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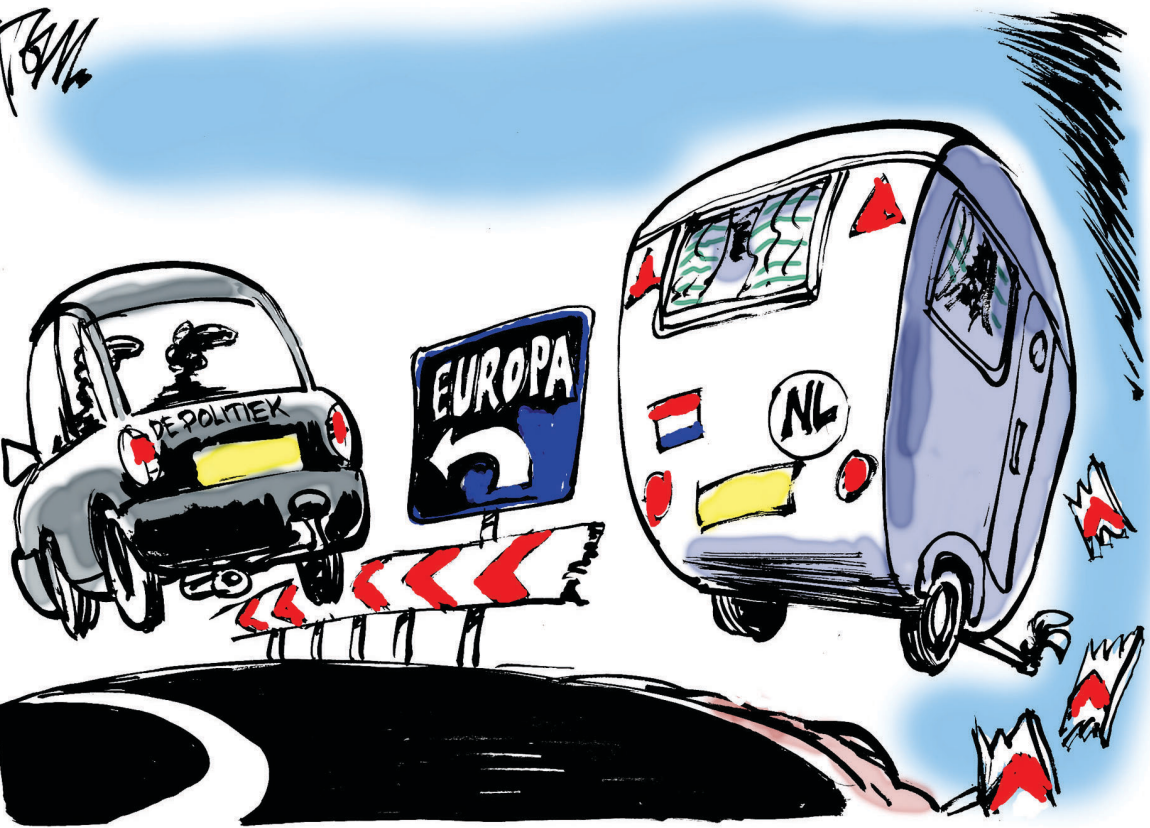
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# Going Europe or Going Dutch

## *How the Dutch Government Shapes European Union Policy*

Mendeltje van Keulen



AMSTERDAM UNIVERSITY PRESS

# **Going Europe or Going Dutch**

***How the Dutch Government  
Shapes European Union Policy***

**Mendeltje van Keulen**

Voor mijn ouders

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# **GOING EUROPE OR GOING DUTCH**

## **HOW THE DUTCH GOVERNMENT SHAPES EUROPEAN UNION POLICY**

PROEFSCHRIFT

ter verkrijging van  
de graad van doctor aan de Universiteit Twente,  
op gezag van de rector magnificus,  
prof. dr. W.H.M. Zijm,  
volgens besluit van het College voor Promoties  
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te Amersfoort

Promotoren: Prof. dr. J.H. de Wilde  
Prof. dr. J.J.A. Thomassen

Co-promotor: Prof. dr. J.Q.Th. Rood

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I further explored the ins and outs of European Union policies at the College of Europe in Brugge, in an unforgettable year of study and fun with fellow ‘Europhiles’. Back at Clingendael, from 2000 onwards, this PhD. project started to materialize. Over the years, many people have contributed to this dissertation in various ways, a few of whom deserve particular mention here.

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Den Haag, February 2006

Mendeltje van Keulen

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# Chapter 1

## Opening the Black Box

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### §1. Introduction

How can a national government influence the making of European Union (EU) policies? This question is central to this study. The majority of rules and legislation annually issued by the Council of Ministers and the European Parliament is binding for national governments. Key to understanding the intricate relation between the national and the EU level are the legal principles of supremacy and direct effect of EU law.<sup>1</sup> As European decisions directly impact on the member states, governments have a strong interest to minimize the constitutional, legal, administrative and financial costs related to their implementation or ‘taking’ (Börzel 2003). Their representatives are very active in the process of formulating and ‘uploading’ certain preferences about their contents and form to the EU level. But national politicians and officials are not the only stakeholders active in this process of ‘shaping’ new EU policies. With the growing salience of European policies and politics, a plethora of public and non-state actors has become actively involved in this process. Within the academic field of EU studies, this has inspired new thinking about the nature and mechanisms of the interaction between the governments of the member states and the EU.<sup>2</sup> Although the ‘Europeanisation’ of national governments has been the subject of extensive

- 
- 1) As established by a number of landmark Court of Justice rulings including *Van Gend en Loos* (1963) and *Costa v Enel* (1964).
  - 2) This study uses the shorthand notion European Union (EU) to encompass its predecessors, including the European (Economic) Community (EC and EEC).

research projects since the early 1990s, the variables relevant for a national government's shaping capacity have remained seriously understudied.

This book reports of an attempt to open the 'black box' of how national governments deal with EU policy-making and to analyse its content. It is examined how and when a national government participates in the shaping of EU policy, with the aim to single out relevant moments and variables. Public attention for the EU generally focuses on 'grand' history-making package deals and European Council summitry. What happens in Brussels, however, accounts for only a fraction of the resources and efforts national governments devote to the different stages of the EU bargaining game. This study analyses processes at the national and at the European (EU) level, as well as the interaction between these two locations of public policy-making. The theoretical part of this book (chapters 2 and 3) examines academic and practitioners' insights into the position of national governments, in order to account for their role and capacity in the EU policy process. The empirical part (chapters 5-8) analyses 'the Dutch case': the empirical realities of European policy-making by and in the Netherlands and for two 'routinised' internal market decisions.

This first introductory chapter presents the central puzzle of this study and defines its key notions, assumptions and arguments as well as the research design and the methods used in search for answers.

## **§2. Why study governments in the EU?**

### *§2.1 Introducing EU studies*

The academic domain of this study is formed by a sub-discipline of International Relations theory, known as European Studies, or – more adequately – 'EU studies'. As the process of European integration widened and deepened over the decades, so the domain of EU studies has grown. That 'member states matter' is generally not contested, but the role and position of national governments in the European Union is the subject of much academic debate.

In order to sketch this debate, four important EU studies perspectives, all to a varying degree concerned with the description or analysis of a particular 'opportunity-structure' for national governments, are summarised in table

1.1. A distinction is made between ‘grand’ integration theory (Nugent 1999), which flourished in the early days of European integration and witnessed a revival in the mid-1990s (see Trannholm-Mikkelsen 1991, Stone Sweet and Sandholz 1998, Moravcsik 1999) and two newer, policy-oriented concepts: multi-level governance and Europeanisation (see Hooghe and Marks 2001, Knill 2002, Börzel 2003).

*Table 1.1 Perspectives on governments within the EU*

<i>Theory / perspective</i>	<i>Claim</i>	<i>Added value</i>
Intergovernmentalism	‘Governments rule’	National governments as ‘shapers’ and ‘takers’
Neo-functionalism	‘Supra-nationalism rules’	How supranational institutions have a life on their own
Multi-level governance	‘Messy state’	By-pass of government by other actors ‘going Europe’
Europeanisation	‘Impact of Europe’	Adaptation to increase efficiency and effectiveness

Probably the most prominent EU studies theory, intergovernmentalism, offers a rather outspoken view on the role and influence of national governments in EU policy-making. Participating in the European integration process is a purposeful choice for their self-preservation – governments do interact, but in a strategic and dominant way as ‘masters of the treaty’. They act as a ‘gatekeeper’, and are able to regulate all interactions between the EU and the domestic level. For the purpose of this study, the added value of intergovernmentalism lies in its emphasis on the central role of national governments and their representatives as ‘shapers’ and ‘takers’ of EU policies. It is argued that EU membership can actually enhance the autonomy of national governments vis-à-vis their national constituencies and thus serve as a ‘rescue’ of the national state (Milward 1992). This ‘rescue’ is often associated with the dynamics created by the internal market project in the 1990s which facilitated national financing of the welfare state (see: Corbey 1995).

Intergovernmentalism has been criticised for the assumption of rational governments having sufficient information to foresee the consequences of their actions; for its tendency to marginalize the significance of supranational institutions and the interplay between them and for separating, rather artificially, processes at the domestic and EU level (see Willcott 1995, Garrett and Tsebelis 1996, Puchala 1999). Although recent, ‘liberal’ intergovernmentalist accounts of EU policy-making do offer a theory of national preference formation (through conflict between domestic groups), intergovernmentalism does not give us tools to describe or explain ‘feedback

processes' or 'integration dynamics', i.e. how participation in EU policy processes impacts upon the initial preferences of actors at the national level through effects of socialisation and adaptation.

The idea that, while working together, national representatives active at the EU level can develop a sense of collective identity, which leads them to redefine their 'national' preferences in interaction (Sandholtz 1993, Kerremans 1996) is central to the second classical theory of European integration: neofunctionalism. It is presumed that the European Union slowly but gradually develops into an autonomous source of political authority, located separate and 'above' that of the member states, hence 'supra-nationalism'. National governments would gradually 'wither away', as policy-making competencies are taken up at the supra-national level by the European Commission, the European Court of Justice and the European Parliament. The entrepreneurial role of these institutions has been the subject of later works with a neofunctionalist tone (Trannholm-Mikkelsen 1995, Sandholz and Stone Sweet 1999).

These recent revivals of the old debate have also demonstrated how useful political science-based insights into comparative politics and policy-studies are for the study of the EU. A closer examination of how national governments deal with the demands of EU policy-making means taking stock of these recent EU studies approaches, which originate in the early 1970s. Two paradigms concerned with the patterns of interactions both within the EU and between the EU and the domestic level are multi-level governance and Europeanisation.

Multi-level governance analyses the interaction of supra-, sub- and national level actors in making EU-policies (see Hooghe and Marks 2001, Bache and Flinders 2004). Relevant for this study is the supposedly changing locus of political control that would drift away from national governments, both upwards towards the European level of decision-making and downwards towards sub-national governments (Länder; provinces; autonomous regions) (Hooghe and Marks 2001, 4). The steady increase of players and the widening of the playing field has led analysts to state boldly that governments are 'no longer the sole objects of integration, nor the exclusive link between the national and the EU level' (Sandholtz 1996, 412) and to focus their studies on 'how government executives may lose their grip on power' (Marks 1996, 341). The result is a rather 'messy state'. However,



governance is not satisfactory as to describing how governments continue to play a central role in processes of preference formation and representation.

Like governance, Europeanisation is a modern buzzword in EU studies (Cowles et al. 2001, Featherstone and Radaelli 2003, Börzel and Risse 2003). Although definitions and interpretations abound, Europeanisation is commonly understood as a variable which impacts upon the member state governments, to the effect that domestic policy areas become increasingly subject to common policy-making at the EU level (Börzel 2002, 6). This strand of literature can be grouped under the heading: ‘how and to what extent is the member state Europeanised?’. Volumes focusing on the management of EU-affairs in one or multiple member states flourish in abundance (Falkner 2001, Goetz 1995, Harmsen 2000, Wessels et al. 2004, Rometsch and Wessels 2001, Zeff and Pirro 2001). In addition, recent studies explaining implementation performance through the actions of the government in question in the negotiating stages offer tentative attempts to academically link the stages of governments ‘shaping’ and ‘taking’ EU-policy (Bursens 2002, Börzel 2003, Falkner et al. 2005, Rood et al. 2006) – but this remains a field of study largely unexplored.

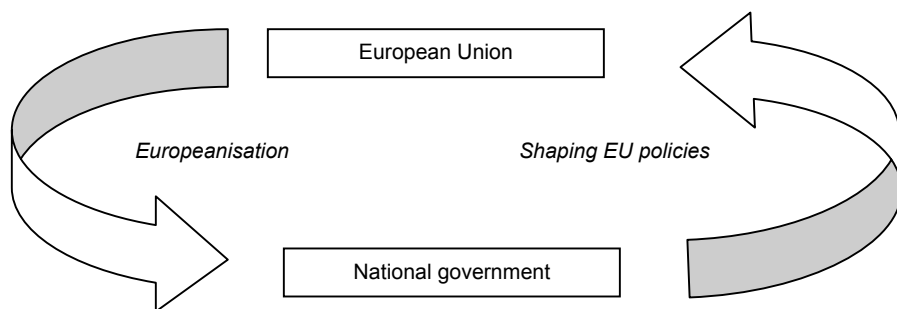
### §2.2 *Added value and relevance*

Paraphrasing the key question of Europeanisation studies (‘to what extent is the member state Europeanised’) a question driving this study is: ‘how and to what extent is the EU nationalised?’ Through which venues and at which crucial moments do national governments attempt to influence EU-policy-making? Which conditions and characteristics are relevant for their motivation and capacity to do so?

Part of the interest in the position of national governments stems from the observation of a ‘gap’ between modern EU studies concepts and public discourse. Newer EU studies perspectives, such as multi level governance and Europeanisation focus on the limitations and constraints upon national governments to deal with the demands of EU membership. At the same time, political and media accounts of the EU policy process continues to be dominated by the reportedly prominent position of member states and their governments. One example is the discourse about the ‘national positions’ of the twenty-five member states which ‘win’ or ‘lose out’ in the intricate decision making process. Congruently, a lot of the influence opportunities in Brussels are organised along national lines: staff recruitment, committee

presence. Apparently, for politicians and policy-makers, the central level of government remains a focal point of EU policy-making, as the location where interests are melded into ‘national positions’ for a battle in the political arena of EU level negotiations. A study of how governments attempt to influence what happens at the EU level of common policy-making and which moments and variables are relevant for their performance is an attempt to close this apparent gap between theory and discourse.

*Figure 1 Mechanisms of ‘bottom-up’ and ‘top-down’ EU-member-state interaction*



The practical relevance of this study lies both at the level of member state governments and at the EU level. The precise legal and regulatory impact of EU membership is disputed. Although it is often assumed that this ‘regulatory pressure’ is very high, empirical analysis generally focuses on the regulatory impact of legislation. In this respect, analyses focusing on the Netherlands have assessed that a mere 14% of national laws would directly result from EU legislation and policies.<sup>3</sup> But this focus on directly binding legislation is too narrow. Governments are confronted with framework-laws, decisions, case law of the Court of Justice, as well as more ‘soft instruments’ such as the results of benchmark studies and policy co-ordination, which produce norms and standards to be taken into account when developing national policies.

For governments wishing to be active at the EU level, investing in the *quality* of their actions is more relevant than in the old days of economic co-operation between six or twelve then-EC member states. Those wishing to be relevant in EU policy-shaping will have to invest actively in getting their

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3) Algemene Rekenkamer (2004, 8), but figures are highly contested, see also Bovens and Yesilkagit 2005.

act together. In order to secure the aforementioned ‘link’ between processes at different levels, it is important to secure knowledge and insights into how the EU works at different levels of the central government administration. If civil servants of government ministries, responsible for dossiers with an EU-dimension, are aware of this link to assess potential consequences for national and EU-related actions, problems with implementation and enforcement may be foreseen. In order to minimize adaptation costs, insights into the process of how the shaping of these rules can be influenced and how to increase the ‘goodness of fit’ between existing legislation and newly proposed EU policies (Knill 2002, Cowles et al. 2001) are highly relevant. The processes of change and adaptation sketched by multi-level governance and Europeanisation form an important impetus for the study of national shaping capacity.

Insight into the role of national governments in the shaping of EU policies, a process known as complex and intricate, is just as important to the EU itself. As the European Commission has repeatedly stressed, the quality of EU rules and legislation relies upon active support from national governments for their negotiation and implementation.<sup>4</sup> Also, as the EU lacks its own executive, the administrative capacity of the EU and thereby, indirectly, its political legitimacy depends to a large extent on the functioning of its member states and their national political systems (Schmidt and Thomassen 1999). Therefore, apart from contributing to the emerging ‘third wave’ in EU studies, a second purpose of this study is to build an understanding of current practice and to design and test a framework for the systematic analysis of national shaping capacity for both academics and practitioners.

