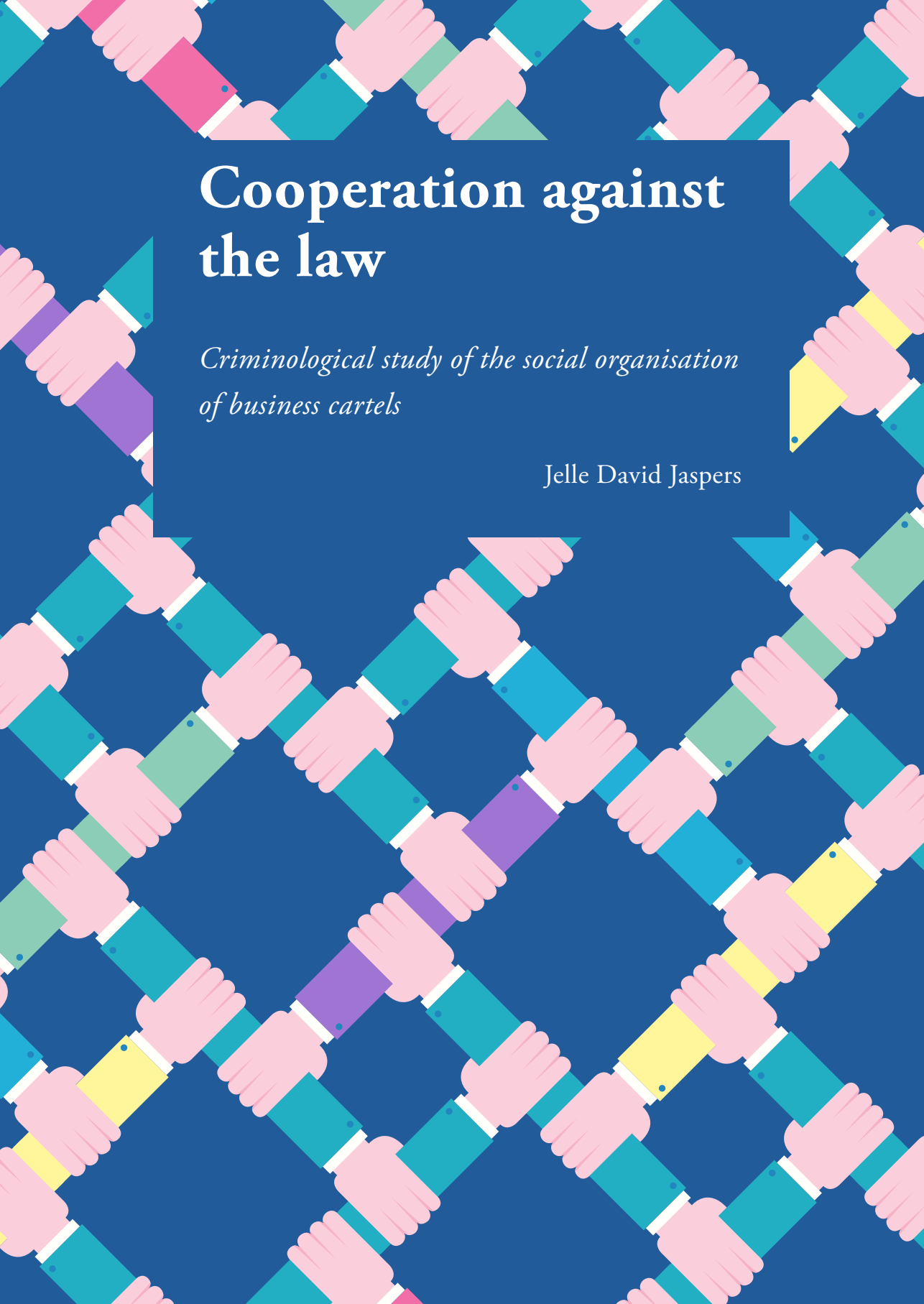


Cooperation against the law

Criminological study of the social organisation of business cartels

Jelle David Jaspers

Cooperation against the law

Criminological study of the social organisation of business cartels

Jelle David Jaspers

Thesis design: Proefschrift-aio.nl
Printed by: Proefschrift-aio.nl

Cooperation against the Law

Criminological study of the social organisation of business cartels

Verboden samenwerking

Een criminologische studie naar de sociale organisatie van kartelafspraken

Proefschrift

ter verkrijging van de graad van doctor aan de
Erasmus Universiteit Rotterdam
op gezag van de rector magnificus

Prof.dr. R.C.M.E. Engels

en volgens het besluit van het College voor Promoties.
De openbare verdediging zal plaatsvinden op

vrijdag 21 februari 2020 om 13.30 uur

door
Jelle David Jaspers

geboren te Leeuwarden

Erasmus University Rotterdam

Erasmus

Promotiecommissie

Promotoren:
Prof. dr. H.G. van de Bunt
Prof. dr. J.G. van Erp

Overige leden:
Prof. dr. M.L.M. Hertogh
Prof. dr. L. Paoli
Prof. dr. R. van Swaaningen

Table of contents

Preface

For a thesis dealing with the shadow side of cooperation, the journey of writing it could not have been further from it. I am indebted to many people whom I had the pleasure of working with and that helped me greatly along the way. The people I met and worked with throughout my research are the best part of the PhD-journey for me.

I am grateful to the Netherlands Organisation for Scientific Research (NWO) for funding my research. Through their Research Talent grant, awarded in 2014, I was able to pursue this study. I am thankful to the detection team at the Authority for Consumers and Markets for their interest, time and help at the start of this study. A special thanks to Gerard Bakker, Stijn van den Broek, Geert Beckers and Pablo Amador Sanchez for answering my questions. I am also thankful to the Dutch Association for competition law for forwarding my request for respondents amongst its members and for co-organising a workshop afternoon around leniency with practitioners. I want to thank all my respondents for their time and candidness.

I am grateful to the Erasmus School of Law for providing me with a great place to work, develop myself as a researcher and for giving me the freedom to conduct my own project. I would especially like to thank my former colleagues and students in the department of Criminology. Thank you all for sharing your thoughts, encouragement, tips, experience, stories and celebrating the highs and lows of academic life. A special thanks to Karin van Wingerde, both for all those 'minutes' I have stolen from you standing at your door for 'just a small question' and also for your help in the final phase of my thesis.

I am also grateful to the members of the Doctorate Committee for assessing my thesis and for their comments. I would especially like to thank my supervisors. Dear Judith, thanks to you we responded to that NWO-call that started this whole project. I have gotten to know you as a true networker, connecting people and ideas. With an active and positive drive, you always get things done. This essential energy has proven both helpful and inspirational to me. I am confident that future PhD-candidates will also benefit greatly from your supervision. Dear Henk, your career and reputation are impressive and like many others, I have looked up to your broad and deep knowledge of the field since my student years. It has been such a pleasure working closely with you over the past years, getting to know you as a modest, sometimes shy and kind-hearted person with a wicked sense of humor. You gave me my first job and opportunity to commence my academic career. This is something I will always be grateful for.

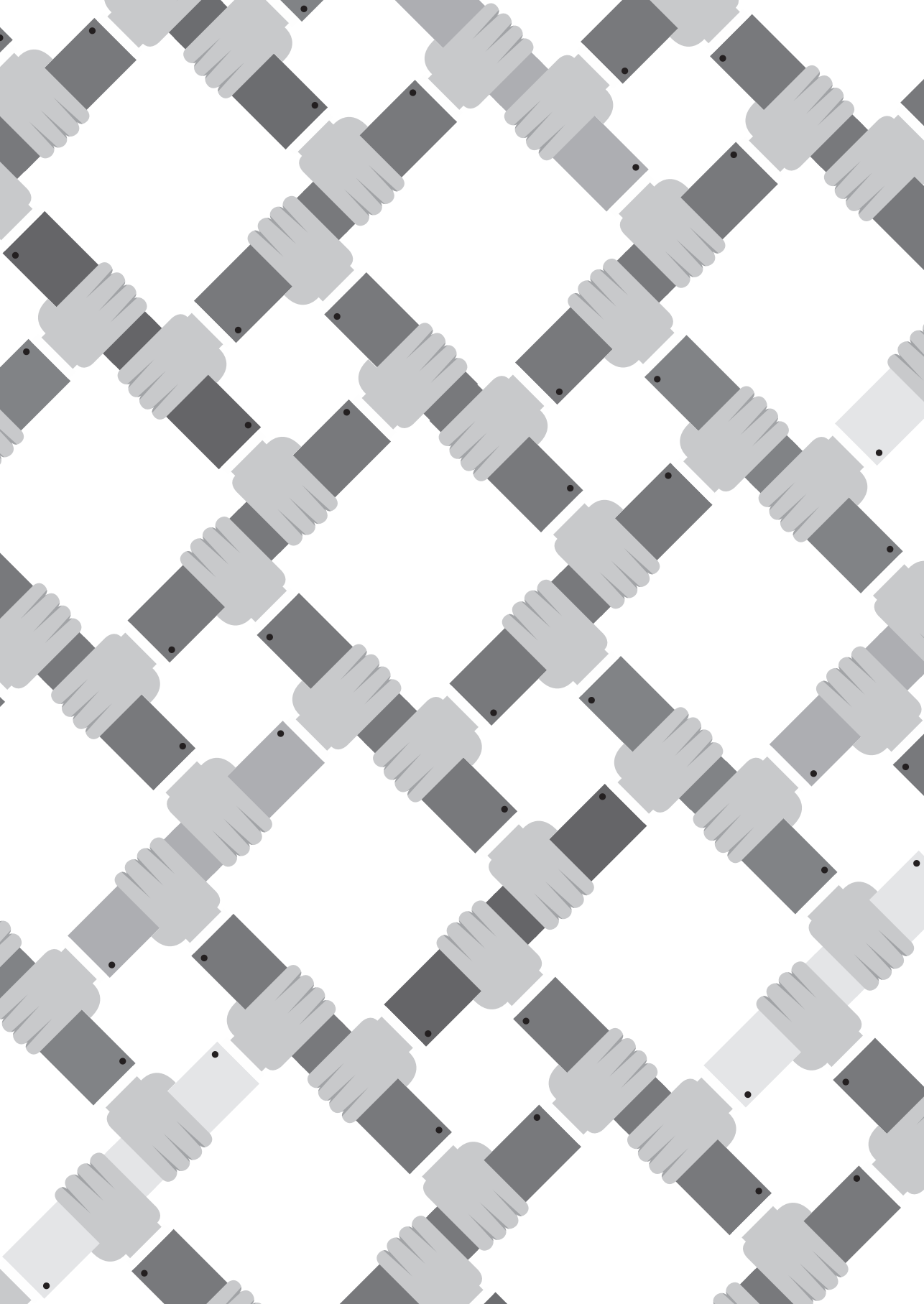
Additionally, I have had the pleasure of working with so many great colleagues abroad. Carlo, thank you so much for hosting me at your institute in Montréal. Thank you for taking time out of your busy schedule to meet with me and for sharing your thoughts and ideas. To the team

there: Marie, Max, Dominique and Julian, thank you for sharing your workspace, ideas and for hanging out, exploring the city and the sugar shacks! Nick, thank you so much for hosting me in Manchester. You are a truly talented academic and a rising star in this field. I have learned a lot from seeing you and your mind at work. Thank you for being so generous with your time and reading and commenting my writing.

Furthermore, I hereby want to thank all my friends and colleagues in Hong Kong. The joy of meeting new friends and making new memories motivated me even more to make it to that finish line for the thesis. Thank you especially, Carl, Martha, Vicky, Reece, Aoife, Karan, Marcel and Bryan for the weekend and evening hikes, dinners, karaoke and weekend trips. Exactly the distraction I needed!

Finally, I would like to thank my friends and family back home. Dear mom and dad, throughout my life you have always supported me. You encouraged me, but never pushed, challenged me, but never judged and you love me unconditionally. Dad, thank you for showing me the joy of asking questions and learning, and the importance of determination. Mom, thank you for showing me how to have empathy, be kind and attentive and the importance of being stubborn. I am also thankful for having two such great paranymphs by my side. Dear Merlijne, thank you for being the best big sister in the world. For setting such a high bar for achievement whilst always caring about how I am doing. It gives me so much joy that you accepted to return the favor of being my paranymph this time around. Dear Michel, thank you for being such a great friend and accepting to be my paranymph. We grew up into adulthood together and I truly enjoyed watching you become the amazing person you are today. Arne, Ivo, Robbert, Sonny, Luuk, Frank, Maart, thank you all for your friendship. All the great excuses we come up with for small weekend getaways and celebrations, they have been a welcome distraction throughout the years. Guess what, a PhD-defense is another excuse to drink a beer!

Above all, thank you my dearest Anne for your love, patience and support. I enjoy our life adventures so much and I am looking forward to many more to come.



Chapter 1

Introduction: criminological study on the social organisation of business cartels

1. Introduction

> *In October 2014, the International Council on Clean Transportation published a study revealing large discrepancies between official certification standards and real-world exhaust emissions from modern diesel cars (Franco, Posada Sanchez, German & Mock 2014). On average, Nitrogen oxides (NOx) emissions were seven times higher than the limit. Tests were conducted using three cars, two of which were Volkswagen cars. The American Environmental Protection Agency and California Air Resources Board posed questions to Volkswagen (VW) in the US, after which VW eventually admitted having used false software to rig the testing procedures for new cars (Reuters 2015). This case is also known as the Emission scandal or Diesel gate. However, on the back of Diesel gate was the discovery of an even bigger and underlying scheme between five car manufacturers: VW, Audi, Porsche, BMW and Daimler. Since the 1990's, between these five manufacturers two hundred employees in over sixty working groups made agreements on car technologies, costs, suppliers, and market allocation (Dohmen & Hawranek 2017). Journalists Dohmen and Hawranek -Der Spiegel- state it is one of the biggest cartels in the history of Germany. Besides financial damages to costumers, a lack to innovate and improve technologies for cleaner emissions and agreements to delay introduction of these technologies affected public health. Poor air quality causes thousands of premature deaths through NOx-gasses (Dohmen & Hawranek 2017).*

Cooperative behaviour is often associated with beneficial outcomes and positive externalities. For example, cooperation in light of achieving global climate goals, improving sustainability of products, or exchanging knowledge on health and safety practices. These are considered positive aims achievable through cooperation between organisations. However, some forms of cooperation and collaboration have detrimental consequences, as the example demonstrates. In other words, cooperation can be for good or for bad. This study deals with the shadow side of cooperation. This study deals with a type of cooperation that is forbidden by law because

of its negative effects, namely business cartels. Business cartels entail cooperation between firms in the same or similar area of economic activity trying to avoid competition between them by controlling the market through e.g. fixing prices, dividing customers or rigging tender procedures. By effect, cartels drive up prices, decrease costumer choice, limit opportunities for new businesses to enter the market, hinder innovation and negatively affect the quality of products. In addition, cartels are often associated with draining public funding, for example in case of cartels in construction industry, pharmaceutical and other healthcare industries. Therefore, cartels can also negatively impact public health. Insight into the nature and structure of cartels is necessary for prevention and disruption of cartels in order to minimise their negative impacts in society.

Cartel agreements need an organising structure, a system of communication and a way to prevent or resolve conflicts, just like other forms of organised cooperation. At the same time, participants to a cartel seek to avoid detection of their illegal agreements. Those two elements are central to this thesis and are illustrated by this example of a seminal European case: the European Vitamin cartels.

> *In 2001, the European Commission fined eight companies a total of €855,22 million for multiple secret price-fixing and market-sharing cartels in vitamin products. In the words of the then European Commissioner for Competition Mario Monti: "the most damaging series of cartels the commission has ever investigated" (EC 2001, Press release IP/01/1625). The cartels were characterised by both a highly formal nature as well as elaborate efforts to ensure secrecy. Regular meetings conducted on three corporate levels demonstrated the structured nature of the cartel. Top executives met once a year in "summit" conferences, staged in luxurious hotels and resorts to set the cartel's "budget". The managers, one level below the executives, followed up the conferences with "Shareholder Meetings" to set and monitor quotas and settle on mutual compensations. Lastly, regional managers met quarterly to talk prices and volumes and communicate back to the global sales managers (Connor, 2001). Secrecy was organised by instructing participants to destroy the minutes of their meetings. Some meetings were held in Basel (Switzerland) because participants thought European jurisdiction did not apply there. When the industry was under investigation, cartel participants used burner phones and switched cars in an attempt to avoid detection from regulators.*

Conflicts between cartelists, cartelists cheating on agreements or cartelists denouncing the cartel to the authorities all form internal threats to the stability of business cartels. Such internal threats are all the more pressing today, now that cartel agreements are subject to administrative, private or criminal legal sanctions globally. Therefore, cartelists need to prevent or resolve internal conflicts and ward-off threats to the stability of the agreements without the

use of legal means, such as formal arbitration or enforceable contracts, available to legitimate collaborations. This is why cartelists are known to establish several clandestine coordination and communication techniques. Sometimes these techniques result in a highly formalised structure, as the example of the Vitamin cartels demonstrates. In other cases, cartel agreements revolve around more informal 'understandings' between competitors. Ironically, when the cartel is exposed or detected, the result of internal communication is often a paper trail that will serve as evidence for the conduct and involvement of individual participants.

Paoli (2002) describes how criminals operating in illegal markets face the need to operate both *without* and *against* the state (i.e. law). First, because goods and services provided by illegal market suppliers are prohibited, they cannot resort to state institutions to enforce contracts. Because of the lack of institutional trust, interpersonal trust becomes essential in illegal networks. Second, illegal market suppliers have to operate under threat of arrest and confiscation of their assets by law enforcement (Fijnaut & Paoli 2006). In analogy to Paoli's description of organised criminals, cartelists also have to operate without and against the law. Constraints revolve around the interaction between cartelists (without the law) and between cartelists and regulators (against the law/state). First, cartelists have to manage their illegal agreements and solve potential conflicts without legally enforceable contracts. Without institutional trust in the form of agreements backed by legal provisions, interpersonal trust will prove essential for cartelists. Second, cartelists have to operate under the threat of detection and punishment of their agreements or defection because regulators reward confessions with sanction immunity (leniency). These constraints have increased in recent decades due to a change in cartel enforcement in Europe and globally. Regulation and enforcement of cartels have moved from a position of relative tolerance (outside the US) towards increased criminalisation. A growing number of countries across the globe introduced rules prohibiting cartels and strict criminal or administrative punishments, ranging from high monetary fines to prison sentences. Especially cartel enforcement by the European Commission and in European Union member states, this process accelerated over the past three decades, and brought cartel regulation and enforcement in the EU closer to the longstanding and stricter criminal law cartel enforcement tradition in the US.

Despite the increased regulation and enforcement of cartel conduct however, recently detected cases in Europe demonstrate how cartels last for years or even decades before they are uncovered. These detected cases show how cartel conduct can be systemic to an entire industry sector. This prompts the question central to this research, which is **how cartel agreements manage to endure despite increased efforts to discourage and punish them**. In this thesis, the approach to the research question focuses on the social organisation of cartels and the interaction between cartels and enforcement. The social dynamics within and relational and structural networks around cartels are examined to determine how businesses succeed to cooperate

without and against the law. Paragraph 1 is an introduction to this study. In paragraph 2, existing criminological studies on business cartels are discussed. Paragraph 3 introduces the theoretical perspective of this study that is complementary to the existing literature. Paragraph 4 deals with the legal and regulatory context of this study: the global criminalisation of business cartels and the specific European setting of cartel regulation and enforcement in comparison to the US. Paragraph 5 outlines the structure of the thesis, the research question, sub questions and the research methods.

1.1 Defining cartels

Harding and Joshua (2010) developed a general and broad definition of cartels as: "An organization of independent enterprises from the same or similar area of economic activity, formed for the purpose of promoting common economic interests by controlling competition between themselves" (p. 12). This definition defines cartels as a form of *organisation*, conducted by firms in *the same market*, trying to *control competition*. The Organisation for Economic Cooperation and Development (OECD) defines cartels as: "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce." The OECD definition is more specific, in that it points to the different types of cartel agreements and is more closely related to legal definitions.

There are four types of cartel conduct: price-fixing, bid rigging, market allocation and information exchange. First, in price fixing cartels, businesses make explicit agreements on the price of goods and services. Price-fixers will often arrange regular meetings to discuss the market and collectively determine prices and strategies to control the market through controlling prices. A well-known example of a price-fixing cartel is the American investigation into the international ADM lysine cartel (see Box 1.1) that ultimately led to investigations into the European Vitamin cartels. Second, in bid rigging cartels, companies agree who gets a project in a tendering procedure. They submit bids pretending they are competitive but raise prices artificially, determining the winner beforehand. Bid riggers take turns in winning and often even out disparities through compensations at the end of the year. Bid rigging often occurs in the construction industry and in public procurement. Well-known cases of bid rigging include the New York construction industry (Jacobs, Friel & Raddick 1999), the Dutch construction fraud (Hertogh 2010; Van de Bunt 2010; Van den Heuvel 2005) and the construction cartels in Quebec, Canada (Reeves-Latour & Morselli 2017). Third, market allocation can take two forms: dividing costumers or dividing markets geographically into regions and agreeing not to compete outside of one's own territory. Costumer division agreements operate through costumer lists and either a rule about not targeting other cartelists' 'A-relations', or flexible rules including financial compensation in case costumers assigned to other cartelists are acquired

despite efforts of allocating them. Fourth, the EU recently included 'information exchange' in the legal concept of cartels in the European guidelines on horizontal agreements. This means non-explicit and/or one-sided information exchanges concerning information contributing to market transparency and predictability can constitute a cartel and be punished likewise. Conceptually, this introduces a new category of cartels, but in legal practice information exchange so far has only been used in connection to one of the other types of conduct and as supporting evidence to reconstruct a continuous cartel infringement. Lastly, although these types of conduct can theoretically be separated, in practice cartels are often a combination of different strategies and methods used to execute agreements aimed at controlling the market.

BOX 1.1

ADM Lysine Cartel: the FBI Informant

One of the world's most well-known price-fixing cases is the international Lysine cartel. This was a global cartel between Archer Daniels Midland (ADM), a US based food processing company, and its Japanese and Korean competitors. Lysine is a widely used animal food additive, an essential amino acid that speeds up the formation of lean meat on farm animals. During the mid 1990s, the companies involved in the cartel conspired to fix prices and managed to raise prices for lysine up to 70%. The Vice-President of ADM, Marc Whitacre, eventually became an FBI informant and revealed the cartel through secret tapings of the meetings. Marc Whitacre's story is remarkable in several ways and resulted in both a book 'The Informant' by writer Kurt Eichenwald and a movie with the same title, starring Matt Damon. Conley & O'Barr (1997) describe the ADM story as the result of a classic autocratic top-down corporate culture, in their article 'Crime and Customs in Corporate Society: A Cultural Perspective on Corporate Misconduct'.

Corporate and white-collar criminology define cartels as a classic form of white-collar crime. Conceptual debates aside, white-collar crime is generally defined as: "illegal or unethical acts that violate fiduciary responsibility of public trust committed by an individual or organization, usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organizational gain" (Helmkamp, Ball & Townsend 1996: 351). According to Friedrichs (2010) white-collar crime is characterised by the following criteria: "it (1) occurs in a legitimate occupational context; (2) is motivated by the objective of economic gain or occupational success; and (3) is not characterized by direct, intentional violence" (p. 5). Likewise, cartel conduct takes place within the conventional nature of doing business, namely the process of increasing predictability and decreasing risks. In principle, cartelists act in the interest of increasing stability and profitability of their companies, however using illegitimate or criminal means to that end and potentially damaging the public or consumers. Also, business

cartels are not usually associated with the use of violence, although there are exceptions (*see chapter 4*). In addition, cartels can be defined more narrowly as corporate crime. Braithwaite (1984) defines corporate crime as: "conduct of a corporation, or of employees acting on behalf of a corporation, which is proscribed and punishable by law" (p. 6). Comparable to Sutherland (1949), this definition avoids legalistic discussions about whether conduct that is not punishable by criminal law falls within the definition. Likewise, this study applies this broad definition, because criminal, administrative and private legal sanctions shift throughout time and vary between jurisdictions for the same conduct. However, these regional differences and the moral ambiguity that it expresses are relevant and will be addressed throughout this study.

2. Criminological studies on business cartels

To understand how the nature and structure of cartels enables them to endure, we first need to understand what causes the existence of cartels in the first place. This research therefore builds on existing social-legal and criminological studies that focus on the motives and opportunities for individuals and organisations to get involved in cartel agreements. These studies result in two main conclusions. First, increasing predictability of business and reducing risks and uncertainties of a competitive market are important drivers for cartelists to get involved in cartel agreements; and illegal conduct is effectively neutralised and rationalised by cartelists. Second, motives and rationalisations for cartel conduct are socially embedded in collectivistic business cultures that cultivate cooperation, collaboration and anti-competition sentiments at odds with (changing) cartel legislation and regulation. These are two main points of departure in the analysis of social organisation of cartels in this study.

2.1 Motives for involvement in cartel agreements

Many empirical studies explain cartel conduct using some version of a cost benefit analysis, rooted in rational choice theory, e.g. strain (cf. Paternoster & Simpson 1996). Jamieson (1994) looks at all antitrust violations (242) in the US among Fortune 500 firms between 1981 and 1985. She reviews causes on both the level of the firm as well as the level of the industry and market. Jamieson describes cartels as "an initial aversive response to the turbulent field" (p. 96) and notes how "rational corporate structures require organizational members to translate environmental uncertainty into something predictable" (p. 25). In other words, cartels are a means to an end for corporations attempting to manage the uncertain environment in which they operate: a competitive and ever-changing market. Cartels are a response at the corporate and individual level as a result of interacting with uncertainty on a macro level. Likewise, Geis (1967) in his seminal case study on the heavy electric antitrust cartels in the US, points to "the avoidance of uncertainty, the formalization and predictability of outcome, the minimization of risk" (p. 130) as drivers for cartel conduct. Sonnenfeld & Lawrence (1978) studied the

folding carton industry in the US, using qualitative interviews with executives of four of the ten largest producers in the industry. The study of Sonnenfeld and Lawrence found that price fixing constituted an attempt to translate uncertainty, and corporate and executive 'vulnerability' into 'a form of rationality that the internal corporate structure could manage' (cf. Jamieson, 1994, p. 18). Agnew, Piquero and Cullen (2009) affirm how economic strain is a substantiated theoretical explanation for white-collar crime, and also note how this economic strain works reversely through the 'fear of falling'. This fear of falling is best described as an anticipated strain, especially applicable to white-collar workers, regarding losing the success and status people have achieved throughout their career. This strain can induce crime in an attempt to avoid anticipated losses. Again, this explanation rests on a rational choice perspective. In this rational choice perspective offenders are viewed as rational, profit-seeking entrepreneurs, involved in activities that are driven by the same laws of supply and demand as legal activities (Kleemans 2013) (cf. Becker 1968).

The studies discussed so far are all cross-sectional in design and generally depart from detected cases, either using large quantitative databases from enforcement agencies or conducting interviews and case study analyses. Studies that adopt a longitudinal approach explain cartel conduct by looking at the individual life-course of offenders (Wheeler, Weisburd, Waring and Bode 1988; Weisburd, Wheeler, Waring & Bode 1991; Weisburd & Waring 2001; Piquero & Weisburd 2009). These studies connect characteristics of the offender (age, race, sex etc.), with characteristics of the offense. This results in categories of offenders, including high rate persistent group of offenders labelled 'stereotypical criminals', an intermittent group pattern of offending called 'opportunity seekers', and a low-rate group of offenders named 'opportunity takers' and 'crises responders' (Weisburd & Waring 2001). Studies concerning the life-course of white-collar criminals demonstrate that cartelists: 1) are repeat offenders; 2) begin their criminal 'careers' at a later age compared to other types of offenders; and 3) have a lower frequency of offending compared to other types of offenders (cf. Weisburd, Chayet & Waring 2016). This affirms claims by Sutherland (1949) and Connor (2010) that cartel conduct is reoccurring, and cartelists are often recidivists (repeat offenders).

2.2 Opportunities for involvement in cartel agreements

Besides push factors that motivate firms to engage in cartel conduct, there are pull factors that create opportunities for cartel agreements. Criminal opportunities for cartel agreements include: high barriers for market entry, a low number of players in the market (high market concentration) and homogeneity of products (Benson & Simpson 2009; Jamieson 1994; Punch 1996; Sonnenfeld & Lawrence 1978). Barriers for market entry may concern high research and development costs, high costs of transportation or patents, licences and permits (e.g. related to environmental sustainability or safety). These barriers make a market more closed to new entrants and by effect more predictable for the existing players in it. Firms in markets with high

entry barriers will also have a higher chance of being well acquainted with their competitors. For the number of firms in a market a similar argument can be made; less players results in more opportunity for being well acquainted with your competitors. However, when it comes to the number of players in a market, Jamieson (1994) questions: "does the greater concentration/higher profitability configuration relieve organizations from financial pressures to violate the law? Or, does greater concentration facilitate collusion that, in turn, accounts for the greater profits of these corporations" (p. 25). In other words, a low number of participants in a market might facilitate cartels but make the *need* for collusion less pressing. The same goes for high barriers of entry; they might facilitate (existing) cartels, but decrease the need for a cartel, because if the potential of new entries is low, the market is already predictable so there is no need for cartel agreements. Lastly, higher product homogeneity makes it easier for competitors to fix cartel agreements. Products like cement, flour, oil etc. have a clear volume and day price. This makes the market more transparent and predictable, which also facilitates agreements between competitors and enforcing those agreements effectively (Benson & Simpson 2009).

2.3 Neutralisations and rationalisations for involvement in cartel agreements

Neutralisations are a type of cognitive dissonance connected to crime and invoked in the human brain to decrease effective self-control previous to engaging in a criminal or deviant act (neutralisation) or after a criminal or deviant act (rationalisation). Neutralisation techniques are originally described in a study on youth crime by Sykes and Matza (1957) and were later applied to corporate crime (Box 1983; Piquero, Tibbetts & Blankenship 2005; Agnew et al. 2009). These neutralisation techniques include denying responsibility; denying victims and damage; claiming regulation inhibits growth and prosperity; or appealing to higher loyalties like continuity of the firm and providing employment for personnel. An example of denying victims and damage is the much-referenced quote by a Westinghouse executive (in answering questions from the prosecutor) in the study by Gilbert Geis (1967) on the heavy electrical equipment cartels: "Illegal? Yes, but not criminal. (…) I assumed that criminal action meant damaging someone, and we did not do that" (p. 67). Besides techniques of neutralisation, Benson's (1985) study on antitrust violations demonstrates how cartelists rationalise their conduct by explaining it with existing traditions in the market. Certain forms of cooperation or market sharing are part of standing practices and customs in the industry. Offenders claim that standing practices and agreements (while laws and regulations changed) forced them into breaking the law. One or more of three factors generally affect the above-described explanations: 1) personal values and norms 2) corporate culture, and 3) industry culture. Cartel conduct is rooted in principles, norms, motives and opportunities and can, over time, become ingrained in traditions and customs within a corporation, a profession or an industry as a whole (cf. Conley and O'Barr 1997). Neutralisation techniques are part of this process. For example, Sutherland (1949) notes how trade associations not only provide a formal organisation that can be used for coordination purposes, but also as "an agency for developing consensus regarding competition" (p. 70). Sutherland describes the sentiment against competition

that is cultivated within the context of trade associations: "participants in these associations hear frequently of 'ruinous price wars', 'cut-throat competition', 'stabilizing the industry' and 'live and let live'. They have developed contempt for 'price cutters' and 'price chisellers' (...). Price cutting is one of the heinous sins of businessmen in this anomalous period in which businessmen talk of the virtues of free competition and free enterprise. Price cutters such as Ford, Firestone, and Macy's have been very unpopular among their business associates" (p. 70-71).

Although many criminological studies on cartel conduct do acknowledge the essential role social interactions and networks play in cartel conduct, they do not make it the focal point of their study and hereby neglect to actually analyse the nature and structure of cartel networks systematically. Baker and Faulkner (1993) point out: "Shapiro's (1980) conclusion about criminology still applies to the study of price-fixing conspiracies: "The study of crime and deviant behaviour has been negligent, particularly in recent years, in its lack of attention to the form and social organization of criminal activity. We know a great deal about criminals ... but very little about the activity itself" (p. 29; also see Wheeler 1976)" (p. 842). For cartels, this gap is still insufficiently filled in the literature. To the contrary, criminological studies on organised crime *have* focused on the form and organisation of criminal activities over the past decades (cf. Morselli 2009; Kleemans & Van de Bunt 1999; 2003) and have incorporated insights from social network analysis. This has resulted in important findings, such as how organised criminal groups are often not hierarchically structured but operate through diverse social networks that are embedded in existing relations and institutions (Kleemans & De Poot 2008). Another insight from criminological studies on organised crime is the demand for communication structures and the development of alternative means and strategies to build trust between cooperating criminals. The insights from criminological studies on organised crime have had major societal impact in the past 40 years. Research findings have changed and shaped criminal policy and enforcement strategies of organised crime around the world. This demonstrates the potential of an approach focused on the organisation of criminal conduct.

Within the criminological study on corporate and white-collar crime, a lack of attention towards the form and organisation of corporate crime in the past has inspired several white collar and corporate crime scholars to adopt a similar approach for the study of corporate and white-collar crimes. In the literature on corporate crime, an increasing number of studies now examine the organisation of corporate crime and its embeddedness in existing social structures (cf. Edwards & Levi 2008; Levi 2008a; Levi 2008b; Lord & Levi 2017; Van Erp 2018). These scholars also incorporate insights from social network analysis. So far, scholarship has barely dealt with the topic of cartel conduct using this approach, with the exception of some studies in the field of social network analysis (cf. Baker & Faulkner 2009). These studies demonstrate how the significance of trust and communication influences the structure of covert networks like cartel agreements (see *Chapter 3*).

Two observations after this overview of criminological studies on cartels: the existing literature focuses on motives, rationalisations and opportunities for initial involvement in cartel conduct, and predominantly so for a non-European context (mainly US based).

First, most of the criminological studies on cartels focus on individual or organisational motives, rationalisations and opportunities that explain why people get involved in cartel conduct. Focussing on factors that explain why people get involved in cartels, these studies deal less with the collective aspects associated with cooperating in illegality and the question how offenders deal with the constraints of coordinating and concealing their conspiracy. In other words, existing studies deal with how cartels *arise* or *originate*, but insufficiently explain how cartelists *continue* or *sustain* their illegal agreements. The scholarly contribution of an approach that does focus on the organisational and collective aspects of crime are demonstrated by criminological studies on organised crime. Criminological studies on organised crime have incorporated insights from social network analysis and focus on the social embeddedness of crime in professional networks and institutions. Although the criminological discourse on corporate and white-collar crime is focussing more attention towards organisational aspects of crimes such as fraud, embezzlement and corruption, studies have not applied this approach to business cartels.

Second, existing criminological studies on business cartels are mostly US-based as a result of a longer tradition of criminalisation and criminal law enforcement in the US, as opposed to the European Union. Because of this, the existing body of research insufficiently takes into account specific European legal and cultural contexts. Regulation and enforcement of cartels in Europe has traditionally been a matter of administrative rather than criminal sanctions. In Europe, cartel conduct is associated with much more ambiguity and regional differences towards the wrongfulness and type of punishment than in the US.

Hence, a gap in current research lies in studying how social network dynamics between cartelists and between the cartel and the regulator contribute to the *continuation* or *endurance* of existing cartel agreements within a European context. This study addresses that gap by using a perspective that incorporates social dynamics of cartels in a European context. The following section describes this embedded perspective.

3. Towards an embedded perspective on the organisation of cartel conduct

Cartel conduct is *embedded* economic action. Cartel agreements are economically motivated, as discussed previously, but they take place in a social and cultural context that influences the nature and structure of these agreements. The term *embeddedness* was introduced by Karl Polanyi (1944) and refers to the degree non-economic institutions constrain economic activities. DiMaggio & Zukin (1990): "We use "embeddedness" broadly to refer to the contingent nature of economic

action with respect to cognition, culture, social structure and political institutions" (p.15). DiMaggio & Zukin (1990) distinguish four types of embeddedness: cognitive, cultural, social and political embeddedness. First, cognitive embeddedness refers to mental processes that limit the exercise of economic reasoning, for example bounded rationality (Simon 1987). Second, cultural embeddedness refers to shared or collective understandings that shape economic strategies and goals. For example, limits to trading between ritually classified groups or cultural norms of integrity causing people not to cheat even if they could get away with it. Third, social embeddedness refers to the networks of social interaction in which economic action takes place. For example, dealing with the significance of trust and reciprocity in business transactions and relations. Fourth, political embeddedness refers to the sources and means of economic action that reflect inequalities of power (Dimaggio & Zukin 1990). These power imbalances can derive from legal systems, for example in case of property rights the owner is the power-holder, for they control the relevant criteria in certain economic activities.

This study seeks to explain the longevity of cartel agreements by studying social and cultural explanations for the social organisation of business cartels. In analogy to Paoli's (2002) description of criminal networks, cartels face the need to operate both *without* and *against* the state. And as mentioned before, this increases the significance of trust and communication between cartelists. The nature and structure of those social interactions can prove to be an important explanation for the longevity of cartels. Therefore, cultural and social embeddedness of cartel agreements are relevant to this study. Although cultural embeddedness and social embeddedness can theoretically be distinguished, they are closely interconnected. Social embeddedness is both the outcome and the input of cultural embeddedness and vice versa.

3.1 Cultural embeddedness of business cartels

A classic study in the field of white-collar criminology provides a perspective on cultural embeddedness of cartel conduct. Sutherland (1949) describes the ideology in which price fixing is embedded as *private collectivism* and explains it as follows:

> *"During the last century this economic system has changed. The restrictions on free competition has been substituted a system of private collectivism. To a great extent prices, profits the flow of capital, and other economic phenomena are determined by formal and informal organizations of businessmen. In this private collectivism the public is not represented, and the interests of the public receive consideration primarily in the advertisements issued by the corporations. This private collectivism is very similar to socialism in its departure from free enterprise and free competition, but differs from socialism in that it does not include representation and consideration of the public" (p. 84).*

Sutherland explains price fixing conduct through the cultural process of socialisation. He demonstrates how attitudes towards crime and neutralisation techniques are learned through a social learning process of associating with relevant others. Sutherland developed this idea into the theory of differential association (Sutherland, Cressey and Luckenbill 1995). Regarding price fixing, he points to a cultural explanation including a fundamentally different ideology among businessmen that departs from the ideals behind formal legislation. Whereas Sutherland refers to the American context, Stephan (2010) discusses how also in Europe social norms favourable to collusion and collectivistic business cultures can undermine cartel laws. Regulation and enforcement of cartels are locally implemented and confronted with differences in local social norms and business cultures in European national member states. Using several examples, Stephan illustrates how social norms favourable to collusion make it less likely costumers will report cartel conduct to the authorities. Stephan describes how cooperative behaviour and group membership are important in being successful in business. Cartels are not universally perceived as morally wrong or harmful, like e.g. theft (Whelan 2013). Throughout history, governments and legislators outside of the US have treated cartels as furthering public interest and have been tolerant towards competition restricting conduct of private firms. These norms can be persistent and can remain supported or adhered to in certain social groups, like an industry or market, even if regulations shift on a national level.

The lack of public support for legal rules can have far reaching consequences. Regarding this issue, Christine Parker (2006) introduces the term 'compliance trap'. She demonstrates how simple deterrence often fails to produce compliance commitment because it does not incorporate business sentiments on the morality of the regulated conduct ('deterrence trap'). By the use of responsive regulation, regulators seek to build moral commitment to compliance with the law. Regulators can overcome the deterrence trap by using moral judgment in their enforcement strategies. However, this can lead to the 'compliance trap'. With the compliance trap Parker refers to the lack of popular and political support regarding the moral seriousness of cartel laws. In this case, cartelists interpret the moral message as stigmatising and unfair and this will likely have a negative effect on their long-term compliance with the law, as was the case is Australian cartel enforcement. In later studies, amongst Australian cartelists, Parker (2012; 2013) demonstrates how business people's knowledge about the law is less important than their relationship or distance from the law. Parker's interviews with 25 convicted cartelists provide insight into the legal consciousness of business people regarding changing cartel regulations. The results demonstrate the moral ambivalence towards cartel conduct and the ambiguity around what it means to act economically. Parker shows how the rhetoric of cartel criminalisation focuses to simplistically on calculated self-interest as the motivation for compliance, ignoring the normative and social contexts in which cartel behaviour occurs. Parker underlines the importance of collective beliefs and social control within certain markets and industries generating and cultivating existing cartel conduct.

Socio-legal research generally shows discrepancies between the convictions and attitudes of e.g. business professionals on the one hand and legislators or lawyers on the other. These discrepancies are connected to what Falk Moore (1973) defines as semi-autonomous social fields. These semi-autonomous social fields are not completely isolated or fully autonomous but do have the capacity of generating rules and conformity to those rules (cf. Meerts 2018; Falk Moore 1973). Ewick and Silbey (1998) developed a theory of 'legal consciousness' in which they identified three types of legal consciousness: 'before the law', 'with the law', or 'against the law'. Legal consciousness refers to the legal 'temperature' in a semi-autonomous social field. This legal temperature relates to people's attitudes about the law within certain sub-cultures or organisational fields, like a business culture in a line of industry, a profession or a corporate culture. This is well illustrated by a study of the Dutch construction cartels, in which Hertogh (2010) applies legal consciousness to describe the differences between attitudes towards 'fair competition' in the Dutch construction industry and the formal legal rules and regulations on competition. Van de Bunt (2010) demonstrates how a powerful informal social norm of 'fair sharing' within the Dutch construction industry explains the continuation of bid rigging conduct. Despite the fact this conduct was at odds with the changing legalisation in Dutch competition law, which prohibit cartels. These studies demonstrate how cultural context proves crucial in explaining cartel conduct in a changing legal and regulatory landscape.

With regard to semi-autonomous social fields, another example of cultural embeddedness of economic action that relates to cartels is the concept of a 'moral economy' (Thompson, 1971; Scott 1976). Thompson (1971) describes how poor peasants - during the English food riots of the late 18th century - established their own peaceful political culture with their own informal norms. They set the price for products amongst themselves and lived by the principle that a fair price was more important to the community than a free market price, punishing large farmers who sold their surpluses for a different price. Scott (1976) continued to work on the concept of a moral economy in the context of peasant communities and formulated the principles participants lived by, namely being 'risk-averse' (reluctant towards introducing new techniques and innovation) and providing 'subsistence insurance' for all participants of the community. Scholars use the concept of moral economy to refer to the interplay between customs or norms on the one hand and economic action on the other, and to explain why economic actors will sometimes conform to social pressure or traditions at the expense of chances to increase profits.

3.2 Social embeddedness of business cartels

Mark Granovetter (1985) developed the concept of social embeddedness of economic action that is extensively used in economic sociology. In his seminal article *Social Structure and Economic Action* Granovetter (1985) demonstrates how the structure of relations between actors is essential in explaining economic outcomes. This insight has been central in social network analysis since (Baker & Faulkner 2009). Social embeddedness is widely used in studies on

organised crime (cf. Gambetta 2009; Kleemans & Van de Bunt 1999; Wang 2017). Studies on organised crime describe how and explain why criminal activities are structurally and relationally embedded. This embeddedness concerns institutional aspects, such as the role of licit organisations, services, and communication platforms, and the function of social relations of criminal network participants with people outside or inside the periphery of the criminal network. Particularly the role of facilitators is discussed in studies on organised crime (cf. Morselli & Giguère 2006; Kleemans & Van de Bunt 2003; Van Koppen, De Poot, Kleemans & Nieuwbeerta 2009). Facilitators can range from bystanders to actively involved actors that contribute to the execution of the activities by the criminal network.

As mentioned, in the literature on corporate crime an increasing number of studies examine the organisation of corporate crime and its embeddedness in social structures (cf. Edwards & Levi 2008; Levi 2008a; Levi 2008b; Lord & Levi 2017). Corporate crime differs from organised crime in that, by definition, it deals with serious crime in otherwise *formal* networks, although this is possible but not necessarily the case for organised crime (cf. Fear 2006; Lord, Van Wingerde & Campbell 2018). Cartels can be understood similarly, to consist of illegal activities that take place within the normal course of doing business: namely, within licit organisations (cf. Braithwaite 1989; Clinard & Yeager 1980; Jamieson 1994). Such an approach offers insight into how participants within cartels work together to overcome the constraints of working without and against the law (and state) in order to explain the longevity of cartels.

John Braithwaite's (1984) work on corporate crime in the pharmaceutical industry is another seminal criminological study that provides insight into a perspective on the social embeddedness of cartel conduct. Braithwaite (1984) studies antitrust violations, amongst other crimes, in the pharmaceutical industry and comments on the risks and challenges of price fixing agreements for its participants. He notes how participants need to monitor the actions of others in the cartel to make sure everyone complies with the social norm:

> *"In a price-fixing agreement, the most crucial requirement is to be able to detect cheating. Even an inadvertent undercutting of competitors on a bid can lead to a general round of price-cutting; or one company which is (wrongly) suspected of cheating to grasp a bigger market share can cause others to retaliate. The historical instability of cartels is a result of the fact that they are rife with temptations and inducements to cheat. Hence the importance of communication between companies of detailed information on pricing behaviour" (p. 193).*

This still applies to the contemporary organisation of cartel conduct. Internal risks for cartel participants include conflicts between cartelists, cartelists cheating on agreements or cartelists denouncing the cartel to the authorities. A few studies since have examined cartels as illegal social networks (Faulkner et al. 2003; Baker & Faulkner 1993; Reeves-Latour & Morselli 2017;

Morselli & Ouellet 2018). These studies deal with the function of effective communication and coordination techniques for cartel participants in order to keep a sufficient information position on the behaviour of others in the cartel. Besides communication, the need for secrecy or discretion regarding the illegal nature of business cartels is discussed. In Chapter 2 and Chapter 3 of this thesis, more is discussed on the role of clandestine communication structures and covertness in cartel networks.

3.3 Cartels and the role of trust

In answering the question how cartels are able to endure, two types of trust are important; trust between cartelists (see Chapter 2, 3 and 4) and trust between cartelist and regulator (see Chapter 5). First, the trust or lack thereof between participants of cartel agreements enables or disables them to overcome the risks of internal conflicts, cheating and defection. Second, the trust or lack thereof between cartelist and regulator (i.e. competition authority or authorities), such as confidence in fair procedure and due process influences the likelihood that cartelists will denounce the cartel or further inhibits them from doing so.

First, trust between cartelists is important to overcome internal threats to the stability of the cartel. Because of the risk of cheating and the impossibility for cartelists to resort to legally binding contracts or arbitration in light of conflict, trust plays an essential role in illegal networks like cartels. In other words, because institutions do not govern your interactions, as is the case in illegal networks like cartels, interpersonal trust becomes even more essential in making and enforcing agreements. Trust involves expectations of people about the behaviour of others in their group or social network. Gambetta (1988) states:

> *"When we say we trust someone or that someone is trustworthy, we implicitly mean that the probability that he will perform an action that is beneficial or at least not detrimental to us is high enough for us to consider engaging in some form of cooperation" (p. 217).*

Furthermore, Gambetta points out trust is about the expectation or cost-benefit analyses that cooperation with someone else will lead to a beneficial outcome. However, *to trust* is also to rely on something. For instance, to rely on the information of others that cooperation with a particular person will be beneficial. Participants need to rely on this kind of information, because it is impossible in day-to-day interactions to know everything about the trustworthiness of others. In that sense, we need trust in interpersonal relationships in order for us to engage in day-to-day forms of cooperation and interaction. This means trust is more than merely rational choice; a calculated decision on the likeliness of the other person's willingness to cooperate or defect: it involves risk-taking, including an uncertain outcome. Gambetta continues: "for trust to be relevant, there must be the possibility of exit, betrayal, defection" (1988). It can be noted that for people to take the risk of defection or betrayal by others, they must expect others to

follow up on their commitments. Positive expectations towards the behaviour of others and exposure to the risk of betrayal, are both central to the concept of trust.

Cartelists will have to establish trust between participants in the cartel in order to be successful. This trust will be more likely to prove sustainable if it does not rely solely on rational cost-benefit analysis, but also on shared values and norms that support cooperation in favour of the social network or community. Sutherland touches upon this shared sentiment between businesses, which he labels *private collectivism*. Summing up, trust: 1) consists of the positive expectation of the behaviour of others and the intention to accept vulnerability; 2) can relate both to the perceived trustworthiness and to the perceived capacities of the other; 3) can be seen as the result of social interaction, e.g. through social control mechanisms (the same accounts for distrust); 4) trust and distrust are *different* outcomes of the *same* social interactions which both require information about the conduct of others.

Second, trust between cartelist and regulator influences the likelihood of cartels being denounced to the authorities by cartelists. Competition authorities in most jurisdictions introduced leniency policies. Leniency policy offers cartelists the possibility to come forward with evidence regarding their involvement in cartel conduct in exchange for immunity or reduction of financial penalties. Leniency is a potentially attractive alternative to firms that want out of cartel agreements with their competitors. Especially in jurisdictions that introduce cartel enforcement or increase enforcement efforts and penalties, leniency has proven to be a fruitful policy in uncovering cartel conduct. In Europe, nearly 60% of detected cartel cases are discovered through leniency applications, making it the most important detection tool for competition authorities in uncovering cartel infringements (Carmeliet 2012). However, researchers have suggested several issues with leniency policies. First, based on a case-study analysis of 40 international cartels Stephan and Nikpay (2015) concluded that 53% of cartels ended before parties applied for leniency and only 6% ended after they applied. These results challenge the assumption that leniency ends existing cartel agreements by undermining internal trust between cartelists. Second, both US-based findings (Sokol 2012) and international findings (Harding, Beaton-Wells & Edwards 2015) suggest cartelists use leniency strategically to damage others in the market. Third, in Europe a decrease in the number of leniency applicants triggered a debate around factors that decrease the likelihood cartelists coming forward with their confession. Both procedural aspects of leniency applications and the rise of private enforcement through follow-on civil damage cases are suggested to negatively influence leniency applications in Europe (Swaak & Wesseling 2015). Chapter 5 (*Leniency in exchange for cartel confessions*) deals with the question what the considerations are in applying for leniency or refraining from doing so and how those considerations relate to private enforcement of business cartels in the Netherlands.

4. Cartel criminalisation

This study deals with the social organisation of business cartels. Cartel conduct today is contextualised by the contemporary social and legal conceptualisation of what a cartel is. These conceptualisations have changed over time. In this paragraph, further consideration is given to the social and legal conceptualisation of cartels and their development through time and space.

4.1 The European cartel parallax

In their book 'Regulating Cartels in Europe', Harding and Joshua (2003) describe the process of legal change towards cartels in Europe as follows: "European law -both in the sense of EC law and law at the national level- has moved from an earlier stance of tolerance coupled with some ambivalence to a position of strong condemnation" (p. 270). In fact, globally there has been a movement towards criminalisation of cartel conduct in the past two decades (Beaton-Wells & Ezrachi 2011; Harding 2006). Three things define this process: geographical dispersion, stricter enforcement and legal inflation of the cartel concept. Since the late 1990s, both in Europe and around the world, most countries increasingly introduced administrative penalties and some countries criminal penalties for serious cartel conduct (Beaton-Wells, 2008; Ottow, 2012). Legal scholars speak of a global trend of cartel criminalisation, because countries in every region of the world are increasingly prosecuting cartels (Shaffer & Nesbitt, 2011). Besides exporting the legal cartel concept, enforcement of cartels is introduced in certain jurisdictions and increased and toughened in others; increasing maximum fines, introducing criminal sanctions and devoting more resources to competition authorities charged with enforcing cartels. Besides geographical dispersion of the legal concept and stricter enforcement, a process of criminalisation is often accompanied by inflation of legal concepts; increasingly more conduct falling into a legal definition over time. Likewise, scholars have noted how the definition of cartels is ballooning (Wesseling 2013). An example of this, as mentioned earlier, is information exchange: one-sided, non-explicit exchanges of information between competitors can also qualify as a cartel since 2011. In addition, legal scholars have criticised how thresholds for evidence to proof a continuous infringement have been lowered, using the argument that cartels are hard to detect because they are illegal and therefore secretive (OECD 2006). Through the process of criminalisation, cartels have gained an element of delinquency, also referred to as 'delinquency inflation' (Harding & Joshua, 2003; Wesseling, 2011). However, in Europe, unlike the US, this criminalisation process is not a bottom-up reaction to the increasing public outrage towards cartel agreements (cf. Stephan 2011), but mainly a product of top-down legislative and enforcement activity (cf. Harding 2010).

