An international comparison of the abuse-of-dominance provision

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Comparing the number of cases in the Netherlands with ten other jurisdictions

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Summary and conclusions

The Netherlands ranks amongst the countries with the lowest number of abuse-of-dominance interventions. This study compares the number of competition law cases concerning abuse of a dominant position in the Netherlands with other jurisdictions. It examines possible explanations for the lower number of interventions in the Netherlands.

First, this report seeks to explain why abuse interventions occurring in four other jurisdictions in 2005-2009 did not occur in the Netherlands. The higher number of interventions in Finland and Germany results mainly from differences in regulation and legislation. The difference with Denmark is mainly due to a difference in enforcement practice. This study explains why the intervention was less likely to occur in the Netherlands for a majority of interventions observed in four jurisdictions.

Second, this report examines macro-data and enforcement characteristics to explain the lower number of interventions. Differences in the tools and resources available to the five competition authorities and their deterrent effects do not explain the relatively low number of Dutch interventions. This report has been unable to conclude whether Dutch firms have violated the abuse-of-dominance provision to a lesser extent, as compared to other jurisdictions. The explanation that the Netherlands Competition Authority NMa chose to intervene in few abuse-of-dominance cases in the period studied, or resolved a relatively high number of cases informally, cannot be ruled out.

The study does not analyse the effectiveness of enforcement; the number of interventions observed in a jurisdiction cannot be used to evaluate enforcement. A low number of interventions may be the result of effective enforcement (or a low number of violations) and a high number of cases may be the result of mistakes (prohibiting behaviour that is not harmful).

The Netherlands ranks amongst the countries with the lowest number of abuse-of-dominance interventions

The Netherlands intervened in one case relating to abuse of a dominant position in the period 2005-2009. Is this number low, compared to other jurisdictions? And if so, what are plausible explanations for the differences? We selected ten jurisdictions that were expected to yield interesting insights: Australia, Canada, Denmark, Germany, European Commission, Finland, France, New Zealand, United Kingdom and United States. The number of interventions was lowest in the Netherlands. Besides the Netherlands, Australia (3) and Canada (4) scored relatively low; France (29), Denmark (19) and Germany (17) had the most interventions.

In relative terms, the European Commission (1) and the US (0.4) score below the Netherlands (2) with respect to the number of interventions per unit of GDP. The UK (3), Australia (4) and Canada (4) scored relatively low as well. New Zealand (130), Denmark (114) and Finland (44) ranked the highest. With respect to the ratio of abuse interventions to non-merger interventions (abuse and cartel), the Netherlands (0.02) scored substantially lower than most other jurisdictions.

The US (0.02) and Australia (0.04) scored low as well. Denmark (0.4) and Finland (0.5) scored the highest.

The higher number of interventions in Finland and Germany mainly results from differences in regulation and legislation. The difference with Denmark seems mainly due to a difference in enforcement practice

To study explanations for differences in the number of interventions, we selected four jurisdictions from the ten mentioned above: Denmark, Finland, Germany and the UK. For a majority of the cases observed in these jurisdictions we have found that they were less likely to occur in the Netherlands.

Regulation, liberalisation and legislation explain a large part of the difference with respect to Germany (13 out of 17 cases) and Finland (4 out 7 cases). In Germany 12 cases were based on a temporary legal provision that is not present in the Netherlands. Four of the Finnish telecom cases would have been dealt with by the telecom regulator in the Netherlands.

With respect to Denmark, the most important explanation seems to be a difference in enforcement practice (8 out of 19 cases). For some decisions, the Danish authority did not analyse the economic effects, whereas other cases could have been addressed with another legal provision (e.g. the cartel prohibition). Our findings that Danish enforcement is relatively form-based are confirmed in literature; a form-based approach may imply that an authority will intervene more quickly. With respect to the UK, we conclude that abuse-of-dominance was less likely to occur in the Netherlands for 3 out of 5 UK interventions.

Tools and resources used by the five competition authorities and their deterrent effects do not explain the relatively low number of Dutch interventions

This study examined macro-data and enforcement characteristics to analyse a number of potential explanations for the lower number of abuse-of-dominance interventions in the Netherlands compared to Denmark, Finland, Germany and the UK. Our analysis indicates that the NMa's powers of investigation do not fall short of those held by the other CAs. We also conclude that the NMa does not lack resources compared to the other CAs and is not less active in pursuing non-merger cases. We find that a larger proportion of investigations lead to interventions for other authorities. The scarcity of Dutch interventions is not likely to be due to a lack of investigations.

Relatively more Dutch cases might have been taken on by the European Commission instead of the NMa. However, we found that the Commission did not investigate Dutch firms in the 2005-2009 period on the basis of abuse-of-dominance. Moreover, private action was unlikely to be a substitute for public NMa enforcement because, although abundant, private cases are generally unsuccessful for the plaintiff. Finally, we found no indication that firms are generally more law abiding in the Netherlands, or that the deterrent effect of enforcement by the NMa is substantially higher than in Finland, Germany or the UK. A lower deterrent effect might be one of the explanations with respect to Denmark because a fine was not imposed in any of the Danish cases.

We have been unable to establish whether fewer violations occurred in the Netherlands

Not only the number of cases on the abuse of a dominant position, but also the number of cartel cases varies a lot between jurisdictions. The NMa intervened in few abuse cases, but in a relatively high number of cartel cases. On one hand, this might indicate that fewer Dutch firms have a dominant position, or that dominant firms choose not to abuse it. On the other hand, it might also indicate that the NMa opts to process a relatively high number of cartel cases (or to resolve abuse-of-dominance cases in an informal way).

With regard to country-specific data, we did not find any indication that there are fewer dominant firms in the Netherlands. Although the Dutch economy's openness to trade suggests geographical markets may be wider, thereby reducing the likelihood that Dutch firms are dominant, this argument applies only to some sectors. In the case-studies we found that 6 cases would have been less likely to occur in the Netherlands because the market is more competitive.

The NMa might have chosen to intervene in a small number of abuse-of-dominance cases in the period studied, or resolve cases informally.

In addition, we cannot rule out that the NMa may have chosen to intervene in relatively few abuse-of-dominance cases or resolve more abuse cases informally. We did not find any particular indication that the NMa's formal priorities are different from other countries. The published policies for handling complaints and prioritisation do not differ markedly between the countries studied. Given these priorities, a relatively higher number of cartel cases may result from the fact that cartel cases are easier to bring than abuse cases. In practice, a competition authority may decide to handle more abuse-of-dominance cases informally, or choose not to intervene in more cases if the courts require a higher burden of proof. We have investigated issues relating to whether the NMa differs in this respect internationally, such as the burden of proof required by courts, but the result is ambiguous.

1 Introduction

> *"Our efforts to find a good balance have resulted in the adoption of the Commission's 2008 Guidance detailing the enforcement priorities for unilateral conduct by dominant firms. The Guidance is based on the principle that all firms, including those that hold a dominant position, are entitled to compete on their merits. What these firms cannot do is use their position to impair competition and harm consumers. It is the likelihood of a negative impact on consumers that governs our enforcement policy. I am aware that finding a good balance between under-enforcement and overenforcement is a challenge that many jurisdictions around the world have struggled with in the past few years. It's not going to be easy to bring these efforts on a global scale, but I encourage everyone to press on. I strongly support a process of gradual, long-term convergence in enforcement standards across the world."*
>
> Joaquín Almunia, Converging paths in unilateral conduct, ICN Unilateral Conduct Workshop, Brussels, 3 December 2010

Investigations of firms with a dominant position are high profile cases. On the one hand, such cases provide for ample publicity (e.g. Microsoft and Google) and the opportunity for authorities to showcase their impact. On the other hand, the cases are often tedious, extend over long periods and involve complex economic and legal reasoning. Cases rely heavily on quantitative data and economic argumentation. The legal questions involved often lack precedent.

The Dutch Ministry of Economic Affairs, Agriculture and Innovation (EL&I) is conducting a study on the effectiveness of the Dutch prohibition on the abuse-of-dominance and, if appropriate, possible measures to improve the effectiveness of this prohibition. At first glance, some countries and competition authorities appear to handle a larger number of abuse-of-dominance cases, however, it is worth gaining greater insight into international differences in order to assess whether this first impression is correct and, if so, determine the causes of these differences. This international comparison will therefore be used for the study conducted by the Ministry. This comparison is to focus on comparing the number of cases; assessing the impact of interventions on welfare is beyond its scope. This must be taken into account when comparing different legislation and enforcement practices between countries. A higher number of cases does not necessarily imply greater effectiveness because this could be the result of over-enforcement (prohibiting actions that are not harmful to welfare).

The competition laws of many OECD countries contain a concept of single firm exploitation of market power or use of improper means of attaining or retaining market power. Typically, an analysis of an abuse-of-dominance involves two distinct parts, determining the status of the firm and evaluating behaviour. Although many jurisdictions use a similar concept, there are differences in legal definitions and/or enforcement practices. This has led the European Commission to strive for convergence. For instance, on 3 December 2010, the European Commissioner for Competition, Joaquin Almunia, emphasised the need for convergence in a speech held at the International Competition Network (cf. the quote above).

Jurisdictions and competition authorities may vary in a number of ways; legal terminology may, for example, differ. Box 1, below, illustrates that these differences do, indeed, exist in relation to the European Union, United States and Australia. Different legal terminology, however, does not necessarily imply that the law will be more or less strict in practice. Differences in strictness do, however, exist. For example, European Member States are not precluded from adopting and applying stricter national laws which prohibit or sanction unilateral conduct. Unilateral behaviour capable of affecting trade between Member States can thus be prohibited by national law, even if it occurs below the level of dominance or is not considered abusive within the meaning of Article 102 (TFEU). Stricter national rules exist in a number of Member States.

The section on abuse of a dominant position of the Dutch Competition Act (article 24) is largely equivalent to Article 102 of the Treaty on the Functioning of the European Union (TFEU), see Box 1 below. However, in contrast to article 102 TFEU, it does not include a specification of possible abusive behaviour and the requirement for the abuse to affect trade between Member States. The Dutch provision is brief in contrast to the German and Danish cases, for example, in which the law specifies more details.[1]

Box 1 Legislation in the Netherlands, EU, US and Australia

Article 24 (The Netherlands)
1. Undertakings are prohibited from abusing a dominant position.
2. The implementation of a concentration, as described in section 27, shall not be deemed to be an abuse of a dominant position.

Article 102 (EU)
Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[1] Gesetz gegen Wettbewerbsbeschränkungen (GWB), § 19 Missbrauch einer marktbeherrschenden Stellung, zie < bundesrecht.juris.de/gwb/BJNR252110998.html#BJNR252110998BJNG005202377 >.

§ 2 Sherman Act (USA)
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 46(1), Trade Practices Act 1974 (Australia)
A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
(b) preventing the entry of a person into that or any other market; or
(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

Competition authorities differ in the discretionary powers at their disposal. Some authorities may be able to dismiss an abuse case, simply on the grounds of their own enforcement priorities. Moreover, competition law and practice does not provide for a uniform measurement of dominance and abuse in a specific case. Different judges and competition authorities might, therefore, come to different conclusions in similar, specific cases. Full cross-country convergence in preventing firms from abusing their dominant positions may, therefore, be very hard to accomplish.[2] It is worth noting the extent of enforcement harmonisation between Member States:
"... the Commission acknowledges that divergences of Member States' enforcement systems remain on important aspects such as fines, criminal sanctions, liability in groups of undertakings, prescription periods and the standard of proof, the power to impose structural remedies, as well as the ability of Member States' competition authorities to formally set enforcement priorities."[3]

The differences between jurisdictions, judges and competition authorities may be useful to discern 'best practices' and may thus be exploited to learn from one another and improve the effectiveness of enforcement. The number of cases and investigations varies between countries. The Dutch Ministry EL&I commissioned SEO Economic Research to provide an international comparison of the prohibition on abuse of a dominant position; an overview of the number of cases for the period 2005 to 2009 and the causes of possible differences.

The research project consists of two parts. Part I provides an overview of cases in the Netherlands and 10 other jurisdictions. It aims to put the number of Dutch cases in an international comparative perspective. In Part II of the project, the differences between the Netherlands and a subset of 4 countries are analysed. The objective of Part II is to identify factors that are most likely to explain why the Netherlands has fewer cases than the four other

2 *"... these differences have significant implications for how cases are eventually enforced by the NCAs"* Cseres, 2010, p. 19.

3 Ibid, p. 19.

jurisdictions. Possible explanations for the observed differences in the number of cases will be discussed and the most plausible explanations identified.

This study answers the following questions, for the period 1 January 2005 to 31 December 2009:

- Part I: How many cases of unilateral conduct were challenged on the basis of abuse-of-dominance provisions in 11 jurisdictions? How many public cases were challenged in court, how many of those were upheld/overturned? How often were stand-alone private actions brought in court?
- Part II: For a selection of four jurisdictions where the authority challenged more cases of unilateral conduct than the Netherlands: what factors might explain the fact that the Netherlands challenged fewer unilateral conduct cases than the four other countries concerned? Alternatively, what factors might explain why cases occurring in the four other countries did not occur in the Netherlands? Which explanations can be supported by the available data?

The method used in this study is as follows:

- Part I (overview of cases in 11 jurisdictions):
  On the basis of desk research and data collection from the competition authorities (CAs) and interviews, we provide an overview of the number of cases investigated, the number of cases leading to an intervention (defined as either a finding of violation or accepting commitments from the undertaking) and the development of cases in subsequent appeal and court review. Additionally, we provide the number of stand-alone private actions for each jurisdiction.
- Part II (explaining the number of cases in 5 jurisdictions):
  - We first provide a conceptual framework that determines the number of interventions; this framework identifies determinants that may differ between jurisdictions. It serves to identify which types of information are relevant for explaining the number of cases;
  - Guided by the conceptual framework, we collected information from literature and interviews with experts. The information collected concerns the characteristics of legislation and enforcement in each jurisdiction, as well as case-specific information.
  - Based on the collected information, we provide explanations as to why the cases challenged in other countries have occurred to a lesser extent in the Netherlands.

1.1 Background

Based on the *Rating Enforcement 2010* of the *Global Competition Review* (GCR), the Dutch Ministry of EL&I made a preliminary selection of ten jurisdictions: Australia, Canada, Denmark, Germany, European Commission, Finland, France, New Zealand, United Kingdom and United States. The *Rating Enforcement* compares the most important competition authorities and grades them on the basis of quantitative and qualitative data (expert opinion, among other things) on a five star scale. It also specifies the number of abuse-of-dominance cases begun, underway and closed in 2008. The Netherlands is one of the countries with the lowest number of abuse-of-dominance cases. Because the *Rating Enforcement 2010* only gives an indication of the number of cases handled by competition authorities in one year and does not contain information on the

number of interventions, only a preliminary selection of jurisdictions has been made on the basis on this publication and the input of competition experts. First, the competition authorities with a grade at least equal to that of the Netherlands Competition Authority (NMa) (three and a half stars) have been identified, to increase the chance of obtaining interesting lessons. Second, from these, the ten economies which are expected to be the most comparable to the Netherlands have been selected.

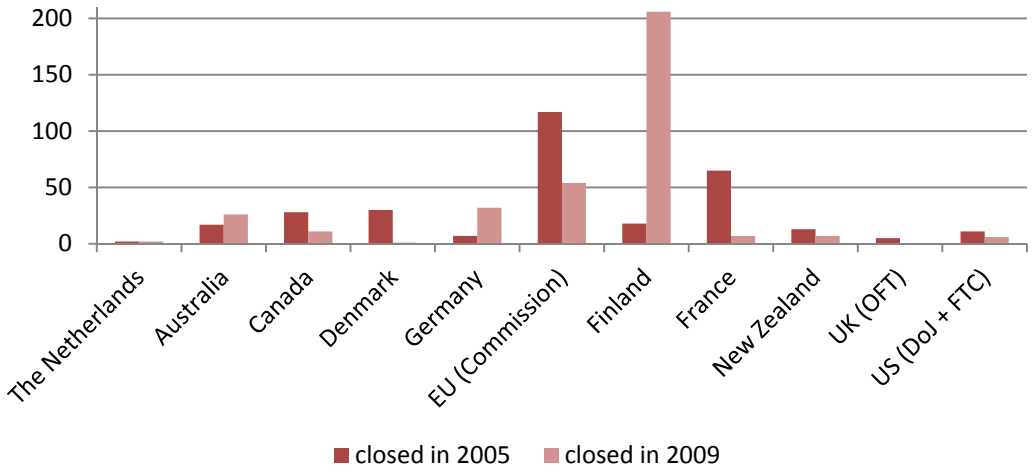
Table 1 and Figure 1 provide an overview of the GCR data on abuse-of-dominance cases for 2005 and 2009. Because of the limitations of GCR data, SEO Economic Research validated the results found by the Ministry, by collecting data directly from the respective competition authorities, using desk research and telephone interviews. Based on this first-hand data, we are able to paint a more precise picture of the number of cases in the Netherlands and the 10 other jurisdictions. Both the overview of the Ministry and our validated overview show that the Netherlands has relatively few abuse-of-dominance cases. On the basis of our results, we recommend choosing a subset of countries to analyse the differences with the Netherlands.

Table 1 Number of cartel and abuse-of-dominance cases (2005 and 2009)

	Cartel cases 2005	Abuse-of-dominance (2005)			Cartel cases 2009	Abuse-of-dominance (2009)		
		Launched	Rolled-over	Cases closed		Launched	Rolled-over	Cases closed
The Netherlands	8	0	5	2	17	1	2	2
Australia	39	12	24	17	6	16	28	26
Canada	5	22	18	28	14	14	15	11
Denmark	4	NA	NA	30	3	NA	NA	1
Germany	41	77	173	7	58	80	48	32
EU (DG Comp)	5	48	135	117	6	67	104	54
Finland	3	32	75	18	0	188	90	206
France	75	30	43	65	11	23	22	7
New Zealand	2	15	18	13	13	7	5	7
UK (OFT)	4	4	7	5	2	1	1	0
USA (DoJ + FTC)	38	10	15	11	37	13	28	6

Source: Global Competition Review

Figure 1 Cases closed in 2005 and 2009 (GCR)



Source: Global Competition Review

1.2 Structure of this report

The structure of this report is as follows:

Summary and conclusions;

1. The introduction (this section) provides the background information to the project;
2. Section 2 provides a quantitative overview of cases in 11 jurisdictions. It concludes whether or not the number of cases is relatively low in the Netherlands;
3. Section 3 then introduces the conceptual framework for explaining the number of cases. The methodology that will be used for analysing these explanations is introduced;
4. Section 4 presents the collected data. Both country-specific and case-specific data is used;
5. Section 5 presents the analysis: which explanations (derived in Section 3) can be supported by the available data (provided in Section 4)?

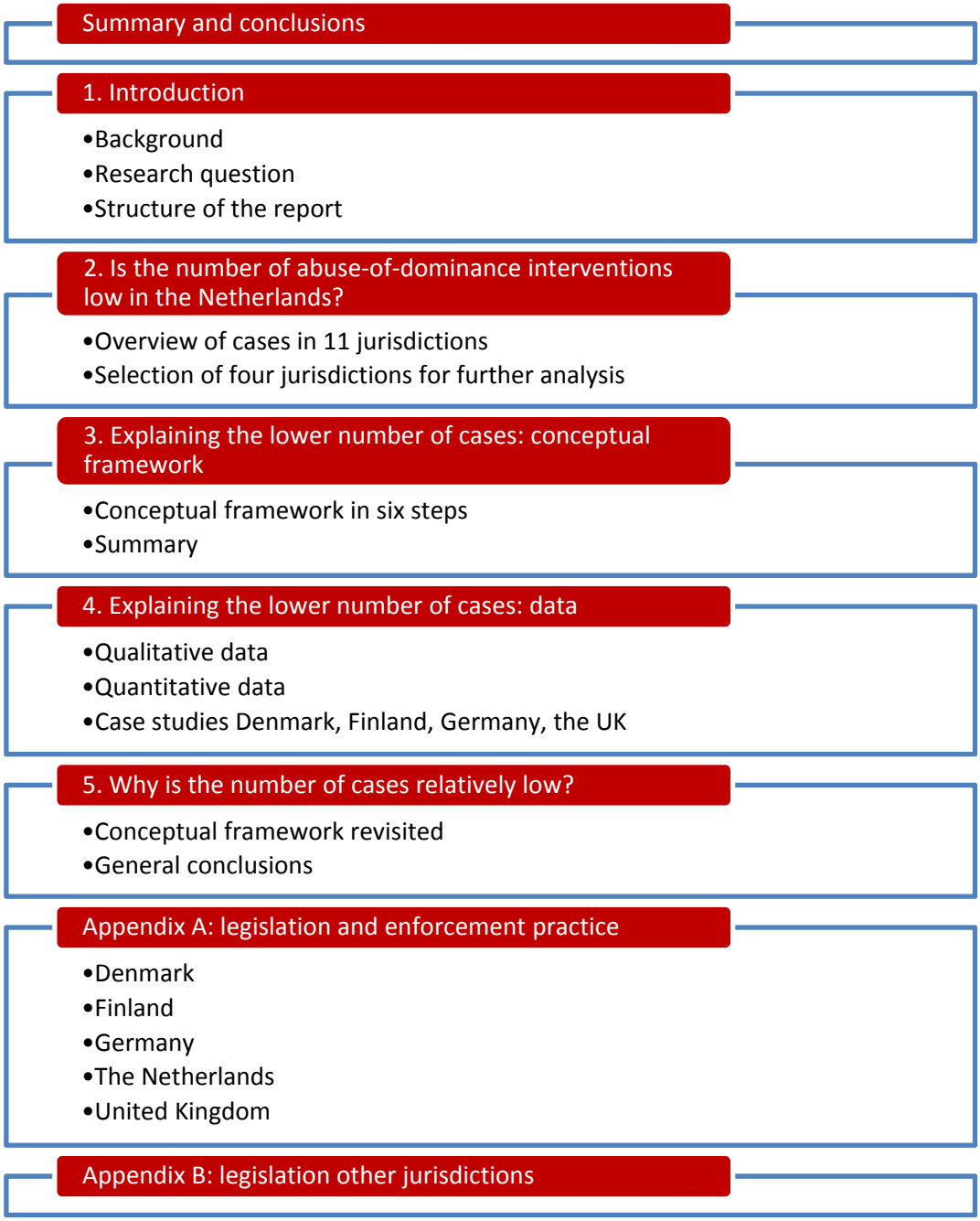
Literature

Appendix A: legislation and enforcement practice in Denmark, Finland, Germany, the Netherlands and the United Kingdom.

Appendix B: legislation in six other jurisdictions.

This structure results in the Reader's Guide in Box 2.

Box 2 Reader's guide to this report



Source: SEO Economic Research

2 Is the number of cases low in the Netherlands?

Is the number of Dutch abuse-of-dominance cases relatively low?

Section 2.1 provides an overview of the number of cases of abuse of a dominant position handled in the period 1st January 2005 to 31st December 2009 by competition authorities in eleven jurisdictions. For each jurisdiction, the number of cases was collected for the relevant legal provision (see Appendices A and B). Section 2.2 discusses the selection of the four jurisdictions to be further analysed in the rest of the report.

2.1 Abuse-of-dominance: public and private actions in eleven jurisdictions

Table 2 below presents the number of investigations, interventions and stand-alone private actions in the selected jurisdictions. In our framework, an 'investigation' relates to efforts made by the CA in relation to detecting and investigating a possible infringement by a firm. A 'sanction decision' or 'intervention' is either a decision that finds an infringement or the acceptance of commitments from the undertaking involved.[4] In both cases, the decision of the CA results in consequences for the firm, either in the form of penalties or behaviour that must be changed.

Which enforcement efforts are counted as an investigation by the CA may vary per jurisdiction. It may therefore be the case that for a similar, specific case, e.g. handling a complaint, one authority would count it as an investigation whereas another authority would not. This limitation in the data implies that the numbers reported should be compared with care. For example, the NMa remarked that the numbers it provided to us are the result of a filtering process in which some cases that were considered less fruitful were excluded. We comment on whether such issues should be taken into account under 'Data limitations' below.

The Netherlands has the lowest number of sanction decisions compared to the other jurisdictions.[5] The number of interventions differs considerably between jurisdictions and ranges from 1 to 29. In addition to the Netherlands, Australia, Canada, the UK and the US show a relatively low number of sanction decisions. The differences here, in the number of investigations between jurisdictions, are even larger and range from 13 to 218. All countries, except the UK,

4 Also, undertakings can, for instance, be forced to stop certain behaviour and publish the ceasing of this behaviour.

5 The intervention reported for the Netherlands is the case *CR Delta* (case number 3353). The first decision in this case originates from 2003, and subsequent decisions on appeal and court review were taken on 25 July 2005 and 6 March 2008, respectively. One could argue that this case should not be counted in the results, since its origin is before 2005. However, excluding the case from the results would not have an effect on the conclusions of this study: all other countries intervened in more cases. In order to allow for a meaningful international comparison, the case is included in the results. This is a conservative approach: if we find that the number of Dutch cases is low when the CR Delta case is included, this conclusion continues to hold when that case is not included.

have conducted more investigations than the Netherlands. The US and Denmark also have a relatively low number of investigations.

The only case brought in the Netherlands was eventually completely overturned by the courts. According to our reading of the case data, only three other jurisdictions have seen a decision completely annulled. One sanction decision in the EC, one in New Zealand and one in the US was overturned by the courts. Stand-alone private actions were seldom brought, except for in the Netherlands, the UK and the US. For New Zealand, the CA estimated that the number of private actions is below 6.

Table 2 The number of abuse-of-dominance cases (2005-2009)

Jurisdiction	**Investigations**	**Sanction decisions**					**Stand-alone private actions**
	Total	*Total*	*Of which uncontested*	*Contested, upheld*	*Contested, overturned*	*Contested, result unclear or mixed*	
Australia*	78	3	n/a	n/a	n/a	n/a	n/a
Canada*	93	4	3	1	0	0	0
Denmark	28	19	12	3	0	4	3
EC**	91	11	6	1	1	3	n/a
Finland	52	7	2	5	0	0	1
France	91	29	15	8	0	6	3
Germany***	218 (358)	17 (24)	16	1	0	0	6
Netherlands	18	1	0	0	1	0	42
New Zeeland	38	13	11	1	1	0	Est. ≤ 5
UK	13	5	4	0	0	1	15
USA (DoJ + FTC)	24	5	3	0	1	1	265
Total	**744**	**114**	**72**	**20**	**4**	**15**	**335**

Source: SEO Economic Research, based on desk research and information provided by competition authorities and legal advisors. The last column includes all cases, regardless of whether an infringement was found. * Investigations based on GCR data. ** Only cases included with art. 102 TFEU as legal basis. The EC reports 20 abuse cases closed by decision but this also includes rejections of complaints. *** Additional legislation between brackets, see table 3 for notes on Germany.

The results were obtained on the basis of desk research, literature review, telephone interviews with the respective competition authorities and contributions from legal advisers. The decision dates of cases were used to determine which cases to include; decisions with a date between 1st of January 2005 and 31st December 2009 were included. This means that cases started in 2004, with a decision in 2006, for example, are included, however, cases started in 2008 with a decision in 2010 are not.

We have also investigated whether public sanction decisions were contested through appeal or judicial review. No time limit was applied to these follow-up cases; if a public decision was contested in 2010, this is counted as well. Note however, that appeals or judicial reviews may take place sometime after the initial decision, even after the moment at which the data was collected. This means that some of the cases that are now listed as uncontested might subsequently have

been contested at a later point in time. For those decisions that were contested, we investigated whether the decision was upheld or overturned. If no information on the outcome was available or the outcome was mixed (the decision was partly upheld and partly overturned), the decision is counted in the column 'result unclear or mixed'.

The last column shows the number of private stand-alone actions we collected. The criteria used for compiling this data were: the date of the first court decision had to have been between 1st January 2005 and 31st December 2009 and claimants had to have claimed that the defendant had breached the abuse-of-dominance provision before a court. Private actions that build on a public infringement decision (*e.g.* to claim damages) are follow-on rather than stand-alone and are not included.

Data limitations

Some limitations were encountered during the collection and investigation of competition law cases from 11 jurisdictions. What are these data limitations and how do they affect the results?

Firstly, the legal provisions on abuse-of-dominance may differ between countries, we therefore started with a review of the legal provisions in each jurisdiction (for results see Appendices A and B). Next, decisions were collected for the relevant legal provisions. For all jurisdictions, except Germany, the provisions on abuse-of-dominance were found to be similar enough for international comparison. The situation in Germany is slightly different however because Germany has enacted legislation that is not present in the other jurisdictions. Table 3, below, therefore explains which German provisions were included in our results and which not.

Secondly, authorities and courts may not necessarily disclose and publish the (full) number of cases and publicly available data sources may therefore be incomplete. Put differently, there may have been cases that were not counted, causing the results to be underestimations. For public cases, this has been addressed by collecting data directly from the competition authorities. It is therefore unlikely that one or more public interventions are unaccounted for in our results.
Private cases may be ruled by several courts in a jurisdiction and information on private cases is therefore fragmented and less complete. No single comprehensive overview of private cases per jurisdiction was available. Whether a case is listed in an information source often depends on its relevance for the legal community. This limitation was addressed by using multiple sources and contributions from legal experts. Some competition authorities were able to provide us the number of private cases in the relevant period.[6] Legal practitioners kindly provided a detailed overview for the UK and the US. For France, Germany and the Netherlands we used publicly available legal sources (e.g. www.concurrences.com and databases published by courts) to obtain an overview of cases. For those countries it cannot be ruled out that some private cases are not included in our results.

Thirdly, which efforts are recorded as an investigation may vary between jurisdictions. This issue explains some of the differences between our results and the results provided by the GCR. This was particularly relevant for Finland; the GCR data counted cases that involved minimal effort that could not be seen as serious cases according to the Finnish CA. The data was purged of these cases using the input from the CA. This was also relevant for the Netherlands; the NMa

6 Canada, Denmark, Finland, New Zealand (estimated).

commented that the number of investigations provided to us was the result of a filtering process in which relatively weak cases were excluded. In some sense, the reported number of 18 investigations can therefore be seen as an underestimate. This issue did not play a role for the other competition authorities.

Finally, whether a case is recorded in a data source may depend on the outcome, e.g. only investigations that lead to a decision are listed. This was the case for the UK as the OFT only counted the investigations that resulted in a decision.

Notes on Germany

In Germany, several legal provisions deal with the behaviour of dominant firms or firms with superior bargaining power, see Table 3. Section 19 is the provision that is most similar to other countries' provisions. In addition, the Bundeskartellamt advised us that for an international comparison it would be appropriate to count cases for Section 29 as well, therefore those cases are included in the main results. The numbers of cases for the other provisions are reported below. Note that for Germany the cases handled by the Landeskartellbehörden are not included in this comparative study.[7] Results on investigations are exclusive of 2009 since that information was not available when the data was collected.

Table 3 Germany: results additional legislation

Germany	Investigations (excl 2009)	Interventions (Sections 20 and 21 excl 2009)
Included in Table 2:		
Section 19 – Abuse of dominant position	190	5
Section 29 – Energy sector	28	12
Not included in Table 2:		
Section 20(1)(2) - Prohibition of discrimination and unfair hindrance	65	3
Section 20(3) - Prohibition of granting of special terms	10	0
Section 20(4) - Prohibition of sale below cost price	24	3
Section 20(6) - Prohibition of discrimination by trade and industry associations	4	0
Section 21(1) - Prohibition of boycott	18	1
Section 21(2)-(4) - Other anti-competitive conduct	19	0
Total	***358***	***24***

Source: Bundeskartellamt. Note: exclusive of cases by the Landeskartellbehörden.

Is the number of Dutch cases low?

Table 2 confirms the preliminary finding of the Ministry EL&I based on the *Rating Enforcement 2010* of the *Global Competition Review*: The Netherlands ranks amongst the countries with the lowest number of public abuse-of-dominance cases. The number of investigations (18) was only lower in the UK (13).[8] All other jurisdictions investigated more cases, from 24 in the US to 218 in Germany. When it comes to the number of interventions, the Netherlands is particularly

7 Including those cases would not alter the insight that the Netherlands has handled few cases compared to Germany. We limited the scope of analysis therefore to the cases handled by the Bundeskartellamt.

8 If we include the UK investigations that did not lead to a decision (5 investigations), the UK and the Netherlands score equal.

noteworthy; only one investigation into abuse-of-dominance resulted in a sanction decision. Eventually this decision was completely overturned by the courts.

How can the figures be put in perspective? First, the number of markets and number of firms holding a dominant position may differ between jurisdictions.[9] It is however unfeasible to measure the number of dominant firms since this depends on the economic context and therefore requires extensive analysis on a case-by-case basis. Yet, a larger country may encompass more markets and hence there are more opportunities for dominance and abuse of market power to occur. The size of a country may therefore provide for a meaningful standardisation of the absolute number of cases. We used Gross Domestic Product (GDP) as an indicator for country size to standardise results.[10] Table 4 presents the number of investigations and interventions per unit of GDP. Second, the total of non-merger interventions (the sum of abuse and cartel decisions) indicates the intensity of enforcement in a jurisdiction, see Table 5. The share of abuse cases in non-merger cases is depicted as the ratio of abuse-of-dominance cases to the sum of abuse and cartel cases.

