

The parliamentary enquiry on fraud in the Dutch construction industry collusion as concept between corruption and state-corporate crime

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Abstract. In December 2002 the final report of the Royal Commission concerning *Irregularities in the Dutch Construction Industry* was published. The broadcasting of the public hearings in the months before was breaking news. It proved the whole sector participated in illegal practices, ranging from fraud, unjustified subsidies and license issuance to real bribery and money or favours to individual politicians or higher-ranking public servants; from undercutting the market, monopolisation and forcing up prices, to selective control by partial inspectorates. In his article the author, an advisor to the Commission, summarises the mayor types of irregularities the report reveals with special interest in the network dimension they had in common. The Commission spoke about collusion as the key problem. Collusion can be described as secret agreement for a fraudulent or deceitful purpose, especially to defeat the course of law. Theoretically this concept can have many faces. In this parliamentary enquiry it was illustrated in three ways: as anti-trust illegalities, as a kind of governmental crime, and as kind of corruption. The report showed a long-lasting structural interrelation between these three types with a special role for the twining between collusion and corruption. Corruption research often mentions collusion as a cause, condition or explanation of corruption. But rarely is that argument illustrated in detail. This article seeks to do so. Especially when corruption is hard to grasp in modern society, a solution could be to take collusion as 'a network offence' more seriously. The collusion subsystems revealed here are relatively stable networks, invulnerable to individualised anti-corruption legislation. The author pleads for stricter rules governing state-corporate interrelationships, more severe control on network abuses, and the introduction of minimum standards for public contracting as proposed by Transparency International.

Introduction

Early in November 2001, in a television documentary entitled "*Sjoemelen met miljoenen*" ("Fiddling by the Millions"), a Dutch public broadcasting corporation paid attention to double-entry bookkeeping, slush funds, forced-up prices, illegal prior consultation, cartelisation, bribery and fraud in the construction industry. It was also alleged that corrupt contacts existed between public servants and contractors. Virtually at the same time, the news media reported that three large construction companies had entered into a transaction with the Public Prosecutor's Office to avert prosecution for fraud in connection

with the Schiphol Train Tunnel Facility Project. In this transaction, companies had paid a fine of 1,000,000 Euros each. In addition, the three construction companies were to pay back to their client, Dutch Rail (NS), the amount of 5,000,000 Euros each. NS, in turn, was to pay back 25,000,000 Euros to the Dutch Ministry of Transport, Public Works and Water Management (V&W) because of subsidies it should not have received.

This concurrence of events produced such a disconcerting picture that the Lower House of the Dutch Parliament decided to conduct a parliamentary inquiry. The objective of the inquiry was to gain an insight into the nature and extent of the irregularities and the role of the authorities as both client and law enforcer. After preliminary investigations had been conducted, public hearings were held in August and September 2002, in which over 60 witnesses were questioned. These hearings and the Final Report, which came out on 12 December 2002, confirmed the shocking picture the media had presented in the beginning of that year, that the entire sector was in on the fraud and other illegal practices. Management knew about it and authorities helped to perpetuate the system.

In this article, I would like, in my role as co-investigator, to present a synopsis of the case, analyse the conduct of its protagonists and deal with the explicatory theory which the – Parliamentary Commission arrived at. It may be summed up as a ‘concept theory’ founded on secret deals and relationships; a collusion theory. The Commission distinguished three forms of collusion in the course of its investigations: collusion between contractors themselves, such as illegal price fixing; collusion between the authorities and the construction sector, such as favouring certain contractors; and collusion at the individual level as the pathway to or initial phase in the bribery of public servants, such as the wining and dining of public servants in positions of authority. In the case under discussion, it became evident that one form of collusion followed on from the other. Jointly, they formed a culture, in which those within the sector placed themselves above the law and were able to manipulate the authorities. Where they succeeded, the authorities were also in large part to blame. In this article, I intend to comment on this and make an endeavour to place the collusion theory within a criminological context.