A way of understanding the dilemma of and interaction between crime and social reaction is the concept of a legal parallax. The *parallax effect* refers to the apparent movement of an object when viewed from different positions. You experience the parallax effect when driving

a car on the highway, with some objects closer and some further away, both of them moving at a different speed, in your perception. The effect is commonly used in computer games and web design. A *legal* parallax refers to the changing social reaction expressed in legal attitudes towards a certain type of conduct. Legal parallax in *cartels* is well explained by Harding and Joshua (2003):

> *"In seeking to understand and account for this transformation it may be important to ask whether this reflects a change in the subject matter itself or in the perspective on the subject. May it be said that the behaviour of cartels and the impact of the behaviour is different in any significant ways as between the earlier and later twentieth century? Or have European views altered, coming, for whatever reasons, into line with the American outlook on the subject which gave rise to the Sherman Act a century earlier? In short, it may be asked whether this is a phenomenon of legal parallax: to what extent the subject may have remained constant, but the position of those observing that subject has altered" (p. 272).*

An example illustrating the legal parallax in relation to cartels is the social reaction towards the actions of the Dutch company Philips. During the first half of the 20th century, Philips was involved in the first *international* cartel in history, called the 'Phoebus' cartel. The Phoebus cartel divided the global market for incandescent light bulbs. Almost a hundred years later, LG Philips was yet again involved in price fixing, in a cartel relating to LCD screens detected by the European Commission (*COMP/39.309 LCD 2010*). However, the social reaction to similar behaviour was very different this time around. Unlike in the early 1900s, social reaction to the cartel conduct now included high public fines and strong condemnation by the European commissioner (see Box 1.2). This example illustrates how although the subject matter remained roughly constant throughout the years, the social reaction towards the conduct dramatically changed position.

Although tolerant European views towards cartel conduct have undeniably changed in the past three decades to become more in line with the American norm towards cartels generally, there is no major convergence between the enforcement methods used. Both procedural and substantively there are differences between the American and the European 'fight against cartels' that will also be addressed in paragraph 4.4. But one important difference that will be mentioned here is the adversarial legalism underpinning American regulatory enforcement (Kagan 2006). Kagan explains how American enforcement is both more legalistic and adversarial compared to European legal systems where more horizontal forms of enforcement are applied.

BOX 1.2

Philips and the cartel parallax

In December 1924, Anton Philips teamed up his company Philips with General Electric, Osram and France's Compagnie des Lampes in the Phoebus Cartel. For years, the Phoebus cartel divided the global market for light bulbs and introduced production quotas. Phoebus is considered the first cartel with a truly global reach. However, the cartel did more than just fix prices and divide markets. Once manufacturers realised the quality and life span of light bulbs was improving, they identified a threat to their revenue model, based on the quantity of light bulbs sold. In response, they collectively hacked improvement and innovation in the light bulb's lifespan.

By installing the so-called '1,000 hours working group', all manufacturers in the cartel were obliged to bring back the lifespan of incandescent lamps to a 1,000 hours. The participants of the cartel closely monitored this process and all firms were required to send their light bulbs to a central testing lab in Switzerland. A system with fines was in place to ensure everyone in the cartel complied with the agreement, to increase the costs of breaching the agreement and prevent opportunism by participants. The industry standard of 2,500 hours in 1924 eventually dropped to 1,000 hours by 1940. Historically significant, the Phoebus cartel is considered to have given birth to what is called 'planned obsolescence' of industrial products. The changing international affairs and mutual relations due to the Second World War disrupted the cartel's operations and it started falling apart in the early 1940s.

Almost a hundred years after Anton Philips initiated the Phoebus cartel, LG Philips was involved in price-fixing yet again. The case was detected and fined by the European Commission and concerned fixing prices on LCD screens between LG Philips and its global competitors. These producers received a fine of 215 million Euros. Commission Vice President in charge of competition policy, Joaquín Almunia, said: *"Foreign companies, like European ones, need to understand that if they want to do business in Europe they must play fair. The companies concerned knew they were breaking competition rules and took steps to conceal their illegal behaviour. The only understanding we will show is for those that come forward to denounce a cartel and help prove its existence"*. The question rises: have times really changed, or is it mainly the social reaction to this conduct that has altered its stance?

4.2 Moral entrepreneurs and the criminality of cartel conduct

The political and legislative shift from tolerance towards stronger (moral) condemnation of cartels raises critical voices. Several authors reflect on the challenges around identifying the moral wrongfulness of cartels (Braithwaite 1984; Whelan 2013; Harding 2010; Beaton-

Wells 2007). Braithwaite, in his US based study on the pharmaceutical industry, argued that if competition regulation were merely a matter of reducing economic damage by e.g. price fixing, criminal law would not be an effective means of legal control (cf. Harding 2006, p. 200; Braithwaite 1984, p. 193). This question includes the assumption that competition regulations are induced for 'economic reasons'. Harding (2006) points out how this might certainly be the case for legal systems outside the US, but less so for the Sherman Act. This demonstrates the differences between countries in cultural embeddedness of cartel conduct.

Reversely, Whelan (2013) argues that moral wrongfulness is a central issue in the cartel criminalisation debate, both informed by deterrence theory or retribution theory. Whelan discusses whether cartel activity in the UK and the EU can qualify as a violation of more fundamental norms against stealing, deception or cheating. Whelan describes how all these norms could be connected to the cartel offence, but also how all of them have clear limitations at the same time. For stealing, a fundamental right of ownership should exist; do victims have a right to the cartel overcharge? Deception requires customers to actually assume cartelists compete with their competitors. Also, the cartel agreement must have been effectuated; a product should have been offered at the cartelised price. Lastly, cheating requires determining the exact unfair advantage for the cartelist. Likewise, in the events leading up to cartel criminalisation in Australia, Beaton-Wells (2007) has pointed to the legal challenges for the cartel offence to qualify as criminal in terms of sufficient levels of culpability, harmfulness and wrongfulness.

Harding (2010) questions whether cartel violations qualify as an 'original sin or rather as a child of regulation'. He states: "It would appear therefore that the significant movement towards criminalisation of cartel activity across a number of jurisdictions is a 'top-down' rather than 'bottom-up' process, in the sense that it has been led by transnational enforcement interests rather than a more wide-spread popular belief in a level of delinquency justifying the moral opprobrium of the criminal law" (Harding 2006, p. 200). This potential gap between law and society was made abundantly clear in practice during the Australian regulatory conversion into cartel criminalisation, starting in the summer of 2009 (cf. Parker 2013). The Australian example illustrated how top-down introduction of cartel criminalisation, without the appropriate amount of appreciation for social, normative and economic ambiguities regarding cartel conduct in society, can undermine legitimacy and credibility of cartel regulation and enforcement (Beaton-Wells & Haines 2009; 2010).

In his book *Outsiders Studies in the Sociology of Deviance* sociologist Howard S. Becker speaks of moral entrepreneurs (1963). As Becker (1963) puts it: "rules are the products of someone's initiative and we can think of the people that exhibit such enterprise as *moral entrepreneurs*" (p. 147). In this enterprise Becker distinguishes rule creators and rule enforcers. Rule creators are the one's leading the 'moral crusade', as Becker puts it. These rule creators can also be defined

as reformers. Reformers will often be politicians or lobbyists, for example. Becker states that moral crusaders are successful in their mission when they have created a new rule or set of rules. With the creation of a new set of rules comes the creation of new enforcement agencies: rule-enforcers. What began as a drive to convince the world of the necessity of moral reform becomes an organisation devoted to enforcement of the rule(s), such as a competition authority. In the tradition of symbolic interactionism, Becker describes how this process creates outsiders in society. In this case, outsiders are cartelists practising their traditional market agreements now prohibited by newly enforced regulations that were previously tolerated by enforcement or permitted by law.

Becker's definition of moral entrepreneurs also applies to the debate around criminalisation of cartel conduct. Across the globe, politicians have been pushing the agenda for cartel criminalisation and increasing anti-cartel enforcement efforts in several jurisdictions. Harding (2010) questions if organisational enforcement interests of competition authorities may drive a top-down process of cartel criminalisation, instead of solving an existing problem bottom-up. In that sense regulatory authorities are not neutral or objective actors in the process. Regulatory bodies institutionalise the moral crusade and by effect legitimise the fight against cartel conduct and cartelists. In *Cartel criminality: the mythology and pathology of business collusion* Harding & Edwards (2016) describe how both rule makers and rule enforcers use narratives and images of cartels in their efforts to push the agenda for cartel criminalisation. This opposition between bottom-up and top-down forces demonstrates how moral ambiguity around cartel conduct can occur. In some markets and come national cultures there might be less support for cartel regulations than in others.

4.3 Conceptualisations of 'the cartel'

Attitudes and conceptualisations regarding cartels are bound to time and place. The *corpora* in the Roman era (e.g. *corpus navicolariorum*; long distance shippers) and the medieval *guilds* (e.g. the Dutch drapers guild) were both organised groups of merchants controlling quality, prices and participation in their market, similar to contemporary cartels (cf. Ottervanger 2010). Legal definitions concerning this conduct have shifted throughout history, but also differ between geographical locations. In order to understand the nature and history of the European commitment to regulating cartel conduct, we have to briefly go in to some of the history of cartel regulation.

Antitrust law in the US and competition law in the EU are both based on regulating market power of corporations. However, the course of history largely explains the regional differences in cartel regulation. For the purpose of this research, we start the history of contemporary regulation of cartel conduct with the introduction of the Sherman Antitrust act in 1890 in the US. The reason for introducing new rules and regulation regarding competition in the US was

the growing influence of large economic trusts in industries like railways, oil and sugar, during that time. Vast changes in the American corporate landscape around the turn of the century involved major scale-up and centralisation in management of firms. These developments led to domination by a few large companies in many American industries. The introduction of the Sherman Act was a direct response to the concentration of market power in the US and the public outrage it caused (Aalders 2010). Therefore, criminalisation of cartels in the US was mainly a bottom-up legal political process; legislation was triggered in reaction to a changing society, public protest and social movement. Looking at the definition of US antitrust law we can identify the underlying principles rooted in this history:

> **Sherman Antitrust act 1890** (Sections 1 of the Sherman Antitrust Act. 1): "Every contract, combination in the form of trust or otherwise, or *conspiracy*, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 1 of the Sherman Act characterizes business practices qualified as restraint of trade as *per se* violations. A per se violation requires no further inquiry into the actual effect on the market. This American legal definition is conduct oriented, conceptualises cartel agreements as a conspiracy against the public and criminalised the conduct from the outset (Harding & Joshua 2003). Cartel conduct in the US should be observed in relation to the foundations of American society; including the principle of free markets and competition as instruments for progress and prosperity. Historian Aalders (2010) states: «The differences between cartels in America and Europe could not have been greater. Where Europeans embraced cartels as an instrument for economic governance, the Americans fought cartels since the late nineteenth century convinced of their economic as well as political harms (...) As a land of immigrants, feelings of individualism and personal freedom played a much bigger role than in Europe, Japan or elsewhere in the world» (p. 287). Contemporary European law is increasingly moving towards the American stance on cartels in recent decades. However, in the legal definition we can still identify differences in the underlying principles between cartel legislation in the US and the EU, rooted in this history of origin.

The European process of cartel legislation, regulation and enforcement was induced by international political and economic developments, especially due to the political influence of the US in Europe after the Second World War. Therefore, it is more top-down, contrary to the bottom-up social movement towards cartel condemnation in the US. This made the European commitment towards anti-cartel regulation historically more ambiguous, more instrumental and less associated with moral condemnation against cartel conduct. Today's European legal definition is still more outcome orientated, defining cartels as 'an instrument of damage' (Joshua & Harding 2003, p. 59). The definition fits well with the European efforts to build

and strengthen the internal European market. The supranational European definition of cartels serves as a template for national members states and reads:

BOX 1.3

Social harms of cartels: the Fentanyl case

Jonhson&Johnson (J&J) initially developed Fentanyl and commercialised it in different formats since the 1960s. In 2005, J&J's protection on the fentanyl depot patch had expired in the Netherlands and Novartis' Dutch subsidiary, Sandoz, was on the verge of launching its generic fentanyl depot patch. It had already produced the necessary packaging material. However, in July 2005, instead of actually starting to sell the generic version, Sandoz concluded a so-called "co-promotion agreement" with Janssen-Cilag, J&J's Dutch subsidiary. The agreement provided strong incentives for Sandoz not to enter the market. Indeed, the agreed monthly payments exceeded the profits that Sandoz expected to obtain from selling its generic product, for as long as there was no generic entry. Consequently, Sandoz did not offer its product on the market. The agreement was stopped in December 2006 when a third party was about to launch a generic fentanyl patch. The agreement therefore delayed the entry of a cheaper generic medicine for seventeen months and kept prices for fentanyl in the Netherlands artificially high - to the detriment of patients and taxpayers who finance the Dutch health system.

Why did J&J and Novartis enter into that agreement? According to internal documents Sandoz would abstain from entering the Dutch market in exchange for "*a part of [the] cake*". Instead of competing, Janssen-Cilag and Sandoz agreed on cooperation so as "*not to have a depot generic on the market and in that way to keep the high current price*". Janssen-Cilag did not consider any other existing potential partners for the so-called "co-promotion agreement" but just focused on its close competitor Sandoz. Sandoz engaged in very limited or no actual co-promotion activities.

The European Commission fined Johnson & Johnson and Novartis € 16 million for delaying market entry of generic pain-killer fentanyl and the Commission Vice-President Joaquín Almunia, in charge of competition policy, stated: *"J&J paid Novartis to delay the entry of a generic pain killer. The two companies shockingly deprived patients in the Netherlands, including people suffering from cancer, from access to a cheaper version of this medicine. Today's decision should make pharmaceutical companies think twice before engaging into such anticompetitive practices, which harm both patients and taxpayers.*"

> **Article 101 TFEU:** "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"

This definition communicates the more consequentialist approach European institutions, such as the European Commission have taken in regulating cartels. In Europe, labelling behaviour as a cartel is outcome oriented, looking to the effect of, rather than the actual conduct of restrictive market practices. However, different regulatory regimes reflect a diversity of approaches towards cartel offences between member states in the European Union: from administrative penalties to the use of criminal law, sometimes resulting in different approaches *within* national member states for different types of cartel offences (e.g. Germany: administrative law for price-fixing, criminal law for bid rigging, cf. Wagner-von Papp 2011). This demonstrates the regulatory complexity in Europe as opposed to the US. Throughout Europe, there has been moral ambiguity around cartels up until recent history. For example, in the Netherlands there was practically no enforcement until the late 1990s. Indeed, there was a Cartel Register where firms could register their legal cartel agreements with the ministry of Economic Affairs (cf. Petit 2017). It was not until 1998 that any noteworthy regulatory action was taken towards cartel agreements in the Netherlands.

4.4 Cartels and social harm

Harmful effects that are associated with cartel agreements relate to financial damage: product quality, a lack of innovation and draining of public funds. For example, Dutch economist Schinkel (2006; 2007) made calculated estimates of financial damages caused by the Dutch construction cartels and the European beer cartel. A total amount of between 1.5 and 2.5 billion euros a year in illegal profits and damages for the period 1992-2001 was caused by the construction cartels (Schinkel 2006) and 424 million euros a year for the period between 1996-1999 by the beer cartel (Schinkel 2007). Additionally, cartels are indirectly associated with harms to public health, i.e. in the pharmaceutical industry (see Box 1.3). Recent investigations into the German car industry and the EC Truck cartel (Case AT.39824) both demonstrate how cartel agreements can include manipulating or slowing down the introduction of cleaner engines. In its turn, this has detrimental effects to air quality, with thousands of premature deaths as a result of air pollution by the emission of NOx-gasses, in the case of diesel (Dohmen & Hawranek 2017). More generally, cartels can also be considered 'undemocratic'. Meaning, they contribute to inequality in the distribution of resources. In contemporary society, market mechanisms increasingly influence domains of our social life (cf. Michael Sandel 2013). Hereby, health care and education are increasingly considered commodities. Those commodities are distributed via the logic of market competition. As a result, distortion of fair competition

through cartel agreements or a failure to regulate the market properly means an increase of inequality in the distribution of resources at the expense of the patient, the student or the citizen and to the advantage of a small group owning the means of production.

4.5 Cartels and economic effects

Besides moral and social condemnation, negative consequences in terms of economic effects and market efficiency have influenced the regulation of cartels. Cartels are believed to disrupt three economic efficiencies: 1) allocative efficiencies (higher prices, lower output), 2) productive inefficiency, and 3) innovation (Petit 2017). Adam Smith (1776) already identified the threat of business collusion when he famously wrote: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices" (p. 152). Unlike lawyers and legal scholars, economists use economic assumptions and describe cartels in a non-normative tradition. In their definition, economists do not focus on intentions, but look at outcome. This means a cartel can only be a cartel if there is an economic effect in the market, in terms of disrupting allocative or productive efficiency, or innovation. In that sense, on the one hand economists take a broader approach to what a cartel is than legal scholars, hence they can also include legal cartels permitted by law (cf. Petit 2017), for example the global oil cartel OPEC. On the other hand, economists take a narrower approach than legal scholars, for they exclude cartels without actual effect in the market, despite intentions and conduct.

This study accepts the broad definition of what a cartel is formulated by Joshua and Harding (2010): *"An organization of independent enterprises from the same or similar area of economic activity, formed for the purpose of promoting common economic interests by controlling competition between themselves"*. Strictly speaking, this definition includes both legal and illegal cartels, and cartels with and without actual economic effects. However, for the selection of detected cases in this research there has been a focus on detected cartels considered by the competition authority as illegal. Justification for this selection within the broader definition is that these cases will most likely demonstrate the constraints of coordination and secrecy for cartelists trying to cooperate *without* and *against* the law.

5. Research outline

5.1 Research question

Despite the process of cartel criminalisation in recent decades, cartels that demonstrably lasted for years, sometimes decades are still detected today (Connor 2010; Connor & Helmers 2007; Leslie 2008; Levenstein & Suslow 2006; 2011). This raises several empirical questions. On the one hand, corporations enter cartels in order to control uncertainties in markets; collective

business interests between firms operating in the same market seem to perpetuate cartel agreements. On the other hand, incidents of conflicts, cheating, and denouncing the cartel to the authorities pose threats to the stability of cartel agreements. Within cartels there is no option for legally binding contracts or professional arbitration in case of internal conflicts. Therefore, a key characteristic of operating in illegal networks is to establish trust between participants. In addition, the need to maximize concealment as well as coordination is essential (Baker & Faulkner, 1993; Faulkner Cheney, Fisher & Baker 2003).

This research will focus on the question how cartelists control their cartel, and how enforcement strategies by cartel authorities influence those interactions. The question is: how do cartels manage to endure in illegality? To study and operationalise the research question, this study is divided into four sub-questions. These sub-questions are based around challenges that cartelists need to overcome in order to manage their agreements: stabilising, concealing, enforcing, and confessing. This study aims to explore both the internal organisation of cartels, dealing with coordination, concealment and enforcement, and the interaction of cartelists with regulatory and enforcement authorities, particularly in relation to the leniency policy.

5.1.1 Stabilising the market: the cooperation paradox

Economic assumptions presuppose cartels to be inherently unstable and short-lived. Indeed, in a perfect market, cartels would be self-destructive: there can be profits in undercutting the cartel price and hereby enlarging one's market share, effectively ending the cartel (Harrington 2006; Stigler 1968). However, it can be rational to cooperate rather than compete, especially in the long term. Leslie (2004) points out that the best solution for long-term livelihood is to settle trust between direct competitors. A notorious quote of a member of the ADM lysine cartel, speaking to his competitor is: "you are not my enemy, our customers are the enemy" and "I want to be closer to you than I am to any of my customers" (Connor, 2001). Sutherland (1949) noted on the trust dilemma: "Even though business men have developed an increased consensus in opposition to the competitive principle, they search for loopholes in the statutes, and attempt to secure an advantage over other establishments in the industry. This leads to an expansion of the details covered by the agreements" (p. 73-74). Because of the incentive to cheat, the cartel agreements will become increasingly more detailed. The question is: do more detailed agreements contribute to building trust between cartelists, or are they a symptom of a lack of trust or even distrust between cartelists? Furthermore, cartel conduct is not always motivated by pure short-term greed but by the desire to avoid losses, which can fluctuate given the economic climate, possibly destabilising cartels under positive market conditions. Also, people can be pressured and coerced into cartel agreements (Parker 2011, p. 252). But while there can be motives to cooperate there are also incentives to cheat, such as the possibility to increase one's market share and sanction immunity with the authorities through the leniency system (Levenstein & Suslow, 2006; Carmeliet, 2012). Both jeopardize the stability of cartels.

Moreover, the stability of cartels may depend on the internal power balance and the voluntary or (informally) coerced nature of member's participation. Chapter 2 of this study deals with the first sub-question: How do informal coordinating mechanisms enable cartel stability outside the scope of formal legal control and what role does trust play?

5.1.2 Concealing: the secrecy-coordination paradox

Criminal acts committed through collaboration between criminal partners require not only concealment but also communication. Communication is essential in organising crime: namely, making arrangements regarding the required resources, contacts and transport; settling disputes; and dividing criminal profits (Gambetta 2009). The balance between operational efficiency through communication and secrecy through concealment is a widely known trade-off for participants of any covert network. The paradox of concealment and communication is a focal point in the study of illegal and criminal networks (Morselli 2009; Kenney 2009; Krebs 2002). As with many criminal networks, business cartels need to coordinate collective actions efficiently by communicating while facing the risk of exposure. Firms have to exchange information on prices, customers, tendering procedures and so on; internal issues and disputes must be resolved; and acceptable agreements on compensations must be reached between participants (Faulkner et al. 2003). And in the light of increasing enforcement efforts and the criminalisation of business cartels (Harding, Beaton-Wells & Edwards 2015; Shaffer and Nesbitt 2011; Whelan 2014), perpetrators of cartel conduct must also conceal their activities from customers, non-participants, and internal and external watchdogs. Chapter 3 of this study deals with the second sub question: How are cartels able to remain hidden from outsiders for long periods of time?

5.1.3 Enforcing agreement: cartels and the involvement of organised crime

Some business cartels involve organised crime. In these cases, organised crime groups solve the potential issue of internal instability in cartels by using their violent reputation (Varese 2014). In this category of cases, organised crime groups and networks supposedly act as 'cartel enforcers', both by controlling compliance of firms to the existing agreements in the cartel and by preventing outsiders of the cartel from entering the market. Involvement of criminals with a violent reputation can solve issues regarding internal instability of the cartel (Gambetta & Reuter 1995). These organised criminals receive commission or 'pizzo' from the derived profits of cartels (Varese 2014, p. 345). The literature on organised crime extensively discusses examples of the involvement of organised crime groups in economic crime, like business cartels (Varese 2014; Stephan 2010; Chu 2002; Gambetta & Reuter 1995; Reuter 1983). These examples are generally labelled as infiltration of organised crime in legitimate business sectors. However, not all cartels involve organised crime groups. What determines these differences? Chapter 4 of this study deals with the question: why do business cartels sometimes do and sometimes do not involve organised crime groups?

5.1.4 Breaking down secrecy: cartel confessions in exchange for leniency

Cartel confessions are the most important source for competition authorities in uncovering cartel conduct violations (Carmeliet 2012). Especially during the nineties and first decade of this century, leniency has enabled detection and punishment for competition and anti-trust enforcement agencies in a substantial amount of cartel cases. However, in recent years a decline in the number of leniency applications was noted and discussed by competition authorities worldwide (ICN 2014). It is still unclear what precisely causes this decline. Leniency arrangements are based on the assumption that cartelists are rational actors with accurate and predictable information about both the expected benefits of the cartel, as well as the likelihood of detection and the size and likelihood of punishment (Stephan & Nikpay 2015). In combination with deterrent penalties and a credible threat of detection, leniency is presumed to instil distrust between cartelists and trigger a race to the competition authorities (Stucke 2015). In light of the decreasing frequency of the use of leniency in recent years, experts express concerns regarding the dependency of competition authorities on this detection tool (Guttuso 2015; ICN 2014). Recent discussion centres on the functioning of leniency arrangements in practice. Chapter 5 discusses the question: What are considerations for cartelists in applying for leniency or refraining from doing so?

5.2 Methodology

In order to answer the research question, this study uses three methods of analysis: literature review, case-file analysis and semi-structured interviews. Methodological approaches conducted in previous cartel studies (cf. Parker 2011, p. 248) include: 1) quantitative studies using enforcement data (Golub, Detre and Connor 2005; Simpson 1986; 1987; Simpson & Koper 1992; Jamieson 1994); 2) case study qualitative interviews (Sonnenfeld & Lawrence 1978; Sonnenfeld 1981; Parker, Ainsworth and Stepanenko 2004; Parker 2006; 2012); 3) case study public records detected cases (Stephan 2009; Berzins and Sofo 2009; Connor 2010; Stephan 2005; Simpson & Piquero 2001; Conley & O'Barr 1997; Geis 1967); 4) quasi-experimental surveys of individuals posing hypothetical vignettes and asking about behaviour (Simpson 1998; 2002; Piquero, Exum & Simpson 2005; Smith, Simpson and Huang 2007). The lessons learned from these approaches is that because of the secretive nature of cartels and the restrictions to access to enforcement data due to confidentiality, a combination of these methods is the most fruitful approach. For two reasons a selection of qualitative research methods is used to answer the central research question in this study. First, the research questions in this study consist of 'how' and 'what' questions. These questions revolve around understanding the nature and structure of cartels and the relational and structural networks they are embedded in. Answering these questions will enable us to better understand what makes cartel agreements last. For that reason, a relatively modest selection of cartel cases (n=14) is sampled for this study to be analysed in depth in order to answer these questions. Second, large quantitative databases on illegal cartel cases in the Netherlands are unavailable due to confidentiality and reluctance of the

Dutch Authority for Consumers and Markets to share this information for research purposes. The available data sources that remain are the case studies and interviews with competition authority officials, lawyers, legal counsel and cartelists. In addition, these sources are also more suited to answer the underlying research questions of this study. Therefore, these sources are best analysed through a qualitative methodology and analysis.

5.2.1 Research methods and data sources

This study employs several qualitative research methods and uses a combination of qualitative sources. The results in this study are based on literature review, case-file analysis of official documentation and semi-structured interviews. The literature review contains both theoretical and empirical studies on cartels from different disciplines including criminology, sociology, socio-legal studies, and competition law and economics. The case-file analysis conducted for this study is based on secondary sources that can be divided in three categories: 1) private enforcement reports and records of detected Dutch cartel cases, 2) public parliamentary investigation reports and records into construction industry in the Netherlands and Quebec, Canada, and 3) public enforcement reports published by the European Commission on detected European cartels. The European cartel cases are used to illustrate and contextualise the main findings of the research, resulting from the former two categories and other sources; the literature review and interviews. The interviews conducted for this study are primary sources and can be characterised as semi-structured interviews. These interviews were held amongst three categories of respondents in the Netherlands: 1) competition authority officials/investigators (in 2012), 2) specialised competition lawyers (between 2015-2017), and 3) cartelists (between 2015-2017).

The methodology sections in the main chapters of this study deal with the specific methodology and data sources used per sub-question. Table 1 provides an overview of methodologies used per chapter in this study.

Table 1 Methodology used per chapter

	Literature review	**Case-file analysis**	**Interviews**
Chapter 2	■	■	■
Chapter 3	■	■	■
Chapter 4	■	■	
Chapter 5	■		■

To create an overview of all the methodology used in this study a more detailed overview is also presented below. Note that there is overlap with the methodology sections in the respective chapters.

5.2.2 Methods used in chapter 2 and 3: case-file analysis of private enforcement reports of detected Dutch cartel cases and interviews with Dutch competition authority investigators

Chapter 2 (on the cooperation paradox) and chapter 3 (on the coordination-secrecy paradox) both examine cartel stability based on a qualitative case file analysis of 14 Dutch cases and complimented with semi-structured interviews with Dutch competition officials. In these 14 cases, the Dutch Competition Authority imposed an administrative fine between October 2007 and January 2012.[1] The cases were selected because reports that led to a fine contain substantial proof, including documentation on coordination and communication within cartels. This documentation allowed for a systematic and in-depth study of the structure and nature of cartels. The fourteen cases were examined using document analysis and semi-structured interviews with case managers from the Authority for Consumers and Markets. The documentation consisted of official reports by the authority,[2] summarising the files and containing a selection of evidence used in administrative proceedings towards administrative fines imposed upon corporations. These files contain descriptions of the modus operandi of cartels, and include correspondence between their members, transcriptions of verbal interrogations with corporate officials by the competition authority, and sources of cartel administration. These statements are supported by additional written administration. For chapter 2, the material was systematically studied using a checklist focusing on the type of network; the nature of mutual relations; mechanisms for mutual control; mechanisms for mutual trust; and instances of cheating and conflicts. For chapter 3, the material was studied systematically using a checklist focusing on the modus operandi for concealment; the type of network; the nature of mutual relations; the role of the social environment (e.g. industry associations, customers); and mechanisms for mutual trust. For every case (in both chapters 2 and 3), the document analysis was complemented with a semi-structured interview with the project manager of the authority that handled the investigation. In these interviews, the following topics were discussed (chapter 2): the nature of the cartel; mechanisms for mutual control and trust; and instances of cheating; mutual conflicts, (chapter 3): the nature of the cartel; the type of network and communication; mechanisms for mutual control and trust; and the role of third parties. The interviews with investigators served to provide a better overview of the files in the records of the case and an opportunity to ask additional questions that could not be answered in full through only studying the written reports.

1 Commissioning administrative fines is one of the possible sanctions authorised by Dutch competition law (according to Art. 56 lid 1 sub a Mw). Since October 2007, Dutch competition law allows the investigation of private property and the possibility of fining natural persons (Kamerstukken I 2006/07, 30 071, A). October 2007 is the starting point of the analysis for the sake of comparability of the material. January 2012 is indicated as end date because cases usually take several years from the initial investigation until the official sanction; all cases completed by January 2012 have been included.

2 These files are a result of investigations based on the legal power invested in the Dutch competition authority to interrogate corporate officials and demand corporate intelligence (Art. 5:16 Awb), to investigate company and private property and administration (Art. 5:15, art. 54, 55 Mw), and to use leniency requests and other relevant informants and public information.

The use of secondary sources has several limitations. Because of detection and enforcement biases, the cases do not necessarily provide a representative image of all cartel conduct in the Netherlands. Some cartels have greater chances of being detected, and cases that involve substantial proof will have a greater chance of ultimately resulting in an administrative fine. The statements of corporate officials referred to in this study, originate from secondary sources and therefore might express firms' perspectives, but were expressed in the course of an administrative procedure. Note that one of the formal legal requirements of finding a person or corporation guilty of an infringement is that the effects of the infringement must be 'noticeable'; have a significant effect on the market. This might lead some of the corporate officials to deny the 'real' effect of any agreements made, as a legal defence strategy, or to under-report their conduct in general. Table 2 presents descriptive information on the selected cases, including the cartel's duration,[3] number of firms, and nature of the conduct.[4] The relatively high number of firms in these cases can be biased because of three main reasons. Firstly, cartels with an active industry association have a greater chance of detection. Secondly, cartels with a more limited number of firms may conspire more effectively, with little chance of detection. Thirdly, an effective cartel may have a self-amplifying effect; the collusion can offer more firms an opportunity to survive.

The Dutch cases in this study have an average duration of about five years, which is comparable to the typical duration of cartels globally (Levenstein and Suslow 2006; 2011). This duration shows that firms manage to stabilise their cartel for several years, which indicates a form of stability and effective coordination. Besides duration, most of the cases involve a large number of participating firms. For instance, 15 firms were involved in cases 7 and 9. It indicates the need for systems of communication and monitoring in coordinating collective action in cartels. The duration also suggests effective communication.

Table 2 states the nature of the conduct. Three main categories are distinguished: bid-rigging, price-fixing, and market division or allocation. Based on legal definitions, these serve as a descriptive label, indicating the main category of the infringement, though these categories are not mutually exclusive per se. Bid-rigging involves firms in a tendering procedure, communicating before the bidding takes place. They divide the work and rotate bids, thereby rigging the procedure. Also known as collusive tendering, it generally involves raising price offers to the buyer. In price-fixing cartels, firms make explicit agreements on the price or

3 To determine the duration of these cartels, the period of the continuous infringement stated in the report is used. This also means that the period before the introduction of the Dutch cartel prohibition (January 1998) is not incorporated in determining the duration. This suggests an underestimation of the actual duration of the cartel. This effect is enhanced by the internal selection bias of the competition authority concerning the minimum standards regarding evidence.

4 In light of confidentiality, the industry in which the cartels took place cannot be indicated per case in table 2. The cases took place in the following industries; construction (6); heavy industry (3); general services industry (2); forestry (1); waste disposal (1); and financial services (1).

surcharge of a particular product or service. Firms will use, for instance, minimum pricelists. The other cases are market division or allocation. In these cartels, firms agree to fix market shares or divide markets into geographical regions.

Table 2 Descriptive information on selected cartel cases

Case #	Duration in years	Number of firms	Nature of the conduct	Collective market share
Case 1	6	9	Market division	70%
Case 2	8	9	Price-fixing	85-90%
Case 3	6	8	Bid-rigging	60-80%
Case 4	6	5	Market division	60-80%
Case 5	6	5	Bid-rigging	-
Case 6	1	9	Bid-rigging	-
Case 7	7	15	Market division	90%
Case 8	1	2	Bid-rigging	-
Case 9	6	15	Market division	87.3%
Case 10	1.5	4	Price-fixing	58%
Case 11	2	3	Bid-rigging	85-95%
Case 12	9	14	Bid-rigging	-
Case 13	3.5	10	Market allocation	-
Case 14	11	4	Market allocation	35-50%

5.2.3 Method used in chapter 4; case-file analysis of public records parliamentary investigations into bid rigging in the construction industry in the Netherlands and Canada

For the purpose of this chapter, the publicly available records of the investigations from La Commission sur l'octroi et la gestion des contrats publics dans l'industrie de la construction (CEIC 2015) and Parlementaire Enquetecommissie Bouwnijverheid (PEB 2002) served as data for a comparative analysis. These publicly available reports contained: transcripts from witness testimonies, police evidence including wiretaps and video surveillance, demographic information, economic and market studies. A document analyses was performed on these sources based on a topic list including the following topics: general case information, type of actors, structure of the industry, market indicators and the modus operandi of the cartels. In addition, information on regulatory regimes and regulatory changes during the active years of the cartels was gathered and analysed.

5.2.4 Method used in chapter 5; semi-structured interviews with specialised competition lawyers, in-house legal counsel and cartelists

For the purpose of this chapter a qualitative study among corporate and legal professionals in the Netherlands was conducted. As mentioned, most socio-legal studies on leniency in cartel

cases are based on single case studies or systematic case-file analyses. Unfortunately, leniency case-file reports – including transcripts of cartel confessions, internal communication and documentation of leniency applicants – are classified. Despite several requests to access these files for the purpose of scientific study, the Dutch national competition authority denied access to these files. Due to both the limited availability of official documents as empirical material and the nature of the research question – which is directed at qualitative understanding of the interaction between leniency arrangements and cartelists –motivations and perceptions in this study are studied through interviews.

A total of 34 semi-structured interviews were carried out with competition lawyers (17), in-house legal counsel (6) and cartelists (11). The competition lawyer and in-house legal counsel all had extensive experience in consultation and defence in (alleged) cartel infringement cases. In addition, most of them (14) had experience with preparing and submitting leniency applications for clients. Because cartel cases tend to be both a specialist topic and are often considered high-profile cases with high financial and reputational stakes, a combination of a level of seniority and expertise amongst respondents was important. Therefore, all respondents were selected on the basis of their professional experience and expertise. Respondents held relevant professional experience of minimum 8 years, up to 41 years and were all experts in the fields of competition law. The competition lawyer respondents all worked in one of the following occupations: partner, lawyer-partner, senior counsel or off-counsel. The in-house legal counsel respondents also had a relevant professional experience of a minimum of 8 years, up to 18 years. In addition, interviews were held with cartelists (11); chief executives and directors with experience in the process of considering leniency related to (potential) cartel conduct violations in their company. Their working experience in an executive or director role varied between 5-26 years. All the corporate professional respondents had a one-time only experience with cartel infringements and or leniency. Only two of them had a background in law, the others in business studies or economics. Half the cases ultimately led to an administrative fine from the competition authority. Also, respondents' firms only pursued leniency in about one-third of these cases. This was important in answering the question why some cartelists also refrain from asking for leniency.

In order to gain access to the field and establish contacts with respondents to conduct interviews, the Dutch national association for competition lawyers was contacted. The board of the association forwarded a request in their newsletter, explaining the research and call for respondents. Several respondents contacted the researcher after the call in the newsletter, others were contacted after online searches for contact information, and others were approached through the so-called snowballing method; every respondent was asked to recommend additional contacts which were contacted. Clients (in-house legal counsel, chief executives and directors) were also contacted through this method of snowballing. The interviews took place at

the offices of the respondents. Mostly, these interviews were held in the conference room, rarely in personal offices or coffee corners. Interviews typically lasted for around 50 minutes, with outliers of 45 and 150 minutes. The interviews were audio recorded and transcribed afterwards. During the interviews, the following topics were discussed: issues relating to the distribution of responsibility (e.g. the role of legal professionals) and the decision-making process within companies relating to cartel infringements and leniency; incentives and disincentives to apply for leniency; and the role and influence of follow-on civil procedures (damage claims, compensations) and the influence of professional litigation funders.

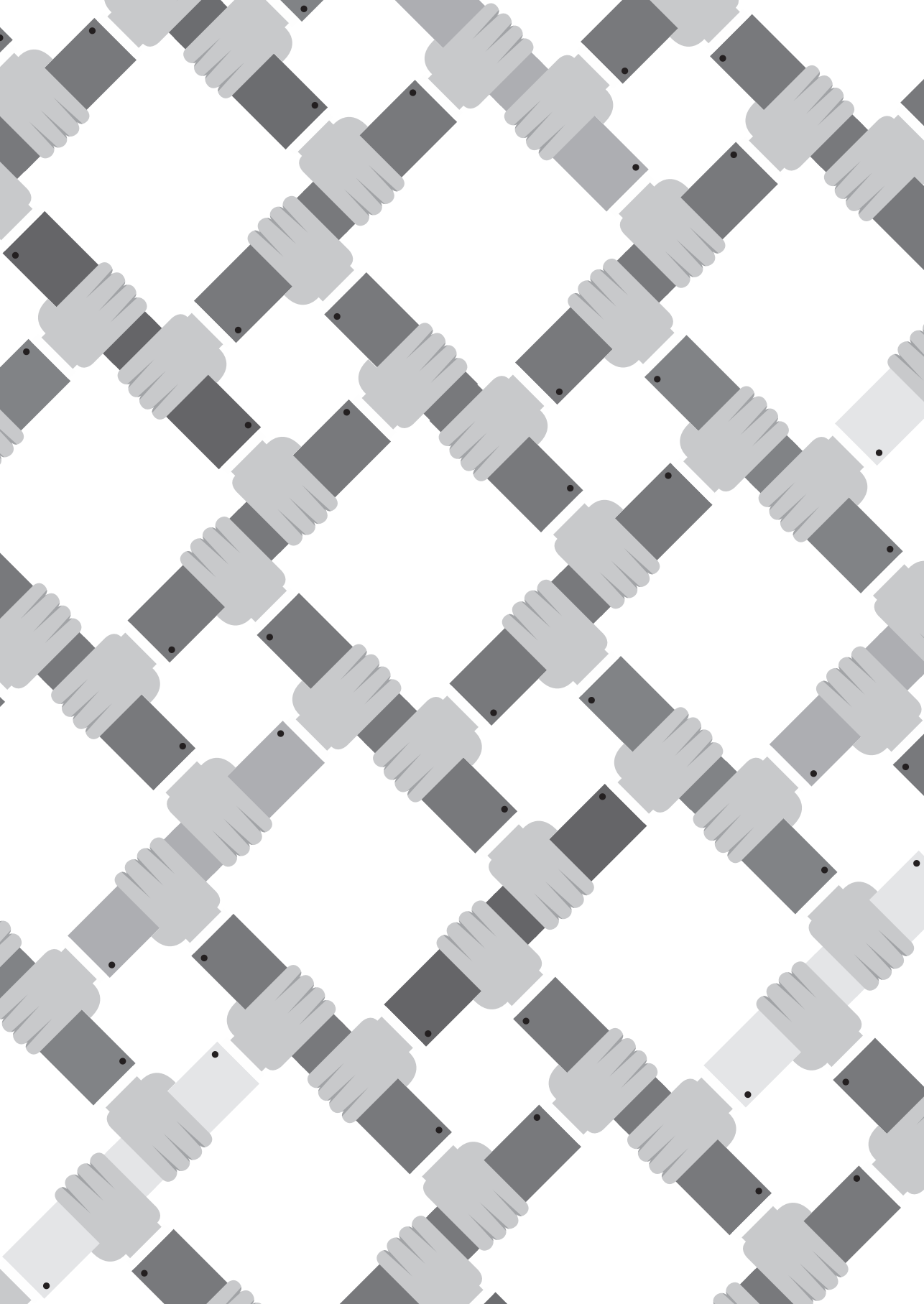
The use of this approach has several limitations. About 30-40% of approached potential respondents declined from being interviewed for this study. This mainly concerned those who were contacted after the online search ('cold calls'). All non-response was followed up by a question for the reason(s) of non-response. Where indicated, reasons for non-response amongst lawyers were mainly a lack of time, interest or sufficient expertise in their own opinion. Reasons for non-response amongst in-house legal counsel, executives and directors, mainly concerned issues regarding confidentiality. In-house legal counsel often sign internal contracts with their company, or between company and regulator in case of settlements. Either way, this bounds them from speaking or commenting on the case. In addition, the negative image of big business (especially multinational corporations) as non-compliant was noted several times as a reason not to cooperate in this study. Regarding cartelists: the fact that mostly multi-national firms declined from participating in the study might indicate a slightly overrepresentation of more local and smaller businesses. On the other hand, the majority of interviews with lawyers were lawyers of large international and trans-national firms dealing with major multinational corporations as clients, so their experience is represented in the data from that end.

Semi-structured interviews have limitations. Firstly, it is not possible to generalise results to a greater population. Therefore, the results in this study are not representative for all cartel cases or every leniency application in the Netherlands. The purpose of this study is to understand the nature of the interactions regarding leniency. Research findings regarding the interaction between regulation and businesses can have a wider relevance e.g. in other domains of law. It tells us something about the nature of interactions between different types of professionals when it comes to the decision-making process around compliance issues within companies. Secondly, social desirability of respondents is an issue in interviews. Naturally, lawyers are advocates to their clients' best interest and therefore, to a certain extent, also to their conduct. To correct for anticipated social desirability, the interviewer used extensive research through case studies on recent national cartel cases. In addition, during the interview the researcher consequently insisted respondents to go into specific examples from their own professional experience to avoid generalizations in their answers. Moreover, in the process of doing so, this provided an opportunity for the interviewer to go into detail.

5.2.5 Informed consent and data management

Confidentiality was guaranteed for all methods used in this study. No information is presented in this thesis or other publications based on this research that may lead to the identity of respondents, specific organisations, or specific cases. With the exception of public information, such as public sanction decisions or news articles used in this study. For the purpose of the semi-structured interviews in this study, data was collected only with informed consent of respondents (see Appendix II and III). In case of the interviews with competition lawyers and cartelists, respondents were asked to agree with an audio-recording of the conversation beforehand. Regarding data-management and data protection, respondents were explained the following: 1) these recordings will serve the purpose of transcribing the interview afterwards; 2) when the transcription is completed these audio-recordings are deleted; 3) the transcriptions are anonymised, this anonymisation means transcripts will not contain any retraceable personal information regarding the respondent, their client, organisation or market; 4) this means respondents might recognize themselves in statements they have made in future publications of this study. However, third parties will not be able to identify them from this information. In other words, their anonymity is not infringed. Before the start of the interview, the researcher identified himself, his role and affiliation and the source of funding for this study. Respondents were also informed on the publication plan for the study. This research is funded by the Netherlands Organisation for Scientific Research (NWO) through a Research Talent Grant.[5]

5 https://www.nwo.nl/actueel/nieuws/2014/magw/gehonoreerde-voorstellen-magw-onderzoekstalent.html



Chapter 2

Managing cartels: how cartelists create stability in the absence of law*

Abstract:

Firms enter cartels (e.g. price-fixing; bid-rigging) in order to control market uncertainties and gain collusive profits, but face challenges in controlling the cartel itself. A challenge for business cartels is how to organise collective illegal activities without the use of formal control, such as binding legal contracts or arbitration. While one might expect that a lack of formal legal control leads to mutual conflicts and opportunistic behaviour resulting in short-lived cartels, firms often manage to continue their illegal conduct for years. This raises questions as to how firms organise their cartels in the absence of legal means. Chapter 2 addresses how informal coordinating mechanisms enable cartel stability outside the scope of formal legal control. Based on an in-depth study of 14 Dutch cartels, this chapter shows the importance of informal social mechanisms to coordinate, monitor, enforce, and compensate for the longevity of business cartels. Furthermore, the results emphasise that in order to explain cartel stability, social mechanisms that induce trust need to be considered.

* This chapter has been published as: Jaspers, J.D. (2017). Managing Cartels: how Cartel Participants Create Stability in the Absence of law. *European Journal on Criminal Policy and Research, 23* (3), 319-335.

1. Introduction

Business cartels are an example of corporate and economic crime that entail collusion between competitors to fix prices, divide markets, or rig tendering procedures (Friedrichs 2010; Stewart 2007; Geis 1987). Cartels initially enable firms[6] to minimalise uncertainties and the risks of a competitive market. However, once in a cartel, firms face various external and internal threats to the cartel itself. Internal threats involve cheating, not complying with the cartel, and defection, insiders denouncing the cartel using leniency.[7] Cartelists need to deal with these threats in an informal setting. In other words, cartels require collective action, but participants have to operate subversively, against the background of increasing criminalisation[8] of this conduct in recent years. Cartelists are therefore unable to formulate binding contracts or resort to legal conflict resolution in the event of broken agreements.

Business cartels are, in that sense, comparable to organized crime. From organized crime literature, we know that non-violent forms of dispute settlement are common and often prove to be a less costly business tool than violence, in illegal contexts (Paoli 2003; Zaitch 2002). Violent retaliation can attract unwanted attention from authorities and harm 'business' relations and reputations of reliability in illegal markets (Zaitch 2005). Studies on drug markets show that non-violent retaliation in the form of negotiation, avoidance and toleration reduces the costs of conflict and is widespread (Jacques & Wright 2008; 2011). In analogy to the study of organized crime, the aim of this chapter is to investigate how legitimate firms manage their illegal agreements with others and how they deal with the risks of cheating, free riding and defection.

The question how firms manage to stabilise cartels has received limited attention in criminological literature. There are some criminological white-collar crime studies on cartel conduct, like the seminal study of Geis (1987) on price-fixing in the heavy electrical equipment industry. These studies explain cartel conduct by a need to manage and avoid uncertainties, make results more predictable and minimise risks (Agnew, Piquero, and Cullen 2009; Paternoster and Simpson 1996; Jamieson 1994; Geis 1987; Sonnenfeld and Lawrence 1978). However, these studies do not adopt a longitudinal perspective to cartels. To the extent that studies do adopt a longitudinal approach to white-collar crime, they focus on the individual life course, instead of on co-offending (Piquero and Weisburd 2009; Weisburd and Waring 2001).

6 Admittedly, there are issues of agency within firms that influence the outcome of corporate conduct. However, I will not deal with that issue here and will consider firms simply as economic entities.

7 Leniency is a whistleblowing instrument through which firms can come forward to competition authorities with substantial evidence regarding the cartel in return for sanction immunity or waivers of prosecution.

8 Since the late 1990s, most countries introduced administrative penalties, and some countries have imposed criminal sanctions for cartel conduct (Beaton-Wells 2008; Ottow 2012). Today, scholars speak of a global trend of cartel criminalisation, with more than 30 countries worldwide using criminal law to sanction cartels and most other countries, the European Union and its member states in particular, having increased the level of fines significantly over the last two decades (Harding, Beaton-Wells, and Edwards 2015; Shaffer and Nesbitt 2011).

In economic literature, numerous studies do focus on how firms manage to stabilize cartels (Harrington 2006; Hinloopen 2006; Ashenfelter and Graddy 2005; Spagnolo 2000; Spar 1994; Stigler 1968). Economists mostly perceive cartels as 'inherently unstable', focusing on the incentives to cheat and means of retaliation in order to prevent cheating. The image of cartels as 'inherently unstable' is influential and underpins competition law and policy. Accordingly, the legal debate focuses on raising regulatory pressure in order to destabilise existing cartel agreements. This inherent instability is not in line with the empirical evidence of the duration of cartels. Cartels manage to exist for years – even decades (Levenstein and Suslow 2006; Leslie 2008; Connor 2010; Connor and Helmers 2007) – and they often comprise a relatively large number of participating firms (Connor 2010). The criminalisation project therefore seems ill informed by a proper understanding of the operation of business cartels (Beaton-Wells and Haines 2010; Harding 2006; Harding and Joshua, 2003: 284).

This chapter contributes to a more complete understanding of the operation of cartel stability, by addressing the question how cartels operate in secrecy, confronted with coordination problems and instability and how they deal with mutual disagreements in the absence of legal means. To review the scholarship on cartel stability, it is helpful to distinguish two directions of thought. The first and most dominant approach is an economic one that focuses on a lack of trust between cartelists and on their individual incentives to cheat. The second approach is a social one that focuses on the impact of social mechanisms that enable trust between cartelists. As regards cartel stability, these contrasting approaches result in two explanatory models that generate different expectations as to how members stabilise their cartels in the absence of legal means.

In an empirical manner, this chapter investigates different responses of cartelists to assess the validity of existing theoretical explanations concerning cartel stability. Therefore, the question is posed: How do informal coordinating mechanisms enable cartel stability outside the scope of formal legal control and what role does trust play? Based on 14 case studies of Dutch cartels, this chapter explores how cartels manage to survive for years despite the threat of cheating and detection; how do firms organise cartels; and how do they prevent and overcome internal conflicts? Section 2 of this chapter discusses previous studies and theory concerning cartel stability. Section 3 introduces data and the methods used for this study. Section 4 addresses the internal mechanisms of coordination, monitoring, compensation, and enforcement in light of the research question. Section 5 deals with the conclusions, limitations, and possibilities for further research.

2. To cheat or not to cheat: theoretical perspectives on cartel stability

2.1 The economic perspective: stability through retaliation

Economic literature on cartels uses a model that departs from the idea of a lack of trust between member firms. In this model, firms are bound to cheat on the mutual agreement because of incentives to do so. Economic studies perceive cartels in terms of a game-theoretical problem: it starts from the idea that cartel participants are motivated instrumentally, and the perceived costs and benefits are part of a rational assessment. With this comes a focus on incentives for players in the cartel to cheat, such as overselling or underpricing (Stigler 1968). Firms will do so in order to maximise individual profits further or to expand market shares beyond the cartel's collective agreement. This leads to the perceived 'inherent instability' of cartels (Rapoport 1965). This model is vividly illustrated by one of the directors of ADM in the lysine cartel[9]: 'Everybody's going to want to cheat anyway. Knowing them, we will want to cheat' (Leslie 2004: 561; Eichenwald 2001: 220).

In this perspective, cartel stability depends on the perceived losses and profits that result from cheating in relation to the likelihood of possible punishment from other cartel members. Therefore, cartelists can only establish stability by means of a system that increases – by way of internal punishment – the costs of cheating (Spagnolo 2000; Spar 1994). Cartels need to monitor their agreement to detect cheating and punish firms that practise it (Levenstein and Suslow 2006; Connor 2001; Ayres 1987). Thus, in order for a cartel to survive, this model assumes credible punishment should be in place to penalise members that cheat, thereby enforcing the cartel agreement (Ayres 1987; Green and Porter 1984; Stigler 1968). Forms of credible punishments described are price slicing and the threat of price wars (Harrington 2006; Grossman 1996). For instance, when firms observe cheating by other firms, they lower their cartel prices temporarily in order to punish possible cheaters and to stabilise the cartel (Ashenfelter and Graddy 2005).

In short, an economic approach seeks explanations for cartel stability in effective internal detection and punishment. This introduces the expectation that the cases will demonstrate sophisticated systems of coordination, monitoring, and enforcement. Retaliation in the form of price slicing and price wars will serve to increase the costs of cheating, thus ultimately stabilising cartels.

9 The international lysine cartel entailed a price-fixing conspiracy between the American food processing company Archer Daniel Midland and its main Korean and Japanese competitors around the animal feed additive lysine. Cartelists allegedly managed to raise global prices of lysine by 70% for several years during the mid-1990s.

