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Early Cartel Legislation and Cartel Policy in the Netherlands. In Memoriam: The Economic Competition Act (1956-1997)

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Abstract

This year the Dutch Economic Competition Act of 1956 was replaced by new legislation, which is more in line with EU competition policy, and which is generally considered to be more effective. This article takes issue with current views that the old Act was flawed from the start and that "modern", vigorous competition and economic growth necessarily require new legislation. First, by offering new data on the incidence of Dutch cartels in the early 1950s, it shows that such agreements were widespread and coincided with fast economic growth. Cartels, therefore, can not automatically be associated with lack of (international) competitiveness and growth. Second, by sketching the political economy in which the old Act was subsequently implemented, it argues that well until the early 1980s, Dutch competition policy mainly concentrated on sustaining price stability and distributional justice rather than fostering domestic competitiveness.

1 Introduction

In 1997 the former Dutch Economic Competition Act passed away at the age of 41. Its birth was seen as opening an epoch of great promise. The spiritual father, Jelle Zijlstra, described his child as "the most beautiful law ever to pass through my hands" and recalled how economists of all persuasions in parliament had been amazed by its splendour. He, too, however, had to acknowledge that its career had been one of "disappointment" (Zijlstra 1992: 46). Especially during the last decade of its life a growing consensus had emerged that the Act had been a miserable failure. The influential Social Economic Council (*Sociaal-Economische Raad*, SER) suggested that competition policy, for most of the Act's existence, had lacked impact and that formal policy had been of "little significance" (Sociaal-Economische Raad 1994). Ex-Secretary of State for Economic Affairs Yvonne van Rooij had no doubt that a case by

case examination of cartel policy would confirm the judgment that it had been "unimpressive" (Van Rooij 1992). The Christian Democrat MP, H. Schartman suggested that the experience of competition policy on the basis of the old legislation taught that whilst the aims and ideals of the old law were "wonderful", the criteria were too abstract to allow pursuit of a concrete and clear policy. He concluded that "We are ready for an entirely new Act" (Schartman 1990).

One major incentive to adopt new legislation came from Brussels. Since the mid-1980s, the Single European Market Programme has tried to strengthen European competition policy parallel to the efforts to complete the internal market. The Maastricht Treaty further enhanced these aims, by subjecting EU economic policy to "the principle of an open market economy with free competition" and by agreeing that any new provision on industrial policy may not "lead to a distortion of competition" (European Community 1994). Dutch governments have since endorsed these efforts. In their view, the national economy's viability and international competitiveness depended upon a flexible, competitive home market. The domestic market, it was generally felt, had for many years lacked such flexibility and the time was therefore ripe for launching a major policy overhaul that also included new legislation.

Aside from this structural motivation, there were certainly also tactical considerations at play that influenced this decision to align Dutch competition policy with European legislation. Policy-makers found it increasingly difficult to ignore their country's growing isolation within Europe in this area. The Netherlands was among the last countries to uphold legislation that did not prohibit cartels outright. Not only did this enhance the country's reputation as Europe's cartel paradise, it also meant that Dutch cartels were increasingly under siege by the European Commission, which found some of them to be in conflict with article 85 of the Treaty of Rome. It was no coincidence that by far the larger part of the EU 's Orders relating to national competition agreements was directed against Dutch cartels (Asbeek Brusse and Griffiths forthcoming). In most of the recent literature, therefore, a general consensus emerges on the inevitability of abandoning the old, flawed, national Dutch legislation to meet the new requirements of a vigorous competition policy.

This article will examine this view from a historical perspective by returning to the birth and early career of the Dutch Economic Competition Act back in 1956. It will begin by surveying the standard economic theory on why cartels are inimical to economic development. Contrary to the prevailing neo-classical orthodoxy, we will offer an alternative hypothesis suggesting a possible positive contribution of cartels to economic growth under the specific circumstances of economic reconstruction and "catching up". Next, the article will present new data on the incidence of cartels in the Netherlands at the time of the

Act's conception and make some observations on the pattern of subsequent cartel development. This will correct the impression from most research that cartels reached their climax in the 1930s and only regained significance in the 1960s or 1970s. We will demonstrate that cartels were prevalent in large sectors of economic life in the early 1950s and that the structure of cartels remained remarkably constant over the subsequent thirty years. The article will then turn to the circumstances surrounding the Act's birth by examining the debate in cabinet and parliament. We will show how the legislation became embroiled with the parallel domestic debate on the neo-corporatist organization of economic management. Finally, the article will discuss some of the main characteristics of early cartel policy. We will conclude that Zijlstra's original vision never materialized. Instead, Dutch policy under the Economic Competition Act focused on maintaining price stability rather than on fostering competition. It is only against this specific historical background of the national political economy that the former Competition Act and its subsequent implementation can be understood.

2 Cartels in theory

Cartels can be defined as voluntary agreements between otherwise independent producers to manage the market by restricting the conditions of sale, either in terms of volume or of price. The arguments for and against cartel-like agreements are long established. One recent textbook analysis reviews the case as follows. The object of cartel formation (or collusive practices to the same end) is to simulate monopoly conditions whereby a reduction in sales is sufficient to raise the price and to permit the earning of profits above those available in perfectly competitive conditions (usually referred to in economics as "economic rent"). In terms of static economic analysis this development is accompanied by two effects: an efficiency loss occurring because the lower levels of output imply operating at higher marginal costs, and, of a rather greater magnitude, a transfer of resources from consumers (through higher prices) to producers (through higher profits). If they are devoted to research and development (R&D,) which helps produce new goods or cost reductions in the future, those higher profits may be justified in terms of allocative efficiency, but this, in turn, depends upon the firms competing for future market shares. On the other hand, the profits might be dissipated in trying to protect the market from intruders, for example through excessive advertising, or they may disappear in higher costs, through a reduced size of unit output, if the restricted output had to be shared among new entrants. In the latter situation, the consumer would still lose out through higher prices, whilst the economy would be penalized through a less efficient pattern of output. The

only case it seems willing to concede is that for "crisis cartels" at a time of reduced demand and overcapacity. In such circumstances, although the market should dictate that the least efficient firms disappear first, this might not occur in practice. Moreover, the collective effect of individual business decisions might be to overshoot, leading to capacity shortages and higher prices during the recovery phase (Yarrow 1996).

This classic, relatively static analysis stresses the negative case against non-competitive practice. The argument can be sharpened even further if the dynamic effects are taken into account. Michael Porter is not alone in associating cartels with the dampening or suspension of "the self-reinforcing process of upgrading that grows out of domestic rivalry" or in asserting that a cartel "marks the beginning of the end of international success" (Porter 1985: 663). From a different direction, Mancur Olson condemned institutional "sclerosis" affecting almost all forms of cooperation as groups concentrate on rent-seeking and distributional advantage rather than looking for long-term competitive gains. These tendencies, he argued, become so entrenched that they can only be overturned by dictatorship, war or occupation (Olson 1982).

Before assuming that cartels are generally detrimental to economic development, we must be careful not to back-project current values. Lazonick suggests:

> The history of capitalist development in the twentieth century challenges the outlook of those economists who continue to propound, and indeed elaborate, the vision of the market coordinated economy. ... Without substantial control over market forces, manufacturing enterprises in all major industries would not have the incentives to make the large-scale investments in plant, equipment and personnel necessary to participate in global competition. (Lazonick 1991: 147)

In this view, the high initial profits offered by market control provide the means and the incentive for innovative investment. One could take this reasoning even further. Despite the current dominance of neo-classical economics and the veneration of the market as the most efficient allocative agent, in the early 1950's free markets were more feared than revered. They exposed economies to volatile swings in economic activity and to long periods of sub-optimal utilization of productive assets. In such a vision, markets were to be regulated and managed.

