hypothesis of this study was that a policy of promoting compliance must go hand in hand with a policy of effective deterrents, in this case: sanctions.[126] However, the study found that sanctions are not the only factors that contribute to the stimulation of compliance programmes, but that the leniency programme, internal whistle-blowing procedures, fine reductions and guidance do so as well[127] The first two tools are intended to destabilize cartels, giving a company an incentive to optimize its internal procedures in order to catch infringements at an earlier stage. The latter two tools might help to encourage companies to spend resources on a well-functioning compliance programme, and explain what such a programme would look like. In other words, compliance strategies should be considered as complementary to the enforcement toolkit, as the success of compliance programmes is partly dependent on the success of more deterrent enforcement instruments and partly dependent on alternative enforcement instruments and guidance tools.

5.2 Level of Guidance

One of the main differences in national practice is the approach to giving guidance about competition law compliance. From the viewpoint of the normative framework, the decision whether or not to publish guidance about the content of compliance programmes touches upon the principle of legal certainty, which encompasses – amongst others – the prohibition of the arbitrary use of powers by public authorities and is closely connected to the notion of transparency.[128] In this light guidance increases transparency and is likely to promote a compliance culture across the board,[129] while providing companies with more certainty about whether or not the compliance programmes they have devised are in line with what the competition authority requires. This last situation is even more pressing when competition authorities grant fine discounts for the existence or implementation of a compliance programme. If they do so, competition authorities attach certain consequences to the existence or implementation of compliance programmes, and if such consequences are dependent

126 Chairman Bruno Lasserre in the Autorité de la Concurrence, Annual Report 2009, p. 5.
127 Compliance Study France 2008, para. 31.
128 See in more detail Chapter 3, section 3.5.
129 The need for guidance has been underlined in a recent survey, as not every company is as well educated about the content of competition rules and the value of compliance, and as a result, the risks of infringements are often underestimated. See Sokol 2012, p. 22.

on the implementation of a 'good' or 'thorough' compliance programme, companies must be certain of the elements that constitute such a programme.

However, the legal certainty provided by publishing guidance comes at the cost of the flexibility that competition authorities enjoy when determining the amount of the fine and weighing compliance programmes in this determination. This tension leads to the question how detailed the guidance should be from the point of view of flexibility. In general, the less detailed the rules are, the larger the room for appreciation – but, inevitably, the less transparency and legal certainty there is. In terms of flexibility, giving any guidance could be considered a limiting factor, depending on how much room for appreciation there is left to the competition authorities. If the guidance would consist of broader principles (principle-based guidance), some room for appreciation would be left to the companies. However, if the guidance would consist of narrow requirements (rule-based guidance), the competition authorities would have little room to deviate from it or to interpret these requirements differently. Generally speaking, rule-based guidance provides grip and clarity due to its detailed rules, and guides companies in a specific direction. On the other hand, a rule-based approach can be perceived as rigid, and incites box-ticking behaviour. Competition authorities need to avoid creating such a 'checklist for compliance', because this might discourage companies from looking beyond the elements mentioned in the competition authority's guidance, and thereby limit the normative commitment it intended to incite.[130] On the other hand, principle-based guidance stimulates companies to think about the best execution of the principles, while leaving room for appreciation for the authorities. The downsides of this approach are the risks of inconsistency and uncertainty, and the inherent difficulties of a review when there is room for discussion.[131] To summarize, a balance must be struck between the legal certainty pursued by providing specific guidance, and the flexibility necessary to be able to perform a case-by-case analysis.

> *As a general rule, whether or not guidance should be given – and if so, in what level of detail – should be dependent on the consequences attached to compliance programmes, and the level of detail and specificity of the guidance should be consistent with the seriousness of these consequences.*

When applying this general rule to national practice, it is clear that both the Autorité and the UK CMA attach consequences to the existence or implementation of a compliance programme in an explicit way. In France, the Code de Commerce gives the possibility of accepting commitments under the settlement procedure and granting a fine reduction for them,[132] while in the UK, the UK CMA sees compliance programmes as a mitigating circumstance in the calculation of the fine. In fact, granting fine reductions for mitigating circumstances (which could consist of serious compliance efforts) is included in the

130 The message should always be that compliance programmes have to be tailored to the company, and that not two of them are the same. This is underlined by Wils 2013, p. 19. For him, this is a reason not to create more detailed guidance on compliance programmes, which he calls check lists.

131 See for a more extensive description of the advantages of both approaches: Schilder 2008.

132 Article L. 464-2, *Code de Commerce*.

fining guidelines of the other two competition authorities as well.[133] This suggests that all three of the competition authorities should have to provide some sort of guidance under the principle of legal certainty to educate companies as to under what conditions their efforts could be considered mitigating circumstances.

In France, there is clear guidance on both the procedure of recognition and the content of compliance programmes.[134] The French guidance document is binding upon the Autorité, but it can be deviated from it if sufficient reasoning is provided.[135] The possible discounts are mentioned there and are underlined consistently – at least somewhat consistently – by decisional practice. In the United Kingdom, the UK CMA is open about its reduction policy, which is underlined by practice.[136] The guidance of the UK CMA is written from a company's perspective ('how your business can achieve compliance'), but contains a chapter on review by the authority. Even though the guidance states that 'each case will be assessed on its own merits', decisional practice shows that UK CMA limits its review to the steps included in the document and a maximum fine discount of 10%[137] Lastly, the ACM provides very little guidance on the contents of a compliance programme, since it has not given guidance on compliance in the form of guidelines, but by a number of cases and speeches. From these publications, a number of desired elements of compliance programmes can be derived, but it was also stipulated that the ACM would probably not take compliance programmes into account when setting a fine. However, the ACM's practice, fining guidelines and general practice leave some wiggle room, and therefore also some uncertainty.[138] In conclusion it can be said that the competition authorities have clear views on the use of their discretion and have published materials accordingly. It contributes to legal certainty that practice underlines theory, so that companies know what to expect. However, if the 'wiggle room' left in the Netherlands tends to be used more often, perhaps a clearer picture of the application of the fining guidelines is needed.

5.3 Fine Discounts for Compliance Programmes

One of the main issues with regard to the promotion of compliance programmes by national competition authorities is the question of whether or not a fine reduction should be granted for the implementation or improvement of one. On the one hand, it has been argued that it might be considered arbitrary or unfair that companies which have a compliance programme in place can benefit from competition law infringements at a lesser cost than companies who do not have such a programme in place.[139] Having a compliance programme in place is not a formal requirement, and by the time the programme is considered as a mitigating circumstance, it means that an infringement has occurred in spite of it – making a differentiation between companies with and without compliance programmes more difficult to defend. On the other hand, it might

133 See Fining Notice Autorité 2011, Fining Guidelines ACM 2014 and CMA Procedural Notice 2014.
134 Framework Document Compliance Autorité 2011.
135 Framework Document Compliance Autorité 2011, para. 6.
136 See Chapter 7, section 3.1.1.
137 OFT Penalty Guidance 2012, sections 7.3 and 7.4.
138 See Fining Guidelines ACM 2014, Speech Fonteijn 2014 – pointed out by Elkerbout 2014.
139 See for instance Wils 2013, p. 23.

also be considered proportionate to take account of the costs companies incur when implementing a compliance programme.[140] Apart from that, a single incident is not necessarily a sign of a 'failed' compliance programme, and the willingness to improve upon an existing programme should be considered a sign of the commitment to compliance.[141] The dichotomy between the two opinions is also reflected in national practice. The ACM does not grant such discounts, stating that compliance is the responsibility of the companies in question. The Autorité offers discounts in the course of a non-contestation procedure and has the possibility to take improvements upon existing compliance programmes (or the implementation of a new one) into account as a mitigating factor, and the UK CMA explicitly grants a 5-15% discount if the existence or improvement of a compliance programme can be considered a mitigating factor in the calculation of the fine.

Treating compliance programmes as mitigating circumstances in the calculation of the fine could be an incentive for companies to invest resources in setting up a thorough compliance programme.[142] Even though this could be true, such incentives should be treated with care. When the possibility of obtaining a fine discount in the future gives company directors the last push in the right direction, giving such an incentive could be useful and could reinforce a company's commitment. However, if possible fine discounts are the only drivers behind the adoption of a compliance programme, serious doubts could be raised concerning the genuineness of the commitment of the company in question. This is called window-dressing, and allows companies to set up a compliance programme in order to secure a discount and would continue infringements behind the veil of the programme. In that way, a compliance programme becomes an 'insurance policy' for cartelists.[143] The deterrent effect of enforcement is decreased, because the expected sanction is lowered with the amount of the fine reduction. Moreover, if a company that did not report an infringement that it found under a compliance programme receives a fine reduction, the message is sent that competition law infringements are 'business as usual'.[144] These arguments have, however, been fiercely debated. First of all, it has been held that even though it is true that a possible fine discount might provoke window-dressing, competition authorities have the discretion to determine whether or not a fine discount is granted. This means that the sincerity of a company's compliance efforts has to be taken into account before deciding on a discount. Even though it has been argued that competition authorities are unable to do so,[145] others have held that competition authorities are capable of getting a clear picture of the sincerity of the efforts through the depth of their investigations into infringements.[146]

From this debate about the desirability of fine discounts, a number of conclusions can be drawn. First of all, it can be considered proportionate to reward companies that have 'gone the extra mile' to ensure compliance. It should be taken into account that

140 Geradin 2013 and Elkerbout 2014.
141 Murphy and Kolasky 2012, p. 3.
142 Stephan 2009, p. 12.
143 Argument derived from Wils 2013, p. 23. See differently Geradin 2013, p. 3.
144 Wils 2012, p. 23.
145 Wils 2013, p. 22.
146 In accordance with Geradin 2013, p. 14.

the possibility of receiving such a discount can be an incentive to set up a compliance programme in the first place. However, the effectiveness of enforcement policy is diminished if such discounts only incite window-dressing. The proportionality and effectiveness of fine discounts thus hinge on the sincerity of the companies which have implemented a compliance programme and the capacity of the competition authorities to detect this. For that reason, fine discounts for compliance efforts can be granted, though with care.

> *The competition authority has to be careful not to reward window-dressing when applying a fine discount. This means that fine discounts may be granted, but only if a company is sincere and has reported the infringement, while committing itself to improve the programme for the future.*[147]

This starting point is already reflected in practice. The UK CMA, being the only authority out of the three to grant reductions for pre-existing fining decisions (that the company does not offer to improve upon) only does so if the company has taken 'adequate steps in order to secure compliance'.[148] Even though the UK CMA does not extensively define what that means, there is a certain threshold applicable to granting a fine discount. Also the Autorité only grants fine reductions in its settlement procedure if the compliance programme offered as a commitment is 'substantial, credible and verifiable', a test which should also be applied in the course of its fully adversarial procedures when taking compliance programmes into account as mitigating factors.[149] This test – if executed properly – implies that a company that had implemented a compliance programme merely as a smokescreen would have chosen a poor insurance policy. If the ACM would decide to treat compliance as a mitigating circumstance, similar thresholds should apply.

5.4 Preventing Capture

Regulatory capture entails the exercise of influence by market parties, politics or other stakeholders upon the policy and choices made by supposedly independent authorities.[150] By their very nature, compliance programmes create a closer working relationship between companies and competition authorities, which means that the risk of capture in enforcement procedures could increase. From the national practice, it appears that this risk can manifest itself in two different procedural phases: during negotiations and in the monitoring phase after an infringement has taken place.

All national competition authorities view the implementation of a compliance programme as a desirable course of action. This starting point is often underlined in speeches, guidance documents and sometimes even rewarded in fining decisions.

147 Specific recommendations for improvements that help distinguishing between commitment and smokescreens are discussed in the intermezzo in Chapter 7, section 5.2 (eye for internal incentives, role of the compliance officer and generating managerial commitment).
148 See Chapter 7, section 3.1.
149 See Chapter 7, section 2.3.2.
150 See in more detail Chapter 3, section 3.5 and the sources quoted there.

Implementing a well-functioning compliance programme generates 'good press' for both the competition authority and the company and can sometimes be considered a tangible result of informal interventions. There is – in other words – something to gain for the competition authority as well, and the more emphasis that is placed on the importance of compliance programmes, the more companies could be tempted to use this knowledge against them. This is relevant in case a compliance programme is implemented in the course of a negotiated procedure. In that case, the commitment to implement a compliance programme could improve the company's bargaining position in the procedure, which runs contrary to the commitment that a compliance programme is supposed to stand for. For that reason, safeguards must be in place to prevent companies from using compliance programmes as bargaining chips in other procedures. Competition authorities must underline that compliance is primarily the responsibility of companies, and if it were possible to offer them as commitments in formal procedures, this must be viewed as an additional gain, not as the primary focus.

Apart from that, the monitoring processes in compliance programmes could increase the risk of capture. Under most (large-scale and strict) compliance programmes, it is not uncommon for companies to report on their compliance efforts annually.[151] Because of this reporting relationship, competition authorities become involved in a company's business processes, which could make it harder to make an unbiased decision in a later phase. This could be avoided by dispersing the responsibility for the monitoring of compliance programmes and the possible follow-up procedures amongst different branches of the competition authority.

Compliance programmes should not be used as bargaining chips in other procedures, and monitoring responsibilities should be executed having due regard for the risk of capture.

In practice, the institutional divide between investigative teams and final decision makers in the ACM and the Autorité and the division of competences within the UK CMA make it unlikely that these issues will play a significant role in the future. Apart from that, all competition authorities have taken a firm stance on the responsibility of companies, making it unlikely that compliances programmes are pursued to the benefit of competition authorities. Where the monitoring of compliance is concerned, it is worth mentioning that the ACM has made an explicit division between monitoring and other enforcement activities regarding the Memorandum of Compliance with KPN, but it is unclear whether the same happens with regular compliance programmes.[152] It also has to be borne in mind that this particular compliance programme concerned a (partially) regulatory relationship, in which the contact between the company and competition authority was much more intensive than would be the case under regular competition law compliance programmes.

151 Think of the Memorandum of Compliance between the ACM and KPN in the Netherlands, and various other cases in France in which a reporting obligation was rendered mandatory. See Chapter 7, sections 2.3 and 4.3.

152 In fact, the majority of the interviews conducted at the ACM show that monitoring compliance programmes is not really seen as a core activity and happens only occasionally. See Chapter 7, section 4.1. The methodology underlying these interviews is explicated in Annex I – Methodology.

5.5 Main Points and Future Challenges

The analysis under the normative framework shows that there are inherent tensions when devising a policy to deal with compliance programmes. First of all, the effect of compliance programmes on enforcement is dependent on a trade-off between a loss of deterrence and an increase in normative commitment. Secondly, closer cooperation between companies and competition authorities also brings about a risk of capture. In the third place, fine discounts could be desirable from the point of view of proportionality and instrumentality, but could be counter-effective if they invoke window-dressing. Lastly, the decision to publish guidance and the level of detail of this guidance points towards a tension between legal certainty and flexibility.

However, now that the tensions in the application of compliance programmes are apparent, the question is how they should be resolved. In principle, the resolution of incompatibilities is based on a policy choice, specific to each Member State. When looking at the tensions identified above, it is safe to say that the treatment of compliance programmes does not lead to very serious infractions of safeguards or restrictions on instrumentality. Of course, there are issues that can be optimized when it comes to instrumental requirements, and there are issues that reveal a clash between safeguards and other requirements. However, choosing one side of the argument does not lead to a situation that is unacceptable from the other point of view. This is probably due to the fact that stimulating compliance is a voluntary preventative tool, and not a measure imposed *ex post*. Compliance programmes can be taken into account when applying *ex post* measures, such as fines or settlements, and in that case values such as legal certainty and impartial decision-making have greater weight. However, in general, the tensions identified are not that pressing that one solution is absolutely preferable over the other.

With regard to the promotion of compliance programmes, the main challenge for competition authorities is expected with regard to the aspects they promote as components of good compliance programmes. On this point, there is a significant difference between the elements listed in the competition authorities' guidance documents and the elements discussed in the literature.[153] To that end, it could be desirable for competition authorities to provide information to companies on how individual targets and bonuses can contribute to non-compliance. Also, competition authorities should be clearer as to what constitutes a 'true managerial commitment' and under which circumstances such a commitment is not to be expected. Lastly, it is advisable to be more open about the role of the compliance officer and the freedom and powers he needs to do his job. These requirements should be underlined with even more emphasis if legal professional privilege were extended to in-house counsel.[154] The main question concerning these aspects is to what extent it can still be considered legitimate for competition authorities to promote these very specific criteria. Extending the discussion about compliance programmes to this extent blurs the line between the private responsibility of the companies and the public responsibility of the competition

153 See in more detail Chapter 7, section 5.2.

154 Note that under UK law, legal professional privilege is already extended to in-house counsel. See in more detail Chapter 7, section 5.2.3.

authorities. However, competition authorities can make companies more aware of the way these elements connect with better compliance and incorporate these aspects in future guidance documents.

6. FINAL REMARKS

The main question underlying this thesis investigates the balance between instrumentality and safeguards when applying alternative enforcement instruments, including the challenges that the use of alternative enforcement instruments can pose. With the aim of answering – at last – the first part of this research question, this chapter has reviewed negotiated procedures, markets work, individual guidance and the promotion of compliance programmes in the light of this balance, with regard to a number of specific policy considerations. In this concluding section, the balance between instrumentality and safeguards is struck for each instrument individually, and a number of issues are pointed out that merit discussion in a broader context.[155]

6.1 Striking the Balance per Instrument

Based on the analysis in this chapter, read in conjunction with the observations made in the substantive Chapters 4, 5, 6 and 7, the question can be answered how the different alternative enforcement instruments should be perceived in the light of the balance between instrumentality and safeguards.

Negotiated procedures
For the different types of negotiated procedures (transactions, settlements and simplified resolutions) this balance is struck fairly well. In France, there is an explicit focus on safeguards which does not hamper instrumentality – as practice shows. On the other hand, the UK CMA explicitly pursues efficiency with its settlement procedure, but safeguards the rights of companies by maintaining (amongst other safeguards) the right to review by an administrative court. In the Netherlands, the focus seems to be on efficiency as well, but concerns for safeguards are remedied to an extent by the ACM's institutional set-up. The evaluation under the normative framework does not lead to an explicit preference in setting-up the procedure, which is not surprising as – apart from a few policy considerations discussed above – the three types of negotiated procedures are rather similar.

Markets work
For markets work, the balance between instrumentality and safeguards differs from Member State to Member State. In the UK, the emphasis is clearly more on the safeguard requirements than on instrumentality. It has been mentioned on multiple occasions that the phase 2 investigation overshadows the possible effectiveness of the phase 1 study. This gives rise to the conclusion that, within the phase 1 studies, the balance shifts

155 Which is done next, in Chapter 9. These two chapters can therefore be read in conjunction, and together form the answer to the research question posed and explained in Chapter 1.

towards safeguards, whereas in the phase 2 investigations – due to their more extensive consequences – the balance is more even. The situation in France and the Netherlands is similar, as the instruments applied in these Member States are comparable as well. All in all, the balance between safeguards and instrumentality is struck fairly well; both competition authorities have published effective markets work reports (either informational, or having effectuated changes in the market) and strive for flexibility, without encroaching upon companies' safeguards. This does not mean that there are no concerns – these risks are, from a general perspective, depicted above. However, as yet, these risks have not yet manifested themselves in practice.

Individual guidance
Within the instrument of individual guidance, national practice shows that the balance between instrumentality and safeguards is struck with a double focus on instrumentality, causing conflicts between effectiveness on an instrument level (the benefits of giving individual guidance) and effectiveness on a policy level (risks of overuse). Apart from that, some of the safeguard concerns connected to individual guidance remain unaddressed, for which reason the procedures for individual guidance can generally be characterised as 'unbalanced' under the normative framework. One of the reasons for this ambiguous approach to individual guidance is because there is uncertainty about the desirability of the instrument as such. The question should be answered whether the expected benefits of individual guidance will ever be enough to outweigh its possible negative effects. If this question is answered in the negative, any alterations proposed would focus so much on limiting these negative effects that they might have a stifling effect on the use of the instrument itself. If this question is answered in the positive, the analysis conducted above gives rise to a number of recommendations that could make its use and outcomes more legitimate.

Compliance programmes
The least tension is found in the balance between instrumentality and safeguards with regard to compliance programmes. The differences between the national practices as identified above do not lead to very serious infractions of safeguards or restrictions on instrumentality. Of course, there are issues that can be optimized, but choosing one approach does not lead to a situation that is unacceptable from the other point of view. The reason why it is easier to strike a balance within this instrument is that stimulating compliance is a voluntary preventative tool, and not a measure imposed *ex post* – making it less likely for serious breaches of safeguards or impediments of instrumentality and effectiveness to occur.

6.2 Common Issues in the Different Instruments

Apart from making it possible to identify how the different instruments can be viewed in the light of the normative framework, this chapter has also discussed policy considerations that have to be taken into account when designing or improving the alternative enforcement instruments. Because the instruments have been discussed separately, it might not have been as obvious that many of the policy considerations are common to all of the alternative instruments.

> For instance, the question whether or not to issue guidance has been discussed with regard to both negotiated procedures and compliance programmes. Also, the effect of all alternative enforcement instruments on enforcement policy in general (be that the aim of deterrence or the interplay with different instruments in the toolkit) has proven to be an important policy consideration. Also, the internal design of the competition authority (the separation of functions in particular) and its independence from politics and market parties has been touched upon and, lastly, the issue of a review by a court has been discussed insofar as the application of the instrument would lead to a lack of review and accountability.

The fact that a number of the issues discussed in this chapter are 'common issues' indicates that these form (part of) the challenges that competition authorities are faced with when applying alternative enforcement instruments. However, the fact that precisely *these* issues appear to be the common issues is not completely coincidental, as they connect to the different levels with which enforcement practice is connected. In Chapter 3, it has been held that enforcement is not a self-standing activity executed in one specific case, but can be traced back to an enforcement policy (the policy level), influenced by the design and relationships of the authority (the agency level) and contributing to the application and development of the rule (the rule level).[156] It appears from this chapter that alternative enforcement is not devoid of interplay with these levels, and the challenges for competition authorities when using or devising these types of instruments are easier to identify when looking at them from this broader perspective. This discussion is continued in Chapter 9.

Refocusing on the issues arising from evaluating alternative enforcement practice against instrumentality and safeguard requirements, it is striking that the 'level of discussion' is very different between negotiated procedures on the one hand, and market studies, individual guidance and compliance on the other. For this last category of instruments, a large portion of the discussion has focused on the question of how the instrument relates to the enforcement toolkit in general. It appears that competition authorities are still not exactly sure which role these types of instruments should play within their enforcement policies (if any),[157] what objectives to pursue with them,[158] and what the 'enforcement risks' are of applying them on a larger scale.[159] This is completely different from the type of policy considerations discussed with regard to negotiated procedures, which focus more on the question of how these procedures should be designed. The goal of these procedures is relatively uniform and clear (increasing efficiency) and the procedure itself is more formalized and relies on existing structures. It is important to note that these differences in development stages exist, as in the next chapter the focus is on alternative enforcement as a whole and the individual instrument level is eventually left behind to perceive enforcement practice in a broader context.

---

156 See Chapter 3, section 4.4 in more detail.

157 Particularly with regard to the desirability of individual guidance (see section 4.5 above) and the need to stimulate compliance by tools other than deterrent instruments (section 5.1.1 above).

158 See section 3.1 above on the objectives of markets work, section 4.3 on the effects of individual guidance and section 5.1 on the reasons for stimulating the adoption of compliance programmes.

159 See section 3.2 above on the enforcement risks and the remedies thereof with regard to markets work, section 4.1 for the fundamental hesitations underlying the application of individual guidance and section 5.3 for the loss in deterrence that fine discounts for compliance programmes can cause.

Chapter 9

ALTERNATIVE ENFORCEMENT IN A BROADER CONTEXT

This thesis has dealt with the application of selected alternative enforcement instruments by three national competition authorities. In Part II of this thesis, the enforcement practice of the UK CMA, the Autorité and the ACM has been discussed for negotiated procedures, markets work, individual guidance and compliance programmes. In each chapter, the different national practices have been evaluated against the normative framework underlying this thesis, relying on a balance between instrumentality and safeguard requirements. Apart from that, the different national practices have been compared, on the basis of which pressing points of difference have been identified. These differences have been translated into 'policy considerations' in the previous chapter, which – in turn – have been set out against the normative framework as well. This entire exercise has answered the first part of the research question posed in this thesis,[1] but has not fully addressed the challenges that competition authorities are faced with when developing and applying alternative enforcement instruments. This final chapter therefore looks beyond the scope of the instrument level, by addressing (alternative enforcement) challenges for competition authorities on a policy, agency and rule level.

1. INTRODUCTION

The second part of the research question that underlies this thesis concerns the challenges that alternative enforcement might pose for the enforcement of competition law in the Member States. The outline of the different enforcement instruments has already shown that on an instrument level, such challenges are legion. However, the enforcement of competition law is not just concerned with designing effective or flexible enforcement instruments. Besides the instrument level, enforcement is intertwined with the policy level, the agency level and the rule level as well.[2] Broadly speaking, this entails that the choice of a different instrument (and also the way in which instruments are designed) is intertwined with the broader enforcement policy that competition authorities pursue, with the institutional design of the authority itself and its relationship with stakeholders and lastly also with the interpretation and advancement of competition rules as such.

1 Part 1 of the research question underlying this thesis is: How can alternative enforcement instruments be seen in the light of the balance that needs to be struck between safeguard and instrumental requirements that national and European law have placed upon enforcement? Part 2, under discussion in this chapter, is: What challenges does this pose for the enforcement of competition law in the Member States? See in more detail Chapter 1, section 4.

2 See in more detail Chapter 3, section 4.4.

As a stepping-stone to this broader discussion, this chapter first typifies the alternative enforcement practice of the national competition authorities *in general*. In the previous chapters, much attention has been paid to the balance between instrumentality and safeguards on an individual instrument level, but the choices made on this level are in no way coincidental. They can be connected to differences in legal culture, or to specific drivers behind changes in enforcement.[3] In this chapter, the general characterisation of alternative enforcement practice in the different Member States is discussed and suggestions are made for striving for an optimal balance between instrumentality and safeguards across the board (§2). After that, an often made observation is finally returned to,[4] as the balance between alternative enforcement instruments and a fully adversarial procedure is discussed (§3). This discussion is connected with the interplay between enforcement choices and the policy level. On an agency level, the evaluation of national practice has shown that two topics merit special attention: the relationship between alternative enforcement instruments and existing decision-making structures and the authorities' independence from the government and market parties (§4). The rule level is addressed most clearly when it comes to the advancement of the interpretation of competition law through review by a court (§5). This ties in with some of the challenges that competition authorities are likely to deal with in the future, particularly in the face of a changing perception of the importance and goals of competition.[5]

Apart from a connection to the different levels of enforcement, alternative enforcement practice is intertwined with the European level as well. The events on a European level (mostly, the decentralisation of competition law enforcement) have been mentioned as a driver of national and alternative enforcement practice and in the previous chapters attention has been paid to the developments of the relevant alternative enforcement instruments for the Commission.[6] In this chapter, the precise interplay between the national and European level is characterised for each alternative enforcement instrument. Apart from that, the consequences of an increased use of these instruments for a uniform development of *European* competition law are discussed (§6). This chapter, and thereby also this thesis, concludes with a number of final remarks, after which the research question is answered concisely (§7).

2. BALANCING INSTRUMENTALITY AND SAFEGUARDS

In the previous chapters, the balance between instrumentality and safeguard requirements has been discussed and struck with regard to each alternative enforcement

3 See Chapter 2 for a more detailed description of the legal culture and Chapter 1, sections 2.1, 2.2 and 2.3 for the drivers behind alternative enforcement (modernization, the goals debate and expectations of a 'good' authority).

4 That is the observation that alternative enforcement instruments should be applied in a balance with fully adversarial procedures in order to maintain a balanced enforcement policy with a view to deterrence and legitimacy.

5 See Chapter 1, section 2.2 on the goals discussion as a driver of alternative enforcement.

6 See Chapter 1, section 2.1 on modernization as a driver of alternative enforcement, and Chapter 4, section 1.1, Chapter 5, section 1.1, Chapter 6, section 1.1 and Chapter 7, section 1.1 on the use and development of the individual instruments on a European level. Also, Chapter 8, section 4.2 pays specific attention to the Commission's history of sending comfort letters, as this has had a significant influence on the cautious design of individual guidance today.

instrument individually.[7] However, as it appeared from the evaluation of national practice, the policy choices underlying this balance are similar (or at least, comparable) for each alternative enforcement instrument. Thus, national alternative enforcement practice as such can be characterised based on the balance between instrumentality and safeguard requirements. This characterisation is, as remarked above, not coincidental, but is connected to legal culture and the historical development of competition law enforcement in the Member States. Naturally, it was not the aim of this thesis to analyse national enforcement practice from this perspective, but given the background and context provided before, as well as the experiences derived from field research, some (tentative) connections can be made. Keeping these differences in mind, this section also makes recommendations for an optimal balance between instrumentality and safeguards on a general level.

2.1 Characterisation of the National Competition Authorities

Safeguards balanced by bounded flexibility and high output (Autorité)

In France, alternative enforcement instruments are treated similarly to fully adversarial procedures. They are largely embedded in procedural rules and have their own place in the formal decision-making scheme. This means that the alternative enforcement instruments have their own legal basis, usually coupled with guidelines explicating the approach of the Autorité to applying them. Under the legality principle,[8] the Autorité has little discretion to explore different options before pursuing a case. After signals have reached the Autorité and it has decided to pursue them, the Autorité cannot push back the formal opening of a case before starting investigations. This reduces the possibility of so-called 0 meetings, and forces the Autorité to make procedural decisions at an early stage. During the entire procedure, the regular procedural safeguards apply.[9] This shows that alternative enforcement practice in France is rather safeguard-oriented and that its alternative enforcement instruments are legally embedded. Even though one would expect that this would take away from efficiency, effectiveness and flexibility, the Autorité appears to have found a balance between the two. Its procedures do not last significantly longer than those of other authorities and its output (in terms of the cases decided) is the highest of the authorities under review.[10] Even though the Autorité enjoys little flexibility when it comes to the pliability of the alternative enforcement instruments to specific situations, it has discretion to choose the enforcement instrument that it finds most suitable for the situation concerned. In other words, the Autorité enjoys bounded flexibility: it has the flexibility to choose *between* alternative (or non-alternative)

7 See the evaluation of negotiated procedures in Chapter 4 (section 5), of markets work in Chapter 5 (section 5.1), of informal guidance in Chapter 6 (section 5.1) and of compliance in Chapter 7 (section 5.1) in order to see how this balance has panned out with regard to these particular instruments.

8 See Chapter 2, section 3.3 and the references made there.

9 Access to the file, the right to a hearing, the right to make written representations, see Chapter 2, section 3.3 in more detail for the steps and safeguards within the Autorité's procedures. These safeguards apply when a case is opened. With regard to the advice procedure, where no case is formally opened, different standards apply. See Chapter 5, section 2 and Chapter 6, section 2.

10 Between 2004 and 2015, the Autorité took 127 fining decisions in the field of antitrust, 58 commitment decisions and it concluded 47 transactions. Apart from that, it gave 298 advisory opinions. See also the statistics on enforcement in the Member States with the references after this thesis.

enforcement instruments, and little within.[11] Above that, the Autorité's guidelines show that it has formulated a clear view on when to apply which instruments.[12]

The trade-off that the Autorité has made between instrumentality and safeguards seems to be a balanced one. It safeguards companies' rights and a consistent enforcement policy, but has also shown a gradual development of the enforcement instruments and a high level of output for each of its tools.[13] The Autorité's focus on safeguards and the fact that its flexibility is limited can be explained by the functioning of the legality principle in French administrative law. This principle constrains government action by ensuring that it adheres to the law and the reasons behind any action are properly explained. From a more practical angle, the Autorité itself has demarcated its focus on safeguards as a discerning feature in its enforcement practice – making it stand out amongst its other European counterparts.[14] The Autorité's high-level output despite its stricter procedures is more difficult to explain from the viewpoint of this particular research, as it does not just connect to the way enforcement procedures are designed, but to broader institutional design questions, including issues like the deployment of resources, organisational structure, workload and 'labour culture'. Because of this myriad of variables, no definitive interpretation can be provided (although this makes the finding no less interesting).[15]

Tension between strict safeguards and enhancing efficiency (UK CMA)

The balance struck between instrumentality and safeguards by the UK CMA is a different one. Alternative enforcement instruments in the UK are also legally embedded (in the sense that there is a legal basis and there are procedural guidelines explaining the UK CMA's approach), but the UK CMA enjoys more discretion in the application of each instrument. This discretion is mostly found in the first stages of the investigation, before the formal opening of the case. In this phase (the initial assessment phase), the UK CMA is able to engage in pre-meetings and informally contact stakeholders, though all on the basis of voluntary cooperation.[16] From the moment a formal investigation is launched, the UK CMA is subjected to a number of strict obligations, the most visible of which are its transparency obligations.[17] In the UK CMA, this obligation is reflected in the fact that it has published detailed procedural guidelines for every enforcement

11 With regard to markets work and individual guidance (that is, the Autorite's advice procedure), bounded flexibility is defined as the possibility to fine-tune the scope and determine the outcomes of the advice, even though it has been referred to it by a competent body (save for self-referrals). Chapter 5, section 2 and Chapter 6, section 2.

12 See Fining Notice Autorité 2011, Notice on Commitments Autorité 2009 and Non-Contestation Notice Autorité 2012.

13 For the comment on gradual development: think, for instance, of the development of the approach to compliance programmes as devised under the Autorité's transaction procedure. See Chapter 4, section 2 in more detail.

14 Pronounced in Autorite 25 Years.

15 Based on my experiences at the UK CMA and the ACM, I do however underline that I am not under the impression that the staff work less hard, or take on a smaller workload. Instead, I suggest that an explanation can be found in the way in which the 'flow of cases' is organised (for instance, bigger or smaller case teams) or in the focus that the ACM and the UK CMA currently have in the aftermath of the institutional mergers (aimed at internal streamlining, more policy-oriented instead of executive).

16 See CMA Procedural Guidelines, para. 4.11 and also Chapter 2, section 4.3.

17 Having strict transparency obligations in place for public bodies is typical in common-law traditions, where legal decision-making is entrusted to the judiciary rather than an administrative authority. See in (a little more) detail Chapter 2, section 4.3.

instrument, and that its enforcement choices, strategies and changes therein are all reported and publicly available. Apart from that, formal decisions (even settlements) are fully reasoned to facilitate review by an administrative court and each of the alternative enforcement instruments has landmark moments in which the UK CMA is required to publish about the progress of the case. Even though these requirements are intended to safeguard transparent decision-making and the rights of companies to appeal, they also take away from the speediness of procedures – making them longer and more laborious. This does not sit well with the UK CMA's strategic goals, which primarily aim for more robust and *efficient* decision-making. The goal of increasing efficiency is found in the alternative enforcement instruments as well,[18] which indicates that within these instruments there is tension between two conflicting requirements.

Historically, the UK CMA's focus on safeguards has had a similar result as the French practice (legally embedded instruments, explication in guidelines, detailed formal decisions), but was influenced more by the principle of transparency. In part, the role of this principle can be explained by the different place that administrative authorities have in a common-law system, for which reason transparency in decision-making is valued to a greater extent.[19] Be that as it may, the UK CMA's enforcement regime has always been highly regarded, despite its lower output in terms of fining decisions, negotiated procedures and commitment decisions. The current focus on more robust and more efficient decision-making should therefore be perceived from a political point of view, from which authorities are persuaded to be more effective, more efficient and preferably self-sufficient.[20] This objective has, however, put the UK CMA in the difficult position of having to uphold its old standards of decision-making, while increasing output and decreasing lead time. As is remarked with regard to the different alternative enforcement instruments: this tension could create more informality in the preliminary stages of enforcement, ultimately hampering the aspired efficiency goals.

Instrumentality-driven development with possible consequences for safeguards (ACM)
In the Netherlands, alternative enforcement practice shows a different picture of the balance between instrumentality requirements and safeguards. The ACM appears to be one of the more instrumentality-oriented authorities, focused on resolving problems in the market. The choice of enforcement instrument is dependent on the problem encountered, and the application of this instrument is tailored to the situation at hand. The ACM has been given flexibility under its fining guidelines to do so and has – as yet – not filled in this discretion by drafting more detailed procedural guidelines.[21] As a counterbalance, the ACM's enforcement practice is dependent on its internal separation

18 In markets work, efficiency is enhanced by the use of statutory timeframes, safeguarding a quick resolution. In settlements, the aim of efficiency is formulated very clearly in the UK CMA's guidance, which the streamlined administrative procedure being a mandatory part of any settlement. Lastly, informal opinions – which are quick and efficient instruments by their nature – were retained and expanded for that very reason.

19 See Chapter 2, section 4.3 in more detail.

20 See Chapter 1, section 2.3 on the 'good authority' discussion as a driver of alternative enforcement.

21 To recall, the Minister of Economic Affairs in the Netherlands has drafted the ACM's Fining and Leniency Guidelines. The ACM itself has not published procedural notices further explaining the way in which it intends to fill in its discretion, save for its strategy documents and its enforcement agendas. See Strategy ACM 2013 and Agenda ACM 2016-2017.

of functions and the dual system of objections and appeals. However, as the application of alternative enforcement instruments in the Netherlands is still in an experimental phase, it is unclear what their place is within these decision-making structures. It has been identified that in some cases these structures are circumvented,[22] while in others these structures are carefully maintained.[23] If the alternative enforcement instruments as used by the ACM were applied on a larger scale, however, there would be risks connected to the balance that is currently maintained.[24] The current situation does not yet merit concerns, but it seems that the ACM has arrived at a crossroads: it has experimented with alternative enforcement in the slipstream of its merger and it has developed a number of instruments that it is likely to use again (simplified resolution, irregular opinions, market scans). If it would continue under the flexibility that it has now, the above-mentioned objections could increase and become symptomatic of the ACM's enforcement policy. Under these circumstances, a clear tension between instrumentality requirements and safeguards could be expected.

The instrumental character of the ACM's enforcement practice allows for experimentation, enables it to develop an instrument in practice and to 'find the right tone' for the market problem at hand. This is in line with the enforcement strategy that underlies the ACM's practice.[25] Its problem-solving approach to competition law is unique, and places the ACM before challenges that the other competition authorities are less likely to face. It is – in this light – the only national competition authority under review that addresses broader issues with such emphasis, while also being faced with effectiveness and efficiency considerations.[26] This could explain the ACM's renewed focus on alternative enforcement instruments.[27] The ACM's vision of enforcement is currently being translated into practice and it is interesting to see how it evolves.

---

22 Such as in individual guidance, leading to irregular opinions, see Chapter 6, section 4.5.

23 Such as in negotiated procedures, where they are, at least, formally maintained. Informally, there might be room to pursue different options. See Chapter 4, section 4.2.

24 These risks are derived from the evaluation made with regard to the individual enforcement instruments in the previous chapters. See in particular Chapter 8, sections 2.7, 3.6, 4.5 and 5.5. Applying enforcement instruments in a flexible way on a larger scale encroaches upon legal certainty and possibly equality. Companies will not know what to expect from the authority, and might have a difficult time understanding why their particular situation would merit one type of intervention, while similar situations were closed using another. Apart from this, an increase in the use of informal instruments (or other alternative enforcement instruments that are unlikely to result in an appeal) encroaches upon legal review, as its results are likely to escape review by a judge. This could hamper the advancement of the interpretation of competition law, and could ultimately decrease the reputation of taking solid enforcement decisions that can stand the scrutiny of a court.

25 Which is a problem-solving approach, based on the work of Sparrow 2000. See in more detail Chapter 2, section 2.2.2.

26 See in more detail Chapter 1, section 2.3 on the expectations of good authority.

27 As some of them have proven to aim for gains in effectiveness or efficiency. See Chapter 1, section 4.2. and the aims of the different instruments as discussed in Part II of this thesis. It has, however, been argued repeatedly that the ACM's changes in strategy should be perceived as 'evolution, not revolution' (see Lachnit 2016, and also on the basis of the interviews conducted between January and April 2014 – see Annex I – Methodology). There have been examples of alternative enforcement initiatives in the past, the experience of which is now used to develop its future approaches (think, for instance, of the *Homecare* case, in Chapter 4, section 4.4.2). It could therefore well be that instrumentality-driven enforcement is not just symptomatic of the experimentation phase the ACM is currently in, but is a characteristic of competition law enforcement in the Netherlands in general.

2.2 Preferred Balance and Recommendations

It appears that the balance struck between instrumentality requirements and safeguards is different in all three Member States. French practice has shown that a safeguard-oriented approach does not necessarily mean a decrease in effectiveness and efficiency, although some flexibility is comprised. The UK CMA's practice reveals an inherent tension between efficiency goals and transparency obligations. Lastly, the ACM's practice of flexibility and informal measures runs the risk of eventually limiting legal certainty and review by a judge. These differences in practice give rise to the question what the preferred balance between instrumentality and safeguard requirements should be for alternative enforcement in general, and what recommendations can be made to improve this balance in the three Member States.

2.2.1 *Preferred Balance (Autorité)*

In an ideal balance between instrumentality requirements and safeguards, competition authorities are able to pursue the different goals of alternative enforcement instruments without hampering safeguards to an unacceptable extent. To recall, in the normative framework presented in Chapter 3, it has been posited that such a balance will ultimately contribute to the authority's legitimacy, while the absence of such balance (or – if you will – an imbalanced policy) diminishes legitimacy.[28]

In the light of the requirements included in the normative framework underlying this thesis, the balance pursued by the Autorité therefore seems preferable. It builds upon existing structures and warrants safeguards for companies, while leaving sufficient room for evolution. The attractiveness of such an embedded approach is demonstrated by the development of its transaction practice,[29] while a clear example of evolution *within* alternative enforcement instruments is formed by the Autorité's approach to compliance initiatives.[30] The fact that the Autorité has published guidelines surrounding the application of its instruments reflects its focus on legal certainty, which is underlined by coherence and transparency in its decision-making process. As is shown by the Autorité's practice, these obligations are – in the end – not so pressing that they hamper output and effectiveness.[31]

---

28 The connecting function of the principle of legitimacy in the normative framework is explained in Chapter 3, section 1.3. Different interpretations of legitimacy (answering the question to what kind of legitimacy a balanced approach actually contributes) are provided in the footnote below. See also the work of Simonsson on legitimacy in competition law enforcement in particular (Simonsson 2010).

