

WHOSE REGULATORS? COMPETING PERSPECTIVES ON BUREAUCRATIC AUTONOMY – THE CASE OF THE DUTCH COMPETITION AUTHORITY

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Work in progress

**Kutsal Yesilkagit
University of Utrecht
Utrecht School of Governance
Bijlhouwerstraat 6
3511 ZC Utrecht
Netherlands
+31 30 2538649
a.k.yesilkagit@uu.nl**

1. Introduction

Regulation after delegation can evolve in precipitated ways, as the formal institutional arrangements, which circumscribe the structure, jurisdiction and competencies of independent regulatory authorities, “do not determine the behavior of IRAs and their relationships with other actors because powers and controls can be used [by elected politicians and regulates] in many diverse ways and institutional frameworks are incomplete” (Thatcher 2002: 955). After delegation, the formal institutional design of agencies turns out to be a weak predictor of agency behavior (Krause & xxx). The arrangements with which politicians intend to ex ante hardwire or stack-the-deck of regulatory agencies prove to be working in unintended ways (Balla 1998). Findings of a number of recent studies of regulation conclude that agencies develop different patterns of behavior and that other kinds of interaction between agencies and their direct environment develop than those that were expected on the basis of their design. Examining business-regulatory relationships in Germany and the UK, Coen shows that after they have been created regulators in both countries work with business to define their domestic regulatory roles and create their own distinct political space from government pressures” such that “the regulatory relationship has evolved beyond that envisaged in the initial delegation of powers to the regulator” (Coen 2005: 394-395, 375). Examining the interactions between Dutch central governmental ministries and their independent agencies, Yesilkagit came to a similar conclusion as he found that “[R]ules, procedures, and competences may seem clear on paper as they inform all actors about the formal intentions of the designers. However, the agency leadership can interpret the rules in a different way than politicians had in mind when they designed the rules” (Yesilkagit 2004: 535).

One of the fears of ruling politicians in democratic systems is that because of a ‘poor’ design, regulators will drift away from the goals set in legislation, either because regulators become captured by the sector or because they develop and pursue interests of their own. Delegation of authority may become synonymous for runaway bureaucrats and the fear of losing control (Christensen & Laegreid 2006). The goal of this paper is to delve deeper into the determinants of ‘real’ bureaucratic autonomy of regulatory

agencies. Most studies on autonomy focus on the delegation of formal autonomy and the formal design of agencies (Christensen 2001; Epstein & O'Halloran 1999; Gilardi 2002). Given the gap, the question this paper addresses is what the determinants of informal agency autonomy are. When and under which circumstances can we expect formally independent agencies to be more or less independent than formally prescribed? Which factors cause the degree of informal or real autonomy of regulatory agencies? Or plainly: Whose interests do regulators serve after delegation?

These questions have been addressed from a variety of theoretical lenses and models (see Baldwin & Cave 1999), but the majority of these models falls in either one of the following two lines of perspectives. One perspective considers the degree of bureaucratic autonomy of an administrative agency as a function of the influence exerted by political actors in the environment of the agency. Theories within this perspective, which I will refer to as the *external control theories* of bureaucratic autonomy, agencies with the highest level of autonomy have the lowest level of political constraints imposed upon them by their principals. The other perspective regards the high level of autonomy an agency enjoys as being the resultant of an agency's organizational and its leadership's capacities to forge a solid base of autonomy of its own. Highly autonomous agencies from within this perspective, i.e. *administrative behavioural theories*, are those that have managed to create a wide constituency basis, have strong sense of identity and mission, and a clearly demarcated as well as coherent set of tasks.

To this end, I will examine the extent to which the bureaucratic autonomy of the Competition Authority in the Netherlands (*Nederlandse Mededingings Autoriteit* – NMA) is affected by the control instruments of its principals and the internal bureaucratic capacities of the agency itself. The primary purpose of choosing this case is that of replication: to what extent do the factors that are reported in US studies as having an effect (or not) on the bureaucratic autonomy of regulatory agencies perform within a European parliamentary setting? The variation in institutional setting allows us to assess whether control and reputation variables will perform the same within a fundamentally different institutional setting (Weaver & Rockman 1993; but see Hammond & Butler 2003). If this is the case, we would come closer to having more generalizable mechanisms that affect the autonomy of bureaucratic agencies within democratic

systems. Section 2 presents the two competing sets of theories, followed by section 3 where the research design of this research is presented. Section 4 presents the results and the paper ends with a conclusion.

2. Theories of Bureaucratic Autonomy: Theories of External Control versus Administrative Behavioral Theories

External Control Theories of Bureaucratic Autonomy

There does not exist a single external control theory of bureaucratic autonomy. We can distinguish between theories of external control that have taken a narrow conception of what constitutes ‘external’ and theories that have cast their net somewhat wider.¹ Theories with a narrow conception only take into account the influence of formal political institutions on bureaucratic autonomy, notably the President and Congress; studies with a broader conception also take into account the influence of other non-political actors, such as the courts, interest groups, and citizens. The reader should be aware that this classification of theories is contingent on the political system within which these were developed. As these theories have been mainly developed within the US, the claims developed by these theories are highly restricted to the US system of separation-of-powers and the existent system of checks-and-balances therein. Therefore, I will describe this strand of autonomy research as it has been developed in US political science. After this discussion I will briefly assess their applicability to parliamentary systems.

External control theories of bureaucratic autonomy with a narrow focus on how and to what extent formal political institutions, i.e. Congress and the Presidency, have influence on agency discretion. Within the US, these theories corrected the long-time dominant view within US scholarship that bureaucracy was out of control because only a “small fraction of resources [were] going into congressional oversight, the haphazard nature of the oversight activities that did take place, the lack of expertise by members of Congress and their staffs, and the disregards of bureaucrats for their members” (Miller

¹ But see Krause (1996) who has made the same distinction a decade ago.

2005: 209). During the 1980s the ‘congressional dominance’ theories of bureaucratic politics emerged (McCubbins 1985; Calvert, McCubbins & Weingast 1989), showing that Congress exerted both ex post controls through the appropriation process, legislation and legislative changes, and oversight hearings (Weingast & Moran 1983; Bendor & Moe 1985; Kiewiet & McCubbins 1991; Epstein & O’Halloran 1999) and ex ante controls through agency design, administrative procedures, audits and compulsory reporting (McCubbins 1985; McCubbins, Noll & Weingast 1987; Macey 1992; Potoski & Woods 2001; Whitford 2002). Presidential influence theories of political control were a reaction to this school, pointing out to the congressional dominance scholars that Presidential powers stretch over the bureaucracy thanks to the authority to appoint agency directors, reorganization, and budgetary powers (Beck 1982; Moe 1982, 1985; Wood 1988; Bendor & Moe 1985; Howell & Lewis 2002; Lewis 2003).