### **§3. About definitions and scope**

#### *§3.1 The central puzzle*

This study does not engage in normative debates, for example those about democratic control and legitimacy of EU policy-making. Nor are the ‘why-questions’ of integration explored (Van Ham 2002, 2) – it is not investigated

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4) The relevance of sound internal management of EU affairs within the member states has been underlined in the Helsinki European Council Conclusions Directives for Internal Reform, 10-11 December 1999.

why the governments of the member states have judged that ‘there is more to be gained from being inside the EU than from being outside’ (Nugent 2003, 442). As its prime focus is on exploration and descriptive analysis, this study fits into the middle box of the EU studies ‘mosaic’ (Wiener and Diez 2004, 19; see table 1.2). However, as discussed in the theoretical chapters, theories primarily designed for explanation and normative debate may add rather valuable insights into the puzzle of shaping capacity.

Table 1.2 This study placed into the ‘mosaic’ of EU studies

	Polity	Policy	Politics
Explanatory/understanding		(X)	
Analytical/ descriptive		X	
Critical/normative			

The central research question or ‘puzzle’ of this book is the following:

**Which variables determine the capacity of the Dutch government to shape new EU policies?**

§3.2 *Defining the scope*

This section defines the different notions in the research question and the scope of this study.

‘*Shaping capacity*’ can be defined as a government’s ability to perform in the process of shaping or formulating new EU policies. The subject of this study is thus the process of shaping – not the performance achieved, which may be defined as national government influence.<sup>5</sup>

Member state governments are signatory to the treaties that established the European Communities and the European Union. Member state is a rather misleading notion, as the state functions in a country governed by a complex public-private system (Van Schendelen 2002, 27). *National government* is shorthand for the political and administrative organisations at the central state level, competent for setting and enforcing public policies. The empirical part of this book is confined to the Dutch government: the central

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5) Academic assessments of influence, common in political science, are nonetheless very useful as a source for research methods, see chapter 6.

government level of the Netherlands, a founding member state of the then-EC. The analysis examines the ambitions, preferences, capabilities and resources for EU-related actions of the Dutch executive layer of government ('Rijksoverheid'), including Cabinet and the government ministries.<sup>6</sup>

However tempting, this book does not deserve to be placed on a bookshelf dominated by intergovernmentalists. First, though the object of study is state-centric, in the discussion, the lens is widened to include other possible channels for state-level interest representation: courts; sub-national levels of government; citizens; political parties and organised interests (Nugent 2003, 443). These may root in the domestic level, but use transnational and trans-governmental relations and contacts for their EU-directed actions. Second, as discussed in chapter 2, that governments would be unitary actors, a key claim of intergovernmentalism, is regarded as 'a matter for empirical exploration and not a prior assumption' (Bulmer and Lequesne 2005, 3). Governments operate in a policy environment, the conditions and characteristics of which facilitate or hamper a national government's ability to perform. Different EU studies approaches offer divergent perspectives on this 'opportunity-structure' – a notion taken from 'neo-institutionalism' (March and Olsen 1989, Aspinwall and Schneider 2001). According to this perspective on public policy-making, political and policy outcomes result from the strategic interaction of (groups of) actors: governments and supra-; sub- and non-state actors. These individuals and organisations try to 'upload' their wants, desires and preferences about the desired outcomes to the EU level, where common decisions are made. In the EU context, preferences are formulated and presented in the form of negotiating positions. Government representatives choose and pursue actions that aim to close the gap between preferences, positions and outcomes. Key to neo-institutional reasoning is the claim that this takes place in a political context filled with 'institutions'. This academic notion refers to those formal or informal rules, practices and norms that constrain or enable actors and thus create some 'order and predictability' (March and Olsen 2005, 5).<sup>7</sup> By studying EU policy-shaping,

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6) See De Rooy (2003) for an analysis of the effects of Europeanisation of the subnational level of government (provinces; municipalities) in the Netherlands.

7) The academic notion 'institutions' is not to be mistaken for the EU- or supranational institutions: the organisations at the EU level (Commission; European Parliament, Court of Justice) charged with common policy-making.

it is thus relevant to analyse the routings and obstacles that governments are confronted with in this process of preference formation and representation, both at the national and at the international (EU) level.

The Dutch government participates in the shaping of EU legislation according to cumbersome rules and procedures laid down in the treaties. Policy-making competencies are divided in an intricate interplay amongst the EU's institutions (Council of Ministers; European Parliament and European Commission). When used in this study, the notion *EU policy-making* refers to this process of shaping new EU decisions, whatever legal form they may take. The book focuses on those stages in which new policy is tabled, discussed and set, i.e. the phases of agenda setting, negotiations and decision-making around new EU policies.<sup>8</sup>

Many EU studies analyses focus on the Council of Ministers as the most important decision-making institution. One example is offered by studies concerned with the intricacies of quantitative voting power analysis (see Hosli and Soetendorp 2000). A first problem with these studies is their implicit assumption that voting would be the dominant mode of policy setting (Wallace 2005, 36). Council voting records demonstrate that voting is much less common than media accounts of EU policy-making would make us believe (see Mattila and Lane 2001 and chapter 6). Second, the emphasis on the stages of decision-making does not do justice to the interaction between the institutions that is so characteristic to the EU's policy process. Although the Council formally remains the prime venue for national interest representation, the role of the European Parliament has developed from that of a 'toothless tiger' to a serious co-legislator. Because of this formal role in the legislative process, the Parliament should certainly not be underestimated. Empirical analyses of how governments deal with Brussels show that governments put much time and efforts in influence attempts directed at the European Commission and the Parliament, in order to make use of its 'power of the pen' (see Nugent 1999). Lobbying efforts directed at both institutions should, therefore, be duly taken into account when analysing the process of shaping EU policy by national governments.

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8) The transposition and enforcement of EU policy in the Netherlands have been the subject of recent analyses (Versluis 2003, Mastenbroek 2004).

In the year 2000, the Council and the Parliament issued 11.414 legal acts, the majority in the form of regulations and *directives*.<sup>9</sup> The empirical scope of this book is limited to the analysis of the negotiations around the latter ‘decision-type’. Directives are used for setting specialised sectoral policies, especially in the field of policy harmonisation between the member states. It is important to underline the distinction between this ‘normal’ legislation with the grand, ‘history-making’ decisions concerning treaty reform or budgetary frameworks. (Peterson and Bomberg 2000) The latter attract much more media attention than the day-to-day Brussels policy-making process and have been the focus of recent, broad analyses (e.g. Moravcsik 1999, Laursen forthc.).

This research project focuses on the ‘*first pillar*’ of the European Union (see table 1.3), which concerns economic, social, monetary and related policies. Between and within the EU’s three pillars, a balance is struck between supranational and more intergovernmental modes of co-operation.<sup>10</sup> Dependent on the relevant policy area, governments are thus confronted with different ‘opportunity-structures’ for shaping EU-policies. In the second and third pillars, concerned with foreign and security policy and police and justice cooperation in the field of criminal matters, governments can act more autonomously, as the member states share the right of initiative and decisions can only be made unanimously. As this ensures a national veto in the final stages of decision making, the ability of governments to influence EU level developments is not as challenged as is the case in the first pillar, where most proposals for new rules are decided conform the supranational ‘Community method’. According to this procedure, governments must share the initiative and legislative competencies with the European Commission and the European Parliament.

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- 9) Alesina, 2001, 61. Regulations have a general scope, and are obligatory in all its elements and directly applicable in all member states. Some 80% of all EU legislation is issued in the form of directives (Dinan 2000, 421). A directive is a legal act which is directly applicable in the member states when its provisions have been transposed into national law. National governments are left the choice for method and format. The case studies analysed in this study concern two directives in the field of internal market policy harmonisation.
- 10) The notion ‘intergovernmental’ refers in this respect not to the corresponding ‘classical’ integration theory (see chapter 2) but to a particular modes of decision-making ‘between’ governments.

Table 1.3 Pillar structure of the European Union

European Union		
First pillar	Second pillar	Third pillar
European Community Legal regime: EC Treaty	Common Foreign and Security policy Legal regime: Title V, EU Treaty	Police and Judicial co-operation in criminal matters Legal regime: title VI EU Treaty
European Coal and Steel Community (1952-2002)	European Security and Defense Policy (on the basis of art. 17 EU)	
European Atomic Community		

The vast majority of first pillar decisions are made under the ‘majority-voting’ procedure, a mode of decision-making that gained importance with its proliferation in successive treaty changes since the mid-1980s.<sup>11</sup> With majority-voting, governments can be overruled in the Council, by a winning or blocking coalition of member states. Collectively, governments have lost influence because of the co-legislative competencies of the European Parliament in the co-decision procedure, valid for many first-pillar policy areas. What these procedural innovations imply for the ‘opportunity-structure’ for governments wishing to be active at the EU level is investigated in chapter 3.

*How to assess* how governments contribute to the shaping of EU policies? The key mode of decision-making in the EU is negotiating: a process by which actors strategically pursue preferences in a process of common deliberations without a hierarchically placed authority (Zartman 1977, 621-3). Negotiation lies ‘at the heart’ (Wallace and Wallace 1996, 32) of a policy-process based on the principles of consensus, cooperation, compromise, and compensation (Rood 2001). A prime analytical difficulty is that these bargaining processes are typically multilateral (instead of bilateral, i.e. involving only two parties) and involve a wealth supra- and subnational, state- and non-state actors. Second, the concept of a neat policy chain or the

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11) The original Treaties of Rome (1957), establishing the European Economic Community (EEC) and Euratom, were amended and extended with the Merger Treaty (1965), the Single European Act (1986); the Treaty of Maastricht (1992); the Treaty of Amsterdam (1997) and the Treaty of Nice (2001). Outside the time frame covered by this study, a new Constitutional Treaty was signed by the heads of state and government in 2004.



distinction between prenegotiating and the actual negotiating stages are misleading in the working practice of the EU. Often, dossiers pass back and forth between different levels – proposals may skip certain phases, accelerate because of political pressures, or be stored away for years until the advent of a new national Council Presidency, with a fresh interest in the matter.<sup>12</sup> A small number of highly sensitive dossiers form the exception, in the sense that they are not systematically discussed in working groups or in the committee of Permanent Representatives of the member states (COREPER), but are only dealt with at a high political level in ministerial Council meetings or summits. To systematically analyse this process, this study deploys a particular ‘process tracing’ technique originating in political science and influence analysis: ‘intensive process analysis’. For more on the research design, see chapter 6.

As to the *time frame*, this study is limited to an analysis EU policy-making up to the year 2000. This implies that more recent developments, including the Constitutional Treaty and its rejection by a majority of Dutch voters through a referendum on June 1<sup>st</sup>, 2005 and subsequent analyses of (the lack of) political saliency of EU policy-making in the Netherlands, are explicitly not discussed. However, when appropriate, mention will be made of contributions and reform proposals issued since 2000.<sup>13</sup>

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- 12) The influence of the EU Council Presidency, an office which every member state holds for six months according to a rotation scheme, on the outcomes of EU policy-shaping are debated (see Elgström 2003, Schout et al. 2004). The 2002 European Council meeting in Sevilla adopted changes to the system which would ensure more coherency of EU agenda’s. But the government holding the Presidency continues to enjoy certain competencies in the field of agenda management and external representation which give it a clear advantage over other delegations.
  - 13) Including many recent advices to the Dutch government on the organisation and co-ordination of Dutch EU policy (Raad voor het Openbaar Bestuur 2005, Adviesraad Internationale Vraagstukken 2005, Raad van State 2004, De Zwaan 2004). See also chapter 5.

## **§4. Organisation of the book**

This book has been structured in four parts:

*1) Theory: how governments shape EU policy (chapters 1, 2 and 3)*

No single theory can both explain and describe the complexities of EU policy-making. Individual accounts always report of attempts to capture ‘parts of the beast’ (Puchala 1972, 267). In the theoretical part of this book, chapter 2 reviews the abovementioned ‘classical’ theories, to look for insights into the concept of national shaping capacity. In chapter 3, it is investigated which suggestions as regards to the ability of governments to influence EU level developments can be extracted from newer EU studies perspectives: multi-level governance and Europeanisation. Although the shaping capacity of governments is indeed challenged by a number of developments, a systematic exploration of the opportunities and threats in this chapter demonstrates that this category of actors continues to be particularly prominent in the EU policy process.

*2) Designing a framework and a method for analysis (chapters 4 and 6)*

Europeanisation-literature has focused almost exclusively on processes of national adaptation to the EU. Not much is known about the variables that are relevant for how and when these ‘Europeanised’ national governments attempt to shape new EU policies. To remedy this gap, existing insights are collected and categorised in a framework for analysis in chapter 4, drawing on a review of recent scholarly and practitioners’ contributions to EU studies literature. As the first results are rather unstructured and fragmented, these variables are listed and their relevance and potential impact – positive or negative – on shaping capacity are discussed. It is argued that national shaping capacity is a combination of the motivation or will of governments to be active at the EU level – including preferences, ambitions and objectives – and their ‘potential’ – the capabilities, skills and resources deemed necessary to influence the policy-process according to these preferences. The discussion singles out a number of variables, which – considering the theoretical insights discussed in previous chapters – are considered particularly relevant. These can thus be expected to ‘light up’ in the empirical analysis. These include the constitutional and policy congruence between the national and EU level, the relative salience of the issue at hand and the strategic, anticipation and co-ordination capacity of the government in question.

Chapter 6 introduces the format and method of the qualitative case-studies: detailed reconstructions of real-life decision making practices around two EU directives, with a special focus on and the shaping activities of Dutch government representatives with the help of ‘intensive process analysis’. In order to make process analysis suitable for analysing EU level processes, the original research method (Huberts 1988) has been adapted and dissected in eight subsequent steps. Two case studies are disaggregated into many discrete points in time, each of which represents an individual observation or a data point. Two categories of data sources are used: ‘people’, i.e. national and EU level actors involved at the political and administrative level, and ‘papers’: academic analysis and policy documents. Document analysis for the policy reconstruction included archive research in the Dutch Ministries of Foreign Affairs and Economic Affairs. The resulting ‘paper trail’ is complemented with a number of structured interviews. Prior to composing the final draft of the report, it has been consulted with a number of selected academic experts and EU policy practitioners, in order to establish ‘validity through pooled judgment’ (‘peer reviews’). Moreover, the author has profited from field research in Council working groups and regular contacts and interviews with government officials involved from different government ministries in EU policy-shaping through training and research projects.

### *3) The Dutch case – An empirical analysis (chapters 5, 7 and 8)*

In order to examine how shaping works in practice and to test the framework for analysis, the empirical part of the book is concerned with ‘the Dutch case’. It could be assumed that the Netherlands, as ‘largest of the small member states’, can rely upon considerable political clout within the EU. However, in this long-standing member state, there is much discussion about the directions and contents of its national EU policy and the potential of the central government to realise these objectives. Chapter 5 discusses the shaping capacity for EU-policy-making of the Netherlands on the basis of the framework designed in the previous chapter.

The first case-study, presented in chapter 7, concerns the Gas directive (98/30/EC), for which the Netherlands government, traditionally a staunch opponent of energy liberalisation because of the state monopoly on national gas supply, became a pusher or ‘pace-setter’. The second case study in chapter 8 concerns a reconstruction of the shaping of the Biopatent directive (98/44/EC), dealing with the complex and controversial matter of patenting

biotechnological inventions. These cases have been selected according to a 'most-similar systems' methodological design (Przeworski and Teune 1970, 32-4). The two directives to be analysed both are strongly driven by the wish of the European Commission for EU level harmonisation of legislation in a formerly nationally organised policy field. Both were adopted under the co-decision and majority-voting procedures. As to the domestic level, the negotiations were in both cases co-ordinated by the government department of Economic Affairs. The cases differ, however, as regards to the voting behaviour of the Dutch government in the decision-making stages of the policy-process. The Dutch government delegation voted against the Biopatent directive in the Internal Market Council meeting in November 1997. One sub-question of the case study analysis is how this voting behaviour relates to the shaping capacity of the Dutch government.

#### *4) Conclusions and considerations (chapter 9)*

The concluding chapter 9 reports of the empirical analysis that served to find out which conditions and characteristics make up a government's shaping capacity. The purpose of this chapter is to discuss what the empirical analysis offers from an analytical point of view and for the shaping of EU policies in general and the efforts of the Dutch government in particular. Last but not least, as the scope and time frame of this book are necessarily limited, the chapter discusses promising avenues for further research and shortly reviews the continuing debate on Dutch shaping ambitions and potential after the 1990s.

# Chapter 2

## Governments in European Integration Theory

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### §1. A tale of two why-questions

In the slipstream of the ‘*acquis communautaire*’ of rules and legislation, within EU studies, the ‘*acquis académique*’ (Wessels 1997, 268) developed.<sup>1</sup> This chapter and the following aim to explore this academic heritage, in order to look for insights into the role and shaping capacity of national governments. This chapter starts out by reviewing relevant insights from the two ‘classical’, macro-level theoretical accounts of integration, endlessly reformulated since their emergence in the 1950s and 1960s: ‘supranationalism’ and ‘intergovernmentalism’. Both schools focus on the two ‘why’-questions: why integration, and why now? (Van Ham 2001, 2), both have a strong normative dimension underlying their academic base and both have always easily used empirical developments as evidence for their respective claims (see Haas 1958, Hoffmann 1966 and 1999, Moravcsik 1999). But where neofunctionalism sees the EU slowly but gradually developing into an autonomous source of political authority, separate and ‘above’ that of the member states, which are weakened and diluted as a result, intergovernmentalism argues how unitary governments rationally determine the course of integration.