29 See Chapter 4, sections 2 and 2.3 in particular.

30 See Chapter 7, section 2.

31 While pronouncing this preference, it has to be remarked that the Autorité's practice is preferable *from the perspective of the normative framework*, which is a legal interpretation of how enforcement should take place at a specific point in time. This framework does not – or, at least, only to a very limited extent – include 'dynamic' considerations of how enforcement should develop and how it should anticipate changes in the perceived role of the authority in society (note that since this is a thesis in law, the choice has been made to focus on legal requirements surrounding the application of alternative enforcement instruments, while remaining sensitive to the environment in which the authority operates. The levels of enforcement (as presented in Chapter 3, section 4.4) reflect this, and so do the so-called 'drivers of enforcement'). It has been remarked on multiple occasions in this thesis that competition law is constantly developing, and that – under pressure from global challenges – the position of competition authorities

2.2.2 *Recommendations to Balance Instrumentality and Safeguards*

In order to make sure that alternative enforcement instruments can be applied to their fullest (actually achieving the goals they were set out to achieve), competition authorities have to make sure that the current procedural setup does not hamper their effectiveness, efficiency or flexibility. This means that they have to review whether alternative enforcement instruments fit within existing decision-making structures, or that special procedures have to be designed in order to apply them. Also, it is desirable that competition authorities publish some form of guidance about the application of their instruments. It is shown by French practice that such guidelines do not necessarily hamper instrumentality, and can even contribute to the effectiveness of enforcement.[32] Nevertheless, such guidelines should leave sufficient room for discretion so that procedures can be modified according to the circumstances of specific cases. According to the administrative law system of the Member State, this discretion may be small (France) or broad (the Netherlands). Competition authorities should provide sufficient reasoning for their enforcement decisions accordingly in order to safeguard legal certainty and prevent accusations of arbitrariness. This means that when the legal embedding of the enforcement instrument allows for more discretion, a greater obligation to provide sufficient reasoning is placed on the competition authorities.

Recommendations to balance instrumentality and safeguards
- *Review whether alternative enforcement instruments 'fit' within existing decision-making structures or require an adaptation.*[33]
- *Publish guidance about the application of instruments while leaving sufficient flexibility to adapt to future challenges, or pursue a transparent and coherent approach on a case-by-case basis.*
- *Provide for a sufficient explanation of procedural choices in each case.*

Even though these recommendations are likely to increase the legitimacy of alternative enforcement instruments as such,[34] a good enforcement policy does not just rely on a balance within the procedures, but also on a balance *between* the different procedures. As a matter of fact, some of the risks connected to the various alternative enforcement instruments will only manifest themselves (or increase significantly) if these instruments are applied on a large scale. In that case, there is no longer any balance between alternative enforcement and other instruments, which means that the

in society could be re-evaluated. The underlying fundamental question is thus whether competition authorities should only focus on the rules and their interpretation *as they are*, or whether they are the right institutions to explore connections with other interests (consumer protection, sustainability, etc.) and actively pronounce themselves on the interplay with competition. If, in this light, more is expected from competition authorities, substantive legitimacy is diminished if these issues are not addressed (see for a definition Majone 1997, pp. 160-161). For that reason, competition authorities that enjoy more flexibility in their enforcement practice would be better equipped to deal with these challenges.

32 As remarked in section 2.2.1 above, and is elaborated upon in more detail in Chapter 4, section 2.

33 A suggestion for this exercise is made in section 4 below.

34 Indicating the throughput legitimacy and procedural legitimacy of the authorities. See Chapter 1, section 1.3 in more detail.

downsides of alternative enforcement instruments are transferred to the policy level, thereby affecting the competition authority more profoundly. In order to pursue a balance between instrumentality and safeguards, competition authorities thus also have to strive for a balance between alternative enforcement and their 'regular' procedures: the fully adversarial procedure.

3. BALANCING ALTERNATIVE AND FULLY ADVERSARIAL PROCEDURES

Alternative enforcement instruments are not alternatives in the sense that they completely replace the fully adversarial procedure (which applies by default[35]), but they are used alongside this procedure, aimed at intervening in a way that these procedures cannot. By definition, alternative enforcement instruments are thus applied in balance with the fully adversarial procedure. The question is, however, what that balance should be. From the evaluation of national practice, there are three different situations which are discernible: where alternative enforcement is used alongside the fully adversarial procedure without significantly impacting the output, where alternative enforcement replaces some of the fully adversarial procedures or encroaches upon the output in another way, or where the use of the fully adversarial procedure is increased despite the existence of alternative measures. These situations are characteristic of the balances currently struck by the three competition authorities – which have their own risks and downsides. To mitigate these, starting points are formulated for striking a balance between alternative enforcement instruments and fully adversarial procedures on a policy level.

3.1 Characterisation of the National Competition Authorities

Using alternative alongside adversarial (Autorité)
Alternative enforcement instruments can be used alongside fully adversarial procedures, without there being a significant impact on the number of decisions stemming from a fully adversarial procedure. This means that the national competition authority has found a way of engaging in alternative enforcement, without compromising its other interventions. In this situation, alternative enforcement instruments are used truly *alongside* the fully adversarial procedure, which offers the advantage of retaining the deterrent effect of its fining decisions, while also engaging in interventions that pursue different objectives. The enforcement practice of the Autorité is illustrative for this situation. The Autorité is the most 'active' competition authority under review based on its output. On average, it takes […] infringement decisions a year – a number that has not significantly altered in the last twelve years, despite the introduction of the transaction, the commitment decision and the competence to make self-referrals to investigate markets. This seems odd, and gives rise to the question of how the Autorité has managed to 'do the same' in terms of fines, while applying additional instruments as well.

35 See the definition of alternative enforcement as provided in Chapter 1, section 3.

The most obvious explanation for this lies in the possibility that the Autorité's composition and budget has altered over the course of these years, enabling it to increase the output as a whole. It is difficult to review the validity of this argument, as it cannot be discerned from the public sources how the Autorité's budget has been deployed. However, it is certain that the Autorité has expanded significantly in terms of powers and human resources,[36] which could have enabled a contemporaneous application of alternative enforcement instruments and the fully adversarial procedure. Another explanation lies in the formal character of the Autorité's enforcement work. Even though it is true that the Autorité uses commitment decisions and transactions on a regular basis, it does not engage in informal resolution like some of the other authorities. Also, the level of markets work conducted on its own initiative is still rather limited.[37] This means that resources that in the other competition authorities are deployed to these types of instruments are used differently in France, resulting in the level of output listed above.[38]

Increasing alternative over adversarial (ACM)

It is also possible for the use of alternative enforcement instruments to encroach upon the use of the fully adversarial procedure, either by replacing fining decisions with alternative instruments, or by subsuming resources that would otherwise be deployed to the fully adversarial procedure. This means that alternative enforcement instruments have (partially) replaced the existing enforcement instruments, as a result of which fewer fining decisions are taken. The enforcement practice in the Netherlands is illustrative for this situation. Between 2004 and 2015, the ACM took 56 infringement decisions, with an average of eight decisions a year. However, the largest cases were dealt with in the first few years of this researched period,[39] after which the ACM's predecessor focussed on delivering a large number of more smaller-scale decisions.[40] After the creation of the ACM in 2013, just three fully adversarial fining decisions were taken,[41] while the

36 See Chapter 2, section 3.1.

37 The Autorité has made 10 self-referrals since it was granted this competence six years ago. See in more detail Chapter 5, section 2.

38 This is, however, a difficult assertion to make and does not take account of the numerous advisory opinions that the Autorité provides on an annual basis (which the other authorities do not). Resolving the paradox of the Autorité's outcome falls outside the scope of this thesis, as it takes more insight into its organisational structure and possibly even cultural issues.

39 For instance the large Construction cases (*Construction* case, referring to over 1300 fining decisions concerning widespread bid rigging in the following 7 sectors: concrete, civil utilities, parks and recreation, roads, installations, cables and ducts, traffic control. The ACM has an archive of all formal decisions and their reference codes, accessible at https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/kartels/archief-bouwfraude/).

40 See for instance Nederlandse Mededingingsautoriteit, Case 6431 (*Kazerne II*), in which fines of €7,000 were imposed, or Nederlandse Mededingingsautoriteit, Case 6425 (*Glazenwassers*), in which the ACM's predecessor imposed a fine of €1000. These examples are, of course, not representative for the entire case load dealt with in these years, but they do signal the tendency to focus on smaller, domestic cases in the aftermath of the *Construction* case. This finding is partially based on the interviews conducted within the ACM. See Annex I – Methodology for a description of the embedding of this information.

41 These are the following: Autoriteit Consument en Markt, Case 6538 (*Executieveilingen*), which concerned a cartel with 71 participants, Autoriteit Consument en Markt, Case 7244 (*Leesmappen*), in which an aggregate fine of €6 million was imposed and Autoriteit Consument en Markt, Case 6303 (*Meel – Bencis*), in which a cartel facilitator was fined in the aftermath of an earlier decision.

number of market scans and advisory opinions increased significantly.[42] This shows that the ACM's practice of taking fining decisions has decreased over the last few years, while the alternative enforcement practice has soared.

There is a clear transition point within the researched period that demarcates the change in this balance: the institutional merger that created the ACM. As explained in more detail in Chapter 2, the creation of the ACM led to the adoption of a new enforcement strategy, one based on a problem-solving approach that relies on the usage of the ACM's full range of enforcement instruments.[43] This new underlying strategy has caused the ACM to address questions that – by nature – require a different approach than a fully adversarial procedure. The merger itself, however, also underlined the need for more efficiency and effective enforcement,[44] which by itself could explain a (renewed) focus on quicker procedures or solutions with a practical (impactful) component. The numbers show that the ACM has done exactly that in the last three years, as a result of which the ratio of fully adversarial procedures vis-à-vis alternative enforcement instruments has shifted.

Increasing adversarial over alternative (UK CMA, possibly)

Competition authorities can also aim to increase the use of the fully adversarial procedure at the cost of the application of alternative enforcement instruments. This situation presupposes an authority that has had alternative enforcement instruments at its disposal for a longer time, but wishes to increase the use of – for instance – fining decisions nevertheless. In this situation, the fully adversarial procedure encroaches upon the use of alternative enforcement instruments. Illustrative in this respect is the proposed strategy of the UK CMA. While merging the former OFT and Competition Commission, the UK Government clearly stated that the new competition authority should strive for more high impact interventions and more robust decisions. This aim was in contrast with the enforcement style of the UK CMA's predecessor, which took relatively few fining decisions (21 between 2004 and 2015), but focussed more on its markets work regime, its guidance and educational functions and addressing competition and consumer risks through the application of instruments other than fines.[45] Now, operating as the UK CMA, the aim is to take more infringement decisions and to make use of the criminal cartel offence it has at its disposal.

By using this part of the enforcement toolkit more often, the UK CMA hopes to increase its deterrent effect and to confirm its reputation as a credible enforcement authority both in and out of court.[46] However, it is too simple to state that the changes in the UK CMA's enforcement policy were mainly driven by the desire to increase

42 Since its inception, the ACM has published only three infringement decisions compared to seven market studies, ten opinions (informal and irregular), two commitment decisions and a simplified resolution. The ACM's markets work regime, which had an output of one report per year in 2005 and 2006 and now averages around four reports a year (average between 2009 and 2015). Also, the practice of issuing irregular opinions has been developed after the creation of the ACM. As discussed in Chapter 6, there are now a total of 7 opinions, 6 of which have been published after 2013.

43 See Strategy ACM 2013.

44 See Chapter 2 section 2.1 for the background on the merger of ACM and Chapter 1 section 2.3 on the expectations placed upon authorities and their impact on enforcement.

45 By comparison, the UK CMA has taken 11 commitment decisions, 10 settlements, has delivered 3 informal opinions and has closed 40 markets work cases.

46 See Strategy CMA 2014.

deterrence and credibility. Instead, the institutional merger was also driven by cost-saving considerations and an attempt to decrease the length of procedures.[47] As remarked earlier, this might create tension between the objective of enhancing deterrence and the objective of enhancing efficiency.[48]

3.2 Appraisal of These Approaches

Having discussed the various possible relationships between alternative enforcement instruments and the fully adversarial procedure, the question remains what the optimal balance should be, based on the research conducted in this thesis. To answer this question, it could be helpful to look at the possible consequences of increasing the use of alternative enforcement instruments over the fully adversarial procedure. In principle, alternative enforcement instruments have certain advantages over a fully adversarial procedure. Depending on the type of alternative enforcement instrument used, they enable the competition authority to be more flexible and to act more quickly, they are capable of restoring the competitive situation or even preventing any harm from occurring and they enable the competition authority to invest in a less adversarial relationship between the competition authority and the companies.[49] However, these advantages also have their downsides. It has been remarked in the previous sections that – generally speaking – alternative enforcement instruments could diminish the authorities' deterrent effect in the absence of fining decisions,[50] that they are less likely to be appealed in court,[51] that they encroach upon companies' procedural rights,[52] and that they could give competition authorities the opportunity to shape markets informally – using their formal powers as leverage to effectuate change.[53] Relying solely on alternative enforcement instruments enlarges these downsides and transfers any negative side-effects from an instrument level to a policy level, on which they are more difficult to mitigate or prevent. For that reason, a reversal to alternative enforcement alone would not be possible; fully adversarial procedures are necessary to create a balanced approach to competition law enforcement.

So, a balance must be struck – which immediately also implies that enforcement choices have to be made. In doing so, competition authorities have to prioritise; they cannot do everything at once and pursue all the cases put before them.[54] The foregoing

47 See in more detail Chapter 2, section 4.1.

48 See section 2.1 above. Although these two need not be mutually exclusive, as the fully adversarial procedure can also be streamlined *and* applied more often simultaneously.

49 See Chapter 1, section 1.3 on the definition of alternative enforcement, and the qualifications given to the various alternative enforcement instruments in section 4.2 of that same chapter.

50 See Chapter 3, section 2.1.4 on deterrence.

51 Which could be preferable from a safeguard point of view, especially where legal certainty and defence rights are concerned. See Chapter 3, section 3.6 on these evaluative points. See also Chapter 4, section 5, Chapter 5, section 5, and Chapter 6, section 5 on the outcomes of the different instruments.

52 See Chapter 3, section 3.5 for a discussion of procedural rights.

53 Which means that competition authorities act beside the scope of their powers (see Chapter 3, section 3.1 on legality), which could ultimately decrease its perceived legitimacy if they do not reflect the position of the citizenry (leaning on the definition by Scharpf 2003, as remarked in Chapter 3, section 1.3).

54 The power to prioritize cases is based on the discretion competition authorities enjoy to take up cases. It does not need to respond to every market problem or every complaint (see CJEU Case T-24/90 (*Automec* II), with regard to the Commission). From the point of view of fairness, it seems

has shown that the competition authorities make these choices in different ways: France has strived to maintain its 'old' level of output, the Netherlands has increasingly opted to apply alternative enforcement instruments and the UK aims to pursue more fully adversarial cases in the future. In the current situation all three of the competition authorities pursue their own idea of a balanced toolkit and have – as yet – not encroached on a large scale upon procedural rights or have imposed their will informally to an extent that would qualify as market shaping. In the current situation all three different balances suffice. However, this does not mean that there are no risks to their current approaches. Because of the way competition law enforcement in France is organised, the Autorité cannot benefit from some of the more informal tools of alternative enforcement. Even though it indicated not to lack such instruments in daily practice,[55] their absence renders enforcement less flexible and limits the choices of enforcement instruments.[56] For the ACM, the fact that it has published a limited number of fining decisions in the last few years might impact on its deterrent effect, its credibility and the development of competition law through legal review in the long run.[57] The UK CMA appears to focus more on its fully adversarial procedures (most notably its fining decisions), but should take stock of the fact that it built a very strong and credible reputation mainly on the basis of using other enforcement instruments.[58] The UK CMA thus has to be wary not to relinquish the possible benefits of alternative enforcement altogether.

---

undesirable for competition authorities to 'pick and choose' (see, for instance, Petit 2010 for a critical review of the national competition authorities' discretion), but the reason to prioritise might be more practical than anything else (Wils 2011 lists no less than 6 reasons to prioritise: the over-inclusiveness of antitrust prohibitions, enforcement costs exceeding enforcement benefits, limited resources, the unrepresentativeness of complaints, deterrence through infrequent application and the fact that others might be better placed). In order to prioritise fairly, competition authorities should do so on the basis of predetermined criteria and they should explain properly on the basis of what considerations they have decided to reject claims or not take on cases. As is noted in Chapter 2, section 3.3, the Autorité has limited discretion to reject complaints and has to come to a final decision unless the complainant is non-admissible. In the UK, the UK CMA communicates its prioritisation principles clearly and explains its reasons for pursuing (or not pursuing) cases (see CMA Prioritisation Principles 2014). In the Netherlands, the ACM uses principles as well, but has not published them. However, the ACM seems to be under a strict obligation to explain the reasoning behind – at the very least – rejecting claims based on priority (see College van Beroep voor het Bedrijfsleven, LJN BN4700 (*Vereniging van Reizigers/NMa II*), and see more in general on the obligation to enforce versus the freedom to prioritise: Gerbrandy 2009 – Chapter 5).

55 Based on the interviews conducted at the Autorité on June 26, 2014. See Annex I – Methodology for a description of the methodology underlying these interviews and their embedding in this thesis.

56 Which is connected with the argument made in the footnotes to section 2.1.1 above, which states that if the perceived role of the authority in society changes, the Autorité would be less equipped to change with it.

57 The last point is discussed at length below. The deterrent effect of the authorities' decisions is one factor determining its effectiveness (see Chapter 3, section 2.1.4 on the effectiveness of enforcement policy as one of the interpretations of effectiveness). If its decisions are perceived as being effective, the legitimacy of the authority may increase (meaning substantive legitimacy, in the definition by Majone 1997. See Chapter 3, section 1.3).

58 Indicating that in the UK substantive legitimacy did not just rest on the deterrent effect of its decisions, but might have rested on the perceived effectiveness of the UK CMA's interventions and its apparent problem-solving skills (see, again, Majone 1997 and Chapter 3, section 1.3 in more detail). Apart from that, the UK CMA's tendency to provide extensive reasoning and transparency on its decision-making processes (all safeguards in the sense of Chapter 3, section 3) might have increased throughput, or procedural legitimacy (see Scharpf 2003 and, more critically, Schmidt 2013). Note that the definitions of legitimacy are not mutually exclusive and overlap to a certain extent. See Chapter 3, section 1.3.

Intermezzo: different background, opposite directions (UK CMA and ACM)
Roughly speaking, the UK CMA and the ACM are going in opposite directions. The ACM is coming from a policy of regularly fining and moving towards a broader approach to markets, while the UK CMA is relinquishing this broader approach to focus more on the deterrent effect of its enforcement work. With these opposite movements, the two competition authorities have the opportunity to take advantage of each other's earlier pitfalls. With regard to the ACM, this means that it has to beware of the balance between its different enforcement instruments, in order to secure outcomes on all different types of enforcement. It also means that it can maintain a credible reputation in the absence of fining decisions, as long as it is transparent about the process and benefits of its other enforcement efforts. For the UK CMA, this means that it has to beware of compromising the scope of the case under investigation for the sake of efficiency. It also entails that it has to beware of the emergence of extensive phase 0 discussions that are not subjected to transparency requirements but do not contribute to the legitimacy of the competition authority as a whole. On the other hand, the ACM's experience also shows that high-impact interventions can be delivered in balance with more informal instruments, and that their application does not necessarily take away from the deterrent effect of competition law enforcement in a broad sense.

At this point, it is very difficult to state which balance between fully adversarial and alternative enforcement procedures is most desirable, as this choice clearly connects to broader policy choices, to the influence of overarching principles of law and – more mundanely – to financial considerations.[59] For that reason, there might not even be such a thing as an 'optimal balance' in an enforcement toolkit, as what is 'optimal' for that particular competition authority at that particular time is dependent on external variables as well. Instead, the outer boundaries of a balanced enforcement policy should be determined. These lie in the risks and downsides of the individual enforcement instruments in terms of the normative framework (the balance between instrumentality and safeguards) and the extent to which these are transferred to a policy level. With this in mind, general starting points for a balanced policy can be formulated.

3.3 General Starting Points for a Balanced Policy

To mitigate the risk of transferring the negative consequences of one-sided interventions to a policy level, and to streamline the balance between alternative enforcement instruments and fully adversarial procedures in the future, competition authorities should formulate clear starting points to identify which situations call for which enforcement instruments exactly. Especially for the competition authorities that have not published guidance as to the application of alternative enforcement instruments, such starting points could have a positive effect on the coherence of application and increase perceived fairness. These starting points can be derived from the evaluation of the different instruments, as identified in the previous chapter.[60] The settlement-like

59 Illustrated by the third driver of enforcement and the pressure upon competition authorities to deliver effective results as efficiently as possible. See Chapter 1, section 2.3.

60 For markets work: 'Competition authorities should pronounce a clear view on when to apply markets work. It is recommended that the instrument be applied in complex or emerging markets, or in the presence of broader competitive issues that can be identified by economic market screens' (Chapter 8,

component of negotiated procedures, firstly, is most efficient when applied in larger, multi-party cases. In these cases in particular, the downsides of lacking an appeal phase are outweighed by the significant efficiency gains of having many companies committing themselves not to contest the final decision. Markets work, on the other hand, should be conducted in large, complex markets in which multiple competition, consumer or regulatory issues are expected. The competition authority can benefit from gaining an insight into these sectors in particular, especially if the concerns identified merit follow-up enforcement action. Furthermore, individual guidance should be given where emerging or rapidly developing markets are concerned, justifying the use of a quicker (but informal) instrument over a fully adversarial procedure.

However, as is stressed repeatedly above, these types of markets or competition problems should not be addressed by using alternative enforcement instruments alone. A balance must be sought that takes into account efficiency and effectiveness gains, on the one hand, but recognizes and avoids the risks connected to relying on alternative enforcement instruments alone. In other words: regardless of the starting points for using the different alternative enforcement instruments as reiterated above, there might be situations in which – from a policy perspective – the use of a fully adversarial procedure is preferred nevertheless. This would be the case if there were little case law on a certain aspect of competition law. In these cases, the general interest in the further development of competition law through legal review should outweigh the desire to resolve cases more quickly or with added benefits. Alternative enforcement is not intended to help competition authorities shy away from difficult questions. Also, when a certain question keeps recurring, competition authorities should attach more weight to the possibility of having the case reviewed by a court than to repeating their own evaluations. This particular circumstance sees to the application of individual guidance, in which this situation is most likely to occur. Furthermore, competition authorities should pursue a fully adversarial procedure when there is a specific need to increase deterrence in a certain sector. With a view to procedural fairness, this decision cannot be made on the spot, but needs to be part of a larger enforcement strategy. In other words: there should not be a situation in which two similar infringements are treated differently, just because the competition authority has decided that it is time to 'sharpen the knife'.[61] Lastly, as the functioning of some of the alternative enforcement instruments is dependent on the willingness of companies to cooperate, a fully adversarial procedure is required in its absence.[62]

---

section 3.3). For individual guidance: 'Individual guidance should be extended to cover situations broader than merely 'unresolved and novel questions', but when giving guidance on the interplay of competition law with other (pubic) interests, alternative forms of accountability are necessary to safeguard a legitimate outcome (Chapter 8, section 4.5).

61 To that end, the ACM has pinpointed 'priority sectors' in which such attention is to be expected, see ACM Agenda 2014-2015. However, it should also be noted that companies do not have the *right* to the application of an alternative enforcement instrument. They can – at best – argue that similar cases deserve to be treated similarly (on the basis of equality), but they cannot derive rights from decisions made with regard to other companies. To prevent such arguments from being made, competition authorities should provide clarity about their enforcement choices, on the basis of which it is more difficult for companies to argue that previous decisions were taken in 'similar circumstances' (which is not likely).

62 It should be remarked that when certain companies are 'repeat offenders', a willingness to cooperate is presumed to be absent. This is in line with the notion of a 'tit for tat' approach, in which companies are treated according to their past and present behaviour in the market. See in more detail Ayres & Braithwaite 1992 on responsive regulation.

Situations in which to apply a fully adversarial procedure:
- *When there is little case law.*[63]
- *When there are recurring 'novel and unresolved' questions.*
- *When there is a specific need to increase deterrence.*
- *When there is no willingness on the part of the companies.*

The decision to increase deterrence in certain sectors should be based on a predetermined enforcement agenda, which takes account of past endeavours of the competition authority and changes in the market.

Under these circumstances, competition authorities should choose to use a fully adversarial procedure over alternative enforcement instruments, even if the other criteria for applying individual alternative enforcement instruments are met. This means that – in some cases – considerations connected to the policy level, the agency level or the rule level can be of overriding importance.[64]

3.4 Prioritising for a Balanced Policy

The recommendations for balancing alternative enforcement instruments with a fully adversarial procedure indicate the circumstances in which competition authorities should pursue a fully adversarial procedure instead of alternative enforcement instruments. Competition authorities should take these circumstances into account when they are reviewing the best approaches to resolving cases put before them. However, in order to pursue a balanced enforcement portfolio, competition authorities might also need to review the possible outcome of a case in the pre-stages of enforcement. They might want to consider the characteristics of the market problem before 'taking on' a certain case, in order to secure sufficient diversification in the instruments pursued. They might want to *prioritise* bearing in mind the possible outcomes of the case, viewed in the light of its earlier interventions.[65]

This brings about a new underlying question: should competition authorities pursue a balanced enforcement policy by prioritising their cases based on the type of instrument that is likely to be applied? In other words: should the objective of pursuing a balanced enforcement policy be one of the deciding factors on the basis of which it is decided which cases to pursue? On the one hand, it seems unsatisfactory that the interests of the enforcer should override the interests of enforcement in general. If the conditions in the market so require, the competition authority should take all the measures that it needs, regardless of the label attached to it. The effects of the intervention should be central. On the other hand, competition authorities (as independent administrative

63 This requirement is further elaborated upon in section 5 below.

64 Except for the condition of willingness, which is more of a practical note to these criteria. It is however not uncommon to take the attitude of the infringer into account. See for instance Baldwin & Black 2007 on 'really responsive regulation', in which this is one of the circumstances to be responded to.

65 As is remarked before, competition authorities often prioritise in order to deploy their limited resources in a fair manner in the cases put before them. See section 3.2 above and more in particular footnote 53.

authorities) hold a special place in society and without a credible reputation and perceived legitimacy, they cannot operate properly.[66] Moreover, competition authorities are faced with an enormous workload, in which enforcement choices are inevitable. In that light, it does not seem inappropriate to take the effect on its broader enforcement strategy into account when determining whether or not to pursue a case.[67] Naturally, this criterion alone is not a deciding factor, and the impact on the market and on, for instance, consumer welfare is a leading factor when prioritising cases.[68] Still, it is clear that at some point choices have to be made and the balance between the different types of enforcement instruments applied by the authority should be one of the factors taken into consideration.

To return to the main question posed in this section; competition authorities should pursue a strategic balance between both adversarial procedures and alternative enforcement instruments, based on the circumstances of the case put before them. As long as some form of balance is pursued, the downsides of either type of instrument can be remedied on an instrument level, and will not be transferred to the policy level. It appears that there is a 'sliding scale' of optimal balance, as the different balances pursued by the Autorité, the ACM and the UK CMA currently all seem viable. However, in order to maintain a proper balance and with a view to procedural fairness, criteria should be determined that streamline the application of different instruments to different cases. Also, some form of evaluation should take place in the prioritisation phase (pipeline) – taking account of the range of interventions already pursued *in addition* to the impact of the case itself.

4. DECISION-MAKING: STRUCTURES AND FREEDOM

Policy is just one part that influences the performance of a competition authority. Its performance can also be linked to the agency level, which – broadly speaking – entails the way the authority is designed and how it relates to stakeholders in the field.[69] From the analysis of national practice, it follows that the agency level creates challenges for the application of alternative enforcement instruments with regard to two very specific issues: the decision-making structures existing within the competition authorities (with a special focus on the separation of functions) and the relationship of the authorities with their responsible Ministries (mostly with regard to the freedom to choose interventions and develop enforcement policies). This section discusses both of these issues, makes

66 See for instance Black 2001, who touches upon the legitimacy of enforcement as a precondition for its effectiveness. This is also presupposed in the good agency principles formulated by Ottow 2015. Competition authorities need to alternate – as is described above at length – between formal and informal procedures, between deterrence- and compliance-based strategies in order to appeal to all bases of compliance (see in more detail Van Erp 2002 and Chapter 3, section 2.1.4. Maintaining a proper balance between these different interventions is thus linked to its legitimacy (in terms of substantive legitimacy, see Chapter 3, section 1.3).

67 In fact, this already forms a criterion in the UK CMA's prioritization principles, see CMA, Prioritisation Principles, April 2014, being: impact, strategic significance, risks and outcome. The ACM applies prioritisation principles as well, which are not publicly available.

68 CMA, Prioritisation Principles, April 2014, para. 2.1.

69 See in more detail Chapter 3, section 4.4 concerning a more specific explanation of the agency level.

recommendations with regard to rethinking decision-making structures and identifies risks with regard to the relationship with the Ministry.

4.1 Rethinking Decision-Making Structures

An important component of the agency level is the way in which a competition authority is set up, including the organisation of its decision-making structures: how cases 'flow' through the organisation, how information is shared between departments and, more specifically, whether there is a strict separation of functions between them. For most of the alternative enforcement instruments discussed, the existing decision-making structures within the authorities have remained relatively unchanged. Alternative enforcement instruments have either been incorporated within these structures, or are capable of bypassing them altogether.

When alternative enforcement instruments are applied in existing decision-making structures, it might appear that these are not equipped for dealing with these instruments. This might lead to a disapplication of the instrument, or a strained application, which prevents the instrument from realising its full potential. Conversely, it might also lead to an increase in informality within the procedures, such as conducting non-meetings or pre-negotiations. This is not necessarily a bad thing, but should not occur in a way that is invisible to the outside world and not subjected to any form of accountability.

> These risks can be illustrated by national practice. The UK CMA's markets work regime, for instance, is a clear example of an alternative enforcement instrument retained in existing decision-making structures – in this case a two-phased application. It has been discussed in Chapter 5, however, that the particular seriousness and impact of phase 2 investigations is capable of overshadowing the less far-reaching phase 1 studies. These studies sometimes circle around the question whether or not a reference for a phase 2 investigation (a MIR) should be made, whereas they are capable of being effective instruments in their own right. The 'weight' of the phase 2 investigation has been found to risk pushing work back to an informal stage (phase 0), or to diminish the possible effectiveness of the phase 1 study as such.[70]

> Another example of risking informal negotiations can be found in the simplified resolution procedure in the Netherlands, where the possible efficiency gains of negotiating in an earlier phase are ruled out by a strict separation of functions. If the case team investigating the infringement were to explore a possible resolution, this would happen informally and would not likely be visible in the final decision.[71]

Alternatively, some alternative enforcement instruments are clearly capable of bypassing internal decision-making structures. This occurs when the separation of functions is not applied on purpose (think of the absence of the Case Decision Group in the UK CMA's settlements[72]), or when these instruments are informal in nature (such as individual guidance and recommendations). This means that, as a consequence, there are no procedural rules warranting a 'fresh set of eyes', while the outcome of the

70 See Chapter 5, section 5.1.2 in more detail.
71 See Chapter 4, section 5.1.
72 See Chapter 4, section 3.2.2.

intervention might have a significant impact on the market. The fact that alternative enforcement instruments sometimes bypass existing decision-making structures might have consequences for the perceived legitimacy of the authority itself – depending on the scale on which these instruments are applied.[73]

The interplay between alternative enforcement instruments and decision-making structures can therefore pose some interesting challenges in the light of the normative framework underlying this thesis. Placing alternative enforcement instruments in existing decision-making structures can lead to problems if this appears not to be a good fit, but bypassing existing decision-making structures might not always be desirable either. This suggests that there are circumstances under which decision-making structures would benefit from (slight) adaptations for the purpose of applying alternative enforcement instruments. In some instruments, such adaptations have already taken place (think of the role of the Rapporteur in French transaction procedures[74]), but in others, the risks pointed out above might warrant a rethinking of the decision-making procedures.

Decision-making structures should be adapted to better accommodate alternative enforcement instruments when:
- *They are not applied for that very reason, or*
- *They incite unintended informality, and*
- *They are applied on such a scale that informality becomes a legitimacy problem.*

Suggestions for alterations to the decision-making structures are made in the previous chapter with regard to the relevant instruments.[75] In this decision, the instrumentality considerations for rethinking these procedural issues should be weighed against the safeguards decision-making structures present. Most notably, the separation of functions between investigation and other departments is not just a 'bump in the road', but secures unbiased decision-making, warrants procedural fairness and protects the competition authority itself from capture by market parties.[76] Such considerations have to be taken into account as well when rethinking the existing decision-making structures.

This balance needs to be struck for the suggestions made in this thesis as well. For instance, on multiple occasions this thesis has recommended on various occasions to remedy a lack of internal review or review by a court with alternative methods of

73 This undoubtedly affects throughput or procedural legitimacy (Scharpf 2003 and Majone 1997 respectively, explained in more detail in Chapter 3, section 1.3), because certain steps for involving stakeholders are omitted, transparency requirements might be bypassed and accountability can be limited.

74 See Chapter 4, section 2.2.2. The Rapporteur is responsible for conducting the negotiations, which forms an additional safeguard.

75 See Chapter 8, section 2 for negotiated procedures, section 3 for markets work and section 4 for individual guidance.

76 In the first sense it forms an additional safeguard when an administrative fine is imposed, which can be perceived as a 'criminal charge' under the ECHR (ECHR, Application no. 5100/76 (*Engel and others v the Netherlands)*, para. 81, but see also See ECHR, 73053/01 (*Jussila v Finland*), para. 43). See in more detail Chapter 3, section 3. In the second sense, an internal separation of functions ensures that the departments that come into contact with market parties cannot exert influence on the final decision, or do not draft the statement of objections. The importance of the separation of functions in this respect is elaborated upon in Chapter 8, sections 2.5 and 3.4.

accountability.[77] This could be pursued by consulting stakeholders in the process of an intervention, by asking other competition authorities for advice, or by remaining in dialogue with the market. Alternative methods of accountability is an example of 'rethinking existing decision-making structures' and should – in line with the finding made above – take the importance of safeguards into account as well. The challenge for competition authorities in this is therefore to pursue these mechanisms, while preventing capture by both market parties and other stakeholders. In the end, the competition authority is responsible for its final decisions, and even though mechanisms of alternative accountability can increase throughput and output legitimacy,[78] it should be aware of not compromising other values in the process.

4.2 Freedom to Take Independent Decisions

Having touched upon capture by market parties in the previous section, another aspect of independence that might have an impact on alternative enforcement is the relationship between the competition authority and the responsible Minister. Competition authorities should enjoy operational independence (so that they are free to pursue the cases and take the decisions that they find necessary), and budgetary independence (so that they are accountable for the spending of the budget, but that they cannot be steered because of it).[79] This independence is compromised if competition authorities are not free to choose interventions on the basis of suitability, but are bound to a certain course of action for other reasons.

Even though the political independence of the authorities falls somewhat outside the scope of this research, it has had some impact on alternative enforcement practice. In fact, each national competition authority has had its own run-ins with the responsible Ministers, which could have an impact on the way competition law is enforced.

> For instance, it is clear that the Autorité – out of the three competition authorities under review – is the authority that is most active in government advocacy, the effectiveness of which is largely dependent on political considerations.[80] From the perspective of the alternative enforcement instruments discussed, this means that most of the market and individual guidance publications are 'bound' by the request of the referring parties. The Autorité could be challenged to take a more independent approach by focussing more on its self-referrals. By doing so, it could further develop its approach to markets work by distancing itself from the political arena.

---

77 According to the social forum definition by Bovens 2007, accountability requires the competition authority to explain and justify its conduct, allowing the forum to pose questions, to pass judgment and to impose consequences. In alternative mechanisms of accountability, the 'forum' has changed from the judiciary to other enforcement authorities (social accountability) or other competition authorities (professional accountability).

78 Alternative accountability mechanisms can contribute to both institutional throughput legitimacy and constructive throughput legitimacy, as defined by Schmidt 2013. Another example of constructive throughput legitimacy is further elaborated upon by Sabel & Zeitlin 2010. See also Chapter 3, section 1.3.

79 See for a more detailed exposé of the principle of independence Chapter 3, section 3.4 and the sources quoted there in the footnotes.

80 This is caused by the provision in the *Code de Commerce* that requires the Autorité to perform competition impact assessments of proposed legislative changes. See Chapter 5, section 2.1, but see also the background of competition law enforcement by the Autorité in Chapter 2 of this thesis.

In principle, a reference from a responsible Minister is not necessarily a bad thing, as it indicates the political relevance of an issue. After all, competition authorities are accountable to the Minister (to some extent) and should be able to explain the effect and the relevance of their interventions.[81] When an issue is referred to it, the *political* relevance is a given. However, the influence of the Minister on the markets investigated and the cases pursued should not be so big that the independence of the competition authority is compromised.[82] This can also happen *de facto* if referrals and suggestions from politics are so numerous that they overshadow other enforcement activities. As perceived above,[83] this is not the case for the Autorité.

> Another illustration of the influence of responsible Ministers is the merger into the UK CMA (and, to a lesser extent the ACM). This merger was partially driven by budgetary considerations and aimed to make the UK's enforcement regime more sanction-oriented. These considerations have been translated into a strategic steer,[84] which underlies the UK CMA's strategy document. On the basis of this strategy, the UK CMA now pursues more fully adversarial cases.
>
> Similarly, in the coalition agreement between the two political parties currently making up the Dutch Government, it was included that the ACM should have a financial objective, ordering it to generate a certain amount of revenue in fines. Because this particular aspect was received with criticism,[85] this objective is not formally included in the law. The ACM's fining ceiling, however, is currently being raised.[86]

All in all, the question underlying this type of independence is how free the national competition authority is to take its own decisions and to use the instruments that it finds most appropriate. To put it very boldly, fining decisions create a stream of revenue, whereas informal interventions, market studies and commitment decisions do not.[87] On the other hand, negotiated procedures and informal resolutions are typically quicker, saving time and human resources and could therefore also be cheaper. As noted in the introduction to this thesis, competition authorities are under increasing pressure to be as effective as possible, at the cost of as few resources as possible.[88] Such pressure could influence the authorities' decisions (to apply a certain instrument, or to tackle certain market problems or not) which compromises their independence. In their current functioning, the influence is noticeable at times (illustrated by the examples above), but

---

81 Which is a form of political accountability, as defined by Bovens 2007 and explained in Chapter 3, section 3.5 To paraphrase Ottow 2015: competition authorities should at least be accountable to the extent that their operational independence is somewhat counterbalanced.

82 This indicates institutional independence, as opposed to operational independence (which can be characterized as impartiality). See Aelen 2014, and also the explanation provided in Chapter 3, section 3.4.

83 When reviewing the balance between instrumentality and safeguards, in section 2.1.

84 See BIS 2015, Government's Strategic Steer.

85 From the point of view of independence, the desirability of such an objective is highly questionable. See Aelen 2014. See for the coalition agreement: Regeerakkoord VVD-PvdA, 29 October 2012 (Bruggen Slaan), p. 71.

86 The latest development is a vote on this proposal, and the subsequent discussion in the Dutch Lower House (*Tweede Kamer*). See Tweede Kamer, Handelingen 2015-2016, no. 15, item 14.

87 On the other hand, negotiated procedures and informal resolutions are typically quicker, saving time and human resources and could therefore also be cheaper. Nevertheless, it would be undesirable for the competition authority to make this decision solely based on budgetary considerations.

88 See in more detail Chapter 1, section 2 on the drivers of alternative enforcement.

is usually regarded as *one* of the considerations on the basis of which instruments are applied.[89] Be that as it may, budgetary considerations should not be the main driver of enforcement decisions; the effect of the interventions should be leading.[90]

5. DEVELOPMENT OF COMPETITION LAW THROUGH LEGAL REVIEW

On several instances in this thesis it has been remarked that the application of alternative enforcement instruments on a larger scale can have the effect that important questions of competition law are no longer dealt with through a fully adversarial procedure, leading to a reduction in appeals before national and European courts. It has been noted that this can be problematic from an accountability perspective and from the point of view of the uniform application of European competition rules,[91] but also touches upon a more fundamental question concerning the advancement of the interpretation of law through a review by a court. In that sense, alternative enforcement practice connects to the rule level of enforcement, as it might hamper the further development of the rules through case law.[92] Competition law is very case law-driven, which entails that the Court of Justice and the national courts play an important role in interpreting and applying the rules.[93] Whenever there is a recurring problem, or the competition authority has made an erroneous evaluation, it is up to the national administrative courts or the Court of Justice to reveal this tension and offer an alternative interpretation if necessary. This is in line with the notion of the division of powers and checks and balances underlying our Western societies.[94]

5.1 Interpretation of Competition Law on Two Levels

The use of alternative enforcement instruments, however, makes it less likely that cases end up before an administrative court – as is often remarked in this thesis. Negotiated

89 See CMA Prioritisation Principles, April 2014, Strategy ACM 2013 and the various guidance notices published by the Autorité respectively. Also illustrated by the examples above is that budgetary considerations or political changes can be the driving force behind some major changes in the enforcement regime, such as the mergers in the UK and the Netherlands, or the recent changes in the Autorité's statutory powers.

90 This conclusion does not deny the importance of some form of cost-benefit analysis when choosing interventions or prioritising cases. It should, however, not just be the leading consideration.

91 This is legal accountability, as defined by Bovens 2007 and explained in Chapter 3, section 3.5. It has been suggested that the accountability issue should be remedied by alternative accountability mechanisms. See the recommendations in Chapter 8, sections 2.5, 3.5 and 4.4. The consequences for the uniform application of Union law are discussed below in section 6.

92 Note that it has been remarked on several occasions as well that alternative enforcement could be particularly suitable to deal with 'new' questions that would otherwise not have been prioritised for enforcement. In that sense, alternative enforcement also facilitates the development of competition law on a rule level. See the recommendations made in Chapter 8, particularly with regard to markets work and informal guidance in sections 3.6 and 4.5.

93 Recent examples of developments in case law concern the interpretation of 'restriction by object' under Art. 101 TFEU or the effects of abusive practices under the TFEU. See, respectively: CJEU Case C-345/14 (*Maxima Latvija*), CJEU Case C-67/13P (*Cartes Bancaires*), CJEU Case C-23/14 (*Post Danmark II*) and CJEU Case T-268/09 (*Intel v Commission*).