Feeling that both congressional dominance and presidential influence studies focused on just one side of the process of political, multiple principal studies of bureaucratic control have broadened this views in two ways. First, these studies have shown that there are no justifying grounds, both theoretically as well as empirically, for treating the influence of these political actor in isolation of each other. Second they have shown empirically that bureaucratic agencies perceive other than these core governmental actors as exerting influence on their decision-making (Wood & Waterman 1991; Ringquist 1995; Hammond & Knott 1996; Waterman, Rouse & Wright 1998; Furlong 1998). Focusing on the President and Congress, Hammond and Knott (1996: 163) conclude that bureaucratic autonomy is a “contingent matter” depending on the strategies pursued by the President, the House and the Senate in a given circumstance. In some circumstances (e.g. events) some agencies may enjoy more autonomy than in other circumstances, but the systemic finding is that political control is a matter of “joint custody” of president, congress and the courts. Further evidence for the concomitant powers of the two core political institutions is brought to bear by Wood and Waterman (1991) who found that political appointments, an instrument shared by both institutions, has substantially more impact on bureaucratic responsiveness than changing budgets, legislation and administrative reorganizations (see also Ringquist 1995).

Furlong found that political control is not an “issue...of congressional dominance

or presidential control, but rather of shared authority and the ability to influence policy in one direction or another”. However, and here he goes a step further than his predecessors, he also finds strong support for the influence of interest groups. He concludes: “interest groups’ ability to access and shape policy both directly and indirectly is evident and must not be overlooked” (Furlong 1998: 61). Interest groups, as Moe asserted once, are key players in the politics of delegation and administrative design, as they, perhaps more than elected politicians, care about the control regime of administrative agencies as these agencies are essential to the policy process and the distribution of public services to their members (Moe 1995).² Finally, the broadest focus is to be found in the work of Waterman, Wright and Rouse (1998) assert that was better to speak of “venues of influence” than of multiple (individual) principals exerting influence on agencies, because “influence [on an agency] is exerted not just by multiple principals but by differently perceived sets of principals [to which the agency] respond[s] in different ways” (Waterman et al 1998: 19).

Administrative Theories of Bureaucratic Autonomy

A common critique of the external control theory studies is that they overlook one central actor in administrative politics: the agency itself. In line with these studies, Ringquist (1995) found executive appointments and budget changes to play a decisive role on bureaucratic decision-making by the EPA. But he also found that EPA autonomy was partially determined by bureaucratic discretion (and how EPA officials used that space), agency resources and the salience and complexity of the policy area. Krause asserts that these studies “have largely ignored the independent role administrative agencies are capable of playing in the administration of policy” (Krause 1996: 1088). Essentially, then, control theories of bureaucratic autonomy have seemingly downplayed the idea that

Once an agency is created, the political world becomes a different place. Agency bureaucrats are now political actors in their own right: they have career and

² An extreme form of interest group control of agencies is of course that of capture (Stigler 1971). Less stringent views are to be found in interest group theories in which interest groups participate in varying forms with public policymaking (van Waarden 1992).

institutional interests that may not be entirely congruent with their formal missions, and they have powerful resources –expertise and delegated authority — that might be employed toward these “selfish” ends. They are now players whose interests and resources alter the political game (Moe 1995: 143).

Administrative behavioral theories of bureaucratic autonomy put the agency, its interests, its capacities, its identity and its mission central to their explanatory model. The main thesis of this line of research is that the autonomy of administrative organizations is a function of the organization’s capabilities to forge its own autonomy from its direct environment. Whereas we could say that in the former perspective the organization is considered as a passive taker of the discretion that its environment grants to itself, in this perspective the agency becomes an active seeker or forger of autonomy. Salience for reputation theories has recently risen due to the work of Carpenter (2001) and Krause and Douglas (2005). Whereas the former has shown that some agencies (e.g. the Postal) became highly autonomous during the developmental era of the American bureaucracy because of the skilful entrepreneurship of agency leaders to build reputation-based networks, the latter have empirically shown that institutional design, one of the key *ex ante* instruments of political control according to control theorists, have proven to be a less stronger predictor of bureaucratic autonomy than professional reputation of agency staff within financial and economic support agencies.

Still, these recent works can be said to be from older descent. Interest in bureaucratic autonomy in political science and public administrations has been prominently figuring within studies of public administration for over a couple of decades (Selznick 1957; Downs 1967; Kaufman 1960; Clark & Wilson 1961; Wilson 1989). Bureaucratic autonomy, or better put: the reaching of it, was considered by these authors a *sine qua non* for nothing less than the ‘survival’ of an agency. Agencies survive, according to Clark and Wilson (1961), when they succeed in offering the right type of incentives (material, solidary, purposive) to their members and beneficiaries of their program to support the power bases of the organization. For this organizations need to compete with other organizations for the scarce resources with which organizations can produce those incentives. During this competition “[E]ach organization seeks to assert

and maintain its autonomy or distinctive competence in order that it may lay unchallenged claim to a stock of potential incentives” (Clark and Wilson 1961:156). The preserving of one’s autonomy has become the critical task, according to Clark and Wilson, of an organization, as “[A]utonomy gives an organization a reasonably stable claim to resources and thus places it in a more favorable position from which to compete for those resources” (Clark and Wilson 1961: 158).

Autonomy must be forged, it does not come by itself. The literature distinguishes between two main sets of conditions for achieving autonomy (cf. Wilson 1989: 188-192). One set of condition is that agencies deliver services that are “worthwhile to some group with influence over sufficient resources to keep it alive” (Downs 1967: 7). It must thus develop a clientele that benefits and perhaps is dependent upon the services delivered by the agency. This dependence, however, should also “impress those politicians who control the budget that its function generate political support” form which politicians can benefit in terms of their re-election or improving of their party political base (ibid.). Carpenter calls this the political legitimacy basis of an agency:

Bureaucratic autonomy requires *political legitimacy*, or strong organizational reputations embedded in an independent power base. Autonomy first requires demonstrated capacity, the *belief*, by political authorities and citizens that agencies can provide benefits, plans, and solutions to national problems found nowhere else in the regime. These beliefs must also be grounded *in multiple networks*, through which agency entrepreneurs can build *program coalition* around the policies they favor (Carpenter 2001: 14, emphasis in original).

A second set of conditions for autonomy is that agencies have the capacities to deliver the benefits to their supporters: it must have the staff with the right skills and the dedication to fulfill the organization’s ultimate goal of securing a stable and strong autonomous position within the public space. Kaufman’s study of the forest service forms an example here. The high degree of unity Kaufman observed within the Forest Service is partially – next to hierarchical specialization, communication procedures, among others – the resultant of the recruitment and socialization of the rangers: they are infused with the

values and norms of headquarters but they behave as if these values were their own.³ In line with this, carefully designed recruitment instruments is what Selznick (1957) saw as a prerequisite for autonomy. The leadership of an organization, if it wanted to pass the “initial survival threshold” (Downs 1967:9) and to maneuver through critical periods ahead, it had to carefully select, first, the “social base”, i.e. those segments of “the [organization’s] environment to which operations will be oriented” (Selznick 1957: 104). A second critical task is the creation of a homogenous staff. This way, the agency’s leadership can build an institutional core who “when matured in this role, perform the essential task of indoctrinating newcomers along desired lines” and secure that future policies of the agency will conform, both in norm and spirit, to the doctrines and mission of the founders of the organization (Selznick 1957: 105).

Carpenter brings these two conditions for bureaucratic autonomy nicely together. He defines autonomy as the capacity of bureaucratic actors to “change the agendas and preferences of politicians and the organized public” (Carpenter 2001: 15). In this he ascribes the bureau chiefs of administrative agencies – the mezzo level – a crucial role. Agencies that have managed to acquire bureaucratic autonomy, Carpenter argues, have acquired that through the capacity of bureau and division chiefs (1) to politically differentiate their agencies’ preferences and missions from those of politicians and organized interests through careful recruiting and socializing their personnel; (2) to develop organizational capacities for programming, planning, delivering public services, and above all, to innovate their programs; (3) and to forge multiple networks in the environment of their agencies that support their agencies’ missions and goals and in the end to gain a strong *legitimacy* base for their agencies.

