Strategic interactions in competition policy: Dutch experiences[1]

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1 Introduction

It is well known that the Sherman Act of 1890 led to strategic behaviour by firms. For instance, since cartels were forbidden by the Sherman Act, the number of mergers increased in the USA. Especially after 1897 there was a clear and big increase in the number of mergers (Motta, 2004, pp. 5). This led to the Clayton Act of 1914 which (a.o.) established a legal foundation for merger control in the USA.

These historical observations illustrate two points. First, the market reacts to institutional changes like changes in legislation, and, secondly, the legislator reacts to a new (market) situation with amendments to existing competition law.

When competition legislation is introduced or amended in order to achieve a policy goal – which is generally supposed to be in the interest of the public- firms will either try to adhere to the law to their best possible advantage or to evade the law at least partly, depending on a cost-benefit analysis of both types of reaction. However, it takes some time before this process of adjusting to legislation fully settles down. This might explain why it took more than half a decade before the market reaction to the introduction of the Sherman Act became obvious. In a recent study by the Netherlands Bureau for Economic Policy Analyses (CPB) it is argued that in the period 1994-2001 the reaction to the introduction of the Netherlands competition law of 1998, took about two years.

> "The size of the coefficient of the lagged indicator suggests an adjustment of firms' competitive behaviour to changes in the other determinants in the previous year. The coefficient of 0.44 implicates that competition is fully adjusted to initial changes of other determinants after two years."(CPB, 2006: 37)

So, changes in the law lead to reactions of economic agents but it takes time. This adjustment process may lead to a new equilibrium. In this equilibrium it is possible that the new law is fully adhered to, but it is also possible that it is partly absorbed with evasive behaviour. Full adherence would imply that cartels no longer exist, 'abuse of dominance' would no longer

occur and only efficient mergers would result. Full adherence would also imply that the enforcement of competition law would be flawless (no first- or second order mistakes); otherwise firms would adjust (arguably inefficiently) to these mistakes made by law enforcement.

The legislative response to changes in market behaviour starts a process of action-reaction between the legislator and market parties. This process runs the risk that an abound of legislation and regulation is created as the legislator keeps adjusting the law to reach a ‘perfect’ outcome.

The interaction between legislation and market parties calls for reconsideration of the law now and then. Regulation runs the risk of becoming obsolete, for instance. On the one hand it is necessary to update legislation. On the other hand competition policy which becomes too complicated because of regular adjustments might hamper the functioning of markets itself. The legislator should find a balance between effectiveness and efficiency in legislation.

Apart from adapting to changes in law, there are also other kinds of reactions by market parties to existing competition law, competition authorities, the (competition) regulators and (private and public) law enforcement. We think of lobbying, lawsuits, public discussion, etc.

In this paper, we will focus on brief descriptions of these interactions and (where possible) use anecdotal evidence of the Dutch context to illustrate them. As such, this paper may be viewed as the first step in trying to model analytically the relevant interactions in the context of competition policy. Alternatively, this way of proceeding might be viewed as a process of ‘proposition formation’[4].

The Netherlands’ competition law dates from 1998. It is essentially the same legislation as EU competition law. The law of 1998 substituted the law of 1956 called the WEM (Wet Economische Mededinging) which allowed cartel agreements as long as they were reported to the Ministry of Economic Affairs. Until recently in the Netherlands there were hardly any

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[4] It is a challenge to model these interactions, expectations formation and (out-of-equilibrium) behavioural adjustments in a full model. Even describing simple, yet realistic game-theoretical, models (in order to determine equilibrium outcomes) of the interactions between the three players (at the second level) is rather complicated.

changes in the Competition Act of 1998, but at this moment the first major changes in the law are in preparation, due to (for some part) certain market developments.

From the start of the EU, competition law has been operative (though rigorously applied since the 1990's only). Since EU competition law was stricter than the Dutch WEM was, a lot of Dutch competition cases in the period before 1998 were based on this EU law rather than on the WEM and handled by the European Commission rather than Dutch authorities.[5]

The remainder of this paper is structured as follows. First, we briefly elaborate on a framework to study the different types of interactions in the context of competition policy. Subsequently, we describe the different types of interactions in more detail in sections 3 to 6 using anecdotal evidence. We close with a discussion and implications for further research.

2 Framework for studying strategic interactions in competition policy

In general there is an intricate pattern of actions and reactions between at least five types of player in the context of competition policy: the legislator, the competition authority (or regulator), the judiciary, firms, and the public at large (or consumers).[6] We distinguish, for analytical purposes, two main (but related) levels of interactions.