94 The role of the courts on a national level is discussed in Chapter 2. Note that the UK system in particular puts an additional emphasis on a review by a courts, as administrative authorities with reviewing and sanctioning powers are odd entities in common law countries. See in particular Chapter 2, section 4.5.

procedures result in content (or, at least, consenting) companies, which might even have waived the right to appeal. Markets work often results in informal recommendations,[95] and so do individual guidance documents, such as advisory opinions or opinions. These recommendations are not enforceable, but neither are they appealable. This means that there is a certain tension when companies feel obliged to comply with recommendations made (because of the authorities' credibility and reputation[96]), while it is unlikely that a court would ever review these recommendations. If the use of these instruments were to increase, fewer cases would be reviewed by a court and the interpretation of competition law would occur on one level (the executive), instead of two (the executive and the judiciary). This is not necessarily a bad thing if competition rules were crystallized and not subject to various interpretations, but as the development of competition law has shown, the field is particularly prone to alterations due to differences in opinion about the function of competition and the economic situation in general.[97] When looking at the alternative enforcement practice, it stands out that markets work and individual guidance are most often deployed to issues on the fringes of competition policy (such as sustainability issues, developments in emerging markets or the interplay with regulated markets), and that negotiated procedures are used (or recommended) in the more evidentiary complex abuse cases.

> *The typical subject matter of some of the alternative enforcement instruments leads to a single-level interpretation of this part of competition law, for which reason competition authorities should be sensitive to the state of the case law and their approaches to similar cases in the past.*

The downside of this practice is that these issues are now largely addressed though alternative enforcement instruments, which means that the interpretation, the debate (and also the struggle) remains with the competition authority. It would be preferable for recurring issues as the ones mentioned above to be dealt with by appealable decisions as well, so that an administrative court can evaluate the interpretation of the competition authority. Being sensitive to the state of the case law and their past approaches to the subject matter also prevents the competition authorities from developing a 'standard way' of dealing with certain cases. As an added benefit, a degree of uncertainty in

95 Except for the UK CMA's phase 2 market investigations, in which behavioural and structural remedies may be imposed. See Chapter 5, sections 3.2.3 and 3.4 in more detail.

96 Which ties in with the necessary balance between fully adversarial procedures and alternative enforcement instruments, as discussed in section 3 above. Oddly, the balance in enforcement policy needed to achieve a legitimate performance also 'creates' the problem of seemingly binding recommendations. This does not mean that competition authorities should remain less 'credible' or 'believable' (like a dog that barks but does not bite), but underlines the need for alternative mechanisms of accountability and a reversal to a fully adversarial procedure if the rule level suffers.

97 See Chapter 1, section 2.2 for the debate about the goals of competition law, which has not just led to the application of different enforcement instruments (that are more capable of achieving some of the goals mentioned), but understandably also lead to differences in interpretation of the rules themselves. Note that the case law can be very divergent due to more mundane factors, such as complex facts underlying the case, the scope of the appeal brought before the courts or the quality of the companies' (and the authorities') legal representation.

approach functions as an additional deterrent,[98] bolstering the competition authorities' reputation.[99] This is part of the reason why it is recommended above that a careful balance with the fully adversarial procedure be pursued where recurring issues are concerned, or in case legal review appears to be lacking.[100]

5.2 Boundaries of Interventions

Apart from a single-level interpretation of the rules, a lack of legal review poses a threat to the boundaries of the competition authorities' interventions. This holds particularly true for issues in which a more proactive stance is socially desirable. Sustainability, for instance, can be heavily influenced by personal opinions about how competition law *should* take account of these interests, while overlooking what it *can* do under the current legal framework. This is the same for other topics in which public interest is at stake.

> The competition authority that currently struggles most with these issues is the ACM. In line with its new enforcement strategy, it is actively providing opinions and recommendations with regard to different sustainability issues, mostly concerning large-scale cooperation to promote a sustainability goal to the detriment of consumer welfare.[101] For the ACM, these issues are 'recurring issues' as identified above, partially because their subject matter is a 'hot topic' in politics and competition law, but also partially because the Dutch political and decision-making structure is known for its deliberative nature – which explains why the ACM (as a stakeholder in the legal part of the discussion) is asked for advice beforehand.[102]

98 When companies do not know which reaction to expect from the authority, the cost-benefit analysis underlying compliance is more difficult to determine (which, of course, assumes that companies make rational choices – which they do not always do, see for instance Sunstein 2012 and Stucke 2012). This uncertainty should not be so great that it encroaches upon legal certainty and leads to unequal treatment. See Chapter 3, section 3.2 in more detail.

99 Which might benefit from some bolstering, because it is possible that legal review plays out to the disadvantage of the competition authority. Even though this should not be seen as a factor of importance, it is always unfortunate when carefully prepared arguments are overruled in court. It is even more unfortunate when it concerns the leading interpretation presented by the main enforcement authority (which is likely to be a press release which is difficult to frame). Be that as it may (and believing in the expertise of communication specialists within the authorities), the value of legal review on this point is of overriding importance, and can even lead to politics intervening if the outcome is undesirable from a political point of view.

100 See section 2 above.

101 Examples are: Autoriteit Consument en Markt, 'Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er jaren kolencentrales in het kader van het SER Energieakkoord', 26 September 2013 (*Energieakkoord*). Autoriteit Consument en Markt, Analyse ACM van duurzaamheidsafspraken 'De Kip van Morgen', Kenmerk: ACM/DM/2014/206028 (*Chicken of Tomorrow*). Autoriteit Consument en Markt, 'Advies ACM over herkomsttransparantie in de steenkolenketen', 19 November 2011 (*Steenkolen*). See Chapter 5, section 4.3 and Chapter 6, sections 4.3 and 4.5.

102 The word 'poldermodel' has no literal translation in English, but signals a compromising way of dealing with major issues. Literally, it refers to the new land created by the Dutch, in combination with a model for decision-making. In this model, stakeholders are invited to present their views and come to a joint and consensual solution for pressing issues. See in more detail Prak & van Zanden 2013. The large, multi-party agreements concluded in the field of sustainability (the ones referred to in the footnote above) are symptomatic of the Dutch Poldermodel.

As the competent authority in the field of competition law, competition authorities can be asked to give their opinion on the compatibility of different multi-party agreements, promoting different sustainability goals. Because of the social desirability of these goals (depending on one's own point of view, of course), it is tempting to view these agreements as favourable, while in fact they might not be compatible with competition rules. Alternatively, competition authorities might apply a very strict test to ascertain compatibility, which could lead to the disapplication of the agreement altogether. In both situations, an administrative court does not review the final recommendations made by the competition authorities, while these recommendations can have far-reaching effects in the market.

> To illustrate, the Chicken of Tomorrow opinion of the ACM prohibited parts of a multi-party agreement that – to a large part of the general public – sounded like a really good and environmentally friendly idea. This caused further negotiations to end and the ACM to suffer criticism of its analysis.[103]

Competition authorities have to be careful that – through the application of alternative enforcement measures – they do not intervene beyond their mandates, shaping markets by exercising their influence beforehand instead of watching over the boundaries of fair competition. As illustrated above, this can lead to unsatisfactory results, especially when there seems to be tension between the objectives pursued by the possibly anti-competitive agreements and the room that competition law leaves for these objectives.[104] However, in the end it is not up to the competition authority to broaden its competences unilaterally. In these particular circumstances, review by a court would not necessarily guarantee a more legitimate outcome,[105] but it might confirm that – with regard to these new issues – competition law is stuck in a paradigm, and needs legislative changes in order to incorporate it better.

6. EUROPEAN CONTEXT

In this thesis, alternative enforcement practice has been analysed from a national perspective. However, national competition authorities also apply European competition rules and operate in an increasingly global environment. This means that there is an inevitable interplay between national practice and European law. In this section, some preliminary thoughts and observations are made with regard to the relationship between the European and national levels. This is consistent with the aim of this thesis, which focuses on the analysis of national practice in the first place. Nevertheless, the decentralisation of competition law has been a driver of changes in enforcement in the

---

103 See Chapter 6, section 4.5 This particular opinion concerns Analyse ACM van duurzaamheidsafspraken 'De Kip van Morgen', Kenmerk: ACM/DM/2014/206028 (*Chicken of Tomorrow*).

104 See the inaugural lecture by Gerbrandy, who argues for a resilient competition law that incorporates such interests. See Gerbrandy 2016 – draft version on file with the author.

105 Also think about the standard under which most decisions of competition authorities are discussed. Courts do not always engage in a full merits review, and sometimes are very deferential to the discretion which the competition authorities enjoy, and their expertise in completing 'complex and technical assessments'. This point is touched upon in Chapter 8, section 3.5. See also Chapter 2, sections 2.2.1, 3.2.1 and 4.2.1 for the different standards in the Member States under review.

Member States, and, the other way around, developments on a European level have had a definite influence on some of the alternative enforcement instruments. However, the interplay with the European level poses different challenges as well. Because of their different character, coordination between competition authorities might differ and the question should be asked whether the large-scale application of these instruments could be problematic in the light of the principle of the effectiveness of European law, or the legal development of European law as such. Also, it should be considered whether there are specific challenges or opportunities for collaboration within the European Competition Network – which all competition authorities under review form a part of.

6.1 Effect on the Development of Alternative Enforcement Instruments

In all of the previous chapters that have analysed an alternative enforcement instrument, reference was made to the way in which similar instruments were devised for the Commission. This discussion has to be seen in conjunction with one of the drivers of alternative enforcement: the decentralisation of competition law enforcement. Apart from the operational challenges that this may give rise to (which are discussed separately below[106]), there might have been a connection between the developments on a national level and the developments at the Commission. This interplay can be characterized as top-down (meaning that the developments at the European level have inspired developments on a national level), bottom-up (the other way around, so that developments on a national level inspire developments on a European level) or horizontal (when national competition authorities inspire – or learn from – each other). This relationship is explored for all individual alternative enforcement instruments.

Cross-fertilisation and top-down development (negotiated procedures)
The development of national practice on the point of negotiated procedures has to be seen in conjunction with the development of European practice. When it comes to commitment decisions and the leniency procedure there has been a clear top-down development, as Regulation 1/2003 inspired the adoption of these instruments in the Member States.[107] However, when it comes to the negotiated procedures discussed in this thesis, the relationship with the European level is more difficult to characterize. For one thing, the Commission itself was rather late in implementing a settlement procedure. At that time, the Autorité already had the transaction at its disposal and the ACM had used an ad-hoc procedure to deal with its large *Construction* case.[108] The Commission's settlement procedure, however, seems to have been more inspired by the US experience than by the national examples of similar instruments.[109] This is illustrated by some significant differences between the French transaction and the Commission's settlement procedure,[110] but regardless thereof, the set-up and legal embedding of the

106 See sections 6.2 and 6.3 below.
107 See Chapter 4, section 1.1 for a more precise overview of the development on a European level.
108 See Chapter 4, sections 3.1 and 4.4.1.
109 See for instance Burrichter 2006 and the speeches by former Commissioner Neelie Kroes on the matter (European Commission, SPEECH/08/445, Neelie Kroes, 'Settlements in Cartel Cases').
110 Although these differences seem to have become smaller under the *Macron* law (see Chapter 2, section 3.1) Previously, under French law, the company took the initiative to engage in a settlement after the SO

procedures seem similar.[111] To put it the other way round, there has been a clearer influence of the Commission's practice on the UK's settlement procedure, which has more characteristics in common with the Commission's settlement procedure than the Dutch and French practice do.[112] The relationship between the national authorities and the Commission in the development of negotiated procedures has therefore been one of cross-fertilisation, with a larger focus on the top-down movement (especially under Regulation 1/2003, and towards the UK) than bottom-up developments.

Limited, but with horizontal aspects (markets work)

Even though the European Commission also conducts sector studies, there is surprisingly little interplay between the national competition authorities and the Commission on this point. For the Commission, sector inquiries were a heritage of a competence it acquired in 1960, ten years after the UK CMA's predecessor executed its first type of markets work.[113] For the UK CMA, markets work has always been one of its core activities and has developed into the extensive system we know today.[114] For the Autorité, the advice procedure is connected to its general advocacy role and the power to make self-referrals stemming from a quest for independence above anything else. Lastly, for the ACM the power to conduct market scans is modelled on a project in the financial markets and its monitoring activities in regulated markets. This shows that in the three competition authorities the instrument has developed separately, due to other outside factors or interpretations of the roles of competition authorities. However, currently, the UK CMA's system of imposing remedies after an investigation has spiked the interest of some of the competition authorities, suggesting that there might a development in terms of intra-European (or horizontal) influencing.[115]

Top-down, but with caution (individual guidance)

Giving guidance in individual cases might have connotations with the system of competition law enforcement before a large-scale reform took place in the early 2000s. In these years, the Commission (and earlier also some of the national competition authorities) functioned under a notification system, which entailed that companies had

---

was sent, there was a non-contestation, but no admission of liability and the fining ceiling was divided by 2. Under the Commission's procedure, there is the possibility to negotiate before the SO is sent and thus to influence the objections that make it into the SO. Also, the Commission requires full admission. See in more detail the presentation by Rapporteur Beaumeunier 2014. Currently, the Rapporteur seems to have the initiative to start negotiations and the fining ceiling is no longer cut in half, but the entire fine is negotiable (see Chapter 4, sections 2.1 and 2.4).

111 See Chapter 4, section 1.1 for an overview of the legal embedding and the set-up of the Commission's settlement procedure.

112 Such as the possibility of discussing pre-SO, or even during 0 meetings, and the requirement to admit full liability. Also, the term 'settlement' was chosen to connect to the Commission's practice. See CMA Guidance 2014, Chapter 14 and footnote 173 for this last statement. This does not mean, as is often repeated, that this completely excludes the possibility of pre-SO negotiations for Dutch and French practice. They are, however, not formally recognized.

113 See Chapter 5, section 1.1 for the development of the Commission's approach to markets work.

114 For the practice of the UK CMA, see Chapter 5, section 3 in more detail. For the practice of the Autorité, see Chapter 5, section 2 in more detail. For the practice of the ACM, see Chapter 5, section 4 in more detail.

115 As noted before, the UK CMA's system has already been implemented in Israel. See Department for Trade and Industry, Peer Review of Competition Policy, performed by KPMG, 2007.

to notify proposed agreements in order to receive clearance. This created a backlog of cases which was so severe that the Commission was forced to issue informal 'comfort letters'.[116] To some, the possibility of giving individual guidance presents the risk of reintroducing the notification through the back door, with all its adverse consequences. This might also be one of the reasons for a more hesitant application of this instrument in the UK. However, most of the criticisms of the Commission's practices were connected to the scale on which comfort letters were applied – bordering on a 9/10 ratio. This shows that the hesitance which competition authorities might have in applying this instrument cannot entirely be explained by looking at the Commission's past experience alone.[117] Be that as it may, the current set-up of the national procedures for giving guidance in individual cases (at least, the Dutch and UK guidelines) resembles the Commission's current approach to guidance letters – including its strict criteria.[118] Therefore, national practice on individual guidance has top-down characteristics, but has inherited its uncertainties and sensitivity to its downsides with it.

Slightly bottom-up (compliance programmes)

The least visible interplay between the national and European levels is visible when it comes to compliance programmes. In promoting these compliance programmes, the Commission seems to have chosen an approach similar to the ACM.[119] Even though the Commission has published a (rather limited) guidance manual on its website, it refers to the practice of the Autorité and the UK CMA's predecessor for further reference. Apart from this slightly bottom-up interaction, there is little interplay between the European and national levels when it comes to compliance. This can be explained by the character of the instrument itself; it is aimed at preventative action to be taken by *companies*, which can be stimulated by competition authorities, but not necessarily so. Because the Commission already shows some deference to the national initiatives on this point, compliance stimulation also offers one of the greatest opportunities for cooperation under the European Competition Network (ECN). In that sense, it can follow the ECN's Model Leniency Programme, which was published in 2006 and revised in 2012, but has not been followed by other 'model programmes' just yet.[120]

6.2 Effect on the Functioning of Alternative Enforcement Instruments

Competition authorities are competent to apply Articles 101 and 102 TFEU and share this responsibility with the other national competition authorities and the Commission. In this set-up, enforcement action by one competition authority restricts enforcement action by the others, as companies cannot be fined twice for the same infringement.[121] To

116 And to create block exemptions for certain groups of infringements, see Chapter 1, sections 2.1 and Chapter 6, section 1.1.

117 See Chapter 9, section 4.2, but take into account section 4.1 as well.

118 See Chapter 6, sections 3.2 and 4.2.

119 Giving limited guidance, but referring to other guidance documents. See Chapter 7, section 1.1.

120 See ECN Model Leniency Programme 2012 revision. The ECN has given recommendations on different enforcement issues, such as investigative powers and the power to impose structural remedies. See in more detail http://ec.europa.eu/competition/ecn/documents.html.

121 However, the difficulty is that competition authorities limit the geographical scope of the infringement to their Member States, which means that companies are fined for different parts of the infringement.

prevent this from happening, case allocation rules have been devised and competition authorities notify each other of ongoing investigations.[122] All of these mechanisms have been devised with regard to the fully adversarial procedure and have not foreseen an increase in alternative enforcement instruments. This gives rise to the question of what effects the application of the different alternative enforcement instruments can have upon enforcement by other national competition authorities and even the Commission.

Ne bis in idem and forum shopping (negotiated procedures)
With regard to negotiated procedures, the answer to this question is most straightforward. Negotiated procedures (and, in that, specifically the settlement-like procedures) resemble fully adversarial procedures with the exception that procedural rights are waived and a discount is granted. Since it concerns a formal investigation to begin with, regular case allocation rules apply.[123] Under the principle of *ne bis in idem*, the conclusion of a negotiated procedure also precludes action by other competition authorities where the enforcement of European competition rules are concerned, since it is a formal procedure in which an infringement is found and a fine is imposed.[124] Another question concerns the level of discount granted for not contesting the findings in a negotiated procedure, and whether some form of harmonisation would be desirable in order to prevent forum shopping. In the current situation this is not necessary, as the interplay with leniency and the general consensus on 'maintaining deterrence' already caps the discounts between 10% and 20%,[125] and it is not likely that national competition authorities would compromise either in order to make negotiated procedures more attractive.[126]

No precluding effects, but opportunities for collaboration (markets work)
Regarding markets work, the main question concerns the effects of the findings of one competition authority upon the actions of another. These effects are likely to be limited, as the national competition authorities investigate the functioning of markets on their own territories, while the Commission launches inquiries on a European level.[127] In other words, the angle of investigations differs from the one to the other, and any consequences attached to markets work are limited by this specific angle. Therefore, this does not preclude the other competition authorities from conducting markets work or opening an investigation, nor does it prevent legislators from taking action if the situation so requires.[128] Apart from the effects of markets work, the European level

---

See footnote 123 below on the principle of *ne bis in idem*. Note that this can also cause problems from the point of view of the effectiveness of European law. See section 6.3 below.

122 See in more detail the ECN Cooperation Notice.

123 Which is the 'best placed' authority, see Articles 6-15 ECN Cooperation Notice.

124 See in more detail Van Bockel 2010, Van Bockel et al. 2014 and Nazzini 2014.

125 See Chapter 4, sections 2.4.1 and 3.4.1 in more detail.

126 In all the national competition authorities being researched, the value of leniency is underlined in their annual reports, and 'deterrence' forms a part of the enforcement strategy, or the underlying values. See Chapter 2, sections 2.2.2, 3.2.2 and 4.2.2 for the enforcement strategies and priorities of the UK CMA, the Autorité and the ACM respectively.

127 See Chapter 5 in more detail.

128 See the Telecommunications inquiries that were elaborated upon in Chapter 5, section 1.1 (European Commission, Directorate General for Competition, Working Document on the initial results of the Leased Lines Sector Inquiry, Brussels, 08/09/2000. European Commission, Directorate General for

offers an opportunity for competition authorities to collaborate in studies that concern international companies or a geographical market that comprises more than one Member State. Such collaboration could be very effective, especially in structurally complex markets, concerning large, international companies that are notorious offenders. When multiple competition authorities have undertaken markets work or enforcement action, the sharing of information and collaboration would enable a more targeted approach. However, in the current legal framework, it is likely that this collaboration would take the shape of notification and the sharing of best practices, as further streamlining is not yet provided for. As a first precondition, all national competition authorities involved would need to have the competence to conduct markets work and gather information for this purpose. Even if they would all have such a competence at their disposal, the sharing of information would be a difficult issue. Currently, the cooperation notice between the national competition authorities contains a provision regulating the sharing of information for the application of Articles 101 and 102 TFEU,[129] but it is unclear whether this includes markets work as well. This question is addressed in more detail below.[130]

No legitimate expectations, no precluding effect (individual guidance)

When it comes to individual guidance, the question can also be asked whether or not guidance by one competition authority precludes guidance or follow-up action on the same topic by another authority. In this case, this seems to be less problematic, as most competition authorities underline specifically that their opinions are preliminary in nature and do not preclude enforcement action by them, nor by other competition authorities. As a consequence, it is unlikely that companies can claim to have derived legitimate expectations from the authorities' individual guidance. Even if it is not specifically stated that opinions do not preclude further action, case law has indicated that – despite a preliminary evaluation by the competition authority – companies themselves remain responsible for the evaluation of their conduct under the relevant competition rules.[131] Informal guidance provided by a competition authority does not relieve them of this duty. This might take away from the effectiveness of the instrument (as individual guidance clearly does not shield from follow-up enforcement action and other competition authorities are not bound by the evaluations made by others), but safeguards the uniform application of European competition rules.[132]

Competition, Working Document on the initial results of the sector inquiry into Mobile Roaming Charges, Brussels, 13 December 2000. European Commission, Unbundling of the local loop: Commission calls public hearing, Brussels, 12 June 2002, IP/02/849. European Commission, Directorate General for Competition, Issues Paper on the preliminary findings of the Sector Inquiry into New Media (3G), Brussels, May 2005).

129 Paras. 26-28 ECN Cooperation Notice.

130 See section 6.3.1 below. Illustrative in this respect is the recent Booking.com case where it was found that pursuing a commitment decision by multiple authorities was deemed to be of such importance, as the approaches were coordinated through the ECN, for which some sharing of information would have been impossible. See European Commission, ECN Brief December 2015, available online here: http://ec.europa.eu/competition/ecn/brief/.

131 See CJEU Case C-681/11 (*Schenker*) and the case note by Lachnit 2013.

132 See in more detail section 6.3 below.

Need for harmonisation or procedural convergence (compliance programmes)
Compliance programmes are not considered to be enforcement instruments in themselves, but are nevertheless connected to the use of other enforcement instruments. For that reason, there are questions to be asked regarding the streamlining of compliance on a European level – specifically when compliance programmes are taken into account as a mitigating factor in the imposition of a fine. In that case, would compliance programmes devised in other Member States be taken into account? In most of the national competition authorities under review, the criteria for evaluating compliance programmes can be broadly interpreted, which means that the exact shape and form is of little consequence, and any well-functioning and robust compliance programme would be eligible for a discount. However, in other national competition authorities (such as the Autorité), the criteria are more strictly interpreted. In France, in particular, the underlying evaluative criteria are 'substantive, credible and verifiable', but national practice has shown that the Autorité has attached great value to the requirements for compliance programmes that it has developed on its own.[133] What would that mean for companies that have drafted their compliance programmes in accordance with the criteria required by, for instance, the Hungarian competition authority? Should they be eligible for a discount in France? Or should they alter their compliance programmes? Based on the time and effort companies are required to put in *bona fide* compliance programmes, one would argue that they should be eligible. However, this forms a real uncertainty for larger companies operating on an international scale (which are, coincidentally, also the companies for whom compliance programmes are a feasible investment), as compliance programmes are costly, and should preferably comply with requirements on a larger scale.[134] This means that – when more competition authorities appear to take compliance into account as a mitigating factor – some form of harmonisation of criteria, or drafting a 'best practices' document on an ECN level seems desirable.

6.3 Principle of Effectiveness and the European Competition Network

In the introduction to this thesis, the European level has been mentioned as a driver of alternative enforcement – particularly in the light of the Modernization process, which has given the competition authorities the possibility (and the obligation) to enforce European competition law alongside their national competition rules.[135] Apart from that, there is some interplay between the development of alternative enforcement instruments on the different national levels and the practice of the Commission, as is discussed above. However, the European level can also form an additional difficulty and a limitation upon the autonomy that national competition authorities enjoy. To end on a positive note, cooperation on a European level (through the European Competition Network) can have a [forward-moving] effect on alternative enforcement.

133 See Chapter 7, Framework Document Autorité, 2012.
134 Although, indeed, not infringing the law in the first place is the best warranty of all. This debate is elaborated upon in Chapter 8, sections 5.1 and 5.3.
135 See Chapter 1, section 2.1.

6.3.1 Effectiveness of Union Law and Uniform Application

When enforcing European competition rules, national competition authorities have to adhere to the principle of the effectiveness of Union law.[136] The requirement of effectiveness does not only apply to the substantive interpretation of Articles 101 and 102 TFEU, but also to the enforcement measures accompanying them, as significant disparities in this respect could just as well undermine their effectiveness.[137] Thus, national enforcement measures may not make the application of European competition rules impossible or excessively difficult. This has been interpreted to mean that the uniform application of European competition rules should not be compromised or put in jeopardy by national procedural rules (or, in this case, national enforcement measures).[138]

Apart from the interplay identified above with regard to the individual enforcement instruments, alternative enforcement on an aggregate level poses challenges in the light of this principle as well. As practice has shown, national competition authorities have devised different approaches to alternative enforcement as such, and the strategies underlying the application of the various instruments differ as well.[139] As a consequence, competition authorities might address similar market problems through different enforcement instruments – all depending on the preference and priorities of the enforcing authority. In an economy in which large market players operate on an international level, there is a real possibility that these differences will occur more often in the future. From the perspective of the effectiveness of European law, these 'enforcement differences' pose a challenge in terms of the uniform application of competition rules. Enforcement differences could result in companies engaging in 'forum shopping' when one authority is significantly more lenient than the other, something that by itself raises questions from the perspective of procedural fairness.[140] Enforcement differences could also cause differences in the advancement of the interpretation of competition rules, as the subject

136 See Chapter 3, section 2.1.2 for the relationship between this principle and the procedural autonomy of the Member States, as well as the developments that this principle has faced in the field of competition law – particularly in recent years.

137 CJEU C-429/07 (*Inspecteur van de Belastingdienst v X BV)* paras. 36-37 and the Opinion of Advocate General Mengozzi, CJEU C-429/07, Inspecteur van de Belastingdienst v X BV, point 42. This is an example of the subsidiarity of procedural autonomy, in which this starting point takes a backseat to the objective of the effective application of competition rules. See Petit 2014 and Chapter 3, section 2.1.2.

138 See for instance CJEU C-375/09 (*Tele2 Polska*), paras. 26-28 with regard to so-called negative decisions and in CJEU C-681/11 (*Schenker*), paras. 46-50 with regard to the non-imposition of a fine. These cases are examples of the enrichment of the principle of effectiveness to incorporate uniform application as a value, as argued by Petit 2014.

139 Think, for instance, of the fact that the ACM pronounces itself on compatibility with competition rules in individual guidance, whereas the UK CMA and the Autorité do not (see Chapter 6, section 4.5). Another example is the treatment of compliance programmes, which leads to a fine reduction in the one Member State but not in the other (see Chapter 7, section 5.1.4). A factor that is also of relevance is the stage of development of alternative enforcement instruments. Think, for instance, of the number of simplified resolutions in the Netherlands (one), versus the long-standing practice of the Autorité (see Chapter 4, sections 2.3 and 4.2).

140 Because why should companies involved in similar agreements be treated very differently? The starting point is that 'similar situations shall not be treated differently unless differentiation is objectively justified', which is derived from CJEU Joined Cases 117/76 and 16/77 (*Albert Ruckdeschel et al. v Hauptzollamt Itzehoe*). See in more detail Tridimas 2006, pp. 45 and further. See, specifically with regard to competition law, Voss 2013.

matter of cases, the level of detail of the competition authorities' reasoning and the review performed on the basis of decisions could vary greatly based on the procedural choices made.[141] These risks become even more pressing where *informal* alternative instruments are concerned. As a general rule, the more cases are closed informally, the less the Commission is facilitated in executing its monitoring function under Regulation 1/2003 and the less control the Court of Justice can exercise over the interpretation of European competition law.[142] For this reason (and, of course, for the policy reasons mentioned above) national competition authorities should maintain a balance between alternative enforcement and fully adversarial procedures. The Commission currently does not focus on the risks and possibilities of alternative enforcement instruments, as the consultation it launched in late 2015 does not address alternative enforcement as such, but rather the fully adversarial procedure and the competition authorities' investigatory powers.[143]

6.3.2 *Cooperation through the ECN*

Apart from this risk, the connection between alternative enforcement and the European level provides a huge opportunity for competition authorities in the form of the European Competition Network (ECN). Currently, the ECN is the platform on which formal decisions are exchanged and limited best practices are developed, but its role could increase even more through the use of alternative enforcement instruments.

> Illustrative of these opportunities is the *Booking.com* case (which is, strictly speaking, not one case, but a collection of national cases concerning similar market problems), which concerned price parity clauses (or most-favoured nation clauses) in agreements with online travel agents. The viability of such clauses under competition law is questionable, for which reason many competition authorities started investigating

141 For instance, an informal commitment will give less insight into the functioning of the market and the application of the competition rules therein than a fully adversarial procedure would. Even within alternative enforcement there are differences between the reasoning required to substantiate a commitment decision and – for instance – a negotiated procedure (in which, in fact, a statement of objections and an appraisal takes place).

142 The monitoring role of the Commission is explained in Regulation 1/2003, Article 11(3), 11(4), 11(5) and 11(6). The importance of this role is underlined in CJEU C-375/09 (*Tele2 Polska*), paras. 26-28 with regard to so-called negative decisions and in CJEU C-681/11 (*Schenker*), paras. 46-50 with regard to the non-imposition of a fine. The last judgment also touched upon the value of informal recommendations vis-à-vis the Commission's decision, but leaves the question open which interpretation should prevail in case of disparities between the Member States.

143 Commission Consultation on 'How to empower the national competition authorities (NCAs) to be more effective enforcers'. 'The Commission would like to gather views on how to ensure that NCAs: can act independently when enforcing EU competition rules and have the resources and staff needed to do their work; have an adequate competition toolbox to detect and tackle infringements; can impose effective fines on companies which break the rules; and have leniency programmes, which encourage companies to come forward with evidence of illegal cartels, that work effectively across Europe'. The documents underlying this consultation do not hint at some addressing of alternative enforcement. See SWD (2014) 231 final Commission Staff Working Document, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues (2014) accompanying COM(2014) 453 final Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (2014).

> this subject matter.[144] Through the European Competition Network, the Italian and the Swedish competition authorities and the Autorité succeeded in launching and coordinating their investigations, resulting in the adoption of parallel commitment decisions in April 2015. In these commitment decisions, the online travel agent involved (Booking.com) offered identical commitments to remedy the market problem in all three Member States, as a result of which no infringement decisions were adopted.[145]

The *Booking.com* case shows the value of a coordinated approach to large cases concerning internationally operating market parties.[146] The coordination through the ECN concerned three commitment decisions though, which are formal decisions remedying a specific problem in the market. As was remarked before with regard to markets work, it is unclear whether such close cooperation is possible (or even desirable) under the current framework for exchanging information. In this framework, the exchange for information is outlined for the purpose of the *application* of Articles 101 and 102 TFEU.[147] Where markets work is concerned, it has been argued that the framework does not cover the exchange of information on this point, since no cartels or abuses are being investigated, but rather features of the market that are not working well. It can be argued that this objective does not necessitate information sharing across different competition authorities with a view to companies' rights.[148] Where more informal instruments – such as individual guidance – are concerned, the main question is whether the 'application' of competition law also includes giving advice about the application of the law. Given the scope and the consequences of the advice,[149] one could argue that it does (and that information can be exchanged), but the difficulty with advice procedures is that the *companies* supply the underlying information for the purpose of the request alone. Companies might not foresee the consequences if this information is shared with other competition authorities.[150] It

144 See for a more extensive discussion, for instance, Gonzalez-Diaz & Bennet 2015 and the references included in this (short) analysis. The discussion also takes place on international platforms; see OECD Platform Parity/MFN Clauses 2015.

145 See Autorité de la Concurrence, 15-D-06 (*Booking.com*), Autorità Garante della Concorrenza e del Mercato, Case 25422 (*Prenotazioni Alberghie Online*) and Konkurrensverket, Case 596/2013 (*Bookingdotcom*).

146 Although the question remains why the coordination only took place between three competition authorities, and why other authorities decided to pursue similar cases on their own accord – resulting in different outcomes and also (slightly) different interpretations. In that light, the *Booking.com* cases are also an illustration of the risks for uniform application that divergent alternative enforcement instruments can pose.

147 See Article 12(1) of Regulation 1/2003 and also ECN Cooperation Notice, para. 26.

148 Assuming that in deciding whether or not information should be exchanged a trade-off is made between the rights of companies and the necessity of pursuing a coordinated approach to the enforcement of European competition law in the light of effectiveness. It can be argued that this necessity is larger when infringements need to be addressed.

149 See Chapter 8, section 4.3.

150 This actually connects to the practice on markets work as well, where it was noted that competition authorities may use their investigative powers insofar as they make clear for what purpose the information is being gathered. It can be argued that competition authorities should make clear that one of the consequences of providing information can be in terms of an international exchange of information. See the *Cement* cases. See CJEU Case C-247/14 P (*HeidelbergCement/Commission*), CJEU Case C-248/14P (*Schwenk Zement/Comission*), CJEU Case C-267/14P (*Buzzi Unicem/Comission*) and CJEU Case C-268/14P (*Italmobiliare/Commission*) and their discussion in Chapter 8, section 3.4.

is unclear whether the ECN in its current form sufficiently facilitates cooperation on alternative enforcement instruments.[151]

> *The ECN provides an opportunity for coordinated approaches to complex and international market problems, but its current set-up might not be equipped for this. It is recommended to look into these possibilities and address the procedural issues which hamper further collaboration.*

The benefits of more coordination through the ECN are, however, apparent and legion. Coordination does not necessarily have to be as extensive as in the example provided above. Save for cooperation in cross-border cases, the ECN can facilitate the development of best practices on alternative enforcement instruments. The interest within these authorities in the functioning and procedures of others is great,[152] and there are opportunities for mutual learning that would increase the efficiency, effectiveness and safeguards of the national alternative enforcement procedures. Apart from that, review by peer authorities on an international level could remedy the accountability deficit inherent in the procedures that circumvent (or are not likely to result in) review by a court.[153] The ECN offers structural opportunities in both respects.

7. FINAL REMARKS

Enforcement does not occur in a vacuum, as is remarked on multiple occasions in this thesis. Competition authorities have to take into account different, divergent interests and attempt to apply complex competition rules to various types of parties in a regulatory landscape in which independent powers are mixed with accountability to the Minister and the expectations of the general public. This means that competition authorities do not just ensure balanced interventions on an instrument level, but have to take account of the policy level, the agency level and the rule level as well.[154] In this thesis, the importance of the broader context is underlined by the interplay between alternative enforcement instruments on these different levels. While a large part of the thesis has focused on finding a balance between instrumentality requirements and safeguards on an instrument level (or even within the individual instruments), it has proved to be

151 There are probably other practical and theoretical impediments hampering cooperation which fall somewhat outside the scope of this research, or which are not apparent from alternative enforcement practice. For that reason, this point definitely merits further research, especially in the light of the possible benefits outlined directly below.

152 The benefits of collaborating (or even sharing best practices) in the field of alternative enforcement are underlined by the specific assignments performed during the internships at the UK CMA and the ACM in preparation for this thesis. I have collaborated with case teams in the ACM, and I have attended meetings of several working groups at the UK CMA. In both of these experiences, in-depth knowledge of the functioning of *other* authorities has proven to be beneficial. See for the structural embedding of these internships Annex I.

153 This is a form of professional accountability as in the definition by Bovens 2007. See in more detail Svetiev 2013, who suggests this with regard to commitment decisions. Professional accountability could also be one of the 'alternative mechanisms of accountability' as is often suggested with regard to alternative enforcement instruments. See for instance Chapter 8, particularly sections 3.5 and 4.4.

154 See in more detail Chapter 3, section 4.4.

impossible to look at alternative enforcement without taking the other consequences into account as well. On a policy level, it appeared that the balance between alternative enforcement instruments and the fully adversarial procedure is just as important as the balance between instrumentality and safeguards *within* each instrument. On an agency level, the internal set-up of the competition authority and its predetermined decision-making structures have had an impact on the design of alternative enforcement procedures, but have proven to sit uncomfortably within these structures at times. The external set-up of the competition authorities is also of importance, especially their independence from the Ministry despite the pressures (budgetary or with regard to their effectiveness) they might endure, and their independence from the market parties – which is put under pressure in the more informal alternative enforcement instruments. On the rule level, the importance of the role of the judge is underlined with a view to the interpretation of competition law in difficult or novel situations. The use of alternative enforcement instruments is capable of hampering this development, which means that competition authorities have to be aware of this effect when determining the choice of instruments. As an additional, but inescapable discussion, this chapter has focused on the relationship between national enforcement and European requirements, which have to be taken into account, but which can result in tensions as well. In this interplay, each instrument proved to have its own challenges, while the uniform interpretation of European competition rules could suffer if the use of alternative enforcement instruments would supersede the use of decisions that are capable of being appealed before the courts.

Returning to the research question underlying this thesis,[155] it is safe to say in the light of the foregoing that alternative enforcement poses some challenges for the national competition authorities. The use of alternative enforcement instruments puts a great emphasis on the importance of a balanced enforcement policy, not just taking account of the effect of the intervention on the market, but also of the effects on the overall legitimacy of the enforcement policy, of the effects within its decision-making structures and on the external regulatory landscape, and the interpretational advancement of competition rules. However, this thesis has also shown the inventiveness of the different competition authorities in dealing with these challenges, despite the tensions they are under. Even though the approach of the Autorité, the ACM and the UK CMA differs with regard to almost every alternative enforcement instrument discussed, they have managed to pursue a balance between instrumentality and safeguards within these different instruments. Should these instruments be applied on a larger scale, the risks (and thus, the challenges) of these different approaches would become more pressing. To that end, this thesis has benefited from the differences between the competition authorities to show the advantages and downsides of other approaches. Likewise, it has provided recommendations to pursue a balance between instrumentality and safeguards within negotiated procedures, markets work, individual guidance and compliance and in enforcement policy as a whole.

155 How can alternative enforcement instruments be seen in the light of the balance that needs to be struck between safeguard and instrumental requirements that national and European law have placed upon enforcement and what challenges does this pose for the enforcement of competition law in the Member States? See Chapter 1, section 4.

Annex I

METHODOLOGY

The central question to this thesis is how alternative enforcement instruments should be evaluated in the light of the balance that needs to be struck between safeguard and instrumental requirements that national and European law have placed upon enforcement. This is followed up by the question of what challenges this poses for the enforcement of competition law in the Member States. The embedding, relevance and delineation of the research question has already been discussed in the introduction (Chapter 1) in order to explain and contextualise the research question in the section it was presented in. However, the choice of the Member States studied was made based on a particular methodological approach and is discussed here (§1). Apart from that, this annex discusses the other methodological choices made while writing this thesis: the sources used (§2), the approach to the research and the classification of the methodology (§3) and the semi-structured interviews conducted within the national competition authorities and the choices in structuring and using this information (§4).

1. CHOICE OF NATIONAL COMPETITION AUTHORITIES

On the basis of the research question presented above, it can be concluded that this thesis is partially comparative in nature.[1] This thesis is limited to the alternative enforcement practice of the national competition authorities of three Member States: the Netherlands, France and the United Kingdom. The choice for these particular Member States can be accounted for on the basis of a double test. First, a number of objective requirements were applied, after which the three most divergent national practices were chosen in order to facilitate a comparison.[2]

The first requirement on the basis of which the national competition authorities researched are chosen is the fact that it must concern a *Member State*, or in other words, that the country is part of the European Union. This requirement must be met, as the normative framework designed to test alternative enforcement practice relies partially on a European law interpretation of certain principles of law. Secondly, the national competition authority must have sufficient alternative enforcement practice in order to evaluate this in full. Along those same lines, the national competition authority must

1 Although not fully comparative, see section 3 below.

2 The reason why only three Member States are studied (instead of four or more) is because of the time constraint. As this research concerns enforcement practice, many cases have to be studied in detail. Given that most competition authorities publish around 25 case-closing decisions a year (fines, settlements, commitment decisions, etc.) and as many (or more) opinions and other publications, the 12-year timespan studied simply did not allow for more national competition authorities to be compared.

have sufficient enforcement practice in general, in order to be able to see developments in enforcement practice and to compare alternative enforcement instruments to other instruments.[3] The fourth and fifth requirements are more practical in nature; the alternative enforcement practice must be accessible in terms of sources,[4] and in terms of language.[5] Because the *practice* of the national competition authorities is central to this thesis, many cases, decisions and procedural notices and publications are studied. This information has to be available, especially when it concerns alternative enforcement. It is clear that such an in-depth evaluation depends on a deeper understanding of the language.

The final Member States are chosen for their apparent differences in structure, strategies and approach, but also for their similarities in alternative enforcement instruments (leaving something to compare).[6] In a pre-study,[7] this led to the conclusion that the Dutch system should be compared for its more discretionary and open approach to enforcement. The ACM's predecessor at the time focused on the instrumentality of enforcement. This type of approach immediately stood out next to the French practice, which was characterised as more formal and procedurally embedded – with a focus on safeguards. Lastly, the UK CMA's predecessor was chosen for its different approach to competition law enforcement in general (through a system of market investigations, guidance and a high degree of transparency).

2. SOURCES

The research question underlying this thesis explains that *national enforcement practice* is the central subject of investigation. This means that the main sources researched in this thesis concern documents from national competition authorities. These documents can be divided into three categories: cases, policy documents and other publications. In this division, cases include formal decisions, but also publications on informal interventions or other casework that cannot be qualified as a formal decision (such as markets work in the Netherlands or advisory opinions in France). Policy documents include strategy documents, but also fining guidelines, instrument guidelines and documents related to the institutional mergers that took place in the Netherlands and the UK. Lastly, other publications concern annual reports, news publications, conference reports and

3 This left out Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia as viable choices, because they were founded within the researched period of time (2004-2015). This analysis was performed by means of a pre-study (see footnote 6 below), and was conducted in 2012, meaning that the merger towards the UK CMA in the UK and towards the ACM in the Netherlands had not yet been concluded.

4 For instance, this left out Germany as a viable choice, because – at the time – the content of settlements then remained unpublished.

5 This left out Denmark, Finland, Greece, Portugal, Spain and Sweden as viable choices. The researcher speaks Dutch, English, French, German and Italian. Under this requirement, it is possible for documents to be translated, but at the time not all competition authorities translated their documents into another language.

