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Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond

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ANNEX A. ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACM	<i>Autoriteit Consument en Markt</i> (NCA, the Netherlands)
AG	Advocate-General (EU)
ATC	Average Total Costs
AVC	Average Variable Costs
BHG	<i>Bundesgerichtshof</i> (Federal Court of Appeal, Germany)
BKartA	<i>Bundeskartellamt</i> (NCA, Germany)
CA (1)	Competition Act 1998 (UK)
CA (2) (in Chapter VI)	Competition Act 1986 (Canada)
CAC	Competition Appeal Court (South Africa)
CAT	Competition Appeal Tribunal (UK)
CCA	Competition and Consumer Act 2010 (Australia)
CCS	Competition Commission of Singapore
CdC	<i>Code de Commerce</i> (Commercial Code, France)
Cir.	Circuit (US)
CJ	Chief Justice (e.g. in Australia)
CNC	<i>Comisión Nacional de la Competencia</i> (NCA, Spain)
CSR	Corporate Social Responsibility
CT	Competition Tribunal (Canada). For South African Competition Tribunal, see SACT
Cf	<i>Confer</i> (compare)
D.C.	District of Columbia
DoJ	Department of Justice (US)
EC (1)	European Communities
EC (2) (preceded by number)	Treaty establishing the European Community
ECJ	European Court of Justice
ECN	European Competition Network
ECR	European Court Reports

E.g.	<i>Exempli gratia</i> (for example)
EU	European Union
EWCA	Court of Appeal of England & Wales
EWHC	High Court of England & Wales
FCA	Federal Court of Appeal (Canada)
FFC	Full Federal Court (Australia)
FTC	Federal Trade Commission (US)
GC	General Court of the European Union
GEMA	Gas and Electricity Markets Authority (UK)
HC	High Court
HCA	High Court of Australia
ICA	The Irish Competition Authority
ICN	International Competition Network
<i>Ibid.</i>	<i>Ibidem</i> (the same)
I.e.	<i>Id est</i> (that is)
J	Justice (e.g. in England & Wales and Australia)
LDC	<i>Ley de Defensa de la Competencia</i> (Spain)
MEQR	Measure having an equivalent effect as a quantitative restriction
NCA	National Competition Authority
NMa	<i>Nederlandse Mededingingsautoriteit</i> (NCA, the Netherlands) (as of 1 April 2013: ACM)
nyr	Not yet reported (in European Court Reports)
OECD	Organisation of Economic Cooperation and Development
Ofcom	Office of Communications (UK)
Ofgem	Office of Gas and Electricity Markets
OFT	Office of Fair Trading (UK) (as of 1 April 2014: Competition and Markets Authority)
ORR	Office of Rail Regulation
OJ	Official Journal of the European Union
P.	Page
Para	Paragraph
SACA	South African Competition Act

SACT	South African Competition Tribunal
SCA	Singaporean Competition Act
TCA	The Competition Authority (Ireland), see ICA
TEU	Treaty on European Union, as amended by the Treaty of Lisbon
TFEU	Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon
UK	United Kingdom
US	United States
v (or v.)	Versus

ANNEX B. LIST OF CASES

EUROPEAN UNION

European Court of Justice

- Case 7/61 *Commission v Italy* [1961] ECR 317
- Case 6/64 *Costa v ENEL* [1964] ECR 585
- Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299
- Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235
- Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125
- Case 40/70 *Sirena v Eda* [1971] ECR 69
- Case 78/70 *Metro* [1971] ECR 487
- Case 6/72 *Europemballage and Continental Can v Commission*, [1973] ECR 215
- Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission* [1975] ECR 1663
- Case 127/73 *BRT v SABAM and Fonior* [1974] ECR 313
- Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* 1974 [ECR] 837
- Case 36/74 *Walrave and Koch* [1974] ECR 1405
- Case 41/74 *Van Duyn* [1974] ECR 1337
- Case 26/75 *General Motors v Commission* [1975] ECR 1367
- Case 36/75 *Rutili v Minister for the Interior* [1975] 1219
- Case 26/76 *Metro v Commission* [1977] ECR 1875
- Case 27/76 *United Brands v Commission* [1978] ECR 207
- Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461
- Case 5/77 *Tedeschi v Denkavit Commerciale* [1977] ECR 1555
- Case 13/77 *Inno v Atab* [1977] ECR 2115
- Case 30/77 *Bouchereau* [1977] ECR 1999
- Case 77/77 *BP v Commission* [1978] ECR 1513
- Case 7/78 *R v Thompson* [1978] ECR 2247
- Case 22/78 *Hugin v Commission* [1979] ECR 1869

- Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon'), [1979] ECR 649
- Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125
- Case 34/79 *R v. Henn and Darby* [1979] ECR 3795
- Case 31/80 *L'Oréal* [1980] ECR 3775
- Case 322/81 *Michelin v Commission* ('Michelin I') [1983] ECR 3461
- Case 66/82 *Fromançais v Forma* [1983] ECR 395
- Joined Cases 96 to 102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and Others v Commission* [1983] ECR 3369
- Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151
- Case 174/82 *Sandoz* [1983] 2445
- Case 177 and 178/82 *Officier van Justitie v Van de Haar* [1984] ECR 1797
- Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831
- Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679
- Case 41/83 *Italy v Commission* [1985] ECR 873
- Case 72/83 *Campus Oil* [1984] ECR 2727
- Case 123/83 *BNIC v Clair* [1985] ECR 391
- Case 177/83 *Kohl v Ringelhan & Rennet* [1984] ECR 3651
- Case 240/83 *Procureur de la République v Association de défense des brûleurs d' huiles usagées* [1985] ECR 531
- Case 42/84 *Remia and Others v Commission* [1985] ECR 2545
- Case 161/84 *Pronuptia* [1986] ECR 353
- Case 178/84 *Commission v Germany* [1987] ECR 1227
- Case 311/84 *CBEM v CLT and IPB* ('Télémarketing') [1985] ECR 3261
- Case C-89/85 *Ahlström v Commission* ('Woodpulp II') [1993] ECR I-1307
- Case 121/85 *Conegate* [1986] ECR 1007
- Case C-62/86 *AKZO v Commission* [1991] ECR I-3359
- Case 66/86 *Ahmed Saeed* [1989] ECR 803
- Case 267/86 *Van Eycke v ASPA* [1988] ECR 4769
- Case 302/86 *Commission v Denmark* [1988] ECR 4607

- Case 27/87 *Erauw-Jacquery v La Hesbignonne* [1988] ECR 1919
- Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521
- Case 18/88 *RTT v GB-Inno-BM* [1991] ECR I-5941
- Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* [1990] ECR I-583
- Case C-145/88 *Torfaen v B&Q* [1989] ECR 3851
- Case C-202/88 *France v Commission* [1991] ECR I-1223
- Case C-331/88 *Fedesa* [1990] ECR I-4023
- Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417
- Case C-154/89 *Commission v France* [1991] ECR I-659
- Case C-180/89 *Commission v Italy* [1991] I-709
- Case C-260/89 *ERT* [1991] ECR I-2925
- Case C-2/90 *Commission v Belgium* [1992] ECR I-4431
- Case C-42/90 *Bellon* [1990] ECR I-4863
- Joined Cases C-271, 281 and 289/90 *Spain, Belgium and Italy v Commission* [1992] ECR I-5833
- Case C-169/91 *Stoke-on-Trent* [1992] ECR I-6635
- Case C-185/91 *Reiff* [1993] ECR I-5801
- Case C-228/91 *Commission v Italy* [1993] ECR I-2701
- Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097
- Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission ('Magill')* [1995] ECR I-743
- Case C-320/91 *Corbeau* [1993] ECR I-2533
- Case C-53/92 P *Hilti v Commission* [1994] ECR I-667
- Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287
- Case C-275/92 *Schindler* [1994] ECR I-1039
- Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539
- Case C-393/92 *Gemeente Almelo and Others v Energiebedrijf IJsselmij* [1994] ECR I-1477
- Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517
- Case C-412/93 *Leclerc-Siplec v TF1 and M6* [1995] ECR I-179
- Case C-415/93 *Bosman* [1995] ECR I-4921
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- Joined Cases C-68/94 and C-30/95 *France v Commission* [1998] ECR I-1375
- Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883
- Case C-333/94 P *Tetra Pak v Commission* ('*Tetra Pak II*') [1996] ECR I-5951
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- Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265
- Case C-368/95 *Familiapress v Bauer Verlag* [1997] ECR I-3689
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- Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge and Dafra-Lines v Commission* [2000] ECR I-1365
- Case C-7/97 *Bronner* [1998] ECR I-7791
- Case C-126/97 *Eco Swiss* [1999] ECR I-3055
- Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139
- Case C-344/98 *Masterfoods and HB Ice Cream* [2000] ECR I-11369
- Case C-379/98 *PreussenElektra v Schleswag* [2001] ECR I-2099
- Case C-398/98 *Commission v Greece* [2001] I-7915
- Case C-405/98 *Konsumentombudsmannen v Gourmet International* [2001] ECR I-1795
- Case C-35/99 *Arduino* [2002] ECR I-1529
- Case C-54/99 *Église de Scientologie* [2000] ECR I-1335
- Case C-163/99 *Portugal v Commission* [2001] ECR I-2613
- Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375
- Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577
- Case C-453/99 *Courage and Crehan* [2001] ECR I-6297