Both tables confirm our findings that the Netherlands ranks among the countries with the lowest number of abuse cases. With respect to the number of interventions per unit of GDP the Netherlands ranks 9th internationally. Only the EC and the US score below the Netherlands. Thus, the results show that even though the two largest jurisdictions in the sample (the EC and the US) have intervened in more cases than the NMa, in proportion to their GDP they intervened less. Germany, the UK, France, Canada and Australia are larger than the Netherlands too but have also intervened in more abuses of dominance cases relative to their GDP. With respect to the share of abuse-of-dominance cases in non-merger cases, the Netherlands scores substantially lower than almost all other jurisdictions. The US scores similar to the Netherlands and Australia also has a very low number of abuse cases. The table shows that the Netherlands, however, is one of the jurisdictions with a high number of cartel interventions. The number of cartel cases varies a great deal between jurisdictions, ranging from 6 in Finland to 218 in the US. Although the Netherlands is one of the jurisdictions with a high number of cartel interventions, Australia, the US, France and Germany closed substantially more cases.

9 But note that jurisdictions may have different definitions of market dominance and may differ in their opinion on whether or not a dominant position exists in a specific case.

10 Note however that the relationship between GDP and the number of firms holding a dominant position in a jurisdiction is unknown and a correlation may be absent. The relationship does not necessarily have to be increasing.

Table 4 Number of abuse-of-dominance cases per unit of GDP

Jurisdiction	Investigations per unit of GDP	Interventions per unit of GDP	Rank of interventions
Australia	115	4	6
Canada	91	4	7
Denmark	167	114	2
EC DG COMP	8	1	10
Finland	326	44	3
France	53	17	4
Germany	96	7	5
Netherlands	***34***	***2***	***9***
New Zealand	380	130	1
UK	7	3	8
US (DoJ+FTC)	2	0.4	11
Total (sum of jurisdictions' GDPs and interventions)	**23**	**4**	

Source: SEO Economic Research, based on <stats.oecd.org>, VPVOB, USD constant prices, constant ppp, OECD base year (2000). For the denominator the 5-year average GDP (divided by 1,000,000) was used. In 2005 and 2006, the EU had 25 Member States; this has been corrected for by subtracting the new Member States' GDP in 2005 and 2006.

Table 5 Abuse and cartel interventions

Jurisdiction	Abuse interven-tions	Cartel interven-tions	Total (non-merger interven-tions)	Share of abuse	Source cartel interven-tions	Notes cartel interventions
Australia	3	80	83	0.04	GCR	
Canada	4	36	40	0.10	GCR	
Denmark	19	28	47	0.40	CA Denmark	Number of cartel cases dealt with by the Danish Competition Counsel
EC	11	32	43	0.26	EC website	Cartel cases
Finland	7	6	13	0.54	GCR/FCA	Proposals for fines
France*	29	104	133	0.22	GCR	
Germany	17	58	75	0.23	Bundeskartellamt	Decisions with sanctions, commitment decision and orders
Netherlands	1	57	58	0.02	GCR/NMa	Cartel decisions including compliance program and commitment decision
New Zealand	13	24	37	0.35	GCR	
UK OFT	5	12	17	0.29	OFT	
US (DoJ+FTC)	5	218	223	0.02	GCR, FTC	DoJ: cartel decisions, FTC: consent orders
Total	**114**	**655**	**769**			

Source: SEO Economic Research. * For 2005 & 2006 the number for DGCCRF is used instead of the France Competition Council (CC). For the CC, the number of cartel decisions was 24 in 2006 and 44 in 2005.

For the jurisdictions and the time-period studied, the Netherlands also ranks among the countries with the lowest share of investigations leading to an intervention. For the total of 11 jurisdictions analysed, we identified a total of 744 investigations carried out by competition authorities, see Table 2. From those 744 investigations, 114 resulted in an intervention (defined as a violation decision or the acceptance of commitments). Thus, on average about 7 investigations resulted in 1 sanction decision. For the Netherlands only 1 of 18 investigations resulted in an intervention. Australia, Canada and Germany also had a relatively high number of investigations relative to interventions. Denmark, France, New Zealand and the UK by contrast, obtained interventions with relatively few investigations.

Of the 114 sanction decisions in these jurisdictions, 39 were contested and 4 were overturned in court. A relatively large number of the sanction decisions in Finland, France and those made by the EC have been contested. In Finland all were upheld. For Denmark, the EC and France a number of reviews or appeals ended in an unclear or mixed outcome. The Netherlands is the only jurisdiction in the 2005-2009 period where every intervention was contested and overturned. However, this finding is based on only one intervention and caution is therefore warranted when deriving conclusions about the robustness of NMa decisions in relation to court review.
The EC, New Zealand and the US also saw one of their interventions overturned by the courts.

Interestingly, the number of stand-alone private actions in the Netherlands is high compared to the other jurisdictions, with the exception of the US.[11] For every public investigation, there were more than 2 private cases in the Netherlands; for the US this equals 11. The result for the total of 11 jurisdictions is 0.5 private cases for every public investigation. Without the US, the ratio equals about 0.1 private cases for each public investigation.
We noted above that for the Netherlands, France and Germany the number of private cases may be underestimated, due to data limitations. This is not the case for the other countries.[12] This means that we can conclude that private enforcement is more frequent in the Netherlands compared to Canada, Denmark, Finland, New Zealand and the UK.

We have reviewed the 42 private cases in the Netherlands. In many of these cases the abuse-of-dominance provision is not the claimant's main argument. Our analysis concludes that none of the 42 cases led to an infringement of the abuse-of-dominance provision.[13] We thus deduce that the number of public and private cases leading to enforcement of the abuse-of-dominance provision is low in the Netherlands (cf. part I of the research question).

Can the high number of private cases in the Netherlands explain the low number of public interventions (cf., part II of the research question)? The main analysis of possible explanations for the low number of Dutch infringements is discussed in the following sections of this report. However, the role of private enforcement will already been addressed here. It is useful to address two possible hypotheses. First, does the incidence of private enforcement indicate that the public

11 A possible explanation for the high incidence of private enforcement in the US is sometimes given by reference to a 'claim culture'.
12 For Australia no information was available.
13 Interestingly, private enforcement was more successful in the UK in the period studied. From the 15 cases, 4 were at least partly successful. A relevant distinction in this respect is probably between Common Law and Statutory Law. Contrary to the Netherlands, the UK has a Common Law system. Common law is law developed by judges through the decisions of courts rather than through legislative statutes. That may imply that civil courts are more experienced in deciding competition related disputes.

route is not effective? If this were the case, one would expect that claimants could successfully pursue cases in court. We found that none of the 42 cases led to an infringement. This does not suggest that the NMa has ignored cases.[14] Therefore, although we did not have data to formally test this hypothesis, it is unlikely that public enforcement is less effective as compared to private enforcement.

Second, does the incidence of private cases suggest that affected parties preferred the route of private enforcement over filing a complaint with the competition authority, i.e. implying that the NMa received relatively little input on which to build cases? Again, we did not have data to formally test this hypothesis. This is, however, unlikely to be the case. First, the NMa received at least 76 complaints in the 2005-2009 period.[15] Second, it does not seem rational for a victim of an alleged abuse to not file a complaint when it pursues private enforcement; if a complaint is not filed it could work as a disadvantage in court. Moreover, filing a complaint does not involve a great deal of resources, hence, it is unlikely that the incidence of private enforcement means that the NMa has received few complaints. Consequently, the incidence of private cases in the Netherlands does not provide a plausible explanation for the low number of interventions in the Netherlands.

The remainder of this report will focus on explaining why the number of interventions in the Netherlands (1 NMa intervention) is lower than in other countries.

Conclusion

Based on a preliminary quick-scan, the Ministry of EL&I concluded that the number of cases on the abuse of a dominant position is relatively low in the Netherlands. In this study we have investigated this matter more thoroughly. Our results show that for some countries, the GCR data that was used in the ministry's quick-scan were incomplete. Our results are based on more detailed data, obtained directly from the respective authorities. On the basis of our primary data collection, we have compared 11 jurisdictions in a number of ways and our results confirm that the Netherlands ranks among the countries with the lowest number of abuse-of-dominance cases. In absolute as well as relative terms, the number of public investigations and sanction decisions is low in the Netherlands. However, the number of investigations in the Netherlands is higher than in the UK and the number of interventions in proportion to GDP exceeds the scores of both the EC and the US.

The success of Dutch decisions in court review is difficult to compare with other jurisdictions because the Netherlands had only one sanction decision in the 2005-2009 period. It appears that private enforcement is attempted frequently in the Netherlands, though these attempts are unsuccessful. Although the number of Dutch private actions is high compared to the number of public investigations, it is unlikely that private cases explain the infrequency of public enforcement.

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14 A CA has greater investigative powers than a private party does. Thus, if a claimant could establish an infringement decision in a private action, the case would arguably have been relatively easy for the CA to make.

15 Based on information provided by the NMa, exclusive of 2006 due to a data gap.

2.2 Selection of four jurisdictions for comparison

The objective of the second part of this study is to explain why the number of cases is lower than in other countries. For this part of the study, we selected four jurisdictions from those in table 2 for a comparative analysis. This section describes how that selection was made.

Four jurisdictions were selected for further analysis in order to obtain valuable insights. Various explanations will thus be assessed. The starting point for the selection was to select the highest ranking countries from Table 4. There were a number of issues to consider. The three smaller jurisdictions feature in the top-3 in table 4. We decided to include Denmark and Finland in the sample, however, New Zealand was not included due to the low degree of international trade, compared to the Netherlands. A low degree of international trade could point to smaller geographical markets and New Zealand could therefore deliver somewhat less valuable insights. France was not selected due to a lack of availability of case information in English. The UK was preferable to Australia and Canada due to the higher ratio of interventions to investigations. This resulted in the following selection:

- Denmark;
- Finland;
- Germany;
- United Kingdom.

3 Explaining the lower number of cases: conceptual framework

What factors determine – in theory – the number of interventions observed in a jurisdiction? How can these determinants explain the low number of interventions and what methodology is used in this report?

3.1 Conceptual framework

As mentioned in Section 1, jurisdictions and competition authorities may differ in a number of ways. As a result, there are a great many factors that may explain the differences in the number of abuse-of-dominance cases between jurisdictions. Some of these factors are interrelated. For example, a relative lack of resources might be an explanation for a low number of cases. However, resources might not be required if there are simply fewer violations of competition law (for example, because the competition authority is known to be highly effective in its enforcement). Some differences between jurisdictions may prove to be irrelevant factors in practice. For example, differences in legal terminology do not necessarily imply that the law will be more or less strict in practice. Because it is difficult to gain a clear view of all possible factors, their relevance and interrelations, a conceptual framework that sheds light on the determinants of the number of cases is needed. That framework minimises the possibility that relevant explanations are overlooked and will tell us what data and information to look for.

Basically, a sanction decision (minimally) involves a competition authority (henceforth CA) or court judging a firm to be dominant and to have violated the abuse-of-dominance provision. What is judged to be dominant and/or abuse may differ between jurisdictions because of different legal definitions, enforcement practices and economic contexts. Moreover, even when the legal definition, the enforcement practice and the specific economic context of a case is equal between two jurisdictions, competition authorities and courts might differ in their opinion on whether dominance and/or abuse occurred. Many jurisdictions, and certainly the jurisdictions studied in this international comparison, share a similar concept of abuse-of-dominance which is enforced by a competition authority (as explained in Section 2, private enforcement is not considered in the remainder of this international comparison). Starting from this, we can identify six 'steps' involved in a sanction decision on which jurisdictions can differ, causing the number of cases to vary (note that these are not actual consecutive steps but the conceptual building blocks of a sanction decision):[16]

1. There is a dominant firm:
   The number of potentially dominant firms in a jurisdiction depends on many factors that, together, define the relevant markets and the extent of market power the companies in those markets possess. An economy's structure, size or openness to trade can be such that

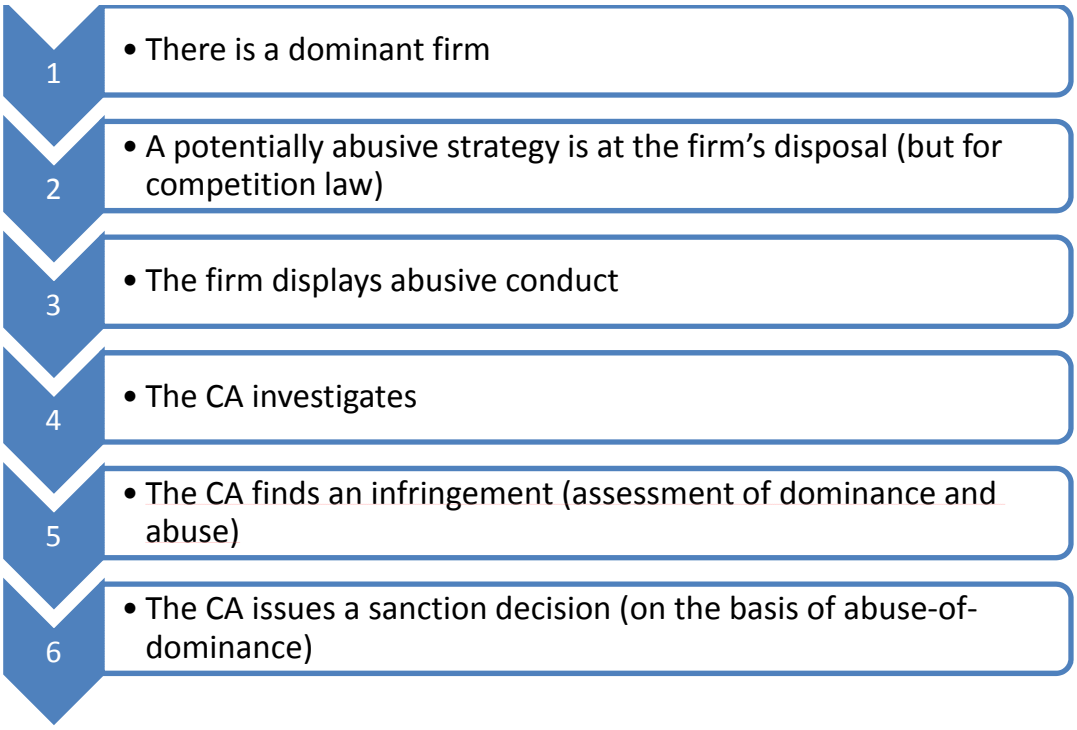
[16] Strictly speaking, condition 6 is, by definition, sufficient to obtain a decision. In theory, an authority could issue a decision without having detected or assessed any actual firm behaviour.

dominance is less or more likely to occur. In addition, what is seen as dominance might differ due to a difference in legislation and/or enforcement practices (see step 5).

2. A potentially abusive strategy is at the firm's disposal:
   The firm must be 'free' from regulation that would block the abusive strategy prior to competition law enforcement. For example, ex-ante regulation may block firms from infringing competition law.
3. The firm displays abusive conduct:
   The number of potential violations of the abuse-of-dominance provision in a jurisdiction depends on three interrelated factors. Firm behaviour might be different; for example, firms might be more law abiding of their own accord or due to the greater deterrent effect of enforcement. In addition, what is seen as abusive conduct might differ due to a difference in legislation and/or enforcement practices (see step 5).
4. The CA investigates:
   After receiving complaints or as a result of its own research, the CA investigates a potential abuse-of-dominance case. Even if the number of potential abuse-of-dominance cases is hypothetically equal, the number of investigations may differ. First, for various reasons, the CA may not be aware of potential abuse-of-dominance because it receives fewer complaints or is ineffective in detection, for example. Second, a CA might decide not to start an investigation for reasons such as its prioritisation policy and/or a lack of resources.
5. The CA finds an infringement:
   During its investigation, the CA makes an assessment of the market position and conduct of the firm(s) and then gathers evidence. What is seen as dominance and/or abusive conduct and how it has to be proven might differ as a result of a difference in legislation and/or enforcement practices (note the connection with step 1 and 3). It can also be influenced by the courts; for example, it might be more difficult to find an infringement if the burden of proof required by the courts is higher.
6. The CA issues a sanction decision:
   The CA issues a formal infringement decision or accepts commitments with the abuse-of-dominance provision as a legal basis. Alternatively, the CA may opt to address the conduct with another provision (e.g. the cartel prohibition), use another authority or close the case informally (i.e. not intervene at all).

Note that both under and over-enforcement are possible in this scheme. This study only compares the number of cases and not the effectiveness of jurisdictions; it is beyond the scope of this study to determine whether or not the 'correct' judgment has been made in each case. Relatively strict legislation and enforcement practices might increase the number of cases at the cost of punishing pro-competitive behaviour. Therefore, a higher number of cases does not necessarily imply greater effectiveness. This should be taken into account when comparing the jurisdictions' different approaches. The six steps are summarised in Figure 2 below.

Figure 2 From economic activity to an abuse-of-dominance decision in six steps



Source: SEO Economic Research

As will be discussed below, these steps are interrelated. The purpose of describing the process in Figure 2 systematically is to minimise the possibility that relevant explanations are overlooked. Each *step* results in a *determinant* that may explain the *number of cases* in a jurisdiction, see Table 6. Accordingly, each determinant provides for an *explanation* for the *infrequency of cases*. When a country scores relatively low on one or more of the determinants, the number of interventions may be lower.

The first column lists the six steps that were introduced above. The second column is the determinant that results from that step. For example, step S1 results in an overview of the number of firms in a jurisdiction that are (assessed as) dominant in their respective markets, labelled D1. D2 indicates how many abusive strategies are available for dominant firms and D3 how many of those are actually displayed.

Table 6 Explaining the number of abuse-of-dominance interventions in a jurisdiction

Step	Determinant	Explanation for relatively low number of interventions in a jurisdiction
S1: There is a dominant firm	D1: No. of dominant firms in a jurisdiction	E1: There are few dominant firms
S2: A potentially abusive strategy is at the firm's disposal	D2: No. of abusive strategies in firms' choice sets	E2: Dominant firms do not have abuse at their disposal due to legal barriers
S3: The firm displays abusive conduct	D3: No. of violations in a jurisdiction	E3: Dominant firms do not display the abusive strategies at their disposal due to preferences, *e.g.* poor cost-benefit ratio
S4: The CA investigates	D4: No. of violations of which the CA becomes aware	E4: The CA is not effective in detecting violations (incl. through complainants), parties resolve disputes bilaterally
S5: The CA finds an infringement	D5: The no. of cases that are assessed as anti-competitive	E5: The CA's discretionary leeway, as compared to other jurisdictions, implies that fewer cases are considered anti-competitive, the CA makes type II errors, low prioritisation
S6: The CA issues a sanction decision	D6: No. of cases that lead to a formal intervention (observable)	E6: The CA addresses anti-competitive conducts informally, due to other preferences and the risk of court review, or with another legal provision

Source: SEO Economic Research

The low number of interventions can be explained by a low score on a determinant, and this is labelled an explanation in the third column in Table 6. In the remainder of this section each explanation will be discussed. For each explanation, it will be indicated how it will be analysed in this report.

A few remarks must be kept in mind. First, the explanations are of a theoretical nature and some cannot be analysed with the available data. Second, the distinction between these six steps is not clear-cut. For example, the resources of a CA play a role in the detection of conduct, but also in the processing of complaints, case assessment and case resolution. Third, there are numerous interactions between the determinants. For example, a dominant firm will take the response of the CA into account and a CA will take the response of the courts into account. Related to this, a country may differ from the Netherlands in more than one of the six determinants. With regard to the explanations that cannot be analysed it is important to know whether they might be relevant and whether efforts should be made to improve data availability for future research. Because of the limitations of the data and the conceptual framework, it is not useful to draw conclusions that are subject to the *all other things being equal* condition. Therefore, we use a range of data (country and case data) and will not only study the possible explanations in isolation but also as a whole, to come to the most likely causes of differences in the number of cases.

Box 3 Summary theoretical framework: step – determinant – explanation

By systematically describing the **steps** that lead to an intervention, a comprehensive overview of the determinants of the number of cases in a jurisdiction is obtained.
Each step in that process yields a **determinant** of the number of cases. A low score on a determinant provides for an **explanation** for the infrequency of cases.

Source: SEO Economic Research.

3.1.1 There are few dominant firms

For a violation of competition law to occur, economic activity is required, see also Section 2. The volume of economic activities within a jurisdiction may therefore influence the number of violations and, therefore, the number of enforcement decisions. For example, suppose there is a (hypothetical) jurisdiction that does not contain any firms. In that case, one would expect the number of violations to be nil. Next, imagine the economy of the United States. The sheer volume of economic activities and business practices would lead one to expect the number of violations of competition law to *exceed* nil. The more business activities take place, the more activities can be assessed as violations. The shape of the relationship between economic activity and violations is, however, unknown and does not have to be monotonous; a smaller economy may display more violations than a larger one if, for example, the firms in the larger country are more law abiding.
The above holds for a violation of competition law in general. For a violation of the abuse-of-dominance provision, dominance is a requirement. The establishment of dominance is part of the idiosyncratic assessment by the CA. In a jurisdiction with no business activity, one would expect the number of dominant firms – and therefore the number of violations – to be nil. Conversely, in a large economy some firms could be considered as being dominant. The more firms in a jurisdiction have a dominant position in their respective markets, the more firms are 'qualified' to violate the abuse-of-dominance provision. Again, the relationship between the number of dominant firms and the number of violations is unknown; it does not have to be increasing, nor monotonous.
Whether firms are dominant in their respective markets depends *inter alia* on the structure of an economy, and the openness to trade. The number of firms in a jurisdiction that are dominant in their respective markets is therefore an important factor in explaining the number of potential violations, and hence, the number of public interventions.[17]

Method

How can this determinant of the number of cases be analysed? A first indication of dominance is the concentration of a sector (Motta, 2004). Ideally, one would look at a measure of concentration for the whole economy, compile an overview of all firms in the economy and count the number of firms that are dominant in their market.[18]

17 Note that the relationship between the volume of economic activity and the number of firms dominant in their respective markets is unknown and not analysed in this study. Opposing effects might be at work. First, due to economies of scale, smaller economies might be more concentrated than larger economies, and hence, embody more companies with a dominant position. Second, smaller economies might be more open to trade, causing the relevant markets to be wider and the number of dominant firms to be lower.

18 Note that whether a firm is dominant and violates the law or not is decided by the CA. Throughout, we abstract from this assessment by the CA. That determinant is discussed later in Step 5.

This is however not feasible. In this study, we first look at two measures that may approximate the number of firms that are dominant on their respective markets: GDP and the total number of firms. Both measures are imperfect approximations; the number of dominant firms does not have to increase GDP or the number of firms. Yet, if a positive correlation could be found, it would provide a useful initial indication that the Netherlands has fewer cases because there is less firm activity. Second, we analyse the cases that occurred in the other jurisdictions and compare this with the corresponding Dutch sector; if the Dutch sector is organised more competitively this would explain why the case was less likely to occur in the Netherlands. Table 7 summarises the method used for analysing Explanation 1.

Table 7 Summary explanation 1: There are few dominant firms

Variable	Relevance	Method	Data
Economic activity / no. of dominant firms	High volume of activity may explain higher no. of dominant firms/ no. of violations	Proxied by GDP and no. of firms. Note: imperfect proxy	Country
Concentration of the economy	Higher concentration may indicate higher no. of dominant firms	Survey data from World Economic Forum	Country
Case study: are the relevant sectors in other countries' cases concentrated in the Netherlands as well?	If not, that explains why a similar case did not occur in the Netherlands	Case study	Case

Source: SEO Economic Research

3.1.2 Dominant firms do not have abuse at their disposal

Whether the behaviour of a dominant undertaking leads to a violation of the abuse-of-dominance provision depends on the extent of regulation and liberalisation of the sector in which it operates. First, when an incumbent operator in a network sector does not have to face entrants due to legal barriers, there is no case for exclusionary behaviour. In contrast, when a sector is liberalised, former monopolists may face potential entrants and may have an incentive to delay the entry or force the exit of rivals (Motta, 2004, p. 411). Sectors with strong tendencies for concentration (such as network sectors) may be liberalised to varying extents and this may explain the incidence of abuse in a jurisdiction. Second, the strategies of a dominant firm might be regulated *ex ante* (e.g. in telecoms, energy or rail transport). When specific potentially abusive behaviour is blocked by other types of regulation, a firm cannot violate competition law. The behaviour would be blocked by other regulation, and could therefore not lead to a breach of the abuse-of-dominance provision. An example is excessive pricing: when the price a firm charges is regulated *ex ante* with a price cap, it is less likely that the price can reach an abusive level.

Hence, variations between jurisdictions in liberalisation and regulation of economic activities are an important determinant of the number of (potential) violations, and thus, the number of public interventions.

Method

How can this determinant of the number of cases be analysed? Ideally, one would compile an overview of all the dominant companies in the economy (see Determinant 1 above) and analyse

which abusive strategies would be at each dominant firm's disposal. In this overview, a company that does not face potential rivals (due to legal barriers, for example) would not have exclusionary behaviour in its choice set. Similarly, a company that is regulated on price would not have excessive pricing in the choice set.[19] This overview would thus provide the number of abusive strategies in the dominant firms' combined choice sets.
If the resulting number of available abusive strategies was low for the Netherlands, compared to other countries, this would imply that there are fewer potential violations, and hence, less potential for cases. This result would provide a plausible explanation for the low number of interventions.

However, it is not possible to provide an overview of dominant firms in a jurisdiction and the number of abusive strategies in their choice sets. Nor is it useful to simply count the number of regulated industries if the potential for abuse that these industries harbour is unknown. In this report we therefore look at the cases that occurred in the other countries and analyse whether the corresponding businesses in the Netherlands would have had the infringing strategy at their disposal. This analysis may reveal that an infringement occurring in a particular industry in another country was less likely to have occurred in the Netherlands. Such a finding would provide an important explanation for the low number of interventions in the Netherlands.
In theory, this analysis would have to be completed with the reverse exercise, i.e. which Dutch industries (that did not yield cases in the Netherlands nor in the other jurisdictions) are organised in such a way that abuse was *more* likely to occur compared to those industries in other countries? Such an analysis, however, would involve analysing all industries in all jurisdictions and this is not feasible.
Table 8 summarises the method.

Table 8 Summary explanation 2: Dominant firms do not have abuse at their disposal

Variable	Relevance	Method	Data
Are the abusive strategies in other countries' cases available to Dutch businesses?	If not, this explains why a similar case did not occur in the Netherlands	Case study	Case

Source: SEO Economic Research

3.1.3 Dominant firms do not display the abusive strategies at their disposal

The next step necessary for a violation (and hence, a subsequent intervention) is that a firm displays the abusive conduct.[20] Making a rational decision, firms would weigh the costs and benefits of the strategy. Benefits would include the net effect on profits or other commercial targets, and costs would include the risk of detection and resulting losses such as fines, as well as the disutility of breaching the law (Becker, 1968).
The main rationale behind law enforcement is indeed deterrence: influencing the behaviour of firms in such a way that violations do not occur (Buccirossi, 2011). Firm behaviour is therefore a crucial determinant of the number of violations and CA decisions. Note that detection depends

19 Assuming that the ex ante regulation is implemented in such a way that it prevents excessive pricing.
20 Note that whether a dominant firm violates the law or not is decided by the CA. Throughout, we abstract from this assessment by the CA. That determinant is discussed later in Step 5.

not only on the CA but also on the responses of the parties affected (customers, suppliers or rivals), i.e. their opportunities to influence the CA through complaints.
The extent to which firms appraise costs and benefits will vary. The deterrent effect of enforcement depends *inter alia* on the probability of conviction and the resulting fines. Managers may be unaware of competition law, or, in general, firms may simply not act rationally. The anti-competitive nature of a specific conduct may be unknown without sound analysis or guidance. The preference for complying with the law may or may not be present. In theory, these variables will affect whether a violation occurs. These variables are firm-specific and, at jurisdiction-level, differences may therefore be levelled out.
Thus, when these variables differ between jurisdictions, they provide an explanation of the number of cases. First, when business culture is such that firms are law abiding, the number of violations will be lower. Second, where the legal community provides for sound guidance, the number of violations will be lower. Third, where the authority has a reputation for detecting and punishing infringements, the number of violations may be lower. Fourth, the net profit of an abusive strategy depends on the expected responses of other market participants. Aggressive behaviour towards a rival may be suboptimal when firms meet in multiple markets. Exploiting a supplier may lead to bad publicity when NGOs focus on fair prices for small, primary (*e.g.* food) producers. Predatory pricing leads to a short-term profit reduction and this may not be sufficiently recouped on the long term. These issues are highly case and firm-specific and can therefore hardly be linked to a country or jurisdiction. Put differently, these issues could be seen as 'noise'.

Method

How can this determinant be analysed? If data was available on these variables, it might provide an explanation of the low number of cases in the Netherlands. If, for example, one found that the deterrent effect in the Netherlands is higher than in other countries, this would explain the infrequency of cases; firms do not violate the law due to the risk of NMa enforcement. Similarly, if Dutch business culture implied that Dutch firms are more law abiding than firms in other jurisdictions, this would yield an explanation as well. Alternatively, business culture could imply that Dutch firms have a preference for colluding with their rivals, instead of excluding them. These explanations are purely hypothetical, yet it is important to be aware that corporate culture may explain differences in firm behaviour between jurisdictions.
The variables sketched above are firm-specific and can hardly be measured on firm-level, let alone for all firms in a jurisdiction. The only scope for analysing firm behaviour is through available macro-data. In this report we review the available data on the deterrent effect. For the other variables, no data is available. Table 9 summarises.

Table 9 Summary explanation 3: Dominant firms do not display abusive strategies

Variable	Relevance	Method	Data
Pay-off of abuse	The higher the pay-off, the more violations	Firm-specific, therefore n/a	n/a
Deterrent effect	The higher the deterrent effect of enforcement, the lower the no. of cases	Index of deterrent effect, level of fines	Country-specific
Preference for compliance	The higher the disutility of breaching the law, the lower the no. of violations	World Bank data on compliance	Country

Source: SEO Economic Research

3.1.4 The CA does not investigate

The next step necessary to obtain an enforcement action is that the competition authority becomes aware of the (potential) violation and starts an investigation. Generally speaking, there are two channels through which an investigation is initiated: (i) receiving a complaint and (ii) an *ex-officio* investigation.

The quantity and quality of information an authority receives may differ between jurisdictions. In addition, authorities may differ in their capabilities to handle and interpret the information at their disposal. The following issues may vary between jurisdictions, providing possible explanations for the number of cases:

Information through complainants:

- The number of complaints received;
- The usefulness of the complaints (e.g. the detail necessary to build a case);

Powers of investigation, resources and prioritisation:

- The powers of investigation;
- The resources, such as staff, available for abuse-of-dominance cases, in terms of quantity and quality;
- The importance of abuse-of-dominance in the prioritisation policy of the CA.

Method

How can these variables explain the low number of cases in the Netherlands? First, if the number of received complaints is low in the Netherlands (compared to the other jurisdictions), this would mean that the NMa has less input on which to build cases.[21] Of course, this result would beg the question *why* the number of complaints is low in the Netherlands. What incentives are there for complainants to complain?[22] Do the affected parties settle the dispute in another way, e.g. through private enforcement, or do they use the complaint as a threat in bilateral contact? Or are there simply fewer violations occurring? It is important to bear in mind that these issues may play an important role in the number of complaints a CA receives, and hence, how many cases it can challenge.

The above also points to the fact that all the steps discussed here are interrelated; whether a firm chooses an abusive strategy depends on the likelihood of the abused party complaining to the authority. Whether an affected party complains to the CA depends on how it expects the CA to respond, et cetera.

Second, how a complaint is dealt with by the CA depends on the importance it attaches to the conduct in question. This of course involves the preliminary assessment of the complaint, which will be further discussed in Step 5 below. An authority may simply not attach importance to complaints about e.g. excessive pricing or margin squeeze, if it believes those types of behaviour do not lead to consumer harm. If the Netherlands differed in this respect from other CAs, this would provide an explanation for the low number of cases.

Third, the availability of resources plays an important role for both handling complaints and *ex-officio* investigations. The effect of resources works in two opposing directions. The more resources available for abuse-of-dominance provision, the more cases can be investigated. Yet, it can also be argued that scarcity of resources might induce an authority to analyse a complaint superficially and proceed relatively quickly to accepting commitments. Note that the CA's resources typically have to be allocated between cartel control, merger control and abuse-of-dominance. Hence, the more resources spent on cartels and mergers, the lower the level of resources are available for abuse-of-dominance.

Fourth, powers of investigation will determine how many facts an authority may acquire when visiting business premises, analysing company data or interviewing managers, et cetera. It can be argued that the greater the powers of investigation, the more information the CA can gather, and hence, the higher the number of cases it can challenge.

Table 10 below summarises how detection by the CA may influence the number of cases it challenges, and how this determinant is analysed in this study.

21 Assuming that the cases in other jurisdictions are built on the complaints received.

22 Note that the incentives may be weaker than in the case of cartel control. There is no mechanism such as leniency available. Complainants may have a weak commercial position with respect to the dominant firm.

