Empirical Assessment of Public Enforcement of Competition Law: Criteria and Three Case Studies (EU, UK and France)

Ali Abdel Mahdi Massadeh

4130626

Thesis submitted in fulfilment of the requirements of the degree of Doctor of Philosophy in Law

University of East Anglia
School of Law

January 2015

Table of Contents

Acknowledgment

First and foremost, I would like to express my utmost gratitude and apperception to my supervisors Prof. Motern Hviid and Dr. Pinar Akman. Without them this thesis would not have been completed. Their advice, support, guidance, patience and understanding throughout the period of my LLM and PhD have made things much easier and possible.

I am very grateful for the Centre for Competition Policy (CCP) for giving me the opportunity to do the PhD in the first place through its generous studentship. My apperception goes also to the staff of CCP for their continuous support and help. The activities and the events organised by CCP have contributed in many ways in the shape of this thesis and my personality as well.

I would like to thank my colleagues at the University of East Anglia. Many thanks for the Law School for its support and for the post graduate community at the School. Special thanks should go to the Staff of the post graduate office at the faculty of social sciences for their kind assistance and support.

Parts of this thesis were presented at the following institutions: European University Institute (EUI); King's Collage, London; University of Mannheim; and several times at the University of East Anglia. Therefore, I would like to thank everyone who commented or provided feedback on my work and for the hospitality of these institutions.

This work would not have been completed without the unconditional support of my family. Special thanks and apperception goes to my Father, my Mother, my brothers and sisters (Ahmad, Firas, Samah and Salam) for their support and love in many many ways. Last but not least, I would like to express my sincere gratitude to my wife, Nedaa and my son Ahmad

(and my other son who will be born in the next few months). I would like to thank them again and again for their love, sacrifices and patience.

This thesis is dedicated to my beloved father.

List of Abbreviations

CAs- Competition Authorities

CAT- Competition Appeal Tribunal

CC- Competition Commission

CJEU- Court of Justice of the European Union

CMA- Competition and Markets Authority

CPA- Committee of Public Accounts

EC-European Commission

ECN- European Competition Network

ERRB- Enterprise and Regulatory Reform Bill

FCA- French Competition Authority

GC- European General Court

GCR- Global Competition Review

LME- The Law on the Modernisation of the Economy

NAO- National Audit Office

NCA- National Competition Authority

NCA- National Competition Authority

OECD- the Organisation for Economic Co-operation and Development

OFT- Office of Fair Trading

PCA- Paris Court of Appeal

TFEU- Treaty on the Functioning of the European Union

TGCR- The Global Competiveness Report

WEF -The World Economic Forum

- Chapter 1 - Introduction

The main concern of this thesis is to examine how public enforcement of competition law should be assessed. This thesis offers the theoretical, analytical and empirical perspective for why and how public enforcement should be assessed, and the importance of the assessment process itself in revealing enforcement problems. Public enforcement of competition law means for the purpose of this thesis is the application of competition law to anticompetitive practices and to unilateral conduct practices; which means that Mergers and state aid issues are outside the scope of the thesis.

Over the last decade, the issue of assessing/ evaluating competition enforcement has become more noticeable. In one of its policy papers the Organisation for Economic Co-operation and Development (OECD) states "Considerable work remains to be done to refine the methodologies used to evaluate the effectiveness of completed competition policy interventions."[1] In addition, Competition Authorities (CAs), policy makers, conferences and academics have paid extra attention and have spent a lot on assessment studies that aim to identify the benefits and the drawbacks of competition enforcement and how it can be improved. For example, Kovacic explained, "the lack of widely accepted, consistently applied standards for assessing the quality of agency performance has beset the field of competition policy throughout its history. This absence severely impedes the achievement of consensus on what competition agencies ought to be doing".[2]

[1] OECD (2005) 'Evaluation of the Actions and Resources of Competition Authorities'. DAF/COMP(2005)30 available at http://www.oecd.org/dataoecd/7/15/35910995.pdf , accessed 20 April 2012. P. 10

[2] William E. Kovacic et al, 'How does your Competition Agency Measure Up?' (2011) 7 European Competition Journal 30.

Despite these efforts, as it will be demonstrated below and more extensively in chapter 2, there is no consensus on what could constitute a good performance by CAs, or how public enforcement should be assessed.[3]

Thus, this thesis investigates the issue of assessing public enforcement of competition law by suggesting criteria for the assessment process and to apply the suggested criteria to data collected by the author from the UK, EU and France. The period under examination starts from May 2004and up to December 2012. The period starts when Regulation 1/2003[4] came into force which has decentralised the application of EU competition provisions, where National Competition Authorities are required to apply EU competition law alongside national competition provisions. This period would allow to have a good number of observations while at the same time would give a good overview about the outcome of appeals.

In addition, a different but much related issue that has to be taken to account when discussing the issue of assessing public enforcement of competition law is deterrence. Measuring deterrence is a very controversial issue that many scholars tried to find a way to measure deterrence and what matters when measuring deterrence.[5] Tell now there is no agreed way to

[3] Mats A. Bergman, 'QUIS CUSTODIET IPSOS CUSTODES? OR Measuring and Evaluating the Effectiveness of Competition Enforcement' (2008) 156 De Economist 387; and William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' (2006) 31 Journal of Corporation Law 503.

[4] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Now 101 and 102 TFEU).

[5] See for example, Wouter P.J. Wils 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2)World Competition, 183 ; Douglas H. Ginsburg & Joshua D. Wright, 'Antitrust sanctions' (2010) 6(2) Competition Policy International 3; Chris Harding 'Cartel Deterrence: The search for evidence and argument', 56 (2011) *The Antitrust Bulletin* 345; Alberto Heimler and Kirtikumar Mehta, 'Violations of Antitrust Provisions: The Optimal Level of Fines for Achieving Deterrence' (2012) 35 World Competition, 103.

measure deterrence.[6] The levels of deterrence in any given jurisdiction are very important to be considered when assessing the CA because it affects the levels of enforcement. It is argued in this thesis that issues related to what could constitute optimal deterrence should be dealt with after agreeing on how to assess public enforcement of competition law. The role of deterrence will be discussed in further detail in chapter 2.

The gap that this thesis aims to fill is to establish implementable criteria for assessing public enforcement of competition law. One aim is to learn from the criticisms that the previous studies have received.[7] This will be done by employing a methodology, which has not been used before in this area, when testing and applying the criteria. The criteria aim to cover as many aspects as possible that may affect the CA performance. Furthermore, there is a lack of empirical comparative studies that this thesis aims to do.[8] In addition, the collection and the analysis of data is another contribution that this thesis offer, because there is a need for statistical studies for the jurisdiction examined in the thesis; the data presented in the thesis may facilitate to other researchers reaching different aims that are not covered here, empirically.

---

[6] Paolo Buccirossi, Lorenzo Ciari, Tomaso Duso, Giancarlo Spagnolo and Cristiana Vitale, 'Deterrence in Competition Law', Discussion Paper SP II 2009 – 14, Wissenschaftszentrum Berlin, 2009.

[7] Many of the methodologies/ criteria have been criticised, for example; for not including issues other than case number (concluded/ initiated); for not being comparative; or for not taking into account the budget and the human capital into account. This issue is examined in detail in chapter 2. See for example, Mats A. Bergman, 'QUIS CUSTODIET IPSOS CUSTODES? OR Measuring and Evaluating the Effectiveness of Competition Enforcement' (2008) 156 De Economist 387, 404; and William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' (2006) 31 Journal of Corporation Law 503, 542 and 543 (Calling for comparative studies to be conducted in the area of assessing public enforcement of competition law); see also, Peter Ormosi and Stephen Davies **"**A comparative assessment of methodologies used to evaluate competition policy" (2012) 8 Journal of Competition Law and Economics 769 (critical assessment of evaluations methodologies).

[8] Ibid.

Thus, there are two clear gaps in this area: (1) researching for acceptable criteria for the assessment of public enforcement of competition law; (2) applying the assessment criteria to actual data collected form CAs. This thesis aims to fill the aforementioned gaps by asking and answering the research question(s) in the next section.

1-1: Existing literature[9]

There have been many studies that can be considered as assessment studies. In these studies, the criteria employed differ from work to another, as a result of having different criteria there were different outcomes of the studies depending on the criteria employed and the aim of each study. It is noted, that there many studies that are either very specific or very general; for example, studies that examine a single case and its impact vs. Studies that examine a large number of jurisdictions but with very brief results. For the purpose of this thesis and to build credible criteria, any study that can be considered as an assessment study is investigated in order to understand the criteria employed and learn from it.

There have been many studies/reports/ rankings that have aimed to assess/ evaluate or rank CAs or its actions. In those efforts there were no consistent standards (criteria)/ or no clear criteria for the assessment process, as it will be shown below.

To start with the studies that aimed to establish an evaluation/assessment methodology or call on what have to be considered when assessing CAs' performance. The contributions to this type of studies came from international organisations (e.g. OECD), policy makers and

[9] It has to be noted that there is an extensive literature review about the topic of the thesis in Chapter 2. However, it is important to highlight one of the main motivations of this work, namely the lack of consistent criteria for the assessment of public enforcement of competition law.

academics.[10] This type of literature can be seen as good advisory work for those who want to assess CA's performance. The main criticism for such type of literature is that it offers some suggestions that are practically very difficult to apply, or the information needed are very difficult to obtain or measure.[11]

The only ranking available for CAs is the Global Competition Review (GCR) ranking. The GCR has been ranking a number of CAs since 2004. For their ranking there are no clear criteria (standards), it mainly depends on responses collected from surveys distributed that are distributed to competition officials (decision makers) and competition experts in the countries included in their ranking. It has to be noted the GCR ranking do not offer analysis of the results they reach, it merely presents the results of the survey. [12]

There is also another form for the assessment of competition law enforcement is by creating indexes to examine competition laws and their affects.[13] To date, there are no studies that aim

[10] See for example: Timothy J. Muris, 'Principles for a Successful Competition Agency' (2005) 72 University of Chicago Law Review 165; William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities" (2006) 31 Journal of Corporation Law 503; William E Kovacic, 'Rating the Competition Agencies: What Constitutes Good Performance?' (2009) 16 George Mason Law Review 903; Kai Hüschelrath and Nina Leheyda, 'A Methodology for the Evaluation of Competition Policy' Discussion Paper No. 10-081, Centre for European Economic Research (ZEW), Mannheim; Peter Ormosi and Stephen Davies **"**A comparative assessment of methodologies used to evaluate competition policy" (2012) 8 Journal of Competition Law and Economics 769

[11] This issue is dealt with in Chapter 2. See for example, Peter Ormosi and Stephen Davies **"**A comparative assessment of methodologies used to evaluate competition policy" (2012) 8 Journal of Competition Law and Economics 769 (for the differences between evaluation methodologies); William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities" (2006) 31 Journal of Corporation Law 503; Timothy J. Muris, 'Principles for a Successful Competition Agency' (2005) 72 University of Chicago Law Review 165.

[12] Global Competition Review ranking studies "Rating Enforcement", from 2004 until 2013

[13] Keith N. Hylton and Fei Deng, 'Antitrust around the world: An Empirical analysis of the Scope of competition laws and their effects' (2007) 74 Antitrust Law Journal 271; Michael W. Nicholson, 'An Antitrust

to examine the CAs' performance.[14] The criteria used in each study in order to create the index are different in these studies.

CAs have contributed to the area of the assessment of public enforcement of competition law, but in a more specific nature. For example, some CAs have commissioned some studies to evaluate its actions in a particular area or about a particular case that the CA have concluded.[15]

In addition, there are academic publications where it examines particular cases and its impact on competition enforcement. These studies are characterised to be very detailed with regard the selected case or group of cases however, it is not comprehensive because it does not cover the whole activities of the CA.[16]

Law Index for Empirical Analysis of International Competition Policy' (2008) 4 Journal of Competition Law & Economics 1009.

[14] The only study that partially deals with developing countries CAs application of the law (NOT performance), the aim of this study were to examine if developing countries applying their competition laws (therefore, cannot be considered as an assessment study); see Dina I. Waked, 'Do Developing Countries Enforce Their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries' (2012), available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044047

[15] The UK office of Fair Trading (OFT), now the UK Competition and Market Authority (CMA), has been very active in this area where it has commissioned some studies to assess certain areas of its activities. The Studies where commissioned either on behalf of the OFT or by the UK department of Industry and Trade. See for example, OFT 1391 A study by London Economics (2011) OFT 1391 available at http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1391.pdf; Pricewaterhouse Coopers LLP, 'Ex Post Evaluation of Mergers' (2001) Report for the UK Office of Fair Trading, Department of Trade and Industry and the Competition Commission; KPMG (2004), 'Peer Review of Competition Policy', Report for the UK Department of Trade and Industry. Available at http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/files/file32813.pdf

[16] A good example of this is, Bruce Lyons (ed), *Cases in European Competition Policy: The Economic Analysis* (Cambridge University Press, Cambridge 2009). In this edited collection, the respected authors provided an economic analysis for a number of cases in the EU.

There is another form of studies that assess the success rate on appeal for the CA. To date there are only two studies that have done so explicitly in the competition law arena.[17] Success rate on appeal is very important to be considered as it determines the rightness of the CA decision making. However, it only covers a partial part of the CA activities.

Table 1 below presents the approaches employed in the existing literature and what are the criteria (if any) used in the studies.

Study (approach)	Criteria used
• **Suggested criteria (methodologies/ principles)**	- Mainly based on critical thinking suggesting set of criteria and guiding principles on how to assess public enforcement.
• **Success rate on appeal**	- Full review of the CA's decisions. - It assesses substantive and procedural issues. - Calculating how successful the CA is.
• **Case studies**	- Critical analysis - Previous case law - Economic modelling
• **Indexes**	- Collecting data about the competition law, i.e. competition law on the books and their completeness. - Codifying key features of the law. - Scoring
• **Rankings**	- Mainly based on describing the results of a survey distributed in the jurisdictions under examination.

Table 1: List of studies that aimed to assess public enforcement of competition law and the criteria employed.

Form what has been said earlier and what the table presented, it can be seen very clearly that there is no consistency with the selection of the criteria employed. More importantly, one can notice that there are no clear and systematic criteria employed in the studies (approaches).

1-2: Methodology

The thesis relies on a mix of methodologies in order to answer the research questions stated above. It relies on analytical, comparative and empirical methodologies. For the criteria

[17] Christopher Harding and Alun Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995-2004' (2005) 30 European Law Review 349; Joshua D. Wright and Angela Diveley 'Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission'. Available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990034.

chapter (chapter 2), it employs an analytical method where it critically analyses existing literature and adds to it in order to reach the criteria for the assessment. Then, the suggested criteria will be applied and tested empirically to the three jurisdictions under examination (in the subsequent chapters 3, 4 and 5). The application of the criteria require data collection form the jurisdictions under examination, and then to analyse and interpret the data for each jurisdiction in the country's chapters. In the final chapter of the thesis, the criteria will be applied again but in a comparative sense, where this chapter aims to compare and contrast the three jurisdictions, to draw some conclusions and to highlight the advantages and the disadvantages of each jurisdiction and how it can be improved. In the conclusion, refined criteria are offered in light of the testing that have been undertaken in the previous four chapters by highlighting what are the important issues that have to be considered when assessing public enforcement of competition law.

As it has been highlighted earlier, this thesis only deals with anticompetitive practices and unilateral conduct cases. Hence, merger and state aid are outside the scope of this thesis. The reason of excluding merger and state aid, as explained in Chapter 2, is that these cases require separate criteria because of the very different way in enforcing the related legal provisions and the aim of the enforcer. Mergers and state aid cases are usually notified to the enforcer and the enforcer aims to predict the future; whereas in anticompetitive practices and unilateral conduct cases, the enforcer has to investigate and discover these practices and aims to investigate the past or the present conduct of the investigated parties.

The period investigated in this thesis is from 1 May 2004 and up to 31 December 2012. The data collected for this period are original and collected manually by the author. The information needed and employed to carry out the research in the thesis are from a variety of resources. The main source of the information are: data collected by the author form the cases

concluded by the CAs; data collected from the appealed decisions to appeal courts; data collected about the capabilities (budget and human capital) of the CAs, this data are obtained from the CA's annual report and website also results from previous related studies are taken into consideration for comparison purposes. In addition to the data described, the thesis takes into account academic work in order to interpret the analysed data.

The size and the uniqueness of the datasets has been a major motivation for conducting the present work. There are nearly 500 cases between the three jurisdictions with over 15 variables. For the appealed judgments, over 200 cases have been appealed where data have also been obtained and analysed. Over 100[18] of the appealed cases have been analysed and studied in order to interpret the results gleaned from the data.

One of the main challenges that the author faced when conducting this research, is the difficulty with controversial issues such as the levels of deterrence and the difficulties associated with its measurement when interpreting the results. In such situations, the thesis relied on established principles in the literature in order to draw sound and reasoned interpretations.

1-3: Structure

The structure of the thesis is quite systematic where all of the chapters follow a fairly similar structure. This has be done because the suggested criteria in the thesis and how it have been applied throughout the thesis. Before stating the structure of the thesis, it is important to highlight the research question and how it will be answered in the chapters.

The main and the general question that the thesis aims to answer: How and why public enforcement of competition law should be assessed?

[18] Cases issued by the CAs and the outcome of appeals.

In order to answer this question the following questions will be addressed and answered: (i) What matters the most when assessing public enforcement of competition law? In other words, what are the best criteria that have to be taken into account when assessing public enforcement of competition law? (ii) What is the role of the 'enforcement and non-enforcement activities (Outcomes)' and 'the budget and human capital (Capabilities)' of the CAs and the 'surrounding circumstances' in the jurisdiction on the performance of the CA? (iii) Why the UK, Europe and France are representative jurisdictions for the analysis undertaken in the thesis? (iv) What are the obstacles that each jurisdiction faces and how it could overcome these issues; and what each jurisdiction/ CA can learn from the others? (v) What are the general issues that any CA should take into account when enforcing competition law?

Chapter 2 is the foundation of the thesis and consists of two parts and answers question (i) and (ii). The first part provides an extensive literature review about the subject matter of the thesis and the second part offers the suggested criteria for the assessment of public enforcement of competition law. Part one, starts the discussion about public enforcement in general and then it talks about the relationship about public and private enforcement of competition law. The discussion then moves on to discuss the literature that deals with optimal enforcement issues, in particular optimal deterrence, fines and structure; where it has been argued that optimal enforcement issues should be dealt with after assessing the CA and finding the weaknesses. Subsequently, the literature review continues with the studies that can be considered as an assessment studies, including statistical studies and specific studies that deal with narrow issues (e.g. studies that deal with leniency programs or fining guidelines). Part two of Chapter 2 offers the suggested criteria based on what have been gleaned from the literature review and what can be added when constructing the criteria. This

part starts with setting out some assumptions and highlighting the strengths and the weaknesses with the possible measures that have been suggested in the existing literature. This part consists of three main sections: (1) Enforcement and non-enforcement activities of CAs (outputs), (2) Capabilities of CAs (budget and human capital), (3) Surrounding circumstances and facts about the CA and the jurisdiction. The outputs category includes: number of cases; nature of cases; duration of investigations; sources of investigations; complexity of cases; dimensions of cases; success rate on appeal; market/ sector investigations/studies; guidelines; studies conducted by the CA. The Capabilities category includes Staff; specialist; budget, among other issues. The surrounding circumstances category takes into account the following issues: case studies, peer reviews, competiveness reports, among other issues. Chapter 2 concludes with how the criteria should be applied and what are the possible implications for the criteria theoretically.

Chapter 3, 4 and 5 deals with public enforcement of competition law in the EU, UK and France, respectively. At the beginning, it provides key facts about the competition regime in each jurisdiction and the appeal process; it then discusses literature that has dealt specifically with public enforcement in each jurisdiction. Then the criteria are applied as described in Chapter 2 (outputs, capabilities and surrounding circumstances), where the data are presented and analysed. After the data presentation and analysis, key legislations that have possible impact on public enforcement are discussed; and the possible consequences of these legislations on the results obtained from the data are offered. Furthermore, any changes in the legislations or the institutional structure of the CAs that have occurred within the period under examination (May 2004 to December 2012) are scrutinised. In addition, each of the chapters links the presented results to the policies adopted by each CA (for example, it links the results to leniency procedure and to settlements procedures...etc.) The chapters then

concludes while taking into account that further analysis are undertaken in the comparative chapter (Chapter 6) examine CAs from a comparative perspective.

Chapter 6 conducts a comparative investigation of the three jurisdictions in order to understand outstanding issues from the previous chapters and to help in exposing any problems. This chapter follows the same structure of the previous three chapters, where it presents comparative results according to the order of the suggested criteria. In addition to the discussion associated with the presentation of the comparative results; further analysis and discussion is undertaken afterwards with issues that have not been discussed before (such as, deterrence, selection of cases and non-ordinary routes for ending investigations). This chapter concludes with summing up the findings and the observations gleaned from the analysis.

Chapter 7 concludes the thesis. It presents the main findings of the thesis and what each jurisdiction has to change or maintain. It also offers a final standpoint on the suggested criteria.

- Chapter 2- Assessing Public Enforcement of Competition Law: Proposed Criteria

> "The lack of widely accepted, consistently applied standards for assessing the quality of agency performance has beset the field of competition policy throughout its history. This absence severely impedes the achievement of consensus on what competition agencies ought to be doing".[1]

2-1: Introduction

The main aim of this chapter is to establish an acceptable, implementable and comparative criterion for the assessment of public enforcement of competition law. The aim of the proposed criteria is not only to assess public enforcement of competition law, but also to examine if Competition Authorities (CAs) are doing what they ought to be doing[2] and how CAs can improve their performance. This will be done by comparatively highlighting how the CA in question may enhance its performance and what are the possible feasible solutions for the CA, in light of its capabilities, which can be learnt from other CAs.

Consequently, when constructing the proposed criteria, this chapter will pay particular attention to the suitability of the criteria to comparative studies where CAs can learn from each other. Many commentators have highlighted the value and the need of comparative assessment studies on many occasions.[3] Comparative studies may be seen highly useful in the

---

[1] William E. Kovacic et al, 'How does your Competition Agency Measure Up?' (2011) 7 European Competition Journal 30, 30.

[2] Although it is difficult to assess this matter in its own right, but commentators suggested that the lack of an assessment method would make knowing what CAs are doing or should do even more difficult. This will be discussed later in the chapter.

[3] Mats A. Bergman, 'QUIS CUSTODIET IPSOS CUSTODES? OR Measuring and Evaluating the Effectiveness of Competition Enforcement' (2008) 156 De Economist 387, 404; and William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' (2006) 31 Journal of Corporation Law 503, 542 and 543

arena of assessing CAs' performance, particularly, when one compares CAs at the same level of development (i.e. CA in a developed country vs. CA in a developed country) with similarities in the institutional design of CAs.

The aim of this chapter is not to rank or classify CAs into categories based on the quality of enforcement. This chapter aims to provide a tool that facilitates comparative studies between CAs. Thus, the aim of such a tool is to help to reveal enforcement problems that may delay or prevent the enhancement of enforcement mechanisms.

The usefulness of having criteria that assess CAs' enforcement activities could benefit CAs and firms who are subject to competition rules from different angles. For example, assessing CAs would result, certainly, in evaluating the CA and, hence, identifying what has to be modified and what has to be maintained. Furthermore, the assessment process may produce other important implications other than assessing the application of the law. The assessment process may help in achieving consistent application of the law, as if one has a clear idea of what the CA has done or what it may do, it would result in consistent application of the law and, thus, legal certainty. Consequently, this would result in setting the boundaries of the law and where the rules would apply, as a result this would benefit players in the market by setting the limits for them. In addition, assessing public enforcement of competition law would help the CA in identifying enforcement problems; as a result, the ability of the CA in setting its enforcement priorities more precisely and avoid the problems revealed from the assessment process.

Competition laws are enforced in two ways. The first way is the enforcement of competition laws by public agencies, public enforcement. The other way, is the enforcement of competition law by private parties who seek remedy as a result of a competition law infringement (s), private enforcement. Although the main focus of this thesis is to assess

public enforcement of competition law, studying the existence of private enforcement is very important to be considered because it may affect the levels of public enforcement, and indeed the levels of deterrence. In addition, it is suggested that public and private enforcement are complementary and not separate; hence, each type of enforcement may affect the other.

In this chapter, it is believed that public enforcement of competition law is superior to private enforcement of competition law (in Europe), because private enforcement is weak and public enforcement is the most effective and the established form of enforcement in Europe. Therefore, the burden on CAs to keep markets as competitive as possible is much higher than in other jurisdictions; thus, monitoring public enforcement is of great importance, as there are no other form of enforcement that may compensate any 'slips' by the public enforcer. Because of this, a tool for assessing public enforcement is very important in order to report to CAs how they may enhance their performance.

Currently, according to many scholars and policy makers, there are no acceptable, agreed or testable methods for assessing CAs' performance. Kovacic stated, "The lack of widely accepted, consistently applied standards for assessing the quality of agency performance has beset the field of competition policy throughout its history. This absence severely impedes the achievement of consensus on what competition agencies ought to be doing".[4] From Kovacic's words, it can be understood that the absence of an agreed criteria has led to creating uncertainty and confusion in the application of competition rules around the world and impedes the enhancement of the application of competition law. This is because neither CAs nor other stakeholders are sure if CAs are doing what they are supposed to be doing. In another instance, Kovacic addressed a question about how CAs' performance should be

[4] William E. Kovacic et al, 'How does your Competition Agency Measure Up?' (2011) 7 European Competition Journal 30.

assessed. He replied "Absolutely fundamental question that receives too little attention".[5] Consequently, this has lead, as stated earlier, to creating enforcement problems and difficulties to find the accurate mechanisms to enforce antitrust rules. Furthermore, the problem of not having an agreed standard has been discussed at international level, in 2005 the Organisation for Economic Co-operation and Development (OECD) has called for more work to be done in this area, it stated "Considerable work remains to be done to refine the methodologies used to evaluate the effectiveness of completed competition policy interventions."[6] Thus, it can be concluded that an agreed criteria is of crucial importance for the enhancement of antitrust enforcement.

However, as it has been pointed out and as it will be discussed later in the chapter, to date there has been no agreed method for assessing CAs' performance; this chapter questions the reasons behind this; it then aims to introduce a criteria, the application of which is mainly based on publicly available information. In order to cover as many aspects as possible that may affect the CA's performance, the proposed criteria will examine what the CA has produced, including enforcement and non-enforcement activities. At the same time, it shall look at the capabilities and the institutional characteristics of the CA and seek to further clarify surrounding circumstances and facts about the CA and/or the jurisdiction under examination.

The scope of this chapter is limited to assess CAs' performance in antitrust enforcement, i.e. agreements and unilateral conduct cases. This means merger cases are outside the scope of this chapter. This is because there are many differences between mergers and non-merger cases. First, the way in which CAs deal with merger and non-merger cases. In the case of

[5] William E. Kovacic Presentation delivered at GCLC, Brussels 1 December 2011. available at http://chillingcompetition.com/2011/12/01/slides-evening-policy-talk-bill-kovacic/ accessed 20 December 2011

[6] OECD (2005) 'Evaluation of the Actions and Resources of Competition Authorities'. DAF/COMP(2005)30 available at http://www.oecd.org/dataoecd/7/15/35910995.pdf , accessed 20 April 2012. see P. 10

mergers, there is an *ex-ante* application of the law and in most jurisdictions merging parties have to notify their transaction to the CA. Whereas, in non-merger cases there is an *ex- post* application of the law and firms involved in anti-competitive practices try to hide their conduct and it is the CA task to find out about such practices. Second, from the regulation of each type of conduct; in most jurisdictions merger and non- merger cases are regulated with different legislations.[7] Finally, in antitrust enforcement, mostly CAs set priorities to its antitrust enforcement, while in merger cases the CA has to deal with any notified merger and it cannot decide which mergers it will examine or not. For the reasons given, merger cases will not be considered when constructing the proposed criteria.

This chapter is divided into two main parts. Part one provides a literature review that highlights the importance of public enforcement of competition law, then it discusses the relationship between private and public enforcement of competition. Afterwards, literature that deals with optimal enforcement will be discussed, where it will be argued that the area of optimal enforcement should be dealt with after assessing the application of competition law; it will also be argued that each jurisdiction (CA) should have its own 'optimal enforcement package'. Then this chapter will narrow the focus down and reviews studies that can be considered as assessment studies. Part one concludes with what has been observed from the literature review. Part two of this chapter introduces proposed criteria for the assessment of public enforcement of competition law. Part two consists of three main sections, where each of them is a main part of the proposed criteria. The application of the proposed criteria relies mainly on three sets of information (outputs of the CA, capabilities and surrounding circumstances and facts about the jurisdiction or the CA). Each set of information is discussed in a section in part two of this chapter. Part two also discusses other issues, *inter*

[7] For example, in Europe non-merger cases are regulated by Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), while the European Merger Regulation regulates merger cases, Council Regulation (EC) No 139/2004.

alia, the lack of an agreed standard for assessing CAs; it also sheds light on the requirements for the application of the criteria and how it should be applied.

2-2: Part One: Literature review

The main concern of this thesis is to assess public enforcement of competition law. Part one provides a literature review of literature that deals with the enforcement of competition law, either by public agencies or by private parties. The examination of private enforcement, alongside public enforcement, is important because both types of enforcement may affect one another; hence, the levels of enforcement by the public authority in the examined jurisdiction may be affected and, indeed the levels of deterrence. Thus, this part will look at literature that discusses enforcement issues; it then will examine literature that deals with optimal enforcement issues. Then, a review of studies that can be considered as assessment studies will be considered. After that, the chapter will narrow the focus into literature that calls for establishing an assessment standard for CAs' performance.

When discussing the enforcement of competition law, it is difficult to determine where to start the discussion with, shall one start by discussing the objectives of competition law, or shall one start with the enforcers of competition law (competition agencies), or with the optimal design of competition agencies or what is the optimal strategies for enforcing competition laws. In fact, all of these issues are of considerable importance for the implantation of competition laws, and these issues are inter-related to one another and a discussion of any of these issues will lead to the other. Furthermore, all of the mentioned issues are debatable issues, for example, many scholars have contributed to the area of objectives of competition laws with different views on this topic, and the same can be said to the area of optimal enforcement.

However, because the main concern in this thesis is to assess the application of competition law by CAs, the issues of the objectives of competition law and the optimal design of CAs will be discussed briefly in this chapter. This is because, such issues are to be observed after assessing the application of the law, so one can identify what are the objectives of the laws on practice and on the basis of this one can determine if the CA meets the objectives of the law.[8] The same can be said for the design of the CA, where one needs to assess the authority and then decide what has to be changed. It should be made clear in this respect that the objectives of the CA differ from the objectives of the law. The objectives of the CA, if stated clearly, may affect the CAs outputs. For example, if the CA embraces a certain enforcement policy (ies) this may affect the application of the law and may provide explanations for the levels of enforcement.

First, this part starts the discussion with literature that dealt with public enforcement of competition law. Then a review of literature that dealt with private enforcement of competition law and its effect on public enforcement will be provided subsequently.

2-2-1: Enforcement of competition law in general

At the outset, if one looks at the general textbooks that deal with competition law, they generally have a chapter about public enforcement of competition law; mostly the information about public enforcement is about how public agencies enforce the law and the procedures that should be followed by the CA when enforcing the law. For example, information on how to initiate an investigation, powers given to CAs during the course of the investigation, options at the end of the investigation...etc. For example, Whish and Bailey,[9]

[8] For example Korah has talked about the conflicts of goals of competition law; see Valentine Korah *An introductory Guide to EC Competition Law and Practice* (9th edn, Hart, Oxford, 2007) 16.
[9] Richard Whish and David Bailey *Competition Law* (7th edn, OUP, Oxford, 2012), Chapter 7

Dabbah,[10] and Goyder and Albors-Llorens[11] highlighted in a descriptive manner how CAs enforces competition law in Europe and the UK. In the same way, the respected authors described how competition may be enforced privately, i.e. How private parties may bring a claim as a result of an anti-competitive practice. However, none of the mentioned authors has provided analytical views on public or private enforcement of competition law, their work can be seen as a guide on the enforcement of competition law.[12]

Another way of explaining public and private enforcement has been provided by Ezrachi.[13] He explains both types of enforcement, though separately, by reference to the leading cases in Europe. In respect to public enforcement, he considered most of the actions that the European Commission has to take from the point on how the Commission prioritises its enforcement activities (i.e. whether to initiate an investigation or not) to the point in which it issues its final decision. The same can be said in respect of private enforcement, where Ezrachi explains how private parties, with reference to case law, can enforce EU competition law before national courts.

In addition, other textbooks provided analytical and critical views in these areas. Monti,[14] in the context of European competition law, has dealt with both types of enforcement in a very critical manner in a chapter entitled 'institutions'. In respect of public enforcement, Monti highlights the major differences between the abolished regulation (regulation 17/62[15]) and the

[10] Maher M. Dabbah *EC and UK Competition Law* (CUP, Cambridge, 2004) chapter 14, 627- 677

[11] Joanna Goyder and Albertina Albors-Llorens *Goyder's EC Competition Law* (5th edn, OUP, Oxford, 2009) chapter 19, 502-528, (discussing the history(the origins) and the current situation of competition law enforcement)

[12] However, in other parts of the mentioned books, some of the authors provided critical views toward specific issues of public or private enforcement.

[13] Ariel Ezrachi *EU Competition Law: An Analytical Guide to the Leading Cases* (2nd edn, Hart, Oxford, 2010) chapter 10

[14] Giorgio Monti *EC Competition Law* (CUP, Cambridge, 2007) Chapter 11, 392- 438.

[15] Council Regulation No 17 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty (at present Articles 101 and 102) [Official Journal No. 013, 21.02.1962]

current regulation (Regulation 1/2003[16]) that is used to enforce competition law in Europe, he then carries on by bringing to light on the possible 'side effects' of Regulation 1/2003, describing it as 'far from being necessary and revolutionary'[17]. Monti has two main concerns over Regulation 1/2003.[18] First, the risk of under enforcement because a well-placed national competition authority may take no action because either of national interest, or because it lacks resources to intervene. Second, Monti is worried about the danger of duplication of enforcement. In the context of private enforcement, Monti has been critical as well. The main criticism was toward the practical difficulties for claimants when attempting to claim damages, especially in the case of commitment decisions and leniency applications, because national courts are not bound by these decisions.[19]

2-2-2: Public and Private Enforcement of competition law

When talking about the assessment of public competition law enforcement, one needs to take into account the existence of private enforcement of competition law. For example, in the US, there are very few public enforcement cases compared to private enforcement, some studies have claimed that the ratio between private enforcement to public enforcement is between 10 to 1 and 20 to 1.[20] So, the decrease of public enforcement is compensated by private enforcement. However, there are major differences between the functionality of public agencies on both sides of the Atlantic.[21]

[16] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Now 101 and 102 TFEU)
[17] Giorgio Monti *EC Competition Law* (CUP, Cambridge, 2007) 419
[18] Giorgio Monti *EC Competition Law* (CUP, Cambridge, 2007) 417
[19] Giorgio Monti *EC Competition Law* (CUP, Cambridge, 2007) 437
[20] See CA Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, (OUP, Oxford, 1999). Found in, Assimakis P Komninos 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3(1) Competition Law Review, 10

[21] For an illustration See, Ilya Segal and Michael Whinston, 'Public vs private enforcement of antitrust law: a survey' (2007) 28(5), European Competition Law Review, 306 (highlighting the differences between public and private enforcement in Europe and the US; providing information about the effective role of private antitrust in the US, and the lack of private enforcement on Europe. They then went on to highlight the pros and

The relationship between public and private enforcement of competition has received attention in the literature.[22] It has been argued that private enforcement of competition law helps in achieving the objectives of competition enforcement that cannot be achieved solely by relying on public enforcement.[23] These objectives are injunctive, restorative/ compensatory and penal. According to Monti, public enforcement does not achieve the restorative/ compensatory aspect in its present form, and he sees the European Commission sees private enforcement operates to achieve all three goals.[24] Hence, in Monti's eyes, private enforcement complements public enforcement of competition law.

In a different context, Hviid[25] argued that when considering re-designing or talking about the optimal design of the public enforcement regime, one should not dismiss the role of private enforcement in achieving deterrence and compensation; hence, seeing the relationship between private and public enforcement a complementary one.[26] In the same vein, Rosochowicz argues that private and public enforcement of competition law should work together in order to reach an optimal level of enforcement, this is because, CAs do not have enough human and financial resources in their disposal to reach an optimal level of enforcement. Hence, private enforcement would help in filling the gaps left by public

---

cons of each type of enforcement, they also discuss issues regarding the effects of the institutional design and highlighting the objectives, goals and the problems associated with each type of enforcement.)

[22] It should be noted that the arguments made here are in the context of Europe unless otherwise stated. For an example of studies that dealt with the relationship between public and private actions in the US, see David Rosenberg and James P. Sullivan, 'Coordinating private class action and public agency enforcement of antitrust law' (2006) 2(2) Journal of Competition Law & Economics 159; see also, R. Preston McAfee, Hugo M. Mialon, and Sue H. Mialon, ' Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) available at: http://ssrn.com/abstract=775245 (highlighting economically under which circumstances which type of enforcement (or both types) is desirable under US law)

[23] Giorgio Monti *EC Competition Law* (CUP, Cambridge, 2007) 436.

[24] Giorgio Monti *EC Competition Law* (CUP, Cambridge, 2007) 436.

[25] Morten Hviid, 'Why private enforcement should be reformed alongside public enforcement' Competition Policy Blog (3 May 2011). available at http://competitionpolicy.wordpress.com/2011/05/03/why-private-enforcement-should-be-reformed-alongside-public-enforcement/ Accessed 20 May 2012.

[26] Hviid made this point as an advice for the UK government when it dismisses private enforcement when reforming the public enforcement regime. However, the UK government has consulted, separately, on how to improve private enforcement latter.

enforcement because of its compensatory and deterrent nature.[27] Komninos has contributed to this area differently, however with similar conclusions. He, for example, highlighted the reasons for treating private enforcement for being independent from public enforcement, he then went on to shed light on practical difficulties in the interrelationship between public and private enforcement; and how issues such as settlements by CAs and leniency applications, may hamper private enforcement. Komninos[28] concluded by observing that in Europe there is no primacy of public enforcement over private enforcement of competition law.[29] Furthermore, competition officials have supported the complementary relationship between private and public enforcement, where, in a recent speech, the Director General of DG Comp highlighted this issue.[30]

In contrast to the above opinions, Wils adopts a very different view regarding the relationship between private and public enforcement. He argued that the lack of private antitrust enforcement is very desirable and that he cannot find a single situation, where private enforcement complements public enforcement. Wils argues that private antitrust enforcement is driven by private profit motives, which fundamentally diverge, from the general interest, and because of the high cost of private antitrust enforcement. He suggested that public enforcement is more effective because of the existence of more powerful instigative and

[27] Patricia Hanh Rosochowicz, 'Deterrence and the relationship between public and private enforcement of competition law' Unpublished work. Available at http://www.google.co.uk/url?sa=t&rct=j&q=deterrence%20and%20the%20relationship%20between%20public%20and%20private%20enforcement%20of%20competition%20law&source=web&cd=2&ved=0CFIQFjAB&url=http%3A%2F%2Fwww.kernbureau.uva.nl%2Ftemplate%2FdownloadAsset.cfm%3Fobjectid%3DEC3C3FD7-AF23-4837-8C9C8FCECA2976B4&ei=zs7xT_fYDMqp8APIj5HTBg&usg=AFQjCNGNt5aRwAhQFq2ujSkdcIzXhuIl4g Accessed 20/05/2012.

[28] Assimakis P Komninos 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3(1) Competition Law Review.

[29] With reference to *Masterfoods* case and Article 16 of Regulation 1/2003. Arguing that, the primacy (in the named case and article 16) is for acts of a community organ over the decisions of national organs and not necessarily to be understood as primacy of public over private enforcement.

[30] Alexander Italianer, 'Public and private enforcement of competition law' speech delivered at the 5th International Competition Conference 17 February 2012, Brussels, available at http://ec.europa.eu/competition/speeches/text/sp2012_02_en.pdf accessed 20 May 2012.

sanctioning abilities.[31] More recently, Wils sticks to his views, where he highlighted the relationship and the interactions between public and private enforcement. Wils argues that the role of private enforcement should be limited to compensation; the public enforcer's task should be clarifying and developing competition law prohibitions, and deterring and punishing violations.[32]

Most of the above-mentioned literature highlighted the complementary role of private enforcement to public enforcement, and vice- versa.[33]

2-2-3: Why Private Enforcement Matters (especially in the EU)

Private enforcement of competition law in Europe can be described as a 'work- in-progress', where CAs in Europe aiming to encourage the enforcement of competition law privately. This can be demonstrated by guidance papers produced by CAs in Europe. To name a few, the European Commission's White Paper on damages actions for breach of the EC antitrust rules of 2008,[34] and the UK's Office of Fair Trading (OFT) recommendations on private damages actions in competition law of 2007.[35] However, the existence of private enforcement is a matter that is difficult to assess, particularly with stand-alone cases where it is difficult to find out about cases. Hence, this may affect some side of the analysis because of the lack of information about private enforcement.

---

[31] Wouter P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26(3) World Competition, 473.

[32] Wouter P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 (1) World Competition, 3.

[33] With the exception of Wils.

[34] European Commission, 'White Paper on damages actions for breach of the EC antitrust rules' (2008) Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF accessed 20 May 2012.

[35] OFT 916resp 'Private actions in competition law: effective redress for consumers and business' (November, 2007) Available at http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf accessed 20 may 2012. Academics as well contributed to the discussion on how to encourage private enforcement in Europe; see Michael Harker and Morten Hviid, 'Competition Law Enforcement and Incentives for Revelation of Private Information' (2008) 31(2) World Competition 279.

In the case of lack of information about the existence of private enforcement, the importance of assessing public enforcement becomes greater. Because if there is a lack of private enforcement in Europe, then, the burden is on CAs to tackle anti-competitive behaviour in markets is much higher. As a result, CAs should be aiming to fill in the gap left from the lack of private enforcement of competition law.

In this respect, it is important to highlight the studies that aim to study the existence of private enforcement of competition law in Europe. The number of studies that attempted to quantify the existence of private enforcement is limited. There have been two studies conducted on behalf of the European Commission: the Ashurst[36] and the welfare impact studies.[37] Both studies provide information about private enforcement at a European and national level; these studies also provides information on the ways in which claims can be calculated and how private enforcement can be encouraged, both studies also highlight how can private enforcement add to public enforcement and how it enhances welfare.[3839] Barry Rodgers has examined the existence of private enforcement in the UK between 2000 and 2008 in six articles. He has done so, by looking for cases and settlements that occurred in the UK.[40]

[36] Ashurst, a study prepared by Emily Clark, Mat Hughes and David Wirth, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (2004) available at http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf accessed 20 May 2012

[37] Report for the European Commission 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' (2007) available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf accessed 20 May 2012.

[38] Report for the European Commission 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' 2007, see P. 56-64 .

[39] However, it should be noted that both studies have received some criticisms. See, Sebastian Peyer, 'Myths and Untold Stories - Private Antitrust Enforcement in Germany' CCP Working Paper 10-12. P. 19-20.

[40] Barry J. Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part I' (2006) European Competition Law Review 279; Barry J. Rodger 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004 - Part II', (2006) European Competition Law Review 241; Barry J. Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part III'(2006) European Competition Law Review 341; Barry J. Rodger, 'Competition law litigation in the UK courts: a study of all cases 2005-2008: Part 1' (2009) 2(2) Global Competition law Review 93; Barry J. Rodger, 'Competition law litigation in the UK courts: a study of all cases 2005-2008: Part 2' (2009) 2(3) Global Competition law Review, 136-147; Barry J. Rodger, 'Private enforcement of competition law, the hidden story: competition litigation settlements in the United Kingdom, 2000-2005'(2008) 29(2) European Competition Law Review 96.

Payer examined the existence of private enforcement in Germany between 2005 and 2007.[41] For the mentioned above, it can be seen that there are not too many studies about private enforcement of competition law in Europe.

Hence, despite the established relationship between public and private enforcement of competition law; the lack of empirical studies for both types of enforcement makes it necessary to deal with each type separately because of the lack of information of the other type, and the way in which each type is assessed is different as well. For example, in the case of private enforcement, researchers have been trying to find the existence of it. While, in the case of public enforcement, most of the research is attempting to assess or evaluate the actions of CAs. Furthermore, the assessment of public enforcement of competition law can be more precise, because of the ability to capture what the CA has done and the ability to assess its outcomes. [42] It is also important to mention that there are only a limited number of analytical empirical studies about public enforcement in Europe.[43]

Another important aspect that makes examining public enforcement important is that public agencies cannot deal with all infringement of competition law or even the necessary ones for many different of reasons. If this is the case, then the CA has to be selective with its enforcement activities; in such a scenario, assessing the CA's selections (outputs) becomes even more important, i.e. assessing public enforcement. Lande and Davis illustrate the role of public authorities, in the context of competition agencies, they state:

> "As a practical matter the government cannot be expected to do all or even most of the necessary enforcing for various reasons including: budgetary constraints; undue fear of losing cases; lack of awareness of industry conditions; overly

[41] Sebastian Peyer, 'Myths and Untold Stories - Private Antitrust Enforcement in Germany' CCP Working Paper 10-12.
[42] Bearing in mind the existence of private enforcement, where such information is available.
[43] This will be shown later when reviewing studies that can be considered as assessment studies.

> suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behaviour; higher turnover among government attorneys, and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are at times politically motivated."[44]

In addition to this, the enforcement mechanisms used in competition law have been criticised. In this regard, Posner states: "it is not enough to have good doctrine; it is also necessary to have enforcement mechanisms that ensure, at reasonable cost, a reasonable degree of compliance with the law. Antitrust is deficient in such mechanisms."[45]

Thus, from reviewing the literature above about public enforcement, private enforcement and the relationship between them; it can be said that at the current state of both types of enforcement in Europe, more focus should be given to public enforcement. This is because of the following reasons. First, private enforcement in Europe is weak and still underdeveloped according to academics, policy makers and competition officials. Therefore, public enforcement is the only major (effective) tool for enforcing competition law and tackling anti-competitive behaviours in markets. Second, public enforcement is the most developed and well-equipped enforcement tool (in Europe and its member states).[46] That is why, a tool for the assessment of public enforcement is of crucial importance, given that, CAs may not be able to deal with all competition law infringements; and we do not know what optimal enforcement is or what CAs should be doing, as it will be shown below. A comparison

[44] Robert H. Lande and Joshua P. Davis, 'An Evaluation of Private Antitrust Enforcement: 29 Case Studies' [interim report], (2006), available online at http://www.antitrustinstitute.org/recent2/550b.pdf. Accessed 25 June 2012, P.4

[45] Richard A. Posner *Antitrust Law* (2nd edn University of Chicago Press, Chicago, 2001) 266.

[46] This as well has been observed by Advovate General MAZÁK In his opinion in *Pfleiderer AG V Bundeskartellamt* Case C-360/09Para 4**0**. This as well has been adopted by Angus MacCulloch and Bruce Wardhaugh in a presentation delivered at the 8th CCP annual conference; a review of their presentation is available at Research at CCP Blog (18 June 2012) by Ali Massadeh, available at http://researchatccp.wordpress.com/2012/06/18/2012-conference-review-session-four/ accessed 20 June 2012.

between CAs can provide solutions for each other, and insights may be observed from this where CAs can learn from each other.

To conclude on the aspects related to public and private enforcement and its relation to the assessment of public enforcement. Public and private enforcement are complementary and not separate, hence, it is important to take into account each type of enforcement when assessing the other. However, because of the lack of information and sufficient studies about the existence of private competition law enforcement in Europe; when assessing public enforcement of competition law, one needs to assume the lack of private enforcement and focus on public enforcement so that CAs aim to fill the gap left by the lack of private enforcement. Of course if any information available about private enforcement in a given country, this shall be taken into account as this will give clearer explanations about the application of competition law in that country.

2-2-4: Optimal Enforcement Literature (fines, deterrence, structure)

Another form of literature that can be seen, although indirectly, as a pathway for assessment studies, is the literature that calls for optimal enforcement of competition law. The area of optimal enforcement of competition law represents one of the hotly debated topics in antirust scholarship. The contributions to this area vary.[47] Some scholars have attempted to deal with the issue of optimal enforcement of competition rules in general terms,[48] while others dealt

[47] See for example, Wouter P.J. Wils *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International, 2002); Wouter P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29World Competition, 183; W.M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 652, Alberto Heimler and Kirtikumar Mehta, 'Violations of Antitrust Provisions: The Optimal Level of Fines for Achieving Deterrence' (2012) World Competition 35, 103; Yannis Katsoulacos and David Ulph, 'Optimal Enforcement Structures for Competition Policy Implications of Judicial Reviews and of Internal Error Correction Mechanisms' (2011) European Competition Journal 7, 71. The literature in this fotnote will be discussed below.

[48] Examples of such type of studies (discussing optimal enforcement in general) are rare. Wils, for example, discussed many aspects of optimal enforcement separately, even he examined related issues separately, for example, the issues of fines have been analysed in three different chapters. He also discussed Fines and

with more specific issues, such as optimal sanctions, optimal institutional structure/ design or optimal deterrence. Such debates are of great importance to the enhancement of competition law enforcement.

However, in order to reach an optimal level of enforcement, at the outset one should try to identify what prevents optimal enforcement from taking place. More specifically, one should aim to expose enforcement problems in any given jurisdiction by taking into consideration the specifics of each enforcement authority and the country in question before trying to scrutinise what could constitute optimal enforcement. Furthermore, what is considered, as an optimal practice in a given country might not be the case in another country. Therefore, in order to investigate what is optimal enforcement for a given regime, one needs a tool that helps in examining the antitrust regime in question and helps in exposing what may prevent optimal enforcement from taking place. However, as it will be shown below, more research has been done in the area of optimal enforcement than in the area of assessing CAs.

To start with the issue of optimal design of CAs. It can be argued, that the optimal design of CAs is the only type of optimal research that can be dealt with before assessing the application of the law, because these studies are designed to newly established CAs where the assessment of how the CA has applied the law is very difficult if not impossible, because there will be no enforcement within such CAs. With regard to the optimal design of the CA, in 2003 the OECD stated that there is no single optimal design for CAs, it stated:

> "Evidently there is no one optimal design given the objectives that have been adopted for the competition agency or the functions that have been allocated to it. There appears to be a considerable variety in the solutions chosen in different

deterrence. See Wouter P.J. Wils *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International, 2002).

jurisdictions, and it is difficult to ascertain whether these alternative approaches are optimal without also looking at country specific factors such as its legal and administrative traditions, stage of economic development, political realities, etc."[49]

Hence, it could be argued that the case with optimal enforcement studies in general, weather it is about sanctions, deterrence or enforcement in general, has to be decided according the needs of the CA and indeed the jurisdiction in question.

Unlike the area of optimal design of CAs, other optimal enforcement issues have received more attention. One of the earliest contributions to the area of optimal enforcement is the seminal paper of Landes,[50] where he discusses the optimal sanctions for antitrust violations. Landes discusses not only the optimal sanctions for antitrust infringements but also highlights other issues, such as, the choice between private and public enforcement of antitrust law. In his discussion about optimal enforcement, he states that optimal enforcement does not mean prohibiting all antitrust, as there are some 'efficient' violations, where the gains to the offender exceeds the harms to the victim, such violations should not be prohibited even if the cost of enforcement is very low.[51] Landes dealt with antitrust violations separately, i.e., he dealt with cartels, joint ventures, predatory pricing... etc. differently; then he recommended an optimal sanction for each type of violation separately. From Landes's approach, it can be seen that optimal sanctions have to be decided on area-by-area basis and, indeed, if this is the case, then this can be seen that there is no single way to optimal enforcement that can accommodate all types of enforcement. Based on this, then an optimal enforcement policy

[49]OECD, 'The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency' (2003) 5 OECD Journal of Competition Law and Policy 7, 36.

[50] William M. Landest, 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 652. Other contributions include: William H. Page, 'Optimal Antitrust Penalties and Competitor's Injury' (1990) 88 Michigan Law Review 215; Herbert Hovenkamp, 'Antitrust's Protected Classes' (1989) 88 Michigan Law Review 17.

[51] This is based on arguments made by Becker, However Becker's argument were not made in the context of antitrust, Becker 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of political economy 169. Landes invokes Becker's views in his analysis.

cannot be generalised to all jurisdictions, as each country has its own specifics and its own circumstances. This is why assessing the application of competition by CAs is of crucial importance before trying to establish what is an optimal practice and what is not.

In the area of optimal fines, questions have been raised about what could be the optimal fine that may deter an offender from committing an antitrust violation. Some researchers distinguish between infringements committed by a single offender (unilateral conduct cases) and a group of offenders (anti-competitive agreements or cartels). On this matter, Wils[52] concluded that there are impracticalities in reaching an optimal fine in both scenarios, and even if an optimal fine has been identified, there is as well impracticality in imposing such a fine. However, he highlighted the importance of researching the area of antitrust optimal fines, as this would be helpful in measuring fines against antitrust violations. Wils stated, "Even if it thus appears unfeasible in practice to measure econometrically the theoretically optimal fine for a given antitrust violation, the theory on optimal fines certainly remains useful as general guidance for the practice of fixing the amount of antitrust fines."[53]

Heimler and Mehta took a similar approach to Wils. They suggested that distinct ways should be taken to cartel and abuse of dominance cases when setting the amount of fine because of the differences in the probability of detecting these infringements.[54]

In a widely cited paper by Ginsburg and Wright [55]about what could be the appropriate antitrust sanction to achieve optimal deterrence. They argue that the optimal sanction (for price fixing and other cartel activities) should be guided mainly by two principles: "(1) the total sanction must be great enough, but no greater than necessary, to take the profit out of price-fixing; and (2) the individuals responsible for the price fixing should be given a

[52] Wouter P.J. Wils 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2)World Competition, 183 .
[53] Wouter P.J. Wils 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2)World Competition 183, 207.
[54] Alberto Heimler and Kirtikumar Mehta, 'Violations of Antitrust Provisions: The Optimal Level of Fines for Achieving Deterrence' (2012) 35 World Competition, 103.
[55] Douglas H. Ginsburg & Joshua D. Wright, 'Antitrust sanctions' (2010) 6(2) Competition Policy International 3.

sufficient disincentive to discourage them from engaging in the activity."[56] In this context, they highlighted the sources of antirust sanctions; they stated that law enforcement and the market are the main sources for antitrust sanctions. Ginsburg and Wright illustrate this by stating "There two sources of antitrust sanctions: Law enforcement, which may fine both types of offenders, incarcerate individuals, and, as we propose, debar them from serving as corporate officers or directors; and the market, which imposes reputational penalties upon both types of offenders. The challenge for antitrust law is to coordinate these various corporate and individual sanctions to achieve the optimal total sanction".[57] They concluded that increasing the fines imposed on corporations is not the likely answer to solve the problem of optimal deterrence, and hence deter cartel activity; what is needed (besides fines on corporations) is sanctions against individuals, as those need to be deterred as well. It can be understood from Ginsburg and Wright the challenging nature of deciding what optimal sanctions can be (or the difficulty in reaching it) for antitrust violations.

Motta[58] contributed to the area of optimal deterrence and fines by examining the approach and the practice of the European Commission based on the 2006 fining guidelines[59] with regard to cartels. Motta described the fining guidelines as far from being optimal. However, he suggested that deterrence can be improved through the following. First, by introducing a settlement procedure in cartel cases,[60] so the Commission can redirect its resources and save time. Second, to have an effectively designed mechanism for private actions for damages.

[56] Douglas H. Ginsburg & Joshua D. Wright, 'Antitrust sanctions' (2010) 6(2) Competition Policy International 3, 3.
[57] Douglas H. Ginsburg & Joshua D. Wright, 'Antitrust sanctions' (2010) 6(2) Competition Policy International 3, 5.
[58] Massimo Motta, 'On cartel deterrence and fines in the European Union' (2008) 29 European Competition Law Review 209. For an extensive discussion about deterrence in competition law, see Paolo Buccirossi, Lorenzo Ciari, Tomaso Duso, Giancarlo Spagnolo, and Cristiana Vitale, 'Deterrence in Competition Law' (October 2009) WZB Working paper SP II 2009-14 (This paper provides a comprehensive discussion about deterrence in competition policy in general. It also identifies the likely factors that may affect deterrence; how deterrence can be measured; and it concludes by aiming to distinguish between 'good' and 'bad' deterrence, however the authors admit that this is a very challenging task.)
[59] Fining guidelines 2006.
[60] The European Commission has introduced settlements procedure in cartel cases in June 2008.

Third, to introduce sanctions and administrative fines for managers were involved in a cartel. Fourth, the promotion of compliance programs to be adopted by firms, and to be compulsory in the case of repeat offenders.

An example of how competition officials evaluate their CAs' work and how they measure it, is a very recent speech by the European Commissioner for competition policy, titled higher duties for competition enforcers.[61] From the title of the speech, it seems that competition officials in Europe are not convinced enough of what they are doing. In his speech, the Commissioner promised that the European Commission would be more aggressive and set higher fines,[62] showing a bit of frustration that the Commission did not impose high fines in the year 2011 compared to the year of 2010.[63] These statements from Joaquín Almunia can be interpreted that the European commission itself (DG COMP) does not see itself applying competition law optimally. Therefore, he evaluates the work of the European Commission based on the number of cases and the amount of fine imposed compared to previous years.[64] However, one may questions the basis of the dissatisfaction of the European Commission of its enforcement; the European Commission has measured its success based on fines; because the amount fines imposed has decreased from a year to the subsequent year it has seen itself as underperforming. Competition officials should raise such points only after assessing the application competition law by their CA; they need to consider other activities done by the CA. The CA task is not only to fine but also to raise awareness and the levels of deterrence in its jurisdiction.

[61] Joaquín Almunia, 'Higher Duty for Competition Enforcers' speech delivered at the International Bar Association Antitrust Conference/Madrid 15 June 2012, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/453 accessed 25 June 2012.

[62] However in the context of cartels. This, however, can be generalised towards other areas as the Majority of the Euroepean Commission cases were cartel cases. This will be shown in subsequent chapters.

[63] In 2011 an amount €614 million has been imposed in four decisions, whereas, in 2010 a total of €2.9 billion has been imposed in seven decisions. p. 2 of the speech.

[64] At the end of his speech, Almunia emphasised on the role that competition law can play during the recovery of the financial crisis in Europe and its role in achieving an integrated European market.

To conclude on the matter of optimal enforcement, as many of the authors mentioned earlier found difficulties in reaching what constitutes optimal enforcement, optimal deterrence, optimal fines or optimal institutional design; one needs to focus on issues that may lead to better enforcement of competition law instead of optimal enforcement. This may be achieved, as this thesis argues, through a proper assessment of competition law enforcement, which is based on clear and flexible criteria. Furthermore, because of the impractically of discussing specific issues (or cases) about competition law enforcement, it is better to look at the whole enforcement activities of the CA and aims to assess it.

If deterrence, which is one of the undisputable aims of competition law, is immeasurable, or even the matter of deciding what could constitute optimal deterrence/fine/ enforcement, is a very debatable issue. Then one may compare optimal enforcement issues to perfect competition, where it is very difficult if not impossible to attain. Thus, it can be concluded that it is more practical and feasible to look for better enforcement instead of optimal enforcement.

2-2-5: Studies that can be considered as Assessment studies

To turn to the literature that is closer to the topic of this thesis. In what follows studies that attempted to assess CAs' enforcement activities (whether directly or indirectly) , studies that suggested methods for assessing CAs but without trying to test these methods and studies that suggested best practices that are to be taken into account when assessing the performance of CAs, will be reviewed.

To the author's knowledge, there are no studies that set out criteria and test the proposed criteria to actual data. In other words, there are no studies exist that have a testable criteria for assessing the performance of CAs or the application of competition law.[65]

2-2-5-1: Statistical and Empirical Studies

To start with general studies that aim to provide statistical analysis about a given jurisdiction. Such statistical studies aim to give information about a given CA, but without testing the results against a criteria or criteria to show how their results can enhance the performance of the examined CA, however, some of the studies links such number to certain events, such as, the enactment of a new law or the introduction (or abolish) of certain procedure. An example of such studies is Carree et al's paper where they analysed the European Commission's decisions from 1957 until 2004.[66] [67]This study provides a historical overview that summarises the Commission's work in the area of antitrust, the authors also links the statistics to changes in legislation and administrative implementation.[68] For the period of the study there were 538 formal antitrust decisions concluded by European Commission pursuant to Articles 81, 82, 86

[65] In merger control there are many studies. See for example, Tomaso Duso, Klaus Gugler and Burcin Yurtoglu 'How Effective is European Merger Control?' (2011) 55 European Economic Review 980

[66] Martin Carree, Andrea Gunster and Maarten Pieter Schinkel, 'European Antitrust Policy 1957-200:4 an analysis of Commission decisions' ACLE Working Paper 2008-06. According to the authors, this the only study that provides complete statistical summary of European antitrust cases.

[67] There are similar studies in the context of US antitrust enforcement, see Posner, R.A., "A Statistical Study of Antitrust Enforcement", (1970) 13 Journal of Law and Economics365; Gallo, J.C., J.L. Craycraft, and S.C. Bush, 'Guess Who Came to Dinner: A Statistical Study of Federal Antitrust Enforcement for the Period 1963-1984' (1985) 2 Review of Industrial Organization 106; Gallo, J.C., K. Dau-Schmidt, J.L. Craycraft and C.J. Parker , 'Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study' (2000) 17 Review of Industrial Organization 75; Ghosal, V. and J. Gallo, 'The Cyclical Behaviour of the Department of Justice Antitrust Enforcement Activity' (2001) 19 International Journal of Industrial Organization 27 Salop, S.C. and L.J. White, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 Georgetown Law Journal1001; Lin, P., R. Baldev, M. Sandfort and D. Slottje, 'The US Antitrust System and Recent Trends in Antitrust Enforcement' (2000) 14 Journal of Economic Surveys 255.

[68] For example they link their findings to the 1996 leniency notice and the 1998 fining guidelines. They authors also observe that the high fines imposed in some cartel cases and that the *Microsoft* case made the Commission's work more visible.

EC[69] and Council Regulation 17.[70] [71]The authors collected many variables from these cases, such as: length of decision, duration of the investigation, nationality of firms, nature of the alleged offence, level of fines imposed, the Commissioner who signed the decision and whether there was an appeal of the case or not.

Such studies can be considered as a valuable source for the understanding of certain events that occurred within the years of the study and the history of the examined CA in numbers. However, it does not say anything about the overall performance of the authority in question and how the CA may improve its performance.

There are other empirical studies that examine a particular issue or event. For instance, examining the effectiveness of leniency or fining policies in a particular jurisdiction.[72] For example, Stephan[73] examines the 1996 European leniency notice[74] empirically. He examines horizontal cartel cases in Europe, which have been opened as a result of the 1996 leniency notice. Stephan finds that the leniency notice was of limited success because it did not help in uncovering active cartels but failed cartels. This mainly because around three quarters of the examined cartels were subject to prior or simultaneous investigations in the US; and most of the cartels were in the chemicals industry (67%) where many of the cartels were connected to one another.[75]

Brenner,[76] however, has a positive view on the 1996 leniency notice. Brenner examined a sample of 61 cartel cases investigated and prosecuted by the European Commission between

[69] Now Articles 101,102 and 106 TFEU.
[70] The European Council Regulation 1/2003 has replaced Council Regulation 17/1962.
[71] Merger and State aid cases are excluded from this study.
[72] Iwan Bos Maarten Pieter Schinkel, 'On the Scope for the European Commission's 2006 Fining Guidelines. Under the Legal Fine Maximum' (2006) 2 Journal of Competition Law and Economics 673 .
[73] Andreas Stephan 'An Empirical Assessment of the 1996 Leniency Notice' CCP Working Paper No. 05-10.
[74] European Commission, 1996. Commission notice on the non-imposition or reduction of fines in cartel cases. Official Journal of the European Commission C 207.
[75] Andreas Stephan 'An Empirical Assessment of the 1996 Leniency Notice' CCP Working Paper No. 05-10, p 15.
[76] Steffen Brenner, 'An empirical study of the European corporate leniency program' (2009) 27 International Journal of Industrial Organization 639.

1990 and 2003; he compares cartels that were detected after leniency adoption with cartels detected before the leniency notice came into force. He found that under the 1996 leniency notice investigation and prosecution becomes faster by about 1.5 years. Furthermore, he finds evidence indicating that the program provides incentives to reveal information on criminal activities in the sense that agencies are better informed about the cartel conduct than they would be absent the program.

The concerns with these studies are self-evident as it can be seen from the examples given above; where two studies assess the same piece of legislation but ended up with very different views from the authors. This is mainly because of the intention and the purpose of each study, and what each author is aiming to achieve. However, from a purely assessment perspective, this is very confusing, because such studies do not give an overall assessment of the application of competition law by the CA. This as well can be a dilemma for policy makers when they want to reform a certain policy. If an overall assessment of the law was applied to the CA, then a judgment on what to reform or keep would be easier.

Similar studies have conducted in other areas as well. Geradin and Henry[77] consider the fining policy of the European Commission. The authors reviewed all the Commission decisions and CFI judgments dealing with fines, which have been adopted since the publication of the 1998 fining Guidelines.[78] The main findings of this work are: (1) most of the infringement are treated as severe infringement, including cartels and non-cartel cases; (2) the Commission seems to be looking at the effects of the conduct and it did not rely on legal standards when setting the amount of fine;(3) the CFI never increased the fine imposed by the Commission and it has been reluctant principles behind the Commission's fining

[77] Geradin, D. and D. Henry, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts Judgments' (2005) 1(2) European Competition Journal 401.

[78] European Commission, 1998. Guidelines on the method of setting fines. Official Journal of the European Commission C 9.

decision, it only reviewed whether the fining guidelines were correctly applied or not.[79] Whatever the outcome of such studies, i.e. positive or negative, it do not say anything about the performance of the authority as a whole. One may also argue that the outcome of such studies have some ambiguous effects on the CA in general. For example, if the outcome of a certain study is positive, then this may create a perception that overall performance of the CA is good (and vice versa), especially in the case where there are no studies in other areas of the CA enforcement activities, while the CA may be doing well (or not well) in other areas that is not considered.