6 See Chapter 2 in more detail about the structure, strategies and approach of the UK CMA, the Autorité and the ACM. This chapter also touches briefly upon the similarities in the authorities' enforcement toolkits.

7 Conducted in 2012. Not published, but on file with the author.

summaries between round-table meetings.[8] Apart from the documents drafted by national competition authorities, external studies and international reports play an important role, as they give an external perspective on the functioning of competition authorities. In order to select the documents used in this thesis, I have made an overview of all the publications available on the competition authorities' websites, based on the classification given above. For the policy documents and other publications, selecting the right documents was not troublesome. None of the competition authorities involved had excessively published many of these documents, and the relevant documents were easily identifiable on the basis of their summaries. Selecting the right cases to study was more difficult, especially since the labelling of cases is not always consistent (think, for instance, of the French *avis*, which is similar to various other types of instruments in other national competition authorities). All cases were reviewed on the basis of the characteristics of the alternative enforcement instruments.[9] This led to the lists as included in the chapters. As indicated in these chapters, the lists may contain errors in appreciation where different labels were concerned. All in all, I have attempted to produce a uniform and complete list of alternative enforcement cases in the different Member States.

In addition to the documents of the national competition authority, the research relies on the more classical sources of legal research: law, case law and literature.[10] The laws studied were more or less a given, as the national competition laws, administrative laws and principles of national law guide the behaviour of the competition authorities. Also European law and its underlying general principles influence enforcement on a national level due to the decentralisation of European competition law enforcement. The case law studied in this thesis has a connection with enforcement as well. This could be due to the fact that it concerns case law on national or European appeals, case law about procedural autonomy on a European level or case law concerning the procedural rights of companies and individuals. The latter type of case law might stem from the European Court of Human Rights as well, as the Member States studied have signed the ECHR. Lastly, academic literature is used for two purposes: to identify the state of discussion with regard to the alternative enforcement instruments (in Chapters 4 to 7) and to give more substance to the normative framework (in Chapter 3). Academic literature is selected by using subject matter as a starting point, starting from the most leading works in the general field and zooming in on the more specific literature that is connected with competition law enforcement practice.

The last sources on the basis of which this research is concluded are interviews and observations from practice. These interviews were conducted within the national competition authorities, during either a single visit or a prolonged stay. The observations from practice are derived from research internships conducted at the ACM and the UK CMA. Both of these sources are discussed more extensively below.[11]

8 This list is, of course, non-exhaustive, but gives an idea of the characterisation of the different types of documents.

9 These are now reflected in the definitions of the instruments in each chapter. See for negotiated procedures Chapter 4, section 1, for markets work Chapter 5, section 1, for individual guidance Chapter 6, section 1 and for compliance Chapter 7, section 1.

10 See Thijssen 2009, who refers to Kunneman 1991 and Loth & Gakeer 2005 on this point.

11 See section 3 of this Annex.

3. APPROACH

The timeframe during which this thesis has been completed covered four years, between 2012 and 2016. During this time, I have divided the research into roughly four phases: information gathering, case analysis, field research and a synthesis.

In the first phase, the information was gathered that was necessary in order to carry out a first case analysis. This means that, firstly, all relevant cases needed to be selected by using the method described above.[12] Such a selection would not have been possible without an overview of enforcement practice in the different Member States, for which reason the first phase also consisted of a preliminary study of the national competition authorities' activities. Apart from selecting the cases to be analysed later, the first phase also laid the ground for the normative framework. This framework is shaped along the axis of the tension between instrumental and safeguard requirements for supervision and enforcement, which – in short – require enforcement to function properly, while at the same time respecting fundamental principles and the rights of others. The Utrecht School of Public Economic Law inspired this delineation,[13] and in this research I have interpreted the tension between instrumentality and safeguard requirements for the field of enforcement specifically, leading to the requirements as presented in the thesis. Under this delineation, academic literature on different requirements for public interventions was collected, as well as relevant case law, general principles, the characteristics of regulatory theories and the goals of competition law and enforcement. This led to an outline that was ultimately formed into the normative framework that underlies this thesis.[14]

After collecting all the relevant information, the cases were analysed in the second phase. The main methodology in this phase was desktop research, more specifically a qualitative document analysis.[15] All decisions were analysed in a systematic way, focussing on predetermined procedural characteristics.[16] These characteristics were summarized per case in a way that facilitated a comparison in a later phase. For the negotiated procedures, for instance, it was fairly easy to follow such a structured approach, as the competition authorities apply a clear and consistent structure in their decisions. For other types of instruments, the decisional structure was more inconsistent, causing the summaries to be less uniform. The case-analysis phase served three different purposes: it enabled me to engage in a second round of selecting cases, it included a preliminary evaluation of national practice and it prepared me sufficiently for field research.

This field research took place in the third phase of the research, which consisted of interviews and internships, the approach to which is discussed separately below.[17] It is important to remark that the timing of these activities was a deliberate choice. At that point in time (the beginning of 2014), I had just gathered enough information to design interesting interviews, without being biased by earlier research or full-blown

12 See section 1 of this Annex.
13 See Chapter 3, section 1.2.
14 See Chapter 3 in general.
15 See in more detail Bowen 2009.
16 Depending on the type of the instrument, these characteristics comprised the context, facts and parties, scope, procedural timeframe, objections raised during the procedure, fines, commitments and appeal.
17 See section 4 of this Annex.

evaluations. Moreover, the interviews and internships only increased my understanding of the functioning of the different authorities and the cases I had analysed just before.

Lastly, the information yielded from the different phases was synthesised in the final phase. This last phase of my research was mainly exploratory in nature, as it tested national practice (supplemented by the background information yielded from the interviews) against the normative framework as formulated in the first phase.[18] This was a reciprocal process in which information from earlier phases strengthened conclusions from the interviews and internships, while these latter experiences caused me to see the normative framework and the cases in a different light. I tested enforcement practice against the safeguard requirements by using in-depth legal research, drawing from case law and using legal interpretation. Due to their nature, this was more difficult for the instrumentality requirements, but it was possible to infer some conclusions by looking at national competition authorities' outcome calculations, reception in the field, and their own perceptions of instrumentality. Apart from that, I have used the legal approximation of effectiveness and the specific criteria connected to flexibility and efficiency to come to the observations and recommendations I have made. The synthesis also has traces of comparative law, but it is not as extensive as, for instance, functional comparative law or contextual comparative law.[19] Even though it is true that the Member States studied are chosen through a method derived from comparative law,[20] the thesis itself reviews the legal systems as such and not in a comparative fashion. I have carefully assessed that the relevant conclusions are presented with regard to the specific Member States and that more general remarks and recommendations take account of the inherent differences that exist between the legal systems. Having said that, the diversity of the national competition authorities has allowed me to pinpoint interesting resemblances and differences that have fed into many of the more general observations.

4. INTERNSHIPS AND INTERVIEWS

The evaluation of national practices is underpinned by observations from interviews and from practice. To that end, I have conducted internships and interviews within the ACM, the Autorité and the UK CMA. I have not used these interviews as a separate, stand-alone source, but rather as an opportunity to test hypotheses and to discuss different views and developments. This has enabled me to contextualise my findings better and to make references to the 'cultural' aspects within the different national competition authorities. Moreover, the results of the interviews conducted offer interesting points for future research. In any case, whenever observations are made that are based on national practice, reference is made to the relevant interviews or internships. Due to practical reasons, the extensiveness and intensity of the observations in practice varied between the different competition authorities. This difference is less pressing, as the results of the interviews and internships are used as context and background. Nevertheless, the

18 Testing against a normative framework can be seen as one of the classic ways of carrying out legal reseach. See Thijssen 2009 and the sources referred to there.

19 Functionalism in comparative law is most clearly explained in Zweigert & Kötz 1998, while the countermovement (or, at least, mostly seen as such) of contextualism is put forward by Legrand (for instance in Legrand 1996).

20 See section 1 above.

degrees of intensity in which I have observed the functioning of the different national competition authorities are accounted for in the way this thesis relies on the observations drawn from practice. Generalising statements are avoided, it is repeated that the views put forward in the interviews do not necessarily reflect the view of the authority as a whole, and the precise method of observation is always disclosed in the footnotes.

4.1 ACM: Internship and Semi-Structured Interviews

Observations from ACM practice have been gathered through a three-month internship and an extended series of interviews across the organisation. For the time of the internship I worked in-house, on the basis of a fixed-term contract for research internships. I worked with a case team at the competition department, advising on one specific case.[21]

The interviews were set up during my time at the ACM. Because of my extended stay within the ACM, I was able to interview a large number of staff members. The interviews from the Netherlands are, for that reason, the most extensive in number and are most representative. In total, I interviewed 42 staff members across all levels of the organisation. The interviewees were chosen on the basis of their level and department. Overall, I have struck a balance between departmental directors, management and senior staff in order to have a true dissection of the authority.

Board	1
Competition department	15
Legal department	6
Policy and communications	5
Telecom, transport and postal regulation	4
Energy regulation	5
Consumer protection	5
Chief economist's department	1
Total	**42**

The interviews conducted within the regulation departments were out of personal interest, but also to review whether or not certain findings with regard to policy choices would differ from department to department. These results are not necessarily relevant for the research question of this thesis as such, but are helpful to refine conclusions on that point.

The interviews consisted of 14 closed questions and 8 open questions, which were asked in a random order alternating between closed questions and open follow-up questions. By this set-up, the interviews were semi-structured in nature, which allowed me to adapt the nature of the questions to the interviewee, focusing more on policy where policy-makers were concerned, while focusing on more practical issues with the enforcement departments. Nevertheless, all interviewees were asked all of the questions.

21 This case is not relied upon in this thesis.

The interviews were conducted in Dutch, but a translation of the questions asked is provided below.

Closed questions

1. Do you use alternative enforcement techniques in practice?
2. Would you say that you use them more or less often than before the merger [towards becoming ACM]?
3. Does the ACM publish on these alternative enforcement actions?
4. Do you think alternative enforcement is efficient?
5. Do you think alternative enforcement is effective?
6. Is it clear from the offset which instruments should be applied to a case?
7. Do you use combinations of different enforcement instruments in one case?
8. Do you think that the ACM's problem-solving strategy has changed enforcement in practice?
9. Does 'problem solving' as such differ from the pre-merger strategy?
10. Does the ACM need new enforcement instruments to facilitate a problem-solving strategy?
11. Does the ACM need further-reaching investigatory powers to facilitate a problem-solving strategy?
12. Do you think that the ACM's procedures could be more streamlined?
13. Is it important to you that the ACM communicates on and publishes its activities?
14. In which field do you expect developments in the near future: the alternative enforcement, civil enforcement or criminal enforcement of competition law?

Open follow-up questions

1. How would you define alternative enforcement? What are examples from the ACM's practice? (*follow-up to question 1*)
2. Would you value more publicity concerning the ACM's alternative interventions? (*follow-up to question 3*)
3. How do you view alternative enforcement in general? (*follow-up to questions 4 and 5*)
4. What are examples of situations in which alternative enforcement has had a positive effect on the market? (*follow-up to questions 4 and 5*)
5. Could you give examples of cases that have been dealt with through a fully adversarial procedure, after attempts at alternative enforcement failed? (*follow-up to questions 4 and 5*)
6. How does the case team determine which enforcement instruments should be used for which cases? (*follow-up to question 6*)
7. How would you describe the influence of the ACM's new enforcement strategy on day-to-day work? (*follow-up to questions 8 and 9*)
8. Should the ACM adapt any further in order to better accommodate its problem-solving strategy? (*follow-up to questions 10 and 11*)

These questions have formed the basis of a structured transcript of each interview, which are stored without reference to sensitive information or the mentioning of data that could facilitate the identification of the interviewee. Apart from the transcripts, the answers to the different questions have been grouped together and have been analysed

(on the basis of keywords) to underpin observations made in this thesis. Due to the semi-structured nature of the interviews and their secondary function in this thesis, I have not made use of digital applications (such as SPSS) for the analysis of the answers. For that reason, this thesis does not refer to the interviews in a quantitative way (9 out of 42 respondents, etc.).

4.2 Autorité: Semi-Structured Interviews

With regard to interviews and internships, my experiences at the Autorité are the most limited. I visited the Autorité and conducted interviews, but I did not collaborate with the staff on any projects or cases. The visit to the Autorité took place on 19 June 2014, at the Autorité's offices, on which day I also conducted the interviews used in this thesis. I interviewed three staff members, two from the *Service du Président* and one from the *Service d'Instruction*, safeguarding answers given from different viewpoints. Naturally, this limited number of interviews does not make for a representative sample, but the interviews have enabled me to get more clarity on the functioning of the French competition system and to discuss my ideas about alternative enforcement with competition law practitioners from a different culture. However, the fact that the sample of the interviewees is very limited is accounted for in the way this thesis relies on the interviews – as is explained above.

The questions asked during the interviews at the Autorité are outlined below. The interviews were conducted in English and partially in French, and are processed in the same way as the interviews conducted at the ACM in the Netherlands. This means that there are non-confidential transcripts and confidential recordings available. The interview is completely semi-structured in nature, containing a list of open questions that allow for an elaboration and follow-up questions.

Enforcement strategy

1. How would you describe the enforcement strategy of the Autorité de la Concurrence?
2. How does a standard antitrust procedure work? (With special attention to the procedural duties resting upon the Autorité de la Concurrence in the French administrative system).
3. At what point in the procedure is the decision made as to which instrument is the most suitable for resolving the case?
4. Which are relevant factors for this choice?
5. Does the Autorité de la Concurrence use alternative enforcement instruments?
6. Does the Autorité de la Concurrence use other instruments that would qualify as alternative, but are not on the list above?
7. To what extent does the Autorité de la Concurrence make use of informal measures? (With special attention to the room offered for such measures under the French administrative system).
8. What does the Autorité de la Concurrence consider to be the advantages and pitfalls of the use of alternative and informal instruments? Specifically seen in the light of procedural safeguards and legitimacy: how does the Autorité de la Concurrence warrant these when enforcing competition law in an alternative or informal way?

Procédure de non-contestation des griefs

9. How does the Autorité de la Concurrence value this instrument in the light of effectiveness?
10. How do the negotiations between the *Rapporteur Général* and the undertaking take place?
11. Do commitments given by undertakings indeed play a pivotal role within the non-contestation procedure?

Compliance programmes

12. How does the Autorité de la Concurrence value compliance assistance in the light of effectiveness?
13. Can it be said that compliance assistance has developed itself through the non-contestation procedure?

Market studies (self-references)

14. How does the Autorité de la Concurrence value this instrument in the light of effectiveness? In other words: could a study change the market?
15. What are the possible outcomes of market studies?
16. Can we expect developments in this field in the future?

To a large extent, the questions are comparable to the questions asked within the ACM in the Netherlands. There are, however, two major differences. First of all, the questions asked at the Autorité are more geared towards explicating the approach in competition cases in general, whereas the ACM's interviews include questions about the enforcement strategy (the problem-solving approach) as well. Secondly, the Autorité's interview focuses on three instruments in particular, whereas at the ACM a more 'open' style of asking about enforcement instruments was pursued. The first difference can be explained by the fact that the visit to the Autorité has been an opportunity to 'fill in the gaps' that still existed about French enforcement procedures. Due to my experiences in the Netherlands, there were no such gaps in knowledge for the ACM. The second difference can be explained by the degree of formalisation that exists in France. The Autorité often uses predetermined and procedurally outlined instruments, making it easier for the interviewer to ask about those instruments in particular. In order not to leave any information behind, I specifically asked about informal (so non-formalised) instruments.

4.3 UK CMA: Internship and Unstructured Interviews

Specific observations arising from the UK CMA's enforcement practice are based on a research internship and a series of unstructured interviews. I interned at the UK CMA between September and November 2014. Part of this internship took place at the UK CMA's office in London (three separate visits, amounting to approximately two weeks of in-house time), the other part was completed through digital collaboration (with regular conference calls and contact via e-mail).

During the internship I collaborated on three different projects, across the authority. This means that I did not work in one specific department, but divided my time across these three projects. Broadly speaking, these projects concerned the role of consumers in competition law, the improvement of the UK CMA's enforcement procedures and the merger towards becoming UK CMA. For the purpose of these projects I contributed from an academic point of view. In return, the project meetings enabled me to meet many people within the UK CMA and to get a better idea of the functioning of the authority in its entirety. This experience in particular is reflected in the thesis.

Within the UK CMA, I conducted a number of unstructured interviews. The choice for unstructured interviews rather than semi-structured (as is done in France and the UK) is organisational, and has to do with the ad-hoc character of my presence in the UK, as well as the nature of the internship as such. I was asked specifically to contribute to the different projects, instead of the double objective I was able to pursue in the Netherlands. Be that as it may, the unstructured nature of the interviews allowed me to ask about certain 'black boxes' in UK competition law enforcement in particular, without imposing upon the respondents too much. I made sure, however, that the content of the interviews altogether reflected the same subjects as covered in the Netherlands and in France, in order to maintain a consistent line.

Subject	**Respondents**
Development towards the CMA	2
Streamlining the CMA's enforcement	2
Enforcement instruments: negotiated procedures	1
Enforcement instruments: market studies	2
Role of consumers in competition law enforcement	3

For confidentiality reasons, the interviews within the UK CMA were not recorded on a voice recorder. However, there are non-confidential transcripts available that deal with the general content of the different interviews. As is the case with the Autorité, I am aware that these interviews do not make for a representative sample and cannot be relied upon as a separate source. As is mentioned repeatedly above, these interviews were intended primarily to increase my own understanding of the functioning of UK competition law enforcement, and to gain an impression about the UK CMA and the enforcement 'culture' as such. These general observations are reflected in the thesis. Whenever there are specific connections to any of the internship projects or the interviews conducted, this is accounted for in a footnote.

4.4 Confidentiality

An important issue with conducting interviews within competition authorities is that of secrecy and anonymity. Competition authorities deal with sensitive information on a daily basis, which should not be made public (or only on the authorities' and companies' terms). In order to safeguard information that should not be disclosed, I conducted the interviews and internships under an understanding of confidentiality. This entails that information about current cases is not disclosed, nor is the content of policy meetings

behind closed doors. For the interviews, the understanding of confidentiality also entails that the names of the staff interviewed are not made public and that individual interviews are not quoted literally. However, with a view to maintaining accountability for the data gathered, the interviews are recorded and anonymized transcripts of the interviews are available. These transcripts have been checked by the persons interviewed for their accordance with confidentiality rules, but not on the content.

Both of the internships were conducted on the basis of a research contract. The confidentiality clauses of this contract entail that any sensitive information that has come to my knowledge during the internships may not be disclosed in this thesis. The functioning of internal procedures, the knowledge about enforcement strategy in practice and the developments within the competition authorities can be used as background information, insofar as the subjects are known to the general public – for instance, because working documents or procedural papers are published on the authorities' websites.

Annex II

STATISTICS COMPETITION LAW ENFORCEMENT

The lists below represents the decisions, advisory opinions, opinions and market-related publications (or decisions) made by the Autorité de la Concurrence, the Competition and Markets Authority and the Autoriteit Consument en Markt. The researched period starts on 1 January 2004 and ends on 1 February 2016. The list is compiled on the basis of an analysis of publications, annual reports and online news items.[1]

Statistics Autorité

Fining decisions antitrust	127
Commitment decisions	58
Transactions	47
Advisory opinion	298
… qualifying as markets work	19
… self-referrals	10
… qualifying as individual guidance	15

Statistics UK CMA

Fining decisions antitrust	21
Commitment decisions	11
Settlements	10
Market studies	25
Market investigations	15
… which are stand-alone	9
Opinions	3

Statistics ACM

Fining decisions antitrust	56[2]
Commitment decisions	12
Simplified resolutions	1
Market scans	33
Informal opinions	82
… reviewing individual questions	15
Irregular opinions	7

1 This collection is compiled with the help L. van Kreij. His work, representing a more detailed overview of the cases and their sources, is on file with the author. Even though the list is compiled with care, errors of appreciation may have occurred.

2 This number is an estimation based on the Annual Reports and the ACM website, due to the opaque nature of the composition of the statistics in the ACM's annual reports and the lack of a database on the website. These statistics are collected and compiled by L. Van Kreij. His work is on file with the author.

SUMMARY

Competition authorities are known for imposing enormous fines on companies that have infringed the law. However, most authorities are equally active – if not more so – in educating, deliberating, influencing or preventing, to which end they have different enforcement instruments at their disposal. Imposing a fine (or issuing an order, or imposing a periodic penalty payment) through a fully adversarial procedure can be characterised as formal, based on a vertical relationship between companies and competition authorities, deterrence-based, punitive, reactive and case-specific. Alternative enforcement – by contrast – entails a deviation from command-and-control style enforcement by using enforcement instruments and it can be characterised as informal, horizontal, compliance-based, restorative, preventative or efficient, or a combination of one or more of the above. This research focuses on the use of certain alternative enforcement instruments by the Dutch *Autoriteit Consument en Markt* (the ACM), the UK Competition and Markets Authority (UK CMA) and the French *Autorité de la Concurrence* (the Autorité).

The national application of these alternative enforcement instruments (negotiated procedures, markets work, individual guidance and compliance programmes) is mapped and compared. Apart from that, all instruments are tested against a normative framework underlying enforcement. This framework is based on the balance between instrumental requirements on the one hand (effectiveness, efficiency and flexibility) and safeguards on the other (legality, legal certainty, proportionality, independence, accountability, transparency and rights of defence). Such a balanced application of enforcement instruments, in turn, contributes to the competition authorities' legitimacy. However, enforcement action does not occur in a vacuum, but is intertwined with the policy level (referring to the aggregate of enforcement instruments, including the underlying strategy), agency level (referring to the internal and institutional design of the enforcement authority) and rule level (formulation and current interpretation, goals). As is underlined by some of the principles that form part of the normative framework, the interplay of the alternative enforcement instruments with these levels is explored as well.

NEGOTIATED PROCEDURES

Negotiated procedures are enforcement procedures in which a moment is incorporated for a discussion between the competition authority and the companies under investigation, other than the moments of contact common to fully adversarial procedures. In this thesis, the analysis focuses on three national instruments in which

a company must renounce its right to contest the substance of the objections raised by the competition authority in exchange for a lower fine: the transaction (France), the settlement (the United Kingdom) and the simplified resolution (the Netherlands). The Autorité has had a legal basis to settle cases on a negotiated basis since 2001, has applied the procedure in many cases and already elaborated upon its approach in procedural guidelines back in 2008. By contrast, the ACM does not enjoy a formal legal basis, does not make use of procedural guidelines and has a limited body of cases on this point – though it is contemplating innovative approaches to competition law enforcement and has shown some movement in the direction of settlement-like instruments. Somewhere in between is the practice of the UK CMA, which has developed an approach to negotiated procedures in practice without a specific legal basis and has only recently formalized its approach in a procedural notice.

Despite the fact that the underlying rationale of the negotiated procedure is largely the same in all three Member States, there are still significant differences in the design and application of negotiated procedures between the national competition authorities. These differences can be seen as 'policy considerations': issues or questions to be taken into account when designing or re-designing procedures. For negotiated procedures, the policy considerations concern the moment of negotiations, the status of hybrid procedures, the use of procedural guidelines, the formalization of commitments, the internal separation of functions, the interplay with leniency and civil add-on procedures and enforcement losses in terms of deterrence and clarification. This thesis makes recommendations as to how to resolve these issues bearing in mind the balance between instrumentality considerations and safeguards.

MARKETS WORK

Markets work can be defined as an investigation into the functioning of (certain aspects of) markets outside the scope of an infringement procedure, on the basis of which the competition authority can take various steps to improve the competitive situation in the market. From the analysis of national practices, it appears that there are quite some differences between approaches within this category. The UK CMA operates under a fully-fledged 'markets work regime', formalised in law and explicated in legal guidelines. This is a unique procedure that can be separated into a phase 1 study (with a guidance character, similar to the ACM's and Autorité's powers) and a phase 2 investigation (in which far-reaching remedies can be imposed and strict procedural safeguards apply, and which is not included in the comparison unless explicitly mentioned). The Autorité gives advisory opinions on the basis of self-referral or a referral by other bodies. The ACM enjoys a more flexible authority to conduct market research and does so in differing degrees of intensity and formality.

The objectives pursued by markets work vary from Member State to Member State: inducing compliance by clarification, gathering insight for the competition authority itself and generating publicity. Markets work can, however, also have a negative effect on enforcement and the credibility of competition authorities. These risks can be limited by formulating criteria for selectiveness. It is suggested that markets work is best applied in complex or emerging markets, or in the presence of broader competitive issues. Apart

from selectiveness, competition authorities should be aware of the effects that markets work can have on their other enforcement tools and minimize spill-over effects. From a safeguards perspective, markets work often escapes any review by a court, because of the non-binding nature of the reports published. When there is no legal review, alternate forms of accountability have to be established in order to safeguard the legitimacy of the markets work regime. This can take the form of public consultation. Lastly, there is tension between the broader approach to market problems that markets work pursues and the perception of the function of a competition authority, which might influence the perceived legitimacy of these interventions. For that reason, it is important to facilitate a discussion about these boundaries, also with regard to the limits of intervention under markets work.

INDIVIDUAL GUIDANCE

A similar remark can be made with regard to individual guidance. This instrument is defined as the advice given to (groups of) companies with regard to competition concerns about their proposed collaboration or other market behaviour. For the Autorité, individual guidance is given in the course of its advice procedure, which is hybrid in nature and shows characteristics of government advocacy, market scans, and informal opinions. The UK CMA gives individual guidance by means of the procedure for short-form opinions, which has been retained in the merger towards 'becoming the CMA', but on a trial basis only. The ACM, lastly, applies two different instruments to give individual guidance: the more procedurally embedded informal opinion and the irregular opinion. The latter results in a variety of reports, opinions and advice directed at market parties concerning competition law-related topics.

Although individual guidance instruments are available to all three of the national competition authorities, they might not be working well, as some competition authorities have proved to be hesitant to apply them (Autorité, UK CMA) or have developed a new, less formalised, type of advice instrument instead (ACM). This can be explained by the comforting or prohibiting effect that this type of guidance might have, which competition authorities might want to avoid – especially in the absence of a legal review. As a result, conditions for giving individual guidance are quite strict. Be that as it may, national competition authorities are capable of being well-placed institutions to provide guidance on the application of competition law. However, before making such statements, the preliminary question must be asked whether or not individual guidance is an instrument that competition authorities should have at their disposal and whether its application is desirable. If not, no alterations to the existing procedures could tip the scales of negative versus positive effects. If so, it suggested that negative consequences could be avoided by strict capacity limitations and a flexible approach to the application of the instrument. Apart from that, any decrease in deterrence and formal declarations can be remedied by maintaining a careful balance between informal opinions and formal decisions. Individual guidance can be extended to cover situations which are broader than merely 'unresolved and novel questions', but when giving guidance on the interplay of competition law with other (pubic) interests, alternative forms of accountability are necessary to safeguard a legitimate outcome.

COMPLIANCE PROGRAMMES

Compliance programmes are policy documents drafted by companies, underlining the importance of law abidance and setting up a procedure to safeguard this across the board. Promoting the adoption of compliance programmes is not a legal task of any of the competition authorities, but is seen as an addition to their broader enforcement strategies. The UK CMA, the Autorité and the ACM all have a way of promoting the implementation of compliance programmes in companies – although their approaches are rather different. The Autorité has the most formalised approach to compliance programmes; the UK CMA is the most active in promoting and rewarding these programmes and the practice of the ACM is the most tentative, and is presumably still under development.

Even though the responsibility for compliance lies with companies, stimulating compliance programmes should be seen as a flanking policy, appealing to affirmative bases for compliance by increasing normative commitment and clarifying applicable rules on a smaller scale. Still, when promoting the use of compliance programmes, it is necessary to have a deterrent enforcement policy at hand. One of the main issues with regard to the promotion of compliance programmes by national competition authorities is the question whether or not a fine reduction should be granted for the implementation or improvement of such a compliance programme. In that respect it is argued that competition authorities have to distinguish between a genuine commitment and window-dressing when applying a fine discount. This means that fine discounts may be granted, but only if a company is sincere and has reported the infringement, while committing itself to improve the programme for the future. Apart from that, compliance programmes should not be used as bargaining chips in other procedures, and monitoring responsibilities should be executed having due regard for the risk of capture. When drafting a policy on this matter, it should be borne in mind that stimulating compliance is a voluntary preventative tool, and not a measure imposed *ex post*. Compliance programmes can be taken into account when applying *ex post* measures, such as fines or settlements, and in that case values such as legal certainty and impartial decision-making have greater weight. However, in general, the tensions in the policy considerations identified above are not that pressing that one solution is absolutely preferable over another.

BALANCING INSTRUMENTALITY REQUIREMENTS AND SAFEGUARDS

The core of this research concerns the balance between instrumentality and safeguard requirements with regard to each individual alternative enforcement instrument, as illustrated above. However, as it appears from the evaluation of national practice, the policy choices underlying this balance are similar (or, at least, comparable) for each alternative enforcement instrument. Thus, national alternative enforcement practice as such can be characterised based on the balance between instrumentality and safeguard requirements.

In France, most alternative enforcement instruments are treated similarly to fully adversarial procedures. They are largely embedded in procedural rules and have their own place in the formal decision-making scheme. This shows that alternative enforcement

practice in France is rather safeguard-oriented and that its alternative enforcement instruments are legally embedded. Even though one would expect that this would detract from efficiency, effectiveness and flexibility, the Autorité appears to have found a balance between the two. It safeguards companies' rights and a consistent enforcement policy, but has also shown the gradual development of the enforcement instruments and a high level of output for each of its tools. The balance struck between instrumentality and safeguards by the UK CMA is a different one. Alternative enforcement instruments in the UK are also legally embedded (in the sense that there is a legal basis and there are procedural guidelines explaining the UK CMA's approach), but the UK CMA enjoys more discretion in the application of each instrument – particularly in the initial phases. However, after a case is formally instigated, the UK CMA operates under strict procedural rules (the most visible of which are its transparency obligations) which are intended to safeguard transparent decision-making and the rights of companies to appeal. Unfortunately, these obligations also detract from the speediness of procedures – making them longer and more onerous. This does not sit well with the UK CMA's strategic goals, which primarily aim for more robust and *efficient* decision-making. In the Netherlands, alternative enforcement practice shows a different picture of the balance between instrumentality requirements and safeguards. The ACM appears to be one of the more instrumentality-oriented authorities, focused on resolving problems in the market. The ACM has been given flexibility to do so under its fining guidelines and has – as yet – not used this discretion by drafting more detailed procedural guidelines. As a counterbalance, the ACM's enforcement practice is dependent on its internal separation of functions and dual system of objections and appeals. If the alternative enforcement instruments as used by the ACM are to be applied on a larger scale, however, tension between instrumentality requirements and safeguards can be expected. The ACM's vision of enforcement is currently being translated into practice and it is interesting to see how it evolves.

BROADER IMPACT OF ALTERNATIVE ENFORCEMENT INSTRUMENTS

This thesis also investigates the challenges that alternative enforcement might pose for the enforcement of competition law in the Member States. The outline of the different enforcement instruments has already shown that on an instrument level, such challenges are legion. However, the choice for alternative instruments (and also the way in which instruments are designed) is intertwined with the broader enforcement policy that competition authorities pursue (the policy level), with the institutional design of the authority itself and its relationship with stakeholders (the agency level) and lastly also with the interpretation and advancement of competition rules as such (the rule level). Even though this thesis has focused on the national enforcement of competition rules, there is a clear interplay with the European level as well.

On a policy level, alternative enforcement instruments should be applied in balance with the fully adversarial procedure in order to prevent one-sided interventions (the downsides of which are transferred to a policy level when used on a large scale). To streamline the balance between alternative enforcement instruments and fully adversarial procedures in the future, competition authorities should formulate clear starting points

to identify exactly which situations call for which enforcement instruments. Especially for the competition authorities that have not published guidance as to the application of alternative enforcement instruments, such starting points could have a positive effect on the coherence of application and increase perceived fairness. This thesis argues that a fully adversarial procedure should be applied when there is little case law, when there are recurring 'novel and unresolved' questions, when there is a specific need to increase deterrence or when there is no willingness on the part of the companies.

Policy is just one part that influences the performance of a competition authority. Its performance can also be linked to the agency level, which – broadly speaking – entails the way the authority is designed and how it relates to stakeholders in the field. From the analysis of national practice, it follows that the agency level creates challenges for the application of alternative enforcement instruments with regard to two very specific issues: the decision-making structures existing within the competition authorities, and the relationship between the authorities and their responsible Ministries. With regard to the first, decision-making structures should be adapted to better accommodate alternative enforcement instruments when these instruments are not applied for that very reason, when they incite unintended informality or when they are applied on such a scale that informality becomes a legitimacy problem. With regard to the latter, the question underlying independence is how free the national competition authority is to take its own decisions and to use the instruments that it finds most appropriate. In their current functioning, the influence of responsible Ministries is noticeable at times, but is usually regarded as one of the considerations on the basis of which instruments are applied. However, these considerations should not be the main driver of enforcement decisions; the effect of the interventions should be a leading consideration.

In several instances, it has been remarked that the application of alternative enforcement instruments on a larger scale can have the effect that important questions of competition law are no longer dealt with through a fully adversarial procedure, leading to a reduction in appeals before national and European courts. In that sense, alternative enforcement practice connects to the rule level of enforcement, as it might hamper the further development of the rules through case law. Whenever there is a recurring problem, or the competition authority has made an erroneous evaluation, it is up to the national administrative courts or the Court of Justice to reveal this tension and offer an alternative interpretation if necessary. Apart from that, a lack of legal review poses a threat to the boundaries of the competition authorities' interventions. These tensions underline the need for a balanced approach within the authorities' toolkits.
Alternative enforcement instruments on a national level are intertwined with the European level as well. This interplay is visible in the development of the instruments (top-down, bottom-up or cross-fertilisation), as well as in the effects that the application of the different alternative enforcement instruments can have upon enforcement by other national competition authorities and even the Commission. However, the European level can also form an additional difficulty and a limitation upon the autonomy that national competition authorities enjoy. To end on a positive note, cooperation on a European level (through the European Competition Network) can have a positive effect on alternative enforcement.

CONCLUDING REMARKS

Returning to the research question underlying this thesis, it is safe to say in the light of the foregoing that alternative enforcement poses some challenges for the national competition authorities. The use of alternative enforcement instruments puts great emphasis on the importance of a balanced enforcement policy, not just taking account of the effect of the intervention on the market, but also of the effects on the overall legitimacy of the enforcement policy, of the effects within its decision-making structures and on the external regulatory landscape, and the interpretational advancement of competition rules. However, this thesis also demonstrates the inventiveness of the different competition authorities in dealing with these challenges, despite the tensions they are under. Even though the approach of the Autorité, the ACM and the UK CMA differs with regard to almost every alternative enforcement instrument discussed, they have managed to pursue a balance between instrumentality and safeguards within these different instruments. This thesis benefits from the differences between the competition authorities to show the advantages and downsides of other approaches. Likewise it provides recommendations to pursue a balance between instrumentality and safeguards within negotiated procedures, markets work, individual guidance and compliance and in enforcement policy as a whole.

SAMENVATTING

Mededingingsautoriteiten staan erom bekend soms enorme boetes op te leggen aan ondernemingen die de wet hebben overtreden. Echter, de meeste autoriteiten zijn net zo actief – zo niet actiever – op het gebied van voorlichting, overleg, beïnvloeding en preventie, waartoe zij verschillende instrumenten tot hun beschikking hebben. Het opleggen van een boete (of het geven van een bindende aanwijzing, of het opleggen van een last onder dwangsom) door middel van een procedure op tegenspraak kan worden gekarakteriseerd als formeel, gebaseerd op een verticale relatie tussen de ondernemingen en de mededingingsautoriteiten, en met een afschrikwekkend-, reactief- en zaaksgebonden karakter. Alternatieve handhavingsinstrumenten daarentegen laten zich kenmerken door één- of meer tegenovergestelden van deze eigenschappen: informeel, meer horizontaal, *compliance*-gericht, proactief of breed inzetbaar. Dit onderzoek analyseert het gebruik van bepaalde alternatieve handhavingsinstrumenten door de Nederlandse Autoriteit Consument en Markt (ACM), de Britse *Competition and Markets Authority* (UK CMA) en de Franse *Autorité de la Concurrence* (de Autorité).

Dit onderzoek brengt de nationale toepassing van deze alternatieve handhavingsinstrumenten in kaart en vergelijkt deze. Los daarvan worden de diverse instrumenten (schikkingsprocedures in brede zin, marktonderzoek in brede zin, individuele zienswijzen en compliance programma's) getoetst aan een normatief kader. Dit kader is gebaseerd op de klassieke Utrechtse tweedeling tussen instrumentele eisen (effectiviteit, efficiency en flexibiliteit) en waarborgeisen (legaliteit, rechtszekerheid, proportionaliteit, onafhankelijkheid, *accountability*, transparantie en rechten van verdediging). Een goede balans tussen deze beide soorten eisen draagt bij aan de legitimiteit van de toezichthouder. Daarbij dient worden opgemerkt dat handhaving niet plaatsvindt in een vacuüm, maar sterk verbonden is met het beleidsniveau (geheel aan handhavingsinstrumenten inclusief onderliggende strategie), het *agency*-niveau (interne vormgeving en externe relaties van de toezichthouder) en het materiële regelniveau (formulering en interpretatie van toepasselijke regels). Zoals enkele van de eerdere genoemde eisen van het normatief kader al aangeeft wordt de wisselwerking met deze niveaus van handhaving eveneens onderzocht voor de alternatieve handhavingsinstrumenten.

SCHIKKINGSPROCEDURES IN BREDE ZIN

Schikkingsprocedures in brede zin lijken erg op reguliere boeteprocedures, met dien verstande dat er een moment is ingebouwd waarin autoriteit en ondernemingen overleggen over de te nemen procedurele stappen. Meestal draait het dan om het niet-betwisten van de feiten en de juridische analyse (door de ondernemingen) in ruil voor

een boetekorting (gegeven door de autoriteit). In dit onderzoek zijn er drie verschillende schikkingsprocedures in brede zin onderzocht: de Franse transactie, de Britse schikking (in enge zin) en de Nederlandse vereenvoudigde afdoening. De Autorité kreeg reeds in 2001 de bevoegdheid tot uitvoeren een transactie, die formeel is neergelegd in de wet en werd uitgewerkt in richtsnoeren in 2008. Daar tegenover staat de praktijk van de ACM, die zich nog in de opstartfase bevindt en nog niet is uitgekristalliseerd in richtsnoeren. Ergens tussen deze twee uitersten bevindt zich de aanpak van de UK CMA, die zonder expliciete juridische basis ontwikkeld is in de praktijk. De UK CMA heeft recentelijk haar praktijkervaringen geformaliseerd in procedurele richtsnoeren.

Hoewel de onderliggende gedachte van de schikkingsprocedure in brede zin nagenoeg gelijk is in alle drie de lidstaten, zijn er zeker significante verschillen aan te wijzen met betrekking tot de vormgeving en toepassing van het handhavingsinstrument. Deze verschillen laten zich benoemen als 'beleidsoverwegingen': vragen, of mogelijke problemen die in ogenschouw moeten worden genomen bij het (opnieuw-) vormgeven van een dergelijk instrument in de praktijk. Voor schikkingsprocedures in brede zin zijn deze beleidsoverwegingen de volgende: het moment van onderhandelen, de status van hybride schikkingen, het wel of niet gebruiken van procedurele richtsnoeren, de wisselwerking met clementie en civiele handhaving en eventuele handhavingsverliezen in afschrikwekkend en educatief opzicht. Dit onderzoek geeft aanbevelingen voor het maken van deze beleidsoverwegingen – de balans tussen instrumentele vereisten en waarborgeisen indachtig.

MARKTONDERZOEK IN BREDE ZIN

Marktonderzoek in brede zin kan gedefinieerd worden als een onderzoek (een studie) naar het functioneren van een bepaalde markt, op basis waarvan er stappen ondernomen kunnen worden om dit te verbeteren. Binnen deze categorie van handhavingsinstrumenten zijn er best wat verschillen tussen de diverse nationale praktijken. Op de eerste plaats is daar het geformaliseerde en uitgekristalliseerde '*markets work regime*' van de UK CMA; een unieke procedure bestaande uit twee fasen. De eerste fase (de markt*studie*) heeft een verkennend karakter en is vooral bedoeld om de markt en marktproblemen in kaart te brengen. De tweede fase (het markt*onderzoek*) is veel formeler, en is omkleed met strikte procedurele waarborgen, omdat de UK CMA op basis van dit onderzoek bindende aanwijzingen kan geven tot het verbeteren van de markt op individueel ondernemingsniveau. Vanwege dit atypische karakter wordt de tweede fase van het UK regime niet meegenomen in de verdere vergelijking. De Autorité, daarentegen, is enkel bevoegd om adviezen op aanvraag (van andere overheidsinstanties) te geven. De ACM heeft iets meer flexibiliteit dan de Autorité op dit gebied, en doet marktonderzoek met een variabel niveau van intensiteit en formaliteit.

De doelstellingen van marktonderzoek in brede zin verschillen per lidstaat: het bewerkstelligen van compliance door voorlichting, het verzamelen van kennis over de markt of het genereren van publiciteit. Marktonderzoek in brede zin kan echter ook een negatief effect hebben op de handhaving- en geloofwaardigheid van mededingingsautoriteiten. Deze risico's kunnen gelukkig worden geminimaliseerd door strikte criteria te formuleren voor de toepassing van marktonderzoek. Dit proefschrift

suggereert dat marktonderzoek het best kan worden toegepast in complexe markten of markten in ontwikkeling, of in aanwezigheid van bredere marktproblematiek. Behalve het vergroten van selectiviteit op basis van deze criteria, moeten mededingingsautoriteiten zich bewust zijn van de effecten van marktonderzoek op andere handhavingsactiviteiten en het bestaan van *spill-over* effecten. Vanuit een waarborgperspectief is het kwalijk dat marktonderzoek, vanwege het niet-bindende karakter, niet getoetst wordt door een rechter. Wanneer dit het geval is zullen er alternatieve vormen van *accountability* moeten worden ingesteld, bijvoorbeeld in de vorm van een consultatie. Ten slotte is er ook nog een spanning tussen de bredere aanpak die marktonderzoek voorstaat, en de perceptie van de functie van een mededingingsautoriteit (en haar legitimiteit). Om die reden is het belangrijk duidelijke grenzen te stellen omtrent het toepassingsbereik en de beoogde gevolgen van een marktonderzoek.