Table 10 Summary explanation 4: The CA is not effective in detecting violations

Variable	Relevance	Method	Data
Number of complaints received	Input on which to build cases	Complaints not available, therefore no. of investigations is used	Country
Quality of complaints	Input on which to build cases	n/a	n/a
Prioritisation of allegedly abusive conduct	Allocate more resources	Review of policies	Country
Resources	Can pursue more cases	Data on budgets and staff, no. of cartel cases challenged.	Country
Powers of investigation	Can pursue more cases	Literature	Country

Source: SEO Economic Research

3.1.5 The CA considers fewer cases as anti-competitive

The preceding 4 steps have resulted in abusive conduct displayed by a dominant firm that is being investigated by the CA. In practice, the CA assesses which firms are dominant, and which strategies constitute an abuse. Each CA has some discretionary leeway in this respect.[23] Authorities may assess potentially abusive conduct in varying ways. Authorities may have their own views on market power, market definition and abuse. Their methods to assess abuse-of-dominance may also differ. This means that a particular conduct in a particular economic context could be judged as an infringement by one authority, while another authority might conclude otherwise. For the sake of exposition, we use the term 'enforcement practice' to refer to all elements of leeway a CA has. Due to European legislation, the scope for variation in enforcement practices is limited. Appeal and review by courts also limit the discretionary leeway for interpreting and applying competition law.

Even when two jurisdictions adopt equal enforcement practices, they may obtain different outcomes for a given case. One authority could sanction the specific conduct, while the other authority does not sanction the exact same given conduct. This is due to the fact that an authority may make mistakes. Mistakes result in over-enforcement (when legal behaviour is prohibited) and under-enforcement (when illegal behaviour is not punished).

These types of mistakes are known in the literature as type I and type II errors. When legal conduct is prohibited, a type I error has taken place (over-enforcement); conversely, when illegal conduct is not detected a type II error has occurred (under-enforcement). Hence, the more type I errors a CA makes, the *higher* the number of cases. The more type II errors a CA makes, the *lower* the number of cases.

The distinction between error and enforcement practice can unfortunately not be made in this report. Suppose a CA prohibits conduct that would arguably not violate Art 102 TFEU,[24] this could either be a type I error, or the result of stricter enforcement practice. This distinction cannot be analysed with the available data. In this study, the distinction between mistake or error on the one hand and idiosyncratic enforcement practice on the other will therefore not be made.

How can these issues explain the infrequency of interventions in the Netherlands? The analysis partly overlaps with the analysis of differences in detection in Step 4 above. First, if Dutch

23 Moreover, legislation may differ between jurisdictions.

24 For a reason other than the absence of an effect on trade between Member States.

legislation permitted strategies that would be regarded as infringements in other jurisdictions, it would explain the low number of cases. Second, if legislation is equal between countries, the NMa may use its discretionary leeway such that enforcement is lax. Third, the NMa may have diverging opinions on what behaviour constitutes an abuse-of-dominance. Fourth, the NMa may make type II errors.

Box 4 Discretionary leeway: assessment of economic effects may vary between CAs

An illustration of discretionary leeway is whether an authority assesses and weighs up the effects of particular conduct on consumer welfare. A jurisdiction's enforcement practice can be characterised as being either form or effects-based (see also ICN, 2009). A form-based approach to conditional rebates, for example, would check whether the rebate scheme meets criteria such as the size of the discount, the time period and whether it is loyalty inducing. If the criteria are met, the conduct is considered abusive. The effects-based analysis would analyse the competitive structure of the market and whether customers would be worse off as a result of the rebate scheme.

Whether an authority acts in a form or effects-based manner is therefore an important determinant of the number of interventions. There are three remarks to consider in this respect. First, an effects-based approach is more complex and requires more analysis. When resources (or data) are limited, an effects-based approach might not be feasible and this could mean a case is not pursued. Second, adopting a form-based approach may imply prohibiting behaviours that are not anti-competitive but nonetheless meet the form-based criteria (resulting in over-enforcement, or type I error). Third, adopting a form-based approach could lead to allowing anti-competitive behaviour that does not meet the form-based criteria (resulting in under-enforcement, or type II error). The form-based criteria are imperfect indications of anti-competitive effects, hence, it is difficult to ascertain whether a form-based authority could be expected to challenge fewer or more cases.

Source: SEO Economic Research

Method

These issues are analysed as follows in this report. First, on basis of desk-research, the legislation and enforcement practices in the five jurisdictions are reviewed. Second, the cases challenged in other countries are studied. The case-studies provide indications of how the enforcement practice in the four jurisdictions compares to the Netherlands.

Table 11 Summary explanation 5: The CA considers fewer cases as anti-competitive

Variable	Relevance	Method	Data
Differences in legislation	High, effect unknown	Literature	Country
Discretionary leeway:	High, effect unknown	Literature and case studies	Country and case
Diverging views on concepts	High, effect unknown	Literature	Country
Form- or effects-based approach	High, effect unknown	Literature and case studies	Country and case
Type I and type II errors	Type I errors: higher no. of cases, type II errors: lower no. of cases	n/a	n/a

Source: SEO Economic Research

3.1.6 The CA addresses anti-competitive conduct informally or by other means

In addition to detecting a strategy and assessing whether it is illegal, an authority also has other options for dealing with a case. A formal decision based on the abuse-of-dominance provision is only one of the options. Other options include resolving the case informally, resolving the case on the basis of another provision (e.g. cartel control), handing the case to another authority (national or supranational) or not intervening at all. In addition, a complainant may indicate that the case will be challenged in court through private enforcement. This would reduce the urgency for the CA to intervene. The way a CA deals with a case is therefore an important determinant of the number of formal decisions.

In this step, the preferences and objectives of the CA and its decision makers are relevant. Similarly to firm behaviour, a CA weighs the costs and benefits of issuing a formal decision. Costs would include the use of resources and the risk of its decision being overturned in court. The benefits of issuing a formal decision would include the improved score on 'outcome' as the CA enhances its public profile when it intervenes. This not only occurs through press coverage of a case, but also in the annual report. For instance, the NMa and OFT endeavour to measure the effects of its interventions in euros and publish the results on an annual basis.[25] Another possible factor in the cost-benefit ratio of intervening is potential pressure from politicians or other pressure groups, resulting in possible bias.[26]
The role of court review also deserves further attention. Above it was noted that each authority has some discretionary leeway to assess abuse-of-dominance. For example, an authority's enforcement practice can be characterised as being form or effects-based to varying degrees. An authority may have idiosyncratic beliefs about which practices result in consumer harm. These characteristics are not formed in isolation, but are also shaped by appeal and court review. It can therefore be expected that an authority's enforcement practice adapts to the decisions of the courts that review its interventions. For example, if a court's practice is form-based, an authority can be expected to intervene in a more form-based manner as well.

Method

How can these issues explain the low number of cases in the Netherlands? Assuming data is available, there are several options. First, if the number of cases closed informally was high compared to the other countries, it would indicate that informal resolution is simply a substitute for a formal decision. If the total of formal and informal closures was known for each country, it might appear that the Netherlands does not lag behind. Second, whereas in another jurisdiction, conduct is addressed with the abuse-of-dominance provision, the NMa might apply cartel control to the same type of conduct. Third, Dutch firms might be dealt with by the European

25 Jarig van Sinderen and Ron Kemp, "The Economic Effect of Competition Law Enforcement: the case of The Netherlands", De Economist 156, No. 4, December 2008, pp. 365-385.

26 One of the factors in this respect is whether the CA is formally independent from other political institutions. In the Netherlands, this is organised as follows. The NMa has been an Independent Administrative Body (in Dutch: *Zelfstandige Bestuursorgaan or ZBO*) since 1 July 2005. This implies that the Minister of Economic Affairs can no longer intervene in specific competition law cases. It remains possible for the Minister to impose general directives.

Commission. Fourth, private enforcement may be a substitute for public enforcement. Lastly, the NMa may choose not to intervene, for example due to the risk of a successful appeal in court, a lack of resources or low prioritisation (see also steps 4 and 5 above).
Few of the issues discussed above can be measured. Table 12 presents the methods adopted in this study.

Table 12 Summary explanation 6: The CA addresses anti-competitive conducts informally

Variable	Relevance	Method	Data
Informal case closures	Substitute for formal decision	n/a	n/a
Apply another provision	Substitute for formal decision	Case study	Case
Other authority	Substitute for formal decision	Case study	Case
Private enforcement	Substitute for formal decision	No. of private cases in NL	Country
Not intervene	May be preferred by CA	n/a	n/a
Political bias	May affect CA behaviour	n/a	n/a
Court review	May affect CA behaviour	Literature	Country

Source: SEO Economic Research

3.2 Summary: possible explanations

Table 13 summarises the explanations outlined above and the methods used in this report to analyse these explanations. The first column is identical to the last column in Table 6.

Table 13 Methods used for explaining the low number of abuse-of-dominance interventions in a jurisdiction

Explanations for low number of interventions in a jurisdiction	Method/data used in this study	Relevance
E1: There are few dominant firms	a. GDP and no. of firms used to proxy no. of dominant firms. Note: proxy is imperfect b. Case study of competitive structure of industries that displayed infringements in other countries c. Survey data on concentration	a. If the no. of dominant firms is low, fewer firms qualify to breach the law. b. If the industries that displayed infringements in other countries are organised more competitively in the Netherlands, the competitive structure of the Netherlands explains the low number of cases c. Indication of concentration of the economy
E2: Dominant firms do not have abuse at their disposal due to legal barriers	Case study of regulatory environment of industries that displayed infringements in other countries	If the regulatory environment in the Netherlands does not permit abusive strategies, fewer violations can occur
E3: Dominant firms do not display abusive strategies at their disposal due to preferences, *e.g.* poor cost-benefit ratio	a. Literature on deterrent-index b. Levels of fines c. World Bank data on compliance	a. If deterrent-index is high, firms violate less b. If the Netherlands has higher fines (or e.g. personal fines), the deterrent effect is stronger, and firms violate less c. The higher the disutility of breaching the law, the lower the no. of violations
E4: The CA is not effective in detecting violations (incl. through complainants), parties resolve disputes bilaterally	a. Resources (budgets and staff): data on resources b. Powers of investigation: overview of powers held by CAs c. Number of complaints received: n/a d. Quality of complaints received: not analysed e. Prioritisation: overview of prioritisation policies	a. If the NMa lacks recourses, fewer cases can be pursued b. If the NMa lacks powers, fewer cases can be pursued c. If the NMa receives few complaints, less input is available to build cases on. d. Not analysed e. If the NMa attaches low importance to abuse-of-dominance, it pursues fewer cases
E5: The CA's discretionary leeway, as compared to other jurisdictions, implies that fewer cases are considered anti-competitive, the CA makes type II errors, low prioritisation	a. Literature research on discretionary leeway per CA b. Analyse cases for indications of divergence (form or effects-based?), effect unknown in theory c. Type I and type II errors: not analysed d. Prioritisation: see above	a. Discretionary leeway may imply that other countries intervene in cases where NMa would not intervene b. Case study will reveal if NMa would have intervened as other CAs did c. Not analysed d. If the NMa attaches low importance to abuse-of-dominance, it pursues fewer cases
E6: The CA addresses anti-competitive conducts informally, due to *inter alia* preferences and the risk of court review, or with another legal provision, or refer to another authority	a. Informal case closures: not analysed b. Apply another provision: case study of provisions applied by other CAs c. Another authority: case study and investigations EC d. Risk of court review: literature e. Political bias: not analysed	a. not analysed b. If other CAs' decisions would be addressed with another provision in the Netherlands, it explains low number of cases c. Case study may indicate that case would be handled by another authority d. May affect CA behaviour e. not analysed

Source: SEO Economic Research

4 Explaining the lower number of cases: data

Why is the number of Dutch abuse-of-dominance interventions relatively low?

This section takes a closer look at Denmark, Finland, Germany, the UK and the Netherlands. The available data is presented in this section. The explanations identified in Section 3, particularly in Table 13, will be analysed. Qualitative and quantitative data will be used, both at country-level and at firm-level. The structure of this section is therefore as follows:

Qualitative data (4.1)
- Legislation and enforcement practices;
- Prioritisation and complaints;
- Powers of investigation and sanctions;

Quantitative data (4.2)
- Quantitative data on GDP, number of firms, survey data on competitiveness, CA resources, deterrence and compliance

Case-data (4.3)
- Denmark;
- Finland;
- Germany;
- The United Kingdom

4.1 Qualitative data

This section presents the various types of qualitative data. This data is country-specific.

Legislation and enforcement practices

Do countries differ in their enforcement of competition law? National competition authorities may assess (potentially abusive) unilateral conduct in varying ways. First, national legislation may differ. Second, authorities may have their own views on market power, market definition and abuse. Their methods and standards of proof to assess unilateral conduct may also differ. This means that a particular conduct in a particular given economic context could be judged as an infringement by one authority, while another authority might conclude otherwise. In this section we compare Denmark, Finland, Germany and the United Kingdom with the Netherlands in this respect.

The jurisdictions analysed in this report are EU Member States. EU competition law operates in parallel to national rules. While the substantive EU rules that are to be enforced are the same and there is also a high convergence between substantive competition rules in national legislations, the procedural rules and the institutional settings that together form the framework of enforcement are potentially less well harmonised (Cseres, 2010). In this section we will therefore

look at: (i) legislation, (ii) the definition and assessment of dominance, (iii) the definition and assessment of abuse, (iv) further variations in the assessment of exclusionary conduct and (v) variations in the assessment of exploitative conduct. The overview of legislation and enforcement practices is contained in Appendix A.6.

Box 5 Legislation and enforcement practice in five jurisdictions

Appendix A contains a review of legislation and enforcement practices in Denmark, Finland, Germany, the Netherlands and the United Kingdom. The conclusions are:

- The five countries follow EC law and practice, there is a high degree of harmonisation and convergence, partly due to Regulation 1/2003;
- Germany has deviating legislation (Sections 20, 21 and 29 ARC). Germany may use presumptions of dominance based on market shares. German enforcement seems to be based on the effects on competitors, rather than on consumers;
- There are indications that Denmark and Germany adopt a more form-based approach and have less regard for consumer welfare (as compared to the Netherlands, the UK and Finland).

Source: SEO Economic Research, see Appendix A.

The review of legislation and enforcement practices is summarised in Box 5. The available studies suffer however from some methodological drawbacks, i.e. they depend on submissions by the CAs and the legal community and may therefore be biased. Moreover, the questionnaires may not be representative for the entire 2005-2009 period. We therefore complement the insights from these studies with case-studies in Section 4.3.

Information on Dutch enforcement

Box 5 reviewed the available documents that compare enforcement practices. What further information is available on Dutch enforcement? Two issues will be investigated in more detail. Firstly, does the NMa operate effects-based or form-based and, secondly, does court review in the Netherlands deviate from court review in other countries?

Does the NMa adopt an effects-based approach?

An important characteristic of enforcement is whether it is predominantly form-based or effects-based, see Box 4. The review of international literature in Box 5 suggests that Denmark and Germany are rather form-based compared to the Netherlands and the UK. What further information is available on enforcement by the NMa?

In a speech in 2009 the NMa emphasised its support for effect-based analysis: "*There has been […] an increased emphasis in competition law on effects-based analysis, and an increased tendency to ground decisions in economic thinking. This is a trend that the NMa very much supports as a competition authority, perhaps even more so than the European Commission - although I myself would express some reticence because of the possible costs and the possible unpredictability that the effects-based approach can bring, especially in cases where it results in an arms-race between conflicting teams of economists. […] The NMa's support for the economics-based*

approach is evidenced, for example, in our acceptance of efficiency defences in merger cases and it is reflected in our economics-based approach to competition problems generally, and to vertical restraints in particular."[27]

The speech may be indicative of the NMa's ambitions but does not necessarily say much about enforcement before 2009. The CR Delta case is considered to be form-based (Elkerbout, 2010). Moreover, ICLG (2009) states; "*The legislation does not identify any conduct that is per se illegal. Having said that, the NMa has taken a number of decisions, particularly on excessive pricing, that are rather form-based than effect-based.*" Thus, there are indications that the NMa has acted in a form-based manner. The speech does not say anything about effects-based approaches for abuse-of-dominance cases while the quote from ICLG specifically focuses on abuse-of-dominance and the only sanction decision (CR Delta) seems to be form-based.

To shed more light on this issue this report examined the 18 NMa investigations on abuse-of-dominance. Labelling an investigation form- or effects- based is a somewhat subjective exercise, and the results should therefore be interpreted with care.

[27] Competition 2009 summit, SAS Radission Brussels, Competition law and policy for multinationals in a global context: issues for agencies and business. December 4th, through www.nma.nl/images/Wall_street_journal_competition_summit_4_december_200922-157807.pdf

Table 14 NMa investigations 2005-2009

Case (number)	*Date*	*Type of alleged abuse*	*Assessment*	*Form- or effects based?*
NHA/Waldeck (3125 – 125)	28-06-2005	Predatory pricing	No dominant position, based on market shares	Separate verification of dominance suggests form-based
CR Delta (3353)	25-07-2005	Exclusionary rebates	The court stated in 2007 that the NMa should have investigated effects.	Form-based
Kabeltarieven Casema (3588)	27-09-2005	Excessive pricing	Pricing not excessive, based on assessment of costs and profits	n/a
Kabeltarieven UPC (3528)	27-09-2005	Excessive pricing	Pricing not excessive, based on assessment of costs and profits	n/a
Interpay (2910 – 864)	21-12-2005	Excessive pricing	NMa decides to not perform an in-depth analysis, based on priority and mitigating developments in the market	n/a
Vereniging van reizigers vs. KLM en SLM (3475)	21-06-2006	Excessive pricing	NMa expects that competition will increase and rejects the complaint on the basis of priority	n/a
Ticket Service, TicketBox en Mojo	20-07-2006	Exclusivity clauses	NMa halted the investigation due to firms changing their clauses	Abuse not assessed
ACN vs. SIMN (3084 – 163)	04-08-2006	Exclusionary behaviour	No evidence for abuse	Abuse not assessed
KPN	11-08-2006	Use of data	n/a	Abuse not assessed
FreshFM v. Buma (3295)	10-05-2007	Excessive and discriminatory tariffs	International price comparison	n/a
KPN vs. Kabelbedrijven (5702)	20-07-2007	Predatory pricing	Price is found to exceed cost, no further assessment	Some elements form-based
Apple: iPod en iTunes (5981)	06-09-2007	Bundling/tying	NMa concludes products are not bundled/tied	Abuse not assessed
XS4ALL v. Buma (4070)	21-12-2007	Contract clauses	NMa disputes the facts of the complaint	Abuse not assessed
Autoschadeherstelmarkt	14-04-2009	Various alleged abuses	No dominant position, based on market shares	Abuse not assessed
Internet sales	23-06-2009	Discriminatory practices	The NMa did not find evidence	Abuse not assessed
Productschap Tuinbouw vs. GasTerra (5720-1)	26-06-2009	Excessive pricing	Assessment of price based on hypothetical benchmark	n/a
Sandd/TNT (6207)	15-12-2009	Predatory pricing	NMa concludes that price exceeds cost, based on the assumption that Netwerk VSP and TNT are one firm.	Some elements form-based
easyJet v. N.V. Luchthaven Schiphol (6486)	16-12-2009	Excessive and discriminatory pricing	NMa refers to another case based on the Aviation Act. No further investigation due to priorities.	n/a

Source: SEO Economic Research. For investigations into exploitative conduct it is not possible to conclude on form- v. effects-based enforcement and this is marked “n/a” in the last column. Investigations that did not contain an assessment are marked “Abuse not assessed” in the last column.

Alleged abusive practices can be categorised as either exploitative or exclusionary (cf. Vickers 2005). For the NMa investigations this distinction is indicated in Table 14 (excessive pricing is exploitative conduct; the other conducts are exclusionary). The distinction between form- and effects-based enforcement can be made only for exclusionary conduct. The debate on the effects-based approach to conduct by dominant undertakings has primarily focussed on exclusionary practices.[28] For exploitative conduct it is therefore difficult to make a distinction between form- and effects-based enforcement.

From the 18 NMa investigations, 7 concern exploitative conduct. For these cases we could therefore not analyse whether the assessment was form- or effects-based. This is marked with "n/a" in the table. For the remaining 11 cases of exclusionary conduct, we find that 7 cases did not contain an assessment of abuse. For those 7 cases we could not conclude whether the assessment was form- or effects-based and these are marked "Abuse not assessed" in the table. The remaining four cases of exclusionary conduct are examined in Box 6 below.

Box 6 Four NMa investigations of exclusionary conduct contain form-based elements

NHA/Waldeck

In the NHA/Waldeck case, the NMa rejected the complaint on the basis of the fact that the definition of the market and market share indicated that the undertaking is not dominant. Gual et. al. (2005) argue that an effects-based approach puts less weight on a separate verification of dominance. Not assessing conduct on account of a lack of dominance suggests enforcement is relatively form-based, according to the authors.

CR Delta

The CR Delta case in which the NMa intervened has been reviewed by District Court *Rechtbank Rotterdam* in 2007 and legal scholars (cf. Elkerbout 2010). It is concluded that the decision lacked the investigation of effects.

KPN v. Kabelbedrijven

In the case KPN v. Kabelbedrijven, three elements in the decision seem form-based. Firstly, the NMa states that an (alleged) predatory pricing strategy should not be investigated in relation to the financing of such a strategy.[29] This seems contrary to an effects-based approach. As the EC notes in the enforcement priorities[30], sacrifice is an important element of predation. Cross-subsidisation is subsequently disregarded by the NMa.

Secondly, the NMa finds that price exceeds cost and rejects the complaint on that basis. This is somewhat in contrast to the Commission's effects-based approach laid down in the enforcement priorities:

"[...]the concept of sacrifice does not only include pricing below AAC. In order to show a predatory strategy, the Commission may also investigate whether the allegedly predatory conduct led in the short term to net revenues lower

28 For example, both the Commission's discussion paper on the application of Article 82 of the Treaty to exclusionary abuses and the Commission's Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty do not cover exploitative conduct.

29 See: http://www.nma.nl/documenten_en_publicaties/archiefpagina_besluiten__en_fusiemeldingen/mededinging/archief/2007/5702BBME.aspx, paragraph 23.

30 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 24 February 2009.

than could have been expected from a reasonable alternative conduct, that is to say, whether the dominant undertaking incurred a loss that it could have avoided."[31]
Similarly, Gual et. al. (2005) note that *"in contrast, a form-based per se approach to "predatory pricing" would prescribe that 'the incumbent cannot lower its price below a certain threshold' "*
Thirdly, the NMa seems to base its conclusion on the evidentiary lack of success of predation, as it notes that KPN is unlikely to leave the market (paragraph 31). This is counter to economic reasoning: it is not necessary for KPN to exit the market for anti-competitive effects to occur. See also the Commission's enforcement priorities:
"The Commission does not consider that it is necessary to show that competitors have exited the market in order to show that there has been anti-competitive foreclosure."[32]

Sandd v. TNT
The final case we discuss is Sandd v. TNT (now PostNL). Two issues are worth mentioning. First, the NMa assumes that Netwerk VSP and TNT are part of the same economic entity, based on legal reasoning. This assumption implies that the costs attributed to the service in question is lower than in the case Netwerk VSP would be assumed to be a separate economic entity. Economic reasoning suggests that Netwerk VSP should be seen as a market participant on its own. Second, the NMa concludes the investigation on the basis of the finding that price exceeds costs. However, as noted before, in an effects-based approach a predatory strategy may be found to exist also when price exceeds cost, especially in an industry where the dominant firm has a non-replicable advantage such as a large distribution network. The EC notes:
"Another example of such an exceptional situation where price cuts above average total costs could be deemed predatory is where a single dominant company operates in a market where it has certain non-replicable advantages or where economies of scale are very important and entrants necessarily will have to operate for an initial period at a significant cost disadvantage because entry can practically only take place below the minimum efficient scale. In such a situation the dominant company could prevent entry or eliminate entrants by pricing temporarily below the average total cost of the entrant while staying above its own average total cost."[33]

Box 6 argues that four decisions contained some form-based reasoning. The NMa may have developed its approach over the 2005-2009 period from *CR Delta* towards an effects-based approach. However, we found form-based elements also in the Sandd v. TNT decision of December 2009. For 14 investigations we could not conclude whether they were form- or effects-based. Consequently, this report's analysis of NMa investigations in the 2005-2009 period cannot support the hypothesis that the NMa adopts an effects-based approach.

Does court review in the Netherlands deviate from court review in other countries?
In Section 3.1.6 the risk of court review was discussed. The CA may want to avoid bringing cases that will later be overturned in court. It can therefore be expected that the enforcement practices of a CA will adapt to the courts that review its decisions. What information is available on court review in the Netherlands, as compared to other jurisdictions?
Again, the *CR Delta* case that was decided by the Dutch Trade and Industry Appeals Tribunal (in Dutch: *College van Beroep voor het bedrijfsleven,* henceforth CBb) on 7 October 2010 has sparked

31 Ibid, paragraph 65.
32 Ibid, paragraph 69.
33 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, paragraph 129.

analysis by legal scholars (Elkerbout (2010), Slotboom and Ter Wee (2011)). However, the date of this decision implies that the effect of this decision on the NMa's enforcement prior to 2010 is limited. In the same case, there was an earlier decision by the District Court *Rechtbank Rotterdam* on 4 July 2007. This decision is likely to have more influence on the time period studied. For this decision, Elkerbout (2010) remarks that it left some doubts about the importance of assessing economic effects. Van Kraanen-Belhaj and Speyart (2008) also discuss the District Court *Rechtbank Rotterdam* decision. In 2007, the authors argue, the *per sé* approach was still considered leading in European practice and *Rechtbank Rotterdam* also referred to case practice that takes a form-based approach. In contrast to the case law that *Rechtbank Rotterdam* referred to, it required a demonstration of *actual* effects rather than *likely* effects (as in European practice). The Court's decision does, however, not consistently follow this approach for all the three different rebates discussed in the case. The authors conclude that the Court's decision leaves uncertainty about the importance of effects-analysis.
Slotboom and Ter Wee (2011) point at a number of developments since 2003 that suggest that abuse-of-dominance enforcement may have become more effects-based. In a number of CBb decisions in the 2005-2008 period, the CBb requires a high standard of economic evidence to find infringements. Although these decisions concerned the cartel prohibition, it could be expected, according to the authors, that the CBb would also require a high level of economic evidence for abuse cases. Moreover, the European Commission has become more effects-based since 2005. The authors also note that the CBb 2010 decision on requiring effect-analysis in an abuse case is somewhat contradictory to European practice.

In summary, it is difficult to conclude what effect court review had on the NMa's decisions in the 2005-2009 period, compared to other countries. Analysis of court decisions leaves this question largely unanswered. The CBb decision of 2010 was not likely to have influenced the NMa due to its timing. The District Court *Rechtbank Rotterdam* decision resulted in ambiguity in relation to the importance of economic analysis. Finally, although the CBb decisions in the 2005-2008 required a high level of economic analysis, they concerned the cartel rather than the abuse prohibition.

Conclusion

Box 5 concludes that the legislation and enforcement practices show a high degree of similarity between the five jurisdictions. There are however divergences. Germany has adopted special legislation for superior bargaining power (Sections 20 and 21 ARC) and the energy sector (Section 29 ARC).
Furthermore, there are indications that Denmark and Germany adopt a more form-based approach, and have less regard for consumer welfare. Further analysis of Dutch investigations and court decisions does not allow us to draw strong conclusions on the importance of economic analysis for the NMa, nor on the influence of court review.

Prioritisation and complaints

What information is available about the prioritisation policies of the CAs, and the way complaints are handled? The available information is summarised in Table 15 below. The Table shows that each CA has discretionary powers to decide whether to investigate a complaint or not. The methods used for prioritisation are not described in detail, except for the Netherlands and UK. The Netherlands, Finland and the UK take the consumer interest explicitly into account. For

Denmark and Germany this may be the case as well, however, this is not explicitly mentioned in the available information sources.

Table 15 Prioritisation of complaints

Country	Handling of complaints	Complaint procedure
Denmark[34]	According to Section 14(1) of the Act, the Competition Council may decide whether there are sufficient grounds for an investigation or for making a decision in a case, including whether the consideration of a case should be suspended or discontinued. The Competition Council may prioritise its cases based on political reasoning as well as available resources.	No formal procedure
Finland[35]	The FCA may decide not to take action if, regardless of the competition restriction, competition in the said market can be deemed to be effective as a whole. In this assessment particular attention is paid to the effect of the competition restriction on the functionality of the markets, benefits for the consumers and to protecting the freedom of undertakings to operate without unjustified barriers and restrictions. Consequently, the FCA has a certain discretionary power as to which competition restrictions to investigate and is not obliged to take action on each complaint that it receives.	No, but the FCA has issued guidelines as to what information a complaint should generally include.
Germany[36]	The initiation of an investigation upon a complaint is generally left to the discretion of the Bundeskartellamt. Therefore, the CA is not obliged to take action on each complaint. Furthermore, the decision not to take action on behalf of a complainant does not have to be addressed to the complainant, explaining the reasons.	Complaints can be lodged in any form: orally, by phone or in writing. Even anonymous complaints are acceptable.
The Netherlands[37]	The NMa is not obliged to investigate every suspected infringement and complaint. It sets its priorities on the basis of: economic significance, consumer interest, severity of the infringement and likely efficiency of NMa action.	There are no special requirements for the form a complaint should take. However the more detail it contains of the parties and behaviour concerned, the more likely the NMa will be able to take action.
United Kingdom[38]	The OFT may launch a formal investigation if it has reasonable grounds for suspecting that competition law has been breached but it is not obliged to do so. When deciding whether to investigate, it will take into consideration its resources and casework priorities of which step 1 is the consumer benefit of intervention.	No formal procedure

Source: SEO Economic Research

34 www.iclg.co.uk/index.php?area=4&kh_publications_id=109

35 ICN, 2009 Anti-cartel enforcement template through www.kilpailuvirasto.fi/tiedostot/ICN_Anti-Cartel_Enforcement_Template_FINLAND.pdf. We make the assumption that the complaints procedure is the same for anti-cartel enforcement as for abuse-of-dominance cases.

36 ICN, 2009 Anti-cartel enforcement template through www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/ICN_Anti-Cartel_Enforcement_Template_Germany.pdf We make the assumption that the complaints procedure is the same for anti-cartel enforcement as for abuse-of-dominance cases.

37 www.iclg.co.uk/index.php?area=4&kh_publications_id=109

38 www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/complaints#named2. Competition Prioritisation framework, October 2006, downloadable through www.oft.gov.uk/shared_oft/press_release_attachments/compcriteria.pdf

Table 2 presents the number of investigations carried out. Interviewees have expressed that investigations are always almost based on complaints. The Netherlands has investigated relatively few cases (only the UK scored lower, all other countries investigated more cases).[39] Information on the number of complaints received was not available, except for the Netherlands. The Netherlands received at least 76 complaints, and about 24% resulted in an investigation. This study cannot conclude whether this percentage is low or high internationally. Moreover, since the number of investigations may be an underestimate, it could be that more complaints resulted in an investigation. It is clear however, that the share of investigations leading to interventions is at most 6% for the Netherlands.[40] For the other countries, this percentage ranged from 8% (Germany) to 68% (Denmark).

Conclusion

Investigations are mostly started on the basis of complaints. The five countries do not differ markedly in their published prioritisation policies, with the exception that the Netherlands and the UK explicitly refer to consumer interest. There are no indications for important differences in the complaint procedures. Whether the relatively low number of investigations of the Netherlands can be explained by the number of received complaints could not be analysed. It is clear however that the percentage of investigations carried out by the NMa leading to an intervention is relatively low for the Netherlands. This suggests that the relatively low number of cases cannot be explained by the number of investigations.

Sanctions and powers of investigation

A lack of powers held by the CA could imply that fewer cases can be pursued. Table 16 shows which powers are available to the respective authorities. It shows that the Netherlands' powers of investigation do not fall short of those held by other authorities.

39 Note however, that the reported number of NMa investigations may be an underestimate due to the way the NMa counts enforcement activities.

40 To the extent that the number of 18 investigations is an underestimate, the percentage of investigations leading to an enforcement action is an overestimate.

Table 16 Investigative powers held by competition authorities

	Denmark	Finland	Germany	The Netherlands	United Kingdom
Power to order interim measures	X	X	X	X	X
Power to adopt commitments		X	X	X	X
Power to seal business premises, books	X	X	X	X	X
Power to inspect private premises		X		X	X
Informal guidance	X		X	X	X
Power to impose structural remedies			X	X	X

Source: SEO Economic Research, based on Cseres (2010).

If the NMa could impose more severe sanctions, compared to the other CAs, this could point towards a higher deterrent effect. Table 17 reports on fines, personal sanctions, criminal offence and damage claims. The table shows mixed results; since October 2007, the NMa has been able to impose a personal fine, and shares this instrument exclusively with Denmark. Only in Denmark and Germany are criminal sanctions available. In the UK directors can be disqualified but this instrument is lacking in all other jurisdictions. Furthermore, Danish fines are considered to be lower than those applied by the EC. This might point towards a low deterrent effect of Danish enforcement.