The Schiphol Tunnel

What illegal acts were committed by the three construction companies and their clients in building the Schiphol Tunnel? The companies had sent 189 forged invoices for the purpose of transferring the favourable business results of one of them, KSS, to the other two, Strukton and HBW. Through this

practice and by sending additional invoices for general costs, transferring interest accrued on liquidity surpluses and directly benefiting the other two in acquisitions, the actual profit of 42,000,000 Euros was brought down to 13,000,000 Euros, a difference of close to 30,000,000 Euros. The decision to lower the profit and deposit it into a slush fund was taken by the Management of the co-operating three companies (PECB, 2003: 213). The decision was not put in writing. In addition to this, there was a second slush fund, which was fed with the proceeds from the sale of surplus materials and VAT returns, for instance when workers bought materials for private trading through the company. The Management of the three companies was aware of this slush fund as well. The auditing accountant had not noticed the irregularities. According to the Management, the motive behind the 30,000,000 Euros was to build up a (hidden) reserve. The Committee deemed it plausible that the idea behind it was to gain a better negotiating position, since fresh negotiations had to be held with NS for each subsequent piece of tunnel. This was the result of the Construction Team Agreement, in which the tender had been worked out. It is a form of tendering on the basis of a skeleton contract, in which the offering and the bidding party, on the basis of open accounts and fair market prices, renegotiate the project and settle the account phase-by-phase. In complex construction projects, this option may be chosen in order to get the work started quickly, although it is an expensive way of tendering; getting rid of the competition always leads to cost increases. Nevertheless, NS chose this course, which becomes understandable in view of the fact that Strukton was a wholly-owned subsidiary of NS and that KSS in turn was a combination of Strukton and HBW. Client and victim in name, NS had also a direct interest therefore in two of the three contractors.

Against the advice of its own construction office, the Ministry of V&W – the granter of the subsidy and the party which ultimately footed the bill for the project- had approved NS' wish, in any case for the first half of the project. Without the Ministry's approval, NS then continued the practice for the second half. When the Ministry found out, it had no other option, it testified, than to 'approve a fait accompli'. In a later stage, NS requested yet a third subsidy of 60,000,000 Euros. The Ministry's Financial and Economic Affairs Office refused to approve the subsidy. Some time later, the then Minister did approve the additional subsidy 'without allowing herself to be well-informed on the matter', according to the Committee. It described the procedure as messy with the Ministry 'being overtaken by events' (PECB, 2003: 280). That, in fact, was an understatement. The Ministry was, after all, familiar with the interconnections. Also for this reason, public servants had recommended a public tender and had advised against the extra money for NS. The Minister decided to go ahead anyway. She gladly granted the sector the overpriced

construction work and could not surmise that her decision making would be exposed in such detail because of the contractors' deception.

The “shadow accounts” of whistleblower Bos

When investigating the Bos ledgers (and subsequently three more shadow accounts), the Commission learned that extraordinary alliances were no exception in the construction world. This case file formed the key to the answers in the Schiphol Tunnel case.

Ex-director Ad Bos of the Koop Tjuchem construction company kept handwritten records of the years 1988–1998, in which all kinds of setoffs with other companies had been entered. These setoffs related to market sharing, price fixing and mutual compensation. Project by project, it was recorded who participated, who was given the work, and how much other bidders were owed or would expect. Prior consultation was always prohibited in the case of public tenders, but until 1986 it was possible in the Netherlands to report cartels. From 1986 onwards, the prohibition was absolute. Practice proved to be different, however. In 1992, the co-operating contractors were fined by the European Commission on the grounds of cartel practices. In spite of this, the practice of cartelisation continued. In 1996, the new Dutch Competition Act (*Mededingingswet*) expressly affirmed the prohibition, as the Parliamentary Commission stated, but many did not observe the rules. Virtually all major national contractors figured in the various shadow accounts. This was no clandestine conspiracy between incidental companies within a certain region; this was much bigger: a sector-wide practice, in fact. Cartelisation was known to be prohibited, but it was done anyway; (a) because virtually no control took place, whether by the market or the authorities and (b) it secured profit margins, lowered the risks, facilitated planning and optimally ensured continuity. Cases of failed tenders, a minority, show that Belgian construction companies often worked 30 per cent under the price quoted by Dutch companies and still made a profit.

In the many partial investigations the Commission conducted as a result of the shadow accounts, it uncovered a variety of underlying criminal offences, such as tax fraud and social insurance fraud. Many companies held undisclosed savings accounts. In only very few cases were the contractors not familiar with the standard figures employed by the administration. Public servants and the engineering and law firms advising the administration leaked like a sieve; however, accountability of individuals could not be established. In sum, these were networks of illegal practices in which both clients and contractors were involved. Even the Tender Arbitration Board proved to be far from impartial.