Recent empirical studies find two important issues regarding cartel stability that challenge the assumptions in the economic model. Firstly, cartels invest more in means to prevent cheating than to resort to ex post punishments,[10] which are costly (Harrington 2006; Levenstein and Suslow 2006). Secondly, a retaliatory response to cheating increases the likelihood of a cartel's natural demise (Levenstein and Suslow 2011). Where strong systems of monitoring and enforcement are considered to account for cartel stability in the economic model, empirical results suggest otherwise. The deviating effects of internal punishments leave room for alternative explanations for the longevity of cartels.

2.2 The social perspective: stability through mutual trust

Empirical cartel studies that use a social approach criticise economic assumptions on behaviour as being too simplistic (Parker 2012). Results from the Melbourne cartel project[11] show the discrepancies between economic assumptions in competition policies and the social reality of business conduct (Parker 2012; Haines and Beaton-Wells 2012). A social approach examines the relation between actors rather than focusing on the individual agent. It considers the actions of individuals to be strongly socially embedded. A social approach considers cartels in the context of mutual trust, focusing on the incentives of firms to act cooperatively in the informal setting of cartels. Trust may provide an important element in explaining how firms manage to operate their cartels for long periods (Stephan 2010; Leslie 2004), and better account for some of the recent empirical findings on cartel stability.

Empirical studies using a social approach to cartel stability are scarce, but we can find similar explanations for cooperative behaviour in studies on legal business conduct in informal settings; this is referred to as 'the shadow of the law'. It shows that business relations are socially embedded and able to generate social norms that make legal sanctions unnecessary and superfluous (Ellickson 1991; Granovetter 1985; Black 1983; 1984; MaCaulay 1963; 2013).[12] Scholars in economic sociology have stressed the argument and the paradox of the social embeddedness

10 In this regard, I point out the importance of compensation systems, such as side payments and buy-backs. These are financial compensations or compensations in kind, and serve to even out disparities regarding, for instance, agreed-upon volumes at the end of the year. I classify them here as a means of coordination in order to regulate the execution of the agreement and to prevent miscommunications or conflicts. This has to be distinguished from punishment by retaliation as a response to conflicts.

11 This research project was conducted at the Melbourne Law School by researchers Caron Beaton-Wells, Fiona Haines, Christine Parker, David Round, and Janette Nankivell. The project studied the process of cartel criminalisation and the perceptions of the general public and business professionals with regard to cartel conduct. Researchers used a multidisciplinary approach, including legal and social research methods. For more information, see http://www.law.unimelb.edu.au/cartel.

12 The ability of people to work together for common purposes in groups and organisations has also been defined as *social capital* by a group of influential scholars within the field of sociology (Coleman 1988; Fukuyama 1995; Putnam 1995). Fukuyama (1997: 378-9) says: 'Social capital can be defined simply as the existence of a certain set of informal values or norms shared among members of a group that permit cooperation among them (…) the norms (…) include virtues like truth-telling, the meeting of obligations, and reciprocity'. Putnam (2000; 19) also stresses the importance of norms of reciprocity and trustworthiness that arise from social networks.

of economic action, claiming that the more an informal economy approaches the model of a 'true market', the more it depends on social ties. Social embeddedness is considered especially visible in a context where mutual trust is the only resource against malfeasance (Portes 2010; Granovetter 1993). Therefore, in the absence of enforceable legal protection, personal relations between cartelists are expected to form an important factor for the internal stability of cartels. Stephan (2010: 361) states: 'The notion that one should befriend individuals in business and bring them into one's home can be an explicit social mechanism for ensuring that an agreement is honoured in the absence of strong legal protection'. Personal relations and interpersonal trust can account for cartel stability, and three main conditions for interpersonal trust can be identified: communication, reciprocity, and reputation.

Communication: Common protocols and frequent communication can play a significant role in the process of building trust. People who communicate frequently are more likely to perceive mutual trust (Leslie 2004: 538). Face-to-face meetings and coordination will facilitate the perception of trustworthiness, thus promoting cooperative behaviour. Just as in the economic approach, systems of coordination and monitoring are expected here. The social approach perceives these systems as a symptom of the incentives to cooperate and as a means to build trust, thus making punishments irrelevant. Moreover, simply allowing discussions and participating in negotiations increases cooperative behaviour within cartels, creating more internal support and legitimacy for the agreement and its conditions (Leslie 2004: 544). Therefore, instead of retaliation, negotiation and mediation are expected in response to mutual disagreements.
Reciprocity: In the operation of cartels, firms will build upon mutual rights and obligations because of the coordination of agreements and the compensation in light of them (Van de Bunt 2010; Hertogh 2005). This enables norms of generalised reciprocity to develop within the cartel. Being in debt to others and having others indebted to you affects one's actions. It is expected that this creates mutual dependencies between firms, which in turn promotes peaceful arbitration and discourages cheating, thus ultimately stabilising the cartel.

Reputation: A reputation for being trustworthy is crucial in business relations (Van Erp 2008). One's promise of trustworthiness must be credible, as trust is a function of expectations (Leslie 2004: 540). Having a shared past serves as input for this reputation, and having a shared future creates a need for it, again giving firms an interest in handling their relations in a harmonious manner. The desire for a positive reputation encourages parties to avoid mutual conflict or retaliation (Posner 2009). Retaliation, such as price wars, can be an expensive piece of 'equipment' in business relations. Firms thrive on being perceived by others as being a trustworthy, cooperative, and reasonable partner.

Table 1 Two ideal typical explanatory models of cartel stability

MODEL	Economic approach	Social approach
UNDERLYING BEHAVIOURAL ASSUMPTIONS	Instrumentally oriented economic action: -Instrumentally motivated actors -Mutual lack of trust central -Focuses on the incentives to cheat: --maximise profits --expand markets	Socially oriented economic action: -Normatively motivated actors -Mutual trust central -Focuses on the incentives to cooperate: --value introjection
ORGANISATION OF CARTELS	As a result of lack of trust and incentives to cheat: -Systems of coordination and monitoring	As a result of social ties, means to build trust, and the incentives to cooperate: -Systems of coordination and monitoring
EXPECTED RESPONSE TO CHEATING	Punishment/retaliation	Mediation/negotiation
EXPECTED OUTCOME	Forced compliance of cheating firm to original agreement, or exclusion of cheater	Adjusted agreement and/or compensation scheme and continuation of the cartel

Table 1 depicts the two explanatory models of cartel stability. Both approaches expect similar organisation within cartels: namely, systems of coordination and monitoring. However, they foresee different responses in light of internal cheating: the economic approach expects retaliation and the social approach anticipates negotiation. The models contain ideal types, the cases that are studied and discussed are viewed in regard to these models to assess which elements they contain in practice.

3. Methods and data sources

This chapter examines cartel stability based on a qualitative case file analysis of 14 Dutch cases. In these cases, the Dutch Competition Authority imposed an administrative fine between October 2007 and January 2012.13 These cases were selected because reports that led to a fine contain substantial proof, including documentation on coordination and communication within cartels. This documentation allowed for a systematic and in-depth study of the structure and nature of cartels. The fourteen cases were examined using document analysis and semi-structured interviews with case managers from the Authority for Consumers and Markets. The

13 Commissioning administrative fines is one of the possible sanctions authorised by Dutch competition law (according to Art. 56 lid 1 sub a Mw). Since October 2007, Dutch competition law allows the investigation of private property and the possibility of fining natural persons (*Kamerstukken I* 2006/07, 30 071, A). October 2007 is the starting point of the analysis for the sake of comparability of the material. January 2012 is indicated as end date because cases usually take several years from the initial investigation until the official sanction; all cases completed by January 2012 have been included.

sources are official reports by the authority,[14] summarising the files and containing a selection of evidence used in administrative proceedings towards administrative fines imposed upon corporations. These files contain descriptions of the modus operandi of cartels and include correspondence between their members; transcriptions of verbal interrogations with corporate officials by the competition authority; and sources of cartel administration. These statements are supported by additional written administration. The material was systematically studied using a checklist, focusing on the type of network; the nature of mutual relations; mechanisms for mutual control; mechanisms for mutual trust; and instances of cheating and conflicts. For every case, the document analysis was complemented with a semi-structured interview with the project manager of the authority that handled the investigation. In these interviews, the following topics were discussed: the nature of the cartel; mechanisms for mutual control and trust; and instances of cheating and mutual conflicts. These interviews served to provide a better overview of the files and an opportunity to ask additional questions that could not be answered in full through studying the written reports.

Table 2 Descriptive information on selected cartel cases

Case #	Duration in years	Number of firms	Nature of the conduct	Collective market share
Case 1	6	9	Market division	70%
Case 2	8	9	Price-fixing	85-90%
Case 3	6	8	Bid-rigging	60-80%
Case 4	6	5	Market division	60-80%
Case 5	6	5	Bid-rigging	-
Case 6	1	9	Bid-rigging	-
Case 7	7	15	Market division	90%
Case 8	1	2	Bid-rigging	-
Case 9	6	15	Market division	87.3%
Case 10	1.5	4	Price-fixing	58%
Case 11	2	3	Bid-rigging	85-95%
Case 12	9	14	Bid-rigging	-
Case 13	3.5	10	Market allocation	-
Case 14	11	4	Market allocation	35-50%

The use of secondary sources leads to several limitations of this study. Because of detection and enforcement biases, the cases do not necessarily provide a representative image of all cartel conduct in the Netherlands. Some cartels have greater chances of being detected, and cases that

14 These files are a result of investigations based on the legal power invested in the Dutch competition authority to interrogate corporate officials and demand corporate intelligence (Art. 5:16 Awb), to investigate company and private property and administration (Art. 5:15, art. 54, 55 Mw), and to use leniency requests and other relevant informants and public information.

involve substantial proof will have a greater chance of ultimately resulting in an administrative fine. The statements of corporate officials referred to in this chapter, originate from secondary sources and therefore might express firms' perspectives, but were originally made in the course of an administrative procedure. Note that one of the formal legal requirements of finding a person or corporation guilty of an infringement is that the effects of the infringement must be 'noticeable'; have a significant effect on the market. This might lead some of the corporate officials to deny the 'real' effect of any agreements made, as a legal defence strategy, or to under-report their conduct in general. Table 2 presents descriptive information on the selected cases, including the cartel's duration,[15] number of firms, and nature of the conduc.[16] The relatively high number of firms in these cases can be biased because of three main issues. Firstly, cartels with an active industry association have a greater chance of detection. Secondly, cartels with a more limited number of firms may conspire more effectively, with little chance of detection. Thirdly, an effective cartel may have a self-amplifying effect; the collusion can offer more firms an opportunity to survive.

The Dutch cases in this study have an average duration of about five years, which is comparable to the typical duration of cartels (Levenstein and Suslow 2006; 2011). This duration shows that firms manage to stabilise their cartel for several years, which indicates a form of stability and effective coordination. Besides duration, most of the cases involve a large number of participating firms. For instance, 15 firms were involved in cases 7 and 9. It indicates the need for systems of communication and monitoring in coordinating collective action in cartels.

Table 2 also states the nature of the conduct. Three main categories are distinguished: bid-rigging, price-fixing, and market division or allocation. Based on legal definitions, these serve as a descriptive label, indicating the main category of the infringement, though these categories are not mutually exclusive per se. Bid-rigging involves firms in a tendering procedure, communicating before the bidding takes place. They divide the work and rotate bids, thereby rigging the procedure. Also known as collusive tendering, it generally involves raising price offers to the buyer. In price-fixing cartels, firms make explicit agreements on the price or surcharge of a particular product or service. Firms will use, for instance, minimum pricelists. The other cases are market division or allocation. In these cartels, firms agree to fix market shares or divide markets into geographical regions.

15 To determine the duration of these cartels, the period of the continuous infringement stated in the report is used. This also means that the period before the introduction of the Dutch cartel prohibition (January 1998) is not incorporated in determining the duration. This suggests an underestimation of the actual duration of the cartel. This effect is enhanced by the internal selection bias of the competition authority concerning the minimum standards regarding evidence.

16 In light of confidentiality, the industry in which the cartels took place cannot be indicated per case in table 2. The cases took place in the following industries; construction (6); heavy industry (3); general services industry (2); forestry (1); waste disposal (1); and financial services (1).

4. Managing cartels in the absence of formal legal control

To analyse which elements of the two approaches occur in the cases, they are discussed in light of the explanatory model provided in Section 2: respectively, the organisation of cartels, the responses to cheating and conflicts, and the outcome of these responses.

4.1 The organisation of cartels: systems of coordination, compensation and monitoring

Cartel stability is enabled by systems of coordination, compensation, and monitoring in all cases, as expected from both the economic and the social approach. Bid-rigging cartels use cover pricing and phases-of-the-moon systems. Firms inform each other on new incoming requests from potential and existing clients, while others respond when they receive the same request. Agreements are made on a specific project, and firms divide the work, communicating their prices and offers prior to submitting them in a tender procedure. They typically agree on who will obtain the tender, and the rest will submit a higher price. The firms themselves often document divided projects and clients. Based on this overview, they make use of compensations to even out disparities. To do this, firms can use false invoices, by which goods and services are billed that did not actually take place. In some cases, discounts for mutual deliveries are used to compensate. In addition, some bid-rigging cartels use a phases-of-the-moon system to decide whose turn it is to acquire the next project or client. It is a form of bid rotation by taking turns. Less communication is needed this way, leading to less potential written evidence of communication. Here is an example of how such a system can operate:

> *"We kept an overview in Excel. It was quite simple. Name of the tender, names of the suppliers [cartelists], their prices, and the name of who got the tender. Those firms involved in the specific tender kept score, they noted the price on which the tender was assigned. An example: if there were three suppliers, one would have received work for €70,000, the other for €80,000 and the third for €30,000; then the next project would be for the one with €30,000. The lowest in the list came first." (5)*

There are also instances of cover pricing; purposely submitting a higher price than other firms. This is also referred to as 'borrowing prices' or courtesy bidding, which is used to stay in the loop and remain visible to potential clients, while lacking the capacity to actually execute the work. Cover pricing is a form of bid-rigging that takes place more decentralised and ad hoc.

Price-fixing cartels usually organise a number of meetings to set minimum prices or increase prices regarding a certain product or service. Minimum pricelists and standard client letters are used. In one example, producers meet twice a year to discuss and fix prices. As well as the means to increase prices, cartel members also discuss the timing of announcing the surcharge.

Other cases include market division cartels, dividing market shares and geographical allocation. These cartels use client lists, turnover lists, market-sharing lists, and geographical distributions. Dividing clients, often referred to by firms as 'respecting clients', is most common among the selected cases. One of the cartelists explains the use of client lists as follows:

> *"Goal of the list is to respect each others' A-relation customers. This means that if I received an order from someone else's A-relation client, I at least had to apply the price lists. And we did. The other one would then have the possibility to underprice that offer to manipulate the order in their direction". (1)*

Cartels show a learning ability when it comes to effective coordination. In the next example, firms develop and professionalise their coordination system through trial and error. Initially they have a simple system: firms report orders of a certain size at a central contact point, discuss who is to be given the order, and divide the work accordingly. However, as in most of the cases, firms need some form of compensation to even out disparities that would build up over time and were not in line with the mutual agreement. To compensate for this, firms would prefer orders, but sometimes also needed to apply financial transactions. However, this led to practical issues resulting in a flexible compensation rule, noted in the minutes of one of their meetings. This example illustrates how cartelists manage to negotiate a solution as well as how firms choose the desire for stability over financial gain:

> *"Because no member of the cartel could ever deliver exactly in accordance with the pre-established market shares, and it is considered undesirable for members to transfer money to one another as if they were bankers, an agreement is established including that compensation is not needed for over- or under-exceeding 5% of the market share". (4)*

Other cases also illustrate this point. In case 14, firms divided national regions, and every cartelist was committed to refer potential clients to the firm that was active in that area. However, firms did not always succeed in referring clients. If clients went against being referred, the firm that originally received the order accepted the offer, hereby violating the original allocation agreement. For this situation, the cartel introduced a rule: if a client from another region was contracted, the firm owed 2% of that contract to the cartelist who 'owned' that region. Cases 4 and 14 are good illustrations of the coordination process in most cases, for two reasons. Firstly, it shows how parties can prevent resentment or conflicts by compensating according to what is perceived as 'just'. Secondly, it demonstrates how cartelists evaluate and negotiate in order to establish internal rules and agreements. Both examples of the informal rules that emerge from collective bargaining in the absence of formal legal means. Cartel rules can clearly be a result of social norms in a sector, as in the example of 'respecting clients'. Furthermore, the

coordination process highlights the significance of communication and reciprocity. It illustrates how informal social can function as a far more powerful system to govern business conduct then formal legal rules (cf. Macaulay 1963). This also facilitates cartel stability and makes internal punishment or retaliation less likely or irrelevant.

However, cartelists do monitor their agreements, which indicates some scepticism of firms with respect to the level of trust. We can distinguish different functions of these informal control mechanisms: firms collect information on the actions of other participants in the cartel; assess whether it is in line with the agreement; and decide what type of response should be applied to the cheating party. Cartels use two main mechanisms to monitor the agreement: meetings for reporting sales figures and so on, and independent administrators. In most cases, cartelists use some form of reporting figures, such as turnover, market shares, and prices. A managing director explains which issues are dealt with in these meetings:

> *"This was an evaluation meeting in which the outcome of dealer negotiations was addressed. Amongst other things, the following questions were dealt with: Did everyone manage to retain their clients? Did clients leave? Was an increase in prices established?" (2)*

Firms mention the social control function of cartel meetings. In the next example, one of the participants explains how meetings – in theory – would be superfluous. His statement, however, indicates the scepticism that most cartelists hold towards others' complying with the agreements:

> *"The role of pricelists is that they contain the price upon which others should overcharge in formulating their offer. Actually, the meetings would not have been necessary if every member had just abided by the pricelists, because that was defining." (4)*

Some cartels also use independent – third-party – administrators, sometimes referred to as a cartel 'secretary'. They are often retired executives, familiar with the market. They arrange practical matters, look after administration, and lead discussions or negotiations. One of these 'secretaries' explained that he organised the meetings, made reservations for venues, paid expenses in advance, took minutes of the meetings, and kept score of the general turnover numbers. Being an independent 'fixer', a secretary often functions not only as an administrator but also as an informal auditor. He monitors the cartel and fulfils a role in preventing possible disagreements or in mediating in the case of conflicts.

Firms are capable of coordinating and compensating in good standing and through collective bargaining within cartels. However, signs of informal control indicate a certain lack of trust. Notable from these examples is that, because of their need to operate underground, cartelists

have to rely heavily on informal means of coordination as expected from the paradox of social embeddedness (Portes 2010). At the same time, however, cartelists tend to formalise their interactions heavily by clandestine bookkeeping, minutes of meetings, and rules on mutual compensation. It remains unclear whether this is a function of trust or a lack of it.

4.2 Responses: cheating, discussion, and conflict

With internal monitoring also comes information on the behaviour of other cartelists. This information sometimes reveals cheating by one or more cartel members. When parties do not communicate regularly, suspicions of cheating arise, resulting in mutual disagreements and irritation. One of the firms openly raised questions on the level of internal compliance in the cartel in the following example, documented in internal correspondence between cartel members:

> *"Member [name club], [C] is right – we report everything that has to be reported, but we also observe from the order of the numbers [phases-of-the-moon system] that there seem to be only two companies that still report. The rest of them do nothing or keep quiet. Especially now, when times are tough, it is useful and necessary that we keep in touch (…). That's what we agreed upon. Or is [serial number of environmental certification these companies require to do business in this market] the end-all of the [name club]? This can't be true. Show some personality and guts – this attitude leads to nothing, to nothing at all." (3)*

Third-party fixers also notice internal struggles that occur in the context of collective meetings. The 'secretary' in the following example explains how he had a mitigating role in a dispute that derived from episodes of mutual cheating:

"I would tell them to stop arguing. (…) I believe that firms deviated a lot from the established pricelists. Everyone did. One would be left with the impression "they exchange everything, we all go home, and everyone does something else instead." (4)

> *In addition to third-party fixers, other cartel participants can fulfil a conciliatory role in the event of internal disagreements. A managing director explains:*
>
> *"Arguments could escalate quickly because somebody had taken someone else's A-relation customer, for instance. If others saw this happening, they would adopt the role of mediator between parties in the meeting." (1)*

The next example also shows how firms can overcome conflicts bilaterally through communicating and showing a willingness to settle. This is a segment of a wiretapped conversation between cartelists as part of a police file, also used in the administrative procedure

by the Dutch competition authority. It reflects a conversation held after an episode of cheating on the agreement by one of the parties:

> *"[A:] Guys, if this is the way we are going to do business, every man for himself, you know what's going to happen, right? The price will only go down and, well, quite frankly, I can of course go way down. I don't want to do this, but you just wait and see [B:]. You know, let us be wise. We should just return to the way we did business before, in everybody's best interest. We should take for granted that mistakes will be made, but we should set aside our feelings and trust each other's word." (12)*

These cases show how cheating is noticed by others in the cartel and can lead to disagreements. However, cheating can also occur without being detected. In the following example, one of the cartelists explains how they would manipulate the information presented to others:

> *"It was a statement of the auditor that indicated how many square metres [name company] had supplied in the previous year. We would manipulate this statement and present it in the meeting. We blurred out the [type of product] that wasn't relevant to the cartel. We would leave the total amount but replace the attachments with the amounts we had reported earlier." (1).*

These four cases demonstrate that despite sophisticated coordination systems, cheating occurs and can result in conflict. Although negotiations and mediating 'fixers' can help to overcome most conflicts, thus stabilising the cartel, in some cases this does not suffice. The following example, also from case 1, shows how multiple attempts to overcome a lack of trust can ultimately fail. One of the managing directors provides a brief history of the cartel's internal struggles:

> *"In the autumn of 2002, the tension between [V] and [B] escalated again. [B] was accused in connection with several matters. I had a conversation on this matter with [V]. As a result of this conversation, [V] even called a director of [B]. I was upset about this, and then ended everything in December. (…) I think [V] eventually apologised in, I think, March 2003. We then sat back at the negotiation table. Everything was already falling apart anyway; [B] was doing his own thing. There had been a meeting in April 2003, and we concluded: "Guys, we have to stop. This is pointless." The stupid thing was that you were better off if you weren't sitting at the table, because then you wouldn't have to decrease your volume of production. As the biggest party, [V] had the greatest interest in keeping the thing together. You would have a really disproportional attendance at the table. We then finally quit." (1)*

4.3 Outcome: breaking up is hard

Based on the documents and the interviews with enforcement officials, it is not always possible to determine whether cartels in the selected cases actually ceased their activities, and, if so, whether this took place before, during, or after the administrative procedures. As previously mentioned, however, 'internal violations' involving cartel agreements are mostly resolved at an early stage, ex ante, by mutual compensations, negotiations, and mediation. In the last example, we saw how cheating could eventually lead to the demise of the cartel.

Nevertheless, based on the case material, there is reason to believe that on numerous occasions ending the cartel was not an easy decision. It was rarely due to explicit pressure and intimidation, and more often because of existing loyalties towards 'co-competitors', as illustrated by a quote from one of the directors:

> *"Again, I declare that we decided internally, with the introduction of the new Dutch competition law, to cease our activities. We did not succeed. We should have distanced ourselves from these activities. I urged this several times and was sometimes pressured by other firms to continue with the agreements." (12)*

This example underlines what other scholars have pointed out: taking part in cartels is not a voluntary and purely instrumental decision, but is embedded in social reality that includes existing loyalties to industry peers in markets and within firms (Parker 2012). Breaking with the cartel was often also difficult because of the mutual dependencies that had evolved as a result of working closely with others for years. When one relies on informal systems and methods for doing business, it is not easy to reject them overnight for the sake of continuation of your business. This is illustrated in the following example:

> *"Recently I have said "no" on five or six occasions; the reason for saying "yes" again to future agreements [collusive tendering] was that I would also be included in the market if they received an order. If I say "no" too often, I'm sure to be excluded by them in the future. If I say "yes", however, this also creates possibilities for me. It's give-and-take in this business." (12)*

Reciprocity is a powerful market mechanism. It means that one might become a 'prisoner' of the system, entangled in mutual rights and obligations that make it harder to say goodbye (Van de Bunt 2010; Hertogh 2005) The uncertainty of a competitive market – smaller margins, downward price levels, and so on – can also function as a push factor into continuing the cartel. This can result in cartelists, that had become competitors, to become cartelists again. This is illustrated by the following example:

> *"In March 2003 we as a company said "we should stop". It was illegal then, and it's illegal now. We have to learn to reason from the cost price plus leeway. After the summer of 2003 (fall) [company B] frontally attacked [company A]. [A] counter-attacked. Prices dropped dramatically and [A] yielded in a lot of orders that autumn. Then [B] took the initiative again to sit back at the negotiating table and said this was not workable; we are giving away everything to the market." (1)*

5. Conclusions

This study highlights how firms in the selected cases manage their cartels in the absence of law. The focus of this chapter has been on the internal structure of cartels, with regard to how firms are able to stabilise their cartel. The research question was How do informal coordinating mechanisms enable cartel stability outside the scope of formal legal control and what role does trust play? Two different perspectives were identified in the existing literature: an economic approach departing from the assumption of a lack of trust and a need for monitoring and retaliation, and a social approach departing from the assumption of mutual trust and the use of negotiation and mediation. Elements from both ideal types occurred in the selected cases.

On the one hand, the cases demonstrate the importance of informal social mechanisms for the 'successful' operation of cartels. Means of coordination and compensation – meetings, informal rules, and mutual debts – were established between firms through communication and reciprocity. The cases thereby confirmed the paradox of social embeddedness: namely, the need to operate secretly forces cartelists to rely heavily on social ties through informal means of coordination. Furthermore, mutual rights and obligations make parties interdependent, and reciprocity can function as a powerful market mechanism. This stabilises and strengthens cartels and makes it hard for firms to end existing agreements.[17]

On the other hand, third-party auditors and the formalisation of agreements in writing also indicate a lack of trust: conflicts occurred in some cases, and parties sometimes responded through retaliation. However, retaliation appears more likely to lead to the end of the cartel rather than stabilising it. In light of conflicts, the dominant strategy seems to be not to punish other cartel members. In contrast, firms are often able to overcome mutual disagreements by means of negotiation and compensation. Moreover, most cases do not involve explicit episodes of conflict, confirming the preventative effect imposed by the systems of coordination and

17 In addition to these findings, it is noted that social capital, strong social ties, and trust are often considered desirable in light of growth and economic value (cf. De Bliek 2015). However, these mechanisms can also have less desirable consequences. The strong ties in a social group such as a business cartel can benefit its members but exclude others from access. Moreover, it can limit and restrict the individual freedom of its members (Parker 2012; Portes 2010: 39).

compensation. This is comparable to findings on drug markets, where retaliation is found to be a costly business tool and negotiation and toleration are common (Jacques & Wright 2008; 2011; Zaitch 2005).

The results emphasise that in order to explain cartel stability we need to consider the social embeddedness and the importance of social mechanisms that induce trust. Trust and a lack of trust both play a role in how firms manage and shape their cartels. In a theoretical sense, it remains a chicken and egg situation, because the formalisation of cartel agreements – clandestine bookkeeping, minutes of meetings, and rules on mutual compensations – can express both mutual trust or a lack of it. Both elements are clearly hard to disentangle, and such an exercise harms the complexity of the social reality of cartels. In this regard, the economic approach overlooks the fact that – given the participants' proper response – conflicts can prove to be an opportunity to strengthen the cartel, and they pan out to be a source of stability instead of instability. This is also referred to as the 'cleansing' function of social conflicts (Coser 1956). In these cases, cartels will be more difficult to break up, even when facing the threat of formal legal control (enforcement) or changing market conditions (Levenstein and Suslow 2011).

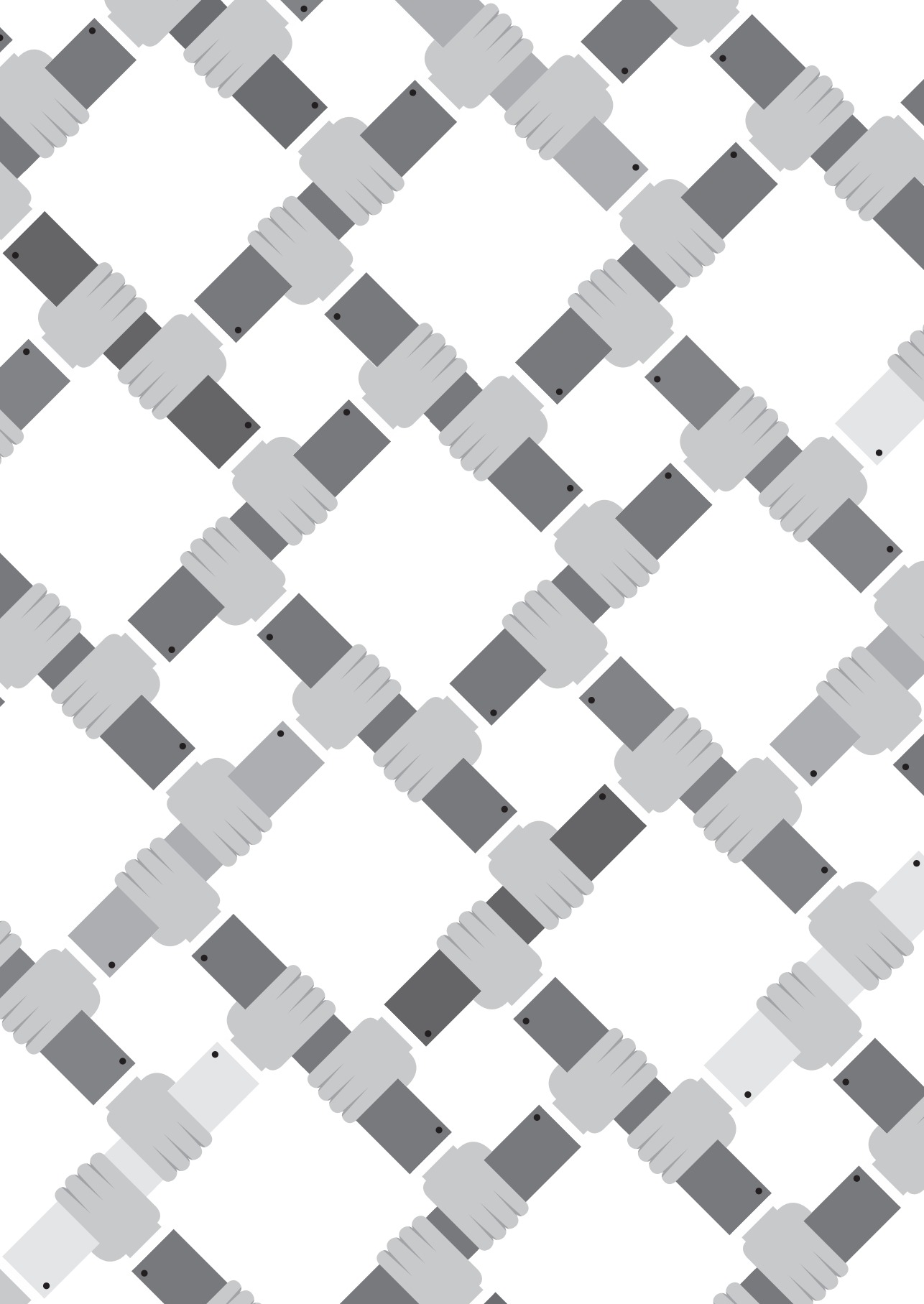
The results illustrate the importance of mutual dependencies between competitors and the use of informal social mechanisms to build trust and to stabilise cartels. This enables even relatively large groups of firms to cooperate effectively (e.g. case 12, fourteen firms and a duration of nine years, case 7, fifteen firms and a duration of seven years). The cases thereby show how an economic model provides an incomplete explanation for cartel stability and calls for incorporating a different approach to explain how cartel stability operates. Furthermore, this calls for incorporating a social perspective in competition law and policy, in which the influence of economic assumptions is widespread.

5.1 Limitations

It is difficult to determine the perspective of cartelists when their statements and testimonies have to be derived from secondary sources collected in the context of administrative procedures. Some issues, therefore – such as the significance of reputation – are less well documented. The data also did not always provide a definitive answer to whether the detected cartel had actually ended. This is an important question, because there is reason to believe that mutual conflicts and detection can also give rise to cartels beginning or starting anew. This could indicate a learning ability in prosecuted firms in addition to a 'stronger-through-conflict' cooperation with other firms in their market. Large-scale cartel recidivism on an international and European level also supports this view (Connor and Helmers 2007; Connor 2010). However, the level of recidivism is yet to be established with regard to the Dutch situation, and more careful consideration of the 'cleansing function of social conflict' is needed.

This chapter has only discussed the internal threat of cheating within cartels. Other threats, like defection by insiders (whistle-blowers) or detection by outsiders, have not been addressed here but will be in the following chapters of this study. The material on detected cartels does not provide this inside information on considerations of firms that blew the whistle on the cartel in exchange for immunity or a waiver of prosecution.

Another issue raised by this study concerns the strain between concealment of conduct and coordination, as was pointed out by the formalisation of agreements through minutes of meetings, bookkeeping, and so on. Communication and exchanges between firms in a cartel are underestimated (Grout and Sonderegger 2005). Communication seems to play a significant role in cartel stability, which might suggest that cartelists will engage in overtly collusive practices, in contrast to what might be expected from their need to conceal their cartel. This generates further questions surrounding cartel stability; for instance, what will prevail – the need to coordinate or the need to conceal? For further research on these issues, it is recommended to interview insiders such as compliance officers, in-house or external lawyers, or general managers of businesses confronted by or involved in cartel infringements (see chapter 5).



Chapter 3

Strong by concealment? How secrecy, trust, and social embeddedness facilitate corporate crime*

Abstract:

Chapter 3 examines how corporate crime is organised through studying the longevity of illegal business cartels. Previous studies demonstrate cartels can remain undetected for years or decades. Similar to criminal networks, cartel participants need to communicate in order to collaborate effectively but operate covertly at the same time. The case study analysis of fourteen Dutch cartel cases in this study demonstrates two main findings. First, cartel participants communicate frequently and elaborately, and the need for trust and communication impedes concealment. Second, the longevity of cartels cannot be explained by isolation from but by embeddedness in their social environment. The context of legitimacy and a facilitating environment are significant factors. Criminal collaboration is studied extensively in literature on organised crime, however gained little attention in the literature on corporate crime. Hereby, this study contributes to an understanding of how corporate criminal conduct is organised, by applying relevant theory on criminal networks gleaned from the literature on organised crime.

* This chapter has been published as: Jaspers, J.D. (2019). Strong by concealment? How secrecy, trust, and social embeddedness facilitate corporate crime. *Crime, Law and Social Change*. doi: 10.1007/s10611-019-09847-4.

1. Introduction

Criminal acts committed through collaboration between criminal partners require not only concealment but also communication. Communication is essential in organising crime: namely, making arrangements regarding the required resources, contacts and transport; settling disputes; and dividing criminal profits (Gambetta 2009). The balance between operational efficiency through communication and secrecy through concealment is a widely known trade-off for participants of any covert network. The paradox of concealment and communication is a focal point in the study of illegal and criminal networks (Morselli 2009; Kenney 2009; Krebs 2002). In the literature, concealment and communication are often presented as opposites, operating as communicating vessels (Baccara & Bar-Isaac 2008; Baker & Faulkner 1993; Morselli, Giguere & Petit 2007).

As with any criminal network, business cartels – e.g. price-fixing, bid-rigging – need to coordinate collective actions efficiently by communicating while facing the risk of exposure. Firms have to exchange information on prices, customers, tendering procedures and so on; internal issues and disputes must be resolved; and acceptable agreements on compensations must be reached between participants (Faulkner, Cheney, Fisher & Baker 2003; Jaspers 2016). In light of increasing enforcement efforts and the criminalisation of business cartels (Harding, Beaton-Wells & Edwards 2015; Shaffer and Nesbitt 2011; Whelan 2014), perpetrators of cartel conduct must also conceal their activities from customers, non-participants, and internal and external watchdogs.

Despite the risk of detection, many cartels remain active for years, even decades (Connor and Helmers 2007; Levenstein and Suslow 2006). For instance, the recent European price-fixing truck cartel lasted for 14 consecutive years (IP/16/2582), and is no exception (cf. Connor & Helmers 2007). This raises questions as to how business cartels succeed in remaining undetected for long periods, considering the increased pressure on revealing cartel conduct and their need for communication and coordination. Are there effective social control mechanisms within cartels that ensure long-lasting secrecy? Do cartels employ effective modus operandi of concealment? Does a silent or even cooperative social environment ensure cartels of their longevity? Although these are familiar questions with regard to criminal networks, they have received limited attention thus far in the literature on cartels.

Cartels consist of illegal activities in otherwise legal networks (Fear 2006) and the question as to how cartels deal with communication and secrecy should be addressed accordingly. Considering cartels as communication networks has rarely been done (cf. Faulkner et al. 2003; Baker & Faulkner 1993). Recent studies that do adopt an organised crime perspective regarding the organisation of serious crimes such as fraud and bribery have demonstrated that this provides

a fruitful approach for studying corporate and white-collar crime (Edwards & Levi 2008; Levi 2008a; Levi 2008b; Lord & Levi 2016). It exposes the nature and structure of these crimes, and sheds light on new criminal opportunities and systematic causes for corporate and white-collar crime. Business cartels can be seen as a form of corporate and thereby organisational crime (Braithwaite 1989; Clinard & Yeager 1980; Jamieson 1994) in which legitimate firms, business relations, and transactions provide the context for illegitimate conduct (Wheeler & Rothman 1982; Punch 1996). Business cartels are inherently incorporated in legal networks and legitimate firms (Fear 2006). However, earlier studies demonstrate how covertness and secrecy are important dimensions of cartel conduct. Both within and outside companies involved in cartel agreements, covertness is an important aspect (cf. the Vitamins cartel, Connor, 2006). This exemplifies how much of what happens in firms is shaped by informal and unwritten processes (Parker, 2016; Costas & Gray, 2014).

Hence, this chapter applies the criminological notions on the functioning of illegal and criminal networks to the nature and structure of business cartels. First, using these insights – rather than legal and economic theory – enables a broader understanding with regard to the longevity and effective secrecy of cartels. Applying social theory to study corporate crime and in particular cartels enables to reach beyond the idea of both the homo economicus (the rational actor, cf. Parker 2012) and the homo juridicus (the legal actor that knows and recognises the law, cf. Haines & Beaton-Wells 2012) in understanding and explaining cartel conduct. Second, the empirical findings of this chapter shed new light on the theoretically assumed tension between communication and concealment in illegal networks. By investigating how cartels are organised, this chapter applies insights gained from extensive study of covert and criminal networks to cartel agreements. Employing that perspective, this study builds upon the work of Levi (2008b), Passas (2003) and Ruggiero (1996), where corporate and white-collar crime is studied by examining the mobilisation of existing resources and networks.

2. Secrecy and trust in criminal networks

Two lines of thought within the literature on criminal networks are discussed: one that departs from the concept of the 'secret society' and the trade-off between communication and concealment, and one that focuses on the importance of mutual trust and social networks for operating in illegality. These insights are subsequently translated into expectations regarding cartels.

2.1 Criminal networks as secret societies

Several sociological studies on covert networks and criminal networks like terrorist groups and mafia families depart from a trade-off between communication and concealment (Baccara & Bar-Isaac 2008; Baker & Faulkner 1993; Chen 2005; Kenney 2009; Krebs 2002; Morselli 2009,

p. 63; Morselli, Giguere & Petit 2007; Zhang & Chin 2002). These studies employ the classical concept of the secret society as their conceptual point of departure. Networks that maximise for concealment and are strongly isolated from their environment – like Freemasonry or WWII resistance groups – are also characterised as secret societies (Simmel 1906; Hazelrigg 1969). Georg Simmel introduced the concept of the secret society as follows: […] 'an interactional unit characterized in its totality by the fact that reciprocal relations among its members are governed by the protective function of secrecy' (Hazelrigg 1969; Simmel 1906). Simmel (1906) elaborated on two central circumstances in the secret society: namely, members are concerned with the protection of ideas, objects, activities, and sentiments to which they attach positive value; and members seek protection by controlling the distribution of information about the valued elements. According to Simmel's concept, outside pressure towards certain ideas and activities of a group enhances the likelihood of secret societies forming.

The literature on criminal networks that uses the concept of the secret society describes different examples in which criminal networks deal with the expected trade-off between concealment and communication. One example is the 'Cupola' within the Cosa Nostra. This 'commission' of highly ranked experienced men within the Cosa Nostra was supposedly responsible for internal dispute settlement (Gambetta 2009, p. 61). These men held a key information position regarding the illegal activities of the Cosa Nostra 'family' but were themselves never directly involved in criminal activities. This shielded them from prosecution by the authorities and law enforcement. This example suggests a form of centralisation of communication and information. A second example of how illegal networks deal with the assumed trade-off between communication and concealment are terrorist groups. Terrorist groups are known to operate and communicate through a decentralised cell structure. People within a cell know each other, but do not possess information concerning how the overarching network outside the cell is organised or know the identity of participants of other cells (Krebs 2002; Memon, Larsen, Hicks & Harkiolakis 2008).

In theory, prioritising either for concealment or for effective communication leads to a different network structure. Prioritising for concealment is expected to lead to a decentralised network, while prioritising for effective communication is expected to lead to a centralised network (Baker & Faulkner 1993). Networks that are focused on effective communication leave their participants more vulnerable to detection and punishment. In contrast, networks that are focused on concealment are less successful in generating effective communication, which is detrimental to the network's operational efficiency (Baker & Faulkner 1993; Goffman 1970). The aspect for which networks prioritise is expected to depend on the need to act and the accompanying need for and frequency of communication (Baccara & Bar-Isaac 2008; Morselli et al. 2007; Baker & Faulkner 1993). This means that terrorist groups are more prone to prioritise for concealment than for communication, because they require less continuous action

and therefore less communication (Morselli et al. 2007). Moreover, covert social networks are therefore expected to be project-oriented (Fielding, 2016).

In short, decentralised networks provide better protection against detection of its members, while centralised networks provide more effective communication. In light of the literature, it is expected that cartels limit their frequency of communication with regard to their need to operate covertly. The degree of communication within the network is expected to be minimalised, and participants share information only on a need-to-know basis (cf. Zhang & Chin 2002).

2.2 Criminal networks as networks of trust

For decades, the classic concept of secret societies was also the image that existed of organised crime. Contemporary literature suggests that communication and concealment go hand-in-hand. Instead of a paradox, they are both regarded as imperative to the longevity of criminal networks (Kleemans & de Poot 2008; Von Lampe & Ole Johansen 2004; Klerks 2001). The classic image of criminal networks as being centralised and hierarchical is also outdated by criminological research into organised crime and has been adjusted to be an image of the flexible criminal 'entrepreneur' (Paoli & Vander Beken 2014; Spapens 2010; Zaitch 2002; 2005). Owing to the need to be flexible and secretive, most criminal networks involved in organised crime are unlikely to become large-scale 'enterprises' with a clear structure, hierarchy, and bureaucracy (Paoli 2002).[18] Criminal networks are more likely to function horizontally and through means of decentralised communication structures. In these structures trust, again plays an important role.

The literature on organised crime demonstrates how mutual trust is of great importance to the functioning of criminal networks (Kleemans & de Poot 2008; Von Lampe & Ole Johansen 2004; Klerks 2001). Trust is considered to work in two ways – it is important both for effective communication and for the successful concealment of illegal activities. Indeed, communication is considered a condition for concealment in criminal networks. In this sense, trust functions as a linking pin in the operation of criminal networks. In some contemporary literature, communication and concealment are therefore not considered a trade-off but two equally pivotal imperatives for the functioning of criminal networks. Trust is strongest in pre-existing social relations: namely, strong ties. Therefore, most participants in illegal networks are recruited from existing social networks (Erickson 1981). Strong social ties, like family ties (cf. Moors & Spapens 2016), provide trustworthy partners that are discrete towards outsiders with regard to the illegal activities. Unlike conclusions in the literature that are based on the

18 This does not negate the fact that vertically organised hierarchical criminal organisations (e.g. the Cosa Nostra) exist. However, they are neither the only form of organised crime nor do they exclusively control the illegal markets. Paoli states this in her 'paradoxes of organized crime'. One of these paradoxes entails that organisations that are effective in illegal markets, due to their flexible and horizontal structure, are unfit *because* of their nature to develop into large-scale criminal 'enterprises'.

trade-off between communication and concealment, trust can be built through elaborate communication (Klerks 2001; Von Lampe & Ole Johansen 2004). However, strong ties do also present a possible liability relating to concealment, because potential evidence is scattered when information is exchanged elaborately. Ultimately, trust is a function of expectations, and has to do with building a reputation of trustworthiness (Baker & Faulkner 1993). A shared past provides input for this reputation, and a shared future creates the need for it (Kleemans & Van de Bunt 1999).

At the same time, it is important for criminal networks to work not only with trustworthy partners but also with capable partners: namely, people who can provide certain skills, contacts, and resources that are essential to the illegal conduct (Van de Bunt & Kleemans 2007, p. 51). Therefore, criminal networks also tend to use potential partners outside of their existing social network. This is referred to as the strength of weak ties (Granovetter 1973; 1981). Because participants in criminal networks sometimes need to work with these weak ties, they use what is called trust-substitutes – forms of 'hostage-taking' to increase cooperation among co-offenders (Campana & Varese 2013). When there is a lack of trust in legitimate business relations, parties can use certain securities that increase the costs of opportunistic behaviour, such as contracts with fines or bounties. Within criminal networks, participants rely on alternative resources. One of these resources can be the threat of violence, such as 'hostage-taking' (Van de Bunt & Kleemans 2007, p. 66; Campana & Varese 2013; Gambetta 2009; Zaitch 2005). However, the actual use of violence often appears to be a costly strategy insofar as it attracts unwanted attention from enforcement authorities, which results in caution in applying it (Zaitch 2005; Jacques & Wright 2008; 2011). In addition, the use of violence might prevent partners from cheating, but can at the same time result in losing other, potential partners (Gambetta 2009, p. 36).

In short, based on the literature it is expected that cartels focus strongly on effective communication because of the importance of mutual trust, and not primarily on concealment. In addition, cartels are expected to focus on generating mutual trust, and to communicate frequently in order to achieve this goal. Firms within cartels are expected to use existing social ties (strong ties), and also to seek capable business partners with whom they do not have a history of cooperation – and trust (weak ties) – because these ties prove to be essential for establishing specific goals. The use of weak ties leads firms within cartels to make use of trust-substitutes.

2.3 Criminal networks and social embeddedness

The fact that criminal conduct can remain hidden from outsiders might not only be due to the operation of the network itself – it may be explained by the relation of the network to its social environment. Do isolation and covertness truly protect members of criminal networks against detection? Or does it make them more vulnerable to suspicion and detection? An alternative

explanation is that neither isolation nor exclusion, but the social embeddedness of crime and criminal networks protects its members against detection (Passas 2003; Van de Bunt 2010; Van de Bunt, Siegel & Zaitch 2014). Scholars have suggested that most crime is committed within an informed and even cooperative social environment (Gibson 2014; Hallsworth & Young 2008). The embeddedness of illegal activities in legal networks, organisations, and platforms provides a silent social environment that operates as a shell surrounding criminal networks.

In other words, to answer the question how cartels succeed in hiding their activities from outsiders for long periods of time, the relation of the cartel and its participants with their social environment is also important. In the existing literature, the concept of social embeddedness is used to describe this process (Granovetter 1973; 1981; Van de Bunt, Siegel & Zaitch 2014). Social embeddedness entails both structural and relational embeddedness. It concerns institutional aspects, such as the role of licit organisations, services, and communication platforms, and the function of social relations of criminal network participants with people outside or inside the periphery of this network. Regarding the role of facilitators, social embeddedness is discussed extensively in the literature on criminal networks (Morselli & Giguère 2006; Kleemans & Van de Bunt 2003). Facilitators are considered to be licit actors[19] that intentionally or unintentionally fulfil a role in the illegal activities of the criminal network: for instance, the role that solicitors and lawyers play in laundering criminal money (Lankhorst & Nelen 2005; Middleton & Levi 2005; Di Nicola & Zoffi 2005), or the role of companies and entrepreneurs in the transport sector in the traffic and trade of illegal goods (Van Koppen & De Poot 2013; Kleemans & De Poot 2008).

2.4 Business cartels as criminal networks

As previously stated, the expectation is that many of the traits, dilemmas, and processes relevant for most illegal and criminal networks contribute to an understanding and an explanation of the operation of business cartels. However, cartels do possess certain particularities that must be addressed. First, because cartels deal with agreements between business competitors, mutual trust and communication are expected to be essential, but are also more problematic for the operation of cartels. Self-interest and opportunism can form challenges for competitors to work together. This raises the question as to whether cartel participants use trust-substitutes, and, if so, in what shape or form do these trust-substitutes occur. Second, cartel conduct entails illegal activities that take place within the normal course of doing business: namely, within licit organisations (cf. Braithwaite 1989; Clinard & Yeager 1980; Jamieson 1994). Therefore, is it easier to shroud cartel conduct in a sphere of legality (cf. Punch 1996; Friedrichs 2010; Wheeler & Rothman 1982)?

19 Therefore, although they are not referred to as facilitators for the purpose of this article, *illicit* actors involved in facilitating crime, such as a hitman or a forger of passports, are sometimes also labelled facilitators in the existing literature (Ruggiero 1996; Morselli & Giguere 2006).

By now, one could reflect on the question whether the context of, for example, working out misunderstandings within price-fixing cartels could be further away from dealing with conflict over missed payments between hardened drug criminals. The Dutch fruit trader Rinus M. found out about this difference the hard way. When he became involved in transporting illegal drugs and a shipment went missing, he tried to resolve the issue using business mores, but was confronted with those of organised crime: namely, intimidation and eventually assassination (NRC, 16th September 2016). Although there are obvious differences between business cartels and other forms of organised crime, such as the use of violence, it is fruitful to apply insights on criminal cooperation, gained in studies on organised criminal networks, to business cartels. This can help to explain the nature of cartel networks and their longevity, and to provide input with regard to considering enforcement strategies.

In conclusion, a criminal network perspective, including notions of secrecy, trust and social embeddedness, provides several reasons as to why criminal conduct remains hidden from the public for long periods. Three main expectations are: (1) criminal networks may not be as centralised and hierarchically organised as in the classic image of the 'secret society'; (2) criminal networks may not only prioritise for concealment but also for effective communication; (3) it is not isolation from their social environment but their embeddedness that provides an explanation for the longevity of criminal networks.

3. Methods and data sources

This chapter examines cartel stability based on a qualitative case file analysis of 14 Dutch cases. In these cases, the Dutch Competition Authority imposed an administrative fine between October 2007 and January 2012.[20] These cases were selected because reports that lead to a fine contain substantial proof, including documentation on coordination and communication within cartels. This documentation allowed for a systematic and in-depth study of the structure and nature of cartels. The cases were examined using document analysis and semi-structured interviews with case managers from the Authority for Consumers and Markets. The sources are

20 Commissioning administrative fines is one of the possible sanctions authorised by Dutch competition law (according to Art. 56 lid 1 sub a Mw). Since October 2007, Dutch competition law has allowed the investigation of private property and the possibility of fining natural persons (*Kamerstukken I* 2006/07, 30 071, A). October 2007 was the starting point of the analysis for the sake of comparability of the material. January 2012 was indicated as end date because cases usually take several years from the initial investigation until the official sanction. All cases completed by January 2012 have been included.

official reports by the authority,[21] summarising the files and containing a selection of evidence used in administrative proceedings towards fines imposed upon corporations. These files contain descriptions of the modus operandi of cartels including: correspondence between their members, transcriptions of verbal interrogations with corporate officials by the competition authority, and sources of cartel administration. These statements are supported by additional written administration.

The material was studied systematically, using a checklist focusing on the modus operandi for concealment; the type of network; the nature of mutual relations; the role of the social environment (e.g. industry associations, customers); and mechanisms for mutual trust. For every case, the document analysis was complemented with a semi-structured interview with the project manager of the authority that handled the investigation. In these interviews, the following topics were discussed: the nature of the cartel; the type of network and communication; mechanisms for mutual control and trust; and the role of third parties. These interviews served to provide a better overview of the files and an opportunity to ask additional questions that could not be answered in full through studying the written reports.

