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Convergence of national competition laws. The cases of Germany, Austria, and the Netherlands

Draft

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Table of Contents

1.	<i>Introduction</i>	1
2.	<i>Theoretical framework</i>	2
2.1.	<i>Dependent variable</i>	2
2.2.	<i>Independent variable</i>	2
3.	<i>Competition policy</i>	6
4.	<i>National and European competition rules in the 1950s</i>	7
4.1.	<i>National anti-trust laws</i>	8
4.2.	<i>European competition rules</i>	9
4.3.	<i>Differences between European and national competition rules</i>	10
5.	<i>Adaptational pressure</i>	11
5.1.	<i>Leaving national competition laws alone</i>	11
5.2.	<i>Pressure exerted by European case-law</i>	13
5.3.	<i>Delineated jurisdiction in merger control, procedures, and institutions</i>	15
5.4.	<i>National differences in the adaptational pressure</i>	16
6.	<i>National adaptation</i>	19
6.1.	<i>Convergence?</i>	19
6.2.	<i>Germany</i>	21
6.3.	<i>The Netherlands</i>	24
6.4.	<i>Austria</i>	26
7.	<i>Conclusion</i>	28
	<i>References</i>	31
	<i>European Commission Decisions</i>	35
	<i>Judgements of the European Court of Justice and the Court of First Instance</i>	35
	<i>Abbreviations</i>	36

Table of Figures

<i>Figure 1 The influence of internationalisation on domestic policies</i>		14
<i>Figure 2 The shaping of the impact of Europeanisation by national factors</i>		6
<i>Figure 3 Share of "national" cases in Commission decisions on cartels and co-operation. 1964-1998</i>		14
<i>Figure 4 Result of decisions by the Commission on "national" cartels and co-operation. 1964-1998</i>		17
<i>Figure 5 Decisions for cases of D, A, NL. 1964-1998</i>		18

Tables

<i>Table 1 Comparison cartel laws in the 1950s</i>		8
<i>Table 2 Differences and similarities between the national and the European systems</i>		11
<i>Table 3 Number of cases per country compared with share in intra-EU trade. 1964-1998</i>		18
<i>Table 4 National competition laws in 1999</i>		20
<i>Table 5 Observed convergence tendencies</i>		21

1. INTRODUCTION

In many European countries, newspaper articles on new cases in competition policy now belong to the weekly routines. This has not always been like that. European countries have no long tradition of anti-trust policy. Especially in the first part of this century, they put trust in a laissez-faire policy towards cartels or even promoted them. There was also not much concern about market concentration in these times. This began to change after the Second World War, when European countries were confronted with the pressure of the United States to pursue a stricter competition policy. This, among other factors, led to amendments of competition policy in some countries and the first introduction of anti-trust norms in other countries. This, however, must be seen as a "more apparent than real" (Dumez and Jeunemaître, 1996: 217) change towards a strict cartel law. At the same time, the Treaty establishing the European Community also included competition rules.

Legal and economic scholars specialised in competition policy have observed in recent years a gradual convergence of national European competition laws, including the laws of countries which are no Members of the European Community or have become this only recently. Martin (1998: 2-3) concludes that there is a tendency towards prohibition control for horizontal restraints of trade, a differentiated policy towards vertical agreements, a limitation of the scope of derogation from competition policy for regulated industries, and the establishment of independent competition authorities. Furthermore, most of these writers ascribe an important role in this process to the influence and pressure of the European Community (see Laudati, 1998, Stockmann, 1992, and Dumez and Jeunemaître, 1996).

This paper will try to answer the following two questions:

- 1.) *How far reaching is the convergence of national competition policies towards the rules of the European Community*
- 2.) *What role has European integration played in the policy changes?*

I have made the following choices for this paper: I will try to answer these questions for three countries, namely Germany, the Netherlands, and Austria. These countries have been chosen because they had adopted different models of competition policy at the starting point of my research period, which I set in the 1950s. Under competition policy I here understand those rules directed at combating restraints of trade and the concentration or abuse of market power by firms.

As to my independent variable, I will concentrate on one specific path of influence of European integration on national policies, namely the legal pressure exerted by the adoption and application of competition rules on the European level. I will only indicate the influence of increasing possibilities for policy learning and increased competition following from European integration where it is necessary to complete the picture. Austria is a special case, since it has been a member of the EC only since 1995. I will observe whether the accession has already had consequences for its competition policy.

My paper is structured as follows. In Section 2, I will discuss some theoretical aspects of convergence and the influence of European integration thereupon. Section 3 includes an outline of the most important elements of competition policy. In Section 4, I will describe the most important differences of the original national competition laws of Germany, Austria, and the Netherlands in the 1950s on the one hand, and the European anti-trust rules, on the other hand. In Section 5, I will discuss to what extent the European institutions laid pressure on the Member States to adapt their national competition laws. In Section 6 I will deal with the national reactions

to this pressure. In the conclusion I will come back to my theoretical framework and discuss the consequences of my empirical study for it.

2. THEORETICAL FRAMEWORK

2.1. Dependent variable

Although the final aim of this paper is to study national adaptation to the European rules, I will first identify whether convergence towards European rules has taken place. I will then in a second step try to establish to what extent convergence follows from adaptation to legal pressure by the European Community and to what extent it is mainly a result of national processes.

Convergence can be defined as “*the tendency of societies to grow more alike, to develop similarities in structures, processes, and performances*” (Kerr, 1983: 3). It is important to follow this definition, and not to classify the persistence of diversities as divergence. Convergence must thus be analysed by comparing the policies of different countries at different points of time. If the policies of the countries A and B show more similarities in t_1 than in t_0 , we speak of convergence, if the dissimilarities have increased, we can speak of divergence, if the difference has stayed constant, I will speak of persistence of diversity (see also Seeliger, 1996).

For determining whether national competition policies have converged towards the European model, I will compare the policies on the following dimensions: (a) the role competition law is ascribed as an instrument of economic policy, (b) the policy towards horizontal restraints, vertical restraints, and market power, (c) the scope of the competition law, and (d) the implementing institutions. I restrict myself to the analysis of competition law in the narrow sense, without dealing with laws concerning unfair competition or competition rules in sector-specific laws. Furthermore, I concentrate on the legislative process and deal with the actual application only where it concerns important general tendencies. Furthermore I will not deal with the effect of sector-specific secondary legislation based on Article 90(3) EEC.

2.2. Independent variable

I will in this paper discuss only one part of the influence that Europeanisation exerts on national policies. However, I will first give an overview of the literature on the role of internationalisation in convergence processes, since many of the arguments in the internationalisation literature are also relevant for European integration.

Internationalisation and national policies

Different independent variables have been named in literature which must explain convergence. Especially early studies on economic convergence use contingency factors, such as technology, as an independent variable (see Berger, 1996: 2-4). More recent investigations on policy convergence have concentrated on the influence of internationalisation on national policy processes. Internationalisation I define broadly as an increase in the economic, political, legal, and cultural contacts within specific regions (see also Unger and van Waarden: 13). European integration can so be seen as a sub-case of internationalisation, although with specific features. Internationalisation should lead to convergence through the following factors: (a) increased international competition, (b) international policy learning, and (c) political factors like harmonisation, uni-lateral imposition, or supra-national rules (for an overview see Bennett, 1991: 221-228, Berger, 1996, Unger and van Waarden, 1995: 21).

The biggest part of literature concentrates on the influence of increased international competition on policy convergence. The basic argument is twofold: First, intensified trade may

lead to a change in national interests, since firms with international linkages have little interest in protectionism (see Milner, 1987: 641). Garrett and Lange (1995) study how this change in the preferences of domestic actors influences policy changes. Furthermore, increased competition on the world markets will urge governments to adopt policies which increase the competitiveness of its economy (Bellak, 1995). Whereas there are some arguments that this will lead to a race-to-the-bottom with reference to regulatory standards, there are also writers which argue that also the contrary effect of a "race-to-the-top" is possible (Levinson, 1996, Vogel, 1995).

It is clear that this "competitiveness-increasing" policy cannot simply be picked from a handbook on Economics. The choice of a policy depends also on the cause-effect beliefs of the actors - the prevalent "ideas", "policy beliefs", or "policy paradigms" (see Goldstein, 1993: 11-12, Hall, 1992: 91-92, Majone, 1992). Ideas may be changed by learning through theoretical development and experience - beliefs concerning technical details probably more easily than fundamental beliefs (see Sabatier and Jenkins-Smith, 1997: 7-8). Increased international contacts can lead to intensified academic co-operation and probably also to a diffusion of the "best practice" by increased observance of the policies of other countries (Kester, 1996). Learning within the European Community is made easier by institutionalised co-operation.

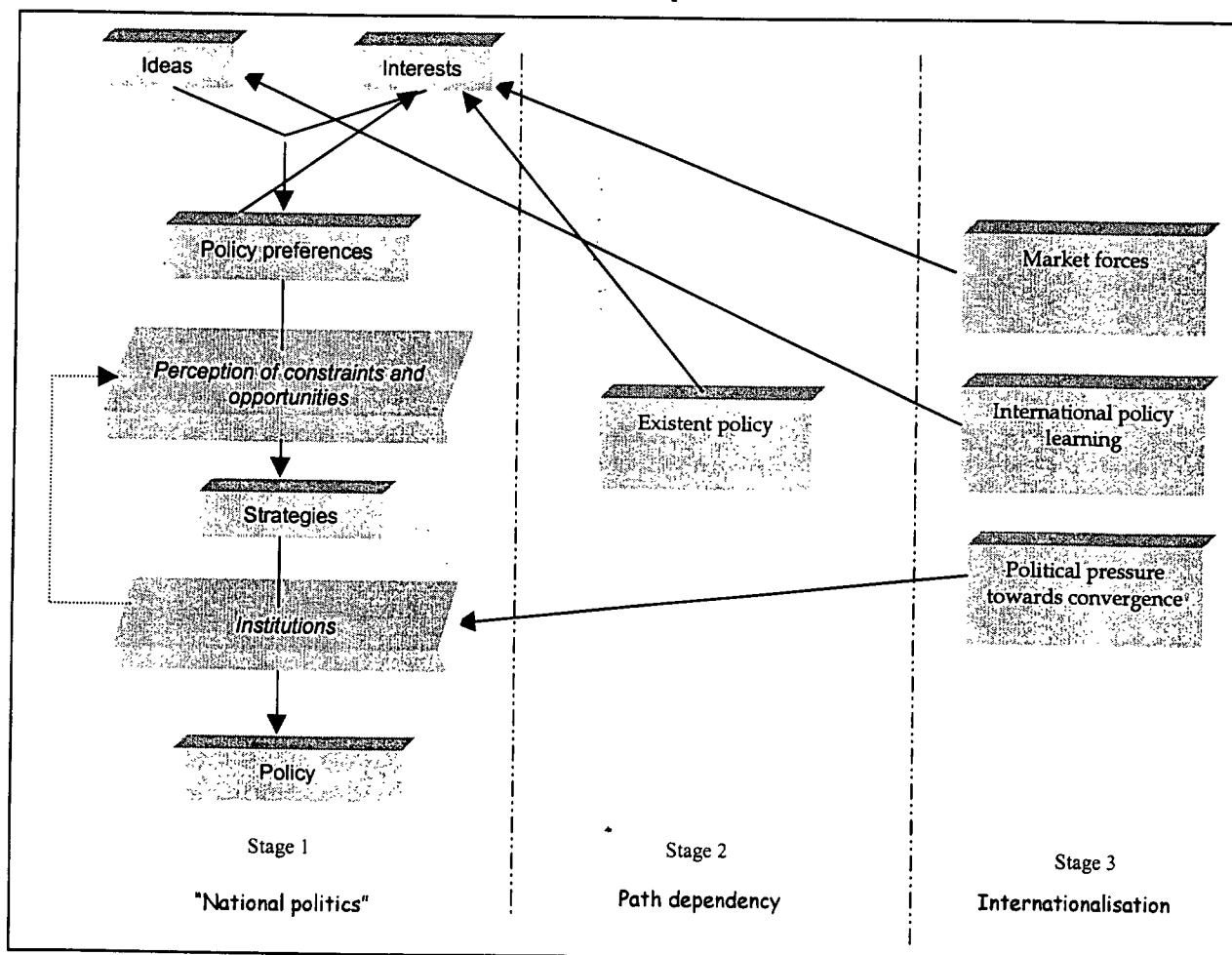
Internationalisation may also mean increased political bargaining between countries. Intensified trade increases the need to avoid unnecessary discrepancies between policies, which might lead to trade distortions or "*system frictions*" (Ostry, 1996). Higher transaction costs may derive from the need for internationally operating firms to adapt to different laws concerning contracts, patents, environment, and also competition and co-operation. But also from a normative point of view, it may be seen as unfair that firms of some countries may have advantages from the national structures and policies that are barriers to foreign firms (Bhagwati, 1996). This problem can be tackled by bilateral harmonisation, unilateral pressure by a powerful country, or the installing of supra-national rules. The European Community offers special opportunities for politics-driven convergence.