Institutional economics asserts that markets are not neutral; they are political constructions. The nature of the construction, and confidence in its survival, determine the framework of decisions taken within it as much as the vicissitudes of comparative costs and competitiveness (Hodgson 1994). Post-war governments provided selective protection and industrial subsidies, import barriers and export promotion, and a commitment to counter-cyclical policy, which were all intended to boost confidence in the view that industrial

growth was a national policy priority. Horizontal agreements among producers were often encouraged as part of this framework. They were incorporated into neo-corporatist organizational structures and often acted as an executive arm of government. Cartels need to be seen in this context; they served to reduce uncertainty by providing frameworks for market regulation. This could take several forms. In times of recession, they provided an assurance that a self-regulatory protective system designed by industry for industry could be slotted into place away from public scrutiny, without strict parliamentary approval and free from bureaucratic governmental interference. In times of expansion, they provided an assurance of market share at predictable prices. And, in addition, as Lazonick observed, they funded investments through what could be seen as a "producer tax" on consumers. In such circumstances, it is possible to envisage cartels contributing to long-run economic growth which depends less on an increase in investment in response to higher demand (i.e., as a move along a preference curve) than on a shift of the entire curve to a higher plane for investment decisions. This implies that at each combination of economic factors determining investment decisions, entrepreneurs would be more willing to invest after a change in circumstance than they had been before. In plain language, investors would become more confident of higher returns in the future or equal returns over a longer period. This situation would most usually be expected from a shift in the technological paradigm, but it can equally occur through institutional change, by making firms more confident of the future.

After the uncertainty of the inter-war years, cartels formed part of the political economy of reconstruction and catching-up. They were the post-1945 equivalent of the "special institutional arrangements" envisaged by Alexander Gerschenkron for the nineteenth century for nations industrializing in the framework of relative backwardness (Gerschenkron 1962; 1968), or of the arrangements employed later, but in a similar situation, by Japan and the Pacific tigers. Moreover, there is little evidence to suggest that they grossly inhibited Dutch economic performance. The economy expanded at slightly more than 5 per cent per annum throughout the 1950s. There are various explanations for this growth, both from the demand side and the supply side (Van Ark, de Haan and de Jong 1996), but cartels are not usually mentioned in this respect, either as promoting or as inhibiting growth. However, evidence of sclerosis is hard to find. Man-hour productivity grew strongly in this period, and by 1960 the Netherlands had recovered its position as one of the most productive economies in Western Europe. Moreover, foreign trade had grown faster than national income and, more significantly, more than one would have predicted on the basis of its export structure and the growth of world demand for typical Dutch exports. Between 1953 and 1962, the Netherlands outperformed its "constant market share" predicted growth by nearly 25 per

cent. Among advanced industrial nations, only Japan, West Germany and Italy registered relative performances that were better (Griffiths 1986).

We have offered a tentative hypothesis that cartels may have contributed positively to the growth of the Dutch economy. It is limited in time and space to the period of economic reconstruction and catching-up, and we would not necessarily extend it beyond the 1950s, nor insist that it applied to all cartels. Even if one rejects this view (and at the moment there is not much evidence to prove it one way or the other) it is clear that this rapid economic growth was compatible with the existence of cartels ... assuming that the economy was heavily cartelized.

3 Cartels in practice

In contrast to raw material agreements or some international service cartels, there has not been much empirical historical research on cartels in manufacturing after World War II. Most of the work that has been done on such cartels covers the period up to the outbreak of the Second World War, even when the title of some volumes suggest that they might go beyond this point (Barjot 1995). It is hardly surprising, therefore, that they should come to the conclusion that cartels were a cyclical phenomenon reaching their pinnacle towards the end of the Great Depression of the 1930s (Kudo and Hara 1992; Wurm 1989). The reason why historical cartel research stops in 1939 is because there is simply much more information on the inter-war years. Governments in Europe did not usually prosecute cartel practices and, at the height of the economic crisis, often even encouraged them. Firms were therefore not particularly secretive about their cartel activities, publishing details of their meetings and agreements in the financial and trade press. Moreover, wartime legislation also forced industrialists to divulge information to their governments, and much of this was subsequently published. Finally, after the war many German businessmen were interrogated and their archives sometimes seized. All these factors serve to provide a very good idea of the number of cartels and their fields of operation (Hexner 1946; Stocking and Watkins 1948). Companies have also recently begun to open up their archives to historians, and certainly for the inter-war period they do not seem to be particularly squeamish about also releasing information on their cartel activities. This has sometimes allowed the reconstruction of how cartels actually operated in the inter-war period.

None of these conditions prevail for the post-war period. Most of the information that we have comes from antitrust suits and from the publication, usually in summary form, of information from national cartel registers. However, a more important factor than the public availability of information, is that

historians have not been conditioned to look for cartels in this period. The overwhelming impression of the literature was that cartels were suppressed after 1945 and revived, depending on the author, either in the 1960s as a response to the lowering of formal trade barriers (Dell 1963: 63-66, 114-115; Swann 1988: 115), or in the 1970s, in response to the economic dislocations following the oil crisis (Strange 1994: 177). The most notable exception to this "minimalist" stream of literature is a little-cited work by Mirow and Maurer whose relentless pursuit of the International Electrical Association was rewarded when an insider passed on several thousand pages relating to the cartel's activities. The unusual nature of this situation is reflected in the fact that, aside from this one example, the evidence of manufacturing cartels in the rest of the book is rather thin. Mirow and Maurer are also exceptional in that, until recently, they were alone in asserting that cartels were a permanent feature of the post-war world economy (Mirow and Maurer 1982). In the last decade, new historical research has begun to emerge, partly in response to the heightened interest in supply-side economics and competition policy. There is more in the governmental archives than people had previously thought, and this has slowly begun to change our appreciation of cartels. Research is showing that there was more cartel activity than we had been led to expect and it is also drawing our attention to the fact that policy on cartels was often at odds with the picture suggested by the available legislation (Morelli 1996; Mercer 1995; Asbeek Brusse and Griffiths 1996, forthcoming).

In the Netherlands, Uitermark has drawn a nuanced picture highlighting the role of informal policy whereas Barendregt has linked bursts of activity on the cartel front with counter-cyclical policy (Uitermark 1990; Barendregt 1991). H.W. de Jong, as one of the first, used material released in 1989 to draw attention to the longevity of cartels and to conclude that the Netherlands had always represented a "cartel paradise" (de Jong 1990). None of these Dutch studies, however, made use of archival material available from the Ministry of Economic Affairs and the Council of Ministers, which are open and deposited in the *Algemeen Rijksarchief* in The Hague.

It is difficult to make precise statements on the nature and distribution of cartels in the Netherlands. For a start, we only have information on those domestic agreements that were actually registered with the authorities, or uncovered through their investigative arm. This information was probably never complete, and we have no indication of the degree of under-registration at different moments in time. Moreover, the law was never comprehensive in its coverage. For example, some sectors, such as services, had entirely escaped the two earliest laws (i.e., the *Ondernemersovereenkomstenwet* of 1935 and the *Kartelbesluit* of 1941) and they were not obliged to register at all. The available information on the extent of the cartel phenomenon in the early 1950s, compared with two earlier observation points is given in Table 1.

Before looking at the evidence, however, three preliminary comments on the data itself are in order. First, the sectoral breakdowns for 1942, 1948 and 1955 record cartel *practices* (i.e., vertical cartels are registered in each sector that was involved) whereas the data for 1952 reflect the category in which the cartel *agreement* was registered. Our preliminary analysis of the 1952 data would suggest that the figures would need to be inflated by 10-15 per cent to make them comparable with the other observations. Second, the early data does not allow any differentiation between national and local cartels whereas from 1952 it is possible to separate the two categories. Thirdly, we present two sets of figures for 1952; the first set (1952i) is those contained in the cartel register in March 1952, and used by the Ministry of Economic Affairs in compiling its own breakdown. This register was incomplete, in the sense that many agreements had lapsed and that some newly registered agreements had still to be incorporated into the register. Moreover, the second set (1952ii) also allows a distinction to be drawn between national and local agreements.