- Case C-497/99 P *Irish Sugar v Commission* [2001] ECR I-5333
- Case C-24/00 *Commission v France* [2004] I-1277
- Case C-112/00 *Schmidberger v Austria* [2003] I-5659
- Case C-172/00 *Ferring* [2002] ECR I-6891
- Joined Cases C-204/00 P, 205/00 P, 211/00 P, 213/00 P, 217/00 P & 219/00 P *Aalborg Portland v Commission* [2004] ECR I-123
- Case C-15/01 *Paranova Läkemedel and Others* [2003] ECR I-4175
- Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297
- Case C-113/01 *Paranova* [2003] ECR I-4243
- Case C-192/01 *Commission v Denmark* [2003] ECR I-9693
- Case C-198/01 *Conorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato ('CIF')* [2003] I-8055
- Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105
- Case C-243/01 *Gambelli and Others* [2003] ECR I-13031
- Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887
- Case C-388/01 *Commission v Italy* [2003] ECR I-721
- Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039
- Case C-36/02 *Omega* [2004] ECR I-9609
- Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375
- Case 270/02 *Commission v Italy* [2004] I-1559
- Case C-286/02 *Bellio Fratelli Srl v Prefettura di Treviso* [2004] ECR I-3465
- Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987
- Case C-53/03 *Syfait v GlaxoSmithKline* [2005] ECR I-4609
- Case C-109/03 *KPN v OPTA* [2004] ECR I-11273
- Case C-514/03 *Commission v Spain* [2006] ECR I-963
- Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173
- Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331
- Case C-105/04 P *FEG v Commission* [2006] ECR I-8725
- Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619
- Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991
- Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519

- Case C-171/05 P *Laurent Piau v Commission* [2006] ECR I-37
- Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125
- Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others v GlaxoSmithKline* [2008] ECR I-7139
- Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission* [2009] ECR I-9291
- Case C-49/07 *MOTOE* [2008] ECR I-4863
- Case C-52/07 *Kanal 5 and TV 4 v STIM* [2008] ECR I-9275.
- Case C-202/07 P *France Télécom v Commission* ('Wanadoo') [2009] ECR I-2369
- Case C-209/07 *Beef Industry Development Society and Barry Brothers* ('BIDS') [2008] ECR I- 8637
- Case C-8/08 *T-Mobile and Others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529
- Case C-153/08 *Commission v Spain* [2009] ECR I-9735
- Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555
- Case C-333/08 *Commission v France* [2010] ECR I-757
- Joined Cases C-403/08 and C-429/08 *FAPL* [2011] ECR I-9083
- Case C-413/08 P *Lafarge v Commission* [2010] ECR I-5361
- Case C-52/09 *TeliaSonera* [2011] ECR I-527
- Case C-108/09 *Ker-Optika* [2010] ECR I-12213
- Case C-272/09 P *KME Germany AG v European Commission* [2011] ECR nyr
- Case C-291/09 *Francesco Guarnieri & Cie v Vandevelde Eddy* [2011] ECR I-2685
- Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-5161
- Case C-375/09 *Tele2 Polska* [2011] ECR I-3055
- Case C-421/09 *Humanplasma v Austria* [2010] ECR I-12869
- Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419
- Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] nyr
- Case C-386/10 P *Chalkor v Commission* [2011] nyr
- Case C-457/10 P *AstraZeneca v Commission* [2012] nyr
- Case C-549/10 P *Tomra Systems ASA and Others v Commission* [2012] nyr
- Case C-226/11 *Expedia v Autorité de la concurrence* [2012] nyr

- Case C-1/12 *Ordem dos Técnicos Oficiais de Contas ('OTOC') v Autoridade da Concorrência* [2013] nyr
- Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa ('Slovenská')* [2013] nyr
- Case C-136/12 *Consiglio nazionale dei geologi v AGCM* [2013] nyr.

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- Case T-30/89 *Hilti v Commission* [1990] ECR II-163
- Case T-51/89 *Tetra Pak Rausing v Commission ('Tetra Pak I')* [1990] ECR II-309
- Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389
- Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro and Others v Commission* [1992] ECR II-1403
- Case T-117/89 *Sens v Commission* [1990] ECR II-198
- Case T-83/91 *Tetra Pak International v Commission ('Tetra Pak II')* [1994] ECR II-755
- Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595
- Case T-513/93 *Consiglio nazionale degli spedizionieri doganali v Commission* ECR II-1810
- Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole television and Others v Commission* [1996] ECR II-649
- Case T-156/94 *Aristain v Commission* [1999] ECR II-645
- Case T-305/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931
- Case T-348/94 *Enso Española v Commission* [1998] ECR II-1875J
- Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998] ECR II-3141
- Case T-86/95 *Compagnie générale maritime and Others v Commission* [2002] ECR II-1011
- Case T-111/96 *ITT Promedia v Commission* [1998] ECR II-2937
- Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others v Commission* [1999] ECR II-93
- Case T-5/97 *Industrie des Poudres Sphériques* [2000] ECR II-3759
- Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969
- Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707
- Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929

- Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* ('TACA') [2003] ECR II-3275
- Case T-219/99 *British Airways v Commission* [2003] ECR II-5917
- Case T-342/99 *Airtours v Commission* [2002] ECR II-2585
- Joined Cases T-67/00, T-68/00, T71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, paras 179
- Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 and Others v Commission* [2002] ECR II-3805
- Case T-57/01 *Solvay v Commission* [2009] ECR II-4621
- Case T-66/01 *ICI v Commission* [2010] ECR II-2631
- Case T-151/01 *DSD v Commission* [2007] ECR II-1607
- Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969
- Case T-203/01 *Michelin v Commission* ('*Michelin II*') [2003] ECR II-4071
- Case T-210/01 *General Electric v Commission* [2005] ECR II- 5575
- Case T-314/01 *Avebe v Commission* [2006] ECR II-3085
- Joined Cases T-49 to 51/02 *Brasserie nationale and Others v Commission* [2005] ECR II-3033
- Case T-56/02 *Bayerische Hypo- und Vereinsbank v Commission* [2004] ECR II-3495
- Case T-114/02 *BaByliss v Commission* [2003] ECR II-1279
- Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209
- Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] II-3291
- Case T-53/03 *BPB v Commission* [2008] ECR II-1333
- Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477
- Case T-340/03 *France Télécom v Commission* ('*Wanadoo*') [2007] ECR II-10
- Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601
- Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805
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- Case IV/31.900 *BPB Industries* [1989] L 10/50
- Case IV/33.544 *British Midland v Aer Lingus* [1992] OJ L 96/34
- Case IV/33.814 *Ford/Volkswagen* [1993] OJ L 20/14

- Case IV/34.600 *Night Services* [1994] OJ L 259/ 20
- Case 94/119/EC *Port of Rødby* [1994] OJ L 55/52
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- Case COMP/C-3/37.792 *Microsoft* (24 March 2004)
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- Case IV/M.53, *Aerospatiale-Alenia /DeHavilland* (2 October 1991)
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- Case IV/M.1313, *Danish Crown/Vestjyske Slagterier* (9 March 1999)
- Case COMP/M.2333, *De Beers/LVMH*, (25 July 2001)
- Case COMP/M.2314 *BASF/Eurodiol/Pantochim* (11 July 2001)
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- Case COMP/M.3099, *Areva/Urenco/ETC* (6 October 2004)
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- Case COMP/M.4439, *Ryanair/Aer Lingus*, (27 June 2007)
- Case COMP/M.4854, *TomTom/TeleAtlas* (14 May 2008)
- Case COMP/M.4942, *Nokia/Navteq* (2 July 2008)

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France

Case law

- Paris Court of Appeal judgment of 17 September 2008, Case 2007/14904

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- Autorité decision of 1 March 2000, *Armor Hélicoptère*, Case 00-D-13
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- Autorité decision of 18 March 2005, *Canal+*, Case 05-D-13
- Autorité decision of 28 July 2005, *Jaeger LeCoultre*, Case 05-D-46
- Autorité decision of 8 November 2005, *Saint-Honorat*, Case 05-D-60
- Autorité decision of 14 March 2007, *GlaxoSmithKline*, Case 07-D-09
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Germany

Case law

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ANNEX D. CURRICULUM VITAE

Tjarda van der Vijver (Haarlem, 1984) followed his pre-university education at the Sancta Maria Lyceum, Haarlem, between 1996-2002. In 2002-2003, he followed courses in French and Spanish language and culture at the Université Montpellier III in France and the Universidad del País Vasco in Bilbao, Spain. Afterwards, Tjarda went to Leiden University Law School, graduating *cum laude* in 2008 with master degrees in European law and company law. His master's thesis for the European law master, which analyzed exemptions to third party access in the EU gas sector, received awards from the Dutch Association of European Law, the Dutch Association of Energy Law and the Royal Dutch Gas Association. In 2009 Tjarda obtained, with merit, a specialist master degree in competition law & economics from King's College London. Subsequently, he worked at the network sectors & media unit of the Netherlands Competition Authority. His work focused mainly on competition law enforcement and merger control in the energy, telecom and media sectors. In 2010, Tjarda became an external PhD candidate at Leiden University, and worked on his PhD full-time between January and August 2013. As of September 2013, Tjarda works as an associate at Allen & Overy LLP in Amsterdam.