- The first level concerns the ultimate effect of legislation on market outcomes. To put it simply: the legislator introduces competition law and a competition authority,[7] given certain market outcomes (for instance, as was the case in the Netherlands, market outcomes that were determined in a possibly large number of markets by cartels) and this leads (over time) to (probably) different market outcomes. These market outcomes might either be part of an

[5] A famous example is the 1992-Commission Decision on Bid Rigging in the Construction sector in the Netherlands (European Commission, 1992, Building and Construction in the Netherlands, 05.02.1992, Official Journal L92 – 7/04/1992, page 1, celex 392D0204. See also Russo, Carree, Günster and Schinkel (forthcoming).

[6] For the remainder we will focus on the first four types of players. Only as far as 'private litigation' is concerned, we will discuss the role of the consumer.

[7] At this conceptual level one may also read this statement as: the legislator introduces a specifically regulatory framework, including a regulator. We will therefore speak of 'regulator' or 'competition authority' as 'enforcement agency'.

adjustment process over time, or they might be new equilibrium outcomes. The outcomes are determined by the interactions between the other players (enforcement agencies, judiciary, firms). In that sense, those interactions are a 'black box' at this level of analysis. Whichever will be the case; these outcomes of the 'black box' may be considered unsatisfactory by the legislator and have an incentive to change the law in order to remedy the problems as conceived by the legislator. The discontent of the legislator may be based on information or complaints of the other players, for instances by means of lobbying activities. Examples of this will be described below in more detail, but one can think of changes in the Netherlands' competition law concerning the discussion on the personal liability of managers on top of liability of firms. Changes in the law are also partly due to exogenous reasons, like the impact of European rules.[8]

- The second level concerns the closer scrutiny of the first level's 'black box'. What are the interactions between enforcement agency, the judiciary and the firms and why might the outcomes be considered undesirable (and in what sense), so that changes in the law might be required? These interactions determine the actual market-outcomes and whether or not these are considered to be (un)satisfactory. Therefore it is very useful to look into these processes in more detail. Adjustment of the rules of interaction or strategic behaviour to influence these interactions and the outcome can prevent changes in the law and will improve the effectiveness of legislation.

These interactions, as stated before, are necessarily of a dynamic nature. The introduction of competition law and its' enforcement induce reactions by firms and the judiciary. These reactions lead to yet other reactions by the competition authority, and so on. Expectations are formed and adjusted over time until some (new) equilibrium might be reached. Still, the possibility exists that during the adjustment process, out-of-equilibrium market outcomes are so that they are considered to be unsatisfactory and will lead to adjustments in either the law or in the application of enforcement.

To study the interactions at the second level, we will distinguish five types of interactions (for ease of exposition). The first type of interaction has to do with changes that are induced by the introduction of the competition act. The second type of interaction reflects some sort of an

[8] Those interactions will not be described here, though.

equilibrium situation in which expectations about the enforcement agency's activity have been formed (and the enforcement agency has to decide how to make use of this). The third type of interaction is about type I and type II-errors (i.e. 'false prosecutions' and 'false non-prosecutions') and their influence on behaviour. The fourth type of interaction considers the role of the judiciary and the last one is about private litigation.

A) At the introduction of the competition act:

- firms establish expectations about enforcement and actions taken;
- the enforcement agency establish expectations about firms' behaviour and actions taken;
- based on the actions and expectations of both parties, there can be adjustments in behaviour.

This process will be described in section 3. Topics we discuss are: the enormous amount of exemption requests by market parties after the introduction of the competition act, the thoroughness which the NMa displayed in treating the exemption requests in order to gain a reputation, but which also had some negative consequences, for example on the pro-active detection of cartels or other abuses.

B) At any later stage in which expectations have been set (more or less):

- a possible change of behaviour by the enforcement agency may occur, and/or;
- a possible change of behaviour by firms may occur.

This will be described in section 4. We will discuss the use of alternative ways of enforcement and the influence of 'leniency' and 'fining' on cartel formation specifically. We also present the results from a recent research paper on the effects of the Netherlands Competition authority (hereafter NMa) as anticipated by companies. This longitudinal research shows that companies increasingly take the competition law and the competition law enforcement into account in their business decisions.

C) At any later stage in which (possibly) type I and type II errors become more or less clear:[9]

- the enforcement agency may change their behaviour in enforcement activities and decisions;

[9] Typically the judiciary will play an active role in the establishment of both types, but we will not focus on the interactions by all three players. The role of the judiciary will be separately dealt with.

- how firms react to these types of errors.

This will be described in section 5. We will discuss the possible problems that firms might experience as a consequence of these type of errors. For example, companies might wish to sue other companies in order to 'raise rivals' costs'.

Opmerking [r1]: Is dit relevant in deze context (heeft dit met type 1 en 2 te maken) of moeten we hier bv Nuon Reliant opnemen, fusie doorlaten gaan met remedies maar daarna in beroep om dit terug te draaien en schade te claimen.

