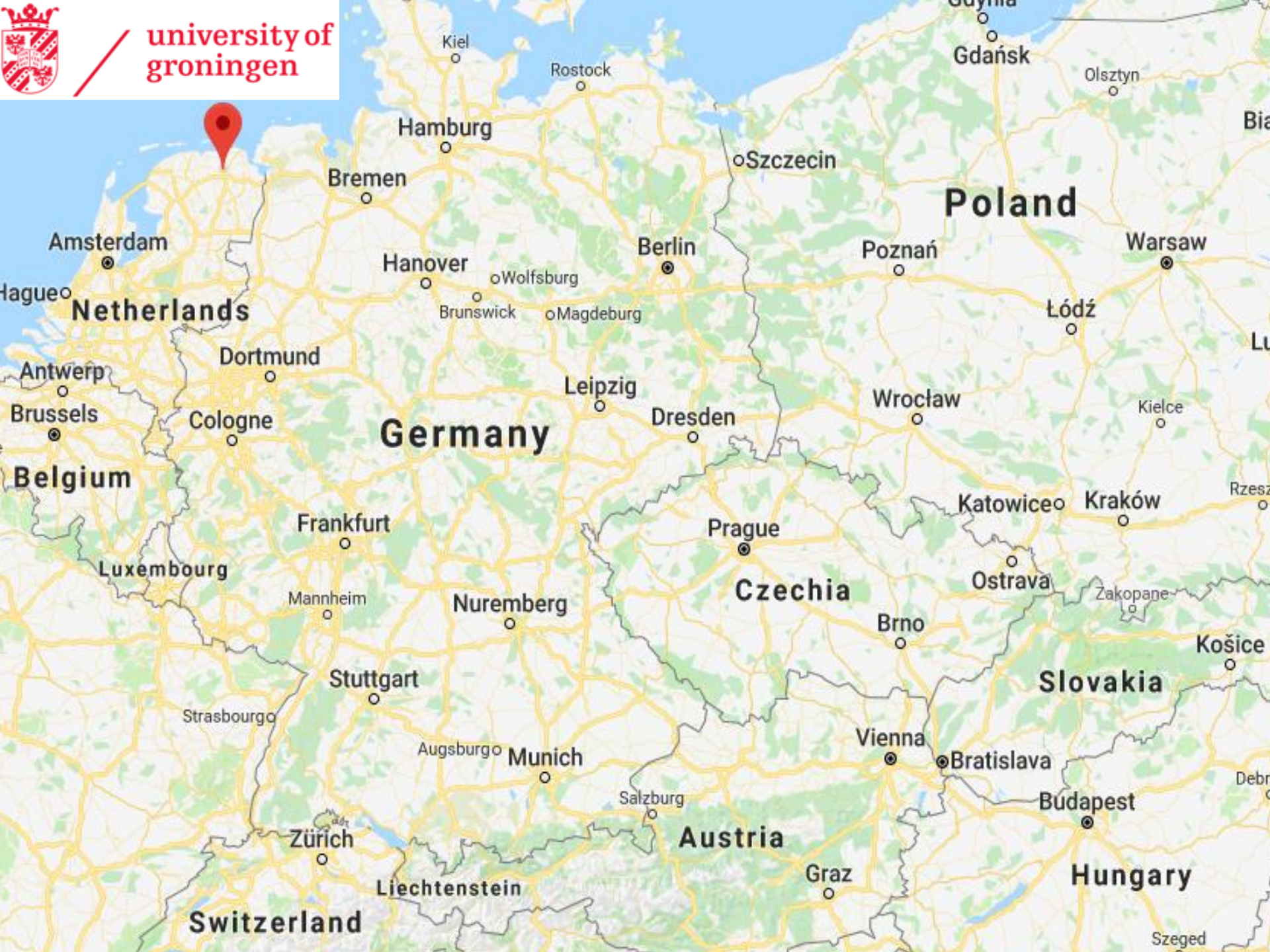




Judicial Review of National Competition Authorities' Economic Assessment: Underlying Conditions and Consequences