Another type of studies, are those which employ a standard to test empirical findings against. A standard that has been used in the literature is success rate on appeal. Basically, such studies count the number of appealed decisions and the outcomes of the cases for a given period of time. Afterwards, they calculate the overall success rate on appeal, and based on this, they decide whether the CA is doing a good job or not. For example, Wright and Diveley[80] used appeals outcomes as their primary quality measure to determine the quality of decision making between expert agencies and generalist judges. Harding and Gibbs,[81] in the European context, employed a similar measure for cartel cases.

Furthermore, other studies can be categorised as assessment studies that aim to introduce an index to assess competition laws and/or policies, by and large, for a large number of jurisdictions. However, to date there are no studies that assess CAs' performance; instead,

[79] Geradin, D. and D. Henry, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts Judgments' (2005) 1(2) European Competition Journal 401. Working paper version p. 58.

[80] Joshua D. Wright and Angela Diveley 'Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission'. Available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990034.

[81] Christopher Harding and Alun Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995-2004' (2005) 30 European Law Review 349.

these studies, mostly, examine laws and their effects. For example, Hylton and Deng[82] offered an index for the assessment of competition law and their effects in 102 countries, which represent the number all of the competition regimes existing for the time period of the study, the time period of this study is from 2001 to 2004. They offer the "scope index" to measure the breadth of the overall competition law and other subparts, such as the law on dominance or mergers. The "scope index" gives score to competition laws/ regimes from 0 to 29, where the higher the score the better is the law/regime. In terms of the overall scope of competition law (regional level), they found that Europe is the strongest region in the world; the weakest regions are South America and Central America.[83] The highest score (for countries) according to the "scope index" scores is 28 and is allocated to European countries.[84] The lowest score is given to Paraguay (2).[85] With regard to the effects of competition law on the intensity of local competition, the authors' analysis offers mild preliminary support for the claim that competition law has a positive, though quite limited, effect on the intensity of competition within a nation. The authors acknowledge the limitations of their study and admitting that the results, especially on the effects of competition law on the intensity of local competition, are preliminary because more data is needed.[86]

[82] Keith N. Hylton and Fei Deng, 'Antitrust around the world: An Empirical analysis of the Scope of competition laws and their effects' (2007) 74 Antitrust Law Journal 271.
[83] Keith N. Hylton and Fei Deng, 'Antitrust around the world: An Empirical analysis of the Scope of competition laws and their effects' (2007) 74 Antitrust Law Journal 271, 273.
[84] Keith N. Hylton and Fei Deng, 'Antitrust around the world: An Empirical analysis of the Scope of competition laws and their effects' (2007) 74 Antitrust Law Journal 271, 282. (The European countries that score the highest are: Austria, Cyprus, Estonia, France, Ireland, Spain, and the United Kingdom). The "Scope Index" for the EU as a region is 27.
[85] Keith N. Hylton and Fei Deng, 'Antitrust around the world: An Empirical analysis of the Scope of competition laws and their effects' (2007) 74 Antitrust Law Journal 271, 282.
[86] Keith N. Hylton and Fei Deng, 'Antitrust around the world: An Empirical analysis of the Scope of competition laws and their effects' (2007) 74 Antitrust Law Journal 271, 275.

Similarly, Nicholson[87] presented an "Antitrust Law Index" that measures the presence and the complexity of competition laws, in countries where competition laws were in effect in 2003 (52 jurisdictions).[88] The "Antitrust Law Index" gives scores to jurisdiction between 0 and 21. The United States is on the top of the "Antitrust Law Index", it scores 21, and many transition economies in Central and Eastern Europe dominated the top of the "Antitrust Law Index"; the lowest score is given to Malta and Chile (4).[89] One of the main conclusions that Nicholson offered is that strong laws do not necessarily represent effective antitrust policy.

As it can be seen, such type of research mainly looks at the comprehensiveness (scope and effectiveness) of the law in each jurisdiction and at the powers given to the CA in that jurisdiction. The main concern of these studies, which looks at the content of competition law on paper, is that enforcement is assumed but not measured whatsoever. The first index, the "Scope Index" measures the comprehensiveness and the other index, the "Antitrust Law Index", measures the presence of certain key provisions. If one compares the values of both indexes, one will be able to find the variation of the outcomes of each index because it depends mainly on the criteria employed in each index. As mentioned earlier, Hylton and Deng employ completeness of the law and Nicholson employs measuring the presence of key provisions.

Another concern with indexes studies is that they do not highlight the problems in the examined jurisdiction or why the country's score is high or low. Hence, such methods do not help the country (CA) on how to improve its performance or what should be modified. This is

[87] Michael W. Nicholson, 'An Antitrust Law Index for Empirical Analysis of International Competition Policy' (2008) 4 Journal of Competition Law & Economics 1009.

[88] For an excellent and critical overview of the studies that introduce an index for measuring competition law and/or policy, see Dina I. Waked, 'Do Developing Countries Enforce Their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries' (2012) p 9-20, available at SSRN.

[89] Michael W. Nicholson, 'An Antitrust Law Index for Empirical Analysis of International Competition Policy' (2008) 4 Journal of Competition Law & Economics 1009, 1021.

mainly because, as stated earlier, that enforcement of competition law is assumed but not measured or given any attention.

2-2-5-2: Studies discussing Assessment/ evaluation methodologies

Closer to what thiis chapter is discussing, there is relevant literature that reviews evaluations methods; such literature highlights the benefits and the shortcomings of widely used methods for evaluating CAs. This literature reviews all methods, i.e., merger and non-mergers (mainly about mergers or specific area), qualitative and quantitative methods. Examples of such studies are: Begraman, [90]Davis, Omrsi[91] and Kovacic,[92] where they reviewed widely used evaluation methods by highlighting the pros and cons of each methodology. However, their reviews include methods used for evaluating mergers, methods used to estimate consumer savings as a result of the CA action(s), methods used to estimate the impact of CAs interventions. Therefore, such literature can be seen as a very useful source when constructing a criteria or method for evaluating CAs performance. In the same vein, Kovacic[93] critically reviewed ex-post evaluation methodologies. Kovacic followed this by suggestions that should be taken into account when constructing a methodology for conducting performance evaluations.

Furthermore, there are studies that deal with the best practices that CAs should take into account when measuring their performance and how CAs can improve their performance, weather the assessment conducted internally (by the authority itself) or externally. For

[90] Mats A. Bergman, 'QUIS CUSTODIET IPSOS CUSTODES? OR Measuring and Evaluating the Effectiveness of Competition Enforcement' (2008) 156 De Economist 387.
[91] Stephen Davies and Peter Ormosi "Assessing Competition Policy: Methodologies, Gaps and Agenda for Future Research" CCP Working Paper 10-19 available at: http://www.uea.ac.uk/ccp/Working_Paper_10-19.
[92]William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities" (2006) 31 Journal of Corporation Law 503.
[93] William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities" (2006) 31 Journal of Corporation Law 503.

example, Muris[94] highlights 'principles for a successful competition agency'. Some of the principles that Muris called for are: developing a proper understanding of the CA's role; the integration of competition and consumer protection policy; a broad range of policy tools and remedies; not dismissing institutional capabilities of the CA; the CA has to be transparent of how the law is enforced.[95] These principles can be seen as the basics for a successful CA and what it is desirable for CAs to take into account when thinking about reforms. However, it is unclear how these principles would determine the quality of competition law enforcement; such studies may help in understating how CA may operate. For example, if the CA has clear goals and it is transparent enough on how the law is applied, then this would help us in assessing the authority's enforcement of the law. In the given example, one would be able to identify the goals of the CA and if the CA achieved its goals.

Similarly, Kovacic[96] highlighted the importance of assessing CAs' performance, emphasising that the rating of CAs should not be based on enforcement activities; instead it should be based on the impact of enforcement as it is more important than the activity levels of enforcement.[97] Kovacic highlights the lack of an appropriate criteria for rating agencies performance; and points out the importance of having such criteria in order to properly assess CAs' enforcement activities and how one should not dismiss the capabilities of CAs (however, regarding this point reference was made to mergers).[98]

[94] Timothy J. Muris, 'Principles for a Successful Competition Agency' (2005) 72 University of Chicago Law Review 165.
[95] Timothy J. Muris, 'Principles for a Successful Competition Agency' (2005) 72 University of Chicago Law Review 165, 169- 183.
[96] William E Kovacic, 'Rating the Competition Agencies: What Constitutes Good Performance?' (2009) 16 George Mason Law Review 903.
[97] Kovacic highlighted how effective the FTC was under the Bush administration in response to the Obama campaign. Where the Obama campaign described the Bush administration in regard of antitrust enforcement as the weakest in terms of enforcement in the past half century; according to Kovacic, this was based on the number of cases.
[98] William E Kovacic, 'Rating the Competition Agencies: What Constitutes Good Performance?' (2009) 16 George Mason Law Review 903, 914-918.

However, the main concern with such studies is that they do not take into consideration the specifics of CAs and they are not necessarily realistic. This is because such studies calls for certain practices that is to be taken into account without considering the capabilities of CAs. In addition, the principles or the best practices suggested by such studies are very wide. Such studies shall be carried out after reviewing and assessing the CA in question. It should be noted, however, that such studies may be very useful for inexperienced CAs but not for CAs where assessing its application of competition law is possible. Therefore, these studies may offer solutions for CAs where certain concerns have been identified as a result of assessing the authority's performance.

Another type of studies that can be considered as assessment studies are rankings. The only example that exists in competition law arena is the Global Competition Review (GCR) ranking.[99] The GCR ranks the leading CAs around world based on surveys sent out to competition officials and practitioners, the results are driven form the responses received, subsequently, it ranks CAs into four ratings: Elite, very good, good and fair. However, in ranking studies it is not clear how such rankings would benefit CAs examined. If a CA got a Fair rating, the survey does not say how it can improve its performance or where the problems lie, or on what basis a given CA has got an 'elite' rating. Having said that, the way in which the results of the survey presented gives good information about many aspects of the authorities examined, which helps in cross-countries comparisons and constitute a very good source for additional information when conducting assessment studies. Furthermore, the GCR rating has been criticised by commentators. Kovacic criticises the GCR rating

[99] Global Competition Review ranking studies "Rating Enforcement", from 2004 until 2011.

describing it as a poor measure for CAs' performance, because it mainly focus on levels of activity a proxy for effectiveness. [100]

Furthermore, Nicholson stated that 'These rankings provide basic ordinal rankings for broad comparisons among jurisdictions, but are neither intended for nor effective in the empirical analysis of international competition policy.'[101]

2-2-5-3: Introducing Assessment Methodology

More closely to the topic of this chapter, there are a handful number of studies that attempted to introduce methods for evaluating CAs' performance, however, without testing such methods. For instance, Hüschelrath and Leheyda[102][103] introduced a three steps methodology to evaluate competition policy: preparation, execution and reporting, where each of the three stages is subdivided into three building blocks. The preparation stage consists of: (1) identification of the evaluation object; (2) determination of the functions, the aims and the context of the evaluation; (3) timing of the evaluation. The execution stage consists of: (1) derivation of evaluation criteria; (2) definition of the counterfactual; (3) selection and application of indicators and methods. The third, and the final, stage consists of: (1) derivation and interpretation of results; (2) appraisal of the significance of the results; (3) derivation of conclusions.

When looking at the stages and the sub-stages of the methodology, it seems that this study is a guidance that can be used when evaluating competition policy. For this reason, this study cannot be considered as a methodology of competition policy; it can be considered as a 'best

[100] William E. Kovacic, 'Measuring What Matters: Performance Standards for Competition Agencies' Presentation delivered at GCLC, Brussels 1 December 2011, slide 4 available at http://chillingcompetition.com/2011/12/01/slides-evening-policy-talk-bill-kovacic/ accessed 20 December 2011 (criticising the only method for rating CAs (i.e. GCR rating).

[101] Michael W. Nicholson, 'An Antitrust Law Index for Empirical Analysis of International Competition Policy' (2008) 4 Journal of Competition Law & Economics 1009, 1014.

[102] Kai Hüschelrath and Nina Leheyda, 'A Methodology for the Evaluation of Competition Policy' Discussion Paper No. 10-081, Centre for European Economic Research (ZEW), Mannheim

[103] To the author's knowledge, this is the only paper that tries to introduce explicitly a methodology for the evaluation of competition policy.

practices' study that is to be taken into account when evaluating a given CA or competition policy in a given country. In addition, the proposed methodology has not been tested and the authors see their project as a contribution to the debatable issue of evaluating competition policy and as an identification of ways for further academic research.[104]

2-2-6: Concluding remarks on Part One

Part one of this chapter has provided a review of the literature that touches upon the area of assessing public enforcement of competition. At the beginning of this part, the significance of public enforcement has been established. Then, the relationship between private and public enforcement of competition law has been brought to light, showing that public enforcement in Europe is of crucial importance because of weak private competition law enforcement. Furthermore, it has been argued that CAs in Europe face a challenge that is maybe not faced by other CAs, which the lack of private enforcement. Hence, CAs in Europe are facing a tough challenge where they should be aiming to fill the gap lift out from the lack of private enforcement. Afterwards, the issue of optimal enforcement has been examined. It has been argued that optimal enforcement issues have to be dealt with after assessing the competition regime, and that there are no single formula for optimal enforcement , where it has to be decided on a case by case biases (i.e. each regime/CA has its own optimal enforcement package). With respect to optimal enforcement, it has been concluded that it is a situation similar to perfect competition, where it is very difficult (if not impossible) to attain. Therefore, this thesis, at this stage, calls CAs to pursue better enforcement rather than optimal enforcement. At the end of this part, literature that can be considered as assessment literature has been examined. The pros and cons of this literature have been pointed out, and how it

[104] Kai Hüschelrath and Nina Leheyda, 'A Methodology for the Evaluation of Competition Policy' Discussion Paper No. 10-081, Centre for European Economic Research (ZEW), Mannheim P.22.

may contribute to the next part of this chapter when constructing criteria for the assessment of public enforcement of competition law. The next part of this chapter aims to introduce criteria for the assessment of public enforcement of competition law.

2-3: Part Two: Proposed criteria

In order to establish criteria for assessing public enforcement of competition law, one has to set out some plausible assumptions and highlight the strengths and the weaknesses in the existing measures used. The assumptions presented below are based on what have been gleaned from the reviewed literature earlier in Part One.

2-3-1: Assumptions

- In Europe, public enforcement is superior to private enforcement. Thus, the task of enforcing competition law relies heavily on CAs and one should not expect too much from private enforcement in raising deterrence levels.
- It is assumed that the CA cannot catch and punish every single infringement because of limited capabilities and resources and therefore it has to prioritise its activities.
- It is assumed that full deterrence does not exist in any jurisdiction; hence, the CA has to deal with breaches of competition law.

2-3-2: Constructing the proposed criteria

If one wonders why, until now, there are no agreed standard for assessing CAs' performance. An answer to this may be sought by looking at the used or suggested standards for assessing CAs' performance. From table 1 below, it can be seen that used or suggested standards have many shortcomings, and most probably that is why there are no agreed standard for assessing

CAs' performance. The measures discussed in table 1 will be discussed in further detail below when constructing the criteria that this chapter will offer.

Measure	Aim of the measure	Drawbacks
Success rate on appeal	- Full review of the CA's decisions. - It assesses substantive and procedural issues.	- Merely success rate alone does not tell us whether the CA is doing well or not. - The appeal court will not say anything about other activities of the CA, i.e. not comprehensive review.
Number of cases	- Activeness of the CA.	- High or low number of cases does not say anything about the quality of such decisions. The CA may have been active, but has it been productive.
Duration of investigations	- How fast the CA is in ending its investigation. - Might be used as a sign of how efficient the CA is.	- What is fast or slow? - How we can judge the quality of decisions making.
Rankings	- Good overviews of what CAs are doing.	- It does not say anything of how the CA can improve its performance or where the problems are lie. - Manly depends on responses, merely not responding would lower the ranking. - No clear criteria of how CAs ranked.

Table 1: Possible measures for assessing CAs' performance

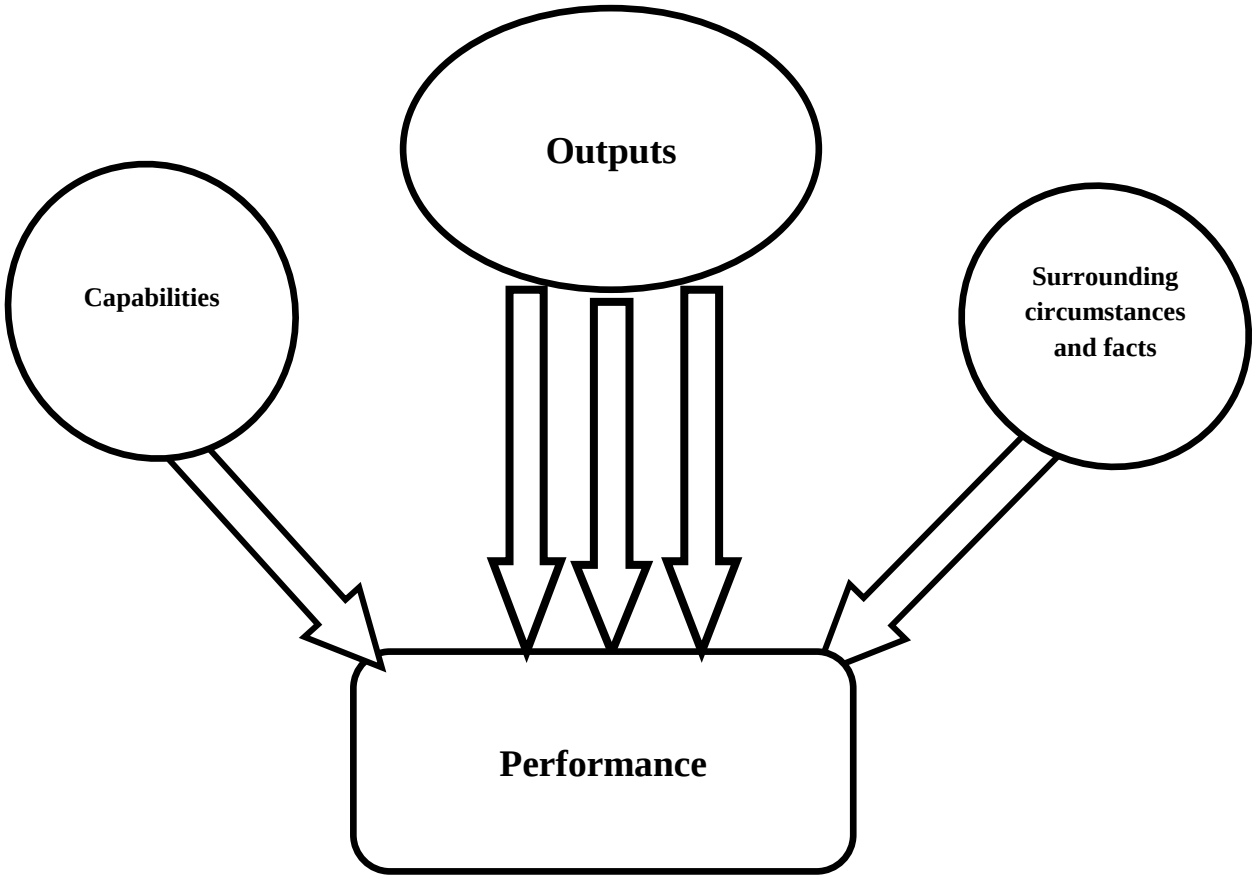
Hüschelrath and Leheyda observe that 'One reason for the identified lack of research in the area might be the belief that a fixed methodology is simply not needed or desired – partly because it would constrain active thinking on the best way to approach a certain evaluation question. Although it is certainly true that evaluation exercises need to be flexible in order to be able to adapt the specifics of the project'.[105]

The difference between the methods that have been suggested and the criteria that will be proposed in this chapter is that the proposed criteria will include all possible measures in a single criterion (this will be shown below). Furthermore, all of the outcomes that the

[105] Kai Hüschelrath and Nina Leheyda, 'A Methodology for the Evaluation of Competition Policy' Discussion Paper No. 10-081, Centre for European Economic Research (ZEW), Mannheim, p.6. Therefore, this thesis will bear in mind this issue and would suggest criteria that would avoid this by suggesting comprehensive criteria, as it will be seen below, that will take into as much as possible aspects of the CA activities.

proposed criteria will produce will give explanations to one another. Hence, the proposed criteria will consist mainly of three sets of information: enforcement and non-enforcement activities, endowments of the CA (capabilities) and what are the surrounding circumstances and facts within the CA and/or the jurisdiction under examination. In addition, when constructing the proposed criteria literature that calls for best practices (when assessing CAs' performance) will be consulted and taken into account, where such best practices are feasible to implement. Therefore, the proposed criteria include what the CA produced while taking into account the capabilities of the authority in question, bearing in mind the comparative aspect of the criteria. In what follows a detailed description for each set of information will be given, in addition, it will be shown how each set complements the other.

Graph 1 gives an overview of the proposed criteria. As it can be seen from graph 1, more emphases have been given to the outputs of the CA, this is because, capabilities and surrounding circumstances are examined in order to understand the CA's outputs. Hence, the proposed criteria offer clear and flexible criteria, where it can accommodate as many as possible aspects of what could affect public enforcement.



Graph 1: Proposed criteria

2-3-2-1: Enforcement and Non Enforcement Activities (Outputs)

This category includes the following: number of cases, success rate, duration of investigation, complexity of cases, non-enforcement activities. Thus, this category represents outputs of CAs.

2-3-2-1-1: Number and nature of cases:

Once the CA concluded a given investigation it has three options to close its investigation, it may issue an infringement, non-infringement or commitments decisions. From a CA's standpoint, there should be two goals to be fulfilled from its investigations. First and foremost, ending and remedying anti-competitive behaviour that occurred or could occur in its jurisdiction. This can be achieved by issuing infringement and commitments decisions. The second goal should be clarifying the law and setting the boundaries for its application. This could be achieved by any of the three decisions available for the CA.

Therefore, the number of cases concluded (regardless of the nature of the decision) can be seen as a measure for the CA's enforcement activities. However, this measure tells us so little about the quality of the CA's actions, particularly if one leaves aside the second goal mentioned earlier, namely, the issue of clarifying the law. Merely the number of cases concluded will not reflect the quality of the decisions.[106] Furthermore, at the stage of counting the cases and the nature of these cases it is not clear if the CA got it "right" or "wrong", because CAs' decisions are appealable and this has to be taken into account when considering the performance of the CA. Furthermore, the nature of the concluded cases is an important

[106] In this regard Salop and White, however, in the context of private antitrust enforcement, stated "data on the number of suits initiated, when viewed in isolation, are insufficient to draw conclusions about the effectiveness of deterrence and the extent to which violations are being committed", Steven C Salop and Lawrence J White, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 Georgetown Law Journal 1001, 1021.

aspect to be looked at when considering the number of cases. The issue of the nature of cases and its effect on the CA's output is discussed below.[107]

However, the number of concluded cases can be seen as a good measurement of the activeness of the CA but not about the quality of its performance. Therefore, if the number and the nature of concluded cases are taken alongside other issues (i.e. with other parts of the proposed criteria) it would constitute a reliable measurement for CAs. In addition, by taking into account the number and the nature of concluded cases, some of the claims that have been made about authorities' performance can be tested. For example, it has been suggested that, the higher the caseload of the authority; the lower is the percentage of winning a case. [108] The validity of such claims can be tested.

2-3-2-1-2: Success rate on appeal

The appeal system can be seen as a comprehensive tool (it assesses factual findings and conclusions drawn from these facts) to assess the authority's application of the law on a case-by-case basis, which is difficult to be seen in any other evaluation/ assessment standard. Consequently, if one calculates the CA success rate on appeal, then an estimate of the CA performance can be given.[109] However, in this respect, some limitations to this method should be mentioned. First, not all decisions are appealed, particularly, where the cost of appeal outweighs the benefits from it. Second, the CA enforcement policies play a decisive role in the CA's success rate on appeal. For example, if the CA targets clear cut violations which are

[107] See, subsection B (success rate on appeal), subsection C (Duration and source of investigations) and subsection D (complexity of cases).

[108] Presentation delivered by Joe Harrington available at http://www.econ2.jhu.edu/People/Harrington/Harrington_CRESSE_7.09.pdf

[109] This measure has been used, as stated earlier, by Joshua D. Wright and Angela Diveley 'Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission'. available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990034 and Christopher Harding and Alun Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995-2004' (2005) 30 European Law Review 349.

much easier to prove than other type of cases. For instance, if a CA targets cartel cases based on leniency applications, it is much easier than targeting unilateral conduct cases. To illustrate this, take the case of excessive pricing as an example (a unilateral conduct case). In such a situation, the CA is required to determine what an excessive price is and what is not.[110] Whereas, in the case of cartel cases (where there is a leniency application), the CA will have a definitive proof of the conduct, hence, a possibility of such a decision to be dismissed on appeal is much lower than in the case of unilateral conduct cases, where the decision is merely based on the CA's assessment of the conduct. Therefore, the nature of the appealed cases could play a very important role when calculating success rate on appeal. Indeed, the number of cases concluded in the period under examination may also play a role in affecting the success rate on appeal. Third, from a comparative perspective, cross-countries comparisons would not give the ideal image of each CA in comparison to its counterpart. This is because, as some claims,[111] of differences in the standards applied in each jurisdiction and differences in the legal systems as well.

Therefore, from the given above, it seems that in order to take into account success rate on appeal as a mean for assessing CAs' performance, other issues have to be taken into account to draw conclusions about the authority's performance. Such as the nature of the cases, number of cases, and other issues related to the capabilities of the CA. In addition, studying success rate on appeal would clarify many propositions that recent scholarship have attempted to answer. For instances, questions about the relationship between the number of experts in the CA and success rate on appeal may be answered, and the proposition if the

[110] For example excessive pricing is a hotly debated area when considering the application of abuse of dominance rules. The same applies to other unilateral conduct practices such as predatory pricing, margin squeezing, price discrimination etc... For a good illustration about the issue of excessive pricing see, Pinar Akman and Luke Garrod, 'When Are Excessive Prices Unfair?' (2011) 7 Journal of Competition Law and Economics 403.

[111] Mats A. Bergman, 'QUIS CUSTODIET IPSOS CUSTODES? OR Measuring and Evaluating the Effectiveness of Competition Enforcement' (2008) 156 De Economist 387, 390.

increase/ decrease in the number of concluded cases would increase or decrease the success rate on appeal?

2-3-2-1-3: Duration and source of investigations

Duration of investigation may be used to evaluate how efficient and fast the CA in ending its investigation. Hence, this category intends to examine the length of the proceedings that CAs take in order to reach its final decision. That is to say, from the point in which the CA starts its investigation to the point in which it issues its final decision. To do so, some aspects that may affect the duration of investigations should be pointed out. The nature of the investigated case and the source of investigations may affect the length of the investigations. In regard of source of investigations, it has to be highlighted that the CA may open its investigation based upon different grounds: *ex officio* investigations, complaints, results of market studies (inquiries) and leniency applications. Therefore, when examining duration of investigations, the source of the investigation is, certainly, an aspect to look at. To illustrate this, consider for example a cartel case. A normal cartel investigation would take longer than a cartel investigation where there was a leniency application.[112] The same is true with other cases if, for example, in a given industry there was a market study, which identifies any competition concerns in a given market, this would help the CA when it starts an investigation, as the CA will have a clear idea about the infringement. In contrast, if the CA starts an investigation based on suspicions (so called "*ex officio*" investigation), such investigations may require more time from the CA, as in such a case the CA will have little information about the investigated conduct compared to the previous situations.

[112] Brenner found that investigation and prosecution becomes faster under the leniency program by about 1.5 years. see Steffen Brenner, 'An Empirical Study of the European Corporate Leniency Program' (2009) 27 International Journal of Industrial Organization 639, 643.

2-3-2-1-4: Complexity of cases

Competition law cases (as any other areas of law) are not equal in terms of complexity. Complexity may arise from the nature of the case, the quantification of harm or the calculation of sanctions. As a result, this may affect many aspects of the CA's outputs. It may affect, *inter alia*, duration of investigations, the number of cases concluded and success rate on appeal.

However, the matter of measuring or determining the complexity of cases is a controversial one. Hence, one needs to come up with a measure that helps in distinguishing between cases.

A possible way to determine the complexity of cases is the terminology used by CAs and courts, on both sides of the Atlantic, where it can be seen as an indicator for the complexity of the cases examined. For example, in the US, the phrases "per se" and the "rule of reason" are used to distinguish between conduct that is deemed illegal directly (per se), and which type of conduct needs further examination to establish if it has anti-competitive effects (rule of reason).[113] The same can be seen in the EU, but with different language, the phrases "object" and "effect" conduct are used to distinguish between types of conduct. "Object" is used for clear-cut infringements, whilst "effect" is used for conduct that requires examining its effect.[114] Therefore, for applying the criteria, such distinction between the types of behaviour can be used to identify which cases can be seen as "easy cases" or "difficult cases", in other words, to determine the complexity of the cases. Furthermore, the source of

[113] Oliver Black, 'Per se rules and rules of reason: what are they?' (1997) European Competition Law Review 154.

[114] For a discussion about 'per se' and 'rule of reason'/ 'object' and 'effect'. See Richard Whish, *Competition Law* (6th edn OUP, Oxford 2009) p. 113-135; Anneli Howard, 'Object and effect: what's in an object?' (2009) 8 Competition law journal 37. For an excellent, in-depth and critical overview, see Oliver Black, *Conceptual Foundations of Antitrust* (CUP, Cambridge 2005), on per se and rule of reason see p 63- 93; on object and effect see p. 115-127.

the investigation and the nature of the cases will be taken into account when deciding the complexity of the cases.

2-3-2-1-5: Non- enforcement activities

In addition to enforcement activities, CAs around the world work on issues that may affect its enforcement activities, however commentators usually overlook these activities. The former commissioner, Muris, at the FTC highlighted the importance of taking into account non-enforcement activities when examining the performance of CAs by stating: '...nonlitigation activities that have a major impact on public policy or less obviously significant cases and rules that do not tackle large players, but that alter doctrine in important ways, are usually overlooked'[115] Therefore, taking into account non-enforcement activities would help in assessing the authority's performance more precisely.

A common practice that most CAs do is the issuance of guidelines for certain type of conduct. For example, many CAs issue guidelines on the treatment of vertical agreements, leniency application or fining guidelines. Furthermore, many CAs have the power to conduct market studies (or sector inquiry), where if the CA feels that competition in certain market or industry is not functioning well, it may carries out a market study to identify if there are any competition problems. Such studies may lead the CA to open an investigation if the study reveals that there are competition law concerns.[116] Another type of non-enforcement activities is when the CA asks an external body to evaluate its actions in a certain area, or the

[115] Timothy J. Muris, 'Principles for a Successful Competition Agency' (2005) 72 University of Chicago Law Review 165, 166

[116] For example, the European Commission conducted inquires in the energy (2005) and in the pharmaceuticals (2009) industries.

so-called impact assessment exercises, this type usually used to estimate savings or deterrence effects as a result of the CA's actions.[117]

To conduct such types of non-enforcement activities, certainly, the CA incurs time and cost. Therefore, by taking this into account such activities when applying the proposed criteria, the performance of the authority examined can be assessed more precisely, as one will be able to know where the CA has spent its time and money.

2-3-2-2: Endowments (capabilities) of CAs[118]

The issues that will be discussed in this category will be mainly used to clarify issues gleaned from the previous category (i.e. the outputs of the CA under examination). This will be particularly useful when comparing CAs to one another, as one will be able to identify what the CA achieved or produced (enforcement and non-enforcement activities) in light of the capabilities of each CA. Based on this, one will be in a position where he/she can identifies weaknesses and strengths of the CA from a comparative perspective and recommends how the CAs under examination may enhance their performance. Muris stressed on the importance of assessing the authority's performance in light of its capabilities, he states 'too often the effectiveness of competition policy is equated with the number of and visibility of cases pursued. Experience with competition policy shows that this focus ignores the need to evaluate an agency's commitments in light of its institutional capabilities'[119]. Muris then pointed out that the CA may create serious problems by taking so many matters where it

[117] Such studies will be discusses below.
[118] For consistency this information can be taken from the GCR survey where available to the jurisdiction under examination.
[119] Timothy J. Muris, 'Principles for a Successful Competition Agency' (2005) 72 University of Chicago Law Review 165, 181.

lacks the human capital and financial capabilities to execute them all;[120] this is another issue that can be examined when applying the criteria. In order to complement the process of assessing the CA's performance, one also needs to take into account the specifics of each CA and the country under examination; this will be dealt with in the next section.

Therefore, this category includes, *inter alia*, the following issues: staff, budget and number of specialists.

2-3-2-2-1: Staff

The number of staff in the CA may affect all the outcomes of the CA under examination in terms of quality and quantity. For instance, it may well affect the duration of investigation as well as it may affect the quality of the authority's decisions as it has been suggested.[121] For example, a CA may not be able to present its case very well because of lack of staff or inexperienced staff, because of this; it may lose its case on appeal. Hence, answers to important questions can be revealed when taking into considerations outcomes and the number and the nature of the CA's staff. Other issues about the staff of the CA may also affect its performance. For instance, answers to the following questions may provide explanations to aspects related to the authority performance. (i) Is the CA dealing solely with competition law issues? (ii) What is the number of staff devoted to competition law enforcement? (iii) Is it true that increase/ decrease of the number of staff affect the duration or the quality of the decisions?

[120] Timothy J. Muris, 'Principles for a Successful Competition Agency' (2005) 72 University of Chicago Law Review 165, 181-182 (giving the FTC in the 1970s as an example , where it case load was to high compared the agency's capabilities, thereby raising doubts about the FTC's ability to handle the cases successfully).

[121] Mats A. Bergman, 'QUIS CUSTODIET IPSOS CUSTODES? OR Measuring and Evaluating the Effectiveness of Competition Enforcement' (2008) 156 De Economist 387.

2-3-2-2-2: Budget

The budget of the authority certainly affects the authority performance. However, what is more important is how much the CA has to deliver its message, i.e. the amount of money allocated for enforcement. For example, there may be a CA that has higher budget than another CA, however, the former may allocate less money than the latter for enforcement. This may provide explanations about the performance of the CA; also, it will help, based on outputs of CAs, in advising CAs about the allocation of resources from a comparative perspective. So CAs can learn from each other on how to allocate their budgets efficiently.

2-3-2-2-3: Number of specialists[122]

Nowadays many CAs around the world are adopting and applying competition laws that require in depth analysis, and there is a considerable switch to the so called "effect based approach" and moving away for the so-called "form based approach". Even in the case of clear-cut infringement, decisions makers are calling for applying an effect based approach for the quantification of harm and the effects of the conduct to calculate fines.[123] With that in mind, CAs are required to recruit experts who can conduct and quantify the effects of competition law infringements, which is an expensive and difficult task.

Therefore, when taking number of specialists together with other aspects of the criteria, one will be able answer the following concerns: have the increase/ decrease of experts affect the

[122] Includes lawyers, economists and the level of education for the staff.
[123] In a recent speech by a Judge in the European General Court, he has called for applying an effect based approach in cartel cases when quantifying harm and fines. Available at http://webcast.ec.europa.eu/eutv/portal/_v_fl_300_en/player/index_player.html?id=14091&pId=14068 accessed 10 March 2012.

quality, the number of cases, the duration of investigations? In other words, has the existence of specialists improved the CA performance compared to another CA?

2-3-2-3: Surrounding circumstances and facts about the CA (or the jurisdiction)

This category examines issues relating to the CA or the jurisdiction under examination, and mainly consists of previously conducted studies or reports. This information will be consulted in order to seek an explanation for unanswered questions or issues, and to seek further clarity on issues that have been unanswered from the previous categories (outputs and capabilities).

2-3-2-3-1: Case studies

A case study examines a particular decision that the CA took or a group of decisions in certain area.[124] To put simply, the aim of these studies is to show where the CA gets it 'right' or 'wrong' and what would be the possible implications in the future as a result of adopting the decision (s) that has/have been examined in the study.[125] Mostly, a case study explores only one or few areas of the authority's enforcement activities (e.g. cartels or mergers) or even a selection of cases. This approach characterised to be detailed (regarding the examined case or selection of cases), however, not comprehensive as it does not cover the whole activities of the CA. Case studies usually conducted into cases where there is a big firm involved, where the fine was very high or in some cases where the CA departs from an established ruling. Therefore, case studies can be considered as an assessment of the CA performance in a given case (s), however, without considering the whole activities of the CA and without considering the CA's capabilities. Examples of cases that have been subject to case studies are the Microsoft[126] case and the GE/ Honeywell merger.[127]

[124] Examples about cases that attract lots of attention are.
[125] A good example of this is, Bruce Lyons (ed), *Cases in European Competition Policy: The Economic Analysis* (Cambridge University Press, Cambridge 2009). In this edited collection, the respected authors provided an economic analysis for a number of cases in the EU.
[126] Case COMP/C-3/37.792 — Microsoft, 2004.

It should be noted, that such studies might become of importance when the CA in question produces a small number of cases in a given year. In such a case, if there were case studies about any of the cases produced, then such studies will provide an insight about the CA's performance and it may answer questions about the authority's performance in that year.

2-3-2-3-2: Peer reviews

Peer reviews are studies that are conducted either by the CA itself or on behalf of the authority by an external body. Peer reviews usually examine specific areas, *inter alia*, assessing the impact of CA's decisions, estimating the savings from the CA's enforcement actions or the impact of interventions on deterrence. The main aim of these reviews is to examine where the CA under investigation stands in respect of the issues of the review, and how the CA can improve its performance in that respect. For example, many peer reviews studies have been conducted on behalf of the Office of Fair Trading (OFT) in the UK. The studies have been conducted in different areas, most recently for example, a peer review study assessed the impact of competition intervention on compliance and deterrence.[128] The aim of these reviews was to find out where the UK's CAs stands and how it can improve its performance compared to another jurisdictions.

Hence, peer reviews may provide a good insight about the CA's performance. For example, if a peer review concluded that the levels of deterrence are high in a given jurisdiction and the

[127] See, the European Commission Decision of 03/07/2001, Case No COMP/M.2220. Declaring the merger between General Electric/Honeywell to be incompatible with the European common market**.**

[128] A study by London Economics (2011) OFT 1391 available at http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1391.pdf accessed 1 February 2012. Other peer reviews studies about the OFT includes the following: Pricewaterhouse Coopers LLP, 'Ex Post Evaluation of Mergers' (2001) Report for the UK Office of Fair Trading, Department of Trade and Industry and the Competition Commission; KPMG (2004), 'Peer Review of Competition Policy', Report for the UK Department of Trade and Industry. Available at http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/files/file32813.pdf accessed 20 December 2011; KPMG (2007), 'Peer Review of Competition Policy', Report for the UK Department of Trade and Industry. available at http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/files/file39863.pdf accessed 20 12 2011

number of cases concluded was low compared to another jurisdiction, then the peer review study in this case has provided an explanation for the low number of cases.

2-3-2-3-3: Competitiveness reports

The World Economic Forum (WEF) annually produces The Global Competiveness Report (TGCR) that assesses the competitiveness of most of the countries around the world. Although TGCR is not directly about competition policy, it has very useful information that may affect the levels of enforcement of competition laws in the examined countries. For instance, TGCR provides information, among other issues, about the effectiveness of anti-monopoly policies, barriers to entry, market size and the intensity of local competition...etc. At the outset, and taking this information alone would not say anything about the performance about the CA's performance. However, if this information considered with previously mentioned issues about the CA's enforcement activities and the capabilities of the CA, it may provide some explanations to unanswered questions.

The information provided in TGCR could be used to draw some explanations when applying the criteria to actual data. For example, when applying the criteria into a given country and finding that that there are a lot abuse of dominance cases compared to another jurisdiction. To seek an answer to this, one could look at the value of the following: extent of market dominance in the two countries, prevalence of trade barriers and intensity of local competition. Such information may clarify the reason of why this is happened and if it is really the case or not.

Hence, information obtained from TGCR would play important role when conducting assessment studies. However, it cannot be relied solely on TGCR when drawing conclusions about the performance of any given CA.

2-3-3: Application of the criteria and source of information needed for the application of the criteria

When considering the application of the criteria it is important to give a description of the data and the information needed for the application of the proposed criteria. The data and the information related to cases have to be collected from the CA's decisions. For the information related to the levels of competition, intensity of local competition and other information about the country itself can be obtained from competitiveness reports, such as TGCR. While, information about the CA itself, such as: number of staff, budget... etc., can be obtained either from the GCR survey or from the CAs' annual report. Case studies, peer reviews, any other surveys or any work that attempted to evaluate the CA performance, should be examined and taken into account where appropriate. Some other information can be found in the competition laws of the jurisdictions under examination (e.g. the available remedies to the CA). In addition to this information, one has to set a period of time, preferably more than three years,[129] for the assessment of the CA in question.

It should be highlighted, again, that the results of applying the criteria should not be drawn independently from each part of the criteria but from the criteria as a whole. More importantly, due to the characteristics of the criteria proposed earlier, and to make the most from applying it, it is better to be applied to more than one jurisdiction (CA) with similar economic size and similarities in the institutional design. By doing so, one will be able to compare outcomes of CAs in light of similar characteristics and capabilities, and will be more competent to identify problems that could prevent the enhancement of the examined CAs.[130]

[129] On average CA's investigations take around three years to be concluded. See subsequent chapters.

[130] In addition, the need and the value of comparative assessment studies have been highlighted by many scholars, see for example William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' (2006) 31 Journal of Corporation Law 503, 542 and 543 (highlighting the benefits and the lack of comparative studies).

2-3-4: Conclusion and possible implications

This chapter has proposed criteria for the assessment public enforcement of competition law (excluding mergers and state aid activities). This chapter begins by highlighting the importance of public enforcement of competition law; and why, particularly in Europe, the burden on CAs is higher than in other jurisdictions, because of this, according to the current state of public and private enforcement, one should see public enforcement superior to private enforcement and give more attention. In addition, it has been explained why optimal enforcement issues should be decided after assessing public enforcement of competition law. The lack of a widely accepted method for assessing public enforcement has been pointed out, and reasons for the need of a method have been given.

In this chapter, effort has been made to design criteria that are based on flexible and clear criteria. The application of the criteria mainly relies on three sets of information, which are publicly available. The sets of information are: (1) outputs of CAs (enforcement and non-enforcement activities); (2) information about the capabilities of the CA; (3) facts and surrounding circumstances about the examined jurisdiction. Furthermore, the aim of these criteria is not to rank or classify CAs into categories; instead, its aim is to facilitate comparative studies where CAs may learn from each other based on recommendations gleaned from applying the criteria.

It is hoped that the application of the proposed criteria will not only assess public enforcement of competition law, but also helps in exposing enforcement problems, and hence helping CAs in identifying what has to be modified and/ or maintained. Consequently, CAs will be able to set enforcement priorities more precisely.

In addition to this, applying the criteria to actual data would help in checking the applicability of many claims that have been suggested in the literature for the jurisdictions under

examination. For instance, the results of applying the criteria would give answers to the value of having a specialised appeal court; or issues about the caseload of the CA and the probability of wining cases. In addition, it would be possible to assess certain areas of the CA's enforcement activities, such as leniency or fining policies, in light of the overall assessment of public enforcement in the examined CA. Overall, assessing public enforcement is important but what is more important is what is driven and gleaned from the assessment process.

-Chapter 3- An Empirical Analysis of Public Enforcement of Competition Law in the EU (May 2004- December 2012)

3-1: Introduction

This chapter examines public enforcement of competition law as applied by the European Commission (hereinafter 'EC' or 'Commission'). This chapter will examine the application of Articles 101[1] and 102[2] of the Treaty on the Functioning of the

[1] Article 101 read "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make 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.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

[2] Article 102 read "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."

European Union (TFEU) since Regulation 1/2003 came into force, 1 May 2004, until 31 December 2012.[3] In order to study public enforcement, one need to look not only at enforcement activities of the EC but also what may affect public enforcement. Hence, this chapter examines enforcement activities, non- enforcement activities and the capabilities (budget and human capital) of the EC for the period under scrutiny. In addition, to examining the role of the EC as an institution in enforcing competition law and its other activities (non- enforcement); any events that occurred or legislations that have been enacted and may affect competition law enforcement will be studied. Thus, this chapter aims to cover as many aspects as possible that may affect public enforcement of competition law.

To achieve the aim of this chapter, data regarding public enforcement of competition law have been collected from the Commission's decisions that have been concluded between 1 May 2004 and 31 December 2012. This includes number of cases, sources of investigations, nature of investigation, length of investigations, outcomes of investigations and the fine imposed in each case (if any fines were imposed). In addition, this chapter examines if the concluded cases were appealed, and if so what was the outcome of appeals and the amount of fine after appeal. These issues related to the enforcement of competition law by the EC.

In order to examine public enforcement of competition law, one needs to look at the issues that may affect the enforcement of the law. Thus, data regarding non-enforcement activities of the EC have been collected as well. Any activity that has been conducted by the Commission and may use its resources has been collected. The source of such information is the EC's website or its activity reports. In addition, data

[3]Mergers and state aid are outside the scope of this thesis, as pointed out in Chapter 2.

regarding the capabilities of the EC (budget and number of staff and specialists) have been collected as well. This will be done in order to examine under which circumstances the Commission produced its enforcement and non-enforcement activities. The data have been obtained from the Global Competition Review publications on 'rating enforcement'. In order to obtain further accuracy for the analysis; any publications, reports, or studies that examines issues related to public enforcement of competition law in Europe will be studied in this chapter and its findings will be taken into consideration. Furthermore, any events, changes in legislations or structural changes will be considered.

To the author's knowledge, this is the most updated study that considers public enforcement of competition law in Europe. In addition, it is the only study that considers enforcement activities, non-enforcement activities and the capabilities of the EC in the same work. However, it has be noted, that this chapter is aimed to provide a platform for the comparative analysis that will be conducted later in the thesis between the three jurisdictions.

The structure of this chapter is as follows: Section 3-2 discusses the outcomes of the EC and is divided into two main subsections. Sub-section 3-2-1 presents and analyses the enforcement activities of the EC and the outcomes of appeals for the appealed cases. Sub-section 3-2-2 considers the non-enforcement activities of the EC. Section 3-3 illustrates the capabilities of the EC. Section 3-4 discuses studies any other form of publications that can be considered as an assessment study or aims assess aspects related to public enforcement of competition law in Europe. Section 3-5 concludes.

3-2: Outcomes of the EC

This section presents the enforcement and the non-enforcement activities of the EC between 1 May 2004 and 31 December 2012. Sub-section A considers the enforcement activities which includes number of cases concluded, nature of the cases, sources of investigations, amount of fine imposed in each case, outcomes of appeals if cases have been appealed and the amount of fine after appeal if the fine was amended by the Court. Sub-section B considers the non-enforcement activities of the EC, so one has an idea how the Commission allocated its efforts; this includes guidelines, sector inquires and any other form of studies that may affect competition enforcement or may use the resources of the EC or the time of the EC's staff.

3-2-1: Enforcement activities[4]

3-2-1-1: Number of cases

Table 1 below shows the number of cases concluded by the EC from May 2004 to December 2012. The EC concluded 102 cases: 63 infringement decisions; 26 commitment decisions and 13 non-infringement decisions.[5]

From May 2004 until the end of 2004, the EC concluded eleven decisions, nine infringement decisions and two non- infringement decisions. In 2005, there have been nine cases concluded, six infringement decisions, one commitment decisions and two non-infringement decisions. 2006 saw the number of cases drooped to eight cases, six infringement decisions and two non-infringement decisions. The year 2007 saw a high number of cases compared to the previous years, where the EC concluded 16 cases,

[4] Full information about the cases discussed in this section are available in the appendix at the end of this chapter; where table 1 presents infringement decisions and table 2 presents commitments and non-infringement decisions.

[5] Cases where the Commission decided that it is not in the Community interest to open an in-depth investigation are included in the non-infringement decisions category.

eleven infringement decisions and five commitment decisions.[6] In 2008, the EC concluded eleven decisions, nine infringement decisions and two commitment decisions. In 2009, the number of cases concluded was 13 cases, six infringement decisions, two non-infringement decisions and five commitment decisions. The number of cases jumped to 15 cases in 2010, there were seven infringement decisions, two non-infringement decisions and six commitment decisions. In 2011, the number of cases dropped to eleven cases, five infringements, four non-infringements and two commitments. In 2012, the number of cases dropped further to eight cases, the lowest number of cases in a year in the whole sample, there were four infringements, two non-infringements and two commitments.

Year	Infringement	Non-infringement	Commitments	Total
2004	9	2	0	11
2005	6	1	2	9
2006	6	0	2	8
2007	11	0	5	16
2008	9	0	2	11
2009	6	2	5	13
2010	7	2	6	15
2011	5	4	2	11
2012	4	2	2	8

Table 1: Number and type of cases concluded by EC (May 2004- December 2012)

[6] It is worth mentioning that four of the five commitments decisions resulted from one investigation by the Commission. See cases: Cases COMP/E- 2/39140 DaimlerChrysler, COMP/E-2/39141 Fiat, COMP/E-2/39142 Toyota, COMP/E- 2/39143 Opel.

As it has been stated in the previous chapters, the number of cases alone should not be taken as an indicating factor to determine the performance of the EC; other factors have to be taken into account in order to examine public enforcement of the EC. There may have issues that affected the number of cases, such as, the size of the cases concluded in each year or the available resources to the EC or other issues that will be examined later in the chapter. More importantly, it also important to examine if the EC truly won the cases concluded, i.e., what happened on appeal if these cases has been appealed.

3-2-1-2: Nature of investigations

It is also worth examining the nature of the cases concluded in the period under examination. Table 2 below shows the number of cases by the decision reached in each year. The majority of the cases were dealt with under Article 101 TFEU, there were 71 out of the 102 cases where Article 101 TFEU where the subject of the investigation. In 57 cases, the EC found an infringement of Article 101. In twelve cases, the investigations were concluded by parties offering commitments and the EC accepted those commitments. In two cases, the EC concluded its investigations by declaring that there are no breaches of Article 101 TFEU or the Commission decided that it is not in the Community interest to open an in-depth investigation. Thus, it can be seen that most of the EC's investigations under Article 101 TFEU have resulted in actions been taken by the EC (either by declaring infringements and fining the parties involved or accepting commitments that remedy the EC's competition concerns). This can be interpreted that the Commission concerns were right and spotted anti-competitive practices in most of its Article 101 TFEU investigations.

Article 102 TFEU was subject to 27 investigations. In six cases, the EC found that Article 102 TFEU has been violated. Around half Article 102 TFEU investigations (14 cases) have been concluded as commitment decisions. Seven investigations have been concluded as non-infringement decision, where the EC has not found any breach of Article 102 TFEU or the Commission decided that it is not in the Community interest to open an in-depth investigation.

The remaining four cases where investigated under Article 101 & 102 TFEU at the same time. All of these cases were declared as non-infringement decisions or the Commission decided that it is not in the Community interest to open an in-depth investigation.

It can be observed from the application of Article 102 TFEU that the EC that it is more difficult to find an infringement of article 102 TFEU compared to Article 101 TFEU; and that the EC in Article 102 TFEU investigations relied more on commitments decisions.[7] In addition, the EC has issued more non-infringement decisions in Article 102 TFEU investigations than Article 101 TFEU despite that the number of 101 investigations was much higher than Article 102 TFEU investigations.[8]

	Infringement Article 101	**101 commitments**	**Infringement Article 102**	**102 commitments**	**No infringement Article 101**	**No infringement Article 101 & 102**	**No infringement Article 102**
2004	8	0	1	0	0	0	2
2005	5	1	1	1	0	0	1
2006	5	2	1	0	0	0	0
2007	10	4	1	1	0	0	0
2008	9	0	0	2	0	0	0
2009	5	1	1	4	0	2	0
2010	7	2	0	4	0	0	2

[7] This may be because of the sectors which the Commission found competition concerns
[8] This may also been because of the sources of investigations in each type of cases. For example, complaints vs. Own initiative or leniency. This will be examined below

2011	4	0	1	2	1	2	1
2012	4	2	0	0	1	0	1
Total	57	12	6	14	2	4	7

Table 2: number of cases by the decision reached

3-2-1-3: Sources of investigations

After considering the number of cases and the type of cases concluded by the EC between May 2004 and December 2012, it is worth examining the source of the EC's investigation, i.e., the basis that made the Commission to open an investigation in the first place. The EC started its investigations on different grounds; for example, leniency applications, complaints, the Commission's own initiative, sector inquires, the European Competition Network (ECN) and notifications under the old regime were used as sources of investigations. Table 3 below shows on what grounds the EC open its investigations. It is important to study the sources of the EC's investigations in order to give a precise advice to the Commission, and to understand if the source of the investigation has an impact on the outcome of the cases, in terms of quality, time or whether the EC preferred a certain tool over the other. Table 4 below shows the source of investigation by the decision reached.

The EC mainly relied on leniency application, complaints and the EC's own initiative as the sources for its investigations. Leniency applications, the most used tool, have been used 37 times as the main source for investigations. Complaints and the EC's own initiative were the second used tools, nine times and 13 times respectively. Other sources were rarely used; [9]such as ECN (once), sector inquiry (once) and notified agreement to the Commission under the old notification regime (three cases).

[9] In one case the source of the investigation was unknown. (see footnote 8)

What is more important to identify, is if there is any relationship between the nature of the investigation and the source of the investigation. For the infringement decisions under Article 101, the source of the investigations for the majority of the infringement decisions was leniency applications (37 cases). The Commission own initiative was the source of eleven cases, and in five cases, the EC started its investigations based on complaints. Sector inquires, the ECN and notified agreement to the EC where the source of investigations in one case each.

Under Article 101, there were 14 commitments and non-infringements decisions. Complaints and the EC's own initiative were the sources that the Commission relied upon mostly. The source of the investigation for the two non-infringement decisions were complaints. For commitments decisions, the Commission own initiative was the source of the investigation in three cases; in seven cases, the source was complaints and; in two cases, the Commission started its investigation because the agreements were notified to the Commission under the old notification regime.[10]

For the infringement cases dealt with under Article 102, where there was six cases. The source of the investigation in four cases was complaints and in two cases, the source of the investigation was the EC's own initiative.

In eleven cases, under Article 102, the Commission accepted commitments from the investigated parties; the source of the investigation was either complaints (six cases) or the Commission's own initiative (five cases).[11] All of the cases where the

[10] In three cases, the source of the investigation was unknown (see footnote 8).
[11] In three cases, the source of the investigation was unknown (see footnote 8).

Commission declared that Article 102 has not been violated (six cases); the source of the investigations was complaints.[12]

There have been four cases where Article 101 and 102 have been investigated but no infringements have been found, the source of the investigation in these cases was unknown.[13]

Source of investigation	Count
Unknown	11
Complaint	28
ECN	1
Leniency	37
Notified agreement to the Commission	3
Own initiative	21
Sector Inquiry	1

Table 3: sources of investigations for the concluded cases by the EC (May 2004- December 2012)

Source of investigation	Type						
	Article 101	101 commitments	Article 102	102 commitments	No infringement 101	No infringement 101 & 102	No infringement 102
Not known	1	3	0	3	0	4	1
Complaint	5	7	4	6	2	0	6
ECN	1	0	0	0	0	0	0
Leniency	37	0	0	0	0	0	0
Notified agreement to the Commission	1	2	0	0	0	0	0
Own initiative	11	3	2	5	0	0	0
Sector Inquiry	1	0	0	0	0	0	0

Table 4: Source of investigations and the decision reached

[12] In one case, the source of the investigation was unknown (see footnote 8).
[13] In three cases, the source of the investigation was unknown (see footnote 8).

3-2-2: Analysis and observations

To draw some observations from the above mentioned. All of the cases where the Commission's own initiative was the source of the investigation, there was an action taken by the Commission. This was done by either declaring an infringement or fining the parties involved or accepting commitments from the investigated parties to remedy the Commission's competition concern. This may interpreted that the Commission will not open a formal investigation unless it is highly satisfied that there are anti-competitive practices. Another interpretation for this precise rate is that the only information that is available publicly is about formally opened investigations and that the Commission may have closed own initiative investigations because there were no infringements, but this has not been made public. However, this is not possible with other sources of investigations, as the Commission in these cases has to respond, or it decide to open an investigation it has to state the actual date when it has knew about the alleged infringement.[14]

The source of investigations under Article 102 TFEU cases was mostly complaints (18 cases) and then the Commissions own initiative (seven cases). It seems that the Commission relies on information from outsiders to open Article 102 TFEU investigations and this may has led to high percentage of non-infringement decisions compared to the overall number of Article 102 TFEU investigations. This may because complaints are usually made from actual or potential competitors, which they may not provide precise information or providing untrue allegations toward their

[14] Gippini-Fournier stated "The date when proceedings are opened is usually indicated in a decision, but it is not as such a reliable indicator, as it is largely in the Commission's discretion and may come after months or years of preliminary investigation" Eric Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008 available at http://ssrn.com/abstract=1139776, See P. 13.

competitors. This can be seen very clearly from the sample, where the source of all non-infringement decisions was complaints.

In addition, the nature of Article 102 TFEU investigations is not straightforward compared to cartel cases, for example; as to determine what constitute an abuse of a dominant position or not is not an easy task because it depends on many factors, not only the practice itself.[15] In addition, the matter that in most cases it is one firm that is being investigated, not as in the case of cartels; where a cartelist(s) may confess information to the CA. In the whole sample there were 47 cartel cases, 37 of these cases where opened as a result of leniency applications, which shows the main difference between Article 102 TFEU and cartel (Article 101 TFEU) cases and how this tool helped the EC in finding infringements.

The Commission under both Article 101 and 102 has used commitments decisions. But as a percentage to the overall number of cases under each provision, it can be seen that more than half of Article 102 investigations ended up as commitment decisions (14 out of 27) compared to a small number of commitments decisions under article 101 (13 out of 70). This also brings back the discussion about the nature of the investigations under each provision, mentioned in the previous paragraph.

3-2-2-1: Fines[16] and duration of investigations

The previous sub-section considered the number of cases, the nature and the sources of investigations for the cases concluded by the EC from May 2004 to December

[15] Other issues have to be considered under Article102 TFEU cases; such as: Market shares, market definition, other competitors in the market, effects on innovation and free riding problems....and so on.
[16] It should be noted that the fine in some cases were reduced substantially on appeal. The matter of appeals and success rate on appeal will be discussed in the next section.

2012. This sub-section considers the duration of investigation and the fines imposed in these cases, and it will link this to the findings in the previous sub-section. In other words, after providing the duration of investigations and the fine imposed in each case, it will be attempted, for example, if there is any relationship between the duration of the investigation and the type and the source of the investigation; also it will be attempted to see if the fine imposed affect the duration of investigation. These issues and other issues will be analysed below.

3-2-2-1-1: Fines imposed

The fine imposed by the EC ranges from not imposing any financial penalties to around €1.4 billion. Before discussing the penalties imposed in each case, the overall fine in each year will be provided. Table 5 below shows the amount of fine imposed in each year from May 2004 until December 2012. As it can be seen that fines imposed are increasing from the year 2004 until 2007. From May 2004 to December 2004, total amount of fine imposed by the EC was around €370 million. In 2005, the amount of fine increased to over €668 million. In 2006, the total amount of fine increased to around 1.8 billion. 2007 saw the highest amount of fines imposed in a single year where the overall amount of fine was around €3.4 billion. In 2008, the amount of fine dropped to around €2.27 billion. In 2009, the overall amount of fine increased to €2.6 billion. In 2010, the fines increased to around €2.85 billion. In 2011 the overall amount of fine decreased dramatically, compared to the previous years, to around €700 million. In 2012, the fine increased to around €1.6 billion.

If one looks if the amount of fine has any relationship with the number of cases concluded for the years under examination. For example, the year 2007 saw the

highest number of cases and the highest amount of fine imposed in a single year. However, in 2012, the Commission concluded four cases, the lowest number of cases in a year, but the amount of fine imposed in this year is not the lowest in the sample. Hence, it cannot be said that the number of cases could play a role in the amount of fine imposed. In addition, fines are determined based on many aspects; such as, the size of the market, duration and seriousness of the infringement and indeed the size of the firms involved.[17]

Year	Fine in each year (€)	Number of cases concluded
2004	372,911,100	9
2005	668,597,000	6
2006	1,857,167,500	6
2007	3,475,190,500	11
2008	2,271,177,400	9
2009	2,600,134,400	6
2010	2,852,138,533	7
2011	741,607,194	5
2012	1,653,176,000	4

Table 5: the overall amount of fine imposed in each year by the EC (May 2004 - December 2012)

3-2-2-1-2: Duration of investigations

After discussing the number of cases, the nature of the cases and the fine imposed in these cases. It is now important to talk about the time it took the commission to produce these cases, i.e. the duration of investigations. It is also important to assess what could affect the duration of investigations concluded by the EC. It is worth examining if the there are certain issues that may affect the duration of investigations; for instance, does the nature of the case investigated affects the length of the

[17] See, the European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006.

investigation? Does the source of the investigation affect the length of the investigation? Do the capabilities of the EC affect the duration of the investigation (this will examined in the next section "capabilities of the EC")? Does the number of cases concluded in a given year affect the overall duration of that year?

In this section, the average duration for infringement decisions will be examined separately from non-infringements and commitments decisions. The main reason behind this is that in non-infringement decision the EC is not involved with issues of assessment of harm and calculating the fine. Also, in commitments decisions the Commission does not conduct a full investigation, it only conducts a preliminary assessment of the alleged infringements, if the parties offer commitments that remedy the Commission's concerns,[18] then the EC will accept these commitments and closes the investigation.

To start with, the average duration for infringement decisions concluded by the EC between May 2004 and December 2012. Table 6 below presents the average duration of investigations in each year; the average duration for all infringements decisions in the whole sample is 51.9 months. From May 2004 to December 2004, the average duration was 28.7 months where the EC concluded nine cases. In 2005, it has increased to 59.3 months with six cases concluded. In 2006, the average duration was 56.9 months with six concluded. In 2007, the average duration decreased to 55.1 months where the Commission concluded ten cases. In 2008, the average duration stayed at 55.1 with nine cases concluded. In 2009, the EC concluded 6 infringement decisions and the average duration was 51 months. In 2010, the average duration

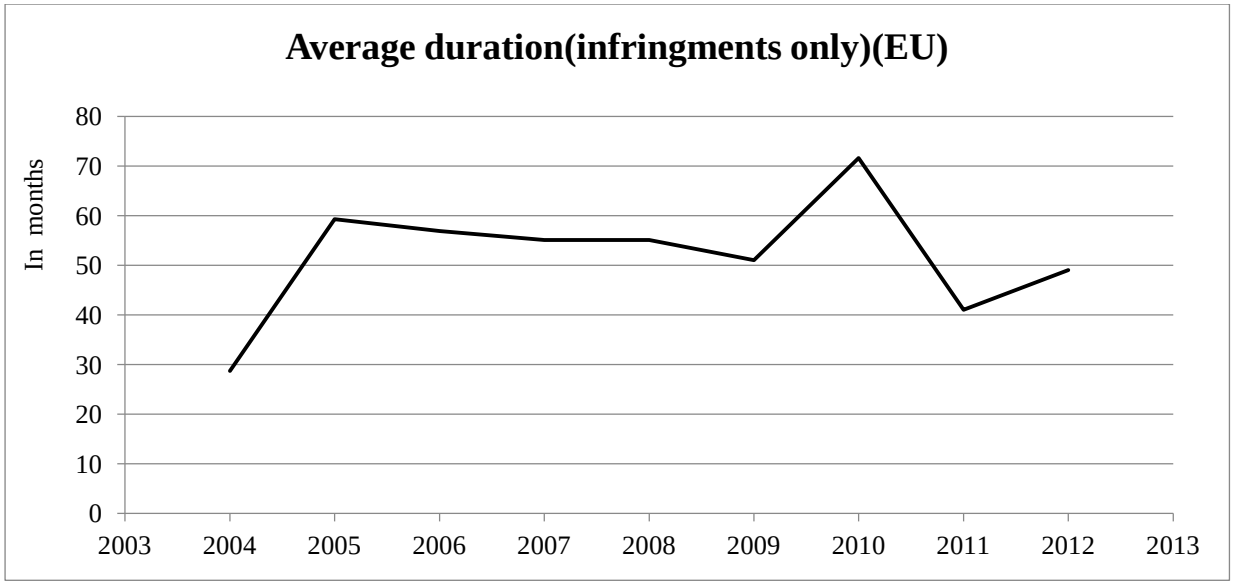
[18] See Article 9 from Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal of the European Communities L 1/1.

increased dramatically to 71.6 months where the EC concluded seven cases. In 2011, the average duration was 41 months with five cases concluded. In 2012, the average duration was 49 months with three cases concluded. As it can be seen that in most of the years the average duration was above the average duration for the whole sample. What can also be observed from graph 1 is that the average duration in each year (starting from 2005) is decreasing, with exception of 2010.[19]

Year	Average duration(in months)
2004	28.7
2005	59.3
2006	56.9
2007	55.1
2008	55.1
2009	51
2010	71.6
2011	41
2012	49
Average duration for all cases	51.9

Table 6: Average duration for infringements cases decisions concluded by the EC (May 2004- December 2012)

[19] There were two cases where it took the Commission around 96 months to conclude its investigations. This was in *DRAMs* and *Pre-stressing steel*.



Graph 1: Average duration for infringement decisions concluded by the EC (May 2004 - December 2012 in months)

Below are some observations from linking duration of investigations with other issues discussed previously.

3-2-2-1-3: Ordinary cartel procedures vs. Settlement cartel procedures

It is important as well to examine if there are particular type of cases that may lower or raise the average duration of investigations. To start with a recent procedure that has been introduced to lower the length of investigations, settlements in cartel cases.[20] This procedure has been used four times until the end of 2012.[21] In ordinary cartel procedures, the average duration for the 43 cases is around 51 months. For settlements procedures (4 cases) the average duration is around 56 months. However, it has to be noted that in the first settlement cartel case it took the Commission 96 months to

[20] Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases *Official Journal L 171 , 01/07/2008 P. 3 - 5*

[21] The Commission reached settlements in the following cases: DRAMs, CRT glass bulbs, Refrigeration compressors and Water management products.

conclude its investigation, which can be considered as an outlier.[22] The average duration without this outlier is around 41 months, which is 10 months lower than the ordinary procedure. Hence, it can be said that in most settlement cartel cases the Commission concluded its investigations quicker than ordinary procedures.