In addition to evidence of secret accounts, whistleblower Bos had detailed lists of money spent on bribes; these were entered into the *Koop Tjuchem* books as materials or acquisition costs. From his own experience Bos explained to the Committee that such expenditure was considered normal by the sector. His statement was subsequently corroborated by other witnesses. Several million Euros spent annually was seen as nothing out of the ordinary for the larger construction companies.

Collusion

Before going into the matter of bribes, it is prudent to first discuss the Committee's collusion approach more in general, and position the approach within a criminological context. According to the Committee:

'The notion of 'collusion' plays a key role in explaining the irregularities in the construction industry. Three meanings have been found in the investigations. The first refers to companies secretly engaging in conspiracy in order to prejudice clients. An example is the price increasing cartels investigated by the Committee.

The second is an indication of a conflict of interests and responsibilities of companies and public services, as a result of which – in the interest of the two, but not necessarily aimed at personal gain- statutes and subordinate regulations are flouted. This form shows the dangers of too intimate a relation between public administrators and officers of public authorities and private enterprise. The Committee encountered many examples of this type of collusion, such as illegal preferential treatment of certain 'friendly' companies.

The third meaning of collusion does not have to do with organisations, but with the conduct of individuals, as the antechamber to corruption and fraud. As a result of the nature of the activities, the frequent contacts between individual public servants and contractors lead to an increased risk of breaches of integrity.' (PECB, 2003: 270).

From a socio-scientific perspective, such differentiation as to meaning within a single phenomenon may be referred to as a 'concept theory', in which the sensitising concept is 'collusion', within the meaning of secret arrangements or understandings, and the independent variable the mutual relation between the three.

Forbidden cartels

Collusion by proscribed cartels is a distinct criminal category. As early as 1967, Geis gave a very vivid description of the anti-trust cases relating to

the heavy electric equipment industry in the US. He outlined the techniques applied and justifications put forward by the sector and painted a clear picture of the vice-president of General Electrics, who was responsible for his company's market behaviour (Geis & Meier, 1977). Subsequently, Clinard and Yeager (1980), Shapiro (1984) and Jamieson (1994) elaborated on this image in more comprehensive studies. According to these investigators, anti-trust law violations formed the most persistent, but also the most lucrative form of corporate crime. Criminal investigation and prosecution of these cases were seen to be fraught with difficulty. Jamieson (1994: 44) found that in the United States in three-quarters of the cases, competitors had instituted proceedings, whereas just one quarter had been uncovered by public agencies. Other results were the following: it was no coincidence that the most inveterate repeat offenders made the most profit and that politics coloured investigative policy at that time as well. Under the Reagan administration, there were 75 per cent fewer convictions than under his predecessor, Carter. Interpreting suspected collusion turned out to be a delicate activity, with possible political overtones (Jamieson, 1994: 88). This also held true for sanctions. In most cases, the damage remained limited to compensation and fines. However, in some cases, members of the management board were held personally responsible on the basis of strict liability, especially in notorious cases. They were sentenced to severe custodial sentences, fines and disqualification from practising their profession (Geis & Meier, 1977: 119/120; Jamieson, 1994: 70). Ian Ayers (1993: 295) conducted research into the internal dynamics of cartels. He pointed out in his research that only extremely severe sentences or extremely high civil claims could in effect keep entrepreneurs from engaging in cartel practices (read also: Posner & Easterbrook, 1981: 336).

This picture is substantiated by these Dutch cases. Although forbidden since 1992, until 1998 cartels were not subject to serious control in the Netherlands. A small office at the Ministry of Economic Affairs with a handful of employees was charged with the supervision. This could be interpreted in only one way: prosecution of cartel offences had no priority in the Netherlands (Quaedvlieg 2001: 11). Under pressure from the European Union, an independent supervisory body was established in 1998: the National Anti Trust Authority (NMa). However, until 2002 enforcement had been lax. During the parliamentary hearings, the NMa director admitted that controls were exercised in exceptional cases only. After publication of the Commission's Final Report matters changed. A new director was appointed and new powers were afforded, in part obtained through the courts and in part based on new statutes. From the end of 2003 onwards, all major investigations were reported in the media. In December 2003, some twenty companies that were listed in the Final Report, including major well-established Dutch construction companies,

were charged and fines were imposed of over 100,000,000 Euro. In January 2004, all construction companies were encouraged to confess to the NMa before May 1, 2004 to all “cartel sins” committed in the past. If such sins were uncovered after that date, exclusion from future public construction projects would be a possibility. This approach was very successful: on May 3, the NMa announced that four hundred (!) shadow accounts, whose existence had not been known until that date, had been surrendered.