INDIVIDUELE ZIENSWIJZEN

Een vergelijkbare opmerking kan gemaakt worden met betrekking tot individuele zienswijzen. Dit instrument is erop gericht om (groepen van) ondernemingen advies te geven over hun voorgenomen acties en mogelijke strijd met mededingingsrecht. De Autorité geeft dergelijke zienswijzen in het kader van haar bovengenoemde adviesprocedure, die een hybride karakter heeft en eveneens trekken vertoont van *advocacy* en marktonderzoek. De UK CMA geeft individuele zienswijzen door middel van een *short-form opinion* – een instrument dat voor de institutionele veranderingen die aan de creatie van de UK CMA ten grondslag liggen niet vaak gebruikt werd, maar toch bewaard is gebleven. De ACM, op de laatste plaats, beschikt over een expliciete en een impliciete competentie om een zienswijze af te geven, in dit onderzoek gelabeld als respectievelijk informele zienswijzen en onregelmatige zienswijzen.

Hoewel individuele zienswijzen in alle drie de lidstaten gebruikt worden, lijkt het alsof het instrument *an sich* niet goed werkt. Sommige mededingingsautoriteiten zijn erg terughoudend met het gebruik ervan (UK CMA, Autorité), terwijl anderen juist buiten de bestaande kaders een nieuw instrument hebben ontworpen (ACM, de onregelmatige zienswijzen). Beide houdingen kunnen worden verklaard door het effect dat een zienswijze kan hebben op de partijen die het aanvragen (geruststellend, verbiedend, bindend), hetgeen mededingingsautoriteiten vaak willen vermijden door het stellen van strikte voorwaarden aan het uitgeven ervan. Desalniettemin zijn mededingingsautoriteiten zeer goed in staat om toelichting te geven over de toepassing van mededingingsrecht en zal er – alvorens in te gaan op het daadwerkelijke functioneren en inrichten van een adviesinstrument – een discussie moeten worden gevoerd over de wenselijkheid hiervan. Als dit niet wenselijk wordt geacht, wordt het discussiëren over procedurele inrichting overbodig. Als dit in de basis wel wenselijk wordt geacht, wordt er in dit proefschrift voorgesteld om een strikte capaciteitslimiet aan te houden, in combinatie met een meer flexibel toepassingsbereik. De verhouding met afschrikwekkende boetes kan worden gehandhaafd door een zorgvuldige balans aan te houden tussen formeel- en informeel optreden. Individuele zienswijzen kunnen dan worden gebruikt voor bredere nieuwe en onopgeloste vragen, zoals de verhouding

tussen mededingingsrecht en publieke belangen. Ook hier is er echter oog nodig voor het instellen voor alternatieve vormen van *accountability* om legitimiteit te bewaren.

COMPLIANCE PROGRAMMA'S

Compliance programma's zijn plannen van aanpak, opgesteld door bedrijven, om ervoor te zorgen dat diverse wetten zo goed mogelijk worden nageleefd. Het stimuleren van compliance programma's is niet expliciet een wettelijke taak voor mededingingsautoriteiten, maar wordt wel vaak gezien als aanvullende taak in het kader van hun bredere handhavingsstrategieën. De UK CMA, Autorité en ACM zijn elk op hun eigen manier actief op dit gebied. De Autorité hanteert een geformaliseerde aanpak voor het stimuleren van compliance programma's; de UK CMA is het meest actief in het promoten en belonen ervan, en de aanpak van ACM is het meest voorzichtig – en waarschijnlijk nog in ontwikkeling.

Hoewel de primaire verantwoordelijkheid voor naleving bij bedrijven ligt, zou het stimuleren van compliance programma's breed moeten worden gedragen, omdat het een positieve stimulans tot regelnaleving biedt door de toepassing van de regels op bedrijfsniveau te verhelderen en zo *commitment* van bedrijven te vergroten. Echter, om bedrijven ertoe te zetten daadwerkelijk *compliant* te zijn, is het nodig een geloofwaardige en afschrikwekkende boetepraktijk achter de hand te hebben. Het is dan ook een van de meest betwiste punten van dit instrument of het enkele *hebben* van een compliance programma voldoende is om in aanmerking te komen voor een boetekorting, in geval er een inbreuk is vastgesteld. In dit onderzoek wordt beargumenteerd dat dit mogelijk is, mits mededingingsautoriteiten zich bewust zijn van het verschil tussen daadwerkelijk *commitment* en *window dressing*. Dit houdt in dat er alleen een boetekorting kan worden gegeven indien het compliance programma aan enkele voorwaarden voldoet, en de onderneming zelf de overtreding heeft gerapporteerd. Los hiervan moeten mededingingsautoriteiten ervoor waken dat bedrijven het opstellen van compliance programma's niet gebruiken als onderhandelpunt in schikkingsprocedures in brede zin, en dat het monitoren van de uitvoering van compliance programma's geen problemen geeft voor de onafhankelijkheid van mededingingsautoriteiten. Over het algemeen, echter, is het maken van deze beleidsoverwegingen afhankelijk van persoonlijke (nationale) keuzes, waarbij de ene niet per se te prefereren is boven de ander. Dit is te verklaren door het feit dat compliance programma's vrijwillige, preventieve instrumenten zijn, waarbij de spanningen in het normatief kader minder stringent te noemen zijn.

BALANS TUSSEN INSTRUMENTELE- EN WAARBORGEISEN

De kern van dit onderzoek betreft het in kaart brengen van de spanning tussen instrumentele- en waarborgeisen in elk van de bovengenoemde handhavingsinstrumenten. Echter, uit de analyse van deze instrumenten blijkt dat bepaalde beleidsoverwegingen (hierboven zeer beknopt zijn weergegeven) en de keuzes die nationale autoriteiten dienaangaande hebben gemaakt vergelijkbaar zijn voor elk van de instrumenten. Op geaggregeerd niveau is het daarom mogelijk om iets te zeggen over

de alternatieve handhavingspraktijk van de verschillende mededingingsautoriteiten in zijn algemeenheid.

In Frankrijk zijn de meeste alternatieve handhavingsinstrumenten eveneens formele procedures met weinig beleidsvrijheid. Alternatieve instrumenten zijn ingebed in procedurele richtsnoeren en hebben hun eigen plaats in de besluitvormingsprocedures van de Autorité. Dit illustreert dat de alternatieve handhavingspraktijk in Frankrijk vrij waarborg-georiënteerd is. Hoewel men zou verwachten dat dit ten koste gaat van de Autorité's effectiviteit, efficiëntie en flexibiliteit blijkt dit in de praktijk niet zo te zijn. De Autorité heeft hierin een goede balans gevonden door de rechten van ondernemingen voldoende te waarborgen, de alternatieve instrumenten stap voor stap te ontwikkelen en de algemene output hoog te houden. De balans tussen instrumentele- en waarborgeisen ligt anders bij de UK CMA. Hoewel de alternatieve instrumenten ook juridisch zijn ingebed (in de zin van een wettelijke basis en procedurele richtsnoeren), heeft de UK CMA meer beleidsvrijheid bij het toepassen van deze instrumenten, met name in de eerste fases van een zaak. Echter, nadat het onderzoek formeel is gestart opereert de UK CMA onder strikte procedurele regels (zoals transparantieverplichtingen), die bedoeld zijn om rechten van ondernemingen en de legitimiteit van de UK CMA te waarborgen. Ongelukkigerwijs dragen deze waarborgeisen niet bij aan de snelheid van de procedures, die vrij lang en zwaar zijn. Dit resultaat staat op gespannen voet met de UK CMA's strategische doelen, die meer efficiënte en robuuste besluitvorming voorstaan. In Nederland, tot slot, heeft de alternatieve handhavingspraktijk een hele andere balans, aangezien de ACM te karakteriseren valt als het meest georiënteerd op instrumentaliteit (dankzij haar probleemoplossende strategie en hoe deze in de praktijk is gebracht). De ACM geniet flexibiliteit onder de door de Minister opgestelde beleidsregels, en heeft deze tot op heden nog niet ingevuld door nadere richtsnoeren. Daar tegenover staat dat er binnen de ACM veel nadruk wordt gelegd op functiescheiding en bestuurlijke heroverweging (bezwaarfase). Op dit moment lijkt er derhalve balans te zijn, maar mocht de alternatieve handhavingspraktijk toenemen, kan er toenemende spanning worden verwacht binnen het kader. Het is dus afwachten hoe ACM's visie op toezicht en handhaving zich verder ontwikkelt in de praktijk.

BREDERE IMPACT VAN ALTERNATIEVE HANDHAVINGSINSTRUMENTEN

In dit onderzoek worden niet alleen de positieve kanten van de individuele instrumenten belicht, maar is er ook aandacht voor de uitdagingen die een implementatie van deze instrumenten kan creëren voor handhaving van mededingingsrecht in het algemeen. De analyse van de instrumenten, zoals hierboven verkort weergegeven, heeft al laten zien dat die uitdagingen (beleidsoverwegingen) er zeker zijn. Echter, de keuze voor een bepaald handhavingsinstrument hangt samen met het beleidsniveau (geheel aan handhavingsinstrumenten inclusief onderliggende strategie), het *agency*-niveau (interne vormgeving en externe relaties van de toezichthouder) en het materiële regelniveau (formulering en interpretatie van toepasselijke regels). Hoewel dit onderzoek zich in de eerste plaats heeft gericht op het nationale niveau, is er ook een duidelijke wisselwerking met het Europese niveau aan te wijzen.

Ten eerste, op beleidsniveau, dienen alternatieve handhavingsinstrumenten worden toegepast in een balans met een procedure op tegenspraak, om zo een eenzijdig handhavingsbeleid te vermijden en te voorkomen dat enkele nadelen van alternatieve handhavingsinstrumenten zich verplaatsen van instrumentniveau naar beleidsniveau. Om deze balans te bewerkstelligen moeten mededingingsautoriteiten heldere uitgangspunten formuleren voor de toepassing van elk type instrumenten. Zeker wanneer er geen duidelijke richtsnoeren zijn over de precieze toepassing, kunnen dergelijke uitgangspunten duidelijkheid bieden aan marktpartijen, en de gepercipieerde coherentie en legitimiteit verhogen. Op basis van dit onderzoek wordt aangeraden dat alternatieve handhavingsinstrumenten beter *niet* toegepast kunnen worden wanneer er *terugkerende* nieuwe en opgeloste vragen zijn, wanneer *deterrence* in een bepaalde sector verhoogd moet worden, of wanneer bedrijven zich onwelwillend opstellen.

Op *agency*-niveau, vervolgens, zijn er twee hele specifieke issues aan te wijzen bij het gebruik van alternatieve handhavingsinstrumenten: de besluitvormingsprocedures binnen de mededingingsautoriteiten en de relatie tussen de autoriteiten en hun verantwoordelijk ministers. Met betrekking tot het eerste issue blijkt uit de analyse dat er soms spanning is tussen alternatieve handhavingsinstrumenten en interne besluitvormingsprocedures, wanneer deze niet zijn toegerust op een alternatieve aanpak. Als dit de hoofdreden is waarom een bepaald instrument niet wordt toegepast (zie 'individuele zienswijzen'), kan een mededingingsautoriteit ervoor kiezen deze structuren aan te passen en zo een 'verborgen' en 'informele' praktijk te vermijden. Dit geldt vooral indien een dergelijke praktijk zich al heeft ontwikkeld en vrij vaak wordt toegepast. Met betrekking tot het tweede issue kan de vraag worden gesteld hoe vrij mededingingsautoriteiten eigenlijk zijn bij het maken van keuzes voor bepaalde handhavingsinstrumenten. Uit de huidige praktijk blijkt dat de ministeries in alle drie de landen soms invloed hebben op die keuzes, maar dat dit slechts een van de overwegingen is bij de uiteindelijke keuze. Echter, dergelijke overwegingen zouden op zichzelf nooit de doorslaggevende factor moeten zijn bij het kiezen voor een interventie: het effect hiervan moet leidend zijn.

Op het materiële regelniveau, ten vierde, blijkt uit de analyse van de instrumenten dat er zorg bestaat dat belangrijke mededingingsrechtelijke- en procedurele vragen niet meer bij de rechter belanden, omdat het gebruik van alternatieve handhavingsinstrumenten de gang naar de rechter vaak uitsluiten of voor zijn. Deze zorg bestaat eveneens uit twee elementen: op de eerste plaats vindt een belangrijk deel van de ontwikkeling van mededingingsrecht plaats bij de rechter, en op de tweede plaats is er in afwezigheid van rechterlijke toetsing altijd de mogelijkheid dat de mededingingsautoriteit buiten de gestelde juridische kaders handhaaft. Vooral dit laatste punt leidt tot discussie, omdat het aansluit bij de vraag hoe breed de taakomschrijving van mededingingsautoriteiten eigenlijk moet worden opgevat. Deze spanning onderschrijft derhalve de noodzaak van een gebalanceerd handhavingsbeleid met duidelijke uitgangspunten.

Alternatieve handhavingsinstrumenten op nationaal niveau zijn onlosmakelijk verbonden met het Europese niveau. Deze wisselwerking is zowel zichtbaar in de ontwikkeling van de verschillende instrumenten (*top-down*, *bottom-up* of kruisbestuiving), als in de effecten die de toepassing van de verschillende instrumenten kan hebben op de handhavingsmogelijkheden van andere mededingingsautoriteiten en de Commissie. Los daarvan kan het Europese niveau ook een extra beperking

vormen van de nationale procedurele autonomie onder het Europeesrechtelijke effectiviteitsbeginsel. Om toch positief te eindigen, biedt de samenwerking op Europees niveau (door middel van het *European Competition Network*) zeker kansen en kan zelfs een positief effect hebben op de ontwikkeling van handhaving in brede zin.

AFSLUITENDE OPMERKINGEN

Om terug te keren naar de onderzoeksvraag die aan dit proefschrift ten grondslag lag: er kan zeker gesteld worden dat de nationale alternatieve handhavingspraktijk wat uitdagingen creëert voor nationale mededingingsautoriteiten. Dankzij het gebruik van deze instrumenten neemt het belang van een uitgebalanceerd handhavingsbeleid alleen maar toe; een beleid dat niet alleen het effect van de interventie in ogenschouw neemt, maar ook oog heeft voor de legitimiteit van de autoriteit zelf (en haar gehele beleid), de interne- en externe beslissingsstructuren en invloedsporen, en de ontwikkeling van het mededingingsrecht zelf. Echter, dit onderzoek laat ook zien dat de verschillende mededingingsautoriteiten heel inventief kunnen zijn in het omgaan met deze uitdagingen, ondanks de politieke en praktische spanningen waar zij soms onder opereren. Hoewel de aanpak van de Autorité, de UK CMA en de ACM erg verschilt, heeft elk een eigen balans weten te vinden tussen instrumentaliteit en waarborgeisen. Deze verschillen maken dit onderzoek juist zo interessant, omdat het de mogelijkheid geeft om de voor- en nadelen van de verschillende aanpakken in kaart te brengen en tegen elkaar af te wegen. Daarnaast zijn er aanbevelingen gedaan om de bestaande balans tussen instrumentele eisen en waarborgen te behouden en voort te zetten, zowel bij de schikkingsprocedures in brede zin, bij marktonderzoek in brede zin, bij individuele zienswijzen en bij compliance programma's, als bij handhavingsbeleid in zijn algemeenheid.

RÉSUMÉ

Les diverses autorités en charge de la concurrence sont connues pour leur propension à infliger de très lourdes amendes aux entreprises ayant enfreint la loi. Cependant, la plupart de ces autorités sont tout aussi actives – si ce n'est plus – dans leur devoir d'éducation, de délibération, d'influence ou de prévention, pour l'exercice desquels elles disposent de plusieurs outils d'exécution. Ordonner une pénalité financière (donner un ordre ou imposer une pénalité périodique) au travers d'une procédure contradictoire, peut être considéré comme un acte formel de nature punitif, réactif et spécifique à chaque cas, basé sur la dissuasion et sur une relation verticale entre les entreprises et les autorités de la concurrence. Au contraire, les méthodes d'exécution alternative se distinguent de la méthode classique de commande-contrôle, notamment par l'utilisation d'un ou plusieurs instruments d'exécution que l'on peut définir comme informels, horizontaux, basés sur la conformité, réparateurs, préventifs et/ou efficients. Cette étude se concentre sur l'utilisation de certains instruments d'exécution par l'autorité Néerlandaise consommation et marché (*Autoriteit Consument en Markt*, abrégé ci-après ACM), l'autorité Anglaise des marchés et de la concurrence (ci-après, CMA) et l'autorité de la concurrence Française (ci-après, l'Autorité ou Autorité de la Concurrence).

L'application de ces instruments alternatifs d'exécution au niveau national (procédures négociées, analyses des marchés, conseils individuels et programmes de conformité) est répertoriée et comparée. Par ailleurs, tous les instruments sont testés en fonction d'un cadre normatif sous-tendant l'exécution. Ce cadre est fondé sur la balance entre la nécessité instrumentaire d'une part (efficacité, efficience, et flexibilité) et la logique de protection d'autre part (légalité, sureté juridique, proportionnalité, indépendance, responsabilité, transparence et droits de la défense). Une application équilibrée des instruments d'exécution contribue, en effet, à la légitimité des autorités de la concurrence. Cependant, l'action d'exécution ne se produit pas en vase clos, mais est confrontée au niveau politique (en référence aux rassemblements des instruments d'exécution, en incluant les stratégies sous-jacentes), au niveau des agences (en référence à l'organisation interne et institutionnelle de l'autorité d'exécution) et au niveau des règles (formulation et interprétation, objectifs). Comme le précisent certains des principes qui forment le cadre normatif, l'interaction des instruments alternatifs d'exécution avec ces trois niveaux est aussi explorée.

PROCÉDURES NÉGOCIÉES

Les procédures négociées sont des procédures d'exécution dans lesquelles un moment est inclus pour permettre une discussion entre l'autorité chargée de la concurrence et

les entreprises visées par une enquête, moment autre que celui classiquement prévu dans la procédure contradictoire. Dans la présente thèse, l'analyse se concentre sur trois instruments nationaux selon lesquels l'entreprise est censé renoncer à son droit de contestation sur la substance des objections faites par l'autorité chargée de la concurrence en échange d'une pénalité amoindrie : la transaction (en France), le *settlement* (en Angleterre) et la résolution simplifiée (aux Pays-Bas). En France, l'Autorité, qui a depuis 2001 une base légale pour résoudre les cas qui lui sont présentés au travers de négociations, a déjà fait un usage extensif de cette prérogative et a développé son approche dans des consignes procédurales publiées en 2008. En revanche, l'ACM Néerlandaise ne bénéficie ni de bases légales officielles, ni de consignes procédurales, ni d'un corps d'affaires conséquent, mais fait tout de même preuve d'une approche innovante dans son exécution du droit de la concurrence et a montré un sens de l'initiative dans le domaine des instruments de résolution. La pratique de la CMA au Royaume Uni se situe entre-deux, celle-ci ayant développé une préférence pour les procédures négociées dans la pratique, mais sans base légale. En effet, elle vient seulement de consacrer cette approche dans une notice procédurale.

Même si la justification sous-jacente aux procédures négociées est en grande partie le même dans ces trois Etats Membres, il existe toutefois d'importantes différences entre ces derniers, notamment au niveau de la conception et de l'application de ces procédures entre les autorités nationales de la concurrence. Ces différences peuvent être vues comme des 'considérations politiques' : problématiques ou questions à prendre en compte lors de la conception des procédures. Pour les procédures négociées, les considérations politiques concernent le moment des négociations, le statut des procédures hybrides, l'utilisation de consignes procédurales, la formalisation des engagements, la séparation interne des fonctions, l'interaction entre les procédures d'indulgence et les procédures civils complémentaires et les pertes d'exécution en terme de dissuasion et de clarification. Cette thèse se termine sur des recommandations concernant les potentielles solutions à ces considérations politiques tout en gardant en tête la balance entre questions instrumentales et besoin de protection.

ANALYSES DES MARCHÉS

L'analyse des marchés peut être définie comme l'enquête de fonctionnement des (ou certains aspects des-) marchés en dehors du champ d'une procédure d'infraction, et sur la base de quoi l'autorité chargée de la concurrence peut prendre différentes mesures afin d'améliorer la situation concurrentielle sur le marché. Après une analyse des pratiques nationales, certaines différences apparaissent dans l'approche de ce concept. Au Royaume Uni, la CMA opère au travers d'un 'régime d'analyse des marchés' totalement mature, codifié dans la loi et spécifié dans des directives juridiques. C'est une procédure unique qui peut être séparée en une première phase d'étude (avec un caractère directeur, similaire aux pouvoirs de l'Autorité ou de l'AML) et une phase 2 d'enquête (dans laquelle des recours peuvent être imposés, des sauvegardes procédurales strictes appliquées, et qui n'est pas incluse dans la comparaison sauf si explicitement mentionné). En France, L'Autorité de la Concurrence donne des opinions consultatives sur la base de référence personnelles ou de recommandations par d'autres institutions. L'ACM bénéficie de plus

de liberté dans son étude de marché de par le fait qu'elle peut faire varier d'intensité ou de formalité ses pouvoirs dans ce domaine.

Les objectifs de l'analyse des marchés différent selon les Etats Membres : induire une conformité via clarification, rassemblement d'informations pour l'autorité en charge de la concurrence elle-même et générer de la publicité. L'analyse des marchés peut, en revanche, avoir un effet négatif sur l'exécution et la crédibilité des autorités en charge de la concurrence. Ces risques peuvent être temporisés en établissant des critères de sélection. Il est suggéré que l'analyse des marchés s'applique le mieux dans des marchés complexes ou émergents, ou dans le cas de problématiques plus larges en lien avec la concurrence. En dehors de la sélection, les autorités en charge de la concurrence doivent être conscientes des effets que l'analyse des marchés peut avoir sur leurs autres instruments d'exécution et minimiser les débordements. Pour ce qui est de la logique de protection, l'analyse des marchés échappe souvent au contrôle du juge en raison du caractère non contraignant des rapports publiés. Lorsqu'il n'y a pas de contrôle juridique, d'autres formes de responsabilité sont nécessaires afin de sauvegarder la légitimité du régime d'analyse des marchés. Cela peut, par exemple, prendre la forme de consultations publiques. Enfin, il y a une tension entre l'approche large des problèmes de marché que l'analyse des marchés poursuit et la perception du rôle d'une autorité en charge de la concurrence, ce qui peut affecter la légitimité de ces interventions. C'est pour cette raison qu'il est important de faciliter une discussion à propos de ces limitations, et en incluant la limite d'intervention du analyse des marchés.

CONSEILS INDIVIDUELS

Une remarque similaire peut être faite par rapport aux conseils individuels. Cet instrument est défini comme le conseil donné à une ou des entreprise(s) en ce qui concerne des questions de concurrence relatives à leur proposition de coopération ou autres types de comportement sur le marché. En France, pour l'Autorité, le conseil individuel est donné dans le cadre de la procédure de conseil, qui est hybride par nature et possède des caractéristiques de promotion de politiques gouvernementales, d'analyse de marché et d'opinions informelles. La CMA donne des conseils individuels au travers de sa procédure d'avis à court terme, qui a été retenue à titre d'essai seulement dans le cadre de la politique d'élaboration de la CMA. Finalement, l'ACM se sert de deux instruments différents afin de fournir des conseils individuels : l'avis irrégulier et l'avis informel. Ce dernier est ancré dans une logique plus procédurale alors que l'avis irrégulier est composé d'une variété de rapports, d'avis et de conseils destinés aux acteurs présents sur le marché et concernant des sujets en lien avec le droit de la concurrence.

Bien que les instruments de conseils individuels soient disponibles pour les trois autorités chargées de la concurrence, il se peut qu'ils ne fonctionnent pas correctement en raison du fait que certaines de ces autorités restent hésitantes dans leur application (France et Royaume Uni) ou ont développé un nouveau type d'instrument de conseil moins formalisé (Pays-Bas). Cela peut s'expliquer aussi par l'effet rassurant ou dissuasif que ce type de conseil peu avoir, ce que les autorités en charge de la concurrence veulent en général éviter, tout particulièrement en cas d'absence d'analyse juridique. En conséquence, les conditions nécessaires pour donner des conseils individuels sont

assez strictes. Quoi qu'il en soit, les autorités nationales en charge de la concurrence sont capables de se constituer en autorités adéquates pour donner des conseils sur l'application du droit de la concurrence. Cependant, avant de faire de telles affirmations, la question préliminaire qui doit se poser est de savoir si le conseil individuel est un instrument que les autorités en charge de la concurrence doivent avoir à leur disposition, et si son application est désirable. Dans la négative, aucune modification des procédures actuelles ne pourrait faire pencher la balance entre effets positifs et négatifs. Dans l'affirmative, il est suggéré que les conséquences négatives pourraient être évitées au travers d'une limitation stricte de capacité et d'une approche flexible de l'application de cet instrument. En dehors de ce problème, toute baisse en terme de dissuasion ou de déclaration formelle peut être corrigée en maintenant une balance entre avis informel et décision formelle. Le conseil individuel peut être étendu à d'autres situations que celles concernant de 'questions nouvelles et non résolues'. Toutefois, donner des conseils sur l'interaction entre droit de la concurrence et autre intérêts (publiques notamment) requiert d'autres formes de responsabilité afin d'assurer un résultat légitime.

PROGRAMME DE CONFORMITÉ

Les programmes de conformité sont des documents rédigés par les entreprises, soulignant l'importance de l'obéissance à la loi et mettant en place une procédure afin de protéger ce principe au travers du conseil d'administration. Promouvoir l'adoption de programme de conformité n'est pas une des tâches juridiques des autorités en charge de la concurrence, mais est perçu comme un plus à leur stratégie d'exécution. La CMA, l'Autorité de la Concurrence et l'ACM ont toutes une manière de promouvoir l'implantation de programmes de conformité, ce même si leur approche est différente. En France, l'Autorité a l'approche la plus formalisée ; la CMA est la plus active dans la promotion et la récompense de ces programmes et la pratique de l'ACM est la plus timide, car supposément encore en développement.

Bien que la responsabilité en terme de conformité relève du chef des entreprises, stimuler les programmes de conformité devrait être perçu comme une politique d'accompagnement, promouvant une approche positive du mécanisme de conformité en augmentant la conformité aux règles et en clarifiant les règles applicables à petite échelle. Pourtant, même en encourageant l'utilisation de programmes de conformité, il reste nécessaire d'avoir une politique d'exécution dissuasive. Un des problèmes principaux en terme d'encouragement d'utilisation des programmes de conformité par les autorités nationales en charge de la concurrence est la question de savoir si une réduction de pénalité doit être accordée en cas de mise en œuvre ou d'amélioration de l'un de ces programmes. Il est précisé que les autorités en charge de la concurrence doivent faire la distinction entre conformité authentique et conformité artificielle lorsqu'elles souhaitent autoriser une réduction de pénalité. Cela veut dire que ces réductions peuvent être accordées seulement si l'entreprise est sincère et a signalé l'infraction, tout en s'engageant à améliorer le programme dans le futur. En dehors de cette question, les programmes de conformité ne doivent pas être utilisés comme outils de négociation dans d'autres procédures, et le devoir de surveillance doit être effectué en gardant en tête la possibilité de manipulation. Lors de la rédaction de ce

type d'instrument, le fait devrait être pris en compte que stimuler la conformité est un outil de prévention volontaire et non une mesure imposé *ex post*. Les programmes de conformité peuvent être pris en compte lors de l'utilisation de mesures *ex post*, tel que des pénalités ou des accords, et, dans ces cas, les valeurs telles que la sûreté juridique et l'impartialité auront un poids plus important. Cependant, en général, les tensions dans les considérations politiques évoquées précédemment ne suggèrent pas qu'une solution soit préférable à l'autre.

BALANCER CONDITIONS D'INSTRUMENTALISATION ET PROTECTION

Le cœur de cette recherche concerne la balance entre besoins d'instrumentalisation et de protection en prenant en compte chaque instrument d'exécution alternatif, comme illustré précédemment. Cependant, comme il ressort de l'examen des pratiques nationales, les choix politiques sous-jacents à cette balance sont similaires (ou tout du moins, comparables) pour chaque instrument d'exécution alternatif. En conséquence, les pratiques d'exécution alternatives nationales peuvent, de ce fait, être caractérisées en fonction de la balance entre besoins d'instrumentalisation et de protection.

En France, la plupart des instruments alternatifs d'exécution sont traités de la même manière que les procédures contradictoires. Ils sont largement incorporés dans des règles de procédure et ont leur propre place dans le schéma formel de prise de décision. Cela montre qu'en France, la pratique d'exécution alternative a une logique de protection et que ses instruments alternatifs d'exécution sont juridiquement implantés. Même si on pouvait s'attendre à une baisse d'efficacité, d'efficience, et de flexibilité, l'Autorité de la Concurrence semble avoir trouvée une balance entre les deux. Elle protège les droits des entreprises et a une politique d'exécution consistante, mais a aussi montré une progression graduelle des instruments d'exécution et un haut niveau de rendement de ses outils.

La balance entre instrumentalisation et protection atteinte par la CMA est différente. En Angleterre, les instruments alternatifs d'exécution sont aussi juridiquement établis (il y a une base juridique et des directives procédurales qui expliquent l'approche de la CMA), mais la CMA a plus de liberté dans l'utilisation de chaque instrument, et ce, particulièrement lors de la phase initiale. Cependant, après qu'une affaire ait formellement démarré, la CMA doit suivre des règles de procédure strictes (les plus visibles étant les obligations de transparence) prévues dans un but de protection de la transparence des prises de décision et du droit d'appel des entreprises. Malheureusement, ces obligations ont un effet négatif sur la rapidité de la procédure, la rendant plus longue et plus lourde. Ce problème ne va pas de pair avec les objectifs stratégiques de la CMA, qui se concentre principalement sur une prise de décision plus efficace et plus robuste. Aux Pays-Bas, la pratique alternative d'exécution illustre une balance différente entre besoins d'instrumentalisation et de protection. L'ACM semble être l'autorité la plus axée sur l'instrumentalisation, se concentrant sur la résolution des problèmes affectant le marché. L'ACM s'est vu conférée de la flexibilité au travers de ses directives de fixation d'amende et n'a pas encore, à ce jour, fait usage de cette prérogative afin de rédiger des directives procédurales plus précises. En revanche, la pratique exécutoire de l'ACM est dépendante de sa séparation de fonctions interne et de son système double d'objection

et d'appel. Si les instruments alternatifs d'exécution tels qu'utilisés par l'ACM étaient appliqués à une échelle plus grande, une tension pourrait être ressentie entre besoins d'instrumentalisation et de protection. La vision de l'ACM en terme d'exécution est actuellement transférée dans la pratique et il est intéressant d'étudier son évolution.

AUTRE IMPACT DES INSTRUMENTS ALTERNATIFS D'EXÉCUTION

Cette thèse identifie aussi les défis que l'exécution alternative peut poser à l'exécution du droit de la concurrence dans les Etats Membre. Le contour des différents instruments d'exécution a déjà montré qu'au niveau instrumental, de tels enjeux sont légion. Cependant, le choix des instruments alternatifs (et la manière dont ces instruments sont conçus) est entremêlé avec la politique d'exécution plus large que les autorités en charge de la concurrence poursuivent (niveau politique), avec le cadre institutionnel de l'autorité en charge de la concurrence et sa relation avec les parties intéressées (niveau de l'agence), et finalement aussi avec l'interprétation et l'avancement des règles concurrentielles en tant quel tel (niveau de la règle). Bien que cette thèse se soit concentrée sur l'exécution nationale des règles de la concurrence, il y a, de par la même, une interaction limpide avec le niveau européen.

Au niveau de la politique, les instruments d'exécution alternatifs devraient être appliqués en balance avec la procédure contradictoire de manière à prévenir des interventions unilatérales (interventions, qui si utilisées à grand échelle, sont alors transférés à un niveau politique). Pour rationaliser la balance entre instruments alternatifs d'exécution et procédure contradictoire dans le futur, les autorités en charge de la concurrence devraient formuler un point de départ clair afin d'identifier les instruments associés à chaque situation de manière précise. En particulier, pour les autorités en charge de la concurrence n'ayant pas publiées de consignes concernant l'application des instruments alternatifs d'exécution, ces points de départ peuvent avoir un effet positif sur la cohérence de la mise en pratique et augmenter le sentiment de justice. Cette thèse soutient que la procédure contradictoire devrait être utilisée lorsqu'il y a peu de jurisprudence, lorsqu'il y a des questions 'nouvelles et non résolues' récurrentes, lorsqu'il a un besoin spécifique d'augmenter la dissuasion ou lorsqu'il n'y a aucune volonté de la part des entreprises.

La politique n'est que l'une des influences que subit l'autorité en charge de la concurrence sur ses performances. Ces dernières peuvent aussi être reliées au niveau de l'agence qui – généralement parlant – régule la manière dont l'autorité est conçue et son lien avec les acteurs intéressées à ce sujet. Au travers de l'analyse des pratiques nationales, il peut être conclu que le cadre de l'agence entraine des défis dans l'application des instruments alternatifs d'exécution, et ce, à deux niveaux spécifiques : la structure de la prise de décision qui existe au sein de l'autorité en charge de la concurrence, et la relation des autorités avec le ministère représentant les pouvoirs publics. Pour ce qui est du premier problème, la structure de la prise de décision devrait être adaptée afin de mieux tenir compte des instruments alternatifs d'exécution quand ces instruments ne sont pas utilisés pour cette même raison, quand ils incitent à une informalité non-intentionnelle ou quand il sont appliqués à une telle échelle que l'informalité devient un problème de légitimité. Quant au second problème, la question sous-jacente à

l'indépendance est de savoir à quel point l'autorité en charge de la concurrence est libre de prendre ses propres décisions et d'utiliser les instruments qu'elle trouve les plus appropriés. Dans leur fonctionnement actuel, l'influence du ministère en charge est palpable par moment, mais est normalement considérée comme une des considérations sur la base desquelles les instruments sont appliqués. Cependant, le principal moteur des décisions d'exécution devrait être constitué par l'effet des instruments et non l'influence de ces dernières considérations.

À plusieurs reprises, il a été remarqué que l'utilisation d'instruments alternatifs d'exécution à plus grande échelle peut provoquer une situation dans laquelle les questions de droit de la concurrence ne sont plus traitées au travers d'une procédure contradictoire, ce qui mène à une réduction des appels devant les juges nationaux et européens. Dans ce sens, les pratiques alternatives d'exécution sont reliées aux règles d'exécution (niveau de la règle), car cela pourrait ralentir le développement des règles au travers de la jurisprudence. Quand il y a un problème récurrent ou lorsque l'autorité en charge de la concurrence a fait une évaluation erronée, c'est à la cour administrative nationale ou la Cour de Justice de révéler cette tension et d'offrir une vision alternative si nécessaire. En dehors de ça, un manque d'analyse juridique crée une menace aux limites d'intervention des autorités en charge de la concurrence. Ces tensions soulignent le besoin que les autorités ont d'une approche balancée.

Par ailleurs, les instruments alternatifs d'exécution au niveau national et les instruments européens sont interdépendants. Cette interdépendance est visible dans le développement des instruments (du niveau supranational vers le niveau national ou vice et versa, ou encore par un processus de fertilisation mutuelle), ainsi que dans les effets que l'application des différents instruments alternatifs d'exécution peuvent avoir sur l'exécution effectuée par d'autres autorités nationales en charge de la concurrence, et même par la Commission. Cependant, le niveau européen peut aussi en soi être considéré comme une barrière additionnelle et une limitation sur l'autonomie des autorités nationales en charge de la concurrence. Pour finir sur une note positive, la coopération au niveau européen (au travers du réseau européen de la concurrence) peut avoir un effet positif sur l'exécution alternative.

CONCLUSION

Si l'on revient à la problématique sous-jacente de cette thèse, il peut être avancé que l'exécution alternative comporte des défis pour les autorités nationales en charge de la concurrence. L'utilisation d'instruments alternatifs d'exécution met un fort accent sur l'importance d'une politique d'exécution balancée, ne prenant pas seulement en compte l'effet de l'intervention sur le marché, mais aussi l'effet sur la légitimité globale de la politique d'exécution, des effets sur la structure de sa prise de décision et sur le paysage réglementaire extérieur, et l'avancement interprétatif des règles de la concurrence. Cependant, cette thèse montre aussi l'ingéniosité des différentes autorités nationales en charge de la concurrence dans leur manière d'aborder ces challenges, et ce, malgré les tensions sous-jacentes. Même si les approches de l'Autorité de la Concurrence en France, de l'ACM, et la CMA diffèrent en fonction de chaque instrument alternatif d'exécution discuté, elles ont réussi à mettre en œuvre une balance entre instrumentalité et protection

au travers de ces différents instruments. Cette thèse bénéficie des différences entre les autorités en charge de la concurrence afin de montrer les avantages et inconvénients des autres approches. De la même manière, elle propose des recommandations afin de poursuivre une balance entre instrumentalité et protection dans la politique d'exécution globalement, mais aussi en terme de procédures négociées, fonctionnement de marchés, conseils individuels et programmes de conformité.

SOURCES

LITERATURE

Abrantes-Metz & Sokol 2013a
R.M. Abrantes-Metz & D.D. Sokol, 'The Lessons from Libor for Detection and Deterrence of Cartel Wrongdoing', *Harvard Business Law Review Online*, Volume 3, 2012, pp. 10-16.

Abrantes-Metz & Sokol 2013b
R.M. Abrantes-Metz & D.D. Sokol, 'Antitrust Corporate Governance & Compliance', University of Minnesota Law School, *Legal Studies Research Paper Series,* Research Paper No. 13-18.

Accetto & Zleptnig 2005
M. Accetto & S. Zleptnig, 'The Principle of Effectiveness, Rethinking its Role in Competition Law', *European Public Law*, Volume 11, No. 3, 2005, pp. 375-403.

Adanaes 1971
J. Adanaes, 'The moral or educative influence of criminal law, *Journal of Social Issues*, Volume 27, No. 17, 1971, pp. 17-31.

Addink 2013
G.H. Addink, *Good Governance: Concept and Context*, Draft Version 2013.

Aelen 2014
M. Aelen, *Beginselen van Goed Markttoezicht*, Den Haag: Boom Juridische uitgevers 2014.

Ahlborn & Padilla 2008
C. Ahlborn & A.J. Padilla, 'From fairness to welfare: implications for the assessment of unilateral conduct under EU competition law', in *European Competition Law Annual 2007: 'A reformed approach to Article 82 EC'*, Oxford: Hart Publishing 2008, pp. 55-102.

Allena 2014
M. Allena, 'Fair trial and administrative procedure: new horizons in the light of art 6 ECHR', *Ius Publicum Network Review*, n. 2/2014, *Bocconi Legal Studies Research Paper* No. 2546705, available at:SSRN: <ssrn.com/abstract=2546705>.

Anderson 1963
C.V. Anderson, Effective Antitrust Compliance Programs and Procedures, *Bus. Law*, Volume 18, 1962-1963, pp. 739-751.

Angelucci & Han 2010
C. Angelucci & M.A. Han, 'Monitoring Managers Through Corporate Compliance Programs', *Amsterdam Center for Law & Economics Working Paper* No. 2010-14.

Ariely 2009
D. Ariely, *Predictably Irrational: the Hidden Forces that Shape Our Decisions*, New York: HarperCollins Publishers 2009.

Athanassiou 2011

P. Athanassiou, Financial Sector Supervisors' Accountability. A European Perspective, *ECB Legal Working Paper No. 12*, August 2011.

Attali 2008

J. Attali, *Rapport de la Commission pour la liberation de la croissance française*, 2008. Available at: <www.lefigaro.fr/assets/pdf/attali.pdf>.

Auby 2002

J.B. Auby, 'Administrative law in France', in: R. Seerden & F. Stroink, *Administrative Law of the European Union, its Member States and the United States,* Antwerpen – Groningen: Intersentia 2002, pp. 59-89.

Ayres & Braithwaite 1992

I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford: Oxford University Press: 1992.

Baarsma 2010

B. Baarsma, *Moeilijke marktwerking en meedogenloze mededinging: een welvaartseconomisch perspectief* (inaugural speech University of Amsterdam), Amsterdam: Vossiuspers UvA 2010.

Baldwin & Black 2005

R. Baldwin & J. Black, *Defra: A Review of Enforcement Measures and an Assessment of their Effectiveness in Terms of Risk and Outcome*, London: 2005.

Baldwin & Black 2007

R. Baldwin & J. Black, 'Really Responsive Regulation', *LSE – Law, Society and Economy Working Papers,* no. 15/2007, London School of Economics and Political Science, 2007.

Baldwin, Cave & Lodge 2012

R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation. Theory, Strategy and Practice*, second edition, Oxford: Oxford University Press 2012.

Barkow 2010

R.E. Barkow, 'Insulating Agencies: Avoiding Capture Through Institutional Design', *Texas Law Review*, Volume 89, no. 15, 2010, pp. 15-79.

Bellis 2011

J.F. Bellis, 'Legal professional privilege: An overview of EU and national case law', *e-Competitions*, No. 39467, October 2011.

Bennett 2007

M. Bennett, 'The rule of law means literally what it says: the rule of the law: Fuller and Raz on formal legality and the concept of law', *Australian Journal of Legal Philosophy*, Volume 32, 2007, pp. 90-113.

Bergeijk & Godfried 2002

P.A.G van Bergeijk & M.H. Godfried, 'De beëindiging van het kartelparadijs', *Economisch-Statistische Berichten*, Volume 87, 2002, pp. 204-207.

Van Den Bergh & Camesasca 2006

R.J. van den Bergh & P.D. Camesasca, *European competition law and economics: a comparative perspective*, 2nd edition, London: Sweet & Maxell 2006.

Besselink 2011

L. Besselink et al., 'Introduction: legality in multiple legal orders', in L. Besselink, F. Pennings and S. Prechal (eds.), *The Eclipse of the Legality Principle in the European Union*, Alphen a/d Rijn: Kluwer Law International 2011.

Béteille, Lamure & Marini 2008

M.L. Béteille, É. Lamure & M.P. Marini, *Rapport de modernisation de l'économie*, 2008. Available at: <www.senat.fr/rap/l07-413-1/l07-413-11.pdf>.

Beumer 2014

A.E. Beumer, 'The interaction between EU competition law procedures and fundamental rights protection: the case of the right to be heard', *Yearbook of Antitrust and Regulatory Studies* Volume 7, No. 10, pp. 9-34.

Birkinshaw 2006

P.J. Birkinshaw, 'Freedom of information and openness: fundamental Human Rights?,' *Administrative law review*, Volume 58, No. 1, 2006, pp. 177-218.