3-2-2-1-4: Cartels, anti-competitive agreements and abuse of dominance cases: any differences in treatment?

In the whole sample, there are 47 cartel cases and the average duration for these cases is 47.8 months.[23] There are ten cases that can be classified as anti-competitive agreements cases (under Article 101); the average duration for these cases is 52.8 months. Six infringement cases were dealt with under Article 102; the average duration for these cases is 51.1 months. These figures may indicate two possible explanations. First, and most probably, that the Commission is devoting more staff and resources to its cartel enforcement cases and that the Commission has experts in this particular area. Hence, cartel cases require less time than other type of cases despite the high number of cartel cases. Second, the Commission is finding anti-competitive agreements and abuse of dominance cases more complicated than cartel cases. This requires the Commission more time to conclude these cases.

[22] DRAMs.

[23] According to Templ Lang one of the reasons for the high number of cartel cases is "The result of Reg. 1/2003 was to allow the Commission to decide its enforcement priorities, for the first time. It was understandable that it chose to give priority to price-fixing and market-sharing, which are relatively easily proved as a result of leniency and immunity applications." See, John Temple Lang, 'Three Possibilities for Reform of the Procedure of The European Commission in Competition Cases Under Regulation 1/2003' available at: http://ssrn.com/abstract=1996510 , p. 229.

3-2-2-1-5: Amount of fine imposed vs. Duration of investigations

It is also important to look at if the fine imposed affects the duration of investigations. The cases where the fine imposed was 20 million or less (14 cases), the average duration is around 47.1 months. The cases where the fine imposed was over 20 million and less the 100 million (15 cases), the average duration is around 52.3 months. The cases where the fine was over 100 million and less than 500 million (23 cases), the average duration is around 53 months. The cases where the fine was over 500 million (11 cases), the average duration was 46.6 months. What can be seen from these figures is that only when the fines are very high (over 500 million) and very low (less than 20 million) in the sample, the average duration of investigations is less than the overall average duration for the whole sample (51.9 months). This may be interpreted as that the Commission is allocating a lot of its resources where it seems that the fine might be very high because such cases may bring publicity to the EC's actions. In addition most of these cases are cartel cases based on leniency therefore such cases are more successful on appeal, i.e. most likely to be won by the EC if appealed.

3-2-2-1-6: Duration of investigations vs. Sources of investigations

One may also want to consider what may affect the duration of investigation or which type of cases or specifics in each case that may the length of the investigations. Table 7 below show the sources of investigations and what the mean for each set of cases was. What can be observed form table 7 that the Commission when it has received information about the existence of infringement (complaint or leniency application) it

took the Commission more time than in the case where it opened the investigation on its own initiative. This may have two explanations. First, in cases where the Commission receives information about an alleged infringement the Commission is obliged to state when it has received a complaint or leniency application in its official decision, whereas in the case of own initiative investigation the Commission may not open a formal investigation unless it has enough evidence that supports its investigation, therefore, this may be an explanation of why investigations which started from the Commission's own initiative takes less time. The second explanation could be that the information supplied to the Commission by leniency applications and from complaints does not have decisive evidence about the alleged infringement and the Commission needs to investigate the conduct further which ultimately requires more time from the Commission than in cases where the source of the investigation is the EC's own initiative. So the leniency application or the complaint may only be used to indicate to the alleged infringement but not to provide evidence.

It also can be seen from table 7 that when the source of the investigation was a sector inquiry or from the ECN, the Commission concluded its investigations in a shorter period than the other sources. Thus, it seems that in these cases, the Commission was well informed about the infringement and hence the length of the investigation was shorter.

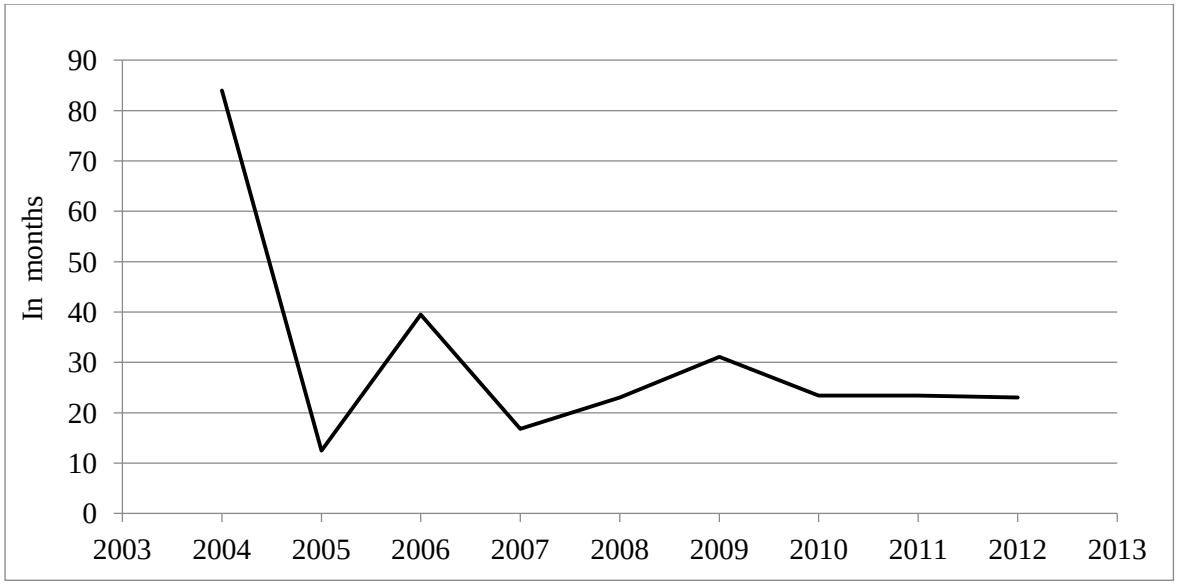
Complaint		**ECN**		**Leniency**		**Notified to the Commission**		**Own initiative**		**Sector Inquiry**	
Mean	Count	Mean	Count	Mean	Count	Mean	Count	Mean	Count	Mean	Count
54	9	33	1	51.4	37	67	1	46.3	13	38	1

Table 7: Average duration for infringements decisions by the source of investigation (in months)

3-2-2-2: Non- infringements and commitments

For the non-infringements and commitments decisions, it can be seen clearly from graph 2 and table 8 below that on average these cases have been concluded much quicker than infringement decisions. The overall average duration of investigations for non-infringement and commitments decisions for the whole sample is around 30.7 months (for infringements it is 51.9).

From May 2004 to December 2004, the Commission concluded two non-infringement decisions and the average duration was 84 months. In 2005, the average duration was 12.5 months where the EC concluded three cases (one non-infringement and two commitments). In 2006, there were two commitments decisions and the average duration was 39.5 months. In 2007, five commitments decisions were concluded and the average duration was 16.8 months. In 2008, the average duration was 23 months where the EC concluded two commitment decisions. In 2009, the average duration was 31.1 months; the commission concluded seven cases (five commitments and two non-infringements). In 2010, the average duration was 23.4 months; this year saw the highest number of non-infringement and commitments decisions concluded, eight cases (six commitments and two non-infringements). In 2011, there were five cases (three non-infringements and two commitments), the overall average duration in 2011 was 23.4 months. In 2012, the average duration of investigations was 23 months, the EC four cases (two commitments and two non-infringements).



Graph 2: Average duration of investigations for non-infringement and commitments decisions concluded by the EC (May 2004 - December 2012 in months)

Year	Average duration (In months)
2004	84
2005	12.5
2006	39.5
2007	16.8
2008	23
2009	31.1
2010	23.4
2011	23.4
2012	23
Average duration for all cases	30.7

Table 8: Average duration for commitments and non-infringements decision (May 2004- December 2012)

3-2-3: Success rate on appeal [24]

The EC's decisions are appealable to the European Courts. The EC's decision can be appealed to the European General Court (GC)[25], which it can review the

[24] The last date which the author searched for appealed cases is 30 January 2013.

Commission's decision both on points of law and facts. The final stage of appeal of the EC decision is to the Court of Justice of the European Union (CJEU), which it can review the GC's judgments only on points of law. This sub-section aims to review of all of the cases concluded between May 2004 and December 2012 to examine if these cases have been appealed and if so what happened on appeal. Success rate on appeal has been used by some scholars in order to determine the quality of Competition Authorities decision making. This chapter will take this into account, however not as a determinative factor.[26]

As it has been mentioned earlier, the Commission concluded 102 decisions; there were 63 infringements decisions. From the 63 decisions, there were four cartel cases[27] settled with the Commission, which cannot be appealed, and nine cases not appealed. There were around 50 decisions appealed to the Community Courts. Some of the recent decisions are still pending on appeal (20 cases). For the rest of the appealed cases (30 cases) none of these cases was lost by the Commission entirely and there were no huge defeats to the commission even in the cases where the fine has been reduced.

This chapter will classify appealed decisions into four main categories; (i) Upheld: Upheld the Commission decision on both liability and fine. (ii) Largely upheld: upheld the Commission's with respect to liability but reduces the fine imposed. (iii) Partly upheld: annuals the Commission's with respect to some parties on liability and

[25] Some of the cases were reviewed by the Court of First Instance (CFI), the predecessor of the GC.
[26] This issue has been discussed in chapter 2.
[27] DRAMs, CRT glass bulbs, Refrigeration compressors and Water management products. There was a hybrid cartel case, where some parties settle with the commission but others did not. This was in the , Animal Feed Phosphates case where all of the parties settled with the Commission except one party in which ordinary procedures was used with regard to this party and subsequently appealed the decision (still pending on appeal)

fines, and upheld the decisions on liability or fine for others. (iv) Dismissed: annulling the Commission decision entirely.

From the 63 infringement decisions there were 50 cases appealed. 20 of which are still pending,[28] nine cases were not appealed, [29]and 4 cartel settlement cases. Hence, there are 30 cases in which have been appealed and judgments are available. 12 cases out of the 30 cases, the Community courts upheld entirely the Commission's findings with regard to liability and fine (upheld).[30] In eleven cases out of the 30 cases, the Community courts upheld the Commission's with regard to liability but reduces the fine imposed (largely upheld).[31] In seven cases, the Community courts annulled the Commission decision with respect to some parties and upheld the Commission's findings with respect to other parties, which may results in reductions in the overall fine (partly upheld).[32] There were no cases where the GC annulled the Commission's decision entirely. Table 11 below shows the number and percentage of all of infringement decisions concluded by the Commission between May 2004 and December 2012. Table 12 below presents all the cases that have been appealed, together with the outcome and the fine.

[28] Bitumen Spain; CISAC; Car Glass; Aluminum Fluoride; Candle Waxes; Bananas; Intel; Heat Stabilisers; Power Transformers; Calcium Carbide; Marine Hoses; Bathroom fittings & fixtures; Pre-stressing steel; Animal Feed Phosphates; Airfreight; LCD; Consumer detergents; Telekomunikacja Polska; Mountings for windows and window-doors; and Freight Forwarding.
[29] Brasseries Kronenbourg; Souris-Topps; Belgian Architects'; GDF; professional videotape producers; Nitrile Butadiene; Ordre National des Pharmaciens en France; Exotic fruit; and TV and computer monitor tubes.
[30] Clearstream; Raw tobacco Spain; PO/Needles; Prokent/Tomra; MasterCard; Morgan Stanley/Visa International ; Chloroprene Rubber; Wanadoo España; Flat Glass; PO/Hard Haberdashery: Fasteners; and CB.
[31] Plumbing tubes; SEP and others; AstraZeneca; MCAA; Industrial bags; PO/Thread; Bitumen (NL); Methacrylates; Elevators and Escalators; International removal services; and E.ON/GDF.
[32] Choline Chloride; Fittings; Hydrogen Peroxide; BR/ESBR; Dutch beer market; Gas Insulated Switchgear; and Sodium Chlorate.

Upheld	Largely upheld	Partial Upheld	Settlements	Not appealed	Pending
12 cases (19%)	11 cases (17.4%)	7 cases (11.1%)	4 cases (6.3%)	9 cases (14.3%)	20 cases (31.7%)

Table 11: Number and percentage of infringement decisions, whether appealed or not.

In what follows a brief description of a selection of some of the appealed cases will be given, followed by some observations gleaned from the discussion. The appealed cases will be discussed in three categories according to the fine that has been imposed by the Commission. First, cases where the fine imposed was over 500 million. Second, cases where the fine imposed was less than 500 and over 100 million. Third, cases where the fine imposed was less than 100 million. Table 12 below presents all infringement decisions and shows whether it has been appealed and the outcome and the amount of fine after appeal.

3-2-3-1: Cases where the fine imposed was over €500 million

The biggest reduction in fines was in the *E.ON/GDF* case, dealt with under Article 101 TFEU, where the GC reduced the fine imposed by over 42% (from €1,106 billion to €640 million).[33] This is the highest reduction in fine as an amount of reduction or as a percentage of reduction. According to the GC, the fine has been reduced on both parties involved because there was an error in determining the duration of the

[33]Case T-360/09 E.ON Ruhrgas AG & E.ON AG v. Commission [2012]; Case T-370/09 GDF Suez v Commission [2012].

infringement in France and hence the GC reduced the fine imposed.[34] The GC judgment was not appealed to the CJEU.

The *Elevators and Escalators* case represents the second highest fine imposed for the appealed cases were the Commission imposed around €992 million. In this case, the Commission found four infringements (cartel) where the durations of each one is different and the Commission fined each undertaking for each infringement separately. There were four appeals, three appeals were dismissed[35] by the GC and one appeal resulted in reduction of fines.[36] The overall amount of fine after appeal became around €832 million.[37]

In the *Gas insulated switchgear* case the Commission imposed around €750 million. Four parties appealed to the GC. The GC annulled the EC decision for Toshiba and Mitsubishi Electric;[38] reduced the fine for Fuji;[39] and dismissed Hitachi and others appeal and upheld the Commission's findings entirely.[40] The appeals resulted in reducing the overall fine to around €539 million.[41]

In 2006, the Commission imposed €519 million in the *BR/ESBR* case. The GC partly upheld the Commission decision. The GC annulled the Commission decision in relation to two undertakings;[42] reduced the fine imposed to one undertaking;[43] and

[34] Case T-360/09 E.ON Ruhrgas AG & E.ON AG v. Commission [2012]; Case T-370/09 GDF Suez v Commission [2012].
[35] Case T-138/07 Schindler Holding and Others v Commission [2011]; Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 General Technic-Otis and Others v Commission [2011]; and Case T-151/07 Kone and Others v Commission [2011].
[36] Joined Cases T-144/07, T-147/07, T-148/07, T-149/07, T-150/07 and T-154/07 ThyssenKrupp Liften Ascenseurs and Others v Commission [2011].
[37] ThyssenKrupp Liften Ascenseurs and Kone appealed the ECJ, still pending.
[38] Case T-133/07 Mitsubishi Electric v Commission [2011]; Case T-113/07 Toshiba v Commission [2011]
[39] Case T-132/07 Fuji Electric v Commission [2011].
[40] Case T-112/07 Hitachi and Others v Commission [2011].
[41] The GC judgment has been appealed to CJEU, but still not decided.
[42]Case T-45/07 Unipetrol v Commission [2011]; Case T-44/07 Kaučuk v Commission [2011]; Case T-53/07 Trade-Stomil v Commission [2011].
[43] Case T-59/07 Polimeri Europa v Commission [2011].

upheld the Commission decision entirely to two undertaking.[44] After appeal, the overall fine was reduced to around €315 million.

3-2-3-2: Cases where the fine imposed between €100 and €500 million

In the *Pluming tubes* case, seven undertakings appealed the EC's decision, most of the appellants requests were dismissed by the CFI (now GC).[45] There was a small reduction of fines for two appellants by the CFI.[46] The overall amount of fine imposed before appeal was €222 million, after appeal the overall fine is around €221 million.[47]

In *Methacrylates,* the EC imposed around €344 million on five cartelists. Four undertakings appealed the EC decision; the GC dismissed two appeals[48] and reduced the fine imposed in the other two.[49] The reductions brought the overall fine after appeal to around €238 million.[50]

3-2-3-3: Cases where the fine imposed was less than €100 million

The PO/Needles case was appealed to the CFI (Now GC) by the two parties fined. The CFI reduced the fine imposed for both appellants.[51] The overall fine after appeal became €47 million, where it was €60 million before appeal. The CFI judgment was appealed to the CJEU, where it upheld the CFI. [52]

---

[44]Case T-42/07 Dow Chemical and Others v Commission [2011]; and Case T-38/07Shell Petroleum and Others v Commission [2011].

[45] KME Germany (dismissed); Outokumpu and Luvata (dismissed); Boliden (dismissed); Wieland-Werke (dismissed); KME Germany AG (dismissed). Chalkor appealed to the ECJ (dismissed).

[46] Chalkor (Fine reduced 9,160,000 to 8,246,700); IMI (reduced from 44,980,000 to 38.556).

[47] Two undertakings appealed the CFI judgment to the ECJ, but their appeals were dismissed.

[48] Lucite International and ICI.

[49] Quinn Barlo and Aremka.

[50] Some parties appealed to the ECJ, but still not decided.

[51] Case T-36/05 Coats Holdings and Coats v Commission [2007]; Case T-30/05 Prym and Prym Consumer v Commission [2007].

[52] Case C-534/07 P William Prym GmbH & Co. KG, Prym Consumer GmbH & Co. KG v Commission of the European Communities [2009].

In *AstraZeneca*, a fine of €60 million was imposed on AstraZeneca for abusing its dominant position by the Commission. AstraZeneca appealed to the GC, where it has reduced the fine to around €40 million.[53] The judgment was appealed to the CJEU where it has dismissed AstraZeneca's appeal and confirmed the GC's judgment [54]

In *Clearstream*, the Commission found Clearstream infringing Article 102 TFEU but it did not impose any fines on it. Clearstream appealed to EC's decision to the CFI. The CFI dismissed Clearstream request and upheld the Commission findings.[55]

In *Prokent/Tomra*, the Commission found an infringement of Article 102 TFEU and imposed €24 million as a fine. Tomra appealed the decision to the GC; the GC dismissed Tomra appeal entirely and upheld the Commission.[56] The GC judgment was appealed to the CJEU where it upheld the CFI and dismissed the appeal from Tomra.[57]

In 2007 the Commission in *Morgan Stanley/Visa International*, found an infringement of Article 101 TFEU and fined Visa around €10 million for excluding Morgan Stanley from membership of Visa Europe.[58] Visa Europe and Visa international appealed to the GC for an annulment or a reduction in fines. The GC dismissed Visa's request and upheld the Commission findings on fine and liability.[59] The GC judgment was not appealed to the CJEU.

In *Sodium Chlorate*, the Commission imposed around €79 million on five cartelists. Four appealed to the GC. The GC dismissed the request of three appellants.[60] The GC

[53] Case T-321/05 AstraZeneca AB and AstraZeneca plc v Commission [2010].
[54] Case C-457/10 P AstraZeneca AB and AstraZeneca plc v Commission [2012].
[55] Case T-301/04 Clearstream v Commission [2009].
[56] Case T-155/06 Tomra Systems and Others v Commission [2010].
[57] C-549/10 P Tomra Systems ASA, Tomra Europe AS, Tomra Systems GmbH, Tomra Systems BV, Tomra Leergutsysteme GmbH, Tomra Systems AB, Tomra Butikksystemer AS v European Commission [2012]
[58] Morgan Stanley/Visa International, para. 354.
[59] Case T-461/07 Visa Europe and Visa International Service v Commission [2011].
[60] Case T-349/08 Uralita, SA v Commission [2011]; Case T-343/08 Arkema France v Commission [2011]; Case T-299/08 Elf Aquitaine v Commission [2011].

annulled the Commission decision with respect to one appellant.[61] However, the overall amount of fine was not affected as the party who was successful on appeal was fined jointly with another party; after appeal, the other party will pay the whole fine. The GC judgment was appealed to the CJEU by one party; however, the CJEU upheld the GC.[62]

3-2-3-4: Commitments and non-infringement decisions

Some of the Commitments and the non-infringements decisions were appealed to the Community Courts. From the 39 decisions, eight decisions were appealed; three commitment decisions[63] and five non-infringement decisions.[64] Four cases are still pending; three cases have been dismissed and upheld the Commission decision. Only in one case, the request of the appellant was successful and overturned the Commission decisions.[65]

3-2-3-5: Observations

What can be noted that for all the cases concluded between May 2004 and December 2012 that the Courts did not dismiss the Commission's findings entirely. In other words, it can be said that the Commission's investigations (for the appealed cases) were all the times right and tackled anti-competitive practices.

[61] Case T-348/08 Aragonesas Industrias y Energía, SAU v Commission [2011].
[62] C-404/11 P Elf Aquitaine SA v European Commission [2012].
[63] Repsol CPP, Rambus, Iliad / France Telecom, Vivendi, Iliad / France Telecom.
[64] EFIM, Vivendi, Omnis / Microsoft, Si.mobil / Mobitel, CEEES/AOP – REPSOL.
[65] In Rambus, the Court allowed the intervention of a third party which was refused by the Commission.

It can also be noted that most of the cases that were not appealed, the fines imposed in the majority of these cases were comparatively low to the other cases in the sample. In six cases, the fine did not exceed €10 million.

In addition, all of the Article 102 TFEU cases were appealed. There were six cases appealed, two of which are still pending. In the other four cases, the Court upheld the Commission's findings on liability and reduced the fine in only one case. This can be understood, as the Commission is not investigating Article 102 TFEU cases unless that there a high possibility of anti-competitive behaviour and the Commission is presenting its cases and evidence in a convening manner that help it to win cases on appeal.

Cartel settlements procedures: is the 10% reduction worth it?

In cartel cases there are procedures that can be followed by the Commission to end its investigation. First, the Commission can follow ordinary procedures in its investigations and in such cases the Commission will not reduce the fine imposed on cartelist unless there is/are reasons to do so.[66] Importantly, cartel cases under ordinary procedures can be appealed to the Community courts. Second, the Commission may end its investigation by reaching a settlement with the parties investigated and the Commission will reduce 10% of the fine that it intends to impose. Settlements procedures are unlikely to be appealed to the Community Courts. Therefore, settlement procedures should end investigations earlier than ordinary procedures (this is the aim of the commission when it introduced the settlement procedure in cartel

[66] There are certain circumstances where the Commission may reduces or increase the fines according its fining guidelines. The following may play a role in awarding reductions: Leniency, mitigating circumstances, inability to pay and co-operation with the Commission's investigation. See the Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003 Official Journal C 210, 1.09.2006. Para 18 to 38.

cases) and also it saves the Commission's time and resources.[67] Because settlement procedures are unlikely to be appealed and may end earlier than ordinary procedures; hence, the Commission will have more resources to be directed to other activities.

In the majority of the appealed decisions, the court has reduced the overall fine by over 10%. In cartel settlement cases, the Commission gives 10% reduction of the fine that it would impose it in an ordinary procedures. If one calculates the overall fines pre and post appeal, it appears that in total the fines have reduced by around 19% after appeal.[68] This means, overall, that the Commission is actually wining the cases in an easier and cheaper way. As the Commission when settling cases with cartelists, the Commission is avoiding the cost of litigation. Which can be understood as the Commission is taking a shortcut with its procedures and predicting what probably could happen on appeal and, ending better off at the end if one looks at the whole cases appealed between May 2004 and December 2012. In addition, one has to take into account the duration of the investigations as if it is truly that those investigations under settlements procedures ended up as are shorter. This has been shown earlier that most of cartel settlements procedures were shorter by 10 months.[69] In addition, the Commission will avoid the time spent on appeal. Thus, it can be said that, so far, settlements procedures seems to bring benefits to the Commission in terms of time savings.[70]

[67] See, Cartel case settlement, available at http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html

[68] The overall amount of fine before appeal is around € 7.367 billion and post appeal is around €5.962 billion, the percentage of the overall reduction in fine is 19.07.

[69] See section 3-2-2-1 on duration of investigations.

[70] The settlement procedure in cartel cases has been supported by Motta. He stated "If firms settled and agreed to pay a certain fine and not to appeal the decision, this would allow the Commission not only to save time and resources in the period until the decision, but also from court appeals. The Commission's manpower can then be redirected to the investigation, prosecution and uncovering of new cartels". See, Massimo Motta, 'On cartel deterrence and fines in the European Union' (2008)

Case	Fine imposed (€)	Appeal to GC	Appeal to ECJ	Final fine after appeal	Outcome
Choline Chloride	66,430,000	Liability: Upheld Fine: reduced and increased[71]	Upheld CFI	57,974,000	Largely Upheld
Plumbing tubes	222,291,100	Liability: Upheld Fine: reduced[72]	Upheld[73]	221,377,700	Largely upheld
Clearstream	0	Liability: Upheld Fine: Upheld	Not appealed	0	Upheld
Raw tobacco Spain	20,000,000	Liability: Upheld Fine: reduced [74]	Upheld GC	13,593,800	Largely upheld
PO/Needles	60,000,000	Liability: Upheld Fine: reduced [75]	Upheld CFI	47,000,000	Largely upheld
SEP and others	49,500,000	Liability: Upheld Fine: reduced	Upheld	44,550,000	Largely upheld
AstraZeneca	60,000,000	Liability: Upheld Fine: reduced	Upheld GC	40,250,000	Largely upheld
MCAA	169,600,000	Liability: Upheld Fine: reduced	Upheld GC	162,197,000	Largely upheld
Industrial bags	290,000,000	Liability: largely Fine: reduced[76]	Pending	275,320,000	Partial Upheld
Raw tobacco Italy	56,000,000	Liability: Upheld Fine: Upheld[77]	Pending	56,000,000	Upheld
PO/Thread	43,497,000	Liability: Upheld Fine: reduced[78]	Not appealed	43,374,000	Largely upheld
Prokent/Tomra	24,000,000	Liability: Upheld Fine: Upheld	Upheld GC	24,000,000	Upheld
Fittings	314,760,000	Liability: Partly Fine: reduced [79]	Upheld GC[80]	312,308,000	Partial Upheld

29(4) European Competition Law Review 209, 212.

[71] There were three appeals: dismissed for Akzo; fine increased after appeal on BASF (from €34,970,000 to €35,024,000) ; fine reduced for UCB (from €10,380,000 to €1,870,000). Akzo appeal to CJEU dismissed

[72] There were seven appeals: KME Germany, dismissed; Fine reduced for Chalkor (from €9,160,000 to €8,246,700); Outokumpu and Luvata, dismissed; Boliden, dismissed; fine reduced for IMI (from €44,980,000 to €38,556,000); Wieland-Werke; dismissed;KME Germany AG, dismissed.

[73] Chalkor appeal to the CJEU,dismissed.

[74] Fine reduced on Cetarsa (from €3,631,500 to €3,147,300); fine reduced on Agroexpansión (€2,592,000 to €2,430,000); fine reduced on Delfanta reduced from (€11880000 to €6,120,000)

[75] Two appeals: Prym and Prym fine reduced (from €30,000,000 to €27,000,000); Coats fine reduced (from €30,000,000 to €20,000,000)

[76] Nine appeals: decision annulled for Stempher BV (fine was €2,370,000 to 0); reduce fine for Bonar (from €12,240,000 to €9,180,000); reduce fine for UPM-Kymmene (from €56,550,000 to €50,700,000) ; appeals dismissed for six appellants.

[77] Two appeals by Deltafina and Alliance One, dismissed.

[78] Four appeals: appeal of three undertakings, dismissed; Fine reduced to BST (to €856,800)

Bitumen (NL)	266,717,000	Liability: Upheld Fine: reduced[81]	Not appealed	239,717,000	Largely upheld
Hydrogen Peroxide	388,128,000	Liability: Partly Fine: reduced [82]	Pending	330,003,000	Partial Upheld
BR/ESBR	519,000,000	Liability: Partly Fine: reduced[83]	Pending	316,150,000	Partial Upheld
Methacrylates	344,562,500	Liability: Upheld Fine: reduced[84]	pending	238,025,000	Largely upheld
Dutch beer market	273,783,000	Liability: Partly Fine: reduced [85]	Upheld GC	218,698,312	Partial Upheld
Morgan Stanley/Visa International	10,200,000	Liability: Upheld Fine: Upheld	Not appealed	10,200,000	Upheld
Chloroprene Rubber	247,635,000	Liability: Upheld Fine: Upheld[86]	Pending	247,635,000	Upheld
Bitumen Spain	183,651,000	Pending			Pending
Wanadoo España	151,875,000	Liability: Upheld Fine: Upheld[87]	Pending	151,875,000	Upheld
Elevators and Escalators	992,000,000	Liability: Upheld Fine: reduced [88]	Pending	832,110,050	Largely upheld
Gas Insulated Switchgear	750,712,500	Liability: partial Fine: reduced[89]	Pending	539,687,500	Partial upheld
Flat Glass	486,900,000	Liability: Upheld Fine: Upheld	Not appealed	486,900,000	Upheld
PO/Hard Haberdashery: Fasteners	303,644,000	Liability: Upheld Fine: Upheld[90]	Not appealed	303,644,000	Upheld

[79] Nine appeals: decision annulled for Aalberts Industries; reduced the fine on Kaimer slightly (from €7,970,000 to €7,150,000); reduced the fine on Tomkins by 1 million; four undertakings, dismissed (Viega,Legris,IMI and FRAO).

[80] Three appeals to the ECJ, all dismissed.

[81] Three appeals: dismissed for Total and Kuwait; reduction in fine for Shell (from €108,000,000 to €81,000,000)

[82]Five appeals: annulled for Edison (from €58,125,000 to 0); four dismissed (FMC,Snia, Solvay and Arkema).

[83]Six appeals: Shell and Dow, dismissed; reduced fines for ENI/Polimeri (from 272,250,000 to 181,500,000); annuled the Commission decision for Unipetrol/Kaucuk (from 17,550,000 to 0); annulled the Commission decision for Trade-Stomil (from 3,800,000 to 0).

[84] four Appeals: reduce fine for Quinn Barlo (from €9 million to €8,25 million) ; reduced fine for Aremka (from 219,131,250 to 113,343,750); Lucite International, dismissed; ICI, dismissed.

[85] annulled the Commission decision to Koninklijke Grolsch (from €31 658 000 to 0); reduce fine to Heineken (from €219,275,000 to €197,985,937); reduced fine for Bavaria (from 22,850,000 to 20,712,375)

[86] Three appeals, all dismissed.

[87] Two appeals by Kingdom of Spain and Telfoneca, dismissed

[88] Four appeals: three appeals, dismissed; reduction in fines for ThyssenKrupp Liften Ascenseurs in the four cases (form 68607000 to 45738000), (from 374220000 to 249480000), (from 13365000 to 89100004), (from 23477850 to 15651900).Overall reductions= 159,889,950

[89] Four appeals: annulled the Commission for Mitsubishi Electric (from 118 575 000 to 0); reduction in fine for Fuji (from 3 750 000 to 2 200 000); annulled the Commission for Toshiba (from: 90,900,000 to 0); dismiss the appeal from Hitachi and Others.

International removal services	32,700,000	Liability: partial Fine: reduced [91]	Pending	30,451,000	Partial upheld
CB	0	Liability: Upheld Fine: Upheld	Not appealed	0	Upheld
Sodium Chlorate	79,070,000	Liability: partial Fine: not affected [92]	Upheld GC		Partial upheld
CISAC	0	Pending			Pending
Car glass	1,383,896,000	pending[93]			Pending
Aluminium fluoride	4,970,000	Pending			Pending
Candle Waxes	676,011,400	Pending			Pending
Bananas	60,300,000	Pending			Pending
Intel	1,060,000,000	Pending			Pending
Heat Stabilisers	173,860,400	Pending			Pending
Power Transformer	67,644,000	Pending			Pending
Calcium Carbide	61,120,000	Pending			Pending
E.ON/GDF	1,106,000,000	Liability: upheld Fine: reduced[94]	Not appealed	640,000,000	Largely Upheld
Marine Hoses	131,510,000	Pending			Pending
DRAMs	331,000,000	Settlement	Settlement	331,000,000	Settlement
Bathroom fittings & fixtures	622,250,783	Pending			Pending
Pre-stressing steel	269,870,750	Pending			Pending
Animal Feed Phosphates	175,647,000	Pending			Pending
Airfreight	799,445,000	Pending			Pending
LCD	648,925,000	Pending			Pending
Consumer detergents	315,200,000	Pending			Pending
Telekomunikacja Polska	127,554,194	Pending			Pending
CRT glass bulbs	128,736,000	Settlement		128,736,000	Settlement
Refrigeration compressors	161,198,000	Settlement		161,198,000	Settlement
Mountings for	85,876,000	Pending			Pending

[90] Three appeals, dismissed and two pending.
[91] 5 appeals: annulled the Commission for Verhuizingen (from 104,000 to 0) ; reduce the fine for Gosselin (form 4,500,000 to 2,320,000) ; 3 dismissed [Putters, Ziegler, Team Relocations].
[92] 4 appeals: 3 dismissed; 1 annulled but did not affect amount of fine.
[93] Three appeals: pending.
[94] Upheld the Commission but reduced the fine on both parties from €553,000,000 to €320,000,000 each.

windows and window-doors					
Freight Forwarding	169,000,000	Pending			Pending

Table 12: cases that have been appealed and the outcome of appeals

3-3: Non enforcement activities

Most of the CAs around the world besides conducting enforcement activities and enforcing competition provisions, they conduct non-enforcement activities that have many objectives to achieve. Non-enforcement activities might be used to test markets or sector to check the competiveness of these markets. In the EU, the Commission conducts the so-called sector inquires in order to check if competition distorted in certain markets. In addition, non-enforcement may be designed in order to raise awareness of the consequences of breaching competition law (e.g. compliance programs). Furthermore, non-enforcement activities might be used to highlight the benefits of competitive markets and its role on consumer welfare. Another role of non-enforcement activities is that CAs issue guidance documents in order to clarify the law and how the law will be applied by the CA (e.g. fining guidelines).

The EC has given some of its time and resources to non-enforcement activities; these non-enforcement activities have been on different issues, as explained in the previous paragraph. Some of these non-enforcement issues have led to enforcement actions, such as the *Eon/GDF* case where the Commission knew about the infringement because of the outcomes of the sector inquiry in the energy sector. In addition, other non-enforcement activities may have led to an increase in the enforcement levels of the EC and has helped in spotting competition law violations. For example, as it has been seen previously in the chapter, the Commission notice on immunity from fines

and reduction of fines in cartel cases[95] has helped the Commission in the majority of cartel cases in uncovering cartels.[96] Furthermore, in the area of cartels, the Commission's settlements procedures helped the Commission to save time and resources with ending disputes earlier than ordinary procedures, and the Commission avoided the cost of litigation on appeal. Hence, giving the Commission the opportunity to priorities its work more. Table 13 (sector inquires) and 14 (documents and guidelines and other publications) below lists the non-enforcement activities of the EC between May 2004 and December 2012.

Year	Sector inquiries
2004	
2005	• 3G Sector Inquiry
2006	
2007	• Business Insurance Sector Inquiry; • Retail banking Sector Inquiry; • Study on electricity markets supports the results of the Commission's Sector Inquiry (of 2005); • Study on Conveyancing Services Market. • Inquiry into competition in gas and electricity markets
2008	• Inquiry into the pharmaceutical sector
2009	
2010	• 1st Report on the Monitoring of Patent Settlements
2011	• 2nd Report on the Monitoring of Patent Settlements
2012	• 3rd Report on the Monitoring of Patent Settlements

Table 13: Sector inquiries conducted by the EC (May 2004 and December 2012)

Year	Documents issued
2004	
2005	
2006	• Commission notice on immunity from fines and reduction of fines in cartel cases Official Journal C 298, 8.12.2006, p. 17 • **2006 ECN Model Leniency Programme** (September 2006) • Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, p. 2-5
2007	
2008	• Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (Text with EEA relevance), Official Journal L

[95] Commission notice on immunity from fines and reduction of fines in cartel cases Official Journal C 298, 8.12.2006, p. 17.
[96] See, section 3-2-1-3 on sources of investigations.

	171, 1.7.2008, p. 3–5 • Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2.7.2008, p. 1–6
2009	• Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p. 7–20
2010	• DG Competition Stakeholder Survey • Competition authorities in the European Union – the continued need for effective institutions (16 November 2010) • The recommendation of the High Level Group on Milk aimed at improving the bargaining power of dairy farms (17 November 2010)
2011	
2012	• ECN Model Leniency Programme: 2012 revision November 2012 • Investigative Powers Report Decision-making Powers Report • The reform of the Common Agricultural Policy (21 December 2012) • Protection of leniency material in the context of civil damages actions (23 May 2012) • Compliance matters: What companies can do better to respect EU competition rules

Table 14: Documents, studies, guidelines or any other sort of documents issued by the EC between May 2004 and December 2012.

It can be seen that the Commission has devoted some of its resources to non-enforcement activities. However, it is difficult to determine whether the Commission has got the right balance between enforcement and non-enforcement activities, as the Commission has outcomes on both sides. A comparison with other jurisdictions may help in understanding what could be the right balance; this will be done in chapter 6 below. Furthermore, one should not ignore that some of these non-enforcement activities may play a role in raising deterrence, helping in understating the law, raising awareness of the consequences of breaching competition law and, indeed it may have an important role in fostering enforcement activities.

3-4: Capabilities of the EC

After considering the Commission's outcomes in terms of enforcement and non-enforcement activities; it worth investigating under which circumstance the EC

produced these activities. In other words, examining how the budget was allocated and the number of staff and experts in the Commission for the years under scrutiny. Such an examination, alongside the activities of the EC, may provide how the budget and the staff of the Commission may affect the EC's outcomes and their quality. However, a better understanding can be achieved when comparing the whole activities and the capabilities of the EC to other CAs, which will be done later in the thesis.

3-4-1: Number of staff and specialists

The number of staff and specialists may affect, at least in theory, the quality of decision-making and the duration of investigations. However, one should bear in mind that the procedures and legislations might affect the duration of investigations; also, it depends on the other activities concluded by the EC. In addition, the nature of the investigations concluded may affect the duration and it may affect the possibility of winning cases on appeal. Having said that, the increase in the number of staff and the number of experts in the EC may play a role in reducing duration of investigations and may increases the possibility of winning cases on appeal (bearing in mind the budget of the EC).

Table 15 below shows the overall number of staff, lawyers and economists in the EC from 2004 to 2009. It can be observed from table 15 that the number of staff and specialists (lawyers and economists) is increasing over the years. The increase in the number of staff is very rapid where it can be seen that the number of staff more than doubled between 2004 and 2009. It can also be seen the jump in the number of economists at the Commission, where in 2004 the number of economists was 54 and

in 2009 the number has risen up to 265. This may indicate that the EC is more willing to employ economic analysis in its work. In addition, the number of specialists may be as a response to the increase employment of the effects based approach in the Commission's work.

Year	Number of staff	Lawyers	Economists	PhDs in Economics
2004	272	116	54	
2005	382	156	92	13
2006	593	243	207	21
2007	633	248	221	17
2008	700	319	245	19
2009	757	340	265	20

Table 15: Number of staff and specialists at the EC (2004-2009)

3-4-2: Budget of the EC

The enforcement of the law and recruiting experts is not a cheap process, therefore, CAs need to priorities its work in order to focus on most harmful violations. It can be noted from table 16 below that up to 2006 the budget of the EC was increasing from year to year; also, the budget allocated to enforcement was increasing. In these years, the amount of the budget allocated to enforcement was always over 30% of the overall budget. However, in 2007 the overall budget decreased dramatically which also affected the amount of budget allocated to enforcement where the Commission allocated only 12.1% from its overall budget to enforcement. In 2008, the overall budget of the EC has increased; despite this, the Commission reduced further the budget allocated to enforcement to 12%. In 2009 the overall budget of the Commission increase by more € 10 million from 2008, however the Commission allocated 14.2% to enforcement.

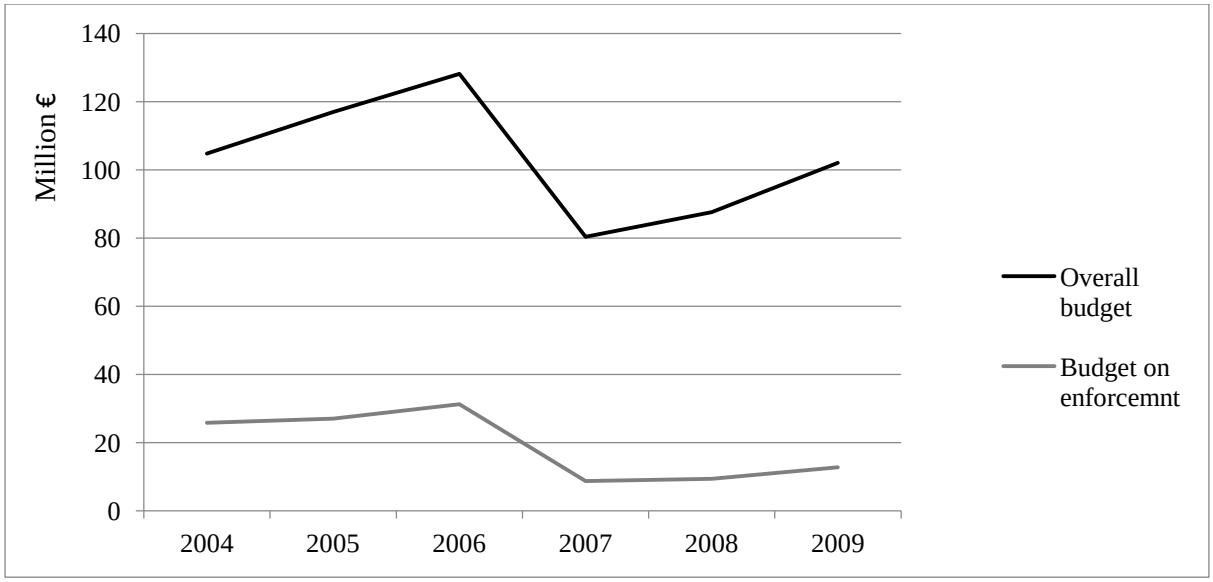
By looking at the number of staff and the budget in each year, it is not surprising that the percentage allocated to enforcement changed substantially pre 2006 and post 2006 because the number of staff and specialists has increased dramatically over the years and the budget of the Commission decreased after the year 2006. Thus, the Commission was allocating less of its budget to enforcement.

Year	Overall budget (€ million)	Budget on enforcement (€ million) percentage (%)
2004	79	25.8 (32.6 %)
2005	90	27 (30 %)
2006	97	31.2 (32.1 %)
2007	71.7	8.7 (12.1 %)
2008	78.2	9.4 (12 %)
2009	89.4	12.7 (14.2 %)

Table 16: The overall budget and the budget on enforcement by the EC (2004-2009)

From graph 3 below it can be seen that whether the budget is increasing or decreasing the budget allocated to enforcement is decreasing (as percentage) and the amount spent on salaries and other issues in the Commission are taking most of the overall budget. Hence, the increase in the number of staff and the number of specialists at the Commission may be was on the expense of enforcement activities. Also it can be seen from graph 3 the gap between the black line (overall enforcement) and the gray line represents the amount of the budget spent on salaries and other issues other than budget on enforcement. Where the area below the grey line represents the amount spent on enforcement.[97]

[97] This amount may include not only antitrust enforcement (Article 101 and 102) but other enforcement issues such state aid and merger control.



Graph 3: budget of the EC and the amount allocated to enforcement

3-4-3: Analysis and observations

Duration of investigations vs. Capabilities of the EC

It is worth examining if the capabilities of the EC have an effect on the duration of investigations. As it has been explained earlier, over the years there has been an increase in the number of staff and specialists within the EC. Thus, it will be examined if the increase/ decrease in the number of staff and budget affected the duration of investigation. This will be done by calculating the average duration for each year examined and compare it with the budget and the number of staff in each year. As it can be seen from table 17 below, that the average duration of investigations does not correspond with the increase/ decrease with the budget and it does not correspond with the increase number of staff and the number of specialists. However, this does not seem to be a correct measure of the effects of the increase or the decrease of the capabilities of the Commission. Since, the average duration of investigations for infringements is around 51 months and the years scrutinised in this

thesis is the year of conclusion of decisions; therefore, it is difficult to find out if the capabilities of the EC affects the duration of investigation or even the number of cases. Even if the year of initiation was employed it is difficult to know the impact of the capabilities on investigations from an outsider because the investigation usually over 36 months and it would difficult to assess whether the capabilities of EC affect duration of investigations, because the capabilities change from year to another.

Year	Number of staff	Lawyers	Economists	PhDs in ECO	Overall budget (€ million)	Average duration (months)
2004	272	116	54		79	28.7
2005	382	156	92	13	90	59.3
2006	593	243	207	21	97	56.9
2007	633	248	221	17	71.7	55.1
2008	700	319	245	19	78.2	55.1
2009	757	340	265	20	89.4	51

Table 17: Average duration of investigation and the Capabilities of the EC

3-5: Surrounding circumstances and facts about the EC or the EU

This section aims to provide information that could further help in understanding how competition law had been applied in the period under examination (May 2004-December 2012). Thus, this section presents and discusses studies that attempted to evaluate or assess (directly, indirectly or studies that could be considered as assessment studies) enforcement of competition law in Europe. This section also sheds light on some issues or events that may affect or may affected public enforcement of competition law.

To the author's knowledge, there are no studies that examine the Commission's performance directly, or the EC as an institution, or studies that examine the

application of antitrust rules directly. There have been studies that examine the Commission success rate on appeal; studies that examine a particular policy or the application of certain legislation and how the Commission enforced these rules, or the assessment of guidelines that regulates the application of antitrust rules. However, none of the studies presented below has dealt with public enforcement of competition law for the period under examination in this chapter.

There was a statistical study was conducted by Carree et al. that analysed the Commission decisions between 1957 and 2004.[98] The authors provide information about the number of cases, number of parties, type of decision, investigations duration, fine imposed and other related issues. The study linked the statistics to changes in legislation and other events that occurred for the period of the study. Therefore, this study can be considered (as stated by the authors) as a historical study that provides information about cases concluded by the Commission between 1957 and 2004.[99] Also, this study did not provide policy recommendations or any sort of suggestions for policy makers.[100]

There have been some studies that attempted to assess certain regulation, guidelines, notices or policies that the Commission uses when applying competition law.[101] For instance, there are some studies that examine the application of the fining or leniency related legislations and how this changed the way in which the Commission is dealing with cases, using data extracted from the Commission's decisions. These types of

[98] Martin Carree, Andrea Gunster and Maarten Pieter Schinkel, 'European Antitrust Policy 1957-2004: an analysis of Commission decisions' ACLE Working Paper 2008-06.
[99] Martin Carree, Andrea Gunster and Maarten Pieter Schinkel, 'European Antitrust Policy 1957-2004: an analysis of Commission decisions' ACLE Working Paper 2008-06. P.4.
[100] Martin Carree, Andrea Gunster and Maarten Pieter Schinkel, 'European Antitrust Policy 1957-2004: an analysis of Commission decisions' ACLE Working Paper 2008-06. P.4.
[101] The pros and cons of these studies have been examined, earlier, in chapter 2.

studies usually conclude with observations of whether these legislations have brought improvements or if it has achieved its goals.

For example, Stephan[102] examines the 1996 European leniency notice[103] empirically.[104] He examines horizontal cartel cases in Europe which have been opened as a result of the 1996 leniency notice. Stephan finds that the leniency notice was of limited success because it did not help in uncovering active cartels but failed cartels. This mainly because around three quarters of the examined cartels were subject to prior or simultaneous investigations in the US; and most of the cartels were in the chemicals industry (67%) where many of the cartels were connected to one another.[105]

Brenner,[106] however, has a positive view on the 1996 leniency notice. Brenner examined a sample of 61 cartel cases investigated and prosecuted by the European Commission between 1990 and 2003. He compares cartels that were detected after leniency adoption with cartels detected before the leniency notice came into force. He found that under the 1996 leniency notice investigation and prosecution becomes faster by about 1.5 years. Furthermore, he finds evidence indicating that the program provides incentives to reveal information on criminal activities in the sense that agencies are better informed about the cartel conduct than they would be absent the program.

---

[102] Andreas Stephan 'An Empirical Assessment of the 1996 Leniency Notice' CCP Working Paper No. 05-10

[103] European Commission, 1996. Commission notice on the non-imposition or reduction of fines in cartel cases. Official Journal of the European Commission C 207.

[104] In 2006, the European Commission's 1996 Leniency notice was replaced with the Commission notice on immunity from fines and reduction of fines in cartel cases, Official Journal C 298, 8.12.2006, p. 17.

[105] Andreas Stephan 'An Empirical Assessment of the 1996 Leniency Notice' CCP Working Paper No. 05-10, p 15.

[106] Steffen Brenner, 'An empirical study of the European corporate leniency program' (2009) 27 International Journal of Industrial Organization 639.

The concerns with these studies are self evident as it can be seen from the examples given above; where two studies assess the same piece of legislation but ended up with very different views from the authors. This is mainly because of the intention and the purpose of each study, and what each author is aiming to achieve. However, from a purely assessment perspective, this might be confusing, because such studies do not give an overall assessment of the application of competition law by the CA. This as well can be a dilemma for policy makers when they want to reform a certain policy. If an overall assessment of the law was applied to the CA, then a judgment on what to reform or keep would be easier.

Similar studies have conducted in other areas as well. Geradin and Henry[107] consider the fining policy of the European Commission. The authors reviewed all the Commission decisions and CFI judgments dealing with fines, which have been adopted since the publication of the 1998 fining Guidelines.[108][109] The main findings of this work are: (1) most of the infringement are treated as severe infringement, including cartels and non-cartel cases; (2) the Commission seems to be looking at the effects of the conduct and it did not rely on legal standards when setting the amount of fine;(3) the CFI never increased the fine imposed by the Commission and its has been reluctant principles behind the Commission's fining decision, it only reviewed whether the fining guidelines were correctly applied or not.[110]

[107] Geradin, D. and D. Henry, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts Judgments' (2005) 1(2) European Competition Journal 401.

[108] European Commission, 1998. Guidelines on the method of setting fines. Official Journal of the European Commission C 9.

[109] In 2006, the European Commission replaced the 1998 Fining guidelines with the Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003.
Official Journal C 210, 1.09.2006.

[110] Geradin, D. and D. Henry, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts Judgments' (2005) 1(2) European Competition Journal 401. Working paper version p. 58.

Another form of assessing the EC performance is a standard that has been used in the literature, namely, success rate on appeal. Basically, such studies count the number of appealed decisions and the outcomes of the cases for a given period of time. Afterwards, a calculation of the overall success rate on appeal will be conducted, and on the basis of this, the study decides whether the CA under examination has a good success rate on appeal or not. Harding and Gibbs,[111] employed this standard for cartel cases concluded by the EC between 1995 and 2004. The authors calculate the number of appellants for the cases that have been appealed and then categorise the outcome into three categories:[112] (1) successful: this means that the appellants have the Commission's decision annulled in favour of them. (2) Partly successful: the fine has been reduced to the appellants by the Court. (3) Unsuccessful: the Court upheld the Commission's decisions entirely. In the authors sample there were 16 cartels in which there were 217 companies participated in these cartels. Out of the 217 companies, 153 appealed to the CFI and 47 appealed to the ECJ. The authors then considered that there are 200 companies appealed (the total appeals to the CFI and the ECJ). According the categorisation employed by the authors, there were:[113] 12 successful appeals (i.e. the Commission decision was annulled with regard to 12 companies); 122 partly successful (i.e. the fines have been reduced to 122 companies); and 66 unsuccessful appeals (i.e. the Courts dismissed the appeals of 66 companies and confirming the Commission decision).

[111] Christopher Harding and Alun Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995-2004' (2005) 30 European Law Review 349.
[112] Christopher Harding and Alun Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995-2004' (2005) 30 European Law Review 349, 365.
[113] Christopher Harding and Alun Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995-2004' (2005) 30 European Law Review 349, 365.

This type of study is an important tool to be considered when examining the performance of CAs; however, success on appeal is only a partial assessment of the CA performance as one need to look at other issues that may affect its performance and indeed its success rate on appeal. [114] This is mainly because[115] that not all decisions are appealed and, indeed, it does not consider other activities and the capabilities of the CA in question.

This chapter conducted a similar test but for all cases that have been appealed from May 2004 to December 2012. It has been found that the Commission never lost a case entirely on appeal and that there were no huge defeats in terms of reductions in fines.[116]

Other studies have been conducted by externals bodies but cannot be considered as direct assessment studies of the EC. In 2005, the OECD produced a study about competition law and policy in the EU.[117] One of the main messages of the study is to provide some information about Regulation 1/2003 and its possible implications and, the role of Member States competition authorities and courts after regulation 1/2003. This study presents issues related to the history and the policy goals of competition policy in the EU. One of the issues that have been highlighted in the study (and related to the subject matter of this chapter) is the lack of individual sanctions against cartelists which may undermine the effectiveness of cartel enforcements. This study notes that if it is not feasible to implement sanctions against individuals under

[114] This issue is discussed in greater detail in the Chapter 2.
[115] as it has been shown in earlier in this chapter and the previous chapter.
[116] See sub- section 3-2-3 "success rate on appeal".
[117] Michae Wise, 'Competition Law and Policy in the European Union (2005)' (2007) 9 (1) OECD Journal of Competition Law and Policy 7.

community law, then the Commission could support individual sanctions under national laws of Member States.[118]

Some commentators have contributed to the discussion of public enforcement of competition law by examining regulation 1/2003. In 2008, a community report was prepared to the FIDE Congress 2008 about the first experiences with Regulation 1/2003.[119] The report examined the new procedures brought by regulation 1/2003 and its effects on the Commission's caseload, i.e. it did not examine the Commission performance. The report also offered views on issues related to investigation powers, co-operation between Member States CAs and the role of national courts.

The report presents some comparisons on the caseload of the Commission pre and post regulation 1/2003. The report notes that regulation 1/2003 substantially reduced the Commission workload, in terms of cases.[120] The report also notes that the nature of cases is very different compared to pre regulation 1/2003.[121] The report observed that there has been an instant positive impact of regulation 1/2003 (in the area of cartels)[122][123] which allows the Commission to focus on serious infringements of competition law.[124] [125]

---

[118] Michae Wise, 'Competition Law and Policy in the European Union (2005)' (2007) 9 (1) OECD Journal of Competition Law and Policy 7, 9.

[119] Eric Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008 available at http://ssrn.com/abstract=1139776.

[120] Eric Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008 available at http://ssrn.com/abstract=1139776, See pages 5-10.

[121] Eric Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008 available at http://ssrn.com/abstract=1139776, See p. 7.

[122] According to the author that there is no positive impact in other area of infringement other than cartels. Eric Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008 available at http://ssrn.com/abstract=1139776, P.12.

[123] This point has been spotted as well by the OECD report, discussed earlier. See, Michae Wise, 'Competition Law and Policy in the European Union (2005)' (2007) 9 (1) OECD Journal of Competition Law and Policy 7, 9. The report stated "The report notes as positive developments both

In addition, the report makes comparisons about the duration of investigations pre and post regulation 1/2003, where the author found that duration of investigations pre the enforcement of 1/2003 was shorter compared to post 1/2003 came into force. However, the author suggested that the time of undertaking such calculation is too early (the last case which the author's looked at was in 2007).[126] Nonetheless, as it has been found earlier in this chapter that average duration for infringement decisions was 51.9 months and for commitments and non-infringements was 30.7 months therefore, it can be said that most of the cases included were opened under reg17 and not Regulation 1/2003.

Therefore, it can be said that the report has positive views about the impact of regulation 1/2003 and predicted that the fruits of Regulation 1/2003 are still to come (at the time when the report was produced).

A more recent study by John Temple Lang about Regulation 1/2003 where he has very critical views about the regulation and provided reasons why some procedures regarding the decision making have to be reformed.[127] However, Temple Lang's main points were only made with respect to procedures that govern decision making within the European Commission. Temple Lang highlighted two main criticisms of the

---

the increase in DG Competition resources dedicated to the cartel enforcement and the increase in enforcement activity."

[124] The author used the increasing number of cartel cases over the years (1986- 2007) as a sign to show that the Commission is more able to focus on the most serious infringements of competition law. Eric Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008 available at http://ssrn.com/abstract=1139776, See P. 7-12.

[125] See also, the report notes "Regulation 1/2003 has freed up considerable resources for the prosecution of the most serious antitrust infringements. This has borne some fruits, in particular in the area of cartels. But there is more potential to be unleashed" Eric Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008 available at http://ssrn.com/abstract=1139776, p.134.

[126] Eric Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008 available at http://ssrn.com/abstract=1139776, p. 14-17.

[127] John Temple Lang, 'Three Possibilities for Reform of the Procedure of The European Commission in Competition Cases Under Regulation 1/2003' available at: http://ssrn.com/abstract=1996510.

current procedures under Regulation 1/2003. First, the decisions of Commission are taken by Commissioners which none of them has any special knowledge of competition law or competition economics; importantly, none of the Commissioners where involved in the earlier stages of building the decision.[128] Second, the drafting of the decision, decisions are drafted by the same officials who wrote the statement of objections, which makes it difficult to exclude the possibility that decisions lack objectivity, impartiality and possibility of biased assessment of evidence.[129]

Furthermore, Temple Lang pointed to other issues within the current procedures; such as, the high levels of fines imposed by the Commission[130] and, that there is a real possibility that the procedures may be found contrary to the European Convention on Human Rights by European Court of Human Rights.[131]

Hence, he proposed three possible ways to reform the current system. [132] First, the reform that would not require amendments to European treaties, is to give the General Court the powers to adopt prohibition decisions and to impose fines in competition cases, instead of the Commission; second, setting up a decision making body within the Commission; third, setting up a European competition authority. Temple Lang is in favour of the first possibility for reform as amendments to the treaty is not required.[133] He also insisted to the urgency of adopting one of the possibilities to

[128] John Temple Lang, 'Three Possibilities for Reform of the Procedure of The European Commission in Competition Cases Under Regulation 1/2003' available at: http://ssrn.com/abstract=1996510 , p.194.
[129] John Temple Lang, 'Three Possibilities for Reform of the Procedure of The European Commission in Competition Cases Under Regulation 1/2003' available at: http://ssrn.com/abstract=1996510 , p.194.
[130] John Temple Lang, 'Three Possibilities for Reform of the Procedure of The European Commission in Competition Cases Under Regulation 1/2003' available at: http://ssrn.com/abstract=1996510, p.203.
[131] John Temple Lang, 'Three Possibilities for Reform of the Procedure of The European Commission in Competition Cases Under Regulation 1/2003' available at: http://ssrn.com/abstract=1996510, p.230.
[132] John Temple Lang, 'Three Possibilities for Reform of the Procedure of The European Commission in Competition Cases Under Regulation 1/2003' available at: http://ssrn.com/abstract=1996510, p. 195.
[133] John Temple Lang, 'Three Possibilities for Reform of the Procedure of The European Commission in Competition Cases Under Regulation 1/2003' available at: http://ssrn.com/abstract=1996510, p.228.

reform suggested, as the Commission should not risk its achievements where its procedures may be contrary to the European Convention on Human Rights.

There has been some indirect assessment for the EC by studies carried out by KPMG when it has assessed competition policy in the UK. A ranking has been given to the EC but without explaining why the ranking has been given; because the EU was not the main concern of these studies. These studies were conducted by KPMG in 2004[134] and 2007.[135]

As it has been mentioned on the chapter about public enforcement the UK. The peer reviews conducted by KPMG were mainly to review competition policy in the UK. The peer reviews were based on surveys distributed to competition experts (competition authorities officials, lawyers, economists and from business) across the world, mainly from Europe. In the 2004 and the 2007 reviews, Europe was ranked fourth for its non-merger regime behind the US, Germany and the UK. However, because these peer reviews are mainly about the UK no explanations of why the EU has got this ranking been given.

3-6: Conclusion

This chapter has provided a detailed overview of public enforcement of competition law as applied by the EC and it has analysed the cases that has been appealed to the Community Courts. It has also highlighted the non-enforcement activities and the capabilities of the EC between May 2004 and December 2012. This was followed

[134] KPMG (2004), 'Peer Review of the UK Competition Policy Regime', a report to the Department of Trade and Industry.
[135] KPMG (2007), 'Peer Review of Competition Policy', a report to the Department of Trade and Industry.

with a discussion of studies that examined issues related to public enforcement of competition law in Europe.

During the empirical analysis of the cases concluded by the EC many obeservitions, which were gleaned from the discussion, were highlighted and possible interpretations and implications were offered in the discussion. The following are the main observations gleaned from the empirical analysis:

- It appears that the Commission is giving more attention to Article 101 cases, in particular cartel cases; the reason behind this is the role that leniency applications played in uncovering illegal cartels.

- The majority of Article 102 TFEU cases were concluded as commitments decisions, there were only six infringement decisions.

- The EC success rate on appeal is very high, where the Commission did not lose any appealed case entirely on appeal; in addition, the reductions in fines on appeal does not seem to be significant.

- With regard to the sources of investigations of the Commission, it appeared that whenever the Commission opened an investigation on its own initiative, an infringement or commitment decision will be issued and the Commission will conclude its investigation quicker than other sources of investigations. None of the non-infringement decisions were opened based on the Commission's own initiative.

- Regarding the capabilities of the EC: the Commission number of staff and specialists is increasing over the years even though the budget was

decreasing; as a result the amount allocated on enforcement has decreased.

- Also from the analysis, it seems that the non-enforcement activities of the EC contributed indirectly to increase the enforcement activities of the EC. For example, a sector inquiry has led to an infringement decision. Also, the guidelines on leniency and fines seem to have affected the number of cases and the amount of fines imposed in its cases, respectively.

- Leniency applications proved to be an effective tool to uncover cartels but do not necessarily speed up the duration of investigations. Own initiative cases were concluded much quicker than cases where leniency application was the source of investigation.

- The high number of cartel cases may be back to the international nature of cartel cases, where the EC has to take the leading role if the infringement has a European or international dimension. This may explain why there is very high number of cartel cases compared to other form of cases. Other possible explanation, that the Commission is focusing on cartel cases more than other types of cases.

Appendix

Case	Year	Duration of investigation (in months)	Type	Fine	Source of investigation	Average duration of investigations (yearly)
Choline Chloride	2004	19	101	66,430,000	Leniency	28.7
Brasseries Kronenbourg	2004	8	101	2,500,000	Own initiative	
Souris-Topps	2004	34	101	1,590,000	complaint	
Plumbing tubes	2004	45	101	222,291,100	Leniency	
Clearstream	2004	40	102	0	Own initiative	
Raw tobacco Spain	2004	36	101	20,000,000	Leniency	
PO/Needles	2004	35	101	60,000,000	Own initiative	
Belgian Architects'	2004	20	101	100,000	Own initiative	
GDF	2004	22	101	0	Not known	
SEP and others	2005	73	101	49,500,000	complaint	59.3
AstraZeneca	2005	73	102	60,000,000	Complaint	
MCAA	2005	73	101	216,910,000	Leniency	
Industrial bags	2005	48	101	290,000,000	Leniency	
Raw tobacco Italy	2005	46	101	56,000,000	Own initiative	
PO/Thread	2005	46	101	43,497,000	Own initiative	
Prokent/Tomra	2006	60	102	24,000,000	complaint	56.9
Fittings	2006	66	101	314,760,000	Leniency	
Bitumen (NL)	2006	47	101	266,717,000	Leniency	
Hydrogen Peroxide	2006	38	101	388,128,000	Leniency	
BR/ESBR	2006	44	101	519,000,000	Leniency	
Methacrylates	2006	38	101	344,562,500	Leniency	
MasterCard	2007	61	101	0	Own initiative	55.1
Dutch beer market	2007	85	101	273,783,000	Own initiative	
Morgan Stanley/Visa International	2007	84	101	10,200,000	complaint	
Chloroprene Rubber	2007	57	101	247,635,000	Leniency	
professional videotape producers	2007	67	101	74,790,000	Own initiative	
Bitumen Spain	2007	60	101	183,651,000	Leniency	
Wanadoo España	2007	48	102	151,875,000	complaint	

Elevators and Escalators	2007	37	101	992,000,000	Leniency	
Gas Insulated Switchgear	2007	34	101	750,712,500	Leniency	
Flat Glass	2007	33	101	486,900,000	ECN	
PO/Hard Haberdashery: Fasteners	2007	70	101	303,644,000	Own initiative	
International removal services	2008	54	101	32,700,000	Own initiative	55.1
CB	2008	67	101	0	notified agreement to the Commission	
Nitrile Butadiene	2008	60	101	34,230,000	Leniency	
Sodium Chlorate	2008	63	101	79,070,000	Leniency	
CISAC	2008	91	101	0	Complaint	
Car glass	2008	45	101	1,383,896,000	Own initiative	
ALUMINIUM FLUORIDE	2008	39	101	4,970,000	Leniency	
Candle Waxes	2008	42	101	676,011,400	Leniency	
Bananas	2008	38	101	60,300,000	Leniency	
Intel	2009	60	102	1,060,000,000	complaint	51
Heat Stabilisers	2009	81	101	173,860,400	Leniency	
Power Transformers	2009	65	101	67,644,000	Leniency	
Calcium Carbide	2009	30	101	61,120,000	Leniency	
E.ON/GDF	2009	38	101	1,106,000,000		
Marine Hoses	2009	32	101	131,510,000	Leniency	
DRAMs	2010	96	101	331,000,000	Leniency	71.6
Bathroom fittings & fixtures	2010	71	101	622,250,783	Leniency	
Pre-stressing steel	2010	96	101	269,870,750	leniency	
Animal Feed Phosphates	2010	80	101	175,647,000	Leniency	
Airfreight	2010		101	799,445,000	Leniency	
LCD	2010	49	101	648,925,000	Leniency	
Ordre National des Pharmaciens en France	2010	38	101	5,000,000	complaint	
Consumer detergents	2011	33	101	315,200,000	Leniency	41
Telekomunikacja Polska	2011	26	102	127,554,194	Own initiative	
Exotic fruit	2011	78	101	8,919,000	Leniency	

CRT glass bulbs	2011	34	101	128,736,000	Leniency	
Refrigeration compressors	2011	34	101	161,198,000	Leniency	
Mountings for windows and window-doors	2012	56	101	85,876,000	Leniency	49
Freight Forwarding	2012		101	169,000,000	Leniency	
Water management products	2012	42	101	13,661,000	Leniency	
TV and computer monitor tubes	2012		101	1,470,515,000	Leniency	

Table 1: all infringement decisions concluded by the EC (May 2004 - December 2012)

Case	Year of conclusion	type	Duration of investigation (months)	Source of investigation
Scandlines Sverige	2004	No infringement of Article 102	84	Complaint
Case COMP/37.974	2004	No infringement of Article 102		Complaint
COMP/C-2/37.214 German Bundesliga	2005	101 commitments	16	Notified agreement
Airport users/AIA	2005	No infringement of Article 102		Complaint
Coca-Cola	2005	102 commitments	9	Complaint
FA Premier League	2006	101 commitments	57	Own initiative
Repsol CPP	2006	101 commitments	22	Notified agreement
Distrigaz	2007	102 commitments	44	
DaimlerChrysler	2007	101 commitments	10	Complaint
Toyota	2007	101 commitments	10	Complaint
Fiat	2007	101 commitments	10	Complaint
Opel	2007	101 commitments	10	Complaint
German Electricity Wholesale Market	2008	102 commitments	23	
Rambus	2009	102 commitments	29	Complaint
GDF	2009	102 commitments	43	
EFIM	2009	101 &102	39	
RWE Gas Foreclosure	2009	102 commitments	34	Own initiative
Ship classification	2009	101 commitments	22	Own initiative
Microsoft	2009	102 commitments	24	Own initiative

Agence mondiale	2009	No infringement of Article 101 & 102	27	
Long-term contracts	2010	102 commitments	32	Own initiative
Swedish Interconnectors	2010	102 commitments	12	Complaint
E.ON Gas	2010	102 commitments	24	Complaint
BA/AA/IB	2010	101 commitments	15	
ENI	2010	102 commitments	41	Own initiative
Vivendi, Iliad / France Telecom	2010	No infringement of Article 102	16	Complaint
Visa MIF	2010	101 commitments		Own initiative
Omnis / Microsoft	2010	No infringement of Article 102	24	Complaint
Si.mobil / Mobitel	2011	No infringement of Article 102	18	
CEEES/AOP - REPSOL	2011	No infringement of Article 101/102		
BRV / FIA, certain Formula One engine manufacturers, FIM, Dorna, Honda	2011	No infringement of Article 101/102	23	
Standard and Poor's	2011	102 commitments	40	Complaint
Italian Association of Lehman Brothers' Bond Holders	2011	No infringement of Article 101	19	Complaint
IBM - Maintenance services	2011	102 commitments	17	Own initiative
Numericable - Luxembourg	2012	No infringement of Article 102	13	Complaint
SIEMENS/AREVA	2012	101 commitments	23	Complaint
Restrictions concerning ELT books	2012	No infringement of Article 101	33	Complaint
Ebooks	2012	101 commitments		

Table 2: All non-infringements and commitments decisions concluded by the EC (May 2004 - December 2012)

-Chapter 4- Public Enforcement of Competition law in the UK

(May 2004- December 2012)

4-1: Introduction

This chapter examines public enforcement of competition law in the UK as applied by the Office of Fair Trading (OFT). It will provide information about the cases that the OFT concluded, the capabilities of the OFT and reviews studies that assessed the OFT from May 2004[1] to December 2012. The aim of this chapter is to provide a platform for the comparative analysis that will be undertaken between the three jurisdictions (UK, France and the EU) after providing a review for each jurisdiction separately, where the criteria proposed in the previous chapter will be applied for the three jurisdictions in a single chapter.