D) At the stage where the judiciary shows its' influence:

- the judiciary will have an impact on the enforcement agency's actions, both with regard to the judiciary and the firms;
- the judiciary will influence the firms' expectations and actions taken;
- the decisions of the judiciary will also have an impact on private litigation and, hence, on firms' behaviour.

The judiciary interferes with the effectiveness of the enforcement agency. This influence can be positive or negative, but we will only deal with the judiciary as a determinant for type I and type II-errors in the sense that lawsuits are being used as a strategic element by firms (hence also in section 5).

E) Private litigation:

- firms may have the incentives to litigate and this will have consequences on the market outcomes;
- (groups of) consumers may have an incentives to litigate which also has influence on the market outcome[10].

This will be described in section 6. Although an important topic, because it might be one way of filling the possible gap in the enforcement agency's effectiveness,[11] it does not as yet have an important role to play in the Netherlands.

3 Reactions to the introduction of the Competition Act

The Netherlands used to be called a cartel-paradise. Before 1998 cartels were allowed when they were registered, hence the new law, that prohibited formerly allowed behaviour, was

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[10] In this case we will not discuss the possible reactions of the enforcement agency to these private litigations. An example of such a reaction might be that the competition authority will fine less severely, which will lead to different reations by the other players involved.

[11] Alternatively, if effective, private litigation might also sustain the enforcement agency's policy.

quite a change to firms and enforcement. The NMa needed to establish a reputation as a real 'cartel-fighter', firms would try to resist the implications of the law.

We will discuss some elements of the adjustment process, i.e. the uneasiness with the end of the cartel paradise, the exemptions asked by firms as a consequence and the (re)actions by the NMa.

Uneasiness with the end of the cartel paradise

The competition law of the 1956 (WEM) allowed companies to make agreements on price policies, on geographical market division, etc. The only condition to allow such a practice was that companies had to report their agreement to the Ministry of Economic Affairs, which registered the agreement in a register (the Dutch "Kartel Register"). Sectors which were used to cartelise may have a longer process to adapt to the new situation. In our opinion it is not a surprise that the first illegal agreements after the fundamental change in the competition law were found in sectors which in the old days were allowed to form a cartel One can think of the construction sector in the Netherlands and other sectors that had difficulties to relinquish previous price agreements after the introduction of the competition law. The long standing tradition of cartel behaviour might have led to a very slow adjustment process. Also the enormous amount of exemption requests by firms at the introduction of the competition act, which have taken years to be assessed by the NMa is an example of such an adjustment process .

Exemption

The number of exemption application was about 1.100 in the first two years after the competition law came into force. This number of request was considerably higher than expected. Of these requests, 47% of them turned out not to violate any of the new competition rules. Of the other 53%, only 9% were granted as exemption. These unnecessary applications can be considered as adjustment costs to the new competition law.[12] A limited number of the actual cases which were potentially in conflict with the new competition law were granted an exemption. In our opinion this case illustrates that companies were not aware of the content of the Act. They asked for exemptions for activities which were not in conflict with the new

[12] According to Ministry of Economic Affairs (2003) the administrative burdens of the exemption applications were about €600.000, about 29% of the total administrative burden of the Competition law.

competition law. Other companies were used to the habit of price agreements, bid rigging and/or a division of markets and had the impression that these practices could be continued under the new law. This case shows that it is very important to give good information on laws and changes in it in order to avoid adjustment costs as much as possible.

Role of the NMa

The NMa had an important role to play, but was of course inexperienced when it was newly established. The NMa needed to prove itself to be an effective enforcer, but was confronted with the large number of requests for an exemption. Therefore, the NMa started very thorough assessments of these requests. This lead to positive spin-offs, like interesting information about Dutch economic sectors and knowledge about the application of competition law in practice. It also gave the NMa the opportunity to inform firms and sectors about the limits of competition law. There was a price to be paid, though. There was relatively little time (in 1998-2000) for other enforcement actions, such as pro-active cartel investigations. This, of course, may have contributed to a longer period of time before the NMa was considered by firms to be a vigorous cartel-fighter. In the next section, we will discuss in more detail how these perceptions work and how the firms' perceptions about the NMa develop over time.

Changes in the law

One of the main changes in the Competition Act that are currently being discussed in Parliament is to make managers personally liable for violations of the Competition Act. One of the consequences is that they can be fined, but the possibility of imprisonment is also discussed. An important reason for this discussion is to increase the deterrent effect of the Competition Act. Another, related, change in the Competition Act is the possibility to search not only a firm's premises, but also those of the managers. Also this is a reaction to anticipation by managers and forms on NMa cartel investigations. There were some cases where there is evidence that papers on cartel agreements were kept on private premises.