3. Research Design

Case Selection: Competition Policy Regulation in The Netherlands

³ The leadership of the Forest Service “actually infuse into the forest officers the desired patterns of action in the management of their districts, so that the Rangers handle most situations precisely as their superiors stood looking over their shoulders, supervising every detail...From the Rangers’ point of view, they are not obeying orders or responding to cues when they action on their districts...It is not compulsion or inducement or persuasion that moves them; it is their own will.” (Kaufman 1960: 222).

The main aim of this research is to test the competing theories of bureaucratic autonomy within a different institutional setting than where these theories were initially developed and tested. To this end, I will examine the extent to which the bureaucratic autonomy of the Competition Authority in the Netherlands (*Nederlandse Mededingings Autoriteit – NMA*) is affected by the control instruments of its principals and the internal bureaucratic capacities of the agency itself. The primary purpose of choosing this case is that of replication: to what extent do the factors that are reported in US studies as having an effect (or not) on the bureaucratic autonomy of regulatory agencies perform within a European parliamentary setting? The variation in institutional setting allows us to assess whether control and reputation variables will perform the same within a fundamentally different institutional setting (Weaver & Rockman 1993; but see Hammond & Butler 2003). If this is the case, we would come closer to having more generalizable mechanisms that affect the autonomy of bureaucratic agencies within democratic systems.

The Netherlands' political system is a parliamentary democracy of the consociational type (as opposed to the Westminster type, see Moe & Caldwell 1994), among its basic political institutional features the consequent production of multiparty governments founded upon a stable, often oversized, parliamentary majority coalitions that usually form as a result of the country's proportional electoral system (Lijphart 1999; Andeweg & Irwin 2005). This system also differs sharply from the US system due to the ministerial portfolio system (Laver & Shepsle 1990, 1996). In contrast to the US presidential system where a clear separation of powers between the executive and legislative branches juxtaposes President and Congress on a relatively equal footing, within parliamentary systems the legislature and executive are more or less 'lined up' with the latter being fully responsible and dependent upon the legislature through a vote of confidence.⁴ There is a singular chain of delegation from voters to parliament, from parliament to cabinet, from cabinet leadership to individual minister, and from the individual minister to the bureaucracy (Andeweg 2000; Strøm 2000). At the executive

⁴ This is the case in the Netherlands. In other parliamentary democracies, e.g. where minority governments are the norm such as in Scandinavian countries, the relative balance between the executive and the legislature is more in favor of the latter than in the case of the Netherlands. Parliamentary systems also differ along a range of other more formal dimensions, such as the necessity of a formal vote of confidence. For these variations please refer to Lijphart (1999), Müller and Strøm (2003)

end of this chain, individual ministers are the “relevant privileged actors”. Their portfolio assigns to them an autonomous role for making proposals and even policy for within their portfolio (cf. Huber & Shipan 2002). This system makes a minister an agent of parliament but at the same time a principal for the bureaucracy that is assigned to her portfolio. The autonomy of bureaucratic agencies is partially dependent on the formal powers of the minister (Christensen 2001). Within parliamentary systems, ministers are ultimately responsible for the decisions, actions and behaviour of bureaucrats residing under their authority.⁵

Another reason for why I have chosen competition policies is that of the specific circumstance that the 1998 reform of Dutch competition policies and the subsequent establishment of the Dutch Competition Authority as the main enforcer of this new policy meant a fundamental break with the past practices and culture of the Dutch economy. For decades cartels were not only admitted but within the corporatist and consociational political economic culture of the Netherlands, cartels were also considered the appropriate form of economic governance in the Netherlands. Full market competition was considered as a threat to the stability and survival of various economic sectors. Hence, a 1993 report of the OECD on the Netherlands reported that the (secret) government registers of cartel contained 245 agreements to divide markets, about 270 to fix prices, 50 agreements on exclusive dealings, and more than 200 agreements to control competition in distribution (in OECD 1998:4). The pre-1998 period in the Netherlands has therefore been utterly described as a ‘cartel paradise’ (de Jong 1990). Being a new kid on the block, the NMA was delegated the seemingly insurmountable task of liberalizing the Dutch economic sectors and bring it into line with the principles of liberal markets. In other words, a case study of the autonomy of the Dutch competition authority that was created only in 1998 in order to execute anti-trust legislation in a cartel paradise, is highly

⁵ In the Netherlands, one of the instruments to determine the degree of discretion is laid down in the Guidelines for legislation (*Aanwijzingen voor regelgeving*). Indirectly it prescribes to individual ministers what kind of powers they can delegate to independent bodies as well as the areas on which this discretion may be used. Article 124f (1) states that only on organizational and technical matters and in special cases provided that the ministers beholds his power to (dis)approve with the agency’s decision. Further it prohibits through Article 124f (2) the delegation of advisory tasks with regard to the formulation of general binding rules in matters pertaining to central governmental policies. A minister may delimit the policy discretion of agencies by issuing general (article 124l, 5b); issue guidelines to the agency of how to execute their tasks (article 125l, 6).

suited for the purpose of examining the effects of external political and interest group pressures on the NMA as well as to assert the value of administrative behavioural explanations.

A final reason for choosing competition policies is that it brings the crucial dimension of European public policymaking into the equation. Since the establishment of the European Community competition policies form a core area of European integration. Article 3(g) of the EC Treaty states that within the EU there shall be a “system ensuring that competition in the internal market is not distorted”. Articles 81 and 82 (anti-trust), Articles 87-89 (state aids) and Merger Regulation 139/2004 (replaced 4064/89) delegate to the Commission extensive powers to implement and enforce competition policies within the member states. Council Regulation 1/2003 ‘modernized’ EC competition policies by extending the powers of the European Commission (i.e. DG IV, the competition Directorate General) to the national competition authorities and national courts. In other words, the Dutch competition authority might well be Janus-faced: it has been delegated authority from both the national as well as the European principals. What this situation implies for the autonomy of the NMA is an empirical question. It makes this case more than a mere replication of US theories of bureaucratic autonomy as it also delves into developing a new theory of bureaucratic autonomy within the European multi-level governance setting (Hooghe & Marks 2001). However, this does not enable any generalization to bureaucratic autonomy in multi-level settings as competition policies are quite unique vis-à-vis other areas of European public policy in terms of the extensive powers EC’s DG IV enjoys.

Methodology

Case study design, Rodgers and Jensen (2001) assert, should ideally be standardized such that the causal mechanisms and the outcomes of each individual case study can be cumulated and compared with larger set of case study findings. The design of research in this paper reflects this line of thought. Below I will describe the primary research entity as well as the main interventions and critical events that are believed to have had a

significant impact on the primary entity.⁶ More specifically, this research is a qualitative longitudinal case study that analyzes the impact of a series of interventions and critical events on the NMA's agenda and its agenda-setting process with regards to anti-trust policies. In a sense, this case study combines the basic idea of a longitudinal case study with that of pre-post type of cases studies (Rodgers & Jensen 2001: 238). The time frame starts with the creation of the NMA on 1 January 1998 and ends on 31 June 2007.