Public enforcement of competition law in the UK was undertaken by the OFT (for the period examined), the OFT is the main body that can enforce the competition provisions related to antitrust enforcement in the UK.[2] Public enforcement, in the context of this chapter, means the application of Chapter I[3] and II[4] of the UK

[1] Since 1 May 2004, when Council Regulation (EC) No 1/2003 of 16 December 2002, the OFT, with the other European competition authorities, has had the power to apply and enforce Articles 101 and 102 of the TFEU where European competition authorities are required to apply European rules when trade between member states is affected.

[2] Other regulatory bodies may enforce competition in the UK in their industries.

[3] Chapter I reads "(1)Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—
(a)may affect trade within the United Kingdom, and
(b)have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
are prohibited unless they are exempt in accordance with the provisions of this Part.
(2)Subsection (1) applies, in particular, to agreements, decisions or practices which—
(a)directly or indirectly fix purchase or selling prices or any other trading conditions;
(b)limit or control production, markets, technical development or investment;
(c)share markets or sources of supply;

Competition Act and the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). However, the OFT monitor competition in the UK through non- enforcement activities, which has to be studied when considering the application of competition law; enforcement and non-enforcement activities will be studied in this chapter. It is also important when studying public enforcement of competition law to study if the OFT's enforcement activities (decisions) have been appealed or not, and if so what happened on appeal. In this context, it is worth highlighting that the OFT decisions could be appealed to the Competition Appeal Tribunal (CAT), which reviews the full decision, both in fact and in law. In subsequent stages of appeal, the courts only review points of law, i.e., procedural regularity and the application of the law to the assumed facts.

(d)apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e)make 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.
(3)Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.
(4)Any agreement or decision which is prohibited by subsection (1) is void.
(5)A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).
(6)Subsection (5) does not apply where the context otherwise requires.
(7)In this section "the United Kingdom" means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.
(8)The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter I prohibition".

[4] Chapter II read " (1)Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
(2)Conduct may, in particular, constitute such an abuse if it consists 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 the contracts.
(3)In this section—"dominant position" means a dominant position within the United Kingdom; and "the United Kingdom" means the United Kingdom or any part of it.
(4)The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter II prohibition".

It is important to note an important change that has been brought by the Enterprise and Regulatory Reform Bill (ERRB) which has created the Competition and Market Authority (CMA). The CMA is based on merger of the OFT and the CC. It has been created in April 2014. The possible implications of the creation of the CMA will be discussed below.

At the outset, it is important to highlight the source of the data and the way in which the data has been gathered. As it has been explained in the previous chapter, the data collected has been classified into three categories: outputs, capabilities and surrounding facts and circumstances. Whilst, each category differs from the other, the way in which the data collected differs and the source of it differs as well. The data related to outputs have been mostly collected from the cases or from the OFT's own publications. The capabilities of the OFT data have been collected from the Global Competition Review's publications, annual reports of the OFT and the OFT's website. While the last category, surrounding facts and circumstances, this data have been obtained from different recourses, such as: academic publications, international bodies' publications, governmental reports and the OFT's own publications.

Hence, this chapter aims to provide empirical information about public enforcement of competition law in the UK as declared by the OFT. More specifically, this chapter will provide information about the amount and the nature of public enforcement in the UK.

To quantify the amount and the nature of public enforcement in the UK, information regarding enforcement and non-enforcement activities have to be obtained. The following variables have been collected in order to quantify public enforcement: the number of investigations, the nature of investigations, outcomes of investigations, the

length of each investigation, sources of investigations, the amount of fines imposed and success rate on appeal. Those variables represent enforcement. For the non-enforcement activities, any publication that the OFT produced will be included in the discussion, such as; guidelines, market studies or any other form of studies. The inclusion of non-enforcement activities is important in order to explain how the OFT used its capabilities.

In addition, in order to assess public enforcement of competition law in the UK, information regarding the capabilities of the OFT is necessary in order to see what the OFT has produced in light of its capabilities. Capabilities in this context means: the financial abilities and the human capital (in terms of numbers and experts) of the OFT. It is also important to examine what certain events occurred within the period under examination, as this may affect the performance of the OFT and its efficiency. As if there were structural or procedural changes this could affect the OFT performance.

At the outset, it important to highlight that this chapter will not provide answers, solutions or praise what may be thought problems, weaknesses or strengths of the OFT; instead such issues will be highlighted in order to be dealt with in the "comparative chapter" later after examining the three jurisdictions. However, at the end of each chapter analysis about recent changes and key procedural issues that may affect competition enforcement will be provided, based on the empirical findings gleaned from reviewing the OFT for the period under examination.

4-2: Outcomes of the OFT

This section will provide information about the OFT enforcement and non-enforcement activities. Enforcement activities mean cases produced by the OFT

according to Chapter I & II of the Competition Act and Articles 101/102 TFEU. This includes infringement, non-infringement and commitment cases.[5] Non-enforcement activities mean any activity that is related to competition enforcement or may affect competition enforcement; in other words, any activity that costs the OFT or consumes its time are considered as non- enforcement activity. Examples of non- enforcement activities are: guidelines, studies conducted by the OFT or on its behalf, and market studies.

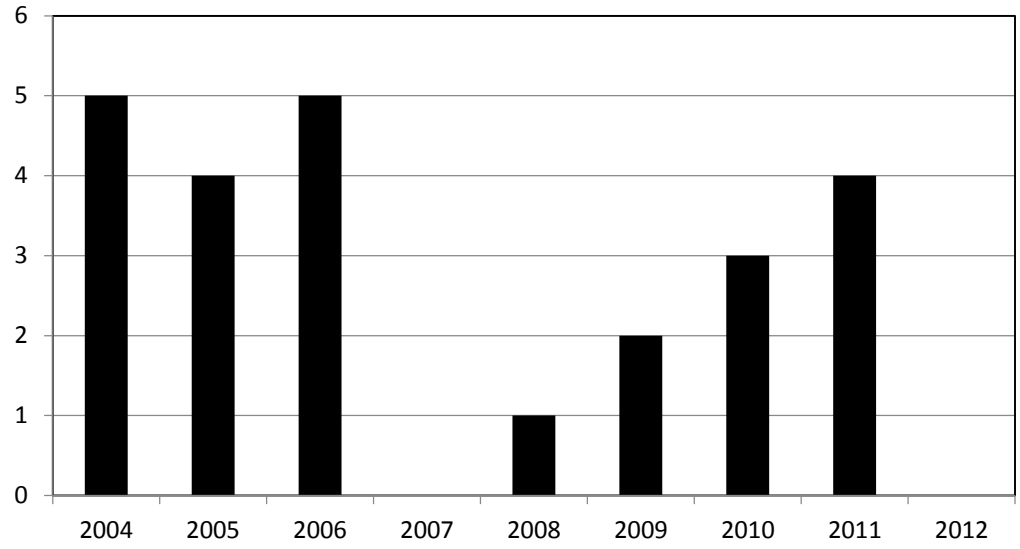
4-2-1: Enforcement activities

4-2-1-1: Number, nature, source and dimension of cases

Between May 2004 to December 2012 the OFT has concluded 23 cases, where alleged infringements of Chapter I and/or II of the Competition Act have been investigated. The majority of those cases have a UK dimension, i.e. European Competition rules were not applicable; there were four cases which have a European dimension.[6] From the 23 cases there were 18 cases concluded as infringements, four cases were declared as non- infringements and one commitment decision. There were eight cases dealt with under Chapter II of the Act; five were non-infringements decisions, one commitment decision and two infringement decisions. The other 15 cases were Chapter I cases, all of them were declared as infringement decisions. In this respect, it is worth mentioning the number of cases concluded in each year of the period under examination (May 2004- December 2012). In 2004, the OFT concluded five cases; in 2005, it concluded four cases; in 2006, five cases were concluded; there were no cases concluded in 2007; 2008 sees one case concluded; in 2009, two cases;

[5] Table 1 in the Appendix presents all cases concluded by the OFT (May 2004- December 2012) and it shows the type, the fine and the source of the investigation for each case.
[6] MasterCard UK Members(Chapter I and Article 101), Flybe Limited(Chapter II and Article 102), loan-services (Royal Bank of Scotland (RBS) and Barclays) (Chapter I and Article 101) and Reckitt Benckiser (Chapter II and Article 102).

in 2010 the OFT concluded two cases; in 2011 four cases were concluded; and in 2012 no cases were concluded. Graph 1 below shows the number of cases concluded in each year. Table 1 below shows the number of cases according to the conclusion reached by the OFT.



Graph 1: Number of cases concluded by the OFT (May 2004-December 2012)

Year	Commitment CH II	Infringement CH I	Infringement CH I And 101	Infringement CH II	Infringement CH II & 102	No Infringement of CH II	No Infringement of CH II & 102
2004	0	2	0	0	0	3	0
2005	0	3	1	0	0	0	0
2006	1	4	0	0	0	0	0
2008	0	0	0	1	0	0	0
2009	0	2	0	0	0	0	0
2010	0	1	0	0	0	0	1
2011	0	1	1	0	1	1	0

Table 1: number of cases by the decision reached

Turning to the sources of the investigations and on what basis the OFT started its investigation. The sources of the investigations vary. In nine cases the OFT opened investigations based on complaints. Leniency applications were the source of an

investigation in five occasions. In three cases, the OFT knew about infringements of competition law from information obtained from a previously investigated case. The OFT started two formal investigations based on information from media report. There were two cases notified to the OFT under the old notification regime. In two cases the source of the investigations were based on the OFT's own initiative, i.e. the OFT's investigation was the main source for opening the investigation. Table 2 below shows the sources of investigations and how many times the OFT relies on each of them to open an investigation.

Source of investigations	Count
Complaint	9
Information from another case	3
Leniency	5
Media	2
Notified	2
Own initiative	2

Table 2: Sources of investigations for the concluded cases by the OFT (May 2004- December 2012)

The sources of Chapter II cases were complaints from actual or potential competitors in the same market and in one case from the media.[7] Hence, it appears that in Chapter II cases the OFT do not act on its own initiative but based on complaints (information) received from players in the market. There is no clear explanation of why the OFT did not take the initiative in enforcing Chapter II cases other than it is not a priority of the OFT.

[7] See; First Edinburgh, Harwood Park Crematorium, TM Property Services Limited, Associated Newspapers and Cardiff Bus cases. In Reckitt Benckiser (2011) the OFT knew about this report from a report by BBC Newsnight.

However, in Chapter I cases there were more diversity with the sources of investigations. Two cases were opened as a result of complaints.[8] There were five cases where leniency was the main source for opening investigations in the first place.[9] There were two cases under the old notification regime, where the OFT knew about the cases because the parties notified their agreements to check the legality of them.[10] In a single case, the OFT knew about a Chapter I infringement from the press.[11] There were four investigations[12] linked to each other, where the OFT after acting on its own initiative it discovered, from subsequent leniency applications or the OFT's own investigation, that there are other infringements in somehow different but related markets, which resulted in four investigations.[13] There were two cases where the OFT acted on its own initiative and subsequently some parties co-operated with the OFT investigation and received leniency.[14] Table 3 below the nature of the decision and what was the source of the investigation.

[8] Aluminium spacer bars and Bid-rigging in the construction industry.
[9] Stock check pads and Construction Recruitment Forum. There were other cases where leniency was applied for but this was after the OFT opened the investigation.
[10] Attheraces and MasterCard UK Members.
[11] Schools Exchange of information
[12] felt and single ply, Mastic Asphalt Roof, Felt and single ply flat-roofing and Flat roof and car park
[13] either the product market or the geographic market
[14] UOP Limited and felt and single ply (this is the case where the it has resulted in another three cases)

	Commitments CH II	Infringement of CH I	Infringement of CH I & 101	Infringement CH II	Infringement CH II & 102	No Infringement CH II or Article 102
Complaint	1	2	0	1	0	5
Information from another case	0	3	0	0	0	0
Leniency	0	4	1	0	0	0
Media	0	1	0	0	1	0
Notified agreement	0	1	1	0	0	0
Own initiative	0	2	0	0	0	0

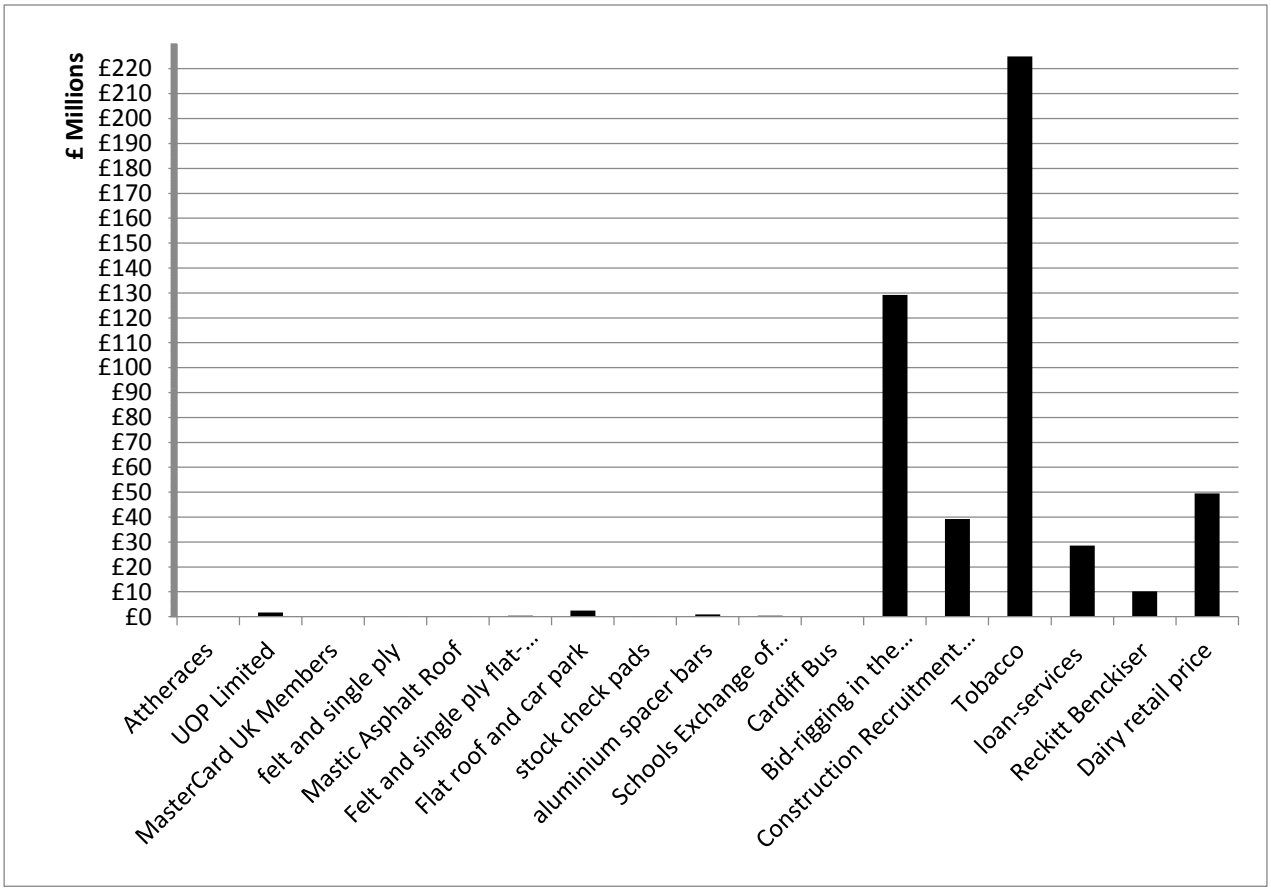
Table 3: sources of investigations and the nature of investigations

4-2-1-2: Fines[15] and duration of investigations:

Alongside the five non-infringement cases and the commitment decision, there were four out the 23 cases where the OFT declared an infringement of competition rules but did not impose any fines on the parties. This has been done for several reasons, either because of the legal requirements,[16] the insignificance of the infringement or because the infringement was not implemented.[17] The highest fine imposed was in the *Tobacco* case, where the OFT imposed a £225 million fine. The second highest fine was in the *bid-rigging in the construction industry* case where the OFT fined the parties involved around £129 million. In four cases the amount of the fine imposed where between £10 and £50 million.[18] In two cases, the fines were around £ 2

[15] It should be noted that the fine in some cases were reduced substantially on appeal. The matter of appeals and success rate on appeal will be discussed in the next section.
[16] Cardiff buses.
[17] MasterCard UK Members.
[18] Construction Recruitment Forum, loan-services (Royal Bank of Scotland (RBS) and Barclays), Reckitt Benckiser, and Dairy retail price.

million.[19] In five cases, the amount of the fine did not exceed £1 million.[20] Graph 2 below shows all infringement decisions and the amount of fine imposed in each case.



Graph 2: Amount of fine imposed by the OFT in each case.

When talking about the outputs of the OFT, it is important to take into account how long it took the OFT to produce these outputs (i.e. cases). To put it simply, this chapter will consider the duration of each investigation concluded by the OFT in the period under examination; it will then look at the specifics of each investigation in order to determine what could affect the length of the investigation.[21] The duration of the investigations concluded by the OFT ranges from 12 months to 95 months. The

[19] Flat roof and car park and UOP Limited.
[20] Aluminum spacer bars, stock check pads, Felt and single ply flat-roofing, Mastic Asphalt Roof and felt and single ply.
[21] This will be done in the "Comparative chapter" in order to have a better understanding of each jurisdiction including the UK (OFT).

average duration for all of the investigations conducted was around 40 months. At this stage it cannot be said whether the average is normal or abnormal; to determine this one has to look at other factors, such as budget and staff, and to compare this average to another CA with similar characteristics and bearing in mind the caseload.[22]

From the 23 cases there were 17 infringement cases. The OFT only imposed fines in 13 cases. In ten out of the 13 cases,[23] the investigation lasts around 40 months or more in certain cases; in the other three cases the investigations last less than 30 months.[24] It has to be mentioned in this respect that only in one Chapter II case the OFT has imposed fines.[25]

For non-infringement and commitment decisions, the duration of the investigations ranges from 12 to 40 months. In three cases the duration of the investigation was between 29 and 40 months. In two cases the investigation took 19 months. The OFT concluded the investigation within 12 months in the last case.[26] Graph 4 below shows the average duration of investigations for each case; it has to be noted that there were no cases in 2007 and 2012.

It is surprising to see (Graph 4 below) that the longest investigations were in cases where there were leniency applications; because, at least in theory, the OFT do not need to do so much investigations compared to the case of own initiative

[22] This will be done later on in the thesis, where the three jurisdictions will be assessed against each other.
[23] felt and single ply (43 months), Mastic Asphalt Roof(40 months), Felt and single ply flat-roofing (44 months), Flat roof and car park (35 months) aluminum spacer bars (50 months) Bid-rigging in the construction (58 months) and Construction Recruitment Forum (40 months), Tobacco (85 months), loan-services (Royal Bank of Scotland (RBS) and Barclays) (34 months) and Dairy retail price (95 months).
[24] In UOP Limited, the investigation lasts 24 months; in stock check pads the investigation last 25 months; and in Reckitt Benckiser length of the investigations was 29 months.
[25] There were two cases where CH II has been found to be infringed. The OFT imposed around £10 million in the Reckitt Benckiser case. The other case, Cardiff Buses, the OFT did not impose any fine.
[26] It should be noted in this respect, that the alleged infringement in all of the non-infringement decisions and the commitment decision was abuse of dominance (i.e. Chapter II).

investigations. This was in the *Tobacco* and *Dairy retail price cases*, where the investigations lasted 85 and 95 months, respectively; this is way higher than the overall average for investigations (around 42 months).

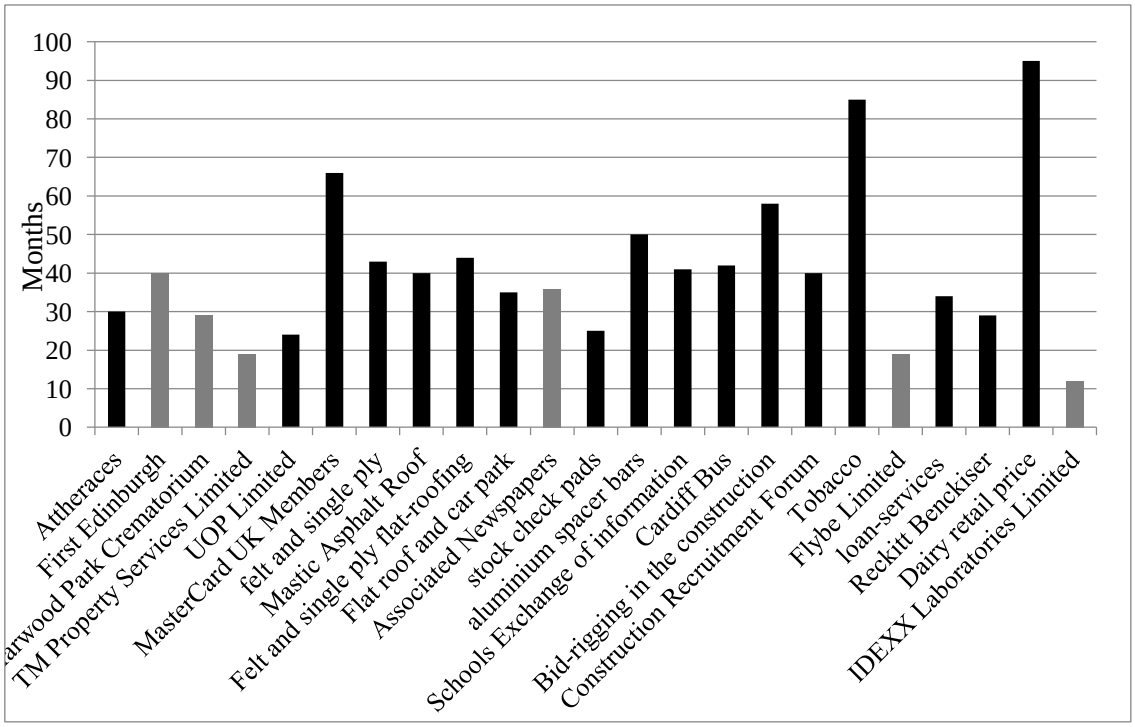
It is also surprising to see the *MasterCard* case has such a long duration above the average duration of all of the cases examined. It is surprising, firstly, because this case (agreement) was notified to the OFT under the old notification system, which means that the OFT did not investigate this case from scratch. Secondly the OFT did not impose any fines in this case, as the agreement was not implemented at all, which means that the OFT was not involved in assessing the effects of the agreement and was not involved in any calculation of fines.

While, unsurprisingly the shortest investigation duration was for a non- infringement decision where the OFT declared that there was no infringement of Chapter II in 12 months.

If one argues that the duration of investigations depends on the workload at certain times. Then, if one looks at the start and the end date for each case; i.e. to look at which month the OFT opened each investigation and the month in which each case has been concluded. Doing so does not indicate that the workload, in term of cases, seems to be busy at certain times, as the starting and the conclusion month for each case is fairly distributed over the period examined.

It can be noticed as well that the length of non-infringements and commitment decisions were always below the overall average and in most cases were concluded quicker than infringement cases. Graph 3 below shows the length of the investigation

in each case, where the black bars represent infringement decisions and the gray bars represent non- infringements and commitments decisions.



Graph 4: Duration of investigations for all cases in months

4-2-1-2: Success rate on appeal

When considering what the OFT has produced, it is important to check the quality of its outcomes. A possible way to do so is to check what happened on appeal for each case in the period under examination; if these cases were appealed. Table 4 below shows all of the cases for the period under examination, it shows the outcome of each case, whether the decision has been appealed or not; it also shows what was the outcome on appeal (i.e. whether the court confirmed the OFT's or not, or has the appeal court reduced the fine or if the court has taken any other action).

Out of the 23 cases concluded by the OFT in the period under examination, there were ten cases appealed to the CAT. In two cases,[27] where the OFT did not impose any fines, the CAT set aside the OFT's decisions. In a non-infringement decision,[28] the CAT replaced the OFT decision with its own, i.e. it confirmed that there was no infringement of competition law but on different ground than those of the OFT's. In three cases the CAT uphold the OFT's decision with respect to liability and penalty (fines).[29] In the other occasions where the OFT imposed fines,[30] in three cases the CAT uphold the OFT's decisions with respect to liability but reduced the fine imposed in these cases.

To elaborate more on the cases where the CAT reduced the fines imposed by the OFT quite substantially.

In the *Bid-rigging in the construction industry* case, the total fine imposed by the OFT on 103 undertakings was 129,200,000. 25 undertakings out of the 103 appealed to the CAT, where most of the appeals were in favour of the undertakings.[31] The CAT in

[27] Attheraces and MasterCard UK Members. *(1)The Racecourse Association and Others (2) British Horseracing Board v Office of Fair Trading* [2005] CAT 29; *(1)MasterCard UK Members Forum (2) MasterCard International Incorporated and MasterCard Europe Sprl (3) Royal Bank of Scotland Group v Office of Fair Trading* [2006] CAT 14.

[28] Harwood Park Crematorium. *M.E. Burgess, J.J. Burgess and S.J. Burgess (trading as JJ Burgess and Sons) v Office of Fair Trading* [2005] CAT 25.

[29] Flat roof and car par, Flat roof and car park and stock check pads.

[30] UOP Limited, Bid-rigging in the construction and Construction Recruitment Forum.

[31] *AH Willis and Sons Limited v. Office of Fair Trading* [2011] CAT 13; (1)*GMI Construction Holdings PLC (2)GMI Construction Group PLC v Office of Fair Trading* [2011] CAT 12; *Crest Nicholson PLC v Office of Fair Trading* & *ISG Pearce Limited v Office of Fair Trading* [2011] CAT 10; *Kier Group plc, Kier Regional Limited, Ballast Nedam N.V, Bowmer and Kirkland Limited, B&K Property Services Limited, Corringway Conclusions plc, Thomas Vale Holdings Limited, Thomas Vale Construction plc, Sicon Limited and John Sisk & Son Limited v. Office of Fair Trading* [2011] .CAT 3; *North Midland Construction PLC v Office of Fair Trading* [2011] CAT 14; *(1) Quarmby Construction Company Limited (2)ST James Securities Limited v. Office of Fair Trading* [2011] CAT 11; *(1)G F Tomlinson Building Limited (2) G F Tomlinson Group Limited v Office of Fair Trading, (1)G&J Seddon Limited (2) Seddon Group Limited v Office of Fair Trading, (1) Interclass Holdings Limited and (2) Interclass plc v Office of Fair Trading, (1) Sol Construction Limited (2) Barkbury Construction Limited v Office of Fair Trading,(1)G F Tomlinson Building Limited (2) G F Tomlinson Group Limited v Office of Fair Trading, Apollo Property Services Group Limited v Office of Fair Trading and Galliford Try Plc v Office of Fair Trading* [2011] CAT 7; *(1) Barrett Estate Services Limited (2)*

most of the cases uphold the OFT's findings on liability but not on penalty, only in two out of the 25 appeals the CAT set-aside the OFT's decisions entirely.[32] The CAT's reductions on fines were substantial, where reductions amount was over 50% of the original fine. This brought the fine after to £ 63,752,262. It should be noted that the 25 appeals were dealt with in nine judgments by the CAT.

In the *Construction Recruitment Forum* case, three out of seven undertakings appealed to the CAT with respect to the penalty imposed. The Appellants were those undertakings who were fined the most. The appeal was successful and the CAT reduced the fines imposed on the three undertakings.[33] The total amount of fine after appeal is 8,137,263, whereas before appeal the fine was 39,270,000.

The last case appealed was the *Tobacco* case, where the CAT allowed appeals to six Appellants and quashed the OFT' decisions in relation to those parties.[34] In addition the OFT returned the fine paid by TM Retail subject to a prior agreement with the

---

Francis Construction Limited v Office of Fair Trading, (1) GAJ Construction Limited (2) GAJ (Holdings) Limited v Office of Fair Trading, (1) Renew Holdings plc (2) Allenbuild Limited v Office of Fair Trading, (1)Robert Woodhead (Holdings) Limited (2) Robert Woodhead Limited v Office of Fair Trading, (1) JH Hallam (R&J) Limited (2) JH Hallam (Contracts) Limited v Office of Fair Trading and Hobson and Porter Limited v Office of Fair Trading [2011] CAT 9; *(1) Durkan Holdings Limited (2) Durkan limited (3) Concentra Limited v Office of Fair Trading* [2011] CAT 6.

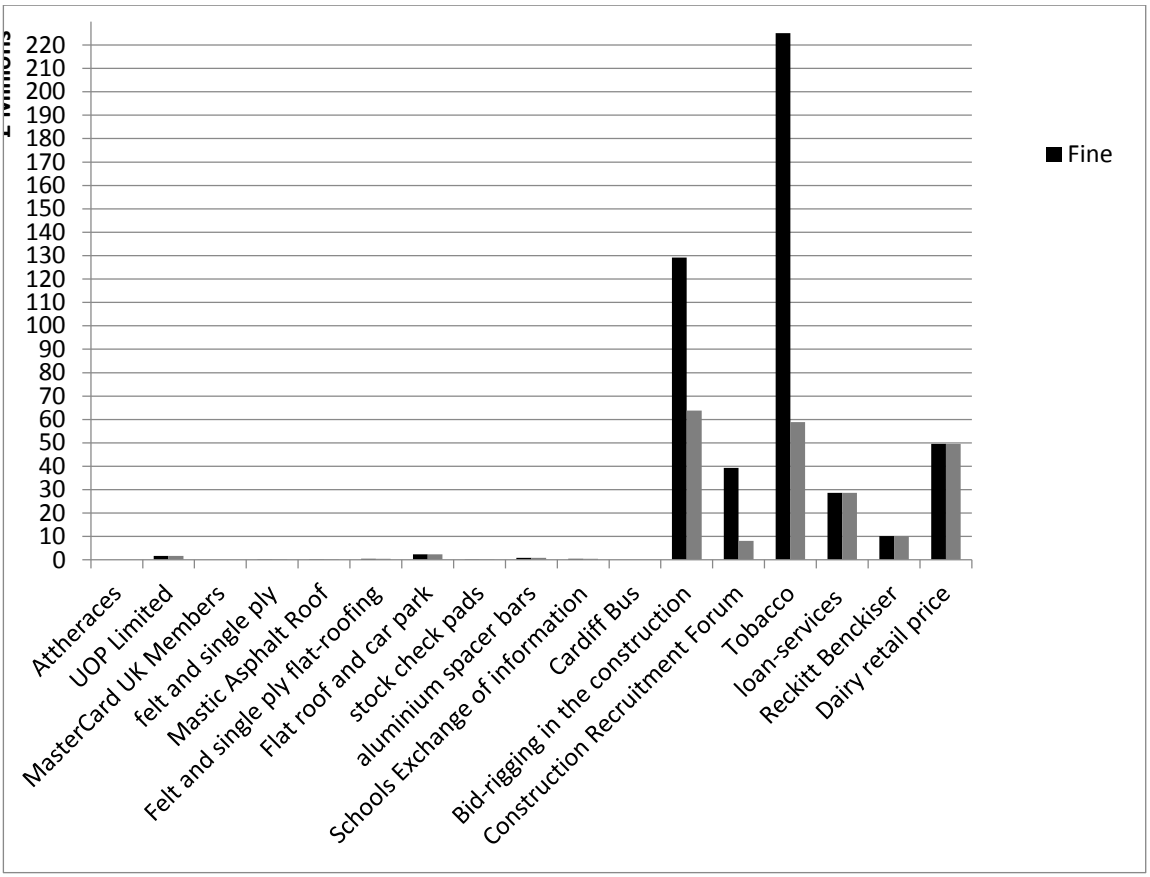
[32] *AH Willis and Sons Limited v. Office of Fair Trading* [2011] CAT 13 and (1)*GMI Construction Holdings PLC (2)GMI Construction Group PLC v Office of Fair Trading* [2011] CAT 12.

[33] Although the appeals were submitted separately by the three Appellants; however, the CAT heard the appeals together since several of the main grounds of appeal are common to all three Appellants, and from the CAT's point of view it is convenient to deal with them in a single judgment.

[34] (*1) Imperial Tobacco Group plc (2) Imperial Tobacco Limited v Office of Fair Trading* [2011] CAT 41; *Co-operative Group Limited v Office of Fair Trading* [2011] CAT 41 ; *Wm Morrison Supermarkets PLC v Office of Fair Trading* [2011] CAT 41 ; *(1) Asda Stores Limited (2) Asda Group Limited (3) Wal-Mart Stores (UK) Limited (4) Broadstreet Great Wilson Europe Limited v Office of Fair Trading* [2011] CAT 41; *(1) Shell U.K. Limited (2) Shell U.K. Oil Products Limited (3) Shell Holdings (U.K.) Limited v Office of Fair Trading* [2011] CAT 41; (*1) Safeway Stores Limited (2) Safeway Limited v Office of Fair Trading* [2011] CAT 41.

OFT.[35] The total amount of fine after appeal is around £ 58 million, whereas before appeal it was around £ 225 million.

Thus, it can be seen that the fines was reduced substantially in the biggest cases on appeal. Graph 5 below shows the amount of fine before and after appeal. Table 4 shows all cases concluded by the OFT and whether the case has been appealed and the appeal outcome.



Graph 5: amount of fine imposed before and after appeal

Case	Outcome and type of investigation	Amount of fine before appeal (if any) (£)	Appeal outcome (£)
Attheraces	Infringement of CH I	0	Set aside the OFT's decision
First Edinburgh	No infringement of CH II	0	Not appealed
Harwood Park	No infringement of CH II	0	The CAT replaced the OFT decision

[35] TM Retail reached an early resolution agreement with the OFT in July 2008. According to this agreement the OFT gave assurances relating to the effect of any successful appeal brought by another party against the OFT's Tobacco. decision. See the OFT website http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/tobacco#.UMdsxGf867I; And http://www.oft.gov.uk/news-and-updates/press/2008/82-08#.UMdtZ2f867I

Crematorium			with its own
TM Property Services Limited	No infringement of CH II	0	Not appealed
UOP Limited	Infringement of CH I	Total 1,707,000[36]	DQS appealed, but the appeal proceedings were brought to an end following consent by the OFT to a reduction in the fine to £36,210. total fine after DQS's appeal = 1,634,210
MasterCard UK Members	Infringement of CH I & Article 101	0	Set aside the OFT's decision
felt and single ply	Infringement of CH I	138,515	Not appealed
Mastic Asphalt Roof	Infringement of CH I	87,353	Not appealed
Felt and single ply flat-roofing	Infringement of CH I	471,029	Not appealed
Flat roof and car park	Infringement of CH I	2,419,608	Yes, the CAT uphold the OFT's decision
Associated Newspapers	Commitments (CH II)	0	Not appealed
stock check pads	Infringement of CH I	168,318	One party appeal out three. The CAT dismissed the appeal and uphold the OFT's decision
aluminum spacer bars	Infringement of CH I	898,470	Yes, the CAT uphold the OFT's decision
Schools Exchange of information	Infringement of CH I	467,500	Not appealed
Cardiff Bus	Infringement of CH II	0	Not appealed. The OFT's decision resulted in bringing a successful claim for damages
Bid-rigging in the construction	Infringement of CH I	129,200,000 The original total fine on the 25 who appealed was 79,045,501	Yes, the fine was reduced. 25 out of 103 appealed. it was reduced from £79,045,501 to £13,597,769 The total fine after appeal= £ 63,752,262
Construction Recruitment Forum	Infringement of CH I	39,270,000	Appealed by three out of seven= the total fine was reduced to £ 8,137,263[37]
Tobacco	Infringement of CH I	225,000,000	Six parties appealed, all won their appeals.[38] Fine reduced to £ 58,827,126
Flybe Limited	No infringement of CH II	0	Not appealed
Loan Services	Infringement of CH I and 101	28,590,000	Not appealed
Reckitt Benckiser	Infringement of CH II and 102	10,200,000	Not appealed
Dairy Retail Price	Infringement of chapter I	49,510,000	Not appealed
IDEXX Laboratories Limited	No infringement of CH II	0	Not appealed

Table 4: Cases concluded by the OFT between (May 2004- December 2012) whether cases have been appealed and appeal outcome.

[36] Uop=1,232,000; Thermseal=139,000; Dqs=109,000; Dgs=227,000; Ukae=0 = 100% immunity.

[37] Fine on parties before appeal (as imposed by the OFT) Hays= 30,359,129; Eden Brown= 1,072,069; CDI= 7,602,789. Fine on parties after appeal Hays= 5,880,000; Eden= 477,750; CDI= 1,543,500

[38] Appellants fines before appeal: Asda= £14,095,933; The Co- operative Group = £14,187,353; Morrisons = £8,624,201; Safeway = £10,909,366; Shell = £3,354,615; Imperial Tobacco = £112,332,495

As it can be seen from table 4, there were ten cases appealed to the CAT. It appears from this that the OFT won only three cases, entirely (i.e. on liability and fines). In the other seven cases, the OFT decisions either have been quashed entirely or the fines reduced substantially. This was the case with infringement and non- infringement decisions. A calculation of the success rate on appeal of the OFT may give an initial measurement of the OFT decision making quality. If one considers the number of cases appealed (10 cases). then the success rate on appeal is as follows: (i) 3 out of 10 (30%) outright win; (ii) 3 out of 10 (30%) partial win; 4[39] out 10 (40%) lost cases. In addition, if one assumes that the cases that have not been appealed as wins, then the OFT has 16 out 23 (69.5%) outright wins.

It should be highlighted in this respect that the OFT, recently, adopted a revised guidance on setting the penalties, where it gives the OFT more flexibility when imposing fines. This will be discussed later in the chapter, in section 4-3.

4-2-2: Non enforcement activities

When aiming to assess public enforcement of competition law, one needs to look at the outputs of the CA in general in order to understand where the budget of the authority goes and where its effort is directed. One of the important aspects in enforcing law is the allocation of resources, as this may inform outsiders how the resources are allocated and on these basis one may suggest how the OFT's resources may be better allocated.

[39] Considering the *Tobacco* case as a lost case, as all of the parties who appealed the decision won their appeal.

Non- enforcement activities are important component of any CA. Non- enforcement activities have many important implications that may affect the enforcement of the law. It may play a role in raising the possibility of compliance, voluntary, with the law. If, for example, the CA is investing in educating business about the consequences of breaching competition law, this may raise deterrence levels in the jurisdictions and hence businesses may comply with law because they are well aware of the consequences of breaching competition law. Such activities cost the CA money and time.

Another example of non-enforcement activities is the issuance of documents that clarifies the application of the law and how the CA may apply the law, widely known as guidelines. These documents can be seen as complementary to legislations. It is important for these issues to be considered as it is done by the staff of the CA and hence affects the allocation of resources and efforts.

Many CAs are given the power to investigate markets in order to see if there are competition concerns or not. In the UK, the OFT is given the powers to conduct market studies to test if markets works well for consumers. The OFT does not have the power to impose remedies, if it appears at the end of the market study that there competition problem (s) in the investigated market. However, at the end of the market, the OFT may refer the matter to the CC where it can impose remedies if it sees that there are competition concerns. Therefore, market studies are considered in the non-enforcement activities as the OFT cannot take and enforcement action based on the market study outcomes.

It has to be noted that market studies may raise the levels of deterrence, as businesses may consider that are may be investigated by the OFT. Therefore, it may deter those

who are thinking of committing an infringement. However, an enforcement action (opening a formal investigation) may be better in the case where infringements are already in place as the OFT can take action where there are suspicions that there is an infringement of competition law.

For any CA a balance between enforcement and non-enforcement activities is required. But balance in this context does not mean equal activities in each type. The CA should estimate this balance; for example, if in a given jurisdiction deterrence is low then the CA may want to focus on enforcement to restore competiveness in its jurisdiction.

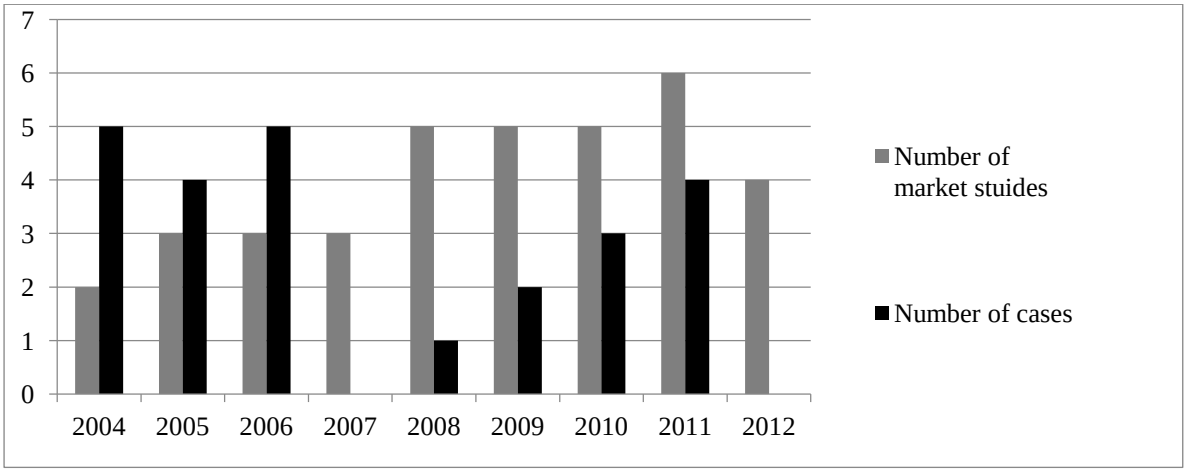
In addition, if the amount of enforcement activities is not adequate, then this may undermine the significance of enforcement and non-enforcement activities altogether. Because even if businesses are aware of the consequences of breaching competition law, they will have in mind that CA is not enforcing the law sufficiently and that they may get away with their breaches unpunished. Therefore, enforcement and non-enforcement activities are important and complementary; however, the role of enforcement activities and its influence is greater.

Thus, this section presents the non-enforcement activities of the OFT from May 2004-December 2012.

Table 5 below presents market studies concluded by the OFT. The number of market studies across different sectors, and, not exclusively competition matters were 35 market studies. Some of these market studies have been referred to the CC for more in depth scrutiny.[40] Graph 6 shows the number of concluded market studies compared to

[40] 11 market studies out of the 35 have been referred to the CC. See http://www.oft.gov.uk/OFTwork/markets-work/references/#.UMfRRGf867I.

cases concluded, on a yearly basis. Where it can also be noted that the number of market studies is much higher than the number of cases concluded (23) for the same period. In addition, table 5 lists markets studies concluded by the OFT from May 2004 to December 2012.



Graph 6: number of market studies concluded by the OFT (May 2004- December 2012)

Year	Market study
2004	1. Financial Services and Markets Act 2. Public subsidies
2005	3. Care homes 4. Property searches 5. Ticket agents
2006	6. Commercial use of public information 7. Payment protection insurance 8. School uniforms
2007	9. Medicine Distribution in the UK 10. Pharmaceutical Price Regulation Scheme 11. BAA airports
2008	12. Home buying and selling 13. Internet shopping 14. Homebuilding in the UK 15. Personal current accounts 16. Sale and rent back
2009	17. Local bus services 18. Isle of Wight Ferry services 19. Northern Rock 20. Home buying and selling 21. Scottish property managers
2010	22. advertising of prices 23. insolvency practitioners 24. Online targeting of advertising and prices 25. Second-hand cars

2011	26. consumer contracts 27. equity underwriting 28. Mobility aids 29. Off-grid Energy 30. Organic waste 31. Outdoor advertising
2012	32. aggregates 33. dentistry 34. Private healthcare 35. Private motor insurance

Table 5: market studies concluded by the OFT between May 2004- December 2012

Table 6 below lists all of guidance and advocacy documents produced by the OFT, between May 2004 and December 2012.

Year	Documents
2004	1. OFT 443:The Competition Act 1998 and public bodies (August 2004) 2. OFT 415:Assessment of market power (December 2004) 3. OFT 419: Vertical agreements (December 2004) 4. OFT 420:Land agreements (December 2004) 5. OFT 421: Services of general economic interest exclusion (December 2004) 6. OFT 442: Modernisation (December 2004) 7. OFT 408: Trade associations, professional bodies and self-regulating bodies (December 2004) 8. OFT 407: Enforcement (December 2004) 9. OFT 405: Concurrent application to regulated industries (December 2004) 10. OFT 404: Powers of investigation (December 2004) 11. OFT 403: Market definition (December 2004) 12. OFT 402: Abuse of a dominant position (December 2004) 13. OFT 401: Agreements and concerted practices (December 2004)
2005	14. OFT 428: Application in the energy sector (January 2005) 15. OFT 435: Cartels and the Competition Act 1998 (March 2005) 16. OFT 436: Leniency in cartel cases (March 2005) 17. OFT 426: Under investigation? (March 2005) 18. OFT 447: Competing fairly (March 2005) 19. OFT 430:Application to services relating to railways (October 2005)
2006	20. OFT 451: Involving third parties in Competition Act investigations (April 2006) 21. OFT 439: Public transport ticketing schemes block exemption (November 2006)
2007	22. OFT 876: Completing competition assessments in impact

	assessments: for policy makers (February 2007) 23. OFT 962: The deterrent effect of competition enforcement by the OFT (November 2007)
2008	24. OFT 803: Leniency and no-action (December 2008)
2009	25. OFT 1132: An assessment of discretionary penalties regimes (October 2009)
2010	26. OFT 866: Evaluation of OFT Competition Advocacy (April 2010) 27. Competition in mixed markets: ensuring competitive neutrality (July 2010) 28. OFT 1164: A review of the OFT's impact estimation methods (January 2010) 29. OFT 1240: Evaluation of the impact of the OFT's investigation into bid rigging in the construction industry (June 2010)
2011	30. Quick Guide to competition law compliance (June 2011) 31. OFT 1430:Company directors and competition law (June 2011) 32. OFT 1341: How your business can achieve compliance with competition law (June 2011) 33. OFT 1270: Competition Law Compliance Survey (June 2011) 34. OFT1339: Understanding competition law DVD (June 2011) 35. OFT 740rev: How competition law applies to co-operation between farming businesses: FAQs (November 2011) 36. OFT 1389: Public bodies and competition law (December 2011) 37. OFT 1391: Assessing the Impact of Competition Intervention on Compliance and Deterrence (December 2011)
2012	38. OFT 1415: Street furniture advertising: Recommendations to Local Authorities (May 2012) 39. Rural broadband Wayleave rates - a Short Form Opinion (August 2012) 40. OFT 423: OFT's guidance as to the appropriate amount of a penalty (September 2012) 41. OFT 1263rev: A guide to the OFT's investigation procedures in competition cases (October 2012)

Table 6: list of documents and studies concluded by the OFT or on behalf of the OFT

It seems that the OFT has devoted a lot of recourses and staff for its non-enforcement activities. It also seems that the OFT is more active in the non-enforcement side than the enforcement side. The validity of these claims may be checked in the next chapters when comparing the OFT to other CAs.

4-2-3: Capabilities of the OFT

After considering the OFT's outcomes, it is equally important to study the OFT's capabilities in order to understand under which circumstances the OFT has produced the aforementioned outcomes.

4-2-3-1: Number of staff and specialists

The number of staff and specialists may affect the outcomes of the OFT in terms of quality, quantity and the time it took the OFT to produce this. It may also help in determining what could affect the outcomes the most. Furthermore, it will help in identifying where the OFT should invest more or less. For example, when looking at the number of staff and specialists and the outcomes of the OFT, one may possibly be able to identify which aspect is more important than the other for the OFT when comparing the outcomes and the capabilities of the OFT on a yearly basis for the period under examination.

The number of staff focused on competition enforcement in 2004 was 243,[41] from those there were 84 lawyers and 67 economists; however, the percentage of staff that is focused on competition is 43% of the 243 staff. This means around 105 staff was allocated in 2004, it should be noted that the precise number of specialists who work on competition matters is not available for this year.

In 2005, the number of staff focused on competition enforcement was 242,[42] 38% of which were devoted solely to competition. Hence, the number of staff allocated to competition enforcement has decreased to 92, from the 242 staff there is 36% (around

[41] This includes competition and markets staff.
[42] This includes competition and markets staff.

87) lawyers and 26% (around 63) economists. It is the same with the year 2004, the exact number of specialists in 2005 is not available as well for this year.

In 2006, the number of staff focused on competition enforcement increased to 301,[43] 41% (around 124) of which is for competition enforcement. Of the 301 there were around 81 (27%) lawyers and around 84 (28%) economists. It should be noted that in this year there four of the competition staff with PhDs in economics, this may indicate that the OFT is seeking further specialists in order to improve their analysis.

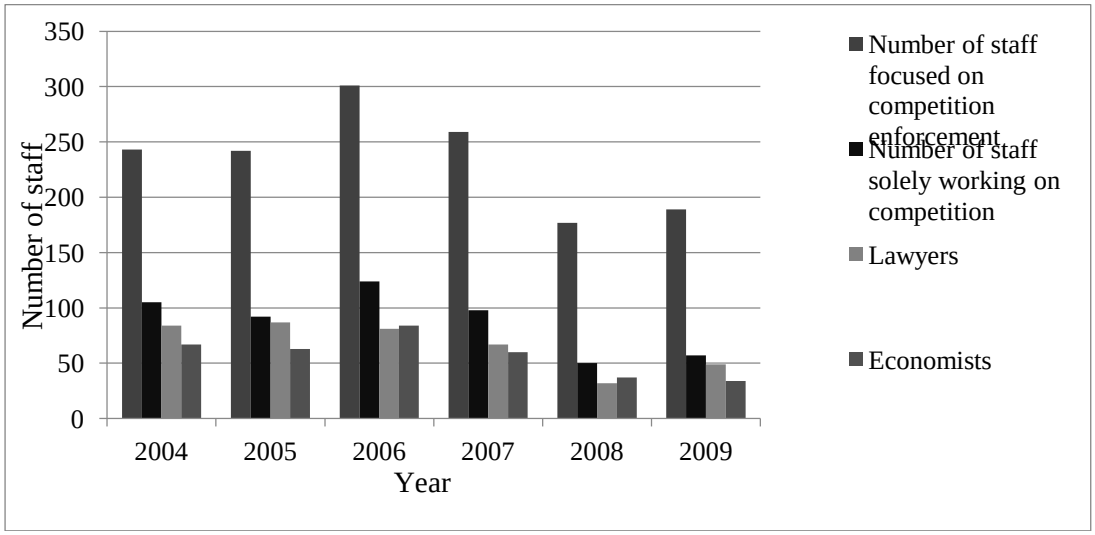
In 2007 the OFT staff who are focused on competition enforcement was 259,[44] around 98 (38%) of which are focused on competition. The number of lawyers and economists are around 67 (26 %) and around 60 (23%), respectively. The number of PhD holders in economics has increased to five.

In 2008 the OFT staff who are focused on competition enforcement 177,[45] around 50 (28%) of them focused on competition. As the number of staff decreased, the number of specialists decreased as well; there were around 32 (18%) lawyers and 37 (21%) economists. However, the number of economists who hold PhDs increased to nine.

In 2009, the number of staff who working on competition enforcement increased to 189, around 57 (30%) of them are working on competition matters. The number of specialists increased, around 49 (26%) are lawyers and around 34 (18%) economists. the number of economists who hold PhDs increased to 14.

[43] This includes competition and markets staff..
[44] This includes competition and markets staff.
[45] This includes competition and markets staff.

Graph 1 below summaries the number of number of staff focused on competition, staff working on competition matters and number of specialists at the OFT from 2004 untill May 2010.



Graph 7: number of staff focused on competition, staff working on competition matters and number of specialists at the OFT

4-2-3-2: Budget [46]

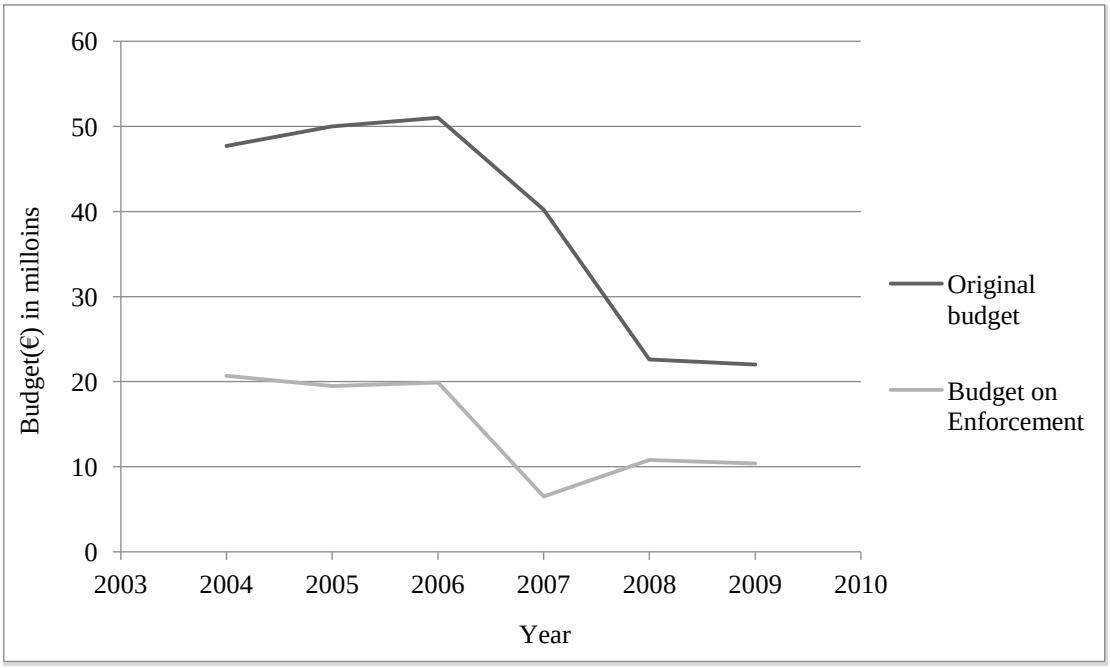
As with the enforcement of any kind of law, enforcement of competition law is a costly process. Therefore, any CA will priorities its activities according to its budget, studying the budget of the OFT and how this budget is an important aspect that is to be considered when examining its performance with respect to competition law enforcement.

In 2004, the OFT's budget was €47.7 million, however, 56.7% of the budget was spent on salaries of the staff. In 2005, the OFT's budget increased to €50 million and the amount spent on salaries increased to 61%. The amount spent on salaries stayed the same in 2006, the budget increased to €51 million.

[46] The budget provided by the GCR in Euros, not Sterling Pound.

In 2007 the OFT's budget fallen down to €41.2 million and the amount spent on salaries increased to 82%. In 2008, the budget decreased further to reach €22.6 million and the amount spent on salaries decreased as well to 48%. In 2009, the budget decreased to €22 million and the amount spent on salaries increased to 53%.

It can be seen from graph 8 below that the OFT budget has decreased over the time, it can be noticed as well the budget allocated to enforcement, in most years, is less than 50% of the overall budget. It has also to be mentioned that the allocated budget to enforcement is not only to competition law enforcement but also to other OFT activities, which includes consumer protection and other activities. Therefore, one needs to expect that the budget allocated to competition enforcement is only a proportion of the budget allocated to enforcement. Graph 8 and table 7 show in detail how the OFT's budget is distributed from 2004 to 2010.



Graph 8: the OFT's budget form 2004-2010

Form graph 8, it can be seen the overall budget (black line) is decreasing over the years, and the budget allocated to enforcement (grey line) is decreasing as well. The budget on enforcement includes all types of enforcement, including issues not related to competition enforcement. The gap between the lines represents the amount of money spent on salaries. The gap is narrowing despite the increase of staff numbers.

UK (OFT)	Budget (€ million)	Number of staff (% of staff focused on competition)	Number of experts
2004	47.7 % on salary 56.7% = 27 On enforcement = 20.7	243 (43%) = 105	Lawyers= 84 Economists= 67
2005	50 %on salary 61%=30.5 On enforcement= 19.5	242 (38%)=92	Lawyers= 36% Economists= 26% No. Of PhDs in ECO= 4
2006	51 %on salary 61%= 31.3 On enforcement=19.9	742 (41%)=301	Lawyers= 27% Economists= 28% No. Of PhDs in ECO= 4
2007	£40.2 %on salary 84% =33.7 On enforcement= 6.5	677 (38%)=259	Lawyers= 26% Economists= 23% No. Of PhDs in ECO= 5
2008	£22.6 %on salary 48% =10.8 On enforcement =11.75	638 (28%)=177	Lawyers= 18% Economists= 21% No. Of PhDs in ECO= 9
2009	£22 m %on salary 53% =11.6 On enforcement= 10.4	640 (29%)= 189	Lawyers= 26% Economists= 18% No. Of PhDs in ECO= 14

Table 7: budget, staff and the number of experts of the OFT (2004-2010)

4-2-4: Surrounding circumstances and facts about the OFT or the UK

On the one hand, in the previous sections, information about the OFT's outcomes and capabilities has been provided (i.e. the OFT as an institution). On the other hand, this section deals with issues that may affect the OFT's performance (outcomes) other than the OFT's capabilities. Hence, this section examines what commentators thought about the OFT; it will also present peer-review studies that evaluates or assesses a

particular area of the OFT and what was the outcome of these studies, peer-reviews include any reports commissioned on behalf of the OFT by an external body or any governmental reports about the OFT; the last type of studies, are studies that may provide information about trade or competiveness of the UK as a jurisdiction.

KPMG has conducted two peer reviews about competition policy in general in the UK in 2004 and 2007. The main objective of the peer reviews is to assess the effectiveness of the UK competition policy regime and rank it among other countries. In both peer reviews, KPMG employed a similar methodology with some comparative insights. The methodology employed was a survey distributed to competition experts[47] in the UK and other jurisdictions supplemented with few face-to- face interviews. [48]

In 2004, KPMG's peer review ranked the UK non- merger regime fourth after USA, Germany and Italy ahead of the EU.[49] In the 2007 peer review, KPMG stated that the UK regime has improved, however the ranking stayed the same with the gap between the UK and Germany has narrowed.[50] According to the face-to-face interviewees, the UK lacked significant antirust decisions which have affected the overall effectiveness of the UK non- merger regime and made it weaker than the US and Germany.[51]

The main conclusions that can be drown from both peer reviews can be summarised in the following bullet points (regarding the non-merger regime).

[47] The number of respondents to the survey in 2004 was 215 and in 2007 was 301.
[48] The number of face to face interviews in 2004 was 35 and in 2007 was 25.
[49] KPMG (2004), 'Peer Review of the UK Competition Policy Regime', a report to the Department of Trade and Industry p. 9. The jurisdictions included in the peer review are USA, Germany, UK, EU and other jurisdictions named as 'others'. However, the overall ranking (merger and non-merger regime) for the UK was third after the USA and Germany.
[50] KPMG (2007), 'Peer Review of Competition Policy', a report to the Department of Trade and Industry, p.5. The jurisdictions included in the peer review are USA, Germany, UK, EU and other jurisdictions named as 'others'. However, the overall ranking (merger and non-merger regime) for the UK was third after the USA and Germany. It should be stated that the overall ranking of the UK is closer to the USA and almost level with Germany; therefore, the UK has improved from the KPMG peer review in 2004. P.7.
[51] KPMG 2007, p.5.

- Many correspondents highlighted the matter of prioritisation, where many of them believe that the UK competition regime can be improved if there is better prioritisation of cases. In particular, they stated that the OFT closed many low impact cases (non-cartel cases) on administrative priority grounds in order to ensure that it is able to deliver higher impact cases more quickly, as this approach may reduce deterrence.[52] In addition, this may allow infringements because of their low impact go unchecked, hence, reducing the effectiveness of the regime.
- It has been noted the issue of the length of time the OFT takes to reach its decisions and that the OFT should aim to reduce it.[53]
- It has been suggested that the OFT should increase the level of penalties awarded.[54]
- The OFT has been encouraged to take more decisions.[55]
- The OFT has a lot of powers to be used, but the OFT are not making the most of it.

Furthermore, in the eyes of the respondents, the results of the KPMG survey show that the UK regime is thought to be very complex in comparison to other regimes.[56]Despite this, all of the respondents and interviewees have been asked to rank their home regime and the UK regime; all of the respondents have ranked the UK regime higher than their home regime.[57]

[52] KPMG 2007, 34 and 45.
[53] KPMG 2007, 34.
[54] KPMG 2007, 34.
[55] KPMG 2007, 34.
[56] KPMG 2007, 48.
[57] KPMG 2007, 30.

The findings of the peer reviews are important to be considered. However, highlighting problems without providing solutions on how the OFT may resolve these problems is another issue. The main issue about these peer reviews is that they representing opinions of competition experts rather than providing solid grounds for these opinions and why they think that there are problems. For example, the KPMG reviews stated that it takes the OFT too long to reach its decisions. This may be proved to be a right claim. However, on what basis one may determine what is too long or too short; if one aims to determine this one needs to take into account many factors. For instance, one needs to look at the human capital (numbers and experts) and the budget of the OFT, and comparing this to another CA with similar characteristics may provide an answer.

Another example of the recommendations of the peer reviews is that the OFT needs to take more decisions. This has been suggested without reviewing what the OFT has produced. Additionally, and importantly, without considering the levels of deterrence in the UK or if the European Commission is dealing with cases that may affect the UK and these cases have a European dimension.

The KPMG peer reviews are examples of reviews conducted by private bodies on behalf of the Ministry of trade and Industry in order to assess the OFT's performance.

Another form of reviews is studies conducted by public bodies in the same country that one of its tasks is to monitor public bodies work, such as CAs. In the UK, the National Audit Office (NAO) evaluated the UK competition regime in 2005[58] and 2010.

[58] In 2005 the NAO reviewed only the OFT, i.e. not the whole competition regime.

In the 2005 report,[59] the NAO reviewed the OFT's performance and concluded by identifying certain concerns, the following are the main proposed recommendations:

- Recruiting senior experienced staff or giving more trainings to junior staff, and introducing[60]
- Case management and setting deadlines for resolving cases.[61]
- Transparency issues: making external parties more informed about the OFT's investigations.[62]
- Measuring the benefits achieved for consumers as a result of its actions.[63]
- Balancing of resources allocated to hard enforcement activity and softer compliance mechanisms.[64]

Originally the NAO 2005 report, this was prepared for the Committee of Public Accounts (CPA), the CPA[65] questioned the OFT's senior officials regarding the NAO findings. The CPA has been critical when questioning the witnesses about the NAO and it has adopted similar conclusions and recommendations to the NAO's.[66] The CPA has been very critical on the issue the OFT is not using powers given to it, in particular not imposing criminal sanctions against parties who do not cooperate with the OFT during the course of investigations, the CPA stated that it wishes to return to the recommendations in due course and it will ask the NAO to review the OFT's performance. The Following are the main recommendations made by the CPA:[67]

[59] National Audit Office 2005 'The Office of Fair Trading: Enforcing Competition on Markets' HC 593 Session 2005-2006.
[60] NAO, 2005, p. 4
[61] NAO 2005, p. 4.
[62] NAO 2005, p. 4.
[63] NAO 2005, p. 5.
[64] NAO 2005, p. 4.
[65] Committee of Public Accounts, 'Enforcing competition in markets' Forty–second Report of Session 2005–06.
[66] See the oral evidence the end of the report.
[67] CPA, p.6-7.