Lobbying and shelter for special interest groups to influence the scope of the competition law

Lobbying activities often focus on regulation for a particular group instead of the competition law in general. For instance, professionals who operate under the protection of a specific law (exemptions on the Competition law) tend to have a strong position they want to protect. Political discussions on the introduction of a more market oriented change is avoided and often blocked by pressure groups. Lobbying is a very strong instrument in order to influence

the policymaker in favour of protection of a certain profession. “Famous” examples in the Netherlands are the “public notaries”. Although more competition has been introduced some politicians are afraid that the quality of the notary services will suffer as a consequence of a more intense competition.[13] The notary does no have enough incentives to oppose such a political uneasiness. The opposition against more competition in these markets is often based on the argument that quality control is of the utmost interest of the public and can not be guaranteed without government intervention. These arguments are not supported by a lot of professionals.

There are, however, also lobby activities related to the Competition law. Representation organisations of small retailers lobbied for an adjustment of the Competition law. They wanted to include a prohibition in the Competition law to sell below the purchasing costs as a response to the intense competition between larger supermarket chains. They claimed that the intense competition dispel smaller retailers from the market.

Recently, the Dutch Electricity sector lobbied intensively to prevent the split of their companies into a commercial distribution part and a regulated network part. Although the Minister of Economic Affairs and the House of Representatives were in favour of a new law to split the companies, the companies persuaded the Senate to abandon the split, at least initially.

4 Expectations and behaviour

Stuk over leniency zoals aangegeven onder punt B??

An important way to enforce the competition law is voluntary compliance by companies. This anticipation effect is very important as a large majority of companies will comply as a small number of the companies will be involved in unlawful behaviour. The question is, however, how to influence this anticipation effect? To understand this, it is important to understand managerial decision making. Managerial decisions, such as those related to competition, are based upon simplifying and framing processes. Managers use mental models as simplifications of reality (Chernatorty, Daniels and Johnson, 1993). Based on observations and expectations about competitive forces, managers develop their perception about the

[13] This is a paradox. Economist think that competition might lead to higher quality of services for a lower price, while politicians claim that competition might lead to a lower price and lower quality.

competitive situation they are in and the specific role of the enforcement agencie plays. This perception of competition will influence their decisions on competitive moves and counter-moves and decisions to comply or not to comply to the Competition law. With the policy parameters at their discretion, competition authorities can try to maximise their effect on the perception of companies. As a result, the 'institutional competitive pressure' might influence the perceptions of (changes in) competitive forces in the eyes of managers. For instance, a tough cartel enforcement might direct companies to abstain from concerted practises and create more incumbent rivalry. Of course, it is important to have a strict fining policy, but also leniency programs may play an important role.

In their international study, Mayo and Schiffer (2006) studied the relation between firms' perceptions about anti-competitive behaviour in their market and country specific characteristics. For instance, they found a positive relationship between the quality of the judiciary and the level of anti-competitive practices a firm experiences. Firms in countries with a high quality of the judiciary, based on World Bank data, had a low perception of the level of anti competitive practices by other firms. Also the age of the competition authority had a positive effect on the perceived anti-competitive practises. Firms in countries with older competition authorities experienced fewer problems. This indicated that over time the quality and efficiency of the enforcement efforts of the competition authorities improved with decreasing anti-competitive obstacles perceived by firms within their purview.

For developing their perception of competition, companies will observe and study their competitive forces and playground. Porter (1980) nicely summarizes centuries of advanced IO-work in an easy-to-comprehend scheme of five forces that determine an industry's competitive intensity: (1) incumbent rivalry, (2) substitutes' entry threat, (3) potential entrants' entry threat, (4) buyers' bargaining power, and (5) suppliers' bargaining power[14]. An effective competition policy and proper actions taken by a competition authority will see to it that the other competitive forces can effectively work.

[14] Also in the New Empirical Industrial Organization, the five forces perspective is used, for example in conjectural variation models (see Cabral, 2000: 160, footnote f).

Based on the five-forces model of Porter (1980) and the sixth institutional competitive force[15], a multi-item scale was developed to measure the perception of competition as perceived by companies (Kemp, Mosselman and van Witteloostuijn, 2004). By taking the average score, the overall score of that force is calculated. In 2005 and 2006 data were collected among approximately 4.750 small and medium-sized companies. In table 1 the perceived competitive scores for 2005 and 2006 are presented. Of the competitive forces, companies perceive the bargaining power of buyers as the most important competitive force, followed by internal rivalry. Substitutes and the institutional forces are least important. The relative importance of the six forces remain stable over 2005 and 2006. The only significant increase in the managers' perception is the institutional competitive force, i.e. the effect of the competition law on company decisions and the actions of the NMa in the sector. The relative importance as well as the absolute importance in increased.