In Figure 1, I show this concept in a simplified way. I have tried to make the processes more transparent by artificially splitting them up into three stages. Each stage makes the model more complex¹. For the sake of clarity I have also refrained from indicating all possible directions of influence.

In stage 1 a purely national process results in a certain policy outcome. Actors have certain interests, and ideas concerning how these interests can best be served, therefore they have special policy preferences. However, actors must try to fulfill their policy preferences in the political process. This process is shaped by institutions, which I define in accordance with Hall (1986: 19) as "*the formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals in various units of the polity and economy*". The subjective perception of these institutions, and especially the constraints and opportunities they produce, leads to the formulation of strategies and thereby influences the likely direction of the actor's pressure. The interaction of the strategies of different actors are shaped by institutions. These have an influence on the policy output by affecting the power of an actor to influence a policy (Thelen and Steinmo, 1992: 2-3).

¹ In reality, factors of all three stages are active at the same time, except when a really new policy is created and there is no influence of internationalisation at all.

Figure 1 The influence of internationalisation on domestic policies



In stage 2, still without internationalisation, the existent policy influences the policy process by shaping the interests of actors. Actors adapt to the rules and make extensive commitments based on the expectation that these rules will continue. This increases the costs of changing the rules. Initial policy decisions thereby become self-reinforcing over time (Pierson, 1996: 146–147). I consciously make a distinction between “institutions” and the “existing policy”. What can be defined as institution depends on the actual subject of research. The law and the implementing administrative agencies can be classified in my framework as “institutions” when studying the application of the law, but not when studying the process of amending the existing law.

In stage 3, internationalisation is taken into consideration. Market forces lead to a change in interests and international policy learnings lead to a change in ideas. Political pressure towards convergence, by harmonisation, unilateral imposition of rules, or supra-national rules, leads to a change in institutional constraints and opportunities, and thereby indirectly to a change in the strategies of the actors.

These considerations on the influence of internationalisation on national policies must not evoke the impression that national states have totally lost their grip on national politics. This can not only be deduced from the fact that one can absolutely not speak of world-wide or even Europe-wide congruency of any policy field. But also analytically, it is clear that the three above-named

factors of internationalisation merely influence national factors, not determine national policy outcomes. Berger (1996: 16-17) summarises the conclusions reached by the authors in the book she edited as follows:

“Although the authors may disagree on how convergence comes about, they do have one point of strong agreement that distinguishes their arguments from much of the other literature predicting convergence. However powerful they judge external market or political forces for change, none of the contributors believes that exogenous pressures alone bring about convergence. In each of the case studies of institutional change driven by global market forces or by international political pressures or some combination of the two, the author emphasizes the significance of the domestic story, that is, of the internal constellation of political and economic forces that not only accommodates the externally pushed change but, far more actively, also pulls it in and shapes it.”

Europeanisation and national policies

The influence of Europeanisation – which I define for this paper as the adoption of policies on the level of the European Community - on national structures and policies is a relatively new research field. The reverse direction of influence has been studied more thoroughly. This research concentrates on the question, whether Community policies and institutions are functions of Member States interests (Moravcsik, 1993), or whether there are gaps emerging in Member State control on European policy so that policy outcomes are not always the intention of the (at least current) national governments (Pierson, 1996). Although this problem surely has its impact on the reverse relationship, namely the influence of the EC on domestic structures and policies, it increases the complexity of the problem. Therefore I will, as far as possible², ignore this line of research and take Community policies as given.

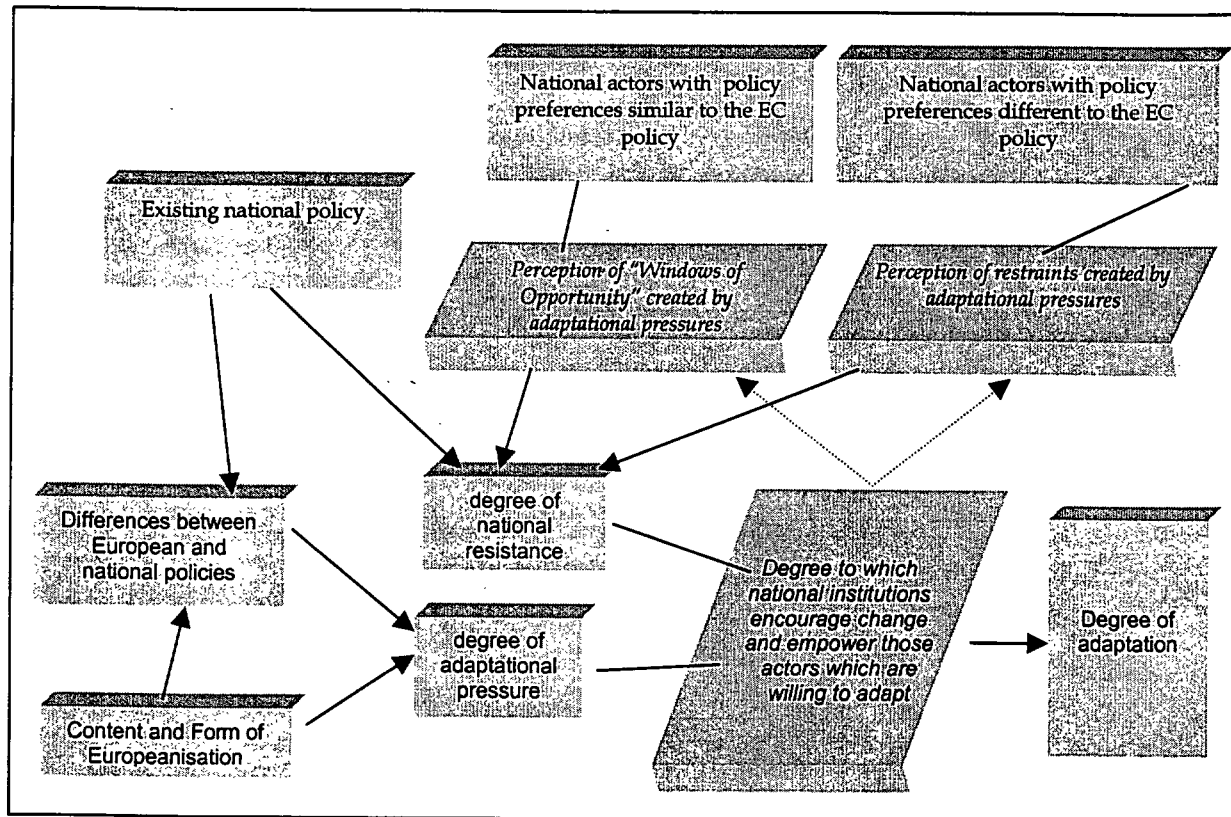
The book-project of Caporaso, Cowles, and Risse (forthcoming) is a recent attempt to identify the impact of the European Community on national institutional arrangements. In the introduction, they represent the following framework for the empirical research presented in their book (Risse, Cowles, and Caporaso, 1999: 2): The emergence of “*formal and informal norms, rules, regulations, procedures and practices*” at Community level require adjustments at the national level, since Member States must comply with European rules. The extent of similarity between existing national policies and European rules is called the “*goodness of fit*”. The greater the differences are, the lower is this goodness of fit and the higher are the so-called “*adaptational pressures*”. However, whether the national policies and structures follow these pressures depends also on national factors, especially mediating institutions and the preferences of the actors. This once again emphasises the importance of national factors which may prevent far-reaching convergence.

I will use a framework that shows some similarities to the concept used by Caporaso, Cowles, and Risse (forthcoming). Figure 1 had shown how I think that internationalisation influences national politics. In

Figure 2, the argument is reversed. It shows how the impact of one sub-case of internationalisation, namely the pressure exerted by a given level of Europeanisation, is mediated and shaped by national factors.

² As exception I will devote some thoughts on the reason of the absence of positive harmonisation and on the influence of German competition policy on the European competition rules.

Figure 2 The shaping of the impact of Europeanisation by national factors



In my framework, Europeanisation determines adaptational pressures in two ways: First, its content has an influence on the difference between European and national policies. Secondly, its form has an influence on whether eventual differences lead to a high or low adaptational pressure. For example, environmental standards published in guidelines by the European Commission will lead to less adaptational pressure than a directive with the same content. Resistance by the Member State depends on path dependency, and the strategies of national actors. These “strategies of resistance” depend not only on whether the policy preferences are similar to the European policy, but also on whether the influence of the European Community offers the national actors additional opportunities or additional restraints in the national policy process. The actual level of national adaptation depends on the interplay of adaptational pressure and national resistance and the degree that institutions favour actors that are willing to adapt.

This will be the framework of this paper. The case studies are intended to explore the relationship between these different variables and especially to find out whether there are any specialities about competition policies, which make the process different from other European policies.

3. COMPETITION POLICY

Competition is considered to be the most important co-ordination mechanism in our western economies. In neo-classical economics it assures that the products needed are produced at lowest possible costs, are distributed to the people who want them and are not-overpriced. However, in history different actors have seen or at least meant to have seen too much or too little of competition resulting from the conduct of firms. The most prominent examples are the emergence of big business in the United States in the 19th century and the ruinous competition perceived in

European countries in the 1930s. The question that raise was whether the state should interfere. In this the state had no clear guidance in economic theory, since different school use different concepts of competition and come to different policy implications (for an overview see Maks, 1995: 197-202).

Furthermore, the relationship between competition policy and trade is not clear yet. It is commonplace that practices like discrimination of foreign firms or the division of markets between competitors have negative effects on trade. However, since the long-term effects of mergers and co-operation on economic performance is still disputed, and furthermore the actual effectiveness of competition policy in achieving its goal of protecting competition is difficult to evaluate, it is not easy to assess whether different competition policies will lead to trade distortions (see also European Community and its Member States, 1999a and 1999b and Bliss, 1996).

The most common problems dealt with under the heading of competition policy are the following:³

- ❖ agreements between competitors that decide to restrain competition among them (price cartels, quota agreements, market sharing, strategic alliances, standardisation agreements,...). not only in the form of contracts, but also as gentlemen's agreements or concerted practice → **horizontal restraints of trade**
- ❖ agreements between firms on different levels of the distribution chain that restrict competition between one party to the contract and third parties (resale price maintenance, exclusive distribution, exclusive purchase, exclusive patent licences, ...) → **vertical restraints of trade**
- ❖ unilateral conduct of firms with existing market power that leads to either a removal of competitors from the market or to the exploitation of dependent parties on the market (discrimination, monopoly pricing, predatory pricing, tie-in,..) → **abuse of market power**
- ❖ the structural joining of forces by firms which thereby increase concentration on the market and raise or establish market power → **mergers**

The most common distinction made in competition policy is the one between prohibition principle and abuse principle. **Prohibition principle** means that restraints of trade are forbidden, unless the competent authority states otherwise. The **abuse principle** means that restraints of trade are not forbidden, but are subject to control by the state, which may forbid them in case of abuse.