Bishop & Walker 2010

S. Bishop & M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 3rd Edition, London: Sweet & Maxwell 2010.

Black 2001

J. Black, 'Managing Discretion', *ARLC Conference Papers*, Penalties: Policy, Principles and Practice in Government Regulation, June 2001.

Black 2007

J. Black, 'Really Responsive Regulation', *LSE – Law, Society and Economy Working Papers*, no. 15/2007, London School of Economics and Political Science, 2007.

Black 2010

J. Black, 'The role of risk in regulatory processes', in: R. Baldwin, M. Cave & M. Lodge, *The Oxford Handbook of Regulation,* Oxford: Oxford University Press 2010, pp. 302-349.

Botteman & Patsa 2013

Y. Botteman and A. Patsa, 'Towards a more sustainable use of commitment decisions in Article 102 TFEU cases', *Journal of Antitrust Enforcement*, 2013, pp. 1-28.

Bovens 2007

M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal*, Volume 13, No. 4, 2007, pp. 447-468.

Bowen 2009

G.A. Bowen, 'Document Analysis as a Qualitative Research Method', *Qualitative Research Journal*, Volume 9, No. 2, pp. 27-40.

Braithwaite 1985

J. Braithwaite, *To Punish or To Persuade: Enforcement of Coal Mine Safety*, New York: Albany 1985.

De Bree 2012

R. de Bree, 'ACM: evolutie uit zuinigheid?', *Markt & Mededinging*, Aflevering 4, 2012, pp. 141-148.

Bronckers & Vallery 2011

M. Bronckers & A. Vallery, 'No longer presumed guilty? The impact of fundamental rights on certain dogmas of EU Competition Law', *World Competition* no. 4, 2011 pp. 535-570.

Brunk 1976

C.G. Brunk, 'The Problem of Voluntariness and Coercion in the Negotiated Plea', *Law and Society Review*, Volume 13, 1978-1979, pp. 527-553.

Burrichter & Zimmer 2006

J. Burrichter and D.J. Zimmer, 'Reflections on the Implementation of a Plea Bargaining/Direct Settlement-System in EC Competition Law' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford – Portland – Oregon: Hart Publishing: 2006.

Burrows & Sanders 2014
E. Burrows & R. Sanders, 'Impact of the EU Directive on Antitrust Damages Actions' in: E. Burrows & M. Clark (eds.), *The International Comparative Legal Guide to: Competition Litigation 2015*, London: 2014.

Camp Keith, Tate & Poe 2009
L.C. Camp Keith, N. Tate & S.C. Poe, 'Is the Law Mere Parchment Barrier to Human Rights Abuse?', *Journal of Politics*, Volume 71, No. 2, pp. 644-660.

Carmeliet 2012
T. Carmeliet 'How lenient is the European leniency system? An overview of current (dis)incentives to blow the whistle', *Jura Falconis*, Volume 48, No. 3, 2011-2012, pp. 463-512.

Cauffman 2011
C. Cauffman, 'The interaction of leniency programmes and actions for damages', Maastricht European Private Law Institute, *Working Paper* No. 2011/34.

Cavicchi 2011
P. Cavicchi, 'The European Commission's discretion as to the adoption of Article 9 commitment decisions: Lessons from Alrosa', Europa-Kolleg Hamburg, *Discussion paper* no. 3/11.

Cengiz 2010
F. Cengiz, 'Alrosa v Commission and Commission v Alrosa: Rule of Law in Post-Modernisation EU Competition Law Regime', *TILEC Discussion Paper,* DP 2010-33.

Chisholm 1995
D. Chisholm, 'Problem Solving and Institutional Design', *Journal of Public Administration Research and Theory*, Volume 5, No. 4, 1995, pp. 451-491.

Choumelova & Delgado 2004
D. Choumelova & J. Delgado, 'Monitoring competition in the telecommunications sector: European Commission Sector Inquiries', in: P.A. Buigues & P. Rey (ed.), *The Economics of Antitrust and Regulation in Telecommunications*, Cheltenham – Northampton: Edward Elgar Publishing Limited 2004, pp. 269-284.

Claassen & Gerbrandy 2015a
R. Claassen and A. Gerbrandy, 'Bredere kijk op mededingingsrecht gewenst', *MeJudice*, 24 February 2015.

Claassen & Gerbrandy 2015b
R. Claassen and A. Gerbrandy. 'Rethinking Competition Law: From a Consumer Welfare to a Capability Approach', *SSRN Working Paper*.

Clark 1940
J.M. Clark, 'Toward a Concept of Workable Competition', *American Economic Review* 1940, pp. 241-256.

Craig 1996
P. Craig, 'Substantive legitimate expectations in domestic and Community law', *The Cambridge Law Journal*, Volume 55, No. 2, 1996, pp. 289-312.

Cseres 2013
K.J. Cseres, 'Integrate or separate – Institutional design for the enforcement of competition law and consumer law', *Amsterdam Centre for European Law and Governance Working Paper*, Series 2013 – 01.

Dau-Schmidt 1990
K.G. Dau-Schmidt, 'An economic analysis of the criminal law as a preference-shaping policy', *Duke Law Journal*, Volume 1990, No. 1, pp. 1-38.

D'Aulnis de Bourouill 1904

J. D'Aulnis de Bourouill, 'De Gevaren van Kartels en Trust voor de Wereldhandel', *De Economist, Utrecht*, Volume 53, No. 1, 1904, pp. 93-106.

Davies 2010

S. Davies, 'A Review of OFT's Impact Estimation Methods', *OFT1164*, January 2010.

De Haan & Sondegger 2011

B.R.J. de Haan & M.C.T.M. Sonderegger, 'What's in a name? De publicatie van sanctiebesluiten door toezichthouders, in: Genoemd en gedoemd? Over actieve openbaarmaking door bestuursorganen' in: *Preadviezen Jonge VAR 2011*, Den Haag: Boom Juridische uitgevers 2011, pp. 113-137

De Vries 2013

S.A. De Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for More Harmony', in: S. de Vries, U. Bernitz & S. Weatherill (Eds.), The protection of fundamental rights in the EU After Lisbon, Oxford: Hart Publishing, pp. 59-94.

De Vries 2013b

S.A. De Vries, 'Editorial – EU and ECHR: Conflict or Harmony?', *Utrecht Law Review*, Volume 9, No. 1, 2013, pp. 78-79.

De Vries, Bernitz & Weatherill 2015

S.A. De Vries, U. Bernitz & S. Weatherill, *The EU Charter of Fundamental Rights as Binding Instrument – Five Years Old and Growing*, Oxford: Hart Publishing 2015.

Delicostopoulos 2003

J.S. Delicostopoulos, 'Towards European procedural primacy in national legal systems', *European Law Journal*, Volume 9, No. 5, 2003, pp. 599–613.

Denkers 2013

A.J.M. Denkers, M.P. Peeters, and W. Huisman, *Waarom organisaties de regels naleven; Over individuele motieven, de ethische bedrijfscultuur en de mores in de branche*, Den Haag: Boom Lemma Uitgevers 2013.

Diathestopoulos 2010

M.D. Diathesopoulos, From Energy Sector Inquiry to Recent Antitrust Decisions in European Energy Markets: Competition Law as a Means to Implement Sector Regulation, July 14, 2010. Available at:SSRN: <ssrn.com/abstract=1639883 or http://dx.doi.org/10.2139/ssrn.1639883>.

Donaldson 2001

L. Donaldson, 'The Contingency Theory of Organizational Design: Challenges and Oppertunities', in: R.M. Burton et al. (ed.), *Organization Design – The evolving state-of-the-art*, Springer: New York: 2001, pp. 19-40.

Doorenbos 2003

D. Doorenbos, 'Schandpaal en onschuldpresumptie', *NJB* 2003/42, pp. 2190-2196.

Drexl 2012

J. Drexl, 'Astrazenca and the EU sector inquiry: when do patent filings violate competition law?', *Max Planck Institute for Intellectual Property and Competition Law Research Paper* No. 12-02.

Ehlermann 1996

C.D. Ehlerman, 'Implementation of EC Competition Law by National Anti-Trust Authorities', *European Competition Law Review*, Volume 17, 1996, pp. 88-91.

Ehlermann 2000

C.D. Ehlermann, 'The modernization of EC Antitrust policy: a legal and cultural revolution', *Common Market Law Review*, 37, 2000, pp. 537-590.

Elkerbout 2014
R. Elkerbout, 'Robuuste Compliance Programma's Verdienen Meer Dan Een Lippendienst van de ACM', *Tijdschrift Mededingingsrecht in de praktijk*, no. 3, May 2014, pp. 26-31.

Faure 2010
M.G. Faure, 'Effective, proportional and dissuasive penalties in the implementation of environmental crime and ship-source pollution directives', *European Energy and Environmental Law Review* 2010, pp. 256-278.

First, Fox & Hemli 2012
H. First, E.M. Fox & D.E. Hemli, 'Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System', *Law & Economics Research Paper Series* 2012, Working Paper No. 12-18.

Foekema & Nikkels 2008
H. Foekema and L. Nikkels, 'Cultuuromslag in de bouw, geen omslag maar een trendbreuk', TNS NIPO, *Political & Social Rapport*, E9276 – 27 augustus 2008.

Fox 2010
E.M. Fox, 'Antitrust and Institutions: Design and Change', *Loyola University Chicago Law Journal*, Volume 47, 2010, pp. 473-488.

Freeman 2012
P. Freeman, 'The Competition and Markets Authority: can the whole be greater than the sum of its parts?', *Journal of Antitrust Enforcement*, Volume 1, No. 1, 2013, pp. 4–23.

Geelhoed 1983
L.A. Geelhoed, *De interveniërende staat: aanzet voor een instrumentenleer*, Den Haag: Staatsuitgeverij 1983.

Georgiev 2007
G.S. Georgiev, 'Contagious Efficiency: the Growing Reliance on U.S.-Style Antitrust Settlements in EU Law', *Utah Law Review*, Number 4, 2007, pp. 972-1037.

Geradin 2013
D. Geradin, 'Antitrust Compliance Programmes & Optimal Antitrust Enforcement: A Reply to Wouter Wils', *Journal of Antitrust Enforcement*, Volume 1, No. 2, pp. 325-346.

Geradin, Layne-Farrar & Petit 2012
D. Geradin, A. Layne-Farrar & N. Petit, *EU Competition Law and Economics*, Oxford: Oxford University Press 2012.

Geis 1994
G. Geis, 'White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961' in: M. B. Clinard & R. Quinney (ed.), *Criminal Behaviour Systems: A Typology*. New York: Holt, Rinehart and Winston 1994, pp. 139-151.

Gerber 2001
D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford: Oxford University Press 2001, pp. 207-227.

Gerbrandy 2009
A. Gerbrandy, *Convergentie in het Mededingingsrecht*, Den Haag: Boom Juridische uitgevers 2009.

Gerbrandy 2010
A. Gerbrandy, 'Consten en Grundig', in: T.W.B. Beukers, H.J. van Harten, S. Prechal, *Het recht van de Europese Unie in 50 klassieke arresten*, Den Haag: Boom Juridische uitgevers 2010, pp. 29-37.

Gerbrandy 2012
A. Gerbrandy, 'European Competition law for a sustainable society – a research agenda', *Europa Instituut Utrecht University*, Draft 2012.

Gerbrandy & Lachnit 2013
A. Gerbrandy and E.S. Lachnit, 'Bid-rigging with gingerbread candy: adventures in the land of the Dutch construction cartel, in: B. Rodger, *Landmark cases in competition law, around the world in fourteen stories*, Alphen a/d Rijn: Kluwer Law International 2013.

Gerbrandy 2015a
A. Gerbrandy, 'Addressing the Legitimacy Problem for Competition Authorities Taking into Account Non-Economic Values: The Position of the Dutch Competition Authority', *European Law Review* 2015-5, pp. 769-781.

Gerbrandy 2015b
A. Gerbrandy, 'Informele oordelen, de koning van Frankrijk, Khaleesi en Frank Underwood', *Markt en Mededinging*, 2015-2, pp. 89-90.

Gilliams 2014
H. Gilliams, 'Proportionality of EU Competition Fines: Proposal for a Principled Discussion', *World Competition*, Volume 37, no. 4, 2014, pp. 435-458.

González-Díaz & Bennet 2015
F.E. González-Díaz & M. Bennett, 'The Law and Economics of Most Favoured Nation Clauses, Competition Law and Policy Debate', Volume 1, No. 3, 2015, pp. 26-42.

Gormsen 2007
L.H. Gormsen, 'The conflict between economic freedom and consumer welfare in the modernisation of article 82 EC', *European Competition Journal*, Volume 3 No. 2, pp. 329-344.

Hampton 2005
P. Hampton, *Reducing administrative burdens: effective inspection and enforcement*, as presented to HM Treasury, March 2005.

Hancher, Larouche & Lavrijssen 2004
L. Hancher, P. Larouche & S. Lavrijssen, 'Principles of Good Market Governance', *Tijdschrift voor Economie en Management*, Volume XLIX, 2, 2004, pp. 339-374.

Harlow & Rawlings 2007
C. Harlow & R. Rawlings, 'Promoting Accountability in Multi-level Governance', *European Law Journal*, Volume 13, No. 4, 2007, pp. 542-562.

Harlow & Rawlings 2009
C. Harlow & R. Rawlings, *Law and Administration*, Cambridge: Cambridge University Press 2009.

Van Hasselt & Urlus 2014
E. van Hasselt & H. Urlus, 'The Deterrent Effect of EU Competition Law: Higher Fines and Extended Targets', *National Law Review,* blogpost 14 June 2014.

Hayo & Voigt 2007
B. Hayo & S. Voigt, 'Explaining de Facto Judicial Independence', *International Review of Law and Economics,* Volume 27, 2007, pp. 269–290.

Hayo & Voigt 2010
B. Hayo & S. Voigt, 'Mapping Constitutionally Safeguarded Judicial Independence – A Global Survey', Draft paper available at: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1724696>.

Hellingman & Mortelmans 1989
K. Hellingman & K.J.M. Mortelmans, *Economisch Publiekrecht: Rechtswaarborgen en Rechtsinstrumenten*, Deventer: Kluwer 1989.

Hessel 1988
B. Hessel, *Overheidsoptreden in de relationistische rechtsstaat*, Zwolle: W.E.J. Tjeenk Willink 1988.

Hölscher & Stephan 2009
J. Hölscher & J. Stephan, 'Competition and Antitrust Policy in the Enlarged European Union: A Level Playing Field?', *JCMS,* Volume 47, Number 4, 2009, pp. 863-889.

Hoelen 1953
H. Hoelen, 'Concurrentie, Kartellering en Kartelwetgeving', *De Economist*, Volume 101, No. 1, 1953, pp. 663-683.

Hovenkamp 1983
H. Hovenkamp, 'Distributive Justice and the Antitrust Laws', *George Washington Law Review,* Volume 51, 1982-1983, pp. 1-31.

Huisman & Beukelman 2007
W. Huisman & A. Beukelman, *Invloeden op regelnaleving door bedrijven*, Den Haag: Boom Juridische uitgevers 2007.

Hüschelrath & Schweitzer 2014
K. Hüschelrath & H. Schweitzer, 'Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives', *ZEW Economic Studies*: Volume 48, Heidelberg: Springer, 2014.

Hutter 1997
B. Hutter, *Compliance: Regulation and Environment*, Oxford: Oxford University Press 1997.

Hyman & Kovacic 2013
D.A. Hyman & W.E. Kovacic, 'Institutional design, agency life cycle, and the goals of competition law, *Fordham Law Review*, Volume 81, 2013, pp. 2163-2174.

Hyman & Kovacic 2013a
D.A. Hyman & W.E. Kovacic, 'Competition Agencies with Complex Policy Portfolios: Divide or Conquer?', *Draft Version*, 20 February 2013.

Jackson et al. 2012
J. Jackson, B. Bradford, M. Hough, A. Myhill, P. Quinton & T.R. Tyler, 'Why do people comply with the law? Legitimacy and the influence of legal institutions', British Journal of Criminology, Volume 52, No. 6, pp. 1051-1071, available at SSRN: <ssrn.com/abstract=1994490>.

Jacobs 2010
B.A. Jacobs, 'Deterrence and deterrability', *Criminology*, Volume 48, No. 2, 2010, pp. 417-441.

Jans et al. 2007
J.H. Jans, R. de Lange, S. Prechal & R.G.M. Widdershoven, *Europeanisation of Public Law*, Groningen: European Law Publishing 2007.

Jong 1990
H.W. de Jong, 'Nederland, Kartelparadijs van Europa?', *Economisch Statische Berichten*, Volume 75, No. 14, 1990, pp. 244-248.

Kekelekis 2009
M. Kekelekis, 'The European Competition Network (ECN): It Does Actually Work Well', *EIPASCOPE* 2009/1, pp. 35-39.

Kelley 2010
M. Kelley, 'Settling for Settlement: The European Commission's New Cartel Settlement Procedure', *Washington University Global Studies Law Review*, Volume 9, 2010, pp. 699-720.

Këllezi 2014
P. Këllezi, 'Due Process in Antitrust Settlements', Draft Version 15 October 2014, available at SSRN: <ssrn.com/abstract=2700717>.

Kerse 2000
C.S. Kerse, 'General principles of Community law: procedural guarantees – a note', in: U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law*, Den Haag: Kluwer Law International 2000.

Kohlen & Kuipers 2014
J. Kohlen & P. Kuipers, 'Stroomlijningswet – nieuwe bevoegdheden voor de reeds samengevoegde autoriteiten in ACM', Markt & Mededinging 2014-4, pp. 124-132.

Kon 1982
S. Kon, 'Article 85, para. 3: a case for application by national courts', *Common Market Law Review*, Volume 19, No. 4, 1982, pp. 541-561.

Korobin 2000
R.B. Korobin, 'Behavioral Analysis and Legal Reform: Rules vs. Standards Revisited', *Oregon Law Review* 79, 2000, pp. 23-79.

Kovacic 1996
W.E. Kovacic, 'Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting', *Loy. L.A. Law Review,* 1996-29, pp. 1799-1804.

Kovacic & Hyman 2012
W.E. Kovacic & D.A, Hyman, 'Competition Agency Design: What's on the Menu?', *Public Law and Legal Theory Paper* No. 2012-135, *Legal Studies Research Paper* No. 2012-135, available at SSRN: ssrn.com/abstract=2179279.

Kunneman 1991
F. Kunneman, *Rechtswetenschap*, Nijmegen: Ars Aequi Libri 1991.

Künzler & Warlouzet 2013
A. Künzler & L.Warlouzet, 'National Traditions of Competition Law: A Belated Europeanization through Convergence?', in: K.K. Patel & HH. Schweiter (eds.), The Historical Foundations of EU Competition Law, Oxford: Oxford University Press 2013, pp. 89-124.

Lachnit 2014a
E.S. Lachnit, 'Compliance Programmes in Competition Law: Improving the Approach of Competition Authorities', *Utrecht Law Review*, Volume 10, No. 5, December 2014, pp. 31-50.

Lachnit 2014b
E.S. Lachnit, 'Publiceren van boetes; de voorzieningenrechter beslist – Belangen bij en gevolgen van publicatie van boetebesluiten, *Tijdschrift voor Toezicht*, Volume 5, No. 1, 2014, pp. 57-62.

Lachnit & Verduijn 2011
E.S. Lachnit & M.A.M. Verduijn, HvJ EU, 17 februari 2011, *Mediaforum*, 2011, pp. 342-347.

Lasserre 2009
B. Lasserre, 'The new French competition law enforcement regime', *Competition Law International* 2009.

Lavrijssen 2006
S.A.C.M. Lavrijssen, *Onafhankelijke Mededingingstoezichthouders, Regulerende Bevoegdheden en de Waarborgen voor Good Governance*, Den Haag: Boom Juridische uitgevers 2006.

Lavrijssen 2010
S.A.C.M. Lavrijssen, 'What role for National competition authorities in protecting non-competition interests after Lisbon?', *European Law Review*, Volume 35, No. 5, 2010, pp. 636-659.

Lavrijssen & Hancher 2007
S. Lavrijssen-Heijmans and L. Hancher, 'Europese regulators in de netwerksectoren: revolutie of evolutie?', *SEW*, no. 11, 2007, pp. 447-463.

Lavrijssen & Ottow 2011
S.A.C.M. Lavrijssen and A.T. Ottow, 'The Legality of Independent Regulatory Authorities', in L. Besselink, F. Pennings and S. Prechal (eds.), *The Eclipse of the Legality Principle in the European Union*, Alphen a/d Rijn: Kluwer Law International 2011.

Legrand 1996
P. Legrand, 'How to compare now?', *Legal Studies*, Volume 16, No. 2, 1996, pp. 232-242.

Leslie 2008
C.R. Leslie, 'Cartels, Agency Costs, and Finding Virtue in Faithless Agents', *Wyoming and Maryland Law Review,* Volume 49, No. 5, 2008, pp. 1621-1699.

Lessig 2009
L. Lessig, 'Against Transparency. The perils of openness in government', in: *The New Republic*, October 9, 2009. Available at: <www.tnr.com/article/books-and-arts/against-transparency>.

Levinson 2007
S. Levinson, 'How the United States Constitution Contributes to the Democratic Deficit in America', *Drake Law Review* 2007-4, pp. 859-887.

Lianos 2013
I. Lianos, 'Competition Law Remedies in Europe: Which Limits for Remedial Discretion?', *CLES Research Paper Series* 2/2013, January 2013.

Loth & Gakeer 2005
M.A. Loth & A.M.P. Gakeer, *Meesterlijk recht: over recht, rechtswetenschap en juristerij*, Den Haag: Boom Juridische uitgevers 2005.

Macrory 2005
R. Macrory, *Regulatory Justice: making sanctions effective*, Final report, November 2006.

Majone 1997
G. Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' *Journal of Public Policy*, Volume 17, No. 2, pp. 139-167.

Marcos 2012
F. Marcos, 'Diminishing Enforcement: Negative Effects for Deterrence of Mistaken Settlements and Misguided Competition Promotion and Advocacy', *Working Paper IE Law School*, AJ8-187-I, 2012.

Marquis 2012
M. Marquis, 'Cartel Settlements: An overview of EU and national case law', *e-Competitions*, no. 46057, available via www.concurrences.com.

May 2004
P.J. May, 'Compliance Motivations: Affirmative and Negative Bases', *Law & Society Review*, Volume 38, Number 1, 2004, pp. 41-68.

Mercer 1995
H. Mercer, *Constructing a Competitive Order: the Hidden History of British Anti-trust Policies*, Cambridge: Cambridge University Press, 1995.

Melton & Ginsburg 2014
J. Melton and T. Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence', University of Chicago, *Institute for Law and Economics Working Paper*, No. 612.

Michiels 2007a
F.C.M.A. Michiels, *Te kijk gezet. Een verkennend onderzoek naar de juridische mogelijkheden en beperkingen van instrumentele openbaarmaking van inspectiegegevens, met name door middel van 'naming and shaming', in het bijzonder voor enkele beleidsterreinen van het minsterie van Verkeer en Waterstaat*, Den Haag: Ministerie van Verkeer en Waterstaat 2007.

Michiels 2007b
F.C.M.A. Michiels, "Naming and shaming' in het markttoezicht', *NTB* 2007, pp. 75-84.

Michiels & Muller 2006
F. Michiels & E. Muller, *Handhaving*, Kluwer, Deventer: 2006.

Mole & Harby 2006
N. Mole & C. Harby, 'The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights', Strasbourg: Council of Europe, 2006.

Monti 2002
G. Monti, 'Article 81 EC and public policy', *Common Market Law Review*, 39, 2002, pp. 1057-1099.

Monti 2014
G. Monti, 'Independence, Interdependence and Legitimacy: the EU Commission, National Authorities and the European Competition Network', *Europe University Institute Research Paper*, No. 2014/01.

Motta 2004
M. Motta, *Competition Policy, theory and practice*, Cambridge: Cambridge University Press 2004.

Mortelmans 1985
K.J.M. Mortelmans, *Ordenend en sturend beleid en economisch publiekrecht*, Deventer: Kluwer 1985.

Murphy 2012
J. Murphy, *Using Incentives in Your Compliance and Ethics Program*, Society of Corporate Compliance and Ethics, 2012.

Murphy & Boehme 2009
J.E. Murphy and D. Boehme, 'Fear No Evil: a Compliance and Ethics Professionals' Response to Dr. Stephan', 2009, accessible at: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1965733>.

Murphy & Kolasky 2012
J. Murphy & W. Kolasky, 'The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behaviour', *Antitrust*, Volume 26, No. 2, 2012, pp. 61-64.

Nazzini 2012
R. Nazzini, 'Administrative enforcement, judicial review and fundamental rights in EU competition law: a comparative contextual-functionalist perspective', *Common Market Law Review*, 49, 2012, pp. 971-1006.

Nazzini 2014
R. Nazzini, Fundamental rights beyond legal positivism: rethinking the ne bis in idem principle in EU competition law, *Journal of Antitrust Enforcement* (2014) 2 (2): pp. 270-304.

Nikpay & Walters 2009

A. Nikpay & D. Walters, 'The Emerging Settlements Regime in the UK: The use of settlements in Competition Act cases', in C.D. Ehlerman & M. Marquis (eds.), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, Oxford and Portland: Hart Publishing 2009.

O'Boyle et al. 2014

D. Harris, M. O'Boyle, C. Warbrick, E. Bates and C. Buckley, *Harris, O'Boyle and Warbrick: The Law of the European Convention on Human Rights*, 3rd edition, Oxford: Oxford University Press 2014.

Ogus 1994

A. Ogus, *Regulation; Legal Form and Economic Theory*, Oxford: Hart Publishing 1994.

Ottervanger 2010

T.R. Ottervanger, *Maatschappelijk verantwoord concurreren: mededingingsrecht in een veranderende wereld* (inaugural speech University of Leiden), Leiden: Universiteit Leiden 2010.

Ottow 2006

A.T. Ottow, *Telecommunicatietoezicht*, Den Haag: SdU Uitgevers 2006.

Ottow 2009

A.T. Ottow, *De Markt Meester: De Zoektocht naar Nieuwe Vormen van Toezicht*, Den Haag: Boom Juridische uitgevers 2009.

Ottow 2010

A.T. Ottow, 'Europeanisering van het economisch toezicht', Utrecht: The Europa Institute, Working Paper 01/10.

Ottow 2011

A.T. Ottow, 'De toezicht Bermudadriehoek', *Toezicht*, 4, 2011, pp. 48-50.

Ottow 2014

A.T. Ottow, 'Erosion or innovation? The institutional design of competition agencies – A Dutch case study', *Journal of Antitrust Enforcement*, 2 (1), 2014, pp. 25-43.

Ottow 2015

A.T. Ottow, *Market and Competition Authorities: Good Agency Principles*, Oxford University Press, Oxford: 2015.

Ottow & De Cock Buning 2013

A.T. Ottow & M. de Cock Buning, 'De juridische ruggengraat van toezicht', *Tijdschrift voor Toezicht*, 4 (4), 2013, pp. 34-39.

Ottow & De Weers 2011

A.T. Ottow and K. de Weers, 'Towards a European Enforcement Toolkit?', Utrecht: The Europe Institute Utrecht, Working Paper 01/11.

Parret 2010

L. Parret, 'Shouldn't we know what we are protecting? Yes, we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy', *European Competition Journal*, Volume 6, No. 2, 2010, pp. 339-376.

Patel & Schweitzer 2013

K.K. Patel & HH. Schweiter (eds.), *The Historical Foundations of EU Competition Law*, Oxford: Oxford University Press, Oxford: 2013.

Petit & Rato 2009

N. Petit & M. Rato, 'From hard to soft enforcement of EC competition law – a bestiary of sunshine enforcement instruments', in Charles Gheur & Nicolas Petit (eds.), *Alternative Enforcement Techniques in EC Competition Law*, Bruylant, Bruxelles: 2009.

Petit 2010
N. Petit, 'How much discretion do, and should, competition authorities enjoy in the course of their enforcement activities? A multi-jurisdictional assessment', *Concurrences*, No 1, 2010, pp. 44-62.

Petit 2014
N. Petit, 'Positive decisions in EU competition policy', presentation held at the GCLC 10th annual conference, 5 November 2014.

Plug 2002
P.J. Plug, *Syntheserapport evaluatie mededingingswet*, Den Haag: Berenschot 2012.

Polanski 2013
J. Polanski, Informant Reward Schemes in Competition Enforcement, available at:<papers.ssrn.com/sol3/papers.cfm?abstract_id=2457450>.

Polinsky & Shavell 1999
A.M. Polinsky & S. Shavell, 'The Economic Theory of Public Enforcement Law', *National Bureau of Economic Research* (*NBER)*, Working Paper, No. 6993, 1999.

Posner 1979
R.A. Posner, 'The Chicago School of Antitrust Analysis', *University of Pennsylvania Law Review*, 127, 1997, pp. 925-948.

Prechal 1998
S. Prechal, 'Community law in the national courts: lessons from van Schijndel', *Common Market Law Review*, 35, 1988, pp. 681-706.

Prechal 2005
S. Prechal *Directives in EC Law*, Oxford: Oxford University Press 2005.

Prechal & de Leeuw 2008
S. Prechal & M.E. de Leeuw, 'Transparency: A General Principle of EU Law?' in: U. Bernitz, J. Nergelius & C. Cardner (eds.), *General Principles of EC Law in a Process of Development*, Alphen a/d Rijn: Kluwer Law International 2008.

Prechal & Widdershoven 2011
S. Prechal & R.J.G.M. Widdershoven, 'Effectiveness and Effective Judicial Protection: a Poorly Articulated Relationship', in: T. Baumé et al. (eds.), *Today's Multi-layered Legal Order: Current Issues and Perspectives* (Liber Amicorum A.W.H. Meij), Zutphen: Paris Legal Publishers 2011, pp. 283-295.

Quintyn & Taylor 2002
M. Quintyn & M.W. Taylor, 'Regulatory and Supervisory Independence and Financial Stability', *IMF Working Paper* WP/02/46, 2002.

Raito 2003
J. Raito, *The Principle of Legal Certainty in EC Law,* Dordrecht: Kluwer Academic Publishers 2003.

Ratliff 2006
J. Ratliff, 'Plea Bargaining in EC Anti-Cartel Enforcement A System Change?', in: Claus-Dieter Ehlermann and Isabela Atanasiu (eds.), European Competition Law Annual 2006: *Enforcement of Prohibition of Cartels*, Oxford – Portland – Oregon: Hart Publishing 2006.

Raz 1979
J. Raz, 'The rule of law and its virtue', in J. Raz (ed.), *The Authority of Law: Essays on Law and Morality,* Oxford: Oxford University Press 1979.

Roberts 2006
A. Roberts, 'The Glass case', in: *Blacked Out: Government Secrecy in the Information Age,* Cambridge: Cambridge University Press: 2006.

Robertson 1999
E.L. Robertson, 'A corrective justice theory of antitrust regulation', 49 *Catholic University Review*, Volume 49, No. 3, 2000, pp. 741-783.

Roskis 2015
D. Roskis, France – the Macron Law: What it changes in Competition Law, *Eversheds.com*, blogpost 21 September 2015, available at: <www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Competition_EU_and_Regulatory/FRANCE-THE_MACRON_LAW>.

Sabel & Zeitlin 2010
C.F. Sabel and J. Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture*, Oxford: Oxford University Press 2010.

Sandhu 2007
J.S. Sandhu, 'The European Commission's Leniency Policy: A Success?', *European Competition Law Review*, Volume 28, No. 3, 2007, pp. 148-157.

Scharpf 2003
F.W. Scharpf, 'Problem-solving Effectiveness and Democratic Accountability in the EU', *MPIfG Working Paper*, No. 03/1, 2003.

Schaub 1998
A. Schaub, '25th Annual Conference: International Antitrust Law & Policy', *Fordham Corporate Law Institute*, New York, 22 October 1998.

Schermers & Waelbroeck 1992
H.G. Schermers & D. Waelbroeck, *Judicial Protection in the European Communities*, fifth edition, Deventer: Kluwer Law and Taxation Publishers 1992.

Schilder 2008
A. Schilder, Rules-based versus Principles-based: het Perspectief van de Toezichthouder, available at: <dare.uva.nl/document/130569>.

Schinkel 2010
M.P.S. Schinkel, 'Bargaining in the Shadow of the European Settlement Procedure for Cartels', *Amsterdam Center for Law & Economics Working Paper*, No. 2010-17.

Schinkel 2011
M.P. Schinkel, 'Nalevingsprogramma's', *Markt & Mededinging*, 2011-6, pp. 231-233.

Schinkel 2012
M.P. Schinkel, 'Persberichten van bezwaar', *Markt & Mededinging,* 2012-2, pp. 81-83.

Schleifer 2010
A. Shleifer, 'Efficient regulation', *National Bureau of Economic Research* Working Paper No. w15651, 2010.

Schmidt 2006
V.A. Schmidt, *Democracy in Europe*, Oxford: Oxford University Press 2006.

Schmidt 2013
V.A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput, *Political Studies*, Volume 61 2-22, 2013, pp. 2-22.

Smith 1776
A. Smith, *Wealth of nations*, London: W. Strahan & T. Cadell 1776.

Smits 2005
R. Smits, 'The European Competition Network: Selected Aspects', *Legal Issues of Economic Integration*, 32(2), 2005, pp. 175-192.

Schonberg 2000
S. Schonberg, 'Legal certainty and revocation of administrative decisions: a comparative study of English, French and EC law', in P. Eeckhout & T. Tridimas, Yearbook of European Law, Oxford: Clarendon Press 2000.

Schweitzer 2012
H. Schweitzer, 'Commitment Decisions: an Overview of EU and National Case Law', *e-Competitions*, no. 48150 available at: www.concurrences.com.

Scott 2009
A. Scot, 'The Evolution of Competition Law and Policy in the United Kingdom', *LSE Law, Society and Economy Working Papers* No. 9/2009.

Segal 2006
I.R. Segal, 'Public vs. private enforcement of antitrust law: a survey', *Stanford Law School Working Paper*, No. 335, 2006.

Shavell 1997
S. Shavell, 'The fundamental divergence between the private and the social motive to use the legal system', *Journal of Legal Studies*, Volume 26, 1997, pp. 575-612.

Simonsson 2010
I. Simonsson, *Legitimacy in EU Cartel Control*, Hart Publishing, Oxford: 2011.

Snijders 1966
W.L. Snijders, 'De Ontwikkeling van het Nederlandse Kartelrecht en Zijn Verhouding tot de Kartelbepalingen van het E.E.G.-Verdrag', *Economie*, Volume 30, No. 9, 1966, pp. 425-454.

Sokol 2012
D.D. Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement', *University of Florida Scholarship Repository*, Faculty Publications, 2012.

Sparrow 2000
M. Sparrow, The Regulatory Craft; Controlling Risks, Solving Problems and Managing Compliance, Washington: The Brookings Institution, 2000.

Stasi 2013
M.L. Stasi, 'Competition proceedings and fundamental rights: another piece of the puzzle', Europäische Rechtsakademie, Volume 14, No. 1, published online 12 April 2013, pp. 1-8.

Steindorff 1983
E. Steindorff, 'Article 85, para. 3: No case for application by national courts', *Common Market Law Review*, 20, 1983, pp. 125-130.

Stephan 2009
A. Stephan, 'Hear No Evil, See No Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels', CCP Working Paper 09-09.

Stucke 2012a
M.E. Stucke, 'Reconsidering antitrust's goals', *Boston College Law Review*, Volume 53, 2012, pp. 551-629.

Stucke 2012b
M.E. Stucke, 'The Implications of Behavioral Antitrust', *College of Law Faculty Scholarship* 2013, available at: <trace.tennessee.edu/utk_lawpubl>.

Sunstein 2012
C.R. Sunstein, 'The Storrs Lectures: Behavioral Economics and Paternalism', *The Yale Law Journal*, Volume 122, no. 7, 2013, pp. 1670-2105.

Svetiev 2013
Y. Svetiev, 'Settling or Learning: Commitment Decisions as a New Competition Enforcement Paradigm', *Yearbook of European Law*, Volume 33, No. 1, pp. 466-500.

Szydlo 2012
M. Szydlo, 'Independent Discretion or Democratic Legitimisation? The Relations between National Regulatory Authorities and National Parliaments under EU Regulatory Framework for Network-Bound Sectors' *European Law Journal*, 2012-6, pp. 793-820.

Tamanaha 2004
B. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press 2004.

Temple Lang 2000
J. Temple Lang, 'Legal certainty and legitimate expectations as general principles of law' in U. Bernitz & J. Nergelius (eds.), *General Principles of European Community Law*, Den Haag: Kluwer Law International, 2000.

Thaler & Sunstein 2008
R.H. Thaler & C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness*, New Haven: Yale University Press, 2008.

Thijssen 2009
H.E.B. Thijssen, *De juridische dissertatie onder de loep: De verantwoording van methodologische keuzes in juridische dissertaties* (diss. Tilburg University), Den Haag: Boom Juridische uitgevers 2009.

Torpman & Jorgensen 2005
J. Torpman & F. Jorgensen, 'Legal Effectiveness: theoretical developments on legal transplants', *Archiv für Rechts- und Sozialphilosophie* (*ARSP*), Volume 91, No. 4, 2005, pp. 515-534.

Trebilcock & Iacobucci 2002
M.J. Trebilcock & E.M. Iacobucci, 'Designing Competition Law Institutions', *World Competition*, 25(3), 2002, pp. 361-394.

Tridimas 2006
T. Tridimas, *The General Principles of EU Law* (second edition), Oxford: Oxford University Press, 2006.

Tyler 2006
T.R. Tyler, *Why people obey the law*, Princeton: Princeton University Press 2006.

Van Bockel 2010
W.B. van Bockel, *The ne bis in idem principle in EU law*, Deventer: Kluwer Law International 2010.

Van Bockel 2014
W.B. van Bockel (ed.), P. Wattel, D. Sarmiento, X. Groussot, and R. Nazzini, *Not Twice for the Same: the ne bis in idem principle in EU law,* Cambridge: Cambridge University Press 2014.

Van Den Broek 2015
M. van den Broek, *Preventing Money Laundering: A Legal Study on the Effectiveness of Supervision in the European Union*, Den Haag: Eleven Publishing, 2015.

Van Den Broek & Aelen 2014
M. van den Broek & M. Aelen, 'De dubbele rol van het recht bij de effectiviteit van het financieel toezicht', *Tijdschrift voor Financieel Recht*, 2014, nr. 1/2.

Van Der Lijn et al. 2002
P.J. Plug, R.M. Timmerman, B.E. Baarsma, J.J.M. Theeuwes, J.F.G. Bruggert and N.J. van der Lijn, 'Leren van de evaluatie van de Mededingingswet', *Markt & Mededinging*, No. 1, 2003, pp. 16-20.

Van Der Meulen 2012
B.M.J. van der Meulen, 'Een erg zelfstandig bestuursorgaan', *Markt & Mededinging,* 2012-4, pp. 139-140.

Van Erp 2002
J.G. van Erp, *Sociale regels in de beleidsvoering, een regime-analytisch onderzoek in vier regionale besturen voor de arbeidsvoorziening*, Amsterdam: Thela Thesis 2002.

Van Erp 2005
J.G. Van Erp, 'Motieven voor naleving van regelgeving', in: T. Barkhuysen, W. den Ouden & J.E.M. Polak (ed.), *Recht realiseren. Bijdragen rond het thema adequate naleving van rechtsregels*, Deventer: Kluwer 2005.

Van Erp 2009
J. van Erp, *Naming en shaming in het markttoezicht. Een onderzoek naar de openbaarmaking van sancties op de financiële markt*, Den Haag: Boom Juridische uitgevers 2009.

Van Gerven 1999
W. van Gerven, 'The effect of proportionality on the actions of Member States of the European Community: national viewpoints from continental Europe', in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, Oxford: 1999, pp. 37-64.

Van Gerven 2000
W. van Gerven, 'Of rights, remedies and procedures', *Common Market Law Review*, Volume 37, 2000, pp. 501-536.

Van Gerven 2008
W. van Gerven, 'Two Twin-Principles of EU Law: Democracy and Accountability, Consistency and Convergence', in U. Bernitz, J. Nergelius & C. Cardner (eds.), *General Principles of EC Law in a Process of Development*, Alphen a/d Rijn: Kluwer Law International 2008.

Van Thiel & Yesilkagit 2011
S. van Thiel & K. Yesilkagit, 'Good Neighbours or Distant Friends? Trust between Dutch ministries and their executive agencies', *Public Management Review* 2011-6, pp. 783-802.

Van Wingerde 2013
C.G. van Wingerde, 'Sancties als morele boodschappen; afschrikking en generale preventie in de Nederlandse afvalbranche', *Tijdschrift voor sanctierecht & compliance*, 2013-4.

Vascott 2013
D. Vascott, 'EU cartel settlements: are they working?', interview conducted with Flavio Laina, Gerwin van Gerven and Marc Hansen, *Global Competition Review News*, 8 april 2013, <www.globalcompetitionreview.com>.

VerLoren van Themaat 1968
P. VerLoren van Themaat, *Het Coördinatiebeginsel als Coördinerend Beginsel van Sociaal Economisch Recht*, Deventer: Kluwer 1968.

De Vos 2011
N. de Vos, *Europeanisering van het Vertrouwensbeginsel*, Den Haag: Boom Juridische uitgevers 2011.

Voss 2013
K. Voss, 'The Principle of Equality: A Limit to the Commission's Discretion in EU Competition Law Enforcement?', *Global Antitrust Review* 2013, pp. 149-166.

Waelbroeck 2008
D. Waelbroeck, 'Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?, *The Global Competition Law Working Paper Series*, GCLC Working paper 01/08, available via www.gclc.coleurop.be.

Wagner von Papp 2012
F. Wagner von Papp, 'Best and even better practices in commitment procedures after Alrosa: The dangers of abandoning the struggle for competition law', *Common Market Law Review*, Volume 49, No. 3, 2012, pp. 929-970.

Walker 1980
D.W. Walker, *The Oxford Companion to Law*, Oxford: Oxford University Press 1980.

Wardhaugh 2013
B. Wardhaugh, 'Cartel Leniency and Effective Compensation in Europe: The Aftermath of Pfleiderer', *Web Journal of Current Legal Issues*, Volume 19, No. 3, 2013.

Wesseling & Van Der Woude 2012,
R. Wesseling & M. Van Der Woude, 'The Lawfulness and Acceptability of Enforcement of European Cartel Law', *World Competition*, Volume 35, no. 4, 2012, pp. 573–598.

Weinrib 1991
E.J. Weinrib, 'Corrective Justice', *Iowa Law Review,* Volume 77(2), 1990-1991, pp. 403-426.