If we look at Table 1, working through the data chronologically, the first thing worth pointing out is the relatively large number of "handicraft" agreements that were registered in 1942. Most of these were of purely local significance and they included 66 for blacksmiths, 65 for house painters, 42 for local bakers and 41 for building contractors. The diligence in registering such agreements virtually disappeared, and it is not until 1955 that we again get a significant registration of local agreements. Second, we must mention that the data for

Table 1 Cartel registration in the Netherlands, 1942-1955

National and Local					**National**	**National**
	1942	*1948*	*1952i*	*1952ii*	*1952ii*	*1955*
Industry	389	413	337	294	260	617
Wholesale	195	182	98	79	61	321
Retail	n.a.	19	15	13	8	80
Handicrafts	261	9	19	9	7	64
Total	n.a.	513	469	395	336	891
					Local	**Local**
Industry & craft					36	306
Trade					23	425
Service					n.a.	275
Total					59	1006

Source: see Appendix

1942 is considered to be an underestimate[1] since the registration took place under Nazi legislation, in a time of war, and when it was deemed patriotic not to provide the enemy with necessary information.[2] If it was patriotic to conceal cartels in time of war, evidently some other motive must have been at play during peace time, since the data for 1948 and 1952 show little signs of change in overall levels. This is interesting since officials in the Ministry of Economics were becoming worried about the reemergence of cartels after 1948. The surge in the number of cartels between 1952 and 1955 (even taking account of the difference in recording method) is less a reflection of a revival in cartels than an improvement in the authorities' ability to capture them in the register. In 1951 and 1952 less than 110 new cartels of national importance were registered each year, compared with 140 in 1953, and 180 in the first nine months of 1954. The authorities were successful in making business aware of the requirement to register restrictive agreements, and started prosecuting those who failed to do so.[3] The remarkable rise in the registration of local agreements in 1955 was another reflection of the success of the campaign.

Whether the number of cartels was between four and five hundred (as in the years 1942-1952) or closer to two thousand (as in 1955), the numbers themselves tell us very little about their impact on the economy. The Ministry of Economic Affairs attempted to assess the impact by looking at the proportion of household expenditure accounted for by items that were the object of cartel practice. These items were weighted according to contribution to the consumer price index in 1949. The choice of items and the weighing was supposed to be representative of typical household expenditure patterns of the time, and can therefore be considered a suitable point of departure. The 1949 weighing was employed in analysing price movements until 1955, when it was updated. In looking at the results, one should bear in mind that the 1952 data employed

Table 2 Weight of registered cartel practices in household expenditure, 1952

	Weight in price index	Items influenced by price agreements	Items influenced by other practices
Food	37.70	10.35	20.66
Non-Food	58.06	8.70	16.59
Subtotal	95.76	19.05	37.25
Tax	4.24		
Total	100		

Source: see Appendix

probably underestimated the impact of cartels by a considerable margin. The 1955 cartel data in Table 1 suggests that the information available to the Ministry probably captured less than half of the national producer agreements (not all of which, of course, affected end consumer items) and, more importantly, it had barely scratched the surface of local retailing and service cartels. The results, a summary of which is shown in Table 2, therefore understate the impact of cartels measured this way.

The Ministry's analysis concluded that prices for virtually 56 per cent of the household expenditure were directly or indirectly influenced by the cartel practices captured by the register. Food prices were especially heavily influenced by cartel practices, which impinged on 82 per cent of expenditure in this category, whereas only 43 per cent of non-food items was similarly affected by restrictive practices. The fact that "only" 56 per cent of household expenditure was affected by cartels, did not mean, of course that the remaining 44 per cent was free from price impediment. For example, the prices of items like butter, cheese and eggs, that were free of cartel measures at the distribution end of the production chain, were determined at the farm gate by national government agricultural policy. Once these are taken into account, the only food expenditure items free from any artificial price impediments were hard biscuit (*beschuit*,

Table 3 Distribution of registered cartels by economic sector, 1952

	% GDP	National (%)	Local (%)
Manufacturing			
Food	19.4	33 (9.6)	5 (8.2)
Building	8.6	8 (2.3)	6 (9.8)
Earthenware, glass, chalk, stone	0.4	19 (5.5)	10 (16.4)
Metals and machinery	5.8	51 (14.8)	2 (3.3)
Electro-technical industry	2.6	13 (3.8)	-
Chemical industry and refining	5.6	56 (16.3)	5 (8.2)
Transport equipment and refining	4.1	10 (3.0)	-
Textiles	4.0	19 (5.5)	-
Shoes and clothing	3.9	13 (3.8)	-
Graphics and publishing	1.0	16 (4.7)	-
Wood and furniture	0.9	18 (5.3)	10 (16.4)
Paper	0.5	14 (4.1)	-
Leather and rubber	0.5	4 (1.2)	-
Distribution			
Wholesale trade	6.7	61 (17.8)	18 (29.5)
Retail trade	6.5	8 (2.3)	5 (8.2)

Source: see Appendix

which was cartelized until 1951), dried pulses, jams, berry juices, cacao, chocolate and pudding powders, pepper, soup aromas and cubes. Similarly, large areas of non-food expenditure were controlled by local monopolies: gas, water, electricity, medical assistance, fuel, education, public transport, and post.

The analysis of household expenditure, damning in itself, reflects only part of the economic activity of a country. Left outside its scope are activities in the provision of investment goods, semi-manufactures and exports. For this reason we will attempt to illustrate the relative weight of cartels against the backdrop of the relative importance in the national economy. The measure chosen is the contribution (value-added) of different sectors to the economy (Gross Domestic Product) in 1952. Unfortunately, the published statistics are not sufficiently detailed to permit a calculation of cartelized industry within each sector, or within the economy as a whole. Moreover, the only detailed sectoral breakdown so far uncovered refers to 1952 and, as we have already commented above, this reflects only the tip of the total cartel phenomenon. The details of this analysis are shown in Table 3.[4]

The largest concentrations of cartels were to be found in metals and machinery, chemicals and refining and in wholesaling, and in all three catagories their proportional representation far outweighed their contribution to the economy. Also heavily over-represented (with cartels that were particularly pervasive) were paper, and graphics and publishing. This sectoral distribution of cartels proved remarkably stable over the post-war period.

Table 4 compares the 1952 data with that for 1967 and 1985. We find very similar shares for food and drink and for metals, machinery and electronics. Equally impressive is the continued relatively heavy representation of cartels in the paper, and graphics and publishing sectors. The rise in the share of building and building materials between 1952 and 1967 may well be a reflection of under-reporting in 1952, and the fact that many of the registered agreements in 1952 were local and that, by 1967, these may have been supplemented by peak agreements at a national level. On the other hand, the persistent fall in traditional cartel agreements in chemicals appears to have been genuine. However, this may not reflect an improvement in the competitive environment over time; it may in fact reflect a merger of previously independent, but cartelized units or that cartel functions were exercised through other media, such as patent licenses.

We can obtain a more comprehensive overview of what cartels actually attempted to accomplish in the 1950s if we turn to the breakdown for 1955, which has the added advantage of being more complete than that of 1952. We can link these findings to broadly comparable data from the years 1963-1985. Table 5 gives the percentage of all national registered agreements containing clauses covering a particular restrictive practice. The most prevalent form of cartel practice in 1955 was price agreements. These ranged from fixed or

Table 4 Percentage distribution of national registered cartels in manufacturing; 1952, 1967 and 1985

	1952	1967	1985
Food	12.0	10.6	11.8
Building	2.9	7.0	9.4
Earthenware, glass, chalk, stone	6.9	10.3	12.1
Metals machinery and electro-technical industry	23.3	19.8	22.6
Chemical industry and refining	20.4	14.0	7.6
Other:	34.3	38.9	24.4
Transport equipment	3.6	n.a.	n.a.
Textiles	6.9	5.5	n.a.
Shoes and clothing	4.7	2.1	n.a.
Graphics and publishing	5.8	9.1	n.a.
Wood and furniture	6.5	4.1	n.a.
Paper	5.1	6.4	n.a.
Leather and rubber	1.4	1.0	n.a.
Total	274[1]	508	287

Source: see Appendix

[1] This total includes 22 cartels whose nature was unspecified and which have not been included in the sectoral breakdown.

minimum prices to schedules for calculating prices (especially common when raw materials made up a large share of final costs), and resale margins. This kind of arrangement became even more pervasive in the early 1960s, when it appeared as a feature in no less than 85 per cent of national agreements, before returning to the mid-50s level in the early 1970s. Far more restrictive in their impact are market share agreements which determine and divide sales either on a regional basis or by carving up the national cake. These are the "old fashioned' cartels that became prevalent in the 1930s; in 1955 they accounted for a quarter of all agreements. Now, one might be excused for expecting that, in the context of twenty years of rapid economic growth, this cartel construction may have become less distinctive, and that agreement assumed more "benign" forms, such as conditions agreements. Yet, throughout the following thirty years described, the percentage remains virtually constant. The only thing that can be said, is that the practice of profit/loss pooling that accompanied one in twenty of the market share agreements in 1955 seemed to have fallen into disfavour by 1967.