4. NATIONAL AND EUROPEAN COMPETITION RULES IN THE 1950s

My period of comparison is quite long, namely almost 50 years. The reason for this is that all three countries adopted new competition laws after the war, and more specifically, before or at the same time of the start of the European Economic Community. The Austrian *Kartellgesetz* (KartG)⁴ dated from 1951, the German *Gesetz gegen Wettbewerbsbeschränkungen* (GWB)⁵ and the Dutch *Wet economische mededinging* (WEM)⁶ from 1958. I will first sketch the most

³ One must keep in mind, though, that the following enumeration, already presupposes the most common systems of competition policy and actually already implies a certain theoretical opinion. Many economists of the Chicago School, for example, state that under the assumptions of price theory, it would be irrational to abuse market power by predatory pricing and that it certainly is not possible to distinguish it from aggressive competitive pricing (see Demsetz, 1982: 52-56).

⁴ *Kartellgesetz* from 4 July 1951, BGBl. 1951/173.

⁵ *Gesetz gegen Wettbewerbsbeschränkungen* from 27 July 1957, BGBl. I. S. 1081.

⁶ *Wet economische Mededinging* from 28 June 1956 amended on 26 July 1958, Staatsblad 413 of 1958.

important points of the national cartel laws, then present the basic European competition rules, and finally establish on which aspects there were the most important differences between the national and the European system.

4.1. National anti-trust laws

Table 1 summarises the main characteristics of the three national law in the 1950s. The German GWB had been largely influenced by the Ordoliberals, a group of German economists and lawyers, who believed that the competitive order can only function under a strong competition law. Such beliefs were absent in Austria in the Netherlands. In both countries the philosophy continued, that both competition and non-competition can have its advantages in different situations.

Table 1 Comparison cartel laws in the 1950s

	Germany	Austria	The Netherlands
Basic philosophy	Competition is important for the economy and for democracy. Strong state must protect competition.	Competition is not optimal in all situations. Prohibition of cartels is not desirable, state must prevent excesses.	Competition is not optimal in all situations. Prohibition of cartels is not desirable, sometimes they must be promoted. State must prevent excesses. Some categories of agreements may prove to be generally negative.
Policy towards horizontal restraints	Prohibition system. Exemptions in the law for some co-operation agreements. Furthermore exemption by the Minister for reasons of public interest possible	Abuse system with prohibition of certain restrictive clauses in cartel agreements	Abuse system, possibility of generic prohibition of categories of agreements and the possibility to legally extend cartel agreements to non-members
Policy towards vertical restraints	Abuse system. Prohibition of resale price maintenance	Abuse system	Abuse system
Policy towards market power	Control on the abuse of market power	Nothing	Control on the abuse of market power
Scope	<ul style="list-style-type: none"> • Sector exemptions for transport, banking, insurance, utilities. • Resale price maintenance for brands and books permitted. • Law did not apply to concerted behaviour 	<ul style="list-style-type: none"> • Some sector exemptions for agriculture, transport, co-operatives. • Resale price maintenance of books. • Law did not apply to gentlemen's agreements and concerted behaviour. 	<ul style="list-style-type: none"> • Exemption for liberal professions • Law did not apply to gentlemen's agreements and concerted behaviour.
Implementing institution	Implementation by independent federal agency (organisationally part of the Ministry of Economic Affairs). Minister of Economics can exempt agreements for reasons of public interest. Appeal to court	Implementation by a court of which the members are appointed on suggestion by the Social Partners Interest associations and department of the Ministry of Justice are involved in the procedure. Appeal to higher court	Implementation by the Minister of Economics, appeal to court Advisory Commission of which the member are appointed upon nomination of the Minister of Economics

The German and the Dutch law foresaw in the possibility of forbidding dominant firms of abusing their market power and to order them to do certain things. Austria then included no such provisions, after some years it introduced the duty of notifying a dominant position, but still

without further consequences. None of the three laws included merger control. It had been foreseen in the drafts for the German law, but had been abolished during the long parliamentary negotiations.

The German law differed from the other systems in that it established a general prohibition of horizontal restraints of trade. Certain specified categories of agreements could be exempted on notification by the Cartel authority. All other horizontal restraints could only be exempted by the Federal Minister of Economic Affairs on reasons of public interest. Vertical non-price restraints were only subject to the abuse principle. Resale price maintenance was forbidden. Austria and the Netherlands made no distinction between horizontal and vertical restraints in the law. The Austrian government chose for a pure abuse system: Agreements had to be notified and were entered into a cartel register. They could be forbidden if they were economically not justified. The Dutch law, although also based on the abuse system, offered a very broad spectrum of instruments: from the legal extension of cartels to outsiders, to the prohibition of individual agreements and whole categories of agreements. The latter instrument was used very quickly. In the beginning of the 1960s, collective resale price maintenance and individual resale price maintenance of certain goods were forbidden.

Both the German and the Austrian law included far-reaching sector exemptions, although they partly resulted in delineating the jurisdiction between the general competition law and sector-specific laws. All three countries at the beginning restricted the application of the law to agreements. The institutions which had to apply the competition laws differed considerably. The German GWB established an independent cartel agency with far-reaching powers of investigation and of imposing fines. The assessment of the effects on competition, on the one hand, and on public interest, on the other hand, was divided. The latter was the exclusive competence of the Minister of Economic Affairs. Austria let the application of the KartG to a specialised court, the members of which were appointed on suggestion of the Social Partners. The Dutch law was applied by the Minister of Economic Affairs, in some cases together with other Ministers, whose department was also concerned.

4.2. European competition rules

Competition law belongs to the oldest instruments of the European Community. Its basic rules are laid down in Articles 85⁷ to 90 EEC. The inclusion of anti-trust rules in the Treaty was only partly inspired by the will to protect competition. One objective of the European Economic Community was to increase welfare by increasing trade. Once state trade barriers were eliminated, though, they must not be allowed to be re-erected by private firms engaging in market sharing agreements. This notion has also been important in the application of the European anti-trust rules (on the creation of the European competition rules see Gerber, 1998: 335-347, Küster, 1982: 364-369, Goyder, 1998: 34-39).

Articles 85 and 86 have been the most important rules for some time. They apply only to agreements and conduct that affects trade between Member States. **Article 85 (1)** establishes a prohibition of restraints of trade. This prohibition covers horizontal as well as vertical restraints. It applies not only to contracts, but also to gentlemen's agreements or concerted conduct. Firms must notify their agreements. If the Commission decides that it does not fall under the prohibition, it issues a "negative clearance". However, according to **Article 85(3)** the Commission can grant on notification an individual exemption for an individual agreement if it improves production or distribution, or promotes technical or economic progress, "*while allowing*

⁷ I will use the old numbering of Treaty Articles in this paper.

consumers a fair share of the resulting benefit”, unless it eliminates competition or the restrictions were not indispensable. In 1965, the Council adopted a Regulation⁸ which gave the Commission the additional power of adopting block exemptions. These specify certain categories of agreement, which then must not be notified but are exempted automatically from Article 85(1). **Article 86** concerns the abuse of a dominant position. If a firm has market power, it is not allowed to abuse it. A few examples for abuse are included in the text, like excessive pricing, the limiting of production, or discrimination. Merger control was included into the European competition rules only in 1989⁹.

Article 90 establishes that the competition rules also apply to state-owned enterprises and enterprises with special rights. Enterprises that have been entrusted with “*the operation of services of general economic interest*” or that have “*the character of a revenue producing monopoly*” are subject to the competition rules, too, unless this would obstruct the performance of these special tasks. However, the actual application of Article 90 took off relatively late in the history of European competition policy (for an introduction into European competition policy see Korah, 1997 and Goyder, 1998).

The anti-trust rules are applied mainly by the DG IV of the European Commission. It carries through the investigations, prepares the decision and assesses eventual fines. The decisions itself are taken by the whole Commission. Article 85(1) and Article 86 can also be applied by national competition authorities and national judges. Article 85(3) falls under the exclusive jurisdiction of the European Commission¹⁰ Appeal from decisions of the European Commission must be brought before the European Court of Justice¹¹. Furthermore, the Court rules on preliminary questions brought before it by national courts wishing to apply Articles 85(1) or 86. It gradually assumed an important role in the development of competition law. Generally, the Court provided the Commission with support when the latter interpreted its jurisdiction broadly or developed or changed its policy. Both institutions are convinced that competition law plays an important role in advancing the integration of European markets.

4.3. Differences between European and national competition rules

Table 2 shows for each country whether its laws are different from or similar to the European anti-trust rules. This classification is simplified and only relative, though. There were important differences between the German and the European system. However, compared with the Dutch and the Austrian system, the GWB had more similarities with the European law. German ideas had also exerted much influence on the creation of the EC anti-trust rules (Küster, 1982: 364-369, Gerber, 1998: 346-347).

⁸ Council Regulation 19/65 of 2 March 1965, O.J. L 533/65 of 2 March 1965.

⁹ Council Regulation 4064/89 of 21 September 1990, amended by Council Regulation 1310/97 of 30 June 1997, O.J. L 180 of 9 July 1997.

¹⁰ Most procedural aspects are laid down Council Regulation 17/62 of 6 February 1962, O.J. L 13 of 21 February 1962.

¹¹ in 1988 it was decided to install a Court of First Instance, which now is the first court of appeal.

Table 2 Differences and similarities between the national and the European systems

	Germany	Austria	The Netherlands
Basic philosophy	similar	different	different
Policy towards horizontal restraints	similar	different	different
Policy towards vertical restraints	different	different	different
Policy towards market power	similar	non-existent	similar
Scope	different	different	different
Institution	similar	different	different

5. ADAPTATIONAL PRESSURE

In this section I will try to identify whether, and if yes, how, Europeanisation and the initial gaps between European anti-trust rules and the different national laws led to adaptational pressures. For doing this I will first discuss, whether the form of Europeanisation in competition policy is likely to lead to pressure on national policies. First I have to make a legal analysis of the instruments that the Community institutions have used in this policy field. I will make a distinction between the policies towards horizontal and vertical agreements and dominant firms on the one hand, and merger and institutions, on the other hand. Then I will discuss whether the different levels of deviation of the German, Dutch, and Austrian competition laws from their European counterpart, combined with the special form of Europeanisation in competition policy, lead to different levels of adaptational pressure for the three countries and also for different aspects of competition policy.

5.1. Leaving national competition laws alone

The first important point to be made is that the European competition rules are aimed at directly combating restraints of trade that are important enough to fall under European policy. National anti-trust laws constitute a parallel system. The Community institutions have not taken any measures to harmonise national competition law. Articles 85 and 86 EEC are directed towards firms, not Member States. And the Council has also not used its legislative powers of Article 87(2) sub e), which authorises it to adopt a regulation or directive designed to “determine the relationship between national laws” and the competition rules of the EC. The Commission has stated already in its 4th competition report that such a Council legislation is not likely to happen.¹² In a more recent report she explained that convergence of national competition laws is important, but “*is done not through any formal act of harmonization but through a continuation of, and improvement in, communication and cooperation between Community and national*

¹² An interesting question is, why the European Community did not decide to harmonise national competition laws. This aspect is outside the scope of this research, therefore I will only name some important factors. First of all, competition policy is an old policy area. It must have seemed impossible to convince national governments to prohibit cartels and many forms of co-operation in an early stage. Secondly, the Commission later on may have been satisfied with its extension of jurisdiction, discussed in the second part of this chapter, which made it possible to tackle the most important national cases anyway. Thirdly as long as it was satisfied with the existing “spontaneous harmonisation”, it could keep away from the long and difficult process of harmonisation. This all the more, since as stated before, there is much insecurity on the external effects of different national competition law. Fourthly, some authors doubt whether a harmonisation regulation would be possible on legal grounds.

enforcement officials. ... This process of "soft harmonization" is a natural consequence of the integration process, which creates pressure for a level-playing field throughout the Community." (Commission, 1996: no. 95, see also Mortelmans, 1997: 8).