Table 17 Penalties that the competition authority can impose

	Financial penalty	Personal penalty	Criminal offence	Damage claims	Comments
Denmark	Yes. No maximum fine.	Possible, but not yet imposed.	Yes, punishable by fines.	Private parties who have been harmed may bring civil actions before the courts.	It can be assumed that the Danish courts will apply a (significantly) lower level of fines than applied by the EC.
Finland	Yes by the Market Court. Up to 10% of the undertaking's annual turnover.	No	No	Actions for damages can be brought before district courts or arbitral tribunals.	Imprisonment may be imposed in case of false evidence provided by an undertaking.
Germany	Yes, it may amount to up to 30 % of the turnover achieved during and from the infringement but may not exceed 10 % of the turnover achieved in the previous business year by the undertaking.	No	The only criminal sanctions available are those under § 298 of the Criminal Code (StGB) (bid-rigging)	n/a	For the most substantive infringements, the maximum fine is € 1 million.
The Netherlands	Yes, 10% of worldwide annual turnover	Yes, up to € 450,000 since October 2007	No	Damage claims can be imposed through private law.	The fine for severe cases handled from October 2009 can be raised to up to 25% of the turnover concerned with the infringement of the last year the infringement took place. The fine can also be imposed as a percentage of the total annual turnover with a minimum fine of € 2,500. [41]
United Kingdom[42]	Yes, a fine of up to 10% of the annual group worldwide turnover of the undertaking concerned.	No	No, but directors of companies that breach the prohibitions can be disqualified for up to 15 years.	Third parties can bring damages claims against prosecuted party through private law.	

Source: SEO Economic Research, based on NMa, OFT and ICLG. [43]

41 NMa (2009), Beleisdsregels bestuurlijke boetes. Through: www.nma.nl/images/Beleidsregels_MEZ_bestuurlijke_boetes_NMa_2009_doc22-155186.pdf

42 OFT (2011), legal powers, through: http://oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/,

43 International Comparative Legal Guide Series (2009), through: www.iclg.co.uk/index.php?area=4&kh_publications_id=108, Concurrences (2011), Antitrust Encyclopedia through: www.concurrences.com/rubrique.php3?id_rubrique=512.

Conclusion

The powers of investigation held by the NMa are not insubstantial, compared to other countries. The comparison of sanctions yields mixed results. The NMa has been able to impose a personal fine since October 2007 and shares this instrument exclusively with Denmark. The criminal offence (as in Denmark and Germany) or the disqualification of directors (as in the UK) is lacking in the Netherlands. It is therefore unlikely that the sanction instruments at the NMa's disposal cause the deterrent effect to be considerably higher than in the other jurisdictions. The level of fines actually imposed in specific cases may of course vary between jurisdictions. In the case-studies contained in this report, the actual fines are reported.

4.2 Quantitative data

In this section, we present country-specific quantitative data:

- Economic activity: number of firms and GDP, openness to trade;
- Cross-country survey results on competitiveness;
- Data on the deterrent effect of enforcement in Germany, the Netherlands and the UK;
- Survey results on compliance with society's rules;
- Data on resources available to the CAs: budget and staff;
- Number of cartel cases dealt with.

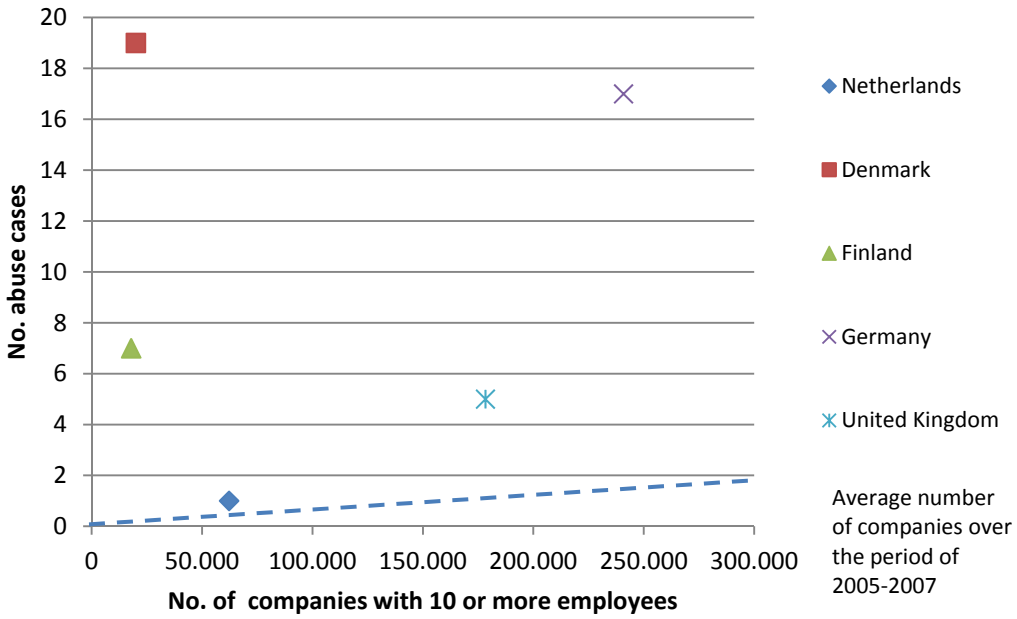
Each type of data will be plotted against the number of abuse-of-dominance interventions. We compare the different variables in pairs.

Economic activity

In Section 2 we already calculated the number of interventions per unit of GDP. The result was that all four jurisdictions show a higher number of interventions. This means that the size of the economy in GDP does not provide for an explanation for the low number of Dutch cases: Denmark and Finland are smaller economies but have intervened more. Germany and the UK are larger economies, but when corrected for GDP, have also intervened more.

Figure 3 depicts the number of firms in the economy on the horizontal axis. It shows that Denmark and Finland are smaller than the Netherlands in terms of the number of firms, while the UK and Germany are larger. The slope of the dotted line depicts the number of abuse-of-dominance interventions per company in the Netherlands. Note that Germany and the UK challenged more abuse-of-dominance cases per company. The figure (based on the number of firms with 10 or more employees) therefore suggests that the low number of interventions in the Netherlands cannot be explained by a low number of firms.

Figure 3 Number of companies with 10 or more employees



Source: Number of companies (Eurostat, 2011). Number of abuse cases (SEO Economic Research) excl. number of Germany's Landeskartelbehorden abuse cases (28 cases over period of 2005-2009 (Global Competition Review (GCR), 2006-2010)

Since there might be a correlation between firm-size and dominance, we also look at distribution of firms over size classes, see Table 18. The Table shows that the percentages of large firms in the economy do not differ much.

Table 18 Distribution of firms to size class (in no. of employees)

Country	1-9 employees	10-19 employees	20-49 employees	50-249 employees	250+ employees (number)	Total number
Denmark	86.95%	6.66%	4.18%	1.86%	0.34% (698)	207,238
Finland	92.63%	3.63%	2.29%	1.15%	0.30% (581)	191,067
Germany	82.88%	9.77%	4.48%	2.37%	0.49% (8.567)	1,752,643
The Netherlands	89.56%	5.42%	3.24%	1.49%	0.28% (1.442)	516,928
United Kingdom	87.49%	7.28%	3.17%	1.69%	0.37% (6.098)	1,627,829

Source: stats.oecd.org. Average of 2005-2007.

The number of large firms may serve as an indicator of economic activity by potentially dominant firms. We therefore also calculated the number of interventions per large firm:

Table 19 Interventions per large firm (more than 250 employees)

Country	Number of large firms (>250 employees)	Number of interventions	Interventions per large firm (x 1,000)
Denmark	698	19	27.2
Finland	581	7	12.0
Germany	8,567	17	2.0
The Netherlands	1,442	1	0.7
United Kingdom	6,098	5	0.8

Source: SEO Economic Research, based on stats.oecd.org.

Table 19 shows that the Netherlands has the lowest number of interventions per large firm. This is not surprising since the distribution to firm size was roughly equal between the five jurisdictions. However, the difference with the UK is very small. The UK has more than four times more large firms than the Netherlands, and has 5 times more interventions. Their scores are therefore very close to each other. Note however, that the assessment of dominance involves the analysis of market definition and is highly case-specific. A large firm does not have to be dominant, and a dominant firm does not have to be large. The correlation between firm size and dominance can be absent and is weak at best.

Openness to trade can arguably be relevant for the definition of geographical markets in some industries, and may hence affect the number of firms with a dominant position.[44] Due to low openness to trade, New Zealand was not included in the international comparison. According to OECD data the share of trade in GDP for the countries in our sample ranges from 28% in the UK to 66% in the Netherlands, the second highest for the five countries was Denmark (47%). For OECD countries, the share of trade in GDP equals 25%.[45] Clearly, the Netherlands scores highest in terms of openness to trade.

This may indicate that the anti-competitive behaviour of Dutch firms typically has an effect on other Member States as well. We therefore analysed the EC investigations in the 2005-2009 period. We found that no Dutch firms were investigated by the EC for abuse-of-dominance.

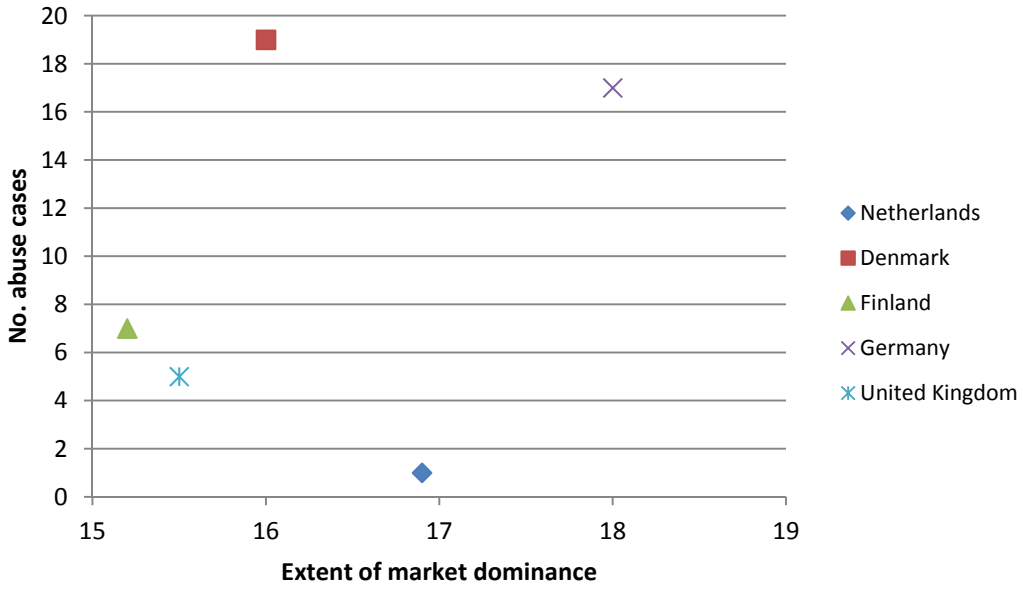
Survey data on competitiveness

The following three figures are based on the Global Competitiveness Index from the World Economic Forum (WEF, 2011).

44 But note that openness to trade may only be relevant for some specific industries, and in other industries the assessment of market power and dominance may not be affected by it.

45 Based on the average of 2003-2007, see <http://www.oecd-ilibrary.org/economics/oecd-factbook-2009/share-of-trade-in-gdp_factbook-2009-24-en >.

Figure 4 Market dominance according to WEF survey (the higher the score, the less concentrated the economy)

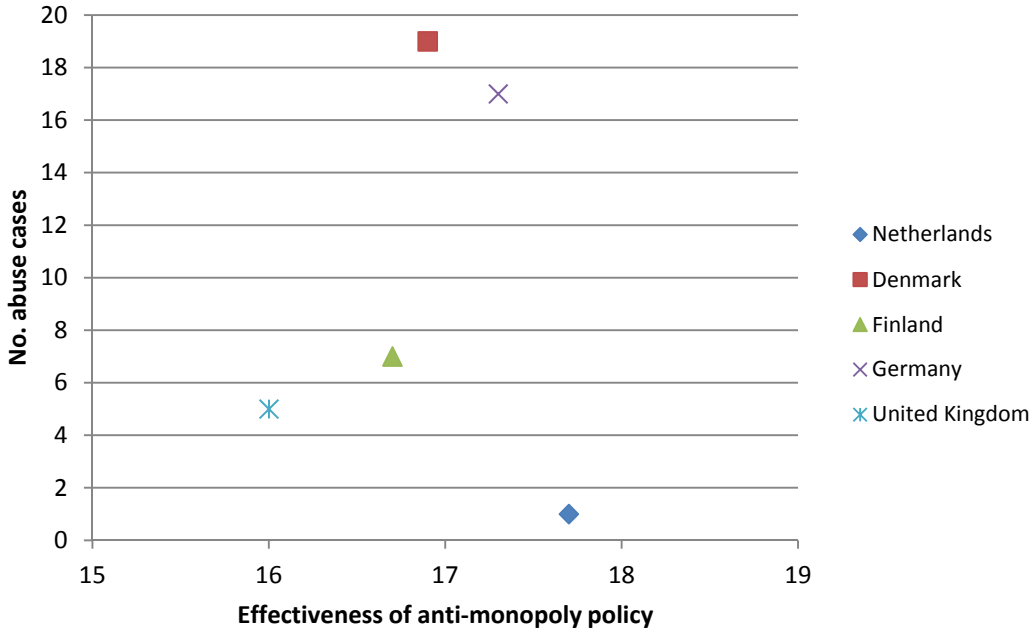


Source: SEO Economic Research, based on WEF. Extent of market dominance (WEF, Global Competitiveness Index, 2008-2011): Survey question reads: "How would you characterise corporate activity in your country? [1 = dominated by a few business groups; 7 = spread among many firms]" The results from the 2007, 2008 and 2009 surveys are aggregated.

The WEF survey is a cross-country project, carried out in the same manner across countries and across time. The available results are for 2007, 2008 and 2009 and have been aggregated by summing the scores. This means that when the survey answers in a particular year range from 1 to 7, the three-year sum ranges from 3 to 21. In Figure 4 the range 15 - 18.5 is shown; no observations lie outside this range.

Figure 4 shows that, according to the respondents, the Dutch economy is slightly less concentrated than Denmark, Finland and the UK. The German economy is slightly less concentrated than the Netherlands. Note however that the differences are very small: on the 3-year total scale ranging from 3 to 21, a difference of less than two points is not likely to be significant. The largest difference with the Netherlands is shown by Finland and equals 1.7. Hence, the results do not convincingly show differences in market dominance.

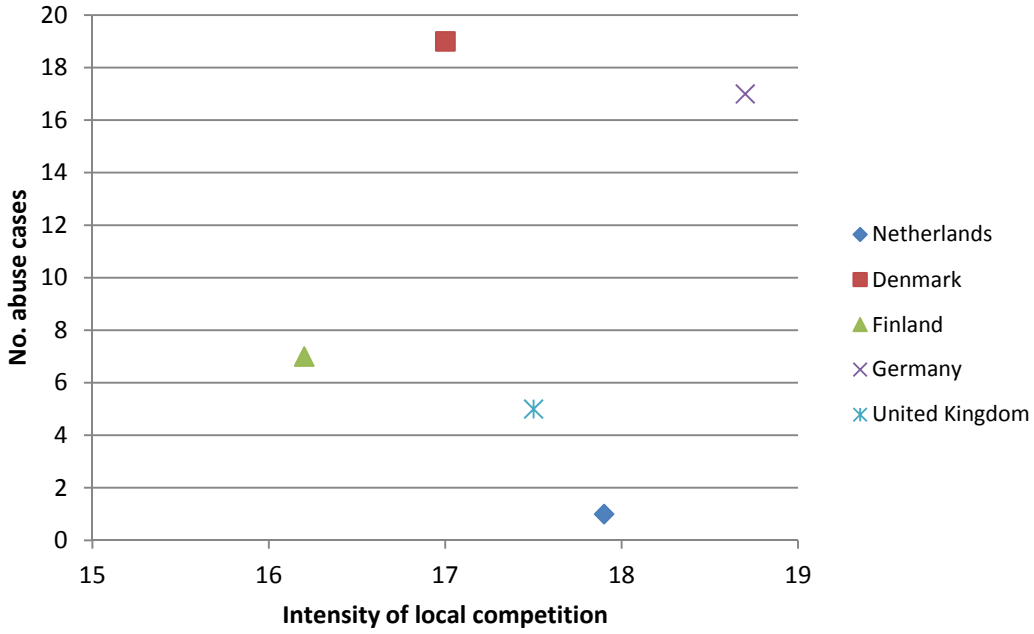
Figure 5 Anti-monopoly policy



Source: SEO Economic Research, based on WEF. Effectiveness of anti-monopoly policy (WEF, Global Competitiveness Index, 2008-2011), question reads: "To what extent does anti-monopoly policy promote competition in your country? [1 = does not promote competition; 7 = effectively promotes competition]". Sum of 2007, 2008 and 2009.

Figure 5 shows that anti-monopoly policy is considered most effective in the Netherlands. Again, the observed differences are very small (less than 2 points) and do not convincingly demonstrate a difference. Another survey question asked "How would you assess the intensity of competition in the local markets in your country?" Figure 6 shows that the intensity of competition is scored slightly higher for the Netherlands than for Denmark, Finland and the UK. Germany scores slightly higher than the Netherlands. The observed differences, however, are too small to argue that the intensity of local competition differs significantly between the countries.

Figure 6 Intensity of local competition

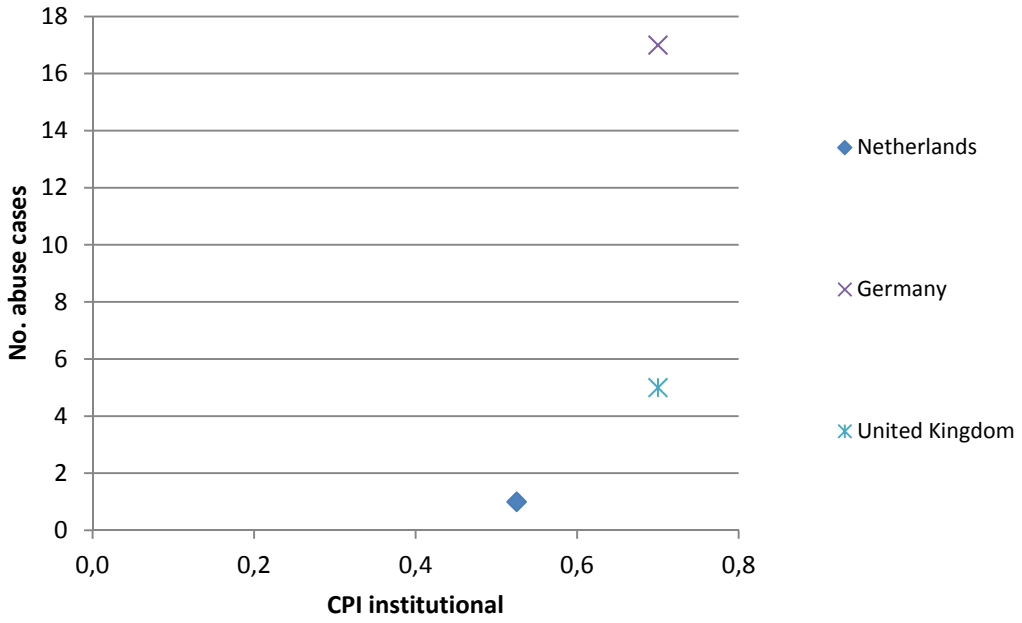


Source: SEO Economic Research, based on WEF. Intensity of local competition (WEF, Global Competitiveness Index, 2008-2011), question "How would you assess the intensity of competition in the local markets in your country? [1 = limited in most industries; 7 = intense in most industries]" Sum of 2007, 2008 and 2009.

Deterrent effect and law compliance

Below, data on the deterrent effect of enforcement, based on Buccirossi (2011), is presented. The Competition Policy Indexes (CPI) measure the deterrent properties of a jurisdiction's competition policy, anti-trust legislation including the merger control provisions and enforcement. The CPI's incorporate information on the legal framework, the institutional settings, and the enforcement tools of each jurisdiction in the sample (Buccirossi, 2011). Countries are scored against a benchmark of generally agreed-upon best practices. The results allow for cross-country and cross-time comparisons. Two types of index are constructed in the paper: one for institutional features (independence of the CA, separation of powers, quality of the law, powers during investigation and sanctions and damages) and one for enforcement features (resources).

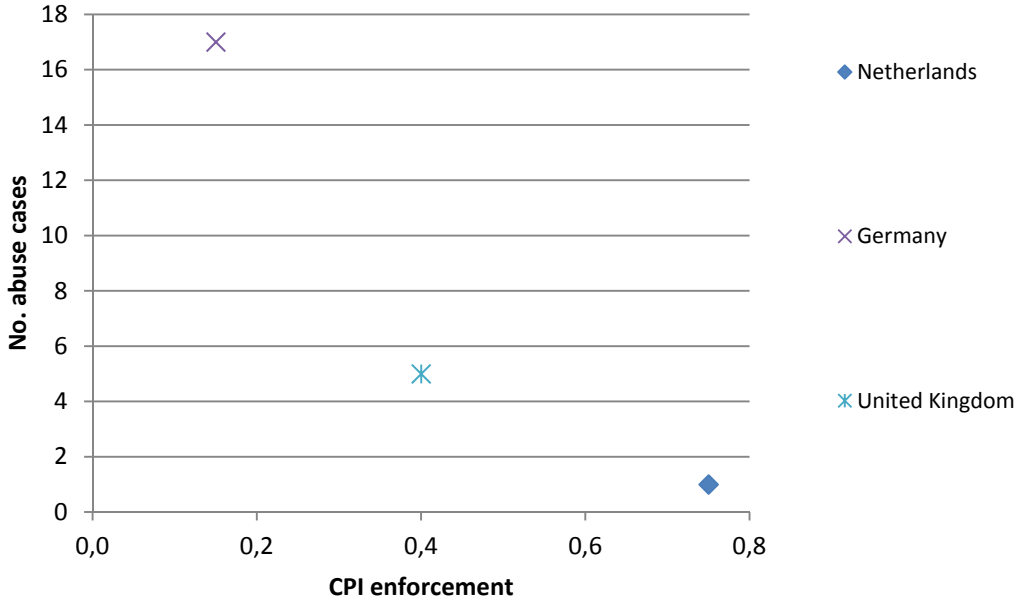
Figure 7 The competition policy index (CPI) - Institutional



Source: SEO Economic Research, based on Buccirossi et al. (2011). Values for 2005. For Denmark and Finland no CPI was available. The higher the score, the higher the deterrent effect.

The index is only available for Germany, the Netherlands and the United Kingdom. According to Figure 7, the institutional deterrent properties are lowest for the Netherlands. The deterrent effect of enforcement, however, is highest for the Netherlands, see Figure 8.

Figure 8 The competition policy index (CPI) - Enforcement

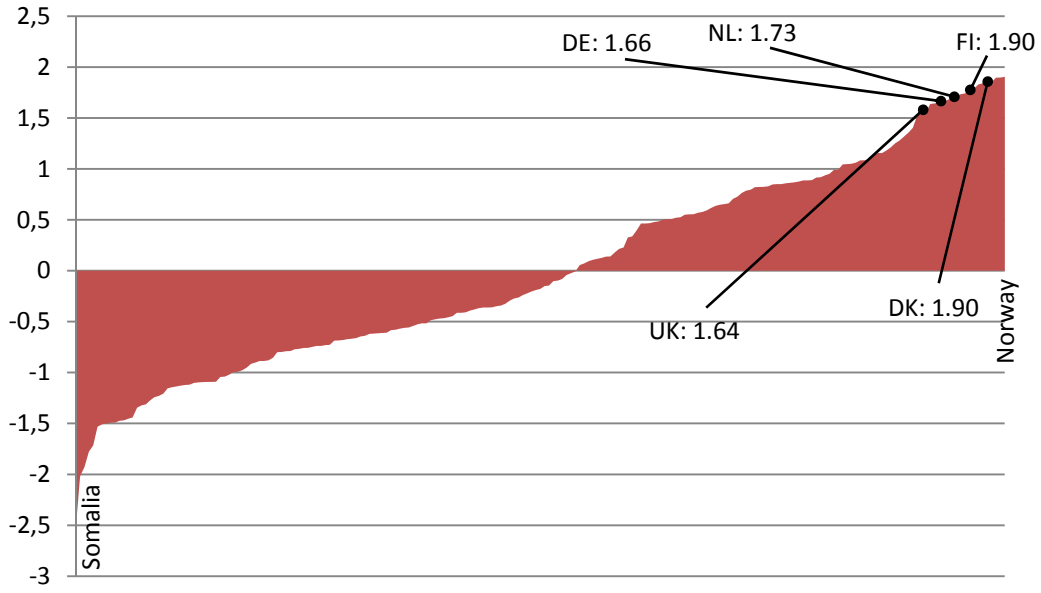


Source: SEO Economic Research, based on (Buccirossi et al. (2011)) Values of 2005. For Denmark and Finland no CPI was available. The higher the score, the higher the deterrent effect.

The enforcement CPI is based on resources: the result thus suggests the NMa scores well on resources. According to the theory of deterrence, this would imply that violations occur to a lesser extent, i.e. firms observe the resources of the NMa and therefore fear detection and prosecution. On the institutional features, the Netherlands scores below Germany and the UK. Buccirossi (2011), however, does not explain exactly which institutional features determine these scores. The result suggests that deterrence is weak. Hence, the CPIs do not paint a clear story on the deterrent properties of Dutch enforcement. Also note that the effect of resources on the number of interventions can work in two opposing manners. First, having more resources means that more cases can be pursued, resulting in a higher number of interventions. Second, more resources could lead to fewer violations occurring, resulting in a lower number of interventions.

Do the countries in our sample differ in terms of law compliance? No data on compliance with the abuse-of-dominance provision or competition law is available. The best available data is presented here. The World Bank has constructed governance indicators for 213 countries in the period 2005-2009. Figure 9 shows the survey results for the extent to which agents abide by the rules. The results of the World Bank are based on perceptions of companies regarding the extent to which they have confidence in and abide by the rules of society (Kaufmann et. al., 2010). Somalia scores worst, and Norway scores best. The scores of the five countries in our sample are very close together. Since the differences are small and the survey is not focused on competition law, the World Bank results do not provide insights about compliance in relation to the abuse-of-dominance provision. At best, the results suggest that, when compared with 213 countries, the countries in our sample are similar in terms of compliance with society's rules.

Figure 9 Rule of Law – perceptions of the extent to which agents abide by the rules

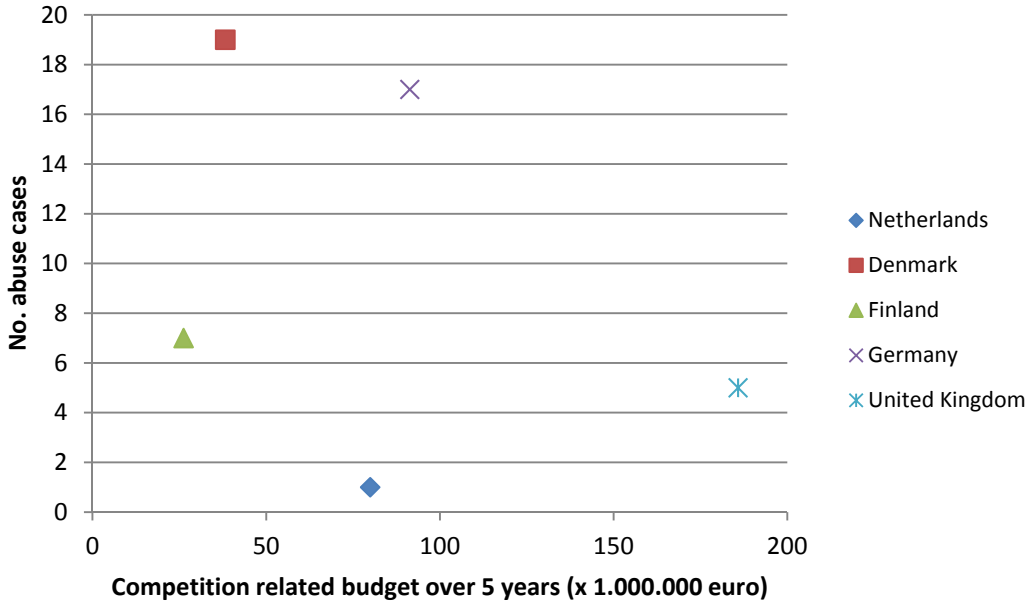


Source: SEO Economic Research, based on World Bank. World governance indicators: http://databank.worldbank.org/ddp/home.do?Step=2&id=4&hActiveDimensionId=WGI_Series. The average of 213 countries in the period 2005-2009 is shown. The best and worst performing countries are shown vertically. Score ranges from -2.5 to 2.5.

Competition authorities' resources

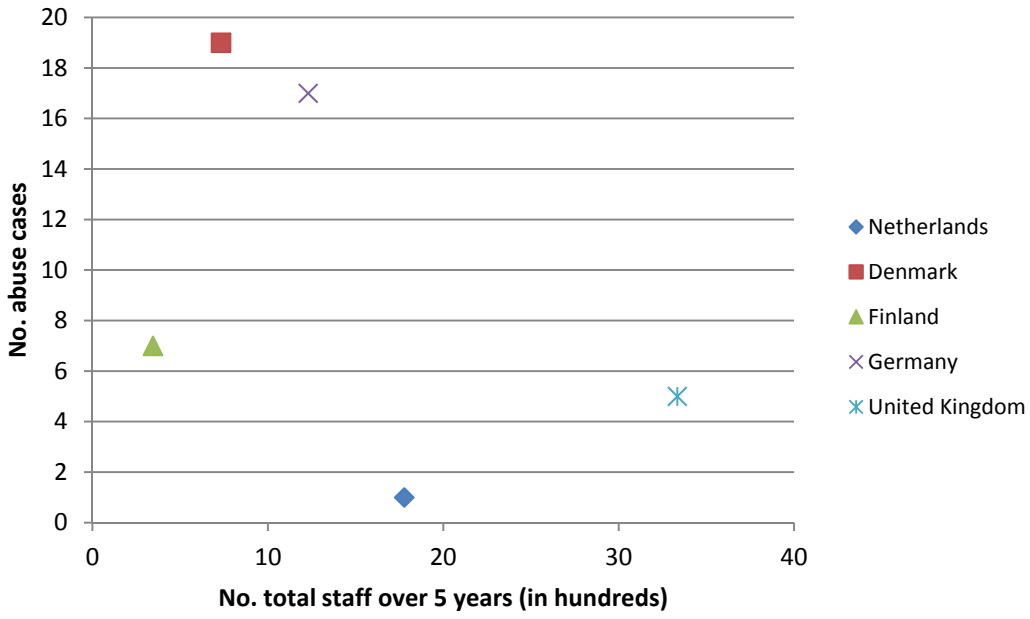
The next figures show the budgets and staff available to the CAs. Figure 10 shows the competition related budget, aggregated for 5 years. The CAs of Germany and the UK have a larger budget than the Netherlands. In terms of total staff, only the UK is larger than the NMa (see Figure 11). These figures include sector-specific competition regulation.

Figure 10 Resources – competition related budget



Source: SEO Economic Research, based on Global Competition Review (GCR) (2006-2010).

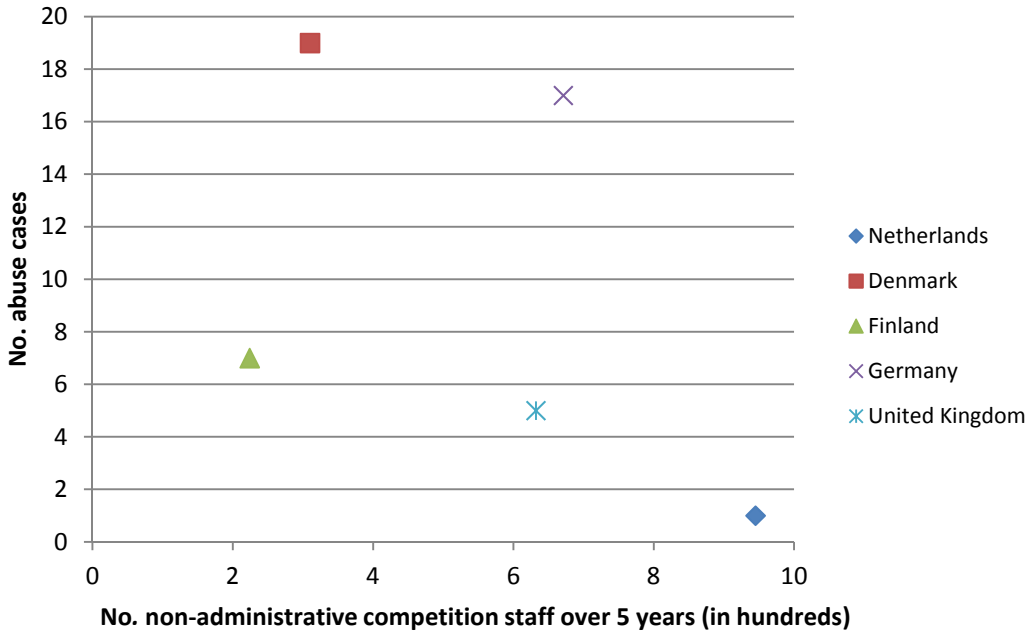
Figure 11 Resources – total staff competition authority



Source: SEO Economic Research, based on Global Competition Review (GCR) (2006-2010).