- The OFT has been advised to start *ex officio* investigations rather than being too reliant on complaints.
- It has been suggested that the OFT should offer training to its staff, so it can tackle the problem of insufficient experienced staff to deal with complicated cases.
- The CPA sees that the problem of delays in investigations is small case teams and that the OFT does not work to any deadlines.

In 2010, the NAO[68] reviewed the whole competition regime, it has reviewed generally the whole activities of the OFT, CC and sectoral regulators. The issue of enforcing competition law by regulators has been major issue in the report, where it aims to identify why regulators are not using their competition law powers and the suitability of the UK system to use such powers.[69] The report does not provide analytical findings regarding the OFT as an institutions or about specific issues on the application of competition law by the OFT; it however provide analytical information about the whole competition regime and advising the Government on how regulators can be more involved in using competition powers instead of regulatory powers, i.e. how to enhance coordination between organisations in the UK linked to the competition regime. Thus, this report does not provide information about the performance of organisations.[70]

One of the main findings of the report is: The UK competition case law is not rich enough. It raises the question, if it is appropriate to incentivise regulators to use their

[68] National Audit Office, 'Review of the UK's Competition Landscape', March 2010, paragraph 3.8
[69] As the issue of applying competition law by regulators is not the main issue in this work, this chapter will not elaborate on this issue. For more information about this issue, see the whole parts of the report where the issue of regulators has been raised in each part.
[70] NAO 2010, p.4-p.8.

competition powers more (regulators rely on regulatory powers more than competition powers)[71] in order to enrich case law; given that using competition law is a lengthy process and that most Competition Act cases are subsequently appealed which creates uncertainty of outcomes.[72]

There have been two reports conducted on behalf of the OFT to measure the deterrent effects of competition law enforcement and the impact of the OFT's interventions on compliance and deterrence.

The first report was conducted by Deloitte in November 2007,[73] which was about the deterrent effect of the OFT enforcement activities in the areas of merger control and competition law. The methodology employed was based on three aspects: interviews, legal survey and company survey. The main aspects that the report aimed to address: (i) the scale of the deterrent effect of the OFT's activities; (ii) how the impact of the competition regime vary according to the sector and the size; (iii) the important factors that may motivate compliance with competition law; and (vi) which competition cases or mergers have had the greatest effect on firms' behaviour. The findings of the reports have been drawn separately from each method employed. Therefore the report for each aspect there are three views drawn from the interviews, the legal survey, and the company survey.

The main findings of the Deloitte report regarding competition law decisions is that there is no clear evidence that the OFT's decisions have a deterrent effect in the same sector in which the decision belong to. Furthermore, the majority of lawyers believe that decisions have more deterrent effect against anti- competitive behaviour in the

[71] See NAO 2010, p.15 where the NAO explains in detail the incentives in favour of using competition powers and the invectives against the use competition powers.
[72] NAO 2010, p. 5.
[73] OFT 962: The deterrent effect of competition enforcement by the OFT' A report by Deloitte (November 2007).

same sector of the decisions but have less deterrent effect against anticompetitive practices in other sectors which have not been investigated (where there were no cases).[74] In addition, both lawyers and companies have seen the UK regime most effective in deterring cartels, less effective in deterring anti-competitive agreements and least effective in deterring abuses of dominant position.[75]

The second report about deterrence and compliance was conducted by London Economics in December 2011.[76] This report is wider than the Deloitte report in terms of the number of respondents and the scope of the report; it also updates and extends the Deloitte report.[77] There were several methodologies employed, the report relies on surveys (to businesses and lawyers), behavioural experiment and discussions held with business stakeholders.[78] However, the main focus of the report was on the results obtained from the business survey.[79] One the main findings of this reports was the deterrence ratio as a result of the OFT enforcement actions, which seems to have a substantial deterrent effect. The report found that for cartel cases investigated there are 28 cartels deterred; for each commercial agreements investigated by the OFT there are 40 commercial agreements deterred; and for each abuse of dominance case investigated there 12 cases deterred.[80]

[74] OFT 962: The deterrent effect of competition enforcement by the OFT' A report by Deloitte (November 2007) p. 69.
[75] OFT 962: The deterrent effect of competition enforcement by the OFT' A report by Deloitte (November 2007) p. 72-73.
[76] OFT 1391 'Assessing the Impact of Competition Intervention on Compliance and Deterrence' A report prepared by London Economics (December 2011).
[77] OFT 1391 'Assessing the Impact of Competition Intervention on Compliance and Deterrence' A report prepared by London Economics (December 2011) p.4-5.
[78] OFT 1391 'Assessing the Impact of Competition Intervention on Compliance and Deterrence' A report prepared by London Economics (December 2011) p.6.
[79] OFT 1391 'Assessing the Impact of Competition Intervention on Compliance and Deterrence' a report prepared by London Economics (December 2011) p. 6.
[80] This deterrence ratio is applicable only for large firms only (200+ employees). OFT 1391 'Assessing the Impact of Competition Intervention on Compliance and Deterrence' A report prepared by London Economics (December 2011), See table 1.1 p.7and p. 14.

Furthermore, respondents rated the OFT highly in terms of deterring potential anti-competitive behaviour.[81] In addition, respondents have been asked to suggest how the OFT may improve its effectiveness with respect to competition law enforcement.[82] On the one hand, respondents from business believe that the OFT may improve effectiveness by investigating fewer cases but more high profile cases; however, high profile cases have not been defined.[83] On the other hand, lawyers suggested that undertaking more cases in general would improve the OFT's effectiveness.

There is an interesting observation regarding both reports, namely the extent and the ratio of deterrence. In the 2007 report it has been found that the OFT is most effective in deterring cartels and then anti- competitive agreements and abuses of dominance, while in the 2011 report the OFT has been found to be most effective in deterring anti-competitive agreements followed by cartels and abuse of dominance. This is surprising because the cases that have been concluded by the OFT between 2007 and 2011 all of the cases were either cartel cases or alleged abuse of dominance cases. Therefore, the levels of deterrence against anti-competitive agreement may become weaker, at least in theory, because there were no cases at all between the two reports. Another explanation is that there is full deterrence against agreements. Another possible explanation, is the OFT's policy in selecting cases, as the OFT is targeting high impact cases which anti-competitive agreements do not belong to this category; because anti- competitive agreements are generally smaller than cartel.

[81] OFT 1391 'Assessing the Impact of Competition Intervention on Compliance and Deterrence' A report prepared by London Economics (December 2011) p.13.
[82] OFT 1391 'Assessing the Impact of Competition Intervention on Compliance and Deterrence' A report prepared by London Economics (December 2011) p. 15.
[83] OFT 1391 'Assessing the Impact of Competition Intervention on Compliance and Deterrence' A report prepared by London Economics (December 2011) p. 15.

Information about the competitiveness of the UK

This information will be taken from the annual Global Competitiveness Report produced by the World Economic Forum. It provides information about the levels of competition and other issues that may affect the levels of competition enforcement. This information may help in giving explanations to the OFT's outcomes, form a comparative perspective. Information about issues related to the intensity of competition, the existence of market power, the effectiveness of anti-monopoly policy and the existence of trade barriers, may explain issues related to the levels of competition law enforcement and the levels of deterrence, when conducting comparative studies.

For example, if there are low numbers of abuse of dominance cases in country X compared to country Y, then if one looks at the ranking of the TGCR for the below factors (in table 7), this maybe a contributing explanation for the level of enforcement against abuse of dominance cases.

Therefore, table 8 presents the ranking of the UK for the factors (started in table 7) from 2008. [84] It seems the ranking of the UK is improving over the years. It should be stressed that one should not draw conclusions on the basis of the ranking itself, but is can be taken as an explanatory issues that one may take into account in order to understand issues related to the levels of competition enforcement and may indicate to the levels of deterrence.

Year	Intensity of local competition	Extent of market dominance	Effectiveness of anti-monopoly	Prevalence of trade barriers

[84] After 2008, the methodology of the Global competitiveness report has changed; therefore the reports for pre- 2007 are no longer available. The information obtained from personal communication with Cecilia Serin, Team Coordinator, Global Benchmarking Network, World Economic Forum.

	(Ranking)	(Ranking)	policy (Ranking)	(Ranking)
2008	10/134	16/134	15/134	33/134
2009	6/133	14/133	17/133	28/133
2010	8/139	10/139	8/139	21/139
2011	3/142	6/142	3/142	17/142
2012	5/144	6/144	9/144	13/144

Table 8: Information taken from the Global Competitiveness Reports (2008-2012)

4-3: Analysis of possible implications for recent changes and proposed changes

The main changes so far in the OFT are investigation procedures and fining policy; other possible changes on the way are in the Enterprise and Regulatory Reform Bill (ERRB). These changes will be discussed, below, alongside current procedures and practices that are related to the enforcement of competition rules in the UK, such as the OFT's prioritisation principles. The discussion will be about issues that may affect public enforcement. The discussion and the recommendations are based on the assumption that the OFT is not bringing enough cases and that the OFT needs to shorten duration of investigations, as it has been suggested by commentators and the reports reviewed earlier in the chapter. In the conclusion section of this chapter, it will be commented as if this assumption is not valid as well.

4-3-1: The OFT's prioritisation principles

Before going into the changes that occurred recently or may occur in the future, it is important to understand on what grounds the OFT may open an investigation or not, as these principles are the deciding principles for opening an investigation. Indeed, it may be seen that the problems (if any) lay at the stage before opening an investigation, i.e. selection of cases. In October 2008, the OFT issued a document

entitled 'OFT prioritisation principles'.[85] This document outlines on what basis the OFT will decide to open an investigation into an alleged infringement. At the beginning, the OFT stated that it has a limited budget and it has to allocate this budget in a way that its actions can deliver benefits to consumers of five times of its annual budget.[86] In light of this, the OFT highlighted that when deciding whether to open an investigation or not[87] it will consider wide range of principles including the following: (i) impact, (ii) strategic significance (iii) risks and (iv) resources. The OFT elaborates on each of these principles and explains the importance of each one.

For the impact principle, the OFT stated that it will pursue cases that have direct effect on consumer welfare; which includes better value for consumers in terms of price, services and choice.[88] The OFT stated that the impact of its work may be seen indirectly benefiting consumers; if as a result of the OFT action (s) the behaviour of consumers, businesses and government has changed.[89] In other words, by raising awareness among consumers and increasing deterrence. It also added cases that may increase efficiency and productivity will be prioritised as it will have economic impact.[90]

The second principle is strategic significance. The OFT will assess if the work is strategically significance the following factors. First, if the work fit with annual plan of the OFT.[91] Second, if the work will help in establishing or examining new legal or economic approaches.[92] Third, if the work in question will improve the ability of the OFT to deliver better outcomes; and if it would help the OFT in achieving better

[85] OFT 953 'OFT prioritisation principles' October 2008.
[86] OFT 953'OFT priorisation principles' October 2008, para 1.4
[87] In certain cases the OFT has a legal duty to respond, such as super complaint form a designated consumer body, within 90 days.
[88] OFT 953 'OFT prioritisation principles' October 2008, p. 8.
[89] OFT 953 'OFT prioritisation principles' October 2008, p. 8.
[90] OFT 953, 'OFT prioritisation principles' October 2008 p. 8.
[91] OFT 953, 'OFT prioritisation principles' October 2008 p. 9.
[92] OFT 953, 'OFT prioritisation principles' October 2008 p. 9.

credibility of the UK competition and consumer regime.[93] Lastly, the OFT will ask, if it is the best placed to act or there other bodies or approaches are better placed to take an action.[94] The OFT will take into account how the work would add to the OFT's portfolio.

The other two main principles that the OFT will look at when considering whether to act or not: are risks and resources. This means that the OFT will assess the likelihood of a successful outcome of the case. At the same time, the OFT will consider its resources and will take into account issues, such as, enabling the OFT to meet its objectives.

It should be noted that the OFT, when considering whether to act or not, it will take into consideration all of the prioritisation principles stated above.[95] The OFT stated "We generally prioritise according to the impact of work on consumers and according to the work's strategic significance. We balance this against the risks and resources involved."[96]

After reviewing what the prioritisation principles are, it is now important to comment on these principles and how these principles may affect enforcement. At the outset, it seems that these principles are very general and does not tell an outsider how exactly the OFT will open an investigation. It can also be said that this is a common issue that any organised CA has to take into when considering opening an investigation.

When looking at the number of cases concluded by the OFT (May 2004-December2012), the OFT should have a more precise policy in order to have a richer case law. In other words, the OFT may need to adopt a short-term policy that

[93] OFT 953, 'OFT prioritisation principles' October 2008 p. 9.
[94] OFT 953, 'OFT prioritisation principles' October 2008 p. 9. Alternative bodies or approaches are: private enforcement, other regulators in the UK, or the European Commission.
[95] Bearing in mind that the OFT stated that the factors listed in the principles are not intended to be exhaustive.
[96] OFT 953 'OFT prioritisation principles' October 2008, para, 2.1

addresses the weaknesses within the UK regime that helps the UK regime to recover. A possible way of doing so is to come up with precise prioritisation principles that help the UK system to have clear targets in the short term (four to five years).[97] this will help the OFT (or the future Competition and Markets Authority (CMA)) to increase the number of cases and may as well decrease the duration of investigations, as the UK CA will have precise targets to achieve. This means that the OFT (or the future CMA) may need to overlook some of the existing activities (mainly non-enforcement activities as explained earlier in the chapter) in order to achieve its short-term policy, i.e. mainly increasing the caseload and reducing investigations durations. In addition, some of the non-enforcement activities may be turned into enforcement activities, for example by opening formal investigations instead of market studies, as it can be seen that the number of market studies is much higher than the number of cases concluded for the period examined in this chapter. Although, one should note that market studies seem to be an easier tool for the OFT than opening formal investigations, as market studies' duration were less than cases.[98] At the same time, it should be noted that market studies may not remedy competition concerns and further action is needed in order to remedy competition concerns, either by refereeing issues to the CC or opening a formal investigation, which ultimately, this process will take longer than an ordinary investigation. However, none of the OFT's decisions examined in this chapter was opened because the source of the investigation was based on information from market studies. Some market studies resulted in referring it

[97] The period of 4 or 5 years is based on the duration of investigations that have been studied earlier in the chapter.
[98] Department for Business, innovation & Skills, 'A competition regime for growth: a consultation on options for reform' March 2011, p. 21

to the CC, however.[99] Another possible reason for the OFT to prefer market studies over opening cases is the appeal process in front of the CAT, which the OFT has struggled to have its decisions cleared in front of it. If this is a valid claim, then the OFT should not worry too much about the outcome as it will result in clarifying the law, regardless. Furthermore, the OFT record against the CAT is not too worrying, as it has been shown earlier in the chapter that there is 50% to win the case if it has been appealed, [100] contrary to what has been suggested without empirical evidence.[101]

All in all, in order to improve the UK competition regime, clear and achievable targets for the short term with focusing on bringing cases and reducing the length of investigations, which means that the OFT (or the future CMA) will need to focus more on enforcement activities and reduce budget and staff allocated for non-enforcement activities. Furthermore, the OFT need to focus on all type of cases so it can create deterrence to small and large infringements.

4-3-2: Procedures for investigating suspected competition law infringements

In October 2012, the OFT amended its procedures for investigating competition law infringements.[102] In the initial thoughts for adopting the new procedures were to improve the speed and the robustness of decision-making, and to remove the investigation process and the decision making so each process is carried out by different teams. Therefore, it can be understood that transparency is an issue that the changes need to address. It is also important to note that these changes have been

[99] The BAA case (a CC case), for example, started as market study and it has been referred to the CC where competition concerns have been resolved.

[100] However, this has to be compared to another CA. For example, the European commission success rate on appeal is around 59%. The European Commission will be studied in the previous chapter (Chapter 3).

[101] It has been suggested in the peer reviews discussed in the previous section that OFT needs to improve in front of the CAT. NAO, 2012

[102] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012

adopted by the European Commission in October 2011.[103] Where some of the issues raised tackled in the changes were already seen at a European level. Therefore, it can be said that these changes are not purely innovative but are in line with changes already addressed at a European level. The most notable changes are: (i) publicity of the OFT work;[104] (ii) case timetables,[105] (iii) new decision making model;[106] (iv) strengthen procedural rights during an investigation.[107]

With respect the publicity of the OFT's work, The OFT will publish case opening notices on its website once a formal investigation is opened. However, the OFT may not publish notices in certain cases where it may prejudice the investigation, such as cartel cases.[108] Also the OFT will prepare case timetables that will cover the investigation stages till the point in which the OFT decide whether it will issue a statement of objections.[109] If a statement of objections has been issued, then the OFT will update the case timetable.[110] However, it should be noted that the OFT can update the timetable at any stage if the investigation require this and the OFT will publish the reasons behind the updates.[111]

The main objective of the OFT's new decision model is to separate between investigators and decision makers. Therefore, once the OFT issues a statement of

[103] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p. 6-32

[104]OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, para 5.7 & 5.8.

[105] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, para 5.7

[106] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012 , para 11

[107]OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, para 12

[108] OFT 1263rev,'A guide to the OFT's investigation procedures in competition cases' October 2012, Para 5.8

[109] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, Para. 5.7 and 5.8

[110] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, Para. 5.7 and 5.8

[111] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, Para. 5.7 and 5.8

objections, a case decision group will be appointed.[112] None of the group's members may be anyone who was involved in the decision to issue the statement of objections.[113]

With regard the fourth point, to strengthen procedural rights during an investigation. The OFT will give the parties the opportunity to comment in writing and orally on a draft penalty statement before adopting the final decision and the penalty, as the OFT will send a draft penalty statement to the parties involved.[114] Also, the OFT will have more "state of play meetings", where parties can meet the case team more frequently than before.[115] These meetings will keep parties up-to-date with the developments of the case and what would be the next stage.[116] In addition, the case team will share provisional thinking on the case.[117]

It can be seen that most of these changes are more related to transparency, and these issue will not change the ability to increase the number of cases. It may help the OFT in finding the right the decision, but one may suggest that these procedures may increase the length of investigations as these issues require more formalities from the OFT.

[112]OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, Para. 11.27. The group task is to issue one of the following decisions (a) whether to issue an infringement decision or 'no grounds for action' decision; (b) on the appropriate amount of any penalty; and (c) to close a case on the grounds of administrative priorities.

[113] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, Para. 11.28

[114] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, Para, 12.31 and 12.32.

[115] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, Para. 9.13.

[116] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, Para. 9.14 and 9.15.

[117] OFT 1263rev, 'A guide to the OFT's investigation procedures in competition cases' October 2012, Para 9.14 and 9.15.

4-3-3: Changes to rules relating to setting fines

In September 2012, the OFT reformed its guidance in sitting the appropriate amount of a penalty.[118] It can be suggested that the main aim of the changes to the fining policy of the OFT was to employ the approach taken by the CAT on appeal, given the recent substantial reduction in fines in recent cases.[119] In addition, the Government reacted to this issue by proposing in the Enterprise and Regulatory Reform Bill (ERRB), that the OFT and the CAT should use the same penalty guidance when imposing fines and reviewing the fines imposed.[120] By this move, the Government aims to limit the number of future cases where the CAT employs different approach to the OFT's when revising the fines imposed and to tackle unnecessary incentives to appeal. The proposed changes in the ERRB will be discussed below.

The main changes in the OFT's fining policy are: raising the starting point; tougher treatment for serious infringements; and treatment of aggravating factors and mitigating factors.

For the starting point the OFT raised the starting point for determining fines from 10 per cent to up to 30 per cent of the undertaking's relevant turnover, i.e. the undertaking's turnover in the product and geographic market affected by the infringement in the last business year before the end of the infringement.[121] It can be said that the new 'starting point' gives the OFT the flexibility to fine serious infringements; while at the same time deterring other firms from being involved in

[118]OFT 423, 'OFT's guidance as to the appropriate amount of a penalty' September 2012.
[119] The *Construction Bid-Rigging*, the *Construction Recruitment Forum* and the *Tobacco* cases. See the appeals section earlier in the chapter.
[120] Freshfields Bruckhaus Deringer Briefing 'OFT adopts new policy on competition law fine', September 2012 p. 2. Available at http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/OFTadopts%20new%20policy%20on%20competition%20law%20fines.pdf
[121] OFT 423, 'OFT's guidance as to the appropriate amount of a penalty' September 2012, Para 2.5. However the statutory upper limit remains the same, 10 per cent of the group's worldwide turnover. See Para. 1.12.

competition law breaches. In addition, this move brings the OFT's approach in sitting the amount of fine in line with the EU approach.[122] Regarding the other changes, the OFT gives itself more flexibility when dealing with very serious infringements.[123] The OFT will use a starting point towards the upper end of the range for the most serious infringements of competition law.[124] In addition, under the new penalties guidance, the OFT will be able to increase the fine if aggravating circumstances appeared in a given case; such as, repeated unreasonable behaviour that delays the OFT enforcement action and recidivism. In the case of recidivism, the OFT is now able to increase the fine to up to 100 per cent if the undertaking(s) commit similar infringements in the last 15 years and have been found guilty by the OFT, UK sector regulators or the European Commission, given that the previous infringements had a UK impact.

The OFT's penalties setting guidance also discussed mitigating circumstances. For example, the existence of a compliance program/ activity may result in a 10 per cent reduction in fine.

One observation that can be seen from reforming the fining guidelines is the powerful indirect role of the CAT and how its judgments may contributed in reforming the fining policy.

The changes in the fining policy of the OFT is a good move by the OFT as it will give more flexibility when setting the appropriate penalty, also it would put the OFT in a better position on appeal. More importantly the suggested changes in the ERRB is a

[122] 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003' (2006/C 210/02).
[123] OFT 423, 'OFT's guidance as to the appropriate amount of a penalty' September 2012, Para 2.5. Examples of very serious infringements are Hardcore cartels and serious abuse of dominant position cases.
[124] OFT 423, 'OFT's guidance as to the appropriate amount of a penalty' September 2012, Para 2.5.

very important move as it will force the OFT and the CAT to use the same method when setting penalty and when the CAT reviews the OFT's decisions.[125]

4-3-4: The Enterprise and Regulatory Reform Bill (ERRB)

Most of the changes regarding antitrust enforcement were concerning the powers of investigations and what would be the consequences if the suspected undertakings (person) did not comply with the requirements imposed by investigators without reasonable excuse.[126] The aspects in the ERRB that may affect enforcement and the duration of investigations are the following: (i) the Secretary of State may impose time-limits on the CMA investigations; (ii) the CMA may decide to investigate cases rather than sector regulators; and (iii) parliamentary review.

In addition, the Secretary of State may impose time-limits on investigations conducted by the future CMA,[127] it may be suggested that the Secretary of State will use this tool if it sees that the CMA is taking too long with its investigations. This may speed up investigations. Also, the ERRB introduced that the CMA may decide to investigate a particular case rather than a sector regulator.[128] This may increase the caseload of the CMA, as it has been noted that regulators have been reluctant to use competition powers given to them.[129] Furthermore, in light of the recent changes the

[125] Freshfields Bruckhaus Deringer Briefing 'OFT adopts new policy on competition law fine', September 2012 p. 2. Available at http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/OFTadopts%20new%20policy%20on%20competition%20law%20fines.pdf

[126] See schedule 11 of the Enterprise and Regulatory Reform Bill.

[127] Enterprise and Regulatory Reform Bill, section 39.

[128] Enterprise and Regulatory Reform Bill, section 45.

[129] As regulators have been mentioned when talking about the enforcement of competition law in the UK because of their ability to apply competition law in their sectors. It is worth looking at competition Act cases concluded by the regulators for the same period under examination (May 2004- December 2012). Regulators have tried to apply competition law, only in one case regulators concluded with an infringement. See Table 2 in the Appendix. Table 5 below shows the cases concluded by regulators and the outcome of these cases.

Secretary of State will be under duty to review the operation of the of the antirust regime and to prepare a report on how the regime is working to The Parliament, which has to be published before the end of the period of 5 years from the ERRB come into force.[130] Reporting to The Parliament is a very good idea, as the CMA performance will be assessed by The Parliament and it will also give interested outsiders an opportunity to comment and analyse the CMA's work.

After providing what procedures the OFT have changed and what are the changes to the CMA. It can be said, that neither the OFT nor the ERRB tackled an important what appears to be a weakness in the UK system, namely bringing new cases and focusing on enforcement activities. However, the changes and the proposed changes may affect, theoretically, may shorten the duration of investigations.

Therefore, it would have been helpful if the ERRB taken the issue of number of cases, or putting the OFT under the duty to open an investigation under certain conditions, at least in the short run. Or giving the Secretary of State to compel the OFT to open investigations under certain conditions after reviewing the CMA performance.

4-4: Conclusion

This chapter has reviewed antitrust enforcement in the UK from May 2004 to December 2012. It has examined empirically the OFT's outcomes, capabilities (human capital and budget) and analysed studies that assessed the UK enforcement regime. This has been followed by studying procedures and proposed changes that may affect antitrust enforcement in the UK.

From the reviewed documents, it has been concluded that the OFT experiences three main issues that affects its performance: low number of cases, length of investigations

[130] Enterprise and Regulatory Reform Bill, section 40

and the lack of high impact cases. None of the reviewed documents has defined what the appropriate number of cases is or what the ideal length for investigations is. This is mainly because of the difficulty in defining such issues. So why not assuming the contrary, and assume that the UK as jurisdiction is competitive and the lack of number cases is because of the levels of deterrence.

A very important point that has been overlooked by commentators is to look if there are any alternatives to traditional public enforcement in the UK. The first point is that in the UK there a high level of deterrence and this is why there is low number of cases. The second point is the levels of private enforcement in the UK and this affecting the role of public enforcement. The third point is that most of competition law infringements that affect the UK are of international nature and hence being investigated by the European Commission. These points require more investigation and need to be examined in order to identify problems within the UK antitrust regime.

Regarding the first point, an answer to this maybe sought by comparing the UK regime to another regime with similar capabilities and characteristics. This will be done in the subsequent chapters. Regarding the private enforcement point, according to the available empirical evidence,[131] private enforcement in the UK is still weak and needs more time to be improved.[132] In addition, there is no evidence that stand-alone

[131] On the empirical evidence see Barry J. Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part I' (2006) European Competition Law Review 279; Barry J. Rodger 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004 - Part II', (2006) European Competition Law Review 241; Barry J. Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part III'(2006) European Competition Law Review 341; Barry J. Rodger, 'Competition law litigation in the UK courts: a study of all cases 2005-2008: Part 1' (2009) 2(2) Global Competition law Review 93; Barry J. Rodger, 'Competition law litigation in the UK courts: a study of all cases 2005-2008: Part 2' (2009) 2(3) Global Competition law Review, 136-147; Barry J. Rodger, 'Private enforcement of competition law, the hidden story: competition litigation settlements in the United Kingdom, 2000-2005'(2008) 29(2) European Competition Law Review 96

[132] Also highlighted in Barry Rodger, 'UK Competition Law and Private Litigation' in Barry Rodger (ed), Ten years of UK Competition Law Reform (2010 Dundee University Press, Dundee) at 74 and 77.

cases have been successful with exception of a small number of cases.[133] Therefore, according to the current evidence private enforcement of competition law may not help public enforcement. As with the first point, the third point requires more research in order to identify if the European Commission has investigated cases that affect the UK and other jurisdictions. This will be examined in Chapter 6.

Furthermore, the issue of the balance between enforcement and non-enforcement activities is an issue that needs to be considered. As if it is true that there is lack of decisions and that investigations take too long to be concluded. The CMA may need to focus, at least in the short run, on enforcement activities more than non-enforcement activities and may need to allocate more staff to focus on enforcement actions. As the lack of enforcement actions may undermine the significance of non-enforcement activities that aim to raise awareness and deterrence, as businesses may have doubts on the ability to bring enforcement actions against them.

In addition, this chapter discussed the new changes and the proposed changes that may take place in the future. In this respect, it has been argued that the changes are a good move in the right direction; however, they may not tackle all of the problems that have been expressed by commentators. The changes may help the CMA in increasing the robustness of decisions and transparency in general. However, there are no clear indications that it may help the CMA to bring more cases more easily. What is needed is a short-term plan is to focus more in bringing cases and prioritising enforcement activities over non-enforcement activities.

[133] Barry Rodger, 'UK Competition Law and Private Litigation' in Barry Rodger (ed), Ten years of UK Competition Law Reform (2010 Dundee University Press, Dundee) at 74 and 77.

Importantly, the UK antitrust regime needs a period of stability where major institutional or legislations changes shall be avoided after the CMA took office in April 2014.

The next chapters of the thesis may help in providing some explanations to UK antitrust regimes and may provide useful insights to the UK; and what the other jurisdiction may learn from the UK experience.

Appendix

Case	Year of conclusion	Duration of investigation (months)	Outcome and type of investigation	Amount of fine (if any)	Source of investigation	Average duration of investigations (on a yearly bases) (in months)
Attheraces	2004	30	Infringement of CH I	0	Notified Arrangement	28.4
First Edinburgh	2004	40	No infringement of CH II	0	Complaint	
Harwood Park Crematorium	2004	29	No infringement of CH II	0	Complaint	
TM Property Services Limited	2004	19	No infringement of CH II	0	Complaint	
UOP Limited	2004	24	Infringement of CH I	1,707,000	Own initiative	
MasterCard UK Members	2005	66	Infringement of CH I & Article 101	0	Notified Arrangement	48.25
felt and single ply	2005	43	Infringement of CH I	138,515		
Mastic Asphalt Roof	2005	40	Infringement of CH I	87,353		
Felt and single ply flat-roofing	2005	44	Infringement of CH I	471,029		
Flat roof and car park	2006	35	Infringement of CH I	2,419,608		
Associated Newspapers	2006	36	Commitments (CH II)	0	Complaint	37.4
stock check pads	2006	25	Infringement of CH I	168,318	Leniency	
aluminium spacer bars	2006	50	Infringement of CH I	898,470	Complaint	

Own initiative (then the OFT found out about the other

Schools Exchange of information	2006	41	Infringement of CH I	467,500	From the media	
Cardiff Bus	2008	42	Infringement of CH II	0	Complaint	42
Bid-rigging in the construction	2009	58	Infringement of CH I	129,200,000	Complaint	49
Construction Recruitment Forum	2009	40	Infringement of CH I	39,270,000	Leniency	
Tobacco	2010	85	Infringement of CH I	225,000,000	Leniency	52
Flybe Limited	2010	19	No infringement of CH II & Article 102	0	Complaint	
loan-services (Royal Bank of Scotland (RBS) and Barclays)	2011	34	Infringement of CH I & Article 101	28,590,000	Leniency	42.5
Reckitt Benckiser	2011	29 (Early resolution)	Infringement of CH II & Article 102	10,200,000	report by BBC Newsnight	
Dairy retail price	2011	95	Infringement of CH I	49,510,000	Leniency	
IDEXX Laboratories	2011	12	No infringement of CH II	0	Complaint	

Table 1: All cases concluded by the OFT (May 2004- December 2012)

Case	Year	Type
Dwr Cymru, OFWAT	2004	NO CH II
Welding Federation, Rail Regulator	2004	NO CH II
Npower ,Gas and Electricity Authority	2004	NO CH II
London Underground, ORR	2004	NO CH II
BT Group plc, Ofcom	2004	NO CH II OR 102
Southern Water ,OFWAT	2004	NO CH II
Vodafone, O2, Orange and T-Mobile, Ofcom	2004	NO CH II OR 102
BT 0845 and 0870 retail price change, Ofcom	2004	NO CH II OR 102
BT Analyst Ofcom	2004	NO CH II
United Utilities Electricity	2004	NO CH II
RS Clare and Company, ORR	2005	NO CH I/101 OR CH II/102
Re-investigation Vodafone, Ofcom	2005	NO CH II OR 102
Re-investigation T-mobile, Ofcom	2005	NO CH II OR 102
BT Wholesale	2005	NO CH II OR 102
United Utilities Water, Ofwat	2005	NO CH II OR 102
BT digital cordless telephones, Ofcom		NO CH II
English Welsh & Scottish Railways, ORR		YES CH II & 102
EDF electricity meter, Gas and Electricity		NO CH II OR 102
BBC Broadcast, Ofcom	2007	NO 101/102
BT's charges for NTS, Ofcom	2008	NO CH II
National Grid	2008	YES CH II & 102
Investigation into BT's broadband residential	2010	No CH II

pricing, Ofcom		
DB Schenker Rail (UK) Limited, ORR	2010	No CH II

Table 2: Number of cases concluded by regulators between May 2004 and December 2012

Chapter 5: An Empirical Analysis of Public Enforcement of Competition law in France (May 2004- December 2012)

5-1: Introduction[1]

This chapter examines, empirically, the application of competition law by the French Competition Authority (FCA).[2] Hence, this chapter scrutinises the application of Articles L.420-1 and L.420-2[3] from the French Commercial Code and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), from May 2004, since the Regulation 1/2003 came into force,[4] and up to 31 December 2012. Further, this chapter examines the non-enforcement activities of the FCA. This will be done in order to understand what exactly the outputs of the FCA during the period under examination. In addition, the capabilities of the FCA will be studied, i.e. the human capital and the budget of the FCA, in order to figure out under which circumstances the FCA produced its outputs.

For the period under examination, there has been an important institutional change in the French competition regime.[5] The Law on the Modernisation of the Economy (LME), of 4 August 2008,[6] created the present FCA which replaced the former Competition Council. The

[1] All of the translations in this chapter are unofficial, whether it has been translated by the author, the French Competition Authority or from the legifrance website.

[2] This chapter examines only public enforcement of competition law. for a good discussion about private enforcement; see, George Cumming, Brad Spitz and Ruth Janal, *Civil procedure Used for the Enforcement Of EC Competition Law by the English, French and German Civil Courts* (Kluwer, The Netherlands 2008)

[3] In France, Article L.420-5 punishes abusively low pricing practises; this provision also included in the analysis.

[4] Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003, p. 1–25.

[5] For the way in which competition law was enforced pre the Modernisation of the French competition regime; see Eric David, 'Country Analysis - France" in Gerhard Dannecker and Oswald Jansen (eds), *Competition Law Sanctions in the European Union* (Kluwer, the Hague 2004) 405- 479; see also, Dominiqe Voillemot and Amael Chesmeau, 'Chapter on France' in Julian Maitland-Walker (ed), *Competition Laws of Europe* (LexisNexis 2003) 121-164; A more recent piece see, Louis Vogel, 'Competition Law' in George Bermann and Etienne Picard (eds), *Introduction to French Law* (Kluwer, The Netherlands 2008) 364-394.

[6] Law no 2008-776 of 4 August 2008 of Modernisation of the Economy, and Ordinance no 2008-1161 of 13November 2008 of Modernisation of Competition Regulation; came into force 2 March 2009.

LME created an independent and more powerful administrative authority.[7] The major changes that the LME has brought other than establishing the new Authority can be summarised as follows. First, it extended the powers of the FCA and reallocates them, previously most of the powers and the recourses shared by the Competition Council and the Ministry of Economy. Now, these powers and resources are centralised within the Competition Authority. Second, the Modernisation of Economy law has transferred merger competence from the Ministry of Economy to the competition authority. Third, strengthen of investigatory powers of competition authority officials. Formally, the Competition Council had to request assistance from the Ministry of Economy's inspection services, whereas now, the Competition Authority has its own investigation services. Fourth, the FCA may, on its own initiative, issue opinions on competition related matters.[8]

Alongside the institutional changes, there were some amendments to procedures that the FCA uses when enforcing competition law. For example, the FCA amended its notice on commitments decisions,[9] leniency notice,[10] settlements procedures, [11] fining guidelines, and to its compliance program.[12]

In order to analyse public enforcement of competition law in France, this chapter employs an empirical approach to this. This chapter presents and analyses data collected from decisions concluded by the FCA from May 2004 to December 2012. The data collected includes the

[7] For example, The Council in the past has been linked with the Ministry of Economy, now the Ministry of Economy can only intervene in merger cases, where it may request a new examination (in-depth analysis or "phase II") or to reverse certain decisions. However, in the case of requesting an in-depth analysis, the Authority may accept or reject the request. See Article L. 430-7-1 of the French Commercial Code.

[8] For more on the new French Competition Authority; see Bruno Lasserre, 'The New French Competition Authority: mission, priorities and strategies for the coming five years' (2009) paper by the President of the Autorité de la concurrence. Available at <http://www.autoritedelaconcurrence.fr/doc/intervention_bl_autorite_trustubusters_09.pdf>; Bruno Lasserre, 'Competition regulation, one year after the reform: a view of authority (Part 1)' (2010) n ° 3-2010 Concurrences 35-46; Bruno Lasserre, 'The New French Competition Law Enforcement Regime' October 2009 COMPETITION Law International.

[9] FCA, Notice on Competition Commitments of 2 March 2009.

[10] FCA, Notice on the Method Relating to the Setting of Financial Penalties of 16 May 2011.

[11] FCA, Procedural notice on antitrust settlement procedure of 10 February 2012

[12] FCA, Framework Document on Antitrust Compliance Programmes of 10 February 2012

following: number of cases, sources of investigations, nature of investigations, length of investigations and the fine imposed where the FCA imposed any fines. In addition to this, this chapter studies if any of the decisions concluded, in the period under examination, have been appealed, and it reports the outcome of the appealed decisions. The examination of appeals is important in order to calculate the success rate of the FCA on appeal, and it provides a good feedback of the FCA's enforcement activities. The data regarding the enforcement activities of the FCA have been obtained from the decisions published by the FCA. Data regarding appeals have been obtained from the Paris Court of Appeal and the Court of Cassation judgments.

As it has been mentioned earlier this chapter examines non-enforcement activities of the FCA. This chapter presents and comments on the non- enforcement activities by studying what the FCA has produced between May 2004 and December 2012. Non-enforcement activities include: opinions issued by the FCA regarding competition matters; sector inquiries; guidelines; advocacy activities; or any other form of studies or documents that may uses the FCA's resources. The data have been obtained from the FCA's website and publications.

In addition, the FCA's budget and human capital (capabilities) are examined in this chapter. Data regarding the budget, the staff, and the number of specialists have been obtained from the Global Competition Review publications on 'rating enforcement'.

After presenting and analysing the data regarding enforcement, non-enforcement and the capabilities of the FCA. This chapter, afterwards, provides facts and surrounding circumstances about the French competition regime. This includes analysing any studies or peer reviews that have evaluated the FCA activities, also studies that examined a specific area of the FCA will be considered. In addition, certain peculiarities of the French competition

regime will be presented, in order to provide explanations about its impact on enforcement and the way it may affect how the FCA deals with competition enforcement.

To the author's knowledge this is the most updated empirical study (if not the only) about the enforcement of French competition law by the FCA. However, it has to be noted, that this chapter it intended to provide a platform for the analysis that will be undertaken in the 'comparative chapter' (Chapter 6) where the results from the three jurisdictions will be studied, and to provide the appropriate advice to each CA.

This chapter is structured as follows. Section 2, presents and analyses the enforcement activities of the FCA, including appeals. Section 3 discuses the non-enforcement activities of the FCA. Section 4 presents the capabilities of the FCA, including the human capital and the budget of the FCA. Section 5 highlights certain peculiarities of the French competition regime and how it may affect competition enforcement. Section 6 concludes.

5-2: Outcomes of the FCA

This section discusses the enforcement activities of the FCA between 1 May 2004 and 31 December 2012. It discusses the cases concluded by the FCA and the nature of these cases. The sources and duration of investigations are also discussed in this section. Then, the fines imposed by the FCA are presented. Analysis for the above issues will be provided. This section ends with analysing the cases that have been appealed.

5-2-1: Number of cases

Between May 2004 and December 2012, the FCA concluded 383 cases. The FCA concluded 138 infringement decisions, 173 non-infringement decisions,[13] 46 commitments decisions and 26 'other' cases.[14] Table 1 below shows the number cases concluded in each year.

From May 2004 to December 2004, the FCA concluded 64 decisions. There were 19 cases concluded as infringements, 36 cases declared as non-infringements and nine 'other' cases concluded. [15] In 2005, 76 cases were concluded, 27 infringement decisions, 38 non-infringement decisions, four commitment decisions and seven other decisions. In 2006, the number of cases dropped to 42 cases, 13 infringement decisions, 20 non-infringement decisions, six commitment decisions and three other decisions. In 2007, the number of cases concluded increased to 50 cases. The FCA concluded 24 infringement decisions, 15 non-infringement decisions, nine commitment decisions and two 'other' cases. 2008 saw the number of cases dropped to 34, 15 concluded as infringements, 14 non-infringement decisions, four commitment decisions and one 'other' decision. 40 cases were concluded in 2009, 15 infringement decisions, 20 non-infringement decisions and five commitment decisions. In 2010 the FCA concluded 30 cases, nine infringement decisions, 13 non-infringement decisions, seven commitment decisions and one 'other' case. In 2011, the number of cases dropped down to 19 cases; the lowest number of cases in a given year in the whole sample. The FCA concluded six infringement decisions, seven non-infringement decisions, five commitment decisions and one 'other' case. In 2012, the FCA concluded 28

[13] Non-infringement decisions include the following cases: cases where the FCA did not find an infringement; cases where the FCA decided that there is no need to continue with the procedure; cases where the FCA rejected the request for interim measures; and cases where the FCA rejected the compliant. See table 2 below for these cases.

[14] Other cases includes decisions related to cases before May 2004 and mainly about cases where parties failed to comply with injunctions imposed or complying with commitments offered to close the proceedings; or cases where there was no evidence of not complying with an injunction or decision. These cases will not be discussed in the chapter.

[15] The overall number of cases concluded in 2004 was 79 cases.

cases ten infringement decisions, ten non-infringement decisions, six commitment decisions and two 'other' cases.

Year	Infringements	Non-infringements	Commitments	Other	Total
2004	19	36	0	9	**64**
2005	27	38	4	7	**76**
2006	13	20	6	3	**42**
2007	24	15	9	2	**50**
2008	15	14	4	1	**34**
2009	15	20	5	0	**40**
2010	9	13	7	1	**30**
2011	6	7	5	1	**19**
2012	10	10	6	2	**28**
Total	**138**	**173**	**46**	**26**	**383**

Table 1: number of cases concluded by the FCA (May 2004- December 2012)

*Source: Author's own research and calculations

It can be observed from table 1, that the number of decreasing over the years under examination, particularly, from the year 2008 onwards. This where the discussions for adopting the Modernisation of the Economy Law was taking place and coming to an end and has established the new Competition Authority, the FCA took office in 2 March2009. Although it is too early to say that the there is a policy to reduce the caseload of the FCA, but this is what it seems the FCA is aiming to reach.[16] In addition, it can be observed that the number of non-infringement decisions is higher than the number of infringement decisions and this is the case in all of the years under examination. This is possibly because of the uniqueness of the French competition regime where it requires the FCA (and formerly the French CC) to deal with any complaint and it has to publish such decisions. Also, there are a lot of the decisions under the non-infringements category that deals with request for interim measures. This is explained in Table 2 below where it shows the exact outcome of all

[16] Bruno Lasserre, 'The New French Competition Authority: mission, priorities and strategies for the coming five years' (2009) paper by the President of the Autorité de la concurrence, P. 22. Available at http://www.autoritedelaconcurrence.fr/doc/intervention_bl_autorite_trustubusters_09.pdf.

decisions, particularly for the non-infringement decisions. It can be seen from Table 2 that there are around 80 decisions, where the FCA rejected complaints or cases with request for interim measures and complaints. It has to be stressed here, again, to the peculiarity of the French competition regime, where the FCA has to respond to complaints in formal decisions.

Year	Accepting commitments	No infringement	No need to proceed	Other cases	Rejecting complaint	Rejecting complaint & request for measures	Rejecting the request for measures	Infringements	Total
2004	0	7	16	9	8	1	4	19	**64**
2005	4	11	14	7	5	6	2	27	**76**
2006	6	4	8	3	2	5	1	13	**42**
2007	9	4	5	2	1	5	0	24	**50**
2008	4	2	2	1	2	5	3	15	**34**
2009	5	2	6	0	3	3	6	15	**40**
2010	7	4	2	1	1	2	4	9	**30**
2011	5	0	3	1	1	1	2	6	**19**
2012	6	0	4	2	5	0	1	10	**28**
Total	**46**	**34**	**60**	**26**	**28**	**28**	**23**	**138**	**383**

Table 2: The exact outcome for the cases for the cases concluded by the FCA (May 2004- December 2012), particularly for the cases that are considered as non-infringements cases

*Source: Author's own research and calculations

5-2-2: Nature (type) of investigations

This sub-section presents cases by the provision(s) in which it has been investigated. At the outset, it is worth highlighting the legal provisions in which the FCA investigates its cases. Anti-competitive agreements are investigated under Article L.420-1 of the Commercial code (mirrors 101 TFEU). Article L.420-2 (1) is applicable to abuse of dominance cases (mirrors 102 TFEU). Article L.420-2 (2) is applicable to abuse of economic dependency cases.[17]

[17] There were no cases where the FCA investigated for abuse of economic dependency in the period under examination. For more about abuse of Economic dependency; see Eric David, 'Country Analysis - France" in Gerhard Dannecker and Oswald Jansen (eds), *Competition Law Sanctions in the European Union* (Kluwer, the Hague 2004) 405, 414-415.

Article L.420-5 punishes abusively low pricing practises, in order to be applicable the undertaking in question do need to have a dominant position in the investigated market.[18]

The FCA conducted investigations toward alleged infringement of competition law that may affect trade at a national level and cases that may affect trade between member states; therefore, the FCA applied French and European competition rules toward alleged infringements. Table 3 below shows the number and the nature of investigations conducted by the FCA in each year.

5-2-2-1: Cases dealt with under Article L.420-1 and Article 101 TFEU

The FCA found infringements of Article L.420-1 in 69 cases. Article 101 TFEU and Article L.420-1 was found to be infringed in 30 cases. In three cases the FCA accepted commitments from parties for potential infringements of Article L.420-1 and 101 TFEU. Seven cases were investigated under 101 TFEU and Article L.420-1, the FCA concluded that there is no breach of any of the provision. There were 37 cases investigated under Article L.420-1 concluded as non-infringements. Seven cases were closed by parties offering commitments under Article L.420-1.

5-2-2-2: Cases dealt with under Article L.420-2 and 102 TFEU

[18] For the period under examination, Article L.420-5 has never been investigated alone; it has been investigated either with Article L.420-1 or L420-2 or both. On Article L.420-5; see Eric David, 'Country Analysis - France" in Gerhard Dannecker and Oswald Jansen (eds), *Competition Law Sanctions in the European Union* (Kluwer, the Hague 2004) 405, 415-416.

The FCA dealt with 116 cases under Articles L.420-2 and 102 TFEU. The FCA concluded nine infringement decisions under Article L.420-2. In eleven cases dealt with under L.420-2 and 102 TFEU together, where declared as infringements. 55 cases where declared as non-infringements under L.420-2 and twelve cases concluded by parties offering commitments to remedy the FCA's concerns. Under article L.420-2 and 102 there were 18 cases without the FCA finding infringement of any of the provisions. Also, under article L.420-2 and 102 there were eight cases closed by parties offering commitments.

5-2-2-3: Cases dealt with under Articles L.420-1 & L.420-2 and 101 & 102 TFEU

The FCA investigated 77 cases where it applied Articles L.420-1 & L.420-2 and in some cases it has applied the national provisions and Articles 101 & 102 TFEU. In seven cases, the FCA found an infringement of both Article L.420-1 and L.420-2. In four cases, the FCA accepted commitments from the investigated parties for potential infringements of Articles L.420-1 and L.420-2. In 30 cases investigated under Articles L.420-1 and L.420-2 no infringement was found. In eleven cases, the FCA found infringement of competition law that affected France and have affect on trade with other EU member states, under Articles L.420-1 & L.420-2 and 101 & 102 TFEU. In six cases, the FCA accepted commitments from the investigated parties, under Articles L.420-1 & L.420-2 and 101 & 102 TFEU. In 20 cases where Articles L.420-1 & L.420-2 and 101 & 102 TFEU were the subject of these investigations, the FCA found no infringement of any of the aforementioned provisions.

5-2-2-4: Cases where Article L.420-5 was investigated

There were no cases were investigated under L.420-5 solely, it has always been investigated with Articles L.420-1 or L.420-2 or both Articles together. In total there were ten cases where Article L.420-5 was examined. Six cases were investigated under Articles L.420-1, L.420-2 and L.420-5. Only in one case an infringement was found. There was only one case was closed by accepting commitments from the investigated parties. Four cases were concluded as non infringements, where Articles L.420-1, L.420-2 and L.420-5 were investigated. There was one case where Article L.420-1 and L.420-5 were investigated, the FCA did not find an infringement. Article L.420-2 and L.420-5 where the subject of three investigations, all of which were concluded by not finding any infringements.

Type of cases	2004	2005	2006	2007	2008	2009	2010	2011	2012
420-1 (infringement)	8	15	7	10	10	6	6	5	2
420-1, 101 (infringement)	1	5	2	7	4	2	3	1	5
420-1, 101 (commitments)	0	0	0	2	0	0	0	1	0
420-1, 101 (no infringement)	0	1	2	1	0	1	0	2	0
420-1, 420-2 (infringement)	1	1	1	2	1	0	0	0	1
420-1, 420-2, 101, 102 (infringement)	2	1	3	2	0	3	0	0	0
420-1, 420-2, 101, 102 (commitments)	0	1	1	2	0	0	2	0	0
420-1, 420-2, 101, 102 (no infringement)	6	2	2	0	3	3	4	0	0
420-1, 420-2, 420-5 (infringement)	0	0	0	1	0	0	0	0	0
420-1, 420-2, 420-5 (commitments)	0	0	0	0	0	0	1	0	0
420-1, 420-2, 420-5 (no infringement)	0	1	0	0	1	0	0	0	2
420-1, 420-2 (commitments)	0	0	1	2	0	0	0	1	0
420-1, 420-2 (no infringement)	3	8	6	2	1	3	1	2	4
420-1, 420-5 (no infringement)	1	0	0	0	0	0	0	0	0

420-1 (commitments)	0	0	2	0	1	3	1	0	0
420-1 (no infringement)	11	9	2	6	2	2	1	1	3
420-2 (infringement)	4	4	0	0	0	1	0	0	0
420-2, 102 (infringement)	3	1	0	2	0	3	0	0	2
420-2, 102 (commitments)	0	1	0	1	0	1	1	0	4
420-2, 102 (no infringement)	4	1	1	0	3	5	3	1	0
420-2, 420-5 (no infringement)	0	0	1	1	1	0	0	0	0
420-2 (commitments)	0	2	2	2	2	1	2	1	0
420-2 (no infringement)	11	16	6	5	3	6	4	2	3

Table 3: number of cases by the decision reached between (May 2004 - December 2012)

***Source: Author's own research and calculations**

It can be observed from the above mentioned that, most of the infringement decisions where anti-competitive agreements cases (99 cases out of 138 infringement decisions). Also, if the case has been investigated under the national and the European provisions, it is more likely that an action will be taken. Article 101 EFTU has been investigated in 40 cases, only in seven cases it has been declared as non-infringement. Abuse of dominance where investigated 116 times. Over half of these cases (73 cases) where concluded by not finding infringements of either L.420-2 or 102 EFTU. Most of the non-infringement decisions were investigated, in the first place, because of complaints. A possible reason for this that many of these complaints is from actual or potential competitors, who cannot compete effectively or cannot enter the market because of their competitor (s).

5-2-3: Sources of investigations

The FCA opened its investigations on different grounds. It is important to study the sources of investigations in order to understand if this has any affect on the outcome of the investigation. The source of investigation means for the purpose of this chapter, the first source in which the FCA knew and investigated the alleged infringement.

Given the peculiarity of the French system, one would expect a high number of decisions opened because of complaints. This can be clarified more when studying the source of the investigations and the outcomes of these investigations. Most of the investigations were opened because of complaints and referrals from ministers which can be considered as complaints as well. The FCA opened 212 investigations based on complaints received from consumer associations, competitors or consumer groups. 114 cases were referred to the FCA from ministries in France. 26 cases were opened on the FCA's own initiative. Six cases were investigated because of leniency applications from cartelists. It can be clearly noticed the low number of own initiative investigations compared to the cases that have been opened because of complaints or because of referrals from ministries. This can be understood as the FCA is doing so little on its own initiative and is limiting its discretion and the way it allocates its resources and priorities.

In addition, one needs to examine the nature of the investigations alongside the sources of investigations in order to understand if there is any relationship between them. This is important to be examined in order to see if the source and the nature of the investigation have a relationship with the outcome of the investigation. Table 4 below shows the sources of investigations for the cases concluded by the FCA between May 2004 and December 2012. Table 5 below presents the nature (and the number) of cases and the sources of investigations for the cases concluded by the FCA between May 2004- December 2012.

Sources of investigations	Count
Complaint	212
Leniency	6
Minister	114
Own initiative	26

Table 4: Sources of investigations for all decision concluded by the FCA (May 2004- December 2012)

***Source: Author's own research and calculations**

5-2-3-1: Article L.420-1 case

For the investigations under Article L.420-1 that lead to finding infringements, there were 69 cases. Most of these cases (50) were referred to the FCA by ministers, twelve cases were investigated because of complaints, six cases were investigated on the FCA's own initiative, and one case because of leniency. There were seven cases under Article L.420-1 concluded as commitment decisions. The source of the investigation for these cases was: three cases from complaints, three cases from minsters and one case was investigated on the FCA's own initiative. The FCA declared 37 cases declared as non-infringements, the source of which was: 18 cases complaints and 19 cases referred form ministers.

5-2-3-2: Article L.420-1 and Article 101 EFTU cases

The FCA found in 30 cases that Article L.420-1 and Article 101 EFTU were infringed. The FCA knew about five cases because of complaints, five cases because of leniency applications, 15 cases were referred by ministers and five cases were investigated on the FCA's own initiative. Three cases under Article L.420-1 and Article 101 EFTU were

concluded as commitment decisions. Two of these cases were started by the FCA and one case was opened because of a complaint.

5-2-3-3: Article L.420-2 cases

The FCA declared infringements of Article 420-2 in nine occasions. Complaints were the source of investigations in seven cases, referrals form a ministries were the source for the other two cases. In twelve cases the FCA accepted commitments offered from the investigated parties. The sources of these cases were: ten complaints and two referrals from ministries. In 56 cases the FCA issued non-infringement decisions. Unsurprisingly, in 46 cases the source of the investigations were complaints, nine cases were referrals from ministries and in one case the source was the FCA's own initiative.

5-2-3-4: Article L.420-2 and 102 EFTU cases

There were 37 cases dealt with under Articles L.420-2 and 102 EFTU. Eleven cases were declared as infringements, the sources of the investigations in these cases were: seven cases were opened as a result of complaints and four cases because of referrals from ministers**.** Eights cases were concluded by parties offering commitments to remedy the FCA's competition concerns. Seven cases were opened because of complaints and one case was referred from a minister. 18 cases were declared as non-infringements, in 17 cases the sources of the investigations were complaints and one case was investigated because of a referral form a minister.

5-2-3-5: Articles L.420-1 and L.420-2 EFTU cases

In eight cases, the FCA found infringements of Articles L.420-1 and L.420-2. The sources of the investigations in these cases were: four cases complaints, two cases were referred from ministers, and one was opened on the FCA's own initiative. There were four cases concluded as commitments, the sources of all of these cases was complaints. For the non-infringement decisions, there were 30 cases. In 27 cases the source of the investigations were complaints, two cases were referred by ministries to the FCA, and one case was opened on the FCA's own initiative.

5-2-3-6: Articles L.420-1, L.420-2, 101 and 102 EFTU cases

Eleven cases were declared as infringements of Articles L.420-1, L.420-2, 101 and 102 EFTU. The source of the investigation in five cases was complaints, three cases were referred to the FCA by ministers and, three cases were investigated on the FCA's own initiative. Under Articles L.420-1, L.420-2, 101 and 102 EFTU, six cases were closed by parties offering commitments. Five cases were opened because of complaints and one case was referred to the FCA by a ministry. For the non-infringement decisions, there were 20 cases. 17 cases were investigated because of complaints logged to the FCA; two cases were referred by ministries and; one case was investigated on the FCA's own initiative.

5-2-3-7: Cases involves Article L.420-5

There were no cases were investigated under L.420-5 solely, it has always been investigated with Article L.420-1, L420-2 or both Articles together. In total ten cases Article L.420-5 was examined. Six cases were investigated under Articles L.420-1, L.420-2 and L.420-5. One

investigation was concluded by finding an infringement; the source of this investigation was a compliant. One case was closed by accepting commitments; this case was investigated because of a complaint. Four cases were concluded as non infringements, three cases were investigated because of complaints and one case was investigated on the FCA's own initiative. There was one case where Article L.420-1 and L.420-5 investigated; the source of this case was a complaint. Article L.420-2 and L.420-5 where the subject of one investigation, the source was of this investigation was a complaint.

Type of cases	Complaint	Leniency	Minister	Own initiative
420-1 (infringement)	12	1	50	6
420-1, 101 (infringement)	5	5	15	5
420-1, 101 (commitments)	1	0	0	2
420-1, 101 (no infringement)	6	0	1	0
420-1, 420-2 (infringement)	4	0	2	1
420-1, 420-2, 101, 102 (infringement)	5	0	3	3
420-1, 420-2, 101, 102 (commitments)	5	0	1	0
420-1, 420-2, 101, 102 (no infringement)	17	0	2	1
420-1, 420-2, 420-5 (infringement)	1	0	0	0
420-1, 420-2, 420-5 (commitments)	1	0	0	0
420-1, 420-2, 420-5 (no infringement)	3	0	0	1
420-1, 420-2 (commitments)	4	0	0	0
420-1, 420-2 (no infringement)	27	0	2	1
420-1, 420-5 (no infringement)	1	0	0	0
420-1 (commitments)	3	0	3	1
420-1 (no infringement)	18	0	19	0
420-2 (infringement)	7	0	2	0
420-2, 102 (infringement)	7	0	0	4
420-2, 102 (commitments)	7	0	0	1
420-2, 102 (no infringement)	17	0	1	0

420-2, 420-5 (no infringement)	3	0	0	0
420-2 (commitments)	11	0	3	0
420-2 (no infringement)	46	0	9	1
Total	**212**	**6**	**113**	**29**

Table 5: Sources of investigations by decision reached for the cases concluded by the FCA (May 2004- December 2012)

***Source: Author's own research and calculations**

5-2-4: Fines [19]

This section presents the fine imposed for the cases concluded in each year for the years under examination.[20] The fine imposed represents the last stage for investigations where an infringement of competition law is found. It represents an important aspect of the FCA's enforcement aspect and one of the most important aspects from the investigated parties' point of view. In addition, fine imposed is an issue that motivates the investigated parties to appeal the FCA's decision. Therefore, it is important to examine the fine imposed and to try to identify if the fine imposed is affected by other issues, or the other way around.

In the cases where the FCA found infringements of competition law (whether at a national level or European level) the fine ranges from not imposing any financial penalties to more than €550 million. This section discusses the fine imposed in each year and the number of cases concluded.[21] However, it has to be noted that many of the infringement decisions have been appealed which means that the fine may have been amended by the court; this will be

[19] This section will only discuss fines imposed on a yearly basis; i.e. individual cases will not be discussed here, but will be discussed with the appeals in section 2.7.

[20] See Nathalie Jalabert-Doury, 'Competition Authority's Upgraded Fining Policy in France — Who Will Be Next?' (2011) Antitrust & Trade Regulation Report, 100 ATRR 674, 06/10/2011by the Bureau of National Affairs (examining critically the Notice of 16 May 2011 the Method Relating to the Setting of Financial Penalties and provides figures about the fines imposed between 2000-2004 and 2005- 2010, where the upper limit of imposing a financial penalty increased from 5% to 10%); see also, Bruno Lasserre, 'Antitrust: A Good Deal for All in Times of Globalization and Recession' 2011 7(1) Competition Policy International 245, 257-265 (discussing fines in Europe with reference to the FCA).

[21] Table 1 in the appendix provides the fine imposed in each case.

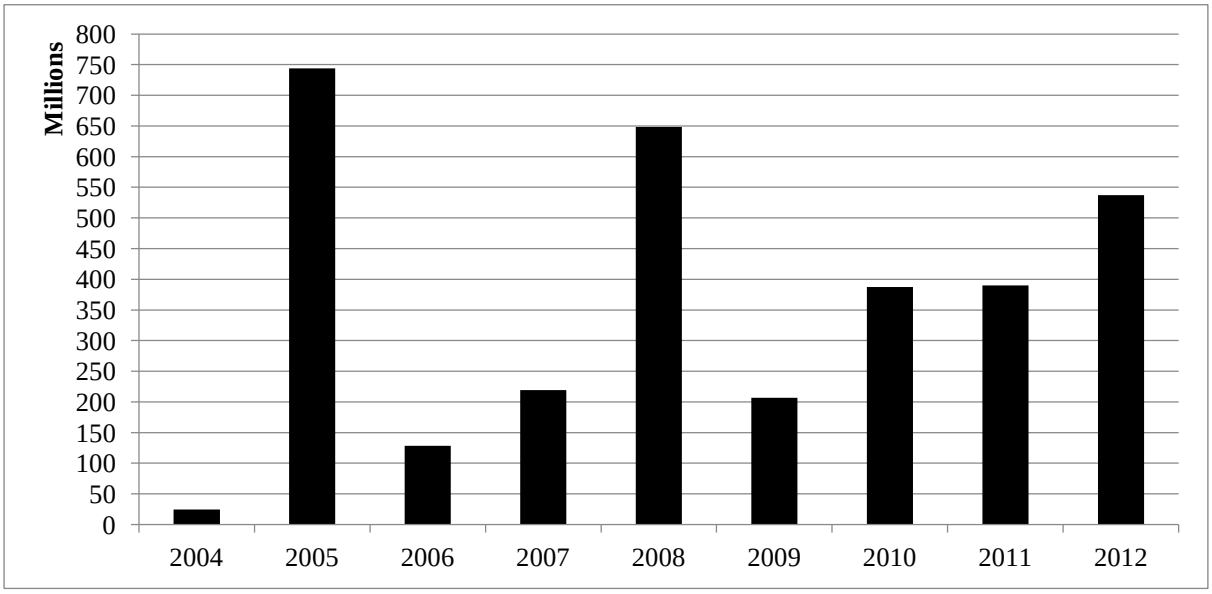
discussed later in section 5-2-7 below. Thus, the figures presented here are not final but it is worth examining this to assess how successful the FCA is in reaching its decisions.

Graph 1 below presents the fine imposed in each year, from May 2004 to December 2012. From May 2004 to December 2004, the overall fine imposed around €24.5 million, where in this period the FCA concluded 19 cases. In 2005, the FCA found infringements of competition law in 27 cases; the overall fine imposed in these cases was around €734.7 million. This is the highest amount of fine imposed in a single year in the whole sample; it has to be mentioned in this respect that the FCA imposed over €530 million in a single case.[22] In 2006, the overall amount of fine was around €128 million with 13 cases concluded. In 2007, the FCA concluded 24 cases and imposed an overall fine of €219 million. The second highest fine in a year was imposed in 2008, the FCA imposed around €648 million when it concluded 15 cases. It is worth mentioning that the FCA imposed over €575 million in one case. [23] In 2009, the fine imposed drooped to €206.6 million when it found infringements of competition law on 15 occasions. In 2010, the FCA imposed around €387 million and concluded nine cases. 2011 saw six cases concluded and the FCA imposed around €389.7 million. In 2012 the FCA imposed around 537 million when it found infringements of competition law in ten cases.

It seems that the number of cases concluded does not play a role in the overall amount of fine imposed. For instance, in the years 2005 and 2008 where the fines imposed were the highest, nearly two-third of the fine imposed in each year was in a single case, as mentioned in the previous paragraph. As a general observation, it can be seen that the years 2010, 2011, 2012 have seen a lower number of cases concluded, compared to some of the previous years under

[22] FCA decision 05-D-65, this case will be discussed more in the section about appeals.
[23] FCA decision 08-D-32, this case will be discussed more in the section about appeals.

examination, but the overall amount of fine imposed in these years was higher.[24] One may interpret this, that the FCA becomes more selective in its cases and focusing on cases where it may harm the economy more. However, this is not a completely valid interpretation as the FCA, as stated earlier, has to investigate any case brought to it. It has to be noted, however, that if one considers the cases where opened on the FCA's own initiative and because of leniency applications, it can be noticed clearly that highest fines were imposed in these cases. In this respect one should give credit to the FCA for selecting those cases, as the FCA's policy (leniency) or its own initiative has tackled the most harmful cases to the economy.



Graph 1: fine imposed in each year for the cases concluded by the FCA (May 2004- December 2012)

***Source: Author's own research and calculations**

[24] As it has been mentioned, in 2005 and 2008 there was a single in each year where the fine imposed constitute around two third of the overall amount of fine for the whole year.

5-2-5: Duration of investigations[25]

After discussing the number of cases, the nature of the cases and the fine imposed for the cases concluded by the FCA. It is now important to talk about the time it took the FCA to produce these cases, i.e. the duration of investigations. It is also important to assess what could affect the duration of investigations concluded by the FCA. It is worth examining if the there are certain issues that may affect the duration of investigations; for instance, does the nature of the case investigated affects the length of the investigation? Do the sources of the investigations affect the length of the investigation? Do the capabilities of the FCA affect the duration of the investigation (this will examined in the next section "capabilities of the FCA")? Does the number of cases concluded in a given year affects the overall duration of that year?

In this section, the decisions concluded by the FCA will be classified into three groups. Infringement decisions, non-infringements and commitments decisions, and interim measures decisions, because of the different nature and the time required to conclude each type of decision. The main reason behind this is that in non-infringement decision the FCA is not involved with issues of assessment of harm and calculating the fine. Also, in commitments decisions the FCA does not conduct a full investigation, it only conducts a preliminary assessment of the alleged infringements, if the parties offer commitments that remedy the FCA's concerns,[26] then the FCA will accept these commitments and closes the investigation. Also, the case of interim (emergency) measures decisions is different from both categories, which requires a quick action from the FCA, whether to order the measure or not.