The purpose of this chapter is not to discuss the contents, merits and flaws of both theories – as this has been done extensively elsewhere (see for example

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1) The ‘*acquis communautaire*’ refers to the total body of some 15.000 EU-laws and regulations. Candidate member states have to implement the *acquis* as one of the requirements for membership.

Rosamund 2000, Wiener and Diez 2003). Their premises merit introduction, however, in order to clarify their perspective on EU-member state relations; to identify the variables determining shaping capacity and to understand the innovations proposed by more recent EU studies approaches. Notwithstanding their different purpose – on explaining rather than exploring the role of governments in the EU – it will be argued that these ‘grand theories’ (Nugent 1999) do add valuable insights into the puzzle of shaping capacity.

## **§2. Neofunctionalism**

### *§2.1 Introducing Neofunctionalism*

*Table 2.1 Classical theories on EU-member-state interaction*

<i>Theory / perspective</i>	<i>Claim</i>	<i>Added value</i>
Neo-functionalism	‘Supra-national institutions rule’	How supranational institutions have a life of their own
Intergovernmentalism	‘Governments rule’	National governments as ‘shapers’ and ‘takers’

Based on the work of David Mitrany (1943) and applied to the emerging European Community through contributions of Ernst Haas (1958), Leon Lindberg (1963) and Philip Schmitter (1970), neofunctionalism developed into a social scientific account of the ‘Monnet-method’ of integration. The latter notion refers to Jean Monnet, a high-ranking French government official who initiated post-war European cooperation initiatives based on the pragmatic idea of functional integration.<sup>2</sup> Ernst Haas (1958, 16) defined integration as ‘the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states’. Neofunctionalism, the most prominent supranational integration theory, has three characteristics: the notion of ‘spill-over’ between sectors and policy areas; a

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2) Interestingly, David Mitrany actually disliked the earliest post-war attempts for West-European integration as a ‘regional fallacy’ because they were territorially limited and would lead to domination by the largest member-states. (quoted in Rosamund 2000, 37).

pluralist perspective on policy-making and the key role reserved for institutions at the supranational level.<sup>3</sup>

Initially, neofunctionalism opposed the realist concept of states as unitary actors. Instead, it deployed a pluralist or ‘cobweb’ (Webb 1983, 11) perspective on public policy-making. Government policy is considered a resultant of access by public and private actors, who would link with similar groups in other member states and thus put pressure on political decision makers. The major sources of these pressures were regarded to be bureaucratic politics (policy communities) and interest groups. Organised groups of individuals or organisations promoting issue-specific, sectoral interests would make contact across national boundaries and engage in lobbying activities to promote further co-operation (‘transnationalism’). But also inside national governments neofunctionalists expected ministries and departments to forge direct links with their counterparts in other countries (‘transgovernmentalism’). These cross-border contacts would be enhanced by a driving force that is perhaps the most famous invention of neofunctionalism. ‘Spill-over’ would make the interests and loyalties of these groups gradually to be transferred from directed towards national governments to a higher political level, that of the EU.

Functional ‘spill-over’ of integration between policy sectors rests on a number of hypotheses (Haas 1958, 283-317, see also Rood 2001, 25). Spillover should be initiated at the domain of ‘low politics’: politics and policy areas that are momentarily deemed less controversial by national governments, such as economics and social affairs.<sup>4</sup> Once co-operating, pressure groups would organise trans-nationally and ‘upgrade’ common

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- 3) Functionalist work can be read as an anticipation of work on interdependence and transnationalism (Keohane and Nye 1977), theories which share the prospect of the transcendence or at least the containment of national states.
  - 4) The distinction between ‘low’ and ‘high’ politics has been introduced and later modified by Hoffmann (1966). It concerns a distinction between two categories of politics, those aiming at the maximization of the common good (low politics) and those of zero-sum games (Hoffmann 1983, 23). ‘Whether an issue falls into one or the other category depends on its momentary salience – on how essential it appears to the government for the survival of the nation or for its own survival, as well as on the specific features of the issue (...) and on the economic conjuncture’.

interests to a supranational level of authority. Government representatives would take up this societal demand for integration as a result of political pressures, as well as practical experiences (political spill-over).<sup>5</sup>

Another characteristic of neofunctionalism is the central role attributed to those politicians and officials working at the EU-institutions (the Commission and the Court of Justice and, more recently, the European Parliament). National officials working within these organisations would be socialised into the new ethos so that there would be a gradual, creeping but inevitable extension of competencies. EU-institutions thus exploit their role as honest broker to mediate among governments and mobilize national policy makers and interest groups into transnational elite networks. Recent contributions with a neofunctionalist tone have highlighted in this respect the proliferation of majority voting and the need for governments to reach package deals and issue linkage in EU negotiations (see Trannholm Mikkelsen 1991, Sandholz and Stone Sweet 1991). Through the generation of technical, legal and political information and ideas, EU-institutions are hence able to persuade policy makers to policies that go beyond their initial intentions – and thus propel integration forward. Slowly but gradually, policy integration would thus find its way into the venues of ‘high politics’.

### *§2.2 Supranational socialisation at the EU level?*

One could easily claim that neofunctionalism has ‘not much to offer’ as regards to the topic of EU-member state relations (Bulmer and Lequesne 2005, 5). Ultimately, the position of national states within the framework for co-operation would be weakened, as through institutional dynamics, national loyalties are transferred to ‘a new political community, superimposed over the pre-existing ones’ (Haas 1958, 16).<sup>6</sup> However, neofunctionalism has two central claims, which merit a closer look for the purpose of this study.

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- 5) The relevance of experiences and socialisation has been highlighted in ‘transactionalism’ (Deutsch 1968, 1978).
  - 6) With the development of neo-functionalism, this idea of a unavoidable finalité present in original analysis has been watered down – Lindberg (1970, 309) speaks of a ‘symbiotic relation’ between the supranational level and the national states participating, meaning that the growth of the European Community would come to a halt when a certain balance would have been found.



First, neofunctionalism goes ‘beyond the state’, in the sense that it offers a pluralist theory about the ways in which preferences arise out of negotiations over diverse interests between societal groups. As negotiating positions are constructed at the domestic level, the mechanisms for their formulation are relevant for the definition of shaping capacity. Whatever the final consequence of processes of cooperation and integration, these mechanisms should be taken into account in an analysis of how governments deal with the impact of European integration and how they attempt to shape its contents.

Second, and perhaps even more relevant, an important hypothesis in neofunctionalism focuses on the ‘transfer of loyalties’ (Haas 1958) of government representatives from the national to the EU level. As national officials who are regularly present at EU level policy-making settings are socialised into a spirit of co-operation and mutual understanding, an *esprit de corps* develops (Laffan 1998, Checkel 1999, Risse and Wiener 1999). Allegedly, national preferences, originating in the national capitals are thereby gradually ‘moulded’ into a commonly constructed ‘European interest’.

Table 2.2 A Neofunctionalist perspective on governments

	Focus	Government?	What happens at central government level?	How to shape EU policies
<b>Neofunctionalism</b>	Community-building at supranational level; integration	Weakened, interests redefined in terms of regional, rather than national orientation	<ul style="list-style-type: none"> <li>– More inter-bureaucratic contact replaces national bodies by EU institutions</li> <li>– Increase in majority voting and Parliamentary powers</li> </ul>	<ul style="list-style-type: none"> <li>– National interests translated into common interests</li> <li>– Socialisation at EU level</li> <li>– Supranational institutions autonomous role</li> </ul>

For our analysis, it is relevant to shortly examine to what extent these predications are mirrored in today’s EU policy-making system. Are national government representatives increasingly socialised into an EU level polity, even to the extent that national loyalties and allegiances are ‘forgotten’ at the expense of national preferences and negotiating positions? Has there been ‘a shift of loyalties, expectations, and political activities towards a new centre’ (Haas 1968, 16)?

For providing a tentative answer to these questions, recent empirical studies on the working of committees at the EU level offer interesting findings (Van Schendelen 1998, Christiansen and Kircher 2002). Here, a closer look is taken at the results of an extensive international research project to compare behaviour of national government officials attending committees at two locations in the policy-process: that of the Council and of the Commission. In the latter venue, expert committees in the phase of drafting new proposals, participants are invited on behalf of the expertise they bring into the negotiations; the first type involves Council working groups and comitology committees, typical venues for national interest representation. On the basis of a survey under some 218 national officials from 14 EU member states, Egeberg (2004) argues that there is indeed a differentiation in official behaviour amongst these three types of venues for EU level action.<sup>7</sup> Consistent with what can be expected from their organisational features, Council working groups and comitology committees appear as ‘intergovernmental’ arena’s, in which participants predominantly behave as government representatives presenting co-ordinated policy positions. In contrast, within expert committees, aimed at providing input to the European Commission, the focus is on independent expertise and policy contents, instead of on preferences and positions.

At first sight, the findings of this and related research projects (see also Beyers and Dierickx 1998, Trondal 2004) appear to sustain the expectations drawn from supranationalism. First, notwithstanding clear differences between different types of committees, the survey shows that the role of expertise is crucial to all. ‘Arguing’ rather than ‘bargaining’ is an important feature of the system, in the sense that participants indicate how after argumentation and discussion on the basis of specialist knowledge, their preferences may alter. Committee participants indicate to assign generally more weight to arguments put forward by colleagues enjoying considerable expertise on the subject, than to their ‘backgrounds’, for example the fact that these positions are voiced by representatives of particular (large) member states.

Second, government officials express a considerable degree of loyalty towards the committee in which they participate, which confirms

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7) See for more on the role of committees the appendix and Hix (1999, 41-5), Nugent (1999, 129-33) and Rhinard (2002, 192-8).

expectations described in neofunctionalist accounts of EU policy-making. Embedded in EU level structures and separated in time and space from their primary institutional affiliations back home, officials tend to develop a sense of allegiance to the supranational level. Especially within Council working parties, participants feel responsible for the proceedings – a finding consistent with the image of a sense of ‘common identity’ present at a higher level of negotiations, between the ambassadors represented in COREPER (De Zwaan 1995, Lewis 1998). These and similar findings, which possibly surprise those who find the Council a typically intergovernmental body, have led Wessels (1991, 137) to conclude boldly that the Council is ‘not an interstate body, but a body at the supranational level’.

A third relevant finding is that a large majority of respondents indicate to trust the knowledge and expertise provided by the supranational institutions involved in the functioning of their committee. This includes the Council secretariat and representatives of the relevant European Commission DG. The majority of respondents perceive Commission officials – which, after all, are nationals of the member states – to act and independently from national interests and to pursue a ‘European’ ideal.

But there is more to it than meets the eye, as based on the same data, two important caveats should be made.

First, the identity evoked in EU level settings does not ‘replace’ national identities. The proportion of respondents indicating that they express more loyalty to their national government is larger (average 70%) than those affiliating to the committee of group at the EU level they participate in (average 43%). This primacy of national allegiance is not surprising. National officials spend the majority of their working time within national administrations. It is interesting to note a distinction in the degree to which a supranational allegiance is expressed in answer to the survey. A stronger feeling towards the supranational level is experienced among national officials representing national positions in Council working parties, than for government officials present in ‘independent’ expert committees. One explanation is the relative intensity of Council working parties. When new proposals are issued by the Commission or the issue salience of existing drafts increases through political pressure, for example from the side of a new national Presidency, these types of committees tend to meet more frequently than expert groups. The latter forum is only engaged in the drafting of new proposals and meets often only once in the process, for example during a two-day expert conference. This would indicate the

‘continuous tension between the home affiliation and the pull of the collective forum’ (Hayes-Renshaw and Wallace 1997, 279).

Second, in contrast to expectations, co-ordination with the colleagues at home is relevant for participants in both types of committees. It can be expected that participants of Commission expert committees, which are generally not sent by their respective governments to present a national mandate, but are invited by the Commission services for reason of their personal expertise do not co-ordinate their position at home before departing to these venues. However, the survey shows that these participants, if government officials, do take into account national considerations (for example the fit between the issue at the table and relevant national rules) not much less than Council working group participants. The latter are explicitly subject to intricate co-ordination procedures for national negotiating positions in the capitals, although their intensity varies between the member states.<sup>8</sup> On average 38% of expert group participants have co-ordinated their position with their colleagues, and some 28% even indicate to have clear instructions about the position to take.

The findings discussed in this section can be complemented with various other studies about national official behaviour within EU level institutions (see Beyers and Dierickx 1998, Beijers and Trondal 2003). A common observation is that domestic level factors, such as the embedding of expert committee members in national administrations, continue to matter more than shared EU level experiences. Even for actors who are regularly involved in EU-policy-making, this experience functions as a secondary socialisation process. An extensive exposure to negotiations and proceedings at the EU level does not lead to more supranational role conceptions (see Goetz 2000). The data show that the latter feature, although present without doubt, remains to a large extent filtered by the national institutions (in the sense of organisations, norms and rules) in which the participants are embedded, and that supranational features of the policy-process, mostly the socialisation that participants of EU level committees perceive, do not replace national allegiance.

Emphasis on the alledged prominence of national features and the central position of national executives in the policy-process is characteristic

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8) See chapter 4 and the annex for more on national co-ordination of EU affairs.

for intergovernmentalism, the second important ‘classical’ integration theory to be discussed in the next section.

### §3. Intergovernmentalism

#### §3.1 *Introducing intergovernmentalism*

The findings, presented in the previous section, on the sustained relevance of the national level of policy-making are by no means groundbreaking. Already in the 1960s and 1970s, disillusioning experiences with the process of integration for some scholars obviously contradicted the neofunctionalist logic of integration. Haas (1975) himself criticized neofunctionalism for underestimating the political and administrative capacity of the member states to adapt to and effectively survive pressures ‘from above’. Because of this empirical counter-evidence, most notably the ‘empty chair crisis’ and subsequent slowdown of the integration process (a process known as ‘Euro-sclerosis’), the sustained position of the member states drew renewed academic attention.<sup>9</sup> Stanley Hoffmann (1966) emphasised the continuing importance of national interests in EU policies, the reason why the process of spillover would come to a halt when hitting the domains of ‘high-politics’. Policy integration would be possible if and only if national governments, as ‘masters’ of the game, give up national competencies for the sake of better policy-making. This ‘integration dilemma’ is easily recognisable as core of the dominant state-centric paradigm in integration theory: intergovernmentalism.

For intergovernmentalists, the European Union is an international organisation with a particularly broad mandate, which serves to uphold and strengthen the interests of its member states (Hoffmann 1966, 1994). For traditional realists, these interests were a set of constant and fixed preferences of decision-makers at the central state level (Krasner 1978, 10-7). More recent analyses see interests as more variable and dynamic. An appealing picture of how interests are formed by the constant process of interaction between the international and the national level is offered by ‘two-level games’. In this analogy of international relations as simultaneous

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9) Euro-sclerosis refers to the stagnation of the policy process in the 1970s as a result of political tensions and economic recession (Dinan 2005, 69).

chess games, national representatives act on two tables: the domestic and international (Putnam 1988, Evans et al. 1994, Anderssen and Liefferink 1997, 10-12). National political leaders appear at both game boards – across the international table sit European counterparts, around the domestic table sit the domestic constituency. The link between the two chessboards is the requirement for any agreement on the first, international level, to be ratified, endorsed or implemented on the second, domestic level. At the domestic level, domestic groups pursue their interests by pressuring the government to adopt favourable policies, and politicians seek power by constructing coalitions among those groups. At the international level, the same actors seek to bargain in ways that enhance their domestic position. A government representative would attempt to maximise his or her own ability to satisfy domestic pressures, while minimising the adverse consequences of foreign developments. The political complexities for the players in this two-level game are enormous, since moves that seem rational for a player at one board might be impolitic for that same player at the other board.

Two-level game is little more than a metaphor to describe the outcomes of international exchange (Rosamond 2000, 147). But the model can be used to acknowledge that ‘an understanding of domestic politics is a precondition for, not a supplement to, the analysis of strategic interaction among states’. The quote is from Andrew Moravcsik (1993, 481) who offers an explanation of European integration that actually consists of two separate theories. First, a liberal theory of national preference formation, second, a model of EU level bargaining between national governments. Interests of governments are not a function of their relative position in the world system, but arise through domestic conflicts between societal groups, the outcomes of which can be explained by the magnitude of benefits to be gained from co-operation, the certainty of these benefits and the relative influence (differential mobilization) of the producers groups representing economic interests. These groups influence governments, which wish to maintain in power and, therefore, respond to domestic pressures.