Table 1 Descriptive information on selected cartel cases

Case #	Duration in years	Number of firms	Nature of the conduct	Collective market share
Case 1	6	9	Market division	70%
Case 2	8	9	Price-fixing	85-90%
Case 3	6	8	Bid-rigging	60-80%
Case 4	6	5	Market division	60-80%
Case 5	6	5	Bid-rigging	-
Case 6	1	9	Bid-rigging	-
Case 7	7	15	Market division	90%
Case 8	1	2	Bid-rigging	-
Case 9	6	15	Market division	87.3%
Case 10	1.5	4	Price-fixing	58%
Case 11	2	3	Bid-rigging	85-95%
Case 12	9	14	Bid-rigging	-
Case 13	3.5	10	Market allocation	-
Case 14	11	4	Market allocation	35-50%

21 These files are a result of investigations based on the legal power invested in the Dutch competition authority to interrogate corporate officials and to demand corporate intelligence (Art. 5:16 Awb); to investigate company and private property and administration (Art. 5:15, art. 54, 55 Mw); and to use leniency requests and other relevant informants and public information.

The use of secondary sources in this study leads to several limitations. Because of detection and enforcement biases, the cases not necessarily provide a representative image of all cartel conduct in the Netherlands. Some cartels have greater chances of being detected, and cases that involve substantial proof have a higher chance of ultimately resulting in an administrative fine. The statements of corporate officials referred to in this chapter originate from secondary sources, and therefore might express firms' perspectives, but were originally made in the course of an administrative procedure. Note that one of the formal legal requirements of finding a person or corporation guilty of an infringement is that the effects of the infringement must be 'noticeable' and have a significant effect on the market. This might lead some of the corporate officials to deny the 'real' effect of any agreements made as a legal defence strategy, or to under-report their conduct in general.

Table 1 presents descriptive information on the selected cases, including the cartel's duration,[22] number of firms, and nature of the conduct.[23] The relatively high number of firms in these cases can be biased due to three main issues. First, cartels with an active industry association have a greater chance of detection. Second, cartels with a more limited number of firms may conspire more effectively, with little chance of detection. Third, an effective cartel may have a self-amplifying effect, as the collusion can offer more firms an opportunity to survive.

The Dutch cases in this study have an average duration of about five years, which is comparable to the typical duration of cartels (Levenstein and Suslow 2006). The duration shows that firms manage to conceal their cartel for several years, despite the large number of participants. This suggests effective communication and raises several questions. What are the methods of concealment? How do firms deal in practice with theoretically expected trade-offs between communication and concealment? Which network structure does this result in? And what role do trust, existing networks, and facilitators play?

Table 1 also states the nature of the conduct. Three main categories are distinguished: bid-rigging, price-fixing, and market division or allocation. These categories serve as descriptive labels – based on legal definitions – indicating the main category of the infringement, though these categories are not mutually exclusive per se. Bid-rigging involves firms in a tendering procedure, communicating before the bidding takes place. They divide the work and rotate bids, thereby rigging the procedure. Also known as collusive tendering, this generally involves

22 To determine the duration of these cartels, the period of continuous infringement stated in the report is used. This also means that the period before the introduction of the Dutch cartel prohibition (January 1998) is not incorporated in determining the duration. This suggests an underestimation of the actual duration of the cartel. This effect is enhanced by the internal selection bias of the competition authority concerning the minimum standards regarding evidence.

23 In light of confidentiality, the industry in which the cartels took place cannot be indicated per case in Table 1. The cases took place in the following industries; construction (6); heavy industry (3); general services industry (2); forestry (1); waste disposal (1); and financial services (1).

raising price offers to the buyer. In price-fixing cartels, firms make explicit agreements on the price or surcharge of a particular product or service. Firms use, for instance, minimum pricelists. The other cases involve market division or allocation. In these cartels, firms agree to fix market shares or divide markets into geographical regions.

4. Results and discussion

The 14 Dutch cartel cases are discussed in light of the question as to how cartels can remain undetected for long periods, and how participants deal with trust, communication, and concealment. Derived from the literature on illegal and criminal networks, three main theoretical expectations are investigated in relation to cartel conduct and presented accordingly: (1) exchange of information in cartels is not as centralised and hierarchically organised as in the classic image of the 'secret society'; (2) trust enables cooperation in cartels, and participants build this trust through elaborate communication or by using trust-substitutes; (3) it is not the isolation of cartels from their social environment but social embeddedness that provides an explanation for their longevity.

4.1 Concealment and communication

In line with what could be expected from earlier studies into business cartels (Baker & Faulkner 1993; Geis 1987; Punch, 1996, p. 98), the Dutch cases do show methods of concealment, such as limiting face-to-face interaction and minimising the channels of communication. Examples of this include phased price increases; minimalising the frequency of communication; meetings in neutral locations (i.e. not at the offices or on personal premises of the firms or corporate officials involved); discrete mutual compensations (e.g. in kind, or discounts to supplies); and the use of codes. Some cases involve communication exclusively by phone or in person. Most meetings took place in neutral locations, such as conference rooms, restaurants, hotels and so on. With regard to the meetings in case 2, the secretary of the cartel stated the following:

> *"The meetings were held in alternating locations. This would typically not take place at the actual offices of one of the firms". (2)*

In case 8, one of the cartel participants – in a conversation with his cartel partner – even refers to the risk of communicating over the phone and stresses the need to meet in person. This episode of a recorded telephone conversation is related to bid-rigging, and is directed at trading information on who takes part in a particular tendering procedure:

> *"**A:** Would you be able to drop by the office this morning?*
> ***B:** Yes, let's see, because tomorrow is the bidding for project of [name of street] right?*
> ***A:** 4 pm, could you make it?*
> *(…)*
> ***B:** Yeah, no, it would be better to meet at yours before, because I also have some background information. I would prefer discussing it with you in private (…)*
> ***A:** Because, uhm, yes.. around 2 pm, could you make that, or no?*
> ***B:** Yeah ok, that could work, I will just stick around here in [name city]". (8)*

The cases show that as well as minimalising written communication, cartel participants also try to minimalise communication in general. This is demonstrated by the use of impersonal systems of communication, such as a circulation system by 'taking turns' in bid-rigging cartels (also referred to as 'phases-of-the-moon system'); pre-determined geographical allocations; lists with client distributions; and minimum pricelists. These systems can make abundant personal contact and correspondence superfluous and can thereby minimise the risk of detection and written evidence at a later stage. However, the paradox here is that building mutual trust, which can be done through extensive and frequent personal communication, is hindered by the use of these impersonal 'buffers' (cf. Goffman 1970, p. 78).

At the same time – antithetic to the previously mentioned studies – the cases show how cartel participants tend to document a significant part of their agreements and communication. This is demonstrated by elaborate written overviews, individual and collective turnover lists, client lists, minutes of plenary sessions etc. (cf. Van de Bunt 2010; Hertogh 2010). This exemplifies that minimalising mutual communication and using impersonal systems of communication is not sufficient for cartels to operate. In particular, the risk of opportunistic behaviour and miscommunication demonstrably leads to frequent communication between cartel participants. A strong illustration of this is the following quote from a secretary of one of the cartels in which he refers to the functioning of instruments such as price lists and the discrepancy between theory and practice:

> *"The function of a price list is that it indicates the price which others should exceed. Actually, the meetings would have been superfluous if everyone in the cartel would stick to the list. Because it was fixed […] Word on the street however was that firms would deviate from the agreed upon prices frequently." (4)*

In most cases, effective communication is prioritised over concealment. Case 14, which dealt with a market allocation, also demonstrates this point. The commercial departments of the firms involved in this cartel, which deal with acquiring new customers, had to be brought up to speed on the implications of the cartel agreement (which meant only acquiring customers

from their own region). To the question of who was aware of the illegal conduct, the project leader of ACM answered:

> *"Executives and commercial managers. At the dawn raids in the offices of the firms, maps were seen with a visualisation of the market allocation at the desks of the commercial staff. They were at least required to know the implications of the market allocation agreements when they were on the phone with potential customers. So actually, everyone that was required to be informed, was informed." (14)*

Case 14 clearly illustrates how participants in the cartel exchanged information only on a need-to-know basis (cf. Zhang & Chin 2002).

Nevertheless, the need for secrecy in relation to effective communication can indeed result in practical dilemmas. In the operation of case 3, the trade-off between secrecy and operational efficiency is illustrated clearly along with the inherent limitations of maximising covert networks for concealment. The participating firms in case 3 used code names to refer to clients when using the centralised dedicated phone and fax line to communicate on new offers. They employed abbreviations to refer to different municipalities – their clients in this case. In one instance of communication, one firm reported an offer of 'R in NB' and 'R in ZH'. As a result, this caused some confusion among the other firms, with 12 faxes (of questions/answers) exchanged on this issue. There was considerable confusion as to which codes belonged to which municipalities, illustrating how the need for concealment interferes directly with the need for effective communication. In addition, it shows how the need for effective communication prevails over the need for concealment. This can be well understood from a practical viewpoint, since the illegal networks' main goal cannot be achieved without clear communication. In other words, if members of illegal networks fail to understand each other, the whole existence of the network is pointless. These findings hereby contradict the theoretical assumption that illegal networks prioritise for concealment but confirm the expectation that prioritising for effective communication can come at the expense of concealment (Baker & Faulkner 1993). The paradox here is that the more one strives for concealment (e.g. by using codes or other impersonal systems of communication), the more frequently one eventually needs to communicate. Also, it concurs well with other studies that show if resources are concentrated amongst a few, the network is likely to be concentrated (Fielding, 2016).

4.2 The level of centralisation

The centralised communication system from case 3 is no exception. Noticeably, most of the cases show clear forms of centralisation in the communication structures that are employed by cartel participants. This shows that cartels do not necessarily prioritise for concealment, and that they operate in a highly centralised manner. Illustrative examples include the use

of collective summaries and administration of the agreements or third parties that function as secretary or chair of the cartel. This is also demonstrated by case 5, in which one of the participants discusses the method of communication in the cartel that entails a bid-rigging conspiracy:

> *"Everyone was audited, it was a form of division of projects […] We all did our own calculations on the price. No one would accept exceptionally high prices. The coordinator and the one whose turn it was to get the project would debate on the conditions in these general meetings." (5)*

To achieve the cartel's objectives, it appears to be important that the participants communicate frequently and extensively, meet in person, and document their agreements in writing to ensure that participants can take each other at their word. This seems counter-intuitive from a perspective of secrecy, regardless of how collective and plenary communication reveals a pragmatic strategy of cartels in building mutual trust. This seems to be related to the essential role of trust in business cartels, where opportunistic behaviour is a perceived risk with regard to participating firms. Conceptually, however, it remains unclear whether elaborate communication and administration should be perceived as a function of trust or of distrust (cf. Jaspers 2016).

4.3 The role of trust and trust-substitutes

Considering the pivotal role that trust plays in cartels, it is unsurprising and in line with the expectations derived from the literature that pre-existing social and professional networks play a significant role in the Dutch cartel cases. Existing ties between competitors, through different platforms within the sector or because firms did business together in the past, can lead to or provide an opportunity for agreements on prices or market division. This confirms the theoretical expectation that having a history of working together strengthens a reputation for being trustworthy (cf. Erickson 1981). However, not all cases involve pre-existing relations, or strong ties, between the cartel participants. As well as trustworthy partners, cartel members also need capable partners. As stated earlier, cartels entail agreements between competitors in which the chance for opportunistic behaviour is ever present. Nevertheless, participants in these cartels find solutions for cooperating with weak ties.

As expected from the literature on criminal networks, cartels also have forms of guarantees or 'insurances' against opportunistic behaviour, which can be characterised as trust-substitutes (cf. Campana & Varese 2013). First, there are systems of clearing scores (cf. Van de Bunt 2008; Hertogh 2010), in which built-up differences between participants are compensated with regard to agreed-upon turnover quota, geographical allocation, or client distributions. For this purpose, mutual discounts on supplies, false invoices, or other transactions are used.

In addition, in cartels where clients or projects (e.g. bids) are divided or rotated, a common future (referred to as shadow of the future, cf. Kleemans & Van de Bunt, 1999) also induces mutual trust. A system of reciprocity leads to participants anticipating the work that will come their way in the future. Second, case 9 contains several examples of the use of trust-substitutes. A relatively large number of firms – 15 – were involved in this case. An example from case 9 is the collective purchase of a bankrupt factory. A large factory, suited for the production of the product involved in the case, came up for sale. The cartel participants were afraid that commissioning the factory by a third party would disturb their conspiracy to control the national market. A third party then purchased the factory on behalf of the cartel, which provided the financial means and instructions for the take-over. The factory was dismantled and the equipment and machines from the factory were divided amongst the participants of the cartel, but – as was discovered later – were never actually put to use. With a provision in the private legal agreement (the purchasing contract), the participants made sure the factory could no longer be used for production of the designated product. The financial investment functioned as a vouch for the market division agreement. Everyone had now invested financial means in a successful execution of the agreement and had something tangible to lose if it failed.

The role of trust and trust-substitutes is in line with what was expected from the literature on criminal networks. Note, however, that with cartels – and in contrast to some forms of organised crime – trust-substitutes are always – seemingly – legitimate means, such as collective loans, mortgages and so on, which create mutual dependencies and increase the collective interest in the cartel being successful. This makes it all the more difficult for enforcement authorities to detect these legitimate forms of cooperation between firms within the context of illegal cartel conduct.

4.4 Social embeddedness of illegal cartel agreements

In almost all cases in this study, industry associations and related formal communication platforms play an important role in the cartel. At a minimum, they provide an opportunity for firms in a market to get to know each other, but sometimes these platforms play a more active role. In case 5, firms used a calculation firm as a platform to rig tendering procedures. A calculation firm normally offers consultancy to all companies in the market to measure and calculate the surfaces and equipment needed for a particular project. This way, firms in the sector can share costs of calculation to decrease the losses on calculating projects that they do not get to execute. This is a common and authorised way of doing business. However, the owner of the calculation firm took it one step further by actively hosting illegal cartel meetings between the competitors and documenting their agreements for them. In case 7, the participating firms initially came together to discuss transport safety issues regarding their product. However, prices and clients were also discussed here, resulting in an illegal client distribution between competitors. In case 14, the firms had a 'soft-franchise' system in

place. They collectively owned a subsidiary to make legitimate agreements – such as sharing research and development costs – but also made illegal agreements – such as market allocation agreements dividing costumers. The following quote from case 10 illustrates more clearly how industry associations can provide an opportunity for cartel conduct, and can therefore be seen as a form of structural embeddedness of cartels:

> *"The industry association [A] and industry association [B] served as communication platforms, in which the members would discuss topics that affected the industry as a whole. Topics like pensions, labour conditions and collective employment agreements […] In between the lines the point was suggested that: 'we should do something about it [the prices]." (10)*

As regards cartel facilitators, intentional and unintentional facilitators can be distinguished. In case 5, for instance, the owner of a calculation firm knowingly and deliberately facilitated cartel conduct. The role that different secretaries and chairmen play in several of the cases can also be seen as deliberately facilitating cartels (e.g. cases 2 and 4). In other cases, clients invited contractors to assess the project on site, which enabled all the requested potential contractors to know which other parties would take part in the tendering procedure. This provided them with an opportunity to rig the procedure, which can be qualified as unintentional facilitation by clients (cases 5 and 7). Clearly, an agreement with a competitor can potentially be made quickly, and many legitimate collaborative platforms and formal meetings can provide an opportunity for cartel conduct to take place.

4.5 Discussion

In short, three main expectations in this study were: (1) cartels may not be as centralised and hierarchically organised as in the classic image of the 'secret society'; (2) cartels may not only prioritise for concealment but also for effective communication; and (3) it is not isolation from their social environment but their (natural) embeddedness that provides an explanation for the longevity of cartels.

First, to avoid the risk of detection, cartels clearly use techniques aimed at concealing their illegal conduct. However, the case study analysis illustrates how cartel participants are focused primarily on bringing about well-functioning agreements, and they therefore – in a pragmatic manner – communicate frequently and in a centralised manner. Paradoxically, efforts to conceal by means of impersonal communication methods, such as phases-of-the-moon systems (rotating bids by taking turns) and price lists, can lead to a need for more communication and documentation. Cartelists also try to ensure that co-conspirators keep their end of the agreement. Opportunism is perceived a large risk by cartel participants and increases the need for centralised communication and extensive documentation of agreements. This illustrates how the need for mutual trust often prevails over concealment of conduct by minimising

the means of communication. However, further study and discussion is needed to determine whether the elaborate systems of communication and sometimes administration are to be considered instruments for building trust or are in fact indications of the lack of trust.

Second, the use of trust-substitutes and the role of facilitators demonstrate how cartels are strongly embedded in their social environment and can emanate from pre-existing professional and personal networks. Cartel participants, in contrast to most 'classic' types of organised criminals, can thereby shroud themselves in a context of legitimate business interactions. The perpetrators of cartel conduct can be considered trusted criminals (Friedrichs 2010; Punch 1996; Wheeler & Rothman 1982). Corporate and white-collar crime perpetrators often rise above suspicion and are facilitated by a cooperative and silent social environment. The position of these perpetrators and the fact that they act on behalf of the organisation - particularly in cartels - hereby creates a smokescreen for enforcement authorities, which complicates their detection efforts (Van de Bunt 2010).

Third, this study demonstrates that the longevity of cartel secrecy is explained not so much by concealment or internal control within the cartel as it is by the embeddedness of cartels in their social environment. This is also illustrated by the use of trust-substitutes (in the form of loans, mortgages, etc.). Furthermore, the role that facilitators play in cartels is made evident from examples of imprudent clients, actively involved secretaries and chairmen of cartels, or – for example – members of collective market associations. The added difficulty in distinguishing the intentional and unintentional facilitation of illegal activities is the distance that exists between the actions of the facilitator and the illegal conduct of the network. This distance provides facilitators with an opportunity to evade moral and legal accountability for their actions (cf. Cohen 2001).

6. Conclusion

The organisation of corporate and white-collar crime was explored in this chapter. This brings up a few points for consideration in the field of both organised and corporate and white-collar crime. Theoretical implications for the study of corporate crime are that, although one can draw a few parallels in the operation of criminal networks in organised crime (e.g. importance of trust; the use of trust-substitutes; social embeddedness), an important difference lies in the vast opportunities that corporate crime perpetrators have at their disposal to shroud their activities in a context of legitimacy and licit corporate conduct. This might also explain why most organised forms of corporate crime do not require types of intimidation or violence in the event of conflict. As regards corporate criminal conduct, an oblivious or cooperative social environment provides practical opportunities for businesses to create and maintain illegal

agreements. When it comes to the body of work describing the trade-off between concealment and communication, the theoretical implication for the study of organised crime is that illegal or criminal networks might not always prioritise for concealment. They can operate through elaborate communication and go beyond information exchange on a need-to-know basis, as was demonstrated by the cases described in this analysis.

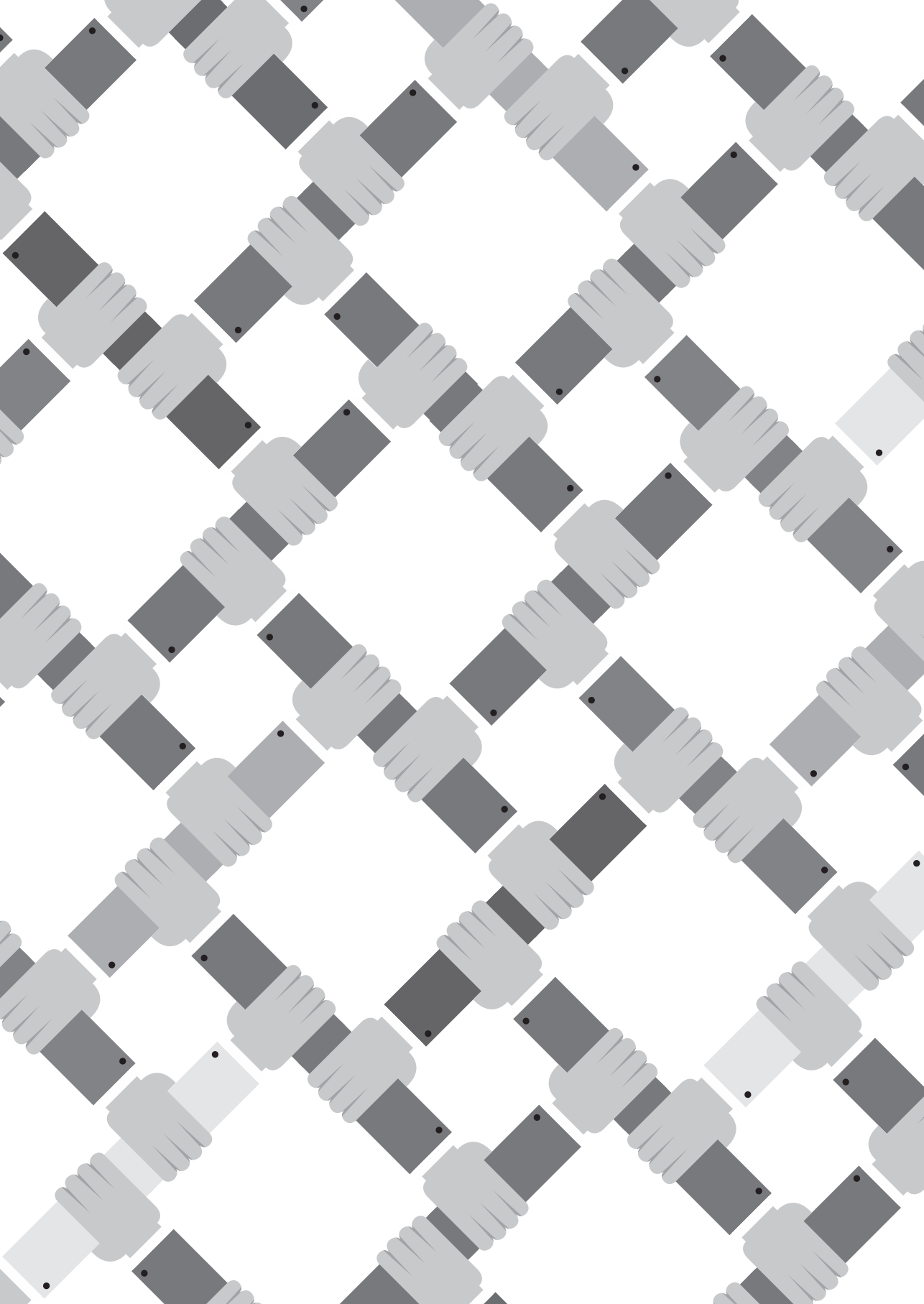
For the purpose of this study, the role of public regulation and enforcement, or lack thereof, as part of the social environment of cartels was not included. If we would, one may consider the role privatization of regulation and enforcement and cuts of public funding in many regulatory fields in explaining how misconduct can remain hidden in general. However, for the specific area of public anti-cartel enforcement a global rise in public authorities and resources for those authorities has taken place in the past decades (Harding, Beaton-Wells, Edwards 2015; Shaffer & Nesbitt 2011; Whelan 2014). In that sense, competition enforcement forms an exception to other regulatory fields, especially in the US, that do suffer privatization and cuts in public funding. This may be connected to the fact that specifically fair competition enforcement endorses and supports the 'neoliberal' ideal of open markets and competition. However, increased resources do not automatically mean increased detection. Also, national governments may increase resources towards enforcement for symbolic reasons that remain separate from questions around enforcement effectiveness regarding detection of cartels.

5.1 Policy implications

It is clear that the longevity cannot be explained solely by studying the means of concealment by cartelists alone. Most cases can be indicated as a 'public secret': namely, many people – within and outside the organisations involved – know or could or should know about the activities but are either disinterested or are reluctant to come forward to reveal them or to inform enforcement authorities. Governance and regulation of corporate and white-collar crime should pay attention to creating possibilities for gathering the information bystanders have about illegal conduct. Acknowledging the vast amount of knowledge and complicity dispersed in the periphery around illegal networks provides opportunities for detection and enforcement.

Because many licit organisations, platforms, and other facilitators provide opportunities for cartel conduct to occur, it is also important to acknowledge their legal and moral responsibility and accountability with regard to cartels. Some judicial decisions demonstrate how such facilitators can be taken into account (Harding 2009). One could argue that governance and regulation of corporate and white-collar crime should examine carefully the responsibility and liability of facilitators and bystanders – as established in efforts against organised crime through criminalising actions of preparation and complicity – (cf. Middleton 2005).

This also brings us to lessons learned for operational cartel enforcement. First, cartel participants tend to communicate frequently and in a considerably centralised manner. Episodes of seemingly legitimate transactions or contracts between competitors can therefore be an indication for underlying illegal agreements. In addition, enforcement could pay attention to the social embeddedness of cartels through franchise constructions, merger and acquisition processes, market associations, buyers and so on. Deliberately or otherwise, these actors are potential facilitators. By activating the 'silent social environment' to speak up, one can break down walls of secrecy and promote disclosure of misconduct (Van de Bunt 2010). The Dutch competition authority ACM took certain steps in this area, by launching a public campaign in which more information was presented on the nature and effects of business cartels to create awareness and to motivate the general public to speak up and provide authorities with extra tips and complaints about cartel conduct (Het Financieele Dagblad, 7 June 2016).



Chapter 4

Business cartels and organised crime: exclusive and inclusive systems of collusion*

Abstract:

In chapter 4, two case studies of large-scale bid rigging in the construction industry in Canada and the Netherlands are analysed to explore why business cartels sometimes do and sometimes do not involve organised crime. By combining concepts from both organised crime and organisational crime, an integrated understanding of the organisation of serious crimes for gain is applied. Across time and space, businesses in the construction industry are known to fix prices, use collusive tendering and divide market shares in illegal cartel agreements. In order to stabilise cartels, participants need to ward off new competitors and prevent cheating within the cartel. The question why we see a system of collusion involving organised crime and violence in Canada as opposed to the Netherlands is answered through analysing two comparable cases. Two systems of bid rigging emerge under different cultural conditions: inclusive and exclusive collusion. The exclusive system makes use of the violent reputation provided by criminal groups and distinguishes from the inclusive system that uses sophisticated administration of mutual claims in shadow bookkeeping.

* This chapter has been published as: Jaspers, J.D. (2018). Business cartels and organised crime: exclusive and inclusive systems of collusion. *Trends in Organized Crime 22,* 414-432. doi: 10.1007/s12117-018-9350-y.

1. Introduction

When firms in the same market control competition between them by fixing prices, sharing markets or rigging tendering procedures they engage in a business cartel (Harding & Joshua 2010). Firms involved in business cartels need to conceal their illegal conduct from customers, non-participants and internal and external watchdogs (Baker & Faulkner, 1993). However, besides keeping enforcement and other watchdogs in the dark, participants also have to ensure that other firms in the cartel comply with the illegal agreements. Cartelists monitor prices, customers, and tendering procedures and negotiate compensations to ensure compliance with cartel agreements (Faulkner, Cheney, Fisher & Baker 2003). In addition to communication and negotiation (Jaspers 2017), some cartels use – the threat of – price wars or exclusion from the market to deter or sanction cheaters within the cartel (Ayres 1987; Connor 2001; Levenstein & Suslow 2006; Bhaskarabhatla, Chatterjee & Karreman 2016). In other cases, potential instability within cartels is prevented using the protection of organised criminal groups and the (threat of) violence (Varese 2014).

In the latter category of cases, organised criminal groups - organisations or networks established with the aim of executing criminal activities (Van de Bunt & Huisman 2004) - supposedly act as 'cartel enforcers'. Both by controlling compliance of firms to the existing agreements in the cartel and by preventing outsiders of the cartel from entering the market they enforce the existing cartel. Involvement of criminals with a violent reputation can solve issues regarding internal instability of the cartel (Gambetta & Reuter 1995). Through extortion or persuasion, organised criminals offer 'protection' services in exchange for commission or 'pizzo' from the derived profits of cartels (Varese 2014, p. 345). The literature on organised crime extensively discusses examples of the involvement of organised criminal groups in economic cartels (Varese 2014; Stephan 2010; Chu 2002; Gambetta & Reuter 1995; Reuter 1983). The studies that specifically deal with cartels generally label these examples of involvement as 'infiltration' of organised crime in legitimate business sectors. These cases entail involvement of the Cosa Nostra in the construction industry in New York (Jacobs, Friel & Radick 1999; Jacobs 1991, p.49) and in the food-, clothing- and transportation industry in New York (Mass 1991, p. 37; Reuter 1987; 1985); involvement of mafia in the fruit- and vegetables wholesale (Gambetta & Reuter 1995) and in the construction industry in Sicily (Gambetta & Reuter 1995); the flower cartel in Sicily (Varese 2011a; 2011b, p. 102; Franchetti 1876); criminal groups in the taxi industry in South Africa (Stephan 2010, p. 353); and protection against competition by the Triads in Hong Kong (Chu 2002, p. 77-80). However, contemporary literature on organised crime takes a more nuanced approach concerning the interactions between 'licit' and 'illicit' services and 'formal' and 'informal' economies (Passas 2002; Van Duyne 1995; 1996). These studies emphasize the overlap and symbiosis between corporate and criminal actors, or 'upper' and 'underworld' (Van de Bunt, Siegel and Zaitch, 2014; Lippens & Ponsaers 2006; Ruggiero 1997).

In addition, not all business cartel agreements involve organised crime. In the literature on corporate and white-collar crime, business cartels have also received ample attention. These cases entail, for example, the ADM lysine cartel in the US (Conley & O'Barr 1997); the heavy electrical equipment cartel cases in the US (Geis 1987); and price-fixing in the pharmaceutical industry (Braithwaite 1984). Geis (1987) already pointed to business cartels as a severe form of corporate crime in his seminal study on price-fixing. Additional studies throughout the years have underlined how anti-trust and competition violations are both the most persistent and most profitable form of corporate crime (Clinard & Yeager 1980; Shapiro 1984; Braithwaite 1989; Jamieson 1994). White-collar crime studies on business cartels mostly explain cartel agreements by the need of corporate actors to minimise risks and manage uncertainties (Agnew, Piquero & Cullen 2009; Jamieson 1994; Geis 1987; Parker 2013; Piquero 2012; Sonnenfeld & Lawrence 1978). However, these studies do not discuss cartels that involve criminal groups and networks. Thus, the literatures on organised and organisational crime offer separate and different accounts of a similar phenomenon.

This chapter attempts to take into account insight from both (sub) fields of criminological study to explain why business cartel agreements sometimes do and sometimes do not include the involvement of organised criminal groups. Van Duyne (2007) already noted the obvious interconnections between business cartels and organised crime. For example, business cartels fit all the criteria for the UN and EU definitions of organised crime, except for criminal prosecution in the Netherlands. Ruggiero (1996) also discusses the analytical similarities between white-collar crime (Sutherland 1949) and organised crime and suggests a joint analysis based on the theory of organisations and the theory of the firm. Moreover, Dorn (2009) suggests that organised crime as a concept is becoming redundant in favour of 'serious crime' in both policy and research. In synthesising the research traditions of organised crime and organisational crime, scholars have suggested working towards theorising the organisation of 'serious crimes' (Edwards & Levi 2008) and 'serious crimes for gain' Lord et al. (2017). Moving away from conceptual debates on the differences between organised and organisational crime we can focus attention towards understanding how networks of perpetrators and facilitators are formed around serious crimes for gain; what resources they use, how they operate and how they are developed and maintained throughout space and time. Cartels can be considered as such a form of serious crime for gain. Cartel crimes can involve non-violent modus operandi; sophisticated schemes, market associations, informal meetings, shadow book keepings, as well as violent modus operandi; violence and the threat of violence.

This raises questions regarding the nature and causes of the involvement of organised criminal groups in business cartels. Why is it that we sometimes do and sometimes do not see involvement of organised crime and the use of their violent reputation in business cartels? What explains the differences between violent and nonviolent business cartels? To examine

these issues, bid rigging in the construction industry is analysed in both the Canadian province of Quebec (cf. Reeves-Latour & Morselli 2016; Hudon & Garzón 2016) and the Netherlands (cf. Van den Heuvel 2005; Van Duyne 2007; Van de Bunt 2010; Hertogh 2010). In both cases, large-scale bid rigging in several markets of the construction industry lasted decades and both cases were investigated through extensive parliamentary inquiries. In this chapter, the publicly available records of the investigations from La Commission sur l'octroi et la gestion des contrats publics dans l'industrie de la construction (CEIC 2015) and Parlementaire Enquetecommissie Bouwnijverheid (PEB 2002) will serve as data for a comparative analysis. Using these types of secondary sources has proven a useful and successful approach (cf. Clinard & Yeager 1980; Della Porta & Vannucci 1999; Van den Heuvel 2005; Van de Bunt 2010; Hudon & Garzón 2016). The design for making this comparative analysis is based on the Most Similar Systems Design, commonly used in comparative politics (cf. Anckar 2008). Many of the characteristics of the two case studies, such as organisation and culture of the industry, economic and market parameters are similar. However, despite the similarities, one significant difference is that in Quebec, violent modus operandi by organised criminal groups were used in some of the cartels. In the Netherlands, no such modus operandi was used.

2. Theory: from protection to collaboration

2.1 Government replacement and protection theory

An influential explanation for the involvement of organised crime in several sectors of the economy is the idea of government replacement or protection theory (Anechiarico 1991; Della Porta & Vanucci 2012; Hill 2014; Gambetta 1993; Gambetta & Reuter 1995). According to this theory, the role of organised criminals would be the result of governments failing to provide certain protection to corporations or individuals (Hill 2014; Gambetta 1993). Instead, organised criminals provide these services and guarantees. Concerning the involvement of organised crime in business cartels, Gambetta and Reuter (1995) explain: "The state is unable to or unwilling to meet the demand of entrepreneurs for profit-enhancing and risk-reducing regulation; the mafia provides the service instead" (p. 132). Della Porta and Vanucci (2012) also connect the involvement of organised crime with a lack of effective government regulation; organised crime replaces an absent government. Several authors use the perspective of government replacement to study different cases of organized crime in several (national) contexts and formulated the idea of protection theory (cf. Kleemans 2014; Shortland & Varese 2014; Paoli 2003). Protection theory searches for analytical links between the absence of state-involvement and the emergence and behaviour of criminal groups. For instance, explaining violence as a means to protect stolen or illegal assets or to ensure criminal agreements in general (Campana & Varese 2013).

Several scholars also criticize protection theory (Paoli 2002; 2003; Kleemans 2014). Although Paoli (2002; 2003) recognizes that mafia type organisations can provide protection and potentially replace certain political functions, she points out that those groups are not exclusively involved in organised criminal activities. Flexible, multifunctional organisations and criminal networks – that do not resemble the hierarchical structure of mafia type organisations (2002) – perform many activities that qualify as organised crime (e.g. participating in illegal markets). While so-called protection to businesses may be a service traditionally provided by hierarchical criminal organisations, flexible criminal networks may not be involved in providing such services. Therefore, the type of organised crime present in a particular area might influence the likelihood of involvement of organised crime in business sectors. Additionally, Kleemans (2014) points out how protection theory lacks a good notion of the analogy between organised criminal groups and states: "states neither guarantee illegal transactions in illegal markets nor illegal operations in legal markets (p. 37)". In other words, protection theory does not explain those activities, which are deliberately not protected by states, because of moral objections or its harmful effects. Also, government replacement and protection theory insufficiently explain the involvement of organised crime in states that do have strong public protection. The fact that organised crime also occurs in countries generally considered as 'strong states', empirically underlines this argument (Fijnaut 1998; Kleemans & Van de Bunt 1999; Kleemans & Van de Bunt 2003). This translates to the topic of cartels, as even in a strong state with a powerful economy like the Netherlands businesses have proved to be able to effectively establish and maintain business cartels (cf. Van den Heuvel 2005; Van de Bunt 2010; Hertogh 2010).

Three implications from the literature on organised crime relevant to business cartels are: 1) protection theory might insufficiently explain certain activities considered as organised crime, because involvement of organised crime in business cartels may not be the result of an absent government; 2) some types of organised crime are not involved in protection services; 3) and the distinction between hierarchical and flexible organised criminal groups might therefore have implications for the involvement of organised crime in business cartels.

2.2 White-collar crime as organised crime

Sutherland (1949, p. 228) already noted how white-collar crime relies on the corporate form of organisation and should therefore be considered organised crime. Building on this, Ruggiero (1996) purposes a joint analysis using organisational theory for the often conceptually distinguished phenomena of white-collar and organised crimes. Social networks around serious crimes for gain are known to involve interactions between 'licit' and 'illicit' services and 'formal' and 'informal' economies (Passas 2002; Van de Bunt, Siegel and Zaitch 2014; Lippens & Ponsaers 2006; Ruggiero 1997; Van Duyne 1995; 1996). Different types of relationships between organised crime and legitimate business, or upper- and underworld are distinguished (Van Duyne, Von Lampe & Passas 2002). Passas (2002) developed a theoretical

framework in which he categorises relationships as antithetical or symbiotic. Firstly, antithetical relationships refer to a form of competition between legal and illegal actors, a predatory nature of the relationship and unequal power balance between actors. For example, in a parasitical relationship criminal groups use business actors to extort illegal profits on a regular basis. In this situation, businesses are seen as victims of extortion (cf. Varese, 2014). Secondly, symbiotic relationships between legal and illegal actors revolve around supply and demand for network and services, mutual benefits and an equal balance of power. For example, in collaboration actors work together towards executing the offence and are both willing participants (cf. Gambetta, 1993; Gambetta & Reuter, 1995). Besides collaboration, parties can be involved in a relationship defined as co-optation; there are still mutual benefits to the collaboration but an uneven power balance between them (Passas 2002).

These studies demonstrate how different actors may participate for their own personal or organisational goals and motivations, benefiting from specific collaborations. Hence, to understand the involvement of organised crime in business cartels, one must appreciate the nuanced nature of the motives and interactions of illegal and legal actors. This requires considering firms and corporate personnel as more than just willing or vulnerable victims of extortion and forced upon influence by organised criminal groups. Because, the risk of a one-dimensional approach is that you might frame an economic crime problem as an organised crime problem or vice versa, by overstating the influence or power of certain actors (Morselli et al. 2012).

3. Methodology: data sources and analysis

For the purpose of this chapter, the publicly available records of the investigations from La Commission sur l'octroi et la gestion des contrats publics dans l'industrie de la construction (CEIC 2015) and Parlementaire Enquetecommissie Bouwnijverheid (PEB 2002) served as data for a comparative analysis. These publicly available reports contained: transcripts from witness testimonies, police evidence including wiretaps and video surveillance, demographic information, economic and market studies. A document analyses was performed on these sources based on a topic list including the following topics: general case information, type of actors, structure of the industry, market indicators and the modus operandi of the cartels. In addition, information on regulatory regimes and regulatory changes during the active years of the cartels was gathered and analysed.

4. Comparing cases: similar circumstances, different outcomes

4.1 Regulatory changes

4.1.1 Canada

Canada has a long-standing history of criminalising cartel conduct, dating back to 1892, when Canada's competition legislation was incorporated into the criminal code (Boscariol et al. 2010). However, antitrust law did come under fire of the provinces in the 1930s. Up to the year 1976 there were only criminal provisions against unfair competition in Canada, after 1976 civil provisions were added to this. In 1986, the current competition act was passed In Canada, partly decriminalising competition law. Although cartels remained subject to criminal sanctions, new non-criminal provisions were drafted for merger reviews and abuse of dominance. In 2010, amendments were made in the Canadian Competition Act. The cartel prohibition came into force with the introduction of a per se criminal offence for certain 'hard-core' cartel behaviour (Boscariol et al. 2010). In terms of regulatory practices, the biggest changes were made from 2011 onwards, in the form of an institutional rearrangement of the anticorruption environment. Both a new Anti-Corruption Act and Quebec's Permanent Anti-Corruption Unit were instated. The permanent coordination unit incorporates within the same structure, two construction regulatory agencies, police squads from municipal and provincial levels, a panel of public prospectors, and special teams from Quebec's Revenue Agency and Quebec's Ministry of Municipal Affairs and Land Occupancy (Reeves-Latour & Morselli 2017). The construction industry was pressured heavily by the creation of these new agencies and increased regulatory scrutiny (Reeves-Latour & Morselli 2017).

4.1.2 The Netherlands

Organisational structures in the construction industry in the Netherlands were in place since the early 1950's; industry associations and clubs enabled and ensured 'regulation of competition' in the industry. For example, the roads and construction combination 'WAC', that was founded in 1953 and the 'SPO', an overarching organisation regulating the pricing in the whole construction industry, which represented 28 cartels with more than 4000 firms involved and was founded in 1963 (Dohmen & Verlaan 2004). Dutch government approved these associations. At this point, there was no active enforcement against cartel conduct in the Netherlands, just a few officers in the Ministry of Economic Affairs dealt with the most excessive market power cases. They were provided with very little resources; hence, their activities were limited. In addition, there was no explicit cartel prohibition under Dutch law. There was the code on Economic Competition (WEM). However, this merely provided a provision that prohibited abuse of a cartel or market dominance, classifying as a criminal offense. In addition, there was a legal provision in the Dutch criminal code, but both the provision in the code on Economic Competition (WEM) and in the criminal code were hardly used in practice (De Bree 2006). This meant a tolerant enforcement climate for cartels in the Netherlands, and during

roughly 40 years, there was no active enforcement of cartels in the Netherlands. Indeed, since 1962 there was a cartel register at the ministry of Economic affairs. Businesses could get their cartel legally registered, to ensure government approved them (cf. Petit, 2017, p. 41-42). The rationale behind the register was that it enabled the Ministry to monitor that firms would not abuse cartels. However, calculated estimates demonstrated that only about half of active cartels were registered during that time (De Jong 1990).

Meantime, the institutions of the European Union aimed to promote one internal European market and as a means to that end wanted to decrease national cartels in its member states. They applied political pressure and introduced new legislation against unfair competition. In the Netherlands, a gradual regulatory shift was also starting to take place regarding legislation and enforcement of unfair competition. Finally, the Dutch price regulating association for the construction industry 'SPO' was prohibited and abolished by a 1992 decision from the European Commission (PEB, 2002, p. 87). This meant that many common practices in the construction industry, such as the pre-consultation agreements in tendering procedures and collective price-regulation, were no longer allowed in the sector. In practice however, most negotiations and price-regulation practices continued 'underground', in secrecy. In 1998, the Dutch government eventually introduced new and stricter legislation in which all cartels, in an effort to end the so-called 'cartel paradise', were explicitly forbidden for the first time. This meant that all efforts by corporations to hinder fair competition, such as bid rigging, price-fixing and market allocation, were explicitly forbidden under administrative law. Note, formally decriminalisation took place, bringing anti-cartel legislation from criminal into administrative law. However, from that moment onwards corporations and their officials could be punished by far more severe financial penalties than ever before. Administrative fines up to 10% of the annual turnover of the company or personal fines up to 500,000 Euros were introduced. In 2016, this was increased to a maximum of 10% annual turnover of 4 consecutive years, or 900,000 Euros in personal fines24. Moreover, the certainty of punishment increased. With the introduction of the cartel prohibition in Dutch law a new independent regulator was installed in 1998 by the Ministry of Economic affairs, namely the Dutch Competition Authority (now: Netherlands Authority for Consumers and Markets). This authority was provided with resources and investigative powers and this is seen as the starting point of competition law enforcement in the Netherlands.

4.2 Economic and market conditions

4.2.1 Canada

Since 1996, there was an increase in overall employment in the construction industry in Canada of 90%, with 11,000-16,000 jobs annually. The sector of civil engineering and roads had two specific periods of growth, namely between 2002 and 2004 and between 2008 and

24 *Stb.* 2016, 22.

2012. Between 1996 and 2012, investments in this industry went up from roughly 4 to 17 billion CAD. The main client in this market is the government, which awards public contracts to construction companies (CEIC, Tome1 p. 76-96). In 2002, the department of Public Contracts of Montréal calculated that the costs of public contracts were 30-35% higher than Toronto or Quebec City (CEIC, Tome 2 p. 9). In 2014, there were 2683 companies working in the civil engineering sector in the province of Quebec, of which 1109 companies in the Greater Montréal area. The majority (83%) of construction firms in Quebec employ five or fewer employees. However, they account for only 19% of the income, which indicates high degree of concentration in the industry (i.e. a few large companies taking up a majority of the total market). In fact, 20 companies have a workforce of between 201 and 500 employees, and two employ more than 500 employees. In addition, the commission pointed out that the use of consortia and joint ventures is very common in the construction industry of Quebec (CEIC, Tome 1, p. 90).

4.2.2 The Netherlands

Between 1998 and 2000, the Dutch construction industry had an economic boost. In 2001, 446000 people were working in the construction industry, accounting for more than 7% of total national Dutch employment. There were 65000 construction companies at that time, of which roughly 75% was considered very small with no employees (individual freelancers), 90% had less than 10 employees and 10% had 10-100 employees (PEB 2002, p. 56). For the purpose of the comparison in this chapter, we will focus on the civil engineering and infrastructure sector (e.g. sewing, roads, tunnels etc.). This sector was relatively concentrated compared to other sub-sectors in the Netherlands; 21 large firms (with more than 500 employees) held a combined total market share of 60%. In 2002, the sector had an annual turnover of 15 billion Euros. The main client in this sector is the government, accounting for more than 5 billion Euros in 2002 (PEB, p. 56; Van de Bunt, 2008). In addition, it is common for companies to work together in the industry using subcontracting, combination works and outsourcing of excess work or activities in which they have little experience. Ergo, there is a high degree of cooperation between firms in this sector. For example, in the asphalt industry, 8 companies together divided 70% of the projects in and around Schiphol (PEB 2003, p. 557; Van de Bunt 2008, p. 135). The parliamentary commission pointed out that although the economic conditions facilitated large-scale bid rigging to occur, these circumstances can be seen as a conditio sine qua non; only in combination with a specific business culture could they evolve into large-scale irregularities in the Dutch construction industry. A combination of tradition and business culture made construction firms continue to coordinate bidding and regulate pricing, after this conduct was explicitly forbidden (PEB, 2002, p. 51).

Table 1 National statistics construction industry Canada and the Netherlands

	Canada	**The Netherlands**
Population	35.6 million people	16.8 million people
Employment construction industry	255,600 people in 2014 (6.3% total employment)	446,000 people in 2001 (7% total employment)
Number of companies in construction	350,000 in 2014 (Quebec: 2683, Montréal: 1109)	65,000 in 2001
Annual turnover	17 billion CAD in 2012 (6 billion public tenders)	15 billion EUR in 2002 (5 billion in public tenders)

Several parallels can be drawn between Canada and the Netherlands, both in terms of the structure and nature of the construction industry and in terms of the legislative and political context. However, a notable difference is the level of concentration and number of construction firms in the local market. High concentration in the Quebec market (i.e. small number of large firms taking 81% of the local market) can make the formation of cartels easier. Since fewer companies have to make agreements to cover the market and it is potentially easier to communicate, coordinate, conceal and monitor the cartel agreements (cf. Jaspers, 2017). However, a high number of firms in a market (i.e. low concentration) can make the uncertainties in the market very pressing, increasing the need for anti-competitive agreements (cf. Jamieson, 1994). This seems to apply specifically to the situation in the Dutch construction industry.

The main similarities in terms of market conditions and structure are: 1) the big share of public tenders in both industries; 2) frequent use of subcontracting, joint venture and consortium projects in the market, leading to extensive collaboration between firms in the sector; 3) both industries experienced episodes of economic prosperity. In addition, several scholars have looked at the influence of the market structure, formulating certain economic vulnerabilities regarding the involvement of organised crime in legitimate business (Lavezzi, 2008; Van de Bunt 2008; Gambetta & Reuter 1995; Reuter 1987). The economy of Sicily is characterised by a large dimension of traditional sectors, such as construction, which also has a strong territorial specificity; a large presence of small firms; a low level of technology; and a large public sector (Lavezzi, 2008). Varese (2011a; 2011b) builds upon the theoretical model of Morselli, Turcotte and Tenti (2011) to assess local conditions for organized crime to provide services to legitimate business. For instance, locally based competition and low barriers for entry are considered to induce risks for business cartels in construction industry (Varese, 2011a; 2011b). These characteristics also apply to both cases in this analysis.

In terms of regulatory changes, both countries have roughly seen an increase in enforcement efforts to tackle several forms of unfair competition, such as bid rigging, price-fixing and market allocation. However, in terms of legislation Canada has had a tradition of criminalisation regarding cartel conduct. While in the Netherlands, there has been a shift away from hardly

enforced criminal law towards the use of strongly enforced administrative law. Comparably however, both Canada and the Netherlands experienced a boost in enforcement efforts over the past roughly 25 years, in terms of professionalisation in existing and the formation of new regulatory agencies. Through providing competition enforcement with an increase in personnel, resources and investigative powers in order to tackle cartel conduct over the past 25 years.

5. Bid-rigging in the construction industry in Canada and the Netherlands

5.1 Parliamentary investigations construction industry in Quebec, Canada (1996-2011)

When the prices of public contracts increased, several whistle-blowers came forward on bid rigging schemes in the province of Quebec, Canada. Upon the initial revelations, the parliamentary commission Charbonneau (CEIC) was installed in 2011. The Commission Charbonneau investigated bid rigging, corruption, illegal financing of political parties and the infiltration of organised crime in the local construction industry in the province of Quebec between 1996 and 2011. During a period of seven months, nearly 50 witnesses testified to the Commission, including entrepreneurs, engineers, technicians, civil servants, political leaders, and the former heads of the city government. The final report was finished in 2015. It covers various forms of misconduct, including corporate crime, corruption and organised crime. Besides bid rigging by construction firms and involvement of organised crime, the Charbonneau investigations cover a great variety of misconduct, such as corruption and illegal financing of political parties. Especially the activities in Laval, Quebec are an example of these types of misconduct (cf. Reeves-Latour & Morselli, 2016). However, in light of the research question this chapter focuses on the Montréal construction cartels.

5.2 The Montréal construction cartels

The Montréal construction cartels involve four bid-rigging schemes regarding public tendering procedures in the engineering and infrastructure sector. The markets include: the construction of aqueducts; construction of sidewalks; construction of city parks; and the construction of roads. The cartel in aqueducts included 15 colluding firms. These firms rotated bids, dividing all local projects in the market. They executed their bid rigging agreement by adjusting their bids, after discussing whose turn it was to win the project. In order to assure this firm would actually win the project the other companies would intentionally turn in higher bids. This is also referred to as 'cover pricing'. The second cartel, in sidewalks, consisted of six firms. A contractor that functioned as a ringleader distributed the available projects by instating fear with competitors, hereby coordinating the cartel. This contractor also tried to organise the construction of city parks (and other markets, such as sewers and aqueducts) using the same

strategy, but with limited success. This cartel lasted between two and three years. Since the beginning of the year 2000, the directors of five firms initiated the asphalt cartel. This cartel is considered to be the most professional and structured of the cartels in Montréal. The conspiracy ensured the firms of profits up to 30%, instead of the usual 4-8%. This cartel entailed a market division, using production quotas and allocating the market in the greater city of Montréal. Every plant had a quota based on volumes of production. The cartels also used geographical market allocation, especially in the asphalt plants. By effect, the cartel successfully lowered the level of foreign competition in Montréal. In 2005, public contracts in Montréal were awarded to local firms in more than 95% of the cases. Contractors and entrepreneurs from outside Montréal were bullied and intimidated if they attempted to acquire projects in the Montréal area.

5.3 The parliamentary investigations Dutch construction industry (1985-2000)

In 2001, large-scale bid rigging in the Dutch construction industry was also uncovered by a whistle-blower; the commercial director of a Dutch construction company that was involved in several bid-rigging schemes. As a result, in 2002 The Parliamentary Commission on the Construction industry in the Netherlands (PEB) was appointed to investigate irregularities in the construction industry (PEB 2002). In addition, the Dutch Competition Authority started investigations into several markets within the construction industry, namely the civil engineering and infrastructure sector and the installation sector (NMa 2004). The parliamentary commission investigated what the nature and scale of the irregularities in the Dutch construction industry entailed, from 1985 onwards. Under irregularities they considered: fraud, false reporting, economic crimes, fiscal fraud, public procurement violations and violations of ethical rules within the industry (PEB 2002, p. 31). The Dutch Competition authority investigated infringements of the cartel prohibition under Dutch and European competition law, from 1998 onwards - when the cartel prohibition was first introduced under Dutch administrative law.

5.4 The Dutch construction cartels

The Dutch construction cartels include bid-rigging schemes in public tendering procedures regarding the construction of infrastructure projects in roads, water and groundwork. In each of these markets a group of bidders predetermined the outcome of tendering procedures. Participants took turns winning projects, artificially raising prices and splitting the difference. Firms used a system involving mutual claims to determine whose turn it was to get the next project. In a rigged tendering procedure, the winning firm owed 'credits' to the other participants that let him win the project. Those firms then held 'claims' on the former winner, calculated from the overcharge of the project (the artificially raised amount) divided by the number of participants. These claims were used in future tendering procedures to determine which firm should 'rightfully' win the project. This also enabled firms to come together for any

specific project in various compositions and within several markets. In other words, there was no fixed ring of bidders per market or region. Instead, there was a relatively flexible and open system in which every Dutch construction company could participate. Scores of the mutual claims were meticulously kept in general ledgers by all major construction companies. Later on, ironically, these ledgers served as central evidence in the investigations revealing the cartels.