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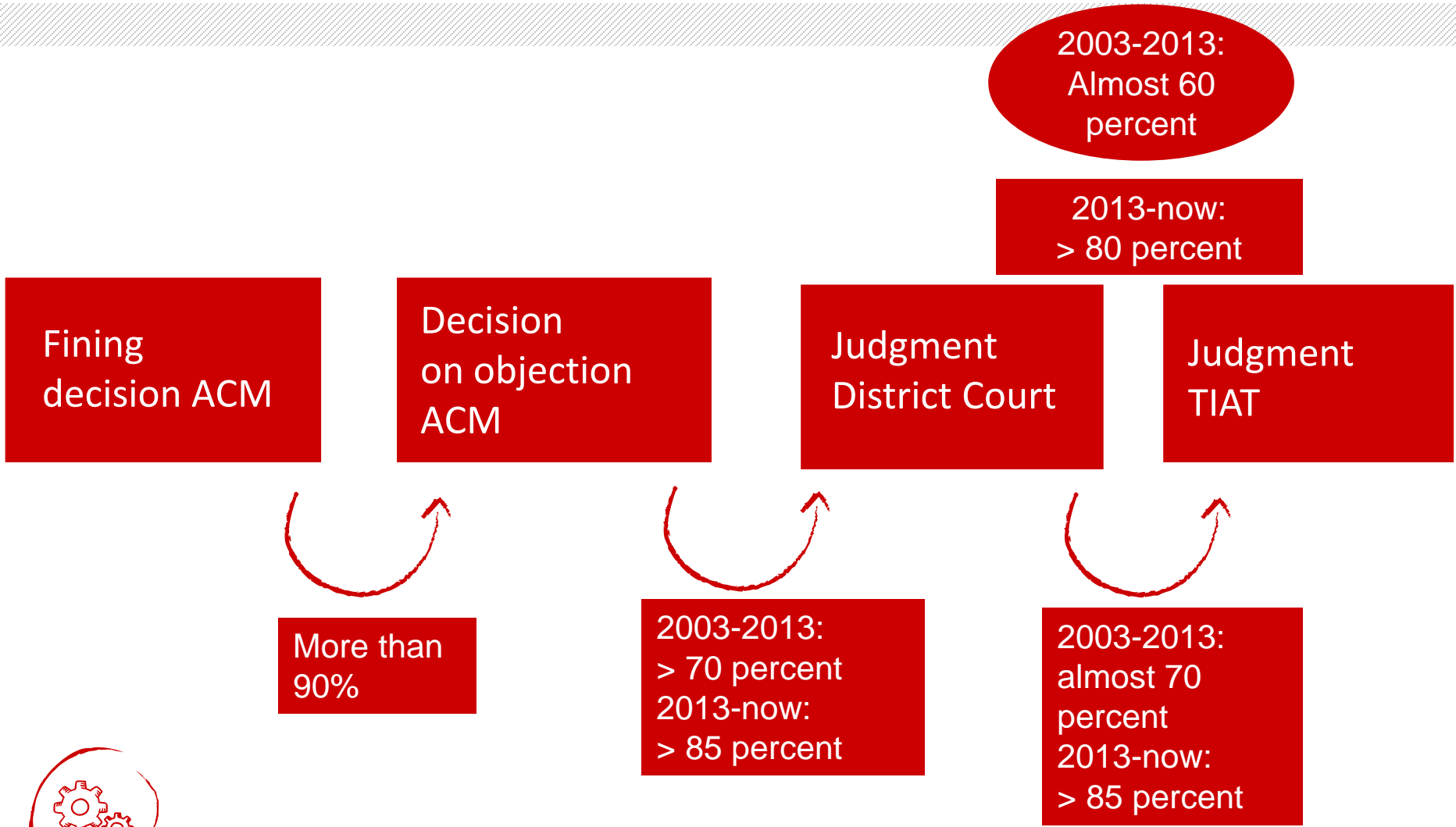


Topic presentation

- › **Judicial Review of National Competition Authorities' Economic Assessment: Underlying Conditions and Consequences**