None of the other practices listed in Table 5 were necessarily protective – it depended on the way in which the provisions were formulated and executed.

Table 5 Percentage of registered national cartels containing various cartel practices, 1955-1985.

	1955	1961	1967	1971	1973	1976	1983	1985
Price regulation	63.1	86.3	74.9	70.0	60.1	62.7	57.1	56.9
Sales and output restriction	26.5	25.3	26.1	24.6	24.9	22.1	23.8	22.7
Conditions	29.5	30.4	31.4	32.2	32.8	32.2	29.8	28.3
Recognition	13.4	15.5	n.a.	10.5	10.1	8.4	9.3	7.5
Registration	11.9	11.3	n.a.	11.1	11.5	12.6	15.0	14.5
Joint purchasing or sale	10.6	8.5	10.1	10.7	11.5	11.0	12.7	12.5
Profit pools	5.9	n.a.	1.7	n.a.	n.a.	n.a.	n.a.	n.a.

Source: see Appendix

It is noticeable that they remain an almost constant feature of national agreements, and in remarkably stable proportions. This lends weight to an observation, made most recently in the Dutch case by De Jong, that cartels tend over time to adopt ever more functions (De Jong 1990). These help to enhance the exclusivity (and sometimes legitimacy) of the group, but they also provide the "glue" that keeps institutional arrangements intact, also through periods when (possibly because of boom conditions) their market-stabilization functions are suspended.

In much of the economic literature, it is generally supposed that cartels are relatively unstable creations, vulnerable to cheating in times of recession and simply superfluous in times of expansion. Moreover, the period we are dealing with followed hard on the heels of a war and of pervasive state control which is supposed to have rendered many cartels redundant (Edwards 1967). In Table 6 we have analysed the cartels registered in 1952 according to the date at which they were first established, if this information was available. Almost three quarters of cartels were older than five years. Half the cartels had been formed in the 1930s, reflecting the surge in cartel formation during the Depression, and were therefore between ten and twenty years old. Only eleven per cent were older still.

This picture of cartel stability has recently been confirmed by de Jong, who observed that of 109 Dutch horizontal price cartels surviving in 1989, 76 per cent were older than five years (de Jong 1992). As in the 1952 survey, the majority was older than five years. More surprising is the age distribution of the rest. No less than 14 per cent had survived for more than thirty years, 23 per cent for between twenty and thirty years, and 19 per cent for between ten and twenty years. The picture for market share agreements, where data for 1991

Table 6 Distribution of registered cartels (1952) by first date of formation

	Before 1919	1919-1929	1930-1939	1940-1945	1945-1951
Industry	7	17	109	43	42
Distribution	1	6	28	8	18

Source: see Appendix

was published separately, shows a younger age distribution, but nonetheless unexpected. Only (!) 14 per cent had been on the register for more than twenty years and a further 17 per cent had survived on the records for more than a decade. By contrast, almost half were mere infants that had yet to reach their fifth anniversaries (Asbeek Brusse and Griffiths, forthcoming).

4 The birth of a "beautiful law": The Economic Competition Act of 1956

In the immediate post-war years of economic reconstruction, Dutch cartel policy broadly followed the lines of that of 1930s, when the government had supported cooperative agreements among private businesses both to avoid excessive and destructive competition and to promote general economic welfare. This pragmatic attitude found expression in the cartel law of 1935, the *Ondernemersovereenkomstenwet*, and its wartime successor of 1941, the *Kartelbesluit*. Both laws incorporated provisions not only to break up cartels considered detrimental but also to recognize, and to declare legally-binding on the entire sector involved, those agreements that were considered beneficial.

For the first three post-war years, officials believed that many private business arrangements had either been dissolved voluntarily or had remained inoperative. Paradoxically, though, those cartels that initially had seemed redundant, soon re-emerged in remarkably good health, becoming active and often strengthening their market positions.[5] This was partly attributable to the specific institutional context of post-war economic policy-making. The heritage of wartime planning controls in combination with the early post-war phase of stringent government control on production, consumption and trade had meant that many enterprises could benefit from a booming seller's market, an absence of foreign competition and relatively generous profit margins. The far-reaching state intervention in the economy had depended on a high level of cooperation between civil servants and private business. Thus, groups of entrepreneurs, organized by product, sector or sub-sector, were often engaged in a process of almost permanent consultation

among themselves and with government officials. Similar situations occurred throughout Western Europe, wherever the political economy of reconstruction demanded similar symbiosis between governments and producers (Asbeek Brusse and Griffiths 1996; forthcoming). What seems to have been more pronounced in the Netherlands is the ease with which such contacts created a policy environment that allowed cartels to thrive well into the 1950s, and beyond.

The context for close institutionalized contact between the private sector and government was provided by the *Publiekrechtelijke Bedrijfsorganisatie* (PBO), a system of peak tripartite organizations, divided into several separate boards, each with representatives from labour, employers and government. The Industrial Organization Act of 1950 formalized these arrangements by creating a tripartite Social and Economic Council (SER) and by allowing for the voluntary institution of horizontal industrial boards (*Bedrijfschappen*) and vertical commodity boards (*Productschappen*) (Dercksen 1982: 126). These industrial boards could obtain regulatory powers on production, sales, research and development, mechanization, product standardization, wages and prices. In practice, however, most boards were restricted to regulating wages, working conditions and, occasionally, selling conditions (Silbiger 1964: 246-247). Even before the law, several of these fora were already in place and they tended, almost naturally, to develop into platforms for concluding private cartel agreements. It was not particularly unusual for those involved in the peak industrial boards to also run the parallel private cartel, nor even for the cartel's administrator or liaison officer to be secretary of a producer sub-group.[6]

In 1949, against this background of renewed cartel activity, the Ministry of Economic Affairs began work on a new cartel law to underpin its long-running competition policy. The existing legislation was considered inadequate since it was too easily associated with the excessive control, enforced cooperation and arbitrariness that characterized the Nazi occupation. Moreover, it only extended to formal, legally-binding cartel agreements and left the government no powers over informal cartels or "gentlemen's agreements". With growing evidence of abuse of market power by both cartel forms, it was felt that new regulations were needed. Ministerial officials drafted a new Economic Competition Act (known as the *Wet economische mededinging*, Wem), which reached the cabinet in June 1950, and parliament in November of the same year.[7]

The draft law reflected a broad consensus on the need for a practical case-by-case approach to cartels. To avoid creating unrest among producers, the draft stressed the continuity between pre-war and post-war competition policy. Noticeably, there was no change in the stance that cartels could be either "good" or "bad", depending on the specific economic situation and their impact on the general public. Thus, the draft retained powers to declare specific cartels (presumably those that benefitted their members, the consumers and the

general public as a whole) legally-binding in times of severe economic crisis. On the other hand it was concerned that, once the immediate post-war controls were lifted, producers might try to turn the government-imposed maximum prices into privately agreed minimum prices. The law met this concern by giving the government powers to suspend cartel agreements and to outlaw certain types of cartel practices. It also introduced a compulsory cartel register for all agreements.