[25] It has to be reminded that there are 26 decisions which have been classified as "other decisions" which are not considered here.

[26] See, French Competition Authority, Notice on Competition Commitments of 2 March 2009.

5-2-5-1: Infringements decisions

As it has been mentioned earlier, the FCA declared infringements of competition law in 138 decisions. The average duration of investigations for all cases is 49.6 months. Table 6 below show the average duration of investigations in each year and the number of concluded cases for infringement decisions only.

From May 2004 to December 2004, the FCA concluded 19 cases and the average duration for investigations was 44.6 months. It has to be reminded that the number of cases and the average duration of investigation do not represent the all of the cases concluded in 2004, as there were decisions concluded before May 2004 are not examined in the thesis. In 2005, the average duration of investigations increased to 66.5 months where the FCA concluded 27 infringement decisions, the highest average duration of investigation in a single year for the whole sample. In 2006, the FCA concluded 13 cases and the average duration of investigations drooped down to 56.6 months. The year 2007 saw 24 cases declared as infringements, the average duration of investigations was 51 months. In 2008, average duration was 41.4 when the FCA concluded 15 cases. In 2009, the number of cases was the same as 2008, but the average duration of investigations increased to 48 months. In 2010, the number of cases concluded dropped to nine cases and the average duration fallen to 39.3 months. In 2011, the number of infringement decisions dropped further to six cases and the average duration increased from 2010 to 44 months. In 2012, the number of infringement cases increased to ten cases and the average duration of investigations to 55.2 months. It has to be noted that in 2012, a case took around 110 months to be concluded by the FCA.[27] If one

[27] FCA decision 12-D-23.

considers this case as an outlier, then average duration of investigations become 49.1 months, just below the overall average duration of cases.

Year	Average duration of investigations (in months)	Number of cases
2004	44.6	19
2005	66.5	27
2006	56.6	13
2007	51	24
2008	41.4	15
2009	48	15
2010	39.3	9
2011	44	6
2012	55.2	10
Average duration for all cases	**49.6**	**138**

Table 6: Average duration of investigations (infringement decisions only) May 2004- December 2012

***Source: Author's own research and calculations**

5-2-5-2: Non- infringements and commitments[28]

The FCA declared 167 cases as non-infringements and commitments. The duration of investigations ranges, in certain cases, from one month to over 130. The overall average duration for the non-infringements and commitments decisions is 37.5 months. From May 2004 to December 2004, the FCA concluded 31 cases, the average duration of investigations was 50.8 months.[29] In 2005, the average duration was 56.9 months where the FCA concluded 34 cases. In 2006, the number of concluded cases drooped down to 19 cases, as with the average duration for investigations drooped to 45.5 months. 2007 saw 20 cases and the average duration fallen to 37.6, just above the overall average duration for the whole sample. In 2008, the FCA concluded ten cases; the average duration for these cases was 37.5 months.

[28] The following decisions are examined in this category: no need to proceed, non- infringements, and rejected complaints decisions.

[29] The year 2004 is not a full year, as this chapter only examined from May 2004, therefore, the overall average for the year 2004 might be higher or lower.

In 2009, the average duration decreased to 26 months when the FCA closed 15 cases. The average duration of investigations increased to 35.5 months in 2010, the FCA concluded 14 cases. In 2011, the FCA concluded nine cases and the average duration fallen to 19.8 months, the lowest average duration of investigations in a single year for the whole sample. In 2012, the average duration of investigations was 28 months when the FCA concluded 15 cases. Table 7 below presents the number and the average duration of investigations in each year, from May 2004 to December 2012.

It can be observed that the number of cases concluded in a single year affects the average duration of the investigations concluded in that year. For instance, the year 2005 saw the highest number of cases concluded in a single year and it saw the highest average duration of investigations. In the same vein, the year 2011 saw the lowest number of cases concluded in a single and the lowest average duration of investigations in a single year in the whole sample. However, this cannot be taken as conclusive observation as other issues have to be taken into account, in order to know if the number of investigations concluded affects the duration of investigations. Further issues will be discussed later in the chapter which may help in understanding this issue and other issues.

Year	Average duration (Non & Commit) (in months)	Number of Cases
2004	50.8	31
2005	56.9	34
2006	45.5	19
2007	37.6	20
2008	37.5	10
2009	26	15
2010	35.5	14
2011	19.8	9
2012	28	15
Average duration for all cases	**37.5**	**167**

Table 7: Average duration of investigation (non-infringements and commitments decisions only) May 2004- December 2012

***Source: Author's own research and calculations**

5-2-5-3: Interim measure decisions (either request accepted or rejected)

Interim or emergency measures decisions are by their nature have to be dealt with quickly by the FCA. This is why these decisions are dealt with separately. The FCA dealt with 52 cases and the average duration was 6 months.

From May 2004 to December 2004, the FCA dealt with five cases where parties asked for interim measures, the average duration for these cases was 4 months. In 2005, the FCA concluded eight cases; the average duration of investigations was 3.6 months. In 2006, the average duration was 5.6 months where the FCA dealt with six requests. In 2007, the average duration was 4.8 months, the FCA concluded five cases. In 2008, the FCA closed eight cases; the average duration for these investigations was 5.2 months. In 2009, the number of cases increased to ten cases and the average duration increased to 10.7 months. In 2010, the FCA concluded six cases; the average duration was 9.3 months. In 2011, the number of cases fallen to three cases, the average duration for these cases was 5.6 months. In 2012, the average duration was six months where the FCA concluded only one case. Table 8 shows the number and the average duration of investigations for interim measures cases.

Year	Average duration (interim measures) (in months)	Number of cases
2004	4	5
2005	3.6	8
2006	5.6	6
2007	4.8	5
2008	5.2	8
2009	10.7	10
2010	9.3	6
2011	5.6	3

2012	6	1
Average duration for all cases	**6**	**52**

Table 8: Average duration of investigation (interim or emergency measures decisions) (May 2004- December 2012)

***Source: Author's own research and calculations**

5-2-6: Analysis about the outcomes of the FCA

This section will provide some analysis from linking the finding reached in the previous sections, and to identify if there are any special characteristics with certain type of cases or if any of the variables discussed earlier has affect on the enforcement of the law.

5-2-6-1: Ordinary procedures vs. Leniency and non-contest procedure

The FCA has certain procedures to investigate and end cases. In ordinary procedures the FCA investigate its cases without co-operation from the undertakings involved.[30] If there is a leniency application, then the FCA has information about the infringement and the leniency applicant (s) receives immunity from fines or reductions. In the non-contest procedure, the FCA opens an ordinary procedure and sends the statement of objections to the undertakings investigated. If the undertakings did not challenge the charges in the statement of objections and offers commitments to their future conduct. The FCA may accept these commitments on its own discretion, mostly to assess if the commitments would improve the future conduct of the undertaking (s) involved. If the FCA accepts the commitments then it may give reductions form the fine that it intends to impose. Such decisions are not appealable for the undertakings that entered the non-contest procedure. Therefore, it can be expected that duration of investigation for cases under leniency and non-contest procedure to be lower than in ordinary investigations.

[30] There are mitigating which may reduce the amount of fine, but these cases are considered as ordinary cases.

There were 14 cases which involved the non-contest procedure; the average duration for these investigations (49.2 months) was just below the overall average duration for all infringement decisions (49.6 months). Few decisions were opened because of leniency applications. Six cases were opened because of leniency application; the average duration for these cases (46.6 months) was below overall average duration. For ordinary procedures where 118 decisions fall in this category, the average duration was over the overall average duration (52.9 months). Hence, it can be seen that decisions where leniency or non- contest procedure used, duration of investigations was shorter than in cases concluded under ordinary procedures and always below the overall duration of investigations.

5-2-6-2: Anti-competitive agreements and abuse of dominance cases: any differences in the treatment?

The FCA declared 138 as infringements of competition rules. There were 99 cases dealt with under Article L.420-1 and 101 EFTU (anti-competitive agreements), the average duration for these cases was 45.5 months, around four months below the overall duration. For L.420-2 and 102, the average duration of investigations was 60.6 months, where 20 cases were concluded for the period under examination. When Article 101 and 102 where investigated in the same case, there were 19 cases, the average duration for these was 63.2 months, around 14 months higher than the overall average. It seems that anticompetitive agreements investigations are concluded much quicker than abuse of dominance investigations. Further, in investigations where an anticompetitive agreement and abuse of dominance were investigated, it would take the FCA more time to conclude its investigation.

Also, it can be said that investigations that involves abuse of dominance and ‘abuse of dominance and anti-competitive agreement in the same investigation have raised the overall

average duration of investigations for infringement decisions, despite the fact that these investigations are less than a third of the overall number of the cases concluded.

5-2-6-3: Amount of fine imposed vs. Duration of investigations

In this section, cases will be classified into three categories. Cases where the fine was comparatively low (less than €1 million); cases where the fine was over €1 million and less than €50 million and; cases where the fine imposed was over €50 million.

In the cases where the fine imposed was less than 1 million (78 cases), the average duration for these cases where around 47 months, two months below the overall average duration of investigations. For the cases where the fine was over €1 million and less than €50 million (50 cases), the average duration was 59 months, twelve months above the overall average duration of investigations. For the cases where the fine imposed was over €50 million (10 cases), the average duration 56.6 months, around 9 months above the average duration of investigations. It seems that the FCA does not give more attention when the infringement is more harmful to the economy and treats all cases in a similar way in terms of allocating resources. One may assume that in cases where the fine was low is simpler and that such undertakings do not have resources as in the cases where the fine imposed is higher and the undertaking are more capable of challenging the FCA's charges than smaller undertakings.[31] Since the FCA is not giving special attention to cases where the fine is higher, then it took the FCA more time to conclude its cases where the fine is higher than €1 million.

[31] This is based on the assumption that the higher the fine the bigger is the undertakings involved, because fines are calculated on the basis of sales and the extent of the extent of the infringement and the annual turnover of the undertaking. See, FCA Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties.

5-2-6-4: Duration of investigations vs. Sources of investigations

Table 9 below shows average duration for the investigations concluded by the source of the investigation. It can be seen from Table 9 that when a leniency application is the source of the investigation it would take the FCA less time than other sources. This may indicate that leniency program employed the FCA is effective in terms of reducing the duration of the investigation and has helped the FCA in finding infringement is a shorter period of time. It also seems that when cases are referred from ministries are supplied to the FCA with good evidence or with more information than other cases (or given more attention). Another possible reason for the shorter length of investigations for cases referred from ministries, because many of the sector inquiries and opinions issued by the FCA are usually referred to it by ministries which may have some relationship with the cases investigated. Cases opened on the FCA's own initiative takes around four months above the overall average, despite the number of cases is lower compared to complaints and cases refereed from ministers. This may indicate that the FCA does not give extra attention to its 'own cases' and that it deals with cases equally. Cases opened because of complaints are the cases that took longer to be concluded. This is may be because of the high number of complaints that the FCA receives (including non-infringements), or it may mean that complaints are not supplied with enough information about the conduct that is to be investigated and that the FCA needs to collect more information about the conduct.

complaint		leniency		Minister		Own initiative		Overall
Mean	**Count**	**Mean**	**Count**	**Mean**	**Count**	**Mean**	**Count**	
57.46	41	46.67	6	47.06	73	54.94	18	49.6

Table 9: Average duration of investigations for infringement decisions by the source of investigations form May 2004 to December 2012 (in months)

***Source: Author's own research and calculations**

5-2-6-5: Are own initiative cases different than other cases?

The FCA does not have too much control over cases that it can investigate, because it has to deal with complaints and referrals from ministries. It is important to examine own initiative cases to see how the FCA done with its limited discretion.

The FCA's own initiative was the source of investigation in 18 cases. In twelve cases, Articles L.420-1 and 101 EFTU were investigated and the FCA found infringements. The FCA found infringements of Articles L-420-2 and 102 EFTU, in three cases. In three cases, the FCA found infringements of Articles L.420-1, L.420-2, 101 and 102. Form the application of the law in these cases, it seems that the FCA is targeting cases which have wide dimension, i.e. most of the cases investigated on the FCA's own initiative have affect on trade between member states and therefore, Articles 101 and 102 EFTU where applicable. Thus, it seems that the FCA is targeting cases of a wide geographical nature. Further, if one assumes that the size of the fine imposed reflects on the size of the infringement and its harm to consumers.[32] The amount of fine imposed in over half the cases was over €7 million. Also, the second and the third highest fines imposed in the whole sample where imposed where the cases were investigated of the FCA's own initiative. The success rate for 'own initiative' cases is good compared to the whole sample,[33] where the FCA only lost one case on appeal and there were only slight reductions in the fine imposed.[34]

[32] This is a plausible assumption as fines are imposed on the amount of sales and the annual turnover of the undertaking.
[33] The matters of appeals are discussed in detail, in section 5-2.
[34] Two of the 18 cases are still pending on appeal.

5-2-7: Success rate on appeal [35]

The FCA's decisions, with respect to antitrust enforcement, can be appealed to the Paris Court of Appeal (PCA), which can review the FCA's decision both on points of law and facts. The final stage of appeal of the FCA decisions is to the Court of Cassation, which it can review the Paris Court of Appeal's judgments only on points of law.[36] This sub-section aims to review all of the cases concluded between May 2004 and December 2012 to examine if these cases have been appealed and if so what happened on appeal. Success rate on appeal has been used by some scholars in order to determine the quality of Competition Authorities' decision making. This chapter will take this into account, however not as a determinative factor.[37]

As it has been mentioned earlier, the FCA concluded 383 decisions; there were 138 infringements decisions. From the 138 decisions, there were 14 cases which cannot be appealed; as the parties did not contest (settlements) the charges against them and the parties may offer future commitments regarding their future conduct, in return the FCA award a reduction in the fine that it intends to impose.[38] In addition to the 14 cases where parties used the non-contest procedure; there were 46 cases were not appealed at all.[39] Therefore, there were 78 decisions appealed to the Courts in France. Some of the recent decisions are still pending on appeal (ten cases). For the rest of the appealed cases (68 cases), a small number

[35] The last date which the author searched for appeals is 15 April 2013.

[36] For a good overview of the Judicial review in French competition law; see, Nicolas Petit and Louise Rabeux, 'Judicial Review in French Competition Law and Economic Regulation – A Post- *Commission vs. Tetra Laval* Assessment' (2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1290143> .

[37] This issue has been discussed in chapter 2.

[38] This is procedure can be used for any competition law infringement whether it is anti-competitive agreement or abuse of dominance. The legal basis for this procedure is Article L. 464-2 III of the French Commercial Code. French Competition Authority decisions: 05-D-49; 07-D-02; 07-D-21; 07-D-26; 07-D-33; 07-D-40; 08-D-13; 08-D-20; 08-D-28; 09-D-24; 09-D-31; 11-D-07; 12-D-06; 12-D-27.

[39]French Competition Authority decisions: 04-D-21; 04-D-30; 04-D-42; 04-D-43; 04-D-49; 04-D-50; 04-D-56; 04-D-65; 04-D-74; 04-D-75; 05-D-03; 05-D-07; 05-D-10; 05-D-14; 05-D-27; 05-D-44; 05-D-45; 05-D-47; 05-D-55; 05-D-63; 06-D-22; 06-D-25; 06-D-30; 06-D-36; 07-D-03; 07-D-04; 07-D-06; 07-D-24; 07-D-25; 07-D-44; ; 08-D-03; 08-D-15; 08-D-22; 08-D-23; 08-D-29; 09-D-04; 09-D-17; 09-D-39; 10-D-03; 10-D-05; 10-D-10; 10-D-11; 10-D-15; 10-D-22; 11-D-01; 12-D-26.

of cases were lost by the FCA entirely. Nearly half of the cases appealed were upheld entirely by the Courts, and the rest of the cases were partly upheld, i.e. the fine was reduced or the FCA decision was annulled with respect to some parties and upheld with regard to the others.

This section classifies appealed decisions into four main categories: (i) Upheld the decision: The Court upheld the FCA's decision both on liability and fine. (ii) Largely upheld the decision: the court upheld the FCA's with respect to liability but reduce the fine imposed. (iii) Partly upheld the decision: annual the FCA's decisions with respect to some parties on liability and fines, and upheld the decisions on liability or fine for others. (iv) Annulling the decision: annulling the FCA's decision entirely. (v) Upheld or largely or partly upheld/ pending: the PAC has ruled on this and the decision is still pending on appeal before the Court of Cassation.

From the 138 infringement decisions there were 78 appealed to the Courts in France. 37 out the 78 cases were fully upheld by the Courts and confirmed the FCA's findings with regard to liability and fine (Upheld).[40] In 12 cases the Courts upheld the FCA's findings with regard to legibility but reduced the fine imposed (Largely Upheld).[41] In eleven out of the 78 cases, the French Courts annulled the FCA's findings regarding liability and fine to some parties and upheld the FCA's findings to other parties (Partly Upheld).[42] There were four cases where the Courts annulled the FCA's finding entirely and declaring that there is no infringement (s) of competition law.[43] In two cases, the PCA upheld the FCA's finding entirely but still pending

[40] French Competition Authority decisions: 04-D-25; 04-D-26; 04-D-32; 04-D-37 ; 04-D-39; 04-D-70; 04-D-78; 5-D-58; 05-D-59; 05-D-64; 05-D-69; 05-D-70; 06-D-09; 06-D-37; 07-D-05; 07-D-16; 07-D-28; 07-D-29; 07-D-41; 07-D-48; 07-D-49; 08-D-09; 08-D-25; 08-D-30; 08-D-33; 09-D-03; 09-D-05; 09-D-06; 09-D-07; 09-D-10; 09-D-14; 09-D-34; 10-D-04

[41] French Competition Authority decisions: 05-D-43; 05-D-65; 06-D-13; 06-D-15; 07-D-15; 07-D-50; 08-D-12; 08-D-32; 09-D-19; 09-D-36; 10-D-13

[42] French Competition Authority decisions: 05-D-19; 05-D-26; 05-D-32; 05-D-67; 05-D-75; 06-D-07; 07-D-01; 07-D-08; 07-D-47; 09-D-

[43] French Competition Authority decisions: 04-D-48; 07-D-09; 08-D-06

in front of the Court of Cassation (Upheld/pending).[44] In two cases, the PCA largely upheld the FCA's finding but it has reduced the fine slightly, this case is still pending in front of the Court of Cassation (Largely upheld/pending).[45] There are ten cases which are pending on appeal.[46]

Therefore, if one calculates the success rate on appeal for the FCA and assumes that whenever the FCA was right in finding an infringement of competition law and such a decision stands, i.e. being upheld on appeal, then such cases are considered as successful cases. Such an assumption is made because the FCA was right in spotting an infringement of competition law. Hence, the success rate on appeal is 53.5%. This percentage represents cases which have Upheld, Largely Upheld, Partly upheld and cases which are not appealable (Non-contest procedure). If one added the cases in which are not appealed, then the success rate become 86.8%.

Upheld	Largely Upheld	Partly upheld	Annulment	Non-contest procedure	Not appealed	Pending	Upheld/ pending	Largely Upheld /pending
37 cases (26.8%)	12 cases (8.7 %)	11 cases (7.9%)	4 cases (2.9%)	14 cases (10.1%)	46 cases (33.3%)	10 cases (7.2 %)	2 cases (1.4 %)	2 cases (1.4 %)

Table 10: Number and percentage of infringement decisions, whether appealed or not between May 2004 to December 2012

***Source: Author's own research and calculations**

In what follows a brief description of a selection of the appealed cases will be given, followed by some observations gleaned from the discussion. The appealed cases will be discussed in three categories according to the fine that has been imposed by the FCA. First, cases where the fine imposed was over €50 million. Second, cases where the fine imposed

[44] French Competition Authority decisions: 06-D-04; 06-D-08.
[45] French Competition Authority decision 11-D-02.
[46] French Competition Authority decisions: 11-D-13; 11-D-17; 11-D-19; 12-D-02; 12-D-08; 12-D-09; 12-D-10; 12-D-23; 12-D-24; 12-D-25.

was less than €50 and over €1 million. Third, cases where the fine imposed was less than €1 million.[47]

5-2-7-1: Cases where the fine imposed was over €50 million[48]

In 08-D-32, the FCA imposed over €575 million for a cartel in the steel industry. Seven of the convicted undertakings appealed the FCA decision to the PCA. The Court upheld the FCA's findings on liability but reduced the fines substantially.[49] The overall fine after appeal become around €73 million.[50] This case represents the highest reduction in fines on appeal in the whole sample, where the reductions amounted to nearly 90% of the original fine imposed by the FCA. This decision was not appealed to the Court of Cassation.

As a matter of fact, this is a very surprising outcome, because this case was investigated as a result of a leniency application from one of the cartelists. Importantly, there are some parties who did not contest the charges by the FCA and been rewarded reductions in fines (for those who did not challenge the FCA, the decision in not appealed). Therefore, the FCA has had a very good evidence and information about the extent of the infringement. Despite this, the FCA did not deal well with the case when determining the fine, which resulted in huge reductions from the fine imposed by the FCA at the end of its investigations.

In 2005, the second highest fine was imposed for anti-competitive agreements in the mobile telephony market.[51] The FCA imposed a fine of €534 million on the main mobile operators in France. [52]

[47] Table 1, in the appendix, presents all infringement decisions and shows whether it has been appealed and the outcome and the amount of fine after appeal. Table 2, in the appendix, presents all non- infringement and commitments decisions and shows whether it has been appealed and the outcome of the cases after appeal

[48] All of the cases in this category were appealed (10 cases).

[49] Paris Court of Appeal Judgment of 19 January 2010.

[50] The PCA judgment was not appealed to the Court of Cassation.

[51] 05-D-65.

The appeal process in this case is a unique one. The FAC's decision was appealed to the PCA, where it rejected the appeal and confirmed the FCA.[53] The PCA's judgement was appealed to the Court of Cassation, where the Court partially reversed the judgment and sent it back to the PCA.[54] The PCA insisted on its previous stand and rejected and upheld the case as it has concluded by the FCA.[55] The judgment was appealed again to the Court of Cassation, again it partially reserved the decision and ordered to be sent back to the PCA.[56] The PCA insisted on the rightness of its judgment (and the FCA's conclusion).[57] In the end, in May 2012, the Court of Cassation upheld the PCA judgment.[58]

There were three cases, dealt with under Article L.420-2 and 102 (Abuse of dominance cases), where the fine imposed was over €50 million. In 2005,[59] the FCA imposed €80 million on France Télécom for abusing its dominant position in the wholesale market for broadband internet access. The PCA and the Court of Cassation dismissed the appeals brought by the defendant.[60]

In 2012, the FCA concluded two abuse of dominance cases and fined the undertakings involved over 183[61] million and 60[62], respectively. Both decisions are pending on appeal in front of the PCA.

In 2010, the PCA reduced the fine imposed in the 09-D-36 case, because of the dimension of the infringement. The FCA fined Orange Caraïbe and France Telecom around €63 million

[52] For an interesting analysis on this case; see Louis De Mesnard ,'Is the French Mobile Phone Cartel Really a Cartel?' (2009) 122 (2) International Journal of Production Economics 663.
[53] PCA Judgment of 16 December 2006.
[54] Court of Cassation Judgment of 29 June 2007.
[55] PCA judgment of 11 March 2009.
[56] Court of Cassation Judgment of 7 April 2010.
[57] PCA judgment of 30 June 2011.
[58] Court of Cassation Judgment of 30 May 2012.
[59] FCA 05-D-59
[60] PCA judgment of 4 July 2006; and Court of Cassation Judgment of 23 October 2007.
[61] FCA 12-D-24.
[62] FCA 12-D-25.

for implementing anticompetitive practices on the mobile telephony, or fixed telephony (calls to mobiles), market in the West Indies-Guyana zone. Their conduct, on the view of the FCA, breached Articles L. 420-1, L. 420-2, 101 TFEU, 102 TFEU. On appeal, the PCA upheld most of the findings of the FCA apart from the dimension of the infringement. The PCA stated that Articles 101 and 102 are not applicable for the infringements in question and that European competition rules are not applicable in this case.[63] As a result, the PCA reduced the fine imposed to around €35 million. The PCA judgment was appealed to the Court of Cassation, where it upheld the PCA.[64]

5-2-7-2: Cases where the fine imposed was between €1 and €50 million

There are 50 cases in this category, 36 decisions where appealed. Starting with the cases where the Court annulled the FCA decision or there were high reductions in fines. In 04-D-48, under Article L.420-2 and 102, the FCA imposes €20 million fine on France Telecom and SFR Group Cegetel for abusing their dominant position. The PCA quashed the FCA's decision entirely.[65] The PCA judgment was appealed to the Court of Cassation where it upheld the PCA judgment in quashing the FCA's decision.[66] In another case under Article l.420-2 and 102, the PCA completely annulled the FCA decision.[67] In this case the FCA imposed 10 million on GlaxoSmithKline for hindered the entry of certain generic drugs to hospitals.[68] The Court of Cassation dismissed the appeal brought to it and confirmed the PCA judgment.[69]

[63] PCA judgment of 23 September 2010.
[64] Court of Cassation judgment of 31 July 2012.
[65] PCA judgment of 27 January 2011.
[66] Court of Cassation 17 January 2012.
[67] PCA judgment of 8 April 2008.
[68] FCA 07-D-09.
[69]PCA judgment of 17 March 2009.

In 08-D-12, the FCA opened an investigation, under L. 420-1, after receiving a leniency application from one of the cartelists. The FCA punished six plywood manufacturers for anti-competitive agreement on prices by imposing over €8 million. On appeal, the PAC upheld the FCA's finding with regard liability but reduced the fine imposed to around €5.5 million.[70] The PAC judgment was confirmed by the Court of Cassation.[71]

In 11-D-02, the FCA found 14 companies infringing Article L.420-1, by sharing almost all public markets for the restoration of historic monuments in three French regions. The PCA reduced the fine imposed by the FCA, from around €9.8 million to around €9.2 million.[72] The PCA judgment was appealed to the Court of Cassation, where it is still pending.

5-2-7-3: Cases where the fine imposed was less than 1 million

This is the largest category in terms of the number of cases; but as a percentage of the number of cases that was appealed it has the smallest percentage of appealed cases, over 50% of the cases were not appealed.[73]

In 06-D-13, the FCA imposed €718 thousand for a breach of L.420-1 on two undertakings in the construction industry. On appeal the PCA reduced the fine imposed to €508 thousand.[74] The PCA judgment was not appealed.

In 07-D-01, the FCA fined three undertakings for a breach of Article L. 420-1 around €944 thousand. Two undertakings appealed the decision to PCA, where it ruled in their favour and annulled the FCA's decision for the undertakings who appealed the decision.[75] The overall

[70] PCA Judgment of 29 September 2009.
[71] Court of Cassation of 15 March 2011.
[72] PCA judgement of 11 October 2012.
[73] 46 cases out 78 cases were not appealed, whether because of settlements or because the cases where not appealed.
[74] PCA judgment of 25 September 2007.
[75] PCA judgment of 15 January 2008.

fine after appeal becomes €12 thousand, because an undertaking did not appeal the FCA decision. The PCA decision was confirmed by the Court of Cassation.[76]

In 08-D-06, the FCA imposed €814 thousand on seven physicians' unions for conspiring to increase fees for patient visits, a breach of Article L.420-1.[77] The PCA annulled the FCA's decision entirely.[78] The PCA judgment was confirmed by the Court of Cassation.[79]

In 09-D-19, the FCA imposed around €618 thousand on 19 removal companies that had colluded in order to produce fake estimate, an infringement of Article L.420-1. The FCA's decision was appealed[80] to the PCA. The PCA upheld the FCA's findings with respect to liability but reduced the fine slightly for two undertakings. The fine after appeal reduced to around €518 thousand.[81] The PCA judgment was not appealed.

5-2-7-4: Observations and analysis

It can be noted that when the fine is high, the likelihood of appealing the FCA's decision is higher. Whereas, when the fine is comparatively low the possibility of appealing a decision is much lower. To illustrate this, if one looks at the cases where the fine was over €50 million, all of the cases were appealed; whereas, when the fine was less than €1 million, around 60% of the cases were not appealed at all. This may have two explanations. First, in the cases where the fine was high, the undertakings are capable of challenging the FCA's decision because they have enough resources. In addition, when the fine is high, the undertakings are more willing to take the risk and incur litigation costs because the fine is high already. Second, in cases where the fine is low, the undertakings involved may not have the resources

[76] Court of Cassation Judgment of 16 December 2008.
[77] FCA 08-D-06.
[78] PCA judgment of 18 March 2009.
[79] Court of Cassation judgment of 7 April 2010.
[80] Some of the other parties have settled their case with the FCA; therefore, they cannot appeal the decision. Other undertakings did not appeal the decision.
[81] PCA judgment of 9 May 2010.

to challenge the FCA decision; or that the cost of litigation is high and it is not worth challenging the decision and taking the risk of incurring the litigation costs.

Another issue that is worth highlighting is the case of settlement procedure where the FCA award undertakings up to 25 %[82] reduction in fine for those who settle their cases with the FCA. In other words, the difference between the fine imposed pre and post appeals will be calculated. This will be compared to the reductions in fines given because of the settlement procedure. Graph 2 below shows the fine imposed pre and post appeal in each year.

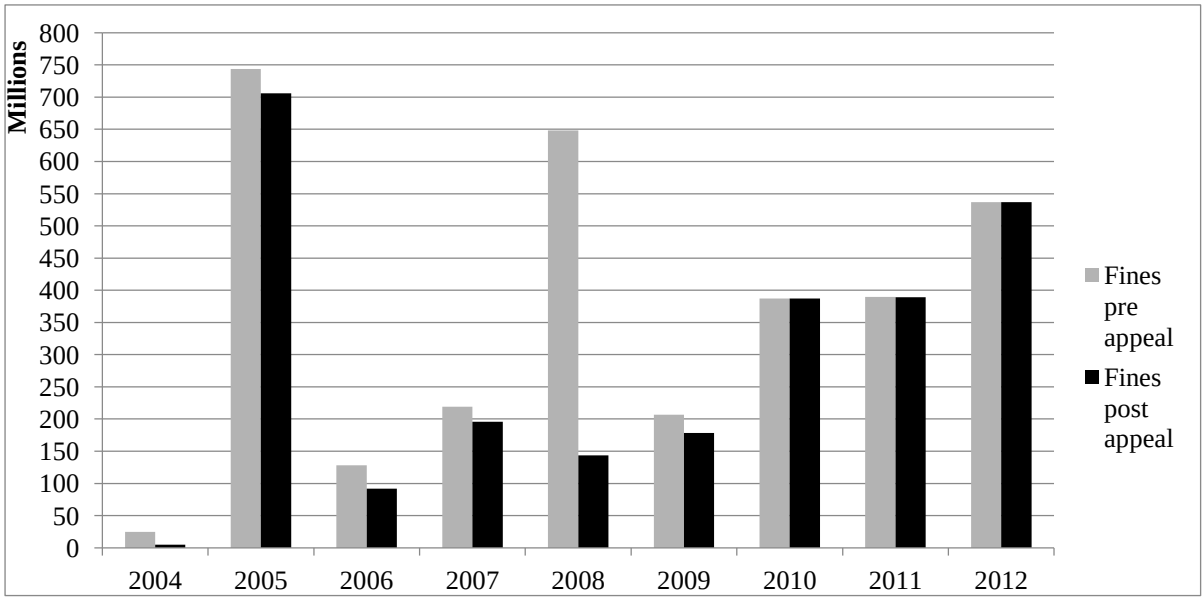
In the years 2011 and 2012, there are three and seven cases still on pending on appeal, respectively. Therefore, they are not included in the calculations. For the cases concluded between May 2004 and December 2004, the reductions in fines as a result of appeals amounted to around 82%. In 2005, the reduction in fines as a result of the appeals was around 5%. In 2006, the reductions of fines were around 29% of the fine before appeal. In 2007, the Courts in France reduced the fines by 11%. The fines imposed in 2008 saw the highest reductions in fines which amounted to around 88%. In 2009, the reductions in fine were around 14%. The fines imposed by the FCA remain the same post appeal. If one calculates the reductions of fines as a result of appeals for the whole sample, then the reductions amounted around 33% of the fine before appeal.

Hence, it seems that the settlement procedure is a successful tool available to the FCA. This is because, the amount of reductions awarded as result of entering into a settlement is lower than the average reductions because of appeals, assuming that the FCA gives highest reduction.[83] In addition, the FCA benefits from the shorter length of investigations, as shown in section 5-2-5 earlier. Furthermore, if the undertaking who settle with the FCA offer commitments to their future conduct; the FCA will have the opportunity to monitor the

[82] For example, in the FCA decision 07-D-33, France Telecom did not contest the facts charged against it and offered commitments regarding its future conduct; the fine was reduced by 25%.

[83] The FCA awards a 25% reduction only in the cases where the undertakings settle with the FCA and offer commitments to their future conduct. This issue is explained more in section 5-5.

conduct of the undertakings and, hence the possibility of compliance with the law is increased.[84]



Graph 2: fine imposed per and post appeal for the decisions concluded by the FCA (May 2004 – December 2012)

***Source: Author's own research and calculations**

5-2-7-5: Non-infringements and commitments decisions (including request for measures)

Out of the 219 non- infringements and the commitment decisions concluded by the FCA, there were 36 decisions appealed. In 26 cases, the FCA decisions were upheld by PCA and Court of Cassation.[85] In six cases the Courts annulled the FCA decisions.[86] There are four

[84] If the undertakings offer commitments to their future conduct, the FCA has the right to monitor the compliance with the commitments offered. If the undertakings fail to comply with the commitments, the FCA can impose penalties on them. See Article L.464-2 of the Commercial Code.

[85] French Competition Authority decisions: 04-D-40; 04-D-45; 04-D-60; 05-D-05; 05-D-13; 05-D-20; 05-D-42; 05-D-50; 05-D-60; 05-D-68; 05-D-72; 06-D-17; 06-D-24; 06-D-29; 07-D-18; 07-D-23; 07-D-27; 07-D-37; 08-D-05; 08-D-08; 08-D-16; 09-D-16; 09-D-26; 10-D-14; 10-D-23; 10-D-24.

[86] French Competition Authority decisions: 04-D-76; 04-D-79; 06-D-12; 07-D-22; 07-D-45; 07-D-46.

cases pending on appeal.[87] The majority of the cases (182) were not appealed at all.[88] Table 11 below shows the outcome of non-infringement and commitments decisions.

Upheld	Annulment	Pending	Not appealed
26	6	4	182

Table 11: outcome of the non-infringements and commitments decisions concluded by the FCA (May 2004- December 2012)

***Source: Author's own research and calculations**

5-3: Non-enforcement activities

Most of the CAs around the world besides conducting enforcement activities and enforcing competition provisions, they conduct non-enforcement activities that have many objectives to achieve. Non-enforcement activities might be used to test markets or sector to check the competiveness of these markets. In France the FCA conducts the so called 'sector inquires' in order to check if competition distorted in the investigated markets. In addition, the FCA, issues opinions, on its own initiative or based on requests from ministries or courts, on specific issues. Furthermore, the FCA may issue opinions on legislations as well. In addition, non-enforcement may be designed in order to raise awareness of the consequences of breaching competition law (e.g. compliance programs). Additionally, non-enforcement

[87] French Competition Authority decisions: 11-D-18; 12-D-11; 12-D-18; 12-D-21.

[88] French Competition Authority decisions: 04-D-16; 04-D-17; 04-D-20; 04-D-22; 04-D-23; 04-D-27; 04-D-28; 04-D-29; 04-D-33; 04-D-35; 04-D-36; 04-D-38; 04-D-41; 04-D-46; 04-D-51; 04-D-53; 04-D-54; 04-D-55; 04-D-57; 04-D-58; 04-D-61; 04-D-63; 04-D-64; 04-D-66; 04-D-67; 04-D-68; 04-D-69; 04-D-71; 04-D-72; 04-D-73;04-D-77; 05-D-04; 05-D-06; 05-D-11; 05-D-12; 05-D-15; 05-D-16; 05-D-18; 05-D-21; 05-D-22; 05-D-23; 05-D-24; 05-D-25; 05-D-28; 05-D-29; 05-D-30; 05-D-31; 05-D-33; 05-D-34; 05-D-35; 05-D-39; 05-D-40; 05-D-41; 05-D-46; 05-D-48; 05-D-52; 05-D-53; 05-D-54; 05-D-56; 05-D-57; 05-D-61; 05-D-62; 05-D-73; 05-D-74; 06-D-01; 06-D-02; 06-D-05; 06-D-10; 06-D-11; 06-D-14; 06-D-16; 06-D-18; 06-D-19; 06-D-20; 06-D-21; 06-D-23; 06-D-26; 06-D-27; 06-D-28; 06-D-31; 06-D-33; 06-D-34; 06-D-35; 06-D-39; 06-D-40; 07-D-07; 07-D-10; 07-D-11; 07-D-12; 07-D-13; 07-D-14; 07-D-17; 07-D-20; 07-D-30; 07-D- 31; 07-D-32; 07-D-34; 07-D-36; 07-D-38; 07-D-39; 07-D-42; 07-D-43; 08-D-01; 08-D-02; 08-D-04; 08-D-10; 08-D-11; 08-D-14; 08-D-17; 08-D-18; 08-D-19; 08-D-21; 08-D-31; 08-D-24; 08-D-26; 08-D-27; 08-D-34; 09-D-01; 09-D-02; 09-D-08; 09-D-09; 09-D-11; 09-D-12; 09-D-13; 09-D-15; 09-D-18; 09-D-20; 09-D-21; 09-D-22; 09-D-23; 09-D-27; 09-D-28; 09-D-29; 09-D-30; 09-D-32; 09-D-33; 09-D-35; 09-D-37; 09-D-38; 09-D-40; 10-D-01; 10-D-02; 10-D-06; 10-D-07; 10-D-08; 10-D-09; 10-D-12; 10-D-16; 10-D-17; 10-D-18; 10-D-19; 10-D-20; 10-D-25; 10-D-26; 10-D-27; 10-D-29; 10-D-30; 11-D-03; 11-D-04; 11-D-05; 11-D-06; 11-D-08; 11-D-09; 11-D-11; 11-D-14; 11-D-15; 11-D-16; 11-D-20; 12-D-01; 12-D-03; 12-D-04; 12-D-07; 12-D-13; 12-D-14; 12-D-16; 12-D-17; 12-D-19; 12-D-20; 12-D-22; 12-D-28; 12-D-29.

activities might be used to highlight the benefits of competitive markets and its role on consumer welfare. Another role of non-enforcement activities is that CAs issue guidance documents in order to clarify the law and how the law will be applied by the FCA (e.g. fining guidelines). Table 12 below lists the sector inquires and opinions concluded by the FCA between May 2004 and December 2012. Table 13 presents the studies, guidelines (procedural notices) or any other form of studies issued by the FCA between May 2004 and December 2012.

Non-enforcement activities of the FCA seems to be more focused on problems of markets rather than trying to help business and consumers on the application and the boundaries of French competition law. For example, there is nearly nothing about educating business or consumers about competition law. Also, there is a lack of guidance documents (guidelines) on legislation. Furthermore, there is a lack of work on reviewing the FCA's own work and the benefits to consumers as a result of the application of competition law. Also, most of the opinions issued by the FCA are very specific, it would be better to have fewer opinions on certain matters and to issue general and more comprehensive opinions. But, this is possibly because most opinions are issued based on references from ministries, courts or regulators. Hence, many of these references are specific in their nature and ask for specific answers from the FCA. Thus, the number of opinions is high and their extent is very narrow.

Hence, it seems that there is no balance in the non-enforcement activities of the FCA. Most of the FCA efforts are focused on markets, rather than educating business or consumers about competition law and its boundaries. However, it has to stated that is possibly because that the FCA is the only body that can enforce competition in France and that it is required to respond to referrals from other bodies in France about competition matters.

Year	Sector inquires and opinions (concluded)

2004	• July 2004: opinion concerning the draft decree on the sale of broadcasting rights for sporting competitions • July 2004: opinion requested by Telecommunications Regulation Authority on France Télécom's standard "Département Innovant" convention. • October 2004: Opinion on Landline to mobile calls. • October 2004: opinion on the state of competition in the non-specialist large-scale retail sector. • October 2004: opinion concerned the conditions in which France Télécom exercises the two activities of access operator on the one hand, and installation-integration of telecommunications systems on the other hand.
2005	• February 2005: opinion on the broadband internet market requested by the Telecommunications Regulation Authority. • February 2005: opinion requested by the Telecommunications Regulation Authority on the development of Voice over Broadband (VoB) offers and the potential distortion of competition. • April 2005: opinion on Universal banking services and competition rules. • April 2005: Opinion advices the regulator to intervene to prevent the risk of insufficient competition on the wholesale mobile telephony market. • May 2005: Opinion on Markets for geographic call termination on alternative landline networks. • July 2005: opinion on the conditions for ensuring fair competition during the transitional period leading up to the introduction of a single numbering format for all the directory assistance numbers which can be dialled up from a telephone. • December 2005: opinion on Motorway Privatisation. • December 2005: opinion on Electricity purchases by intensive industrial users.
2006	• January 2006: opinion on the regulation of the audiovisual broadcasting market. • March 2006: the wholesale market for SMS calls termination on mobile networks. • March 2006: the fair trade business in France. • November 2006: opinion on Broadband Internet.
2007	• February 2007: Call termination on mobile networks in the French Guiana and West Indies. • June 2007: Quality label farm and food industry. • June 2007: Wholesale market for voice calls termination on mobile networks. • July 2007: Marketing of sporting events broadcasting rights. • October 2007: Opinion relative to the legislation on commercial facilities. • November 2007 Opinion concerning the draft decree amending decree2004-699, relative to the marketing of competition or sporting events audiovisual rights by professional leagues
2008	• April 2008: Premium Telephone Services. • May 2008: opinion on the economic organisation of fruit and vegetable processing industry. • June 2008: Deployment of the very high speed fibre optic network. • June 2008: Wholesale market for high speed and very high speed. • June 2008: Fixed telephony markets. • July 2008: Public and private cinemas. • July 2008: Mobile telephony / mobile virtual network operators.
2009	• February 2009: Three opinions on Payment timeframes. • March 2009: two opinions Payment timeframes. • April 2009: Payment timeframes in the book sector. • April 2009: opinion regarding Wholesale audiovisual broadcasting services market. • May 2009: Five Opinions Payment timeframes. • June 2009: Opinion on Fuel prices in the overseas departments. • July 2009: Opinion on TV content access exclusivity offers by Internet service providers. • July 2009: Public transportation of travellers by river shuttles on the Seine. • September 2009: Maritime freight and mass retail distribution in the overseas departments. • September 2009: Deployment of very high-speed optical fibre networks. • September 2009: Networks approved by supplementary health institutions.

	• October 2009: Borrower's insurance. • November 2009: What regulation to end the crisis in the dairy sector? • November 2009: The role of train stations and competition in transportation.
2010	• January 2010: opinion regarding digital books. • February 2010: opinion relative to the digital equipping of cinemas. • February 2010: Opinion on Competition and regulation of airport activities (that could arise from the possible privatization of French airports). • April 2010: Opinion on High and very high speed Internet access coverage. • May 2010: Opinion relative to the introduction of a lawyer's countersignature for private documents. • May 2010: Opinion on the new organisation of the electricity market. • June 2010: Convergence between fixed-line and mobile telecoms. • June 2010: National "ultrafast broadband" programme • July 2010: Opinion on the wholesale markets for voice calls termination on mobile networks in mainland and overseas. • September 2010: Deployment of optical fibre networks in moderately dense areas (on a draft decision by the Telecommunications and posts Regulator. • September 2010: Opinion on the effects on competition rules of the exceptional legal provisions concerning the project of the realization of the public transport network of the Greater Paris. • December 2010: Opinion on the category management between suppliers and retailers in the mass retail distribution for food products sector. • December 2010: Sector inquiry on retail in the food sector. • December 2010: Sector inquiry on online advertising.
2011	• January 2011: opinion on online betting and gambling. • February 2011: opinion on the first inter-branch agreement concluded within the ovine sector. • March 2011: Opinion on Broadband and next generation access networks. • June 2011: Opinion on Wholesale broadband market in the Antilles (French West Indies). • July 2011: Social tariff for broadband Internet access. • July 2011: Price volatility for agricultural raw materials. • October 2011: Two opinions concerning new entrants accessing passenger railway stations. • December 2011: Mobile telephony market: arrival of Free Mobile and full MVNOs. • December 2011: Installation of relay masts Mobile telephony.
2012	• October 2012: Sector inquiry into car repair and maintenance. • October 2012: published two reports, one of them relating to the mechanisms for importing and distributing consumer goods and the other relating to strengthening the competition control bodies of New Caledonia. • September 2012: sector inquiry into e-commerce. • August 2012: Opinion offered to The French energy regulatory commission regarding the electricity Market. • July 2012: Opinion on the Distribution of medicinal products. • July 2012: opinion on the involvement of Producer Responsibility Organisations (PROs) in the waste management and materials recycling sector. • March 2012: opinion regarding the effects on competition of the exclusive sale by dental surgeons of dental prostheses. • March 2012: opinion about a draft decree relating to the establishment of an automatic procedure for the granting of social tariffs of gas and electricity. • February 2012: opinion concerning maritime services to Corsica. • January 2012: Opinion on the roll-out of very high speed broadband via "integrated projects". • January 2012: Opinion on the food retail sector in Paris

Table 12: Sector inquires and opinions issued by the FCA between May 2004 and December 2012

***Source: Author's own research**

Year	Document
2004	
2005	
2006	• September 2006: Class action in the field of competition. (response to the European Commission consultation on this topic)
2007	• April 2007: Adoption of a procedural notice relative to the revised French leniency programme
2008	• April 2008: Procedural Notice on commitments decisions
2009	• November 2009: Opinion on the Review of EC Regulation 2790/99 and of the European guidelines on vertical restraints
2010	
2011	
2012	• February 2012: Corporate compliance programmes. • February 2012: the settlement procedure in antitrust cases • November 2012: Brochure about the French leniency programme.

Table 13: Documents, studies, guidelines issued by the FCA between May 2004 and December 2012

***Source: Author's own research**

5-4: Capabilities of the FCA

After considering the FCA's outcomes in terms of enforcement and non-enforcement activities; it worth investigating under which circumstance the FCA produced these activities. In other words, examining how the budget was allocated and the number of staff and experts in the FCA for the years under scrutiny. Such an examination, alongside the activities of the FCA, may provide how the budget and the staff of the FCA may affect the outcomes and their quality. However, a better understanding can be achieved when comparing the whole activities' and the capabilities' of the FCA to other CAs, which will be done later in the thesis. The data for this section have obtained from the Global Competition Review publications on 'Rating Enforcement'.

5-4-1: Number of staff and Specialists

The number of staff and specialists may affect, at least in theory, the quality of decision making and the duration of investigations. However, one should bear in mind that the procedures and legislations may affect the duration of investigations; also it depends on the

other activities concluded by the FCA. In addition, the nature of the investigations concluded may affect the duration and it may affect the possibility of winning cases on appeal. Having said that, the increase in the number of staff and the number of experts in the FCA may play a role in reducing duration of investigations and may increases the possibility of winning cases on appeal (bearing in mind the budget of the FCA).

Table 14 below shows the overall number of staff, lawyers and economists in the FCA from 2004 to 2011.[89] It can be observed from Table 14 that the number of staff and specialists (lawyers and economists) is increasing over the years. The increase in the number of staff is very rapid where it can be seen that the number of staff in 2011 is three times more than it was in 2004. It can also be seen that there is an increase in the number of economists at the FCA, however, as a percentage it seems that the number of economists is not increasing and it is fairly the same. It can also be noted that number of lawyers, in any given year, is over the half of the overall number of the FCA staff. It can also be noted from Table 14 that there is an increase in the number of senior economists (those with PhD degrees). This may indicate that the FCA is more willing to employ economic analysis in its work. Also the number of specialists may be as a response to the increase employment of the effects based approach in the Commission's work.[90]

Year	Number of staff	Lawyers	Economists	PhDs in Eco	other
2004	50	33 (66%)	17 (34%)		
2005	53	34 (64%)	19 (36%)	6	
2006	130	73 (56%)	26 (20%)	9	31 (24%)
2007	129	71 (55%)	28 (22%)	9	29 (23%)
2008	158	95 (60%)	41 (26%	14	22 (14%)

[89] At the time of writing this chapter, the GCR publications for the year 2012 is not published yet.

[90] Although, the FCA has been criticised for not embracing an effect based approach towards abuse of dominance cases. see Louis Vogel and Joseph Vogel, 'Abuse of dominance under French Law: Desirable Evolutions' The European Antitrust Review (2013) 59, 61

2009	190	108 (57%)	53 (28%)	14	28 (15%)
2010	187	94 (50%)	50 (27%)	13	41 (22%)
2011	200	104 (52%)	50 (25%)	12	26 (23%)

Table 14: number of staff and specialists at the FCA (2004- 2011)

***Source: Global Competition Review publications on 'Rating enforcement'[91]**

5-4-2: Budget of the FCA

The enforcement of the law and recruiting experts is not a cheap process, therefore, CAs need to priorities its work in order to focus on most harmful violations. Therefore, studying the allocation of the FCA budget, alongside what it has produced, would help in understanding how the FCA could improve its priorities or what is required to do so.

The budget of the FCA has been increasing over the years where it starts at around €8.5 to reach around €20 million in 2011. However, the amount of the budget allocated to enforcement seems to be decreasing in certain years. The highest percentage was allocated in 2004 and 2005; by 2011 this has decreased to 24%. This means an increase in the budget allocated to salaries and a decrease in the budget allocated to enforcement, despite the increase in the overall budget. Table 15 below presents the budget of the FCA between 2004 and 2011.

Year	Overall Budget (€ million)	Budget on enforcement (€ million) and percentage of overall budget	Budget on salary (€ million)
2004	8.5	2.5 (30%)	6 (70%)

[91] Global Competition Review, 'Rating Enforcement' (2005)8(5) The International Journal of Competition Policy and Regulation 1, 21-22; Global Competition Review, 'Rating Enforcement' (2006)9(7) The International Journal of Competition Policy and Regulation 1, 21-24; Global Competition Review, 'Rating Enforcement' (2007)10(6) The International Journal of Competition Policy and Regulation 1, 31-32; Global Competition Review, 'Rating Enforcement' (2008)11(6) The International Journal of Competition Policy and Regulation 1, 50-51; Global Competition Review, 'Rating Enforcement' (2009)12(6) The International Journal of Competition Policy and Regulation 1, 58-60; Global Competition Review, 'Rating Enforcement' (2010)13(6) The International Journal of Competition Policy and Regulation 1, 54-56; Global Competition Review, 'Rating Enforcement' (2011)14(6) The International Journal of Competition Policy and Regulation 1, 64-67; Global Competition Review, 'Rating Enforcement' (2012) 15 (5) The International Journal of Competition Policy and Regulation 1, 60-63.

2005	8.6	2.6 (30%)	6 (70%)
2006	11.4	2.5 (22%)	8.9 (78%)
2007	12.8	3.5 (28%)	9.2 (72%)
2008	19.4	5.4 (28%)	14 (72%)
2009	19.4	5.4 (28%)	14 (72%)
2010	20.4	5.3 (26%)	15 (74%)
2011	20	4.8 (24%)	15.2 (76%)

Table 15: the overall budget and the budget allocated to enforcement at the FCA (2004- 2011)

***Source: Global Competition Review publications on 'Rating enforcement'[92]**

5-5: Surrounding circumstances and facts

Although it has been suggested in chapter 2 that this part mainly examines studies that attempted to evaluate or assess the performance of the CA under examination. However, for the period under examination (May 2004- December 2012) there were no studies conducted to evaluate or assess the application of competition law in France.[93] A very recent study by the OECD, which the FCA took part in it, about evaluating the competition law enforcement and advocacy activities; the FCA stated that there are no studies have been conducted in France about the enforcement of competition law or advocacy activities by the FCA.[94]

[92] Global Competition Review, 'Rating Enforcement' (2005)8(5) The International Journal of Competition Policy and Regulation 1, 21-22; Global Competition Review, 'Rating Enforcement' (2006)9(7) The International Journal of Competition Policy and Regulation 1, 21-24; Global Competition Review, 'Rating Enforcement' (2007)10(6) The International Journal of Competition Policy and Regulation 1, 31-32; Global Competition Review, 'Rating Enforcement' (2008)11(6) The International Journal of Competition Policy and Regulation 1, 50-51; Global Competition Review, 'Rating Enforcement' (2009)12(6) The International Journal of Competition Policy and Regulation 1, 58-60; Global Competition Review, 'Rating Enforcement' (2010)13(6) The International Journal of Competition Policy and Regulation 1, 54-56; Global Competition Review, 'Rating Enforcement' (2011)14(6) The International Journal of Competition Policy and Regulation 1, 64-67; Global Competition Review, 'Rating Enforcement' (2012) 15 (5) The International Journal of Competition Policy and Regulation 1, 60-63.

[93] The latest peer review was conducted by the OECD in 2003 and published in 2005; see Michael Wise, 'Competition Law and Policy in France (2003)' (2005) 7 (1) OECD Journal of Competition Law and Policy 7.

[94] OECD, 'Evaluation of Competition Enforcement and Advocacy Activities: the Results of an OECD Survey' Feb (2013) DAF/COMP/WP2 (2012)7/FINAL. Available at <http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/WP2%282012%297/FINAL

Therefore, this section highlights and examines how certain peculiarities and changes in the French competition regime might affect the application of competition law.

There were many changes in the French competition regime, brought by the LME. The most notable change is the establishment of the FCA in March 2009, which replaced the former Competition Council. The LME gave the FCA new powers that did not exist previously. For example, under Article L462-4, the FCA has the powers to issue opinions, on its own initiative, on issues related to the competiveness of markets and how competition law violations can be prevented.

Also for the period under examination, there were changes with regard to legislations and procedures. For example, amendments to the settlement procedure,[95] leniency, commitments[96] and compliance programs[97] have taken place during the period under examination.

The most unique feature of the French competition regime is the 'Non- Contest' procedure (settlements). This procedure can be applied in investigations where any antitrust violation is investigated; it can be applied to anti-competitive agreements and to unilateral conduct cases. In a nutshell, if the undertaking (s) investigated do not challenge the charges in the statement of objections, the fine imposed may be reduced by 10%. Also, if the parties investigated offer commitments to their future conduct, this can result in the FCA reducing the fine by a further 5- 15%, in addition to the 10% reduction for the settlement procedure. It has to be noted that this procedure is to be used on the FCA's own discretion. In addition, the non-contest procedure can be combined with the leniency procedure as well. For example, if a cartelist applied for leniency and has been awarded a reduction in fine and at the same time did not

---

&docLanguage=En> accessed 15 April 2013. See also, Bruno Lasserre, 'Antitrust: A Good Deal for All in Times of Globalization and Recession' 2011 7(1) Competition Policy International 245, 250 (stating the FCA has not published any outcome evaluations and there is no studies conducted about the FCA externally)

[95] French Competition Authority, Procedural notice on antitrust settlement procedure of 10 February 2012

[96] French Competition Authority, Notice on Competition Commitments of 2 March 2009.

[97] French Competition Authority, Framework Document on Antitrust Compliance Programmes of 10 February 2012.

contest the charges in the statement of objections, a further reduction in the fine will be given because of entering the non-contest procedure.[98] The legal basis for this procedure is Article L. 462-2 III of the Commercial Code.[99]

The non-contest procedure can help the FCA in speeding up the conclusion of investigations and reduces the litigation costs, as the undertakings who settle with the FCA cannot appeal the decision. In addition, the settlement procedure may encourage those who violated (ing) competition law to settle their cases with the FCA. Also, as it has been shown earlier in section 5-2-3, that the settlement procedure has been more successful than the leniency procedure, in terms of the number of cases concluded under each procedure.

Another unique issue of the French competition regime is that French competition law seems to be more specific and catches more practices than under European competition law, in the area of unilateral conduct practises. Article L.420-2 is applicable not only to abuse of dominance but also to abuse of economic dependency; between May 2004 and December 2012 there were no abuse of economic dependency cases. Also, there is Article L.420-5 where it punishes excessive low pricing practises; this Article does not require a dominant position to be applicable and it is only applicable to the sales of goods and services to consumers. Article L.420-4 provides exemptions for practices that may be punished under article L.420-2. This exemption is not applicable for cases under Article L.420-5. However, it has to be noted that the application of French competition rules toward abuse of dominance cases has been criticised, as the FCA seems not to employ an effects based approach and that it is employing form (or object)- based approach.[100]

In the following bullet points are some other features of the French competition regime:

[98] This occurred in the recent detergent cartel case in 2011. See case 11-D-17.
[99] This is explained further in the FCA Procedural notice on antitrust settlement procedure of 10 February 2012.
[100] Louis Vogel and Joseph Vogel, 'Abuse of dominance under French Law: Desirable Evolutions' The European Antitrust Review (2013) 59, 61.

- The FCA is the only body in France that can apply competition law. Sector regulators do not have the powers to enforce competition law in their industries; however, they can refer competition related issues to the FCA for opinions. This could be an explanation for the number of cases concluded by the FCA.
- Article L.462-3 offers that any court hearing a case of anti-competitive agreement or abuse of dominance has the option to refer the practices at issue to the FCA to know its opinion about it.
- The FCA may be asked for opinions regarding draft legislations that may affect the levels of competition in market.
- Under French competition law, individuals may face fines and jail sentences for breaches of competition law. This is the case for breaches of Article L.420-1 or Article L.420-2. Individuals may be sentenced to up to four years in jail and € 75,000 fine.[101]

Table 16 below shows the ranking of France for certain aspects regarding the Competiveness of France. This information is taken from the Global competitiveness report produced by the World Economic Forum on a yearly basis. Such information may prove to be useful in a comparative perspective when comparing public enforcement of competition law in France to other countries. For example, information regarding the extent of market dominance and trade barriers may give an insight on why there is more abuse of dominance cases in jurisdiction X than in jurisdiction Y. Thus, such information may be used to provide explanations to issues related to the information; however, not as a determinative factor but alongside the issues discussed above.

[101] Article L420-6 states **"**If any natural person fraudulently takes a personal and decisive part in the conception, organisation or implementation of the practices referred to in Articles L.420-1 and L.420-2, this shall be punished by a prison sentence of four years and a fine of 75,000 euros." This provision has been rarely applied. See, Bruno Lasserre, 'Antitrust: A Good Deal for All in Times of Globalization and Recession' 2011 7(1) Competition Policy International 245, 258 and 266- 269.

year	Intensity of local competition (Ranking)	Extent of market dominance (Ranking)	Effectiveness of anti-monopoly policy (Ranking)	Prevalence of trade barriers (Ranking)
2008	12/ 134	13/134	11/134	27/134
2009	15/133	25/133	10/133	29/133
2010	17/139	22/139	10/139	27/139
2011	12/142	24/142	10/142	32/142
2012	28/144	33/144	20/144	35/144

Table 16: Information related to the competiveness of France

***Source: World Economic Forum, Global Competiveness Reports (2008-2012)**

5-6: Conclusion

This chapter has provided a detailed overview of public enforcement of competition law in France. This chapter also discusses the decisions of the FCA that have been appealed. Further, institutional and procedural changes have been highlighted and linked to the results reached. In addition, this chapter commented on the non-enforcement activities of the FCA and its capabilities. However, this chapter did not provide advice for the FCA on how it may improve its performance. This will be done in the 'Comparative chapter' where it will comment on the FCA from a comparative perspective; in light of this, suggestions on what has to be maintained or changed will be offered.

The main findings of this chapter can be summarised in the following bullet points:

- It has been difficult to assess how the FCA sets its priorities; the main reason for this is that the FCA has to respond to referrals and complaints logged to it. This has resulted in a high number of non-infringement decisions. The same can be reached with respect to non-enforcement activities, where most of the outputs were mainly opinions issued at the request of ministries, sector regulators and courts. This may have caused less attention to other non-enforcement activities that the FCA may conduct.
- It has been shown that the procedure used by the FCA, in particular, the settlement procedure proved to be successful, as it has reduced the duration of investigations when the procedure was used.

- The FCA success rate on appeal is high overall, but there are some cases where the fines were reduced substantially on appeal or the appeal court quashed the FCA's decisions entirely. This may give a perception that the appeal process is still worthwhile. This was particularly the case where the fine was high.
- With regard sources of investigations, most of the investigations where opened because of complaints and referrals from ministries. There was a limited number of cases opened on the FCA's own initiative (*ex officio*), this may indicate that the FCA do not have enough resources and time to open *ex officio* investigations because of the number of complaints and referrals it receives.
- With regard to unilateral conduct cases, around 63% of the cases where concluded as non-infringement decision; over 70% of the non-infringements decisions where investigated because of complaints. This may indicate that there is an abuse of the system or complainants do not have the knowledge to identify anti-competitive conduct. Hence, it would better if the French legislator changes the system where the FCA does not need to respond to all complaints it receives. This would give the FCA a bigger margin to prioritise its activities.
- The establishment of the FCA to replace the former Competition Council seems to have improved the French competition regime. As the FCA seems to reduce its caseload; importantly, only in the years where the FCA was in charge the number of infringement decisions is more the number of non-infringement decisions. Also, the average duration of investigations has been reduced. Particularly, with non-infringement decisions where the average duration of investigation was reduced substantially.

However, it is remain to be seen what the analysis in the next chapter will reveal, where the FCA will be compared to the other jurisdictions. A comparative analysis may help more in

giving the appropriate advice on how to improve the FCA performance by identifying what has to be maintained and what has to be changed or improved.

Appendix

Case	Year of conclusion	Type[102]	Duration (Months)	Fine (€)	Source	Appeal outcome	Fine after appeal (€)
04-D-21	2004	1,2,101,102	25	20,000	Minister	Not appealed	20,000
04-D-25	2004	1	36	12,000	Minister	Upheld	12,000
04-D-26	2004	2	67	76,224	complaint	Upheld	76,224
04-D-30	2004	1	30	23,120	complaint	Not appealed	23,120
04-D-32	2004	2,102	70	700,000	complaint	Upheld	700,000
04-D-37	2004	2		76,224	complaint	Upheld	76,224
04-D-39	2004	1	30	1,016,000	complaint	Upheld	1,016,000
04-D-42	2004	1	39	50,360	Minister	Not appealed	50,360
04-D-43	2004	1	26	166,500	Minister	Not appealed	166,500
04-D-44	2004	2	54	50,000	complaint	Upheld	50,000
04-D-48	2004	2,102	64	20,000,000	complaint	annulment	0
04-D-49	2004	1,2,101,102	69	796,800	complaint	Not appealed	796,800
04-D-50	2004	1	40	59,100	Minister	Not appealed	59,100
04-D-56	2004	1,2	56	64,200	complaint	Not appealed	64,200
04-D-65	2004	2,102	28	600,000	Own initiative	Not appealed	600,000
04-D-70	2004	2	40	484,000	complaint	Upheld	484,000
04-D-74	2004	1,101	58	0	Minister	Not appealed	0
04-D-75	2004	1		150,000	complaint	Not appealed	150,000
04-D-78	2004	1	27	260,100	Minister	Upheld	260,100
05-D-03	2005	1	43	192,224	Minister	Not appealed	192,224
05-D-07	2005	1,101	75	75,000	complaint	Not appealed	75,000
05-D-10	2005	1,101	44	45,000	complaint	Not appealed	45,000
05-D-14	2005	1	40	1,500	Minister	Not appealed	1,500
05-D-17	2005	1	66	525,000	Minister	largely Upheld	160,000
05-D-19	2005	1	85	17,262,950	Minister	Partly Upheld	17,187,950
05-D-26	2005	1	27	7,083,000	Minister	Partly Upheld	6,048,000
05-D-27	2005	1	71	2,000	Minister	Not appealed	2,000
05-D-32	2005	1,2	54	5,002,000	Minister	Partly Upheld	3,023,000
05-D-38	2005	1,101	36	11,550,000	Minister	Upheld	11,550,000
05-D-43	2005	1	72	1,000	complaint	Largely Upheld	1,000
05-D-44	2005	2	115	20,000	Minister	Not appealed	20,000
05-D-45	2005	1	42	73,000	Minister	Not appealed	73,000
05-D-47	2005	1	44	68,000	Minister	Not appealed	68,000
05-D-49	2005	1,2,101,102	70	1,360,000	complaint	Not appealed/S	1,360,000

[102] Abbreviations used in this column. 1= L.420-1 of the Commercial code; 2= L.420-2 of the Commercial code; 5= L.420-5 of the Commercial code; 101= Article 101 EFTU; 102= Article 102 EFTU.