Probably, few EU students trapped in the traditional intergovernmental-supranational divide would recognise at first sight the author of this quote: ‘... the EU is a unique, multileveled, trans-national political system’.<sup>10</sup> But

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10) Moravcsik 1999, page 1.

although it acknowledges the ‘multi-leveledness’ of the EU system, a core assumption of ‘liberal’ intergovernmentalism is that the domestic and the international arenas are clearly separate and distinct. For Moravcsik, domestic actors do not play a significant role outside and independent from government representatives. ‘Groups articulate preferences and governments aggregate them’ (ibid. 483). Although they may be motivated by the pressures of interest groups upon which they are politically dependent, national governments remain the highest authorities within national societies, as well as at the EU level, where they are able to ‘orchestrate their negotiations carefully’ in order to rationally pursuing a stable set of geopolitical or economic interests (Webb 1983, 13). They may agree to ‘pool’ and delegate competencies to the EU level, but only as long as it is in their own interests and insofar as common goals are achieved that would not be possible to realise alone.<sup>11</sup> Because national governments are able to take initiatives and reach bargains in Council negotiations with relatively little constraint, the outcomes of EU policy-shaping reflect the lowest common denominator (Moravcsik 1993, 501). In contrast to the neofunctionalist view, EU-institutions are regarded as agents to facilitate interstate bargaining, but they remain creatures of their political ‘masters’, the governments of the member states.

The assumption of rationality, central to liberal intergovernmentalism, suggests that governments possess all necessary information available and use this rationally to pursue their goals. By co-operating and devising common policies as solutions for policy problems, governments can actually enhance their position ‘at home’. The paradox – which originated with Stanley Hoffmann’s article on the ‘obstinate’ nation state (Hoffmann 1966) – is that by co-operating, and thus sharing competencies with each other and with the EU-institutions, governments can ‘deliver’ to their national constituencies better and more adequately, than would have been the case if they would act solitary. Alan Milward (1992) has described this process (by which member states which have an interest in the promotion of integration to accommodate the demands of their national constituencies) as the

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11) Competencies are pooled at the EU level when national governments agree to decide matters by other voting procedures than unanimity. Competencies are delegated when supranational actors are permitted to take decision without intervening vote by national governments (Moravcsik 1999, 67).

‘European rescue of the nation state’. Leon Lindberg (1994) has later reversed Milwards argument and used it to explain the entrepreneurial qualities of supranational institutions. Lindberg draws an analogy between the ability of governments to use domestic interest in order to strengthen their position both at home and abroad, and the ability of the supranational institutions to gain advantage from the interplay of diverging preferences of the member states.

§3.2 Searching for proof of intergovernmental bargains

Table 2.3 An Intergovernmentalist perspective on governments

	Focus	Government?	What happens at central government level?	How to shape EU policies
<b>Intergovernmentalism</b>	Negotiations between unitary governments	Shapers not shaped themselves; masters of the treaty – homogeneity between member states – Hierarchical system of unitary states	– National interest defined in negotiations between domestic societal groups	– Co-ordination: national interest aggregated and coherently represented, monopoly of national representatives – Focus on Council as prime venue for governments

The same empirical studies described in §2.2 provide interesting insights into the presumed dominance of national governments within the EU system, a claim so central to intergovernmentalist reasoning. At first sight, the centrality of national government representatives feeds the image of national governments as key players of the European game. Even in Commission-organised expert committees, government elites remain key actors. Their prominence is easily explained by the possible impact of European legislation. It is clear that if governments have to implement binding decisions, most notably directives, into their national legal systems, they have an incentive to invest a lot of time and energy into the ‘shaping’ of these rules and laws at the EU level. And indeed, multiple recent volumes have discussed national systems for dealing with the ‘impact of Europe’, one prominent feature being the systems for formulating and co-ordinating national preferences for EU policy developments (see Kassim 2000, Zeff and Pirro 2001, Wessels et al. 2003). These processes of conflict between



domestic groups are extensively described in the first step of liberal intergovernmentalist reasoning, and rightly so as it appears from these policy-oriented studies that the impact of Europe is ‘differential’ (Héritier et al. 2001, 2). There are important differences between national systems, including the degree of centralisation, the methods of co-ordination and the involvement of different actors such as parliaments; regions and lobby groups.

What is particularly interesting from these studies is the degree of internal diversity that characterises national governments and the processes of preference formation. It would be interesting to see to what extent the way a government ‘deals with Europe’ has an impact on the way national positions are formulated and represented, an exploration of which requires looking outside the liberal intergovernmentalist framework. The aforementioned studies repeatedly demonstrate how the negotiating positions represented by government officials not so much result from a mere consultation of societal interests, but be the outcome of negotiation, bargaining and conflict between and within government departments, national parliaments or societies. Apart from domestic producer groups, central to Moravcsik’s theory, there is a considerable impact of ‘bureaucratic politics’, i.e. different government departments with contrasting views on the subject matter. What is crucial is that it appears that governments have much difficulties to control these processes at the domestic level and that the picture of ‘effective systems for the internal management of external relationships [which] enable states to arrive at the international bargaining table fully prepared to take part in negotiations’ is not sustained (Metcalf 1994, 276). The active role of domestic groups in Brussels outside the framework offered by national governments cannot be so easily explained with the tools offered by liberal intergovernmental reasoning (see Wessels et al. 2003, Kassim 2000, Zeff and Pirro 2001). In support of the argument made by Bulmer (1983): ‘it is just as important to understand the national institutional settings as to understand the EU level institutions, in order to get a grip on the EU policy process as a whole’ (Wallace 2000, 7).

The next step in liberal intergovernmentalist reasoning focuses on how governments behave at the EU level. There, the preferences emerging from domestic conflict are expected to be consistently and coherently represented at the EU level by government executives. But the findings are contradictory. First, if the central claims of intergovernmentalism ring true,

the survey results would show a prominent and continuing allegiance of national government officials to their national government. However, the data demonstrate, in contrast, how a gradual ‘supranationalisation’ of loyalties can be witnessed and that a considerable proportion of the officials involved in the survey feels loyal to the committees in which they participate. Rather than national backgrounds, it is the quality of the arguments and the expertise delivered by the speaker that are convincing. Second, according to the data, national co-ordination is not as important as the intergovernmentalist framework leads us to believe. In Council working groups, the prime venue of national interest representation where one would expect the tightest co-ordination, 45% of all instructions have not been co-ordinated within the relevant government ministry. More than half (53%) of all instructions have not been co-ordinated ‘inter-departmentally’, i.e. with the Foreign Ministry or co-ordinating authority in the national capital. Finally, only 35% of all officials claim to have ‘always a clear instruction on the position to take’ which leaves a majority of cases in which instructions are vague and to be further elaborated on the basis of an individual assessment. In other words: the image of ever-vigilant, comprehensively prepared member state principals is misleading (Kassim and Menon 2002).

#### **§4. Discussion**

The debate between the classical theories of European integration tends to sketch contrasting scenarios: the EU would be stuck between the two extreme poles of ‘international organisation’ on the one hand and ‘super state’ on the other hand. ‘Those writing within the intergovernmentalist tradition stress the perennial capacity of the member states to control developments in the EU, while their adversaries emphasize the ability of the EU institutions to extend their own power at the expense of the member states’ (Menon 2003, 172). The discussion of recent empirical findings in this chapter already indicates that on this continuum, ‘a variety of intermediate outcomes are possible’ (Rosamond 2000, 105). For this reason, it has been argued that the ‘old’ debate fails to capture the complexity and dynamism of what happens in the EU on an everyday basis.

Kassim and Wright (1991, 845), for example, point at the fact that neofunctionalist predictions about the intrinsic conflict of interests between national and supranational actors are not mirrored in actual EU politics. Policy practices in the corridors of the Council and European Parliament

building; the Commission DG's and the national capitals show that large differences of opinion occur *between and within* the member state governments and *between and within* supranational institutions. The Council is by no means a coherent institution and over amendments on legislative proposals, frequent battles take place between the Commission and the Parliament.

The intergovernmentalist perspective on how governments formulate, deliver and defend preferences has been subject to similar criticism.

A first strand of critique has focused on the fact that intergovernmentalism does not go into the organisational dimension of 'domestic' (Bulmer 1983) or 'bureaucratic politics' (Allison and Zelikov 1999). Empirical accounts of national EU policy-making point at the internal diversity within member state governments, the dominant role of bureaucratic politics within formal procedures for EU policy-making at the national level and the role of domestic groups in Brussels, being active outside the framework offered by national governments (see Wessels et al. 2003, Kassim 2000, Zeff and Pirro 2001). In-depth study of individual member states could reveal how '[...] the policies that governments pursue at the EU level are the outcome of often complex processes of intra-governmental bargaining, bureaucratic politics and co-ordination of variable quality' (Kassim 2000, 259).

Second, critics have pointed their arrows at the part of (liberal) intergovernmentalism that is describes 'just another' two-levelled bargaining process at the EU level. Instead of governments responding to political pressures 'nested' within states and negotiating positions subsequently being uploaded from national capitals to Brussels, it is argued that EU-member state governments face a continuous 'bypass' of actors that hamper their capacity to act as a gatekeeper and chief negotiator. 'Positions are watered down during the domestic co-ordination process and in negotiation with the Commission and other member states' (Spence 1993, 49). Intergovernmentalists are thus accused of exaggerating the degree of individual and collective control of governments over the EU policy process and, by relying on a picture of 'shapers not shaped themselves' (Wessels 2003, 8), thereby neglecting integration dynamics, such as the possibility that actors change positions during EU level negotiations.

The original purpose of the 'sterile controversy' (Risse 1996, 59) was to explain processes of inter-state co-operation, rather than to extensively

describe what happens what happens within and between states. This does not mean that the debate between intergovernmentalism and neofunctionalism does not offer valuable insights for policy analysis into the relevant events actors, factors and relations in the shaping process. The revival of the old debate in the 1990s has further elaborated, theoretically differentiated and empirically investigated how processes of preference formation at the domestic level are relevant for how states behave at the EU level, and how the role of supranational institutions can be key to understanding European outcomes. As we will see, both are relevant factors to take into account for analysing shaping capacity of governments. However, existing studies have also a tendency to focus on the singular moments of change and crisis, the arena of the ‘history-making’ decisions in European integration (Peterson 1999). Examples of such thoroughly researched events include the coming into being of a common agricultural policy, the 1988 White paper on the completion of the single market; the successive negotiations on treaty change in Maastricht, Amsterdam and Nice and the European Convention (See Moravcsik 1993 and 1998, Sandholtz and Zysman 1989). The process of shaping policies on a day-to-day basis is more adequately analysed with the tools offered by comparative politics and policy analyses. These academic sub-disciplines, primarily concerned with analysing modes of governance and interaction both within the EU (multi-level governance), and between the EU and the domestic level (Europeanisation) have migrated into EU studies in the 1970. These disciplines had long before departed from the conventional concept of the nation state shared by neofunctionalism and intergovernmentalism: member states as hierarchical, authoritative structures of decision-making confronted with ‘sub-layers’ (provinces and municipalities) and ‘supra-layers’ (the EU’s institutions). Political science and policy analyses had long before departed from this traditional image of the nation state. The next chapter investigates how these perspectives see the role of governments and examines their speculations about the ‘opportunity-structure’ and capacity of governments to shape new EU policies.

# Chapter 3

## Governments in the Theoretical New Europe

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### §1. Introduction

For academic research on the EU, the 1990s became the decade of pluralist and policy-oriented studies, most notably ('multi-level') governance approaches and Europeanisation. In this 'second wave' of EU-member state analysis (Holzhacker and Haverland 2006, 10), concerned with the form and impact of interaction between different locations of policy-making, two mainstreams can be distinguished. First, (multi-level) 'governance'-studies, in which the network character of EU policy-making is emphasised, but which remain rather ambivalent on the role of governments. Where prominent analysts explicitly study 'the conditions under which central state executives may lose their grip on power' (Marks 1996, 341), others emphasise how member states retain a very substantial role in decision-making (Jachtenfuchs and Kohler Koch 2004, 102). The ways in which they deal with these demands at the national level is central to 'Europeanisation'-studies, focusing on the impact of the EU at the national level.

This chapter investigates how these perspectives on EU-member state interaction see the role of national governments and critically examines a number of implicit hypotheses as regards to their 'opportunity-structure' and capacity to shape new EU policies.

### §2. Integration theory on the move from 'why' to 'how'

The recent approaches on EU-member state interaction discussed in this chapter have been referred to as the theoretical 'new Europe' (Rosamond 2000, 99). This suggests that attention for the interplay between EU- and

member state level developments was radically innovative. Indeed, EU studies have long been dominated by IR-theorists, discussing the how and when of member state integration. The first volumes discussing the intricacies of policymaking and national governments adaptation date back to the 1970s, when academics from sub-disciplines of political science (comparative politics, policy analysis and public administration studies) became interested in the emerging polity and the interaction between the national and the EU level (Wallace 1970, 1973).

The ‘domestic-politics approach’ was coined by Simon Bulmer, who emphasized the importance of analysing ‘the lower of the two tiers involved in EC policy-making’ (1983, 352): i.e. the domestic level. Although this is regarded the basic unit of EC policy-making, ‘whether the governments are really as powerful as intergovernmentalism would have us believe, must depend on specific examination’ (ibid. 354). Governments can be constrained by specific interests and by transnational forces, but they may also impose a policy on domestic interests, deriving power from their formal position in both the EU and the domestic constituency. Bulmer also underlined the role of domestic pressure and interest groups, ‘forcing’ governments to take a certain stance in Brussels. He developed a framework of national ‘policy styles’: the interaction between the government’s approach to policymaking and the relationship between government and other actors in the domestic political system. Internal political and administrative processes determine the outcome of intra-state bargaining and the negotiating position of national states.

The ‘newness’ of recent approaches can thus be debated, but the fact that EU studies made a decisive ‘governance turn’ (Rosamund 2000, 110) was due to some crucial policy developments after 1985. Through the White Paper on the completion of the EU’s internal market and subsequent development of new competencies by the Commission, the scope of EC policies was extended to include areas previously dealt with by national governments. The 1991 Maastricht treaty, by which the European Union was formally founded, acted as a ‘watershed’. With the addition of the ‘second’ and ‘third’ pillars (see table 1.3), a period of predominantly market-oriented EU policies gave way to the development of a ‘Euro-polity’. Treaty amendments introduced a number of new notions and principles, with the potential to alter the balance of power between the different categories of actors participating in EU policy-making: subsidiarity, co-decision and a more structural

involvement of the sub-national level. With the proliferation of majority voting, governments (and the interests they traditionally represented) could no longer rely upon the protection of a national veto in the Council. This instigated an increase in the volume and diversity of interests represented in Brussels (Mazey and Richardson 1993, 3).<sup>1</sup> The increase in legal and administrative workload of the institutions – and thereby the volume and degree of interactions between the EU and the national level – is visible in the ‘*acquis communautaire*’. The whole of EU rules and legislation more than doubled from 1983 to 1998 (Maurer and Wessels 2003, 44).

In parallel, the ‘theoretical new Europe’ further developed (see Andersen en Eliassen 1993, Ladrech 1994, Börzel and Risse 2000, Caporaso, Cowles and Risse 2000, Mény, Muller en Quermonne, 1996). Two mainstreams, (multi-level) governance and Europeanisation, are discussed in the next sections.

### §3. Multi-level governance: the messy state

Table 3.1 Newer EU studies perspectives on governments

<i>Theory / perspective</i>	<i>Claim</i>	<i>Added value</i>
Multi-level governance	‘Messy state’	By-pass of government by other actors ‘going Europe’
Europeanisation	‘Impact of Europe’	Adaptation to increase efficiency and effectiveness

Governance refers to the setting of public policy through an interaction of state and non-state actors, the result of which cannot be reduced to one actor in particular. In describing how public policy is being made, this container notion emphasizes the dependence of policy makers at the central level on support from lower government levels, the private sector and civil society. As the EU has been described as a ‘hybrid form’ of public policy-making without a single ruler (Rosamond 2000, 110), governance has been

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1) During the time period under study, the number of interests officially represented at the EU level in ‘Eurogroups’ grew from 525 in 1993 (Mazey and Richardson 1993, 6) to 700 in 1998 (Greenwood 1997, 527).

gratefully picked up and applied in academic EU studies, as well as by the EU institutions themselves (European Commission, 2001).<sup>2</sup>

The ‘multi-level’ variant of governance studies has been developed in the course of the 1990s, in analyses of EU structural and cohesion policies. Sub-national actors were closely involved in the formation and implementation of regional support plans and policies, the result being much contact between different private and the public actors and locations of policy-making. Building upon empirical findings on the role of interest groups and lobby representatives, as well as private firms and non-governmental organisations in the EU policy process (Mazey and Richardson 1993, Van Schendelen 2003), multi-level governance was gradually stretched to other EU policy domains. It extensively described how the process of making new policies between member state governments and other interested actors results in dispersed policy-making competencies at different locations at the regional, national and the EU level. Because this latter notion is used to deny its relevance in a non-hierarchical system, it has been suggested to use the word ‘location’ instead (Wallace 2000, 73).

Detailed review articles of multi-level governance abound (Jachtenfuchs 2001), so that for the purpose of this study, a management summary should suffice.

Against the state-centric image of further integration serving as a rescue of the nation state under pressure (Milward 1992), governance analysis places three related claims.

First, collective decision making at the EU level is seen as a loss of control for individual governments. On the one hand, there are restrictions on the ability of individual governments to veto EU decisions. On the other hand, there is an erosion of collective government control, as the Council of Ministers, the formal venue for national interest representation, increasingly competes with the European Parliament for legislative powers. As a result, decision-making competencies in the EU are not monopolized by national governments (Hooghe 2001, 4) but rather shared by actors at different levels.