Table 1 Perceived competitive forces

Competitive force	*Mean score 2005*	*Mean score 2006*
Internal rivalry	3.04	3.06
Substitutes' entry threat	2.63	2.60
Potential entrants' entry threat	2.88	2.90
Buyers' bargaining power	3.34	3.29
Suppliers' bargaining	2.92	2.97
Institutional competitive force	2.40	2.58

Companies score a statement on a five-point likert-type scale, 1=totally disagree to 5 = totally agree

Besides instituting proceedings and imposing fines, competition authorities also have other instruments to influence the managers' perception. As indicated by Bijlsma (2006) a competition authority can publicly announce enquiries into certain sectors and publicly publish the results of these enquiries as a policy instrument to influence firm's behaviour. By publishing their inquiries, they can try to influence the firms' perception in that sector in the sense that they are being watched and thereby influence the firms' expected and actual probability of cartel detection.

[15] In Porter's (1980) logic, governmental intervention may affect any of the other five forces, without being a competitive force in itself.

The NMa publicly announces in its yearly agenda the sectors that will receive extra attention. A closer look at the two statements on the institutional context find support for this effect. Table 2 shows that the more general statement ‘Decisions by the anti-trust authorities strongly influence the way we do business in our market’ has a higher score than the statement ‘The Netherlands Competition Authority is very active in our market’ (see table 2). This is intuitively clear, since the NMa has only limited resources and has to define priorities with respect to her activities.

Table 2 Statements on institutional context

Statement	*% (totally) agree 2005*	*% (totally) agree 2006*
Decisions by the anti-trust authorities strongly influence the way we do business in our market	23.7	31.4
The Netherlands Competition Authority is very active in our market	17.2	22.6

In table 3 the sectors that have a higher score on the second statement than the first one are most sectors in which the NMa has recently been active in. These sectors are mentioned in the Agenda (that the NMa publishes yearly) as sectors that receive extra attention.

Our data show that the NMa can influence the perceptions of companies by starting an investigation or other activities in sectors. Most sectors that are mentioned in the NMa agenda that received extra attention have a high perception score. Apparently firms in these sectors really feel being watched by the NMa.

Table 3: Sectors analysis of the statement: “The Netherlands Competition Authority is very active in our market” (2005)

	% (totally) agree
Low scoring sectors	
Metal industry	2.9
Paper and paper products	4.3

Art	5.6
R&D	5.9
ICT	9.5
High scoring sectors	
Banking	36.4
Building installation	39.5
Road construction, construction of water projects	39.7
Commercial and industrial building	45.0
Insurances and pension funding	48.0

Also large companies observe the actions of the Competition authorities and respond to it. In a recent international study among 250 large companies in France, Germany, Italy, Spain and the UK, 85% of the respondents indicated that they had dealings with or could have dealings with the competition authorities in the near future, the third place in the ranking of ten regulatory topics (DLA Piper, 2007). However, it looks like that companies perceive the consequences as less severe as some of the other topics as only 53% of the companies had a crisis management plan for competition cases whereas for health and safety and the environment respectively 85 and 76% of the companies had crisis management plans.

Mergers

Also in merger control, anticipation effects are present. According to Twynstra Gudde (2005) firms in highly concentrated markets (combined market share > 80%) do not even consider to merge, because of the merger control, with the exception of the occasional research in a possible defensive merger. Also in non-concentrated markets anticipation effects occur. According to the interviewed companies, this restraint differs from the past when the NMa did not exist. Based on estimations of lawyers, the researchers concluded that one out of five merger plans are not notified or substantially modified because consultants foresee problems with the merger control. The anticipation effect can be observed in all phases of the merger control, from the decisions to study potential merger candidates to 'punten van overwegingen' in Phase II investigations. For the anticipation effect to be successful, according to the lawyers, companies should be able to correctly predict the decision of the competition

authority. In order to reach such clarity a high level of transparency, clear guidelines and sometime informal views is necessary.

Beside anticipating at the merger decision by the NMa, companies can react to the Competition Act in another way. We want to mention one specific strategic aspect of mergers under the Competition Act. In the Act certain conditions have to be fulfilled before the merger has to be notified to the NMa. One of these is a revenue-threshold. It is possible for a large firm to merge with smaller ones, so that each merger separately does not need the NMa's approval, although the total value in terms of turnover acquired in one transaction would have to be notified. So, under certain circumstances, a dominant position may be acquired without need for a formal approval of the NMa.

5 Types of errors

If competition authorities or courts may make mistakes, it opens opportunities for companies to strategically use this option. For instance, type I and type II-errors may provide firms with an incentive to raise their rivals' cost, delay entry to a market, etc. as the competition needs time to study a complaint or accusation. We will focus on some of these elements: the need for the NMa to be vigorous but to take account of these errors (avoid groupthink, for instance, or the need to monitor its own behaviour) and complaining by firms in order to abuse competition law to their advantage.[16]

Complaints

The NMa receives a lot of tip-offs and formal complaints about anticompetitive behaviour. The numbers of formal complaints are put in table 4. Complaints by competitors can be an indicator of strategic behaviour of firms.