6. Results: Exclusive versus inclusive: bid-rigging schemes in public tendering procedures

Both in the Netherlands and in Montréal, firms in the engineering and infrastructure sector coordinated their bidding process in public tenders. Construction firms structurally collaborated in order to determine which firm would be the winner of the contract, using strategies such as cover pricing and courtesy bidding. Moreover, prices of contracts were artificially inflated. Both case studies entail a combination of bid rigging and price-fixing in the construction industry.

6.1 Exclusion: violence in the Montréal construction cartels

Entrepreneurs, especially from the cartels in sidewalk, sewing and aqueducts, were seen at the company of a known leader of the Italian Mafia in Montréal. They regularly frequented the so-called 'social club', which served as a headquarters for the Rizzuto clan. The exchange of money was taped with a hidden camera. According to a witness, the members of the cartel were working 'under the blessing' of the Mafia and paid them compensations, also referred to as 'pizzo'. These forms of taxes or extortion rackets were usually paid to the leader of the cartel in sidewalks. He acted as an intermediary between the cartels and the Mafia. Leaders of the Rizzuto clan acted as mediators to settle conflicts between firms and to prevent newcomers from entering the market.

The cartels operated on a basis of consensus and reciprocity. Contractors made compromises to be able to reach a well-functioning system where all companies involved could benefit. At the same time, the system clearly functioned as a disciplinary instrument for the firms involved. An entrepreneur that participated in one of the cartels explained:

> *"The interest of entrepreneurs is that the system works, so it was in the interest of everyone involved to push in the same direction, like a hockey team. Once the decision has been made, it must be respected: "If, with every contract, we argued, well, I'll tell you, it would not have lasted more than two weeks. There is no one in charge: decisions are taken by consensus" (CEIC, Tome 2, p. 33).*

Contrary to the Dutch bid rigging scheme, there was no formal accounting or keeping scores in the Montréal cartel cases. No notebooks or other forms of registration containing names of the companies that won the contracts in Montréal. Comparable to the Dutch cases, the Montréal cartels were based on informal social control between the construction firms in the cartel:

> *"When I say, "keep an eye out", I mean we talked among entrepreneurs, OK, he got this, it is possible that he is at this level, soon ... When there are three contracts in tender, normally it should go to me, him or such. So it was really an exchange amongst the entrepreneurs in the market" (CEIC, Tome 2, p. 31)*

Another contractor confirmed that the entrepreneurs were trying to get along with each other in a harmonious way, in order to ensure the rotation of contracts:

> *"What I am saying is if Infrabec comes to see me and I don't agree, maybe Paul will call me and say: Why aren't you just settling it? You'll get another one that's coming to you, you know" (CEIC, Tome 2, p. 33).*

One of the entrepreneurs, Lino Zambito, declared how 2,5% of the profits of the cartel were transferred to members of the Cosa Nostra. He added that the system had been in place for many years and was initiated by the construction firms. The involvement of organised criminal groups only started afterwards. He describes a system of kickbacks for services and products that were never actually delivered. This was used to even out disparities between the construction companies and to make cash payments to criminal groups and local politicians (CEIC 2015, p. 239). What Zambito describes can be categorized as a symbiotic relationship between construction firms and criminal groups (Passas 2002; Van de Bunt, Siegel and Zaitch 2014). However, it remains unclear from the data whether this should be seen as collaboration or co-optation (cf. Passas 2002).

One of the standout differences between the Dutch and the Canadian cartels is that in Montréal, construction firms outside the cartel were victimised by members inside the cartel. Firms outside the cartel that wanted to participate in the local construction market in Montréal were bullied, threatened and intimidated into not entering the market or exiting it. Some construction firms in the Montréal area experienced the strong position of the existing cartel through activities of organised criminals. This is demonstrated in the testimonies of several entrepreneurs outside of the bid rigging cartels. They were threatened and bullied by the members of the Cosa Nostra. After acquiring a large new construction project, Martin Carrier -an entrepreneur from the Montréal area- received a call from a director of one of the other construction companies in Montréal, Francesco Bruno. Bruno had also bid on the project and expressed his dissatisfaction about the fact that Carrier was operating in 'his' area and requested

that he would stop his activities. Carrier ignored the message and was then phoned again, this time by Del Balso (member of the Rizzuto family, part of the Canadian Cosa Nostra), which told him the following: "You did not want to listen. You were warned. Now it ends". There were no physical repercussions for Carrier, but he was uncomfortable with the situation. In February 2001, professional conflicts between the firms were still on-going in a civil suit. Around that time Carrier received some remarkable mail to his address. It contained a condolences card with his name on it stating: "Dear friend, if you don't stop bidding in Montréal, this is the type of card we will be sending to your family" (CEIC 2015, p. 987).

Another local entrepreneur, Andre Durocher, also declared receiving threats after putting in his price for a project on the 'Chabanel Street' in Montréal. The reason was that he was bidding on projects that were indented to go to members of the cartel. His installations and tools were destroyed, and his brother was beaten up. Afterwards, four men visited his office and demanded that he would cancel the project. He ignored their demands. Shortly after, he received a call from the insurance company telling him that the insurance on his equipment was cancelled if he would not retract his bid on the Chabanel Street project. This time Durocher caved in and retracted his bid.

6.2 Inclusion: mutual claims and clandestine bookkeeping

Firms in the engineering sector in the Netherlands coordinated their bidding in a meeting before the tendering procedure started. One of the Dutch companies explained the aim of these meetings, summarising the main strategy applied within the market to divide public tenders:

> *"In a pre-consultation meeting the goal was to determine i) which of the involved firms would execute the project (named 'rightful owner'), ii) for which amount the project would be executed, and iii) which mutual claims between the participating firms would be created as a result of this agreement. The 'price' that the 'rightful owner' would pay to the others, to be the lowest bidder in the tendering procedure, would determine the amount of the claims others would have on him in future tenders" (NMa, 2004, p. 7).*

The bidding procedure was particularly predictable, because the lowest bidder would always get the tender. In some cases, tenders would not be open to all construction companies but issued by invitation only. One of the companies explained: "In case of tenders by invitation, we would quickly determine which other firms got an invitation to bid on the project" (NMa, 2004, p. 9). This also meant the circle of bidders could differ from one project to another. However, the different agreements were strongly related. Although the circle of bidders per tender would differ, there was a structural system in place in which virtually every Dutch construction company participated. A statement of one of the companies involved illustrates the common practice of these activities: "It was custom for all contractors operating in the Dutch market

to comply with the system. In fact, there was somewhat of a 'code of honour'" (NMa, 2004, p. 13). According to the investigations and testimonies, around 98% of Dutch construction companies were involved in rigging public tendering procedures. Indeed, the activities entailed a long-standing tradition in the sector, which was passed on to newcomers: "People that were new to the industry were informed and instructed by their predecessor" (NMa, 2004, p. 14). Testimonies demonstrate a web of different schemes throughout the industry, making it nearly impossible not to participate in bid rigging agreements if you wanted to be in business. The inevitability of these practices was especially induced by the system of mutual 'claims' that resulted from the pre-consultation meetings. One of the companies explained:

> *"In this pre-consultation, which usually took place 1 or 2 hours before the bidding process, the bidding would be coordinated between the participating firms (...) In addition to the price, the amount for the claims was determined. These claims were then settled and evened out with previous and future projects" (NMa, 2004, p. 8).*

The coordination and allocation of projects took place through a system of mutual 'rights' and 'obligations', so-called claims. At the pre-consultation meeting, the firms will first write down an amount for which they can potentially execute the project. Firm A writes down the lowest amount, the other firms will now agree that firm A will win the project. Together they will determine for which price firm A will actually submit his bid to get the project. They inflate the earlier amount, which was a competitive price. All other firms will submit a bid above A deliberately, not winning the project as a result. In return, the winner of the project (firm A) will have a 'debt' to the others, based on the difference between the initial amount and the real price of the bid he turns in, divided by the number of participating firms. For example, if the initial amount was 4.75 million and the winner turns in his bid at 4.95 million, the difference of 200.000 Euros is divided between the other four companies, making the debt of firm A to the others 50.000 Euros per firm (PEB, 2002, p. 88).

Because of the accumulation of mutual claims, the participating firms created a web of mutual dependencies. Their relationship with other firms became one of creditors and debtors. It was clear that previously built up claims would play a role in future contracts (NMa, 2004, p. 10-11). One of the companies explained:

> *"It was custom that claims were never intended to be actually paid out in practice. Firms would strive to even out disparities by balancing the claims. In fact, the claims served as 'change' (small cash) for other projects in which a firm would participate. Built up claims were used to acquire projects in other tenders. As a consequence of this system, some firms would only participate in pre-consultation meetings, to collect these 'claims'" (NMa, 2004, p. 11).*

> *"The claims were noted in the general ledger. This way, the claims would materialise and could be used in the future to determine whose turn it was to get a project. The principle of these claims was work in exchange for work" (NMa, 2004, p. 23).*

As demonstrated above, firms would keep clandestine administrations on agreements and mutual claims; this illustrates the structural character of the system. These administrations had the form of general ledgers. For every company one made agreements with and had a relationship of dependency through mutual claims, several pages were listed. This resulted in a norm of 'fair sharing' between construction companies (Van de Bunt, 2010; Van de Bunt, 2008). Besides meticulously kept so-called 'shadow bookkeeping', this social norm was induced by an informal business culture in which people were well acquainted with one another, both professionally and personally. Every company involved in these agreements would keep such an administration. All projects were listed in this administration: companies would note which firm got the project, for which price and the amount of the claims to the other participants. However, it was not always possible to perfectly even out the disparities between the participating firms. As a last resort, firms would therefore sometimes use false invoices for services or products that were never actually delivered. Or they would give large discounts on a shipment of e.g. gravel or other products (PEB, 2002, p. 126).

7. Conclusion

The purpose of this chapter was to investigate why business cartels sometimes do and sometimes do not include the involvement of criminal groups with a violent reputation. The often-separated criminological discourses of organised and organisational crime literature have both treated the phenomenon of economic cartels, respectively framing it as organised crime 'infiltration' and pure corporate conspiracy. However, contemporary studies in organised crime offer extensive elaborations about the interactions and interfaces between 'upper' and 'underworld'. This analysis has therefore, in the tradition of analysing serious crimes for gain, moved beyond analytical debates and focused on the modus operandi, networks and different actors involved in economic cartels. By looking at two different case studies we can see how two different types of collusion emerge under different cultural, economic and regulatory conditions.

Case studies from the construction industry in Canada and the Netherlands demonstrate how two different systems of collusion developed under different regulatory and cultural conditions. The Montréal cartels were a form of exclusive collusion; closed circles of fixed bidders, and construction firms outside the cartel were victimised. The construction cartels in the Netherlands were a form of inclusive collusion; open to all construction firms, with changing compositions. The Montréal cartels were more closed to new entrants, while the Dutch cases

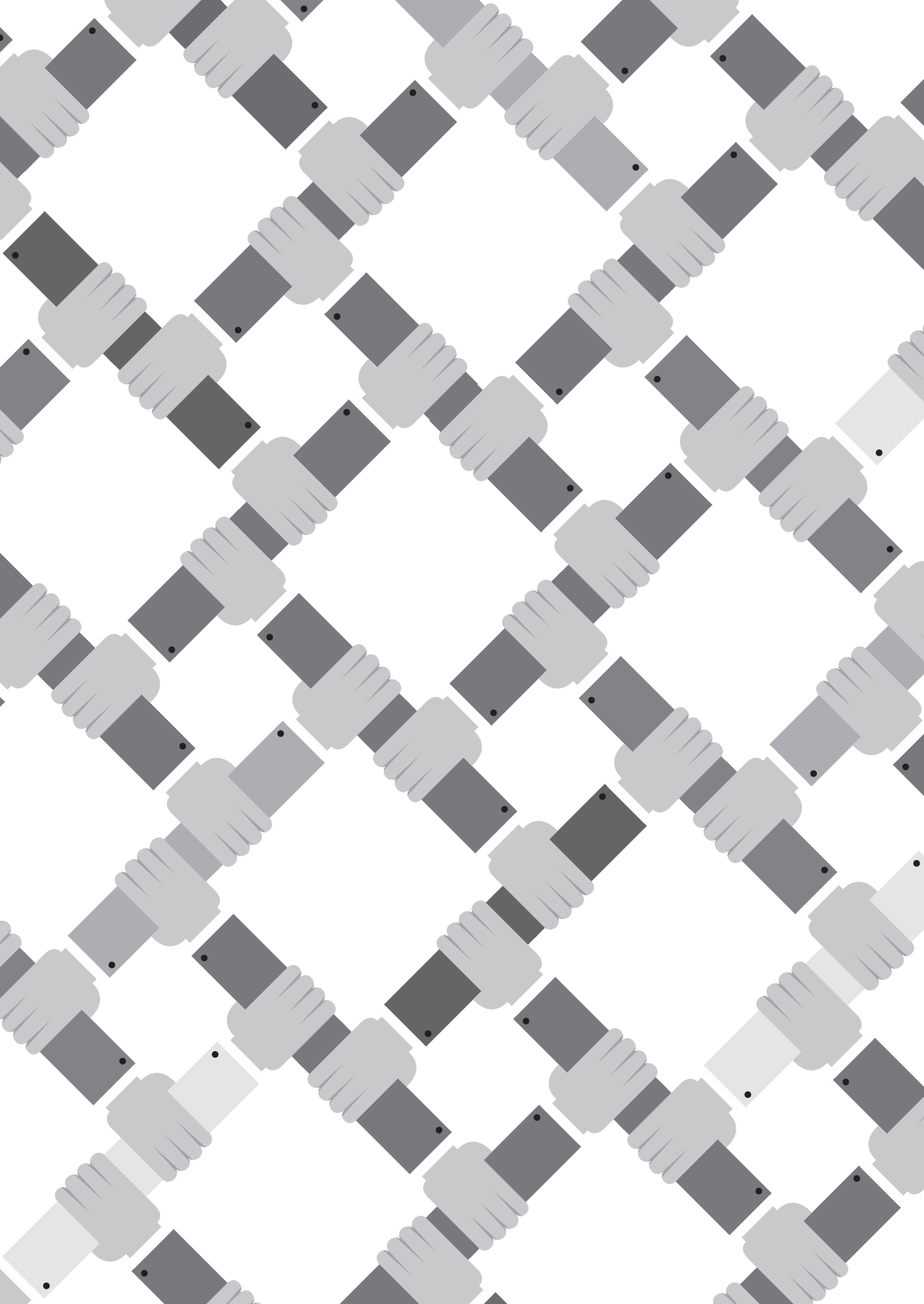
demonstrated a collective business strategy. This strategy was shared within the broader industry. This has to do with the history of the construction industry in the Netherlands, in which the combination of enforcement tolerance and the structural character of the way of working were considered 'business as usual'. Additionally, the Dutch construction industry barely had losing or victimised firms as a result of the bid rigging cartels.

Differences regarding involvement of violent criminal groups in business cartels between The Netherlands and Canada can be explained by the cultural and regulatory conditions under which the two cases emerged. Both a strictly criminalised regulatory regime regarding business cartels and a highly competitive and predictable tendering procedure with criminal opportunities in Canada, explain the involvement of criminal groups with a violent reputation. In the Netherlands, the combination of a historically lenient regulatory regime towards business cartels and a strong subcultural normalisation of bid rigging throughout the construction industry explain the emergence of business cartels without the involvement of organised crime.

Relating to the research question, if the system of collusion is more closed and dependent on keeping outsiders out (preventing newcomers from entering the market) and protecting insiders within the cartel, a demand for intimidation is more pressing. This fits the job description of organised criminal groups with a violent reputation. Note that this neither means they have 'infiltrated' the industry completely, nor that they have initiated or forced their services upon the firms involved in illegal bid rigging agreements in the construction industry. This was demonstrated in the Montréal cases that illustrated a symbiotic relationship between criminal groups and collusive business owners (cf. Gambetta & Reuter 1995; Passas 2002; Van de Bunt, Siegel and Zaitch 2014). In the Dutch inclusive system, there is less of a natural need for a strong arm to enforce the existing power balance of construction firms in the industry. Old industry directors informally coordinated cartels, or third parties like secretaries and chairmen functioned sufficiently as regulators or mediators for the cartels (cf. Van de Bunt 2010; Jaspers 2017; Hertogh 2010).

In both cases authors have suggested that it was not failing regulations and regulators, or the strategic creation of an external criminal group that sufficiently explains the misconduct in the construction industry. In fact, it was the vulnerable system itself that produced the misconduct: "What this means is that the collusion problem and the emergence of an organized and centralized group of profiteers is a product of the system itself and not, as popular opinion often suggests, the strategic creation of an external criminal group that arrives to take control of the process at any given time. In short, a vulnerable system begets its own deviant organization and does not require a mafia or organized crime presence to organize it" (Morselli et al. 2012, p. 2). For the Dutch case, several authors have similarly suggested how the structure and culture of the industry and its vulnerabilities contributed to the bid rigging schemes, and not as is often

suggested regulatory failure alone (Van de Bunt 2008; Van den Heuvel 2005; Vulperhorst, 2005). However, although collusion between firms was the main focus of this chapter, both the Montréal and the Dutch case also revealed collusion between construction firms and governmental agencies, both local and federal (cf. Reeves-Latour & Morselli 2016; Van den Heuvel 2005). The role of the state when it comes to collusion in the construction industry cannot to be underestimated. In a sector where financial and economic interests of the state are so strongly connected to corporate interests and where governments can be client, project developer and regulator at the same time, collusion between government and construction firms is a significant risk.



Chapter 5

Leniency in exchange for cartel confessions*

Abstract:

Leniency offers corporations the possibility to come clean about their involvement in cartel conduct (e.g. price-fixing, bid-rigging) in exchange for immunity or reduction of financial penalties. In Europe, nearly 60% of detected cartels are discovered through leniency. This makes leniency the most applied detection tool for uncovering cartel conduct violations. What are considerations in applying for leniency or refraining from doing so? How do those considerations relate to private law enforcement through civil liability regarding business cartels? These questions are discussed based on semi-structured interviews (n=34) with cartelists, competition lawyers and in-house legal counsel to study theoretical assumptions underpinning leniency arrangements in the Netherlands. This study investigates four scenarios on the use of leniency suggested in the literature and only finds empirical support for two. Strategic use of leniency and false confessions occur in the Netherlands, but to a lesser extent than the existing literature suggests. Moreover, various disincentives and especially the rise of private enforcement make leniency an unattractive and uncertain option for cartelists.

* This chapter has been published as: Jaspers, J. D. (2020). Leniency in exchange for cartel confessions. *European Journal of Criminology*, 17(1), 106–124. doi: 10.1177/1477370819874432

1. Introduction

Cartel confessions are an essential source for competition authorities in uncovering cartel conduct violations (e.g. price-fixing, bid-rigging). Leniency offers corporations the possibility to confess to their involvement in cartel conduct in exchange for immunity or reduction of financial penalties. In Europe, nearly 60% of detected cartel cases are discovered through leniency applications, making it the most employed detection tool by competition authorities in uncovering cartels (Carmeliet 2012). Over the last decade, more than 50 jurisdictions worldwide have adopted leniency arrangements in their competition and anti-cartel enforcement policies (Beaton-Wells 2015). Leniency arrangements contributed to detection of a substantial number of cartels across the globe. For example, due to its Amnesty program, the US Antitrust Division secured more fines in 1999 alone, than the sum of fines imposed under the Sherman Act since its adoption in 1890 (Aubert, Rey & Kovacic 2006). Leniency also triggered the largest financial penalties imposed by the European Commission (e.g. Vitamins, Auction Houses, Air Cargo) (cf. Carmeliet 2012; Stephan & Nikpay 2015). Recently however, the number of leniency applications declined worldwide, causing concern among experts about the dependency of competition authorities on this detection tool (Guttuso 2015; ICN 2014). Therefore, it is important to understand more about the decision-making process and motivations regarding leniency applications. This study contributes to that understanding by empirically investigating motivations and disincentives for leniency applications. Does leniency work according to the theoretical assumptions underpinning it or do cartelists use leniency strategically, and if so, to what extent?

Previous research has addressed these questions through economic modelling (cf. Hinloopen 2003; Blum, Steinat & Veltins 2008; Hinloopen & Soetevent 2008). This gives insight in potential interactions of cartels with leniency and theoretical scenarios on strategic use, but economic models lack empirical validation. Socio-legal scholars have conducted empirical research through single case studies or systematic document analyses of detected cartel cases (cf. Bergman & Sokol 2015; Brenner 2009; Stephan & Nikpay 2015). Some studies also include interviews with cartelists, but these studies have not specifically addressed leniency (cf. Parker 2013). The most extensive study regarding leniency is by Sokol (2012), who uses surveys and interviews among anti-trust practitioners in the US. Through his study, Sokol (2012) was the first to probe the assumptions underpinning leniency by studying how leniency decision-making works in practice. However, Sokol did not interview cartelists themselves and the study is US-based only. Although many studies have looked at the effectiveness of leniency, optimal leniency and some at leniency in legal practice, most of these studies are conducted in the US (cf. Harrington 2008; Sokol 2012). It is known that the US antitrust policy is set in a more adversarial legal system compared to European institutions (cf. Kagan 2006). Therefore, findings of this research cannot be automatically generalised to the European context. This

study contributes to extant research by adding a case from a European country and by adding first-hand experience from cartelists. Building on insights from these earlier empirical studies, this study looks at the specific Dutch context for leniency and investigates the theoretical assumptions behind leniency. The following questions are addressed: what are considerations in applying for leniency or refraining from doing so? How do those considerations relate to private enforcement of business cartels? And to what extent do cartelists use leniency strategically? The aim of this chapter is to answer these questions through interviews with competition lawyers, in-house legal counsel and cartelists in the Netherlands.

2. Theory: Assumptions underpinning leniency arrangements

Cartel agreements are based on mutual trust between cartelists. This trust entails the willingness to make oneself vulnerable to the risk of betrayal by others in the cartel (Leslie 2006). However, explicit agreements, informal contracts and secret book keeping are often also part of running cartels. Those can be seen as attempts to formalise or solidify this trust and as signs of an underlying lack of trust at the same time (Jaspers 2017). Leniency plays into this trust dynamic, attempting to disrupt cartels by increasing the benefits of betrayal for cartelists (Spagnolo 2000). Leniency facilitates this by offering immunity to the first firm who comes forward to the authority with evidence of their involvement in cartel infringements. In addition, leniency provides reduction of financial penalties for firms with sufficient evidence that follow after the immunity-seeker. Policy makers and enforcement authorities rely on leniency to undermine potential trust in cartel agreements and induce distrust between cartelists, ultimately destabilising cartels (Choi & Hahn 2014). In combination with deterrent penalties and a credible threat of detection, leniency is presumed to instil distrust between cartelists and trigger a race to the competition authorities (Stucke 2015). Extradition of cartelists to foreign countries and examples of cartelists sentenced to prison in the US presumably increase credible deterrence (Thomas, et al. 2017; Crofts & Nylen 2015). In reality, cartels might also end because of exogenous reasons such as changing market conditions, change of management, mergers and acquisitions (Levenstein & Suslow, 2006; 2011). Because we only observe discovered cartels it remains unknown to what extent leniency programs actually destabilise existing or deter potential cartels (Harrington 2008).

Cartel enforcement is based on the Beckerian theory of optimal deterrence (Becker 1968), also referred to as the Chicago School Approach (Sokol 2012). The experimental support for the Beckerian Proposition is mixed, given different contexts and markets and there is a lack of consensus on the appropriate level of deterrent fines. The underlying assumption is that firms balance expected gains from a violation against the expected punishment. In this theory, deterrence is a function of the size of the penalty and the probability of detection (Wils 2007).

Stephan and Nikpay (2015) identify three main theoretical assumptions underpinning leniency arrangements: 1) cartelists are rational and unified entities with centralised decision making, 2) with accurate and predictable information about the expected benefits of the cartel, and 3) deterrent penalties and a credible threat of detection make leniency an attractive option for cartelists. These three assumptions; rationality, predictability and deterrence, will be compared to alternative explanations in the existing empirical research on leniency and result in three hypotheses for this study.

2.1 Rationality and unified entities with centralised decision making

The first assumption underpinning leniency policy is that participants in a cartel are rational actors whose behaviour is primarily determined by profit incentives. Additionally, firms are believed to be unified entities with centralised decision-making processes and assumed to make decisions about when to enter, leave or report a cartel at the top level. Contrary to the idea of firms as unified entities, corporations are in fact complex and fragmented institutional structures with decentralised decision-making in various units and locations (Harding 2013). Firms are complex structures due to differences between individual and firm incentives and firms may have difficulties to control and monitor rogue agents (Sokol, 2012). Information deficits exist within corporations; different departments can fail to communicate, and executives can be unaware of what happens on the shop floor. Differences exist between smaller and larger firms regarding decision-making about compliance (Parker 2013): large corporations with many subsidiaries face the difficulty of identifying infringements and to manage improvement if cartel violations have occurred (Braithwaite & Makkai 1991; Jamieson 1994). However, large corporations have more resources available to adopt professional compliance programs and legal advice. Smaller firms have fewer difficulties in monitoring cartel conduct - within smaller firms (e.g. family owned, owner-director), directors or managers are more likely to be aware or actively involved in conduct. Reversely, small firms will have fewer resources available regarding compliance programs.

Moral ambivalence and ambiguity are known to play a role in cartel conduct violations (Haines & Beaton-Wells 2012; Parker 2012; Whelan 2013). Business people can find competition law abstract and complex or might not support moral wrongfulness of cartel conduct (cf. Hertogh 2010). Therefore, the expectation is that the size of firms and their legal consciousness (awareness and support for legal rules) influences to what extent they are aware of cartel conduct and inclined to act on this. Studies show that low legal-consciousness towards competition law causes calculated interaction with leniency. Literature finds a paradox between cartel criminalisation – enhanced enforcement, significantly high financial penalties – on the one hand, and fixed collectivistic sentiments and values in business cultures on the other (cf. Stephan, 2010). Within firms, the topic of competition law and cartel conduct is associated with moral ambiguity (Parker 2012; Whelan 2013). Closely related to what Gilbert Geis

(1977) noted in his seminal study on the heavy electrical equipment cartel cases. He quoted a Westinghouse executive rationalising price fixing: "Illegal? Yes, but not criminal. (…) I assumed that criminal action meant damaging someone, and we did not do that" (p. 67). This translates into the attitudes and self-perception of cartelists. They realise certain economic action and business conduct is strictly speaking not allowed, however they do not perceive it as unjust or morally objectionable.

2.2 Predictability of expected benefits and likelihood of detection

The second assumption underpinning leniency policy is that firms have accurate information about the expected benefits of the cartel, and adequately assess the likelihood of detection and the size and likelihood of punishment. Competition authorities are known to frame leniency as triggering 'a race to the authorities' between firms that struggle with: the risks of their involvement in cartel conduct, distrust towards their 'partners in crime' and remorse (Stucke 2015). Competition authorities actively present this frame within their regulatory communication (Van Erp 2017). Through information on their websites, (social) media campaigns and movie clips, competition authorities portray leniency as an attractive choice for cartelists that are considering their options. However, the suggestion of leniency destabilising active cartels has been challenged in research. Based on a case-study analysis of 40 international cartels Stephan and Nikpay (2015) concluded that 53% of those cartels ended before parties applied for leniency and only 6% ended after they applied. More studies underline this conclusion (Brenner 2009; Stephan 2008) and also suggest reporting is sometimes used strategically; challenging the idea that leniency ends existing cartel agreements (Miller 2009). In addition, practitioners question the reliability of testimonies derived from cartel confessions. It is suggested that whistle-blowers have an incentive to exaggerate their testimony, in order to be granted immunity or reduction of penalties (Snoep 2009).

Harding and Edwards (2015) describe enforcement gaming as follows: "it may be, then, that another aspect of the impact of regulation and the use of sanctions in this context is an unintended and unwelcome (...) 'reverse exploitation' or capture of the process of enforcement by firms subject to the regulatory process as a kind of business opportunity" (p. 206). Scholars suggest several ways in which cartelists use leniency strategically (Harding et al. 2015; Levenstein, Marvão & Suslow 2016; Marvão 2016; Marx, Mezzetti & Marshall 2015). A large number of gaming strategies listed by Harding et al. (2015) include; strategies to hurt competitors, to intentionally bust the cartel for personal gain or to divert attention from regulators away from a bigger cartel (Marx et al. 2015). Marx et al. (2015) use game theory to predict firms will apply for leniency for several products at a time. The likelihood of investigation and conviction for the first product will increase but decrease for subsequent products. Firms will have an incentive to form 'sacrificial cartels' and apply for leniency in less valuable products. Using this strategy, cartelists can reduce the likelihood of detection and convictions in more valuable

cartels. This can also be referred to as a 'throwing-the-bone strategy': diverting attention of regulators away from a larger cartel. In other words, it is expected from the literature that firms use leniency strategically when they confess. However, for many of the theoretical scenarios it remains unclear to what extent empirical data supports them and under which conditions. Therefore, this study will probe to what extent and in which ways leniency is used strategically in the Netherlands.

For this study, different theories on the use of leniency in the literature have been condensed into four scenarios: 1) the destabilising effect (default, no strategic use), 2) the opportunistic response, 3) the anticipation effect, and 4) the throwing the bone-strategy. Firstly, the destabilising scenario is leniency by the book, similar to how competition authorities generally bring it forward in their communication; destabilising active and current cartels. Secondly, the opportunistic response is when cartels have already failed for other reasons. In that case, firms might request for leniency to put their former cartel members at a disadvantage. Thirdly, the anticipation effect signifies a cartel as an intentional and planned construction, only to eventually damage other market players in the long run. When the firm is the first to ask for leniency it makes them immune to sanctions. Note that this means leniency does end the cartel in this scenario, although being used in a strategic way. Fourthly, the throwing-the-bone strategy entails firms holding a large international cartel agreement in product X while also retaining an agreement on a smaller side market Y (or markets) for a different product. Now firms individually or collectively ask for leniency in the smaller cartel to distract the efforts of the authorities and to decrease the risk of detection of the larger cartel. These four scenarios are operationalised for this study using scenarios in the interviews (see methods).

2.3 Deterrence and credible threat of detection

The third assumption underpinning leniency arrangements is that they are effective only when combined with penalties of sufficient magnitude to deter, and a credible threat of detection. In addition, competition authorities can exploit the uncertainty around the strength of an investigation by bluffing (Sauvagnat 2015). However, leniency policies do not operate in a vacuum, but interact with other legislation and enforcement, such as criminal liability and private damage actions (OECD 2012; Luz & Sapgnolo 2017). While it may be beneficial to self-confess in order to be granted immunity or reduction of penalties by public enforcement authorities, admitting to a violation and providing evidence for it can also be a disadvantage in follow-on civil damage cases as immunity from public sanctions does not extend to follow-on civil damage claims (Cauffman 2011; Swaak & Wesseling 2015; Canenbley & Steinvorth 2011; Guttuso 2015; Wils 2009). Buccirossi, Marvão & Spagnolo (2015) demonstrate damage actions could potentially improve the effectiveness of leniency programs, but only if civil liability of the immunity recipient is minimized and access to all evidence is granted to claimants. However, as Guttuso (2015) puts it: "the probability of exposure to private damages

not only in the jurisdiction where leniency was obtained, but also in other jurisdictions, have been cited as key factors inhibiting potential leniency applicants from self-reporting" (p. 279). Private enforcement in the form of follow-on damage procedures is the most important reason cartelists are increasingly cautious with leniency. These procedures are civil cases following after an infringement decision from the European Commission or national competition authorities. In the Netherlands, there have been developments in several cases where claimants are seeking redress from cartelists, such as TenneT/ABB, Sodium Chlorate, Paraffin Wax and Air Cargo. In Tennet/ABB the court ordered ABB to pay TenneT €68 million in damages. In Sodium Chlorate and Parrafin Wax, the German litigation funder CDC (Cartel Damages Claims) was involved. The Netherlands is a popular forum for claiming cartel damages. This attracts professional litigation funders from abroad. Litigation funders gather claims from damaged parties in the market and litigate on their behalf in order to collect a return on their investment in the form of a percentage of the damage claims, if granted (cf. Maton, Poopalasingam, Kuijper & Angerbauer 2011). For example, in the Air Cargo cartel: two days after the dawn raids, 20 class action lawsuits were filed against Lufthansa alone in the US. Lufthansa ended up settling for $85 million. In addition, Lufthansa's outside legal costs relating to the cartel averaged $12 million a year between 2005-2009 (Bergman & Sokol 2015). In short, it is expected that disincentives and stakeholders outside of cartelists and the competition authority might influence the decision-making process of leniency for corporations.

Table 1 Leniency policy assumptions and empirical explanations

Theoretical assumptions leniency	**Alternative empirical explanations**
Firms are rational and unified entities with centralised decision making	Distribution of responsibilities within firms complicates centralised decision-making and moral ambiguity distorts rational decision-making.
Cartelists have accurate information on expected benefits of the cartel	Firms use leniency strategically if and when they confess
Deterrent penalties and credible threat of detection	Leniency applications pose additional risks and uncertainties to cartelists and lead to increased exposure to private enforcement

Table 1 summarizes the main theoretical assumptions underpinning leniency arrangements and the alternative empirical explanations that challenge them. This study assesses whether there is support for these alternative explanations in the Netherlands and to what extent, by answering the following question: does leniency work according to the theoretical assumptions underpinning it or do cartelists use leniency strategically and to what extent?

3. Methods

For the purpose of this chapter a qualitative study among corporate and legal professionals in the Netherlands was conducted (cf. Sokol, 2012). As mentioned, most socio-legal studies on leniency in cartel cases are based on single case studies or systematic case-file analyses. Unfortunately, leniency case-file reports – including transcripts of confessions, internal communication and documentation of leniency applicants – are classified. In the Netherlands, the national competition authority was unwilling to grant access to these files. Due to both the limited availability of official documents as empirical material and the nature of the research question – which is directed at qualitative understanding of the interaction between leniency and cartelists – motivations and perceptions are studied through the use of interviews.

34 semi-structured interviews with competition lawyers (17), in-house legal counsel (6) and cartelists (11), such as executives and directors were conducted. The reason for also selecting non-cartelists as respondents was threefold. Firstly, contacting and establishing trust with legal professionals in the field of competition law was essential in order to gain access to cartelists. The cartelists in this study were clients and professional contacts of these lawyers and in-house legal counsel. Secondly, cartelists only have a one-time experience with leniency, which is informative but lacks more general and comparable knowledge of several cases (for example when it comes to assessing strategic gaming scenarios). Lawyers and in-house counsel provided for broader experience. Thirdly, when cartelists decide whether or not they will apply for leniency, legal professionals are influential agents in this process. Although a final decision on whether or not to apply for leniency lies with the firm, expertise of legal professionals causes an information imbalance with their client which grants them power in the decision-making process. Therefore, their experience and attitude towards leniency has significant effects on the decision of their client.

The competition lawyers and in-house legal counsel all had extensive experience in consultation and defence in (alleged) cartel infringement cases. In addition, most of them (14) had experience with preparing and submitting leniency applications for clients. Because cartel cases tend to be both a specialist topic and are often considered high-profile cases with high financial and reputational stakes, a combination of a level of seniority and expertise amongst respondents was essential. Therefore, all respondents were selected on the basis of their professional experience and expertise. Respondents held relevant professional experience of minimum 8 years, up to 41 years and were all experts in the field of competition law. The competition lawyer respondents all worked in one of the following occupations: partner, lawyer-partner, senior counsel or off-counsel. The in-house legal counsel respondents also had a relevant professional experience of a minimum of 8 years, up to 18 years. In addition, interviews were held with cartelists (11); chief executives and directors with experience in the process of considering leniency related

to (potential) cartel conduct violations in their company. Their professional experience in an executive or director role varied between 5-26 years. All the corporate professional respondents had a one-time only experience with cartel infringements and or leniency. Two had a background in law, the others in business studies or economics. Cases involved the construction industry (4); heavy industry (3); general services industry (2); and financial industry (2). Average duration of the cartels was 3.4 years. The number of participants in the cartels varied between 3 and 7 firms. Typically, the cartelists physically met twice a year. Agreements were made through the use of minimum pricelists, customer lists, and geographical market allocation. Cartelists (n=11) interviewed for this study were involved in a wide variety of cartel types. These cartels initially started through meetings in market associations and industry connections through subcontracting. Cartel agreements were triggered by; low margins, pressure by other companies in the supply chain or uncertain market conditions. Motives for starting the cartel and conditions under which they took place had consequences for the decision to apply for leniency or refrain from doing so. Most notably, in several cases the fear of reactions of others in the industry (social control) is reason to refrain from applying for leniency. Six cases ultimately led to an administrative fine from the competition authority. Respondents pursued leniency in four cases. In two of these four cases respondents indicated they wanted to change their standing business practices and leniency provided a way to do that. In two cases, cartelists used leniency strategically to improve their position by hurting their co-cartelists. However, these cases can be described mostly as opportunistic use of leniency; the cartel already ended, or the cartelists did not hold up the agreement anymore at the time of the leniency application.

In order to gain access to the field and establish contacts with respondents to conduct interviews, the Dutch national association for competition lawyers was contacted. The board of the association forwarded a request in their newsletter, explaining the research and call for respondents. Several respondents contacted the researcher after the call in the newsletter, others were contacted after online searches for contact information, and others were approached through the so-called snowballing method; every respondent was asked to recommend additional respondents which were contacted. Clients (in-house legal counsel, chief executives and directors) were also contacted through this method of snowballing. The interviews themselves took place at the offices of the respondents. Mostly, these interviews were held in the conference room, and sometimes in personal offices or coffee corners. Interviews typically lasted for 50 minutes, with outliers of 45 and 150 minutes. The interviews were audio recorded and transcribed afterwards.

During the interviews, the following topics were discussed: issues relating to fragmented institutional structure (e.g. the role of legal professionals) and decentralised decision making within companies relating to cartel infringements and leniency; incentives and disincentives to apply for leniency; and the role and influence of follow-on civil procedures (damage claims,

compensations) and the influence of professional litigation funders. Four scenarios on the use of leniency from the theoretical framework were presented to respondents for confirmation or falsification regarding their practical experience with leniency. The four theoretical scenarios on strategic use of leniency were introduced to respondents through the use of short scenario descriptions (see appendix III) and respondents were asked to comment on accuracy for these scenarios in their daily legal practice and asked to give factual examples. The transcripts of the interviews were coded for the following topics: decentralised decision making; moral ambiguity; framing and reliability; opportunistic use; civil damage claims. In addition, interviews were coded for verification or falsification on each of the four scenarios.

3.1 Limitations: non-response and social desirability

About 30-40% of approached potential respondents declined from being interviewed for this study. This mainly concerned those who were contacted after the online search ('cold calls'). All non-response was followed up by a question for the reason(s) of non-response. Where indicated, reasons for non-response amongst lawyers were mainly a lack of time, interest or sufficient expertise in their own opinion. Reasons for non-response amongst in-house legal counsel, executives and directors, mainly concerned issues regarding confidentiality. In-house legal counsel often sign internal contracts with their company, or between company and regulator in case of settlements. This bounds them from speaking or commenting on the case. In addition, the negative image of big business (especially multinational corporations) as non-compliant was noted as a reason not to cooperate in this study. Concerning non-response amongst cartelists, mostly multi-national firms declined from participating in the study, which might indicate a slightly overrepresentation of more local and smaller businesses. On the other hand, the majority of interviews with lawyers were with lawyers in large international and trans-national firms dealing with major multinational corporations as clients, so their experience is represented in the data from that end.

Semi-structured interviews have limitations. Firstly, it is not possible to generalize results to a larger population. Therefore, the results in this study are not representative for all cartels in the Netherlands. The purpose of this study is to understand the nature of the interactions regarding leniency. Research findings regarding the interaction between regulation and businesses can have a wider relevance e.g. in other domains of law. They inform us about the nature of interactions between different types of professionals when it comes to the decision-making process around compliance. Secondly, social desirability of respondents is an issue in interviews. Naturally, lawyers are advocates to their clients' best interest and therefore, to a certain extent, also their conduct. To correct for anticipated social desirability, the interviewer used his extensive research through case studies (cf. Jaspers 2017) on recent national cartel cases. In addition, during the interview the researcher consequently invited respondents to provide specific examples from their own professional experience to prevent superficial answers, avoid generalisations and socially desirable responses.

4. Results: Leniency applications in the Netherlands

As per the theoretical framework, the results are categorised using the assumptions underpinning leniency policy: rationality, predictability and deterrence.

4.1 Rationality: centralised versus fragmented decision making

The results of this study confirm that fragmented institutional structure and decentralised decision making within firms causes differences in awareness of cartel conduct between departments and demonstrates that awareness of senior management in case of cartel infringements diverges between smaller and larger firms. (cf. Harding 2013; Sokol 2012). These differences can be attributed to the variety in firm size. The interviews show how large (multinational) companies with multiple subsidiaries struggle with 'local' issues more often when it comes to cartel conduct violations. Smaller and mid-size companies include active involvement of the executive director or owner-director more often than in large firms (cf. Jamieson 1994). The difference in size also affects the decision-making process in applying for leniency. Smaller firms often entail direct involvement of executives and owner-directors, therefore the decision to apply for leniency will affect the executives directly and has personal consequences. A confession means coming clean about your own personal responsibility for the infringement. As opposed to a chief executive of a multinational company that deals with a 'local issue' at a subsidiary. An executive will experience more personal distance in the decision-making process regarding leniency.

Larger firms will generally be better equipped to deal with compliance procedures and legal issues regarding competition law. Hence, they are better equipped than smaller companies to hire internal and external legal advice and consultation. This enables them to better organise, structurally incorporate and implement fair competition rules into their compliance programs. Smaller companies have less resources and staff (or none) to organise compliance in a professional and structural way. Results indicate infringements by small firms are often unintentional and a result of ignorance or lack of professionalism. However, this does not explain why both small and big business are involved in cartel conduct violations. There is more to it than knowing the law. Parker (2013) demonstrates how knowledge about the law is less important to companies than their relationship with the law. Bigger 'elite' firms see themselves as intimate with the law and able to 'game' it in their advantage. Smaller companies perceive themselves as unknowing towards compliance. This perception influences internal support for the rules, otherwise known as legal-consciousness.

4.2 Rationality: Moral ambiguity

Secondly, this study demonstrates that low legal-consciousness towards competition law causes calculated interaction with leniency. Results show cartelists bring forward several reasons and rationalisations for their misconduct. These relate to tradition, market structure and mutual

dependencies between competitors in a market. Lawyers also indicated how their clients often present explanations or rationalisations regarding their cartel activities. Cartelists embrace these justifications and are even happy to explain their illegal conduct to competition officials:

> *"They believe the market conditions justify it… that they… feel like they have to, because of the small profit margins. I notice this with my clients. For instance, a big problem in these interrogations with the competition authority is how clients are more than happy to tell them [the authorities JJ] everything they did and why they did it, because they truly feel that what they did is the right thing." (R3)*

This example illustrates how cartel conduct is integrated in traditions within certain markets. Cartelists have internalised justifications of these practices. In a few markets and industries, these justifications are institutionalised. The results demonstrate a paradox between increased awareness and enforcement on the one hand and sentiments of moral ambiguity on the other. From regulatory studies we know that a lack of support for rules or moral condemnation of conduct can result in an instrumental interaction with rules and regulation (cf. Blumtenhal, Christian & Slemrod 2001; Braithwaite 1995; Gneezy & Rustichini 2000; Van de Bunt & Huisman 2007; Van Wingerde 2012).

Competition lawyer respondents with the longest working experience (> 20 years) point out the changing regulatory context over the past two decades (cf. Beaton-Wells & Ezrachi, 2011). They explain how expansion of global cartel enforcement has induced elevated levels of awareness and increased professionalism in compliance programs and special compliance departments regarding competition law. Today, heavy financial penalties make competition law a top priority in internal compliance programs and training sessions. However, simultaneously the topic bears the most moral ambiguity amongst business people according to respondents. Topics such as bribery or privacy laws, also considered important issues in contemporary compliance, are more unambiguously supported according to the interviewees.

4.3 Predictability: Strategic use of leniency

The interviews demonstrate that firms use leniency strategically, but in a limited number of ways. Firstly, the results do not support more sophisticated scenarios, such as an anticipation effect – cartelists entering into a cartel with the intention of asking for leniency at a later stage to damage their cartel 'partners' financially (cf. Harding et al. 2015) or the 'throwing the bone strategy' – distracting attention and resources of regulators by asking for leniency in several product markets (cf. Marx et al. 2015). The results do not support these two scenarios for strategic use of leniency in the Netherlands. However, the results do support 'opportunistic' use of leniency and selective framing of confessions. Opportunistic use is either reporting cartels that have already ended e.g. in the process of mergers and acquisitions (to avoid or reduce

accountability at a later stage) or reporting in order to get ahead of competitors with more market power when market conditions change.

Examples of opportunistic use of leniency are cartelists that are in a so-called hub and spoke construction with a more powerful market player. In a hub and spoke cartel, the dominant firm is the producer of one the resources for example, so that its competitors are also its clients. These dominant firms set conditions for other players in the market. In two cases, companies used leniency to damage the dominant firm in order to get out of restricting contracts and market conditions. One cartelist explained why he applied for leniency:

> *"After a few years this player made it increasingly difficult for us to do business (…) Every year I was presented with a list of prices for the upcoming year (…) And yes, as with any of our activities this was a way to push the other firm out of business, or at least to make their life as miserable as possible" (R28)*

Concerning strategic use of leniency, other studies point to elaborate gaming schemes and strategies employed by cartelists (Harding et al. 2015; Marx et al. 2015). However, this study found more subtle and nuanced forms of framing and using leniency in practice. By selective framing of confessions, cartelists present their testimony selectively, through either withholding certain information or overstating certain facts and circumstances in order to be granted leniency. For example, respondents refer to "over-confession" when they describe how cartelists frame their confession to leniency officers. When, after internal deliberations, a firm has committed to apply for leniency they are highly motivated for the application to be granted. Competition authorities set certain standards for the application, such as that substantial evidence should be provided, and facts and circumstances must indicate a clear infringement. This can put a strain on the reliability of the testimony of leniency applicants. Respondents also noted that they come across examples in practice where several leniency applications are contradictory and inconsistent in the same case, indicating false confessions

Competition lawyers with extensive experience consider applying for leniency an exception to the rule. If they do apply for leniency this seems to be driven more by inevitability and opportunism. Internal investigations are part of the process of mergers and acquisitions. These internal investigations can result in firms applying for leniency. Change in management can create momentum for a fresh start or leniency is used to settle possible liability-risks in the future. These leniency applications often entail ceased activities, or 'dead' cartels as one competition lawyer points out:

> *"By a clean slate I mean in case of selling the company or when you are about to enter in to a merger. Maybe there are some skeletons in the closet that you have to get rid of. And you can do this through applying for leniency." (R14)*

4.4 Deterrence: Disincentives to apply for leniency

The fourth result from this study is that several disincentives make leniency an unattractive option for cartelists in most cases. In the literature, corporations involved in cartel conduct are often considered agents in a prisoner's dilemma (in the context of game theory cf. Blum et al. 2008) regarding the decision whether to apply for leniency. However, when there is no reason to assume information about the illegal agreements is reaching the authorities and there is sufficient mutual trust, the best option for all those involved is "not to play the game at all" (Leslie, 2006). The results from this study demonstrate a number of reasons for firms involved in cartel conduct not to play the game indeed, namely: insufficient evidence of the conduct for an application, social control (reactions in the market), cultural objections, the costly and time-consuming internal investigations and preparation of leniency applications, and the influence of follow-on civil damages procedures after investigations and fines from public competition authorities.

First off, respondents explain that facts and circumstances might indicate an infringement, but too little evidence can be retrieved to assure an infringement actually happened. If there is a lack of evidence after internal investigations, firms cannot provide the authority with sufficient information to be granted leniency. The following example by an in-house legal counsel illustrates this:

> *"Internal investigations pointed out that regionally there had been deliberations and illegal agreements between competitors. This was mapped into detail and was discussed with head legal in Germany on further steps to follow. A draft leniency application was even drawn up. In the end we decided against leniency, because there was simply insufficient written evidence. Nothing but suspicions really." (R32)*

Secondly, reactions of others in the market are also reason to remain silent in case of possible infringements. The social control backlash from 'telling on your peers' differs greatly, especially depending on the type of market. Depending on how certain markets are structured they induce great dependency between competitors. Damaging the trust by telling the authorities about certain agreements that might qualify as an infringement can gravely damage that trust. Damaging trust might form a disadvantage to firms in future activities in the market. The following example from an in-house legal counsel of a mid-size firm illustrates this:

"The market we operate in is defined by a number of legitimate collaborations on numerous activities. And you know, if you take these steps [apply for leniency JJ] you will be treated like dirt by the others in the market afterwards." (R16)

Thirdly, respondents report cultural objections. Cultural objections have a social dimension but should be understood as more principle-based objections towards leniency. For example, respondents refer to leniency as; 'telling on someone' or 'betraying others' and qualify this as immoral in and of itself. The idea of being disloyal to other businesses in the market, which are often considered colleagues in business, is often perceived as incompatible with personal values. A competition lawyer of a multinational firm explains:

"I have had clients that simply say: 'we will not betray others'. Sometimes you have to explain to them as their lawyer: it can actually be the best scenario for you." (R6)

Fourthly, the burden of going through a leniency process, in terms of financial costs, (management) time and other strains it puts on firms' operations is another reason to refrain from leniency. High costs of legal consultation, internal data collection to prepare a leniency report and the management time of highly paid executives puts a brake on business activities for months or years. More importantly, these are certain and short-term costs the firm is confronted with, in contrast to highly uncertain and long-term consequences of an administrative fine. In that sense it can be distorted cost-benefit analyses when firms do end up with a financial penalty. However, it is their perception at the time of deciding on leniency that drives their decision. There is also a high degree of uncertainty in terms of the legal position of the company during the procedure and the eventual outcome. Before the investigations of the authorities and court decisions are done, this uncertainty can easily last years. Two competitions lawyers state:

"Applying for leniency requires a ton of work, which is often underestimated. It demands lots of statements, documents and paperwork and is therefore a costly procedure." (R25)

"Sometimes you are in a leniency procedure and your gut already tells you: 'this is not working out'. When the authorities keep asking for additional information again and again and there is no real progress. It is way less structured and comes with a lot more uncertainty, more uncertainty in fact than regular cartel investigations! [ex-officio investigations JJ]." (R5)

Table 2 Summary of perceived incentives and disincentives regarding leniency

Incentives to apply for leniency	Disincentives to apply for leniency
Full disclosure in light of M&A process	Insufficient evidence
Opportunistic response	Social: response in the market
	Cultural objections
	Costly and time consuming
	Follow-on damage claims

Table 2 presents a summary of the most commented on perceived incentives and disincentives in applying for leniency in this study. The fifth disincentive: the risk of follow-on damage claims, involves the relationship between firms involved in cartel conduct violations and damaged parties in the market seeking compensation. These private stakeholders are consumers, anywhere down the line in the supply chain of a particular market that can make a convincible claim for losses as a result of cartel agreements. Exposure to private cartel enforcement was highly commented on by respondents.

4.5 Deterrence: Interaction between private and public enforcement

Although private enforcement is relatively recent in the Netherlands, respondents explain how the risk of being confronted with follow-on civil damages procedures induces more caution towards applying for leniency. It also causes most of the leniency testimony to be done verbally and not in writing. Lastly, it also makes parties litigate longer and makes them less inclined to accept settlements from the Commission or national competition authorities, because they can be seen as an admission of guilt. A competition lawyer comments:

> *"I will not be quick to advise leniency anymore, especially because of these follow-on damages claims. That is a classic: 'the operation was successful, but the patient died'. So leniency no longer means closure, today it is only the mere beginning." (R11)*

In line with Cauffman (2011), these results indicate how leniency and private enforcement interact; the threat of follow-on damage claims is an important disincentive to come forward as a leniency applicant. Respondents indicate that civil litigation can lead to corporate liability for damages up to 4 or 5 times the amount in (public) financial penalties imposed by the competition authority.