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2) For example, governance has been presented as a possible solution to coordination and legitimacy problems at the EU level and within the member states (Schout and Jordan 2005).



Second, by moving decision-making competencies to the supranational level, government representatives would ‘move from a position of “decision maker” to that of “co-decision maker”’ (Wessels 1991, 136). The central position of the EU institutions emanates from their competencies in the different stages of EU policy-shaping.<sup>3</sup> For the stage of policy design and enforcement, the European Commission is largely responsible. Originally, supranational analysis focused on the autonomy of the European Commission, which has been claimed to be responsible for regulating of about 80% of legislation (Van Schendelen 2002). There is the famous quote by Hull (1993, 83), claiming that when a decision is adopted by Council and Parliament, it ‘usually contains 80 per cent of [the original] proposal’ – whereas in the same contribution, it is estimated that some 95% of all lobbying efforts take place after the drafting of the proposal, because then generally interested parties become aware of the fact that something is in the making. In the decision-making phase, among the Commission’s assets are its agenda-setting capacity under the co-operation procedure and the level of expertise and experience that responsible Commission officials bring to the different level of Council deliberations. Last but not least, the Court of Justice provides judiciary control. The Court is the final arbiter on EU legal matters that in landmark rulings has established principles as the supremacy of EU law and the direct effect and applicability of certain categories of EU decisions (see Weiler 1983). The procedural innovation of co-decision-making with the Council has considerably increased the formal position of the European Parliament in EU policy-shaping.

The third claim in multi-level governance is related to the domestic level. Here, resulting from similar procedural and policy-making developments, a new engagement of other actor categories can be witnessed, with an emphasis on that of the regions (Wallace 2000, 31). The development of EU regional policies has run parallel to (and should thus be analytically separated from) various national decentralisation initiatives, which altogether reinforce the image of increasing regionalisation of public policy-making. However, in the course of the 1990s, new opportunities for sub-national levels of government have been created at the EU level. These take essentially three forms: formal representation at the EU level, funding of

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3) See for a description of the EU policy-process the appendix.

regional policies through EU's structural and cohesion policies and cross-border co-operation.

But it is not only sub-national actors that have been engaged in EU policymaking. Against the claims, in intergovernmentalism, that the preparation and formulation of preferences remains firmly 'nested' within the state and that economic interests will always dominate these processes of domestic preference formation, multi-level governance studies points at the increasing importance of departments; agencies and non-state actors which the national government is no longer able to control. Governments thus become interaction forums or 'bargaining arena's' for actors and organisation fiercely lobbying for different interests. This has initiated the dilution of traditional co-ordinating authorities charged with the responsibility for national EU-policy-making. Originally, the preparations of EU level negotiations were the responsibility for the government departments of Economic or Foreign Affairs. With the increasing volume and scope of EU legislation, the authority of these authorities has been challenged, both from the 'bottom-up', by individual government departments actively present in Brussels, and 'top-down'. The latter refers to the emergence of the European Council as the forum through which strategic choices are made and political bargains are struck, which makes that Government or Prime Ministers' Offices have become more involved in the organisation of national EU-policy-making.<sup>4</sup>

Multi-level governance argues that this 'bypass' of national governments takes place both directly and indirectly. Directly, because actors outside the central government compete with its representatives at the EU level for access and influence, most notably in the European Commission, as well as in the European Parliament. The challenge for governments is the need to satisfy both their European partners and their domestic constituency – not in the least national parliament, which should ratify or implement common

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4) In the new member states which joined the EU in May 2004, preparatory mechanisms are often co-ordinated by the Government Office. This may be explained by the more hierarchical structures prevailing in these countries, but also by the 'lessons learned' from problems in the 'old' member states, where the co-ordinating authority is traditionally located at the Ministry of Foreign Affairs.

decisions. Because so many ways are now open to domestic actors which are not satisfied by interest representation through the channels of national government, governments face competition in their shaping attempts by actors which 'go transnational' (Jachtenfuchs and Kohler Koch 2004, 104). As result, multi-level governance claims that national governments are no longer in a position of 'monopolist' or 'gatekeeper' of the flows between the domestic and the international level of analysis. Indirectly, as a result of domestic groups drawn into the European policy process and organising themselves transnationally, European policy-making takes place under more public scrutiny, so that 'the action has shifted from national governments and technocrats in semi-isolation to domestic politics in the broad and usual sense' (Hooghe 2001, 10).

To be sure: these three interrelated developments – the impact of EU decision making on the national level; the role of the supranational institutions and an EU-engagement of actors other than governments – had been present in the integration process for decades. However, they were reinforced by the developments in EU policy integration since the late 1980s. Although multi-level governance has rightfully been called a 'compelling metaphor' (Rosamond 2000), it remains covert what this new situation (interdependency of actors; interaction within and between networks) it so adequately describes implies for the ability of national governments to formulate new EU policies. Have governments, confronted with a new situation of complexity and multi-actorness, only lost out, or are new opportunities present?

Before this new 'opportunity-structure' is discussed in more detail, this review of newer EU studies is complemented with a second mainstream: *Europeanisation* studies.

#### **§4. How Europe hits home: studies of Europeanisation**

Like governance, Europeanisation is a modern 'buzz word' which has been considerably stretched since its introduction in the early 1990s.<sup>5</sup> Although

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5) Definitions range from Knill (2001, 1: 'how European integration affects domestic administrative practices and structures'); Ladrech (1994, 69: 'an

definitions and interpretations abound, Europeanisation is commonly understood as a variable which impacts upon the member state governments, to the effect that domestic policy areas become increasingly subject to common policy-making at the EU level (Börzel 2002, 6).<sup>6</sup> If a certain actor or organisation is ‘Europeanised’, what happens at the EU becomes part of its structure or behaviour.

Europeanisation can take place through different mechanisms: directly, through binding laws and politics; and indirectly, through the change of existing ‘opportunity structures’ or framing beliefs and expectations of actors (Knill and Lehmkuhl 2002). Note that the latter aspect of Europeanisation is close to early definitions of integration. Haas (1958, 4-5) defined European integration as a condition in which specific groups and individuals showed more loyalty to European-level institutions than to national authorities. However, generally, the concept of European integration is concerned with what happens at the EU level, whereas the focus of Europeanisation-literature lies ‘at home’, i.e. on what happens within the member states.<sup>7</sup>

Europeanisation has been called the ‘forgotten dimension’ of integration studies (Jachtenfuchs and Kohler Koch 2004, 109), quite remarkably, as academic attention for how integration affected domestic social and political systems can be traced back to the early 1970s. But it was not before the mid-1990s that Europeanisation developed into an important ‘touchstone for theories’ on the domestic impact of the EU (Cowles, Risse, and Carporaso

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incremental process reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy-making’) to Héritier (2001, 3: ‘the process of influence deriving from EU decisions impacting upon member state policies and structures’).

- 6) Note that EU dynamics can also be extended to states other than EU member states. This ‘external’ dimension of Europeanisation refers to ‘a process of change in national institutional and policy practices that can be attributed to European integration’ (Hix and Goetz 2000, 27). Van Schendelen (2002, 31) defines Europeanisation even more generally as ‘an increase in cross-border public and private issue formation in Europe’.
- 7) An exception is the definition applied by Risse et al. (2001): ‘Europeanisation is the emergence and development at the European level of distinct structures of government’.

2001, Featherstone and Radaelli 2003, Mény, Muller and Quermonne 1996). Interestingly, the concept has been stretched to include EU-related processes in states outside the EU (Sciarini 2004), as well as candidate states (Papadimitriou 2004).

Within Europeanisation studies, two broad mainstreams can be distinguished. First, studies focusing on explaining adaptation to EU membership in the member states in terms of convergence and divergence of policy and polity, second, analyses concerned with explaining problems with implementation and transposition of binding EU legislation in the member states.

#### *§4.1 Explaining national adaptation*

One school within Europeanisation literature centres on the rather intriguing question to what extent organisational, constitutional and procedural pressures ‘from above’ would force national administrations to converge into one common administrative model. In other words: to what degree would ‘Europeanisation’ imply the formation of a mature European decision-making system (Andersen and Eliassen 1993, Cowles, Caporaso and Risse 2000) according to a kind of isomorphism? An abundant supply of arguments predicts either convergence, or continuing differentiation between the member states.

For the claim that national political and administrative systems in the member states would gradually converge into one similar model as a result of European Union membership, two explanations are heard.

First, building upon neo-functional predictions (Haas 1958), it has been claimed that through gradual ‘socialization’ into the practices of the EU system, social learning will occur: the process whereby ‘actors through interaction with broader institutional contexts (norms or discursive structures acquire new interests and preferences’ (Checkel 2001, 25). This process would lead to a gradual diffusion of shared values within the national systems of the member states and a common administrative culture and increasingly similar national structures would progressively develop in all EU member states.

A second explanation is a presumed ‘logic of optimisation’. The idea is that European integration creates common problems to the member states, which have to arrange national procedures to participate in common decision-making and to implement binding EU decisions into national

legislative systems. The logic of optimisation predicts that over time, there is a gradual ‘convergence’ of national practices, around the most effective solutions of how to manage EU at home. The most successful modes will be adopted in all member states.

However appealing at first sight, recent comparative studies on the impact of the EU on national governments at the central state level do not sustain these expectations. Two conclusions of this ‘impact-literature’ stand out.

Firstly, Europeanisation is not making the member states (more) similar. Adaptation towards the EU is differentiated, depending on domestic political and administrative structures, cultures and working practices. Everywhere, the increasing scope and volume of EU policies have resulted in more attention for what happens at the EU level, and an increase in the range and frequency of contacts between national governments and the EU level (Wessels and Rometsch 1996, Harmsen 1999). But if *any* conclusion can be drawn, it is that of diversity in ambitions, arrangements and processes within national governments to cope with EU demands. There is so far neither question of convergence of national administrations, nor indication that processes of optimisation, socialisation, coercion or mimicry would be at play. The impact of the EU is ‘differential’ (Heritier 2001), i.e. incremental, irregular and uneven over time and between locations (Featherstone 2003, 4).

Second, the process is slow and incremental and has nowhere resulted in grand strategy changes or an abrupt overhaul of existing arrangements. When analysing national arrangements for dealing with EU negotiations, it is surprising to what extent procedures rely on procedures set up in the early years of membership, sometimes dating back to the 1950s, and how little these have been adapted to the developments discussed in the second section of this chapter. There is no systematically directed domestic organizational or procedural adjustment to changes in the EU environment. Slow and incremental adaptation is the norm, with ‘an emphasis on the immediate’ (March and Olson 1998, Aspinwall and Schneider 2001).

This diverse pattern of adaptation has, alternatively, been explained by a ‘logic of appropriateness’ (March and Olsen 1989, 21-39). When designing structures for co-ordinating and implementing EU policies, national administrations tend to stick to pre-existing conceptions of appropriate or legitimate forms and behaviour. In line with ‘neo-institutional’ theory, the

impact of the EU is mediated through existing structures and values. National arrangements for dealing with EU affairs reflect a ‘search for familiarity’ in ‘domesticating’ the EU (Harmsen 1999, 85). This preservative pattern of institutional development would explain differences between the member states as regards to policy styles, ambitions and politico-administrative opportunity-structures, including the party system, the role of parliament, the degree of administrative fragmentation and the dominant conception of co-ordination (Kassim 2000, 250).

To establish the link with the shaping: comparative studies concerned with the possible convergence and divergence of national systems have demonstrated that member states and national governments react to European integration pressures in a different way, dependent on traditions and cultures. But which variables determine how a government, each in their own way, shape European policies?

#### *§4.2 Explaining implementation performance*

A second mainstream within Europeanisation debates centres around explaining the implementation or transposition deficit: why have governments problems to implement measures they have agreed upon in the shaping of legislation (Mendrinou 1996, 4)?<sup>8</sup> Where early explanations focused upon administrative shortcomings in the implementation process, recent studies have investigated the ‘goodness of fit’-hypothesis. This thesis links implementation performance to the degree of congruence of national policy and legislative arrangements with new, European rules and legislation (Duina 1997, Knill and Lenschow 1998, Knill 2001, Green Cowles Caporaso and Risse 2000, Börzel and Risse 2003, Börzel 2003a). Shaping behaviour or – as it is often referred to – ‘uploading’ efforts by national governments are inspired by the desire to minimize adaptation costs. The assumption in much of the literature is that national governments will act as ‘guardians of the status quo’, protecting national traditions against intrusion from the EU

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8) The European Commission monitors the application of Community law and implementation records and regularly publishes the results in scoreboards and reports. In mid-2005, the transposition deficit – the average percentage of directives not transposed into national law – was 1.9% for the EU-25, implying that 245 directives were not transposed in time in one or more Member States (Source: European Commission 2005).

level. Adjustment processes are expected to be more problematic if the degree of ‘misfit’ between the EU and the national level is high.

The ‘goodness of fit’-hypothesis has been rejected on several occasions (Knill and Lenschow 1998, Héritier and Knill 2001, Haverland 2000, Treib 2003) and thus, the framework for explaining national implementation performance has expanded. It now encompasses a wealth of mediate variables, including national politico-administrative traditions and the policy context (Knill and Lenschow 1998) which would hamper or facilitate the way governments deal with implementation; the number of institutional and political veto points that actors encounter (Haverland 2000, Cowles, Caporaso and Risse 2001) and the national political process (Heritier 2001). The more institutional veto points, or policy actors, or politico-administrative misfit, the more problematic implementation will be.

At the same time, the link with the shaping side of EU policy-making is emphasised. Treib (2003) claims that the preferences of a government for new EU legislation will not always conform to existing legislation. In contrast, governments can be willing to change the status quo at the domestic level, for example in response to party political pressures. Thereby, governments purposefully press for new existing arrangements in Brussels, using the EU level as an instrument to achieve domestic change.

A related attempt to link the ‘top-down’ (in the sense of: implementation) and ‘bottom-up’ (in the sense of: shaping) dimensions of Europeanisation is offered by Börzel (2003). This contribution lists a number of variables with a possible impact upon the capacity of member states to ‘upload’ particular preferences, with the aim of facilitating policy implementation at a later stage. Distinguishing between political and administrative capacities, three different explanatory variables are analysed: the degree of fragmentation, measured as the number of veto players that at the domestic level; the resources that a member state holds, and the level of support for EU integration. The conclusion from an assessment of shaping and taking responses of the EU-15, focusing on the much-explored field of EU environmental policy, is that whereas political fragmentation and resources appear to carry little explanatory power. Leaders or ‘pace-setters’ in EU environmental policy are generally amongst the smallest member states with relatively little administrative capacity (Denmark; Netherlands). The most effective shapers and takers share a low level of administrative fragmentation, many resources and high levels of administrative legitimacy.



The active use of resources and the legitimacy of EU related actions are relevant variables for both explaining success in EU policy-shaping, as well as for explaining a government's implementation performance.

The majority of 'Europeanisation'-literature hence remains concerned with the 'domestic impact of Europe' and dominated by a 'top-down' or 'second-image-reversed'<sup>9</sup> (Gourevitch 1978) perspective. At the same time, there is a clear (but often implicit) link with multi-level perspectives and shaping capacity. Some Europeanisation literature has discussed the relevance of 'uploading' or 'shaping' attempts of governments in relation to their implementation capacity, but this dimension of EU policy-making is predominantly regarded as explanatory for domestic adaptation or implementation performance.

Table 3.2 Dimensions of Europeanisation

Dimensions of Europeanisation	Output	Input
Direction	'Top-down' flow: EU ► member state level	'Bottom-up' flow: member state ► EU level
Effects on structures and actor behaviour	'Taking EU policies': Change and adaptation on domestic patterns and structures; implementation	'Shaping EU policies': policy preparation, interest representation, lobbying and negotiating

However, one key reason for national governments to adjust politico-administrative structures and actor behaviour to the EU is to enhance their ability to influence common decision-making. Adaptations to exploit the new opportunities provided by the participation in the European Union are to be considered as an integral part of the process, or: 'the other side of the coin'. That these 'feedback loops' from the domestic to the EU level and back are not included in most definitions and studies of Europeanisation is a serious omission. Van Schendelen (2002, 37) argues that the EU is not only a source, but also an important focus of what happens within national governments. Relatedly, Bulmer and Burch (2000, 4) have argued that the

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9) In a major contribution to the IR-debate in the late 1950s, neo-realist Waltz (1959) argued how the domestic system is the key to understanding international structures or war and peace as the second image. Gourevitch (1978) argued in contrast for a 'second-image reversed', explaining how the international system would not only be a consequence of domestic politics and structures, but a source.

‘old’ notion of Europeanisation, that they term ‘reception’, needs to be complemented by another dimension, the ‘projection’. One powerful counter argument is that this would risk to conceptually ‘over-stretch’ the already considerably broad concept of Europeanisation (Radaelli 2000). Therefore, the term Europeanisation should be reserved for the ‘top-down’ dimension (Bulmer and Lequesne 2002, 6). However, regardless of which concept or notion is used to cover the outcomes, the question how national governments influence the EU, while processing EU demands in distinct national ways and while seeking to avoid problems with implementation at a later stage, merits more and systematic academic analysis.

This chapter proceeds with an examination of the expected implications of these claims for national governments and their shaping capacity.