Whish & Bailey 2015
R. Whish & D. Bailey, *Competition Law*, Oxford: Oxford University Press 2015.

Wilks 1999
S. Wilks, *In the Public Interest, Competition Policy and the Monopolies and Mergers Commission Manchester*, Manchester: Manchester University Press 1999.

Wilks 2005
S. Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?', *Governance: An International Journal of Policy, Administration, and Institution*s, Volume 18, No. 3, 2005, pp. 431–452.

Wilks 2007
S. Wilks, *The European Competition Network: what has changed?*, Paper for EUSA Conference Montreal, 17-19 May 2007.

Wils 2003
W.P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?', *World Competition*, Volume 26, No. 3, September 2003, pp. 473-488.

Wils 2006a
W.P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice', *World Competition*, Volume 29, Number 2, 2006, pp. 183-208.

Wils 2006b
W.P.J. Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003', *World Competition*, Volume 29, No. 3, 2006.

Wils 2007
W.P.J. Wils, 'Leniency in Antitrust Enforcement: Theory and Practice', in: D. Schmidtchen, M. Albert & S. Voigt (eds.), *The More Economic Approach to European Competition Law*, Conferences on New Political Economy 24, Tübingen: Mohr Siebeck, 2007, pp. 203-248.

Wils 2008

W.P.J. Wils, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles', in: C.D. Ehlermann & M. Marquis (eds.), E*uropean Competition Law Annual 2008: Settlements under EC Competition Law*, Oxford – Portland – Oregon: Hart Publishing: 2009.

Wils 2011

W.P.J. Wils, 'EU Anti-trust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention On Human Rights', World Competition Volume 34, No. 2, 2011, pp. 189–213.

Wils 2013

W.P.J. Wils, 'Antitrust Compliance Programs and Optimal Antitrust Enforcement', *Journal of Antitrust Enforcement*, Volume 1, No. 1, 2013.

Wils 2014

W.P.J. Wils, 'The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance', *World Competition*, Volume 37, No. 4, December 2014, pp. 405-434.

Wils 2015

W.P.J. Wils, 'Ten years of commitment decisions under Article 9 of Regulation 1/2003: Too much of a good thing?', paper presented at *New Frontiers of Antitrust*, Concurrences Journal 6th International Conference, Paris, 15 June 2015.

Wise 2005

M. Wise, 'Competition Law1 and Policy in France', OECD Journal of Competition Law and Policy, Volume 7, No. 1, 2005, pp. 7-81.

Zweigert & Kötz 1998

K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, Oxford: Oxford University Press 1998.

LAW AND REGULATIONS

European Union

- Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012/C 326/01.
- Charter of Fundamental Rights of the European Union, 2000/C 364/01.

Regulations

- Regulation No. 17, First Regulation implementing Articles 85 and 86 of the Treaty, Official Journal 013, 21/02/1962 P. 0204 – 0211.
- Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
- Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).
- Commission Regulation No. 773/2004, relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, 27 April 2004.

Directives

- Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014, 349/1).

International law

- European Convention of Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, Rome, 4.XI.1950.

France

Laws

- Loi Le Chapelier, 14 June 1791.
- Code Pénal 1810.
- Loi de finances n° 63-628 du 2 juillet 1963 rectificative pour 1963 portant maintien de la stabilité économique et financière.
- Loi no. 77-806 du 19 juillet 1977 relative au contrôle de la concentration économique et à la répression des ententes illicites et des abus de position dominante.
- Loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques.
- Loi de modernisation de l'économie n° 2008-776 du 4 août 2008.
- Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques.
- Code de Commerce, Version consolidée au 16 mars 2016.

Decrees

- Décret no. 53-704 du 9 août 1953, rélatif au maintien ou au rétablissement de la libre concurrence industrielle et commercial.

Ordonnances
- Ordonnance n° 86-1243 du 1 décembre 1986 relative à la liberté des prix et de la concurrence.
- Ordonnance n° 2004-1173 du 4 novembre 2004 portant adaptation de certaines dispositions du code de commerce au droit communautaire de la concurrence.
- Ordonnance n°2008-1161 du 13 novembre 2008, portant modernisation de la régulation de la concurrence.

Procedural codes
- Code de l'Organisation Judiciaire, Version consolidée au 1 janvier 2016.

Preparatory documents
- Report n° 413 of the Senate of June 24, 2008, made in the name of the Special Committee on Economic Modernization by Mr L. Béteille, Mrs E. Lamure and Mr Ph. Marini, p. 334 (available at: <www.senat.fr/rap/l07-413-1/l07-413-11.pdf>).

The Netherlands

Laws
- Wetboek van Strafrecht.
- Kartelbesluit 1941, Verordeningenblad 1941, 208.
- Kartelbesluit 1943 (Besluit van de Secretarissen-Generaal van de Departementen van Handel, Nijverheid en Scheepvaart en van Landbouw en Visserij van 12 Februari 1943, houdende wijziging en aanvulling van het Kartelbesluit).
- Wet van 22 juni 1950, houdende vaststelling van regelen voor de opsporing, de vervolging en de berechting van economische delicten.
- Algemene wet bestuursrecht.
- Mededingingswet.
- Burgerlijk Wetboek, Boek 6, Verbintenissenrecht.
- Burgerlijk Wetboek, Boek 7, Bijzondere Overeenkomsten.
- Wet van 13 mei 2004 tot wijziging van de Algemene wet bestuursrecht en enige andere wetten in verband met de mogelijkheid om de bezwaarschriftenprocedure met wederzijds goedvinden buiten toepassing te laten (rechtstreeks beroep), Stb. 2004, 220.
- Wet van 28 februari 2013, houdende regels omtrent de instelling van de Autoriteit Consument en Markt (Instellingswet Autoriteit Consument en Markt).
- Wet van 25 juni 2014 tot wijziging van de Instellingswet Autoriteit Consument en Markt en enige andere wetten in verband met de stroomlijning van het door de Autoriteit Consument en Markt te houden markttoezicht (Stroomlijningswet).

Preparatory documents
- *Kamerstukken I*, 2003/04, 27639, nr. A, 'Wijziging van de Mededingingswet in verband met het omvormen van het bestuursorgaan van de Nederlandse mededingingsautoriteit tot zelfstandig bestuursorgaan', November 2003.
- *Kamerstukken II*, 2003/04, 29702, nr. 3 (MvT), 'Aanvulling van de Algemene wet bestuursrecht (Vierde tranche Algemene wet bestuursrecht)'.
- *Handelingen II* 2004/05, 28244, nr. 89, 'Brief van de d-g NMa aan de Minister van EZ d.d. 22 januari 2005'.
- *Aanhangsel Handelingen II*, 2010/11, nr. 553, 'Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden'.

- *Kamerstukken II,* 2011/12, 33186, no. 3 (MvT), 'Regels omtrent de instelling van de Autoriteit Consument en Markt (Instellingswet Autoriteit Consument en Markt)'.
- *Kamerstukken II*, 2011/12, 33186, no. 6 (NV), 'Regels omtrent de instelling van de Autoriteit Consument en Markt (Instellingswet Autoriteit Consument en Markt)'.
- *Kamerstukken II*, 2012/13, 33622, nr. 3 (MvT), 'Wijziging van de Instellingswet Autoriteit Consument en Markt en enige andere wetten in verband met de stroomlijning van het door de Autoriteit Consument en Markt te houden markttoezicht)'.
- Minister H.G.J. Kamp, Kamerbrief over Boetebeleid Autoriteit Consument en Markt, 27 August 2013.
- Ministerie van Economische Zaken, Kamerbrief over Onderzoeksrapport Prijsvorming van Voedsel, 18 December 2014.
- *Handelingen II*, 2015/16, nr. 15, item 14.

United Kingdom

Laws
- Fair Trading Act 1973.
- Competition Act 1980.
- Company Directors Disqualifications Act 1986.
- Competition Act 1998.
- Enterprise and Regulatory Reform Act 2013.

Rules of procedure
- Administrative Court of the Queen's Bench Division of the High Court, Part 54 of the Civil Procedure Rules.
- Code for Crown Prosecutors 2013.

Orders
- Competition Act 1998, Order 2014, No. 458, 1 April 2014, 'Competition and Markets Authority's Rules'.

CASE LAW

European Court of Justice

- Joined cases 7/56, 3/57 to 7/57 (Dineke Algera et al v Common Assembly of the European Coal and Steel Community), ECLI:EU:C:1957:7.
- Case 32-62 (Maurice Alvis v Council of the European Economic Community), ECLI:EU:C:1963:15.
- Case 17/74 (Transocean Marine Paint), ECLI:EU:C:1974:106.
- Case 33/76 (Rewe v Landwirtschaftskammer für das SaarLand), ECLI:EU:C:1976:188.
- Case 45/76 (Comet v Produktschap voor Siergewassen), ECLI:EU:C:1976:191.
- Case C-85/76 (Hofman LaRoche), ECLI:EU:C:1979:36.
- Case 68/79 (Hans Just v Danish Ministry for Fiscal Affairs), ECLI:EU:C:1980:57.
- Joined Cases 43 and 63/82 (VBVB and VBBB v Commission), ECLI:EU:C:1984:9.
- Case 199/82 (Amministrazione delle Finanze dello Stato v San Giorgio), ECLI:EU:C:1983:318.
- Case 14/83 (Von Colson & Kamann), ECLI:EU:C:1984:153.
- Case 67/84 (Sideradria SpA v Commission), ECLI:EU:C:1985:506.
- Case 222/84 (Johnston), ECLI:EU:C:1986:206.
- Case C-374/87 (Orkem), ECLI:EU:C:1989:387.
- Case C-5/88 (Wachauf), ECLI:EU:C:1989:321.
- Case C-8/88 (Germany/Commission), ECLI:EU:C:1990:241.
- Case C-68/88 (Commission v Greece), ECLI:EU:C:1989:339.
- Case C-331/88 (R v Ministry of Agriculture, Fisheries and Food, Fedesa), ECLI:EU:C:1990:391.
- Case T 13/89 (Imperial Chemical Industries/Commission), ECLI:EU:T:1992:35.
- Case C-42/89 (Commssion v Belgium (Drinking Water Verviers), ECLI:EU:C:1990:285.
- Case T-24/90 (Automec II), ECLI:EU:T:1992:97.
- Case T–30/91 (ICI), ECLI:EU:T:1995:115.
- Case T–36/91 (Imperial Chemical Industries plc v Commission of the European Communities), ECLI:EU:T:1995:118.
- C-97/91 (Borelli v Commission), ECLI:EU:C:1992:491.
- Case C-60/92 (Otto v Postbank), ECLI:EU:C:1993:876.
- Case T-3/93 (Air France v Commission), ECLI:EU:T:1994:36.
- Case C-310/93P (BPB Industries and British Gypsum), ECLI:EU:C:1995:101.
- Case C-312/93 (Peterbroeck), ECLI:EU:C:1995:437.
- Joined Cases C 430/93 and C 431/93 (Van Schijndel and van Veen), ECLI:EU:C:1995:441.
- Case T-528/93 (Metropole), ECLI:EU:T:1996:99.
- Case C-326/96 (Levez), ECLI:EU:C:1998:577.
- Case T-62/98 (Volkswagen AG v Commission), ECLI:EU:T:2000:180.
- Case C-78/98 (Preston and others), ECLI:EU:C:2000:247.
- Case T-112/98 (Mannesmannröhren-Werke AG v Commission), ECLI:EU:T:2001:61.
- Case T-25/99 (Roberts & Roberts), ECLI:EU:T:2001:177.
- Case C-274/99P (Connolly v Commission), ECLI:EU:C:2001:127.
- Case C-94/00 (Roquette Frères), ECLI:EU:C:2002:603.
- Case C 129/00 (Commission v Italy), ECLI:EU:C:2003:656.
- Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P (Aalborg Portland A/S and Others v Commission of the European Union), ECLI:EU:C:2004:6.
- Case T-210/01 (General Electric), ECLI:EU:T:2005:456.

- Case C-276/01 (Steffensen), ECLI:EU:C:2003:228.
- Joined cases C-387/02, C-391/02 and C-403/02 (Berlusconi, Adelchi, Dell'Utri and Others), ECLI:EU:C:2005:270.
- Case C-189/02 (Danske Rørindustrie), ECLI:EU:C:2005:408.
- Case C-12/03P (Commission v Tetra Laval), ECLI:EU:C:2005:87.
- Case T-201/04 (Microsoft v Commission), ECLI:EU:T:2007:289.
- Joined Cases C 295/04 to C 298/04 (Manfredi and Others), ECLI:EU:C:2006:461.
- Case T-301/04 (Clearstream v Commission), ECLI:EU:T:2009:317.
- Case C-28/05 (Dokter), ECLI:EU:C:2006:408.
- Joined Cases T-101/05 and T-111/05 (BASF and UCB), ECLI:EU:T:2007:380.
- Joined Cases C 222/05 to C 225/05 (Van Der Weerd and Others), ECLI:EU:C:2007:318.
- Case C 268/06 (Impact), ECLI:EU:C:2008:223.
- Case T-138/07 (Schindler Holding), ECLI:EU:T:2011:362.
- Case T-398/07 (Spain v Commission), ECLI:EU:T:2012:173.
- Case C-429/07 (Inspecteur van de Belastingdienst v X BV), ECLI:EU:C:2009:359.
- C-550/07 P (Akzo vs Commission), ECLI:EU:C:2010:512.
- Case C-8/08 (T-Mobile Netherlands and others), ECLI:EU:C:2009:343.
- Case C-63/08 (Pontin), ECLI:EU:C:2009:666.
- Joined Cases C-379/08 and C-380/08 (ERG and Others), ECLI:EU:C:2010:127.
- Case C-439/08 (Vlaamse federatie van verenigingen van Brood- en Banketbakkers, IJsbereiders en Chocoladebewerkers v Raad voor de Mededinging), ECLI:EU:C:2010:739.
- Case C-246/09 (Susanne Bulicke v Deutsche Büro Service GmbH), ECLI:EU:C:2010:418.
- Case C-279/09 (DEB v Bundesrepublik Deutschland), ECLI:EU:C:2010:811.
- Case C-375/09 (Tele2 Polska), ECLI:EU:C:2011:270.
- Joined Cases T-29/10 and T-33/10 (Netherlands and ING v Commission), ECLI:EU:T:2012:98.
- Case C-386/10 P (Chalkor), ECLI:EU:C:2011:815.
- Case C-389/10 P (KME Germany), ECLI:EU:C:2011:816.
- Case C-617/10 (Åkerberg Fransson), ECLI:EU:C:2013:105.
- Case C-399/11 (Melloni), ECLI:EU:C:2013:107.
- Case C-681/11 (Schenker), ECLI:EU:C:2013:404.
- Case C-247/14 P (HeidelbergCement/Commission), ECLI:EU:C:2016:149.
- Case C-248/14P (Schwenk Zement/Comission), ECLI:EU:C:2016:150.
- Case C-267/14P (Buzzi Unicem/Comission), ECLI:EU:C:2016:151.
- Case C-268/14P (Italmobiliare/Commission), ECLI:EU:C:2016:152.

European Court of Human Rights

- Golder v UK, Application no. 4451/70, 21/2/1975, ECLI:CE:ECHR:1975:0221JUD000445170.
- Engel and others v the Netherlands, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8/6/1976, ECLI:CE:ECHR:1976:1123JUD000510071.
- DeWeer v Belgium, Application no. 6903/75, 27/02/1980, ECLI:CE:ECHR:1980:0227JUD000690375.
- Jespers v Belgium, Application no. 8403/78, 1981, ECLI:CE:ECHR:1980:1015DEC000840378.
- Ekbatani v Sweden, Application no. 10563/83, 26/5/1988, ECLI:CE:ECHR:1988:0526JUD001056383.

- Bryan v the United Kingdom, Application no. 19178/1991, ECLI:CE:ECHR:1995:1122JUD001917891.
- Open Door Counselling Ltd. & Dublin Well Woman Centre v Ireland, Application no. 14234/88, 1992, ECLI:CE:ECHR:1992:1029JUD001423488.
- Hadjiannastasiou v Greece, Application no. 12945/87, 16/12/1992, ECLI:CE:ECHR:1992:1216JUD001294587.
- Funke v France, Application no. 10828/84, 25/02/1993, ECLI:CE:ECHR:1993:0225JUD001082884.
- Ruiz Mateos v Spain, Application no. 12952/87, 23/06/1993, ECLI:CE:ECHR:1993:0623JUD001295287.
- Bendenoun v France, Application no. 12547/86, 24/02/1994, ECLI:CE:ECHR:1994:0224JUD001254786.
- John Murray v UK, Application no. 18731/91, 8/2/1996, ECLI:CE:ECHR:1996:0208JUD001873191.
- Saunders v United Kingdom, Application no. 19187/91, 17/12/1996, ECLI:CE:ECHR:1996:1217JUD001918791.
- de Haes & Gijsels v Belgium, Application no. 19983/92, 24/2/1997, ECLI:CE:ECHR:1997:0224JUD001998392.
- Janosevic v Sweden, Application no. 34619/1997, ECLI:CE:ECHR:2002:0723JUD003461997.
- Krcmar v Czech Republic, Application no. 35376/97, 3/3/2000, ECLI:CE:ECHR:2000:0303JUD003537697.
- Axen v Germany, Application no. 54999/00, 27/02/2003, ECLI:CE:ECHR:2003:0227JUD005499900.
- Bosphorus v Ireland, Application no. 45036/98, 30/06/2005, ECLI:CE:ECHR:2005:0630JUD004503698.
- Jussila v Finland, Application no. 73053/01, 23/11/2006, ECLI:CE:ECHR:2006:1123JUD007305301.
- Menarini Diagnostics v Italy, Application no. 43509/08, 27/09/2011, ECLI:CE:ECHR:2011:0927JUD004350908.

France

Conseil d'Etat

- Conseil d'Etat, No. 78825 (Ville Nouvelle Est), 28 May 1971.
- Conseil d'Etat, No. 165260 (Société Yonne Funéraire, Société Intermarbres, Société Million et Marais), 3 November 1997.
- Conseil d'Etat, No. 357193 (Casino), 11 October 2012.
- Conseil d'Etat,, No. 374525 (Allocab), 17 December 2014.

Cour d'Appel de Paris

- Cour d'Appel de Paris, 1ere Chambre – Section H, arrêt du 29 janvier 2008, no 2006/07820 (Le Goff Confort).
- Cour d'Appel de Paris, Pôle 5 – Chambre 5-7, arrêt du 29 septembre 2009, no 2008/12459 (Mathe Establishments).
- Cour d'Appel de Paris, Pôle 5 – Chambre 5-7, arrêt du 19 janvier 2010, no 2009/00334 (AMD Southwest).
- Cour d'Appel de Paris, Pôle 5 – Chambre 5-7, arrêt du 26 janvier 2010, no 2009/03532 (Adecco France).
- Cour d'Appel de Paris, Pôle 5 – Chambre 5-7, arrêt du 11 mai 2010, no 2009/14280.

- Cour d'Appel de Paris, Pôle 5 – Chambre 5-7, arrêt du 29 mars 2012, no 2011/01228 (Lacroix Signs Company).
- Cour d'Appel de Paris, Pôle 5 – Chambre 5-7, arrêt du 11 octobre 2012, no 2011/03298.
- Cour d'Appel de Paris, Pôle 5 – Chambre 5-7, arrêt du 20 novembre 2014, no 2012/06826.
- Cour d'Appel de Paris, Pôle 5 – Chambre 5-7, arrêt du 10 octobre 2013, no 2012/07909 (Nestlé Purina Petcare France).
- Cour d'Appel de Paris, Pôle 5 – Chambre 5-7, arrêt du 25 septembre 2014, no 2013/05595.
- Cour d'Appel de Paris, Pôle 5 – Chambre 4, arrêt du 6 Mars 2013, 09/16817.

Cour de Cassation
- Cour de Cassation, Audience publique du 29 mars 2011, Arrêt no 331 F-D (Manpower).
- Cour de Cassation, Audience publique du 18 février 2014, Arrêt no 199 FS-P+B.
- Cour de Cassation, Audience publique du 21 octobre 2014, Arrêt no 934 FS-P+B.

Conseil Constitutionnel
- Conseil Constitutionnel, Décision n° 2013-672 DC du 13 juin 2013.

The Netherlands

Rechtbank Rotterdam
- Rechtbank Rotterdam, (Rendon B.V – Raad van Bestuur van de Nederlandse Mededingingsautoriteit), 6 May 2010, ECLI:NL:RBROT:2010:BM5246.
- Rechtbank Rotterdam, (Stichting Zorgbalans en Stichting Viva v NMa), 12 April 2012, ECLI:NL:RBROT:2012:BW1327.
- Rechtbank Rotterdam, (KPN v OPTA), 24 October 2013, ECLI:NL:RBROT:2013:8216.

College van Beroep voor het Bedrijfsleven
- CBb 18 maart 2010 (Imtech N.V./NMa), ECLI:NL:CBB:2010:BM2423.
- CBb 7 juli 2010 ([A] B.V./NMa), ECLI:NL:CBB:2010:BN0545.
- CBb 7 juli 2010 ([A] B.V./NMa), ECLI:NL:CBB:2010:BN0540.
- CBb 31 augustus 2010 ([A] B.V. en [B] B.V. /NMa), ECLI:NL:CBB:2010:BN6707.
- CBb 31 augustus 2010 ([A] B.V. en [B] B.V./NMa), ECLI:NL:CBB:2010:BN6711.
- CBb 31 augustus 2010 ([A] B.V./NMa), ECLI:NL:CBB:2010:BN6716.
- CBb 1 september 2010 ([A] e.a./NMa), ECLI:NL:CBB:2010:BN6911.
- CBb 1 september 2010 ([A] B.V. e.a B.V./NMa), ECLI:NL:CBB:2010:BN9349.
- CBb 1 september 2010 ([A] B.V. en [B] B.V./NMa), ECLI:NL:RBROT:2008:BD8569.
- CBb 1 september 2010 ([A] B.V. en [B] B.V./NMa), ECLI:NL:CBB:2010:BO0866.
- CBb 1 september 2010 ([A]/NMa), ECLI:NL:CBB:2010:BN6925.
- CBb 13 september 2010 ([A] B.V./NMa), ECLI:NL:CBB:2010:BO0952.
- CBb 13 september 2010 ([A] B.V. en [C] B.V./NMa), ECLI:NL:RBROT:2008:BG0954.
- CBb 13 september 2010 ([A] B.V./NMa), ECLI:NL:RBROT:2008:BG0955.
- CBb 13 september 2010 ([A] B.V. en [B] B.V./NMa), ECLI:NL:CBB:2010:BO0990.
- CBb 18 november 2010 (A. B.V. e.a./NMa), ECLI:NL:CBB:2010:BO4962.
- CBb 18 november 2010 ([A] N.V./ NMa), ECLI:NL:CBB:2010:BO5193.
- CBb 18 november 2010 (Beheersmaatschappij [A] B.V./NMa), ECLI:NL:CBB:2010:BO5197.
- CBb, 20 augustus 2010 (Vereniging van Reizigers/ NMA II), ECLI:NL:CBB:2010:BN4700.
- CBb, 30 augustus 2011 (ETB de Vos, ECLI:NL:CBB:2011:BR6737.
- CBb 24 oktober 2013 (KPN, ECLI:NL:CBB:2014:7.

Hoge Raad

- Hoge Raad der Nederlanden, 26 januari 1990 (Windmill), ECLI:NL:HR:1990:AC0965.

United Kingdom

- Dyer's case (1414) 2 Hen. V, fol. 5, pl. 26.

Court of Appeal

- Court of Appeal (King's Bench Division), Associated Provincial Picture Houses Ltd. v Wednesbury Corporation, 1948.
- Court of Appeal (Civil Division), Case no. C3/2013/1680, between Office of Fair. Trading and Somerfield Stores and between Office of Fair Trading and Gallaher Group, 7 April 2014.

Competition Appeal Tribunal

- Competition Appeals Tribunal, Case 1000/1/1/01(IR) (Napp), 22 May 2001.
- Competition Appeal Tribunal, Case 1052/6/1/05 (Association of Convenience Stores v Office of Fair Trading), Order of the Tribunal of 1 November 2005.
- Competition Appeal Tribunal, Case 1104/6/8/08 (Tesco plc v Competition Commission), 2009.
- Competition Appeal Tribunal, Case no. 1160/1/1/10 – 1165/1/1/10, Imperial Tobacco v Office of Fair Trading, 12 December 2011.
- Competition Appeal Tribunal, Case no. 1188/1/1/11, Tesco v Office of Fair Trading, 20 December 2012.

NATIONAL COMPETITION LAW ENFORCEMENT

Competition and Markets Authority

Criminal cartels

- Competition and Markets Authority, no. CE/9623/12, Galvanised Steel Tanks, 14 September 2015, see online: <www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>.
- Competition and Markets Authority, no. CE/9705/12, Construction, on-going. Updates available via: <www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>.

Infringement decisions (not settlements)

- Decision of the Office of Fair Trading, no. CA98/2/2001, Napp Pharmaceutical Holdings Limited and Subsidiaries (Napp), 30 March 2001.
- Decision of the Office of Fair Trading, no. CA98/1/2004, Collusive tendering in relation to contracts for flat-roofing services in the West Midlands (Case CP/0001-02), 16 March 2004.

Settlements

- Decision of the Office of Fair Trading, no. CA98/05/2006, Exchange of information on future fees by certain independent fee–paying schools (Case CE/2890-03), 20 November 2006.
- Decision of the Office of Fair Trading, no. CA98/02/2009, Bid rigging in the construction industry in England (Case CE/4327-04), 21 September 2009.
- Decision of the Office of Fair Trading, Tobacco (Case CE/2596-03), 15 April 2010.
- Decision of the Office of Fair Trading, no. CA98/03/2011, Dairy retail price initiatives (Case CE/3094-03), 26 July 2011.
- Decision of the Office of Fair Trading, no. CA98/01/2011, Infringement of Chapter I of the CA98 and Article 101 of the TFEU by Royal Bank of Scotland Group plc and Barclays Bank plc (Case CE/8950/08), 20 January 2011.
- Decision of the Office of Fair Trading, no. CA98/02/2011, Abuse of a dominant position by Reckitt Benckiser Healthcare (UK) Limited and Reckitt Benckiser Group plc (Case CE/8931/08), 12 April 2011.
- Decision of the Office of Fair Trading, no. CA98/01/2012, Airline passenger fuel surcharges for long-haul flights – Infringement of Chapter I of the CA98 and Article 101 of the TFEU by British Airways Limited and Virgin Atlantic Airways Limited (CE/7691-06), 19 April 2012.
- Decision of the Office of Fair Trading, Market sharing agreement and/or concerted practice in relation to the supply of prescription medicines to care homes in England (Case CE/9627/12), 20 March 2014.
- Decision of the Competition and Markets Authority, Restrictive arrangements preventing estate and lettings agents from advertising their fees in a local newspaper (Case CE/9827/13), May 2015.
- Decision of the Competition and Markets Authority, Conduct in the ophthalmology sector (Case CE/9784-13) August 2015.

Market studies (phase 1)

- Office of Fair Trading, OFT693, Estate agency market in England and Wales, March 2004.

- Office of Fair Trading, OFT869, Payment protection insurance: Report on the market study and proposed decision to make a market investigation reference, October 2006.
- Office of Fair Trading, OFT845, The grocery market: The OFT's reasons for making a reference to the Competition Commission, May 2006.
- Office of Fair Trading, OFT882, UK airports: Report on the market study and proposed decision to make a market investigation reference, December 2006.
- Office of Fair Trading, OFT865, Supply of school uniforms review Report of GfK NOP findings, September 2006.
- Office of Fair Trading, OFT861, The commercial use of public information (CUPI), December 2006.
- Office of Fair Trading, OFT 967, Medicines Distribution: an OFT Market Study, December 2007.
- Office of Fair Trading, OFT1020, Homebuilding in the UK A market study, September 2008.
- Office of Fair Trading, OFT1096, Isle of Wight Ferry Services: Market study findings and consultation on proposed decision, June 2009.
- Office of Fair Trading, OFT1046, Property managers in Scotland: A market study, February 2009.
- Office of Fair Trading, OFT1068, Northern Rock: The impact of public support on competition, March 2009.
- Office of Fair Trading, OFT1158, Local bus services: The OFT's reasons for making a market investigation reference to the Competition Commission, January 2010.
- Office of Fair Trading, OFT1186, Home buying and selling: A Market Study, February 2010.
- Office of Fair Trading, OFT1245, The market for corporate insolvency practitioners: A market study, June 2010.
- Office of Fair Trading, OFT1358, Aggregates: Report on the market study and proposed decision to make a market investigation reference, August 2011.
- Office of Fair Trading, OFT1380, Off-Grid Energy: An OFT market study October 2011.
- Office of Fair Trading, OFT1303, Equity underwriting and associated services: An OFT market study, January 2011.
- Office of Fair Trading, OFT1372, Organic waste: An OFT market study, September 2011.
- Office of Fair Trading, OFT1304, Outdoor advertising: An OFT market study, February 2011.
- Office of Fair Trading, OFT1451, Private Motor Insurance: Decision to make a market investigation reference, September 2012.
- Office of Fair Trading, OFT1414, Dentistry: An OFT market study, May 2012.
- Office of Fair Trading, OFT1412, Private Healthcare: Market Study Report on the market study and final decision to make a market investigation reference, April 2012.
- Office of Fair Trading, OFT1492, Payday Lending: Final decision on making a market investigation reference, June 2013.
- Competition and Markets Authority and OFGEM, Joint review of competition in the energy market, 2014 (unpublished).
- Competition and Markets Authority, Personal current accounts and banking services to small and medium- sized enterprises: Decision on market investigation reference, 6 November 2014.

Market investigations (phase 2)

- Competition Commission, Market investigation into supply of bulk liquefied petroleum gas for domestic use, 29 June 2006.

- Competition Commission, Home credit market investigation, 30 November 2006.
- Competition Commission, Store cards market investigation, 7 March 2006.
- Competition Commission, Classified Directory Advertising Services market investigation, 21 December 2006.
- Competition Commission, Personal current account banking services in Northern Ireland market investigation, 15 May 2007.
- Competition Commission, The supply of groceries in the UK market investigation, 30 April 2008.
- Competition Commission, Market investigation into payment protection insurance, 29 January 2009.
- Competition Commission, BAA airports market investigation – A report on the supply of airport services by BAA in the UK, 19 March 2009.
- Competition Commission, Rolling Stock Leasing market investigation, 7 April 2009.
- Competition Commission, Local bus services market investigation – A report on the supply of local bus services in the UK (excluding Northern Ireland and London), 20 December 2011.
- Competition Commission, Movies on pay TV market investigation – A report on the supply and acquisition of subscription pay-TV movie rights and services, 2 August 2012.
- Competition Commission, Statutory audit services for large companies market investigation – A report on the provision of statutory audit services to large companies in the UK, 15 October 2013.
- Competition Commission, Aggregates, cement and ready-mix concrete market investigation – Final report, 14 January 2014.
- Competition and Markets Authority, Private motor insurance market investigation – Final report, 24 September 2014.
- Competition and Markets Authority, Payday lending market investigation – Final report, 24 February 2015.

Opinions

- Office of Fair Trading, *Newspaper and magazine distribution*, Opinion of the Office of Fair Trading – guidance to facilitate self- assessment under the Competition Act 1998, OFT 1025, October 2008.
- Office of Fair Trading, *P&H/Makro Joint Purchasing Agreement*, Short-form Opinion of the Office of Fair Trading – guidance to facilitate self-assessment under the Chapter I prohibition of the Competition Act 1998 and/or Article 101 of the Treaty on the Functioning of the European Union, 27 April 2010.
- Office of Fair Trading, *Rural Broadband Wayleave Rates*, Short-form Opinion of the Office of Fair Trading: Guidance to facilitate self-assessment under the Chapter I prohibition of the Competition Act 1998 and/or Article 101 of the Treaty on the Functioning of the European Union, 23 August 2012.

Voluntary assurances

- Office of Fair Trading, Case CE/9692/12 (closed on administrative priority grounds), Amazon online retailer: investigation into anti-competitive practices, October 2012.
- Office of Fair Trading, Press Release 39/12, 'OFT acts to boost competition in outdoor advertising', 17 May 2012.
- Office of Fair Trading, Visa sponsorship arrangements for Olympics 2012 (closed on administrative priority grounds), May 2011.
- Office of Fair Trading, Case CE/2471/03 (closed on administrative priority grounds), Oakley Sunglasses, August 2008.

Autoriteit Consument en Markt

Decisions

- Nederlandse Mededingingsautoriteit, Zaak 2269 (*Noordzeegarnalen*), 14 January 2003.
- Nederlandse Mededingingsautoriteit, Case 2910 (*Interpay*), 28 April 2004.
- Nederlandse Mededingingsautoriteit, Case 1615 (*Gazelle*), 27 October 2004.
- Onafhankelijke Post en Telecommunicatie Autoriteit, Rapport van 18 November 2005 (*Kortingenonderzoek*).
- *Construction*-case, referring to over 1300 fining decisions concerning wide-spread bid-rigging in the following 7 sectors: concrete, civil utilities, parks and recreation, roads, installation, cables and ducts, traffic control. The ACM holds an archive of all formal decisions and their references codes, accessible at <www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/kartels/archief-bouwfraude/>.
- Nederlandse Mededingingsautoriteit, Case 5851 (*Thuiszorg 't Gooi*), 19 september 2008.
- Nederlandse Mededingingsautoriteit, Case 6168 (*Thuiszorg Kennemerland*), 19 september 2008.
- Nederlandse Mededingingsautoriteit, Case 6431 (*Kazerne II*), 5 June 2009.
- Nederlandse Mededingingsautoriteit, Case 6306 (*Meel*), 16 december 2010.
- Nederlandse Mededingingsautoriteit, Case 103661/288 (*Greenchoice*), 27 May 2011.
- Nederlandse Mededingingsautoriteit, Case 7138 (*Thuiszorg Midden-Brabant*), 4 July 2011.
- Nederlandse Mededingingsautoriteit Case 6929 (*Zeescheepsafval*), 16 november 2011.
- Onafhankelijke Post en Telecommuncatieautoriteit, Case 11.0183.29 (*OT2010)*, 21 December 2011.
- Nederlandse Mededingingsautoriteit Case 6855, (*Wasserijen*), 10 januari 2012.
- Nederlandse Mededingingsautoriteit, Case 6425 (*Glazenwassers*), 22 December 2012.
- Nederlandse Mededingingsautoriteit, Case 6538 (*Executieveilingen*), 13 December 2012.
- Nederlandse Mededingingsautoriteit, Case 7191 (*Landelijke Huisartsenvereniging)*, 4 December 2012.
- Autoriteit Consument en Markt, Case 13.0612.53 (*Mobiele Operators*), 9 January 2014.
- Autoriteit Consument en Markt, Case 7244 (*Leesmappen*), 20 January 2014.
- Autoriteit Consument en Markt, Adviescommissie bezwaarschriften Mededingingswet, Advice in Case 6855 (*Wasserijen*), 2 juli 2014.
- Autoriteit Consument en Markt, Case 7069/1832/OV (*AstraZeneca*), 24 September 2014.
- Autoriteit Consument en Markt, Case 6303 (*Meel – Bencis*), 30 December 2014.
- Autoriteit Consument en Markt, Case 14.0705.27 (*Vinegar*), 11 August 2015.

Market Scans

- ECORYS-NEI (in opdracht van de Nederlandse Mededingingsautoriteit), Effecten van Overdracht Pin-Contracten: Eindrapport, Rotterdam: 18 februari 2005.
- Nederlandse Mededingingsautoriteit, Schoolboekenscan 2006 (openbare versie), November 2006.
- Nederlandse Mededingingsautoriteit, Eindverslag Inventarisatie Vrije Beroepen: Notariaat, Mei 2007.
- Nederlandse Mededingingsautoriteit, Monitor Financiële Sector, De Markt voor Natura Uitvaartverzekeringen, 10 Juni 2008.
- Lloyds Register (in opdracht van de Nederlandse Mededingingsautoriteit), Market Assessment for Pro-Rail ICT Systems in Traffic Control, Den Haag/Hamburg: Juni 2008.
- ECORYS Nederland (in opdracht van de Nederlandse Mededingingsautoriteit), Sectorstudie van Zee tot Binnenhaven: Marktwerking in het Goederenvervoer over het Water (Eindrapportage), Rotterdam: 1 Juli 2008.

- Nederlandse Mededingingsautoriteit, Monitor Financiële Sector, De Rol van Verzekeraars op de Markt voor Auto(ruit)schadehersteldiensten, April 2009.
- Nederlandse Mededingingsautoriteit, Monitor Financiële Sector, Rapportage Rekening-Courantverlening aan het MKB, Maart 2009.
- Regioplan Beleidsonderzoek (in opdracht van de Nederlandse Mededingingsautoriteit), Marktwerking in de Kinderopvang (Eindrapport), Amsterdam: Oktober 2009.
- Nederlandse Mededingingsautoriteit, Prijsvorming in de Agrifood-Sector, 2 December 2009, which combines with LEI Wageningen (in opdracht van de Nederlandse Mededingingsautoriteit), Nota 09-074, Prijsvorming van Voedingsproducten, November 2009.
- Nederlandse Mededingingsautoriteit, Sectorscan Signalen Internetverkoop, Juni 2009.
- EIM (in opdracht van de Nederlandse Mededingingsautoriteit), Industriewater in Nederland, 2 Maart 2009.
- Nederlandse Mededingingsautoriteit, Visiedocument Individueel en Collectief Onderhandelen tussen Vrijgevestigde Extramurale Zorgaanbieders en Zorgverzekeraars, December 2009.
- Nederlandse Mededingingsautoriteit, Monitor Financiële Sector, Productkoppeling en Overstapdrempel bij Bancaire Dienstverlening aan het MKB, Maart 2010.
- Nederlandse Mededingingsautoriteit, Visiedocument Betalingsverkeer 2010: Kansen en Bedreigingen voor Meer Concurrentie in het Betalingsverkeer in Nederland, December 2010.
- Nederlandse Mededingingsautoriteit, Quick Scan Hypotheekrente: een Onderzoek naar Marges op Hypotheken, November 2010.
- German Airport Performance (in opdracht van de Nederlandse Mededingingsautoriteit), the Economic Power of Amsterdam Airport Schiphol, April 2010.
- EIM (in opdracht van de Nederlandse Mededingingsautoriteit), Sectorstudie 7080, Marktstudie Visserijketen, Oktober 2011.
- Nederlandse Mededingingsautoriteit, NMa Marktscan Personenvervoor per Spoor, September 2011.
- Nederlandse Mededingingsautoriteit, Monitor Financiële Sector, Notitie bij Sectorstudie Vastgoedfinanciering, SEO Economisch Onderzoek, October 2011. Combined with: SEO Economisch Onderzoek (in opdracht van de Nederlandse Mededingingsautoriteit), Sectorstudie Vastgoedfinanciering, April 2011.
- Nederlandse Mededingingsautoriteit, Sectorstudie Hypotheekmarkt, May 2011. Combined with: EIM (in opdracht van de Nederlandse Mededingingsautoriteit), Consumentengedrag op de Hypotheekmarkt, 21 March 2011. Resulting in: Nederlandse Mededingingsautoriteit, Working Paper Competition and Interest Rates in the Dutch Mortgage Market, M. Mulder & M. Lengton, May 2011.
- Nederlandse Mededingingsautoriteit, Schoolboekenscan, February 2011.
- Ecorys (in opdracht van de Nederlandse Mededingingsautoriteit), Sectorstudie Medische Hulpmiddelen, December 2011.
- Nederlandse Mededingingsautoriteit, Marktscan Woningmakelaardij, Maart 2012. Combined with: Blauw & Nederlandse Mededingingsautoriteit, Concurrentie op de markt voor woningmakelaardij, Het gedrag van consumenten in kaart gebracht, November 2011, B13552-4. And: EIM, Consumentengedrag op de makelaarsmarkt, drs. P.Th. van der Zeijden drs. J. Snoei, drs. R.J.M. Vogels, Zoetermeer, 17 maart 2011 and Blauw & Nederlandse Mededingingsautoriteit, Concurrentie op de markt voor woningmakelaardij, Het gedrag van makelaars in kaart gebracht, B13552-4, November 2011.

- Nederlandse Mededingingsautoriteit, Co-Assurantie Voordelig bij Concurrentie, April 2012. Combined with: TILEC & CentER, Co-assurantie vanuit een speltheoretisch perspectief, October 2011.
- Autoriteit Consument en Markt, Analyse Horeca Biermarkt, 6308-15/34. Combined with: EIM (in opdracht van de Autoriteit Consument en Markt), Overstapgedrag in de horecabiermarkt en motieven om dat wel of niet te doen, Onderzoek naar feitelijk overstapgedrag door cafés met kelder- of fustbier en de verschillende brouwerijen in de periode 2006-2012, 26 June 2012. SE0 Economisch Onderzoek (in opdracht van de Autoriteit Consument en Markt), Naar concurrentie op de tap, Mededingingseconomische analyse van verticale afspraken in de tapbiermarkt, January 2013.
- Autoriteit Consument en Markt, Monitor Financiële Sector, Barrières voor toetreding tot de Nederlandse bancaire retailsector, June 2014. Combined with: KPMG (in opdracht van de Autoriteit Consument en Markt), Barriers to entry, growth and exit in the retail banking market in the Netherlands, Financial Services, April 2014.
- Autoriteit Consument en Markt, Marktscan Zakelijke SMS-markt, no. ACM/DTVP/2014/202774_OV.
- CEG (in opdracht van de Autoriteit Consument en Markt), Overdraft on personal current accounts – a study into market power, June 2014.
- Autoriteit Consument en Markt, Naar sportieve concurrentie – Een analyse van de naleving van de gedragsregels uit de Wet Markt en Overheid door gemeenten bij de exploitatie van gemeentelijke sportaccommodaties, 2014.
- LEI Wageningen and Universiteit Utrecht (in opdracht van de Autoriteit Consument en Markt), Prijsvorming van Voedsel – Ontwikkeling van Prijzen in Acht Nederlandse Ketens van Versproducten, Wageningen: December 2014.
- Autoriteit Consument en Markt, Farmacie onder de loep – Kansen voor toetreding generieke geneesmiddelen en keuzes voor patiënten, February 2015.
- Autoriteit Consument en Markt, IP Interconnection in the Netherlands: a regulatory assessment, October 2015.