DEPENDENT VARIABLE. The bureaucratic autonomy of the NMA is measured in terms of autonomy the agency has to set its own regulatory agenda.⁷ The determination of its own agenda, is widely been considered as one the key indicators of bureaucratic autonomy. The agenda of the NMA, then, is the list of prioritized items to which, when authorized by the NMA leadership, the organization will allocate its scarce resources in order to address the items that have been put on the list. The NMA is a multi-industry regulator (cf. Macey 1992) that has to apply anti-trust legislation across a multitude of different sectors.⁸ The NMA has almost by definition limited organizational resources but in order to fulfil its core task it must choose from among several industries to monitor; this process comes to the verge of organizational decision-making as is described within classic studies of public administration and organizational sociology (Cohen, March & Olsen 1972).

The dependent variable of is agenda-setting. I have focused on two indicators. The first is the names of industries (e.g. housing, finance, health care) that have appeared on the agenda of the NMA. The main aim with regard to this variable is to examine to what extent this list of prioritized items is the resultant of political control or administrative behavioural. In other words, has the NMA put these items itself on the agenda or has it put specific items on its agenda because of external pressures? The second research entity is the agenda-setting procedure itself. The setting of the agenda is a routine process within the NMA. However, routines may change and the procedures may reflect biases as

⁶ Rodgers and Jensen use the terms "outcomes for primary entity" and "interventions" for dependent and independent variables, respectively. Note that there is no fundamental difference between the two approaches.

⁷ I chose here to look at agenda-setting autonomy. This has close resemblance to what Verhoest and others refer to as policy autonomy (Verhoest et al 2004)

⁸ Some sectors fall outside of the jurisdiction of the NMA and are regulated by single-industry regulators, such as the telecommunications regulator OPTA, Health Care Authority, electricity regulator Dte (which is in fact a semi-detached department within the NMA, but has a different jurisdiction than the NMA).

to which kind of items have a larger chance of being listed than others. In other words, examining this variable may reveal to us whether there exist factors that ‘favour’ certain industries to be prioritized over others, and whether political control factors have larger or smaller weight than administrative behavioural in this process. Both variables change over time and we need to account for temporality (see below).

INDEPENDENT VARIABLES. In accordance with the two sets of competing theories, I distinguish between two sets of main interventions. The first set of interventions are from external principals (political control explanations). The brief literature review above has identified a number of determinants that have been claimed to have an effect on bureaucratic autonomy. These are, like several critical events and constant factors, given in Table 1.

From the list of potential political *control variables* I will assess the estimated effects of the appointment of the agency head and agency design on the agenda and agenda-setting procedures of the NMA. The list of potential causal factors that we discussed above is larger, but given the structure of delegation in parliamentary systems, i.e. executive dominance and ministerial autonomy, these are the main variables of which one can empirically expect to exert an effect on bureaucratic autonomy. During the period under study, the Minister of Economic Affairs had the formal authority to appoint the director of the agency. The minister used his authority twice, in 1998 and then in 2005. As regards agency design, the NMA started as a departmental unit of the Ministry of Economic Affairs; in 2005 it was reorganized as an independent administrative body. We may expect that the autonomy of the NMA to set its own agenda has risen after it is become formally an independent administrative body.

The second set of independent variables are those that estimate the effects of administrative behavioural factors on the bureaucratic autonomy of the NMA. Two sets of variables can be distinguished: political legitimacy and organizational capacity. There are two proxies for political legitimacy: the agency’s reputation, here measured as third actors’ perceptions of the identity and mission of the NMA, and the degree to which the agency has an independent power base, here measured as the type and strength of the networks within which the NMA is anchored. The second bureaucratic determinant is organizational capacity. The literature often has service delivery agencies (e.g. schools,

police, social welfare) as point of reference and measures organizational capacity in terms of the extent in which the agency is capable of delivering the services to the constituency that is need of these services. The NMA, however, is a regulatory agency that adjudicates, licenses, or investigates in the field of anti-trust, mergers and state aids cases, and as such it does not deliver services in the sense as is just described. Rather, the organizational capacity of the NMA that is deemed crucial for its autonomy can be measured by looking at the type of industries or individual cases it has prioritized. A high level of organizational capacity will expectedly lead the NMA to handle bigger and more important cases within more important industries. We can then hypothesize that the more the NMA decides in cases with higher levels of complexity, in cases that are (politically) sensitive, or cases in which the “big fish”, i.e. larger firms such as multi-nationals, the more autonomy the NMA enjoys to set its own agenda and determine its agenda-setting process.

CONTROLS. Next to these determinants which we derived form the two main bodies of theories of bureaucratic autonomy we must include as controls or alternative explanations at least three critical events, i.e. events that have had causal effects on the agency autonomy of the NMA but that could not be foreseen by the theory, into the equation. The first is the disclosure of the large-scale but until then uncovered cartels within the construction industry. The television news program, *Zembla* brought the news and interviewed a whistleblower from one of the fraudulent construction firms. This whistleblower revealed within this program that he did have contact with the NMA in early 1999 and that the NMA had thus been aware of these practices since 1999, but had been unwilling to take action. This news aroused a gulf of critique on the NMA from the side of parliament and media, questioning the agenda-setting capabilities of the NMA.

The second event was the enacting of EC Regulation 1/2003 on 1 May 2004. This regulation significantly not only altered the role, powers and position of the NMA vis-à-vis the Commission, but also vis-à-vis the Minister of Economic Affairs. This event lead two Dutch public lawyers to assert that the “discretionary room for the minister becomes smaller the more often the Commission and the national authorities manage to reach policy agreements within the setting of the European competition network” (Verheij & Verhey 2005: 219). I will test their hypothesis.

Thirdly, on 2 November 2006 the long awaited Framework Act of Independent Administrative Bodies was enacted. The law has been debated since the critique that emerged during the 1990s on the fragile constitutional embedding of independent agencies in the Netherlands. The Framework Act wanted to end the flowering of different regimes of independent agencies and standardize both the procedures as well as the final design of independent agencies. Regulatory authorities such as the NMA are by nature and tasks different from the majority of the older and existing independent bodies – regulation versus service delivery – but the debate concerning the independency of regulatory authorities has nevertheless been subjected to the general debate surrounding independent administrative bodies (Verheij & Verhey 2005).

Finally, we need to account for the “growth cycle” of the NMA. Given the specific moments where most of the interventions and the critical events intervened in the course of development of the NMA’s agenda autonomy, this design systematically accounts for the temporal effects of the observations. However, we need also to account for the general sequence of agency development against which background the events and the interventions take place. From Downs and others we learn that agencies struggle for autonomy when they are just created and that its needs, missions, and the orientations of its leadership and staff will differ once an agency has passed the “initial survival threshold” (Downs 1967:9). In other words, we have to assert to what extent our observations on agenda autonomy that are reactions to interventions or events is partly caused by the specific phase or stage in which the agency finds itself.