The early discussions within cabinet revealed signs of serious disagreement over the scope of the proposed legislation and over the division of responsibilities and competencies among the various ministries and advisory bodies involved.[8] These debates intensified after the release of the findings of the Social and Economic Council (SER) in June 1951. Its report supported the fact that the law was based on the abuse principle, but was critical on precisely those points raised in the cabinet. First, the SER considered the definition of competition agreements (or "mededingingsregelingen") to be too wide since it covered all agreements or civil decisions regulating economic competition among firms. The consequence of leaving it unaltered would have been that even non-restrictive, harmless agreements (such as simple sales agency arrangements) would have to be registered with the authorities. The SER also wanted to exclude agreements involving subsidiary companies and their headquarters, which it considered different in essence from cartels, and which, if necessary, could be controlled by separate provisions in the law on the abuse of economic power. Second, the SER wanted the application of the law restricted to the Dutch domestic market, reasoning that neither the Dutch jurisdiction nor the public interest reached beyond this area (but see below) (SER 1953: 10-12). The SER's final major criticism concerned the role of the independent advisory body of experts that would have to serve as a "check and balance" on ministerial powers; the Commission for Economic Competition (*Commissie economische mededinging,* Cem). In the draft law, the Cem would automatically be heard before the minister took any decisions to bind, dissolve or modify a cartel agreement. It would organize its own hearings with the cartel members before submitting to the minister a confidential, factual recommendation which would, however, be entirely non-binding. The SER considered this procedure extremely unsatisfactory since it gave large discretionary powers to the government and failed to guarantee either legal security or a thorough consideration of all the issues involved. Therefore, it suggested a more public procedure whereby the Cem would publish its report at least two months before the ministerial decision, in order to allow all parties involved to formulate their objections and to force the minister to provide a motivation if he decided to disregard these. (SER 1953: 24-25)

It was not until 1953, almost two years after the appearance of the SER advice, that cabinet and parliament held another substantial discussion on the draft

competition law.[9] This delay was partly due to unforseen developments in the external environment of Dutch policy-making that considerably upset ministerial representatives and business alike. In the course of 1950, the United States had tried to use the leverage of Marshall aid to persuade European governments to start an "anti-cartel drive". American officials working for the European Recovery Program (as Marshall aid was officially called) were instructed to increase public awareness in Europe of the dangers of cartels. They had to use the Technical Assistance Program to encourage changes in the European business culture and, last but not least, to push for a tightening of national cartel legislation in Europe (Asbeek Brusse and Griffiths 1996). Coincidental with this new initiative, the United States used its own antitrust legislation to prosecute several large international oil companies, including Royal Dutch Shell, and internationally operating Dutch shipping companies. Moreover, in 1951 the antitrust investigation (begun in 1941) into the international lamp cartel, involving Philips, threatened to escalate into a full-scale civil suit under the Sherman Act. This new development meant that a US court could now demand that the Philips headquarters in Eindhoven hand over confidential company information. Not unnaturally, the business community feared it would only be a matter of time before other Dutch multinationals suspected of cartel activities came under attack from American courts.

The court actions against Dutch companies led to a flurry of activity. On the diplomatic front, Dutch officials successfully cooperated with their Belgian, German and British counterparts to delay American proposals for an in-depth examination of international cartels. They also tried to rally support for the idea that the problem should be dealt with by the United Nations rather than by the extra-territorial application of domestic legislation.[10] On the domestic front, in October 1952, Minister of Foreign Affairs Joseph Luns set up a small interdepartmental committee to examine the pending American threat and its implications for the draft competition act.[11] Working with the Dutch firms under investigation, members of the committee presented a joint amendment that would make it easier for firms situated on Dutch territory to refuse cooperation with US antitrust authorities. In what would have been an internationally unprecedented move, the amendment declared illegal "any form of deliberate cooperation, whether by providing information or by any other means", in formulating or implementing cartel decisions made by another state regarding firms on Dutch territory or Dutch citizens operating abroad, unless ministers decided otherwise.[12] However, employers' organizations soon agreed that such a total refusal to cooperate outside the Netherlands might cause more problems than it would solve and they eventually settled for a less provocative clause that would, hopefully, "erect a dam" against foreign prosecutions in the Netherlands.[13]

Domestic political considerations also delayed the cartel debate within parliament and cabinet. During 1952 and 1953, the SER and the PBO had made only little progress in creating voluntary tripartite organizational institutions at the level of the firm, sector and subsector (see above). While this was going on a new cabinet had taken office, and the new Calvinist economics minister Jelle Zijlstra and the Catholic PBO minister A.C. de Bruijn had become entangled in a political struggle on the PBO's future role in cartel policy. To understand the political sensitivity of this issue, it is worth recalling that this tripartite organization of business and labour represented one of the cornerstones of the post-war governmental coalition between the social-democratic Labour Party (PvdA) led by Prime Minister W. Drees and the Catholic People's Party (KVP) under C.P. Romme. For most social democrats, the PBO was the closest they would ever get to their ideal of planned or regulated capitalism, whereas for most Catholics it embodied a voluntary, corporatist answer to uncontrolled liberalism on the one hand and socialist, state-controlled planning on the other. Thus, all be it for entirely different reasons, both Social Democrats and Catholics favoured a strong role for the PBO in economic policy, and hence also in cartel policy. This bipartisan support for the PBO by the two main coalition partners might have helped the PBO obtain a prominent role in cartel matters, had it not been for Zijlstra's objections. Only a few years before entering cabinet, as a professor of economics at the Free University in Amsterdam, Zijlstra had signed a petition to parliament in which he and eight other colleagues expressed their concern about the interventionist powers of the tripartite industrial boards. A self-confessed supporter of the market economy, Zijlstra had warned against a climate in which organized corporate interests would gradually overshadow the public interest by stifling the price mechanism. (Uitermark 1990: 5-6; Zijlstra 1992: 48). As a result, when Zijlstra took office, his proposed Economic Competition Act became mixed up in a much broader, highly politicized debate on the future organization of the Dutch economy.

Throughout the discussions that followed within cabinet and between parliamentary experts and the minister, the problem of PBO involvement remained unresolved. De Bruijn maintained a position that the PBO be given powers to declare cartels binding and, pending its future organization, also be allowed to dissolve such agreements. Moreover, he wanted decisions on the law to be taken not only by Economic Affairs but also by his own PBO department. The PvdA Minister of Social Affairs J. Suurhoff backed this view since he believed that PBO involvement would give organized labour some say in the matter and would also allow the discussion to take place in a more public forum.[14] Zijlstra, though, refused to commit himself on the matter. Initially, this prompted several members of parliament, Catholics and Social Democrats alike, publicly to question his faith in the blessings of the PBO.[15] On the eve of

the law's presentation to parliament in March 1956, Romme even threatened to put his political weight behind the issue by presenting an amendment defending the PBO's role in cartels.[16] Eventually, however, Zijlstra got his way; if a sector had no industrial board, the Ministry would be responsible for making agreements binding across the sector as a whole. If a sector had an industrial board, the Ministry would only declare an agreement binding if the board could not resolve the issue itself.

Quite apart from the PBO's involvement, there were two other bones of contention dominating parliamentary debates on the draft law, both of which centered on the issue of legal security. The first involved the role of the Commission for Economic Competition (Cem, see also above). The 1951 SER report had endorsed the Cem's creation as an independent advisory body of experts, but it had wanted to avoid arbitrariness by publishing the Commission's recommendations. This SER advice was instantly taken up by the three major Dutch employers' organizations and the Association of Dutch Wholesalers, and the call was echoed by parliamentarians from various political backgrounds.[17] Many Catholics and Liberals considered this provision essential for protecting producer interests, whereas some Social Democrats felt that publication of the recommendations and of the cartel register would increase the laws' effectiveness. After lengthy debates, they were eventually persuaded to concede that public disclosure could compromise the Cem's independence by unduly exposing its members to outsider pressures.[18] Its advice to the minister, therefore, was allowed to remain secret.