5. Conclusions

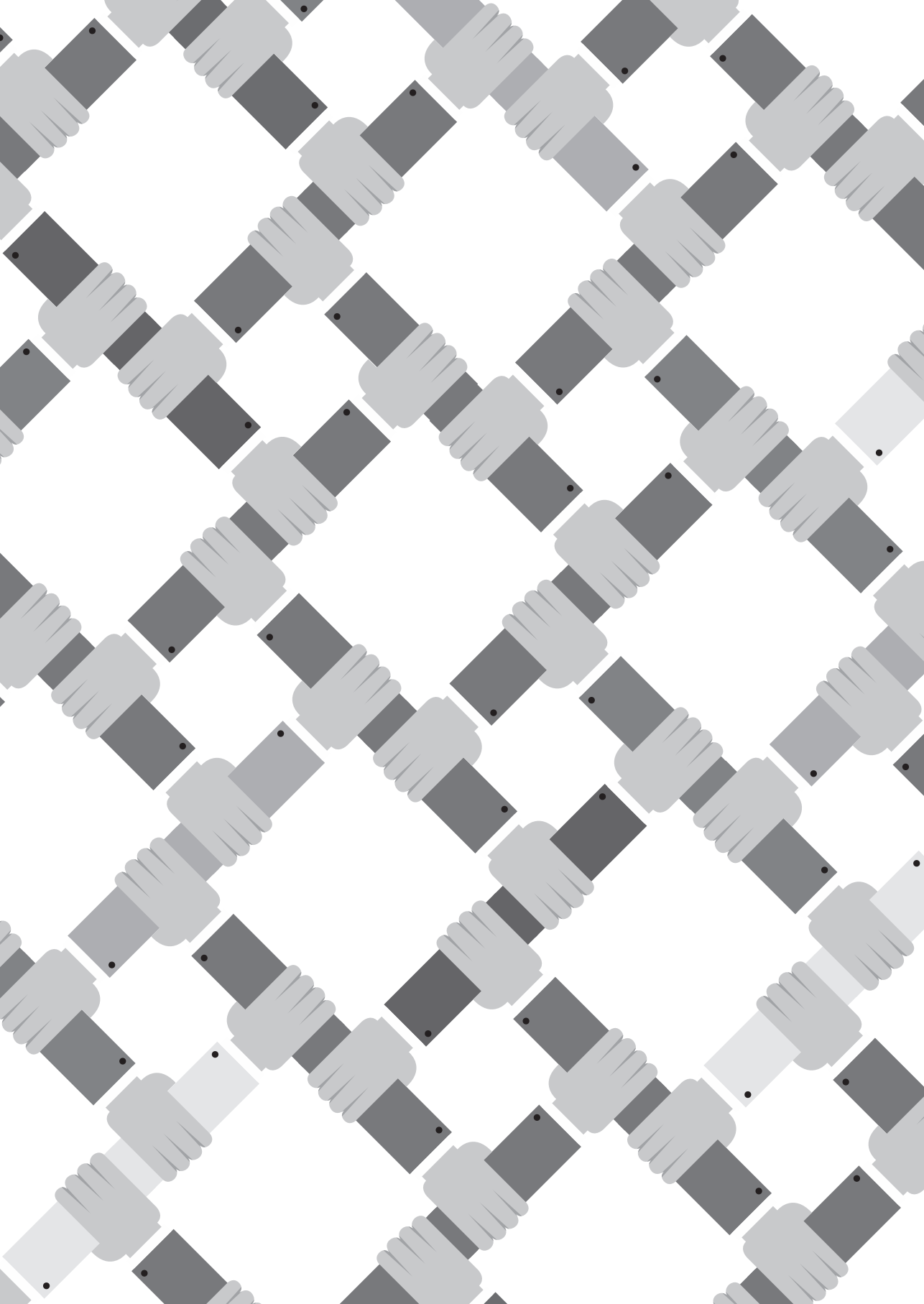
The aim of this chapter was to compare the main assumptions underpinning leniency policy with the practice of leniency in the Netherlands. This study examined three main assumptions (cf. Stephan & Nikpay, p. 142): 1) Firms act as rational and unified entities with centralised decision making 2) Predictability of costs and benefits 3) Deterrent Penalties and Credible Threat of Detection. These assumptions were compared with existing empirical literature on leniency and a qualitative interview study on leniency in the Netherlands. Relating to these assumptions this study comprises four main results. Firstly, awareness of management in case of cartel infringements diverges between small and large firms. The level of social responsiveness and professionalism in terms of compliance and the relationship with the law differs between smaller and larger companies. This influences decision-making procedures towards leniency, making leniency applications less likely for smaller firms. Secondly, there is a paradox between cartel criminalisation – enhanced enforcement, significantly high financial penalties – on the one hand, and fixed collectivistic sentiments and values in business cultures on the other. This paradox results in firms gaming enforcement efforts and strategic use of regulation. Thirdly, firms use leniency strategically, however in limited ways. Support for both selective framing and opportunistic use of leniency was found in the interviews but not for more sophisticated strategies suggested by some authors (Harding et al. 2015; Marx et al. 2015). Fourthly, several disincentives make leniency an unattractive option for cartelists. Disincentives concerning leniency include: insufficient evidence for an application, social control (reactions in the market), cultural (principle based) objections such as 'telling on your peers', the costly and time-consuming internal investigations and preparation of leniency applications, and the influence of follow-on civil damages procedures after investigations and fines from public competition authorities. Seven out of the eleven cartelists that were interviewed for this study decided against leniency. The fear of reactions of others in the industry is an important reason to refrain from applying for leniency. Respondents pursued leniency in four cases. In two of these cases cartelists indicated strategic use to improve their position by hurting their co-cartelists. However, strategic use in these cases can be characterised as opportunistic use of leniency; the cartel already ended for exogenous reasons.

5.1 Discussion and implications

The balance and interaction between compensations and leniency is one of the issues the European Commission and national competition authorities (NCA's) struggle with. Several suggestions for legal provision have been made, ranging from preventing disclosure of leniency applications, reducing risks of damages claims to introduce additional financial incentives to leniency recipients. However, NCA's, can also direct attention towards efforts to better involve other stakeholders, such as professional litigation funders and specialised lawyers in designing more attractive leniency programs that include private interests and reduce obstacles and

uncertainties in the current programs. Private enforcement seems to decrease the number of leniency applications and hereby slowing down the public enforcement of cartels. Private and public enforcement of cartels interact (Cauffman 2011). For example, the financial penalty-decision that the Commission and national competition authorities publish is the starting point for litigation funders to collect claims and start follow-on damage procedures. This is where NCA's have leverage to start negotiations with several stakeholders in the field of private enforcement and damages.

In short, this study demonstrated major disincentives in applying for leniency. This leaves room to speculate how many cartels fail to be revealed by leniency. Moreover, it gives food for thought regarding the dependency of competition authorities on those cases that did result in leniency applicants. In addition, this influences thinking and dominant perceptions of what a cartel is, in both enforcement practice and academic research. Leniency applicants largely provide the mythology around what cartels are and how they look like (cf. Harding & Edwards 2015) and this might feed collective blind spots. The issues with strategic gaming, framed and false confessions only begin to shed light on how biased the regulatory and empirical understanding of cartels is. When most insights arise from detected cases, which are largely induced by leniency. In that regard, can leniency been seen as regulatory success, in terms of its goal to destabilise active cartels? Or is it a form of regulatory deadweight loss; inefficient allocation of resources? Moreover, this study has illustrated how the social context influences decision making towards leniency applications and that whistle-blower incentives, like leniency, do not operate in a social vacuum. For example, in bid-rigging cartels there is interaction with legislation and enforcement around corruption (Luz & Spagnolo 2017). In other words, besides the public enforcement there are other stakeholders in the process that can immensely influence the ultimate outcome of these confessions. These stakeholders are often insufficiently taken into account in the design of regulatory policies, as leniency proves.



Chapter 6

Conclusion and discussion: cooperation against the law

Cartel conduct is cooperation without and against the law. This study has demonstrated how cartels can operate both without and against the law. The central question in this research was how cartel agreements can endure despite increased efforts to discourage and punish them. The social dynamics within and relational and structural networks around cartels were examined to determine how businesses succeed to cooperate without and against the law. First, successful cartelists are able to overcome the constraints that revolve around the interaction between cartelists. Cartelists can overcome the lack of formal arbitration and legal contracts in making and enforcing their illegal agreements. They use clandestine communication and settlement systems to enforce their agreements. Interpersonal trust is essential in maintaining the cartel network. This study demonstrated how the longevity of cartel agreements can be explained by the relational and institutional embeddedness of cartel conduct. Cultural embeddedness of cartel conduct in the European and Dutch context was expressed in the rationalisations and explanations of conduct by cartelists. Second, cartelists are able to overcome the constraints of increased regulation and enforcement of cartel conduct by remaining hidden 'in plain sight'. This study illustrated the influence of culture and regulatory traditions on the nature and structure of two different systems of collusion: inclusive and exclusive collusion. This study also described how cartelists interact with the most important policy tool for competition authorities in uncovering cartel conduct: leniency. Some cartelists do confess their illegal agreements using the leniency arrangement. However, this study also demonstrated certain types of strategic use of leniency.

This chapter deals with the conclusions of this study and provides an answer to the sub-questions and hereby the central research question. Paragraph 1 includes an overview of the findings and answers to the sub-questions of this study. Paragraph 2 includes a discussion of the results and the theoretical implications of this study. In paragraph 3, methodological strengths and limitations of this study are discussed. In paragraph 4, policy implications for cartel enforcement are discussed.

1. Overview of findings

This study was structured around four interconnected research questions. All the questions referred back to the overarching research question, namely how cartel agreements can endure despite increased efforts to discourage and punish them. The research questions in this study revolved around the different challenges cartelists face in sustaining their cartel agreements: stabilising, concealing, enforcing and confessing.

• *How do informal coordinating mechanisms enable cartel stability outside the scope of formal legal control and what role does trust play?*

First, while stabilising the cartel, cartelists are faced with the difficulty of working together without the possibility to rely on formal legal contracts or arbitration. This difficulty was referred to as the cooperation paradox, because although cooperation is in the interest of cartelists, so is cheating the cartel agreement while others abide to it. The absence of legal arbitration and contracts introduces risks of cheating and defection within cartels. Cartelists need to address these risks using clandestine systems of communication, coordination and control.

• *How are cartels able to remain hidden from outsiders for long periods of time?*

Second, cartelists are faced with the challenge of concealing their illegal agreements and related conduct from outsiders to the cartel. As with criminal networks, cartels need to coordinate their collective action efficiently by communicating, while at the same time facing the risk of exposure. In this study, this challenge is referred to as the secrecy-coordination paradox. This paradox points to how cartelists deal with the conflicting interests of coordination and concealment.

• *Why do business cartels sometimes do and sometimes do not involve organised crime?*

Third, cartelists are faced with the risk of internal instability because of a lack of credible enforcement of their illegal agreement in case of cheating cartelists. Some cartels deal with this challenge of cartel stability through third party enforcement by organised criminal groups. The literature on organised crime describes these business cartels as examples of infiltration of organised crime in legitimate business sectors. However, many cartels do not entail involvement of a third party organised criminal group.

• *What are considerations for cartelists in applying for leniency or refraining from doing so?*

Fourth, cartelists are faced with the risk of defection by other cartelists confessing and denouncing the cartel to the authorities in exchange for leniency: immunity or reduction of penalties. Indeed, cartel confessions are the most important source for competition authorities in uncovering cartel conduct. Leniency is presumed to instil distrust between cartelists. However, in light of a decrease in leniency applications in recent years, discussion centres on the functioning of leniency arrangements in practice.

In order to answer the main research question, this study used three methods of analysis: literature review, case-file analysis and semi-structured interviews. This study employed several qualitative research methods and used a combination of qualitative sources. The results in this study are based on literature review, case-file analysis of official documentation and semi-structured interviews. The literature review contains both theoretical and empirical studies on cartels from different disciplines including criminology, sociology, socio-legal studies, and competition law and economics. The case-file analysis conducted for this study is based on secondary sources that can be divided in three categories: 1) private enforcement reports and records of fourteen detected Dutch cartel cases, 2) public parliamentary investigation reports and records into construction industry in the Netherlands and Quebec, Canada, and 3) public enforcement reports published by the European Commission on detected European cartels. The European cartel cases are used to illustrate and contextualise the main findings of the research, resulting from the former two categories and other sources; the literature review and interviews. The interviews conducted for this study are primary sources and can be characterised as semi-structured interviews. These interviews were held amongst three categories of respondents in the Netherlands: 1) competition authority officials/investigators (in 2012), 2) specialised competition lawyers (between 2015-2017), and 3) cartelists (between 2015-2017).

1.1 *Stabilising*: how do cartelists stabilise their cartel 'without the law'?

The first research question of this study asked how cartelists manage their cartels in the absence of law. The focus was on the internal structure of cartels in order to answer the overarching question how cartels can endure. How do cartelists stabilise their cartel agreements? Two different perspectives were identified in the existing literature. First, an economic approach departed from the assumption of a lack of trust between cartelists and a need for monitoring and retaliation as a consequence of this lack of trust. Second, a social approach departed from the assumption of mutual trust and the use of negotiation and mediation as means to build trust. Elements of both ideal types occurred in the private enforcement reports and records of fourteen detected Dutch cartel cases and interviews with the case managers used for this analysis.

On the one hand, cartelists in the selected cases stabilise their cartel agreements through the use of informal social mechanisms. Means of coordination and compensation – meetings, informal rules and mutual debts – were established between firms through communication and reciprocity. The cases proved how the paradox of social embeddedness is applicable to cartels, namely; the need to operate secretly forces cartelists to rely heavily on social ties through informal means of coordination. Furthermore, mutual rights and obligations make parties interdependent, and reciprocity can function as a powerful market mechanism. This stabilises and strengthens cartels and makes it hard for firms to end existing agreements. In addition, social capital, strong social ties, and trust are often considered desirable in light of growth and

economic value (cf. De Bliek 2015). However, these mechanisms can also have less-desirable consequences. The strong ties in a social group such as a business cartel can benefit its members but exclude others from access. Moreover, it can limit and restrict the individual freedom of its members (Parker 2012; Portes 2010: 39). In other words, cartelists become too reliant on their social network within the market, even when these relations are working against their personal or their company's interests. This is how cooperation against the law is established.

On the other hand, third-party auditors and the formalisation of agreements in writing also indicate a lack of trust: conflicts occurred in some cases, and parties sometimes responded through retaliation. However, retaliation appears more likely to lead to the end of the cartel rather than stabilising it. In light of conflicts, the dominant strategy throughout the cases seems to be not to punish other cartel members. In contrast, firms are often able to overcome mutual disagreements by means of negotiation and compensation. Moreover, most cases do not involve explicit episodes of conflict, confirming the preventative effect imposed by the systems of coordination and compensation. This is comparable to research findings on drug markets, where retaliation is found to be a costly business tool and negotiation and toleration are more common (Jacques & Wright 2008; 2011; Zaitch 2005).

The role of trust in cartels remains a chicken and egg situation, because the formalisation of cartel agreements – clandestine bookkeeping, minutes of meetings, and rules on mutual compensations – can both express mutual trust or a lack thereof. Both elements are clearly hard to disentangle, and such an exercise harms the complexity of the social reality of cartel agreements. In this regard, the economic approach overlooks the fact that – given the participants' proper response – conflicts can prove to be an opportunity to strengthen the cartel, and they can turn out to be a source of stability instead of instability. This is also referred to as the 'cleansing' function of social conflicts (Coser 1956). In these cases, cartels will be more difficult to break up, even when facing the threat of formal legal control (enforcement) or changing market conditions (Levenstein and Suslow 2011).

The results illustrate the importance of mutual dependencies between competitors and the use of informal social mechanisms to build trust and to stabilise cartels. This enables even relatively large groups of firms to cooperate effectively. The analysis of these cases hereby shows how an economic model provides an incomplete explanation for cartel stability and it calls for incorporating a social or sociological perspective in competition law and policy. The results of this first part of the study emphasise that in order to explain cartel stability we need to consider the social embeddedness and the importance of social mechanisms that induce trust. Trust and a lack of trust both play a role in how firms manage and shape their cartels.

1.2 *Concealing*: how do cartels remain hidden from outsiders?

The second research question referred back to the second part of the overarching question in this study, namely: how can cartels endure despite increased efforts to discourage and punish them? This part of the study was directed to answering the question how cartels are able to remain hidden from outsiders for long periods. In answering this question, both the role of concealment and communication and the role of trust and social embeddedness were addressed. To analyse the question, insights gleaned from the extensive body of work within both the field of organised crime and corporate and white-collar crime were used (cf. Edwards & Levi 2008; Lord & Levi 2017; Levi 2008). Like participants of criminal networks, cartelists need to deal with both coordinating illegal agreements and concealing their activities at the same time. Private enforcement reports and records of fourteen detected Dutch cartel cases and interviews with case managers were used in answering the second research question.

A combination of the existing literature on criminal and covert networks, and studies on social networks of cartels resulted in the following three main expectations for this second part of the study: (1) cartels may not be as centralised and hierarchically organised as in the classic image of the 'secret society'; (2) cartels may not only prioritise for concealment but also for effective communication; and (3) it is not isolation from their social environment but their embeddedness in their environment that provides an explanation for the longevity of cartels. The results of this study demonstrated three main findings in light of the question how cartels are able to remain hidden from outsiders.

First, to avoid the risk of detection, cartels in the selected cases used techniques aimed at concealing their illegal conduct. However, empirical material illustrated how cartel participants are focused primarily on establishing well-functioning agreements, and therefore communicate frequently and in a centralised manner. Paradoxically, efforts to conceal by means of impersonal communication methods, such as phases-of-the-moon systems (rotating bids by taking turns) and price lists, led to a need for more communication and documentation in practice (cf. Goffman 1970). The cases showed how cartelists also try to ensure that co-conspirators will keep their end of the bargain. Cartelists perceived opportunism as a risk, and therefore they centralised their communication and developed extensive documentation of their agreements. This proves how the need for mutual trust prevails over concealment of conduct by minimising the means of communication. However, further study and discussion is needed to determine whether the elaborate systems of communication and sometimes administration are to be considered instruments for building trust or are in fact indications of a lack of trust.

Second, the use of trust-substitutes and the role of facilitators in the empirical material demonstrated how cartels are strongly embedded in their social environment and can emanate from pre-existing professional and personal networks. Cartels, opposed to most 'classic' forms of

organised crime, can thereby shroud in a context of legitimate business interactions. Cartelists can be considered trusted criminals (Friedrichs 2010; Punch 1996; Wheeler & Rothman 1982). The results from this study hereby prove how corporate and white-collar crime perpetrators can rise above suspicion and are facilitated by a cooperative and silent social environment. The fact that cartelists seemingly act on behalf of the organisation, creates a smokescreen for enforcement authorities, which complicates their detection efforts (Van de Bunt 2010).

Third, the cases show that longevity of cartel secrecy is explained by the embeddedness of cartels in their social environment and not by concealment or internal control of secrecy within the cartel. This is also demonstrated by the use of trust-substitutes (in the form of loans, mortgages, etc.). Furthermore, the role facilitators play in cartels is mentioned and illustrated by imprudent clients, actively involved secretaries and chairmen of cartels, or members of collective market associations. The added difficulty in distinguishing the intentional and unintentional facilitation of illegal activities is the distance that exists between the actions of the facilitator and the illegal conduct of the network. This distance provides facilitators with an opportunity to evade moral and legal accountability for their actions (cf. Cohen 2001).

As mentioned before and in the introduction (see chapter 1), this study takes the approach of exploring the organisation of corporate and white-collar crime (cf. Edwards & Levi 2008; Lord & Levi 2017; Levi 2008). This second part of the analysis has theoretical implications for the field of both organised and corporate and white-collar crime. Theoretical implications for the study of corporate crime are that, although one can draw a few parallels in the operation of criminal networks in organised crime (e.g. importance of trust; the use of trust-substitutes; social embeddedness), an important difference lies in the vast opportunities that corporate crime perpetrators have at their disposal to shroud their activities in a context of legitimacy and licit corporate conduct. This also explains why most organised forms of corporate crimes do not require modus operandi of intimidation or violence in the event of conflict. As regards corporate criminal conduct, an oblivious or cooperative social environment provides practical opportunities for businesses to create and maintain illegal agreements. The theoretical implication for the study of organised crime is that illegal or criminal networks might not always prioritise for concealment. They can operate through elaborate communication and go far beyond minimizing information exchange, as was demonstrated by the cases described in this analysis.

Based on the analysis so far, the question rises whether one can really speak of concealment as an explanation for the longevity of organised illegal activity. Is this an adequate question to pose when it comes to cartel agreements? In any case, it is clear that the longevity cannot be explained solely by studying the means of concealment by cartelists alone. Most cases can be more or less indicated as a 'public secret': namely, many people – within and outside the organisations

involved – do know, could or should know about the activities, but are either disinterested or are reluctant to come forward to reveal them or to inform enforcement authorities. Therefore, the governance and regulation of corporate and white-collar crime should pay closer attention to the legal and moral responsibility and liability of facilitators and bystanders. As many licit organisations, platforms, and other facilitators provide an opportunity for cartel conduct to occur, it is important to acknowledge their legal and moral responsibility and accountability with regard to the existence and endurance of cartel agreements. Some judicial decisions demonstrate how such facilitators can be taken into account (Harding 2009). One could argue that governance and regulation of corporate and white-collar crime should examine carefully the responsibility and liability of facilitators and bystanders, as established in efforts against organised crime through criminalising actions of preparation and complicity (cf. Middleton 2005).

1.3 *Enforcing* agreement: why do some cartels involve organised crime and do others not?

Cartelists are faced with the risk of internal instability because of a lack of credible (legal) enforcement of their illegal agreement in case of cheating cartelists. The purpose of the third research question was to investigate why business cartels sometimes do and sometimes do not include the involvement of criminal groups with a violent reputation to make up for this lack of credible enforcement. The third research question hereby refers back to the first part of the central research question, namely; how can cartels endure? The often-separated criminological discourses of organised and organisational crime literature have both discussed the phenomenon of economic cartels, respectively framing it as organised crime 'infiltration' or purely corporate conspiracy. However, contemporary studies in organised crime offer extensive elaborations on the interactions and interfaces between 'upper' and 'underworld'. In the tradition of analysing serious crimes for gain, this part of the study has therefore moved beyond analytical debates and focused on the modus operandi, networks and different actors involved in economic cartels. The results from case study analyses of two different construction cartels demonstrated how two different types of collusion emerge under different cultural, economic and regulatory conditions.

Case studies from the construction industry in Canada and the Netherlands demonstrated how two different systems of collusion developed under different regulatory and cultural conditions. The Montréal cartels were a form of exclusive collusion; closed circles of fixed bidders, and construction firms outside the cartel were victimised. The construction cartels in the Netherlands were a form of inclusive collusion; open to all construction firms, with changing compositions. The Montréal cartels were more closed to new entrants, while the Dutch cases demonstrated a collective business strategy of the industry as a whole. The latter has to do with the history of the construction industry in the Netherlands, in which the combination of enforcement

tolerance and the structural character of doing business were considered 'business as usual'. The Dutch construction industry therefore barely had losing or victimised firms within the industry as a result of the bid rigging cartels. As opposed to the Canadian construction cartels, where some firms were violently threatened not to bid for specific projects.

Differences regarding involvement of violent criminal groups in business cartels between The Netherlands and Canada can be explained by the cultural and regulatory conditions under which the two cases emerged. Both a strictly criminalised regulatory regime regarding business cartels and a highly competitive and predictable tendering procedure with criminal opportunities in Canada, explain the involvement of criminal groups with a violent reputation. In the Netherlands, the combination of a historically lenient regulatory regime towards business cartels and a strong subcultural normalisation of bid rigging throughout the construction industry explain the emergence of business cartels without the involvement of organised crime.

If the system of collusion is more closed and dependent on keeping outsiders out (preventing newcomers from entering the market) and protecting insiders within the cartel, a demand for intimidation is more pressing. This fits the job description of organised criminal groups with a violent reputation. Note that this neither means they have 'infiltrated' the industry completely, nor that they have initiated or forced their services upon the firms involved in illegal bid rigging agreements in the construction industry. This was demonstrated in the Montréal cases where a symbiotic relationship between criminal groups and collusive business owners existed (cf. Gambetta & Reuter 1995; Passas 2002; Van de Bunt, Siegel and Zaitch, 2014). In the Dutch inclusive system, there is less natural need for a strong arm to enforce the existing power balance of construction firms in the industry. Old industry directors informally coordinated cartels, or third parties like secretaries and chairmen functioned sufficiently as regulators or mediators for the cartels (cf. Van de Bunt 2010; Hertogh 2010) (also see chapter 2 of this study).

In both cases, scholars have suggested that it was not failing regulations and regulators, or an external criminal group alone that sufficiently explains the misconduct in the construction industry. In fact, it was the vulnerable system itself that produced the misconduct: "What this means is that the collusion problem and the emergence of an organized and centralized group of profiteers is a product of the system itself and not, as popular opinion often suggests, the strategic creation of an external criminal group that arrives to take control of the process at any given time. In short, a vulnerable system begets its own deviant organization and does not require a mafia or organized crime presence to organize it" (Morselli et al. 2012, p. 2). For the Dutch case, several authors have similarly suggested how the structure and culture of the industry and its vulnerabilities contributed to the bid rigging schemes, and not as is often suggested regulatory failure alone (Van de Bunt 2008; Van den Heuvel 2005; Vulperhorst, 2005). However, although collusion between firms was the main focus of this part of the study,

both the Montréal and the Dutch case also revealed collusion between construction firms and governmental agencies, both local and federal (cf. Reeves-Latour & Morselli 2016; Van den Heuvel 2005). The role of the state when it comes to collusion in the construction industry cannot to be underestimated. In a sector where financial and economic interests of the state are so strongly connected to corporate interests and where governments can be client, project developer and regulator at the same time, collusion between government and construction firms is a significant risk. However, this falls outside the scope of this study.

1.4 *Confessing*: why do cartelists confess in exchange for leniency or refrain from doing so?

The fourth and final research question refers back to the second part of the central research question, namely: how can cartels endure despite increased efforts to discourage and punish them? Cartel confessions in exchange for leniency are an essential source for competition authorities in detecting cartel conduct. What considerations do cartelists have to confess their conduct to the regulator in exchange of leniency or why do they refrain from doing so? How do those considerations relate to private enforcement of business cartels? And to what extent do cartelists use leniency strategically? In order to answer these questions, the main assumptions underpinning leniency policy were compared with the practice of leniency in the Netherlands. This part of the study touched upon three main assumptions underpinning leniency policy (Stephan & Nikpay 2015): 1) cartelists are rational and unified entities with centralised decision making, 2) with accurate and predictable information about the expected benefits of the cartel agreements, and 3) deterrent penalties and a credible threat of detection make leniency an attractive option for cartelists. These assumptions were confronted with existing empirical literature on leniency and a qualitative interview-based study on leniency in the Netherlands.

The results for the fourth research question comprise four main conclusions. First, awareness of management in case of cartel infringements diverges between small and large firms. The level of social responsiveness and professionalism in terms of compliance and the relationship with the law differs between smaller and larger companies. This influences decision-making procedures towards leniency, making leniency applications less likely for smaller firms. Second, there is a paradox between cartel criminalisation – enhanced enforcement, significantly high financial penalties – on the one hand, and fixed collectivistic sentiments and values in business cultures on the other. This paradox results in firms gaming enforcement efforts and strategic use of regulation. Third, firms use leniency strategically, however in limited ways. Support for both selective framing and opportunistic use of leniency was found in the interviews but not for more sophisticated strategies suggested by some authors (Harding, Beaton-Wells & Edwards 2015; Marx, Mezzetti & Marshall 2015). Fourth, several disincentives make leniency an unattractive option for cartelists. Disincentives concerning leniency include: insufficient evidence for an application, social control (reactions in the market), cultural objections

(principle based), such as 'telling on your peers', the costly and time-consuming internal investigations and preparation of leniency applications, and the influence of follow-on civil damages procedures after investigations and fines from public competition authorities. Seven out of the eleven cartelists that were interviewed for this study decided against leniency. The fear of reactions of others in the industry is an important reason to refrain from applying for leniency. Respondents pursued leniency in four cases. In two of these cases cartelists indicated strategic use to improve their position by hurting their co-cartelists. However, strategic use in these cases can be characterised as opportunistic use of leniency; the cartel already ended for exogenous reasons.

Regarding the second conclusion, the paradox between criminalisation and collectivistic business cultures, the Australian experience with competition enforcement is relevant. Because of a lack of both public support and a coherent and unambiguous political approach the cartel criminalisation project in Australia failed (Beaton-Wells, Haines 2010). Although the situation in the Netherlands with an administrative regulation of cartel conduct seems different, the Australian context can prove relevant. The absence of the possibility for criminal prosecution is often suggested to negatively influence the effectiveness of leniency. In other words, if firms are not sufficiently deterred by severe sanctions, they will be less likely to apply for leniency. This argument is then followed by a call for cartel criminalisation, as was the case in the Netherlands as well. However, this may be risky. Indeed, empirically the criminalisation-leniency relationship is poorly understood (Harding et al. 2015). Leniency policy may in fact undermine the normative function of criminal law (Beaton-Wells, 2017).

The balance and interaction between compensations and leniency is one of the issues the European Commission struggles with (ICN 2014). The EC could try and succeed to better involve other stakeholders, such as professional litigation funders and lawyers to incorporate their private enforcement efforts against cartels. Private enforcement seems to decrease the number of leniency applications and hereby slowing down the public enforcement of cartels. However, private and public enforcement of cartels mutually dependant. For example, the financial penalty-decision that the Commission and national competition authorities publish is the starting point for litigation funders to collect claims and start follow-on damage procedures. To that end, public enforcement has leverage over private enforcement, because private enforcement depends on public enforcement and not the other way around.

To summarize, the two central conclusions in this analysis were: 1) there are major disincentives in the process of deciding whether or not to apply for leniency. This leaves room to speculate how many cartels fail to be revealed by leniency policy. Moreover, it brings up for debate the dependency of competition authorities on those cases that did result in leniency applicants. The dependency of competition authorities on voluntary confessions of cartelists influences

the image of cartels that is dominant in both enforcement practice and academic research. In criminology, the influence of selectivity in criminal enforcement towards understanding crime has been widely discussed. The selection bias particularly influences secondary data sources, such as official case-files or confessions. These sources are gathered with the objective of a criminal or administrative investigation. The choices and limitations in light of the scope and objective of cartel investigations will ultimately also influence the perception and understanding of cartels. In that regard, can leniency be seen as regulatory success? Does leniency settle the most serious or most harmful cartels? 2) Whistle-blower incentives, like leniency, do not operate in a social vacuum. In other words, besides the public enforcement, other stakeholders in the process influence the ultimate outcome of these confessions to a large extent. These stakeholders are often insufficiently taken into account in the design of regulatory policies, as leniency demonstrates.

2. Discussion

2.1 Sociological insights for the study of cartel conduct

This study has shown the value of incorporating insights from (economic) sociology into white collar and corporate crime studies, in analogy to organised crime literature. For example, understanding the interaction between coordination and secrecy demonstrated how the need for effective communication impedes covertness in cartels. Also, the importance of trust was demonstrated by the embeddedness of cartel agreements in personal and professional networks. This study has hereby proven how insights around cooperation, trust, social and cultural embeddedness inform our understanding of the social organisation of corporate crime. This study has done so regarding business cartels, to better answer research questions that revolve around collective efforts of sustaining cooperation against the law. Once we better understand how corporate and white-collar criminals successfully cooperate and avoid detection, we can use these insights towards regulation and enforcement of specific types of corporate crime. Although one may draw parallels in the operation of criminal networks in organised crime (e.g. importance of trust, the use of trust-substitutes, social embeddedness of crime), a difference lies in the greater number of opportunities that corporate crime perpetrators have at their disposal to shroud their activities in a context of legitimacy. In part, this also explains why most organised forms of corporate crimes do not require intimidation or violence in the event of conflict. However, recent developments in the mass production of XTC and cannabis in the Netherlands, have demonstrated how organised crime may also create a shadow economy. As regards corporate criminal conduct, an oblivious or cooperative social environment provides practical opportunities for businesses to create and maintain illegal agreements. This may also apply to some successful forms of organised crime in illegal markets.

Trust and a lack of trust both play a role in the nature and structure of cartel agreements. Formalisation of cartel agreements – clandestine bookkeeping, minutes of meetings, and rules on mutual compensations – can express either mutual trust or a lack thereof. Both elements are hard to disentangle, and such an exercise harms the complexity of the social reality of cartels. In any case, the results in this study show the essential role trust plays in cartels. This study hereby substantiates studies in organised crime. When it comes to literature describing the trade-off between concealment and communication, the theoretical implication for the study of organised crime is that illegal or criminal networks might not always prioritise for concealment. They can operate through elaborate communication and go beyond information exchange according to a need-to-know basis, as was demonstrated by the cases described in chapter 3.

Is concealment an explanation when it comes to cartel conduct? Based on this study it seems questionable as to whether one can really speak of concealment as an explanation for the longevity of organised illegal activity. It is clear that the longevity cannot be explained by only studying the means of concealment by cartelists. Most cases can be characterized as a 'public secret': namely, many people – within and outside the organisations involved – know, or could or should know about the activities, but are either disinterested or are reluctant to come forward to reveal them or to inform enforcement authorities. Therefore, regulation and enforcement of cartels is rightfully directing resources to activating the legal and moral responsibility and liability of facilitators and bystanders of cartel agreements.

2.2 European and Dutch context of cartel regulation

This study demonstrated the importance and specificity of the European context of cartel regulation and enforcement for the nature, structure and organisation of cartel conduct. Moral ambiguity around the wrongfulness of cartels provides opportunities for cartelists to justify their cartel agreements and to embed them in existing transactions, corporate structures and professional relations. More so than in the US, where there is less moral ambiguity around cartel conduct. This study demonstrates less involvement of serious organised crime with business cartels in Europe. This can be linked to the positive sentiments connected to cartel behaviour in Europe, both in the past and in the present.

Historically, the Netherlands has long been qualified as a 'cartel paradise'. Up until 1998, there was no active enforcement against cartel conduct in the Netherlands. Manpower to address competition issues was limited to a few officials at the Ministry of Economic Affairs, who mainly dealt with the most excessive market power cases (De Jong 1990). These officials were provided with very little resources; hence, their activities were limited. In addition, there was no explicit cartel prohibition under Dutch law. The code on Economic Competition (WEM) dealt with cartel conduct. However, this code merely provided a provision that prohibited abuse of a cartel or market dominance, classifying a criminal offense. A legal provision in the Dutch

criminal code also dealt with cartel conduct, but both the provision in the code on Economic Competition (WEM) and in the criminal code were hardly used in practice (De Bree, 2006). This resulted in a tolerant enforcement climate for cartels in the Netherlands, and during roughly 40 years there was no active enforcement of cartels in the Netherlands. Indeed, since 1962 there was a cartel register at the ministry of Economic affairs. Businesses could get their cartel legally registered, to ensure government approved them (cf. Petit, 2017, p. 41-42). The rationale behind the register was that it enabled the Ministry to monitor firms would not abuse cartels. However, calculated estimates demonstrated that only about half of active cartels were actually registered during that time (De Jong, 1990).

Today, cooperation between competitors in a market is still considered positive in certain cases. Improving sustainability, ensuring safety and even innovation can be legitimate reasons to allow for intensified collaboration between competitors within markets (cf. Claassen & Gerbrandy 2018). In the Dutch context of this study such positive sentiments connected to cartel conduct have certainly influenced cartel conduct. This study demonstrated how (for example) safety reasons are mentioned by some cartelists when rationalising their cartel conduct. Cultural embeddedness of cartel conduct in certain markets of the Dutch economy was also noted in this study. First, the structure of many industries in the Netherlands today is still based around cooperation and consensus instead of competition. Many industries and markets have powerful market associations representing the interests of businesses. The political system in the Netherlands also includes much consideration for different interest groups in the procedure of law making and governance. Many industries such as construction, agriculture, and transportation have a strong negotiation position in relation to the political process of decision making. In addition, some of the case studies and interviews demonstrated how cartel conduct was sometimes passed from generation to generation.

3. Methodological strengths and limitations

The research methodology and research sources used to conduct this study have several general and specific strengths and limitations. The research materials used for this study can be divided into secondary and primary data sources. Secondary data sources contain information that is not primarily gathered for scientific research purposes. Primary data sources contain information that is collected for the purpose of doing scientific research. Secondary sources used in this study consist of 1) private official reports on cartel conduct violations gathered by the Dutch competition authority, and 2) public official reports from parliamentary investigations into cartel conduct violations. The primary sources used in this study consist of semi-structured interviews with insiders, namely 1) Dutch competition authority officials (case managers), 2) specialised competition lawyers, 3) in-house legal counsel, and 4) cartelists.

Several qualitative data sources and research methods were combined in this study. Combining research data and methods is also referred to as triangulation of data (Bijleveld 2013). Triangulation increases the internal validity of results. Internal validity entails the credibility of claims. Internal validity is generally high in qualitative data, because data are well verifiable to determine if they measure what they aim to measure (Zaitch, Mortelmans & Decorte 2016). Qualitative data is rich data and enables the researcher to check the validity of the material, especially when combining data sources and methods of analyses. External validity entails the question whether the results of this study can be generalised to a broader population outside of the sample used in the study. External validity is generally lower in qualitative research data. This has to do with the amount of work and time needed to collect and analyse qualitative data, which causes qualitative data samples to generally be too small for generalisation of the result outside the sample. Two strategies were used in this study to compensate for the lack of external validity due to the research data and methods in this study: 1) results were compared to other empirical studies on cartels, 2) results were compared to case studies of detected cases fined by the European Commission. Results from the Dutch empirical sample that were substantiated by those sources are considered to have a modest measure of external validity outside the scope of the Dutch sample of this study.

When it comes to using secondary data sources, researchers deal with selection criteria and aims of the regulatory agency that gathered the data. In the case of this study, secondary sources were collected both by the Netherlands competition authority and parliamentary research commissions. The use of secondary sources leads to several limitations. Detection and enforcement objectives create a selection bias in the data. Therefore, the cases do not necessarily provide a representative image of all cartel conduct in the Netherlands. Some cartels have greater chances of being detected, and cases that involve substantial proof will have a greater chance of ultimately resulting in an administrative fine. The statements of corporate officials derived from official reports, might express firms' perspectives but were originally made in the course of an administrative procedure. Note that one of the formal legal requirements of finding a person or corporation guilty of an infringement is that the effects of the infringement must be 'noticeable'; have a significant effect on the market. This might lead some of the corporate officials to deny the 'real' effect of any agreements made, as a legal defence strategy, or to under-report their conduct in general. For more information on the limitations of the use of the secondary sources in this study see chapter 2 and 4. In order to address these limitations, the secondary data sources were compared and contrasted with interview data. Research data from interviews are primary data sources; gathered for scientific research purposes. These interview data were used to answer questions that could not be answered through case-file analyses and also to nuance and correct the image that emerged from the enforcement data.

Lastly, the use of semi-structured interviews also has limitations of its own. To correct for anticipated social desirability, the interviewer used his extensive research on national cartel cases through case studies (see Jaspers 2017). During the course of the interviews, the interviewer consequently insisted respondents to go into specific examples from their own professional experience to avoid generalizations in their answers. Competition authorities granting access to leniency documents, such as direct testimonies, (providing the anonymity of the corporations) would improve further insights into the dynamics between cartelists, lawyers, in-house legal counsels and the competition authority itself. This can yield a better understanding that can prove beneficial towards more effective enforcement strategies. The Dutch competition authorities denied such access for the purpose of this study.

4. Avenues for future research

If competition authorities would grant full access to using their enforcement databases for the purpose of scientific research, future studies could focus on making these databases fit for purpose. By studying specific characteristics of cartels, such as duration, number of participants, type of network, type of communication etc., and maintaining these databases. Doing this would enable researchers to monitor and report on changes of cartel characteristics over time. Documenting this information in using a standardised approach on a national scale for several European countries would consequently create possibilities for comparative analyses. In addition, these studies could also focus on the effect of significant changes in enforcement efforts, strategies and tools both on a national and European level on these cartel characteristics.

Other suggestions for further research include studying the influence of procedural justice in the process of leniency applications. Interesting would be to see if and how perceived fairness by cartelists and lawyers in these procedures influences the satisfaction with the outcome and how this affects potential future applications.

5. Policy implications for cartel enforcement

5.1 Activating the social environment around cartels

Cartels are embedded in their social environment. Therefore, the implication of this study is to target enforcement effort towards the institutions and relations in which cartels operate. For example, franchise constructions, merger and acquisition processes, market associations, and buyers. The social environment of cartel networks is as essential for cartelists in sustaining their cartel activities as the network itself. Conscious or unconscious, potential facilitators will play a role in the periphery of cartel networks. By activating this ‘silent social environment’

to speak up, one can break down walls of secrecy and promote disclosure of misconduct (Van de Bunt 2010). The Dutch competition authority ACM recently took certain steps in this area, by launching a public campaign in which more information was presented on the nature and effects of business cartels to create awareness and to motivate the public and bystanders to speak up and provide authorities with extra tips and complaints about cartel conduct (Het Financieele Dagblad, 7 juni 2016). Other competition authorities globally have launched similar campaigns (cf. Competition Commission Hong Kong) and many authorities introduced educational videos to explain what cartels are and what the negative effects of cartels are (Van Erp 2017). These campaigns seem to increase awareness of the rules regarding fair competition in targeted industries, but it remains unclear what the precise impact on compliance is.

In conclusion, competition authorities should pay close attention in their public cartel enforcement to the existing relational and institutional networks in which cartels operate. For example, seemingly legitimate collaborations between competitors in the same market could hide an alternative motive. Heightened scrutiny and alertness towards agreements on sustainability, safety or exchanging information to promote collective innovations and sharing research and development is warranted.

5.2 Aligning private and public enforcement interests

The balance and interaction between private compensations and leniency (part of public enforcement by competition authorities) is one of the issues the European Commission struggles with. However, the implication of this study is that competition authorities can attempt to better coordinate their own interests with those of other stakeholders, such as professional litigation funders and lawyers. Private enforcement seems to decrease the number of leniency applications and hereby slowing down the public enforcement of cartels. Private and public enforcement of cartels are dependent on each other. For example, the financial penalty-decision that the Commission and national competition authorities publish is the starting point for litigation funders to collect claims and start follow-on damage procedures.

References

References Chapter 1

Aalders, G. (2010). Kartels: De Amerikaanse strijd om de wereldhegemonie. Amsterdam: Boom.
Agnew, R., Piquero, N. L., & Cullen, F. T. (2009). General strain theory and white-collar crime. In The criminology of white-collar crime (pp. 35-60). Springer New York.
Baker, W. E., & Faulkner, R. R. (1993). The social organization of conspiracy: Illegal networks in the heavy electrical equipment industry. American sociological review, 837-860.
Baker, W., & Faulkner, R. (2009). Social capital, double embeddedness, and mechanisms of stability and change. American Behavioral Scientist, 52(11), 1531-1555.
Beaton-Wells, C. (2007). Capturing the criminality of hard-core cartels: The Australian proposal. Melbourne University Law Review, 31(3), 675-704.
Beaton-Wells, C. (2008). Criminalising cartels: Australia's slow conversion. World Competition: Law & Economics Review, 31(2).
Beaton-Wells, C., & Ezrachi, A. (2011). Criminalising cartels: Critical studies of an international regulatory movement. Oxford: Portland, Oregon.
Beaton-Wells, C., & Haines, F. (2009). Making cartel conduct criminal: A case study of ambiguity in controlling business behaviour. Australian & New Zealand Journal of Criminology, 42(2), 218-243.
Beaton-Wells, C., & Haines, F. (2010). The Australian conversion: How the case for cartel criminalisation was made. New Journal of European Criminal Law, 1(4), 499-521.
Becker, H.S. (1963). Outsiders. Studies in the Sociology of Deviance. New York: The Free Press.
Becker, G.S. (1968). Crime and punishment: An economic approach. In: The economic dimensions of crime (pp. 13-68). Palgrave Macmillan, London.
Benson, M. (1985). Denying the guilty mind: accounting for involvement in a white-collar crime. Criminology, 23(4), 583-607.
Benson, M.L. & Simpson, S.S. (2009). White-Collar Crime: An Opportunity Perspective. New York: Routledge.
Box, S. (1983). Power, crime, and mystification (Tavistock studies in sociology). London: Tavistock Publications.
Braithwaite, J. (1984). Corporate crime in the pharmaceutical industry. London: Routledge & Kegan Paul.
Braithwaite, J. (1989). Crime, shame, and reintegration. Cambridge Cambridgeshire: Cambridge University Press.
Bunt, H.G., van de (2010). Walls of secrecy and silence. Criminology & Public Policy, 9(3), 435-453.
Carmeliet, T. (2012). How lenient is the European leniency system? An overview of current (dis)incentives to blow the whistle. Jura Falconis, 48 (3), p. 463-512.
Chu, Y. K. (2002). The triads as business. Routledge.
Claassen, R., & Gerbrandy, A. (2018). Doing good together: Competition law and the political legitimacy of interfirm cooperation. Business Ethics Quarterly, 28(4), 401-425.
Clinard, M.B. & Yeager, P.C. (1980). Corporate crime. New York: Free Press.
Conley, J., & O'Barr, W. (1997). Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct. Law and Contemporary Problems, 60(3-4), 5.
Connor, J. M. (2001). Global Price Fixing: Our Customers are the Enemy. Dordrecht: Kluwer.
Connor, J.M. (2006). The Great Global Vitamins Conspiracy: Sanctions and Deterrence. American Antitrust Institute Working Paper No. 06-02.
Connor, J. M. (2010). Recidivism Revealed: Private International Cartels 1991–2009. Available at SSRN 1688508.
Connor, J. M., & Helmers, C. G. (2007). Statistics on modern private international cartels, 1990-2005. American Antitrust Institute Working Paper No. 07-10.
Dohmen & Hawranek 2017. Das Kartell. Audi, BMW, Mercedes, Porsche, VW – Enthullt: Die heimliche Absprachen der Autoconzerne. Der Spiegel, 22-07-2017.
Edwards, A. & Levi, M. (2008). Researching the organization of serious crimes. Criminology and Criminal Justice, 8(4), 363-388.

Erp, J., van (2017). Anti-cartel thrillers as a new film genre: How regulator-produced films portray and problematize cartels and communicate deterrence. Crime, Media, Culture, online first: https://doi.org/10.1177/1741659016685377.
Erp, J.G., van (2018). The Organization of Corporate Crime: Introduction to Special Issue of Administrative Sciences. Administrative Sciences, 8(3), 1-12.
Ewick, P., & Silbey, S. (1998). The common place of law: Stories from everyday life (Language and legal discourse). Chicago: University of Chicago Press.
Falk Moore, S. (1973). Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study. Law & Society Review, 7(4), 719-746.
Faulkner, R.R., Cheney, E.R., Fisher, G.A., & Baker, W.E. (2003). Crime by committee: Conspirators and company men in the illegal electrical industry cartel, 1954–1959. Criminology, 41(2), 511-554.
Fear, J.R. (2006). Cartels and competition: Neither markets nor hierarchies. Division of Research, Harvard Business School.
Fijnaut, C.J.C.F., & Paoli, L. (2006). Organised crime and its control policies. European Journal of Crime, Criminal Law and Criminal Justice, 14(3), 307-327.
Franco, V., Posada Sanchez, F., German, J. & Mock, P. (2014). Real-world exhaust emissions from modern diesel cars. International Council on Clean Transportation.
Friedrichs, D.O. (2010). Trusted criminals, White Collar Crime in Contemporary Society. Belmont: Wadsworth.
Gambetta, D. (1988). Trust: Making and breaking cooperative relations. Oxford: Basil Blackwell.
Gambetta, D., & Reuter, P. (1995). Conspiracy among the many: the mafia in legitimate industries. The economics of organised crime, 116-36.
Gambetta, D. (2009). Codes of the underworld: How criminals communicate. Princeton University Press.
Geis, G. (1967; 1987). White Collar Crime: The Heavy Electrical Equipment Antitrust
Cases of 1961. In: M.D. Ermann & R.J. Lundmann (Eds.) Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society. New York: Oxford University Press, p. 111-130.
Granovetter, M. (1985). Economic action and social structure: the problem of embeddedness. American journal of sociology, 481-510.
Harding, C. (2006). Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels. Critical Criminology 14, p. 181–205.
Harding, C. (2010). Pathology of business cartels: Original sin or the child of regulation? New Journal of European Criminal Law, 1(1), 44-58.
Harding, C. (2011). The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation. In: C. Beaton-Wells, and A. Ezrachi, A. (Eds.). Criminalising cartels: Critical studies of an international regulatory movement. Oxford: Portland, Oregon.
Harding, C., Beaton-Wells, C., Edwards, J. (2015). Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows? In: C. Beaton-Wells, & C. Tran (Eds.). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Bloomsbury Publishing.
Harding, C., & Edwards, J., (Research assistant). (2016). Cartel criminality: The mythology and pathology of business collusion. London: Routledge.
Harding, C., & Joshua, J. (2010). Regulating cartels in Europe. New York: Oxford University Press.
Helmkamp, J., Ball, R., & Townsend, K. (1996). Definitional dilemma: Can and should there be a universal definition of white-collar crime. Morgantown, WV: National White-Collar Crime Center.
Hertogh, M.L.M. (2010). Crime and custom in the Dutch construction industry. Legisprudence, 4(3), 307-326.
Heuvel, G., van den (2005). The Parliamentary Enquiry on Fraud in the Dutch Construction Industry Collusion as Concept Between Corruption and State-Corporate Crime. Crime Law and Social Change, 44: 133.
Jacobs, J.B., Friel, C., & Raddick, R. (1999). Gotham unbound: How New York city was liberated from the grip of organized crime. NYU Press.
Jamieson, K. (1994). The Organization of Corporate Crime: Dynamics of Antitrust Violation. London: Sage.
Kagan, R.A. (2006). American and European Ways of Law: Six Entrenched
Differences. UC Berkeley: Center for the Study of Law and Society Jurisprudence and Social Policy Program. Retrieved from https://escholarship.org/uc/item/0d83p6qk
Krebs, V.E. (2002). Mapping networks of terrorist cells. Connections, 24(3), 43-52.
Kenney, M. (2009). Turning to the 'dark side'. Coordination, exchange, and learning in criminal networks. In M. Kahler (Ed.) Networked Politics. Agency, Power and Governance. London: Cornell University Press.

Kleemans, E.R. (2013). Organized crime and the visible hand: A theoretical critique on the economic analysis of organized crime. Criminology & Criminal Justice, 13(5), 615-629.
Kleemans, E.R. & Van de Bunt, H.G. (1999). The social embeddedness of organized crime. Transnational organized crime, 5(1), 19-36.
Kleemans, E.R. & Van de Bunt, H.G. (2003). The social organisation of human trafficking. In Global organized crime (pp. 97-104). Springer Netherlands.
Kleemans, E.R., & de Poot, C.J. (2008). Criminal Careers in Organized Crime and Social Opportunity Structure. European Journal of Criminology, 5(1), 69–98.
Leslie, C. R. (2004). Trust, distrust, and antitrust. Texas Law Review, 82(3).
Leslie, C.R. (2008). Cartels, Agency Costs, and Finding Virtue in Faithless Agents. William & Mary Law Review, 49(5).
Levenstein, M.C. & Suslow, V.Y. (2006). What Determines Cartel Success? Journal of Economic Literature (Vol. XLIV), p.43-95.
Levenstein, M., & Suslow, V. (2011). Breaking up is hard to do: Determinants of cartel duration. Journal of Law and Economics, 54(2), 455-455.
Levi, M. (2008a). Organized fraud and organizing frauds Unpacking research on networks and organization. Criminology and Criminal Justice, 8(4), 389-419.
Levi, M. (2008b). The phantom capitalists: The organization and control of long-firm fraud. Ashgate Publishing, Ltd.
Lord, N. & Levi, M. (2017). Organizing the finances for and the finances from transnational corporate bribery. European Journal of Criminology 14: 365-89.
Lord, N., Wingerde, K. & Campbell, L. (2018). Organising the Monies of Corporate Financial Crimes via Organisational Structures: Ostensible Legitimacy, Effective Anonymity, and Third-Party Facilitation. Administrative Sciences, 8, 17.
Meerts, C.A. (2018). The semi-autonomous world of corporate investigators. Modus vivendi, legality and control. Erasmus University Rotterdam (Dissertation).
Morselli, C. (2009). Inside criminal networks. New York: Springer.
Morselli, C. & Giguère, C. (2006). Legitimate strengths in criminal networks. Crime, Law and Social Change, 45(3), 185-200.
Morselli, C., & Ouellet, M. (2018). Network similarity and collusion. Social Networks, 55, 21-30.
Ottervanger, T. (2010). Maatschappelijk verantwoord concurreren: Mededingingsrecht in een veranderende wereld. Markt en Mededinging, 13(3), 93-93.
Ottow, A.T. (2012). Europeanization of the Supervision of Competitive Markets. European public law, 18 (1), p. 191-221.
Paoli, L. (2002). The paradoxes of organized crime. Crime, Law and Social Change, 37(1), 51-97.
Parker, C. (2006). The "Compliance" trap: The moral message in responsive regulatory enforcement. Law & Society Review, 40(3), 591-622.
Parker, C. (2011). Criminal cartel sanctions and compliance: the gap between rhetoric and reality. In: C. Beaton-Wells, and A. Ezrachi, A. (Eds.). Criminalising cartels: Critical studies of an international regulatory movement. Oxford: Portland, Oregon.
Parker, C. (2012). Economic rationalities of governance and ambiguity in the criminalization of cartels. British Journal of Criminology, 52(5), 974-996.
Parker, C. (2013). The war on cartels and the social meaning of deterrence. Regulation & Governance,7(2), 174-194.
Paternoster, R., & Simpson, S. (1996). Sanction threats and appeals to morality: Testing a rational choice model of corporate crime. Law and Society Review, 549-583.
Petit, L.T.D. (2017). Legal Cartels. Erasmus University Rotterdam (Dissertation).
Piquero, N. L., Tibbetts, S. G., & Blankenship, M. B. (2005). Examining the Role of Differential Association and Techniques of Neutralization in Explaining Corporate Crime. Deviant Behavior, 26, 159–188.
Piquero, N. L., & Weisburd, D. (2009). Developmental trajectories of white-collar crime. In: S. Simpson & D. Weisburd (Eds.). The criminology of white-collar crime, pp. 153-171). Springer, New York, NY.
Polanyi, K. (1944). The Great Transformation. New York: Holt, Rinehart. Punch, M. (1996). Dirty business: Exploring corporate misconduct: Analysis and cases. London: Sage.
Reeves-Latour, M., & Morselli, C. (2017). Bid-rigging networks and state-corporate crime in the construction industry. Social Networks, 51, 158-170.