Table 1 Interventions, critical events and constant factors between 1998 and June 2007

	Description	Measurement
<u>Dependent variables</u>		
Agenda	The list of sector or cases that have been prioritized by the agency and to which it will allocate its resources to	Names of sectors
Agenda setting procedures	The procedures with which the agency selects sectors or cases that will be put on the agenda	Agenda setting and prioritization procedures
<u>Independent variables</u>		
<i>External control variables:</i>		
appointment of agency head	The appointment of an agency head is found to be one of the most important instruments to control the autonomy of the agency	Between 1998 and 1 July 2005, NMA was headed by a Director-General; after 1 July 2005 by Board of Directors
agency design	Theoretically, it is claimed that regulatory agencies need to be independent from political interventions in order to enhance and maintain the credible commitment politicians.	Until 1 July 2005, NMA was a unit of the Ministry of Economic Affairs; thereafter it became an Independent Administrative Body without legal personality
ministerial responsibility	Ministers are ultimately responsible for the behaviour and actions of bureaucratic agencies within their portfolio. Therefore they enjoy extensive powers to override or block agency decisions	The use of override powers or the blocking of an agency decision
pressure groups	Pressure groups representing established firms, new entrants, consumers and other interests within regulated sectors have interests in regulations that benefit their position	The number and intensity of lobbies, as well as their entrance point into the process of agenda-setting
<i>Administrative variables:</i>		
political legitimacy	1. Embedded reputation in 2. independent power base	1. The perception of the NMA by external actors and 2. networks within which the NMA is embedded
organizational capacity	The relative success with which NMA implements anti-trust provisions	The extent in which NMA has been successful in making critical decisions difficult and sensitive cases
<u>Alternative explanations and critical events</u>		
construction cartel affair (9 November 2001)	The program Zembla brought a televised report of serious fraud and cartel practices within the Dutch construction sector	The NMA was criticized for having failed to detect this earlier. I measure the reactions of the NMA to this news and the conclusions of subsequent parliamentary hearing
EC Regulation 1/2003 (1 May 2004)	This regulation decentralized EC competition policies to the member states' competition regulators	The number of times the NMA partook in EC regulatory processes before and after the regulation
time	The temporal dimension	The orientations of an agency leadership will differ once an agency has passed the "initial survival threshold"

4. Results

In this section I will assess the estimated effects of each group independent variables. For each variable I will discuss the extent to which this variable has had a direct, indirect (or intervening) or no effect at all on the agenda and agenda-setting procedures of the NMA. Of these variables, then, I will only describe at some length those variables with a direct or indirect effect, and only mention the variables that had no effect. First the estimated effects of the model's four control variables will be assessed, followed by the administrative and control variables, respectively.

External/Political Control Explanations

Within this cluster of variables, only the appointment of agency heads had indirect effect on the agenda of the NMA. I found no direct or indirect, positive nor negative effect for agency design, ministerial responsibility, and pressure group politics. I will discuss first how appointments had an indirect effect. Then I will discuss the remaining non-effective control variables. I will finally devote attention to the (non-observed) effects of agency design, since this is a prominent variable in delegation and political control literature.

The appointment of the head of an agency can offer the appointing authority a substantial leverage over the agenda of the agency (Moe 1985). In the period under study, the NMA has had two different persons as director-general and president of the board, Mr. A.W. Kist and Mr. P. Kalbfleisch. Kalbfleisch was appointed as director-general in 2003 but was reappointed as president after the NMA got behold of its independent status. In general: While ideology seemingly has not played a role in their appointment, and there is no discernible influence between ideological orientation of both persons and the NMA agenda, there does seem to be a relationship between the dominant political ideological opinions of their time with the choice of industrial sectors on which the NMA focused during their reign.

Kist was a former partner at a large law firm in The Hague, specialised in company law. He was appointed in November 1997 by the Mr. H. Weijers, the fervent

market liberal Minister of Economic Affairs of the junior coalition partner, the social liberal party of Democrats 66 (D'66). On the occasion of his appointment Kist, who has been allegedly affiliated with the Labour Party (NRC 29 August 2005), he made clear that the NMA under his rule would defend the rights of consumers: “We are the guardians of the interests of consumers and keepers of economic democracy (sic)”, Kist told the audience at the ceremony of the installation of the NMA on 25 November 1997 (NRC, 26 November 1997). He explicitly stated that consumers were “the constituency of the NMA” (FD, 26 November 1997). However, just being set up, the agenda of the NMA had been quite overloaded with requests from combinations of firms to obtain dispensation for their concentration.⁹ Although some cases in name of ‘consumer interests’ were taken on, during the early years, the NMA was preoccupied with a burden of these transitional arrangement that emanated from the introduction of the Competition Act in 1998. The remaining capacity was allocated to the implementation of anti-trust regulations, but as one civil servant of the Ministry of Economic Affairs told to the staff of the Parliamentary Enquiry Committee in 2002, the NMA chose the cases it would investigate on a “‘make-a-case’ principle. It was deemed more important”, the civil servant told the committee, “to show [to the outside world, KY] that there genuinely existed a competition policy than to act enforce the law” (Kamerstukken II, 2002-2003, 28244, nr. 12: 142).

His successor Kalbfleisch was formerly the vice-president of the Hague court of justice. He was appointed by the social liberal minister Mr. P. Brinkhorst; he was from the same party as Wijers, but known as somewhat more moderate than Wijers. While Kist has been affiliated with the Labour Party, Kalbfleisch had no political affiliation (ANP, 15 August 2003). When he was appointed director-general in October 2003, the NMA was still preoccupied with the investigations in the construction industry. As we will see below, the large scale detection of cartels within the construction sector in November 2001 and for whose neglect the NMA has been severely criticized by the public and

⁹ The number of these requests exceeded the estimated expected number of such requests: 1040 requests were submitted, while 350 were expected. In addition, the NMA expected to process approximately 150 complaints with regard to abuses of dominant positions from individuals or firms from different sectors or tips from informers concerning cartels: it were 266. Finally, 50 tips were expected but 154 were submitted. Although the agency had correctly prepared itself with regard to the type of work that would, they miscalculated the amount of it (NMA 1999 *jaarverslag 1998*).

Parliament and the latter's special investigative committee that was set up after the affair came into daylight. Next to the construction sector, the NMA continued investigating areas that had been put on the agenda by Kist, the free professions (e.g. lawyers) and the financial sector (e.g. banks and insurance companies). At the same time, the number of sectors being liberalized was increasing during the period Kalbfleisch assumed office. The sectors under liberalization were public transport, energy sector, and the health care sector, which enlarged the number of areas to which the NMA had to attend.

The agenda of the NMA has been to a large extent been the consequence of the choices of the directors, transitional arrangements, and the increase of the areas of the Dutch economy that were liberalized. Ministerial influence on the agenda through appointment has been indirect at best, as no direct political or ideological linkage can be made between the ministers' political background and the two directors. Why were other variables not effective? Agency design has had no effect on the agenda because there were no significant changes observed in the agenda and agenda-setting procedures that could be attributed to the design and change of design the NMA during the period under study. The same is true for the effects of ministerial responsibility.¹⁰ Before independence, the minister had the authority to issue instructions in relation to individual cases to the director-general of the NMA; after independence, this authority was curbed and replaced by the authority to issue only general instructions as to how the board of the NMA should take other interests than economic ones into account (van de Gronden & de Vries 2006: 61). But throughout the period, no use has been made by the minister of these authorities.