Table 4: Sectoral distribution of complaints

Sector	*Complaints in 1999 (%)*	*Complaints in 2003 (%)*
Transportation	5	18
Other services	14	15
IT-services and	5	13

[16] Of course complaints may also be completely justified and are also part of the game.

telecommunication		
Financial services		11
Health care	14	11
Retail and wholesale	5	8
Hotel, catering and recreation industry		6
Media	5	6
Manufacturing		5
Energy	14	3
Agriculture and fishing	10	3
Construction	10	1

As can be seen from table 4, the number of complaints varies over the sector over the two years 1999 and 2003. At the beginning of the existence of the NMa the complaints were concentrated in services, energy, healthcare and to a lesser extend agriculture and construction. In 2003 this changed towards transport, IT-services, financial services and, again, healthcare and retail. Only healthcare and financial services are more or less stable in the number of complaints. So given this pattern it is difficult to conclude that there might be a systematic bias towards strategic behaviour by way of complaining in specific sectors. Table 5 gives an overview of the number of formal decisions following a complaint.

Table 5: Number of formal decisions

	Number of formal decisions
1998	139
1999	89
2000	78
2001	145
2002	187
2003	219
2004	199
2005	174
2006	108

In table 6 the formal complaints of 2003 are categorized by type of anticompetitive behaviour and the result after investigation by the NMa. Of the 219 complaints, 57 are withdrawn by the complainants and 4 resulted in a further investigation. 158 complaints were ended with a NMa decision. For 89 complaints no further actions were taken based on the prioritisation of the NMa. Of the 69 complaints that were studied in more debt, almost all complaints were dismissed. In only three cases companies made some changes in their policies to solve the potential anticompetitive behaviour. Based on data limitations (complainants can be companies as well as consumers) we cannot conclude that companies used the competition law to trouble their competitors. However, we can conclude that if they are trying to do that, they do not succeed as most complaints are dismissed.

Table 6: Number of complaints and types of decision

	No further actions based on priorities	*Number of complaints investigated (2003)*	*Complaints dismissed*	*Complaint dismissed after adjustments*
Decision concerning art. 6 Mw (cartel)	20	8	7	1
Decision concerning art. 24 Mw (abuse dominant position)	58	49	47	2
Decision art. 6 and art. 24 Mw	11	12	12	-

Also in merger control the merging firms but also competitors, suppliers and buyers can try to influence the competition authorities' decision. In merger control, close interaction between firms and competition authority is common practice. During the investigation stage, close contacts between the firm and the competition authority exist as competition authorities may ask questions to understand the market and the consequences of the merger. Especially if remedies are involved to overcome competition concerns by the competition authority, a 'negotiation game' between the two parties might be played. Competitors may try to influence

the outcome of the negotiations as they may be one of the parties to buy e.g. a part of the production capacity that have to be divested as part of the remedy.

Merging companies will, on average, offer as little as possible as remedy whereas the competition authority wants sufficient remedies that future competition is secured. But also after the remedies are agreed upon, the (strategic) interaction between firm and competition authority may continue. The competition authority has to see to it that the remedies are in place and the firm keep to its commitments. The following case can illustrate such a process.

Case "De Limburger": a Dutch news paper merger

In 1999 the Dutch newspaper concern De Telegraaf notified their proposed acquisition of a subsidiary from VNU (publisher) which included amongst others the regional newspaper De Limburger and some free local newspapers.[17] As both companies are active on the market for regional newspapers and free local papers, this merger might negatively influence competition. Therefore, the Director General of the NMa decided that a license was required. Based on the investigation in the phase two proceeding it was decided that remedies were necessary to secure sufficient competition. The remedies concentrated on the product market of free local newspapers and on the product market of regional newspapers.

In this merger, there are two primary customers, readers and advertisers. In the market for free local newspapers, the companies had a combined market share of approximately 65%. This resulted in a dominant position on the market for advertising. De Telegraaf proposed to divest a number of fee local newspapers which was sufficient to solve the problem of a dominant position after the merger. Also on the market of regional newspapers the new firm would get a dominant position with a market share of 80 – 90%. This raised competition concerns on the market for readers and advertisers, whether there would remain enough alternatives and an incentive to innovate. The divestment of the free local newspapers solved the problems on advertising market, the problems on the readers market remained however. Divestment of De Limburger was not an option as research showed that it was not viable to sell De Limburger to another buyer, no party was interested. Therefore the remedy was charged that both regional newspapers (De Limburger and het Limburgs Dagblad) should be structurally separated for indefinite time. Both subsidiaries should have their own commercial and financial policy and the editorial offices should be independent from each other. This structural remedy secured a diverse supply of regional newspapers.