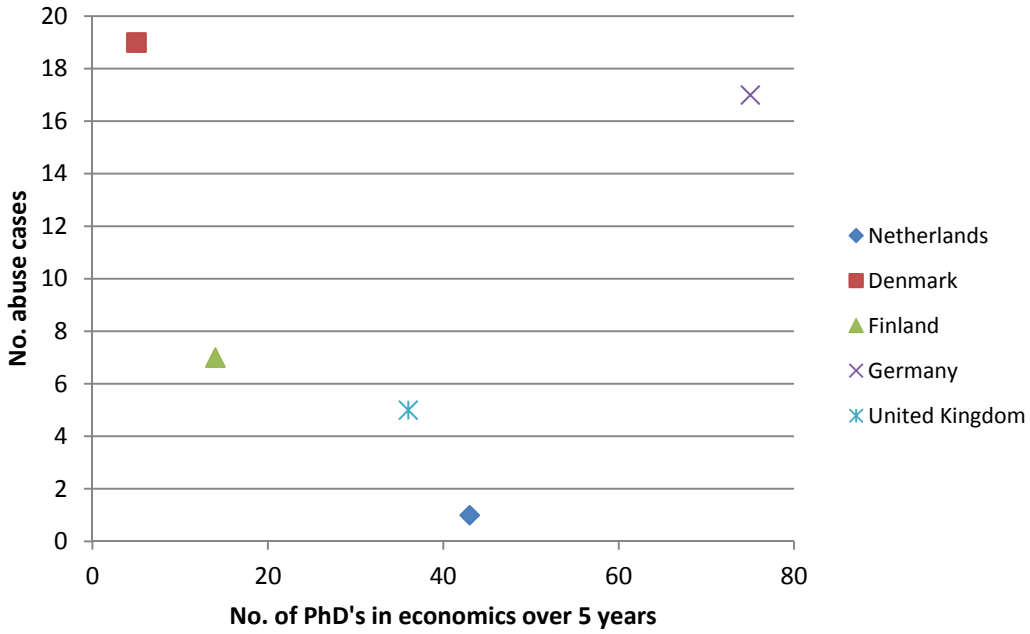
If only non-administrative competition staff is considered, the NMa is the largest CA from the five, see Figure 12.

Figure 12 Resources – number of non-administrative competition staff



Source: SEO Economic Research, based on Global Competition Review (GCR) (2006-2010).

Figure 13 Resources – PhD's in economics.



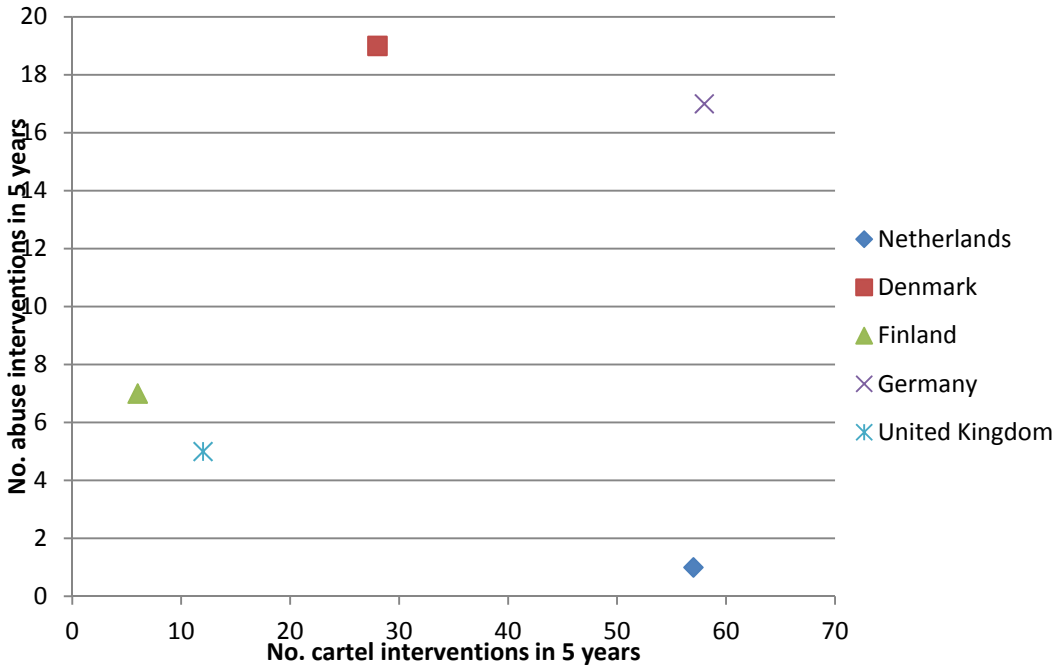
Source: SEO Economic Research, based on Global Competition Review (GCR) (2006-2010).

The number of staff with a PhD in economics may indicate whether an authority is inclined to assess economic effects in their decisions. As became apparent in Section 3, the impact of an effects-based approach on the number of cases is unknown. Figure 13 shows that only Germany employs more staff with a PhD in economics than the Netherlands. Assuming that staff trained in economics are employed to assess economic effects, this result seems to conflict somewhat with the earlier conclusion that Germany adopts a form-based approach.

Cartel cases

Figure 14 shows the number of cartel interventions handled by an authority on the horizontal axis. The Netherlands intervened in more cartel cases than most other authorities did. Only Germany (75) handled more non-merger cases than the Netherlands (58), see also Table 5. Denmark handled 47 non-merger cases, Finland 13 and the UK handled 17 non-merger cases.

Figure 14 Cartel interventions



Source: SEO Economic Research, based on information provided by CAs.

Conclusion

In this section, we have looked at several types of quantitative data. The results highlight whether any of the discussed variables provide plausible explanations for the relatively low number of cases in the Netherlands.

The low number of cases in the Netherlands, as compared to the other countries, cannot be explained by the volume of economic activities. Both Finland and Denmark are smaller in terms of GDP and number of firms, but have a higher number of sanction decisions. The UK and Germany are larger in economic size, but show a higher number of cases per unit of GDP or per firm than the Netherlands. When we look at the number of interventions per large firm, we find that the UK and the Netherlands have about the same number of interventions. The high openness to trade of the Netherlands suggests Dutch firms may have been investigated by the

EC. However, we found that the EC did not investigate Dutch firms on the basis of abuse-of-dominance.
The survey results from the World Economic Forum (2010) on the concentration of the economies do not show significant differences between the countries in our sample. Furthermore, there are no indications that the countries in our sample differ in terms of compliance with society's rules.
The total resources available to the NMa do not provide an explanation for the low number of cases. Denmark and Finland have brought more cases with fewer resources. Depending on which variable is looked at, Germany and the United Kingdom have more resources available, but have challenged proportionally more cases. In terms of non-administrative competition staff, the NMa is the largest authority in our sample.

The number of cartel cases handled is highest for the Netherlands. When cartel cases and abuse cases are added together (yielding the number of non-merger cases), only Germany handled more cases.
The quantitative data presented in this section suggests that the relatively low number of Dutch abuse-of-dominance interventions is unlikely to be caused by:

- Low level of CA resources;
- Low volume of economic activity or number of firms;
- A higher deterrent effect or better compliance with the law in the Netherlands.

The data does suggest that a very high share of the NMa's resources is allocated to cartel cases: the number of cartel cases is high for the Netherlands and was only (slightly) higher in Germany.

4.3 Case-studies

Denmark

Table 20 below lists the 19 Danish cases. We will give a short description of 14 of those. For three postal cases, a more detailed analysis of market power and concentration is provided.[46] The comparison with the Netherlands concludes the case-studies from Denmark.

Ritzau

Notification of an agreement to obtain a statement of non-intervention. Under Section 11(5) of the Danish competition Act (DCA), the Danish Competition Council (DCC) can assert that certain behaviour is not considered an abuse-of-dominance. The DCC was concerned that certain behaviour could be a possible abuse. Ritzau offered commitments and the DCC made the commitments binding under Section 16a of the DCA.
Ritzau is a news agency providing news to media. In the Netherlands *Het Algemeen Nederlands Persbureau* (ANP) is active in that market. There are no indications that abuse-of-dominance was less likely to occur in the Netherlands.

[46] For two cases, a case description was not available

Carlsberg

Review of beer agreements, containing equipment-exclusivity and outlet-exclusivity clauses under both national and EU law. In-depth test of effects on the market of agreements and of commitments (limited usage of exclusivity clauses). Commitments are accepted.
In the Netherlands, beer agreements were scrutinised by the NMa in 2002. According to a press release dated 29 May 2002, the Dutch brewer Heineken changed its contracts following NMa intervention. Subsequently, the contracts were approved by the NMa. This suggests that a similar case was less likely to occur in 2005-2009 due to the effect of prior enforcement.

Mazda Motor Denmark

Market for OEM spare parts for Mazda cars. Mazda imposed conditions which had the effect of putting pressure on authorised dealers and repairers to primarily or exclusively purchase Mazda spare parts. One of these was the right to unhindered and un-notified access to the dealers' and repairers' spare parts store rooms. This was considered an abuse-of-dominance and Mazda was ordered to amend the clause.
There is no information available that indicates that Mazda in the Netherlands is more or less likely to display this behaviour in the Netherlands.

Pradan Auto Import

Distribution of OEM Skoda spare parts. Pradan operated a loyalty discount, which was meant to keep newcomers out of the market. DCC decided that this was abusive. The DCC appears to have applied a form-based test.

DBC Medier

DBC pushed through exclusivity and applied loyalty rebates and bundling strategies. The DCC ordered DBC to stop this abuse-of-dominance. The DCC appears to have applied a form-based test.

Toyota Denmark

Toyota, inter alia, applied certain onerous clauses in the distribution agreements for OEM spare parts in a discriminating manner. They were only enforced consistently towards workshops that were not owned by authorised dealers. At the same time, certain favourable terms were not applied to authorised repairers who were not also dealers. The DCC appears to have applied a rather formal approach. Comment: the information at hand does not offer enough detail to determine whether certain issues in this case could have been resolved under the Motor Vehicle Regulation, rather than Section 11(1) of the DCA and Article 82 EU (Article 102 TFEU).

Rorforeningen

Rorforeningen is an association of the major Danish wholesalers of plumbing and heating products. It applied exclusionary practices in relation to wholesalers who were not members of Rorforeningen. Access to the Rorforeningen catalogue was only open to parties with a market

share of at least 5% for products that were sold by at least 2 members of Rorforeningen. In addition, Rorforeningen acted as control body for new or modified items. This was considered abusive. It would appear that this would qualify as a cartel, rather than abuse.

Table 20 Interventions Denmark (19 cases)

Case	Sector/activities	Type of abuse	Outcome
TV2/Danmark A/S (2005)	Selling TV-commercials	Annual rebates	Order to cease infringement
Elsam (2005)	Energy	Unfair prices	Pricing cap imposed by CA
Ritzau (2005)	News service	Restriction on customers' use of news material	Commitments
Carlsberg (2005)	Beer agreements with hospitality industry	Vertical agreements	Commitments
Mazda Motor Denmark (2005)	Original spare parts for Mazda cars	Inspections on customer's premises	Commitments
Pradan Auto Import (2005)	Original Skoda spare parts	Loyalty rebates	n/a
DBC Medier (2005)	Distribution of films and computer programmes/games	Rebates	Commitments
Toyota Denmark (2005)	Servicing of cars	Discriminating contract clauses	Commitments
Rorforeningen (2005)	Plumbing and heating products	Discrimination, exclusionary practices	Commitments
Post Danmark (2005)	Postal service - distribution of unaddressed items in Denmark	Discrimination, loyalty rebates	Commitments
Fritz Hansen A/S (2006)	Market for upper-end furniture	Exclusionary conduct, loyalty rebates	Commitments
Danbred (2006)	Administration of the Danish breeding programme	Discrimination, exchange of information	Commitments
Five taxi companies (2006)	Taxi	Exclusionary behaviour	Commitments
Post Danmark (2007)	Magazine mail	Exclusionary pricing, rebate schemes and discrimination	Order to comply
Supergros (2007)	Wholesale of groceries to independent retailers	Loyalty rebates, exclusivity clauses, long term notice	Commitments
Elsam (2007)	Energy	Excessive pricing	Infringement found, class action suit expected, case pending at court
Biblioteksmedier (former DBC Medier, 2008)	Distribution of films and computer programmes/games	Exclusive rights	Commitments offered to Danish Appeals Tribunal
Unimerco (2008)	Wholesale market for power fastening tools (nailers, sprigs and staplers)	Tying	No final decisions, commitments offered
Post Danmark (2009)	Postal service - market for direct mail	Loyalty enhancing rebate schemes	Order to end infringement

Source: SEO Economic Research, based on information provided by the CA.

Fritz Hansen A/S

Fritz Hansen is a manufacturer of high quality, upper-end furniture, and owns rights to furniture designed by a number of top designers. The furniture is distributed through a selective distribution system. The standard terms for the Danish dealers included conditions which the DCC found problematic under the competition rules, such as non-competition clauses and progressive, retroactive rebates. Hansen offered commitments which were made binding. The press release does not specify the type of competition issues. Dominance is not mentioned. This case would appear to be a vertical issue, rather than an issue of abuse-of-dominance.

Danbred

The case started because there were complaints about discriminatory treatment. Danish Pig Production (DPP) has agreed on and administers the Danbred or DanAvl breeding programme. DPP is organised by the Danish Meat Association, the organisation for Danish Agriculture and the organisation of Danish Pig Producers. One of the clauses in the DPP standard agreement stipulated that genetic products could only be sold outside the EU through SEA. SEA is an organisation of Danish nucleus and multiplier herds which participates in the Danbred programme and is organised by the Danish meat Association. There were several other clauses and practices which raised competition issues. Commitments were offered and accepted. The press release does not detail what article of the DCA was applied. Dominance is not mentioned. The case appears to be a cartel, rather than an abuse-of-dominance.

Five Taxi companies

Five taxi companies are excluding a sixth taxi company from their clearing system. The DCC concludes that this is an abuse of collective dominance under article 11 DCA. It also found that the five companies had entered into a concerted practice restricting competition under article 6 DCA. It appears that this case could have been addressed with the cartel prohibition.

SuperGros

SuperGros is a wholesaler of groceries. Its standard terms contained conditions which raised competition issues (loyalty rebates, exclusivity clauses, long term of notice). SuperGros did not agree with the assessment of the DCAuth. but offered commitments which were accepted and made binding. The press release does not mention dominance.

Elsam

Elsam produces electricity and abused its dominant position in Western Denmark by imposing excessive prices and 'playing' the market. The prices charged by Elsam substantially exceeded Elsam's total costs (fixed and variable) including an estimated mark-up. A class action suit is expected to follow, according to the press release.
There are no indications that a similar case was less likely to occur in the Netherlands.

Biblioteksmedier (formally DBC Medier)

Biblioteksmedier has a market share exceeding 50%. The DCC did not find abuse, but the decision was appealed to the Competition Appeals Tribunal, which annulled the DCC's decision. The Tribunal held that there was not sufficient factual support for the DCC's decision that the effect of Biblioteksmedier's exclusive rights was so negligible that it did not constitute abuse. Biblioteksmedier has offered commitments. These were accepted.
We found no information that indicates whether a similar case was less likely to occur in the Netherlands.

Unimerco

Unimerco presumably held a dominant position in the market for fastening tools. Its market share exceeded 50-60%. Unimerco demanded or urged customer only to use Unimerco fasteners in Unimerco tools. Unimerco made statements concerning safety risks and threatened that warranty and product liability would be repealed and offered free services only if original fasteners had been used. Unimerco offered commitments. The DCAuth. concluded that a final decision was not required.

Postal cases (3 cases)

Post Danmark (2005): case summary
In 2004, Post Danmark A/S was alleged to have abused its dominant position in the market for distribution of unaddressed items and local weeklies. According to Post Danmark's only competitor in the market for un-addressed mail, Forbruger-Kontakt, Post Danmark had used discriminating prices towards its own customers and those of Forbruger-Kontakt. Post Danmark applied discriminatory prices and loyalty rebates and a pricing scheme that did not treat customers in similar conditions equally. Post Danmark had quoted different prices to its own and its competitors' customers. In a few cases Post Danmark had quoted more favourable prices to its competitor's customers than to its own customers. Post Danmark had also applied discriminatory prices towards its own customers. Finally, Post Danmark had, on six occasions, applied loyalty-enhancing target discounts whereby customers were offered higher discounts if the actual number of items sent exceeded an agreed target. Some of these discounts could not be explained by costs, but were chiefly aimed at gaining market share from Forbruger-Kontakt[47]. Post Danmark offered remedies, which were accepted, but also appealed the decision to the Danish Appeals Tribunal. According to the DCC, the decision included the assessment of effects. The Competition Council concluded that the new pricing scheme is fixed on objective criteria based on the underlying costs of the company. This result ensures that the competitors of Post Danmark meet fair conditions in this market. The remedies ensure equal treatment of customers, acting as company groups, wholesale societies or competitors respectively. Competitors obtain access to distribution through Post Danmark on an equal level as other

47 www.konkurrencestyrelsen.dk/en/service-menu/publications/publication-file/publikationer-2005/annual-report-2004/complete-version/

customers of the company. In the decision[48] no attention is paid to assessing the dominant position of Post Danmark.

Post Danmark (2005): comparison with the Netherlands

In 2006, Danmark Post had a market share of 50-60% for un-addressed mail and Forbruger-Kontakt was its only competitor in this market. In the Netherlands, the market situation pointed at slightly more competition. TNT had a market share of 12% but add to this the market share of its 100% subsidiary and you end up with a total market share of 48% which is not far below the market share of Post Danmark.[49] However, TNT faces more competitors; Interlanden (DHL) and Alfa. Hence, it seems TNT was less likely to hold a dominant position and the case was therefore less likely to occur in the Netherlands.

Post Danmark (2007): case summary

Post Danmark abused its dominant position in the market for magazine mail. It imposed exclusionary pricing and rebate schemes and discriminated between customers. The case started with a complaint by a competitor. Post Danmark's pricing and rebating scheme for magazine mail consisted of i) a general price list, ii) individual price lists, and iii) individual quantity rebates granted on the basis of either the general price list or the individual price lists. The following argumentation is followed in determining the dominant position of Post Danmark: "Post Danmark has a dominant position in the relevant market due to a very high market share, a nationwide distribution network and a significant brand which allow it to act independently of its competitors." Post Danmark has therefore been ordered to arrange for its pricing and rebate scheme for magazine mail to comply with section 11(1) in the Danish Competition Act and Article 82 of the Treaty. Denmark follows the Explanatory Memorandum of the European Commission, when looking at the market share in an abuse-of-dominance case. The DCC found that Post Danmark was not able to justify its pricing and rebate scheme on the basis of its costs. The DCC ordered Post Danmark to rearrange its pricing and rebate scheme and to comply with section 11 DCA and article 82 EU.

Post Danmark (2007): comparison with the Netherlands

Post Danmark had a market share in the magazines' market of 90% in 2006. The exact market share of TNT in the Netherlands is not known but the HHI index is.[50] This index ranges between 2,000 and 3,000 for the market for magazines.[51] This suggests that the Dutch magazine market is concentrated. With a market share of 90%, the HHI in the Danish magazine market will, however, be at least 8,100. A market with an HHI above 8,000 can be regarded as a dominated market. The Dutch market is therefore less concentrated; TNT held a considerably

48 www.konkurrencestyrelsen.dk/konkurrenceomraadet/afgoerelser/afgoerelser-1998-2010/afgoerelser-2005/konkurrenceraadets-moede-den-23-februar-2005/post-danmarks-fremtidige-prissaetning/

49 TNT is now called PostNL.

50 A HHI index below 1,800 indicates a competitive market. An index between 1,800 and 8,000 implies a concentrated market and an index above 8,000 is interpreted as a dominated market.

51 This implies that the highest possible market share of TNT in this segment ranges from 44-54%.

lower market share than Post Danmark did.[52] This suggests that the abuse-of-dominance case was less likely to occur in the Netherlands.

Post Danmark (2009): case summary

Post Danmark applied rebates for direct mail. The DCC investigated whether these were loyalty enhancing. Post Denmark is the sole distributor with a nationwide distribution network, meaning that the customers must use Post Denmark's services when distributing outside the coverage area which is covered by Citymail, the sole significant competitor. The relevant product market is the market for distribution of bulk mail, including distribution of mail dispatched in larger quantities simultaneously from companies, organisations, public authorities etc. Post Danmark held a market share exceeding 90%, which showed it was dominant in the market for bulk mail. The DCC did not make a comparison with the costs of an equally efficient undertaking because these did not exist and might only build up a position in the longer term. It took a dynamic view of competition, to allow less efficient undertakings to stay in the market, because these might also exert competitive constraint on Post Danmark and have an impact on efficiency and quality in the postal service industry.

In connection with market delimitation, the authority has examined and rejected the fact that direct mail is part of a broader market for mass marketing. The authority has examined if there is a degree of substitution between direct mail and other forms of direct marketing such as sms, mms and e-mail, implying that direct mail and these other forms of direct marketing are part of the same market. The authority has found that there are adequately substantial legal and practical barriers, for example as a result of the Marketing Practices Act's prohibition of unsolicited electronic inquiries and the senders' lack of access to the addressees' email addresses, that this is not the case. On this basis, e-mail, sms and mms are not part of the relevant product market. With a market share of more than 90% Post Denmark holds a significantly dominating position in the market for bulk mail. This case shows that the Explanatory Memorandum of the European Commission is followed. The European Court of Justice states the following about market share in an abuse-of-dominance case: "save in exceptional circumstances, very large market shares are in themselves evidence of the existence of a dominant position. That is the case where there is a market share of 50%"[53]. The Danish Competition Council has used the Commission's paper on "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" in the assessment of Post Denmark's rebate system. In practice, it means that the authority has assessed the likely impact on the market concerning Post Denmark's rebate system. The DCC ordered Post Danmark to put an end to the infringement of article 82 EU and article 11 DCA. The DCC applies an in-depth market test.

Post Danmark (2009): comparison with the Netherlands

The market shares for both countries in 2009 are not known. However, looking at the situation in 2006, the two national post markets are different. First, the market share of Post Denmark in 2006 in the market for direct bulk mail was over 90%. In the Netherlands bulk mail was already

52 Note that the NMa investigated the postal market in April 2011 in view of a merger (no. 7124/83). The decision suggests TNT (now PostNL) has a fairly large position on the market. The definition of the relevant market is however different in that case.

53 case C-62/86, AKZO, 1991 ECR I-3359 by the European Court of Justice

liberalised in 2008. It represented 43% of the, until then, liberalised parts. Together, Sandd and Selekt Mail had a market share of 55% which is more than that of TNT (45%).[54] This is a plausible explanation as to why TNT has not been involved in a prosecuted abuse-of-dominance case in this segment. The competitive pressure that TNT faces is higher than that faced by Post Denmark. Furthermore, Sandd and Selekt Mail both have their own nationwide network in contrast to the competitors of Post Denmark. Citymail does have its own network but this only reaches 40% of the Danish households. Therefore, Danish competitors are in most cases dependent on Post Danmark's network[55]. Hence, it was not likely that provider TNT had a dominant position. Due to lower concentration in the Netherlands and the fact that rival providers Sandd and Selekt Mail both have their own networks, the case was less likely to occur in the Netherlands.

Conclusion Danish cases

We provided a brief analysis for 14 cases and an in-depth analysis of 3 postal cases.

Our analysis indicated that three cases appeared to be form-based, see Table 21. The Danish CA confirmed these case comments. Assuming that the NMa would require an analysis of effects in those cases, the cases might not have lead to interventions if either the NMa had not started such analysis or the outcome of the effects-analysis was that the conduct is not anti-competitive.

The second category is that the case appears to be a cartel, rather than an abuse-of-dominance. Assuming that for those cases the NMa would have preferred to apply the cartel prohibition, these cases were less likely to appear in the Netherlands. The same applies to the third category in the Table.

Next, for three cases it appears that dominance was not assessed. These cases ended in commitments, rather than sanctions. Yet, there is a risk of over-enforcement in these cases. Assuming that the NMa tries to minimise this risk more than the Danish CA does it can be argued that the NMa would have required an assessment of dominance. With lack of indications of dominance, the NMa might not have intervened.

Finally, for the three postal cases our analysis indicates that the Dutch market is more competitive than the Danish market.

For some case, more than one comment was relevant. For example, the Danbred case could be seen as a cartel but it also seems that dominance was not assessed. After correcting for double counting, we conclude that 11 cases were less likely to have occurred in the Netherlands. Note that none of the Danish cases involve a fine.

54 Sandd and Selekt Mail merged in 2011.

55 There has been one investigation into abuse of dominant position by TNT in 2009. Sandd filed a complaint against TNT for predatory pricing, tying and bundling, exclusive contracts and price discrimination. The NMa investigated prices from 2007 until mid 2009 but did not find evidence for predatory pricing. It also concluded that other behaviour of TNT was not intended to drive competitors from the market. It was not necessary to conclude on whether or not TNT had a dominant position since the investigation concluded that there was no abuse.

Table 21 Analysis of Danish cases

Comment	No. of cases
Form-based decision (Pradan Auto Import, DBC Medier, Toyota Danmark)	3
Cartel prohibition could have been applied (Rorforeningen, Danbred, Taxis)	3
Other provision (vertical restraints, Motor Vehicle Regulation) could have been applied (Toyota Danmark, Fritz Hansen)	2
Not clear if dominance was assessed (Fritz Hansen, Danbred, Supergros)	3
Dominance less likely due to less concentrated market (3 Post Denmark cases)	3
Total*	**11**

Source: SEO Economic Research. * Note that some cases appear in more than row, the total number of cases equals 11.

Finland

In Finland there were 7 interventions (defined as a sanction or the acceptance of commitments) in the period 2005-2009. Table 22 below lists these cases.

Table 22 Interventions Finland

Case	Sector/activities	Type of abuse	Outcome
Suomen Numeropalvelu Oy (SNOY) (2005)	Telephone directory services	Foreclosure	FCA proposed fine of € 150,000, Market Court upheld the decision in 2009, reduced the fine to € 100,000
Finnsementti Oy (2006)	Cement	Selective discount systems with foreclosing impact	Commitment decision
Oulun Puhelin Oyj (2007)	Access to local loop broadband and telephony	Discrimination, raising rivals' cost	FCA proposed fine € 100,000, decision upheld in Market Court (2010), fine reduced to € 90,000
TeliaSonera Finland Oy (2007)	Access to local loop broadband and telephony	Discrimination, raising rivals' cost	FCA proposed fine € 40,000, decision upheld in Market Court (2010), fine reduced to € 30,000
Kymen Puhelin Oy (2007)	Access to local loop broadband and telephony	Discrimination, raising rivals' cost	FCA proposed fine € 50,000, decision upheld in Market Court (2010), fine reduced to € 40,000
Aina Group Oyj (2007)	Access to local loop broadband and telephony	Discrimination, raising rivals' cost	FCA proposed fine € 75,000, decision upheld in Market Court (2010), fine reduced to € 60,000
Nordea Pankki Suomi Oyj/OP-Keskus osk/Sampo Pankki Oyj (2009)	Banking, pricing ATM use	Joint dominance, pricing discriminatory against new ATM operators	Commitment decision

Source: SEO Economic Research, based on information provided by the CA.

These cases will now be discussed below. For each case, we will try to indicate factors that might explain why a similar case did not occur in the Netherlands.

Telephone directory services (SNOY)[56]

In the case involving Suomen Numeropalvelu Oy (Finnish Telephone Number Service, SNOY), SNOY abused its dominant position by refusing to deliver telephone subscriber information to certain companies operating in the retail market of telephone directory services. SNOY itself is only active in the wholesale level of subscriber information, whereas the owners of SNOY operate in the retail level of catalogue service market. SNOY is the only firm that maintains a national database of telephone subscriber information and resells the information to service providers. Consequently, it is impossible to offer catalogue services to end customers without doing business with SNOY.
Since 2003, SNOY has refused to provide subscriber information to Oy Eniro Finland Ab (Eniro) to be used in an online telephone directory that Eniro offered to end customers for free and without registration. SNOY argued that its refusal was justified on the grounds of data and privacy protection. The FCA found that by its conduct, SNOY sought to foreclose companies offering a new business model (i.e. catalogue services in the Internet for free without registration) from the market. By refusing to deal in subscriber information SNOY was acting in the interests of its owners, which were competing with Eniro in the online directory market. SNOY's refusal to deal was not objectively justified as the privacy and data protection grounds presented by SNOY were shown to be both insufficient and artificial.

Comparison with the Netherlands

In the Netherlands two players (de Telefoongids and Gouden Gids) were serving the directories market until they merged in 2008. Both companies provided similar content. This means that the Dutch market has been organised more competitively and, therefore, a similar abuse-of-dominance case was less likely to have occurred.

Cement

This case is a commitment decision, and fewer details are available. The Finnsementti case involved foreclosure. The selective discount systems applied by the company were seen to have potentially foreclosing impacts. After the FCA had intervened in the matter, the company undertook to apply pricing which does not artificially restrain the import of cement.

Comparison with the Netherlands

No data is available that indicates why a similar case could not have occurred in the Netherlands.

Telecom (4 cases)

The four Finnish cases in the telecom sector involved discriminatory pricing and raising rivals' cost in the market for telephony and broadband services for end-users. The infringing parties are vertically integrated telecom companies that limited the access to the market for downstream rivals. In the Netherlands, the NMa did not handle such cases in this sector in the relevant period of 2005 to 2009.

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[56] Case description from: http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20refusals/finland.pdf

In Finland, FICORA (Finnish Communication Regulatory Authority) may terminate an abuse-of-dominance infringement, but does not have the authority to impose fines on the party involved. Considering the importance of the abusive conduct by four telecom companies to consumers, the Finnish Competition Authority has intervened in parallel to the telecom regulator and proposed fines to the Market Court.[57]

In contrast, the OPTA (Independent Post and Telecommunications Authority) can impose fines when telecom companies have infringed the regulations laid down in the Telecom Act and the specific decisions which are published every three years. These regulations detail obligations in relation to issues such as access (tariffs), non-discriminatory pricing and termination tariffs. Hence, intervention by the NMa is not necessary in order to stop and fine abusive behaviour.

There were no abuse-of-dominance cases for the market for unbundled local loop for broadband in the relevant period of 2005 to 2009. Before this period, a few cases had been handled by OPTA. These are discussed in brief in Box 7.[58]

Box 7 Dutch telecom cases handled by telecom regulator OPTA

Unbundled local loop for broadband

KPN, as the exploiting telecom incumbent, is obliged to grant access to its loop and corresponding facilities on a transparent, reasonable and non-discriminatory basis.[59]

- 2001: Access to the loop is possible in two variants. KPN did not develop and grant access to the loop by means of the preferred variant of BaByXL. OPTA concluded that telecom incumbent should also grant access for variant 2.[60]
- 2002: KPN induced a supplementary tariff for spectral management. OPTA concluded that KPN had no legal ground to do so and imposed a commitment with financial penalty if KPN did not comply.[61]
- 2004: OPTA gave KPN two financial penalties. One for infringement of the conditions of cost oriented prices by imposing rebates, and one for infringement of the non-discriminatory principle.[62]

To avoid margin squeeze, KPN is obliged to deliver a margin squeeze test for regulated services.[63] For ULL broadband, OPTA imposed several behavioural obligations which address potential margin squeeze conduct.[64]

Source: SEO Economic Research

Comparison with the Netherlands

Box 7 illustrates that Finnish-type cases have also been addressed in the Netherlands. However, in the Netherlands these cases have been dealt with and fined by telecoms regulator OPTA, whereas in Finland the CA intervened in parallel to the telecom operator due to the fact that the Finnish telecom regulator could not impose fines.

57 This explanation was provided by the CA.
58 For the fixed telephone network, there have been cases of termination tariffs handled by OPTA.
59 European Parliament (2000). Article 3 (2), Verordening (EG) nr. 2887/2000, Council of European Union (2000) PbEG L 336/4, 18 December 2000 & OPTA, Telecom Act, article 6.9(1)
60 OPTA (2001). Besluit inzake geschil BaByXL-KPN, OPTA/IBT/2001/202834.
61 OPTA (2002). Last onder dwangsom. OPTA/IBT/2002/204441
62 OPTA (2004). Besluit. PTA/JUZ/2004/201288, 29 april 2004.
63 OPTA (2006). OPTA/TN/2006/202439, 04-08-2006
64 OPTA (2008). Marktanalyse, ontbundelde toegang op wholesale niveau, 19 December 2009. Page 18.

Banking, ATM pricing[65]

The Finnish CA accepted commitments from three major Finnish banks in relation to their pricing of ATM cash withdrawals. The issue was whether the banks held a joint dominant position and abused this dominant position. The three banks together own a company (Automatia) that operates a nationwide automatic teller machine (ATM) network. Approximately 85% of cash is dispensed through Automatia. The participating banks bear costs when a consumer chooses to use an ATM outside the network of Automatia. The banks charge their customers a fee if they use another ATM. The FCA observed that this fee paid is larger than the costs that the bank incurs. The FCA considered that the pricing policy was discriminatory towards competing ATM providers.
The banks offered commitments. In particular, the fee charged to consumers would not be higher than the incurred costs.

Comparison with the Netherlands
There are a number of issues that seem to contrast with the Dutch situation. First, the major banks operate ATM networks individually in the Netherlands. Second, most consumers do not pay on a per-unit basis for ATM usage, regardless the network used. Rather, Dutch consumers pay a (yearly) flat-rate. This suggests that suppliers on the market for cash distribution are less likely to have a dominant position in the Netherlands. Moreover, due to the flat-rate pricing policy in the Dutch situation, pricing policies cannot discriminate against competing ATM networks.[66]

Conclusion Finnish cases

For 6 out-of 7 Finnish cases, there are indications that the case was less likely to have occurred in the Netherlands. For four telecom cases we conclude that only the sector-specific regulator would intervene in the Netherlands. The markets for cash withdrawals and telephone directory services are more competitive in the Netherlands compared to Finland.