Reuters: Gardner, T., Lienert, P. & Morgan, D. (2015). Insight - After year of stonewalling, Volkswagen stunned U.S. regulators with confession. Reuters, via: https://in.reuters.com/article/usa-volkswagen-deception-insight/insight-after-year-of-stonewalling-volkswagen-stunned-u-s-regulators-with-confession-idINKCN0RO2JC20150924.
Sandel, M. (2013). What money can't buy: The moral limits of markets. London: Penguin.
Shaffer, G. & Nesbitt, N.H. (2011). Criminalizing Cartels: A Global Trend? Sedona Conference Journal, Vol.12, p. 11-26.
Sutherland, E. (1949). White Collar Crime. New York: Dryden Press.
Sutherland, E. H., Cressey, D. R., & Luckenbill, D. (1995). The theory of differential association. Deviance: A symbolic interactionist approach, 64-68.
Schinkel, M.P. (2006). Illegale winsten en efficiëntieschade als gevolg van kartelafspraken in de Nederlandse bouw: Een toelichting op de Zembla- uitzending "Afrekenen met de bouwfraude".
Schinkel, M.P. (2007). Toelichting op genoemde schattingen van mogelijke prijsopslagen en kartelwinsten in de Zembla-uitzending "De Prijs van Heineken" van 23 september 2007.
Simon, H. (1987). Models of man, social and rational: Mathematical essays on rational human behaviour in a social setting (Continuity in administrative science). New York: Garland Pub.
Smith, A. (1776). An Inquiry into the Nature and Causes of the Wealth of Nations. London: W. Strahan and T. Cadell.
Sokol, D. D. (2012). Cartels, corporate compliance, and what practitioners really think about enforcement. Antitrust Law Journal, 78(1), 201-240.
Sonnenfeld, J., & Lawrence, P. R. (1978). Why do companies succumb to price fixing. Harvard Business Review, 56(4), 145-157.
Stephan, A. (2010). Cartel laws undermined: Corruption, social norms, and collectivist business cultures. Journal of Law and Society, 37(2), 345-367.
Stephan, A. (2011). The Battle for Hearts and Minds: The Role of the Media in Treating Cartels as Criminal. In: C. Beaton-Wells, and A. Ezrachi, A. (Eds.). Criminalising cartels: Critical studies of an international regulatory movement. Oxford: Portland, Oregon.
Stephan & Nikpay (2015). Leniency decision-making from a corporate perspective: Complex realities. In: C. Beaton-Wells, & C. Tran (Eds.). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Bloomsbury Publishing.
Stucke, M. E. (2015). Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency? In: C. Beaton-Wells, & C. Tran (Eds.). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Bloomsbury Publishing.
Swaak, C.R.A., & Wesseling, R. (2015). Reconsidering the leniency option: if not first in, good reasons to stay out. ECLR: European Competition Law Review, 36(8), 346-354.
Sykes, G. M., & Matza, D. (1957). Techniques of neutralization: A theory of delinquency. American sociological review, 22(6), 664-670.
Van Koppen, M.V., De Poot, C.J., Kleemans, E.R., & Nieuwbeerta, P. (2009). Criminal trajectories in organized crime. British Journal of Criminology, 50: 102-123.
Varese, F. (2014). Protection and extortion. In: L. Paoli (red.), The Oxford Handbook of Organized Crime. Oxford: OUP, p. 343-358.
Wagner-von Papp, F. H. (2011). What if all bid riggers went to prison and nobody noticed? Criminal antitrust law enforcement in Germany. In: C. Beaton-Wells, and A. Ezrachi, (Eds.). Criminalising cartels: Critical studies of an international regulatory movement. Oxford: Portland, Oregon.
Wang, P. (2017). The Chinese mafia: Organized crime, corruption, and extra-legal protection (First edition. ed., Clarendon studies in criminology). Oxford, United Kingdom: Oxford University Press.
Weisburd, D., & Waring, E. (2001). White-collar crime and criminal careers. Cambridge University Press.
Weisburd, D., Wheeler, S., Waring, E., and Bode, N. (1991) Crimes of the Middle Classes. New Haven: Yale University Press.
Weisburd, D., & Waring, E. (2001). White-collar crime and criminal careers (Cambridge studies in criminology). Cambridge, UK: Cambridge University Press.
Wesseling, R. (2011). De kartelhel. Amsterdam: Vossiuspers UvA.
Wesseling, R. (2013). Is the definition of a cartel ballooning? Antitrust Chronicle, 12(1).
Weisburd, D., Chayet, E., & Waring, E. (2016). White-Collar crime and criminal careers: Some preliminary findings. Crime & Delinquency, 36(3), 342-355.

Wheeler, S., Weisburd, D., Waring, E., and Bode, N. (1988). White collar crimes and criminals. American Criminal Law Review, 25: 331–357.
Wheeler, S. & Rothman, M.L. (1982). The Organization as Weapon in White-Collar Crime. Michigan Law Review, 80(7), 1403-1426.
Whelan, P. (2013). Cartel Criminalization and the Challenge of "Moral Wrongfulness" Oxford Journal of Legal Studies, 33, 535.
Whelan, P. (2014). The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges. Oxford University Press.
Zukin, S. & DiMaggio, P. (1990). Structures of capital: The social organization of the economy.

References Chapter 2

Agnew, R., Piquero, N. L., & Cullen, F. T. (2009). General strain theory and white-collar crime. In The criminology of white-collar crime (pp. 35-60). Springer New York.
Ashenfelter, O. & Graddy, K. (2005). Anatomy of the Rise and Fall of a Price-Fixing Conspiracy: Auctions at Sotheby's and Christie's. Journal of Competition Law and Economics 1 (1), p. 3-20
Ayres, I. (1987). How Cartels Punish: A Structural Theory of Self-Enforcing Collusion. Colombia Law Review, vol. 87, p. 295-325.
Beaton-Wells, C. (2008). The Politics of Cartel Criminalisation: A Pessimistic View from Australia. European Competition Law Review (E.C.L.R), Vol. 29, No. 3, no. 394
Beaton-Wells, C. & Haines, F. (2010). The Australian Conversion: How the Case for Cartel Criminalisation Was Made. New Journal of European Criminal Law, 4 (1), p. 499-521.
Black, D. (1983). Crime as social control. American sociological review, 34-45.
Black, D. (1984). Social control as a dependent variable. Toward a general theory of social control, 1, 1-36.
Bliek, R. de (2015). Empirical studies on the Economic Impact of Trust. Rotterdam: ERIM.
Connor, J. M. (2001). Global Price Fixing: Our Customers are the Enemy. Dordrecht: Kluwer Academic Publishers.
Connor, J. M. (2010). Recidivism Revealed: Private International Cartels 1991-2009. Available at SSRN 1688508.
Connor, J. M., & Helmers, C. G. (2007). Statistics on modern private international cartels, 1990-2005.
Coser, L. A. (1956). The functions of social conflict (Vol. 9). Routledge.
Eichenwald, K. (2001). The Informant. New York: Broadway Books.
Ellickson, R.C. (1991). Order Without Law: How Neighbours Settle Disputes. Cambridge: Harvard University Press.
Friedrichs, D.O. (2010). Trusted criminals, White Collar Crime in Contemporary Society. Belmont: Wadsworth.
Fukuyama, F. (1995). Trust: The social virtues and the creation of prosperity. London: Penguin.
Fukuyama, F. (1997). The end of order. London: Social Market Foundation.
Geis, G. (1987). White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961. In: M.D. Ermann & R.J. Lundmann (Eds.) Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society. New York: Oxford University Press, p. 111-130.
Granovetter, M. (1985). Economic action and social structure: the problem of embeddedness. American journal of sociology, 481-510.
Granovetter, M. (1993). The Nature of Economic Relationships. In: R. Swedberg (Eds.) Explorations in Economic Sociology. New York: Russel Sage Foundation, p. 3-41.
Green, E. J., & Porter, R. H. (1984). Noncooperative collusion under imperfect price information. Econometrica: Journal of the Econometric Society, 87-100.
Grout, P., Sonderegger, S. (2005). Predicting cartels. United Kingdom: Office of Fair Trading.
Grossman, P. Z. (1996). The dynamics of a stable cartel: the Railroad Express 1851–1913. Economic Inquiry, 34(2), 220-236.
Haines, F., & Beaton-Wells, C. (2012). Ambiguities in Criminalizing Cartels A Political Economy. British Journal of Criminology.
Harding, C., & Joshua, J. (2003). Regulating cartels in Europe. New York: Oxford University Press.
Harding, C. (2006). Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels. Critical Criminology 14, p. 181–205.
Harding, C., Beaton-Wells, C., Edwards, J. (2015). Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows? In: C. Beaton-Wells, & C. Tran (Eds.). (2015). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Bloomsbury Publishing.

Harrington, J. E. (2006). How do cartels operate? Now Publishers Inc.
Hertogh, M. (2005). Van naleving naar beleving van regels. Bouwwereld en bouwfraude vanuit een rechtssociologisch perspectief. In: T. Barkhuysen, W. Den Ouden & J.E.M. Polak (Eds.) Recht realiseren. Bijdragen rond het thema adequate naleving van rechtsregels. Deventer: Kluwer.
Hinloopen, J. (2006). Internal cartel stability with time-dependent detection probabilities. International Journal of Industrial Organization, 24(6), 1213-1229.
Jamieson, K. (1994). The Organization of Corporate Crime: Dynamics of Antitrust Violation. London: Sage.
Jacques, S., & Wright, R. (2008). The Relevance of Peace to Studies of Drug Market Violence. Criminology, 46(1), 221-254.
Jacques, S., & Wright, R. (2011). Informal Control and Illicit Drug Trade. Criminology, 49(3), 729-765.
Leslie, C. R. (2004). Trust, distrust, and antitrust. Texas Law Review, 82(3).
Leslie, C. R. (2008). Cartels, Agency Costs, and Finding Virtue in Faithless Agents. William & Mary Law Review, 49(5).
Levenstein, M.C. & Suslow, V.Y. (2006). What Determines Cartel Success? Journal of Economic Literature (Vol. XLIV), p.43-95
Levenstein, M. C., & Suslow, V. Y. (2011). Breaking up is hard to do: Determinants of cartel duration. Journal of Law and Economics, 54(2), 455-492.
Macaulay, S. (1963). Non-contractual relations in business: A preliminary study. American sociological review, 55-67.
Macaulay, S. (2013). The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules. Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical, 35.
Ottow, A.T. (2012). Europeanization of the Supervision of Competitive Markets. European public law, 18 (1), p. 191-221.
Paoli, L. (2003). Mafia brotherhoods: Organized crime, Italian style. New York: Oxford University Press.
Paternoster, R., & Simpson, S. (1996). Sanction threats and appeals to morality: Testing a rational choice model of corporate crime. Law and Society Review, 549-583.
Parker, C. (2012). Economic rationalities of governance and ambiguity in the criminalization of cartels. British Journal of Criminology, 52(5), 974-996.
Piquero, N. L. (2012). The Only Thing We Have to Fear Is Fear Itself Investigating the Relationship Between Fear of Falling and White-Collar Crime. Crime & Delinquency, 58(3), 362-379.
Piquero, N. L., & Weisburd, D. (2009). Developmental trajectories of white-collar crime. In The criminology of white-collar crime (pp. 153-171). Springer New York.
Portes, A. (2010). Economic sociology: a systematic inquiry. Princeton University Press.
Posner, E. A. (2009). Law and social norms. Harvard university press.
Putnam, R. D. (1995). Bowling alone: America's declining social capital. Journal of democracy, 6(1), 65-78.
Putnam, R. D. (2000). Bowling alone: the collapse and the revival of American democracy. New York: Simon & Schuster.
Rapoport, A., & Chammah, A. M. (1965). Prisoner's dilemma: A study in conflict and cooperation (Vol. 165). University of Michigan press.
Shaffer, G. & Nesbitt, N.H. (2011). Criminalizing Cartels: A Global Trend? Sedona Conference Journal, Vol.12, p. 11-26.
Sonnenfeld, J., & Lawrence, P. R. (1978). Why do companies succumb to price fixing? Harvard Business Review, 56(4), 145-157.
Spagnolo, G. (2000). Optimal Leniency Programs. FEEM Working Paper No. 42.2000
Spar, D. L. (1994). The cooperative edge: The Internal politics of international cartels. Cornell University Press.
Stephan, A. (2010). Cartel laws undermined: Corruption, social norms, and collectivist business cultures. Journal of Law and Society, 37(2), 345-367.
Stewart, D. (2007). Price Fixing. In: J. Gerber & E. Jensen (Eds.), Encyclopedia of white-collar crime. Westport CT: Greenwood Press, pp. 238-240.
Stigler, G. J. (1968). Price and non-price competition. The Journal of Political Economy, 149-154.
Van De Bunt, H. (2010). Walls of secrecy and silence. Criminology & Public Policy, 9(3), 435-453.
Van Erp, J.G. (2008). Reputational sanctions in Private and Public regulation. Erasmus Law Review, 2008 (5), 145-163.
Weisburd, D., & Waring, E. (2001). White-collar crime and criminal careers. Cambridge University Press.

Zaitch, D. (2002). Trafficking cocaine: Colombian drug entrepeneurs in the Netherlands. Den Haag: Kluwer Law International.
Zaitch, D. (2005). The ambiguity of violence, secrecy, and trust among Colombian drug entrepreneurs. Journal of Drug Issues, 35(1), 201-228.

References Chapter 3

Baccara, M. & Bar-Isaac, H. (2008). How to organize crime. The Review of Economic Studies, 75(4), 1039-1067.
Baker, W. E. & Faulkner, R. R. (1993). The social organization of conspiracy: Illegal networks in the heavy electrical equipment industry. American sociological review, 837-860.
Braithwaite, J. (1989). Criminological theory and organizational crime. Justice quarterly, 6(3), 333-358.
Bunt, H.G., van de (2008). Rekeningen vereffenen in de bouw. Tijdschrift voor Criminologie, 51(2), 4.
Bunt, H.G., van de (2010). Walls of Secrecy and Silence. The Madoff case and cartels in the construction industry. Criminology & Public Policy 9(3), 435-453.
Bunt, H.G., van de, Siegel, D. & Zaitch, D. (2014). The social embeddedness of organized crime. In: L. Paoli (eds.) (2014). The Oxford Handbook of Organized Crime. New York: Oxford University Press.
Van de Bunt, H. G., & Kleemans, E. R. (2007). Georganiseerde criminaliteit in Nederland. Derde rapportage op basis van de Monitor Georganiseerde Criminaliteit. Boom Juridische Uitgevers.
Campana, P. & Varese, F. (2013). Cooperation in criminal organizations: Kinship and violence as credible commitments. Rationality and society, 25(3), 263-289.
Chen, A. (2005). Secret societies and organized crime in contemporary China. Modern Asian Studies, 39(01), 77-107.
Clinard, M.B. & Yeager, P.C. (1980). Corporate crime. New York: Free Press.
Cohen, S. (2001). States of Denial: Knowing About Atrocities and Suffering. Malden, MA: Blackwell Publishers.
Connor, J.M. (2006). The Great Global Vitamins Conspiracy: Sanctions and Deterrence. American Antitrust Institute Working Paper No. 06-02. http://dx.doi.org/10.2139/ssrn.1103604
Connor, J. M. & Helmers, C. G. (2007). Statistics on modern private international cartels, 1990-2005.
Costas, J., & Grey, C. (2014). Bringing secrecy into the open: Towards a theorization of the social processes of organizational secrecy. Organization Studies, 35(10), 1423-1447.
Di Nicola, A. & Zoffi, P. (2005). Italian lawyers and criminal clients. Risks and countermeasures. Crime, law and social change, 42(2), 201-225.
Edwards, A. & Levi, M. (2008). Researching the organization of serious crimes. Criminology and Criminal Justice, 8(4), 363-388.
Erickson, B. H. (1981). Secret societies and social structure. Social Forces, 60(1), 188-210.
Faulkner, R. R., Cheney, E. R., Fisher, G. A., & Baker, W. E. (2003). Crime by committee: Conspirators and company men in the Illegal Electrical Industry Cartel, 1954–19591. Criminology, 41(2), 511-554.
Fear, J. R. (2006). Cartels and competition: Neither markets nor hierarchies. Division of Research, Harvard Business School.
Fielding, N. G. (2016). The shaping of covert social networks: isolating the effects of secrecy. Trends in Organized Crime, 1-15.
Friedrichs, D.O. (2010). Trusted criminals, White Collar Crime in Contemporary Society. Belmont: Wadsworth.
Gambetta, D. (2009). Codes of the underworld: How criminals communicate. Princeton University Press.
Gibson, D. R. (2014). Enduring Illusions The Social Organization of Secrecy and Deception. Sociological Theory, 32(4), 283-306.
Goffman, E. (1970). Strategic interaction (Vol. 1). University of Pennsylvania Press.
Granovetter, M. S. (1973). The strength of weak ties. American journal of sociology, 1360-1380.
Granovetter, M. (1981). The strength of weak ties: A network theory revisited. New York: State University of New York, Department of Sociology.
Haines, F. & Beaton-Wells, C. (2012). Ambiguities in Criminalizing Cartels A Political Economy. British Journal of Criminology, 52: 953-973.
Hallsworth, S. & Young, T. (2008). Crime and silence: 'Death and life are in the power of the tongue' (Proverbs 18: 21). Theoretical Criminology, 12(2), 131-152.

Harding, C. (2009). Capturing the cartel's friends: Cartel facilitation and the idea of joint criminal enterprise. European Law Review, 34(2), 298-309.
Harding, C., Beaton-Wells, C., Edwards, J. (2015). Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows? In: C. Beaton-Wells, & C. Tran (Eds.). (2015). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Bloomsbury Publishing.
Hazelrigg, L. E. (1969). A Re-examination of Simmel's "The Secret and the Secret Society": Nine Propositions. Social Forces, 47(3), 323-330.
Hertogh, M.L.M. (2010). Crime and custom in the Dutch construction industry. Legisprudence, 4(3), 307-326.
Jacques, S. & Wright, R. (2008). The Relevance of Peace to Studies of Drug Market Violence. Criminology, 46(1), 221-254.
Jacques, S. & Wright, R. (2011). Informal Control and Illicit Drug Trade. Criminology, 49(3), 729-765.
Jamieson, K.M. (1994). The Organization of Corporate Crime: Dynamics of Antitrust Violation. Thousand Oaks, CA: Sage.
Jaspers, J.D. (2016). Managing Cartels: how Cartel Participants Create Stability in the Absence of law. European Journal on Criminal Law and Policy.
Kenney, M. (2009). Turning to the 'dark side'. Coordination, exchange, and learning in criminal networks. In M. Kahler (Ed.) Networked Politics. Agency, Power and Governance. London: Cornell University Press.
Kleemans, E. R. & Van de Bunt, H. G. (1999). The social embeddedness of organized crime. Transnational organized crime, 5(1), 19-36.
Kleemans, E. & Van de Bunt, H. G. (2003). The social organisation of human trafficking. In Global organized crime (pp. 97-104). Springer Netherlands.
Kleemans, E. R. & de Poot, C. J. (2008). Criminal careers in organized crime and social opportunity structure. European Journal of Criminology, 5(1), 69-98.
Klerks, P. (2001). The network paradigm applied to criminal organizations: Theoretical nitpicking or a relevant doctrine for investigators? Recent developments in the Netherlands. Connections, 24(3), 53-65.
Krebs, V. E. (2002). Mapping networks of terrorist cells. Connections, 24(3), 43-52.Lankhorst, F. & Nelen, H. (2005). Professional services and organised crime in the Netherlands. Crime, Law and Social Change, 42(2), 163-188.
Levenstein, M.C. & Suslow, V.Y. (2006). What Determines Cartel Success? Journal of Economic Literature (Vol. XLIV), p.43-95
Levi, M. (2008a). Organized fraud and organizing frauds Unpacking research on networks and organization. Criminology and Criminal Justice, 8(4), 389-419.
Levi, M. (2008b). The phantom capitalists: The organization and control of long-firm fraud. Ashgate Publishing, Ltd.
Lord, N. & Levi, M. (2016). Organizing the finances for and the finances from transnational corporate bribery. European Journal of Criminology, 1477370816661740.
Memon, N., Larsen, H., Hicks, D., & Harkiolakis, N. (2008). Detecting hidden hierarchy in terrorist networks: Some case studies. Intelligence and Security Informatics, 477-489.
Middleton, D. J. (2005). The Legal and Regulatory Response to Solicitors Involved in Serious Fraud Is Regulatory Action More Effective than Criminal Prosecution? British Journal of Criminology, 45(6), 810-836.
Middleton, D. J. & Levi, M. (2005). The role of solicitors in facilitating 'organized crime': situational crime opportunities and their regulation. Crime, Law and Social Change, 42(2-3), 123-161.
Moors, H. & Spapens, T. (2016). Criminele families in Noord-Brabant. Een verkenning van generatie-effecten in de georganiseerde misdaad. Den Haag: Politie en Wetenschap.
Morselli, C. (2009). Inside criminal networks. New York: Springer.
Morselli, C. & Giguère, C. (2006). Legitimate strengths in criminal networks. Crime, Law and Social Change, 45(3), 185-200.
Morselli, C., Giguère, C., & Petit, K. (2007). The efficiency/security trade-off in criminal networks. Social Networks, 29(1), 143-153.
Parker, C. (2012). Economic rationalities of governance and ambiguity in the criminalization of cartels. British Journal of Criminology, 52(5), 974-996.
Parker, M. (2016). Secret Societies: Intimations of Organization. Organization Studies, 37(1), 99-113.
Paoli, L. (2002). The paradoxes of organized crime. Crime, law and social change, 37(1), 51-97.
Paoli, L. & Vander Beken, T. (2014). Organized Crime: A Contested Concept. In: L. Paoli (ed.) (2014). The Oxford Handbook of Organized Crime. New York: Oxford University Press.

Passas, N. (2003). Cross-Border Crime and the Interface between Legal and Illegal Actors. Security Journal 16(1): 19-38.
Punch, M. (1996). Dirty business: Exploring corporate misconduct: Analysis and cases. London: Sage.
Ruggiero, V. (1996). Organized and corporate crime in Europe: offers that can't be refused: Dartmouth.
Shaffer, G. & Nesbitt, N.H. (2011). Criminalizing Cartels: A Global Trend? Sedona Conference Journal, Vol.12, p. 11-26.
Simmel, G. (1906). The sociology of secrecy and of secret societies. The American Journal of Sociology, 11(4), 441-498.
Spapens, T. (2010). Macro networks, collectives, and business processes: An integrated approach to organized crime. European Journal of Crime Criminal Law & Criminal Justice, 18, 185-215.
Van Koppen, M. V. & De Poot, C.J. (2013) The truck driver who bought a café: Offenders on their involvement mechanisms for organized crime. European Journal of Criminology, 10: 74-88.
Von Lampe, K. & Ole Johansen, P. (2004). Organized Crime and Trust: On the conceptualization and empirical relevance of trust in the context of criminal networks. Global Crime, 6(2), 159-184.
Wheeler, S. & Rothman, M.L. (1982). The Organization as Weapon in White-Collar Crime. Michigan Law Review, 80(7), 1403-1426.
Whelan, P. (2014). The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges. Oxford University Press.
Zaitch, D. (2002). Trafficking cocaine: Colombian drug entrepreneurs in the Netherlands. Den Haag: Kluwer Law International.
Zaitch, D. (2005). The ambiguity of violence, secrecy, and trust among Colombian drug entrepreneurs. Journal of Drug Issues, 35(1), 201-228.
Zhang, S. & Chin, K. L. (2002). Enter the dragon: Inside Chinese human smuggling organizations. Criminology, 40(4), 737-768.

Newspapers

Het Financieele Dagblad 'ACM roept burgers op kartels te melden'. Source: http://fd.nl/economie-politiek/1155032/acm-lanceert-publiekscampagne-tegen-verboden-kartelafspraken

Het NRC Handelsblad 'Hoe een lading cocaïne Rinus fataal werd'. Source: https://www.nrc.nl/nieuws/2016/09/16/hoe-een-lading-cocaine-rinus-fataal-werd-4319184-a1521850

References Chapter 4

Agnew, R., Piquero, N. L., & Cullen, F. T. (2009). General strain theory and white-collar crime. In: The criminology of white-collar crime (pp. 35–60). New York: Springer.
Anckar, C. (2008). On the applicability of the most similar systems design and the most different systems design in comparative research. International Journal of Social Research Methodology, 11(5), 389-401.
Anechiarico, F. (1991). Beyond Bribery: The Political Influence of Organized Crime in New York City. In: Fijnaut, C.J.C.F., & Jacobs, J.B. (Eds.). Organized crime and its containment: a transatlantic initiative. Deventer: Kluwer Law, p. 87-100.
Ayres, I. (1987). How Cartels punish: a structural theory of self-enforcing collusion. Columbia Law Review 87(2): 295.
Baker, W. E., & Faulkner, R. R. (1993). The social organization of conspiracy: Illegal networks in the heavy electrical equipment industry. American sociological review, p. 837-860.
Bhaskarabhatla, A., Chatterjee, C., & Karreman, B. (2016). Hit Where It Hurts: Cartel Policing Using Targeted Sales and Supply Embargoes. The Journal of Law and Economics, 59(4), 805-846.
Boscariol, J. W., Walker S., Katz M., Kearney E., Dinning J., Sosnow C., Narayanan P., Peaker D., Stras M. B., Karas S. R., Roberts J. C. (2010) Canada. The International Lawyer: 613–629
Braithwaite, J. (1984). Corporate crime in the pharmaceutical industry. London: Routledge & Kegan Paul.
Braithwaite, J. (1989). Crime, shame and reintegration. Cambridge University Press.

Bree, R., de (2006). Mededingingsrecht en strafrecht: hernieuwde kennismaking. Markt & Mededinging, 10(7), 1.
Bunt, H.G., van de (2008). Rekeningen vereffenen in de bouw. Tijdschrift voor Criminologie, 51(2), 4.
Bunt, H.G., van de (2010). Walls of secrecy and silence. Criminology & Public Policy, 9(3), 435-453.
Bunt, H.G. van de & Huisman, W. (2004) Organisatiecriminaliteit. Tijdschrift voor Criminologie 2: 106-120.
Bunt, H.G., van de, Siegel, D., & Zaitch, D. (2014). The social embeddedness of organized crime. In: L. Paoli (red.), The Oxford Handbook of Organized Crime. Oxford: OUP, p. 321-339.
Campana, P., & Varese, F. (2013). Cooperation in criminal organizations: Kinship and violence as credible commitments. Rationality and society, 25(3), 263-289.
Chu, Y. K. (2002). The triads as business. Routledge.
Clinard, M., & Yeager, P. (1980). Corporate crime: The first comprehensive account of illegal practices among America's top corporations.
Conley, J., & O'Barr, W. (1997). Crime And Custom In Corporate Society: A Cultural Perspective On Corporate Misconduct. Law and Contemporary Problems, 60(3-4), 5.
Commission of inquiry on the Awarding and Management of Public Contracts in the Construction Industry (CEIC) (2015) Rapport final. Available from: https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_ client/fichiers/Rapport_ final/Rapport_final_CEIC_Integral_c.pdf. Accessed 06-03-2017
Connor, J. M. (2010). Recidivism Revealed: Private International Cartels 1991–2009. Available at SSRN 1688508.
Della Porta, D., & Vannucci, A. (1999). Corrupt Exchanges: Actors, Resources, and Mechanisms of Political Corruption. New York: Aldine Transaction.
Della Porta, D., & Vannucci, A. (2012). The hidden order of corruption: An institutional approach. Ashgate Publishing, Ltd.
Dohmen, J., & Verlaan, J. (2004). De bouwbeerput. Prometheus.
Dorn, N. (2009). The end of organised crime in the European Union. Crime, Law and Social Change, 51(2), 283-295.
van Duyne, P. C. (1995). The phantom and threat of organized crime. Crime, Law and Social Change, 24(4), 341-377.
van Duyne, P. C. (1996). Organized crime, corruption and power. Crime, Law and Social Change, 26(3), 201-238.
van Duyne, P. C. (2007). All in the Dutch construction family: Cartel building and organised crime. In L. Holmes (Ed.), Terrorism, organised crime and corruption: Networks and linkages. Cheltenham: Edward Elgar.
van Duyne, P. C., von Lampe, K., & Passas, N. (Eds.). (2002). Upperworld and underworld in cross-border crime. Wolf Legal Publishers.
Edwards, A. & Levi, M. (2008). Researching the organization of serious crimes. Criminology & Criminal Justice, 8(4), 363-388.
Faulkner, R. R., Cheney, E. R., Fisher, G. A., & Baker, W. E. (2003). Crime by committee: Conspirators and company men in the Illegal Electrical Industry Cartel, 1954–19591. Criminology, 41(2), 511-554.
Fijnaut, C. (Ed.). (1998). Organized crime in the Netherlands. Martinus Nijhoff Publishers.
Franchetti, L. [1876] (1974). Condizioni politiche ed amministrative della Sicilia. Vol. 1 in L. Franchetti and S. Sonnino. Inchiesta in Sicilia.
Gambetta, D. (1993). The Sicilian Mafia. The Business of Private Protection. Harvard.
Gambetta, D., & Reuter, P. (1995). Conspiracy among the many: the mafia in legitimate industries. The economics of organised crime, 116-36.
Geis, G. (1987). White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961. In M. D. Ermann & R. J. Lundmann (Eds.), *Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society* (pp. 111–130). New York: Oxford University Press.
Harding, C., & Joshua, J. (2010). Regulating cartels in Europe. New York: Oxford University Press.
Hertogh, M.L.M. (2010). Crime and custom in the Dutch construction industry. Legisprudence, 4(3), 307-326.
Heuvel, G., van den (2005). The Parliamentary Enquiry on Fraud in the Dutch Construction Industry Collusion as Concept Between Corruption and State-Corporate Crime. Crime Law and Social Change, 44: 133.
Hill, P. (2014). The Japanese Yakuza. In: L. Paoli (red.), The Oxford Handbook of Organized Crime. Oxford: OUP, p. 234-253.
Hudon, P. A., & Garzón, C. (2016). Corruption in public procurement: entrepreneurial coalition building. Crime, Law and Social Change, 66(3), 291-311.
Jacobs, J.B. (1991). Organized Crime in the NYC Construction Industry. In: Fijnaut, C.J.C.F., & Jacobs, J.B. (Eds.). Organized crime and its containment: a transatlantic initiative. Deventer: Kluwer Law, p. 49-54.

Jacobs, J. B., Friel, C., & Raddick, R. (1999). Gotham unbound: How New York city was liberated from the grip of organized crime. NYU Press.

Jamieson, K. (1994). *The Organization of Corporate Crime: Dynamics of Antitrust Violation*. London: Sage.

Jaspers, J.D. (2017). Managing Cartels: how Cartel Participants Create Stability in the Absence of law. European Journal on Criminal Policy and Research, 23 (3), 319-335. doi: http://dx.doi.org/10.1007/s10610-016-9329-7

Jong, H. W., de (1990). Nederland: het kartelparadijs van Europa? Economisch-Statistische Berichten, 75, 244-248.

Kleemans, E. R. (2014). Theoretical perspectives on organized crime. p. 32-52.

Kleemans, E. R., & Van De Bunt, H. G. (1999). The social embeddedness of organized crime. Transnational organized crime, 5(1), 19-36.

Kleemans, E. & Van de Bunt, H. G. (2003). The social organisation of human trafficking. In: Global organized crime (pp. 97-104). Springer Netherlands.

Lavezzi, A. M. (2008). Economic structure and vulnerability to organised crime: Evidence from Sicily. Global crime, 9(3): 198-220.

Levenstein, M. C., & Suslow, V. Y. (2006). What determines cartel success? *Journal of Economic Literature, XLIV*, 43–95.

Lippens R., Ponsaers, P. (2006) Re-visiting the informal economy: introductory notes. Crime, Law and Social Change, 45(4-5):259–261.

Lord, N., Flores Elizondo, C. J., & Spencer, J. (2017). The dynamics of food fraud: The interactions between criminal opportunity and market (dys) functionality in legitimate business. Criminology & Criminal Justice, 1748895816684539.

Mass, R. (1991). Law Enforcement Approaches to Organized Crime Infiltration of Legitimate Industry. In: Fijnaut, C.J.C.F., & Jacobs, J.B. (Eds.). Organized crime and its containment: a transatlantic initiative. Deventer: Kluwer Law, p. 37-47.

Morselli, C., Laferrière, D. & Reeves-Latour, M. (2012). International Experiences in Collusion and Corruption in the Construction Industry, Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction.

Morselli, C., Turcotte, M., & Tenti, V. (2011). The mobility of criminal groups. Global Crime, 12(3), 165-188.

NMa (2004). Rapport GWW activiteiten. Geraadpleegd via: https://www.acm.nl/nl/publicaties/zoeken-in-publicaties/?zf[]=kw%3A62&zf[]=pe%3Acustom%7C2004-01-01%7C2004-12-31&zf[]=qu%3AGWW

Paoli, L. (2002). The paradoxes of organized crime. Crime, Law & Social Change 37: 51-97.

Paoli (2003). Mafia Brotherhood. Organized Crime, Italian Style. New York: Oxford University Press.

Parker, C. (2013). The war on cartels and the social meaning of deterrence. Regulation & Governance, 7(2), 174-194

Passas, N. (2002). Cross-border Crime and the Interface Between Legal and Illegal actors. In P.C. van Duyne, K. von Lampe, and N. Passas (Eds.). Upperworld and underworld in cross-border crime. Nijmegen: Wolf Legal Publishers, 11-41.

Parlementaire Enquêtecommissie Bouwnijverheid (PEB) (2002) De bouw uit de schaduw. Eindrapport parlementaire enquêtecommissie bouwnijverheid. Sdu Uitgevers, Den Haag.

PEB (Parlementaire Enquêtecommissie Bouwnijverheid) (2003). Verhoren 1 t/m 67. Den Haag: Sdu Uitgevers.

Petit, L.T.D. (2017, December 8). Legal cartels. Erasmus University Rotterdam. Retrieved from hdl.handle.net/1765/102979

Piquero, N. L. (2012). The only thing we have to fear is fear itself: investigating the relationship between fear of falling and white-collar crime. Crime & Delinquency, 58(3), 362–379.

Reeves-Latour, M., & Morselli, C. (2016). Bid rigging networks and state-corporate crime in the construction industry. Social Networks.

Reeves-Latour, M., & Morselli, C. (2017). Fighting corruption in a time of crisis: Lessons from a radical regulatory shift experience. Crime, Law and Social Change, 1-22.

Reuter, P. (1983). Disorganized crime. The Economics of the Visible Hand. Cambridge: The MIT Press.

Reuter, P. (1985). Racketeers as cartel organizers. The politics and economics of organized crime, 49-65.

Reuter, P. (1987). Racketeering in legitimate industries. A Study in the Economics of Intimidation. Santa Monica: The RAND Corporation.

Ruggiero, V. (1996). Organized and corporate crime in Europe: offers that can't be refused. Dartmouth.

Ruggiero, V. (1997). Criminals and service providers: Cross-national dirty economies. Crime, Law and Social Change, 28(1):27–38.

Shapiro, S. P. (1984). Wayward capitalists. New Haven, CT: Yale University Press.

Shortland, A., & Varese, F. (2014). The Protector's Choice. An Application of Protection Theory to Somali Piracy. *British Journal of Criminology, 54*(5): 741-764.
Sonnenfeld, J., & Lawrence, P. R. (1978). Why do companies succumb to price fixing? Harvard Business Review, 56(4), 145–157.
Stephan, A. (2010). Cartel laws undermined: Corruption, social norms, and collectivist business cultures. Journal of Law and Society, 37(2), 345-367.
Sutherland E. (1949). White collar crime. The Dryden Press, New York.
Varese, F. (2011a). Mafias on the move: How organized crime conquers new territories. Princeton University Press.
Varese F. (2011b). Mafia movements: a framework for understanding the mobility of mafia groups, Global Crime, 12(3): 281-231.
Varese, F. (2014). Protection and extortion. In: L. Paoli (red.), The Oxford Handbook of Organized Crime. Oxford: OUP, p. 343-358.
Vulperhorst, L. (2005). Verzwegen onderneming. Ondernemers, overheid en het einde van het bouwkartel (2001-2005). Uitgeverij Van Gennep, Amsterdam.

References Chapter 5

Aubert, C., Rey, P., & Kovacic, W. E. (2006). The impact of leniency and whistle-blowing programs on cartels. International Journal of Industrial Organization, 24(6), 1241-1266.
Beaton-Wells, C. (2015). Leniency Policies: Revolution of Religion? In: C. Beaton-Wells, & C. Tran (Eds.) (2015). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Oxford: Hart Publishing.
Beaton-Wells, C. & Ezrachi, A. (Eds.) (2011). Criminalising Cartels. Critical Studies of an International Regulatory Movement. Oxford: Hart Publishing.
Becker, G.S. (1968). Crime and Punishment: An Economic Approach. Journal of Political Economy 76: 169.
Bergman, H. & Sokol D.D. (2015). The Air Cargo Cartel: Lessons for Compliance. In: C. Beaton-Wells, & C. Tran (Eds.) (2015). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Oxford: Hart Publishing.
Blum, U., Steinat, N., & Veltins, M. (2008). On the rationale of leniency programs: a game-theoretical analysis. European Journal of Law and Economics, 25(3), 209-229.
Braithwaite, V. (1995). Games of Engagement: Postures within the Regulatory Community, Law & Policy, 17, 225-55.
Braithwaite, J. & Makkai, T. (1991). Testing an Expected Utility Model of Corporate Deterrence. Law and Society Review 25 (1), p. 7-40.
Brenner, S. (2009). An empirical study of the European corporate leniency program. International Journal of Industrial Organization, 27, p. 639–645.
Buccirossi, P., Marvão C.M.P. and Spagnolo, G., Leniency and Damages (June 2015). CEPR Discussion Paper No. DP10682. Available at SSRN: https://ssrn.com/abstract=2624637.
Bunt, H., van de & Huisman, W. (2007). Organizational crime in the Netherlands. Crime and Justice, 35(1), 217-260.
Canenbley, C., & Steinvorth, T. (2011). Effective enforcement of competition law: is there a solution to the conflict between leniency programmes and private damages actions?. Journal of European Competition Law & Practice, 2(4).
Carmeliet, T. (2012). How lenient is the European leniency system? An overview of current (dis)incentives to blow the whistle. Jura Falconis, 48 (3), p. 463-512.
Cauffman, C. (2011). The Interaction of Leniency Programmes and Actions for Damages. Interaction, 7(2), 181-220.
Choi, Y. J., & Hahn, K. S. (2014). How does a corporate leniency program affect cartel stability? Empirical evidence from Korea. Journal of Competition Law and Economics, 10(4), 883-907.
Crofts, L. & Nylen, L. (2015). MLex Interview with Romano Pisciotti. MLex December 2015.
Erp, J., van (2017). Anti-cartel thrillers as a new film genre: How regulator-produced films portray and problematize cartels and communicate deterrence. Crime, Media, Culture, online first: https://doi.org/10.1177/1741659016685377.
Geis, G. (1977). White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961. In: M.D. Ermann & R.J. Lundman (Eds.) (1977). Corporate and Governmental Deviance. New York: Oxford University Press.
Gneezy, U. & Rustichini, A. (2000). A Fine Is a Price. The Journal of Legal Studies, 29 (1), 1-17.

Haines, F., & Beaton-Wells, C. (2012). Ambiguities in criminalizing cartels: A political economy. British Journal of Criminology, 52(5), 953-973.
Harding C. (2013). Criminal Enterprise. Individuals, organisations and criminal responsibility. Oxfordshire: Routledge.
Harding, C., Beaton-Wells, C. & Edwards, J. (2015). Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows? In: C. Beaton-Wells, & C. Tran (Eds.) (2015). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Oxford: Hart Publishing.
Harding, C., & Edwards, J. (2015). Cartel Criminality: The Mythology and Pathology of Business Collusion. Ashgate Publishing, Ltd.
Harrington Jr, J. E. (2008). Optimal corporate leniency programs. The Journal of Industrial Economics, 56(2), 215-246.
Hertogh, M. (2010). Crime and custom in the Dutch construction industry. Legisprudence, 4(3), 307-326.
Hinloopen, J. (2003). An economic analysis of leniency programs in antitrust law. De Economist, 151(4), 415-432.
Hinloopen, J., & Soetevent, A. R. (2008). Laboratory evidence on the effectiveness of corporate leniency programs. The RAND Journal of Economics, 39(2), 607-616. International Competition Network (2014). Drafting and Implementing and Effective Leniency Policy. Anti-Cartel Enforcement Manual (2014), www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf.
Jamieson, K. (1994). The Organization of Corporate Crime: Dynamics of Antitrust Violation. London: Sage.
Jaspers, J. D. (2017). Managing Cartels: how Cartel Participants Create Stability in the Absence of law. European Journal on Criminal Policy and Research, 23 (3), 319-335.
Kagan, R.A. (2006). American and European Ways of Law: Six Entrenched Differences. UC Berkeley: Center for the Study of Law and Society Jurisprudence and Social Policy Program. Retrieved from https://escholarship.org/uc/item/0d83p6qk
Leslie, C. R. (2006). Antitrust Amnesty, Game Theory, and Cartel Stability. Journal of Corporation Law, 31, 453-488.
Levenstein, M.C., Marvão, C. & Suslow, V.Y. (2016). Preventing Cartel Recidivism. Antitrust, 30, 81.
Levenstein, M. C., & Suslow, V. Y. (2006). What determines cartel success? Journal of Economic Literature, 44(1), 43-95.
Levenstein, M. C., & Suslow, V. Y. (2011). Breaking up is hard to do: Determinants of cartel duration. The Journal of Law and Economics, 54(2), 455-492.
Luz, R. D., & Spagnolo, G. (2017). Leniency, collusion, corruption, and whistleblowing. Journal of Competition Law & Economics, 13(4), 729-766.
Marvão, C. (2016). The EU leniency programme and recidivism. Review of Industrial Organization, 48(1), 1-27.
Marx, L. M., Mezzetti, C., & Marshall, R. C. (2015). Antitrust leniency with multiproduct colluders. American Economic Journal: Microeconomics, 7(3), 205-40.
Maton, A., Poopalasingam, V., Kuijper, M., & Angerbauer, T. (2011). The Effectiveness of National Fora in Europe for the Practice of Antitrust Litigation. Journal of European Competition Law & Practice, 2(5).
Miller, N. H. (2009). Strategic leniency and cartel enforcement. American Economic Review, 99(3), 750-68.
Nielsen L.B. (2000). Situating legal consciousness: Experiences and attitudes of ordinary citizens about law and street harassment. Law and Society Review, p. 1055-1090. OECD (2012). Policy roundtables. Leniency for subsequent applicants. http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf
Parker, C. (2012). Economic rationalities of governance and ambiguity in the criminalization of cartels. British Journal of Criminology, 52(5), 974-996.
Parker, C. (2013). The war on cartels and the social meaning of deterrence. Regulation & Governance, 7(2), 174-194.
Sauvagnat, J. (2015). Prosecution and leniency programs: the role of bluffing in opening investigations. The Journal of Industrial Economics, 63(2), 313-338.
Silbey, S. S. (2005). After legal consciousness. Annual Review of Law Social Science, 1, p. 323-368.
Sokol, D. D. (2012). Cartels, corporate compliance, and what practitioners really think about enforcement. Antitrust Law Journal, 78(1), 201-240.
Spagnolo, G. (2000). Optimal Leniency Programs. FEEM Working Paper No. 42.2000.
Stephan, A. (2008). An Empirical Assessment of the European Leniency Notice. Journal of Competition Law & Economics, 5(3), 537–561.
Stephan, A., & Nikpay, A. (2015). Leniency decision-making from a corporate perspective: Complex realities. In: C. Beaton-Wells, & C. Tran (Eds.) (2015). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Oxford: Hart Publishing.

Stucke, M.E. (2015). Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency? In: C. Beaton-Wells, & C. Tran (Eds.) (2015). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Oxford: Hart Publishing.
Swaak, C. R. A., & Wesseling, R. (2015). Reconsidering the leniency option: if not first in, good reasons to stay out. ECLR: European Competition Law Review, 36(8), 346-354.
Thomas, C., De Stefano, G., Hellings, K., Shulak, D., Imoto, Y., Rozent, G., Agranat, R. and Kay, K.L. (2017). Extradition and antitrust law: Businessmen involved in global cartels extradited to foreign countries. *Concurrences* No.3-2017.
Whelan, P. (2013). Cartel Criminalization and the Challenge of 'Moral Wrongfulness'. *Oxford Journal of Legal Studies*, *33*(3), 535-561.
Wils W.P.J. (2007). Leniency in Antitrust Enforcement: Theory and Practice. World Competition 30, p. 25-64.
Wils, W. P. (2009). Relationship between Public Antitrust Enforcement and Private Actions for Damages, The. World Competition, 32, 3.
Wingerde, K., van (2012). De afschrikking voorbij: Een empirische studie naar afschrikking, generale preventie en regelnaleving in de Nederlandse afvalbranche. Nijmegen: Wolf Legal Publishers.

References Chapter 6

Bree, R., de (2006). Mededingingsrecht en strafrecht: hernieuwde kennismaking. Markt & Mededinging, 10(7), 1.
Bijleveld, C.C.J.H. (2013). Methoden en technieken van onderzoek in de criminologie. Boom Lemma uitgevers.
Bunt, H.G., van de (2010). Walls of Secrecy and Silence. The Madoff case and cartels in the construction industry. Criminology & Public Policy 9(3), 435-453.
Bunt, H.G., van de (2008). Rekeningen vereffenen in de bouw. Tijdschrift voor Criminologie, 51(2), 4.
Bunt, H.G., van de, Siegel, D., & Zaitch, D. (2014). The social embeddedness of organized crime. In: L. Paoli (red.), The Oxford Handbook of Organized Crime. Oxford: OUP, p. 321-339.
Cohen, S. (2001). States of Denial: Knowing About Atrocities and Suffering. Malden, MA: Blackwell Publishers.
Coser, L. A. (1956). The functions of social conflict (Vol. 9). Routledge.
Edwards, A. & Levi, M. (2008). Researching the organization of serious crimes. Criminology and Criminal Justice, 8(4), 363-388.
Friedrichs, D.O. (2010). Trusted criminals, White Collar Crime in Contemporary Society. Belmont: Wadsworth.
Gambetta, D., & Reuter, P. (1995). Conspiracy among the many: the mafia in legitimate industries. The economics of organised crime, 116-36.
Goffman, E. (1970). Strategic interaction (Vol. 1). University of Pennsylvania Press.
Harding, C. (2009). Capturing the cartel's friends: Cartel facilitation and the idea of joint criminal enterprise. European Law Review, 34(2), 298-309.
Harding, C., Beaton-Wells, C. & Edwards, J. (2015). Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows? In: C. Beaton-Wells, & C. Tran (Eds.) (2015). Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion. Oxford: Hart Publishing.
Hertogh, M.L.M. (2010). Crime and custom in the Dutch construction industry. Legisprudence, 4(3), 307-326.
Heuvel, G., van den (2005). The Parliamentary Enquiry on Fraud in the Dutch Construction Industry Collusion as Concept Between Corruption and State-Corporate Crime. Crime Law and Social Change, 44: 133.
International Competition Network (2014). Drafting and Implementing and Effective Leniency Policy. Anti-Cartel Enforcement Manual (2014), www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf.
Jacques, S., & Wright, R. (2008). The Relevance of Peace to Studies of Drug Market Violence. Criminology, 46(1), 221-254.
Jacques, S., & Wright, R. (2011). Informal Control and Illicit Drug Trade. Criminology, 49(3), 729-765.
Jong, H. W., de (1990). Nederland: het kartelparadijs van Europa? Economisch-Statistische Berichten, 75, 244-248.
Levi, M. (2008b). The phantom capitalists: The organization and control of long-firm fraud. Ashgate Publishing, Ltd.
Levenstein, M. C., & Suslow, V. Y. (2011). Breaking up is hard to do: Determinants of cartel duration. Journal of Law and Economics, 54(2), 455-492.
Lord, N. & Levi, M. (2016). Organizing the finances for and the finances from transnational corporate bribery. European Journal of Criminology, 1477370816661740

Marx, L. M., Mezzetti, C., & Marshall, R. C. (2015). Antitrust leniency with multiproduct colluders. American Economic Journal: Microeconomics, 7(3), 205-40.

Middleton, D. J. (2005). The Legal and Regulatory Response to Solicitors Involved in Serious Fraud Is Regulatory Action More Effective than Criminal Prosecution? British Journal of Criminology, 45(6), 810-836.

Morselli, C., Laferrière, D. & Reeves-Latour, M. (2012). International Experiences in Collusion and Corruption in the Construction Industry, Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction.

Passas, N. (2002). Cross-border Crime and the Interface Between Legal and Illegal actors. In P.C. van Duyne, K. von Lampe, and N. Passas (Eds.). Upperworld and underworld in cross-border crime. Nijmegen: Wolf Legal Publishers, 11-41.

Petit, L.T.D. (2017, December 8). Legal cartels. Erasmus University Rotterdam. Retrieved from hdl.handle.net/1765/102979

Punch, M. (1996). Dirty business: Exploring corporate misconduct: Analysis and cases. London: Sage.

Reeves-Latour, M., & Morselli, C. (2016). Bid rigging networks and state-corporate crime in the construction industry. Social Networks.

Vulperhorst, L. (2005). Verzwegen onderneming. Ondernemers, overheid en het einde van het bouwkartel (2001-2005). Uitgeverij Van Gennep, Amsterdam.

Wheeler, S. & Rothman, M.L. (1982). The Organization as Weapon in White-Collar Crime. Michigan Law Review, 80(7), 1403-1426.

Zaitch, D. (2005). The ambiguity of violence, secrecy, and trust among Colombian drug entrepreneurs. Journal of Drug Issues, 35(1), 201-228.

Zaitch, D., Mortelmans, D. & Decorte, T. (2016). Etnografie en participerende observatie. In: T. Decorte & D. Zaitch (Eds.), Kwalitatieve methoden en technieken in de criminologie (pp. 255-319). Leuven: Acco.

Summary

This study deals with the shadow side of cooperation; a type of cooperation that is forbidden by law because of its negative effects, namely business cartels. Business cartels entail cooperation between firms in the same or similar area of economic activity trying to avoid competition between them by controlling the market through e.g. fixing prices, dividing customers or rigging tender procedures. Conflicts between cartelists, cartelists cheating on agreements or cartelists denouncing the cartel to the authorities all form internal threats to the stability of business cartels. Such internal threats are more pressing today, now that cartel agreements are subject to administrative, private or criminal legal sanctions globally. The existing social-legal and criminological studies that focus on the motives and opportunities for cartel agreements result in two main conclusions. First, increasing predictability of business and reducing risks and uncertainties of a competitive market are important drivers for cartelists to get involved in cartel agreements; and illegal conduct is effectively neutralised and rationalised by cartelists. Second, motives and rationalisations for cartel conduct are socially embedded in collectivistic business cultures that cultivate cooperation, collaboration and anti-competition sentiments at odds with (changing) cartel legislation and regulation. In chapter 1, a theoretical approach towards studying the social organisation of business cartels is introduced. Central to this approach is the assumption that economic action (like cartel conduct) is socially and culturally embedded. To understand the organisation of cartels we must study their relational and structural embeddedness in society. The concept of trust is important in this approach in two ways. First, interpersonal trust between cartelists will prove essential given the absence of institutional trust (e.g. legal arbitrations or contracts). Second, trust between cartelist and regulator influences the likelihood of cartels being denounced to the authorities by cartelists. Competition authorities introduced leniency policies, these offer cartelists the possibility to come forward with evidence regarding their involvement in cartel conduct in exchange for immunity or reduction of financial penalties. Confessions are the most important source for authorities in detecting cartels.