The Community institutions may also accelerate the convergence process by forcing a Member State to give up rules and practices that violate the European law. The Commission must in this case initiate a procedure according to Article 169 EEC before the European Court of Justice. This has happened in several policy fields and the Court thereby became an important instrument of European Integration. The principle of supremacy of European competition law has been confirmed by the European Court of Justice in the case *Walt Wilhelm*¹³: "Consequently, conflicts between the rules of the Community and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law takes precedence." Therefore it is clear that if there is a conflict between national competition law and European rules, then the national laws must recede. However, the Court has never concluded that the Member State violates its duties by having a certain competition law, and the Commission has started such a procedure only once, as far as I know.

Because of the specialities of competition law, this would also be difficult to establish. European and national competition law have, at least theoretically, separate spheres of influence. Generally, the EC competition law is applicable on all restraints of trade that have effect on the trade between Member States. National competition laws apply to restraints of trade that have effect on the national market. European and national norms therefore also have different objectives¹⁴, the first protecting competition in Europe and European integration, the latter regulating competition on the national market. One can argue that the laws therefore cannot so easily be in conflict with each other. If a national law states that it does allow cartels on its national territory, this should not violate Article 85(1). As long as the respective state accepts that in those cases where trade between Member States is affected, European law prevails¹⁵, there can be no conflict¹⁶.

However, it is not only important whether the national law itself is in conflict with European law, but also if it obstructs its proper working. The legal problem behind this is very complicated, so I will only state here that in 1977 the European Court of Justice decided that the Belgium State had violated Article 5 EEC in conjunction with Articles 3 sub g) and 86, by promoting resale price maintenance through its value-added tax code¹⁷. Article 5 lays down the duty of the Member States to "abstain from any measures which could jeopardise the attainment of the objectives of this Treaty". The relevant "objective" can be found in Article 3 sub g): "a system ensuring that competition in the internal market is not distorted". The general idea was that a national law or government practice could actually be in conflict with European competition law if it contains measures that promote or enforce the independent violation of the European competition rules by private firms. This principle has been applied in a number of cases, but only to sector-specific laws or price regulation. Although the Commission in her statements to *GB-INNO-BM* had doubted the possibility of such a construction, she made use of it in 1992, when she started an Article 169 EEC procedure against the Netherlands, stating that it had violated Article 5 in conjunction with Article 3 sub g) and Article 85. This case concerned a building cartel, fined by

¹³ Case 14/68, *Walt Wilhelm*, at no. 6.

¹⁴ Case 14/68, *Walt Wilhelm*, at no. 3.

¹⁵ The Austrian cartel law, for example, includes since 1972 an article that states that an agreement that impairs trade with the European Community cannot be economically justified and will therefore not be allowed.

¹⁶ see also the joint cases 89, 104, 113, 116, 117, 125-129/85, *Woodpulp*, at no. 20.

¹⁷ Case 13/77, *GB-INNO*.

the Commission in 1992¹⁸. The Netherlands had adopted a national generic prohibition of bidding agreements. The building cartel subject to the Commission's decision did not fall under the prohibition, though. The Commission argued that by not forbidding this agreement, the Netherlands had not fulfilled their obligations from the Treaty (Forrester and Norall, 1993: 588-589). I will come back to this case later, at the moment I must emphasise that the procedure was stopped, since the Netherlands promised changes, so that we do not know whether the European Court of Justice would have agreed to this interpretation. Furthermore, the circumstances of the case were quite peculiar.

Summarising we can say that the Community institutions made no use of their "usual" measures of harmonisation. However, the increasing application of Article 5 in conjunction with Article 3 g) and 85/86 should have made countries alert that there are limits to the distinctiveness of national laws.

5.2. Pressure exerted by European case-law

However it would be false to assume that the Commission and the Court of Justice have not exerted pressure on the Member States to adapt their national competition laws at all. This pressure was to a large extent a by-product of the application of the European competition rules.

We have seen in the last section that the European and national competition laws theoretically have different spheres of influence. The EC competition law applies when trade between Member States is affected, national competition laws apply when the national market is affected. In practice, however, the two systems share jurisdiction in many cases. National competition laws can be applied to cases which, besides, affecting the national market, also have an impact on trade between Member States. This was confirmed by the European Court of Justice in 1968 in the important judgement *Walt Wilhelm*¹⁹. And European competition rules can also be applied to restrictive practices or agreements of firms by one Member State only. The latter has been made possible by a broad interpretation of the clause "*affect trade between Member States*" in Articles 85 and 86. The Commission began with this strategy very early in its application. The European Court of Justice backed this broad interpretation of the Commission as long as the latter fulfilled its duty to investigate and motivate carefully²⁰ (see Goyder, 1998: 111-116). This led to a relatively high number on decisions by the Commission on – what I call – "national cases". That are cases where the Commission has taken a decision on an agreement of firms that are all based within one Member State. Figure 4 shows how many of the decisions of the Commission on cartels and co-operation agreements²¹ in the period of 1964 until 1998, were such national cases.²²

¹⁸ *Building and construction in the Netherlands*, 5 February 1992.

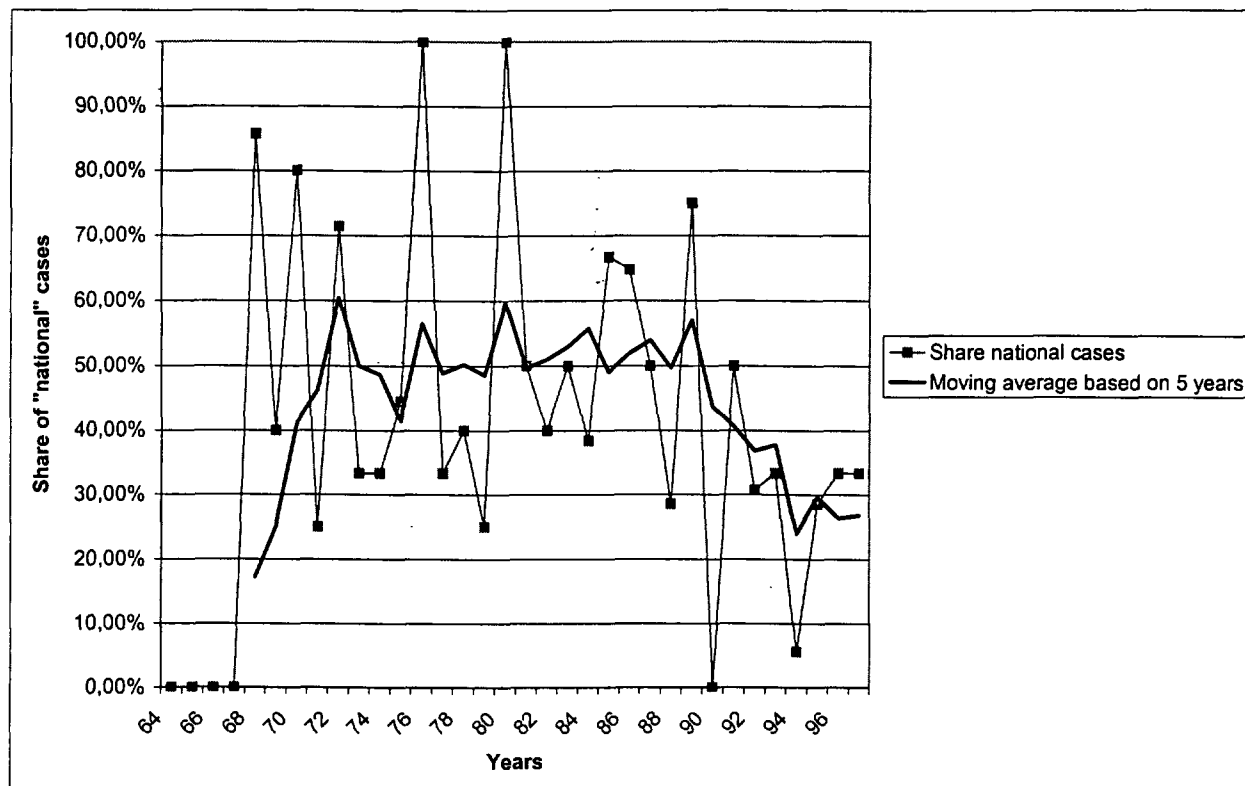
¹⁹ Case 14/68.

²⁰ see Case 126/80, *Salonia*.

²¹ I have excluded decisions on vertical agreements and on intellectual property agreements, since these are often standard contracts notified by and directed to the firm selling the products or the franchise formula, but can in reality be concluded with firms from all over Europe. Furthermore I have excluded cases on boycott and other abuse of a dominant position.

²² only published cases. This figure, as well as all the others in the paper, is, unless indicated otherwise, based on data gathered by the author and based on Jones, van der Woude, and Lewis (1996), DG IV (1999), and European Commission (...).

Figure 4 Share of “national” cases in Commission decisions on cartels and co-operation. 1964-1998



The broadened jurisdiction led to capacity problems. The Commission had to spend much time on notifications of relatively harmless agreements, and could not use its resources for the detection of the more harmful cartels, which are naturally not notified. In the second half of the 1980s, the Commission began, after having safeguarded its broad jurisdiction, to give in to its lack of resources. She has declared repeatedly that she will concentrate on cases with Community importance – that are especially international cartels, decisions that may give a new direction to the policy, and legal questions that have not been decided on yet – and leave the bulk to the national authorities and judges.²³ This strategy was backed by the European Court who confirmed the authority of the Commission to set its own agenda.²⁴ This increasing involvement of national authorities can take two routes: first, through the application of European competition rules by the national judges and competition authorities (decentralisation), and secondly, through the application of national competition law (“renationalisation”²⁵) (Laudati, 1996: 247-251). However, although this may strengthen the role of national law and authorities, this does not mean that the jurisdiction of the Commission has decreased. It can still start a procedure on a wide range of cases if it intends to do so.

This shared jurisdiction with relation to agreements between firms and the abuse of a dominant position, in my view was the main source of adaptational pressure in competition law.

²³ see for example the Commission’s *Notice on co-operation with the national courts in applying Articles 85 and 86 of the Treaty*, O.J. C 39 from 13 February 1993, at point 14-16 and the Commission’s *Notice on co-operation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty*, O.J. C 313 from 15 October 1997, at point 6.

²⁴ Case T/24/90, *Automec*.

²⁵ see European Commission, 1999c: 25.

It led to a decrease in the possibilities of applying national competition law. First of all, this holds for cases where the Commission has already reached a decision or issued a block exemption or is persecuting a case at the same time. Although parallel procedures are allowed, and in some cases even necessary, the national competition authority and judge will not reach different conclusions. There is an academic discussion going on about the question, in which cases it is compatible with the principles of European law to come to a different judgement (see for example Goyder, 1998: 504-510, Kerse, 1994: 385-387, Walz, 1996). A case where a deviation is most probable is the case where the European Commission has given a negative clearance, which means that it states that the case in question involves no restraint of trade or has no influence on trade between Member States. In all other cases, thus individual or group exemptions and prohibitions, a deviance would not be allowed according to most scholars.

Secondly, this also has an influence on national procedures, which have not been preceded by a European block exemption or individual decision. This influence stems from the fact that the Commission has the possibility of “overruling” previous national decisions. This power it derives from the principle of supremacy of the European law. A national competition authority or a national judge who applies national competition policy, cannot be sure that the European Commission will not sooner or later make a decision on the same case under European law. This may lead to an anticipation of a possible Commission intervention and to a convergence in the application of policies.

Thirdly, the strategies of industry may change. Big firms which are doing business internationally and therefore are likely to be subject to the European competition rules, may have less interest in a deviation of national competition law, since their actual possibilities of forming cartels or strategic alliances are restricted by European competition law anyway.

5.3. Delineated jurisdiction in merger control, procedures, and institutions

Also in merger control, national laws exist parallel to European rules, and the Community institutions have taken no steps towards harmonisation (Kögel, 1996: 314-349). There is one important difference with Articles 85 and 86, though. The distribution of jurisdictions between the Commission and the Member states in merger control is guided by another principle. The merger regulation²⁶ sets quantitative thresholds. If a merger achieves these thresholds, it is principally appraised by the Merger task force of the Commission and the Member States must accept its decision. There are two exceptions to this rule. According to Article 9, the Commission may refer a notified merger to the authorities of a Member State if the concentration concerned will significantly impede effective competition on a market within that country, which presents characteristics of a distinct market and which is not a substantial part of the common market. Article 22(3) establishes that the Commission may also appraise a merger that does not have a Community dimension, if it is asked to do so by one or more Member States concerned and if trade is affected. These two exceptions are applied only seldom, though.