Germany

In the period 2005-2009 the Bundeskartellamt intervened in 17 abuse-of-dominance cases, of which 16 involved energy companies. Table 23 lists the 17 cases. Since it appeared from Section 4.1 that Germany has more than one provision, the Table also reports which provision was the legal basis for the decision.

65 Source: PLC: "Banks submit commitments to the FCA on ATM cash withdrawal pricing".
66 In the Netherlands the NMa dealt with a case involving PIN-transactions (Interpay).

Table 23 Interventions Germany

Year	Sector	No. of cases	Activity	Legal basis	Outcome
2006	Carbonated beverages	1	Filling of CO2 cylinders; exclusion of competitors	Section 19 GWB	Prohibition decision
2007	Electricity	1	Abusive pricing by passing on more than 25 per cent of the value of its CO2 emission allowances within its electricity prices	Section 19 GWB	Commitment decision
2008, 2009	Gas	12	Excessive pricing. The turnover component accounts for 55% of the gas price	Section 29 GWB	Commitment, reimburse customers
2009	Gas	1	Excessive concession fees which results in hindrance of gas supplies to the GGEW's network area.	Section 19 GWB	Commitment, maximum price for concession fees
2009	Gas	2	Unknown	Section 19 GWB	Commitment

Source: SEO Economic Research, based on information provided by the CA.

Carbonated beverages (1 case)[67]

The Bundeskartellamt has prohibited Soda-Club GmbH from preventing the replenishment of CO2-cartridges by competitors. Distributors were exclusively tied to Soda-Club and had to commit themselves to have empty cartridges filled exclusively by Soda-Club. In its decision the Bundeskartellamt ordered that independent retailers could fill Soda-Club cartridges and that end-consumers were allowed to have their Soda-Club cartridges exchanged or refilled by competing filling companies. Soda Club opposed the Bundeskartellamt's immediately enforceable decision by applying to the Düsseldorf Higher Regional Court. In provisional proceedings the court confirmed the Bundeskartellamt's decision in all material respects. The German Federal State Court did not follow Soda-Club's argumentation. It considered Soda-Club as having a dominant position in the market for gas refills for the CO2 cylinders used in machines to make carbonated beverages, as had the Higher Regional Court of Düsseldorf previously. In August 2006, following Soda-Club's appeal on points of law, the Federal Court of Justice (BGH) reversed the Düsseldorf Higher Regional Court's decision on procedural grounds and ruled that the appeal was to have suspensive effect.

Comparison with the Netherlands

There are no indications that a similar case was less or more likely to occur in the Netherlands. It remains unknown whether the case could occur in the Netherlands

Electricity – RWE AG (2007, 1 case)

In December 2006 the Bundeskartellamt informed RWE AG, Essen, of its preliminary evaluation that the industrial electricity prices charged by RWE in 2005 were abusive as the company had passed on more than 25 per cent of the value of its CO2 emission allowances within its electricity

[67] See also: http://www.concurrences.com/article_bulletin.php3?id_article=18715

prices. On 8 August 2007, RWE offered commitments in terms of 32b ARC (improved version on 24 September 2007)[68].

A study by ECN shows that producers of electricity in both Germany and the Netherlands pass on an important part of the price of CO_2-emission rights to the consumers (ECN, 2005).[69] This leads to windfall profits for the companies, as they received the rights for free, but higher prices for consumers (Letter to Minister, 2005).

The amount for emission rights that is passed onto consumers is different in both countries. At peak-load, German companies show a higher proportion while in the Netherlands the proportion of the costs passed onto consumers is higher at off-peak. The Office of Energy Regulation (part of the NMa) in the Netherlands is aware of the higher prices for electricity but has so far not taken action.[70]

Comparison with the Netherlands

In Germany, there are two large players at generation level, RWE and E.ON. It is however not clear whether dominance was assessed in the German case. The market shares at generation level in the Netherlands are shown in Table 24. The market shares seem to suggest that it is not likely that there are dominant suppliers on the Dutch market.

Table 24 Market shares electricity generation in the Netherlands

Company	Production quantity	Market share
Electrabel	4,707	31.8%
Nuon	3,453	23.4%
Essent	3,216	21.8%
EON Benelux	1,862	12.6%
EPZ	915	6.2%
Elstra	405	2.7%
Eneco/Econcern	120	0.8%
Nuon/Shell	108	0.7%
Total	*14,786*	*100%*

Source: EnergieNed (2008), some smaller companies might be excluded.

Section 29 cases (12 cases)

It can be observed that there are two legal provisions mentioned in Table 23. As also explained in Appendix A, Section 29 is a sector-specific provision which was enacted in 2008. Alongside Section 19 GWB, Section 29 lays down the rules that define abusive pricing by energy companies. The legal text is shown in Box 8. The Section was introduced in response to increasing prices in

68 www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell07/B8-88-05-2.pdf?navid=61

69 Sijm, J.P.M., Bakker, S.J.A., Chen, Y., Harmsen, H.W. & Lise, WE. (2005). CO2 price dynamics: The implications of EU emissions trading for the price of electricity. ECN-C-05-081, September 2005.

70 NMa (2005), Aanbieding rapport CO2 emissiehandel en de invloed op elektriciteitsmarkten. 102238/1.B999., see < http://www.nma.nl/images/102238-1_B999_AM_brief22-148712.pdf >

the energy sector. It contains two criteria to establish whether energy companies charge excessive prices.

Box 8 Section 29 of the German GWB

Section 29 GWB

An undertaking, which is a supplier of electricity or pipeline gas (public utility company) on a market in which it, either alone or together with other public utility companies, has a dominant position, is prohibited from abusing such position by

1. demanding fees or other business terms which are less favourable than those of other public utility companies or undertakings in comparable markets, unless the public utility company provides evidence that such deviation is objectively justified, whereby the reversal of the burden of demonstration and proof shall only apply in proceedings before the cartel authorities, or
2. demanding fees which unreasonably exceed the costs.

Costs that would not arise to the same extent if competition existed must not be taken into consideration in determining whether an abuse within the meaning of sentence 1 exists. Sections 19 and 20 remain unaffected.

Source: SEO Economic Research, based on Bundeskartellamt.[71]

The first criterion gives the Bundeskartellamt the power to compare prices and conditions from energy companies with those in other comparable markets. Even though the new provision does not explicitly say so, it is expected that comparable markets will mean sectors which are based on a network structure, such as energy markets. No further explanation is given as to which costs shall be taken into account in analysing the difference, causing concern that average costs are to be considered and not marginal costs.

The second criterion states that infringement occurs when the fee charged by the dominant company is disproportionate to the costs it is meant to cover. No further explanation is given as to which costs shall be taken into account in analysing the difference.

The provision remains debated, as there are concerns that the FCO will be allowed to implement disguised ex-ante price regulation (F. Röhling, B. Guerin, 2007[72]). The Monopolies Commission in Germany objected to this new section. One argument was that the section would not automatically lead to more competition. Criterion 1 implies that a dominant company has to adjust its prices the moment that a competitor reduces its prices. This may result in collusive behaviour which in turn will not encourage customers to change suppliers since customers will not have an incentive to change suppliers if the prices are identical. Combining this with low chance of new market entry, it is not likely that competition in the energy sector will increase, according to the Monopolies Commission.[73] The provision regarding the energy sector is temporary and will only be in force until 31 December 2012.

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71 See:
<www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120_GWB_7_Novelle_E.pdf>

72 Frank Röhling, Bertrand Guerin: "Germany reforms the Competition's Restraints Act in order to fight against price abuses in the energy and food trade sectors", 21 December 2007, e-Competitions, No15530, www.concurrences.com/IMG/_article_PDF/article_15530.pdf

73 Monopolies Commission, Special Report No. 47, March 2007, www.monopolkommission.de/ & Commission staff working paper, Report on the functioning of Regulation 1/2003, 29.4.2009

Comparison with the Netherlands

The provision deviates substantially from what is common in the Netherlands and the other countries analysed in this study. The fact that the Netherlands does not have this type of legislation, explains the low number of cases of this type in the Netherlands.

2009 excessive concession fees (1 case)

Hindrance of gas supplies to the GGEW's network area. This hindrance took the form of charging excessive concession fees. GGEW is owned by several towns and municipalities in whose territory GGEW is the basic gas supplier within the meaning of Section 36 of the Energy Industry Act (Energiewirtschaftsgesetz, EnWG).
The towns and municipalities jointly dominate the market for granting public rights of way in their area against the payment of fees. The concession agreement provides GGEW with some scope for setting concession fees. GGEW as the network operator therefore holds a dominant position in the market for granting rights of way against payment of fees which it derives from the towns and municipalities which own the company. Furthermore, it holds a dominant position in the market for network services and, as the gas supplier, also on the downstream market for the supply of load-profiled end-customers within the network area.[74]

Comparison with the Netherlands

In the Netherlands, the tariffs for transport are regulated ex-ante by the NMa. This case was therefore less likely to have occurred in the Netherlands.

2009 - Gas – GAG Gasversorgung Ahrensburg GmbH and Stadtwerke Torgau GmbH

Case descriptions are not available in English. [75]

Conclusion German cases

The results of the case-studies are as follows. The practice of passing on emission rights has been investigated by the NMa as well. No competition law case was made however. It seems that this type of case is less likely to occur in the Netherlands, since the market is less concentrated. Furthermore, 12 cases could not occur in the Netherlands due to differences in legislation. Germany has enacted legislation for the energy sector which outlines criteria to determine whether prices are excessive. These criteria deviate from the practices followed in other countries. One case could not occur due to the fact that the price in question is regulated ex-ante in the Netherlands. Hence, for 14 out-of 17 cases an explanation was found as to why the case did not occur in the Netherlands.

[74] www.bundeskartellamt.de/wDeutsch/download/pdf/Missbrauchsaufsicht/B10-71-08-neu.pdf?navid=59 & www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B10-71-08-E.pdf?navid=36

[75] www.bundeskartellamt.de/wDeutsch/download/pdf/Missbrauchsaufsicht/B10-11-09_GAG_Ahrensburg.pdf?navid=59 & www.bundeskartellamt.de/wDeutsch/download/pdf/Missbrauchsaufsicht/B10-74-08.pdf?navid=59

United Kingdom

This section analyses the 5 cases brought by the OFT and other UK regulators in the period 2005 to 2009. For the relevant legislation and enforcement practices, we refer to Appendix A. For each case, we will try to identify factors that may explain why a similar case was not brought in the Netherlands, i.e. we will try to identify the determinants outlined in Section 3. This involves assessing the competitive situation of the sector involved, as well as differences in the law and the application of the law. Table 25 below lists the cases.

Table 25 Interventions United Kingdom

Case	Sector/activity	Type of abuse	Outcome
London Metal Exchange (No 27/02/2006)	Electronic trading platform	Exclusionary price discrimination and predation	OFT had reasonable grounds for suspecting that LME had infringed Art 82 of the EC Treaty, imposed an interim measures direction to prevent further harm
Associated Newspapers Limited (No CA98/02/2006)	Distribution of free newspapers	Foreclosure of competing newspapers, through exclusive contracts with transport companies	OFT accepted commitments
English Welsh & Scottish Railways (No 17/11/2006)	Rail freight transport	Exclusionary contracts, discriminatory pricing, predatory behaviour	ORR imposed a fine of GBP 4.1 million
National Grid (No CA98/STG/06)	Supply and distribution of gas meters	Long-term contracts with exclusionary effects	The Gas and Electricity Markets Authority imposed a fine of GBP 41.6 million
Cardiff Bus (No CA98/01/2008)	Bus services	Forced entrant to retreat from the market	Infringement found, Cardiff Bus benefits from immunity, no penalty imposed

Source: SEO Economic Research, based on various OFT sources.

London Metal Exchange (No 27/02/2006)

Background[76]

On 1 July 2003, the OFT received a complaint from Spectron Group Plc ('Spectron') about predatory and discriminatory pricing by LME in the provision of its electronic trading platform LME Select. Spectron provides an electronic trading platform called eMetal in competition with LME Select. This platform allows traders to make a trade by placing a 'bid' or 'offer' on the eMetal screen. This bid or offer placed by a broker ('the initiator') specifies the type of metal, quantity and price that the broker wishes to trade. Interested brokers ('aggressors') execute the trade by selecting the bid or offer on screen. Once the trade has been completed on eMetal, each party then enters the details of the trade into the LME/London Clearing House (LCH) electronic processing system. The LCH matches the trades, charges a clearing fee and charges an exchange fee on behalf of the LME. Spectron recovers a commission from the aggressor of the trade.

[76] Source:
< http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/londonmetalexchange.pdf>

The OFT's investigation and reasonable grounds for suspecting an infringement

The OFT commenced an investigation under section 25(5) of the Act because it had reasonable grounds for suspecting that LME had infringed the prohibition in Article 82 in that the LME is:

- dominant in the provision of platforms for the exchange-based trading of non-ferrous base metals contracts; and
- abusing this dominant position by: predation through the pricing and continued operation of LME Select, whereby LME Select's revenues are below some measures of its cost; and/or exclusionary price discrimination, whereby the LME offers discriminatory relative pricing of its trading platforms in a way that does not reflect the nature of the services offered and allows a zero margin for actual and potential competitors, such as Spectron.

More specifically, the evidence provided to the OFT indicates that for a number of years since its introduction in 2001 LME has been generating revenues from LME Select which, on the basis of the OFT's analysis, are below its cost.

In addition, the OFT considers the trading fees charged by LME for LME Select are set at the same level as those for telephone trades, even though LME Select provides all the services of a telephone trade along with additional services. This form of price discrimination (charging the same price for different services) means that anyone trading on Spectron also incurs an LME charge equivalent to the charge incurred for use of LME Select. In other words, brokers pay the *same* level of transaction fee to LME (irrespective of whether they choose to trade on Spectron eMetal or on LME Select). Therefore, from the perspective of the broker, any fee charged by Spectron necessarily represents an additional cost over the cost of using LME Select. This pricing policy means that Spectron – or any other potential competitor trading LME contracts – has zero margin on which to operate.

In addition, LME Select has operated a targeted incentive scheme, which may have amplified any effect on Spectron of the predation and discriminatory relative pricing of LME's trading platform. Under this incentive scheme, the aggressor of a trade made via LME Select was charged an additional fee that was transferred in full to the initiator of that trade. This scheme was later modified to target specific trades upon which Spectron was offering a similar (albeit less pronounced) incentive arrangement. As a result of its need to make a margin on trades, Spectron was unable to match the terms of LME's scheme and this may have contributed to the switching of trades from Spectron's eMetal platform to LME Select.

Interim measures direction

LME announced the possible extension of its trading hours on LME Select to potentially cover 'morning Asian trading'. The OFT considered this behaviour would amount to a further deterioration of the situation, and an extension of abusive behaviour. The OFT therefore issued the direction that The London Metal Exchange should not increase the hours of trading available on its electronic trading platform, and should confirm in writing to the OFT that it has complied with the direction within 5 working days.

Comparison with the Netherlands

There is insufficient information available. It remains unknown whether a similar case was likely to have occurred in the Netherlands.

Associated Newspapers Limited (No CA98/02/2006)

Complaint[77]

On 14 February 2003, the OFT received a complaint from Northern & Shell plc (N&S) alleging that Associated Newspapers Limited (ANL) had breached the Chapter II prohibition of the Competition Act 1998 (the Act). N&S alleged that this had arisen from ANL's entry into exclusive contracts with London Underground Limited (LUL), Network Rail (NR) and a number of train operating companies (TOCs) for access to their stations to distribute its free, morning newspaper, *Metro*, in London. N&S claimed that, as a consequence of such exclusive contracts, it was unable to launch a competing free, evening newspaper in London and that the market for London daily newspapers, both paid for and free, had therefore been foreclosed.

Competition concerns

The OFT was concerned that the Agreements:

- had the effect of preventing potentially competing publishers of free newspapers gaining access to distribution within London; and
- thereby substantially foreclosed the market for the supply of advertising space in London-wide newspapers (both free and paid) and thus, by extension, the London-wide newspaper readership market, both of which are currently dominated by ANL's publications.

The OFT notes that, since ANL is the publisher of both of the London-wide newspapers currently published, i.e. the *Metro* and *Evening Standard*, it is the only player in each of these markets. The OFT also reached a further provisional conclusion that timely access to a critical mass of LUL and/or other railway stations is a vital element in the success of a free, London-wide newspaper, due to the need to reach commuters through the transport network. Whilst alternative methods of distribution exist, such as street merchandising (i.e. people standing in the street handing out the newspaper to pedestrians), the OFT's provisional view was that these are inferior methods of distribution that complement, rather than substitute, station distribution. This is particularly the case for a new entrant wishing to compete against an established and successful incumbent which has already secured the prime distribution method for its sole use.

The OFT accepted that a certain degree of foreclosure is inherent in an exclusive agreement, and may be justifiable for a limited period to permit the launch of a new and innovative product. The OFT generally understands that it may be in the interests of both contracting parties to reach an exclusive agreement. For the station owners and operators this is due to the operational simplicity derived from dealing with only one party. For the publisher this is down to a desire to protect its investment and prevent another party free-riding on its product. However, in this instance, the OFT was concerned that the combined effect of the long periods of exclusivity conferred by the Agreements (10 years) and the 24 hour exclusivity granted went beyond what could be objectively justified.

[77] Source: < http://www.oft.gov.uk/OFTwork/cartels-and-competition/ca98/decisions/anl>

OFT accepted commitments

ANL indicated formally to the OFT that it wished to offer binding commitments in order to address the OFT's competition concerns. The commitments consisted of *i.a.* opening the afternoon and evening distribution slots and providing access to a third party to its distribution racks. The OFT reached the view that the commitments addressed the competition concerns and that, as a result, it was appropriate for the OFT to close its investigation by way of a formal decision accepting the Proposed Commitments.

Comparison with the Netherlands

Interestingly, a highly similar case was investigated by the NMa in the Netherlands in 2000.[78] The publisher of the free morning newspaper *Metro*, Metro Holland B.V., had entered into an exclusive contract with NS Stations B.V., for access to the NS railway stations for the distribution of *Metro*. The two parties had requested guidance from the NMa on the issue of compatibility with the cartel prohibition. The NMa decided that the agreement was compatible. A publisher of another free newspaper, *Sp!ts*, filed a complaint on the basis of abuse-of-dominance, which was rejected by the NMa. Arguments put forward by the NMa included:

- Considering the content of *Sp!ts*, it does not exclusively target train commuters;
- *Sp!ts* has been able to achieve a solid position by means of other distribution channels;

The NMa considers that the distribution in railway stations is not necessary for operating in the market; the options for distribution are wider than railway stations.

Some further differences between the Dutch and UK case indicate that the UK case might have had more anti-competitive effects:

- The publisher of Metro in the Netherlands does not also publish other newspapers; in the UK the publisher of Metro also publishes the Daily Mail, Mail on Sunday, Ireland on Sunday and Evening Standard. This might indicate that the UK publisher had a stronger competitive position;
- The case in the Netherlands only considered railway stations, distribution in the UK case also included metro stations;
- The Dutch contract was for 5 years, whereas the period of exclusivity in the UK case was 10 years.

The Dutch assessment differs materially from the UK case. The NMa does not consider access to railway stations as important for competitors of Metro, while the OFT considers timely access to stations as a vital element in the success of free newspapers.

In summary, a similar case was investigated by the NMa prior to 2005. In that case, the NMa made a different competitive assessment than the OFT did. It is also conceivable that the competitive context was different. The explanation for the absence of an intervention by the NMa can thus be attributed to firm behaviour and the assessment of that behaviour by the NMa.

[78] See: < http://www.nma.nl/documenten_en_publicaties/archiefpagina_nieuwsberichten/nieuwsberichten/archief/2000/00_17.aspx>

English Welsh & Scottish Railways (No. 17/11/2006)

Case summary[79]

The Office of Rail Regulation (ORR) concluded that English Welsh & Scottish Railways (EWS) infringed the prohibition contained in Chapter II of the Competition Act 1998 (the Act) and Article 82 of the EC Treaty, by engaging in the following conduct in the market for the haulage of coal by rail in Great Britain:

- Concluding contracts with industrial users of coal whose terms had the effect of excluding competitors from the market;
- pursuing discriminatory pricing practices in relation to Enron Coal Services Limited; and;
- predatory behaviour directed towards Freightliner Heavy Haul.

ORR considers conduct that amounts to an abuse of a dominant position to be a serious infringement of the Act and has therefore imposed a penalty on EWS. In calculating the level of penalty, ORR has considered the OFT's Guidance as to the appropriate amount of penalty and the requirement that a penalty must reflect the seriousness of the conduct involved and serve to deter future infringement of the Act.

ORR has considered EWS's cooperation in the investigation and has applied a 35 per cent discount to the penalty. In particular, EWS has accepted ORR's infringement findings as set out in the decision which has allowed the case to be more quickly and effectively resolved than would otherwise have been the case.

As a result, ORR has imposed a penalty of £4.1 million on EWS.

Comparison with the Netherlands

The rail freight transport market was liberalised in 1995 and the first competitors of the state-owned NS Cargo arrived on the scene in 1998. Since this time more freight transport operators have entered the Dutch rail market and there is competition between freight transport operators to carry the freights of shippers. This situation, whereby various freight transport operators are permitted to use the same infrastructure, is known as competition on the rails (Fifth NMa Rail Market Monitor, 2010).

The NMa monitors the market and notes that

"*A few freight transport operators indicated that competition was unfair, the reason being that they suspect that a few major operators have been selling services under cost price. This message was also announced in the media in 2009. One freight transport operator indicates that competition is unfair because the major operators are state-owned enterprises that can make huge losses without going bankrupt. The NMa has not previously heard concerns of major operators suspected of selling services under cost price from the freight transport operators.*" (Fifth NMa Rail Market Monitor, 2010, p. 11).

The NMa also notes that it expects further consolidation and increasing concentration of the rail transport market. Some operators suspect that major players are selling services under cost price and describe this as anti-competitive. The NMa notes that it does not consider this information a substantiation of unfair competition:

"*Selling under cost price, should this actually take place, is not anti-competitive by definition. The NMa only recognizes a case of unfair competition if the Competition Act is contravened, for example in cases of price*

[79] Source: http://www.oft.gov.uk/OFTwork/cartels-and-competition/ca98/decisions/ews-rail

squeezing. However, the NMa is taking the operators' warning seriously and is following the market closely on this point. The NMa invites operators to contact them if they have tips or signals that point to unfair competition." (Fifth NMa Rail Market Monitor, 2010, p. 12).

In summary, the competitive and regulatory environment does not deviate substantially from the UK case. In the Netherlands too the supply side is concentrated, with a large player (DB Schenker) and some smaller operators transporting coal. This means that abusive conduct could have taken place in the Netherlands in the period studied. The complaints made about predatory pricing support this view. The NMa states that it monitors the market closely for abuse-of-dominance. Hence, the absence of an intervention by the NMa in this industry can be explained both by the behaviour of players in the market and the assessment of this behaviour by the NMa.

National Grid (No. CA98/STG/06)

Case summary[80]

The Gas and Electricity Markets Authority ('the Authority') finds that National Grid ('NG') has abused its dominant position in the market for the provision and maintenance of domestic-sized gas meters. NG rents gas meters to domestic gas suppliers that are required to measure the volume of gas that a domestic customer has used. NG is dominant in the market for the provision and maintenance of domestic-sized gas meters in Great Britain. NG has abused its dominant position by entering into long-term contracts known as the Legacy Meter Service Agreements ('Legacy MSAs') and the New and Replacement Meter Services Agreements ('N/R MSAs'). These contracts together artificially and illegally restrict the rate at which gas suppliers can replace NG's meters with less expensive and/or more technologically advanced meters offered by Competing Meter Operators ('CMOs'). The Authority has decided that NG's behaviour is capable of affecting trade within the UK and the EC and is a breach of the Chapter II prohibition and Article 82 of the EC Treaty. The Authority has directed that NG must bring the infringement to an end. It has decided that NG's conduct is a serious breach of the Act and has imposed a financial penalty on NG of £41.6 million.

Comparison with the Netherlands

In accordance with the Electricity Metering Code and the Gas Metering Code (both based on the Electricity Act of 1998), metering activities may only be outsourced to parties that have been authorised by TenneT to perform such activities. In order to make this information accessible to the public, TenneT publishes a register of recognised programme responsible parties and parties responsible for metering electricity and gas consumption. To ensure that these registers remain transparent, TenneT also publishes the date of initial recognition and the date of termination of recognition (where relevant), as prescribed by the Metering Code.
In the Netherlands, users can choose to either rent or purchase a meter, and select from different authorised suppliers. In case of small-scale users, the network operators (*netbeheerder*) typically supplies the meter to the end-user. This is similar to the UK case. The UK case concerned the contracts between the supplier of meters and the network operators. There is no information available about how network operators procure the meters in the Netherlands.

[80] Source: < http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/ofgem>

In summary, the competitive environment in the Netherlands is similar to the UK case. There is however no information available on the relevant types of contracts in the Netherlands. Moreover, it is unknown whether any supplier of meters in the Netherlands has a dominant position.

Cardiff Bus (No CA98/01/2008)

Case summary[81]

This Decision arises from a complaint made by 2 Travel Group plc (2 Travel) in November 2004. In response to 2 Travel's entry into the market with a new no-frills bus service, Cardiff Bus introduced its own no-frills bus service. Cardiff Bus' white service buses ran on the same routes and at similar times of day as 2 Travel's no-frills services and were run at a loss. When 2 Travel ran into financial difficulties and stopped its services, Cardiff Bus also withdrew their no-frills services. The OFT concluded that the evidence was sufficient to demonstrate that Cardiff Bus was reacting to 2 Travel's entry by attempting to force the entrant to retreat from the market. Cardiff Bus' white services were launched and operated simply for the purpose of driving out 2 Travel, rather than making profits for Cardiff Bus or fulfilling any other legitimate commercial strategy.

Background

In 1985 bus services in the UK (with the exception of London) were deregulated under the Transport Act 1985. Following deregulation, bus services are now provided by private operators. Private operators can provide bus services in two different ways: commercial and tendered. Commercial services may be provided wherever the private operator believes it will be profitable to do so. Tendered services consist mainly of routes which have been identified by the local authority as necessary but which may not be commercially viable for private operators to provide, such as rural routes and school bus services. These services will be offered on contract and may be subsidised by the local authority.

Regulation

In order to provide bus services, operators must first register with the relevant Traffic Commissioner. A company wishing to operate a bus service is first required under the Public Passenger Vehicles Act 1981 to obtain an operator's licence. Before being granted a licence, operators must satisfy the Traffic Commissioner that they are of good repute, of appropriate financial standing and professionally competent. Moreover, an operator must register with the relevant Traffic Commissioner any local services it wishes to supply. This has to include among others the name of the route, the start and finish point and the time-table. The operator must give the relevant Traffic Commissioner 56 days' notice before the service can start. Any variation to, or cancellation of, the initial registration also generally requires 56 days' notice, except in the case of services registered as 'frequent', where the number of buses on a route will be more than six per hour (that is, one every ten minutes). In this case the timetable does not have to be provided to the Traffic Commissioner, and no notification is needed if the operator decides to further increase the number of vehicles serving the route.

Parties

2 Travel was a small bus and coach company established in 2000. 2 Travel aimed to offer a low cost, no-frills service, targeted at senior citizens and young mothers travelling after school hours.

[81] Source: < http://www.oft.gov.uk/OFTwork/cartels-and-competition/ca98/decisions/cardiffbus>

It engaged in an entry strategy based on winning contracts for tendered services. These provided a guaranteed income stream upon which 2 Travel could expand and run additional commercial services. Cardiff City Transport Services Limited (trading as Cardiff Bus), was established inOctober 1986 as a result of the Transport Act 1985, which required all local authorities to divest their municipal bus operations into private 'arms length' bus companies.

Conduct

In September 2003, Cardiff Bus lost three school contracts to 2 Travel. Cardiff Bus expected 2 Travel, based on its strategy elsewhere, to introduce commercial services on the back of the tendered services it operated. Therefore, it registered all of its existing key corridor routes as frequent routes with the Traffic Commissioner for West Midlands and Wales. In February 2004, 2 Travel registered with the Traffic Commissioner to run commercial local bus services on five routes. At about the same time that 2 Travel introduced its commercial services in Cardiff, Cardiff Bus also started to run a new no-frills service. This is referred to in the decision as the 'white service' (or 'white services') in reference to the fact that the vehicles used on the services were painted white, rather than carrying Cardiff Bus' normal green livery.

Unlike 2 Travel, Cardiff Bus did not need to give 56 days' notice to the Traffic Commissioner to operate services on these routes, because it had already registered its existing key corridor routes as frequent routes, enabling it to run extra services in these corridors without further registrations. Cardiff Bus' white service 117 commenced on 19 April 2004, on the same day that 2 Travel's services started. 2 Travel ran into financial difficulties and stopped its services. Cardiff also stopped its services.

Comparison with the Netherlands

The Dutch Passenger Transport Act 2000 contains rules regarding a number of public-transport categories: buses, trams, subway, trains, and demand-responsive bus and taxi services.[82] In addition, the Act regulates oversight on trams, subway, and municipal and regional buses in the three major Dutch cities of Amsterdam, Rotterdam and The Hague. Transport companies must have a concession in order to be allowed to operate public-transport services. Concessions grant exclusivity on public transport operations within a certain area or on a certain route. However, this exclusive contract is only valid for a certain amount of time. Once the concession expires, it must be tendered again; different transport companies can thus compete with one another for the new concessionary period.

The competitive situation in the Netherlands is therefore substantially different from the UK case. Companies compete for the exclusive concession to operate on a route, and once they have the concession there are no competitors on the same route. The UK case however concerned competition between two companies serving the same route. This type of competition is not possible in the Netherlands.

In summary, the regulatory environment implies that the abusive conduct seen in the UK was not at Dutch firms' disposal. This explains why the NMa did not intervene in this industry.

[82] See: < http://www.nma.nl/en/legal_powers/transport_legislation/default.aspx>

Conclusion UK cases

We have analysed the five UK cases and an explanation for the absence in the Netherlands was provided for three of them. In the free newspaper and railway cases, either firm behaviour or the assessment of the case made by the NMa differed from the UK case. In the Cardiff Bus case, the abusive conduct in question is blocked by legal barriers; bus companies compete for the exclusive rights to serve a route but cannot jointly serve the same route.

5 Why is the number of cases relatively low in the Netherlands?

In section 2 we concluded that the number of abuse-of-dominance cases is relatively low in the Netherlands. We selected Denmark, Finland, Germany and the UK to compare with the Netherlands. Together these countries had 48 interventions in the 2005-2009 period, whereas the Netherlands had one. Section 3 introduced our conceptual framework for studying the causes of this low number of cases. We distinguished six steps involved in a sanction decision on which jurisdictions can differ, causing the number of cases to deviate:

1. There is a dominant firm;
2. A potentially abusive strategy is at the firm's disposal;
3. The firm displays abusive conduct;
4. The CA investigates;
5. The CA finds an infringement;
6. The CA issues a sanction decision.

In this section, the potential determinants identified in Section 3 will be revisited. For each step identified in our conceptual framework, in this section we will analyse what we can conclude from the data presented in section 4. We have collected a range of country-specific qualitative and quantitative data and have analysed 48 sanction decisions. As mentioned in section 3, the distinction between these six steps is not clear-cut, there are numerous interactions between the determinants and jurisdictions may differ in more than one of the determinants. Therefore, we will analyse our 'step by step' conclusions as a whole to come to general conclusions and identify the most likely explanations for the lower number of abuse-of-dominance cases in the Netherlands compared to Denmark, Finland, Germany and the UK.

5.1 There is a dominant firm

Explanation E1 in Table 13 is "There are few dominant firms". If there are relatively few dominant firms in a jurisdiction, few firms are in a position to breach the abuse-of-dominance provision. For various reasons, the number of dominant firms in a jurisdiction is not directly available, since this requires analysis for each firm. This case-analysis depends on the economic context and the relevant legislation and enforcement practices in the jurisdiction. In this report, we analysed whether dominance was less likely to occur in the Netherlands. We analysed this in two ways.

First, macro-data was analysed. Because data on the degree of concentration in every market of a jurisdiction is not available we used several data sets to assess whether dominance is more or less likely to occur. Although the number of firms differs between the jurisdictions studied, the distribution of firms to size class and the WEF survey[83] scores on the extent of market dominance and the intensity of local competition do not differ much. This macro-data does not

[83] Global Competitiveness Index, World Economic Forum (WEF, 2011)

support the possible explanation that dominance is less likely to occur in the Netherlands. However, the Dutch economy is more open to trade than the other economies. No other information or indication was available on the number of Dutch dominant firms.