[17] The acquired subsidiary was also active on the market for local radio and television.

In 2002 the NMa investigated, based on information in the media, whether De Telegraaf had complied with the commitment to separate both subsidiaries. Based on the research certain changes had to be made. In 2004 there was a formal complaint that both regional newspapers were not separated. After investigation, the Director General of the NMa concluded that De Telegraaf violated the commitments. The editorial offices worked closely together and exchanged information. Also the editorial and commercial policies were concerted. Both regional newspapers were clearly not competing with each other. The Director General of the NMa posed a fine on De Telegraaf..

In December 2004, De Telegraaf requested to remove the commitment to separate both newspapers. They based their request on two arguments, first changing market conditions made that the expectations of De Telegraaf about potential synergies proved to be wrong, amongst others because of a decline in the edition. Also the relevant market should be defined larger according to De Telegraaf. Second, according to De Telegraaf, they could have successfully claimed a failing firm defense based on the advancing understanding of the failing firm defense in the European competition case law. On both grounds, the request was dismissed. In October 2005, De Telegraaf filed a second request to remove the commitment. Based on new figures, they claimed that two separate newspapers would be loss-making in the medium term. The Director General of the NMa shared this argument and removed the commitments.

Lawsuits and private litigation

Lawsuits and private litigation can strategically be used by companies. In McAfee and Vakkur (2004) it is illustrated that there are at least 7 reasons why companies might sue one another in the context of the competition law with often false arguments. The categories they introduce as a driving force for “strategic abuse of the competition law” are:

- Extort funds from a successful rival
- Change the terms of the contract
- Punish non-cooperative behaviour
- Respond to an existing lawsuit
- Prevent a hostile takeover
- Discourage the entry of a rival
- Prevent a successful firm from competing vigorously

According to Shugart II (1990) a lot of private law suits in the USA are ill motivated.

> "Critics contend that the treble damage remedy promotes protracted litigation, encourages nuisance suits designed to extort large monetary settlements, and creates perverse incentives that magnify rather than mitigate the social cost of monopoly in the economy" (Shugart, 1990: paginanummer)).

Shugart calculated that in general already 20 years ago an average sue costs about $250.000. This brings the total sue damage to about $250 million a year in the 1980s in the USA. It is difficult to see whether this is at the advantage of the consumer in all cases.

Beisner and Rorden (2006) state that the legislation in the USA on the possibility of private individual and group litigation is an example of litigation abuse, which should be avoided in the EU. They express their worries about the changes in the European legislation towards the American style in which class actions and private parties are given possibilities to pursue antitrust claims. They think that it is a great advantage that in the EU until now the competition authorities are the Argus of competition and that private suing still is rather limited in the EU.

In table 7 the number of private law suits in the Netherlands is presented. The number of lawsuits seems to increase somewhat over time. However in absolute number they stay behind with the number of formal complaints the NMa receives.

Table 7: Anti competitive behaviour cases in private law

	2002	*2003*	*2004*	*2005*
District Court	16	5	14	22
Courts of Appeal	4	3	6	11
Supreme Court	2	4	4	6

In the NL.tree vs KPN case presented below, an appeal to the competition law is illustrated which might have been strategically used by one company to delay the offering of a product to a customer by a competitor.

Case NL.tree cs vs KPN

NL.tree is a joint venture of nine TV cable companies founded in 1998. NL.tree delivered internet access to all institutes for primary and secondary education and vocational training. The contract expired at the end of 2003. In response to this, KPN, the incumbent telecom operator, offered to supply these same institutes broadband internet for free. The offer was for three years and a annual budget of €25 million was involved. KPN presented it as a marketing or sponsoring budget. Before offering this offer, KPN consulted the ministry of Economic Affairs and the NMa. The ministry of Economic Affairs stated that the offer was acceptable if certain conditions were met. First of all, the offer should be relatively short (less than 3 years), there should be no lock-out or lock-in effects (switching costs during or after the contract) and the KPN should pay reasonable wholesale prices to its own network sister in order to prevent cross-subsidies from the regulated wholesale market to the competitive retail market. Also the NMa studied the offer of KPN and saw no competition problems as KPN did not have a dominant position on the market. Furthermore the market was very volatile.

NL.tree started proceedings against KPN in court. They claimed that KPN had a dominant position in the relevant market and abused its position by means of predatory pricing and price squeeze. According to NL.tree the objective of KPN was to drive away NL.tree from the market. By offering a contract for three years, a lot of customers would be tied to KPN. NL.tree was to small to match the KPN offer. At the same time they complained by the NMa and OPTA, the Dutch telecommunication regulator. The summary proceedings should prevent KPN from making irreversible investments. In his ruling, the court decided that KPN had a dominant position on the relevant market (broadband internet access for SMEs)[18] and abused its position by selling below average variable costs.