In most of the cases, the division of tasks is therefore clear. Even though the merger regulation has decreased the number of mergers and acquisitions in which national authorities can implement their own policy, whether restrictive or laissez-faire, there rests a clearly defined area where the national law generally has exclusive jurisdiction without possible intervention by the Commission. Therefore, without harmonisation legislation, there is no legal pressure to adapt

²⁶ Council Regulation 4064/89 of 21 December 1989, [1989] O.J. L 395, as amended by Council Regulation 1310/97 of 30 June 1997, [1997] O.J. L 180.

national merger control. The same hold for the institutions that apply national competition rules and national procedural rules.

Of course, the existence of merger control on the European level has some influence on national discussions about merger control, but in which direction is less clear. On the one hand, national actors may argue that national merger control is not necessary any more, since the big cases are already dealt with by Brussels (see Stockmann, 1992: 457-459).

On the other hand, the existence of European restrictions on merger activities may lead to calls for the establishment of complementary national rules. First, because of the desire to create the same conditions for all firms. A merger that is not subject to the European rules may have a stronger impact on the market of one Member State than a merger that does reach the EC thresholds. Absence of the same rules on the national level might then be seen as a distortion of competition. Secondly, a Member State might hope for a higher number of Article 9 references if it builds up experience in assessing mergers on the national level. The Commission could also use this argument as "carrot" for the adaptation of national institutions. At the moment this is not probable, since, as stated before, the Commission refers cases to Member States in very rare occasions²⁷.

5.4. National differences in the adaptational pressure

My conclusion is thus that the adaptational pressure in competition law is relatively low compared with other policy fields, and that it mainly is exerted through the application of Articles 85 and 86 EEC. I will now have a look at some statistical data, in order to establish if different countries are affected differently by this pressure. Following Figure 2²⁸, I would expect that the Netherlands had to face more pressure than Germany, since its policy was very different from the European one. The Austrian case is more difficult to predict. One the hand, its policy was also a very lenient one, on the other hand, it has become a Member State only recently. European competition rules generally apply to all practices that have an effect on the Community market, thus not only to firms settled in the Member States. There were many cases with firms from the United States, for example. However, Austria is economically relatively insignificant and has no multinational likely to be under constant supervision by the European Commission.

Figure 5 shows how the Commission's decisions on national cartels and co-operation agreements²⁹ were distributed over the different countries³⁰ and whether the decisions were positive (negative clearance or exemption) or negative (prohibition with or without fine). We can see here that the United Kingdom and the Netherlands were subject to the highest number of decisions, but that the outcome of the British procedures was mostly positive, and the outcome of the Dutch procedures was mostly negative. Dutch firms and Belgium cartels and co-operation agreement had most problems with European competition, at least from a quantitative point of view. Germany has had less cases and Austria none.

²⁷ This argument may become important in the future for policies towards horizontal and vertical restraints of trade, as well as dominant firms, see p.30.

²⁸ p.4.

²⁹ see footnote 21.

³⁰ I have only included the six countries of the EU-15 with the highest number of cases.

Figure 4 Result of decisions by the Commission on “national” cartels and co-operation. 1964-1998

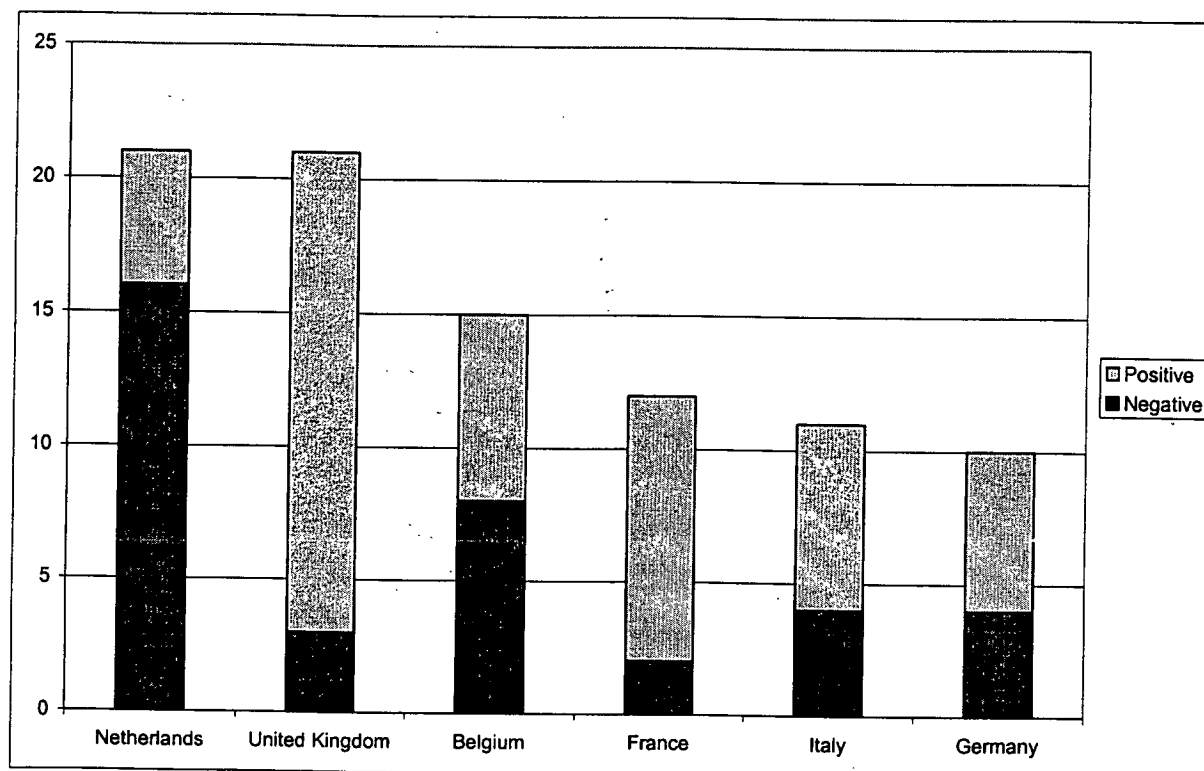


Table 3 shows the share of the momentary EU-members in the totality of Commission decisions³¹ on Articles 85 and 86. I have included the share of these countries in intra-EU trade in 1980³², in order to set the data in proportion to the economic importance of the countries. We can see that the same six countries which are “at the top” of the “national” cases, have the highest number of cases also in the totality of decisions. German firms have been relatively more often subject to decisions concerning vertical agreements and the abuse of market power, as well as international agreements. However, compared with Germany’s share in trade, its number of decisions is still relatively low (see column 5). The Netherlands are relatively less important in vertical agreements and international agreements. Austria is with 18 cases among the last five countries.

³¹ thus national and international agreements.

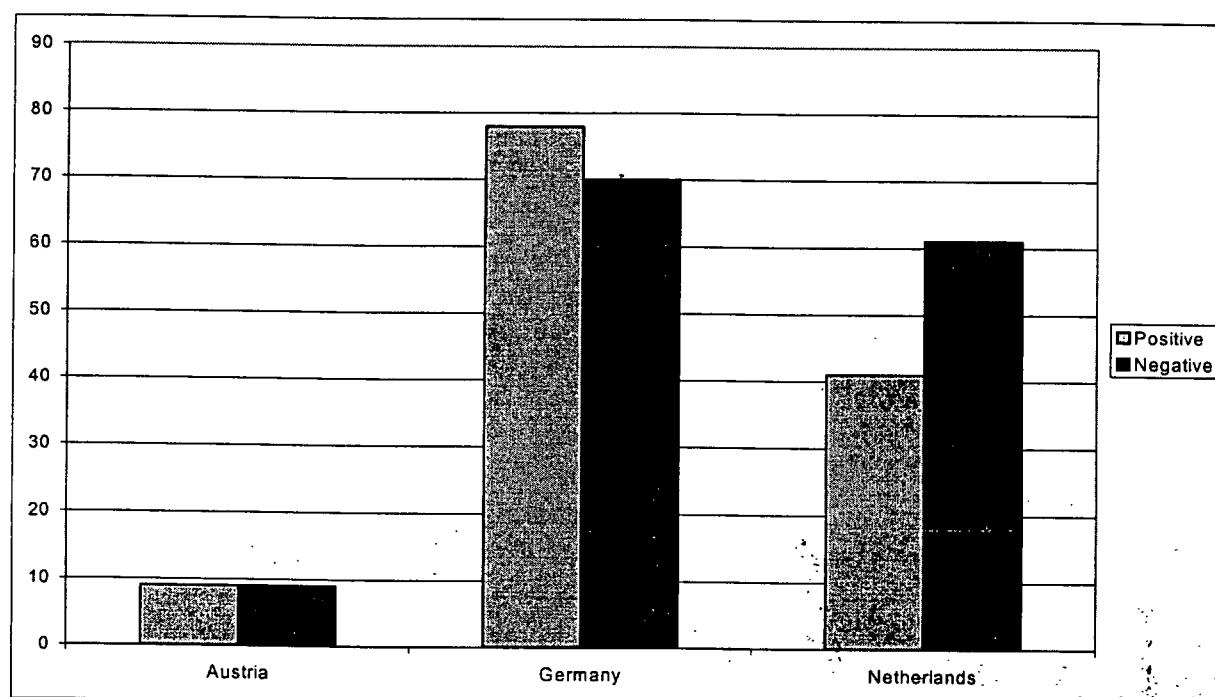
³² calculated from Eurostat. These data add the trade data of Belgium and Luxembourg. I have divided the share in the proportion of their GDP, this is not the correct measure, but good not enough for my illustrative purposes. I have taken the data of 1980, since this more or less in the middle of the relevant period.

Table 3 Number of cases per country compared with share in intra-EU trade. 1964-1998

EU-15	Decisions	Share in cases	Share in intra-EU Trade 1980	Share cases/Share trade
Germany	148	17,8%	25,9%	0,7
Great Britain	126	15,2%	13,1%	1,2
France	123	14,8%	8,6%	1,7
Netherlands	102	12,3%	11,9%	1,0
Belgium	92	11,1%	10,7%	1,0
Italy	72	8,7%	10,9%	0,8
Denmark	29	3,5%	2,9%	1,2
Sweden	27	3,2%	4,5%	0,7
Spain	24	2,9%	2,6%	1,1
Ireland	18	2,2%	1,8%	1,2
Austria	18	2,2%	3,1%	0,7
Portugal	15	1,8%	0,9%	2,0
Finland	15	1,8%	1,8%	1,0
Luxembourg	14	1,7%	0,4%	3,8
Greece	8	1,0%	0,9%	1,1

Figure 6 summarises the outcomes of all cases involving firms based in Germany, Austria, and the Netherlands. Here we can see that also when taking all cases together, the Dutch firms have a worse record than the German ones. Half of the Austrian cases have resulted in positive decisions by the Commission, the other half in negative decisions.

Figure 6 Decisions for cases of D, A, NL. 1964-1998



This shows, that from a purely quantitative point of view, the Netherlands were the country confronted most with a pressure by the case-law of the Commission. But also from a qualitative point of view, we can see that there is a difference between the countries. Decisions by the Commission on Dutch firms generally touch the national policy core more deeply, since they also covered relatively old Dutch cartels that had been permitted by the Dutch Minister of Economic Affairs.

6. NATIONAL ADAPTATION

In the following chapter I will first establish whether convergence has take place. Then I will use process-tracing for coming to first conclusions on the mediation of Europeanisation by national factors.