Second, the competitive structures of industries that gave rise to interventions in other countries were compared with the corresponding industries in the Netherlands, where such information was available. For six case studies, the analysis indicated that the industry was organised more competitively in the Netherlands. First, in Denmark there were three cases in the postal market and we concluded that dominance was less likely in that market in the Netherlands. Second, in Finland the telephone directory sector was characterised by one dominant provider of directory services to end-users, whereas in the Netherlands, directories Gouden Gids and Telefoongids both served the market until they merged in 2008. Third, the Finnish market for ATM cash dispensing seems to be more concentrated than in the Netherlands. Fourth, the market for electricity generation seems to be more concentrated in Germany than in the Netherlands. Thus, for six cases occurring in Denmark, Finland and Germany this report found that these were less likely to occur in the Netherlands, due to a lack of dominant firms. However, this number is only substantial for Finland (2 out of 7 cases). These six cases make up a minor part of the 48 interventions in four jurisdictions. Moreover, we only studied the cases that occurred in the other jurisdictions; it is possible that some markets in the Netherlands are more concentrated than in the other four jurisdictions but have nevertheless not resulted in an abuse-of-dominance intervention.

5.2 A potentially abusive strategy is at a firm's disposal

Explanation E2 in Table 13, "Dominant firms do not have abuse at their disposal due to legal barriers", refers to regulation and varying degrees of liberalisation that determines whether a firm has abusive strategies at its disposal. If the regulatory environment does not permit abusive strategies in certain industries, fewer violations can occur. At macro-level, this explanation has not been analysed, because the effect of regulation and liberalisation on a firm's strategies should be analysed at firm-level.[84] The case studies reveal that:

- Compared to Germany, the GGEW case was less likely to occur in the Netherlands: the concession fees that were found abusive in Germany are regulated by the NMa in the Netherlands.
- In the UK, in the case Cardiff Bus, two companies competed on the same route. In the Netherlands this type of competition is not possible. In the Netherlands, the sector is regulated differently: companies compete for the exclusive right to operate a route.

Regulation and liberalisation thus explain the absence of two cases in the Netherlands, with respect to the UK and Germany. In those cases, legal barriers other than competition law have prevented Dutch firms from abusing a dominant position.

[84] Data at sector-level would still pose limitations as long as it is unknown how many potentially dominant firms the sector harbours and which potentially abusive strategies are blocked.

5.3 The firm displays abusive conduct

Explanation E3 in Table 13 refers to firm behaviour. Whether or not a firm displays abusive conduct depends on the choices a firm makes (as well as the assessment of the conduct by the CA, see step 5). Within every jurisdiction there will be differences in behaviour among firms but there might also be differences in firm behaviour in general between jurisdictions. A lower number of cases could be the result of firms being more law abiding in general and/or being more aware of what will constitute a violation, a higher deterrent effect as a result of enforcement and/or a lower pay-off for abusive strategies in general.

Data on firm behaviour is not directly available and there is no information specifically on abuse-of-dominance with regard to the factors mentioned above. We used several data sets to analyse these possible explanations. First, there is no information to conclude that the jurisdictions in our sample will differ greatly in terms of law abidance culture and awareness of competition law. This is supported by the World Bank cross-country survey on compliance with society's rules. The differences between the countries in our sample are minor in this study.
Second, with regard to the deterrent effect, we have not found substantial differences in sanctions and powers of investigation. Since October 2007 the Netherlands has been able to impose a personal fine for an infringement, and shares this only with Denmark. In other countries however the infringement can lead to a criminal offence (Denmark and Germany) or the disqualification of directors (UK). In addition, the WEF survey score on effectiveness of anti-monopoly policy is similar for all five countries. The Competition Policy Indexes (CPIs) measure the deterrent properties of competition policy (Buccirossi, 2011). With regard to the jurisdictions we have selected, this data is only available for Germany, the Netherlands and the UK. The score of the Netherlands on the CPI measuring institutional features (e.g., independence, quality of law and powers of investigation) is slightly lower than Germany and the UK. Its score on the CPI measuring enforcement features is relatively high as a result of the amount and quality of the NMa's resources. This is consistent with our conclusion that the NMa is not lacking in resources, based on a comparison of the competition-related budget and non-administrative staff. Apart from this deterrent effect, it is impossible to analyse whether Dutch firms have a lower pay-off resulting from or preference for abusive strategies. There are no indications that the pay-off from abuse is lower in the Netherlands.
Thus, there are no clear indications as to whether the lower number of cases in the Netherlands can be explained by firm behaviour.

Two case-studies point at possible differences in firm-behaviour. In the free newspapers case the contract period for exclusivity was 5 years in the Netherlands and 10 years in the UK. This difference in conduct might have played a role in the assessment made by the NMa, i.e. the anti-competitive effects are considered to be lower when the exclusivity period is shorter. The case also differed in terms of assessment by the CA: the NMa and OFT had different opinions on the importance of access to stations. Second, the rail freight industry gave rise to an intervention in the UK. There are indications that abuse-of-dominance could also occur in the Dutch rail freight industry. For both cases it is difficult to conclude however if the absence of an intervention is due to firm behaviour (Dutch firms in the newspaper and rail freight industries did not display anti-competitive conduct) or the NMa's assessment of those industries (the NMa's assessment of

conduct deviated from the OFT's assessment). A combination of both explanations is likely to play a role.

5.4 The CA investigates

The fourth explanation concerns the extent to which a CA becomes aware of possible violations, through complaints or *ex-officio* investigations, and starts an investigation. In this report, we have identified four variables that were analysed with country data:

a. *Resources.* Denmark and Finland have fewer resources than the NMa but have brought more cases. Depending on which variable is looked at, Germany and the United Kingdom have more resources available, but have challenged proportionally more cases. Moreover, the score of the Netherlands on the CPI measuring enforcement features is relatively high compared to Germany and the UK as a result of the amount and quality of the NMa's resources. A lack of resources of the NMa is, thus, not a likely explanation of the lower number of cases in the Netherlands.
b. *Powers of investigation.* Table 16 shows that the NMa does not lack powers of investigation compared to the other CAs. Thus, the powers of investigation are not a likely explanation of the lower number of cases.
c. *Number of investigations.* In the ideal case, we would look at the number of complaints received for each CA. Unfortunately, information on the number of complaints received was unavailable, except for the Netherlands.
   We assume that the number of complaints is related to the number of investigations, in the sense that an investigation is based on a complaint. Since data on the number of complaints is unavailable, we look at the number of investigations. The NMa handled (at least) 18 investigations and other countries, with the exception the UK, are reported to have conducted more investigations. However, only 1 investigation (or 6%) resulted in an intervention. For other CAs the proportion of investigations leading to interventions was higher (ranging from 8% in Germany and 38% in the UK to 68% in Denmark). Hence, it seems that the low number of Dutch interventions cannot be explained by a shortage of investigations conducted.
d. *Quality of complaints.* We did not investigate the contents of the complaints. However, the formal procedures and requirements for complaints do not differ between the countries in our sample, indicating that these procedures do not provide an explanations for the number of cases.
e. *Prioritisation.* The published prioritisation policies do not differ markedly between the countries studied. Interestingly, most investigations seem to be based on complaints. Only the Netherlands and the UK formally mention that they consider consumer benefits in prioritisation decisions. The NMa has handled a relatively high number of cartel cases, compared to the other CAs. The total number of non-merger cases was only higher in Germany. The high number of Dutch cartel cases may indicate that relatively more resources have been allocated to cartel cases.

The fact that the NMa has investigated many cartel cases suggests that resources have not been allocated to abuse-of-dominance cases. However, it cannot be ruled out that simply fewer violations occurred.

5.5 The CA finds an infringement

The fifth explanation in Table 13 is the analysis by the CA. Which conduct and which firms are considered abusive and dominant, respectively, depends on the relevant legislation and enforcement practices. Thus the Dutch authority may not consider the cases occurring in other countries anti-competitive and would therefore not intervene if similar behaviour was to be observed in the Netherlands. We make a distinction between differences in legislation and differences in enforcement practices.

First, we concluded that Germany has adopted legislation that is absent in the Netherlands and the other countries studied. Sections 20 and 21 ARC deal with superior bargaining power and were not included in the comparisons of case quantities.[85] Additionally, Section 29 ARC is sector-specific. It was introduced in response to increasing prices in the energy sector and addresses excessive pricing. The results on Section 29 were therefore included in the comparisons and case-studies. Section 29 lays down rather detailed criteria for determining whether prices are excessive.

Second, the review of literature suggests that Denmark and Germany enforce competition law in a more form-based manner, compared to Finland, the Netherlands and the United Kingdom. Germany seems to consider the interests of the rivals of a dominant company, rather than its consumers. Compared to an effects-based approach, a form-based approach may reduce the resources needed to make decisions, since assessing effects is more complex than assessing form-based criteria. This difference in the time and resources required to make a case, may, in turn, affect prioritisation and induce a CA to challenge more cases. Note, however, that it is unknown a priori whether a form-based approach leads to over or under-enforcement compared to an effects-based approach. Our analysis of Dutch investigations in the 2005-2009 period could not fully support the hypothesis that the NMa adopts an effects-based approach.

These insights from the literature on Denmark and Germany provide, at best, a partial explanation for the number of cases in the Netherlands, since Finland and the UK also challenged more cases. We also studied the competition law cases to look for differences in enforcement practices.

In Denmark 3 out of 19 decisions seem to be form-based. It can be argued that the NMa would have assessed effects in those cases. For a further 3 decisions, it is unclear if dominance was established.

In Germany 12 out of 17 cases were based on Section 29 which is sector-specific legislation that is not present in the Netherlands. The criteria for excessive pricing in Section 29 are rather form-based and since that type of form-based legislation is not present in the Netherlands it can therefore be argued that the NMa would not have intervened if similar firm behaviour had been observed. The case-studies did not provide other indications that German enforcement is form-based.

Finally, in the case of the distribution of the free newspaper *Metro*, the OFT and NMa had diverging opinions on the necessity of access to stations for the successful operations of a rival. Whereas the OFT thought such access was crucial for a rival of Metro, thus blocking the exclusivity of Metro on commuter stations, the NMa considered that other distribution channels would be available. However, as mentioned above, the differences in the assessments made by the two authorities may also have been caused by the fact that the contract terms imposed by the operator of train stations in the Netherlands were less anti-competitive.

[85] The quantities are reported in Table 3.

Hence, differences in legislation explain the lack of 12 out of 17 cases with respect to Germany. Assuming that the NMa requires analysis of effects and dominance before intervening, 6 Danish cases were less likely to be challenged in the Netherlands. Finally, in one case the NMa and OFT had different opinions.

5.6 The CA issues a sanction decision

After having detected behaviour and assessed its illegal nature, a CA has several options for closing a case. Regardless of whether the CA is informed about a case or not, parties may decide to resolve disputes without CA involvement. Also, the EC may investigate the behaviour of Dutch firms. If the CA closes cases without a formal decision, with another provision, or refers it to another regulator, the number of official cases could be expected to be lower.
Our results are as follows. First, we analysed EC investigations, and it appeared that the last investigation by the EC in which a Dutch firm was involved was in 1991. The EC did not investigate Dutch firms on the basis of abuse-of-dominance in the 2005-2009 period.
The case studies reveal that:

- Denmark: for 5 of the 19 decisions, the NMa could have applied another provision (the cartel prohibition) instead of abuse-of-dominance.
- Finland: in the 4 telecom cases the FCA intervened in parallel to the telecom regulator because the latter could not impose fines. In the Netherlands, telecom regulator OPTA can impose fines, which renders NMa intervention less urgent.

The option to apply another provision and intervene in parallel with a sector-specific regulator thus explains why 9 cases observed in Denmark and Finland did not occur in the Netherlands.

Note that some of the identified explanations in Table 13 could not be analysed. No data is available on cases that are closed informally. Importantly, the preferences of a CA and its exposure to biases cannot be measured. The risk of court review may induce a CA to not intervene formally. The case in which the NMa intervened was completely overturned by two court reviews. For the other countries, much fewer decisions were challenged and overturned.
The Rechtbank Rotterdam review of the Dutch CR/Delta case was in 2008, and the College Beroep voor het Bedrijfsleven review in 2010. We analysed the court reviews but could not draw strong conclusions on the influence of court review on the NMa.

5.7 General conclusions

We have found that a majority of the cases observed in Denmark, Finland, Germany and the UK were less likely to have occurred in the Netherlands. However, the case-studies do not yield a single explanation for the lower number of cases in the Netherlands compared to all four jurisdictions. The explanations vary per jurisdiction. Regulation, liberalisation and legislation explain a large part of the difference with respect to Germany (13 out of 17 cases) and Finland (4 out 7 cases). Germany has enacted a temporary legal provision in the energy sector that is not present in the Netherlands and the other countries analysed in this study. The provision remains under discussion and will be in force until 31 December 2012. In Finland the CA had to intervene in the telecom sector. A difference in regulation also explains why one case in the UK

(out of 5) was less likely to have occurred in the Netherlands. Differences in the competitive structure of markets seems a likely explanation for a number of cases (3 of 19 in Denmark, 2 of 7 in Finland and 1 of 17 in Germany). With respect to Denmark the most important explanation seems to be a difference in enforcement practice (8 out of 19 cases). Enforcement seems to be form-based in 3 cases, some decisions lacked the assessment of dominance and the abuse-of-dominance provision was applied to cases that could have been addressed with other provisions (e.g. cartel prohibition).

If we set aside the cases that were less likely to occur in the Netherlands, only one case remains in Finland. Hence, seen that way, there is no difference in the number of sanction decisions in the Netherlands compared to Finland. However, the number of 'unexplained' sanction decisions in Denmark, Germany and the UK is still higher. In total, for about one third of the cases there is no apparent explanation as to why these cases were less likely to occur in the Netherlands. Moreover, we cannot observe the cases that were likely to occur in the Netherlands but were both absent and unlikely in the other jurisdictions. There might have been (undetected) incidents of abuse-of-dominance in the Netherlands that have not occurred in other jurisdictions. For example, markets with a competitive structure in other jurisdictions might be more concentrated in the Netherlands.

Based on the country-specific data we collected, we conclude that the lower number of cases in the Netherlands is unlikely to be the result of a difference in the powers of investigation held by the CAs. A lack of powers of investigation could imply that fewer cases can be pursued. Our analysis indicates that the NMa's powers of investigation do not fall short of those held by the other CA's. If a CA has fewer resources and/or is less active in pursuing cases in general this might result in fewer abuse-of-dominance cases. We also conclude that the NMa does not lack resources compared to the other CAs and is not less active in pursuing non-merger cases. A CA may be obliged to investigate every complaint on abuse-of-dominance and this may result in a higher number of investigations. However, in our sample none of the CAs has this obligation. The requirements and procedures for complaints do not differ markedly between the countries studied. The EC might tackle more Dutch cases because the Netherlands is a relatively small country and more cases might have an effect on trade between Member States. However, we found that the EC did not investigate Dutch firms on the basis of abuse-of-dominance in the 2005-2009 period.

The Netherlands ranks amongst the countries with the lowest number of abuse-of-dominance cases and amongst the countries with a high number of cartel cases. On one hand, this might reflect the incidence of those two types of violations in the Netherlands: Dutch firms have violated the cartel prohibition frequently and the abuse prohibition infrequently. On the other hand, it might also mean that the NMa set its priorities differently and chooses to handle relatively more cartel cases or that abuse cases are more often dealt with informally in the Netherlands.

We discuss first whether it is likely that Dutch firms have violated the abuse-of-dominance provision to a lesser extent. Dominant firms might be less inclined to violate the abuse-of-dominance provision because of the CA's greater deterrent effect or because firms in a jurisdiction are more law abiding in general. Based on country specific data, we conclude that

there are no indications that firms are more law abiding in general in the Netherlands than in the other jurisdictions in our sample. In general, the nature and level of sanctions that can be imposed in the Netherlands do not differ substantially from the other jurisdictions. Although the NMa's deterrent effect might be higher as a result of the amount and quality of its resources, this does not seem to be consistent with a relatively high number of sanction decisions in cartel cases in the Netherlands. None of the Danish and German cases involved a fine. In Denmark, in particular, the absence of fines is consistent with the apparent lack of analysis of dominance and anti-competitive effects in some cases. Some of the conduct was not demonstrated to be harmful for competition and therefore the consequences for the companies were mild. Other jurisdictions, including the Netherlands, are also able to close cases in this way but have also intervened more severely in at least some instances. This could suggest that the deterrent effect of enforcement is lower in Denmark.
Firms in the Netherlands may be less dominant due to the size, structure and openness of the economy. Apart from openness to trade, we have not found macro-data that indicates there are large differences between jurisdictions in this respect. The case-studies of competitive structures of markets explains why six out of 48 cases are not likely to have occurred in the Netherlands.

Have Dutch firms preferred to form cartels rather than abuse their dominant positions? Cartels have been only prohibited in the Netherlands since 1998, and one could argue that Dutch firms might be more inclined to make cartel agreements even after this date. One would expect, however, that this effect had worn off by 2005 (the start of the period investigated). We therefore think it is unlikely that the relatively late (1998) introduction of the cartel prohibition implies that Dutch firms have preferred to form cartels rather than display abusive behaviour.
We conclude from the analysis of country-specific data that we cannot rule out the explanation that Dutch firms have simply violated the abuse-of-dominance provision to a lesser extent. This explanation is however unlikely to be the sole explanation for the differences in the number of cases.

Second, the relatively high number of cartel cases with respect to abuse-of-dominance cases might also indicate that the NMa has given cartel cases priority over abuse-of-dominance cases. This might be the result of a different prioritisation policy. The published prioritisation policies of the five jurisdictions differ in one respect: only the NMa and the OFT explicitly and formally state that they take economic significance and consumer harm into account. Thus, assuming that the NMa has prioritised cases on the basis of likely consumer harm, the high ratio of cartel to abuse interventions might be explained by the fact that the NMa expected cartel cases to cause relatively more consumer harm. However, other authorities may also take consumer harm into account, as they have discretionary freedom to apply prioritisation based on wide criteria.

Several competition law practitioners we consulted during this research have suggested that the NMa's preference for abuse-of-dominance interventions may be low. First, the CA has a certain amount of discretionary leeway when it comes to dealing with cases and weighs up the costs and benefits of intervening. Thus, the CA has some leeway to develop a preference. Second, demonstrating harm is probably less expensive for a cartel than for an abuse case. This is particularly relevant for a CA that operates in an effects-based manner, as assessing effects involves high levels of resources. Moreover, due to the leniency programme, a cartel case might be easier to prove than an abuse case. When scarce resources have to be allocated between a

cartel and an abuse-of-dominance case, the NMa may therefore prefer to fine the cartel. Note, again, that it is difficult to substantiate this hypothesis with data.

Table 26 below summarises the results. The first column lists the explanations that were derived in the theoretical framework in Section 3. The subsequent four columns represent the case-studies of the interventions in the four other jurisdictions. The explanations as to why the case did not occur in the Netherlands have been placed in the row of the corresponding explanation. In case of the UK rail freight case it is indicated that the explanation can also be attributed to E4 or E5.
The last column shows the results from the macro-data.

Table 26 Explaining the low number of interventions in the Netherlands (NL): results

Explanation	Case-data				Macro-data
	Denmark	**Finland**	**Germany**	**United Kingdom**	
E1: There are few dominant firms	3 postal cases	Directories less concentrated in NL, ATM networks less concentrated in NL	Electricity generation less concentrated in NL		Macro-data does not support E1. NL is an open economy but this affects only certain sectors
E2: Dominant firms do not have abuse at their disposal due to legal barriers			GGEW's excessive fees would be regulated in NL	Cardiff bus: in NL firms compete for right to serve a route exclusively	
E3: Dominant firms do not display the abusive strategies at their disposal due to preferences, *e.g.* poor cost-benefit ratio				Rail freight: abuse could also occur in the Netherlands (but see also E4 and E5)	Macro-data does not support E3
E4: The CA is not effective in detecting violations (incl. through complainants)					Powers of investigation, resources and formal prioritisation do not support E4. NMa's resources have been used for cartel cases
E5: The CAs discretionary leeway, as compared to other jurisdictions, implies that fewer cases are considered anti-competitive, the CA makes type II errors; low prioritisation	3 decisions seem to be form-based, for 3 cases not clear if dominance was assessed			Free newspapers: NMa different conclusion in similar case	Literature suggests Denmark and Germany more form-based
E6: The CA addresses anti-competitive conducts informally, due to *i.a.* preferences and the risk of court review, or with another legal provision	5 decisions could have been addressed with another prohibition	4 telecom cases would have been dealt with by OPTA in NL			No clear result on informal discretionary leeway
Legislation			12 cases are based on sector-specific legislation lacking in NL		Germany has special legislation
Concluding: absence of … cases explained	11/19 of cases	6/7 of cases	14/17 of cases	3/5 of cases	

Source: SEO Economic Research. Note that for Denmark the number of explained cases is lower than the sum of cases due to double-counting.

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Appendix A Legislation and enforcement in five jurisdictions

In Appendix A the legislation and enforcement practices of Denmark, Finland, Germany, the Netherlands and the United Kingdom will be briefly discussed. The Appendix concludes with a discussion of the differences between these countries, the degree of harmonisation between EU Member States and Regulation 1/2003.

Appendix A.1 Legislation and enforcement Denmark

In Denmark, three specific institutions are responsible for the enforcement of competition law. The Danish Competition Authority (DCA) carries out the secretariat functions of the Danish Competition Council (DCC). Decisions of the Council may be appealed to the Competition Appeals Tribunal and from there to the ordinary courts. The Danish Competition Authority consists of three competition units, one unit deals with legal affairs and public procurement, another deals with energy regulation, there is an administration secretariat and a management secretariat.

The Danish law that deals with abuse of a dominant position is Section 11 of the Danish Competition Act No. 1027 of 21 August 2007, see Box 9.

Box 9 Section 11 of the Danish Competition Act

(1) Any abuse by one or more undertakings etc. of a dominant position is prohibited.
(2) The Competition Council must declare, upon request, whether one or more undertakings hold a dominant position, cf. however subsection (7). If the Competition Council declares that an undertaking does not hold a dominant position, this declaration shall be binding until revoked by the Competition Council.
(3) Abuse as set out in subsection (1) may, for instance, consist in

1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
2. limiting production, sales or technical development to the prejudice of consumers;
3. applying dissimilar conditions to equivalent transactions with trading partners, thereby placing them at a competitive disadvantage; or
4. iv) making the conclusion of contracts conditional upon acceptance by the other contracting party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(4) The Competition Council may issue orders to bring infringements of the prohibition in subsection (1) to an end according to Section 16. Acting upon possible concerns it may have in relation to subsection (1), the Competition Council may, furthermore, order that commitments made by an undertaking shall be binding, cf. also Section 16 a (1).
(5) The Competition Council may declare, upon notification from one or more undertakings, that on the facts in its possession a certain form of conduct shall not fall under the prohibition in subsection (1) and that, accordingly, it has no grounds for issuing an order under subsection (4).

(6) The Competition Council may lay down specific rules on the material that has to be submitted for a decision under subsection (2) or (5).
(7) The Competition Council may refrain from making a decision under subsection (2) or (5) if the decision may have implications for whether one or more undertakings will abuse a dominant position in the common market or an essential part thereof, and the trade between the member states of the European Union may be influenced appreciably thereby.

Source: SEO Economic Research, based on an excerpt from the Danish Competition Act.

The prohibition is largely inspired by Article 82 of the EC Treaty and accordingly, EC practice may be used as guidance (ICLG, 2009). The purpose of Section 11 is to protect consumer welfare and to promote free and effective competition.

Most investigations are carried out by the Danish Competition Authority on the basis of a complaint, but the Danish Competition Authority acts on its own initiative too. In the course of investigations, the Danish Competition Authority may request any information, which is considered necessary, either by asking questions or by conducting announced or unannounced inspections at the undertakings' premises. The Danish Competition Authority is allowed to adopt a decision in minor cases, but all major or substantial cases are decided by the Council on the basis of the investigations carried out by the Danish Competition Authority. On appeal to the Competition Appeals Tribunal, the Tribunal will usually not carry out any investigations on its own initiative.

According to ICLG (2009), the definition of dominance provided by the European Court of Justice in case 85/76 *Hoffman La Roche* may be applied directly under Danish Law:
"a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained in a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately consumers"
Furthermore, the Danish Competition Appeals Tribunal has stated that:
"For an abuse to be subject to Section 11(1) of the [Act], other means should have been applied than under normal competition – abnormal commercial behaviour – affecting the competition negatively." (Decision by the Danish Competition Appeals Tribunal of 16 March 2006, *Toyota Danmark A/S*).

Market shares are seen as essential indicators for establishing dominance. Very high market shares are seen as strong indicators of a dominant position. Other relevant factors, however, are also taken into account, as is common in EC practice. Interestingly, there is a presumption of dominance if an undertaking holds a market share above 40%. This is especially so where such market share has been maintained for a longer period of time. In particular, the Competition Council's decision of 20 June 2007, *Elsam III,* stated that *"At market shares between 40%-50% there is a presumption of dominance, if additional circumstances of dominance can be established".*

The list provided in Section 11(3) is a non-exhaustive list of conduct that may be abusive. According to ICLG (2009), the authorities decide on an individual basis if a conduct is abusive, generally in line with EC practice. It is noteworthy however, that it is not necessary to demonstrate that the abuse in question had a concrete effect on the market concerned:

It is sufficient in that respect that the abusive conduct of the dominant undertaking tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such effect, cf. case T-219/99 British Airways plc (ICLG 2009, p. 43).

No conduct is allocated a safe harbour. Conversely, no conduct is considered illegal *per se*. That said, there is no requirement to demonstrate the appreciable effects of an allegedly abusive practice to establish an infringement. Danish competition authorities are not required to demonstrate the exact extent and consequences of abuse. It is sufficient to establish that a given conduct to some extent has constituted abuse. This view is supported by the Competition Appeals Tribunal's decision of 3 March 2008. It was stated that abuse can be demonstrated without deciding on the exact extent of the abuse. It was sufficient that it was possible, based on the factual evidence, to ascertain that the dominant undertaking was, to a certain extent, capable of controlling price development and had done so to obtain excessive prices.

Appendix A.2 Legislation and enforcement Finland

It is the task of the Finnish Competition Authority (FCA) to investigate competition restraints both on its own initiative and on the basis of complaints. The FCA prioritises the resources to major competition restraints. Based on Art. 12 of Competition Act, the FCA may decide not to take action if competition in the said market may be deemed to be functional as a whole.

The Competition Act prohibits competition restraints which are generally considered to have harmful effects (prohibition principle). Such prohibited restraints include abuse of dominant position and mutual agreements and practices between competing undertakings to limit competition (cartels). Upon the FCA's proposal, the Finnish Market Court can impose a competition infringement fine on those who have violated the provisions of the Competition Act (Art. 7).

Box 10 Article 6 Finnish Act on Competition Restrictions

Article 6
Any abuse by one or more business undertakings or an association of business undertakings of a dominant position shall be prohibited. Abuse may, in particular, consist in:
1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions:
2. limiting production, markets or technical development to the prejudice of consumers
3. applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage
4. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.

Source: Finnish Competition Authority

Abuse of a dominant position is prohibited both on the basis of Article 102 TFEU and Article 6 of the Finnish Act on Competition Restrictions (Competition Act), see Box 10. The provisions are similar by content and interpreted in a uniform way, i.e. from the undertaking's point of view, it makes no difference which set of rules are applied.

Under Article 3 of the Competition Act, a dominant position shall be deemed to be held by one or more business undertakings or an association of business undertakings, who, either within the entire country or within a given region, hold an exclusive right or other dominant position in a specified product market so as to significantly control the price level or terms of delivery of that product, or who, in some other corresponding manner, influence the competitive conditions on a given level of production or distribution.

Box 11 Information provided by the International Comparative Legal Group (ICLG) questionnaire Finland (excerpt).

2.4 Is a safe harbour provided for low market shares and/or is there a presumption of dominance for high market shares? If so, what are the relevant market share thresholds?

The Competition Act does not provide a safe harbour for low market shares or presumption of dominance for high market shares. However, in its decisional practice, the Finnish Competition Authority ("the FCA") has rather consistently considered undertakings holding market shares in excess of 50-60% as dominant, although any indication of dominance based on a high market share may be rebutted on the basis of other relevant factors.
Please refer to question 2.2 above.

3.4 Are certain types of conduct considered per se illegal, without a need to demonstrate actual negative effects on competition?

There are no types of conduct that automatically and in all circumstances would be considered illegal.

4.12 Does the law adopt a form or effects-based approach? Are there any tests which are used to determine legality?

The approach taken by the FCA can be characterised as an effects based approach rather than a form-based approach. The FCA, at the outset, considered tying by a dominant undertaking as an abuse of a dominant position only insofar as it is used solely for the purpose of restricting competition.

Source: International Comparative Legal Group (2009)

Appendix A.3 Legislation and enforcement Germany

In Germany, the Act against Restraints of Competition (ARC) sets rules and provides the legal framework within which the market participants can move. The ARC has been amended seven times since it came into force on 1 January 1958. The last amendment of 1 July 2005 became necessary because of extensive changes to European law introduced by Council Regulation (EC) No. 1/2003 ("Regulation on the implementation of the rules on competition law"). These changes made it necessary to bring the ARC in line with European law. It is the Bundeskartellamt's task to enforce the ARC and in doing so to protect competition. Apart from the "Bundeskartellamt", in Germany the "Landeskartellamt" regulates effects which are limited to one State. In total, Germany has 16 states in which a Landeskartellamt is active. In cases in which the effects of violations of the ban on cartels or abusive practices extend beyond one State, the Bundeskartellamt is the competent authority.

The ARC serves to maintain competitive structures and prevent anti-competitive practices and their negative effects on the other companies' market opportunities. The ARC is based on three pillars: cartels, abuse control and merger control.

According to Section 1 of the ARC a general prohibition applies to cartels. This prohibition covers not only the classic cartels between competing companies (horizontal agreements) but also other anti-competitive agreements, such as vertical agreements). Under European law a general prohibition of cartels is provided in Article 101 TFEU.

Box 12 Section 19 ARC Germany[86]

Section 19 Act against Restraints of Competition (ARC)

(1) The abusive exploitation of a dominant position by one or several undertakings is prohibited.
(2) An undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services in the relevant product and geographic market, it:
1. has no competitors or is not exposed to any substantial competition, or
2. has a paramount market position in relation to its competitors; […]
(3) An undertaking is presumed to be dominant if it has a market share of at least one third. A number of undertakings is presumed to be dominant if […]
(4) An abuse exists in particular if a dominant undertaking as a supplier or purchaser of certain kinds of goods or commercial services: […]

Source: Bundeskartellamt

The abusive exploitation of a dominant position by one or several undertakings is prohibited (Section 19 (1) ARC) (see Box 12). But even companies that do not hold dominant but merely powerful positions, because small or medium-sized companies depend on them as suppliers or purchasers, are subject to a special prohibition of discrimination and unfair hindrance (Section 20 ARC). If the abusive conduct is likely to affect trade between the Member States, the Bundeskartellamt also applies European law (Art. 102 TFEU). Germany has also enacted sector-specific legislation that addresses abuse-of-dominance; Section 29, for example, was introduced to restrain energy companies.

86 Source: www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf

The Bundeskartellamt has extensive investigatory powers under Sections 57 – 59 of the ARC in order to be able to access the information necessary for the evaluation of a case. By means of administrative proceedings the Bundeskartellamt can require companies to end an infringement of the ARC or of Articles 101, 102 TFEU (Section 32 ARC). Furthermore, in urgent cases the Bundeskartellamt may order interim measures ex officio if there is a risk of serious and irreparable damage to competition (Section 32a ARC). Within the framework of administrative offence proceedings the Bundeskartellamt can impose fines for violations of prohibitions under the ARC. Companies may file an appeal against decisions of the Bundeskartellamt with the Düsseldorf Higher Regional Court. Appeals on points of law against decisions of the Düsseldorf Higher Regional Court can be lodged with the Federal Court of Justice in Karlsruhe.

Appendix A.4 Legislation and enforcement in the Netherlands

The Netherlands Competition Authority (NMa) oversees all industries of the Dutch economy and enforces compliance with the Dutch Competition Act (1998). This Act covers cartels (article 6), abuse of dominant position (article 24, see Box 13) and mergers (article 26). Furthermore, the NMa's enforcement powers are laid down in the Electricity Act 1998, the Gas Act, the Passenger Transport Act 2000, the Railway Act, the Aviation Act and the Market Monitoring Registered Pilotage Services Act.

Box 13 Article 24 Dutch Competition Act

Article 24 1. Undertakings are prohibited from abusing a dominant position. 2. The implementation of a concentration, as described in section 27, shall not be deemed to be an abuse of a dominant position.

Undertakings are defined as "every entity engaged in economic activity, regardless of its legal status and the way in which it is financed". Publicly-owned undertakings may also qualify as undertakings. Intention to make profit is not required. This is in accordance with the case law of the European Court of Justice.[87]
Dominance is defined as a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part of it, by giving it/them the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. There is no market share threshold laid down in legislation.

The Explanatory Memorandum of Dutch Competition Law points towards European case-law for this matter. This states; "save in exceptional circumstances, very large market shares are in themselves evidence of the existence of a dominant position. That is the case where there is a market share of 50 %". Factors other than market shares are also taken into account to establish dominance. According to article 24(2) of the Dutch Competition Act, it is only abuse of a dominant position that is prohibited. The creation of a dominant position alone does not constitute an abuse. This is similar to other European jurisdictions.