Public – private network crimes

In addition to and ensuing from these cartel offences, there were two other forms of collusion, since these cartel offences were encouraged in part by authorities that were extremely accommodating to construction companies. Without necessity, the authorities would often eliminate competition by putting out projects to private tender only. They also had no objections to all types of unnecessary forms of co-operation between companies or groups of companies. All the above forced up prices. In some instances, public clients allowed themselves needlessly to be placed under pressure of time by contractors, which had a price-increasing effect, or fair distribution of the risk involved was lacking so that the client was disproportionately burdened with such risk. Furthermore, arbitration after a ‘*niet passend*’ declaration, by which a bid was rejected, could be described as biased, i.e. in favour of the contractors (PECB, 2003: 262).

The public authority, as the client, was often less than critical where the form of contract and the price were concerned. On the contrary, the authorities were very pliable when it came to the construction industry with its price protecting constructions. Here we encounter the second variant of collusion: institutional conspiracy between public services and the construction industry. Such conspiracy revealed itself, for instance, in the secret favouring of certain construction companies. A classic example was the awarding of work by private tender exclusively to a group of ‘friendly contractors’, using the regional employment argument, for instance. It could also consist in a plain good turn done to one or several contractors by an alderman or engineer of *Rijkswaterstaat*, the Public Works Department of the Ministry of Transport, Public Works and Water Management. The common denominator in all these cases was that free-market forces were sacrificed and the resulting price increases were taken for granted. This may be called institutional collusion, not committed, incidentally, at the local level alone. At the national level the double role played by NS during the construction of the Schiphol Tunnel was also an example of this, as was the role in that case played by the Minister of V&W.

State – corporate crimes, collusion and corruption

Ronald C. Kramer referred to institutional collusion by public authorities as state-corporate crimes (Kramer, 1992: 215), solicitation by authorities to commit such illegal acts being the principal form. His study of the space shuttle Challenger disaster was an example of this. At a later stage, he distinguished, together with Michalowski, between state-initiated corporate crimes and state-facilitated corporate crimes (Kramer *et al.* 2002: 272/3). From the perspective of responsibility of superiors, the first category constituted a more serious offence than the second. As regards the first category, it was the authority which took the initiative and solicited illegal practices; the second type consisted of collusion patterns, in which the authorities ‘merely’ served as facilitators and therefore acted as accessories. In his theoretical state-corporate crimes model, Kramer does not link collusion to corruption. I mention this, because in much criminological research into corruption, the facilitating or condoning attitude of the authorities is seen precisely as the core cause of corruption. Were there two schools of thought on this? In studies of corruption, collusion by public authorities is indeed referred to as the possible cause of corruption (Shleifer & Vishny, 1993: 78; Doig, 1995: 55; Goudie & Stasavage, 1998: 153/157; Rose–Ackerman, 1999: 66/67; Vander Beken, 2002: 273; Eigen & Eigen–Zucchi, 2003: 269); however, these authors seemed so focused on corruption that they offered no separate description of these forms of collusion as distinct from corruption.

Nevertheless, this was exactly what the Dutch case has taught us:

Collusion involving the authorities formed a separate and complex problem. As stated earlier, it occurred both at institutional and individual level. At the institutional level, it manifested itself, for instance, where a public authority secretly tolerated illegal practices by companies or where the authorities gave preferential treatment to certain companies by accepting overpriced construction bids. Conversely, it was observed that public servants were not averse to gifts offered by companies. The Parliamentary Inquiry Commission described this culture of “grease and feasts” as widespread. Without calling it a bribe, the construction sector spent large sums of money on favours rendered to individual public servants and administrators. Formally, they were not involved in institutional collusion by public authorities, but jointly these acts could be seen as an endemic collusion pattern, in which, institutionally, the authorities ‘gave’ and ‘gave away’ too much and the individual public servant ‘received’ too much. This endemic form of collusion was labelled as such and described for many specific countries. Well known examples – outside the third world - are Japan (Upham, 1987; Mamiya, 1995; Van den Heuvel, 1992), Italy (Savona, 1995; Bufacci & Burgess, 2001; Jones, 2003), United Kingdom