BACKGROUND



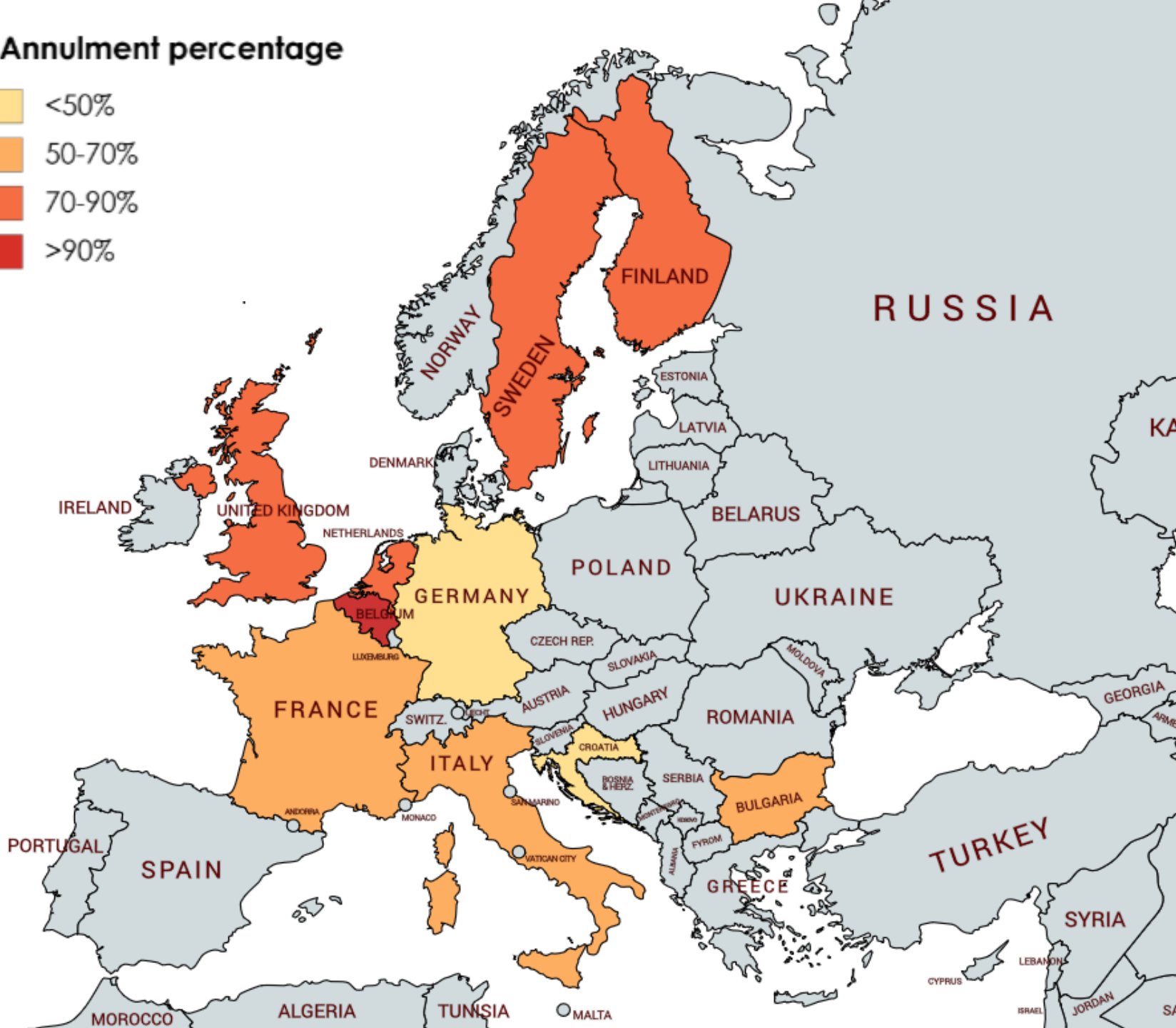
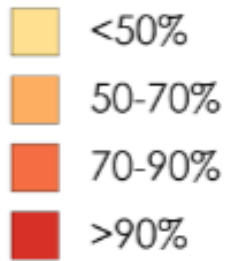


Imposition of the
 fine

Amount of the
 fine

Reasonable
 time

Annulment percentage





Differences in judicial review

- › Differences visible in what national courts require from the competition authority with regard to economic assessment, whether this is reviewed and how this is reviewed
- › Underlying conditions:
 - Powers of review
 - Expertise and strength of the courts
 - In addition to the nature of the case and party influences
- › Consequences