87 <www.concurrences.com/nr_pays.php3?liste_pays=16>

The NMa has the possibility to prioritise when complaints are filed. This means that the authority is not obliged to deal with every complaint. This is different to France, for example, where the authority is obliged to handle every complaint (but note that not everybody is eligible to file a complaint in France).

Box 14 Information provided by the International Comparative Legal Group (ICLG) questionnaire Netherlands (excerpt).

How is abuse defined? Is there a general standard? Is there a closed list of abuses?
Article 24 of the DCA provides that "undertakings are prohibited from abusing an economic dominant position". Article 1(i) DCA gives a definition of "economic dominant position" which is substantively identical to the definition given by the ECJ in *Hoffman - La Roche*. There is no standard and no catalogue of specific abuses. Legislative history makes it clear that the provision is to be interpreted in conformity with EC law.

Does certain conduct benefit from a safe harbour?
No, other than an exception for (i) the creation of a concentration, and (ii) an undertaking which has been entrusted with a the provision of a service of general economic interest, to the extent that compliance with the prohibition prevents the provision of that service.

Are certain types of conduct considered per se illegal, without a need to demonstrate actual negative effects on competition?
No. The legislation does not identify any conduct that is *per se* illegal. Having said that, the NMa has taken a number of decisions, particularly on excessive pricing, that are form-based rather than effect-based.

In addition, the NMa may fine the individuals who ordered the abusive conduct, or were responsible for the implementation thereof, or failed to take preventive measures. In that case the cap is EUR 450,000.

Source: ICLG (2009).

Appendix A.5 Legislation and enforcement in the United Kingdom

In the United Kingdom, the Office of Fair Trading (OFT) enforces the Competition Act 1998. Chapter II is the prohibition of abuse of a dominant position. Article 18 deals with the conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. A necessary condition is that the behaviour affects trade within the United Kingdom, see Box 15.

Box 15 Article 18 Competition Act

Article 18
Four types of conduct are defined:
1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
2. limiting production, markets or technical development to the prejudice of consumers;
3. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
4. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.[88]
Exemptions are defined in Article 19.

Source: OFT

Appendix A.6 Comparing jurisdictions: convergence in enforcement?

Authorities may assess unilateral conduct in varying ways. Authorities may have their own views on market power, market definition and abuse. Their methods to assess abuse-of-dominance may also differ. This means that a particular conduct in a particular economic context could be judged infringing by one authority, while another authority might conclude otherwise. However, due to European legislation, the scope for variation is limited.

Assessment of dominance

The definition and tests of determining whether a firm is dominant in the market, is an important element in determining whether a firm is infringing competition law. Different jurisdictions may, in theory, use different definitions and tests to identify whether firms are dominant. Competition authorities and courts typically rely primarily on indirect evidence to make their case. Entry barriers and barriers to expansion are widely considered the most import factors. Presumptions based on market shares should be used with great caution (Motta, 2004), because they depend on the definition of the relevant market and they say nothing, for instance, about how the market will react when a firm with a high market share restricts output. Direct evidence of substantial market power is not frequently used, since these are very data-intensive and typically subjected to different interpretations. The discussion starts with the Netherlands.

The Netherlands

The NMa is of the opinion that the concept of 'dominance' should be based on sound economic theory and the concept should be used consistently in merger and abuse-cases. In practice, the concept will be applied in a dynamic context and hence, durability must be an essential element before intervention should be considered. The goal of establishing dominance is to investigate behaviour, both in merger and in abuse cases, with a view to answering the question whether or

[88] Competition Act 1998, see <www.legislation.gov.uk/ukpga/1998/41/part/I/chapter/II>.

not consumers will be worse off (in the end) due to the behaviour of the (merged) dominant firm. (OECD, 2006)[89].

In line with this dynamic point of view, all types of evidence are used to establish dominance. The methodologies and standards of proof resemble the European practice. Market shares are considered an important indicator, although not decisive on their own. *"Additional factors have been taken into account, such as infrastructure that realistically cannot be duplicated, licences, IP rights, the level of concentration of the market, gatekeeper positions, or barriers to entry. The NMa and courts will also look for contra-indications, such as countervailing power."* (ICLG, 2009)

Another example is a complaint from cooperating cable-companies (NL.tree) that had won a tender to offer broadband internet services to all primary and secondary schools in the Netherlands. A few months before the agreement ended, the owner of the fixed telephony (KPN) network offered their services for free. The NMa approved this behaviour, since it argued that KPN did not have a dominant position in the relevant market. The court confirmed this decision, and argued that the market for broadband internet is dynamic, that KPN experienced competitive pressure and that the relevant part of demand was zero. (OECD, 2006)

Denmark

According to Community practice directly applicable in Denmark, very large market shares are highly significant evidence of the existence of a dominant position. Other relevant factors are, inter alia, the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest; the technology lead of the undertaking over its competitors; the existence of a highly developed sales network and the absence of potential competition. The market share of an undertaking is an essential indicator of the structure and competitive situation on the relevant market. (ICLG, 2009)

Finland

Market shares are one of the most important indicators of dominance, even though no specific market share limits for dominance or for presumption of dominance have been established. Market shares are, nevertheless, not the single or decisive factor in the determination of a dominant position, and the evaluation is based on several factors, including the market structure and degree of concentration of the market, competitors' market shares and the development of the market shares over time. Other factors to be taken into account include economic and financial strength and vertical integration of the allegedly dominant undertaking as well as the bargaining power of customers and suppliers. Furthermore, potential competition and barriers to entry may also be considered. Essentially, the evaluation aims at determining the market power of the concerned undertaking and the various factors curtailing its use. (ICLG, 2009).

Germany

There are no fixed market share thresholds defined in German Competition law to determine whether an undertaking has a dominant position. However, Article 19(3) of the ARC gives rise to a presumption of dominance once certain thresholds are exceeded: "An undertaking is presumed to be dominant if it has a market share of at least one third. A number of undertakings is presumed to be dominant if this: 1) comprises three or fewer undertakings reaching a combined market share of 50 percent, or 2) comprises five or fewer undertakings reaching a combined

[89] OECD policy roundtable, Evidentiary issues in proving dominance, document DAF/COMP(2006)35.

market share of two thirds, unless the undertakings demonstrate that the conditions of competition may be expected to maintain substantial competition between them, or that the number of undertakings has no paramount market position in relation to the remaining competitors." However, the presumptions only come into play if all available means of determining the actual existence of the requirements have been applied to no avail.[90]

The United Kingdom

Although the United Kingdom is attached to the definition of dominance used by the European Court of Justice, it considered this definition insufficient to describe the position of a dominant firm. The UK also refers to a firm's ability to raise its price significantly above its costs, although it is necessary to look at the source of this ability. For instance, firms could raise price above cost in after-markets, but this is not seen as market power. An important additional factor is a firm's ability to hinder effective competition in the market. Besides market shares, the OFT also considers whether there are:

- Low entry barriers;
- Buyer power;
- Bidding markets;
- Successful innovation;
- Product differentiation;
- Responsiveness of customers;
- Price responsiveness of competitors;
- Profitability.

Although these additional factors are important in establishing dominance, low market shares are generally a sufficiently strong indication of low likelihood of consumer harm. (OECD 2006)

European Commission

European Competition Law defines dominance as "a position of economic strength which enabled a firm to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and consumers". Looking at market shares could be a useful first step in the analysis, but competitive constraints and durability are also important. (OECD 2006)

[90] See http://www.concurrences.com/nr_pays.php3?liste_pays=11.

Assessment of conduct

A number of Danish cases in the period 2005-2009 concern rebates and discounts. This type of abuse will now be discussed in more detail. There are two comparative analyses available in this respect: an ICN report and an OECD policy roundtable. The International Competition Network (ICN) organised a working group on unilateral conduct. Their report on the analysis of loyalty discounts and rebates under unilateral conduct laws (June 2009) is based on responses from competition agencies and non-governmental advisors from thirty-four jurisdictions, including Denmark, Germany, the Netherlands and the United Kingdom (but excluding Finland).[91] It provides some insights into the differences between the countries that are part of this study. In the period 1999-2009, only Denmark found violations in more than two cases.
The majority of agencies have indicated that single-product loyalty discounts and rebates are considered to be legitimate forms of price competition and are generally pro-competitive. Accordingly, given the potential beneficial effects on consumer welfare, the responses expressed a cautious approach to intervention in discounts and rebates. The relevant differences between the countries that are part of this study are highlighted below.

The German Bundeskartellamt remarked that the analysis should not be limited to examining whether the discounted price is predatory because that approach might risk missing loyalty discounts that lead to prices that are not predatory but nevertheless harm competition. It is also noted that Germany has provisions addressing unilateral conduct by non-dominant firms.
Another notable difference is that in Denmark, single-product loyalty discounts and rebates can be considered criminal offences, while this is not the case in the other countries studied.

The report points towards some variations between jurisdictions in terms of the assessment. The UK Office of Fair Trading stressed that it uses "due caution before intervening against loyalty discounts and rebates and eschews any per se approach" due to the indications that such conduct can be pro-competitive (ICN, 2009, p. 9). Generally, presumptions and safe harbours are not applied, although the UK mentioned that action would be less likely if the (discounted) price is above the relevant cost benchmark. Denmark seemingly adopts form-based criteria as it is *"unlikely to investigate discount schemes with a discount of no more than five percent, a short reference period, e.g., no longer than three months, and an incremental rather than retroactive structure"*.
The German Bundeskartellamt defines market foreclosure as *"a situation where actual or potential competitors of the dominant firm are completely or partially denied profitable access to a market and where the maintenance of the degree of competition still existing or the growth of competition in the market is thereby hindered"*. It seems that there is no regard for the effect on consumer welfare in this definition.

The jurisdictions participating in the working group have different standards of proof with regard to anti-competitive effects; these range from requiring proof of actual anti-competitive effects, to showing potential likely (e.g. the Netherlands) or probable (e.g. United States) anti-competitive effects. In Germany, neither the CA, nor, in private cases, the plaintiff is required to show that competitors were actually forced to exit the market as a consequence of the conduct.

91 International Competition Network, Report on the Analysis of Loyalty Discounts and Rebates Under Unilateral Conduct Laws, Prepared by The Unilateral Conduct Working Group, Zurich, Switzerland, June 2009.

Another potential source of variation between jurisdictions is the extent to which the firm's intent is relevant for the assessment of its conduct. For both Denmark and the Netherlands, intent is not relevant for the assessment, while for Germany and the United Kingdom, intent may be relevant for the assessment of competitive effects.
Interestingly, the Danish CA accepts a 'meeting competition defence', with strict conditions: *"a loyalty rebate which is not cost based can under circumstances be justified if the dominant company uses the rebate system to meet competition from rivals. The meeting competition defence can only be accepted if the dominant company is using the rebate system to maintain its own customers – whereas it would not be accepted if the dominant company uses the system to take over rivals' customers"* (ICN, 2009, p. 16).

The OECD published a roundtable report on fidelity and bundled rebates and discounts which covers submissions from nineteen jurisdictions, including Denmark, Germany, the Netherlands and the United Kingdom.[92] It provides information about the differences in enforcement between these countries. The report notes that there is fundamental tension between the need for clear legal rules on one hand, and the consideration of economic factors on the other. The agencies seem to agree that that it is not possible to define certain discounting practices as *per se* violations of competition law. Notably: *"Where a discounting practice violates a price-cost test or safe harbour and rivals are excluded from some sales, further analysis is still required, in particular, a demonstration of harm to consumers. […] authorities should examine whether some consumers will face higher prices or a reduction in variety or service quality as a result of the practice."* (OECD , 2008a, p. 10).
The submission of Denmark yields the following insights. The submission discusses two cases, *Post Danmark* and *SuperGros*, these cases will be further discussed in section 4.4 below. A demonstration of harm to consumers seems not to have been part of the analysis carried out by the Danish CA. The approach followed seems to be a *per se* approach. The Danish council notes that analysis of cost structure and economic effects are not necessarily imperative to conclude that Post Danmark had abused its dominant position given that it's not mandatory after Section 11(1) of the Danish Competition Act or Art 82 to present evidence of concrete effects to establish abuse.
The submission of Germany notes that neither German nor EC law requires the competition agency to show that competitors were actually forced to exit the market as a consequence of the conduct at issue. Rather, it suffices to show that the conduct is capable of producing an exclusionary effect. The assessment seems to be based on the effects on competitors, rather than on consumers: *"The Bundeskartellamt, when applying the provisions of German law, balances the interests of the undertakings involved, i.e. the particular economic and competitive interests of the dominant firm and its competitors."* (OECD, 2008a, p. 77).
The Netherlands notes that the factors considered before opening an investigation are: economic impact of the alleged abuse, harm to consumers, strategic considerations and the chance that the agency will be able to prove an infringement.
The OECD questionnaire also asked whether the authority's approach to discounts is too lenient, too strict or not clear enough. The submission notes that the risk of being too strict is considered the most real. A transition from a form-based approach to a more effects-based approach is seen as desirable to minimise that risk.

[92] OECD, Fidelity and Bundled Rebates and Discounts, OECD Policy Roundtables 2008-29, 2 December 2008.

The United Kingdom is against a *per se* approach and advocates the use of economic analysis. The OFT prioritises cases and has closed down a number of investigations into conditional discounts on the basis of the resources they require are not matched by the likelihood of consumer harm.

OECD Roundtable on guidance

In a policy roundtable, the OECD discussed guidance to business on monopolisation and abuse-of-dominance (OECD, 2007/2008).[93] The policy report contains submissions from 12 members, including Finland, the Netherlands and the United Kingdom. It points out some differences in enforcement between these countries.

From an early stage, Finland has sought to examine the economic impacts of the undertakings' conduct, instead of taking a tight *per se* point of view,. Their published guidelines set out the principles on which dominance and abuse are assessed.

With the introduction of the Competition Act in the Netherlands, the Dutch Parliament explicitly stated that Dutch competition law should neither be stricter, nor more lenient than European competition law. Thus, the NMa closely follows European case law and the Commission's decisions. The NMa has the opportunity to prioritise cases it deems most important. The NMa supports the Commission's ambition to 'modernise' the application of Art 102 TFEU and is in favour of an effects-based approach (OECD 2008). The objective of unilateral conduct provisions is the protection of long term consumer interests through the protection of the competitive process. Note that the protection of competitors is not seen as an end in itself. There seem to be more indications of anti-competitive effects for exclusionary conduct than in case of exploitative conduct. The NMa's submission further notes that *"anti-competitive harm cannot be inferred merely on the basis of evidence regarding the form of the conduct. A theory of harm supported by the facts of the industry must be an essential part of a finding of abuse."* (OECD 2008, p. 32). On the issue of safe harbours it notes that the likelihood of a false negative (allowing an anti-competitive conduct to materialise) seems to be limited in cases of a firm with low market share. The NMa therefore proposes using a market share-based safe harbour for unilateral conduct (30% or lower market share), since such a safe harbour promotes legal certainty. The NMa is opposed to *per se* rules of illegality.

The Office of Fair Trading (OFT) in the United Kingdom also stresses consistency with EC law. As noted above for the Netherlands, the OFT favours an effects-based approach: *"There is no pre-determined and inflexible set of conditions against which the behaviour must be assessed. There is, instead, a clearly defined analytical framework for the assessment of the (likely) effects of abusive behaviour"* (OECD, 2008, p. 44). Form-based rules are a potential source of errors, being either under-inclusive (type II errors) or over-inclusive (type I errors). The OFT suggests using a market share-based safe harbour (40% or less) and a pricing-above-cost safe harbour (for pricing behaviour). Interestingly, under section 60(2) of CA98, any UK court or tribunal must act 'with a view to ensuring that there is no inconsistency' with EC law, and must have regard for relevant decisions and statements by the Commission.

[93] OECD, Guidance to Business on Monopolisation and Abuse-of-dominance, OECD Policy Roundtables 2007-43, 17 June 2008.

Conclusion

- Few differences in the wording of legislations and interpreting concepts (dominance, abuse) between countries studied;
- Denmark and Germany seem to adopt a more form-based approach, and have less regard to consumer welfare;
- The United Kingdom and the Netherlands seem to be highly similar in interpreting concepts and focus on economic effects and consumer welfare;
- Relatively little information on Finland was found, Finland seems to be more similar to UK and the Netherlands than to Denmark and Germany.

Appendix A.7 Regulation 1/2003 and convergence between Member States

Regulation 1/2003 brought about the transition from a system of a more centralised application to a more decentralised application of the EU competition rules. To allow the Commission to focus and act more effectively against serious infringements, the Regulation imposes on the Member States an obligation to designate competition authorities and/or courts that are responsible for the application of articles 101 and 102 TFEU and increases the role of these national competition authorities and courts. In addition, the Regulation sets out the basic rules and procedures to avoid overlap and guarantee an effective and uniform application of EU competition rules throughout the EU.

The Regulation sets out rules for cooperation and consultation between the EU Commission and the national competition authorities. When the Commission decides to initiate proceedings, the national competition authorities are relieved of their competence. If a national competition authority is already acting on a case, the Commission will consult with that authority before initiating proceedings. The Regulation also contains rules for the exchange of information, including confidential information between the Commission and the national competition authorities. There are also rules providing for mutual assistance between the different national competition authorities and the Commission in the event of investigations and inspections at the request of another competition authority. The Commission and the national competition authorities work together within the European Competition Network, which is set up as a forum for discussion and cooperation for cases where articles 101 and 102 TFEU are applied, and is meant to be the basis for the creation of a common competition culture in Europe.[94]

If national courts apply article 101 or article 102 TFEU when the Commission has already taken a decision on the case, they cannot decide counter to the existing Commission decision. The same is valid for the national competition authorities. The national courts in particular must avoid taking a decision that could conflict with a decision the Commission is contemplating in a procedure which it has initiated. In such a case, the national courts may decide to stay the proceedings and await the Commission's decision. The national courts may ask the Commission to provide them with information or to give its opinion on questions concerning the application

[94] See the Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/43.

of the EU competition rules. The Member States are obliged to send the Commission a copy of all judgments of the national courts in which the EU competition rules are applied. In addition, the national competition authorities and the Commission may submit written observations to the courts with regard to the application of the EU competition rules. Where the courts allow them to, they may also make oral observations (as '*amicus curiae*').[95]

When two or more national competition authorities have received a complaint or have started an investigation under article 101 TFEU or article 102 TFEU concerning one and the same (alleged) infringement, this should be sufficient for the other authorities to suspend their investigation or reject the complaint. In such a case, the Commission may also decide to reject a complaint. In order to act more effectively as well as share the workload, the Commission and the national competition authorities acting within the European Competition Network, strive to allocate a certain investigation to the authority that is best placed to carry it out.[96]

Articles 101 and 102 TFEU are only applicable to practices which "may affect trade between Member States."[97] When the national competition authorities apply the national competition rules to infringements which may affect trade between the Member States, they also have to apply the EU competition rules. Also, the application of national competition law may not lead to a prohibition of practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) TFEU or which fulfil the conditions of Article 81(3) TFEU. With regard to the parallel application of the prohibition of abusive behaviour, however, the national competition authorities are allowed to apply stricter national rules such as those applied, for example, in some Member States with regard to pluriformity in the media. With regard to concerted practices and abusive behaviour which do not affect trade between Member States, the Member States are in principle free to apply the national competition rules in any way they like. However, given the strong coordination mechanisms set out in Regulation 1/2003 and put into practice within the European Competition Network, the Member States also generally tend to follow the EU model within this limited national domain. This is also the case in purely national abuse-of-dominance cases.

Appendix A.8 Conclusion

This Section provided a review of legislation and enforcement practices in Denmark, Finland, Germany, the Netherlands and the United Kingdom. The conclusions are:

- The five countries follow EC law and practice, there is a high degree of harmonisation and convergence, partly due to Regulation 1/2003;
- Germany has deviating legislation (Sections 20 and 29 ARC);
- There are indications that Denmark and Germany adopt a more form-based approach, and have less regard for consumer welfare (as compared to the Netherlands, the UK and Finland).

95 See the Commission Notice on cooperation between the Commission and the courts of the EU member States in the application of Articles 81 and 82 EC, OJ 2004 C 101/54.

96 See the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ 2004 C 101/65. See also the Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/43.

97 For more on this concept, see the Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101/81.

Appendix B Legislation and enforcement in six jurisdictions

In this appendix the competition authority and the competition act are described, for the countries that are not involved in Part II of this research; Australia, Canada, EC's Directorate General for Competition, France, New Zealand and the United States of America.

Appendix B.1 Australia

Recently, the 'Competition and Consumer Act 2010' came into force in Australia. For the period covered in this study the 'Trade Practices Act 1974' is relevant, in which section 46 deals with 'misuse of market power' (see Box 1.16).

Box 1.16 Section 46(1) Trade Practices Act Australia

Section 46(1), Trade Practices Act 1974 (Australia)

A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
(b) preventing the entry of a person into that or any other market; or
(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

Section 46 (1AA) prohibits predatory pricing and Section 47 deals with 'exclusive dealing'. For more information see <www.australiancompetitionlaw.org>.

The Australian Competition & Consumer Commission (ACCC) is responsible for administering the Trade Practices Act and associated legislation. Anyone can file a complaint to the ACCC. The ACCC files all complaints in its 'complaints and inquiries database'. The ACCC can also start proceedings itself on the basis of information from members of the public, the media, ACCC staff and other agencies. If the matter is sufficiently serious, the case is investigated and may ultimately lead to the ACCC accepting a court enforceable undertaking from the company involved, or the ACCC instigating civil or criminal court action (annual report 2008).

In correcting anti-competitive behaviour, the ACCC starts by considering an administrative resolution. Depending on the circumstances, administrative resolutions can range from a commitment by an undertaking in correspondence to a signed agreement between the ACCC and an undertaking setting out detailed terms and conditions of the resolution. Many matters are resolved in this way. The ACCC may issue an infringement notice where it believes there has been a contravention of the Act that requires a more formal sanction than an administrative resolution, but where the ACCC considers that the matter may be resolved without legal proceedings. The ACCC often resolves contraventions of the Competition and Consumer Act by

accepting court enforceable undertakings under s. 87B of the Act. In these undertakings, which are on the public record, companies or individuals generally agree to (i) remedy the mischief , (ii) accept responsibility for their actions, or (iii) establish or review and improve their trade practices compliance programmes and culture. Legal action is taken where, having considered all the circumstances, the ACCC believes litigation is the most appropriate way to achieve its enforcement and compliance objectives. The ACCC is more likely to proceed to litigation in circumstances where the conduct is particularly harmful, where there is reason to be concerned about future behaviour or where the party involved is unwilling to provide a satisfactory resolution (<www.accc.au>).

The ACCC has a special 'notification process' for exclusive dealing, which provides immunity for potential breaches of the exclusive dealing provisions of the Trade Practices Act. It differs from the authorisation process because exemption from the exclusive dealing provisions does not depend on a decision by the ACCC. Lodging a notification provides automatic exemption from the date it is lodged with the ACCC (or soon after in the case of third line forcing conduct) and remains in force unless revoked by the ACCC. The process is open and transparent, with notifications placed on a public register. When considering the revocation of a notification, the ACCC is required to consult with interested parties and issue a draft decision document setting out the reasons it is considering revocation.

Appendix B.2 Canada

Sections 78 and 79 of the Canadian *Competition Act* deal with abuse of a dominant position (see Box 1.17). The Competition Bureau, headed by the Commissioner of Competition, is responsible for the administration and enforcement of the Competition Act. After the Competition Bureau receives a complaint, the Bureau evaluates whether the case fulfils the criteria of the Competition Act: (i) the dominant firm(s) has/have market power, (ii) the dominant firm(s) engage(s) engage in anti-competitive acts, and (iii) the anti-competitive acts have substantially lessened competition, or are likely to do so. If all three criteria are met, the case is considered as a civil "reviewable matter", and the Bureau will conduct a confidential investigation.
In some instances, voluntary compliance with the law can be achieved to correct the situation. A more formal solution involves registering the solution agreed by all parties in a consent agreement with the Competition Tribunal. If voluntary compliance cannot be achieved, the Commissioner files an application for an order before the Competition Tribunal to remedy the situation. The Tribunal can impose different measures to overcome the effects of anti-competitive acts and restore competition. The most common remedy is an order to stop the anti-competitive conduct. However, if the Tribunal believes more has to be done, it may order the dominant company to sell some of its assets or shares or impose an administrative monetary penalty (website <www.competitionbureau.gc.ca>).

Box 1.17 Section 78 and 79 Canadian Competition Act

Section 79 Canadian Competition Act.

Prohibition abuse of dominant position.
Where, on application by the Commissioner, the Tribunal finds that
(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Section 78, relates to the practice of anti-competitive acts. It provides guidance on what might constitute anti-competitive behaviour by specifying a non-exhaustive list of eleven potentially anti-competitive acts.
For more information see <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01165.html>

Appendix B.3 EC's Directorate General for Competition

The mission of the Directorate General for Competition (DG Comp) is to enable the Commission to make markets deliver more benefits to consumers, businesses and society as a whole, by protecting competition on the market and fostering a competition culture. DG Comp does this through the enforcement of competition rules and through actions aimed at ensuring that regulation takes competition duly into account among other public policy interests (DG Com website).

DG Comp carries out its mission mainly by taking direct enforcement action against companies or governments when it finds evidence of unlawful behaviour – be it collusion between competitors, abusive behaviour by dominant companies or attempts by government to distort competition by providing disproportionate support for particular companies.
The content of the relevant law article for abuse of dominant position is shown in Box 1.18

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Box 1.18 Article 102 TFEU

Article 102
Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist of: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Appendix B.4 France

Recent years have been characterised by major reforms in the institutional and legal frameworks of competition. Among others, the Law of Modernisation of the Economy (August 4, 2008) transformed the 'Conseil de la Concurrence' into the 'Competition Authority' and enhanced its investigatory powers.[98] Since then, France has had one, single organisation that carries out all competition regulation activities (inquiries, anti-trust activities, merger control, publication of opinions and recommendations).

Box 1.19 Article L. 420-2, paragraph 1 Commercial Code France

Article L. 420-2, paragraph 1 Commercial Code

Common actions, agreements, express or tacit undertakings or coalitions, particularly when they are intended to:
(1) Limit access to the market or the free exercise of competition by other undertakings;
(2) Prevent price fixing by the free play of the market, by artificially encouraging the increase or reduction of prices;
(3) Limit or control production, opportunities, investments or technical progress;
(4) Share out the markets or sources of supply,
shall be prohibited, even through the direct or indirect intermediation of a company in the group established outside France, when they have the aim or may have the effect of preventing, restricting or distorting the free play of competition in a market.

The French equivalent of Article 102 of the Treaty on the Functioning of the European Union is 'Article L. 420-2, paragraph 1 Commercial Code'. Article L. 420-3 Commercial Code voids any "commitment, agreement or contractual clause" infringing Article L. 420-2 Commercial Code (see Box 1.19). Although the French Competition Authority can impose fines upon the infringing party, only the courts can declare a contract void or grant damages to recover the losses resulting

[98] A major change is that its investigation services now include both preliminary inquiries and full investigations, which had been previously split between two different organisations (the DGCCRF and the Conseil de la Concurrence). One of the most notable reinforcements of its investigatory power is that investigators are now allowed to ask questions that are not limited to factual clarification requests.

from anti-competitive practices. Moreover, two other different types of specific rules exist under French law dealing with abuse-of-dominance. The first is 'Article L. 420-2, paragraph 2 Commercial Code' deals with abuse of economic dependence. The second is 'Article L. 420-5 Commercial Code' and prohibits excessively low prices (see <www.concurrences.com>).

Besides handling complaints, the French Authority also provides advices on request; both are counted as cases by the authority. Since not everybody can make a referral the number of referrals is limited and every referral is therefore subjected to an investigation. [99] However, after a referral is made against a company, this company may request the benefit of the commitment procedure and propose changes to its behaviour that have to be approved by the authority. After its decision, the authority notifies the decisions to the parties concerned and to the Minister of Economics. Parties have one month to file an application for annulment of review with the Paris Court of Appeal.

Appendix B.5 New Zealand

The Commerce Act of 1986 prohibits anti-competitive agreements between businesses such as agreements to fix prices or to carve up markets. It also makes it illegal for companies to abuse a dominant market position. The type of agreements that are illegal can involve two or more businesses colluding (coordinated conduct), or the actions of a single business or person (unilateral conduct). Unilateral Behaviour (behaviour by a single person or business) that is prohibited under the Commerce Act includes:

- taking advantage of market power – a person with a substantial degree of market power taking advantage of that position for an anti-competitive purpose (section 36, see Box 1.20);
- resale price maintenance by supplier – a supplier specifying the minimum price at which the supplier's goods can be sold by other businesses (section 37).

For the purpose of this study, Section 36 is the relevant prohibition. The Commerce Commission can investigate complaints or issues that come to its attention. If, as a result of an investigation, the Commission believes the Commerce Act has been breached a range of actions can be taken. This might include educating a business about how to comply with the Act, issuing a warning or prosecuting a business or person in the High Court.

[99] In the field of litigation (complaint), a referral may be made to the Conseil by the Minister of Economy, local and regional administrations, companies, a professional federation, a trade union organisation or a consumer organisation. The Conseil may also decide ex officio to open a case should it deem this necessary.
On an advisory basis (for an opinion), its consultation by Government is mandatory for draft legislation regulating prices or restricting competition. More generally, a referral may be made to it by Government or by Parliament, local and regional administration, professional federations and trade union or consumer organisations on any competition-related issue. In the field of mergers, the Minister of Economy may consult it for its opinion and such consultation is mandatory if the minister considers that the merger restricts competition. Private individuals may not make referrals to the Conseil.

Box 1.20 Commerce Act 1986, No 5 New Zealand

Section 36

36(1) No person who has a dominant position in a market shall use that position for the purpose of:
(a) Restricting the entry of any person into that or any other market; or
(b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
(c) Eliminating any person from that or any other market.

The New Zealand Commerce Commission has identified a number of enforcement responses as options for resolving investigations into, and prosecutions of, suspected contraventions of the Commerce Act:[100]

Possible outcomes of investigations:

- No further enforcement action required
- Compliance advice letter
- Warning letter
- Settlement
- Decision to prosecute

Possible outcomes of prosecutions:

- Withdrawal or discontinuance
- Settlement
- Concluded

Appendix B.6 United States

The United States have two competition authorities. The Federal Trade Commission (FTC) and Department of Justice (DoJ) share responsibility for enforcing anti-trust laws in the USA at federal level. At states level, attorneys general can act on behalf of those injured by anti-trust violations.

At federal level, the FTC is responsible for civil enforcement of anti-trust laws while the DoJ is responsible for both civil and criminal enforcement of these laws. Three major federal anti-trust laws exist. The relevant articles for this study are outlined in Box1.21.

[100] See < http://www.comcom.govt.nz/enforcement-response-options/>.

Box1.21 Legislation in the US

Sherman Act
Section 2
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
This act covers price fixing and market sharing agreements between independent companies (cartels), as well as monopolization practices by individual firms but not mergers. Mergers are covered by the Clayton Act (section 7a, 15 U.S.C. § 18a). Furthermore, it covers price discrimination which is more relevant for this research (see below).

The Clayton Act.
15 U.S.C. section 13 (discrimination in price, services, or facilities) and 14 (exclusive dealings and tying, but only when these acts substantially lessen competition).

Federal Trade Commission Act
(Title 15 U.S.C. Section 45)
"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."
An act or practice is unfair if it causes injury to consumers that:
- is substantial
- is not outweighed by countervailing benefits to consumers and competition
- consumers themselves could not reasonably have avoided.

Deceptive practices are defined as:
- There must be a representation, omission or practice that is likely to mislead the consumer. This includes the "use of bait and switch techniques."
- The practice is examined from the perspective of a reasonable person in the circumstances. If the practice "is directed primarily to a particular group," such as Internet users, "the Commission examines reasonableness from the perspective of that group."
- The representation, omission or practice must be a material one, i.e., it is likely to affect the consumer's conduct or decision regarding the produce or service.[101]

Federal Trade Commission

The Federal Trade Commission only categorises its antitrust enforcement actions as 'merger' and 'non-merger'. There is no official breakdown within this group of non-merger actions. However, the FTC makes the following internal distinction:

- Horizontal: This is a synonym for cartel and multilateral agreements between direct competitors;
- Unilateral: This includes cases which are mostly abuse of a dominant position. Attempts to monopolise are included in this category.

[101] itlaw.wikia.com/wiki/Section_5_of_the_FTC_Act

The FTC applies The Federal Trade Commission Act (see Box1.21).

The FTC is not obliged to open an investigation for every complaint received. In a typical case, two scenarios may occur:

- The FTC finds illegal practices and settles with the suspected parties. The parties promise not to engage in those practices again. This is called a consent agreement and these are always published by the FTC. For these cases there is always an enforcement action taken.
- The FTC finds illegal practices but the parties do not agree. They can file a case at the court (federal judge or administrative court). The fact that the case goes to court is always made public. However, the FTC only publishes documents that they generate themselves. Therefore, the decision of the judge is not always made public on the website of the FTC. For these cases, there is only an enforcement action given when the court agrees with the competition authority.

Department of Justice

The Department of Justice (DoJ) enforces the Sherman Act Section 2. For cartel cases, Section 1 is the relevant prohibition. Only descriptions of appellate briefs are available. These cases are handled by a Court. Both the accused undertaking and the United States of America or an individual state could submit an appellate brief. There is no information about the percentage of the total abuse cases which result in an appellate brief.

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