The issue of legal security was also central to the most controversial issues of all: the appeals procedure. Should the law open the possibility of an appeal against a ministerial cartel decision, and if so, on which grounds and in what form? In line with Zijlstra's thinking, the SER had rejected a full appeals procedure with an autonomous body, because this would reduce the Ministry's scope for formulating an independent cartel policy. When, however, the SER proposed an appeals on procedural grounds alone, the minister objected strongly. In his view, such grounds were so intertwined with general cartel policy considerations that it would still boil down to giving a judge the final say on economic policy. Moreover, if a judge should declare an appeal justified, no one knew what consequences this would have. In September 1955, shortly after Zijlstra had set out his standpoint in a second memorandum to parliament, the employers' organizations again impressed upon parliament that an independent administrative appeals body was absolutely "vital" (VNO 1958). During the final parliamentary debate of 1956, the confessional parties and the liberal VVD strongly defended this cause and tabled an amendment urging the minister to introduce an appeals procedure into the law.[19]

The government had difficulty meeting these demands. It was not clear what the grounds for an appeal would be, nor which body would be responsible

for judging them. On the other hand, there was no denying that a very influential parliamentary body insisted on some extra-ministerial control over the implementation of the new legislation. Zijlstra now accepted a clear distinction between substantive appeals and procedural appeals. In the former case, he was still reluctant to countenance any appeals procedure at all, and certainly not one that removed the final decision from ministerial control. Therefore, he opposed any appeal to an external body, even if, as some had suggested, the Ministry was given the opportunity to defend its own case, or to contest any eventual decision. Several cabinet members sympathized with the need to preserve the Ministry's independence in such matters and the need to avoid the delays that could accompany an appeals procedure, during which period, presumably, the working of the contested agreement could continue. Prime Minister Drees felt that this last objection could be accommodated by not allowing the ministerial judgement to be set aside while an appeal was being heard, though he conceded that this could cause problems if the decision was made in favour of the plaintiff. He, too, sympathized with Zijlstra's position, but warned that the issue of competition policy was a controversial one, and one in which the minister was responsible to parliament and inevitably had to work "in a glass case". Deputy Prime Minister J. Beel also warned that parliament would naturally be suspicious if, in the specific circumstances of competition policy, the government deviated too far from bodies and procedures that it itself had created and that were deemed adequate for other policy areas.

The cabinet decided to tell parliament that the government would accept the need for an appeal being written into the legislation, but that it would leave the nature of such an appeal and the procedures to be determined in a second law, even though Zijlstra's Ministry was already preparing concessions allowing a limited degree of external control in appeals made on administrative grounds.[20] This decision broke the deadlock. The Second Chamber agreed to approve the law on the understanding that a State Commission would examine the possibility for a separate appeals act. The eventual outcome was the creation of a special Chamber for Competition Affairs (*Kamer voor mededingingszaken*) within the already existing Board for Industrial Appeals (*College van Beroep voor het bedrijfsleven*). The Chamber could reverse a ministerial decision on six different grounds of appeal, all of which concerned procedural matters (i.e., whether the Ministry acted within compliance of the law and worked with sufficient diligence). Although it could nullify the Ministry's action it was not allowed to award any damages nor dictate the Ministry's subsequent action. The Chamber was specifically forbidden to express any judgement on the government's economic policy ends, and therefore also to determine whether cartel action was prejudicial to their attainment (Silbiger 1964: 308-310).

5 Formal and informal cartel policy

The Economic Competition Act was passed in 1956 and came into force in 1958. Looking back in 1992, Zijlstra observed:

> The Economic Competition Act was actually the most beautiful law that ever passed through my hands. It was an effort to put modern insights on price formation into practice. The central underlying idea is that free price formation should be accepted as the foundation of a market economy but that it does not, under all circumstances, lead to acceptable results. Consumers of goods or services can suffer serious disadvantage from cartel formation and other concentrations of economic power. The government, therefore, must have access to means of redress. The law was truly well put together. ... Unfortunately it has transpired that the law was not very effective. ... The law was intellectually an exceptionally beautiful plaything, but a disappointment as a policy instrument. (Zijlstra 1992: 46)

But was the Act really that bad? Some researchers have argued that one of its main faults was the absence of a sound and clearly-defined policy aim. The minister's only leading cartel policy principle was that of guaranteeing "the public interest". During Zijlstra's own period in office, it implied that economic competition among firms should be "healthy", in that it "promotes expansion, combats stagnation and results in acceptable cost and price relations" ('t Gilde and Haank 1985: 3).

This is not the time nor the place to enter the debate on whether "public interest" is or is not a workable concept for government policy. On its own, however, it is not operational and officials in the Ministry of Economic Affairs needed to adopt some extra criteria in the form of working norms or practical policy guidelines for judging cartel practices (Uitermark 1990: 315-329). These formed the background for the execution of an informal cartel policy and, perhaps not surprisingly, they deviated somewhat from Zijlstra's lofty policy ends. In practice they usually boiled down to damage control directed against collective boycotts, uniform minimum prices, production quota and fixed market share arrangements.[21] Moreover, as far as horizontal price agreements were concerned, there was a tendency among the department's civil servants to become more lenient as time passed. This informal policy, as much as the law itself, determined the outcome of Dutch competition policy.

By way of example, we will consider price agreements. Until the mid-1950s, informal policy based on a case-by-case analysis of various cartels suggested that price arrangements were considered acceptable only if there was (the threat of) "ruinous competition". Many existing arrangements were not, however, in place to prevent such cut-throat competition.[22] This prompted occasional ministerial intervention whereby cartels were forced either to dissolve or revise their cartel arrangements.[23] One such agreement was a nationwide cartel for

sauerkraut. Looking back from the 1990s, it might seem curious that there was a cartel arrangement for this national food but, at a time and in a country where there was even a cartel for bleach water, it can scarcely be considered exceptional. The sauerkraut cartel fixed minimum prices, as well as delivery and production conditions for producers, wholesalers and retailers. In 1952, it was prompted to lower its minimum prices for producers, to transform its method of calculating total production quota and to abandon minimum price rules for wholesalers and retailers. Note, however, that it was not forced to abandon fixed producer prices.[24]

Informal policy allowed the department to develop over time several qualifications to clarify which cartel agreements were, and which were not considered "in the public interest". In the case of price agreements, the starting point was that they had to prevent an entire sector from being wiped out by competition. But there were additional criteria, such as one to the effect that the prices must be based on (and not exceed) the average cost price of the most efficient firms (Uitermark 1990: 318-319). Yet, despite the initial success of informal policy during the early post-war years, Zijlstra – rightly – remained worried that "the margin between a cartel clearly operating against the public interest and one that might not be so damaging as to warrant government intervention might be rather too wide."[25]

We now know that the introduction of the Economic Competition Act did little to reduce this discretionary margin. One reason was that the Ministry reverted to most of the informal policy guidelines it had developed during the earlier period (Uitermark 1990: 329).[26] Another was that, as far as horizontal price agreements were concerned, there was a gradual shift towards a policy based on the less stringent criterion that such arrangements should not "interfere with price competition in an unacceptable way" (Uitermark 1990: 332). This was a far cry from the productivity and efficiency norms mentioned by Zijlstra. Rather, they represent a static, distributional logic and an acceptance of those cartel practices that were not considered harmful to price stability.

At first sight, the gradual relaxation of informal policy on horizontal price agreements seems to contrast sharply with the Ministry's views on vertical pricing. In 1964, it even introduced a general ban on vertical pricing agreements by declaring them legally-unbinding for a range of products, whereas it also adopted a firmer line on such individual agreements. This time, official reasoning was surprisingly different, and not static; it was now argued that vertical pricing tended to interfere with increases in productivity and economic growth rates. Was this, then, the beginnings of a fundamental shift away from Keynesian distributional considerations and towards a more dynamic, productivity-oriented policy? The answer is a short and clear: "no". The occasional references to growth and productivity do not conceal that actual cartel policy primarily aimed at maintaining price stability. This implied that there should be

"acceptable" margins of profits within distribution and there could be no price increases unwarranted by rises in input prices.

The Ministry's dealings with resale price maintenance in the gramophone records cartel is illustrative of this approach. By the end of fifties, the rapid growth of branded products meant that resale price maintenance was becoming more prevalent. As a result, the "old" system, whereby distributors' resale price was normally some 130 per cent of the price they themselves had paid for the product, began to be replaced by one whereby the recording company dictated the selling price to its distributors. Since these distributors bought their products at a price of around 33 per cent below the fixed resale price, it usually followed that their margins increased to almost 50 per cent. This practice set alarm bells ringing within the Ministry's Directorate General for Trade and Industry, where some people openly complained that the head of the independent Commission for Economic Competition never allowed himself to be convinced that some margins were unacceptably high. Moreover, it argued that the *Directoraat voor Economische Ordening*'s informal policy on resale margins had become "too defeatist". As one memorandum put it:

> In the case of gramophone records [the Directorate] uses the legal argumentation that the poor retailers and the poor importers cannot help that their margins have been fixed so high. The cartel cannot do anything about this either, since importers fix the retailers' margins and the exclusive agents may well have their margins fixed by producer suppliers. But even so, it is still the cartel that provides the system of protection and the rules of the game, on the basis of which this disgraceful exploitation can be maintained. It is no surprise that every retailer, let alone every warehouse owner or wholesaler not to mention every exclusive dealer, drives around in a car. ... If minister de Pous [for Economic Affairs-WAB/RTG] wishes to act in the field of prices, then we have not just a few but dozens of cases we can present to him, and let us then stir up matters.[27]

Not only is this illustrative of the internal disagreements within the Ministry, it also shows once again that even the harshest critics of cartel practices and collective vertical pricing agreements were preoccupied with "reasonable" prices and profit margins, not with productivity and growth. It is not surprising, therefore, that the eventual ban on collective vertical price agreements of 1964 became largely neutralized by allowing for exemptions in over half the cases where these were requested by producers. Admittedly, it did reap a small success with a ban on agreements involving some durable consumer goods (radios, televisions, household electrical goods, automobiles and photographic goods). However, when it subsequently attempted to prohibit certain practices inherent in exclusive dealership and price and loyalty rebates, this failed after a judicial challenge (Asbeek Brusse and Griffiths, forthcoming).