## **§5. A new ‘opportunity-structure’ for national governments**

The debate within (multi-level) governance and Europeanisation is essentially about the environment in which governments operate, which is characterised by a strong degree of interconnectedness of political and policy arenas, and poses challenges of adaptation both at the level of the EU and for the member states internally. For the purpose of this study, the supposed implications for governments can be caught in six ‘implicit’ hypotheses, which are discussed and critically examined below. This analysis is founded on the notion ‘opportunity-structure’, grounded in neo-institutionalism (March and Olsen 1989, Aspinwall and Schneider 2001). According to this theory of public policy-making, formal and informal structures or ‘institutions’ shape actor behaviour: rules, norms and practices that create opportunities or constraints for actors, governments in this case.<sup>10</sup> The effect of institutions can be either constraining or empowering (Aspinwall and Schneider 2001, 3) and the result is one particular opportunity-structure.

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10) This theoretical notion ‘institutions’ should be distinguished from the EU level organisations designed for common policy-making, most notably the European Commission, the European Parliament and the Court of Justice.

Table 3.3 The new 'opportunity-structure' for governments

Constraints on national governments	Opportunities for governments
Role of supranational institutions	'Integral' involvement as shapers and takers
Majority voting	Venues for access and influence outside the Council chain
Bypass by subnational and other actor categories	Consensual nature of the policy process

### §5.1 A critical examination of hypothesised constraints

Which are the constraints that national governments face when they attempt to participate within the modes of governance described in the previous sections? A literature review identifies three supposedly relevant elements of the EU-policy process: the role of supranational EU-institutions; the increasing occurrence of majority voting and the engagements of domestic actors in the EU's policy-shaping process.

- *"The independent role of supranational EU-institutions"*

A key thrust of multi-level governance is to demonstrate that 'even collectively, national governments are constrained in their ability to control supranational institutions they have created at the European level' (Marks 1996, 352). The notion 'supranational institutions' generally refers to the triad European Commission, European Parliament and the Court of Justice. The latter institution's role is predominantly concerned with setting the overall framework for policy-making realities, by ensuring that the law is observed in the interpretation and application of the treaties and of the provisions laid down by the competent Community institutions. Although the Court's importance can hardly be underestimated, related to the policy process, the focus is most dominantly upon the European Commission and the Parliament.

The position of supranational institutions has been claimed to constitute an important constraint upon the collective control of national governments in the EU decision-making framework (Hooghe 2001, 8-9; Earnshaw and Judge 2001, Nugent 2003, 174-205). This relation between the member states and the EU level institutions has been described with the help of 'principal-agent' theories. The principals, or member states, have many problems to control their 'agents', if only because the presence of multiple member states 'prone to competition and conflict' makes monitoring and control over the supranational institutions problematic. This also leads to intricate compromise outcomes, which leave room for the agent to exploit.

Moreover, there is the procedural constraint on change: while a member state needs to muster agreement among its partners to introduce change, the European Commission ‘need only dent the united front of state executives in order to block a proposed change’ (Marks et al. 1996, 354)

Due to the complexity of policy-making, these organisations (and the people working for them) use the autonomy they are granted maximally to pursue their own ideas and preferences, which may differ from those of the member states. Steps toward further co-operation, which member states take willingly, may produce unintended and undesired consequences – a claim obviously originating in classical neofunctionalism.

An interesting paradox which has been present in the construction of common policy-making from the beginning, however, is that the EU’s workforce is recruited *from* the member states, but not representing them. It has been argued how ‘most of the people who devise and operate EU rules and legislation are [...] people who spend the majority of their time as national policy-makers’ (Wallace 2000, 7) – an observation described as ‘administrative interaction’ (Maurer et al. 2000).<sup>11</sup> However, European civil servants are recruited through implicit but finely balanced national quotas, or, in official terms: with ‘respect for geographical balances’ (Dinan 2005, 205). Although expected to act as loyal Europeans, civil servants working for the supranational institutions will not completely divest themselves of their national loyalties (see also §2.2). Because EU policies tend to be very specialised and covering a broad domain of issues, under-staffed European Commission departments are no longer cautiously guarding their domain but instead eager for national government input. One could even argue that, from the viewpoint of legitimacy and expertise, it is a potential advantage for common policy-making that the EU’s staff has a wide range of knowledge and information across the member states.

According to influential observers of the EU policy process, the stage of drafting new policy proposals is increasingly regarded as an opportune time for member states to make a sustained lobbying effort to inject national preferences into the EU policy process. This includes regular contacts between national government ministers and Commissioners (Dinan 2000,

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11) Note that this element leans upon neo-functional logic, which predicted extensive interpenetration amongst bureaucracies (Webb 1983, 19)

225) and the strategic employment of national (top-level) officials within the EU level institutions through seconded expertise or patronage. This also holds for the European Parliament. Within the EP, the potential for influence of nationals is even more prominent, as its members are elected by national constituencies, but more and more governments also second national officials to the staff offices of the Parliament.

That certain member states are more willing than others to ensure that compatriots are involved into the drafting of favourable policy initiatives can be explained by the fact that originally, the European Commission embodied 'the European interest'. Supranational institutions were thus not designed as another forum for blunt national interest representation, a task explicitly deserved for the Council of Ministers. Some member states, including the Netherlands, have held this 'ideal' view on the traditional EU institutional set-up longer than others (see chapter 5).

Be that if it may, if governments indeed actively and increasingly seek these new ways for access and influence, the effects of the relative autonomy of these supranational institutions upon their 'opportunity-structure' are negated. The rather bold claim that the growing competencies of supranational institutions would constrain governments in their capacity to influence the EU policy process, should in any case be more differentiated.

- *"The widespread practice of majority voting in the Council"*

The proliferation majority voting since the late 1980s has been called the most obvious constraint on the control of individual national governments on the outcomes of Council decision-making (Hooghe and Marks 2001, 4). One key reason for the traditional dominance of member states in the policy-shaping process was that each of them held the key to the final, unanimous vote in the Council of Ministers. Notwithstanding size or political clout, a veto could be the end of many rounds of arduous negotiations. Under the system of qualified majority voting, for most decisions, only a blocking minority of member states can prevent a majority decision to be taken. The allocation of votes depends on an intricate mix of variables including GDP, population size and political clout.<sup>12</sup>

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12) The re-allocation of votes often gives rise to conflict between the member states, such as that between Belgium and the Netherlands during the treaty

The possibility of voting in the Council has been claimed to reinforce a development of circumvention of national governments by other stakeholders, as ‘interests, which had once been able to rely upon their national governments as a last resort of protection at the Council of Ministers could no longer afford to do so’ (Greenwood 1997, 53). This would obviously weaken governments as they could be outvoted and thus ‘fail’ to represent national interests. No doubt, the possibility of voting has changed negotiating behaviour of national representatives in the Council (Hosli 1996, 258). But whether this change does effectively constrain the shaping capacity of individual governments remains to be seen. Regular observers of Council processes have claimed how participants at all levels (administrative working groups, the ambassador’s committee COREPER and the ministerial Council-level) indicate to be constantly aware of the votes that are or should be drawn ‘on board’. Referring to this ‘Damocles’ sword’ hanging above the negotiations, rather paradoxically, ‘working in a world of [majority voting] helps to stimulate convergence’ (Bal 2004, 130). As delegations anticipate a possible vote, they act upon that by working on creating new coalitions and formulating compromise acceptable to all. This change in working practices has also inspired governments (and related actors) to act more pro-actively by seeking coalitions and influencing new policies before they reach Council level. Seen in this light, the proliferation of majority voting constitutes for governments a mere adaptation of their working methods, rather than a direct threat.

- *“The bypass by domestic actors active at the EU level”*

An important assumption of ‘state-centric’ integration theory is that the domestic and the foreign or EU policy arena are clearly separated. Domestic actors stay within national borders and government representatives are charged with voicing and negotiating national and ‘domestically constructed’ interests at the international or EU level. In contrast, pluralist theories including multi-level governance offer empirical analysis of the level and extent to which different categories of domestic actors have become engaged in EU level policy-making.

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negotiations in Nice (2000) – the latter country successfully arguing for one more vote than its neighbour in the new weighing system.

First, local and regional levels of government have been prevailed upon to be present at the EU level rather than being represented by their national governments. The German *Länder*, Spanish *Comunidades Autonomas* and the Dutch Provinces all have EU representatives and offices in Brussels.

Second, nongovernmental groups as well as private lobbies and their EU consultants have long since found their way to Brussels. It seems that these groups have acknowledged more rapidly than national governments the new working methods in Brussels. Apart from the need to be present in the drafting stages of proposals, they are very active in lobbying the European Parliament. Members of the European Parliament, who have seen their competencies increase with two subsequent treaty changes in the 1990s, are more than happy with these inputs, which are often directly translated into amendments on legislative texts.

Third, while national arenas remain important for the formation of national preferences, sub-national as well as private actors are not nested exclusively within them but create trans-national and trans-governmental links and associations. The central government level in the member states serves in this picture as a ‘bargaining arena’, in which different ideas, agendas and interest are being competed: states are being gently melded into a multi-level Euro-polity by their leaders and actions of numerous sub-national and supranational actors (Hooghe 1996). Multi-level governance sees the threats for governments in the potentially serious consequences for traditional co-ordinating authorities at the central government level (Hooghe 2001, 7). Not only do co-ordinating authorities, mostly Foreign Affairs Ministries, lack the overview of what happens in different working groups, expert and comitology committees. What is more, the increasing need for specialisation makes that even if this overview could be composed; co-ordinators are heavily dependent upon expert officials or specialists for providing the necessary expertise. This development has been described in robust terms as the evolution ‘from gatekeeper to post office’, a service which the co-ordinating authority generally delivers for a range of new stakeholders, among which the experts from the ministries. Although this it is not to be denied, diplomats hold to the argument that they see their task evolving from foreign policy in general to overseeing the broad lines and leaving the details to the experts.

The implications, though, are clear: this leads to a co-ordination dilemma. Efforts to consistently represent collective interests under a ‘national’

heading may be hampered by separate efforts by representatives of other domestic groupings. Constituencies and interest groups that develop a vested interest in EU policies pressure governments not to reverse them (see Pierson 1996, Pollack 1997). If they do not manage to converge preferences and set the same line for EU-related actions, governments can be confronted with serious competitors at the EU stage, which may undermine national shaping ambitions. One prominent example is the debate on the distribution of the EU's structural funds, where attempts of national governments, including the Dutch, to argue for redistribution in favour of poorer member states are frequently undermined by lobbies of subnational levels of governments, such as regions and provinces.

The latter section held an important 'if'. If governments are not able to deal with these pressures from below, they may feel constrained in their EU-directed actions. In response, certain governments have tried to reinforce their grip on these new actors, for example by making clever use of nongovernmental interests in an innovative public-private partnership (Van Schendelen 2002). Other studies demonstrate that while structural policy, the field where multi-level governance originated has indeed stimulated increased regional activity; this engagement has followed distinctly national lines (Keating and Hooghe 2001, 250). Related analyses show that the impact of regional governments at the EU level in working practice has not been significant – it has even been argued that the position of national governments has been strengthened at the expense of regional and local level (De Rooij 2003). To get private and organized interests 'on board' in an early stage, federally organised governments in particular are known for inviting their representatives to be actively present in the aforementioned Commission expert groups. By strengthening co-ordination efforts 'at home', governments have attempted to include as many stakeholders as possible in the formulation of national preferences and negotiating positions. In the representation of these positions, governments have also made use of the fragmentation of the playing field. When similar, parallel efforts share the same underlying goal or objective, one could speak of a 'multiplier'-effect. For example, regional engagement can even involve an opportunity for more access and influence by national governments. For this strategy to work, however, it is necessary to reach agreement over the preferred negotiating strategy in an early stage.



§5.2 *A critical examination of hypothesized opportunities*

The previous section has discussed how developments which, at first sight, can be regarded as primarily threatening the prominent position of governments within the EU, may also be regarded as challenges. At the same time, the literature also identifies certain chances or opportunities for the shaping ability of governments, including: the integral nature of government participation from the design up to the implementation of new EU policies and legislation and the observation that EU policy-making is highly consensual in nature, so that diverging preferences are almost always sought to be taken aboard.

- *“The integral presence and involvement of governments throughout the policy-chain”*

Government representatives are nearly always represented in the EU’s decision-making system. Due to the increased salience of EU level policy-making, more and more national officials become ‘Europeanised’ in their daily work, in the sense that they are looking for access to Brussels and try to obtain a say in policy-shaping. It is towards the Council-stages that many national procedures for interest representation are directed and not surprisingly, many accounts of member state influence within the EU-structures tend to focus on this stage (see Hosli and Soetendorp 2001). But national government representatives are present or sought in other phases, most prominently those of policy design and legislation. This is, rather paradoxically, a result of the competencies of supranational actors and the growth of influence of regional and local levels and private, semi-public actors as well as associations and Eurogroups. National governments are ‘pushing to get into Brussels because they think it is relevant’ (Wessels 1998, 281).

This ‘administrative merger’ or ‘fusion’ between processes, preferences, and procedures at the EU and at the national level is an interesting self-fulfilling prophesy (Wessels 1997). The argument runs as follows: it is in the interest of the member states to co-operate so that they achieve effective policy-outcomes, in times when their individual action capacity is limited due to growing interdependence and high societal demands. Therefore, at the EU level, mechanisms for common policy-making have been designed, which serve two purposes. First, as intergovernmental co-operation mechanisms generally foster non-compliance problems (‘rogue’ states try to take the

benefits but avoid the costs of co-operation), supranational control structures to ensure co-operation are designed. But these supranational actors tend to create their own dynamics, so that the member states risk to be overshadowed. Therefore, second, sufficient access and participation by and from the member states should compensate for the loss of competencies at the national level. These two pressures, the efficiency of more co-operation and participation to make up for the competencies shared with supranational institutions have resulted in a range of complex procedures for common policy-making. Related, Wright (1996, 146) argues how governments have effectively ‘traded’ competencies and decision-making powers which were traditionally located at the EU level for access to and influence in the European policy-making arena.

The EU level bureaucratic system is thus ‘shot through’ with national officials and influences (Kassim and Wright 1991, 835). This integral involvement, through human resources, active presence, expertise or formal roles, gives governments an obvious advantage over those actors with limited engagement in only part of the process. But, as neglect or absence in earlier phases can no longer be remedied by a veto in the Council phase, government representatives need a thorough insight into the different venues for access and influence. In order to affect of their shaping capacity, these possibilities have to be effectively explored and applied.

- *“The consensual nature of the policy process”*

In contrast to the claim that national shaping capacity would have been diluted by the modes of collective decision-making in the EU, including majority voting, insiders’ accounts of EU negotiations emphasise the practice of accommodating extreme preferences or ‘outliers’. Consensus has been called ‘one of the norms vital to making EU decision-making work’ (Peterson 2000, 58).

Quantitative analysis of Council voting records show that, although voting has become more common since the early 1980s (Hayes-Renshaw and Wallace 1997, 49), taking the vote remains exceptional. In average, only 20% of all legislation is formally contested. In 15% of all Council decisions,

one or more member states voted against. Abstentions by one or more member states occurred in 5% of all decisions.<sup>13</sup>

An example of the impact of this norm regulating the behaviour of Council negotiators can be seen in Swedish voting behaviour. In the years after EU accession of the country in 1995, Sweden was a frequent ‘foot-dragger’, in the sense that it voted often against new EU legislation. These numbers rapidly decreased over the following years, as Swedish negotiators realised that apparently, this was not the way things work in Council practice.

This does not mean that majority voting would not influence negotiating behaviour, but that its impact is covert. With reference to this ‘clear preference for unanimity’ (Hix 1999), the intuitively appealing claim that governments would ‘lose out’ because of constraints upon their ability to dominate decision making processes should be somewhat differentiated. One explanation for this is the permanent nature of EU negotiations as a ‘permanent negotiation institute’ (Bal 1995, 1) in which package deals and trade-offs are very easy. The fact that participants tend to meet regularly over different topics facilitates package deals and bargaining. At the same time, it makes that delegations would in the long term regret an image as regular ‘foot dragger’ in negotiations. Participants know that their relation is not temporary and thus ‘think twice before ruthlessly seeking to maximize their individual interests’ (Héritier 1996, 157).

- *“Government’s internal adaptation to deal with the demands of membership”*

The previous sections have already indicated that governments have not passively undergone the effects of increasing impact and complexity of EU policy-making. To turn the discussed constraints into potential new venues for access and influence, governments actively adapted their organisation and working practices to the demands of EU membership. It has been outlined, in the section on Europeanisation, how each member state has been struggling with the way how to design a system of dealing with the demands

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13) The numbers range from 75% (1994) to 86% (1996), negative votes covering 12% (1996) to 19% (1998) and abstentions ranging from 2% (1996) to 11% (Mattilla and Lane 1994).

of EU membership that is both efficient (in terms of costs and benefits) and effective (in the sense of: attaining the goals that it is meant to attain).

Wessels and Rometsch (1996) already observed that, when it comes to participation in EU policy-making, some domestic political structures and actors have been strengthened, whereas others have their role being weakened or their authority being questioned. The process of EU policy-making at the domestic level resembles 'governmental' or 'bureaucratic politics'. The latter refers to a political theory-paradigm originating in International Relations-theory, according to which national government behaviour (in particular regarding foreign policy) is formed by the interaction of competing preferences and bargaining games between domestic actors (Allison and Zelikow 1999).