I will illustrate the absence of effects from agency design in somewhat more depth, by looking at the interactions between the ministerial department at the mezzo-level. The central department has dense contacts with the 'parastatal' agencies that fall under the portfolio of a minister. So for ministerial influence we need a closer look at the interactions between the department and the NMA.¹¹

¹⁰ In the case of the NMa, the minister may prescribe such guidelines to the board (Article 5d Mw), but these guidelines must focus on how the NMa should deal with non-economic interests when deciding on the exemptions laid down in Article 6(3) (the same as Article 81(3) EC).

¹¹ The issue of independency has been a constant issue of debate. Due to the political implications of having an independent agency regulating competition policies in the Netherlands, which at that time was

Contacts between the NMa and the Ministry of Economic Affairs have been institutionalized. The basic rule is that contacts between the ministry and NMa will not involve discussions or exchanges of information on the individual case level. There are several contacts at different levels, both formal and informal: the director of competition at the ministry and the board or director of the staff unit ‘strategy and communication’; both sides have established account managers for relationships with NMa and Economic Affairs, respectively, and at the level of individual civil servants policy units of the ministry and the competition division of the NMa. At one of the high level meetings the issue separating electricity infrastructure from the electricity production. At such meetings, as was described to us by a higher NMa official, they discuss

All kinds of issues. They keep us informed about developments on high strategic issues that are going on at their side, and we keep them informed about current developments at our agency. They thus for example inform us about the latest developments concerning the ‘separation file’ [separation of infrastructure from production of electricity, KY]. We then say, well be informed about the fact, although it is none of your business, that a report about such and such is about to appear [that might of relevance to you]... It’s just plainly about keeping each other informed (respondent A from NMa).

During these contacts, there is a strict distinction between policy issues and monitoring issues: “We *discuss* policy issues with them, but we only *inform* the department about

still a cartel paradise, the Dutch legislature did not dare to go as far as to design the NMa as an independent agency (Verheij and Verhey 2005: 148). At the same time it was clear to all involved parties that the regulation of competition could only be successful if politicians would abstain from intervening in this area. The first Competition Act therefore contained a clause that stated that any intervention by the minister in a specific case should be based on a writing that would be attached to the individual case’s file in order to ensure as much as possible the transparency of the process (Article 4d Competition Act (old), *Staatsblad* 1997, 242). This clause should also ensure that any general policy instructions from the minister to the director-general of the NMa should be published as an official publication in the form of policy rules (*beleidsregels*) as specified by the General Act of Administrative Law (Kamerstukken II, 1995-1996, 24707, nr. 3: 60). In other words, although the NMa was designed as a departmental body under the direct hierarchical supervision of the minister, the independence of the NMa in the handling of cases was as much as possible shielded from ministerial interventions. In later evaluations, it turned out that the minister, despite the severe lobbying from pressure groups, has never intervened in the agenda of the NMa when this agency was part of the ministry.

issues concerning the maintenance of the law” (respondent from NMa). Informing means, for example, that the NMa will announce the raising of tariffs so that the department can prepare the minister for how to react on this news when she is asked by the press about it.

The Ministry of Economic Affairs can influence the agenda of the NMa, albeit in an indirect manner. Whereas the ministry, as we have seen, abstains itself from intervening in the agency’s decisions, it does have complete control over the funding of the agency. This has to do with the fact that only the board of directors, which replaced the director-general, has been granted independency. The agency’s body has no legal personality and is part of the departmental hierarchy. Although none of the civil servants can take orders or directions from the department, the department can influence to a large extent the budget mechanism. The NMa is dependent on the department in budgetary sense in two ways: the yearly workplan and the reorganizations. In the work plan, the NMa sets out how it is going to allocate its capacity over the various tasks and prioritizes, following its yearly agenda, the sectors that will enjoy specific scrutiny from the NMa. This work plan is then sent to the ministry for a financial approval, it becomes an issue of the half yearly departmental business cycle: the NMa is accountable to the department about the targets set and performance. The same goes for reorganizations (NMa year report 2004: 36). The organization of the NMa can be organized within the frame that is agreed with the ministry. All changes to personnel and task allocation within the formal organization chart is the responsibility of the NMa; however, if the NMa decides to set up a new unit or subunit within one of the existing units, then that becomes a reorganization, which has to be approved of by the department. However, there is a grey area of organizational changes that can or cannot be defined as reorganization. A seemingly simple transfer of a number of staff members from one unit to another “could be interpreted by the department as a reorganization. Then we have to coordinate that change” (respondent C from NMa).

Finally, pressure groups did not exert decisive influence on the NMA agenda, but they were active in pleading their case to the minister at the time when the agency was part of the ministry. As a matter of fact, the immense pressures from the sectors which the then Minister of Economic Affairs, Mrs. A. Jorritsma (1998-2002), experienced, was one of her main motives to grant an independent status to the NMA. She explained:

“Now they [pressure groups] come to me with their complaints every day. But after having watched the NMa operate during the past six months, I have the strong feeling that I do not need the formal powers to intervene in its business. I really want to get rid off of it” (Jorritsma in FD, 12 September 1998).¹² Despite these pressures, industry lobbies did not exert any discernible effect on the agenda of the NMA. The exception is consumer interests, but this was the proclaimed constituency of the NMA, as Kist has said several times in the initial phase of the NMA, to make clear that this was the prime legitimacy ground upon which the NMA would do its difficult job. At the same time, that this has been also the motto of an agency leader creating a reputation for being tough on cartels is an issue we will explore in somewhat more depth below.

Administrative explanations

Bureaucratic agencies earn political legitimacy if they can build favourable reputations, that is beliefs and perceptions about the agency, among actors in their near environment and the more distant public, and when these reputations become vested within networks of groups that have an interest in the agency’s programs. The capacity to deliver its products is intricately related to the reputation of an agency. Autonomy is partly therefore forged by the quality of the services it delivers to its beneficiaries. However in the case of a market regulator, there are no services to be delivered as in the vcase of schools, or welfare agencies. A competition authority adjudicates and regulates, thereby potentially incurring harm to the groups it regulates. The beneficiaries are consumers, but there is no clear group of consumers, except than when represented by some consumer association, and they are no directly affected group in relation to the services or products which the regulator delivers. Therefore, the legitimacy of a regulator should therefore be measured in terms of the load and economic importance of the cases that are dealt with by the authority.

In the case of the NMA, the task of building a reputation and supporting coalitions

¹² During the debate on the budget of Economic Affairs, there was criticisms raised against the intention of the minister to autonomize the NMa so quickly, without waiting for the scheduled evaluation in 2001 of the Competition Act (FD 14 August 1998). The largest interest organization of employers, VNO-NCW, was highly critical as well, deeming an independent agency that defines competition and markets too farreaching (FD 15 august 1998).

befell upon the shoulders of the director-generals.¹³ When the NMA was created, it was positioned hierarchically subordinate to the Minister of Economic Affairs, the Dutch economy was a ‘cartel paradise’, and political pressures for liberalizing the Dutch economy were high. So, although the formal powers of the NMA were slim, it nevertheless had to start in the midst of a period when the Netherlands had to show to the OECD as well as the European Commission (see below), that it was to make serious headway with further strengthening of its competition policies. A strong reputation and supportive coalitions were *sine qua non* for the success and survival of the NMA.