In the more than twenty-year period up to the fundamental policy change of the 1990s, Dutch cartel policy remained driven by complaints and reactive to events. After its brief flurry of activity in the mid-1960s, the Ministry settled into a pattern of near inertia (with the single exception of a proscription of race discrimination). De Jong has demonstrated that over a span of thirty years, only eight agreements had (some of) their provisions dissolved (two cases in the first decade of the working of the Law and six cases in the 1980s). It is possible that the informal consultation procedures incorporated in the legislation were successful in achieving the dissolution of pernicious cartel practices, but the qualitative evidence suggests that this is unlikely. In the period 1978-1987 some 22 horizontal price agreements were voluntarily withdrawn after such consultations but this represented only a fraction of the many national, regional and local price and market division arrangements still remaining within the cartel register (de Jong 1990). This leaves five cases of general prohibition of certain restrictive practices to consider (three in the first decade of the Law's operation and one in each of the subsequent decades).

In 1971 there was a serious attempt by some policy-makers and civil servants to beef up anti-cartel policy in the fight against rising inflation rates. The then Minister of Economic Affairs asked the SER for advice on whether a new law was required or whether the existing measures could be made more effective, either by streamlining procedures or by general prohibitions instead of case by case action (Uitermark 1990). He also asked the SER to consider giving the public access to the hitherto confidential cartel register. Although in its advice delivered in 1973 the SER initially rejected the option of a prohibition on price cartels, the criticism of current policy stimulated further debate. In 1977, the new Minister for Economic Affairs, Ruud Lubbers, suggested amending the existing law to refine the abuse principle and, against the advice of the SER, to prohibit vertical and horizontal price agreements. In addition, the amendment would allow the government to impose price ceilings on certain goods. This proposal, too, met strong criticism from business circles and within the SER. It eventually came unstuck when a special governmental committee charged with examining deregulation (the *Commissie Van der Grinten*, named after its chairman) concluded that the existing Act already provided all the means necessary for promoting competition and suggested that new regulations were therefore undesirable. The initiative was shelved when a new cabinet took office ('t Gilde and Haank 1985).

A decade later, backed by pressure from the EC's active anti-cartel policy which had led to repeated clashes with Dutch cartels at the national levels, the Secretary of State for Economic Affairs Evenhuis (whose motto was "less government, more market") launched a so-called "Plan of Activities" aimed at bridging the gap between Brussels and The Hague on matters of cartel policy. In line with the Commissie Van der Grinten's pronouncement, he eschewed

an overhaul of existing legislation. In his view, the Economic Competition Law itself "offered adequate instruments for an active competition policy." The powers to outlaw swathes of undesirable cartel practice (article 10 of the 1956 Law) afforded ample scope for a stricter policy, and one that was in line with article 85 of the Treaty of Rome. Nonetheless, the government subsequently chose for a gradual transition towards a more restrictive anti-cartel policy based on a "two track approach". The first track implied a strengthening of anti-cartel policy within the existing framework. Apart from a more alert policy for dealing with cartel complaints, this embraced a series of general prohibitions against vertical price agreements, horizontal price agreements, market share agreements and collusive tendering. The second track has now been completed with new legislation to replace the Economic Competition Act (Asbeek Brusse and Griffiths, forthcoming).

6 Conclusion

This article has offered a tentative hypothesis that, in specific circumstances, cartels may not have been detrimental to economic growth and that, by its effect of risk-reduction, it may even have helped promote it. It produced evidence that the growth of the Dutch economy in the 1950s was remarkable and that it occurred in an environment of widespread cartel practices. Moreover, we produced evidence that post-war cartels were not a blip in the historical record but part of the fabric of economy. Not only were cartels exceptionally durable, but there was also a noticeable stability in their sectoral incidence and the type of market regulation adopted.

The legislation itself was born when the state was constructing a regulatory framework governing relations between government and industry, labour and industry, and within industry itself. This influenced the passage of the law, by contributing to its delay, but also helped shape some of its clauses. The desire to protect Dutch participation in international cartel activity form the preying eyes of American justice officials is indicative of the official attitude towards business collusion. Also, the association of "general interest" with government policy and the reluctance to accept more public scrutiny may be partly attributable to the inclination of the law's designers, but it was equally a reaction against the form such intervention would take. Moreover, the law's execution could not be divorced form the prevailing climate. Some early successes notwithstanding, the implementation of competition policy became more associated with "fairness" and distributional justice than with productivity and growth, and those charged with pursuing cartels were those working with them, all be it in another guise, in the interests of general economic management. Officials in the Ministry had gradually forsaken the

prosecution of cartels (be it by searching for non-registered agreements or by evaluating newly registered agreements) (Sociaal-Economische Raad 1994). Given the tight relations between government and business, it might have been unrealistic to expect otherwise. The government relied on the cooperation of the organized business community for its macro-economic policy goals whether it was in the form of price controls as part of a prices and incomes policy in the 1950's and 1960's, or its industrialization and regional policies, or through the increasing web of industrial subsidies that spread in the wake of the first oil crisis. Officials at the Ministry of Economic Affairs worked closely with business on an almost daily basis. Given their dependence on the goodwill of business, they were not in a strong position to take an independent stance against undesirable forms of business cooperation.

By and large, then the law may have had its shortcomings but its effectiveness largely depended on the priorities of the executive and administrative arm of government, which quickly became reluctant to use its provisions. We cannot, therefore, accept recent criticism that the Economic Competition Act itself was flawed from the start by its failure to define general interest or because of a lack of effective policy instruments. In 1964, at a time of rapidly surging prices and in the face of consumer revolt, the law was perfectly sufficient to enable the minister to dissolve collective vertical price agreements. The subsequent drift backwards only confirms the impact of informal policy on the results of competition policy. Similarly, in the 1990s, the government was able, within the confines of the existing law, to enact a more stringent anti-cartel policy with the introduction of general prohibitions on vertical price agreements (replacing the failed effort of 1964), on horizontal price agreements, on market share agreements and on collusive tendering agreements (van Rooij 1992).

To maintain that weak Dutch competition policy stemmed from fatal flaws in the 1956 law rather than the laxity of officials would be to misinterpret the past. It would lead to a distortion in the assessment of the impact of the former law and, in so far as "lessons" are drawn from the past, this may well have a bearing on the performance of the new.

Appendix: Sources for the tables

Table 1 Cartel registration in the Netherlands, 1942-1955

1942 and November 1948: Ministerie van Economische Zaken (1949), *Overzicht kartelregistratie*, s.l.
March 1952: ARA, MEZ, 2.06.087, 4099, *Concept Betreft Kartelpolitiek*, No 1952/92 HN/DO no date, Appendix One.
Revised 1952: Calculated from ARA, MEZ, 2.06.087, 4099, *Concept Betreft Kartelpolitiek*, No 1952/92 HN/DO, n.d. Appendix Two *Overzicht per bedrijfstak of groep van artikelen van de mate van kartellering van het nederl. bedrijfsleven* modified with information from *Quantitatieve Kartelbeschrijving*, n.d. and *Lijst met Prijsafspraken*, n.d.
January 1955: Tweede Kamer, Zitting 1954-1955, Bijlagen 3295, Regelen omtrent de economische mededinging (Wet economische mededinging).