(Crowley, 2003), Australia (Dalglish, 1995; Royal Commission Cole, 2003, quoted in *The Age*, 27.3.2003, *Building Industry lawless: inquiry*), Eastern Europe (Varese, 2000, 2001; Wedel, 2001, 2003) or New York (Jacobs, 1999; Anechiarico & Jacobs, 1996). These were all, direct or indirect, construction related case studies with something 'special' (different culture, political transition, or controlled by the mob) and ending up with the focus on corruption. But here in Holland we got a close up in a typical Rhine-land state without anything 'special'. For years Transparency International has ranked Holland amongst the most non – corrupt states of the world. Its last Global Corruption Report 2005 put special focus on corruption in construction. Although Holland was not mentioned in the special part of this report, in the general corruption perception index, Holland dropped from place 7 in 2003, towards place 11 in 2005. The Dutch media interpreted this drop as mainly caused by the revelations of the inquiry commission.

The Dutch inquiry, preliminary investigations and the hearings revealed a picture of an all too accommodating public sector and a substantial number of high-ranking officials and politicians who enjoyed being showered with lavish gifts. Although only four hard cases of corruption (with traceable services rendered in return) were uncovered, the Commission did encounter a wide range of cases of 'winning over', which reeked of corruption. Air trips to Scotland (to play golf) or Switzerland (to watch ice-skating), the use of yachts with crew, visits to brothels, the use of vacation homes, being regaled with almost new cars, maintenance or doing-up of gardens, or the gratis paving of a driveway, these were things that could not really be seen as the traditional Christmas bonus being delivered in kind.

In Germany, the most comparative neighbour state in Dutch eyes, a series of construction scandals in the beginning of the nineties had led to a boom in prosecutions and publications (Sommermann, 1998; Möhrenschrager, 1996: 829/830; Claussen a.o., 1995; Ludwig, 1992; Pijl, 1988). There a direct link was made between the existence of construction cartels and local corruption. Italian anti-corruption and anti-Mafia legislation had served as an example in the German case. If a municipality had excluded market forces in tenders over a specific lower limit, this was seen as *Kollusion*, as a form of network offence (Schaupensteiner, 1990, 1993, 1996; Rügemer, 1996, 2003; on network offences in general: Nielsen, 2003). Subsequently, in order to get to the individuals involved as well, the definition of 'administrative corruption' was stretched to include being receptive to serious inducements, formulated, as only the Germans can, as *sanktionierung Dankeschön-Bestechung politischer Mandatsträger*, which also included public servants with negotiating powers. (The term *Bestechung* renders any special gift made to a public servant an offence.)

In order to deal also with the individual gift givers much work was done to introduce anti-corruption registers of suspect companies (Schnorr & Wissing, 2002; Nötzel, 2002: 53). With the introduction of this new 'blacklisting' legislation and penalising network offences, Germany seems to have taken serious steps towards getting a better grip on collusion between public authorities and the business world, both at the institutional and the individual level. Bannenberg and Schaupensteiner, leading experts in this field, are still unsatisfied and predict that in a few years new cases will come out ahead. They plea for more strict regulations with severe sanctions (Bannenberg & Schaupensteiner, 2003).

The Netherlands has not yet progressed to this point and the question is whether such development will happen there in the short term. To prove corruption of a public servant in the Netherlands there must be evidence of a gift or favour on the part of one party, and a demonstrable act in return at individual level on the part of the other. Such clear evidence is found in extreme cases only. Annually five public servants are convicted for bribe or other corruption related crimes (Huberts and Nelen, 2005). Labour law, not criminal law, is the dominant language for most corruption suspects in the Netherlands. Even without hard proof troublesome civil servants can be relieved of office. As in many other countries administrations in the Netherlands avoid the 'hard way' of an official criminal investigation (Kilchling, 2001; Nelen & Nieuwendijk, 2003). In part for these reasons, the Commission called their inquiry an investigation into 'irregularities'. She organised its investigative activities and public hearings in a way which made it possible to map out all the various secret dealings and co-operation patterns, in the full knowledge that it would be very difficult to distinguish provable corruption from all other patterns of abuse and illegal intent.