One step towards establishing its reputation as a cartel-basher was set during the opening ceremony of the NMA in November 1997 (see above). On this occasion, the Royal Decree (i.e. cabinet order) by which he was appointed was handed to him by the crown prince H.M. Willem-Alexander in front of an audience that included the, minister, then European Commissioner of Competition, Mr. K. van Miert, representatives of large law firms, and representatives of virtually every sector that was to be regulated by the NMA. This was an highly unusual setting for the installation of an ordinary higher civil servant. In addition to symbolism of the meeting, Kist made clear in his maiden speech that, as we saw above, considered consumers as its agency’s most important constituency. He considered the breaking down of cartels the path towards economic democracy. Of course, the speech contained highly symbolic and normative references, but the message was clear to both the audience that was present as well as the broader public.

In the time left from processing the dispensation requests, the NMA showed its teeth in a number of ‘pro-consumer’ cases. In the end of February, the agency announced to closely monitor the intended merger between Netherlands two largest conference centers (RAI in Amsterdam and Jaarbeurs in Utrecht) and in one sweep it announced to investigate the allegedly dominant position of the NVM, the largest association of real estate agents in the Netherlands (FD, 26 and 28 February 1998, respectively). A few months later, the NMA struck again with its advice to the government to prohibit the

¹³ A directorate-general is an ordinary position within the higher ranks of the Dutch civil service. In general, a ministry has two or three directorates-general and the directors-generals form the top administrative management of a ministry together with a secretary-general.

alliance between the Joint Administration Office (GAK), one of the five private social welfare executive agencies, and the banking and insurance company Achmea; it was the first time that competition agency did advise the government to prohibit concentration (FD, 19 June 1998). Within the same period, NMa acted proactively when it had the Minister of Economic Affairs ask Commissioner Van Miert to revert the handling of the intended merger between Vendex and KBB, two of the largest retail companies holding large warehouses, to the NMa instead of handling this case by the Commission itself; the effects of the merger, the NMa argued, were primarily national (FD, 23 April 1998). And as if in passing, the NMa blocked the merger of two chemist's retailers, Internatio-Muller and Brocacef (FD, 18 July 1998). But also sectors that had not thought about themselves as having anything to do with market principles, were aptly declared to be businesses and were declared to fall under the jurisdiction of the NMA. This happened to trade unions and hospitals as the NMA announced that their activities made them part of the jurisdiction of the Competition Act (FD, 11 June 1998). To give a final example, in March 2003, the NMa imposed a fine on a number of shrimp fishing firms. This fine of 4 million euros caused a sharp decline in the shrimp prices (from 4 to 1,61 euro), and as could be expected heavy protest accompanied by barricading harbors and ferries between the mainland and the northern islands by producers' interest groups in the fisheries. It led to a series of parliamentary questions which were supported by the majority of the MPs (cf. *Handelingen II, 2002-2003, Aanhangsel: 1887*). The questions were addressed to the Standing Committee of Agriculture, Natural Resources and Food Quality to its minister, but soon the question spilled over to the Economic Affairs department. The NMa's decision had become a political issue for the ministry. Unimpressed by these protests and parliamentary upheavals, the NMa instead of revising its future line towards this sector under the pressure from the sector,¹⁴ told directly to the Ministry of Agriculture that "you should radically reform that sector" (respondent A from NMa).

The reputation of the NMA, despite of the activism, received a heavy blow from the construction cartel affair. The affair proved a critical opportunity for the opponents of an independent status of the NMa to downplay the reputation of the NMA as a cartel-

¹⁴"The NMa keeps critically monitoring the shrimp fisheries sector", 3 December 2006, on *Visserijnieuws.nl*, at <http://www.visserijnieuws.nl/>, consulted on 25 July 2007.

basher. Like many other critics, the parliamentary leader of the Labor Party, Mr. Ad Melkert mockingly said that the NMa appeared to better at handling “barbers and physiotherapists” than the big cartels (FD 16 November 2001). The director-general defended himself and his agency by saying that these cases are difficult to prove and that the NMa lacks crucial powers, e.g. to enter private houses for searching evidence, to conduct this kind of investigation properly. But this was to no avail: the reputation of the NMa was hemorrhaged, only to be restored to some extent by a positive review the NMa received from the General Accounting Office (ARK xxxx).

Alternative Explanations and Critical Events

CONSTRUCTION CARTELS AFFAIR. On 9 November 2001, the television newsmagazine *Zembla* brought the news of a huge cartels in the construction sector. The journalists disclosed the existence of ‘shadow accounts’ in which all of the largest Dutch infrastructure builders were mentioned. Together they should have rigged their biddings on governmental public works projects on a massive scale.¹⁵ What is more, the documentary further disclosed that the NMa, together with the Public Prosecutor’s Office, had been approached by a whistleblower, had already been approached and informed by former director of one of the construction firms more than two years ago, but both public organizations had not undertaken any action against the cartel. Parliament reacted aghast at these facts. It raised doubts about the prioritizations of the NMa and the agency’s internal procedures of processing external signals, i.e. that it had focused itself on “small fish” and neglected the larger cases the during the past years (FD 15 November 2001).

The reasons for why the construction sector had not been give the utmost priority hitherto were revealed during the investigations of parliamentary enquiry committee (Kamerstukken II, 2002-2003, 28244, nr.12). First, of the total of 824 informal signals the NMa reached between 1998 and 2001, not more than 10 came from the construction sector; of the 454 formal complaints only 8 were from the same sector. However,

¹⁵ Estimations of experts was that the builders had increased their price with about 8% in average.

measured by the criteria¹⁶ the NMa employs to determine the priority of these signals, none of them were of such quality that it required further investigation by the NMa. A second reason was that it wasn't the priority of the NMa at that time to actually check the information or to monitor the new Competition Act. As one civil servant at the NMa told the staff of the parliamentary committee in 2002, if the NMa had decided to maintain the act "the organization had to make a complete different prioritization" of its task (Kamerstukken III, 2202-2003, 28244, nr. 12: 151), i.e. instead of giving priority to the assessment of dispensation requests, it should have allocated the bulk of its organizational capacities to maintenance of the law. Finally, the capacity the NMa did retain next to the dispensation request to maintain the law, it used this for cases with a high consumers' interests, such as the presumed vertical price agreements concerning gas between service stations and their oil companies. Besides having a consumers' profile, price agreements in this sector were very difficult to prove and was a real "energy usurper", as one respondent told the committee.

Following the affair, the NMa made certain alterations to its agenda and agenda-setting procedures. First, it immediately prioritized the construction as it set up a special project team to investigate the construction sector (FD 23 January 2002) and opened a special phone number for (anonymous) information on cartels. Kist also announced a new procedure to set the agenda. During the presentation of the NMa 2001 year report, Director-General Kist announced that the NMa would from now on involve stakeholders, i.e. Consumers' Association, in the setting of its agency's agenda in order to "involve society and to increase the transparency of the NMa" (FD 28 June 2002). The NMa would remain responsible for deciding which sectors and cases would be investigated.