KPN appealed to a higher court in the first quarter of 2004. In their ruling, the court of appeal came to a different conclusion. The court defined the relevant market differently and on this relevant market KPN had a market share of almost 30%. There were no other specific market conditions that could lead to the conclusion that KPN might have a dominant position. Therefore the court concluded that there was no possibility of predatory pricing. Besides that, the mother organisations of NL.tree (the cable companies) were in a position to match the offer of KPN. And in the meanwhile, of the approximately 11.000 schools two-third of the institutes continued their contract with Nl.tree (a one-year contract), 20% changed to another provider and the rest didn't make a choice yet. The average market of NL.tree over 2004 was 52%[19], which dropped to 1 % in 2005. For KPN (and their

[18] On this market, KPN has a market share of approximately 80%, on the whole market of broadband internet, KPN has a market share of 41%, but given the additional market conditions it still has a dominant position.
[19] The contracts expired on different dates over the year.

subsidiaries) the average market share in 2004 was 26% and raises to 73% in 2005. Thus by this action, NL.tree kept most of their customers for one extra year. With no lawsuit the schools might have switched to KPN's free offer. The joint venture NL.tree was dissolved and the remaining contracts were taken over by the participating cable companies.

In general, the literature on USA litigation policies shows that the system bears the risk of strategic abuse of the antitrust laws.[20] Still there are also advantages in private lawsuits against anti-competitive behaviour over public law enforcement of the competition law. Private parties do know the market better and are well informed. It is therefore important to find a balance between the damage caused by anti competitive behaviour and the payment which an offender of the competition rules has to pay to the plaintiff, the company harmed and the government as representative of the consumer.

6 Conclusions

This paper deals with the reaction of economic agents to the competition law. It analyses the interaction of the competition authorities and companies as well as the interaction of companies to one another.

Especially in the first years of the introduction of the competition law in the Netherlands (1998) a lot of companies asked for an exemption from the new law. The majority of these requests were unnecessary. Of the remaining requests only 9% were approved. This is an illustration that the introduction of a new law often creates uncertainty and it takes time to adapt to new or renewed legislation. This finding for the Dutch situation is confirmed by international research. This shows that the more mature an authority is the more stable the behaviour of company's tends to become. It is important to keep institutional arrangements as stable as possible and that changes in the competition law should only take place when the social benefits of such amendments are higher than the social costs.

Although it is often thought that parties try to lobby towards competition authorities we did not find any proof of unethical behaviour in the Netherlands. Contacts are not further developed than on the business level.

[20] See for an overview e.g. McAfee, Mialon and Mialon (2005), p.2

Companies sue one another in the USA more often than in the EU. Private law suits on competition issues are in the USA also more familiar than in Europe. One of the reasons is the triple damage remedy which makes it very attractive to sue competitors also as a group of consumers in the USA. In the Netherlands the number of cases in which a company sues a competitor or supplier is still rather small. Lawsuits can be a good practice. However, a too rewarding system of collective actions as is common practice in the USA runs the danger that agreements are settled not because there is a competition problem, but because the cost of the defence are very high. If this is the case, lawsuits may become counter productive as these law suits may hamper entrepreneurship.

Although private law suits have advantages, it is in general preferred that anti competitive behaviour should be reported to the competition authority. Competition authorities have more power to dig into public cases than the civil judge has in private cases. Public authorities also have more power to look at sectors or markets in general which might be more to the benefit of the consumer in general. Therefore the competition authorities should have a balanced policy toward whistle blowers and others who report cases.

It is difficult to prove that the competition law in Europe sometimes is misused in the sense that a complaint send to the authority based on article 81 or 82 (6 and 24 in Dutch law) is actually only a result of misuse of the competition law because the compliant wants to block or harm a competitor. Still it is possible to harm competitors, because as long as a law suit runs, the accused is not able to compete. We have the impression that this misuse does not have much impact in The Netherlands. Private law suits still are limited, and most complaints run via the NMa.

In merger and cartel cases there develops a strong connection between the companies and the competition authority. There is always the risk that one party gets too involved with the other. The NMa is aware of this problem. Some think that this might sometimes lead to an inward looking “groupthink”. It becomes more and more practice to find a balance between this risk of “groupthink” and information sharing.

In merger cases it is also important to monitor those cases which were allowed only under restrictions of remedies. It is important to keep a close watch on the implementation of these remedies.

In merger cases also the influence of the announcement effects is important. Companies learn from the decisions made in similar mergers. Companies are aware of the activities of the NMa in their sector, and attach importance to it. This is the outcome of a survey among companies. The competition authority matters, but is the more feared, the more active it is in the own sector.

This paper illustrates that it is important to look into the interactions between different agents active in and around the competition law and law enforcement. Often it is possible to avoid a change in competition law by redefining these interactions.

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