05-D-51	2005	1	113	448,840	Minister	Upheld	448,840
05-D-55	2005	1,101	22	5,000	Minister	Not appealed	5,000
05-D-58	2005	2	94	500,000	complaint	Upheld	500,000
05-D-59	2005	2	72	80,000,000	complaint	Upheld	80,000,000
05-D-63	2005	2,102	55	1,000,000	complaint	Not appealed	1,000,000
05-D-64	2005	1	47	709,000	Own initiative	Upheld	709,000
05-D-65	2005	1,101	51	534,000,000	Own initiative	Largely Upheld	534,000,000
05-D-66	2005	1	91	34,300,000	complaint	annulment	0
05-D-67	2005	1	108	1,384,500	Minister	Partly Upheld	1,134,500
05-D-69	2005	1	95	33,660,000	Minister	Upheld	33,660,000
05-D-70	2005	1	72	14,400,000	Minister	Upheld	14,400,000
05-D-75	2005	2	92	100,000	complaint	Partly Upheld	100,000
06-D-03	2006	1	88	26,100,000	Minister	Partly Upheld	24,000,000
06-D-04	2006	1,2,101,102	89	45,400,000	Own initiative	Upheld/pending	40,200,000
06-D-06	2006	1,2,101,102	46	10,000	Minister	upheld	10,000
06-D-07	2006	1	108	48,000,000	Own initiative	Partly Upheld	43,440,000
06-D-08	2006	1	50	600,000	Minister	Upheld/pending	600,000
06-D-09	2006	1,101	49	5,035,000	leniency	Upheld	5,035,000
06-D-13	2006	1	34	718,000	Minister	Largely Upheld	508,000
06-D-15	2006	1	41	1,325,300	Minister	Largely Upheld	925,300
06-D-22	2006	1,2,101,102	60	300,000	Minister	Not appealed	300,000
06-D-25	2006	1	35	13,630	Minister	Not appealed	13,630
06-D-30	2006	1	38	113,850	Minister	Not appealed	113,850
06-D-36	2006	1,2	72	15,000	complaint	Not appealed	15,000
06-D-37	2006	1,101	27	580,000	Minister	Upheld	580,000
07-D-01	2007	1	41	944,600	Minister	Partly Upheld	12,000
07-D-02	2007	1	61	1,398,000	Minister	Not appealed/S	1,398,000
07-D-03	2007	1,101		500,000	Own initiative	Not appealed	500,000
07-D-04	2007	1	21	50,000	Minister	Not appealed	50,000
07-D-05	2007	1	38	125,000	Minister	Upheld	125,000
07-D-06	2007	1,2	69	800,000	Minister	Not appealed	800,000
07-D-08	2007	1,2,101,102	81	25,250,000	Minister	Partly Upheld	14,750,000
07-D-09	2007	2,102	80	10,000,000	Own initiative	annulment	0
07-D-15	2007	1	132	47,314,200	Own initiative	Largely Upheld	47,229,200
07-D-16	2007	1	42	396,000	Minister	Upheld	396,000

07-D-21	2007	1,101	35	16,225,000	Minister	Not appealed/S	16,225,000
07-D-24	2007	1,101	30	120,000	Minister	Not appealed	120,000
07-D-25	2007	1,2,101,102	84	100,000	complaint	Not appealed	100,000
07-D-26	2007	1,101	68	19,530,000	complaint	Not appealed/S	19,530,000
07-D-28	2007	1,2	68	2,850,000	complaint	Upheld	2,850,000
07-D-29	2007	1	34	1,703,000	Minister	Upheld	1,703,000
07-D-33	2007	2,102	71	45,000,000	Own initiative	Not appealed/S	45,000,000
07-D-40	2007	1	39	1,666,000	Minister	Not appealed/S	1,666,000
07-D-41	2007	1	47	48,000	complaint	Upheld	48,000
07-D-44	2007	1,2,5	51	9,000	complaint	Not appealed	9,000
07-D-47	2007	1	59	3,350,000	Minister	Partly Upheld	1,350,000
07-D-48	2007	1,101	50	2,020,550	leniency	Upheld	2,020,550
07-D-49	2007	1,101	25	2,650,000	Minister	Upheld	2,650,000
07-D-50	2007	1,101	28	37,065,000	Minister	Largely Upheld	36,965,000
08-D-03	2008	1	29	2,000	Minister	Not appealed	2,000
08-D-06	2008	1	59	814,000	complaint	annulment	0
08-D-09	2008	1,2	70	50,000	complaint	Upheld	50,000
08-D-12	2008	1	48	8,184,000	leniency	Largely Upheld	5,585,200
08-D-13	2008	1,101	25	1,620,000	Minister	Not appealed/S	1,620,000
08-D-15	2008	1	32	52,840	Minister	Not appealed	52,840
08-D-20	2008	1	62	2,000,000	Minister	Not appealed/S	2,000,000
08-D-22	2008	1	19	80,800	Minister	Not appealed	80,800
08-D-23	2008	1	26	40,750	complaint	Not appealed	40,750
08-D-25	2008	1,101	28	17,000,000	Own initiative	Upheld	17,000,000
08-D-28	2008	1	35	530,000	Minister	Not appealed/S	530,000
08-D-29	2008	1	28	133,600	Minister	Not appealed	133,600
08-D-30	2008	1,101	71	41,100,000	complaint	Upheld	41,100,000
08-D-32	2008	1,101	41	575,454,500	leniency	Largely Upheld	73,155,500
08-D-33	2008	1	49	1,175,500	Minister	Upheld	1,175,500
09-D-03	2009	1	38	357,000	Minister	Upheld	357,000
09-D-04	2009	2,102	65	3,050,000	complaint	Not appealed	3,050,000
09-D-05	2009	1,101	38	94,400,000	Minister	Upheld	94,400,000
09-D-06	2009	1,2,101,102	78	5,500,000	complaint	Upheld	5,500,000
09-D-07	2009	1	45	78,000	complaint	Upheld	78,000
09-D-10	2009	2,102	29	300,000	complaint	Upheld	300,000
09-D-14	2009	2	45	320,000	Minister	Upheld	320,000
09-D-17	2009	1	26	5,000	complaint	Not appealed	5,000

09-D-19	2009	1	42	618,250	Minister	Largely Upheld	518,250
09-D-24	2009	2,102	48	27,600,000	complaint	Not appealed/S	27,600,000
09-D-25	2009	1,101	49	4,200,000	Minister	Partly Upheld	4,060,000
09-D-31	2009	1,2,101,102	63	6,900,000	Own initiative	Not appealed/S	6,900,000
09-D-34	2009	1	48	159,000	Minister	Upheld	159,000
09-D-36	2009	1,2,101,102	65	63,000,000	complaint	Largely Upheld	35,000,000
09-D-39	2009	1	41	140,000	Minister	Not appealed	140,000
10-D-03	2010	1	55	92,500	complaint	Not appealed	92,500
10-D-04	2010	1,101	29	1,500,000	Minister	Upheld	1,500,000
10-D-05	2010	1	26	22,000	Minister	Not appealed	22,000
10-D-10	2010	1	36	80,000	complaint	Not appealed	80,000
10-D-11	2010	1	48	50,000	Minister	Not appealed	50,000
10-D-13	2010	1,101	27	625,000	Own initiative	Largely Upheld	625,000
10-D-15	2010	1	23	30,000	Minister	Not appealed	30,000
10-D-22	2010	1	32	22,900	Minister	Not appealed	22,900
10-D-28	2010	1,101	78	384,900,000	Own initiative	largely Upheld/pending	384,900,000
11-D-01	2011	1	14	70,000	Own initiative	Not appealed	70,000
11-D-02	2011	1	67	9,803,590	Own initiative	Largely Upheld/pending	9,250,590
11-D-07	2011	1	36	1,160,100	Minister	Not appealed/S	1,160,100
11-D-13	2011	1	58	9,402,100	Minister	Pending	
11-D-17	2011	1,101	45	367,940,000	leniency	Pending	
11-D-19	2011	1	44	1,340,000	Minister	Pending	
12-D-02	2012	1	15	660,700	Own initiative	Pending	
12-D-06	2012	1,2	32	381,400	Own initiative	Not appealed/S	381,400
12-D-08	2012	1,101	44	3,870,590	Minister	Pending	
12-D-09	2012	1,101	47	242,400,000	leniency	Pending	
12-D-10	2012	1,101	53	35,322,000	Minister	Pending	
12-D-23	2012	1,101	110	900,000	Minister	Pending	
12-D-24	2012	2,102	70	183,127,000	complaint	Pending	
12-D-25	2012	2,102	59	60,966,000	Own initiative	Pending	
12-D-26	2012	1,101	78	50,000	complaint	Not appealed	50,000
12-D-27	2012	1	44	9,378,000	Minister	Not appealed/S	9,378,000

Table 1: All infringements decisions concluded by the FCA (May 2004- December 2012)

Case	Year of conclusion	Type[103]	Duration (Months)	Source	Appeal Outcome
04-D-16	2004	1,n	87	Minister	not appealed
04-D-17	2004	2,102,n	40	compliant	not appealed
04-D-20	2004	1,n	65	Minister	not appealed
04-D-22	2004	2,102,n	66	compliant	not appealed
04-D-23	2004	2,n	10	compliant	not appealed
04-D-27	2004	1,n	109	compliant	not appealed
04-D-28	2004	2,n	84	Minister	not appealed
04-D-29	2004	1,2,n	18	compliant	not appealed
04-D-33	2004	1,2,101,102,n	64	own initiative	not appealed
04-D-35	2004	1,n	14	compliant	not appealed
04-D-36	2004	2,n	10	compliant	not appealed
04-D-38	2004	1,2,101,102,n	76	compliant	not appealed
04-D-40	2004	1,2,101,102,n	3	compliant	Upheld
04-D-41	2004	2,n	57	compliant	not appealed
04-D-45	2004	2,n	4	compliant	Upheld
04-D-46	2004	2,n	5	compliant	not appealed
04-D-51	2004	1,2,101,102,n	5	compliant	not appealed
04-D-53	2004	1,2,n	62	own initiative	not appealed
04-D-54	2004	2,102,n	5	compliant	not appealed
04-D-55	2004	1,n	63	Minister	not appealed
04-D-57	2004	1,n	47	Minister	not appealed
04-D-58	2004	1,n	76	Minister	not appealed
04-D-60	2004	2,n	7	compliant	Upheld
04-D-61	2004	2,n	31	compliant	not appealed
04-D-63	2004	1,n	76	Minister	not appealed
04-D-64	2004	1,n	22	Minister	not appealed
04-D-66	2004	1,2,n	45	Minister	not appealed
04-D-67	2004	1,5,n	77	compliant	not appealed
04-D-68	2004	1,n	63	Minister	not appealed
04-D-69	2004	1,n	7	compliant	not appealed
04-D-71	2004	2,n	14	compliant	not appealed
04-D-72	2004	2,n	86	compliant	not appealed
04-D-73	2004	2,102,n	61	compliant	withdrawn
04-D-76	2004	1,2,101,102,n	79	compliant	annulment
04-D-77	2004	1,2,101,102,n	3	compliant	not appealed
04-D-79	2004	2,n	45	compliant	annulment
05-D-01	2005	2,n	4	compliant	not appealed
05-D-04	2005	1,n	96	Minister	not appealed

[103] Abbreviations used in this column. N= Non-infringement decision; C= Commitments decisions; 1= L.420-1 of the Commercial code; 2= L.420-2 of the Commercial code; 5= L.420-5 of the Commercial code; 101= Article 101 EFTU; 102= Article 102 EFTU.

05-D-05	2005	1,2,5,n	48	compliant	Upheld
05-D-06	2005	1,2,n	4	compliant	not appealed
05-D-11	2005	1,2,101,102,n	5	compliant	not appealed
05-D-12	2005	1,2,101,102,c	5	compliant	not appealed
05-D-13	2005	2,n	81	compliant	Upheld
05-D-15	2005	2,n	36	compliant	not appealed
05-D-16	2005	2,102,c	15	own initiative	not appealed
05-D-18	2005	2,n	47	compliant	not appealed
05-D-20	2005	2,n	3	compliant	Upheld
05-D-21	2005	1,2,101,102,n	1	compliant	not appealed
05-D-22	2005	1,2,n	3	compliant	not appealed
05-D-23	2005	1,2,n	51	compliant	not appealed
05-D-24	2005	1,n	87	Minister	not appealed
05-D-25	2005	2,c	6	compliant	not appealed
05-D-28	2005	2,n	22	Minister	not appealed
05-D-29	2005	2,c	75	compliant	not appealed
05-D-30	2005	2,n	9	compliant	not appealed
05-D-31	2005	1,2,n	37	compliant	not appealed
05-D-33	2005	1,101,n	67	compliant	not appealed
05-D-34	2005	1,2,n	3	compliant	not appealed
05-D-35	2005	1,2,n	19	compliant	not appealed
05-D-39	2005	2,n	76	compliant	not appealed
05-D-40	2005	1,2,n	13	compliant	not appealed
05-D-41	2005	1,n	44	compliant	not appealed
05-D-42	2005	2,n	88	compliant	Upheld
05-D-46	2005	2,n	29	compliant	not appealed
05-D-48	2005	2,n	103	compliant	not appealed
05-D-50	2005	1,n	90	compliant	Upheld
05-D-52	2005	1,n	97	compliant	not appealed
05-D-53	2005	2,n	70	own initiative	not appealed
05-D-54	2005	2,n	83	compliant	not appealed
05-D-56	2005	1,n	55	compliant	not appealed
05-D-57	2005	1,n	55	compliant	not appealed
05-D-60	2005	1,2,n	6	compliant	Upheld
05-D-61	2005	1,n	71	Minister	not appealed
05-D-62	2005	1,n	75	Minister	not appealed
05-D-68	2005	2,n	72	compliant	Upheld
05-D-72	2005	2,102,n	65	compliant	Upheld
05-D-73	2005	2,n	72	Minister	not appealed
05-D-74	2005	2,n	78	Minister	not appealed
06-D-01	2006	2,c	21	compliant	not appealed
06-D-02	2006	2,n	27	Minister	not appealed
06-D-05	2006	1,2,n	3	compliant	not appealed
06-D-10	2006	2,n	16	compliant	not appealed

06-D-11	2006	2,n	9	compliant	not appealed
06-D-12	2006	2,102,n	35	compliant	annulment
06-D-14	2006	1,101,n	7	compliant	not appealed
06-D-16	2006	2,n	139	compliant	not appealed
06-D-17	2006	1,2,n	116	compliant	Upheld
06-D-18	2006	1,2,101,102,n	57	compliant	not appealed
06-D-19	2006	1,2,n	6	compliant	not appealed
06-D-20	2006	2,c	5	compliant	not appealed
06-D-21	2006	1,101,n	7	compliant	not appealed
06-D-23	2006	2,5,n	40	compliant	not appealed
06-D-24	2006	1,c	9	compliant	Upheld
06-D-26	2006	1,2,101,102,n	74	compliant	not appealed
06-D-27	2006	1,2,n	5	compliant	not appealed
06-D-28	2006	1,c	32	Minister	not appealed
06-D-29	2006	1,2,c	34	compliant	Upheld
06-D-31	2006	1,n	5	compliant	not appealed
06-D-33	2006	1,n	63	Minister	not appealed
06-D-34	2006	1,2,n	47	compliant	not appealed
06-D-35	2006	2,n	61	Minister	not appealed
06-D-38	2006	2,n	75	Minister	not appealed
06-D-39	2006	1,2,n	4	compliant	not appealed
07-D-07	2007	1,101,c	9	own initiative	not appealed
06-D-40	2006	1,2,101,102,c	6	Minister	not appealed
07-D-10	2007	1,101,n	5	compliant	not appealed
07-D-11	2007	1,n	60	Minister	not appealed
07-D-12	2007	1,n	50	compliant	not appealed
07-D-13	2007	1,2,n	1	compliant	not appealed
07-D-14	2007	2,n	32	Minister	not appealed
07-D-17	2007	1,101,c	76	own initiative	not appealed
07-D-18	2007	2,n	6	compliant	Upheld
07-D-20	2007	2,n	7	compliant	not appealed
07-D-22	2007	1,2,101,102,c	63	compliant	annulment
07-D-23	2007	2,n	79	compliant	Upheld
07-D-27	2007	1,n	28	compliant	Upheld
07-D-30	2007	2,102,c	10	compliant	not appealed
07-D- 31	2007	1,2,101,102,c	18	compliant	not appealed
07-D-32	2007	2,c	23	compliant	not appealed
07-D-34	2007	1,n	35	Minister	not appealed
07-D-36	2007	1,n	58	Minister	not appealed
07-D-37	2007	1,2,n	1	compliant	Upheld
07-D-38	2007	2,5,n	5	compliant	not appealed
07-D-39	2007	2,n	36	compliant	not appealed
07-D-42	2007	1,n	23	Minister	not appealed
07-D-43	2007	2,c	10	compliant	withdrawn

07-D-45	2007	1,2,c	68	compliant	annulment
07-D-46	2007	1,2,c	68	compliant	annulment
08-D-01	2008	2,5,n	13	compliant	not appealed
08-D-02	2008	2,102,n	7	compliant	not appealed
08-D-04	2008	2,c	54	compliant	not appealed
08-D-05	2008	1,2,n	2	compliant	Upheld
08-D-08	2008	2,n	5	compliant	Upheld
08-D-10	2008	1,2,101,102,n	7	compliant	not appealed
08-D-11	2008	2,n	19	compliant	not appealed
08-D-14	2008	1,2,101,102,n	37	compliant	withdrawn
08-D-16	2008	1,2,101,102,n	5	compliant	Upheld
08-D-17	2008	1,n	118	compliant	not appealed
08-D-18	2008	2,102,n	2	compliant	not appealed
08-D-19	2008	1,n	6	compliant	not appealed
08-D-21	2008	2,c	23	compliant	not appealed
08-D-24	2008	2,n	11	compliant	not appealed
08-D-26	2008	1,c	33	Minister	not appealed
08-D-27	2008	2,102,n	53	compliant	not appealed
08-D-31	2008	1,2,5,n	8	compliant	not appealed
08-D-34	2008	c	14	Minister	not appealed
09-D-01	2009	1,c	25	Minister	not appealed
09-D-02	2009	2,n	6	compliant	not appealed
09-D-08	2009	1,c	47	own initiative	not appealed
09-D-09	2009	2,n	8	compliant	not appealed
09-D-11	2009	2,102,c	10	compliant	not appealed
09-D-12	2009	2,n	6	compliant	not appealed
09-D-13	2009	1,n	29	compliant	not appealed
09-D-15	2009	2,102,n	4	compliant	not appealed
09-D-16	2009	2,102,n	13	compliant	Upheld
09-D-18	2009	1,2,101,102,n	24	compliant	not appealed
09-D-20	2009	1,n	35	compliant	not appealed
09-D-21	2009	2,n	28	compliant	not appealed
09-D-22	2009	1,2,n	13	compliant	not appealed
09-D-23	2009	1,101,n	25	Minister	not appealed
09-D-26	2009	1,2,101,102,n	40	compliant	Upheld
09-D-27	2009	1,c	21	compliant	not appealed
09-D-28	2009	1,2,n	4	compliant	not appealed
09-D-29	2009	2,n	8	compliant	not appealed
09-D-30	2009	2,n	12	compliant	not appealed
09-D-32	2009	2,c	20	compliant	not appealed
09-D-33	2009	2,102,n	36	Minister	not appealed
09-D-35	2009	1,2,n	17	compliant	not appealed
09-D-37	2009	2,102,n	8	compliant	not appealed
09-D-38	2009	1,2,101,102,n	52	Minister	not appealed

09-D-40	2009	2,102,n	6	compliant	not appealed
10-D-01	2010	1,c	16	compliant	not appealed
10-D-02	2010	2,n	42	Minister	not appealed
10-D-06	2010	2,c	38	Minister	not appealed
10-D-07	2010	1,2,101,102,n	7	compliant	not appealed
10-D-08	2010	2,n	33	compliant	not appealed
10-D-09	2010	2,102,n	6	compliant	not appealed
10-D-12	2010	1,2,101,102,n	57	compliant	not appealed
10-D-14	2010	2,102,n	22	compliant	Upheld
10-D-16	2010	2,102,n	6	compliant	not appealed
10-D-17	2010	1,2,101,102,n	60	Minister	not appealed
10-D-18	2010	1,2,5,c	28	compliant	not appealed
10-D-19	2010	1,2,101,102,n	53	compliant	not appealed
10-D-20	2010	1,2,101,102,c	13	compliant	not appealed
10-D-23	2010	2,n	14	compliant	Upheld
10-D-24	2010	2,n	11	compliant	Upheld
10-D-25	2010	1,2,n	4	compliant	not appealed
10-D-26	2010	1,n	56	Minister	not appealed
10-D-27	2010	2,c	25	Minister	not appealed
10-D-29	2010	1,2,101,102,c	54	compliant	not appealed
10-D-30	2010	2,102,c	8	compliant	not appealed
11-D-03	2011	1,101,n	31	compliant	not appealed
11-D-04	2011	2,n	6	compliant	not appealed
11-D-05	2011	1,n	5	compliant	not appealed
11-D-06	2011	1,2,n	18	compliant	not appealed
11-D-08	2011	1,101,n	20	compliant	not appealed
11-D-09	2011	2,102,n	6	compliant	not appealed
11-D-11	2011	1,101,c	29	compliant	not appealed
11-D-14	2011	2,c	23	compliant	not appealed
11-D-15	2011	2,n	11	compliant	not appealed
11-D-16	2011	1,2,n	10	compliant	not appealed
11-D-18	2011	1,2,c	21	compliant	pending
11-D-20	2011	2,c	16	compliant	Upheld
12-D-01	2012	1,n	6	compliant	not appealed
12-D-03	2012	1,2,n	44	compliant	not appealed
12-D-04	2012	2,102,c	34	compliant	not appealed
12-D-07	2012	1,n	56	Minister	not appealed
12-D-11	2012	1,2,n	37	compliant	pending
12-D-13	2012	1,2,5,n	17	compliant	not appealed
12-D-14	2012	2,n	22	compliant	not appealed
12-D-16	2012	2,102,c	48	compliant	not appealed
12-D-17	2012	2,102,c	28	compliant	not appealed
12-D-18	2012	2,102,c	16	compliant	pending
12-D-19	2012	1,n	9	compliant	not appealed

12-D-20	2012	1,2,5,n	26	own initiative	not appealed
12-D-21	2012	2,n	10	compliant	pending
12-D-22	2012	2,n	30	compliant	not appealed
12-D-28	2012	1,2,n	36	Minister	not appealed
12-D-29	2012	1,2,n	8	compliant	not appealed

Table 2: Non-infringements and commitments decisions concluded by the FCA (May 2004- December 2012)

Chapter 6 : Comparative Analysis of Public Enforment of Competition Law in the EU, France and the UK: Findings, Recommandations and lessons to be learnt

6-1: Introduction

This chapter compares and contrasts public enforcement of competition law in the EU, France and the UK, in light of the findings and observations gleaned from the individual chapters of each jurisdiction while keeping in mind the criteria and the assumptions set out earlier in the thesis. It is hoped that this chapter may help in exposing enforcement problems (if any), and to confirm the findings from the previous chapters. More importantly, this chapter suggests what each CA can learn from the other CAs and how it may overcome problems identified.

Chapter 2 of the thesis provided criteria for assessing public enforcement of competition law. When the criteria were constructed it has been taken into account that it is suitable to comparative analysis. Also, in chapter 2 the benefits and the advantages of comparing the public enforcement of competition law have been highlighted. Chapters 3, 4 and 5 discussed and analysed the application of competition in UK, EU and France, respectively. Some conclusions have been drawn from these chapters; however, it has been stated that there are some outstanding issues that will be dealt with comparatively. This chapter will compare the three jurisdictions examined and will propose/advice each CA on what has to changed/ improved or maintained. This chapter will briefly present, comparatively, the main issues of the previous chapters and then it comments and analyses the outcomes.[1]

Therefore, this chapter, at the beginning, presents and comments on comparative findings from the previous chapters and then it analyses and discusses the situation in each

[1] The previous chapters aimed to identify how CAs enforce competition law and what may affect it, in other words it attempted to identify patterns or issues that may affect the enforcement of the law in each jurisdiction.

jurisdiction, and aims to identify common issues in the three jurisdictions where these issues can be generalised. Thus, this chapter aims to provide suggestions on the weaknesses and the strengths of each CA and how it can improve its performance from a comparative perspective and taking into account what can be implemented in light of its capabilities and how the CA may change its policies in order to improve its performance.[2] This chapter also aims to suggest what changes in legislation may be needed in order to implement the changes suggested in the chapter.[3]

Few studies examined the application of competition law (or policies related to competition law enforcement) in the jurisdictions under examination in this thesis in the same work. To the author's knowledge, there are three studies that dealt, explicitly, with the application of competition law in the jurisdictions examined in this thesis; i.e. the three jurisdictions examined in the same work.

Some of the studies were specific in nature; for example, these studies examined specific polices or particular area, not the whole antitrust regime. Henry examined the leniency programs of the EU, France, Germany and the UK.[4] He provided a comparative analysis of the strengths and the weaknesses of each programme. The author also highlights how each programme can be improved. The author praised the UK leniency programme for granting immunity from fine and criminal sanctions, which in his view will play a role in incentivising

[2] It has to be reminded about the assumptions that have been set out earlier in the thesis in particular: (1) It has to be reminded that the CA cannot catch and punish every single infringement because of limited capabilities and therefore it has to prioritise its activities. (2) It has to be reminded as well that it is assumed that full deterrence does not exist in any jurisdiction; hence, the CA has to deal with breaches of competition law.

[3] An important note on the use of the language in this chapter when using comparative terms; for example, when stating high or low number of cases this means high or low number of cases compared to the other jurisdictions under examination.

[4] David Henry, 'Leniency programmes: an anaemic carrot for cartels in France, Germany and the UK?' 26(1) European Competition Law Review 2005, 13

cartelists to come forward to supply information about the infringement.[5] On the other hand, he criticised the French leniency programme that only grants immunity from fine but not form criminal sanctions as opposed to the UK programme.[6] However, the FCA, in its most recent notice on leniency,[7] states that it will consider leniency as one of the legitimate reasons which justifies not to pass on the case to the State Prosecutor in which individuals, belonging to the undertaking which has been granted leniency, would be liable to such proceedings absent awarding of leniency.[8]

Rosochowicz, in a comparative PhD thesis, scrutinises how to deter cartel and abuse of dominant position activities in Europe, by examining the case law, available tools and procedure available to the CAs of the EU, France, and the UK.[9] [10] The author mainly focused on three general areas: public enforcement; private enforcement and criminal sanctions against individuals. Rosochowicz stated that public enforcement alone will achieve the required deterrence levels in light of weak private enforcement of competition law in the countries examined. She also highlighted the need to use criminal sanctions against individuals in order to raise deterrence levels. She also shed light on the fact that despite the existence of criminal sanctions in the UK and France they are barely used. She also questions the need of introducing criminal sanctions at a European level. The author recommended the introduction of criminal sanction at a European level;[11] she also recommends that criminal

[5] David Henry, 'Leniency programmes: an anaemic carrot for cartels in France, Germany and the UK?' 26(1) European Competition Law Review 2005, 13; P.21-22
[6] David Henry, 'Leniency programmes: an anaemic carrot for cartels in France, Germany and the UK?' 26(1) European Competition Law Review 2005, 13; P.21-22
[7] The Leniency notice was issued after the publication of Henry's paper.
[8] See the FCA's Procedural notice relating to the French Leniency Programme issued on March 2, 2009; paragraph 48.
[9] Patricia Harffi Rosochowicz, 'Deterring Cartel and Abuse of Dominant Position Activity in the European Union A Comparative Study' ,The University of Reading December 2005
[10] Reference is made to the US when discussing criminal sanctions and private enforcement of competition law.
[11] The author highlighted the difficulties in introducing criminal sanctions against individuals.

sanctions against individual in the UK and France should be used more in order to achieve deterrence, in both countries criminal sanctions have rarely been applied.[12]

A very recent study has been conducted by Buigues and Meiklejohn which examines the resources, independence and enforcement in the UK, France and Germany.[13] It reviews the human resources and the budget of the CAs under examination for the year 2010. It also reviews specific issues, such as: Economics and legal services, centralised vs. decentralised decision making and the length of the mandate.[14] This article also provides the way in which mergers are dealt with by each CA and what are the major differences.[15] It then went on to review the amount of fines and the number of decisions produced by each CA, finding that the FCA has concluded the highest number of cases and imposed the highest amount of fines while the OFT concluded the fewest number of cases and the lowest amount of fines.[16] Attention has been paid to specific enforcement procedures, such as settlements and leniency procedures.[17] It concludes by highlighting some open questions that require further research. This study, according to the authors, is written in a descriptive/comparative approach which aims to identify questions that require further research.[18]

[12] The issue of criminal sanctions will be discussed further below.
[13] Pierre-André Buigues & Roderick Meiklejohn, 'National Competition Authorities in France, Germany, and the United Kingdom: Resources, Independence, and Enforcement' Competition Policy International Antitrust Chronicle, August 2013.
[14] Pierre-André Buigues & Roderick Meiklejohn, 'National Competition Authorities in France, Germany, and the United Kingdom: Resources, Independence, and Enforcement' Competition Policy International Antitrust Chronicle, August 2013 4-9.
[15] Pierre-André Buigues & Roderick Meiklejohn, 'National Competition Authorities in France, Germany, and the United Kingdom: Resources, Independence, and Enforcement' (August 2013) Competition Policy International Antitrust Chronicle9-11.
[16] Pierre-André Buigues & Roderick Meiklejohn, 'National Competition Authorities in France, Germany, and the United Kingdom: Resources, Independence, and Enforcement' (August 2013) Competition Policy International Antitrust Chronicle12-16.
[17]Pierre-André Buigues & Roderick Meiklejohn, 'National Competition Authorities in France, Germany, and the United Kingdom: Resources, Independence, and Enforcement' (August 2013) Competition Policy International Antitrust Chronicle 16-17 (the authors only provided numbers taken from the GCR survey, comments on the numbers are not provided).
[18] Pierre-André Buigues & Roderick Meiklejohn, 'National Competition Authorities in France, Germany, and the United Kingdom: Resources, Independence, and Enforcement' (August 2013) Competition Policy International Antitrust Chronicle, 18

This chapter starts by reviewing and commenting on the enforcement activities of the three CAs. Section 3 presents and comments on the non-enforcement activities, it aims to give reasons behind those activities and tries to explain the magnitude of them. Section 4 examines the capabilities of the CAs and provides information about other activities, such as mergers and state aid activities. Section 5 discuses and analysis issues gleaned from this chapter and the previous chapters that affect competition law enforcement and how shortcomings can be remedied. Section 6 provides some concluding thought and highlights the main issues that have reached.

6-2: Enforcement activities

6-2-1: Cases concluded

The number of cases concluded by each CA varies substantially from one to another. Table 1 below shows the number and the outcome of the investigations concluded by each CA, between May 2004 and December 2012. The FCA concluded the highest number of cases (383) cases, while the OFT concluded the lowest number of cases (24 cases) and the EC concluded 102 cases. In terms of the nature of the concluded cases; three quarters of the cases concluded by the OFT where declared as infringements of competition law, the EC declared over a half of its cases as infringements, just over the third of the cases concluded by the FCA were declared as infringements of competition law. These findings do not represent the performance of any of the CAs examined. These findings should be taken into consideration with other issues in order to understand what could be the reason (s) for the high/ low number of cases. This will be examined below when considering the specifics of the enforcement activities of each CA, the non-enforcement activities, the capabilities and the legislations in each jurisdiction.

	Infringements	Non- infringements	Commitments	Interim measures	Total
EC	63	13	26	0	102
FCA	138	173	46	26	383
OFT	18	5	1	0	24

Table 1: Number and outcome of investigations concluded by the EC, the FCA and the OFT (May 2004- December 2012)

6-2-2: Duration of investigations

From table 2 below it can be observed that the overall average duration of all investigations in each jurisdiction it is fairly similar, where the overall average duration for all investigations is over 40 months and less than 44 months. However, one needs to look at the number of cases concluded when looking the duration of investigations. It has been noted that the OFT concluded the least number of cases, this seems to not affect the duration of investigations when comparing it to the situation in France or in the EU. In general, and before considering other issues, it seems that the outcomes of a given CA do not have an effect on the duration of investigations. This is the case when considering the overall average of investigations for all cases. However, when looking at commitments and non-infringement decisions; it seems that the caseload may play a role in this, as the OFT has the lowest average duration for investigations. It also apparent when looking at the non-infringements decisions of the EC compared to the FCA, where the FCA concluded much more cases than the EC. Still, the difference in the duration of investigations between the three jurisdictions is not too high and it cannot be concluded that the caseload is the reason behind it. This will be examined further when examining the whole activities and the capabilities of the CAs.

	Infringements	Non-infringements & commitments	Interim measures	Overall
EC	51.9	30.7	no	41.3
FCA	49.6	37	6	30.6 (without interim measures 43.3)
OFT	45.9	25.8	no	40.7

Table 2: Average Duration of investigations in the EU, France and the UK, in months

6-2-3: Sources and nature of investigations

Table 3 shows the sources of investigations in each jurisdiction, i.e. on what basis the investigations were opened. At the outset, it is important to highlight how much discretion each CA has in opening its investigations.

On the one hand, in the EU and the UK, the CAs have full discretion on what cases to carry a full investigation on (i.e. to issue a formal decisions). Thus, the cases concluded by the EC and the OFT represent the discretion of each CA, regardless of the source of the investigations. In other words, the cases concluded represent the cases that each CA has chosen to investigate. On the other hand, in France, the FCA has to investigate and issue a formal decision if it receives complaints or if cases referred to it by ministries or regulators. Thus, the discretion of the FCA is more restricted than in the case of the EC and the OFT.

In France, it can be seen from the sources of investigations that most of the cases were investigated because of complaints and referrals, over three quarters of infringement decisions. This cannot be said in the case of the EU and the UK, because all of the investigations are started on the CAs' choice even if the source of the investigation is not the CA own initiative. Hence, in the EU and the UK, all of the cases concluded represent how the CAs prioritise their enforcement activities. However, in France, only in the cases where the source of the investigation is the FCA's own initiative is the cases where it represents the FCA's prioritisation of its enforcement activities. From the infringement decisions, the

FCA's discretion represents around 13% of the overall number of the decisions (i.e. the cases where investigated on the FCA's own initiative).[19]

It is important to examine which tools have been used most by CAs to open their investigation as this may have some implications on the overall performance of the CA, as will be shown below. There was a wide variation of the sources of investigations that each CA relied upon to open its investigations. In the EU, leniency applications and own initiative were the source of investigation for most of infringement decisions. In France, referrals from ministries and complaints were the main sources of investigations, but this not controllable by the FCA as mentioned earlier. In the UK, there is no single mean that can be said that it has lead to most of the investigations, because of the low number of cases. This may give an idea how much discretion the CA has and how it has used this discretion.

It can be observed from table 5 that the discretion given to the EC and the OFT may have played a role in the type of the investigations conducted by the CAs. It can be seen very clearly that there is a focus on agreement cases more than abuse of dominance cases. Further, many of abuse of dominance cases have been concluded by either not finding an infringement or accepting commitments from parties. Although, the FCA has to investigate and issue a decision of any complaint or referral, still most of the cases where the source of the investigation was the FCA's own initiative were agreement cases.[20] As in the EU and the UK, most of abuse of dominance cases were concluded as non-infringements and commitments.[21]

[19] If one considers cases where leniency was the source of the investigation as own initiative cases, because they have been investigated because of the FCA's leniency policy, then the percentage is around 17% of the overall number of infringement cases.

[20] Abuse of dominance where the subject matter of Five out of 26 'own initiative investigations'. Compared to the EC and the OFT this can be considered as a large number.

[21] In the EU, out of 39 cases there were 21 cases dealt with under 102 solely. In France, 118 cases where abuse of dominance cases, investigated only under L.420-2 and/ or L.420-5 and in certain cases 102. In the UK, all of the commitments and non-infringements (5 cases) cases where abuse of dominance cases.

Also, it seems that whenever an abuse of dominance claims is investigated, alongside other claims, it is very likely that it will end up as non-infringement or commitments decision.

This may indicate that abuse of dominance cases are more difficult than agreement cases, as most of abuse of dominance cases were concluded as non-infringement or commitments. Or it may be that because most of the cases where investigated because of complaints then it may be that these complaints are from actual or potential competitors who may not be able to compete with, or because such competitor is not efficient enough to compete with the existing players in the market, then he/she thought of competition law violation whereas it is just his/her inability to compete with them.

However, one has to acknowledge that the low number of infringement decisions in the area of abuse of dominance indicates that the CAs are dealing with cases using softer tools (i.e. commitments) to remedy anti-competitive concerns. Where CAs are not entitled to impose fines when accepting commitments from parties; in addition, CAs do not conduct full investigations in commitment decisions.[22] Thus, the full extent of the conduct investigated may not exposed and this would make private enforcement difficult for possibly affected parties of the conduct and would make it difficult to bring a follow on action. This may have some consequences on deterrence; this will be discussed in greater detail below.[23]

	Complaint	**Own initiative**	**Leniency**	**Referral from ministries**	**Sector studies**	**ECN**	**Notified agreement**	**Media**	**Total**
EU	9	14	37	0	1	1	1	0	63
France	41	18	6	73	0	0	0	0	138

[22] Commitment decisions are based on a preliminarily assessment and not a full investigation as in the case of infringement decisions. See for example, Article 9 of Council Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] O.J. Ll/1. See also, Article L. 464-2 of the French Commercial Code.

[23] See, section 6-5-4 below.

UK	3	5	5	0	0	0	2	2	17

Table 3: Sources of investigations for Infringements decisions in the EU, France and the UK (May 2004-Deecmebr 2012)

	Compliant	**Own initiative**	**Notified agreement**	**Referral**	**Total**
EU	23	8	2	0	33
France	170	8	0	42	236
UK	6	0	0	0	6

Table 4: Sources of investigations for non- infringements and commitments decisions in the EU, France and the UK (May 2004-Decmebr 2012)

	Agreements	**Abuse**	**Both infringed**	**No infringement (Agreement)**	**No infringement (abuse)**	**Commitment (Agreements)**	**Commitment (abuse)**	**Commitment (Agreements and abuse)**	**No infringement (Agreements and abuse)**	**Total**
EC	57	6	0	2	7	12	14	0	4	102
FCA	99	20	19	44	77	10	22	11	55	357
OFT	15	2	0	0	5	0	1	0	0	23

Table 5: number and outcome of investigations concluded by the EC, FCA and the OFT (May 2004- December 2012)

6-2-4: Fines

The existence of fine in any antitrust regime aims to prevent violations of competition law in the first place and if, however, violations took place then the CA may impose fines against violators. Wils states that fines against firms who are found to infringe competition law may contribute to preventing competition law volitions in three ways:

‘First, it may have a deterrent effect, by creating a credible threat of being prosecuted and fined which weighs sufficiently in the balance of expected costs and benefits to deter calculating companies from committing antitrust violations. Secondly, it may at the same time have a moral effect, in that it sends a message to the spontaneously law-abiding, reinforcing their moral commitment to the antitrust prohibitions. Thirdly, through leniency

policies and through the use of other aggravating or attenuating circumstances affecting the amount of the fine imposed, the cost of setting up and running cartels can be raised.'[24]

Thus, when the CA uses its powers to impose fines it would help the CA to recover the losses incurred because of the anti-competitive behaviour and it will also send a message to undertakings that it will not tolerate anti-competitive behaviour in its jurisdiction.[25] If the fine imposed by the CA outweighs the expected benefits (profits) from the infringement then the CA's actions have a deterrent effect that may alter the infringers' and other undertakings' behaviour to comply with competition law. It has to be noted that the matter of an optimal fine is very difficult to be determined, i.e. a fine that would deter.[26]

The CAs under examination in this thesis use very similar fining guidelines for punishing anti-competitive practices.[27] As it can be seen form Table 6, the EC has imposed the largest fines compared to the FCA and the OFT. This can be explained by the size jurisdiction of each CA. The EC deals with infringement that affects trade between Member States, in most of the cases the size of the market is the EU, the European Economic area or Worldwide.[28] Thus, as the fines are based on the amount of sales in the market under investigation (with a cap of 10% of the firm's worldwide turnover),[29] the possibility of the fines imposed being

[24] Wouter Wils, 'Optimal Antitrust Fines: Theory and Practice' 2006 World Competition 29(2). Available at SSRN, p.11

[25] Wouter Wils, 'Optimal Antitrust Fines: Theory and Practice' 2006 World Competition 29(2). Available at SSRN. See also, Alberto Heimler and kirtikumar Mehta, 'Violations of Antitrust Provisions: The Optimal Level of Fine for Achieving deterrence' 2012 35 (1) World Competition 103.

[26] Wouter Wils, 'Optimal Antitrust Fines: Theory and Practice' 2006 World Competition 29(2). Available at SSRN. See also, Alberto Heimler and kirtikumar Mehta, 'Violations of Antitrust Provisions: The Optimal Level of Fine for Achieving deterrence' (2012) 35 (1) World Competition 103.

[27] European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003 Official Journal C 210, 1.09.2006; FCA Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties; OFT 423, 'OFT's guidance as to the appropriate amount of a penalty' September 2012.

[28] See the EU chapter for the dimension of the infringements.

[29] In all jurisdictions, the upper limit of the fine imposed is 30% of sales in the concerned market with an upper limit of 10% of the annual world-wide turnover. See, European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003 Official Journal C 210, 1.09.2006; FCA Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties; OFT 423, 'OFT's guidance as to the appropriate amount of a penalty' September 2012.

when the EC is investigating a case is higher than in the case when National Competition Authority (NCA) investigates a case. NCAs (the FCA and the OFT) mainly deal with cases at a national level; European competition rules would be applicable where the alleged infringements affects trade between member states.[30] Therefore, the size of the market that will be scrutinised by the EC is much larger than the ones by NCAs, hence, the amount of sales in the investigated market may be higher and this is reflected by the fine imposed.

This can be seen very clearly when looking at the fine imposed in each year by the EC, even though the EC did not conclude the highest number of cases. The number of infringement decisions is much higher in France than in the EC, however the overall fines imposed are much less. In the UK, the amount of fine imposed is far less than in France or the EU.[31]This is may be back to the number of concluded cases and to the fact there are many cases where the fine was low or the OFT did not impose any fines despite finding infringements of competition law.

If one looks at the FCA and the OFT where both CAs are monitoring similar economies size and with similar characteristics, then it can be seen very clearly that the number of cases concluded has made a clear difference between both CAs. Also, as it will be shown below, the OFT, for most of the years under examination, has better capabilities than the FCA. Also according to the Competiveness reports (produced by the World Economic Forum), the UK and France has close rankings in what matters/affects competition law enforcement.[32]

	EU		**France**		**UK**	
Year	**Fine (€)**	**cases**	**Fine (€)**	**Cases**	**Fine (£)**	**cases**
2004	372,911,100	9	24,604,628	19	1,707,000	2

[30] NCAs may apply European Competition rules, if the infringement has affect on trade between member states. See Article 11 of Council Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] O.J. Ll/1.
[31] Leave alone that many of the fines were reduced substantially or repealed on appeal.
[32] The issue of competiveness will be discussed further in Section 6-5-6.

2005	668,597,000	6	743,768,014	27	696,897	4
2006	1,857,167,500	6	128,210,780	13	3,486,396	4
2007	3,475,190,500	11	219,114,350	24	0	0
2008	2,271,177,400	9	648,237,990	15	0	1
2009	2,600,134,400	6	206,627,250	15	168,470,000	2
2010	2,852,138,533	7	387,322,400	9	225,000,000	1
2011	741,607,194	5	389,715,790	6	88,300,000	3
2012	1,653,176,000	4	537,055,690	10	0	0
Total	16,492,099,627	63	3,284,656,892	138	487,660,293	17

Table 6: fines imposed and the number of infringement decision by the EC, FCA and the OFT (May 2004- December 2012)

6-2-5: Success rate on appeal

As it has been explained in Chapter 2, the appeal system is a very unique test that examines and evaluates CA decision making on a case by case basis (for the appealed cases) that is hardly to be found with any other method of evaluation or assessment.[33] Furthermore, the success of the CA depends heavily on its success on appeal, as the appeal courts examine the CA decision and decide if it is right or wrong. Thus, the CA when deciding on cases will have in mind that its decisions will be reviewed by the appeal courts.[34]

For the purpose of calculating a percentage for success rate on appeal, appealed decisions will be treated as follows: any case that has been lost entirely on appeal will be considered as 'lost' for the CA in question; while partial upheld and fully upheld cases will be considered as a 'win'. [35] This is because the CA in bringing the cases it has found and sanctioned an

[33] In chapter 1, an assumption is made that the outcome on appeal is taken as a measure of the rightness of the CA decision without going into detail with the appeal court judgment. In other words, it is assumed that the Court of Appeal judgment is right, in any jurisdiction. The Appeal Court is the place where the decisions will be declared as right or wrong.

[34] Despite the importance and the role of the appeal Court and that its judgments has to be taken into account in the assessment process it has some limitations that have been highlighted earlier in the thesis. For example, the appeal court is assessing a case that has been produced by the CA but not the CA as an institution.

[35] In the countries chapters the following terminology was used to the outcomes of the appeals of CAs decisions: Upheld: the Court upheld the findings of the CA on liability and fines entirely. Largely upheld: The Appeal Court upheld the CA findings on liability but amended the fine imposed. Partial upheld: The Appeal Court

unlawful behaviour that occurred in its jurisdictions despite not fully winning the case. Table 7 below shows how percentage for the success rate on appeal is calculated.

In the EU, around 54% of the cases appealed can be considered as wins, as the EC findings were mostly confirmed on appeal. If one added the cases that have not been appealed, then the EC's success rate on appeal is around 68%. Around 32% of the cases are still pending on appeal. For the period under examination there were no cases where the EC lost any case entirely on appeal. Thus, its success rate is 100%.

In France, over 53% of the cases appealed the PCA found that the FCA was right in finding violations of competition law. If one added the cases that have not been appealed at all, then the overall success rate on appeal for the FCA is around 87%. There are 10% of the appealed cases are still pending on appeal. Around 3% of the FCA's cases where annulled on appeal. Thus, the overall success rate on appeal for the FCA is 97%.

In the UK nearly half of the cases were not appealed, which according to the criteria employed in this thesis; those cases are considered as won by the OFT. Around 12% of the cases were annulled on appeal. The rest of the cases (around 41%) were fully or partially upheld on appeal. This makes the overall success rate to around 88%.

The issue of appeals will be discussed in greater detail below, in section 6-5-1.

Jurisdiction	Upheld	Largely upheld	Partial Upheld	Annulment	Settlements	Not appealed	Pending	Overall success rate
EU	12 cases (19%)	11 cases (17.4%)	7 cases (11.1%)	0	4 cases (6.3%)	9 cases (14.3%)	20 cases (31.7%)	**100%**
France	37 Cases (26.8%)	12 cases (8.7 %)	11 cases (7.9%)	4 cases (2.9%)	14 cases (10.1%)	46 cases (33.3%)	14 cases (10.1%)	**97%**
UK	3 cases	1 case	3 cases	2 cases	0	8 cases	0	**88%**

upheld the CA's finding with respect to some of the appellants and annulled the CA's findings with respect to other appellants. Annulment: Annulling the CA's decision entirely.

	(17.6%)	(5.8%)	(17.6%)	(11.7%)		(47%)		

Table 7: Appeal outcome for infringement decisions concluded by the EC, the FCA and the OFT (May 2004- December 2012)

6-3: Non- enforcement activities

CAs are established for the sake of protecting competition law and assuring that firms are complying with competition laws within its jurisdiction. To do so, CAs may achieve this through three possible functions:[36] (1) clarifying what could constitute an infringement of competition law, (2) assuring that competition laws are not infringed, and (3) dealing with firms who violate competition law.[37] Two approaches can be used to achieve these functions. The first approach, by enforcing competition law against infringers where the three functions can be accomplished. The enforcement of competition law against infringers helps in: (1) clarifying the prohibitions of competition law, (2) assuring that competition rules are not infringed, and (3) dealing with the violators of the law. The second approach that can be used by CAs to achieve the first two functions, but not the third, is through non-enforcement activities. This can be achieved by issuing explanatory documents that highlights the boundaries of competition law prohibitions and through conducting studies into markets/sectors to review if there are any competition problems in the investigated market/sector, non-enforcement activities. If a non-enforcement activity reveals the existence of a suspected violation then the CA needs an enforcement tool to remedy any competition concerns.[38]

[36] In the area of enforcing antitrust rules, i.e., rules that deal with anticompetitive agreements and abuse of dominance.

[37] Wouter Wils, 'Optimal Antitrust Fines: Theory and Practice' 2006 29(2) World Competition Available at SSRN, p.5.

[38] In some jurisdictions, at the end of a sector inquiry, the CA may impose remedies but not penalties. This is the case in the EU and the UK (by the Competition Commission).

Thus, non-enforcement activities are important to be considered when assessing CAs because they can explain how the CA's resources were distributed and focused. Non- enforcement activities for the purpose of this thesis means, as explained earlier in the thesis, any activity undertaken by the CA that does not result in an enforcement action. This includes: market/sector studies/inquires; advocacy activities; the issuance of guidelines or explanatory notices; studies conducted by the CA or on its behalf to assess the impact of certain policies or decisions concluded; or any other form of activity that may use the CA capabilities (human capital and budget). These activities are taken into account in order to have an explanation(s) of the enforcement of competition law, and to understand, from a comparative view, what the CAs under examination can achieve in terms of enforcement and non-enforcement activities and what could be the right balance for each type of activity. When doing so, the specifics of each CA and the procedures followed and rules employed will be considered and its possible affects on the enforcement of competition law.

It has to be noted that in France, as it the case with enforcement decisions where the FCA is required to deal with any complaints or referrals, it is the same with market studies/inquires or opinions, where the FCA has to deal with any request from sector regulators, courts or ministries to issue an opinion or to conduct a market study/inquiry. It is only until recently where the FCA can conduct market studies on its own initiative, before the reform the FCA did not have the powers to conduct market studies. The FCA also produced a number of explanatory documents related to the enforcement of competition law. The vast majority of the opinions and the market/sector studies were because of referrals from governmental (small number from courts) bodies, as mentioned in chapter 5; most of the opinions/ market studies were very narrow and aim to answer very specific questions; as a result, many opinions and market studies were very similar in their nature.

In the EU and the UK, non-enforcement activities are conducted on the CAs own initiative; thus, both CAs have full discretion over their non-enforcement activities unlike the FCA.

From table 8 below it can be seen that number of documents that represents the non-enforcement activities varies between the jurisdictions under examination. Also, the effort spent on the types of non-enforcement activities varies (advocacy/ guidelines or market/ sector studies/ inquires/ opinions).

In the EU, it can be seen that more effort has been made toward advocacy activities (guidelines and advocacy documents). However, if one looks at the size and the details in the sector inquires conducted by the EC, one can see the significance of these inquiries and the potential implications of these inquiries and their effects on the application of competition law.[3940] For instance, some sector inquires revealed very serious infringement which enabled the Commission to punish the undertaking involved[41], also it has play a role in shaping legislations.

In France, most of the non-enforcement activities are directed toward market studies/opinions and few advocacy documents. A possible reason for this is that the FCA has to act if it receives a request for a market study or if a regulator (or court) asks for its opinion. Thus, this may have left little time and resources for advocacy activities and the FCA focused most of its non-enforcement activities to market studies/opinions.

In terms of numbers, in the UK there is a balance of effort by the OFT between the two types of non-enforcement activities with more focus on the advocacy side.[42]

[39] See for example, the energy and the pharmaceutical sector.
[40] See the EU chapter for the nature and the number of non-enforcement activities conducted by the EC.
[41] E-ON/GDF.
[42] The National Audit Office (NAO) reviews the state of competition in the UK, the report assessed some of the non-enforcement activities of the OFT. For example, the report discussed the issues of market studies and

If one compares the nature and the size of the sector inquires in the EU, UK and France,[43] it can be seen very clearly that the size of the studies in the EU are the biggest followed by those conducted by the OFT and the smallest in size where the studies and opinions issued by the FCA. To illustrate this, the Commission's sector inquiries usually examines a whole sector; the OFT reviews markets; while the FCA in many of its market studies and opinions aims to answer questions about a certain issue.[44] Although, the number of inquiries is smaller than advocacy documents their impact is higher and it can be seen that the amount of resources put into sector inquiries is quite large. In France, as it has been explained, the number of opinions is not controlled by the FCA as it has to deal with referrals that ask for opinions. This may have resulted in a large number of opinions/ market studies and small number of advocacy documents. Many of the advocacy documents were produced after 2009, when the FCA was established. [45]

Non-enforcement activities	EU	France	UK
Number of guidance/advocacy documents	24	10	41
Market studies/ opinions/ inquires	10	78	35
Total	34	88	76

Table 8: Non- enforcement activities concluded by the EC, FCA and the OFT (May 2004- December 2012)

investigations and the only concern reported is the low number of references to the Competition Commission from the OFT and sector regulators to conduct market investigations. In the report, there was no link between enforcement and non-enforcement activities and if the non-enforcement activities could replace enforcement actions. However the report highlights the issue of the low number of Chapter I and II cases and states that over time the low number or the lack of infringement decisions cases could undermine the deterrence effect of competition powers in the UK. See, UK National Audit Office, 'Review of the UK's Competition Landscape', March 2010; see pages 16 and 24-30.

[43] See the previous chapters for a more detailed discussion.

[44] If one looks at the most recent market investigation in each jurisdiction it can be seen very clearly the size and the extent of each study. See for example, Inquiry into the pharmaceutical sector (EU) vs. Market study on Private motor insurance (UK) vs. Opinion on the food retail sector in Paris (France). It can be seen very clearly that the EC examined the largest issue and the largest size followed by the UK and France. Unlike the EU and the OFT, the FCA examines very local issues.

[45] See chapter on France.

If one compares, in terms of numbers, the enforcement and the non-enforcement of activities of each CA.[46] Only in the UK, the number of non-enforcement activities is much higher than the enforcement activities of the OFT (infringements and non-infringements). Non-enforcement activities are two times higher than the enforcement activities of the OFT and represent over three quarters of the overall activities of the OFT (in the area of antitrust). In the EU and France non-enforcement activities represent 25% and around 17%, respectively, from the overall activities of the both authorities.[47] Based on this, it can be suggested that what the EC and the FCA are doing, in terms of distributing between enforcement and non-enforcement, is the right thing to be done for a CA because CAs are established to be an enforcement authorities and their advisory role should not be the main target of its mission.[48]

Thus, there is a clear contrast of what the OFT has been doing for the eight years under examination and what the other CAs were doing. This in its own right require a revision by the OFT (or the future CMA) to its enforcement policy and rethink about its non-enforcement activities.[49] A possible explanation of the OFT's non-enforcement activities might be that the OFT has a performance target agreed with HM Treasury of delivering direct financial benefits to consumers of at least five times its cost to the taxpayer.[50] In such a scenario, the OFT aim is to achieve the target instead of putting real competition benefits. As a result, the CA will try to target easy cases in terms of finding infringement and show that it is achieving the target set by HM Treasury. Also the CA may justify that it is meeting the target through non-enforcement activities. In doing so, the CA may give less attention to controversial areas

[46] See Table 1 and Table 8 above.

[47] The activities examined in this thesis, i.e. activities in the area of antitrust.

[48] It has been suggested that advocacy activities are not as important as enforcement activates especially in developed countries. See, Abel M. Mateus, 'Ensuring a more level playing field in competition enforcement throughout the European Union' 2010 31(12) European Competition Law Review 514, 524

[49] For a comprehensive discussion about the right balance between enforcement activities and market inquires; see, Tamar Indig and Michal Gal, 'New Powers- New vulnerabilities? A critical Analysis of Market Inquiries Performed By Competition Authorities' in Di Porto and Drexl (eds) *Competition Law as Regulation* (Edward Elgar, 2013) Available at SSRN.

[50] There is no such requirement that the EC of the FCA has to meet.

and where enforcing competition law is difficult, or it may deal with these areas through softer mechanisms which ultimately may not create a sufficient deterrence. The OFT also conducted a lot of studies to assess the impact of its action, this may have been done in order to prove that it has achieved the target. This target may have distracted the OFT's attention. Of course the above mentioned is only one of the possible explanations that have been or will be provided.

6-4: Capabilities of the CA

6-4-1: Budget and staff

In theory, the more the number of staff and specialists working in the CA the faster and the better the quality of decisions produced, bearing in mind the size of the jurisdiction. Table 9 below provides the number of staff and the budget for each CA. For obvious reasons the EC has the largest budget and the highest number of staff and specialists. However in terms of allocation of budget to enforcement activities, the EC is allocating the least to enforcement activities of its budget on average; around three quarters of the EC's budget goes to salaries. Strangely, the OFT has allocated the highest percentage of its budget to enforcement activities; even though it has produced the least enforcement activities compared to the EC and the FCA. The FCA for most of the years has the lowest budget and the lowest number of staff. The FCA, however, has concluded the highest number of cases and concluded the highest number of non-enforcement activities.

Thus, it cannot be said that the amount of budget allocated to enforcement either as an amount of money or as percentage is the determinative factor in the number of concluded cases or if it has an effect on the length of investigations, as it has been highlighted earlier the average duration of investigations for all of the jurisdictions is fairly similar.

Furthermore, the number of staff at the CA seems to not affect the number of investigations and the duration of investigations. What can be learnt from this discussion from a comparative perspective, is that the FCA is the busiest CA, and that in light of what the FCA has achieved with its budget and staff; the EC and the OFT can do more than what they achieved but it is the legislations and the policies adopted by the FCA that helped it to achieve this amount of activities.

6-4-2: State aid and merger cases

When considering the capabilities of any CAs it is important to consider the whole activities of the CA, not only antitrust matters which are the main focus of this thesis. Mergers and state aid (for the EC) cases are important to be considered when talking about the capabilities of the CAs in order to see, form a comparative point of view, what each CA has done in the antitrust area in light of other activities conducted by each CA. Table 10 below presents the number of mergers filed (and the number of state aid cases for the EC) in each year for the CAs under examination. It has to be noted that before the creation of the FCA, the French Competition Counsel did not have any jurisdiction over mergers it has only an advisory role based on a request from the DGCCRF. Regarding mergers, in the EU and France pre-nonfiction of mergers that meets a certain threshold is mandatory. In contrast, pre-nonfiction of mergers in the UK is voluntary. The consequence of such requirements can be seen very clearly reflected by the number of mergers filed, where the OFT has filed the fewest number of mergers. The EC by far has filed the highest number of merger. A possible explanation for this might be the size of the jurisdiction which results in more transactions or that because the UK does not have a notification regime for mergers.

Year	**Number of staff**			**Overall budget (€ Millions)**			**Budget allocated to enforcement of the overall budget (%)**		
	EC	***FCA***	***OFT***	***EC***	***FCA***	***OFT***	***EC***	***FCA***	***OFT***

2004	272	50	243	79	8.5	47.7	32.6%	30%	43.4 %
2005	382	53	242	90	8.6	50	30%	30%	39%
2006	593	130	301	97	11.4	51	32.1%	22%	39%
2007	633	129	259	71.7	12.8	40.2	12.1%	28%	16.1%
2008	700	158	177	78.2	19.4	22.6	12%	28%	47.8%
2009	757	190	189	89.4	19.4	22	14.2%	28%	47.2%
2010	764	187	238	90.8	20.4	20	13.3%	26%	43%
2011	749	200	121	93.5	20	15.5	16%	24%	47%

Table 9: Capabilities of the EC, FCA and the OFT (2004- 2012)

	EU		**France**	**UK**
Year	**Mergers (filed)**	**State aid**	**Mergers (filed)**	**Mergers (filed)**
2004	249	-	0	192
2005	313	-	0	267
2006	356	60	0	150
2007	402	47	0	104
2008	347	91	0	96
2009	259	79	137	66
2010	274	72	246	77
2011	309	90	255	111
2012	283	66	214	98

Table 10: Number of Merger and state aid decisions concluded by the EC, FCA and the OFT (January 2004- December 2012)[51]

6-5: Discussion

This section analysis issues related to the enforcement of competition law in the jurisdictions under examination, in light of the findings reached in this chapter and the previous chapters and examines if the results can be generalised to other jurisdictions.

[51] Source: Global Competition Review publications on 'Rating enforcement' (2004-2012).

6-5-1: Specialised vs. general courts[52]

The number of jurisdictions that has a specialised appeal court is very limited. For the jurisdictions examined in this thesis, only in the UK there is a specialised judicial body that reviews competition law cases concluded by the OFT. The Competition Appeal Tribunal (CAT) is the only court the can fully review public enforcement of competition law in the UK. Subsequently, the Court of Appeal and the House of Lords may review the CAT's judgments only on points of law.[53]

In France, public enforcement of competition law can be appealed to the Paris Court of Appeal (PCA). This appeal can be followed by another stage of appeal in front of the Court of Cassation, only on points of law. Therefore, there is some form of indirect specialisation in France where only the PCA is the only Court that reviews public enforcement and not other regional appeal court. Another form of indirect specialisation is the chamber in the PCA that reviews competition cases. For the cases that have been reviewed in this thesis it was Division 5- Chamber 5-7[54] of the PCA that reviews all of competition cases.[55] Hence, it can be seen that there is a form of specialisation in the French appeal system. Further, there is a high possibility that the judges in Division 5- Chamber 5-7 chamber are experienced judges in the area of competition law enforcement, or have gained experience from the cases that they have reviewed.

---

[52] For a general discussion about specialist and generalist application of competition law, see Joshua Wright and Angela Diveley, 'Do expert agencies outperform generalist judges? Some preliminary evidence from the Federal Trade Commission' 2013 1(1) Journal of Antitrust Enforcement 82

[53] Peter Freeman, 'Competition Decision Making and Judicial Control- The Role of the Specialised Tribunal' Speech Delivered at the Centre for Competition Policy Annual Conference June 2013

[54] See for example, Paris Court of Appeal Judgment of 11 October 2012 with respect to the FCA decision 11-D-02; see also, Paris Court of Appeal Judgment of 28 October 2010 with respect to the FCA decision 10-D-04; Paris Court of Appeal Judgment of 23 September 2010 with respect to the FCA decision 09-D-36; Paris Court of Appeal Judgment of 23 February 2010 with respect to the FCA decision 08-D-08;

[55] Division 5 consists of 13 chambers, chamber 5-7 reviews economic regulation issues which includes decisions the FCA's decisions.

The Commission's decisions can be appealed to the European General Court (GC), a generalist court that reviews many other matters alongside competition cases. The GC's judgment can be appealed to the European Court of Justice only on points of law. Hence, there is no any form of specialisation at European level.

Thus, it can be said that there is specialist court that provide full review of CA's decisions in the UK, and indirect specialist Court in France and general court that reviews the decisions of the Commission.

Comparing the success rate on appeal for each CA may help in providing some explanations to whether the existence of a specialised appeal court would make a difference in the enforcement of competition law. The Commission success rate on appeal is 100%, where all of the cases that have been appealed confirmed the EC's findings either fully of partly. The OFT's success rate on appeal is about 90%, and of the FCA's cases that have been appealed around 97% were won by the FCA.

These percentages and the discussed above may provide some explanations as whether having a specialist court has any difference in the outcome of appeals. Two possible explanations can be provided. First, a general court does not set high standards when reviewing CA decisions.[56] On the other hand, a specialist court or an indirect specialist court provides an extensive review of the cases that it reviews because the judges are more trained and experienced with competition cases. Second, the outcome of appealed cases depends largely on the nature of the cases concluded by the CA. The matter of selecting cases to investigative has been highlighted in several places in this thesis. Therefore, the success on

[56] Foster observes that the GC did not use its full powers when reviewing competition cases and that its review cannot be seen as a review on the merits; in particular he was critical of the Court's review regarding fines and suggests that its review should not be limited to reviewing the compliance of the Commission's fining guidelines. Ian Foster, 'A challenge for Europe's judges: the review of fines in competition cases' 2011European Law Review 36(2) 185, in particular see page 206.

appeal depends largely on the nature of the cases concluded by each CA and the nature of the appeal court does not play a role with the outcome of the cases.

Given the mentioned above and taking into account the nature of the cases in each jurisdiction, this thesis supports the second explanation, i.e. that the role of the nature of the cases and the selection of the cases investigated by the CA plays a major role in deciding the success on appeal. If this is truly the case, then there is a worrying issue from a deterrence perspective. For example, the EU in its recent cases, particularly infringement decisions, it has focused solely on cartel cases and based on leniency (and good proportion cartel settlements).[57] Such enforcement policy of the EC would show, from the outside, that its sanctions and tackling of cartel activity is creating deterrence. However, from the inside, the EC is undermining deterrence in other areas, where its policy when dealing with other suspected infringements it uses softer tools such as commitments, especially in the area of abuse of dominance and in the agreement area. One may see the FCA success rate on appeal is very good given the huge caseload compared to the EC and the OFT, given that it has to persecute any case that is referred to it.

The issue of the selection of cases will be discussed further below.

6-5-2: Non-ordinary procedures used to facilitate ending investigations (Leniency, settlements, commitments)

The main task of CAs is to tackle anti-competitive behaviour in the market. CAs can achieve this through the ordinary way, i.e., to open an investigation and to carry on the full investigation without any co-operation from the investigated parties and it will issue its

[57] As it has been shown in the EU chapter, from 2010 until the end of 2012, the EC concluded 16 infringement cases; 15 of which were cartel cases opened because of leniency and only one abuse of dominance case (Intel). In five of the 15 cartel cases, the settlement procedure was applied.

decision based on its analysis. In such a case, the parties will not receive any reductions in fines[58] and the parties may appeal the decision to the court of appeal, where the court will review the decision on the merits. This is a brief description of the ordinary way of CA decision making process.

Most CAs adopt procedures and policies that help them in achieving their aims more easily and in a more efficient way. Most CAs have leniency programmes that can be used in cartel cases; also most CAs have settlement procedures and they also use commitment procedures to end investigations in a faster way. All of these procedures are introduced with the aim to conclude investigations quicker and to save resources and to help in tackling illegal conducts. There are some differences in the application of these procedure but they aim to similar objectives. Leniency is used to help in tackling illegal cartels where one (or more) of the cartelists may confess to the CA about the illegal agreement in order to get immunity/reduction of fine.[59] Settlements can be used in investigation where the investigated parties (or some) did not contest the CA's statement of objections in order to get a reduction in the fine imposed and the CA will have a final decision with regard to the parties who settled, i.e. in most jurisdictions settlements are not appealable. Commitment decisions are only appropriate in cases where the CA is not intending to impose fines, the aim of it is to let

[58] The fines in an ordinary procedure can be increased/ decreased based on mitigating (e.g. creating a compliance programme) and aggravating (e.g. repetition of the violation) circumstances. See, European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003 Official Journal C 210, 1.09.2006; FCA Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties; OFT 423, 'OFT's guidance as to the appropriate amount of a penalty' September 2012.

[59] See articles L464-2-II and L464-2-III of the French Commercial Code; Commission notice on immunity from fines and reduction of fines in cartel cases, Official Journal C 298, 8.12.2006, OFT1495, Applications for leniency and no-action in cartel cases, July 2013. For a good overview for the three jurisdictions see, David Henry, 'Leniency programmes: an anaemic carrot for cartels in France, Germany and the UK?' 26(1) European Competition Law Review 2005, 13

the investigated parties to change their behaviour subject to binding commitments; failure to comply with commitment may result in the CA imposing fines.[60]

Thus, in a nutshell, the main benefit of each procedure/policy is the following:

- Settlements: reaching administrative efficiencies, speeds up the resolution of cases, frees up resources so that the CA may concentrate its efforts on the most serious

- Commitment: speeds up the resolution of cases; the voluntary maintaining or restoring of competition in the marketplace in appropriate circumstances; frees up resources so that the CA may concentrate its efforts on the most serious violations; also, for the undertakings it brings the case to a close before any findings are issued or charges are brought;

- Leniency: helping in tackling cartels activity.