6.1. Convergence?

Table 4 shows the status quo of the national competition laws, this means the new German GWB, which entered into force on 1st January 1999, the new Dutch Mw, which entered into force on 1st January 1998, and the Austrian KartG of 1988, in the version of 1995. I have furthermore included between brackets and in italic the changes suggested in the draft for an amendment of the KartG in the version of March 1999. The last column shows the most important points of the law of the European Union. However, must keep in mind that European law has developed more strongly through case-law than through legislative adaptation.

Convergence has certainly taken place. All three countries now include the same elements as European competition law and especially the basic principles have become more similar. However, we see that many national characteristics remains, and especially when it comes to technical details which can lead to divergence in the application process. Even the Netherlands, which followed the strategy of taking over the European rules, has adopted its own group exemptions. Germany has in the last amendment included an exemption for the central market of rights to television broadcasting of sports events, from which is known, that the Commission at least has its doubts. Also the old difference it makes between horizontal and vertical restraints, and which is followed by Austria, constitutes a difference with the European and Dutch models. The German and Austrian rules on the definition of market power have fundamental technical differences from the EC Regulation and at least in wording have more in common with each other than with the European counterpart. There is only weak convergence on the institutional question. The Netherlands are following the German example and thereby have also become more similar to the Community solution. Austria does not fit in, since it is still applied by a court, with an extremely important role for the Social Partners, and no role for the Minister of Economics. Table 5 summarises the changes that have taken place that bring the national law nearer by the European system.

Table 4 National competition laws in 1999

	Germany	Austria	The Netherlands	European Community
Policy towards horizontal restraints	prohibition principle. exemption for co-operation of SMEs, agreements on specialisation, rationalisation, structural crisis cartels, terms of trade and standards. general clause of exemption possibility similar to Article 85(3) EEC. Exemption for reasons of public interest by the Minister of Economics	no general prohibition clause. restrictive contracts are forbidden until permission. permission now restrictive; may not be given if against Community rules. abuse control for concerted practices (<i>same rules for agreements and concerted practices</i>); group exemption for co-operation – resemblance with the Commission Notice of 1968.	prohibition principle, European system taken over to a large extent. group exemptions for joint participation in tendering agreements, short-term price cartels of co-operating supermarkets, and price cartels for newspaper subscriptions	Prohibition principle. Notice on co-operation of 1968 lists certain forms of co-operation which usually do not fall under the prohibition. Group exemptions for specialisation agreements and joint R&D
Policy towards vertical restraints	Abuse principle, prohibition of resale price maintenance. Prohibition of non-binding price recommendations, except for brands and SMEs. certain restraints in intellectual property contracts are allowed.	Duty of notification, abuse principle. Resale price maintenance falls under the same rules as horizontal agreements. European group exemptions, except the one for intellectual property agreements are taken over, plus group exemption for franchise agreements	Prohibition principle. European group exemptions are taken over, plus a group exemption for quantitative restraints in shopping centres.	Prohibition principle. Group exemptions for intellectual property agreements, exclusive purchasing, exclusive distribution, franchising, and distribution of cars. Plans to make a difference between horizontal and vertical agreements.
Policy towards market power	<ul style="list-style-type: none"> Prohibition of the abuse of market power. Qualitative criteria: Quantitative criteria for the presumption of market power Merger control, lower thresholds for mergers in the newspaper and magazines sector. prohibition if a dominant position is created or strengthened, unless also positive effects on competition. may be allowed by Minister of Economics for reasons of public interest. 	<ul style="list-style-type: none"> Abuse control. Qualitative criteria with some resemblance to those of the GWB; Quantitative criteria above which market power is established. Merger control. Prohibition if dominant position is created or strengthened, unless also positive effects on competition or merger necessary for international competitiveness and economically justified. Lower thresholds for mergers in the newspaper and magazine sector. 	<ul style="list-style-type: none"> Prohibition of the abuse of market power. European system taken over. Merger control, definitions of European law taken over. Prohibition if dominant position is created or strengthened that significantly hinders competition. may be allowed by Minister of Economics because of public interest 	<ul style="list-style-type: none"> Prohibition of the abuse of market power. Merger control. Prohibition if dominant position is created or strengthened that significantly hinders competition.
Scope	Sector exemptions for agriculture, banking and insurance, copyright collecting societies, rights to the television broadcasting of sports events, resale price maintenance for books	Delimitation to jurisdiction of sector-specific regulation. sector exemptions for agriculture, state monopolies, co-operatives resale price maintenance of books and newspapers.	Delimitation to jurisdiction of sector-specific regulation. no sector exemptions. special provisions for firms with special tasks	Sector exemptions for agriculture, specific regulations for transport and insurance sector
Institutions	Independent <i>Bundeskartellamt</i> as main cartel authority. appeal to the courts. Decision by <i>Bundeskartellamt</i> can be over-ruled by the Minister of Economics for reasons of public interest. Advisory <i>Monopolkommission</i> .	Cartel court as main cartel authority, but he can only act after the Social Partners, interested firms or the State have applied for it (<i>will be changed</i>). appeal to higher court. very important role of the social partners in the preparation of the procedure	Independent agency <i>NMA</i> as main cartel authority. appeal to court. Minister of Economics may allow a merger for reasons of public interest.	Preparation of decisions by DG-IV. special merger task force. Decision by whole Commission.

Table 5 Observed convergence tendencies

	<i>Germany</i>	<i>Austria</i>	<i>The Netherlands</i>
basic philosophy		a bit more competition-oriented	clearly more competition-oriented
horizontal restraints	general exemption possibility similar to Article 85(3) EEC	prior authorisation necessary for horizontal restraints of trade, stricter application	European system taken over (although distinctive group exemptions)
vertical restraints	prohibition of resale price maintenance for all goods except books	prior authorisation necessary for resale price maintenance, except for books	European system taken over (although distinctive group exemptions)
market power	prohibition of the abuse of market power merger control (before the EC!)	abuse control on firms with market power merger control	European system of prohibition of the abuse of market power taken over merger control
Scope	less sector exemptions, legal form is not important, exemption for agreements of minor importance	less sector exemptions, concerted practices do also fall under KartG but do not fall under authorisation system (will be changed), exemption for agreements of minor importance	broad application to all sectors legal form is not important, exemption for agreements of minor importance
Institution		competition authority (<i>Kartellgericht</i>) will get power to initiate a proceeding	creation of independent, specialised institution with powers of investigation and the right to initiate a proceeding

Although convergence towards the European model has taken place to some extent, this does not necessarily mean that this was only a reaction to European pressure.

6.2. Germany

I want to distinguish two periods in the German history of the GWB. The first period lasted until approximately the second half of the 1980s, and was marked by a series of amendments and developments that mainly followed the internal logic of the national law, without considerations of the European law playing a significant role (Stockmann, 1992: 451). The second period, starting in the second half of the 1980s has been marked by an increase in the discussions on adaptation to the European rules.

In the first time of German competition law, influence by the European rules was mostly the result of an exchange of experience, like for example the inclusion of concerted practices in the GWB in 1973 (Axster, 1973). Because Germany for a long time has been the “model” of a strict national law, its experiences have also had its influence on the European rules, for example on Regulation 17/62 (Gerber, 1998: 346-347). Politicians and experts then did not consider adaptation to the European rules to be necessary (example Günther, 1962: 8-11). It was above all the German literature who adhered to the so-called *Zweischrankentheorie* (double barriers theory), which argued that an agreement had to pass both the European and the national norms for being allowed - a theory which is not accepted by most writers now (Walz: 460-461). Since Germany also had an elaborated practice of competition law it was also less threatened by interventions by the Commission.

Merger control was already introduced in 1973. This was thus clearly a result of purely national ideas and interests. European merger control, or better its absence, was merely used as an argument by industry associations. They argued that German firms would be severely discriminated by this national merger control, since it would endanger their competitiveness (Philipp, 1974: 181). Especially the BDI argued for waiting for European regulation. At the same time there were other interest associations, mostly presenting SMEs, which promoted the

introduction of merger control. The government coalition of Social Democrats and the Liberal Party, included merger control already in the first draft for a new law in 1971 and it was accepted in Parliament without much problems. The BDI succeeded in making the thresholds higher and changing some of the relevant criteria. Mergers of firms engaged in the production or distribution of newspapers or magazines were made subject to lower thresholds. Furthermore, the *Monopoly Commission* was founded, an advisory commission constituted of well-known experts, which also had the task to monitor the economy.

This introduction of merger control went together with amendments which were aimed at improving the competitive strength of small and medium-sized enterprises. In the German discussion on the market economy, SMEs were seen as a barrier against concentration and cartelisation, and thereby found to be one of the most important structural preconditions for competition. Other points of emphasis besides merger control through all the following amendments were the co-operation possibilities for small-and medium-enterprises and the control of abuse of market power (Beyenburg-Weidenfeld, 1992: 173).³³

The discussion of the necessity of a national adaptation to the European rules began only in the second half of the 1980s. German national courts began to increasingly apply European competition rules (Brinker, 1998: 9-16). In the beginnings of the 1990s the German *Bundesgerichtshof* even stated in its judgement *Pauschalreisen II*³⁴ that the rules of the German cartel law must always be interpreted with taking the European rules into consideration. In cases where the *Bundeskartellamt* must weigh interests against each other, it may neither forbid agreements that are allowed under European rules, nor allow conduct that is forbidden under Article 85 or 86.

Also the aspect of sector exemptions began to be seen from a "European" point of view. The fourth amendment in 1980 had made first small steps towards a decrease in sector exemptions which was also favoured by the *Bundeskartellamt* (Sturm, 1996: 216). However, resistance was considerable and changes achieved were not really substantial, and also seen as not too successful. However, here the European Community interfered. Not only that it initiated liberalisation by introducing directives concerning sector regulation itself, but the European Commission also began to tackle sectors that were sheltered from competition law up till then, by using Articles 85, 86, and 90 EEC. The case that concerned Germany most was the judgement *Fire Insurance*³⁵ by the European Court of Justice. Here the European Court of Justice confirmed a prohibition by the Commission of a price agreement within the framework of the association of German property insurers, the *Verband der Sachversicherer*. This agreement was exempted under Article 102 of the GWB, which included special provisions for insurance companies. This might seem as an over-ruling of the German law by the Commission. However, the *Bundeskartellamt* had already tried in 1972 to prohibit these practices. It might only do that, though, with agreement of the sector-specific regulation agency, and the latter had refused to prohibit these price-setting activities.

But also in other sectors, like banking, insurances, and transport, the European Commission and the Court began to apply the competition rules more actively in the 1980s³⁶. This tendency restricted the possibilities for national sector exemptions and helped those actors aiming at

³³ see also Bericht des Ausschusses für Wirtschaft of 13 June 1973, Drucksache 7/765, reprinted in WuW 1973, no.8, p.581.

³⁴ *Pauschalreisen-Vermittlung II* (BGH KVZ 10/92), 18.5.93, NJW 1993, p.2245.

³⁵ Case 45/85, *Verband der Sachversicherer*.

³⁶ see for example the decision *Meldoc* of 2 December 1986 in agriculture and the judgement 172/80, *Züchner v. Bayrische Vereinsbank* in banking, 45/85.

liberalisation. A gradual adaptation to the European rules was announced and started with the fifth amendment of 1989 (see Bundeswirtschaftsminister, 1989: 227). Some exemptions were cancelled, but in the insurance sector there was also one exemption added, which had already been possible under EC law, but not under the GWB³⁷. As to further adaptation, the Explanatory Memorandum stated a comprehensive reform of the GWB would not be desirable at the moment, since the development of the European competition rules were not sufficiently clear yet³⁸.

The most recent, sixth, amendment of the GWB was marked, at least in the beginning, by the buzzword of “adaptation to the European rules”. The Ministry of Economics stated that convergence would make the dealing with competition rules easier to firms, first because it lowered transaction costs and secondly, because having the same norms would lead to the same starting position for firms. Furthermore adaptation would increase the influence of decisions from the *Bundeskartellamt* and of judgements by the German courts on the development of EC competition law³⁹. However, it was always made clear that the European norms would not be copied blindly, but only taken over where they were thought to be superior to the German law.