It was that open space fore collusion rather than hard corruption that played a key part in all this. Institutional and individual collusion were committed frequently, but it was often difficult to separate even these two. Take the civil servant (authorised to put projects out tender) who learns to play golf so that he can negotiate better and who attends golf tournaments organised by contractors in the boss's time. He is not only on a rather slippery slope as a representative of his service, but also as an individual public servant, irrespective of the fact of whether during such a tournament a deal is closed or not.

Cases of collusion were not only uncovered between companies themselves and between public authorities and companies; all kinds of providers of services to both parties were also involved in these collusion patterns, as were tender consultancies, consulting accountants, law firms, architects and project developers. In this national construction scandal, the practice of collusion was,

in effect, a case of ‘networking above the law’. In the shadow of the collusion, all kinds of illegal practices flourished, ranging from fraud, unjustified subsidies and licence issuance to money or favours to individual politicians or higher-ranking public servants; from undercutting the market, monopolisation and forcing up prices to selective supervision by partial inspectorates.

Control agencies

To control agencies, collusion forms a classic risk. This phenomenon is known among economists as capturing: the encapsulation of the monitoring organisations by the companies under their supervision (Ayers & Braithwaite, 1992). If we look at the investigation into the construction fraud, we find several examples of such capturing at various levels and in various degrees.

I have already referred to the NMa, the authority that monitors competition and anti trust regulation in the Netherlands. During the hearings, the (now former) director of the organisation, Kist, confessed that, since its establishment, the staff had been kept busy handling all kinds of applications for exemptions and for mergers and forms of co-operation. Hardly any time had been left to monitor competition (PECB, 2003; Verhoren: 1147). Subsequently, this policy underwent a thorough revision under the new board of directors and after new powers had been granted. Since 2003 the Netherlands has a more serious cartel police but ‘blacklisting’ companies that operate illegally, is a bridge too far even for this renewed authority.

The Committee was increasingly surprised by the knowledge accountants possessed in their capacity of auditors about the irregularities in the construction industry. Much was known, but there had been no willingness to attach consequences to this knowledge. Taking action, let alone acting to remedy matters was the exception rather than the rule, even where this was prescribed by statute or called for by their professional code of conduct. They turned a blind eye to structural fraud. The Commission was astonished by the disdain with which some accountants referred during the hearings to the – in their eyes insignificant – amounts that were involved in the illegal set offs, costs of preparatory work and acquisition. The fact that accountants both audited and advised the same company had already been openly criticised, even in the Netherlands (Van Wijk e.o., 2002: 207). These hearings illustrated the consequences of this quasi control.

The Tax Authorities had also contributed to the perpetuation of the competition fraud and the ‘grease and feast’ culture, a case in point being the deductibility of acquisition costs. However, this public agency could not be seen as colluding, as far as could be detected. It was mainly a case of ‘institutional

autism'. The Tax Authorities were accused of being too much focused on their own fiscal interest in controlling the books. Where it knew about fraud, it failed to report it. Neither did it report to the Public Prosecutor's Office that palms had been greased. Had the Public Prosecutor's Office been informed of these facts sooner, many irregularities in the construction industry could have been dealt with at an earlier stage. However, even today, the Tax Authorities prefer to keep their role as stool pigeon as limited as possible. Although the Lower House had asked for legal regulation during the parliamentary debates on the Final Report, the Minister of Finance refused to propose such a regulation, arguing that it would curtail the freedom of agency of tax inspectors too much.

Corporate control bodies – compliance offices and works councils – are not discussed here. They do exist, but the inquiry revealed that, where the top management backed certain illegal practices, internal offices were hardly able to counteract it. Individual whistleblowers revealed the irregularities behind the Schiphol Tunnel case and exposed the first shadow accounts. One of the effects of the parliamentary inquiry is that whistleblowers are now protected by a statute modelled on the British Public Interest Disclosure Act 1998 (Tweede Kamer, 2003, nr. 28.990: 12).