EC REGULATION 1/2003. Since 1 May 2004, competition policies within the EC have been fundamentally altered. Since the enactment of Regulation 1/2003, national competition authorities have become responsible for the direct implementation of Articles 81 and 82 EC. In the Dutch case, this has had at least formally consequences for the authority of the minister to intervene in national anti-trust issues. Specifically, this new

¹⁶ The formal criteria are 1) economic interests, 2) consumer interests, 3) the severity of the offence, and 4) the expected effectiveness of the NMa to address the case. See <http://www.nmanet.nl/nederlands/home/Actueel/Themadossiers/Procedures/index.asp>, consulted on 25 July 2007.

regulation means that the authority of the minister to prescribe general guidelines as regards anti-trust measures, which are granted to the minister on the basis of Article 5 d of the Dutch Competition Act, have practically become void (Verheij and Verhey 2005: 218). The same goes for Article 5d of the same act which states that the minister can give the NMa instructions whenever the NMa attends (advisory) meetings of competition related committees at Brussels – this according to one public lawyer, Sauter (2002, *IN van de gronden & widdershoven*), is against the authority of the Commission in EC competition policies. Regulation 1/2003 not only delegates the authority to national competition authorities to implement 81 and 82 EC, but it has also established the European Competition Network with the main goal of harmonizing EC competition policies through regular meetings and discussions with all of the national competition authorities. The influence of the minister is shrinking, then, the more competition policies become harmonized at the EC level. The empirical question that interests here is: how far are we? To answer this question we will examine the extent to which the NMa has been tied to and embedded within European networks of competition policymaking. First we will look at the period preceding 1/2003, which is actually in force since 1 May 2004.¹⁷ Then we will examine to the period followin May 2004.

From the NMa's first year report (1998) we learn that it had already been active in the advisory committees on anti-trust and mergers, as well as that the agency had partaken in general (expert) committees. It had for these purposes established a EU working group within the agency that coordinated the agency's EU activities. In addition the director-general partook each year steadily to the DG conference which were attended by the DG's of all the participating national competition authorities. From 2001 onwards, the attendance to these formal meetings – where the NMa together with EA and perhaps others departments represents the Dutch position with regard to competiytion policies – the NMa starts partaking within several informal working groups, of which the working group on leniency policies is perhaps one of the most important ones. In 2000 already the NMa partakes in the first proposals to harmonize leniency policies across the EC. In 2001, this results in the establishment of a working group. In addition, another working group is created, one on the 'multi-jurisdictional mergers', with the aim to come

¹⁷ The data is from NMa year reports unless reported otherwise.

to guidelines on how to handle cross-border merger cases. At the end of 2002, a European Competition Network (ECN) is established. During the run up to the modernization of the EC competition policy, The ECN is set up by the Commission with the goal of further harmonizing the policies and implementation of competition policies across the member states. In 2003, the Commission publishes a number of Announcements conveying guidelines for how to apply the EC provisions.¹⁸

The enactment of 1/2003 brings changes to the working procedures of the NMa. The new regulation now prescribes to apply not only national competition law but also EC competition law to cases that affect trade between two or more member state countries. The NMa is further obliged to inform the Commission about new investigations and drafts of decisions in individual cases, so that the Commission can check that decisions made by national authorities are in line with each other and with the EC rules. Also, the regulation enables under strict conditions the sharing of confidential information between national competition authorities and the Commission. Finally, the regulation delegates to NCAs the authority to advise national courts on how to interpret and apply EC Competition legislation (as *amiciae curiae*). These are formal powers, whether used or not, that enormously enhance the bureaucratic autonomy of the NMa vis-à-vis the Dutch government.

Discussion and Conclusion

In this paper I compared and tested the main theses of two competing perspectives on bureaucratic autonomy on a single case study of the agenda-setting process within the Dutch Competition Authority. All the disclaimers of a case study apply. Following Rodgers and Jensen, I presented the case in a way that can be standardized and be compared with the findings of other case studies. More than this, however, I explored the tenability of the mainly US based theories of bureaucratic autonomy within a case study of competition policies and regulation within a parliamentary system. It is now time to assess the relative impact of each the groups of variables.

Starting with the independent variables from the external control theories. The

¹⁸ See <http://ec.europa.eu/comm/competition/antitrust/legislation/legislation.html>

appointment of an agency is with great consensus among US scholars pointed out as the main instrument of political control that politicians have to their avail to influence the agenda and decisions of an agency under their control. In this case study, I found only an indirect effect of appointment authority. With indirect is meant that the director of an agency, here the Director-general of the NMA, does have an impact on the agenda of his or her agency, but that partisanship does not play a role in the appointment process. As regards agency design, it is expected that agencies that are designed to become independent from the principal will also have more actual autonomy than agencies that are not formally independent from the principal. Here we saw that even during the period the NMA was not independent from the Minister of Economic Affairs, it enjoyed a measure of autonomy parallel to that the NMA enjoyed when it had become independent in 2005. The main reason for this is twofold. First subsequent ministers' held high esteem of building and maintaining their credible commitment towards the industry; secondly independency saved them a load of monitoring the agency, which they otherwise had been forced to by the pressures of industry lobbies and parliament. Herewith I already touched the role of interest groups: these exerted large pressures on the minister, but had very little impact on the NMA's agenda. Only one interest claimed the NMA to defend: that of consumers. In conclusion, we find very small support for external control explanations within case study.

By contrast, we find more support for administrative behaviour theses. Political legitimacy, according to administrative behavioural theories, understood as the existence of solid beliefs held by citizens, interest groups and politicians alike about the capacities of the organisation and the existence of solid and strong advocacy coalitions around the organization is the stepping stone for building an autonomy base. The beliefs must be raised and the coalitions be built, which is the task of the agency's mezzo-level or in this case that of the director-general. This study has shown that from the beginning the NMA leadership has tried to forge an image of cartel-basher, guardians of consumer interests and keepers of economic democracy. This successful image framing was reflected in the prioritization of sectors with high consumer salience: health care, housing market, fisheries, and retail. However, the NMA's reputation as a pro-consumer advocate was shattered after the construction cartels affairs was less. By its very nature, it was also less

successful in forging networks: a multi-industry regulator has more enemies than friends. In this case, we could argue that for regulators catching the ‘big fishes’ and handling these cases without making mistakes is a more serious precondition than embedding itself broad networks.

Perhaps the most substantial impact on the politics of agenda-setting within the NMA was the single event of the disclosure of cartel scandal within the construction industry. Of course, this event’s effect worked itself out through political legitimacy: the image that the NMA has missed the giant cartels in this sector did raise people’s doubts about the reputation and the organizational capacities of the NMA. So this event underscores the salience of administrative theories of bureaucratic autonomy. This seems to be different for the effects that EC Regulation 1/2003 had. The decentralization of EC competition policy exerts effects in two directions. The first direction is that the further Europeanization of competition policies gives even lesser room for ministerial and parliamentary intervention in the agendas of the NMA and its counterparts in other member states. With EC 1/2003 even the ministerial power of issuing a general instruction to the NMA in relation to how it should account for non-economic interests within anti-trust policies has become obsolete in the light of Community law. The second direction is that the NMA will become embedded in a strong coalition after all, but now through the European Competition Network. The strengthening of this network and the growing cooperation between the European Commission and the national competition authorities will lead to a greater shielding of the NMA’s agenda from national pressures and concerns.

The findings of this case study suggest further research. To what extent are the findings for external control variables attributable to institutional setting of parliamentary system, i.e. the Netherlands? Checks and balances are not alien to parliamentary systems, but multiple political checks as that in the US between Congress and the President is absent in the Netherlands. Does this imply that administrative behavioural determinants of bureaucratic autonomy within parliamentary systems ‘genetically’ built-in? Further enquiry is needed of the Europeanization of competition policy for the autonomy of national regulators. In this light it would be interesting to delve further into the several emerging multi-level networks of agencies.

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