Table 2 Weight of registered cartel practices in household expenditure, 1952

Source: ARA, MEZ, 2.06.087, 4099 *Benadering van het gedeelte van het huishoudbudget waarop invloed wordt uitgeoefend door kartels*, 10.3.1952

Table 3 Distribution of registered cartels by economic sector, 1952

Cartels: Calculated from ARA, MEZ, 2.06.087, 4099, *Concept Betreft Kartelpolitiek*, No 1952/92 HN/DO, n.d. Appendix Two *Overzicht per bedrijfstak of groep van artikelen van de mate van kartellering van het nederl. bedrijfsleven* modified with information from *Quantitatieve Kartelbeschrijving*, n.d. and *Lijst met Prijsafspraken*, n.d.
Weight in GNP: Nederlandse Volkshuishouding.

Table 4 Percentage distribution of national registered cartels in manufacturing, 1952, 1967 and 1985

1952: Calculated from ARA, MEZ, 2.06.087, 4099, *Concept Betreft Kartelpolitiek*, No 1952/92 HN/DO, n.d. Appendix Two *Overzicht per bedrijfstak of groep van artikelen van de mate van kartellering van het nederl. bedrijfsleven* modified with information from *Quantitatieve Kartelbeschrijving*, n.d. and Lijst met Prijsafspraken, n.d.

1967: Silbiger 1964: 240-244.
1985: Tweede Kamer, Zitting 1986-1987, Bijlagen 19700, XIII, No. 3.

Table 5 Percentage of registered national cartels containing various cartel practices, 1955-1985

1955: Tweede Kamer, Zitting 1954-1955, Bijlagen 3295, Regelen omtrent de economische mededinging (Wet economische mededinging).
1961, 1971, 1976, 1985: Barendregt 1991: 37.
1967: Silbiger 1964: 240-244.
1973, 1983: 't Gilde and Haank 1985: 10

Table 6 Distribution of registered cartels (1952) by the date of first formation

Calculated from ARA, MEZ, 2.06.087, 4099, *Concept Betreft Kartelpolitiek*, No 1952/92 HN/DO, n.d. Appendix Two *Overzicht per bedrijfstak of groep van artikelen van de mate van kartellering van het nederl. bedrijfsleven* modified with information from *Quantitatieve Kartelbeschrijving*, n.d. and *Lijst met Prijsafspraken*, n.d.

Notes

1. Ministerie van Economische Zaken (Ministry of Economic Affairs) (1949), *Overzicht kartelregistratie*, s.l.

2. Algemeen Rijksarchief, Tweede Afdeling, Ministerraad, (henceforth; ARA, MR) 2.02.05.02, 586, MEZ to REA: betreft Kartelpolitiek, no date. (REA 20.6.1950).

3. Tweede Kamer, Zitting 1954-1955, Bijlagen 3295, Regelen omtrent de economische mededinging (Wet economische mededinging). Memorie van Toelichting No 9., page 8-9.

4. Table 3 does not cover the entire economy since we have omitted primary production, public utilities, banking and insurance, transport and communication, and services from the analysis (which together contributed 27.7 per cent of GDP).

5. Tweede Kamer, Zitting 1953-1954, Bijlagen 3295, Regelen omtrent de economische mededinging (Wet economische mededinging). Memorie van Toelichting No.3, page 7.

6. Sometimes this mingling of private cartel and public policy business went very far indeed. As one internal document of the Ministry for Economic Affairs concluded: "Characteristic of [this] intertwining of product groups and cartels is the strange habit of cartels in the aftermath of the liberation to handle their business on official paper of the product group and thus to lend the cartel an official status, which obviously reinforced its authority." ARA, Ministerie van Economische Zaken (henceforth:

MEZ), 2396 *Enige opmerkingen over de kennis omtrent het bestaan van kartels, hun invloed en het ten opzichte van kartels gevoerde beleid, voor zover zulks van belang kan worden geacht voor een nieuwe wettelijke regeling* (*afgesloten 1 juli* 1949), 30.8.1949.

7. ARA, MR 2.02.05.02, 586 Ministry for Economic Affairs to the Raad voor Economische Aangelegenheden (REA), *Betreft Kartelpolitiek*, no date.

Tweede Kamer, Zitting 1950-1951, Bijlagen 2009, Voorontwerp van wet houdende regelen omtrent de economische mededinging (Wet economische mededinging). Presented to parliament on 28.11.1950. The first parliamentary debate on the draft Act took place in 1953.

8. ARA, MR 2.02.05.01, Minutes of the Economic Committee of cabinet, 15.11.1950.

9. The SER advice is also published as a parliamentary document. See: Tweede Kamer, Zitting 1953-1954, Bijlagen 3295, Bijlage van de memorie van Toelichting No.4.

10. ARA, MR, 2.02.05.02, *Rapport van de interdepartmentale werkgroep ter bestudering van de Amerikaanse anti-trustpolitiek en de in verband daarmede door ons land eventueel te treffen maatregelen* (covering letter 12.5.1953) (MR 3.6.1953) Also contains appendices.

11. National Archives and Records Administration, Washington D.C., Record Group 469 Special representative in Europe. Office of the General Counsel. Subject files, 1948-53. *Restrictive business practices,* 1950-53. (Draper to State Department), 28.11.1952.

12. ARA, MR, 2.02.05.02, *Rapport van de interdepartmentale werkgroep ter bestudering van de Amerikaanse anti-trustpolitiek en de in verband daarmede door ons land eventueel te treffen maatregelen* (covering letter 12.5.1953) (MR 3.6.1953) Also contains appendices.

13. ARA, MR, 2.02.05.01, Minutes of Cabinet, 29.7.1953.

14. ARA, MR, 2.02.05.01, Minutes of Cabinet, 3.8.1953

15. ARA, MR, 2.02.05.01, Minutes of Cabinet, 3.8.1953; Tweede Kamer, 1953-1954 Bijlagen 3295, Regelen omtrent de economische mededinging (Wet economische mededinging). Voorlopig verslag No.6., page 6.

16. ARA, MR, 2.02.05.01 Minutes of Cabinet, 12/13.3.1956.

17. ARA, MEZ 2397 *Nota van Verbond van Nederlandse Werkgevers, Katholiek Verbond van Werkgeversverenigingen, Verbond van Prot.Chr. Werkgevers in Nederland inzake het Ontwerp van Wet houdende regelen omtrent de economische mededinging*, 12.2.1954, ibid, *Economische mededinging en handel. Standpunten van het Verbond van de Nederlandse Groothandel,* no date.

18. Tweede Kamer, Zitting 1954-1955, Bijlagen 3295, Regelen omtrent de economische mededinging (Wet Economische mededinging). Memorie van Antwoord No.7, page 4-5.

19. Tweede Kamer, 1955-1956, 65th meeting, 13.3.1956, page 3785.

20. ARA, MR, 2.02.05.01, Minutes of Cabinet, 12/13.3.1956.

21. Tweede Kamer, 1954-1955, Bijlagen 3295, Regelen omtrent de economische mededinging (Wet economische mededinging). Memorie van Antwoord en Bijlagen, No.7-9.

22. ARA, MEZ Centraal archief, 4105 *Betreft: ministeriële uitspraken inzake kartel- en prijsbeleid bij begroting* 1955, 14.1.1955.

23. Tweede Kamer, Zitting 1955-1956, Bijlagen 3295, Regelen omtrent de economische mededinging (Wet economische mededinging). Verslag van het mondeling overleg

No.18, page 2.

24. Tweede Kamer, Zitting 1954-1955, Bijlagen 3295, Regelen omtrent de economische mededinging (Wet economische mededinging). Bijlage II bij de Memorie van Antwoord No. 9.

25. ARA, MEZ Centraal archief, 4105 *Betreft: ministeriële uitspraken inzake kartel- en prijsbeleid bij begroting* 1955, 14.1.1955.

26. ARA, MEZ, 2406 *Betreft: mededingingsregelingen in de wit- en pakpapierbranche*, No.34/59, 14.8.1959.

27. ARA, MEZ 2406 *Betreft: grammofoonplatenkartel* (nota 53/59 HN/DG 8.10.1959), 4.11.1959.

28. This total includes 22 cartels whose nature was unspecified and which have not been included in the sectoral breakdown.

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