The group of 'winners' within the system generally includes the ministries and departments, the Permanent Representation to the EU, as well as the Government/Cabinet Office.

The heads of state and government have generally responded to the increasing value of the European Council by attracting special expertise and institutional support to their offices. As for individual government departments, comparative studies show how government ministries have made organisational adjustments to cope with EU demands, creating special structures to coordinate European issues and adjusting personnel policies to recruiting officials with the necessary skills to function in an EU-dominated environment (Wessels 2003). A third group of actors which have seen their position strengthened are the national Permanent Representations or EU-embassies in Brussels. These institutions have streamlined their 'upstream' functions (from the domestic to the EU level: providing a contact point for national officials) and 'downstream' responsibilities for providing information for and advising the national capital on EU issues (Kassim 2000b).

At the same time, two categories of domestic actors have been characterised as 'losers or latecomers' in the EU process.

First, as discussed in the section on governance, this includes the traditional co-ordinating authorities for EU affairs. Almost everywhere, special inter-ministerial co-ordination mechanisms have been set up in all member states to deal with the increased 'competition' over EU policies between all kinds of interests and stakeholders (see Kassim 2000, 2001). As

said, there are marked changes between the member states between the role and composition of the different committees; the co-ordinating authority and the available mechanisms for getting to a negotiating position, but generally, the authority of foreign affairs ministries faces challenges from several directions.

A second group of acknowledged ‘losers’ are national parliaments. The legislative is arguably the national institutions most displaced by the emergence of an EU dimension to their work (Wallace 2000, 28). National parliaments usually have a formal role in EU policy-making but are rarely influential (see Wessels et al. 2003) due to the fact that they lag behind in their control function and fail to oversee rapid developments at the EU level (see for the Dutch case, Del Grosso 2000 and chapter 5).

The observation that different categories of actors within governments have reacted and adapted differently to European demands leads to the question what has been done to ensure that the national position is voiced coherently and consistently in different EU level venues over time. Here we touch upon the topic of national EU co-ordination, frequently discussed in volumes dealing with member states adaptation to Europe and examined in more detail in chapter 4. For now, it suffices to note that the organisation of the national co-ordination system for EU affairs is often related to the more general ‘effectiveness’ of a government to influence Brussels. A member state would be effective if it succeeds in ‘getting its way’ in EU level negotiations. The obvious problem is, however, the difficulty to establish adequate comparative criteria to judge ‘success’ upon. Intuitively, the degree to which a government is ‘successful’ in Brussels seems to be the degree to which its preferences are mirrored in the final decision. However, negotiations in the EU are interrelated games where success on one game board goes at the expense of giving in on another. Moreover, preferences are often re-formulated in the course of the process so that it is difficult to assess the initial objective against the final outcome. This serious complication explains why judgements of national systems of dealing with EU affairs not often go ‘beyond the anecdotal’ (Metcalf 1987).

However, even if assessing effectiveness is ‘a bridge too far’, it must be possible to construct an overview of the different conditions or characteristics, in short: the variables that make up for national government’s shaping capacity. This is the purpose of the following chapter.

## **§6. Discussion**

This and the previous chapter have presented recent analyses regarding the ‘opportunity structure’ in which governments operate when shaping EU policies. The prime focus of classical integration theory was on ‘why-questions’, instead of analysing policy processes. Both intergovernmentalism and neofunctionalism highlight different elements of the shaping process to be relevant. But the result for governments in terms of their ability to shape new EU policies is disputed. Asking intergovernmentalists about the ‘how’ of policy-shaping – although this is not their first interest, they would place much value on political clout, national co-ordination capacity and the agenda-setting and legislative powers of governments. Supranationalists, in contrast, would highlight the relevance of expertise that governments bring into the negotiating system and the dominance of the administrative level in EU policy-making, which would only gradually – but surely – ‘spill over’ to the political level.

To get over this controversy, a second mainstream in integration theory emerged from the inward migration of political scientists and public administration students in the late 1980s, when attention shifted to the administrative consequences of European integration and the analysis of European and national policy processes. EU studies policy-analysis (Jachtenfuchs and Kohler Koch 2003) does not compete with classical theories, but is rather complementary. The object of research is not ‘why the member states formed the EU’, but ‘how the EU forms the member states’. This attention shift has been called ‘the next’ phase of European integration Studies (Héritier 2000) or the ‘theoretical new Europe’ (Rosamond 2000, 163). However, a literature review shows that newer paradigms are not as innovative as sometimes claimed. Attention for the different levels and locations of policymaking in EU studies can be traced back to the early 1970s.

Multi-level governance studies focus on ‘what happens at the EU level’ and in the interplay between the EU- and the (sub-) national level. This interaction is ‘... transforming politics and government at the European and national levels into a system of multi-level, non-hierarchical, deliberative and apolitical governance, via a complex web of public-private networks and quasi-autonomous executive agencies’ (Hix 1998, 54). New lines of communication and representation are supposed to engage and empower

sub-national, trans-national and non-governmental actors in the EU. As a consequence, a ‘multi-tier negotiating system’ or a system of ‘interlocking politics’ (Risse-Kappen 1996, 60) has emerged. The challenges that governments face have led to a different playing field or ‘opportunity structure’. The EU does not only place pressures on its constituent member states (the need to adapt, implementation pressure, economic competition), but it also presents them with opportunities for influence. The latter includes not only economic benefits but also the possibility of a legitimising political discourse for policies otherwise not domestically possible (‘the EU forces us to ...’).

The latter dimension has been discussed in recent Europeanisation literature, concerned with ‘the impact of the EU’ on the level of the member states (Wessels and Rometsch 1996, Zeff and Pirro 2002, Maurer and Wessels 2003, Kassim 2000, Peters and Wright 2001), it has emerged that shaping capacity is understudied. Current research focuses on the question ‘how and to what extent are the member states Europeanised’. If reference is made to the ‘shaping’ of new policies, this is to explain patterns of domestic adaptation and implementation performance (Bursens 2001, Börzel 2003, Falkner et al. 2003, Mastenbroek and Van Keulen 2004). Only recently, in what has been called the ‘third wave’ in EU studies, calls have been made to find out how exactly member states ‘hit’ Brussels (Beyers and Trondal 2003, 2, see also Bulmer and Lequesne 2005).

This emphasis on ‘what happens at home’ risks implying that a member state would passively undergo the effects of common EU policies. As the analysis of multi-level governance has demonstrated, however, national governments, however challenged in their traditional position, remain a particularly central player in the shaping of European policies and legislation – if only because of their prominent position in the (co-) legislative Council of Ministers. As a result of the increasing salience of EU issues, national governments are pressured to perform in what has been called the ‘struggle for a say’ in EU policy-shaping (Beyers and Trondal 2002). On the other hand, due to the same developments that have engaged new stakeholders active in Brussels, the constraints on governments are quite serious. To use a sports analogy: it is simply more difficult to score when playing on a larger field with more (and more competitive) players, particularly when the salience of the game – and thereby the pressure – is high. For any EU-lobby, the chances for losing out have increased as governments can be outvoted or individual positions

considered irrelevant for the final outcomes. When national input could still be secured by a national veto, setting up national negotiating instructions could relatively easily be dominated by central governments, i.e. their coordinating authorities. It can thus be expected that for governments wishing to be active at the EU level, investing in the quality of their actions becomes more relevant than in the old days of EC co-operation. In a wider and EU dealing with policy areas with more political saliency, those wishing to have relevance in EU policy-shaping will have to invest actively in ‘getting their act together’.

The processes of change and adaptation environment sketched by multi-level governance and Europeanisation may serve as an impetus for the study of national shaping capacity. However, the literature review has demonstrated that, so far, this has not led to systematic analysis. The impact of the ‘messy state’ discussed in recent EU studies perspectives, upon the motivation and potential of governments to influence EU policies, deserves closer examination.

Which variables matter for the capacity of an individual government to influence the formulation of new EU-policies? A next step is to structure and categorise existing insights in a framework for analysis, to be applied in the country study and empirical case studies.



# Chapter 4

## Designing a Framework for Analysis

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### §1. Introduction

All twenty-five national governments take part in the shaping of EU policy, most notably in the legislative Council-phase, where they possess formal veto powers in decision-making. No member state dominates the policy process: all ‘win some and lose some’ – large member states just as often as small ones. But to what extent ‘does size matter’ for national shaping capacity? The literature review in the previous chapters has showed that we lack academic descriptions, other than anecdotal, of this and related dimensions and variables relevant for the shaping process. To explain this academic neglect, it is tempting to point at the sheer complexity and particularities of the EU policy process, which indeed considerably complicate attempts for analysis. But this is no excuse *not* to gather structured insights into the ways in which national governments shape EU policies, in order to account for their prominent – but debated – position in the discourse on EU policy-making.

This chapter presents an overview of the conditions and characteristics deemed relevant for national shaping capacity (§2). It is argued that the actions of national governments directed at influencing the EU level of common policy-making are based on a combination of its preferences and ambitions concerning the issue at hand, and the resources and capacities available for EU-related actions (§3). These variables and their presumed negative or positive effects on shaping capacity are discussed (§4).

## **§2. Relevant variables: a literature review**

Attention for the broad question ‘how and by whom EU policies are being shaped’ can be found in several EU studies sub-streams: in classical integration theory; in policy- and polity ‘impact-of-Europe’-studies and in ‘linkage’ studies concerned with the interaction of various actors operating between and within member states and the EU, including lobbying literature and more practically oriented manuals. The first two strands in EU studies have been extensively discussed in the previous chapters. Contributions to the ‘grand theories’ discussed in chapter 2 are primarily interested in explaining co-operation by governments, whereas this book is concerned with exploring their potential to influence. This does not mean that there are no relevant insights to draw from neofunctionalism and intergovernmentalism on the role and position of governments (see table 1.1) – but a search for possibly relevant variables must not stop here. In the past decades, interest in the European policy process has culminated in a wealth of academic analyses and textbooks. In the early 1970s, Helen Wallace (1973) already emphasised the relevance of government organisation, administrative style and traditions, particular policy goals and objectives as well as domestic politics. More than twenty years later, in a textbook in which other contributions describe the ‘top-down’ dimension of Europeanisation (Bulmer and Lequesne 2005), she ranges a number of influence techniques that national governments can deploy directed at EU policy-making. These include ‘formal’ powers, such as voting weights and economic leverage, which culminate into a less tangible factor ‘political clout’. Also, national policy-style, a notion introduced by Simon Bulmer (1983) is considered relevant for the potential use of threats, coercion and assertive issue-linkage, to which some member state governments are more inclined than others (who may gain more from their persuasive ideas).

The 1990s was a particularly fruitful decade for this ‘second wave’ within EU studies. Multi-level governance and ‘Europeanisation’ are both concerned with the interaction flows between the regional, national and European locations of policy-making. In particular the impact of the EU ‘at home’ has become clear in recent years (Wessels and Rometsch 1996, Zeff and Pirro 2002, Maurer and Wessels 2003, Kassim 2000, Peters and Wright 2001). Moreover, recent studies re-integrate the issue of domestic adaptation, i.e. the ‘taking’ with that of participation at the EU level, the ‘shaping’ (Bursens 2001, Börzel 2003). Related analyses offer insights into

institutional linkage mechanisms, established by governments to operate between the domestic and the EU levels of policy-making. A particularly prominent issue discussed in these studies is national EU policy co-ordination: the structure and procedures at the central state level designed for formulating preferences of different stakeholders into one national position to be represented in EU level negotiations (Van den Bos 1991, Pappas 1995, Wright 1996, Kassim and Wright 2000 and 2001).

Besides discussing similarities and differences of member state systems for managing European policy-making and implementation, contributions such as that by Peters and Wright (2001) discuss related variables, such as the particularities and complexities that EU level actions invoke in comparison to policy-making at the domestic level and the ‘complex issue’ of effectiveness of co-ordination – to be judged according to the issue, the policy types and requirements and objectives (ibid. 170).

For the purpose of this study, two more elements which go beyond the traditional separation of the domestic and the EU level should be highlighted (Kassim 2000, 2001). Peters and Wright do not only stress the required ability of a national government to anticipate new EU legislation (the ‘reception’ side of Europeanisation) but also the ability to ‘shape the EU agenda’ and ‘to tap the resources available in Brussels’ (bottom-up). Necessary conditions are not only ‘political clout’, which is linked to size – but size can be ‘negated or diluted by ineptitude or self constraint’. Another relevant variable is congruence between the EU and the national level, mainly as regards to constitutional and administrative structures and policy climate and contents.

Then, there is lobbying literature. Lobbying can be defined as a particular influence technique mostly associated with informality. Of many related works (Mazey and Richardson 1993, Greenwood 1997), three contributions will be highlighted.

In 1993, Van Schendelen edited a comparative study on public and private lobbying by the member states (Van Schendelen 1993) with the purpose to present and analyse a number of country-studies of how member states lobby the EU. The focus is largely on country-styles, or what Bulmer would call ‘policy-style’: major national characteristics both in structure (degree of fragmentation and decentralisation, political structure, public-private relations; formal representation in Brussels) as in attitudes (towards

internationalisation; coalition partners; EU-mindedness). In more recent work (2002), the author designs a particular technique ('public affairs management') to 'professionalize' of public-private EU-directed lobbying efforts, by systematically using techniques and routes: such as formal and informal contacts; networking, alliance-building and agenda-formation, using procedures and public-private co-operation. The volume concludes by referring to the apparent decrease in effectiveness of national governments influence. Due mainly because of more cumbersome domestic co-ordination and the 'bypass' of interest groups active at the EU level, the author witnesses a trend throughout the member states. Therefore, a call is being made to include more descriptive examination of comparative case studies, making use of theoretical insights. This, in particular the link to theoretical EU studies, is a field to which the current study wants to contribute.

Similarly focused on practitioners use, Humphreys (1997) has drafted a 'manual' of how to shape EU policies. The author identifies three different types of instruments: negotiations, lobbying and briefings. Negotiations are formal venues for interest representation, lobbying is the informal influence of other players and outsiders with their own powers of influence; briefing is the way to pass information through, be it in written form or verbally. The advice is to always prepare in advance a 'negotiating strategy' for each individual piece of legislation or policy for which national input is needed.<sup>1</sup>

This strategy should include: the objectives preferred (what outcome do you want? How realistic is this? Which are fall-backs and interim solutions?); the resources deemed necessary, including if possible a full negotiating team (lead official; administrative support, a lawyer, an EU co-ordinator and the responsible diplomat/official from the national Permanent Representation to the EU) and, for example, skills and language training; the allies and coalition-partners with shared concerns and objectives as well as the rivals and objectors to your preferences; a planned timetable of negotiations; consultations and meetings; information flows; position papers

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1) A strategy can be defined as a systematic action plan aimed at achieving a coherent set of goals and objectives for the middle-long and long term. A national EU strategy ideally includes an idea on the development of the European integration and the country's position and role within this process. This grand design may subsequently be translated into short-term priorities between competing interests and preferences for individual dossiers.

and finally, the need for co-ordination to ensure coherency of actions in order to ‘avoid speaking with a forked tongue’ (p. 324).

The volume does not classify as a theoretical contribution to further the ‘shaping’ dimension within EU studies – nor does it aim to be. Rather it is a valuable insiders account of ‘how to make the Brussels machinery work for you’ (the subtitle), primarily directed at civil servants from the United Kingdom.

Third, in a much-cited textbook on government and politics and EU policy-making, Neil Nugent (1999, 472-8) goes into the issue of national governments trying to influence EU policy-shaping. As he identifies between national influence attempts directed at the supranational institutions, thereby going beyond the formal procedures that focus on the Council chain, this contribution can be shared under the ‘lobby’-heading. Influence attempts of governments focused on the European Commission including a national ‘staffing policy’, the co-ordinated use of expert networks; as well as contacts at the political level between governments and DG’s, Cabinets or the College. At the Council level, variables conducive for governments influence include the following: political size; political saliency of the issue at stake; policy objectives, i.e. the desire to be active; the capacity to act in terms of domestic political situation; membership of alliances and coalitions; the procedure applying; skills and competencies of national negotiators as well as the quality of the national co-ordination mechanisms for EU affairs.

There are also individual and comparative country-studies of how states deal with EU membership, many of which focus on the ‘big three’: the United Kingdom (Bulmer and Burch 2001, George 2001), France (Lequesne 1993, Ladrech 1994, Menon 2001) or Germany (Goetz 1995, Bulmer et al. 2001). There is also much analysis of adaptation processes in smaller member states such as Austria (Falkner 2001), Denmark (Bursens 2002) or Ireland (Laffan 2002). In an analysis of the Netherlands, Hosli and Soetendorp (2000) focus on the Council, which they describe as ‘the prime venue for national interest representation’. Important variables which may increase the chance that a national action is successful include: relative voting power of a member state within the Council setting, which is linked to size and political clout; the set-up of national co-ordination mechanisms for dealing with EU affairs, which can be explained by the degree of fragmentation and the level of politicisation of EU policy-making at the domestic level, which determines the ambitions and preferences of a particular member state.