Despite the process of cartel criminalisation in recent decades, cartels that lasted for years, sometimes decades are still detected today. This raises the question how and why cartels manage to persist, despite increased efforts to discourage them. This research will focus on the question how cartelists control their cartel, and how enforcement strategies by cartel authorities influence those interactions. The question is: how do cartels manage to endure in illegality? To study and operationalise this research question, this study is divided into four sub-questions. These sub-questions are based around challenges that cartelists need to overcome in order to manage their agreements: stabilising, concealing, enforcing and confessing.

This study employs several qualitative research methods and uses a combination of qualitative sources. The results in this study are based on literature review, case-file analysis of official documentation and semi-structured interviews. The literature review contains both theoretical and empirical studies on cartels from different disciplines including criminology, sociology, socio-legal studies, and competition law and economics. The case-file analysis contains: 1) private enforcement reports and records of detected Dutch cartel cases, 2) public parliamentary investigation reports and records into the construction industry in the Netherlands and Quebec, Canada, and 3) public enforcement reports published by the European Commission on detected European cartels. The semi-structured interviews are held amongst three categories of respondents in the Netherlands: 1) competition authority officials/investigators (in 2012), 2) specialised competition lawyers (between 2015-2017), and 3) cartelists (between 2015-2017).

Cartels face two main internal threats, namely cheating and defection. Cartels are unable to formulate binding contracts or resort to legal conflict resolution due to their illegal nature. Chapter 2 of this study focuses on the question:

- *How do informal coordinating mechanisms enable cartel stability outside the scope of formal legal control and what role does trust play?*

Two theoretical models are introduced to deal with this research question; the economic perspective and the social perspective. The economic perspective assumes cartel stability can be established through retaliation. The social perspective assumes cartel stability is created through mutual trust. In the economic perspective cartels can only establish stability by means of a system with internal punishment that increases the costs of cheating. This requires cartelists to monitor their agreement to detect cheating and instate credible punishments. The social perspective focuses on the relation between cartelists and assumes actors are normatively motivated instead of focussing on the individual economically motivated actor. This requires actors to establish systems of communication and reciprocity to build trust and common norms. Both perspectives expect the organisation of cartels to involve systems of coordination and monitoring for different reasons. However, the two models expect different responses to cheating. The economic perspective expects punishment and retaliation, whereas the social perspective expects mediation and negotiation between cartelists. The results demonstrate how systems of coordination, monitoring and compensation exist within cartels. Bid-rigging cartels use over-pricing, rotating systems and end-of-year compensation by means of discounts or evening out disparities with the use of future contracts. Price-fixing cartels use meetings and minimum pricelists. Market division cartels use client lists, turnover lists, market sharing lists and geographical distributions. Some instances of cheating lead to discussions and conflict within cartels. However, breaking up more often seems hard to do for cartelists due to social mechanisms that induce social pressure, existing loyalties towards 'co-competitors' and simply interdependency. The results from chapter 2 thereby confirmed the paradox of social

embeddedness: namely, the need to operate secretly forces cartelists to rely heavily on social ties through informal means of coordination. Furthermore, mutual rights and obligations make parties interdependent, and reciprocity can function as a powerful market mechanism. This stabilises and strengthens cartels and makes it hard for firms to end existing agreements. The results illustrate the importance of mutual dependencies between competitors and the use of informal social mechanisms to build trust and to stabilise cartels.

Criminal acts committed through collaboration between criminal partners require not only concealment but also communication. In light of increasing cartel enforcement concealment also proves essential for cartels. The aim of chapter 3 was to answer the question:

• *How are cartels able to remain hidden from outsiders for long periods of time?*
In answering this question, both the role of concealment and communication and of trust and social embeddedness are addressed to provide possible explanations. Three main expectations in chapter 3 are: (1) cartels may not be as centralised and hierarchically organised as in the classic image of the 'secret society'; (2) cartels may not only prioritise for concealment but also for effective communication; and (3) it is not isolation from their social environment but their (natural) embeddedness that provides an explanation for the longevity of cartels. The results in chapter 3 show three main findings. First, to avoid the risk of detection, cartels clearly use techniques aimed at concealing their illegal conduct, however cartel participants are focused primarily on bringing about well-functioning agreements, and they therefore – in a pragmatic manner – communicate frequently and in a centralised manner. Second, the use of trust-substitutes and the role of facilitators demonstrate how cartels are strongly embedded in their social environment and can emanate from pre-existing professional and personal networks. Third, the cases show that the longevity of cartel secrecy is explained not so much by concealment or internal control within the cartel as it is by the relational and institutional embeddedness of cartels.

The aim of chapter 4 is to investigate why business cartels sometimes do and sometimes do not include the involvement of criminal groups with a violent reputation:

• *Why do business cartels sometimes do and sometimes do not involve organised crime?*
Case studies from the construction industry in Canada and the Netherlands demonstrate how two different systems of collusion develop under different regulatory and cultural conditions. In Montréal the construction cartels take the form of exclusive collusion; closed circles of fixed bidders, and construction firms outside the cartel are victimised. In the Netherlands the construction cartels take the form of inclusive collusion; open to all construction firms, with changing compositions. The Dutch cases demonstrate a collective business strategy. This strategy was shared throughout the broader industry. This has to do with the history

of the construction industry in the Netherlands, in which the combination of enforcement tolerance and the structural character of sharing and dividing projects are considered 'business as usual'. In addition, the Dutch construction industry barely had losing or victimised firms as a result of the bid rigging cartels. Relating to the research question, if the system of collusion is more closed and dependent on keeping outsiders out – preventing newcomers from entering the market – and protecting insiders within the cartel, a demand for intimidation is more pressing. This fits the job description of organised crime groups with a violent reputation. This is demonstrated in the Montréal cases that illustrate a symbiotic relationship between criminal groups and collusive business owners. In the Dutch inclusive system, there is no need for a strong arm to enforce the existing power balance of construction firms in the industry. Old industry directors informally coordinated the cartels, or third parties like secretaries and chairmen functioned sufficiently as regulators or mediators for the Dutch construction cartels. In that sense, the Dutch construction cartels are comparable to the cases described in chapters 2 and 3 of this study.

Chapter 5 of this study deals with the interaction of cartelists with the most important enforcement tool in detecting cartels for competition authorities; leniency. The aim of this chapter is to compare the main assumptions underpinning leniency policy with the practice of leniency in the Netherlands. This chapter touches upon three main assumptions underpinning leniency policy: 1) cartelists are rational and unified entities with centralised decision making, 2) with accurate and predictable information about the expected benefits of the cartel agreements, and 3) deterrent penalties and a credible threat of detection make leniency an attractive option for cartelists. These assumptions are confronted with existing empirical literature on leniency and a qualitative interview-based study on leniency in the Netherlands. The question of this chapter is:

• *What are considerations for cartelists in applying for leniency or refraining from doing so?*
These considerations were also related to private enforcement of business cartels. Regarding the policy assumptions underpinning leniency, the results of this study comprise four conclusions. The first conclusion is that awareness of management in case of cartel infringements diverges between small and large firms. The level of social responsiveness and professionalism in terms of compliance and the relationship with the law differs between smaller and larger companies. This influences their decision-making procedure towards leniency. The second conclusion relates to legal-consciousness. There is a paradox between cartel criminalisation – enhanced enforcement, significantly high financial penalties – on the one hand, and fixed collectivistic sentiments and values in business cultures on the other. This paradox is known to result in strategic use of regulation. Indeed, the third conclusion is strategic use of leniency. Support for both selective framing and opportunistic use of leniency is found in the interviews. The fourth conclusion from the interviews is that there are disincentives in applying for leniency. These disincentives

entail: insufficient evidence of the conduct for an application, social control (reactions in the market), cultural objections, the costly and time-consuming internal investigations and preparation of leniency applications, and the influence of follow-on civil damages procedures. More often than not, this makes leniency an unattractive option for cartelists, making them decide against leniency.

In chapter 6, the main findings, conclusion are discussed. This study shows the value of incorporating insights from (economic) sociology into white collar and corporate crime studies, in analogy to organised crime literature. For example, understanding the interaction between coordination and secrecy demonstrates how the need for effective communication impedes covertness in cartels. Also, the importance of trust is demonstrated by the embeddedness of cartel agreements in personal and professional networks. This study hereby proves how insights around cooperation; trust; and social and cultural embeddedness, inform our understanding of the social organisation of corporate crime. Such an approach allows us to better answer research questions around the collective efforts of sustaining cooperation against the law. This study answers these questions for the topic of business cartels. Once we better understand how corporate and white-collar criminals successfully cooperate and avoid detection, we can also use these insights towards regulation and enforcement of specific types of corporate crime. Further research could focus on systematically monitoring the main characteristics of business cartels. This could track any changes over time as well as monitor the influence of regulatory changes and innovations on the characteristics of cartels. Future research could focus attention to the role of procedural justice in leniency applications to see if and how perceived fairness by cartelists and lawyers in these procedures influences the satisfaction with the outcome and potential future applications.

Nederlandse samenvatting (Dutch summary)

Dit onderzoek gaat over de schaduwzijde van samenwerking. Kartelafspraken zijn een vorm van samenwerking die wettelijk verboden is vanwege de negatieve effecten ervan. Een kartel is een afspraak tussen bedrijven in dezelfde markt die proberen eerlijke concurrentie en mededinging te vermijden door de markt te controleren via bijvoorbeeld prijsafspraken, klantverdelingen of aanbestedingsvervalsing. Deze kartelafspraken zijn verboden bij wet en deelnemers van kartelafspraken worden geconfronteerd met diverse uitdagingen bij het effectief uitvoeren van hun verboden afspraken. Er zijn verschillende interne bedreigingen voor de stabiliteit van kartelafspraken, zoals conflicten tussen kartellisten, kartellisten die valsspelen ten aanzien van de kartelafspraak, of kartellisten die het kartel als clementieverzoeker bij de mededingingsautoriteit melden. De interne stabiliteit van kartels staat tegenwoordig meer en meer onder druk gelet op de toegenomen inspanningen wereldwijd om kartels op te sporen en te bestraffen middels bestuurs- en strafrechtelijke sancties en de opkomst van privaatrechtelijke procedures omwille van kartelschade. De bestaande rechtssociologische en criminologische studies die zich richten op de motieven en gelegenheid voor kartelafspraken, leiden tot twee conclusies. Ten eerste vormen het vergroten van de voorspelbaarheid van bedrijven en het verminderen van risico's en onzekerheden van een concurrerende markt de belangrijkste drijfveren voor kartellisten om betrokken te raken bij kartelafspraken. Illegaal gedrag wordt daarbij door karteldeelnemers effectief geneutraliseerd en gerationaliseerd. Ten tweede zijn motieven en rationalisaties voor kartelgedrag sociaal ingebed in collectivistische bedrijfsculturen waar samenwerking en concurrentiebeperkende sentimenten die haaks staan op (veranderende) kartelwetgeving en -regelgeving worden gecultiveerd. In hoofdstuk 1 van dit onderzoek wordt een theoretische benadering geïntroduceerd voor het bestuderen van de sociale organisatie van kartelafspraken. Centraal in deze benadering staat de veronderstelling dat economisch handelen (zoals kartelafspraken) sociaal en cultureel ingebed is. Om de organisatie van kartels te begrijpen, moeten we dus de relationele en structurele inbedding van die afspraken in de samenleving bestuderen. Het concept van vertrouwen is daarbij op twee manieren van belang. Ten eerste is interpersoonlijk vertrouwen tussen kartellisten essentieel, gelet op het ontbreken van institutioneel vertrouwen (via bijvoorbeeld juridische arbitrage of afdwingbare contracten). Ten tweede beïnvloedt het vertrouwen tussen de kartellist en de mededingingsautoriteit de kans dat kartels door kartellisten aan de autoriteiten worden gemeld middels een clementieverzoek. Mededingingsautoriteiten hebben het clementiebeleid ingevoerd. Dit beleid biedt kartellisten de mogelijkheid om bewijs aan te leveren met betrekking tot hun eigen betrokkenheid en dat van anderen bij kartelgedrag in ruil voor immuniteit of vermindering van boetes. Bekentenissen zijn de belangrijkste bron voor mededingingsautoriteiten bij het opsporen van kartels.

Ondanks het toegenomen toezicht en de bestraffing van kartelafspraken in de afgelopen decennia, worden vandaag de dag nog steeds kartels ontdekt die jaren, soms zelfs decennialang hebben voortgeduurd. Dit roept de vraag op hoe en waarom kartels erin slagen te blijven

voortbestaan, ondanks toenemende inspanningen om ze te bestrijden. Dit onderzoek richt zich op de vraag hoe kartellisten hun kartelafspraken controleren en hoe handhavingsstrategieën door kartelautoriteiten deze interacties beïnvloeden. De vraag is: hoe slagen karteldeelnemers erin om kartelafspraken te bestendigen in de illegaliteit? Om deze onderzoeksvraag te bestuderen en te operationaliseren is deze studie verdeeld in vier deelvragen. De subvragen zijn gebaseerd op uitdagingen die kartellisten moeten overwinnen om hun overeenkomsten te effectueren: stabiliseren, verbergen, controleren en bekennen.

In dit onderzoek worden verschillende kwalitatieve onderzoeksmethoden en een combinatie van kwalitatieve bronnen gebruikt. De resultaten in dit onderzoek zijn gebaseerd op literatuuronderzoek, dossieranalyse en semigestructureerde interviews. Het literatuuronderzoek bevat zowel theoretische als empirische studies over kartels uit verschillende disciplines, waaronder criminologie, sociologie, rechtssociologie, mededingingsrecht en economie. De dossiers bevatten: 1) handhavingsrapporten en boetebesluiten van Nederlandse kartelzaken, 2) openbare parlementaire onderzoeksrapporten over de bouwsector in Nederland en Quebec, Canada, en 3) openbare handhavingsrapporten van Europese kartelzaken gepubliceerd door de Europese Commissie. De semigestructureerde interviews zijn gehouden onder drie categorieën respondenten in Nederland: 1) zaaksbehandelaren/projectleiders van de Nederlandse mededingingsautoriteit (in 2012), 2) gespecialiseerde mededingingsadvocaten en interne bedrijfsjuristen (tussen 2015-2017), en 3) kartellisten (tussen 2015-2017).

Kartelafspraken gaan gepaard met twee belangrijke bedreigingen voor de interne stabiliteit van deze afspraken, namelijk karteldeelnemers die vals spelen ten aanzien van de verboden afspraken en karteldeelnemers die de afspraken opbiechten bij de toezichthouder in ruil voor clementie. Vanwege het illegale karakter van de afspraken zijn karteldeelnemers niet in staat om bindende contracten te formuleren of hun heil te zoeken in juridische arbitrage in geval van onderlinge conflicten. Hoofdstuk 2 van dit onderzoek spitst zich toe op de vraag:

- *Hoe zorgen informele sociale controle- en coördinatiemechanismen voor stabiliteit van kartelafspraken bij afwezigheid van formele juridische controle en welke rol speelt vertrouwen hierbij?*

Twee theoretische modellen worden geïntroduceerd om deze onderzoeksvraag te behandelen: het economische perspectief en het sociale perspectief. Het economische perspectief veronderstelt dat stabiliteit van kartelafspraken kan worden bestendigd door vergelding van schendingen van de afspraken. Het sociale perspectief gaat er vanuit dat kartelstabiliteit wordt gecreëerd door middel van wederzijds vertrouwen tussen karteldeelnemers. In het economische perspectief kunnen kartellisten alleen stabiliteit van hun afspraken bewerkstelligen door middel van een systeem met interne straffen die de kosten van valsspelen verhogen. Dit vereist dat kartellisten hun afspraken controleren om schendingen van gemaakte afspraken

door anderen te detecteren en deze schendingen op geloofwaardige wijze te bestraffen. Het sociale perspectief richt zich meer op de relatie tussen kartellisten en gaat ervan uit dat mensen normatief gemotiveerd zijn in plaats van zich te concentreren op de individueel en economisch gemotiveerde mens. Dit vereist dat karteldeelnemers communicatiesystemen hanteren, waarmee ze wederkerigheid en onderlinge afhankelijk creëren. Hiermee kunnen zowel onderling vertrouwen als gemeenschappelijke normen worden opgebouwd. Beide perspectieven voorspellen dat de organisatie van kartels om verschillende redenen systemen van coördinatie en monitoring bevatten. De twee modellen verwachten echter verschillende reacties op schendingen van afspraken. Het economische perspectief voorspelt straf en vergelding, terwijl het sociale perspectief bemiddeling en onderhandeling tussen kartellisten voorspelt. De resultaten laten zien dat karteldeelnemers systemen voor coördinatie, controle en onderlinge compensatie ontwikkelen om hun afspraken te bestendigen. Kartels waarbij aanbestedingsvervalsing een rol speelt maken gebruik van prijsverhogingen, roulatiesystemen en onderlinge compensaties aan het einde van het boekjaar, door middel van kortingen of het wegwerken van verschillen met het gunnen van toekomstige subcontracten (onderaanneming). Prijskartels maken gebruik van minimumprijslijsten en van bijeenkomsten waar het prijsniveau in de markt wordt besproken. Marktverdelingskartels gebruiken lijsten met klantverdelingen, omzetlijsten, vastgestelde marktaandelen en gebiedsverdelingen. In sommige gevallen leidt valsspelen tot discussies en conflicten binnen kartels. De resultaten laten echter zien dat het vaak moeilijk is voor karteldeelnemers om te breken met de afspraken vanwege onderlinge mechanismen die sociale druk veroorzaken, bestaande loyaliteit jegens 'mede-concurrenten' en ook de onderlinge afhankelijkheid die bestaat binnen markten tussen concurrenten. De resultaten van hoofdstuk 2 bevestigen daarmee de paradox van sociale inbedding: de noodzaak om in het geheim te opereren dwingt karteldeelnemers om via informele coördinatiemiddelen sterk te vertrouwen op onderlinge sociale banden. Bovendien maken wederzijdse rechten en verplichtingen partijen onderling afhankelijk van elkaar en fungeert wederkerigheid daarmee als een krachtig mechanisme. Dit stabiliseert en verstevigt kartelafspraken en maakt het voor bedrijven moeilijk om bestaande overeenkomsten te beëindigen. De resultaten illustreren het belang van wederzijdse afhankelijkheid tussen concurrenten en het gebruik van informele sociale mechanismen om vertrouwen op te bouwen en kartels te stabiliseren.

Verboden afspraken tussen bedrijven vereisen niet alleen onderlinge communicatie, maar ook verhulling. In het licht van de toenemende handhaving van het kartelverbod lijkt het verbergen van afspraken voor buitenstaanders ook essentieel voor kartels. Het doel van hoofdstuk 3 is om de vraag te beantwoorden:

• *Hoe kunnen kartels lange tijd verborgen blijven voor buitenstaanders?*
Bij het beantwoorden van deze vraag wordt zowel de rol van verhulling en communicatie als van vertrouwen en sociale inbedding bekeken om mogelijke verklaringen te geven voor de

onderzoeksvraag. Drie verwachtingen in hoofdstuk 3 zijn: (1) kartelafspraken zijn misschien niet zo gecentraliseerd en hiërarchisch georganiseerd als in het klassieke beeld van 'secret societies'; (2) karteldeelnemers zullen niet alleen prioriteit moeten geven aan verhulling, maar ook aan effectieve communicatie; en (3) het is niet isolatie van hun sociale omgeving, maar juist de inbedding van kartelafspraken in hun omgeving die een verklaring biedt voor hun levensduur. De resultaten in hoofdstuk 3 laten drie hoofdbevindingen zien. Ten eerste, om het risico op onthulling van kartelafspraken te voorkomen, gebruiken karteldeelnemers inderdaad technieken die gericht zijn op het verbergen van hun illegale gedrag. Echter, karteldeelnemers zijn vooral gericht op het tot stand brengen van goed functionerende overeenkomsten en communiceren daarom – vanuit pragmatische overwegingen – frequent en op een overwegend gecentraliseerde wijze. Ten tweede tonen het gebruik van vertrouwensgaranties en de rol van facilitators aan hoe kartelafspraken vaak sterk zijn ingebed in hun sociale omgeving en veelal ontstaan uit reeds bestaande professionele en persoonlijke netwerken. Ten derde tonen de resultaten aan dat de levensduur van het 'kartelgeheim' niet zozeer wordt verklaard door verhulling of interne controle binnen het kartel, maar wel door de relationele en institutionele inbedding van kartels.

Het doel van hoofdstuk 4 is om te onderzoeken waarom kartelafspraken soms wel en soms niet te maken krijgen met de betrokkenheid van georganiseerde misdaadgroepen met een gewelddadige reputatie:

- *Waarom zijn er soms wel en soms geen georganiseerde misdaadgroepen betrokken bij kartelafspraken?*

Gevalsstudies van de bouwsector in Canada en Nederland tonen aan hoe twee verschillende systemen van verboden kartelafspraken zich ontwikkelen onder verschillende soorten regelgeving en culturele omstandigheden. In Montréal hebben de bouwkartels de vorm van exclusieve afspraken; gesloten kringen van vaste bieders controleren de markt en bouwbedrijven buiten het kartel worden het slachtoffer van deze kartellisten. In Nederland hebben de bouwkartels de vorm van inclusieve afspraken; open voor alle bouwbedrijven, in wisselende samenstelling. De Nederlandse kartels laten een collectieve bedrijfsstrategie zien in de hele markt. Deze strategie werd gedeeld in de bredere sector en algemeen aanvaard als manier van zakendoen. Dit heeft deels te maken met de geschiedenis van de bouwsector in Nederland, waarin de combinatie van handhavingstolerantie en het structurele karakter van het delen en verdelen van projecten als 'business as usual' wordt beschouwd. Bovendien kende men binnen de Nederlandse bouwsector nauwelijks verliezers of slachtoffers als gevolg van de kartelafspraken. Met betrekking tot de onderzoeksvraag: als het systeem van collusie meer gesloten is en afhankelijk is van het buitenhouden van buitenstaanders – voorkomen dat nieuwkomers de markt betreden – en het beschermen van insiders binnen het kartel, is er een grotere vraag naar controle en intimidatie. Dit past in de functieomschrijving van georganiseerde misdaadgroepen met een gewelddadige

reputatie. Dit wordt geïllustreerd door de Montréal-zaken waarin een symbiotische relatie bestaat tussen georganiseerde misdaadgroepen en bouwondernemers. In het Nederlandse inclusieve systeem is er geen behoefte aan een sterke arm om de onderlinge verhoudingen van bouwbedrijven in de sector te handhaven. Voormalig directeuren coördineerden daar de kartels op informele wijze. Zij traden veelal op als derde partij, in de rol als secretaris of voorzitter en functioneerden vervolgens als toezichthouders of bemiddelaars voor de Nederlandse bouwkartels. In die zin zijn de Nederlandse bouwkartels meer vergelijkbaar met de kartels beschreven in hoofdstukken 2 en 3 van dit onderzoek.

Hoofdstuk 5 van dit onderzoek gaat over de interactie van karteldeelnemers met het belangrijkste handhavingsinstrument bij het opsporen van kartels voor mededingingsautoriteiten; de clementieregeling. Het doel van dit hoofdstuk is om de belangrijkste aannames die aan het clementiebeleid ten grondslag liggen te vergelijken met de praktijk en uitvoering van de clementieregeling in Nederland. Dit hoofdstuk gaat in op drie hoofdaannames die ten grondslag liggen aan het clementiebeleid: 1) karteldeelnemers zijn rationele en uniforme entiteiten met een gecentraliseerde besluitvorming, 2) met nauwkeurige en juiste informatie over de verwachte voordelen van de kartelafspraken, en 3) afschrikkende sancties en een geloofwaardige dreiging van ontdekking maakt clementie een aantrekkelijke optie voor karteldeelnemers. Deze veronderstellingen worden vergeleken met de bestaande empirische literatuur over clementie en een kwalitatieve studie gebaseerd op semigestructureerde interviews over de uitvoering van de clementieregeling in Nederland. De vraag van dit hoofdstuk is:

• *Wat zijn overwegingen voor karteldeelnemers om al dan niet clementie aan te vragen?*

Bij het beantwoorden van de onderzoeksvraag wordt in dit hoofdstuk ook gekeken naar de invloed van privaatrechtelijke procedures omwille van kartelschade op de beslissing van het al dan niet indienen van een clementieverzoek door karteldeelnemers. De resultaten van deze studie vallen uiteen in vier conclusies. De eerste conclusie is dat betrokkenheid bij en wetenschap hebben van kartelinbreuken bij het management tussen kleine en grote bedrijven verschilt. De mate van sociale responsiviteit en professionaliteit in termen van naleving en de relatie tot wet- en regelgeving verschilt tussen kleinere en grotere bedrijven. Dit beïnvloedt ook hun besluitvorming met betrekking tot het indienen van een clementieverzoek. De tweede conclusie heeft betrekking op het juridische bewustzijn. Er is een paradox tussen kartelcriminalisering – verbeterde handhaving en aanzienlijk hogere financiële sancties – enerzijds en vaste collectivistische sentimenten en waarden in bedrijfsculturen anderzijds. Het is bekend dat deze paradox in andere domeinen leidt tot strategische omgang met wet- en regelgeving. De derde conclusie is dat dit ook geldt voor de clementieregeling. Er is sprake van bepaalde vormen van strategisch gebruik van de clementieregeling. Ondersteuning voor zowel selectieve framing als opportunistisch gebruik van clementie wordt gevonden in de interviews. De vierde conclusie uit de interviews is dat er negatieve prikkels zijn om een clementieverzoek in te dienen.

Ontmoedigende factoren zijn: onvoldoende bewijs gevonden na intern onderzoek voor het doen van een clementieaanvraag, sociale controle (reacties in de markt), culturele bezwaren, kostbare en tijdrovende interne onderzoeken en voorbereiding van clementieverzoeken en ook de invloed van privaatrechtelijke procedures in navolging van bestuurlijke boetes omwille van kartelschade. Dit maakt de clementieregeling veelal een onaantrekkelijke optie voor kartellisten, waardoor ze dan ook besluiten om geen clementie te gebruiken.

In hoofdstuk 6 worden de belangrijkste bevindingen en conclusies van dit onderzoek besproken. Dit onderzoek toont de waarde aan van het integreren van inzichten uit de (economische) sociologie in onderzoek naar fraude en bedrijfscriminaliteit, waarvan de georganiseerde misdaadliteratuur al jarenlang heeft aangetoond dat dit een vruchtbare benadering vormt. Door bijvoorbeeld de interactie tussen coördinatie en geheimhouding beter te begrijpen, zien we dat de behoefte aan effectieve communicatie de verhulling van kartels in praktijk belemmert. Het belang van vertrouwen wordt ook aangetoond door de inbedding van kartelafspraken in persoonlijke en professionele netwerken. Deze studie bewijst hiermee hoe inzichten rond samenwerking, vertrouwen en sociale en culturele inbedding ons begrip van de sociale organisatie van fraude en bedrijfscriminaliteit kunnen vergroten. Een dergelijke benadering stelt ons in staat onderzoeksvragen rond de organisatie van verboden samenwerkingsverbanden beter te kunnen beantwoorden. Dit onderzoek beantwoordt deze vragen voor het specifieke onderwerp van kartelafspraken. Als we beter begrijpen hoe fraudeurs succesvol kunnen samenwerken en ontdekking weten te voorkomen, kunnen we deze inzichten ook gebruiken voor regulering en handhaving van specifieke soorten bedrijfscriminaliteit. Vervolgonderzoek zou zich kunnen richten op een systematische monitoring van de belangrijkste kenmerken van kartels door te tijd heen. Dit zou mogelijke veranderingen en ontwikkelingen kunnen vastleggen en daarmee zou ook de invloed van wijzigingen in regelgeving en handhavingsinnovaties op de kenmerken van kartels kunnen worden bestudeerd. Ook zou de aandacht gevestigd kunnen worden op de rol van procedurele rechtvaardigheid in clementieverzoeken om te zien of en hoe ervaren rechtvaardigheid door kartellisten en advocaten in deze procedures de tevredenheid met de uitkomst en potentiële aanvragen in de toekomst zouden kunnen beïnvloeden.

About the author

Jelle David Jaspers was born on 21 June 1989 in Leeuwarden. He completed his high school education in Haren (Groningen) at Zernike College in 2007. Jelle continued to study Criminology at the Erasmus University Rotterdam, where he received his bachelor's degree in 2011. He continued his studies in Criminology and completed a master's degree specialising in Organised and Corporate crime in 2012.

From 2011 until 2014 Jelle worked as a research intern and later research analyst at the Authority for Consumers and Markets (ACM). In 2013-2014 he worked as a junior researcher and teacher at the department of Criminology at the Erasmus School of Law. At the department of Criminology, he conducted several research projects in collaboration with Dutch regulatory agencies.

In 2014, the Netherlands Organisation for Scientific Research (NWO) granted Jelle a Research Talent grant, funding his PhD research. This research was supervised by Prof. Henk van de Bunt and Prof. Judith van Erp and focused on the social organisation of business cartels. For obtaining this grant, together with his supervisors, Jelle received the Talent extraordinary award on behalf of the Erasmus Trust Fund and the Executive Board of the Erasmus University Rotterdam in February 2015. During his PhD research, Jelle was a visiting researcher at the Centre international de criminology comparée (CICC) at Université de Montréal (Canada) and at the Centre for Criminology and Criminal Justice at Manchester University (UK). In addition to his dissertation, Jelle (co)authored multiple publications on the topic of corporate crime and regulation in national and international journals and books.

Both previous to and during his PhD project, Jelle was involved as a lecturer in several undergraduate and graduate courses in Criminology and Law at the Erasmus School of Law. During his career at the Erasmus School of Law, Jelle presented his work at multiple international and national conferences. He also organised conferences and workshops and coordinated the Dutch division for Organisational Crime within the Netherlands Association for Criminology.

Jelle David Jaspers has since been working as a consultant in financial crime investigations and compliance in Hong Kong and Amsterdam.

PhD Portfolio

Key publications

Jaspers, J. D. (2020). Leniency in exchange for cartel confessions. *European Journal of Criminology, 17*(1), 106–124. doi: 10.1177/1477370819874432

Jaspers, J.D. (2019). Strong by concealment? How secrecy, trust, and social embeddedness facilitate corporate crime. *Crime, Law and Social Change*. doi: 10.1007/s10611-019-09847-4.

Jaspers, J.D. (2018). Business cartels and organised crime: exclusive and inclusive systems of collusion. *Trends in Organized Crime 22,* 414-432. doi: 10.1007/s12117-018-9350-y.

Jaspers, J.D. (2017). Managing Cartels: how Cartel Participants Create Stability in the Absence of law. *European Journal on Criminal Policy and Research, 23* (3), 319-335. doi: 10.1007/s10610-016-9329-7.

Other publications

Jaspers, J.D. (2017). Kartels ontsluierd: heimelijkheid, vertrouwen en sociale inbedding. Hoe kartels er in slagen verborgen te blijven. *Tijdschrift voor Criminologie 59* (3), 245-263.

Jaspers, J.D. & Bisschop, L.C.J. (2017). Planned obsolescence als organisatiecriminaliteit. In: Richard Staring, René van Swaaningen & Karin van Wingerde (Eds.), *Over de muren van stilzwijgen: Liber amicorum Henk van de Bunt* (pp. 561-574). Den Haag: Boom Criminologie.

Verhage, A., Jorissen, A., Prins, R., Jaspers, J.D. (2016). Editorial special issue 'Criminal organisations and organisational crime'. *Cahiers Politiestudies, 2* (39), 59-71.

Jaspers, J.D. & Bunt, H.G. van de (2016). Kartels en georganiseerde criminaliteit. Hoe boven- en onderwereld elkaar ontmoeten. *Cahiers Politiestudies, 2* (39), 59-71.

Mascini, P., Jaspers, J.D. & Erp, J.G. van (2015). *Reacties op onbestrafte overtredingen. De rol van motieven en identificatie bij de omgang met onbestrafte belastingovertredingen in de tuin- en akkerbouw.* (Handhaving en Gedrag). Den Haag: Boom Lemma uitgevers.

Jaspers, J.D. (2013). *Antwoorden op onzekerheid. Over de aard van en verklaringen voor kartelovertredingen in Nederland.* (Jonge meesters). Den Haag: Boom Juridische uitgevers.

Jaspers, J.D., Petit, L. & Beckers, G. (2013). *Van theorie naar detectie. Verslag van een verkennend onderzoek naar de waarde van criminologische theorie voor detectie van kartelafspraken door ondernemingen.* Den Haag: Autoriteit Consument en Markt.

Conference papers and presentations

Jaspers, J.D. (2018, April 19). *The Cartel Parallax, the Social Organisation of Cartels in Times of Criminalisation*. Criminology Seminar Series, Hong Kong University, Jockey Club Tower.

Jaspers, J.D. (2017, December 6). *Clementie in ruil voor kartelbekentenissen.* Academiegebouw Utrecht. Practicioners Seminar Dutch association for competition law.

Jaspers, J.D. (2017, December 4). *A Criminology of Business Cartels. The organisation of competition fraud and the cartel parallax.* Manchester University place, Centre for Criminology and Criminal Justice Seminar.

Jaspers, J.D. (2017, November 16). *Cartel confessions in exchange for leniency*. Marriot Downtown Philadelphia, 73rd Annual Conference of the American Society of Criminology.

Jaspers, J.D. (2017, September 16). *Leniency and punishment, breaking the walls of secrecy?* Cardiff University, 17th Annual Conference of the European Society of Criminology.

Jaspers, J.D. (2017, August 31). *Leniency and punishment, breaking the walls of secrecy?* Utrecht School of Governance, EUROC Workshop. Understanding Corporate Crime: Theory and Methods.

Jaspers, J.D. (2016, September 23). *Beyond concealment. Secrecy, trust and social embeddedness: an alternative explanation for the longevity of business cartels.* Munster, 16th Annual Conference of the European Society of Criminology.

Jaspers, J.D. (2015, September 03). *Controlling conspiracies. How cartelists deal with internal conflicts.* Porto, 15th Annual Conference of the European Society of Criminology.

Jaspers, J.D., Mascini, P. & Erp, J.G. van (2014, juni 05). *Hoe reageren ondernemers op een gepercipieerde afwezigheid van een gelijk speelveld?* Utrecht, Vide: Academisch Toezicht Netwerk.

Mascini, P., Jaspers, J.D. & Erp, J.G. van (2014, november 27). *Hoe reageren ondernemers als ze zien dat overtreders niet worden bestraft? De rol van motieven en identificatie bij de omgang met onbestrafte overtredingen van de belastingwetgeving binnen de teeltsector.* Amersfoort, De aansluiting. Dagretour Handhaving en Gedrag: van beleid naar onderzoek en terug.

Mascini, P., Erp, J.G. van & Jaspers, J.D. (2014). *How Do Crop Producers React to a Perceived Absence of a Level Playing Field?* Paper presented at the LSA in the CRN05 Regulatory Governance session Regulatory Interactions: Minneapolis, Mi, U.S. (2014, mei 28 - 2014, juni 01).

Jaspers, J.D., Mascini, P. & Erp, J.G. van (2014, juni 12). *Het belang van een gelijk speelveld: sanctiebeleving bij het onbestraft blijven van overtredingen door anderen.* Universiteit Leiden, Landelijk jaarcongres Nederlandse Vereniging voor Criminologie.

Jaspers, J.D. (2013, juni 13). *Posterpresentatie: Antwoorden op onzekerheid.* Universiteit Leiden, Jaarlijks congres Nederlandse vereniging voor Criminologie.

Appendix I: topic list case-file analysis

1. General

- Name
- Code
- Date (administrative) decision
- Industry (SBI-code):
    i. Relevant market

2. Investigation

- Cause for investigation
- Investigation powers and methods used
- Individual testimonies given/refused
- Essential evidence

3. Facts and circumstances

- Summary of facts, behaviour of suspects and circumstances in which they operated (e.g. type of cartel conduct, market structure, market culture)
- Description strategy and structure of agreements (modus operandi)

4. The cooperation unit

- **4.1 Suspects**
- Number of legal persons (LP)
- Number of natural persons (NP)
- Data per LP and NP
    i. LP: name
    ii. NP: name
- **4.2 Network**
- Structure and composition of the cartel, location of conduct, geographical market (local, regional. national), type of network (centralised, decentralised) and common market share
- Organisation between cartelists, tasks and roles
- **4.3 Origin of agreements**
- Nature of personal/professional relationships between participants
- Where, when and how did the agreements commence?
- Role and characteristics of market association (e.g. meeting point, cover up, communication platform)
- Duration of the agreements
- Developments within the cooperation and agreements

- **4.4 Trust**
- How did secrecy or covertness of activities take place?
- How did participants deal with trust and distrust?
- Were the agreements known widely within the companies involved?
- Which control and enforcement mechanisms were in place to enforce the agreements?
- Was there a form of dispute settlement within the cartel?
- How were the profits of the cooperation divided between the participants?
- **4.5 Ending of agreements**
- Where, when and how did the agreements end?
- Causes for ending the agreements (e.g. disputes, new players entering the market, breaking/cheating agreements, crisis of trust)
- Did any of the participants (LP or NP) file a leniency application at the Competition Authority?

5. Motives, opportunities and neutralisations/rationalisations

- Which motives can be identified for the participants? (e.g. economic reasons, financial reasons, personal)
- To what extent did the market structure offer opportunities for the agreements?
- Which neutralisations or rationalisations were used by participants?
- Where did these neutralisations or rationalisations apply to (responsibility, damage, victims, higher allegiance)

6. Sanction decision and recidivism

- Which sanction was given to the participants (height of fine)
- Other directions or informal sanctions given
- Recidivism; decisions and/or sanctions for any of the participants for past cartel agreements

7. Summary

- Summary in 100 words based on the topics above

Appendix II: topic list interviews 1 (competition authority officials)

Informed consent and data management

Ask respondents if they agree with the interviewer taking notes during the conversation. Explain that these notes serve the purpose of documenting the interview. The notes are anonymised. This anonymisation means notes will not contain any retraceable personal information regarding the respondent. Explain they might recognize themselves in statements they have made in potential future publications of this study. However, third parties will not be able to identify them from this information. In other words, their anonymity is not infringed.

1. Origin of agreements

- How did the participants get acquainted?
- What was the role of the market association?
- How did the cooperation and agreements commence?

2. Trust

- How did the participants hide their conduct and secured secrecy and covertness of the agreements?
- Did participants hide agreements within their own company?
- How knew of the agreements within the participating companies?
- Which control/enforcement mechanisms were used by participants?
- Were there any conflicts and if so, any dispute resolution?

3. Opportunities

- Which barriers of entry were there for this market?
- To which extent were the companies in this market mutually dependant?
- Did participants report any explanations for their conduct?
- Were there any case-specific conditions that provided an opportunity to participants to make and continue their agreements?

4. Ending agreements

- Did the agreements actually end as far as you know?
- If so, what was/were the reasons for the agreements to end?

Appendix III: topic list interviews 2 (competition lawyers, in-house legal counsel and cartelists)

Informed consent and data management

Ask respondents if they agree with an audio-recording of the conversation. Explain that these recordings serve the purpose of transcribing the interview afterwards. When the transcription is completed, these audio-recordings are deleted. The transcriptions are anonymised. This anonymisation means transcripts will not contain any retraceable personal information regarding the respondent or their clients. Explain they might recognize themselves in statements they have made in potential future publications of this study. However, third parties will not be able to identify them from this information. In other words, their anonymity is not infringed.

1. Background

- Can you tell me something about yourself: function/experience etc.?
- The firm: size, expertise etc.
- How is the firms' practice build up? (Clients/services etc.)
- How do you advise companies concerning (alleged) cartel infringements?

2. Leniency

- How often do you advise companies about the leniency program?
- How often, roughly, do companies actually request for leniency in these cases?
- Do companies mostly follow your advice in these cases?
- Concerning the timing of leniency, would you say leniency generally comes before, during or after the ending of the cartel?
- How often, by your knowledge, do cartels generally continue despite of leniency request?

3. Cases

- Could you walk me through me a few examples of cases in which a company was accused of involvement in cartel infringements? Preferably one in which the company decided on whether to apply leniency.

While respondents elaborate on these cases I will steer for topics regarding different considerations and scenario's (see below)

4. Factors to apply/not to apply

To apply

- Perceived chance that other members apply
- Perceived probability of detection by authorities
- Perceived probability of detection by third parties (complaints etc.)

- Expected fine reduction (only when not A-applicant)
- Labour dispute
- Interpersonal (relational issues)
- Personal grudges/resentment

Not to apply
- Risk of civil claims
- Personal reputational loss
- Firm reputational loss
- Cartel profits
- Moral objections (to defection)
- Distrust in procedures and authorities
- Strong business relationships
- Good/positive personal relationships
- Financial interdependencies
- Reciprocal relations (mutual depts)

5. Leniency scenarios
- The destabilising effect (rat race; fear of detection or defection)
- The opportunistic response (cartel ended)
- The anticipation effect (preconceived plan; ends cartel)
- Throwing the bone strategy

Further clarification topic list

Reasons to apply – theoretical scenarios on the use of leniency

The image of leniency that competition authorities generally bring forward in their communication is that of a destabilising instrument to end active and current cartels (Van Erp, 2013). Through the existence of these arrangements, parties will perceive the risk of defection by others and if they realise the risks of being caught and receiving substantial fines for their actions, they will choose for the safe option to come clean in return for immunity.

As Levenstein and Suslow (2006) bring forward, the most frequent reason for cartels to fall apart are external shocks in the market, e.g. entry of new firms or changes in demand. To give an example, the Belgian Beer Brewers cartel failed in January 1998 mainly as a result of falling demand, overcapacity and pressures from retailers. The European Commission did not start an investigation until six months after raises questions on the notion that the cartel was actually disrupted by the leniency notice (Stephan, 2009, p. 544). A study of European cartel cases (in which leniency was applied by one or more cartelists) demonstrates 53% of the cartels ended before the leniency request was submitted (Stephan & Nikpay, 2015). This suggests

that leniency policies do not disrupt these existing cartels per se, but that these cartels might have failed already for other reasons. In such a case, firms might have requested for leniency to put their former cartel members, now competitors again, at a disadvantage. I will call this the opportunistic response.

There is also a variation on this scenario. That is when parties enter into a cartel, or pressure others to form a cartel with them, with the preconceived idea to ask for leniency when the cartel is up and running. This would entail the cartel as an intentional and planned construction only to eventually damage other market players when the firm is the first to ask for leniency, making them immune to sanctions. I will call this the anticipation effect of the leniency system. Note that this means leniency does end the cartel in this scenario, although being used in a strategic way.

Another scenario in which firms ask for leniency is yet a different strategic option. In this scenario, firms might hold a large international cartel agreement and also make an agreement on a smaller side market. Now the firms ask for leniency in this small cartel to distract the efforts of the authorities and risk of detection in the large cartel. This can be called the throwing-the-bone strategy.

Considerations that are more general can be; the perceived chance that other members of the cartel apply for leniency; expected fine reduction (only when not first applicant); the perceived probability of detection by authorities; perceived probability of detection by third parties. One might also think of other personal reasons such as; a labour dispute; other interpersonal (relational) issues; cartelists that hold a grudge or have resentment against other members of the cartel.

Reasons not to apply

There are several reasons for firms not to apply for leniency in case of a cartel. First off, attention should be giving to the question how leniency relates to other forms of legal control, especially the civil enforcement of competition law. Is there still an incentive for parties when following from a leniency request can be a civil claim? The risk of follow-on damage claims because of leniency applications can have a serious oppressive effect on the willingness to request for leniency.

In addition, one might consider the personal and corporate reputation as a reason not apply. Rosenboom (2012) examined the career development of managers confronted with prosecution by the Netherlands competition authority. The results show detected cartel infringements have a negative effect on the careers of managers in comparison to managers that were not involved. When we consider the reputation of the firm because of leniency requests, we can also expect an oppressive effect. Empirical analysis of Dutch listed firms for anti-competitive activities by the

authorities, shows imposed fines contribute 12% of the total value loss, 55% is due to the loss of cartel profits and reputational damages account for 33% of the value loss (Van den Broek, Kemp, Verschoor & De Vries, 2012). Therefore, cartelists may not apply for leniency due to personal and firm reputation issues. Moreover, drawing further from the results of Van den Broek et al., one might consider the cartel profits as a reason not to apply.

Other personal factors may be: moral objections to defection; distrust in procedures and/or authorities; strong business and personal relationships; financial interdependencies (collective property or mutual assets); reciprocal relations (mutual depts or uncollected compensations).

Abovementioned factors and scenarios are incorporated in the preliminary topic list. This functions as a tool to use in semi-structuring the interviews with competition lawyers. Note, that room is deliberately left for induction from results that derive from respondents themselves.

References

Broek, S., van den, Kemp, R. G., Verschoor, W. F., & Vries, A. C., de (2012). Reputational penalties to firms in antitrust investigations. Journal of Competition Law and Economics, 8(2), 231-258.

Erp, J. G. van (2013). De clementiethriller als nieuw filmgenre. Het gebruik van gedramatiseerde voorlichtingsfilms in het toezicht. Tijdschrift voor Toezicht, 2013(3), 43-66.

Levenstein, M. C., & Suslow, V. Y. (2006). What determines cartel success?. Journal of Economic Literature, 43-95.

Rosenboom, N. S. R. (2012). Career development after cartel prosecution: cartel versus non-cartel managers. Journal of Competition Law and Economics, 8(1), 145-165.

Stephan, A. (2009). An empirical assessment of the European leniency notice. Journal of Competition Law and Economics, 5(3), 537-561.

Stephan, A. & Nikpay, A. (2015). Leniency Decision-Making form a Corporate Perspective: Complex Realities. In: C. Beaton-Wells 7 C. Tran (Eds.) Anti-Cartel Enforcement in a Contemporary Age. Leniency Religion. Oxford: Hart Publishing, p. 139-158.

Dutch topic list (original)

Topiclijst | Interviews respondentengroep 2 (mededingingsadvocaten en kartelisten)

Mededeling vooraf aan respondenten - vertrouwelijkheid

Na mijzelf kort voor te stellen, vraag ik vooraf aan respondenten op zij er bezwaar tegen hebben als ik het gesprek opneem, zodat ik mij volledig op het gesprek kan kunnen richten en het verslag achteraf n.a.v. de opnames uit kan werken. Hierbij geef ik aan de opnames te verwijderen zodra het verslag is uitgewerkt. Daarnaast geef ik aan dat het verslag wordt geanonimiseerd en details die herleidbaar zijn tot de respondent of diens cliënten uit het verslag worden gehouden. Daar voeg ik aan toe dat het wel zo kan zijn dat respondenten zichzelf herkennen in uitspraken die zij hebben gedaan –in publicaties van resultaten op basis van de gesprekken- maar dat anderen hen of cliënten niet zullen kunnen identificeren aan de hand van die uitspraken. Met andere woorden, zeg ik toe dat de anonimiteit van respondenten niet zal worden doorbroken.

Topics

• ALGEMEEN

- Kun je vertellen jouw functie binnen dit kantoor, je werkzaamheden, jaren ervaring etc.?
- Kun je iets meer toelichten over hoe de praktijk in dit kantoor is opgebouwd?
- Indachtig een situatie waarin je cliënten bijstaat/advies geeft bij kartelzaken, op welke manieren kan zo'n proces in zijn werk gaan? (ad hoc, advisering, compliance etc.)

• AGENCY EN BEWUSTZIJN

- Met welke partijen hebben jullie uit naam van de onderneming contact?
- Kun je iets vertellen over welke rol de bedrijfsjurist/bestuurder/compliance adviseur speelt in dit proces, welke positie zij innemen?
- In welke geledingen van de onderneming ligt er wetenschap/verantwoordelijkheid van inbreuken in jouw ervaring?
- Hoe bewust zou je zeggen dat zij zich zijn van het verboden karakter van afspraken die kunnen kwalificeren als inbreuk? (denk aan voorbeelden van formalisering van afspraken schriftelijk, of juist verheimelijking)

• VOORBEELDEN: AFWEGINGEN CLEMENTIE

- Indachtig een situatie van bijstand/advisering in kartelprocedure van cliënten, hoe gaat de besluitvorming daar en welke afwegingen spelen daarin een rol?
- Welke afwegingen spelen een rol in het al dan niet gebruik maken van de clementieregeling?
  - *Mogelijke factoren wel aanvragen:* gepercipieerde kans dat anderen melden, pakkans autoriteiten, melden door derden, verwachtte immuniteit/reductie mogelijke boete, arbeidsconflict, andere relationele conflicten, persoonlijke rancune
  - *Mogelijke factoren niet aanvragen:* risico op schadeclaims, persoonlijke/bedrijfsmatige reputatieschade, kartelwinsten, morele bezwaren (tegen 'verraad'), wantrouwen jegens autoriteit/procedures, sterke zakenrelaties/persoonlijke relaties, financiële afhankelijkheden/verrekeningen etc.
- Waar ligt het initiatief om de clementieregeling op tafel te brengen/is dit nieuws voor cliënten? Hoe ziet dit advies er inhoudelijk uit?:
  - Geven jullie een richtinggevend advies (expliciet voor of tegen clementie)?
  - Wordt jullie advies altijd opgevolgd, waarom wel/niet?
  - Verhouding inbreuken die op tafel liggen en hoeveelheid verzoeken etc.?
- Wat is het belang van het risico op civiele claims in deze afweging?
- Is er een onderscheid zichtbaar tussen grote en kleine ondernemingen m.b.t. deze punten?

• SCENARIO'S CLEMENTIE

- Tot slot wil ik een aantal mogelijk scenario's aan je voorleggen die ingaan op de functie die de clementieregeling in de praktijk kan hebben, ik vraag je om op deze scenario's te reflecteren.

- Destabiliseringseffect
- Opportunistische respons
- Anticipatie-effect
- 'Throwing the bone'-strategie

Appendix IV: Invitation/request interviews 2

Aan de leden van de Vereniging voor Mededingingsrecht

Amsterdam, 7 december 2015

Geacht lid,

Graag brengt het bestuur van de Vereniging twee verzoeken onder uw aandacht.

In de eerst plaats een verzoek van de Academy of European Law (ERA), de European Judicial Training Network (EJTN) en Ecorys, die in opdracht van de Europese Commissie onderzoek verrichten naar de opleidingsbehoeften van nationale rechters die de Europees mededingingsregels toepassen.
Het verzoek is om een korte vragenlijst te beantwoorden, die kan worden gevonden op http://www.era-comm.eu/limesurvey/index.php?r=survey/index/sid/468968/lang/en.
Het verzoek is om dit voor 15 december a.s. te doen.

In de tweede plaats een verzoek van Jelle Jaspers, die promotieonderzoek doet naar advocaten die cliënten bijstaan in kartelzaken of begeleiden bij clementieverzoeken.
De heer Jaspers zou graag met een aantal van die advocaten vraaggesprekken houden over de overwegingen van cliënten om wel of juist niet clementie aan te vragen bij ACM of bij de Commissie. Het gesprek is op volledig anonieme basis en er is geen noodzaak op individuele (vertrouwelijke) zaken in te gaan. Het betreft een onafhankelijk onderzoek, gefinancierd door de Nederlandse organisatie voor Wetenschappelijk Onderzoek (NWO).
Indien u bereid bent een gesprek met de heer Jaspers aan te gaan, verzoeken wij u rechtstreeks contact met hem op te nemen. Zijn contactgegevens zijn: jaspers@law.eur.nl, J.D. Jaspers, Msc., Erasmus University Rotterdam, Erasmus School of Law, Department of Criminology, Room J5-19, T. 0031 10 4081864, M. 0031 6 16767115).

Wij realiseren ons dat het meewerken aan dit soort verzoeken u veel van uw toch al schaarse tijd kost. Desalniettemin willen we u als bestuur van de Vereniging aanmoedigen om uw medewerking te verlenen. Voor de ontwikkeling van ons vakgebied is dit soort onderzoeken van groot belang.

Met vriendelijke groet,

Frederieke Leeflang
Secretaris

Secretariaat p/a Boekel De Nerée Postbus 75510, 1070 AM Amsterdam,
+31 20 795 3162, vvm@boekel.com
www.verenigingmededingingsrecht.nl