This refusal of absolute adaptation was shared by the *Bundesrat* and the *Bundeskartellamt*. The Scientific Council to the Ministry of Economic Affairs and the *Monopolkommission* were generally against an amendment. The main arguments of these four bodies against absolute adaptation were as follows: The European law were judged to have many flaws and to be in evolution itself. There was, for example, consensus among German actors, that the EC policy towards vertical restraints is too strict (see also the German reports in Ehlermann and Laudati, 1997). A breach with German traditions would furthermore lead to a loss of decade-long experience in application. Furthermore, an adaptation of the wording of the law would not lead to convergence anyway, seen the embeddedness in institutions and traditions. Finally, it was also feared that convergence would lead to a *Absenkung des Schutzniveaus* (decrease in the level of protection of competition), because of the wide possibilities for discretion in the European rules (see Kerls, 1997: 140-148, Möschel, 1995: 820-821, Wolf, 1997).

The position of industry was divided. The most important discussant was once again the BDI. They strongly lobbied for convergence towards the European rules. They argued that the provisions of Article 85(1) and (3) would be more modern and more flexible. The general position was: either convergence or no amendment at all. But naturally, they agreed on keeping vertical restraints under the abuse principle. The BDI achieved its goals only partially and used the media for transporting its dissatisfaction with the reform.

But also other, smaller, interest associations were involved in the policy process. They were less interested in adaptation to the European rules. Retailers found support in the government coalition for their demand of prohibiting sales beneath the purchase price. And the German Federal Football Association managed to achieve a new exemption for the central marketing of rights to the television broadcasting of sports events. The last point is interesting, because this exemption was clearly against the policy trend of the European Commission, which had already started investigation into this case. In the end, the negotiations resulted only in partial adaptation.

³⁷ see “Begründung des Regierungsentwurfs vom 30. Mai 1989”, BT-Drucksache 11/4610, published in: *Wirtschaft und Wettbewerb*, 4/1990, at p.332.

³⁸ see “Begründung des Regierungsentwurfs vom 30. Mai 1989”, BT-Drucksache 11/4610, at I.2., published in: *Wirtschaft und Wettbewerb*, 4/1990, p.332.

³⁹ see Bundesministerium für Wirtschaft, *Eckpunkte*, p.4.

6.3. The Netherlands

We have seen that the European Commission over the years have exerted relatively much pressure through case-law on the Dutch competition policy. However, this started already in the 1970s, without leading to a major revision of national policy. There were negative decisions by the Commission in each year in the period from 1974 until 1983. For example, in 1977, the European Commission prohibited a system of collective exclusive dealing of Dutch bicycle dealers⁴⁰, after it had been exempted under Dutch competition law⁴¹ (Mortelmans, 1996: 84-85). Nevertheless a draft for a prohibition of hard cartels failed then. Only when national factors were more favourable to a complete overturn of the system, the European pressure was used as an opportunity.

At the beginning, however, changes were nationally driven. The Netherlands over the decades included some prohibition elements into their abuse system. Collective resale price maintenance and individual resale price maintenance for specific consumer goods were already forbidden in the 1960s. Horizontal price cartels and other horizontal agreements were allowed until the 1990s, however. Neither did the practical application of the anti-trust law make use of all the possibilities an abuse system might offer. First of all, it was above all an informal policy. The number of official decisions was negligible: five prohibitions until 1990, six orders to dominant firms that had abused their market power and two price cartels - for sugar and bakeries - which were made binding on outsiders. With respect to the sugar cartel, the Dutch government had consulted the European Commission, which agreed under specific conditions, which were fulfilled (Mok, 1978: 751). Price and quota cartels were usually not forbidden, but the Minister intervened into the conduct in order to minimise negative effects (for a description of the policy see Uitermark, 1990: 326-398, for statistics of registered cartels, see Asbeek Brusse and Griffiths, 1997: 387).

When the Commission started to forbid Dutch national cartels, there was no intervention by the Dutch government (Mok, 1978: 747). But also adaptation was not really high on the agenda. From the beginning of the 1970s on, the necessity of changes in the competition law was discussed. Suggestions for reform concentrated on three points: measures against boycotts, the public access to the cartel register, and prohibition of especially severe restraints of trade. The last point led to an extremely long period of discussions and new drafts. In 1974, the explanatory memorandum for the budget of the Ministry of Economic Affairs indicated that harmonisation with the European law would also be desirable. In 1977 a draft was presented, which basically would have introduced a prohibition for horizontal and vertical price agreements, with the possibility of exemption, combined with the possibility for the Ministry of Economics to set minimum prices - thus no real attempt of harmonising and the cartel philosophy generally remained the same, too (see Visser, 1982: 739). One basically tried to improve application. The draft, and its follow-ups got much critique from all sides (VerLoren van Themaat, 1978, Asbeek Brusse and Griffiths, 1997: 398, Mok 1980).

The Dutch coalition agreement of 1982 between Christian-Democrats (CDA) and Liberals (VVD) set deregulation and privatisation high on the agenda. This was the beginning of an increased belief in competition and also the beginning of a deregulation agenda which was carried further than in most EC-countries. Paradoxically, its first impact on national competition policy was that all plans for amendment of the WEM were cancelled, which meant the definite end of the drafts for prohibiting severe restraints of trade. One of the commissions installed concluded

⁴⁰ *Centraal Bureau voor de Rijwielhandel*, 2.12.1977, O.J. [1978] L 20/18.

⁴¹ see *Staatscourant*, 1969, p. 110.

that the existing anti-trust rules offered enough possibilities for promoting competition (see Asbeek Brusse and Griffiths, 1997: 398, Kamerstukken II 1982/83, 17 931, no.5). However, this deregulation debates in the end were important for the final amendment of the competition law. There were increasingly more actors willing to break with Dutch traditions, starting with Underminister of Economics (*Staatssecretaris*) Evenhuis in his "Plan for Activities"⁴² of 1986, and they could also make use of the pressure by European institutions.

In 1986, after a decade of negotiations between the competent Ministries and the industry, bidding agreements, according to which the participating firms themselves would decide which enterprise would make the only offer, were made subject to a generic prohibition. An important Dutch building trade association (SPO) had organised pre-tender meetings by the firms concerned since the 1960s. In 1986, the SPO drafted two new regulations for this bidding cartel, laying down the duties of the cartel members and the procedure during tenders. The Dutch Minister decided that these regulations fulfilled the conditions for not falling under the generic prohibition for bidding cartels. When the Commission showed interest in the case, the SPO notified the agreements and asked for a negative clearance. The Dutch government and even the Dutch prime minister intervened per letter and asked both parties to reach a compromise which would lead to an adaptation on the points that the Commission judged to be inadmissible.⁴³ In February 1992 the Commission decided that the Dutch building cartel violated Article 85(1) and imposed a heavy fine⁴⁴. This decision was confirmed by the Court of First Instance⁴⁵. The Commission started an infringement procedure against the Netherlands because of the generic prohibition. What the Commission bothered was that the implicit acceptance of some restraints of trade could be seen by the firms as an actual confirmation of the legality of their conduct (see European Commission, 1993: no.193, Mok, 1995: 201). Since the Dutch government was willing to adapt its competition rules for the building sector, the Commission refrained from taking further steps.

This case was an important initiator of the following amendments of the carte law (Mortelmans). The government and industry had undertook long negotiations on the tendering rules of the WEM and they had failed. Whereas the conflicts between European and national law had had no results in the 1970s, here it was used by actors in the Ministry of Economic Affairs in order to promote their own plans concerning the competition law. The *Staatssecretaris* (Underminister) of the Ministry of Economic Affairs, Yvonne van Rooy, announced a gradual intensification of the competition policy, which would be in line with the convergence tendencies in Europe⁴⁶. This policy led to a series of generic prohibitions for serious forms of restraints of trade, namely horizontal price cartels, bidding agreements, quota cartels, and market sharing.

At the same time, preparations for a totally new competition law were started, under a coalition of Christian-Democrats (CDA) and Social-Democrats (PvdA). In 1992, the Parliamentary Commission for Economic Affairs (*vaste Commissie voor Economische Zaken*) agreed on the draft on a totally new competition law, based on the prohibition system, and similar to the law of the European Communities. In 1994, van Rooy consulted the SER and the *Commissie economische mededinging*. In this first sketch no merger control was included. The

⁴² *Kamerstukken* (Parliamentary Materials) [1986-1987], 19 700, hoofdstuk XIII, no. 118.

⁴³ see the letter of the Dutch *Staatssecretaris* of Economics, Yvonne van Rooy, to the Lower House, *Kamerstukken II* [1991-1992] 22406, nr.7, at p.2.

⁴⁴ *Building and Construction in the Netherlands*, 5 February 1992, [1992] L92.

⁴⁵ *Vereniging van samenwerkende prijsregelende organisaties in de bouw* *nijverheid and other v. Commission* (T-29/92), 21 February 1995, II [1995] E.C.R. 289.

⁴⁶ Letter to the Lower House of Parliament, 6 May 1991, *Kamerstukken* (Parliamentary Materials) [1990-1991], 22 093, no. 1.

SER generally agreed with plans for a new law. There was some discussion on whether the Dutch law should follow the European example also with reference to vertical agreements, but the majority (especially the employees and a majority of the independent experts) plead for a prohibition system for vertical restraints, whereas the representatives of the employers were against it. A relative small majority was also pro national merger control. The advisory commission *Commissie economische mededinging* promoted the introduction of merger control, but also wanted to make some kind of distinction between horizontal and vertical restraints, for example by making vertical restraints subject to an opposition procedure.

The final draft was made by the next government coalition consisting of Social-Democrats (PvdA), Liberals (VVD), and the Social-liberal Democrats (D66). The new Minister of Economic Affairs, Wijers, adopted the suggestions of the SER and the *Commissie Economische Mededinging* and also included merger control in the new law. The parliamentary negotiations were relatively short and did not lead to fundamental discussions on the basic principle of the competition law. Most comments concentrated on the rule of law security and the procedural rules. Another point of interest were the block exemptions to be drafted, however they mainly concerned sectors of a more regional character, like shopping centres, supermarkets and subscriptions for the national newspapers.

Summarising one can say that real policy innovation has taken place in the Netherlands. Was the country for a long time described as the "cartel paradise" of Europe (see for example de Jong, 1992: 921), so has it now a prohibition system, applied by an independent agency and a law which resembles the European rules more than its German counterpart. Whereas the German *Bundeskartellamt* argues that the advantages of being able to draw on its own experience makes an adaptation to the European rules not desirable (Wolf, 1997), the Dutch law has taken over European definitions in order to profit from the experiences of the European institutions.

6.4. Austria

Austria is an interesting case for the following reasons: First its strong involvement of the Social partners in the cartel procedure is a distinctive feature which cannot be found in the other two systems. Secondly, it has become a Member of the European Community only recently, therefore it will be interesting to observe what an influence the EC has had on the policy developments before and after the entry.

That Austria has not been a Community member for most of the relevant period does not mean that the European competition policy did not have any influence on its national competition law. First of all, the European rules themselves apply also to firms from non-Member States, as long as the respective restraints of trade have effects on the markets of the European Community. The United States for example, was confronted with forty-five decisions by the European Commission, which were directed at an American firm. This number does not include those cases where only the daughter of an American firm based in a European country was addressed. Austria, of course, is economically much less important, but there have been 18 cases between 1964 and 1989 where Austrian firms participated either in an international cartel, or in an interest association that was subject to an Article 85 or 86 decision. However, these cases have not had any influence on the national competition policy, probably because they had a clearly international character. No purely national agreement was involved.

The Austrian law underwent many amendments. The first significant changes were the duty for notification of dominant positions and of mergers. This, however, was purely informative and not linked with any kind of abuse control. The first point where the European Community influenced the Austrian competition law were the Free Trade Agreements of 1972. The European

Community then concluded bilateral free trade agreements with the EFTA-countries. These agreements also included clauses modelled after Articles 85 and 86. When a new law was drafted in 1972, this was above all a reaction to this Free Trade Agreement, this was also the main point made in the Parliamentary negotiations (see Schönherr, Dittrich and Frick, 1974: 1-3). More specifically this led to four adaptations, which are significant also now. First of all, the scope of the law was extended to concerted practices. However, concerted practices are treated differently under the law than contracts. Secondly, a new reason for prohibition was included: Generally, the cartel court could prohibit an agreement or practice if it was economically not justified. The new article established that an agreement or conduct which violated international Treaties (thus above all with the European Community), could never be economically justified. Whereas this article was not used some time, it gained some significance later on. Thirdly, the Austrian law now also provided for abuse control on market dominant firms.