The Prosecutor's Office as monitor of corporate crime must be seen as a rarity in general. Its role in this area is limited, although it is vested with appropriate powers. It mainly serves as repressive *ultimum remedium* if administrative control fails (Ayres and Braithwaite, 1992). The word 'fails' sounds more negative than is intended here. In some instances, the 'big stick' of the criminal law may be used after administrative control has failed, since, unlike administrative inspections, the Public Prosecutor's Office may request the court to impose custodial sentences on those actually in control of the illegal acts. They are able to proceed at a more individual and personal level than would co-operation based control. Deployment of these heavy instruments is intended in particular for the more serious cases, which also serve as a major general deterrent. The organisation of the Dutch Public Prosecutor's Office was not really geared towards this type of criminality, as these cases proved. According to the Commission, the Public Prosecutor's Office had failed in the construction fraud cases. Two years (!) had needlessly been allowed to pass before it had lent an ear to whistleblower Bos. The transaction in the Schiphol Tunnel case was called 'a succession of miscommunications' by the Commission. The joint *Procureurs-Generaal* (top of the Public Prosecutor's Office) had not provided guidance and communication either to the rank and file involved in these cases, or to the Minister of Justice. Shortly before publication of the final report the Minister withdrew, however his only mistake was 'not knowing' (PECB, 2003: 157)

Also in this respect, things changed after the publication of the Final Report. Expertise was substantively enlarged at the *Functioneel Parket* (the 'White Collar Crime Division' of the Public Prosecution Department). In December 2003, sixteen companies and twelve managing directors were charged in connection with this parliamentary investigation. These cases will not be brought in court before fall 2004/spring 2005.

Self-justifications and neutralisations, damage and victims

After this tour through the processes and agencies involved, a brief comment on the perpetrators, the damage and the victims is in order. A number of entrepreneurs justified their illegal and fraudulent conduct by claiming that the idea had mainly been to strengthen their own company and make it financially sounder and that such a healthy company was good for the economy: the 'slush funds' were really contingency funds. There had been no extreme self-enrichment and there were no physical victims, so why the fuss? Some even questioned out loud whether holding secret prior consultations was indeed a criminal offence. Such self-justification or neutralisation attempts are well known in criminology (Sykes and Matza, 1957). Responsibility is denied, and so are the unlawful character and the damage inflicted. The illegal practice was inevitable; it was beyond one's control and there had been no intent or evil purpose (Minor, 1981; Benson, 1985; Reichman, 1993). In fact, the arguments strongly resembled those recorded by Geis some forty years earlier (Clinard and Quinney, 1967:122).

What was observed, however, was the shift that occurred in the neutralisation efforts during and after the inquiry. Initially, the secret arrangements were denied and made little of ('it was not real money; they were jelly beans, just candy'). In a later stage, when the hearings produced more and more evidence of structural and substantial fraudulent practices, in which the entire sector had participated, the persons under investigation began to justify their conduct by referring to history ('in the past, it was allowed, and more recently it had still been somewhat permissible') or the authorities ('I thought they still allowed it') or colleagues ('you had to join in, or you were not a player'). Only after publication of the Final Report did one odd ex-director concede that, although wrong in essence, it also had been very tempting, and that such temptation had caused it to be so pervasive and to continue for such a long time. As far as I know, words of regret were never uttered. What was requested by the chairman of the whole construction sector some time after the Report came out, was the possibility of collectively and conclusively settling all damage incurred by a collective fine. This request was denied by

the Public Prosecution Department and the NMa. And rightly so, since even a considerable time afterwards companies voluntarily reported to the NMa, confessing their past ‘cartel sins’.

The other side of the justification coin was the actual ‘quantifiable’ damage: the Commission calculated that the secret prior consultations had resulted in an average price increase of 8.8 per cent. Investigation conducted by the Netherlands Court of Audit showed that construction of government offices had turned out 14 per cent more expensive on average than those in the private sector. The OECD (2002) operated a norm of ‘between 15 and 20 per cent’ increase in costs due to cartelisation, compared with open markets; sufficient indices, therefore, to refer to the damage as considerable. This is, after all, a sector which turns over many billions of Euros annually, so that 10 per cent or more represents a lot of money. This is without considering the indirect costs of the effects of market undercutting. Most of the damage was inflicted on public authorities. By the end of the year 2003, these had instituted test cases to explore their chances of recovering the money. Smaller municipalities got together and joined their claims, whereas the City of Amsterdam and the Ministries acted separately. In March 2004 BAM, the largest construction company in the Netherlands, disclosed that its profit over the preceding year had been 30 millions Euros less, which could be solely attributed to the fines imposed on it by the NMa as a result of the investigation into fraud committed by the construction industry. It was not prepared or could not say anything about the impact of future civil claims for damages (Volkskrant, 26.3.04). Apart from material damage, there was “moral” damage. The sector had really showed itself to be dishonest and unreliable. Although damage to reputation is seen as an important guiding tool to call dishonest organisations to order (Fisse & Braithwaite, 1984), I dare to call into question whether this also holds true for the construction fraud case. Perhaps, when the individual criminal cases are heard, these effects will become relevant. In its inquiry, however, the Commission’s criticism was particularly aimed at the construction industry as a sector; a sector which had strayed collectively across the board. The investigation and its aftermath pointed at a sector problem, not at persons or separate companies.