It has to be mentioned, that there are differences in the jurisdictions under examination regarding the settlement procedure, in particular with regard to which conduct the procedure can be applied and the percentage of reduction that can be given. In the EU, settlements are only available for cartel cases and the EC can give up to 10% reduction of the fine it intends to impose.[61] In France and the UK, settlements are available to all type of cases and the

[60] See Article 9 of Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, OJ L1/1, 4 January 2003. See article of the French commercial code and The FCA Notice on Competition Commitments of April 3, 2008. See, OFT Guidance, Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments, December 2004 D. Waelbroeck, Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?, GCLC Working Paper 1/08, available at http://www.gclc.coleurope.eu; Wouter Wils, 'Settlement of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003' (2006) 29 World Competition 345

[61] See, the European Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, Official Journal C 167, 2.7.2008.

reductions of fines can be up to 25% in France[62] and 35%[63] in the UK. It worth noting, that in all jurisdictions parties can be benefit from reductions because of leniency and settlements in the same case.

This section examines if these special procedures and policies achieved their aims and what are the possible consequences for the use of such procedures.

In the chapters 3, 4 and 5, it has been shown that these procedures, to some extent, have achieved their aims in terms of time and cost saving. However, what can be noticed is that there is a risk of over- reliance where some of the CAs rarely use the ordinary procedure to enforce competition law. On the one hand, as it has been pointed out earlier, that commitment decisions are mostly associated with abuse of dominance cases. On the other hand, settlements are mostly applied in agreements cases. This can be seen very clearly in the EU, such procedures have left out the CA to focus on certain areas to be dealt with an enforcement action while other areas have been dealt with without an enforcement action.

In doing so, the CA is achieving its aims artificially. In other words, this would show that the CA is doing a good job by enforcing competition law and tackling anti-competitive practises while in reality the CA is only concentrating on cases that are too obvious and may not be the most harmful cases. This means that the CA is ignoring other areas where anti-competitive practises may exist or simply because the resources of the CA is limited and it is dealing with

[62] Companies choosing only not to contest the objections benefit in principle from a fixed fine reduction of 10%; if the companies offer commitments to their future conduct (in addition to not contesting the charges) can qualify for a fine reduction of 25%. If companies did not contest the charges and put in place of improve an existing compliance programme they can be awarded an additional fine reduction of 10%. See Article L.464-2, III of the Commercial Code and the FCA's procedural notice concerning the settlement procedure of 10 February 2012.

[63] In the UK, there is no formal guidelines for the 'early resolution' procedure, the OFT preferred the 'learning by doing' approach. See Evi Mattioli, 'Commitments and settlements in the future UK competition regime' European Competition Law Review 2013, 34(3), 160-168.

the obvious infringement or become more obvious because of the procedure that helps in revealing them.

When reviewing the above mentioned to the data presented in the previous chapters, it can be seen that these procedures have achieved what the CAs intend to achieve in terms of time savings. In the jurisdictions under examination, commitments, settlements and leniency investigations have been concluded faster than ordinary procedures.

Also, there are cost savings associated with the settlements; because these decisions are unlikely to be appealed then the CA will avoid the expensive appeal process.[64] The data presented earlier suggested that the settlement procedure has achieved its task in terms of cost savings, as well. This has been done by calculating how much on average the fines has been reduced on appeal for of the appealed cases, where it has been found that when the examined CAs entered into settlements agreements with the investigated parties and calculating the amount of reductions given as result of the settlements. On average, the amount of reductions given in settlements procedures is less than the amount that might be reduced because of the appeals. If one also added the costs associated with appeals then for sure entering into settlements would be much cheaper than the ordinary route.

It is also important to shed light on the possible drawbacks of the use of these procedures. As with any enforcement tool, there are some disadvantages linked with these procedures, but if they are used in the right manner the advantages associated with their application would outweigh the disadvantages. For example, it has been said that leniency and settlements would hamper private enforcement of competition law.[65] Furthermore, settlements and

[64] Nicolas Petit, ' Aperçu de la procedure communautaire de transaction' (2009) Concurrences, 231.

[65] In settlement cases, the settlement submissions will not be rendered accessible. See, http://europa.eu/rapid/press-release_MEMO-08-458_en.htm,, accessed 15 December 2013. See also, Wouter Wils, "Use of Settlements in Public Antitrust Enforcement: Objectives and Principles" in C.D. Ehrlerman and M Marquis (eds), *European Competition Law Annual* (Hart Publishing, 2008).

commitments may have affects on the issue of the clarification of the law because in settlements the decision will not be comprehensive as in the case of ordinary procedure and settlements decisions are very unlikely to be appealed. With respect to commitments, the CA does not conduct a full investigation it only conducts a preliminary investigating.[66] Thus, if CAs rely a lot on non-ordinary procedures this may create confusion with the clarity of the law and may undermine deterrence.

Recently, the EC has relied heavily on these procedures where in most cartel cases both leniency and settlement procedure have been used together in the same cases. The literature suggests that both procedures should be used wisely; with regard to leniency it has been claimed that it is usually used with dying cartels[67] and that there is a danger with settlements that if they are agreed early they may not reveal the full extent of the infringement.[68] So there is a worry that this would undermine deterrence[69] and may create confusion in the

[66] For a very good overview for commitments decision in abuse of dominance cases and the risk of over-reliance on them; see, Yves Botteman and Agapi Patsa, 'Towards a more sustainable use of commitment decisions in Article 102 TFEU cases' (2013) 1 Journal of Antitrust Enforcement 1; in general see, Wouter Wils, 'Settlement of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003' (2006) 29 World Competition 345.

[67] Myong-Hun Chang and Joseph E. Harrington, 'The Impact of a Corporate Leniency Program on Antitrust Enforcement and Cartelization' Johns Hopkins University, Department of Economics Working papers 548, p.15. available at http://www.econ2.jhu.edu/People/Harrington/leniency_4.10.pdf (accessed 15 December 2013).

[68] See, Roger Gamble, 'Speaking formally with enemy-cartel settlements' 2011 32(9) European Competition Law Review 449, 452-453. Gamble states 'if a settlement is reached early in the investigation the defendant may have more knowledge about the cartel and its extent and effects than the regulator and may be able to negotiate a more favourable settlement than it could have when the regulator may have a more complete understanding of the cartel and the defendant's role in it. In these circumstances, the negotiated penalty may not be sufficient for optimal deterrence.

[69] It has been suggested that the over-reliance on leniency would make the CA less aggressive toward other cases where leniency is not being used, hence, undermining deterrence. Myong-Hun Chang and Joseph E. Harrington, 'The Impact of a Corporate Leniency Program on Antitrust Enforcement and Cartelization' Johns Hopkins University, Department of Economics Working papers 548, p. 24. Available at http://www.econ2.jhu.edu/People/Harrington/leniency_4.10.pdf (accessed 15 December 2013). Also see the Canadian Commissioner of Competition on the danger of over-reliance use of settlements, Melanie L. Aitken, Interim Commissioner of Competition, Canadian Bar Association, Competition Law Section, 2009 Spring Forum, Toronto, Ontario, May 12, 2009, available at *http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03066.*html (Accessed 15 December 2013). Wils also highlighted that the CA needs to show that it can win cases through the ordinary procedure because it has a higher deterrent impact especially if it resulted with some private actions; and that judicial clarification is important from time to time. W. Wils, "Use of Settlements in Public Antitrust Enforcement: Objectives and Principles" in C.D. Ehrlerman and M Marquis (eds), *European Competition Law Annual* (Hart Publishing, 2008), p.35 and 39.

market because of issue of clarifying the law. Ultimately the task of the CA is not only to punish but also to have a role in clarifying the prohibitions of competition law which can be done through infringements and non-infringement decisions which would create deterrence and compliance with the law.

With respect to France, although the FCA has applied these procedures more than the EC and the OFT, the FCA seems to be using these procedures more wisely. The FCA is applying these procedures but at the same time it has used the ordinary procedure to enforce the law, which would result in achieving procedural efficiencies (through settlements, leniency and commitments) and would keep the law clarified on a regular basis.

With respect to the UK, looking comparatively at the other jurisdictions and what has been observed in the individual chapter, it seems that the UK is the jurisdiction that needs clarification of the law the most and needs to show that the CA is capable of enforcing the law.[70] It has been highlighted that the UK case law is not rich enough, such concern can only be remedied by enforcing competition law through the ordinary way where the courts' view is as important as the CA. Courts judgments are the only place where clarity of the prohibitions can be sought as they represent a re-examination of the CA decisions and the Court's final say on the issue. When non-ordinary procedures being used the possibility of appealing decisions is much lower than in ordinary route.

6-5-3: Hybrid settlements and their effect on the procedure itself and the overall deterrence on competition law enforcement

In all of the jurisdictions, it is possible that some of the investigated parties choose to settle their case with the CA and the other investigated parties choose not to settle where the CA

[70] Margret Bloom, 'The Competition Act at 10 years old: enforcement by the OFT and the sector regulator' (2010) Competition Law Review, 141 (emphasising on the importance of concluding and bringing more cases and that the OFT needs to open investigations based on complaints).

will continue with the ordinary route. This is known as 'hybrid settlements'. In all of the jurisdictions examined, hybrid settlements have been used.[71]

Thus, it is possible that those who did not settle to appeal the CA's decision. This has happened in France and the UK. In France, in a case involving four employment agencies, three of them settled with the FCA while the fourth chose to follow the ordinary route and appealed the FCA's decision to the Paris Court of Appeal and to the Supreme Court. Both courts confirmed the FCA's finding and the fine imposed, i.e. the Courts uphold the decision entirely.[72] In the UK, in the Tobacco case, where the OFT imposed its highest fine ever against tobacco producers and retailers. Six parties settled with the OFT and six appealed the OFT's decision to the CAT. All of the parties who appealed have won their appeals and the OFT's decision was quashed.[73] At the end, those who settled with the OFT and did not appeal their decision have lost compared to those who did appeal and won their appeals.

What happened in France would give a boost to the system in France and would make firms have a belief that they would benefit when using the procedure. But the same is not true in the UK as what happened on appeal would undermine the system in the UK and make investigated companies reluctant to use and cooperate with the CA. In the UK early resolution has been harmed because the parties who did not settle have won their cases. This would have effects on the procedure itself and on deterrence levels in general. The OFT has chosen to take 'learn by doing approach to 'early resolution agreements', there is no guidelines or notices that regulate the way in which it would be applied; this may have

[71] Animal Feeds cartel (EU); employment agencies (France); Tobacco case (UK).
[72] See Global Competition Review article of 4 April 2011, 'French high court gives clarity on hybrid settlements'.
[73] See the OFT's statement on the case. http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/tobacco#.UtPhLdJdV14 (accessed 15 December 2013).

contributed to some disappointing results because of the lack of clarity on the side of the OFT and the parties investigated.

All in all, it can be said that the procedures discussed above have achieved their aims in terms of time and cost savings. However, the over-reliance on these procedures can result in undesirable consequences that may affect the effectiveness of the competition regime and the levels of deterrence in the jurisdiction. The next section will further examine the issue of deterrence.

6-5-4: Deterrence

This section examines the issue of deterrence, it establishes what are the actions or the features of the CA or the enforcement actions of the CA that may create/ increase/ decrease deterrence levels. This will be done by reviewing the literature that discusses deterrence issues. It will then be applied to what have been observed earlier for the jurisdictions under examination. Based on this, the section concludes with what matters the most for deterrence levels.

Buccirossi et al summarise the issue of deterrence in competition law by highlighting what deterrence depends on three general factors, they state

"..... both good and bad deterrence depend on three general features of the legislation and its enforcement:

1) the level of the loss that firms and individuals expect to suffer if they are convicted (rightly or wrongfully);

2) the perceived probability of wrongdoers being detected and convicted;

3) the perceived probability of being wrongly convicted."[74]

According to Buccirossi et al what helps in achieving the above factors are six policy variables: (i) sanction policy, damages and market reactions; (ii) the probability of detection and convection; (iii) financial and human resources; (iv) power during investigations; (v) the probability of errors; (vi) quality of the law; (vii) independence of the CA; (viii) separation of powers (investigations and decision making).[75]

The authors state that the sanction policy has the most apparent impact on deterrence as it has clear and direct impact on the three features stated earlier.[76] They also highlight that it is not only the fine or other sanction (sanctions against individuals) but also other issues that would happen as a result of the sanction policy by the CA/Court (such as, damages repayments to the affected parties of the infringement, the loss of consumers who are unwilling to trade with a firm who violated the law, affects of the reputation of the firm and reduction of the stock market value of the firm). The fining policies in the jurisdictions under examination are very similar and they are in line with the EC policy. However, in terms of other sanctions, in France and the UK there are criminal sanctions against individuals which do not exist in the EU.[77]

With respect to the financial and human recourses and the powers during investigations, the more the CA has the higher the probability of detection and convection will be. Also, the

[74] Paolo Buccirossi, Lorenzo Ciari, Tomaso Duso, Giancarlo Spagnolo and Cristiana Vitale, 'Deterrence in Competition Law', Discussion Paper SP II 2009 – 14, Wissenschaftszentrum Berlin, 2009, p. 16.
[75] Paolo Buccirossi, Lorenzo Ciari, Tomaso Duso, Giancarlo Spagnolo and Cristiana Vitale, 'Deterrence in Competition Law', Discussion Paper SP II 2009 – 14, Wissenschaftszentrum Berlin, 2009 P. 12- 17.
[76] Paolo Buccirossi, Lorenzo Ciari, Tomaso Duso, Giancarlo Spagnolo and Cristiana Vitale, 'Deterrence in Competition Law' Discussion Paper SP II 2009 – 14, Wissenschaftszentrum Berlin, 2009 P.12.
[77] Criminal sanctions have rarely been used in France and the UK, and even when there were attempts to apply them it was unsuccessful. In France, there have been jail sentences against individuals but the charges against them were not solely because of infringements of competition law but alongside money laundry charges and corruption. See, Patricia Harffi Rosochowicz, 'Deterring Cartel and Abuse of Dominant Position Activity in the European Union A Comparative Study' ,The University of Reading, December 2005, P. 317- 321; See also, Lucie Carswell-Parmentier, 'Recent developments in French competition law - commitments, leniency and settlement procedures - the French approach' (2006) 27(11) European Competition Law Review 616, 627-628

more resources the CA has the better the quality of the information is available for the CA. The stronger the investigation powers the better the information the CA can collect. Hence, the CA ability to detect and convict illegal conduct is better. In the context of investigation powers, it has been pointed out earlier in the thesis, that the three jurisdictions have very similar investigation powers.

The sanction policy in any jurisdiction should not be viewed in isolation from other surrounding facts. The effectiveness of the sanction policy depends on two elements: the sanction policy on the books and the how it is enforced in practice. For example, if the law allows the CA/ court to impose high fines but the CA/court never reached the maximum level of the fines or rarely impose fines then firms will not expect that the maximum level would be applied against them. In any given system the sanction in most cases is subject to appeal. Therefore, the CA record in front of the appeal court is important when looking at deterrence levels. For instance, even if the CA imposes very high fines against violations of competition law, but it has a reputation of losing its cases on appeal or that the fines/sanction in many cases reduced substantially on appeal; this would undermine the deterrence created by the high fine imposed in the first place and firms would except that their fines would reduced and that they will not be hit with high fines ultimately. Thus, violators will not be deterred in the first place.

Therefore, in trying to figure out what matters the most in constituting deterrence in practical terms and applying it to the data collected in this thesis; the following can be said to matter the most when trying to estimate deterrence levels: the number of cases matters, the outcome of investigations, success rate on appeal and the amount of fines pre and post appeal; these issues are to be considered when trying to estimate the levels of deterrence or if the CA

actions can maintain or increase the levels of deterrence.[78] This can be done in this thesis as it looks at these jurisdictions comparatively, although measuring deterrence is a very controversial issue and it is very difficult to be achieved. Thus, this thesis will not measure deterrence but will employ what have been identified in the literature, as described above, and from a comparative point of view one would be able to identify if the actions of the each CA would have a deterrent effect.

Another issue that has to be taken into account when considering the levels of deterrence is the nature of the cases and asking if the CA has given enough attention to all anti-competitive practices.[79] This issue has been discussed earlier in this chapter. The importance of having a wide mix of cases (i.e. actions against all practices) shows that the CA is willing to take a serious action against all potential violators of competition law. It is also important for the CA to show its willingness to take quick actions.

Thus, if one looks at the number of cases, outcome of investigations, success rate on appeal and the fines pre and post appeal in the EU, France and the UK. One would be able to identify which actions of each CA fulfil the deterrence criteria, discussed above, the most. Table 11 below shows the number of successful investigations (i.e. investigations where an infringement have been found or ended with parties offering commitments) compared to the overall number of investigations, the overall amount of fine pre and post appeal (with the percentage of the reductions in fines after appeal).

[78] The suggested in this paragraph is consistent with what has been suggested in the literature'...the level of sanctions and damages envisaged by the national legislation, together with the powers held by the CEAs during the investigations, seem to play the most important role in fostering competition'. See LEAR presentation 'A Study on the Effectiveness of Competition Policy' October 2008, Presentation delivered at European Commission Workshop 'The Effectiveness of Competition policy', Slide 36.

[79] Harington states that 'CA chooses enforcement policy to maximize the number of successful cases'. see Joe Harrington, 'The Battle Against Hard Core Cartels: Measurement and Incentive Challenges' August 2011, Presentation delivered at Antitrust Enforcement in the Presence of Successful Leniency Programs Norwegian School of Economics; slide 44 available at http://www.econ2.jhu.edu/People/Harrington/Bergen_8.11.pdf (Accessed 15 December 2013).

It can be observed from Table 11 that the EC is the CA that meets most of the main deterrence principles. Over 87% of the EC's investigations ended with the remedy imposed, more importantly its success rate on appeal is 100% and overall there were only slight reductions of fines by the appeal court (only 9%). Further, At the EU level, there are no sanctions against individuals.

According the deterrence principles, pointed out above, the FCA come second because it has a large number of investigations[80] and the percentage of cases that have remedied anti-competitive practices. This has been done through different means, for example the FCA ended investigations by issuing infringements decisions or parties offering commitments to remedy the FCA's concerns. Also, the FCA used interim measures as tool to end disputes in a quick manner; the FCA is the only CA that used its powers to issue interim measures decisions. Interim measures can be seen as a very good tool for the CA to use in order to raise deterrence levels, it shows that the CA is prepared to take quick actions.[81] Also, the success rate on appeal of the FCA is very good as it is over 97%; overall the fines were reduced by less than 20% after appeal. In France, there are sanctions against individuals but they have never been used in the period under examination. The non-use of sanctions against individual despite their existence would undermine the value and the deterrence levels that the legislator would expect to achieve from them.

The OFT has concluded the least number of cases, it has imposed the least amount of fines also many of the infringement decisions were concluded without imposing any fines. Regarding success rate on appeal, as a percentage the OFT has a good record on appeal (around 90%), however, the reductions of fines were very high compared the EC and the

[80] Remember that the FCA has to investigate any case that comes to its attention. Thus, as it has been said earlier there were a lot of complaints that ended as non-infringements decisions.
[81] Wouter Wils, 'Optimal Antitrust Fines: Theory and Practice' 2006 29(2) World Competition Available at SSRN, p.9

FCA; the fines were reduced by around 54% after appeal. Given, the small number of cases concluded by the OFT and its enforcement policy, by being very selective and focusing on high impact cases, one would expect a better performance on appeal. In addition, the imposition of sanctions against individuals in the UK was unsuccessful. Form a comparative overview, the situation of competition law enforcement in the UK seems to be the least that fulfil the deterrence criteria discussed above.

Before concluding on the issue of deterrence, it is important to mention the role of private enforcement of competition law on deterrence for the jurisdictions examined. It has been highlighted in the individual chapter of each country that according to the available empirical evidence, private enforcement is still weak in all of the jurisdictions.[82] Furthermore, all of the CAs are trying to find ways to encourage and facilitate private enforcement of competition law. Thus, it cannot be said that private enforcement is playing a major role in increasing the levels of deterrence in the jurisdiction under examination. In addition many commentators have highlighted that in the EU public enforcement is more capable of remedying anti-competitive practices and protecting consumers.[83] Thus, it can be suggested, in light of weak private enforcement, that public enforcement is the only effective tool that antitrust regimes can rely upon to enforce competition law in the EU.

[82] See previous chapters.

[83] Declan J. Walsh, 'Carrots and sticks: leniency and fines in EC cartel cases' 2009 European Competition Law Review 30(1) 30, 31. See also, A.P. Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3 Competition Law Review 5. For a strong defence of the superiority of public enforcement, see Wouter Wils, 'Should Private Antitrust Enforcement be encouraged in Europe' (2003) 26 World Competition 567.

	Number of investigations (% of finding infringement)	Overall amount of fines imposed	Overall amount of fines imposed after appeal (% of reduction)	Success rate on appeal
EU (EC)	102 (63) (61.7%)	€ 16,539,409,627	€ 15,050,414,889 (9%)	100%
France (FCA)	383 (138) (36%)	€ 3,284,656,892	€ 2,633,084,492 (19.8%)	97%
UK (OFT)	23 cases (18) (78.2%)	£ 488,127,793	£ 225,301,654 (53.8%)	90%

Table 11: The percentage of infringement decisions from the overall number of cases; the overall amount of fine pre and post appeal and success rate on appeal for the EC, FCA and the OFT (May 2004-Decmebr 2012)

It is important to note an interesting issue in the literature that discusses deterrence issues, that it did not give weight to non-enforcement activities of CAs. The role of non-enforcement activities is important to be considered when examining deterrence. To illustrate this, if undertakings are aware that the CA may investigate their market/sector (through a non-enforcement tool) this would increase the probability of firms complying with competition law. However, if firms are aware that the CA will not take an enforcement action against them, then this will lead to undermine the deterrence effect of non-enforcement activities. One should also state that CAs are entitled to take an enforcement action based on the results of the non-enforcement activities, this has rarely happened for the cases examined in the thesis. In the EU, there was only one case where a case was opened because of the sector inquiry in the energy sector[84]. In France and the UK, there were no cases where the source of the investigation was a market study or an opinion issued by any of the CAs.[85]

The other type of non-enforcement activities is issuing guidelines and other forms of studies. This may play a role in clarifying the law and when it would be applicable, it may also play a role in deterrence by highlighting clearly what are the consequences for breaching competition law. Non-enforcement activities may have a deterrent effect, but not as much

[84] EON/GDF.
[85] This is based on the author's examination of all the cases concluded between May 2004 and December 2012.

enforcement actions, because what create deterrence is punishment, if there is no punishment then such activities will not have the same affect on deterrence levels.[86]

Thus, non-enforcement activities may complement enforcement activities but may not replace it or achieve the same levels of deterrence as its success is dependent on the enforcement actions of the CA.

6-5-5: Selection of cases

It is worth commenting on the issue of selecting cases, where there are two approaches invoked by the jurisdictions examined: First, the EU and the UK approach where the CAs have full discretion on selecting cases. Second, the French approach where the CA has to respond to complaints and referrals in the form of formal decisions.[87]

The number of cases in France, all type of cases, represents the whole caseload on the CA. In terms of transparency, the French regime is more transparent than in the EU and the UK because it deals with all cases it receives and the amount of cases is publicly known; whereas in the EU and the UK no one knows about the exact number of complaints the CAs receive apart from the CAs themselves.[88] However, for France this not the ideal situation for an institution with limited resources that has to be managed for the best interest of the economy. The ideal situation is that the CA has the discretion to pursue the most harmful cases and what could create deterrence to the economy in order to achieve the best of its resources. However, in order to achieve this and to make sure that the CA is allocating its resources to

[86] It has to be mentioned that market investigations in the EU and the UK (but by the CC), have the powers to impose structural remedies.

[87] For a good overview on the selection of cases; see Wouter P.J. Wils, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 (3) World Competition Available at SSRN, P.15 available at: http://ssrn.com/abstract=1135627.

[88] The issue of the OFT not relaying on complaints has been heavily criticised and it has been claimed the OFT is ignoring complaints. See for example, Financial Times 'Competition complaints hit record high' (9 December 2011) available at http://www.ft.com/cms/s/0/dc5afa96-2197-11e1-a19f-00144feabdc0.html; see also Margret Bloom, 'The Competition Act at 10 years old: enforcement by the OFT and the sector regulator' (2010) Competition Law Review, 141.

the interest of the economy and consumers; one needs to know what cases have not been investigated at all, and this is not available in all jurisdictions. For example, in the case of the OFT it has been shown and claimed[89] that the OFT is not brining enough cases and it is not relying on complains as the source of investigations. If the French approach is applied for a certain period of time, then this may remedy the concerns expressed in the UK. It can also be noticed with the selection of the EC where it focused most of its resources to cartel cases.[90] In the case of the French approach, the CA may miss out important cases, that is to be investigated on its own initiative, because there may be no enough resources for the CA to investigate these cases because it has to deal with complaints and referral; hence, there might be no time or resources left. It can also be argued that there might some cases missed out under the EU and the UK approach if complaints are not dealt with. However, the possibility of missing out cases under the EU/UK approach is lower because it is assumed that the complaints should be examined by the CAs in order to be pursued or ignored, however, it is not known if CAs examine complaints properly or not.

In light of this, it would be suggested that the EU/UK approach is better to employed by CAs in light of the limited resources available to CAs and if the CAs are doing well in terms of bringing cases. However, if there is a drop in the number of cases/ or there is no diversity with the cases prosecuted it would be advisable to use the French approach in order to keep deterrence levels. It also advisable that the use of the French approach should be for a limited time so the CA has its 'own time' afterwards. This may help in clarifying the law and its prohibitions and shows that the CA is willing to enforce competition rules. Although, it is

[89] Margret Bloom, 'The Competition Act at 10 years old: enforcement by the OFT and the sector regulator' (2010) Competition Law Review, 14.1

[90] Temple Lang pointed out to this point where he states: "The result of Reg. 1/2003 was to allow the Commission to decide its enforcement priorities, for the first time. It was understandable that it chose to give priority to price-fixing and market-sharing, which are relatively easily proved as a result of leniency and immunity applications." See, John Temple Lang, 'Three Possibilities for Reform of the Procedure of The European Commission in Competition Cases Under Regulation 1/2003' available at: http://ssrn.com/abstract=1996510, p. 229.

suggested that French approach may consume the resources of the CA, by time it may prove helpful as the enforcement of the law would clarify the law further; as a result unnecessary complaints may stop as complainants may have a clearer picture of what constitute lawful and unlawful conduct. One also should not forget the importance of both infringement and non-infringement decisions in setting the boundaries of the law and setting precedents.

6-5-6: Competiveness of France and the UK

If one thinks of the geographical market as a reason for the low number of decisions produced by the OFT compared to France is that the OFT is monitoring a more competitive market than the FCA. An answer to this concern may be found by reviewing the ranking of each country as provided by the World Economic Forum's (WEF) Global Competiveness Reports.[91] Where, as explained in the criteria chapter, it provides rankings to issues related to the level of competition in many countries. It can be observed from Table 12, that the UK has been ranked higher for most of the aspects that may affect competition law enforcement than France. Also form the WEF ranking it can be seen that France is getting lower in the ranking a year after year. Can this tell that the UK is more competitive than France?

Although questions may be raised about the ranking itself and how it changes considerably from one year to another, given that the report itself is not solely focused on competition enforcement but about the competiveness of countries. Another issue about the WEF ranking is that even if the ranking of the country is high it does not mean that it is competitive but it means that the country in question is more competitive compared to the other countries examined. Thus, according to this it seems that the UK as a country, for the years under

[91] World Economic Forum, Global Competiveness Reports (2008-2012). After 2008, the methodology of the Global competitiveness report has changed; therefore the reports for pre- 2007 are no longer available. The information obtained from personal communication with Cecilia Serin, Team Coordinator, Global Benchmarking Network, World Economic Forum.

examination, the intensity of local competition is higher, the extent of market dominance is lower, has more effective anti-monopoly policies and trade barriers is lower than in France.

If one aims to examine if the rankings given by the WEF's report reflects the existence of anti-competitive practices or reflects on the deterrence levels in each jurisdiction. Then, if one takes the biggest economy in the EU and one of the countries that has been ranked higher than the UK and France, Germany. Germany's CA has concluded the second highest number of cases in the EU since Regulation 1/2003[92] came into force and it has scored better than France and the UK.[93] Thus, the argument that the low number of cases in the UK is back to the competiveness of its markets or that there is a high level of deterrence is an invalid one, according to the figures provided in the WEF report. Thus, it seems in the UK, as predicted earlier in the thesis, that the problem in the UK is a policy issue rather than a competitive or very high deterrence levels.

The WEF report does not provide ranking for the EU. That is why it is not included in this section. In addition, if one calculates the ranking of the EU by calculating the ranking of the EU Member states, this will not be realistic. Because, the level of developments in Member states is not equal and the maturity of the competition regimes varies substantially; simply summing up the ranking of the EU member states will not give a precise measure.

[92]Germany concluded 88 cases, France concluded 95 and the UK concluded 16 cases. According to the ECN statistics, this only includes decisions that fulfil the criteria in Article 11 (4) of regulation 1/2003; it only includes decisions were Article 101 and 102 where applied.

[93] Germany is used an example because of the size of its economy and its ranking in the WEF report. http://news.nationalpost.com/2013/03/22/graphic-the-top-10-european-economies/

	Intensity of local competition (Ranking)		Extent of market dominance (Ranking)		Effectiveness of anti-monopoly policy (Ranking)		Prevalence of trade barriers (Ranking)	
Year	France	UK	France	UK	France	UK	France	UK
2008	12/ 134	10/134	13/134	16/134	11/134	15/134	27/134	33/134
2009	15/133	6/133	25/133	14/133	10/133	17/133	29/133	28/133
2010	17/139	8/139	22/139	10/139	10/139	8/139	27/139	21/139
2011	12/142	3/142	24/142	6/142	10/142	3/142	32/142	17/142
2012	28/144	5/144	33/144	6/144	20/144	9/144	35/144	13/144

Table 12: WEF's ranking of the UK and France for issues that may affect competition law enforcement (2008- 2012)

6-6: Concluding remarks, findings and observations

This chapter has provided comparative analysis of public enforcement of competition law in the EU, France and the UK. It has highlighted, from a comparative standpoint, the enforcement, non-enforcement and the capabilities of each CA. The chapter also provided explanations for some of the outstanding issues from the previous chapters.

Before highlighting the main observations and findings gleaned from the analysis; it is important to highlight the main issue with each CA and how it can overcome its shortcomings.

The main issues with the EC are the over-reliance on non-ordinary procedures, in particular leniency and settlements in cartel cases and commitments in abuse of dominance cases. This can be remedied if the EC starts to open investigations on its own initiative. Also, the number of infringement decisions has dropped in recent years despite the increase in the budget and staff.

For the FCA, the main weakness is not within the CA itself but with the legislations. The FCA has to act based on complaints and referrals, this is the case in enforcement and non-enforcement activities. This has increased the caseload of the CA and left too little for the FCA to prioritise its activities.

The OFT has to rethink about its enforcement activities, it produces the fewest number of cases in the EU. Given its budget and competent staff the OFT has to shift its focus to enforcement actions. Employing the French approach may prove helpful in forcing the OFT to remedy the concerns expressed.

The following are the main findings and observations reached:

- It can be observed that in all jurisdictions that the number of unilateral conduct cases is fewer than agreement cases. Also in investigations where unilateral conduct issues where investigated the duration of investigations is always higher than in investigations where agreements, solely, where the subject matter of the investigation. This may have some possible explanations: first, that CAs are allocating more resources to agreement cases and in particular to cartel cases; second, CAs find it more difficult to investigate abuse of dominance cases than agreement cases. The outcome of unilateral conduct cases may indicate the difficulty of these cases or that CAs do not like to go in depth with these cases; many abuse of dominance cases concluded as non-infringement decisions or concluded with CAs accepting commitments from parties involved which may indicate that CAs want to end disputes in a more peaceful way.

- The size of the firm investigated and the amount of fine imposed seem to play a big role in appealing the CA decision. The lowest percentage of not appealed decision is in the EU, where the fines were comparatively low and the sizes of the firms condemned with violations of competition law are comparatively small. In general, where the fine is high the possibility of appealing the decision becomes higher.

- The available remedies and sanctions are important to be considered as remedies can help in achieving deterrence and help in increasing the efficiency of the system. With regard antitrust enforcement, the three CAs have similar remedies. In France and the UK criminal sanctions against individuals are available to be used. However, they have rarely been used. If the CA is not using or unsuccessfully trying to bring criminal sanctions this would undermine the effectiveness of such a remedy. In Europe, there are no criminal sanctions against individuals for antitrust violations. The most used remedy for antitrust infringements is the fine. In the EU and the UK, mostly fines are the only used remedy for antitrust violations. In France, however, in addition to fines, in some cases, the CA orders the infringers to publish in the daily newspapers, on their expense, that they have violated competition law and ordering them to state the amount of fine being imposed. This would give publicity to the CA's actions and may help in bringing private actions.

- The use of interim measures by CAs varies. In the EU and the UK, interim measures were not used at all in the period under examination (May 2004- December 2012).[94] Interim measures have been used widely by the FCA in reaching temporarily solutions for suspected infringements of competition law, especially with abuse of dominance cases. Interim measures and their possible implications in raising deterrence, as it shows that the CA will take quick and timely action. The use of this tool may end suspected infringements without conducting full investigations where the parties in which the interim measure is used against will offer commitments that

[94] Interim measures have been used in the EU and the UK in competition matters but were not issued by CAs but Courts.

will eliminate the CA's concerns;[95] there are many cases in France were this route was successful in reaching commitments.[96]

- Success rate on appeal: the only CA that did not lose any case of liability is the EC, where most of the cases concluded where either not appealed or were upheld entirely on fines and liability.[97] In France, most of the FCA's decisions were upheld on liability but there were some reductions in the fines imposed. For the OFT, many of the cases where the fine imposed were high, compared to the OFT's cases, the fines were reduced substantially. In addition, the OFT's biggest case (*Tobacco*) was lost entirely on appeal.

- Based on the discussion about the selection and the sources of investigations, CAs should aim to start investigations on their 'own initiative' because of its implications on deterrence.

- Based on the discussion about the duration of investigations, an assessment of public enforcement of competition law should be done every four to five years. This would ensure that there are activities that the CA has concluded, because on average investigations four to five years to be concluded.

- Based on the discussion about non-ordinary procedures, CAs have to be aware when using these procedures as the over-reliance on them may force the CA to relax its actions in other areas because it may use a large amount of the CA's capabilities when

[95] Bruno Lasserre Keynote speech at the GCR Live conference: *Telecoms, Media and Technology*, 2 July 2013, available at http://globalcompetitionreview.com/news/article/33741/lasserre-praises-use-interim-relief-improving-telecoms-competition/

[96] For example this was the case in the selling of the current and the future generations of iphone exclusively through Orange.

[97] As shown earlier, there was only small number of cases where the fine was reduced on appeal.

applying them, this may lead that the CA either not prosecuting other anti-competitive behaviour or it may be forced to resolve the concerns using softer tools.

- Regarding the capabilities and merger and state aid activities of the CAs under examination. The only explanation that one can give for what has been observed earlier is that legislation and policies employed by the CAs has the decisive role of its outputs and performance.[98] One may argue that the size and the cost of the outputs, not only the number of the outputs, of the CAs is important to be considered before reaching such a conclusion. An answer has been given indirectly earlier in the previous chapters and above in this chapter. It has been noted when discussing the non-enforcement activities (market/sector inquires/ studies/ opinions) to this point where the size and the possible implications of such activities. With regard to enforcement action, the matter of estimating the size of the cases has been done based on the fine imposed, as fines are based on the amount of sales in the affected market with a cap of the firm's worldwide turnover.

[98] The EC and the FCA concluded much more merger cases than the OFT, which it seems that the OFT do not want to intervene too much in both merger and antitrust matters.

- Chapter 7- Conclusion

The main concern of this was to assess public enforcement of competition law. More specifically, it aimed to answer the following general question: Why and how public enforcement of competition should be assessed? The motivation of answering this question was the lack of accepted constantly applied criteria for assessing public enforcement of competition law. This present work offered suggested criteria for assessing the enforcement activities in the area of anti-competitive and unilateral conduct areas. The reason of excluding Merger and state aid, as explained in chapter2, is that these cases require separate criteria because of the very different way in enforcing the related legal provisions and the aim of the enforcer. Mergers and state aid cases are usually notified to the enforcer and the enforcer aims to predict the future; whereas in anticompetitive practices and unilateral conduct cases, the enforcer has to investigate and discover these practices and aims to investigate the past or the present conduct of the investigated parties.

Chapter 2 of the thesis showed that there are no clear or applied criteria for the assessment of competition law enforcement, and highlighted the importance and the benefits of the assessment process and why it has to be undertaken. The present work argued that the lack of a consistently applied standard for the assessment of public enforcement of competition law is lacking because of the suggested standard in the literature have many shortcomings and are not comprehensive enough. The first part of chapter 2, showed that the issue of assessing public enforcement has not been given enough attention in the literature; other issues, such as optimal enforcement of competition law, that should be dealt with after assessing the enforcement of the law have been given more weight, as this thesis argued. There are a handful number of studies that explicitly introduce assessment criteria, and the suggested assessment criteria in these studies have not been tested empirically.

Based on the analysis of the existing literature in the area of assessing public enforcement and to what have observed from the literature review, chapter 2 provided set of criteria for the assessment of public enforcement of competition law. The suggested criteria are based on the whole activities of the CA, where the criteria take into account the following main aspects: (i) Outputs of the CAs [enforcement and non-enforcement activities]; (ii) Capabilities of the CAs [Budget and Human Capital]; (iii) Surrounding circumstances and facts about the CA and the jurisdiction [legislations and any studies about the CA or the jurisdiction].

As it has been explained, the main focus of the criteria is the outputs of the CAs and the other aspects of the criteria are taken into account in order to understand what could affect the outputs of the CA. For the CA, its outputs are the most important as this what would create deterrence levels in the market. Such outputs have to be balanced as each of them (enforcement and non-enforcement) has a role to play in achieving CAs goals. Also, the quality of the outputs is an important aspect that has to be considered when assessing public enforcement of competition law. The suggested criteria aimed to cover these important aspects and many other aspects as it have been shown. Furthermore, the comparative aspect of the criteria helped in revealing issues that would not been exposed without comparing the jurisdictions and assisted in offering suggested solutions to the revealed issues. In addition, the comparative aspect offered suggestions on the distribution of the budget and the human capital of CAs.

The present work has provided implementable, acceptable and comprehensive criteria for the assessment of public enforcement of competition law. The criteria are implementable because its application mainly relies on publicly available data and it can be conducted by the CA itself or externally. The criteria are acceptable as it includes aspects that the literature called

for and add to it in order to be comprehensive and aimed, to the possible extent, to alleviate any possible bias when analysing the variables.

Having established criteria for the analysis, the present work then moves to apply the criteria to the EU, UK and France. This has required data collection from the three jurisdictions, the data have been collected from different sources such as: cases concluded by the CAs, appealed decisions, websites of the CAs, annual reports and any previous studies. The data have collected for the period from 1 May 2004 to 31 December 2012.

For the EU (Chapter 3), the thesis noted that the EC is giving particular attention to cartel cases in terms of the number of cases the outcome of its decisions. The EC took a tough approach toward cartel cases, unlike abuse of dominance. One of the main reasons of this was its leniency programme where it has relied heavily on this instrument and the settlement procedure for cartel cases. This has resulted in a very high success rate on appeal where the EC did not lose any case on appeal entirely. The EC took a very different approach with abuse of dominance cases where most of the cases were concluded as commitments decisions. As pointed out earlier, this may have some undesirable implications on deterrence levels; the EC is focusing and punishing certain type of cases (cartels based on leniency) which may affects the deterrence levels on other area, i.e. other anticompetitive practices and abuse of dominance, where the EC was either not examining these cases or dealing with them using softer tools.

A possible explanation for the focus of the EC on these cases may be the reason of limited resources and that the EC wants to focus on most harmful cases and cases that are nearly guaranteed on appeal, hence the EC may save associated costs with appeals.

Chapter 3 noted that the source of the investigation has an effect on the duration of investigations, the EC concluded investigations quicker when the source of the investigation was the Commission's own initiative.

Chapter 4 dealt with public enforcement of competition in the UK, where for the whole period examined May 2004- December 2012 the OFT was in charge for the enforcement of competition law in the UK. One of the main findings in this chapter was that the OFT's non-enforcement activities were much more than its enforcement actions; in some of the examined years the OFT did not take any enforcement action (i.e. did not produce any decision). In addition, that there were a very high number of non-infringement decisions compared to the overall number of decisions concluded by the OFT. It has been noted that the reason for this is the enforcement policy of the OFT, where it targeted high impact cases and overlooked small cases. This policy has resulted in some undesirable results where the OFT failed to successfully prosecute high impact cases and it did not bring small cases that may enrich case law in the UK.

Previous work conducted by the National Audit Office have noted that the OFT concluded small number of cases and took too long to reach its final decision and that the case law in the UK is not rich enough.

In addition, the legislators in the UK have recently brought changes to the UK competition regime. This might be a sign that legislator believed that structural changes are required for the UK competition regime to perform better. It has been noted in Chapter 4 when discussing the changes brought in by the ERRB, that it did not tackle one of the very important issues that this work identified; namely the issue of opening investigations. If the ERRB contained provisions that requires the CMA to respond to complaints by formal decisions for a limited

period of time, this would help in increasing the caseload and would enrich the case law in the UK. This approach is taken by the French legislator as mentioned in Chapter 5.

Chapter 5, dealt with public enforcement of competition law in France. The French competition regime is different in the enforcement of competition law, where the FCA has to respond to complaints and referrals by a decision and has to respond to referrals for opinions. This is why the FCA has concluded the largest number of cases and issued largest number of opinions. As a result, the FCA has declared many decisions as non-infringement decisions especially in the area of abuse of dominance. Also, it is noted that the limited resources has affected the issuance of guidelines that clarifies certain procedures where the FCA issued a limited number of guidelines after it was established, when its budget was increased.

This peculiarity in the French competition regime has implications on how the FCA prioritises its activities. This is obvious form the sources of the investigations where the FCA conducted only few *ex-office* investigations compared to the overall number of investigations. Complaints and referrals were the source of investigations for most of the cases.

In order to offer suggestions for the concerns highlighted in the countries chapters, this thesis conducted an empirical comparative analysis for the three jurisdictions. Chapter 6 applied the criteria for the three jurisdictions where the data have been analysed comparatively. The comparative aspect of the thesis has helped in offering solutions to identified problems from the application of the criteria. Chapter 6 highlighted the main results of the data analysis, pointed out the issue that has to be resolved and offered suggestions on how each CA can improve its performance.

As with any other research project, this thesis can be improved if other data have been available. This thesis would have offered more precise results if the following data are

publicly available: (i) data on the distribution of the budget are available; (ii) precise data on the enforcement policies of CAs; (iii) data on how CAs deal with complaints and how much complaints it receives. Such data would allow giving more robust results and precise results to the jurisdictions examined.

Bibliography

Articles, book and reports

- Aitken Melanie L., Interim Commissioner of Competition, Canadian Bar Association, Competition Law Section, 2009 Spring Forum, Toronto, Ontario, May 12, 2009, available at *http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03066.*html (Accessed 15 December 2013)
- Akman Pinar and Garrod Luke, 'When Are Excessive Prices Unfair?' (2011) 7 Journal of Competition Law and Economics 403
- Almunia Joaquín, 'Higher Duty for Competition Enforcers' speech delivered at the International Bar Association Antitrust Conference/Madrid 15 June 2012, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/453 accessed 25 June 2012
- Ashurst's, a study prepared by Emily Clark, Mat Hughes and David Wirth, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (2004) available at http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf accessed 20 May 2012
- Bergman Mats A., 'QUIS CUSTODIET IPSOS CUSTODES? OR Measuring and Evaluating the Effectiveness of Competition Enforcement' (2008) 156 De Economist 387
- Black Oliver, 'Per se rules and rules of reason: what are they?' (1997) European Competition Law Review 154

- Black Oliver, *Conceptual Foundations of Antitrust* (CUP, Cambridge 2005), on per se and rule of reason
- Bloom Margret, 'The Competition Act at 10 years old: enforcement by the OFT and the sector regulator' (2010) Competition Law Review, 141
- Bos Iwan and Schinkel Maarten Pieter, 'On the Scope for the European Commission's 2006 Fining Guidelines Under the Legal Fine Maximum' (2006) 2 Journal of Competition Law and Economics 673
- Botteman Yves and Patsa Agapi, 'Towards a more sustainable use of commitment decisions in Article 102 TFEU cases' (2013) 1 Journal of Antitrust Enforcement 1
- Brenner Steffen, 'An Empirical Study of the European Corporate Leniency Program' (2009) 27 International Journal of Industrial Organization 639, 643
- Buccirossi Paolo, Ciari Lorenzo, Duso Tomaso, Spagnolo Giancarlo and Vitale Cristiana, 'Deterrence in Competition Law', Discussion Paper SP II 2009 – 14, Wissenschaftszentrum Berlin, 2009,
- Buigues Pierre-André & Meiklejohn Roderick, 'National Competition Authorities in France, Germany, and the United Kingdom: Resources, Independence, and Enforcement' (August 2013) Competition Policy International Antitrust Chronicle, 18
- Carree Martin, Gunster Andrea and Schinkel Maarten Pieter, 'European Antitrust Policy 1957-2004: an analysis of Commission decisions' ACLE Working Paper 2008-06.
- Chang Myong-Hun and Harrington Joseph E., 'The Impact of a Corporate Leniency Program on Antitrust Enforcement and Cartelization' Johns Hopkins University, Department of Economics Working papers 548, p.15. available at http://www.econ2.jhu.edu/People/Harrington/leniency_4.10.pdf (accessed 15 December 2013)

- Christopher Harding and Alun Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995-2004' (2005) 30 European Law Review 349
- Craycraft J.C., J.L., and Bush S.C., 'Guess Who Came to Dinner: A Statistical Study of Federal Antitrust Enforcement for the Period 1963-1984' (1985) 2 Review of Industrial Organization 106
- Crime Becker 'and Punishment: An Economic Approach' (1968) 76 Journal of political economy 169.
- Cumming George, Spitz Brad and Janal Ruth, *Civil procedure Used for the Enforcement Of EC Competition Law by the English, French and German Civil Courts* (Kluwer, The Netherlands 2008)
- D Geradin,. and Henry D., 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts Judgments' (2005) 1(2) European Competition Journal 401
- Dabbah Maher M. *EC and UK Competition Law* (CUP, Cambridge, 2004)
- David Eric, 'Country Analysis - France" in Gerhard Dannecker and Oswald Jansen (eds), *Competition Law Sanctions in the European Union* (Kluwer, the Hague 2004) 405, 414-415
- David, 'Country Analysis - France" in Gerhard Dannecker and Oswald Jansen (eds), *Competition Law Sanctions in the European Union* (Kluwer, the Hague 2004) 405- 479
- Davies Stephen and Ormosi Peter "**Assessing Competition Policy: Methodologies, Gaps and Agenda for Future Research" CCP Working Paper 10-19 available at:** http://www.uea.ac.uk/ccp/Working_Paper_10-19
- Department for Business, innovation & Skills, 'A competition regime for growth: a

consultation on options for reform' March 2011, p. 21

- Doury Nathalie Jalabert-, 'Competition Authority's Upgraded Fining Policy in France — Who Will Be Next?' (2011) Antitrust & Trade Regulation Report, 100 ATRR 674, 06/10/2011by the Bureau of National Affairs

- Duso Tomaso, Gugler Klaus and Yurtoglu Burcin 'How Effective is European Merger Control?' (2011) 55 European Economic Review 980

- European Commission, 'White Paper on damages actions for breach of the EC antitrust rules' (2008) Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF accessed 20 May 2012

- Ezrachi Ariel *EU Competition Law: An Analytical Guide to the Leading Cases* (2nd edn, Hart, Oxford, 2010) chapter 10
- Financial Times 'Competition complaints hit record high' (9 December 2011) available at http://www.ft.com/cms/s/0/dc5afa96-2197-11e1-a19f-00144feabdc0.html
- Fournier Eric Gippini-, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008 available at http://ssrn.com/abstract=1139776,
- Fournier Eric Gippini-, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003' Community Report to the FIDE Congress 2008 available at http://ssrn.com/abstract=1139776,
- Freeman Peter, 'Competition Decision Making and Judicial Control- The Role of the Specialised Tribunal' Speech Delivered at the Centre for Competition Policy Annual Conference June 2013

- Gallo J.C., Craycraft J.L.,and Bush S.C., 'Guess Who Came to Dinner: A Statistical Study of Federal Antitrust Enforcement for the Period 1963-1984' (1985) 2 Review of Industrial Organization 106
- Gallo, J.C., Dau-Schmidt K., Craycraft J.L. and Parker C.J. , 'Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study' (2000) 17 Review of Industrial Organization 75
- Gamble, 'Speaking formally with enemy-cartel settlements' 2011 32(9) European Competition Law Review 449, 452-453
- Ginsburg Douglas H & Wright Joshua D., 'Antitrust sanctions' (2010) 6(2) Competition Policy International 3
- Global Competition Review article of 4 April 2011, 'French high court gives clarity on hybrid settlements'.
- Global Competition Review publications on 'Rating enforcement' (2004-2012).
- Goyder Joanna and Albors-Llorens Albertina *Goyder's EC Competition Law* (5th edn, OUP, Oxford, 2009)
- Harker Michael and Hviid Morten, 'Competition Law Enforcement and Incentives for Revelation of Private Information' (2008) 31(2) World Competition 279
- Harrington Joe Presentation delivered by available at http://www.econ2.jhu.edu/People/Harrington/Harrington_CRESSE_7.09.pdf
- Harrington Joe, 'The Battle Against Hard Core Cartels: Measurement and Incentive Challenges' August 2011, Presentation delivered at Antitrust Enforcement in the Presence of Successful Leniency Programs Norwegian School of Economics; slide 44 available at http://www.econ2.jhu.edu/People/Harrington/Bergen_8.11.pdf (Accessed 15 December 2013)

- Heimler Alberto and Mehta Kirtikumar, 'Violations of Antitrust Provisions: The Optimal Level of Fines for Achieving Deterrence' (2012) 35 World Competition, 103
- Heimler and Mehta Kirtikumar, 'Violations of Antitrust Provisions: The Optimal Level of Fines for Achieving Deterrence' (2012) World Competition 35, 103
- Henry David, 'Leniency programmes: an anaemic carrot for cartels in France, Germany and the UK?' 26(1) European Competition Law Review 2005, 13; P.21-22
- Hovenkamp Herbert, 'Antitrust's Protected Classes' (1989) 88 Michigan Law Review 17
- Howard Anneli, 'Object and effect: what's in an object?' (2009) 8 Competition law journal 37
- Hughes Mat and Wirth David, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (2004) available at http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf
- Hüschelrath Kai and Leheyda Nina, 'A Methodology for the Evaluation of Competition Policy' Discussion Paper No. 10-081, Centre for European Economic Research (ZEW), Mannheim
- Hviid Morten, 'Why private enforcement should be reformed alongside public enforcement' Competition Policy Blog (3 May 2011). available at http://competitionpolicy.wordpress.com/2011/05/03/why-private-enforcement-should-be-reformed-alongside-public-enforcement/ Accessed 20 May 2012
- Hylton Keith N and Deng Fei, 'Antitrust around the world: An Empirical analysis of the Scope of competition laws and their effects' (2007) 74 Antitrust Law Journal 271

- Indig Tamar and Gal Michal, 'New Powers- New vulnerabilities? A critical Analysis of Market Inquiries Performed By Competition Authorities' in Di Porto and Drexl (eds) *Competition Law as Regulation* (Edward Elgar, 2013) Available at SSRN.

- Italianer Alexander, 'Public and private enforcement of competition law' speech delivered at the 5th International Competition Conference 17 February 2012, Brussels, available at http://ec.europa.eu/competition/speeches/text/sp2012_02_en.pdf accessed 20 May 2012

- Jones CA, *Private Enforcement of Antitrust Law in the EU, UK and USA*, (OUP, Oxford, 1999).

- Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, (OUP, Oxford, 1999)

- Katsoulacos Yannis and Ulph David, 'Optimal Enforcement Structures for Competition Policy Implications of Judicial Reviews and of Internal Error Correction Mechanisms' (2011) European Competition Journal 7, 71

- Komninos Assimakis P 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3(1) Competition Law Review

- Komninos Assimakis P 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3(1) Competition Law Review 10

- Korah Valentine *An introductory Guide to EC Competition Law and Practice* (9th edn, Hart, Oxford, 2007) 16.

- Kovacic William E et al, 'How does your Competition Agency Measure Up?' (2011) 7 European Competition Journal 30

- Kovacic William E, 'Rating the Competition Agencies: What Constitutes Good

Performance?' (2009) 16 George Mason Law Review 903, 914-918

- Kovacic William E, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' (2006) 31 Journal of Corporation Law 503

- Kovacic William E, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' (2006) 31 Journal of Corporation Law 503
- Kovacic William E. Presentation delivered at GCLC, Brussels 1 December 2011. available at http://chillingcompetition.com/2011/12/01/slides-evening-policy-talk-bill-kovacic/
- Kovacic William E., 'Measuring What Matters: Performance Standards for Competition Agencies' Presentation delivered at GCLC, Brussels 1 December 2011, available at http://chillingcompetition.com/2011/12/01/slides-evening-policy-talk-bill-kovacic/

- KPMG (2004), 'Peer Review of Competition Policy', Report for the UK Department of Trade and Industry. Available at http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/files/file32813.pdf accessed 20 December 2011;
- KPMG (2004), 'Peer Review of the UK Competition Policy Regime', a report to the Department of Trade and Industry p. 9. The jurisdictions included in the peer review are USA, Germany, UK, EU and other jurisdictions named as 'others'. However, the overall ranking (merger and non-merger regime) for the UK was third after the USA and Germany.
- KPMG (2007), 'Peer Review of Competition Policy', Report for the UK Department of Trade and Industry. available at http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/files/file39863.pdf accessed 20 12 2011

- KPMG (2007), 'Peer Review of Competition Policy', a report to the Department of Trade and Industry
- Lande Robert H. and Davis Joshua P., 'An Evaluation of Private Antitrust Enforcement: 29 Case Studies' [interim report], (2006), available online at http://www.antitrustinstitute.org/recent2/550b.pdf.
- Landes W.M., 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 652
- Landest William M., 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 652
- Lasserre Bruno Keynote speech at the GCR Live conference: *Telecoms, Media and Technology*, 2 July 2013, available at http://globalcompetitionreview.com/news/article/33741/lasserre-praises-use-interim-relief-improving-telecoms-competition/
- Lasserre Bruno, 'Antitrust: A Good Deal for All in Times of Globalization and Recession' 2011 7(1) Competition Policy International 245
- Lasserre Bruno, 'Antitrust: A Good Deal for All in Times of Globalization and Recession' 2011 7(1) Competition Policy International 245
- Lasserre Bruno, 'Competition regulation, one year after the reform: a view of authority (Part 1)' (2010) n ° 3-2010 Concurrences 35-46
- Lasserre Bruno, 'The New French Competition Authority: mission, priorities and strategies for the coming five years' (2009) paper by the President of the Autorité de la concurrence, Available at <http://www.autoritedelaconcurrence.fr/doc/intervention_bl_autorite_trustubusters_09.pdf

- Lasserre Bruno, 'The New French Competition Law Enforcement Regime' October 2009
- Lasserre Bruno, 'The New French Competition Law Enforcement Regime' October 2009 COMPETITION Law International
- LEAR presentation 'A Study on the Effectiveness of Competition Policy' October 2008
- Lin, P., . Baldev R, Sandfort M. and. Slottje D, 'The US Antitrust System and Recent Trends in Antitrust Enforcement' (2000) 14 Journal of Economic Surveys 255
- London Economics (2011) OFT 1391 available at http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1391.pdf accessed 1 February 2012.
- Lyons Bruce (ed), *Cases in European Competition Policy: The Economic Analysis* (Cambridge University Press, Cambridge 2009). In this edited collection, the respected authors provided an economic analysis for a number of cases in the EU.
- MacCulloch Angus and Wardhaugh Bruce in a presentation delivered at the 8th CCP annual conference; a review of their presentation is available at Research at CCP Blog (18 June 2012)
- Mateus Abel. M, 'Ensuring a more level playing field in competition enforcement throughout the European Union' 2010 31(12) European Competition Law Review 514, 524
- Mattioli Evi, 'Commitments and settlements in the future UK competition regime' European Competition Law Review 2013, 34(3), 160-168
- McAfee R. Preston, Mialon Hugo M., and Mialon Sue H., ' Private v. Public Antitrust Enforcement: A Strategic Analysis' (2008) available at: http://ssrn.com/abstract=775245

- Mesnard Louis De ,‘Is the French Mobile Phone Cartel Really a Cartel?’ (2009) 122 (2) International Journal of Production Economics 663
- Monti Giorgio *EC Competition Law* (CUP, Cambridge, 2007)
- Motta Massimo, ‘On cartel deterrence and fines in the European Union’ (2008) 29 European Competition Law Review 209
- Muris Timothy J., ‘Principles for a Successful Competition Agency’ (2005) 72 University of Chicago Law Review 165
- Myths Sebastian Peyer, ‘and Untold Stories - Private Antitrust Enforcement in Germany’ CCP Working Paper 10-12.
- Nicholson Michael W., ‘An Antitrust Law Index for Empirical Analysis of International Competition Policy’ (2008) 4 Journal of Competition Law & Economics 1009

- Nicholson Michael W., ‘An Antitrust Law Index for Empirical Analysis of International Competition Policy’ (2008) 4 Journal of Competition Law & Economics 1009

- OECD (2005) ‘Evaluation of the Actions and Resources of Competition Authorities’. DAF/COMP(2005)30 available at http://www.oecd.org/dataoecd/7/15/35910995.pdf
- OECD, ‘The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency’ (2003) 5 OECD Journal of Competition Law and Policy 7
- OECD, ‘Evaluation of Competition Enforcement and Advocacy Activities: the Results of an OECD Survey’ Feb (2013) DAF/COMP/WP2 (2012)7/FINAL. Available at <http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/WP2%282012%297/FINAL&docLanguage=En> accessed 15 April 2013.
- OFT 1391 ‘Assessing the Impact of Competition Intervention on Compliance and Deterrence’ A report prepared by London Economics (December 2011)

- OFT 916resp 'Private actions in competition law: effective redress for consumers and business' (November, 2007) Available at http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf
- OFT 916resp 'Private actions in competition law: effective redress for consumers and business' (November, 2007) Available at http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf accessed 20 may
- OFT 962: The deterrent effect of competition enforcement by the OFT' A report by Deloitte (November2007)
- OFT Guidance, Incorporating the Office of Fair Trading's guidance as to the circumstances in which it may be appropriate to accept commitments, December 2004
- Page William H., 'Optimal Antitrust Penalties and Competitor's Injury' (1990) 88 Michigan Law Review 215
- Parmentier Lucie Carswell-, 'Recent developments in French competition law - commitments, leniency and settlement procedures - the French approach' (2006) 27(11) European Competition Law Review 616, 627-628
- Petit Nicolas and Rabeux Louise, 'Judicial Review in French Competition Law and Economic Regulation – A Post- *Commission vs. Tetra Laval* Assessment' (2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1290143> .
- Petit Nicolas, ' Aperçu de la procedure communautaire de transaction' (2009) Concurrences, 231
- Posner Richard A , "A Statistical Study of Antitrust Enforcement", (1970) 13 Journal of Law and Economics365
- Posner Richard A. *Antitrust Law* (2nd edn University of Chicago Press, Chicago, 2001) 266

- Posner Richard A. *Antitrust Law* (2nd edn University of Chicago Press, Chicago, 2001)
- Posner Richard A., , "A Statistical Study of Antitrust Enforcement", (1970) 13 Journal of Law and Economics 36
- Pricewaterhouse Coopers LLP, 'Ex Post Evaluation of Mergers' (2001) Report for the UK Office of Fair Trading, Department of Trade and Industry and the Competition Commission
- Report for the European Commission 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios'(2007) available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf
- Report for the European Commission 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' 2007
- Report for the European Commission 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' 2007
- Rodger Barry, 'UK Competition Law and Private Litigation' in Barry Rodger (ed), Ten years of UK Competition Law Reform (2010 Dundee University Press, Dundee) at 74 and 77
- Rodger Barry. J, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part I' (2006) European Competition Law Review 279
- Rodger Barry. J, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part III'(2006) European Competition Law Review 341
- Rodger Barry. J, 'Competition law litigation in the UK courts: a study of all cases 2005-2008: Part 1' (2009) 2(2) Global Competition law Review 93
- Rodger Barry. J, 'Competition law litigation in the UK courts: a study of all cases 2005-2008: Part 2' (2009) 2(3) Global Competition law Review, 136-147

- Rodger Barry. J, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part I'
- Rodger Barry. J, 'Private enforcement of competition law, the hidden story: competition litigation settlements in the United Kingdom, 2000-2005'(2008) 29(2) European Competition Law Review 96
- Rodger Barry. J. 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004 - Part II' (2006) European Competition Law Review 241
- Rosenberg David and Sullivan James P., 'Coordinating private class action and public agency enforcement of antitrust law' (2006) 2(2) Journal of Competition Law & Economics 159
- Rosochowicz Patricia Hanh, 'Deterrence and the relationship between public and private enforcement of competition law' Unpublished work. Available at http://www.google.co.uk/url?sa=t&rct=j&q=deterrence%20and%20the%20relationship%20between%20public%20and%20private%20enforcement%20of%20competition%20law&source=web&cd=2&ved=0CFIQFjAB&url=http%3A%2F%2Fwww.kernbureau.uva.nl%2Ftemplate%2FdownloadAsset.cfm%3Fobjectid%3DEC3C3FD7-AF23-4837-8C9C8FCECA2976B4&ei=zs7xT_fYDMqp8APIj5HTBg&usg=AFQjCNGNt5aRwAhQFq2ujSkdcIzXhuIl4g
- Rosochowicz Patricia Harffi, 'Deterring Cartel and Abuse of Dominant Position Activity in the European Union A Comparative Study' ,The University of Reading, December 2005, P. 317- 321
- Salop Steven C and White Lawrence J, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 Georgetown Law Journal1001

- Segal and Whinston Michael, 'Public vs private enforcement of antitrust law: a survey' (2007) 28(5)
- Segal Ilya and Whinston Michael, 'Public vs private enforcement of antitrust law: a survey' (2007) 28(5), European Competition Law Review, 306
- Stephan Andreas 'An Empirical Assessment of the 1996 Leniency Notice' CCP Working Paper No. 05-10, p 15
- Steven C Salop and Lawrence J White, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 Georgetown Law Journal 1001, 1021
- Temple Lang John, 'Three Possibilities for Reform of the Procedure of The European Commission in Competition Cases Under Regulation 1/2003' available at: http://ssrn.com/abstract=1996510
- V Ghosal. and Gallo J., 'The Cyclical Behaviour of the Department of Justice Antitrust Enforcement Activity' (2001) 19 International Journal of Industrial Organization 27
- Vogel Louis and Vogel Joseph, 'Abuse of dominance under French Law: Desirable Evolutions' The European Antitrust Review (2013) 59, 61
- Voillemot Dominiqe and Chesmeau Amael, 'Chapter on France' in Julian Maitland-Walker (ed), *Competition Laws of Europe* (LexisNexis 2003) 121-164;
- Waelbroeck D., Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?, GCLC Working Paper 1/08, available at http://www.gclc.coleurope.eu; Wouter Wils, 'Settlement of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003' (2006) 29 World Competition 345

- Waked Dina I., 'Do Developing Countries Enforce Their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries' (2012) p 9-20, available at SSRN
- Walsh Declan J., 'Carrots and sticks: leniency and fines in EC cartel cases' 2009 European Competition Law Review 30(1) 30, 31.
- Whish Richard and Bailey David *Competition Law* (7th edn, OUP, Oxford, 2012)
- Whish Richard, *Competition Law* (6th edn OUP, Oxford 2009)
- Whish Richard, *Competition Law* (6th edn OUP, Oxford 2009) p. 113-135
- Wils Wouter P.J. 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2)World Competition 183
- Wils Wouter P.J. *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International, 2002)
- Wils Wouter P.J., 'Optimal Antitrust Fines: Theory and Practice' (2006) 29World Competition, 183;
- Wils Wouter P.J., 'Optimal Antitrust Fines: Theory and Practice' 2006 29(2) World Competition
- Wils Wouter P.J., 'Settlement of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003' (2006) 29 World Competition 345.
- Wils Wouter P.J., 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26(3) World Competition, 473.
- Wils Wouter P.J., 'Should Private Antitrust Enforcement be encouraged in Europe' (2003) 26 World Competition 567.

- Wils Wouter P.J., 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 (1) World Competition
- Wils Wouter P.J., 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 (3) World Competition
- Wils Wouter P.J., "Use of Settlements in Public Antitrust Enforcement: Objectives and Principles" in C.D. Ehrlerman and M Marquis (eds), *European Competition Law Annual* (Hart Publishing, 2008)
- Wils Wouter P.J., "Use of Settlements in Public Antitrust Enforcement: Objectives and Principles" in C.D. Ehrlerman and M Marquis (eds), *European Competition Law Annual* (Hart Publishing, 2008).
- Wise Michael, 'Competition Law and Policy in France (2003)' (2005) 7 (1) OECD Journal of Competition Law and Policy 7
- Wise Michael, 'Competition Law and Policy in the European Union (2005)' (2007) 9 (1) OECD Journal of Competition Law and Policy 7
- Wright D. and Diveley Angela 'Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission'. available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990034
- Wright Joshua and Diveley Angela, 'Do expert agencies outperform generalist judges? Some preliminary evidence from the Federal Trade Commission' 2013 1(1) Journal of Antitrust Enforcement 82
- Wright Joshua D. and Diveley Angela 'Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission'. available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990034