Informal- and Irregular Opinions

- Nederlandse Mededingingsautoriteit, Case 4713, Informele Zienswijze Preferentiebeleid, 2005.
- Nederlandse Mededingingsautoriteit, Case 4174, Informele Zienswijze B&L, 2005.
- Nederlandse Mededingingsautoriteit, Case 4268, Informele Zienswijze TVPO, 2005.
- Nederlandse Mededingingsautoriteit, Case 5194, Informele Zienswijze Convenant Betalingsverkeer, 2005.
- Nederlandse Mededingingsautoriteit, Case 4237, Informele Zienswijze Eredivisie CV – Exploitatie Uitzendrechten, 2005.
- Nederlandse Mededingingsautoriteit, Case 5461, Informele Zienswijze Vervallen Contracteerplicht, 2006.
- Nederlandse Mededingingsautoriteit, Case 6455, Informele Zienswijze: Verdoofd Castreren van Varkens, 2008.
- Nederlandse Mededingingsautoriteit, Case 6672/12, Afwijzing Informele Zienswijze Kompany, 2009.
- Nederlandse Mededingingsautoriteit, Visiedocument Individueel en Collectief Onderhandelen tussen Vrijgevestigde Extramurale Zorgaanbieders en Zorgverzekeraars, December 2009.
- Nederlandse Mededingingsautoriteit, Case 6051, Informele Zienswijze: Oplegregeling Crisisberaad Binnenvaart, 2010.

- Nederlandse Mededingingsautoriteit, Case 7011, Informele Zienswijze Managementplan Garnalenvisserij, 2011.
- Nederlandse Mededingingsautoriteit, Case 7500, Informele Zienswijze Fox/Eredivisie – Uitzendrechten, 2012.
- Autoriteit Consument en Markt, Case ACM/DM/2013/202346, Informele Zienswijze PACT, 2013.
- Autoriteit Consument en Markt, Case 7571, Informele Zienswijze Verplichte Private Verzekeringsconstructie voor Overstromingsdekkingen, 2013.
- Nederlandse Mededingingsautoriteit, Marktadvies Executieveilingen Onroerend Goed, 2013.
- Autoriteit Consument en Markt, 'Analyse van de Autoriteit Consument en Markt met betrekking tot de voorgenomen afspraak tot sluiting van 80er jaren kolencentrales in het kader van het SER Energieakkoord', 2013 – in conjunction with: ECN (in opdracht van Autoriteit Consument en Markt), Effecten van versneld sluiten van de vijf oudste kolencentrales, 2013.
- Autoriteit Consument en Markt, Case ACM/DM/2013/205913, Advies de Stroomversnelling, 2013.
- Autoriteit Consument en Markt, Case ACM/DM/2014/206176, Advies ACM omtrent Herkomsttransparantie in de Steenkolenketen, 2014.
- Autoriteit Consument en Markt, Case AC/DM/2014/204306, Afbouw Intramurale Capaciteit door Gezamenlijke Zorgaanbieders, 2014.
- Autoriteit Consument en Markt, Case ACM/DM/2014/206028, Analyse ACM van duurzaamheidsafspraken 'De Kip van Morgen', 2015 – in conjunction with Economisch Bureau ACM, 'Economische effecten van 'Kip van Morgen' – Kosten en baten voor consumenten van een collectieve afspraak in de pluimveehouderij', October 2014.
- Autoriteit Consument en Markt, Case ACM/DM/2014/206814, Reactie Self-Assessment Pilot Bereikbaarheid Contant Geld, 2014.
- Autoriteit Consument en Markt, Case ACM/DM/2015/201065, Informele Zienswijze Gezamenlijk Inkopen door Zorgverzekeraars van Protonentherapie, 2015.
- Autoriteit Consument en Markt, Case ACM/DM/2014/204334, Informele Zienswijze Gezamenlijke Inkoop Cluster TNFi's, 2016.

Informal commitments

- Autoriteit Consument en Markt, Press Release 24 February 2014, 'MasterCard verlaagt tarieven voor creditcardbetalingen'.
- Autoriteit Consument en Markt, Press Release 25 July 2013, 'NVM vergroot transparantie op Funda'.
- Nederlandse Mededingingsautoriteit, Press Release 13 July 2012, 'NMa accepteert maatregelen van UvA en VU'.
- Nederlandse Mededingingsautoriteit, Press Release 30 December 2010, 'NMa: meer ruimte voor concurrentie tussen verzekeraars'.
- Nederlandse Mededingingsautoriteit, Press Release 28 October 2008, 'NMa: toonaangevende organisaties bloembollensector stoppen advisering over productiebeperking'.
- Nederlandse Mededingingsautoriteit, Press Release, 27 February 2007, 'NMa: Makelaars gaan meer werk maken van mededinging'.

Autorité de la Concurrence

Decisions

- Le Conseil de la Concurrence, 04-D-30, Décision du 7 juillet 2004 relative à des marchés publics de transport scolaire en Haute-Corse.
- Le Conseil de la Concurrence, 04-D-37, Décision du 27 juillet 2004 relative à des pratiques mises en œuvre sur le marché des pompes funèbres dans le Val-de-Marne.
- Le Conseil de la Concurrence, 04-D-42, Décision du 4 août 2004 relative à des pratiques mises en œuvre dans le cadre du marché de la restauration de la flèche de la cathédrale de Tréguier.
- Le Conseil de la Concurrence, 04-D-65, Décision du 30 novembre 2004 relative à des pratiques mises en œuvre par La Poste dans le cadre de son contrat commercial.
- Le Conseil de la Concurrence, 05-D-49, Décision du 28 juillet 2005 relative à des pratiques mises en oeuvre dans le secteur de la location entretien des machines d'affranchissement postal.
- Le Conseil de la Concurrence, 05-D-70, Décision du 19 décembre 2005 relative à des pratiques mises en œuvre dans le secteur des vidéocassettes préenregistrées.
- Le Conseil de la Concurrence, 06-D-03, Décision du 9 mars 2006 relative à des pratiques mises en œuvre dans le secteur des appareils de chauffage, sanitaires, plomberie, climatisation.
- Le Conseil de la Concurrence, 07-D-02, Décision du 23 janvier 2007 relative à des pratiques ayant affecté l'attribution de marchés publics et privés dans le secteur de l'élimination des déchets en Seine-Maritime.
- Le Conseil de la Concurrence, 07-D-21, Décision du 26 juin 2007 relative à des pratiques mises en œuvre dans le secteur de la location-entretien du linge.
- Le Conseil de la Concurrence, 07-D-26, Décision du 26 juillet 2007 relative à des pratiques mises en œuvre dans le cadre de marchés de fourniture de câbles à haute tension.
- Le Conseil de la Concurrence, 07-D-30, Décision du 5 octobre 2007 relative à des pratiques mises en œuvre par la société TDF dans le secteur de la diffusion hertzienne terrestre des services audiovisuels en mode analogique.
- Le Conseil de la Concurrence, 07-D-33, Décision du 15 octobre 2007 relative à des pratiques mises en œuvre par la société France Télécom dans le secteur de l'accès à Internet à haut débit.
- Le Conseil de la Concurrence, 07-D-40, Décision du 23 novembre 2007 relative à des pratiques ayant affecté l'attribution de marchés publics de collecte des déchets ménagers dans le département des Vosges.
- Le Conseil de la Concurrence, 07-D-48, Décision du 18 décembre 2007 relative à des pratiques mises en œuvre dans le secteur du déménagement national et international.
- Le Conseil de la Concurrence, 08-D-12, Décision du 21 mai 2008 relative à des pratiques mises en œuvre dans le secteur de la production du contreplaqué.
- Le Conseil de la Concurrence, 08-D-13, Décision du 11 juin 2008 relative à des pratiques relevées dans le secteur de l'entretien courant des locaux.
- Le Conseil de la Concurrence, 08-D-20, Décision du 1er octobre 2008 relative à des pratiques mises en œuvre par des filiales de la société Compagnie Financière et de Participation Roullier.
- Le Conseil de la Concurrence, 08-D-29, Décision du 3 décembre 2008 relative à des pratiques relevées dans le secteur des marchés publics d'entretien de menuiserie métallerie serrurerie.
- Le Conseil de la Concurrence, 08-D-32, Décision du 16 décembre 2008 relative à des pratiques mises en oeuvre dans le secteur du négoce des produits sidérurgiques.

- Le Conseil de la Concurrence, 08-D-33, Décision du 16 décembre 2008 relative à des pratiques mises en œuvre à l'occasion d'appels d'offres de la ville d'Annecy et du conseil général de Haute-Savoie pour le transport par autocar.
- Le Conseil de la Concurrence, 09-D-03, Décision du 21 janvier 2009 relative à des pratiques mises en œuvre dans le secteur du transport scolaire et interurbain par autocar dans le département des Pyrénées-Orientales.
- Le Conseil de la Concurrence, 09-D-05, Décision du 2 février 2009 relative à des pratiques mises en œuvre dans le secteur du travail temporaire.
- Le Conseil de la Concurrence, 09-D-06, Décision du 5 février 2009 relative à des pratiques mises en œuvre par la SNCF et Expedia Inc. dans le secteur de la vente de voyages en ligne.
- Autorité de la Concurrence, 09-D-19, Décision du 10 juin 2009 relative à des pratiques concernant le déménagement de personnels militaires relevant du CTAC de l'armée de terre à Nancy.
- Autorité de la Concurrence, 09-D-24, Décision du 28 juillet 2009 relative à des pratiques mises en œuvre par France Télécom sur différents marchés de services de communications électroniques fixes dans les DOM.
- Autorité de la Concurrence, 09-D-31, Décision du 30 septembre 2009 relative à des pratiques mises en œuvre dans le secteur de la gestion et de la commercialisation des droits sportifs de la Fédération française de football.
- Autorité de la Concurrence, 10-D-21, Décision du 30 juin 2010 relative au respect, par les sociétés Neopost France et Satas, des engagements pris dans la décision du Conseil de la concurrence n° 05-D-49 du 25 juillet 2005.
- Autorité de la Concurrence, 10-D-29, Décision du 27 septembre 2010 relative à des pratiques mises en œuvre par les sociétés Eco-Emballages et Valorplast dans le secteur de la reprise et de la valorisation des déchets d'emballages ménagers plastiques.
- Autorité de la Concurrence, 10-D-39, Décision du 22 décembre 2010 relative à des pratiques mises en œuvre dans le secteur de la signalisation routière verticale.
- Autorité de la Concurrence, 11-D-02, Décision du 26 janvier 2011 relative à des pratiques mises en œuvre dans le secteur de la restauration des monuments historiques.
- Autorité de la Concurrence, 11-D-07, Décision du 24 février 2011 relative à des pratiques mises en œuvre dans le secteur des travaux de peinture d'infrastructures métalliques.
- Autorité de la Concurrence, 11-D-13, Décision du 5 octobre 2011 relative à des pratiques relevées dans les secteurs des travaux d'électrification et d'installation électrique dans les régions Midi-Pyrénées, Languedoc-Roussillon, Auvergne et limitrophes.
- Autorité de la Concurrence, 12-D-06, Décision du 26 janvier 2012 relative à des pratiques mises en œuvre dans le secteur des agrégats et des marchés aval à Saint-Pierre-et-Miquelon.
- Autorité de la Concurrence, 12-D-09, Décision du 13 mars 2012 relative à des pratiques mises en oeuvre dans le secteur des farines alimentaires.
- Autorité de la Concurrence, 12-D-10, Décision du 20 mars 2012 relative à des pratiques mises en œuvre dans le secteur de l'alimentation pour chiens et chats.
- Autorité de la Concurrence, 12-D-22, Décision du 22 novembre 2012 relative à une saisine présentée par les sociétés NHK Conseil, Agence I&MA conseils, Sudmédia conseil, OSCP, Audit Conseil Publicité Annuaires, Charcot.net, Agence Heuveline, Avycom publicité annuaire, Toocom, Ecoannuaires, Netcreative-Pages annuaires à l'encontre de pratiques mises en oeuvre par la société PagesJaunes SA.

- Autorité de la Concurrence, 12-D-27, Décision du 20 décembre 2012 relative à des pratiques relevées dans le secteur de la billetterie de spectacles.
- Autorité de la Concurrence, 13-D-03, Décision du 13 février 2013 relative à des pratiques mises en oeuvre dans le secteur du porc charcutier.
- Autorité de la Concurrence, 13-D-06, Décision du 28 février 2013 relative à des pratiques mises en oeuvre dans le marché de la télétransmission de données fiscales et comptables sous format EDI à l'administration fiscale.
- Autorité de la Concurrence, 13-D-12, Décision du 28 mai 2013 relative à des pratiques mises en oeuvre dans le secteur de la commercialisation de commodités chimiques.
- Autorité de la Concurrence, 13-D-21, Décision du 18 décembre 2013 relative à des pratiques mises en œuvre sur le marché français de la buprénorphine haut dosage commercialisée en ville.
- Autorité de la Concurrence, 14-D-05, Décision du 13 juin 2014 relative à des pratiques mises en œuvre dans le secteur de la téléphonie mobile à destination de la clientèle résidentielle à La Réunion et à Mayotte.
- Autorité de la Concurrence, 14-D-16, Décision du 18 novembre 2014 relative à des pratiques mises en œuvre dans le secteur du déménagement des militaires affectés en Martinique.
- Autorité de la Concurrence, 14-D-19, Décision du 18 décembre 2014 relative à des pratiques mises en œuvre dans le secteur des produits d'entretien et des insecticides et dans le secteur des produits d'hygiène et de soins pour le corps.
- Autorité de la Concurrence, 14-D-20, Décision du 22 décembre 2014 relative à des pratiques mises en œuvre dans le secteur du papier peint en France.
- Autorité de la Concurrence, 15-D-03, Décision du 11 mars 2015 relative à des pratiques mises en œuvre dans le secteur des produits laitiers frais.
- Autorité de la Concurrence, 15-D-08, Décision du 5 mai 2015 relative à des pratiques mises en œuvre dans le secteur de la commercialisation de la viande de volaille.
- Autorité de la Concurrence, 15-D-17, Décision du 30 novembre 2015 relative à des pratiques mises en œuvre sur le marché de la téléphonie mobile à destination de la clientèle non résidentielle à La Réunion et à Mayotte.
- Autorité de la Concurrence, 15-D-19, Décision du 15 décembre 2015 relative à des pratiques mises en œuvre dans les secteurs de la messagerie et de la messagerie express.
- Autorité de la Concurrence, 15-D-20, Décision du 17 décembre 2015 relative à des pratiques mises en œuvre dans le secteur des communications électroniques.

Advisory opinions

- Le Conseil de la Concurrence, 04-A-15, Avis du 28 juillet 2004 relatif à la convention-type « Département innovant » de France Télécom.
- Le Conseil de la Concurrence, 05-A-08, Avis du 31 mars 2005 relatif à une demande d'avis de la Confédération de la Consommation, du Logement et du Cadre de Vie portant sur les conditions dans lesquelles pourrait être envisagée la mise en place d'un service bancaire de base.
- Le Conseil de la Concurrence, 06-A-09, Avis du 14 avril 2006 relatif à une saisine de l'Union des expéditeurs et exportateurs en fruits et légumes du Finistère (UEEFL).
- Le Conseil de la Concurrence, 07-A-04, Avis du 15 juin 2007 relatif à la possibilité de réserver aux producteurs d'une filière de qualité agricole ou alimentaire certains produits intermédiaires.
- Le Conseil de la Concurrence, 08-A-05, Avis du 18 avril 2008 relatif au projet de réforme du système français de régulation de la concurrence.

- Le Conseil de la Concurrence, 08-A-16, Avis du 30 juillet 2008 relatif à la situation des opérateurs de réseaux mobiles virtuels (MVNO) sur le marché français de la téléphonie mobile.
- Autorité de la Concurrence, 09-A-33, Avis du 29 septembre 2009 relatif aux modalités de la vente de bois par l'Office national des forêts (ONF).
- Autorité de la Concurrence, 09-A-48, Avis du 2 octobre 2009 relatif au fonctionnement du secteur laitier.
- Autorité de la Concurrence, 09-A-55, Avis du 4 novembre 2009 sur le secteur du transport public terrestre de voyageurs.
- Autorité de la Concurrence, 09-A-46, Avis du 9 septembre 2009 relatif aux effets sur la concurrence du développement de réseaux de soins agrees.
- Autorité de la Concurrence, 10-A-04, Avis du 22 février 2010 relatif à une demande d'avis de l'Association pour le maintien de la concurrence sur les réseaux et infrastructures (AMCRI) sur les problèmes de concurrence pouvant résulter de la privatisation des aéroports français.
- Autorité de la Concurrence, 10-A-11, Avis du 7 juin 2010 relatif au Conseil interprofessionnel de l'optique.
- Autorité de la Concurrence, 10-A-13, Avis du 14 juin 2010 relatif à l'utilisation croisée des bases de clientèle.
- Autorité de la Concurrence, 10-A-25, Avis du 7 décembre 2010 relatif aux contrats de « management catégoriel » entre les opérateurs de la grande distribution à dominante alimentaire et certains de leurs fournisseurs.
- Autorité de la Concurrence, 10-A-26, Avis du 7 décembre 2010 relatif aux contrats d'affiliation de magasins indépendants et les modalités d'acquisition de foncier commercial dans le secteur de la distribution alimentaire.
- Autorité de la Concurrence, 10-A-28, Avis du 13 décembre 2010 relatif à deux projets de décret imposant la contractualisation dans des secteurs agricoles.
- Autorité de la Concurrence, 11-A-03, Avis du 15 février 2011 relatif à un accord interprofessionnel dans le secteur ovin.
- Autorité de la Concurrence, 10-A-29, Avis du 14 décembre 2010 sur le fonctionnement concurrentiel de la publicité en ligne.
- Autorité de la Concurrence, 11-A-02, Avis du 20 janvier 2011 relatif au secteur des jeux d'argent et de hasard en ligne.
- Autorité de la Concurrence, 11-A-11, Avis du 12 juillet 2011 relatif aux modalités de négociation des contrats dans les filières de l'élevage dans un contexte de volatilité des prix des matières premières agricoles.
- Autorité de la Concurrence, 11-A-12, Avis du 27 juillet 2011 relatif à un accord interprofessionnel dans le secteur de la dinde.
- Autorité de la Concurrence, 11-A-14, Avis du 26 septembre 2011 relatif à un accord interprofessionnel du secteur viticole (vins de la région de Bergerac).
- Autorité de la Concurrence, 12-A-01, Avis du 11 janvier 2012 relatif à la situation concurrentielle dans le secteur de la distribution alimentaire à Paris
- Autorité de la Concurrence, 12-A-17, Avis du 13 juillet 2012 concernant le secteur de la gestion des déchets couvert par le principe de la responsabilité élargie du producteur.
- Autorité de la Concurrence, 12-A-20, Avis du 18 septembre 2012 relatif au fonctionnement concurrentiel du commerce électronique.
- Autorité de la Concurrence, 12-A-21, Avis du 8 octobre 2012 relatif au fonctionnement concurrentiel des secteurs de la réparation et de l'entretien de véhicules et de la fabrication et de la distribution de pièces de rechange.

- Autorité de la Concurrence, 13-A-08, Avis du 11 mars 2013 relatif aux conditions de mutualisation et d'itinérance sur les réseaux mobiles.
- Autorité de la Concurrence, 13-A-02, Avis du 21 janvier 2013 relatif à la situation des opérateurs de réseaux mobiles virtuels (MVNO) sur les marchés de la téléphonie mobile en France.
- Autorité de la Concurrence, 13-A-11, Avis du 29 mars 2013 relatif aux effets sur la concurrence de la généralisation de la couverture complémentaire collective des salariés en matière de prévoyance.
- Autorité de la Concurrence, Avis n° 13-A-23 du 16 décembre 2013 concernant un projet de décret relatif à la réservation préalable des voitures de tourisme avec chauffeur.
- Autorité de la Concurrence, 13-A-24, Avis du 19 décembre 2013 relatif au fonctionnement de la concurrence dans le secteur de la distribution du médicament à usage humain en ville.
- Autorité de la Concurrence, 14-A-01, Avis du 14 janvier 2014 du 14 janvier 2014 sur le fonctionnement de la concurrence sur le marché de la distribution de propane en vrac à destination des particuliers.
- Autorité de la Concurrence, 14-A-05, Avis du 27 février 2014 relatif au fonctionnement concurrentiel du marché du transport interrégional régulier par autocar.
- Autorité de la Concurrence, 14-A-10, Avis du 31 juillet 2014 relatif à la situation de la concurrence dans le secteur de l'accompagnement à l'international.
- Autorité de la Concurrence, 14-A-13, Avis du 17 septembre 2014 sur le secteur des autoroutes après la privatisation des sociétés concessionnaires.
- Autorité de la Concurrence, 15-A-06, Avis du 31 mars 2015 relatif au rapprochement des centrales d'achat et de référencement dans le secteur de la grande distribution.
- Autorité de la Concurrence, 15-A-09, Avis du 9 juillet 2015 relatif aux conditions de concurrence dans le secteur du cautionnement bancaire immobilier.
- Autorité de la Concurrence, 15-A-16, Avis du 17 novembre 2015 portant sur l'examen, au regard des règles de concurrence, des activités de normalisation et de certification.
- Autorité de la Concurrence, 15-A-19, Avis du 16 décembre 2015 relatif aux effets sur la concurrence du mécanisme de répartition des quotas de pêche en France.

OTHER DOCUMENTS COMPETITION AUTHORITIES

European Commission

Internal rules & procedural notices

- White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, May 1999.
- European Commission, Code of Good Administrative Behavior: Relations with the Public (2000).
- Commission of the European Communities, *White Paper on damages actions for breach of EC antitrust rules*, COM(2008) 165 final, 2.4.2008.
- Commission Notice on the non-imposition or reduction of fines in cartel cases, Official Journal C 207, 18-7-1996.
- Commission Notice on Cooperation within the Network of Competition Authorities.
- Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, 2008/C 167/01, 2 July 2008.

Press releases

- European Commission, Unbundling of the local loop: Commission calls public hearing, Brussels, 12 June 2002, IP/02/849.
- European Commission, State Aid: Commission launches sector inquiry into mechanisms to ensure electricity supplies, Brussels, 29 April 2015, IP/15/4891.
- European Commission, Antitrust: Commission launches e-commerce sector inquiry, Brussels, 06 May 2015, IP/15/4921.

Sector inquiries

- European Commission, Directorate General for Competition, Working Document on the initial results of the Leased Lines Sector Inquiry, Brussels, 08/09/2000.
- European Commission, Directorate General for Competition, Working Document on the initial results of the sector inquiry into Mobile Roaming Charges, Brussels, 13 December 2000.
- European Commission, Directorate General for Competition, Issues Paper On the preliminary findings of the Sector Inquiry into New Media (3G), Brussels, May 2005.
- Communication from the Commission – Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on retail banking, COM/2007/0033 final.
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance, COM/2007/0556 final.
- European Commission, Directorate General for Competition, Report on Energy Sector Inquiry, 10 January 2007, SEC(2006) 1724.
- European Commission, Directorate General for Competition, Pharmaceutical Sector Inquiry (Final report), 8 July 2009.

Speeches

- European Commission, SPEECH/08/445, Neelie Kroes, 'Settlements in Cartel Cases', Speech Almunia, 'Compliance and Competition policy', SPEECH/10/586, 25 October 2010.

Other

- European Commission, D-G Comp, 'Compliance Matters: What Companies Can Do To Better Respect EU Competition Rules', KD-32-11-985-EN-C, 2012.
- Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014), 453.
- SWD (2014) 231 final Commission Staff Working Document, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues (2014) accompanying COM(2014) 453 final Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (2014).
- European Commission, Report on Competition Policy 2015, SWD(2016) 198 final, 15 June 2016.
- Commission Staff Working Paper, Report on Competition Policy 2015, COM(2016) 393 final, 15 June 2016.

Autorité de la Concurrence

Internal rules & procedural notices

- Règlement Intérieur Autorité de la Concurrence 2009 (Décision du 30 mars 2009 portant adoption du règlement intérieur de l'Autorité de la concurrence).
- Autorité de la Concurrence, 'Notice on Competition Commitments Issued on March 2nd, 2009' (English version).
- Autorité de la Concurrence, 'Communiqué du 16 mai 2011 relatif à la méthode de détermination des sanctions pécuniaires'.
- Autorité de la Concurrence, 'Document-cadre du 10 février 2012 sur les programmes de conformité aux règles de concurrence'.
- Autorité de la Concurrence, 'Communiqué de procédure du 10 février 2012 relatif à la non-contestation des griefs'.
- Autorite de la Concurrence, 'Communiqué de procédure du 3 avril 2015 relatif au programme de clémence français.'

Annual reports

- Le Conseil de la Concurrence, Annual Report 2004 (summary in English).
- Le Conseil de la Concurrence, Synthèse du Rapport Annuel 2004.
- Le Conseil de la Concurrence, Annual Report 2005 (summary in English).
- Le Conseil de la Concurrence, Synthèse du Rapport Annuel 2005.
- Le Conseil de la Concurrence, Annual Report 2006 (summary in English).
- Le Conseil de la Concurrence, Synthèse du Rapport Annuel 2006.
- Le Conseil de la Concurrence, Annual Report 2007 (summary in English).
- Le Conseil de la Concurrence, Synthèse du Rapport Annuel 2007.
- Le Conseil de la Concurrence, Annual Report 2008 (summary in English).
- Le Conseil de la Concurrence, Synthèse du Rapport Annuel 2008.
- Autorité de la Concurrence, Annual Report 2009 (summary in English).
- Autorité de la Concurrence, Synthèse du Rapport Annuel 2009.
- Autorité de la Concurrence, Annual Report 2010 (summary in English).
- Autorité de la Concurrence, Synthèse du Rapport Annuel 2010.
- Autorité de la Concurrence, Annual Report 2011 (summary in English).
- Autorité de la Concurrence, Synthèse du Rapport Annuel 2011.
- Autorité de la Concurrence, Annual Report 2012 (summary in English).

- Autorité de la Concurrence, Synthèse du Rapport Annuel 2012.
- Autorité de la Concurrence, Annual Report 2013 (summary in English).
- Autorité de la Concurrence, Synthèse du Rapport Annuel 2013.
- Autorité de la Concurrence, Annual Report 2014 (summary in English).
- Autorité de la Concurrence, Synthèse du Rapport Annuel 2014.

Press releases
- Autorité de la Concurrence, 'Corporate compliance programmes and antitrust settlements', Press releases 2012, 10 February 2012.

Other
- Europe Economics, 'Etat des lieux et perspectives des programmes de conformite – Une etude realisee pour le Conseil de la Concurrence', 5 September 2008.
- Autorité de la Concurrence, La Consultation Publique Menée Fin 2011 (the public consultation of 2011).
- Autorité de la Concurrence, Antitrust Compliance and Compliance Programs: Corporate Tools for Competing Safely in the Marketplace, English version, 2011.
- Autorité de la Concurrence, 25 Years Autorité (2012).

Competition and Markets Authority

Internal rules & procedural notices
- Office of Fair Trading, Modernization Guideline 2004.
- Office of Fair Trading, Guideline Powers of Investigation, 2004.
- Office of Fair Trading, Guidance Market Investigation References, 2006.
- Office of Fair Trading, Quick Guide to Competition Law Compliance – Protecting businesses and consumers from anti-competitive behaviour, 2009.
- Office of Fair Trading Guidance Director Disqualification 2010.
- Office of Fair Trading, OFT 1227, Drivers of Compliance and Non-compliance with Competition Law, May 2010.
- Office of Fair Trading, Guidance Market Studies 2010.
- Office of Fair Trading, Four Step Compliance Process ('Wheel of Compliance'), 2011.
- Office of Fair Trading, Company Directors and Competition Law, OFT 1340, June 2011.
- Office of Fair Trading, OFT 1341, How your business can achieve compliance with competition law, June 2011.
- Office of Fair Trading, OFT 1270, Competition Law Compliance Survey, Synovate, June 2011.
- Office of Fair Trading, OFT's guidance as to the appropriate amount of a penalty, OFT423, September 2012 – adopted by the CMA board.
- Competition Commission, Guidelines for market investigations: Their role, procedures, assessment and remedies, CC3 (revised), April 2013.
- Competition and Markets Authority, Transparency Statement 2014.
- Competition and Markets Authority, Guidance Markets 2014.
- Competition and Markets Authority, 'Guidance on the CMA's approach to short-form opinions', CMA27, April 2014.
- Competition and Markets Authority, 'Competition Law Risk – a short guide', The Institute of Risk Management, 2014.
- Competition and Markets Authority, Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases, March 2014, CMA 8.

- Competition and Markets Authority, CMA 13, *Vision, Values and Strategy for the CMA*, January 2014.
- Competition and Markets Authority, *Prioritisation Principles*, April 2014.
- Competition and Markets Authority, Board Rules of Procedure 2014.
- Competition and Markets Authority, Cartel Offence Prosecution Guidance 2014.

Speeches and press releases

- Press Release OFT 52/08 of 17 April 2008.
- Office of Fair Trading, Speech by P. Collins, 'Compliance: a key role for Trade Associations in helping business understand and meet their legal obligations', Trade Association Forum annual conference, 4 March 2010.
- Office of Fair Trading, Speech by P. Collins, 'Competition Law: Sanctions, Redress and Compliance', King's College London, 27 June 2011.
- Office of Fair Trading, Speech by J, Fingleton, 'The Economics of Compliance', Brussels, CRA Conference, December 2011.
- Office of Fair Trading, Speech by S. Preece (Deputy Director Competition Policy) 'OFT Competition Law Compliance Initiatives and Resources', 6 March 2012.
- Office of Fair Trading, Positive Impact 12/13 Consumer benefits from the OFT's work, June 2013, OFT1493.
- Speech David Currie, 'The new Competition and Markets Authority: how will it promote competition?', delivered on 7 November 2013 at the Institute of Directors, Pall Mall, London – Beesley Lectures.
- Competition and Markets Authority, Speech by A. Chisholm, 'Achieving a Culture of Compliance', Law Society Competition Section Annual Conference, London, 16 May 2014.
- Competition and Markets Authority, Speech by D. Currie, 'Maintaining open and competitive markets – what boards need to do to keep on the right side of the law', Institute of Risk Management, London, 11 November 2014.

Annual reports

- Office of Fair Trading, Annual Report 2003-2004.
- Office of Fair Trading, Annual Report 2004-2005.
- Office of Fair Trading, Annual Report 2005-2006.
- Office of Fair Trading, Annual Report 2007-2008.
- Office of Fair Trading, Annual Report 2008-2009.
- Office of Fair Trading, Annual Report 2009-2010.
- Office of Fair Trading, Annual Report 2010-2011.
- Office of Fair Trading, Annual Report 2011-2012.
- Office of Fair Trading, Annual Report 2012-2013.
- Office of Fair Trading, Annual Report 2013-2014.
- Competition and Markets Authority, Annual Report 2014-2015.

Annual Plans

- Competition and Markets Authority, Annual Plan 2014-2015, CMA 15, 1 April 2014.
- Competition and Markets Authority, Annual Plan 2015-2016, CMA 52, 1 March 2016.

Other

- Office of Fair Trading, Evaluation of the impact of the OFT's investigation into bid rigging in the construction industry, Europe Economics, OFT1240, June 2010.

- Office of Fair Trading, Annual Report and Resource Accounts, 'Flexibility for changing markets', HC 475, 2008-2009.
- Office of Fair Trading, Annual Report and Resource Accounts, 'Positive Influence', HC 301, 2009-2010.
- Office of Fair Trading, Annual Report and Resource Accounts, HC 23, 2012-2013.
- Competition and Markets Authority, Cartel Enforcement: Lessons from the Commercial Vehicles Case, Competition Law Compliance Briefing, June 2014.

The Netherlands

Internal rules & rules of procedure

- Nederlandse Mededingingsautoriteit, Richtsnoeren boetetoemeting, met betrekking tot het opleggen van boetes ingevolge artikel 57 van de Mededingingswet.
- Vuistregels Informele Zienswijzen, Staatscourant Nr. 2667 24 februari 2010.
- Nederlandse Mededingingsautoriteit, Richtsnoeren voor de Zorgsector, Maart 2010.
- Beleidsregels voor Boete en Clementie, Staatscourant Nr 11214, 24 april 2013.
- Autoriteit Consument en Markt, *Strategie Autoriteit Consument en Markt,* 20 September 2013.
- Autoriteit Consument en Markt, Visiedocument Mededinging en Duurzaamheid, 2014.
- Besluit van de Minister van Economische Zaken van 6 mei 2014, nr. WJZ / 14052830, houdende beleidsregel inzake de toepassing door de Autoriteit Consument en Markt van artikel 6, derde lid, van de Mededingingswet bij mededingingsbeperkende afspraken die zijn gemaakt ten behoeve van duurzaamheid.
- Beleidsregel van de Minister van Economische Zaken van 4 juli 2014, nr. WJZ/14112617, met betrekking tot het opleggen van bestuurlijke boetes door de Autoriteit Consument en Markt.

Press releases

- Press release Nederlandse Mededingingsautoriteit, 'NMa herziet boetes banken en Interpay', 22 December 2012.
- Press release Nederlandse Mededingingsautoriteit, 'Geef alle makelaars dezelfde behandeling op Funda', 8 March 2012.
- Press Release Nederlandse Mededingingsautoriteit, 'NMa start studie naar overstapdrempels financiële producten', 15 June 2012.
- Press release ACM, 'NMa zet samen met LHV nieuwe stappen in huisartsenzorg', 15 October 2012.
- Press release Nederlandse Mededingingsautoriteit, 'NMa herziet boetes banken en Interpay', 22 December 2012.
- Press Release Autoriteit Consument en Markt, 'Meer duidelijkheid in brouwerijcontracten gewenst', 7 June 2013.
- Press Release ACM, 'Private arrangement in Energy Agreement to withdraw production capacity from the market restricts competition', 25 October 2013.
- Press release Autoriteit Consument en Markt, 'NVM vergroot transparantie op Funda', 25 July 2013.
- Autoriteit Consument en Markt, Speech by C. Fonteijn, 'Compliance', International Chamber of Commerce, 24 January 2014.
- Autoriteit Consument en Markt, Speech by C. Fonteijn, 'Compliance is welbegrepen eigenbelang', Vereniging Farmacie en Recht, 29 May 2015.

Annual reports

- Nederlandse Mededingingsautoriteit, Jaarverslag 2004.
- Nederlandse Mededingingsautoriteit, Jaarverslag 2005.
- Nederlandse Mededingingsautoriteit, Jaarverslag 2006.
- Nederlandse Mededingingsautoriteit, Jaarverslag 2007.
- Nederlandse Mededingingsautoriteit, Jaarverslag 2008.
- Nederlandse Mededingingsautoriteit, Jaarverslag 2009.
- Nederlandse Mededingingsautoriteit, Jaarverslag 2010.
- Nederlandse Mededingingsautoriteit, Jaarverslag 2011.
- Nederlandse Mededingingsautoriteit, Jaarverslag 2012.
- Autoriteit Consument en Markt, Jaarverslag 2013.
- Autoriteit Consument en Markt, Jaarverslag 2014.

Agenda's

- Nederlandse Mededingingsautoriteit, Agenda 2004.
- Nederlandse Mededingingsautoriteit, Agenda 2005.
- Nederlandse Mededingingsautoriteit, Agenda 2006.
- Nederlandse Mededingingsautoriteit, Agenda 2007.
- Nederlandse Mededingingsautoriteit, Agenda 2008-2009.
- Nederlandse Mededingingsautoriteit, Agenda 2010-2011.
- Nederlandse Mededingingsautoriteit, Agenda 2012-2013.
- Autoriteit Consument en Markt, Agenda 2014-2015.
- Autoriteit Consument en Markt, Agenda 2016-2017.

Other

- Nederlandse Mededingingsautoriteit, Monitor Financiële Sector 2003
- NMA DTe, CREG and CRE, December 2005 (*Roadmap Energy Regulation*).
- Speech T.B.P.M. Tjin-a-Tsoi, 'Spagaat: beeldvorming en feiten', 27 May 2005.
- Nederlandse Mededingingsautoriteit, March 2007 (*Tweede NMa Spoormonitor*).
- Onafhankelijke Post en Telecommunicatie Autoriteit, Visie op Toezicht en Handhaving, 2008.
- Onafhankelijke Post en Telecommunicatie Autoriteit, Jaarverslag 2008.
- P. Kalbfleisch, speech 'Ontwikkelingen Mededingingsrecht 2009', 9 October 2008.
- H. Don, speech '12e Markt en Mededingingsconferentie', 14 May 2013.
- C. Fonteijn, speech International Chamber of Commerce, 24 January 2014.
- C. Fonteijn, 'De politiek heeft wat te kiezen in de zorg', 22 April 2015.

OTHER SOURCES

European Competition Network

- ECN Model Leniency Programme 2012 revision.
- ECN Cooperation Notice.
- ECN Recommendation on Investigative Powers, Enforcement Measures and Sanctions in the context of Inspections and Requests for Information.
- ECN Recommendation on the Power to Collect Digital Evidence, including by Forensic Means.
- ECN Recommendation on Assistance in Inspections conducted under Articles 22(1) of Regulation (EC) No 1/2003.
- ECN Recommendation on the Power to set Priorities.
- ECN Recommendation on Interim Measures.
- ECN Recommendation on Commitment Procedures.
- ECN Recommendation on the Power to Impose Structural Remedies.

European Ombudsman

- European Ombudsman, FIDE Report 1998, The citizen, the administration, and Community Law, Stockholm 1998.
- European Ombudsman, The European Code of Good Administrative Behaviour (2013), Article 6.

European Court of Justice

- Opinion 2/3 of the Court of 18 December 2014, pursuant to Article 218(11) TFEU, made on 4 July 2013 by the European Commission.

International Competition Network

- ICN Advocacy Working Group, 'Advocacy and Competition Policy', ICN Conference Napels, 2002.
- ICN Annual Conference 2010.

Organisation for Economic Co-operation and Development

- OECD, 'Recommendation of the Council on Improving the Quality of Government Regulation' (1995).
- OECD Reviews of Regulatory Reform: France 2004.
- OECD, 'Guiding Principles for Regulatory Quality and Performance' (2005).
- OECD, Plea Bargaining/Settlement of Cartel Cases, DAF/COMP(2007)38, 22 January 2008.
- OECD Policy Roundtables, Experience with Direct Settlements in Cartel Cases, 2008, DAF/COMP(2008)32.
- OECD, Better Regulation in Europe: France, 2010.
- OECD, Directorate for Financial and Enterprise Affairs- Competition Committee, Promoting compliance with competition law, 30 August 2012, DAF/COMP(2011)20.
- OECD, 'Recommendation of the Council on Regulatory and Policy Governance' (2012)
- OECD, 'Principles for the Governance of Regulators' (2013), draft paper for public consultation.
- OECD Platform Parity/MFN Clauses 2015.

The Netherlands

- NEI Kenniscentrum Markt en Mededinging, *Fusies en Overnames in het Nederlandse Bankwezen: een Instrument voor de NMa*, July 2000.
- Cap Analysis, *Scan van de Nederlandse Bouwsector in opdracht van de Nederlandse Mededingingsautoriteit (NMa)*, 13 juni 2002.
- Framework Vision on Inspection and Supervision (Kaderstellende Visie op Toezicht), 2001.
- Compliance rules of the association of insurance companies (Verbond van Verzekeraars, 2004).
- Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Minder last, meer effect: zes principes van goed toezicht, 2005.
- Algemene Rekenkamer, *Normenkader – Deel functioneren NMa*, 14 April 2006, p. 17.
- Kwink Groep, Evaluatie van de Raad van Bestuur van de Nederlandse Mededingingsautoriteit (NMa) – Eindrapport, TU Delft, 30 Augustus 2010.
- Actiz Jaarkrant 2010, 'Succes, vernieuwing en vertrouwen in de zorg'.
- Compliance program KNMP (2011).
- Regeerakkoord VVD-PvdA, 29 October 2012 (Bruggen Slaan).
- Wetenschappelijke Raad voor het Regeringsbeleid, Toezien op publieke belangen: naar een verruimd perspectief op Rijkstoezicht, Amsterdam University Press, Amsterdam: 2013.
- Visie Markttoezichthoudersberaad: Criteria voor Goed Toezicht, ACM, AFM, CBP, DNB, Kansspelautoriteit en NZa, 23 April 2013.
- Financieele Dagblad, 'ACM onderzoekt afspraken garnalenvissers', 23 October 2014.
- Memorandum of Compliance between KPN and ACM, renewed version of June 2014.

United Kingdom

- Department of Trade and Industry, *Opening Markets: new policy on restrictive trade practices*, CM727, 1989.
- Department of Trade and Industry, *A World Class Competition Regime*, CM5233, 2001
- HM Government, The path to strong, sustainable and balanced growth, November 2010.
- NAO Report 2009, Review of the UK's Competition Landscape.
- Department of Business Innovation and Skills, 'A Competition Regime for Growth: Consultation on Options for Reform', March 2011.
- Department of Business Innovation and Skills, 'A Competition Regime for Growth: Consultation on Options for Reform – Impact Assessment', March 2012.
- BIS Strategic Steer 2015 (Competition Regime, Government's Strategic Steer to the Competition and Markets Authority Consultation July 2015).

Other

- American Bar Association, Report on Antitrust Policy Objectives, 2003.
- Office for the Protection of Competition of the Czech Republic, ÚOHS, Annual Report 2007.
- Global Competition Review, Rating Enforcement 2010, June 2010.
- International Chamber of Commerce, 'Antitrust Compliance Toolkit', 22 April 2013.
- Global Competition Review 2014.

CURRICULUM VITAE

Eva Lachnit was born on 16 November 1988, in Dordrecht. She graduated from Johan de Witt Gymnasium in 2006, after which she started her law studies in Utrecht. Eva participated in Utrecht Law College, the legal honours programme of the department of Law, Economics and Governance. During her studies, she spent a semester in Bologna (Italy), studying political sciences, Roman law and ICT & Law at Università degli Studi di Bologna. She graduated with honours in 2009, with a minor in Italian. After earning her bachelor's degree, Eva started her master's in the field of corporate law and decided to follow up with a master's in European law for which she earned *cum laude* in the course of Utrecht University's Excellent Master Track. After graduating, Eva worked briefly as a junior lecturer in the field of public economic law and started her Ph.D. research in January 2012. During this research, she conducted interviews at the French *Autorité de la Concurrence*, the Dutch *Autoriteit Consument en Markt* and the UK Competition and Markets Authority. She completed research internships with the latter two as well. Currently, Eva works as a lecturer for the department of International and European law. As such she is affiliated with Utrecht University's Europe Institute and is a member of the Utrecht Centre of Regulation and Enforcement in Europe. Outside academia, Eva is active as a teacher and choreographer for her dance teams.