Conclusion

Only some of the principal elements from the inquiry are explained in this article, which focuses on analysis on the basis of a collusion concept theory. To the Commission, ‘collusion’ was a relatively novel and vague concept. During the inquiry, it gained definition. It was not a factor, in any case, in the

Preparatory Committee formulating the terms of reference. However, gradually and quite naturally, the collusion concept emerged. The Commission distinguished three forms. All three forms were found in rather large numbers. It also turned out that there was a rather strong correlation between the three variants: the cartel practices showed a historically arrogant attitude towards rules and public authority. Collusion between public authorities and business reinforced a convention that seamlessly matched that arrogance. This existed at both the institutional and individual level. Public servants and administrators allowed themselves, whenever convenient, to be personally wined and dined. The fact that this has not led to more criminal cases of corruption prosecution teaches us two things. The standard of proof concerning corruption is even after new legislation in 2001 still high in the Netherlands, whereas 'collusion' is a criminological phenomenon, which may be seen as being separate from corruption. These two (new) lessons do not detract from the (old) fact that where corruption is established, it may be in part explained by practices of collusion.

In the parliamentary inquiry, a distinction was made between 'corruption' and 'collusion'. In the criminological literature this distinction was often vague. Collusion was too readily seen as synonymous with institutional corruption, whereby institutional corruption in turn was considered a graver offence than individual corruption. With the Report on the parliamentary inquiry into fraud in the construction industry, a new chapter has been added. In the Netherlands, collusion (outside the context of severe threatening crimes like terrorism) is considered less serious than corruption. The word 'corruption' in itself, maybe as part of our protestant heritage, is extremely loaded in any case.

The Committee and its investigators did not set out to compare the Netherlands with Nigeria, Indonesia or even Italy, for that matter. They just wanted to take a thorough look at what went on in the construction industry with the evidence they had been given. They discovered that a lot was wrong in that world, but frequent incidences of provable corruption they did not find. The conclusion that the Netherlands is a country of collusion rather than corruption, can be seen as significant: 'collusion' has connotations of 'not transparent', 'eschewing control', 'selective condoning', 'furtiveness', 'conducive to economic conspiracy and favouritism'. In sum, a rather porous legal order, which calls for much tighter organisation with stricter rules governing business and the authorities. The Commission spoke about the need for a 'new businesslike approach' in dealings between public administrators and the business world (PECB, 2003: 296). This could be translated as: collusion practices must be subjected to more severe administrative regulation and control with clearer links to the criminal law. Preventive ex post control

remains insufficient without threatening severe (more German like) ex ante control in the background. And, to begin with, the Transparency International Minimum Standards for Public Contracting have to be taken seriously. They provides a framework for preventing and reducing corruption based on clear rules, transparency and effective control and auditing procedures throughout the contracting process. (T.I. Global Corruption Report, 2005).

Indeed, the German approach may serve as an example here. It is unfortunate that the Dutch administration did not wish to adopt it, in addition to all the good measures it had taken as a result of the Report. The government refused to regulate contacts between the authorities and the business world more strictly and to introduce more serious sanctions. In the memorandum *Toekomstperspectief Bouwsector* (the future of the construction industry) by the three Ministries (Economic Affairs; Spatial Planning, Housing and the Environment; and Transport, Public Works and Water Management, 2003), even less regulation was expressly advocated, as if excessive regulation was to blame for the illegal escapades of these gentlemen. The inquiry did have the effect that certain control agencies (NMa, the accountancy profession and the Public Prosecution Department) tightened their policies (ex post). The parties involved, public authorities and construction companies, have been encouraged to set up a more fair and honest and a more transparent tender and control practice, and to discontinue the 'grease and feast' practice. However, without ironclad normalisation and control instruments (ex ante), this remains a risky operation, especially in the collusion paradise of the Netherlands.

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