OECD global forum 2017

- › **Safe harbours and legal presumptions in competition law**
- › **Judicial perspectives on competition law**
 - *Does lack of economic expertise on the part of judges create obstacles to the effective enforcement of competition law? If so, how can those obstacles be addressed?*



Conclusions OECD

- › Judges often lack the expertise and resources available to competition agencies, and as a result have difficulties when assessing complex economic evidence. Courts in a significant number of jurisdictions face serious difficulties when faced with economic matters, and often seek to resolve cases on procedural grounds.
- › Judicial specialisation is widely perceived to be a good idea



Types of courts

- › General chamber
- › Specialised chamber in competition law with lawyers
- › Specialised chamber in competition law with lawyers and amongst others economists
- › Many MS moving to specialised court, for example Portugal



Romania

- › *The lack of chambers that are specialised in competition law, lead to the fact that cases are randomly entrusted among 30 judges that activate within the Court of Appeal's Administrative and Fiscal Section. This creates a major problem, as the judges have a general expertise to hear administrative law matters but not being experts specifically in competition law.*



- › *In its practice, the SACL has recognized that the court's assessment of lawfulness and legitimacy of the CC's economic evaluation is limited. In such cases the court can usually assess whether certain procedural requirements and related rules have been met, whether proper arguments have been provided, whether there has been any manifest error of assessment, whether there has been an abuse of authority (misuse of power), and whether factual circumstances have not been distorted.*



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- › *Certainly lack of economic expertise on the part of judges limits the scope of judicial review to some extent. This could potentially lead to obstacles of effective enforcement of competition law if the competition authority commits errors in its economic evaluation and the court does not have the expertise to spot and review them. However, at least in Lithuania, difficult economic evaluations are not conducted very often in the CC's decisions.*



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- › *There are rules of thumb (legal presumptions and safe harbours) which are easier to apply than detailed economic assessment. For instance, it is an established practice that hard core cartels by object do not require assessment of restrictions by effect and in such cases it is not necessary to define the relevant market precisely.*



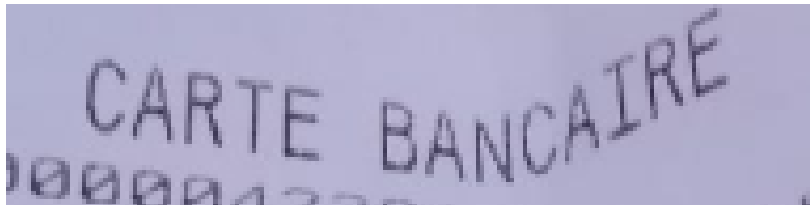
General trend: more review and more intensive review several Member States

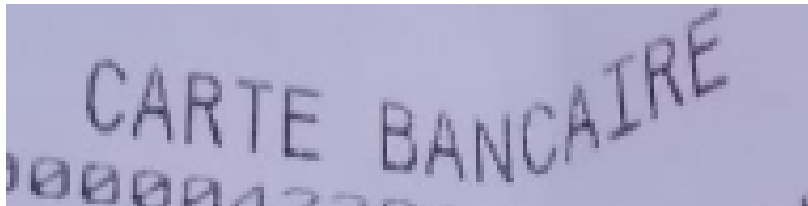
- › *The Italian case law shows an increasing willingness of administrative Courts to access and discuss the facts of the case, as well as the economic analysis of those fact carried out by the Authority, with a view to ensuring the effectiveness of the judicial review, as well as the fullest safeguard of the rights of defence of the undertakings concerned.*



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Conclusions

- › Differences visible in what national courts require from the competition authority with regard to economic assessment, whether this is reviewed and how this is reviewed
- › Depending on:
 - Powers of review
 - Expertise and strength of the courts
 - But also nature of the case and party influences
- › Consequences



References

- › Outhuijse, Annalies, The Effectiveness of Dutch Cartel Fines Analysed on the Basis of the Judgments of the Two Specialised Dutch Courts (June 20, 2017). Available at SSRN: <https://ssrn.com/abstract=2989941>
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- › Outhuijse, Annalies, The Effective Public Enforcement of the Prohibition of Anti-Competitive Agreements: why do Dutch cartel fines get annulled?, not yet published.