

The proper measurement of profitability in competition cases: the Dutch experience

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Wording of laws is usually rather general leaving room for interpretation. Competition laws are no exception to this. Supplementary documents like guidelines, directives, notes, regulations and decisions in court are needed to make competition laws applicable to judgments on possible infringements of the law in real life. In order to reach that goal these documents usually introduce ideas/concepts, like 'fair prices', 'excessive profits' and 'effective competition'. Such ideas/concepts show similarity with the term construct that is frequently used in social sciences. In order to be useful a construct needs operationalisation. Whether such an operationalisation is valid must be tested. Social sciences provide a number of such tests. The paper investigates the behaviour of the Dutch competition authority NMa with respect to their operationalisation of the construct 'excessive profit' in relation to supposed abuse of market power. This construct played a key role in the case NMa vs Interpay. The paper concludes that the construct 'excessive profits' was very poorly operationalised by NMa in this case and in fact has led to the loss of reputation of NMa. Nevertheless the behaviour of NMa may have important consequences for future infringements of Dutch Competition Law based on alleged excessive pricing.

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