A new law was drafted in 1988. The Explanatory Memorandum stated that further adaptation to the European rules was not necessary, but that the changes planned would lead to convergence. It brought a convergence towards the European law in that restrictive agreements (thus not concerted practices) must not be effected before permission. This introduced some kind of a prohibition element. That this was not the purpose of the drafter can be seen in the explanatory memorandum, which states that this change is purely formally and does not mean any change in the principal cartel philosophy. Furthermore cartels were now only registered for a maximum of five years, then they were assessed again.

In 1989, Austria applied for membership in the European Union, official negotiations began in 1993. The most important amendment of its anti-trust rules since then took place in 1993. The most significant change at first sight was the introduction of merger control. This was less a reaction to a fear for concentration in the economy, than inspired by a merger in the newspaper world, where a big German firm had acquired the most important Austrian newspaper editor. This has led to political reactions and it was hoped that merger control could prevent further concentration in this sector. Like in Germany, there are now special provisions for mergers in the newspaper publishing sector. Actually the concentration on the press market has been and is still the favourite subject of discussion in relation with merger control. The details of the rules stem largely from the European Regulation on merger control.

Another important development can be found less in the wording of the law than in practice. One can still find no general clause of "restraints of trade are forbidden". But the fact that agreements need permission, together with the development that the permission criteria of "economical justification" are now taken more seriously than before, this means that these agreements are actually subject to a prohibition system⁴⁷. Concerted behaviour however is only subject to abuse control. Also vertical agreement remains subject to abuse control.

In February of 1999, the Minister of Justice prepared a draft for an amendment of the KartG. An important initiator of this was once again the purchase of an Austrian firm by a German concern. This was used by the Minister of Economics for urging for a substantial reform, favouring a stricter cartel law, applied by the Competition department of the Ministry of Economics, which should transformed into a more or less independent cartel authority. This opinion, however, was not really shared by the Social Partners. They were against *Gelegenheitsgesetzgebung* (legislation inspired by individual occasions). The actual draft, where the governing coalition has agreed upon, includes only two important changes: Firstly, concerted

⁴⁷ Interview with members of the Competition Department of the Ministry of Economic Affairs and the Social Partners on 27 November 1997.

practices are brought under the same regime as agreements and will be subject to relatively control before permission. Secondly, the *Kartellgericht*, will be allowed to start a procedure on its own account, without prior application by the Social Partners or the State representative. European anti-trust rules do not play an important role in the discussions. The explanatory memorandum of the draft simply states that the European competition rules do not require convergence of national laws and that this is therefore not necessary.

Actual converge depends therefore to a large extent on the implementing institutions. The Social Partners have achieved a very important status in the procedure. Not only are they parties to the contract and can therefore initiate a proceeding, but they are responsible for the actual informal negotiations, which are usually the end to the procedure. In more recent years, the competition department of the Ministry of Economics, which is responsible for the application of European competition laws, also takes part in the national law procedure. At the moment, the institutions are very alert to possible influences on trade between Member States and are apparently not willing to risk a second, European procedure. However, the adaptation of policy takes place only gradually. One tries to persuade firms to change their original plans and usually offers them some time to end cartel agreements. An important factor here is that one party of the Social Partners is the *Arbeiterkammer*, which at the same time represents employees and consumers, which clearly can lead to a less consumer-oriented representation than otherwise.

7. CONCLUSION

In this paper, I have compared the development of the competition policies of two founding Member States, Germany and the Netherlands, and one EFTA-member and EU-member since 1995, Austria. In Section 4, we have seen that in the initial point of this study, the 1950s, there was a gap between the supra-national European competition policy and national competition policies, but also between the policies of the three countries.

Then I have tried to identify in section 5, whether the establishment of European competition policy has led to adaptational pressure on the Member States. I have concluded, that the pressure has been relatively low, since European competition rules principally constitute a separate regime and since the Council has taken no measures for harmonising national laws. However, some adaptational pressure has resulted from the application of Articles 85 and 86, which are directed at horizontal and vertical restraints of trade and the abuse of a dominant position. Since decisions by the European Commission have supremacy over national rules, this strongly challenged the possibility for national competition authorities to shape their own policy. This was especially felt by the Netherlands, which was not only confronted with the highest number of negative decisions on national cartels and co-operation agreements, but above all with cases that confronted the core of the national policy. National merger control and national institutions were free from such pressure.

In section 6, I have compared the national cartel laws of 1999 with the rules of the European Community and have concluded that all three countries have converged to the EC anti-trust rules, but in different extent. The Netherlands now resemble the European model most. The German law differs from the EC law in many significant details. Furthermore, it has retained its more lenient policy towards vertical restraints, but here the EC rules will most probably convergence towards the German model. Austria is still lagging behind on a significant scale.

In section 7, I have identified the most important points where the countries have adapted their laws to the European counterpart and where they refused to do so. First of all, we can say that the reaction to adaptational pressure by the European Community in the two founding members Germany and the Netherlands has not really taken off before the second half of the

1980s. Extensive adaptation of the Dutch anti-trust law has been due mainly to the existence of national actors who were willing to back-up the deregulation activities by a strict national competition law and who could use the opportunities of massive intervention by the Commission to minimise industry resistance. Reforms were also backed by independent experts, both in the SER and in the advisory commission *Commissie economische mededinging*. The absence of a national tradition and national experience on a strict cartel law, made it easier and – also for industry – more logical to link in the Community experience. Industry lobbying concentrated more on sector-specific exemptions, and this were introduced after a negotiation process between the Ministry of Economic Affairs and interest associations, to a large extent backed by academic scholars.

In Germany, the situation was different in that there already existed a national tradition of a strict cartel law and a national authority, which had established a Europe-wide reputation in this field. The Ministry of Economic Affairs, the *Bundeskartellamt* and two other advisory commissions were against extreme adaptation. The main argument was that it would mean the substitution of partially more lenient and still somehow changing rules for a law, which has been improved often and for the decades-old application experience of the *Bundeskartellamt* and the courts. The general argument was that European rules should be taken over where they are more strict than the German ones. The most fervent promoter of an adaptation was big industry. They saw the Europe argument as an opportunity to getting rid of those rules which they saw as a burden. They argued that European rules were more flexible and more modern than the European rules and that it would be unacceptable to have different norms in a unified market. In the end, a partial convergence and partial divergence took place.

The Austrian law had been influenced by the European rules already by Free-trade agreements. Accession to the European Community has not led to extensive adaptation. The implementation process, as well as the policy process is to a large extent in the hands of the Social Partners in the advisory commission *Paritätische Kommission*, who are not willing to give up their position. European adaptational pressure is mainly dealt with by anticipating possible interventions by the European Commission and therefore adapting the application of the national law, trying to prevent being over-ruled. The first decision of the Commission on a national price-cartel of banks is underway. The investigation by the Commission was preceded by a failed attempt by the representants of the employees (*Arbeiterkammer*) in the *Paritätische Kommission* to convince the *Kartellgericht* of a concerted practice in the banking sector⁴⁸, so it will be interesting to observe the reactions.

There is an important development taking place in the European competition law, which will surely have an impact on national competition laws. I have mentioned already⁴⁹ that the Commission is promoting the decentralised application of European competition rules⁵⁰. Since this has not really taken off up till now, the European Commission has, in the end of April 1999, published a White Paper (European Commission, 1999c) which discusses really far-reaching changes in the European competition policy. One of the aspects important for this paper is that the Commission is willing to share its exclusive right of granting individual exemptions with the authorities of the Member States. A broad system of block exemptions has to be drafted and prior notification is not necessary any more. While the Commission would continue to determine the

⁴⁸ interview with members of the *Arbeiterkammer* on 28 November 1997.

⁴⁹ p.14.

⁵⁰ thus not the increased use of national laws in situations where trade is affected! This option of “renationalisation” is actually seen as not desirable by the Commission, see European Commission, 1999c: 25.

direction of EC competition policy, the national competition authorities and judges could integrally apply Article 85 in individual cases. If the Commission finds that the effects of a restraint of trade are primarily felt in one Member State, it sends the file to the competent authority, the same redistribution should take place among Member States. For such a system to function, it is necessary to establish a “*network of authorities operating on common principles and in close collaboration*” (European Commission, 1999c: 32). If this proposal is carried through, this essentially should mean three things: First of all, national governments authorities should see a chance of getting more influence again, although by the way of European rules. They might be willing to adapt their national institutions in order to get more grip on the application of European competition rules to “their” cases. Secondly, the European Commission will try to influence national institutions and procedural rules more. Not only by trying to persuade national governments *ex ante*, but also *ex post*, by reserving the possibility of withdrawing a European law case from a national authority if divergence is to be expected. Up till now, however, no plans concerning legislation on national competition authorities have been published. Thirdly, the increased application of European competition laws should lead to an increased exchange of experience between different competition authorities and to a convergence at least of more technical aspects of analysis.

What conclusions can I draw from these findings for my theoretical framework? Competition policy is a special case of national adaptation, because of the form of Europeanisation chosen, namely Community rules for a part of the cases, with a parallel application of national laws. Pressure has not been exerted by legislation, but by decreasing the importance of national laws. This is a much slower and diffuse process and it is therefore difficult to separate national developments from the influence of Europeanisation. However, we can conclude the pressure by Europeanisation is too weak to overcome strong resistance by national actors. This we can see if we compare the Dutch policy from the 1970s and 1980s with that of the 1990s. The described process of restricting the national jurisdiction on cartels was already important in the 1970s. Nevertheless, adaptation began only with the surge of the national belief in free markets and competition. When the country was ready for fundamentally changing its competition policy, then the European anti-trust rules were used as a reference model.

The difference in the degree of adaptation between the Netherlands and Germany can to a large extent be explained by path dependency. Germany has built up a reputation and experience in the field of competition policy – total adaptation of the system would lead to higher costs than in the Dutch case. Political actors as well as the implementing institutions in Germany were against copying the European system. Europeanisation mainly exerted pressure in the direction of making the rules stricter. The German BDI, which was the main German promoter of adaptation, therefore did not find the same windows of opportunities as the actors in the Dutch Ministry of Economic Affairs, which were the main promoters towards adaptation in the Netherlands.

The lack of a significant degree of adaptation in Austria is mainly due to the policy preferences of national actors and to the strong role of the Social partners and especially the representatives of the employers in competition policy, which are naturally not willing to give up their influence in the application of the competition law.

Future research must elaborate on the influence of interest associations in the policy process, and study the influence of policy learning, especially in application of the rules, on the convergence process.

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ABBREVIATIONS

AER	American Economic Review
BDI	German interest association of industry, <i>Bundesverband der deutschen Industrie</i>
CMLR	Common Market Law Review
ESB	Dutch economic journal, <i>Economisch-statistische berichten</i>
EuZW	German journal on European law, <i>Europäische Zeitschrift für Wirtschaftsrecht</i>
GWB	German cartel law, <i>Gesetz gegen Wettbewerbsbeschränkungen</i>
KartG	Austrian Cartel law, <i>Kartellgesetz</i>
Mw	Dutch cartel law since 1998, <i>Mededingingswet</i>
SER	Dutch advisory Social and Economic Council, <i>Sociaal-Economische Raad</i>
SEW	Dutch legal journal, <i>Sociaal-economische wetgeving</i>
SMEs	Small and Medium Enterprises
TVVS	Dutch legal journal, <i>Maandblad voor ondernemingsrecht en rechtspersonen</i>
WEM	Dutch cartel law until 1998, <i>Wet Economische Mededinging</i>
WuW	German legal journal, <i>Wirtschaft und Wettbewerb</i>