Last but not least, in a first and promising attempt to link the ‘top-down’ and ‘bottom-up’ dimensions of Europeanisation, which are often treated separately, Börzel (2003) seeks to explore those variables that define member state’s capacity in both respects (see chapter 3). Three explanatory variables are analysed in more detail: the degree of fragmentation, assessed by the number of veto players at the domestic level; the resources and the level of support for EU integration. A key finding is that whereas political fragmentation and resources appear to carry little explanatory power. Whereas ‘pace-setters’ in EU environmental policy-shaping are amongst the smallest and least-contributing countries, the most effective shapers and takers share a low level of administrative fragmentation, many resources and high levels of administrative legitimacy, thus resources and legitimacy are relevant variables to explain performance both in EU policy-shaping as well as in subsequent implementation.

*Table 4.1 Variables deemed relevant for shaping capacity*

Ambitions, objectives, aspirations, preferences determining political salience (Peters and Wright, Héritier 1995, Nugent 1999)
Political clout, translated in formal representation and voting weights (Peters and Wright 2001, Hosli and Soetendorp 2000)
Fit or congruence between EU and domestic constitutional and administrative structures (Bulmer 1983, Börzel 2003) and domestic policy contents (Falkner 2005);
Degree of political and administrative fragmentation and centralisation (Peters and Wright 2001, Börzel 2003, Kassim 2000/1)
Co-ordination capacity (see for example: Schout 1998, Peters and Wright 2001, Börzel 2003, Kassim 2000/1)
Support for membership, EU-membership, degree of Europeanisation (Börzel 2003)
Ability to anticipate of new legislation (Hosli and Soetendorp 2000, Peters and Wright 2001, Nugent 2004)
Ability for agenda-shaping and issue-manipulation (Peters and Wright 2001)
Ability for getting nationals within the system (Nugent 2001)
Ability for using public-private co-operation (Van Schendelen 2002)
Policy style (Bulmer 1983), incl. use of threats and coercion, assertivity, search for consensus (Wallace 2005)
Membership of coalitions and ability for active coalition-building (Hosli and Soetendorp 2000)

To the extent that the analyses previously discussed have referred to the potential and ambitions of individual governments to exercise control over EU level developments, table 4.1 is an attempt to sum up the relevant elements. There are a number of remarks to make. First, attention for the shaping in these analyses is fragmented and discussed in rather abstract terms. Studies are directed at one particular dimension of the interaction flow between the domestic and the EU level – where current Europeanisation analysis remains firmly focused upon the ‘domestic impact

of Europe', shaping analysis either focuses on informal lobbying (Van Schendelen 1993, 2002), one particular aspect of interest representation, such as or EU-co-ordination (Kassim 2000, 2001) or aims to provide a practical manual for those wishing to be active in EU negotiations (Humphreys 1997). Second, the jargon is confusing, as concepts as 'influence', 'lobby' and 'public affairs management' are used interchangeably and variables deemed relevant for processes at the national level and those playing a role in EU level interactions, stable and situational variables as well as potential and ambition are mixed. Third, practical manuals do not relate to Europeanisation and governance literature. For a sound analysis of variables influencing national shaping capacity, the objective of this study, a first necessary step is to structure and categorise existing insights and analyses.

### **§3. Fitting variables into a framework**

In the framework to be designed, the characteristics and conditions that are considered to affect the ability of a member state government to perform in the formulation of new EU policies are considered as the 'building blocks' of shaping capacity. The impact of these variables can be positive, in the sense that governments are enabled to act, or negative, implying that a particular condition can hamper national capacity to influence policy-making processes. The framework identifies two main categories of variables: will vs potential, second, stable vs situational factors.

First, the distinction between variables related to will (interests; ambitions and preferences) and those having to do with potential (capabilities; skills; knowledge resources) is derived from 'neo-institutionalism'. Institutions, in the sense of patterns of rules, norms and informal behaviour, are assumed to 'channel' processes in setting the rules of the game (Aspinwall and Schneider 2001). Bulmer (1983, 35), in his analysis of domestic EC-policy-making, distinguished between the 'structures' of domestic policy-making and the 'attitudes' regarding integration, two dimensions which should be 'synthesized' to explore member state behaviour within the EU. A government can have far-going aspirations and objectives towards EU policymaking – for the realisation it is dependent on its capacities for shaping EU policies and the resources devoted to influencing Brussels. Every stakeholder is confronted with the need to bring both dimensions in

line when designing an European policy strategy or merely any action towards the European arena. If these two do not match, we are witness to the infamous expectations-capabilities gap.

Second, the room for manoeuvre for action by individual national governments is defined by the combination of stable constants and more instable conditions (Schiemann 1993). At the 'macro'-level, a number of exogenous variables determine the environment in which a government operates. Although difficult to be modified in the short run, they may positively or negatively affect national shaping capacity. Examples are the traditionally strong transatlantic orientation of the Netherlands and the preoccupation with economic integration of successive British governments. As macro-level, stable variables, ambitions differ from 'meso' and 'micro'-level preferences, related to particular policy-areas and dossiers. A similar distinction can be applied to 'potential'. When referring to the length of membership or the size of the national administration, both relatively stable variables, the notion 'capabilities' is used. In the case of a particular policy issue or negotiating situation, this potential is referred to as 'resources'. To be sure, this distinction serves analytical purposes but is at the same time to a large extent artificial. In practice, only time can tell whether a particular policy change will qualify as a 'constant'.

In line with 'two-level game'-theories (Putnam 1985), most literature differentiates between characteristics and conditions governments are confronted with at the domestic level, on the one hand, and the structures and situation at the EU level on the other hand (Nugent 1998, Soetendorp and Hosli 2001, Peters and Wright). The framework for analysis developed here purposely tries to avoid this distinction, as the national arena and the EU level are considered to 'intertwine in constant fashion' (Wright 1996, 149). At the same time, it should be readily acknowledged that this supposedly large degree of intertwinedness of the domestic and the EU level complicates the process analysis about national shaping capacity, as 'it is difficult to try to conceive of the relationship in conventional positivist social science terms, i.e. with independent and dependent variables and simply causality if analysis is to capture incrementalism and continuity' (Bulmer and Burch 2001, 78).

In the next sections, potentially relevant variables are defined, discussed and placed within the four boxes of the framework: those concerned with will



and potential and those related to stable and more dynamic developments in time. This distinction serves to structure insights as a constructed model. In the reality of policy-making, the categories are obviously closely interrelated. In particular it is hard to distinguish between variables related to motivation and the potential to realise these ambitions, which will be clear from the next sections. Variables related to ambitions (§3.1); preferences (§3.2); capacities (§3.3) and resources (§3.4) are discussed, possible explanatory variables or mechanisms are discussed, as well as the supposed positive or negative effects on national shaping capacity. See for the overview the framework presented in table 4.2.

### *§3.1 Ambitions*

A first group of variables relates to the ambitions of a government to be actively involved in EU membership and its objectives regarding particular areas of co-operation. Different EU member states can pursue diverse integration ambitions at various levels. At a more comprehensive ‘macro’-level of analysis, some governments have ambitious all-encompassing ideas about the desired direction of the integration process – be it towards an intergovernmental European free market area or towards a more federalist constellation in which common policies are developed in areas beyond the economic realm. Governments can also be criticised for lacking a ‘grand strategy’ on the desired direction and contents of European integration and policy co-operation– recently, the Dutch government has met such criticism by domestic observers (Social Economic Council 2003, Council of State 2004, see chapter 5). At the meso-level, a government’s integration ambitions are ‘issue-specific’, in the sense that they focus on one or more particular policy-areas: structural funds or agricultural policy. Ideally, macro- and meso-level ambitions together ‘feed into’ the micro-level of particular dossiers and items on the EU’s agenda. This section deals with the variables deemed relevant for governments’ shaping ambitions (see table 4.1).

For adherents of the Realist school in international relations theory, the ambitions of a government are a function of a state’s national interests, ‘core beliefs’ (Sabatier 1999) or, in French: ‘*raisons d’état*’ (Morgenthau 1951, Krasner 1978). This essentially comprises a state’s goals and objectives it concerning security, economy or culture, which are motivated strategically (based on a costs-benefit calculation) or ideologically (i.e. driven by beliefs and normative ideas). The question which actors and institutions are

involved in the procedure by which issues are labelled as ‘national interests’ is a core debate in international relations and, relatedly, in EU studies (see also §3.3). Differences in national ambitions and objectives of individual national governments towards European integration may root in three factors: their core values; level of economic development and national politics and polity.

First, the ‘core values’ of a nation state should be considered. An example is the historically ambivalent attitude of the United Kingdom towards the continent and its preference for more intergovernmental over supranational solutions for common problems (Menon and Wright 1998). But also France has traditionally aspired to play a leading role in integration, inspired by a vision of integration as a process within which the member states dominate (Menon 2001, 75). Germany and the Netherlands have long been counted among the most loyal supporters of integration, albeit for different reasons.

Another explanatory variable for a government’s shaping ambitions is its relative level of economic development. Wallace (2005, 39) points to the fact that the concerns of Germany, the EU’s largest economy and contributor to the EU’s budget tend to be taken very seriously. What is more: the country’s GDP and economic structure determines to a large extent the sum of its contribution and its receipts from the EU budget. Whether a member state is a net payer or a net recipient can be to a large degree explanatory for its stance to take as regards to EU policy initiatives, as the case of the Netherlands but also that of recipient Spain shows. But there is another argument. Higher-regulated economies are often ‘pioneers’, ‘leaders’ or ‘fore-runners’ when it comes to pushing for EU level regulation, for instance concerning environmental policies (Anderson and Liefferink 1997, 10). One explanation is that richer member states face more domestic incentives to strive for harmonisation at the EU level (Borzel 2002, Héritier 2001). Due to strong policy competition between the member states, competitive advantages for industry can be achieved by uploading stricter levels of regulation into harmonisation policies to be decided at the EU level. Because new EU rules and policies often take the form of binding regulations and directives, they have to be ‘downloaded’ in lesser-regulated member states. Indeed, the small size and open structure of the Dutch economy have defined to a large extent the traditional integration objectives pursued by the central government. At the same time, the structure and performance of the national economy also define the country’s contribution to the EU’s budget, which

has been a cause for much national reluctance in some member states, including the Netherlands, as a ‘net payer’ to the common budget.

A third explanation for national ambition regarding European integration lies in national polity, policy and politics. Here again, structure and agency matter: the tradition of centralised government in the United Kingdom explains the government’s choice of ambition towards the EU (Kassim 2001, 49) whereas the German government, in the past decades, has had difficulties in pursuing one coherent European vocation because of the federal state structure. These two examples suggest that particularly the degree of fragmentation of national politics and administration is relevant for national shaping capacity, a hypothesis to be discussed in a next section.

Two other variables, which deserve mention in this respect, are length of membership and public support for integration. Whether a government is a founding father or a newcomer in the European arena probably influences the contents and vigour of its integration ambitions. The argument runs both ways. On the one hand, due to mechanisms of socialisation, a long-standing member may be more comfortable in the EU arena and, therefore, perhaps more willing to give in whereas a new member wants to show its new colleagues and domestic constituency its teeth. On the other hand, newer members may be inexperienced, and thus less ambitious, whereas old members can speak their mind freely and expect some leverage for their long allegiance.

Börzel (2003) has argued that a higher level of general support may increase willingness to ‘swallow’ unpopular decisions from Brussels. Relevant in this respect are the cases of Sweden and Denmark, where around the majority of the population is largely sceptical towards political and monetary integration, which has explained the national stance towards related initiatives.

As previously discussed, many analyses of how a member state deals with EU membership tend to focus on the ‘potential’ for a government to influence EU policy-making. This is remarkable as ideally, how a member state shapes EU policies is conform its general objectives. A concrete example is offered by the United Kingdom. There, the national integration ambition is closely linked to the potential to shape EU policies, in the sense of a ‘co-ordination ambition’. The aim of British EU policy is: ‘to ensure that for any EU activity or proposal ... agreement is reached on a UK policy in good time, taking account of identified UK interests and advancing or at

least protecting those consistent with overall Government policy with realistic objectives taking account of the interests of other members of the EU and that policy agreed is followed through consistently during negotiations, and put into effect once decisions have been made in Brussels'.<sup>2</sup>

Ambitions also set the scope for EU-related actions. Kassim (2001, 70) argues that although 'the UK position may be defined early, communicated to other policy actors and defended coherently (...), the UK's preoccupation with sovereignty and its preference for intergovernmental solutions (...), have tended to make it an outlier in Council negotiations'. Moreover, 'the good faith of the UK (...) is not taken for granted'. In contrast, the traditional pro-European consensus in Germany, combined with the economic power would have played a role in its considerable shaping attempts, 'despite administrative bottlenecks and complexities' (Maurer 2001, 124).

At the EU level, domestic ambitions 'fall' into an European context, which can either serve as a 'push' or, in contrast, constrain national motivation. The notion 'goodness of fit' has already been discussed in the section on Europeanisation. A related variable at the macro-level is constitutional and administrative congruence: the degree to which a country's political and administrative structures and its more 'soft' or cultural characteristics or what has been called its 'policy style' (Bulmer 1983) fit with that of the ways Brussels and the other member state operates. The extent to which the policy of a member state synchronises with the logic of the EU constitutional principles or aspirations is a factor crucial for success. Examples are the relative success of successive UK governments in their pursuit of market liberalisation and the capacity of protectionist countries to slow down liberalisation of air transport and energy markets. In terms of ambitions, a government can have completely differing ambitions as to future cooperation and thus be an outlier notwithstanding its political size or clout, or purposely limit its activities to particular policy areas or individual decisions and thus be absent in particular fields.

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2) See Kassim (2003, 93), offering an overview of the degree of centralisation and ambitions of national coordination systems for EU affairs.

The life of a national government representative is considerably less complicated if national administrative style and procedures ‘match’ with those at the EU level and with those of possible coalition partners and adversaries. Representatives accustomed to an open, flexible and consensus-building style of negotiating are well prepared for the high degree of compromise and the need for coalition building at the European level. However, these styles are commonly regarded as ill suited to formulate overall steering strategies (the apparent strength of the British and the French systems). Those negotiators from centralised systems, where co-ordination is more authoritative, may reap the benefits in terms of more self-confidence, rapid action and more accustomed to use of threats and coercion (Wallace 2000, 2005). The elitist, centralising and confrontational style of the French, which is evident in the interdepartmental committees at home, can be very counterproductive in Brussels. And organisational incongruence with the competencies for policy areas between government ministries and European Commission DGs can hamper national shaping capacity.

In operating at the EU level, all governments encounter particular ‘institutions’ in the sense of formal and informal rules and norms relevant for their motivation and potential to shape EU policies. Generally, the institutional context will be similar for all member states, such as the interplay between European Commission, Parliament and Council according to cumbersome procedures and legal rules. One exception is the rotating national EU-Council Presidency. The government holding the Presidency chairs all Council-meetings from working groups up to political summits for six months. Often, a national delegation voices positions whereas a supposedly ‘neutral’ chairperson is in charge of the meetings. The Presidency possesses informational and procedural resources to encourage concessions and achieve convergence in EU governments’ negotiating positions, for instance in the fields of agenda setting and coalition building. Presidencies are also tempted to use these privileged resources for national gain and to exploit the position as broker to favour desired outcomes (Tallberg 2004, 2). A considerable risk is thus a loss of prestige resulting from too vigorous attempts to pursue national interests through European means (Schout 1999). The prospect of holding the chair usually leads to an impetus for investing into European awareness and domestic co-ordination

mechanisms and thus constitutes an excellent case study of the management of EU affairs.<sup>3</sup>

### *§3.2 Preferences*

Ambitions are the macro-level conditions for determining any government's EU policy in the long term – 'preferences' are the corresponding micro-level variable. In terms of EU policy of legislation, preferences for certain outcomes and results are formulated and represented as 'negotiating positions'. For national governments, the formal setting for issuing these positions is the Council of Ministers, although the literature review has shown that governments more and more use other ways to voice their likes or dislikes about proposed policies.

One categorisation of the different stances that governments may take as regards to EU policies builds on insights on different country strategies in EU environmental policy-making (Andersen and Liefferink 1997, Börzel 2002). A 'pace setting' strategy involves actively pushing policies at the EU level; in contrast, 'foot-dragging' is actively blocking or delaying policies and fence-sitters either do not bother about the proposed policy to be active in the shaping stages or purposefully wait until the others have fought the battles. A suggestion in much EU studies literature is that, for ensuring national shaping capacity, the link between ambitions, preferences and negotiating positions should be coherent between different policy areas and settings, as well as consistent over time (see for example Kassim 2000). Many (media) accounts of EU policy-making imply that positions mirror a deliberate action by a government (representative) with the aim to shape the policy process. In order to analyse the shaping process, it is relevant to determine how, i.e. by which process and whom these preferences are formulated and turned into positions and whether the presumed stability in national position is realistic. The latter remark is the reason why many accounts of how governments deal with the EU pay a great deal of attention to national systems of EU policy-making.

One's perspective on allegedly dominant actors in setting a country's EU policy depends on the theoretical lens that is applied. Intergovernmentalists portray the result of EU policy-making by a national government as shaped

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3) See for more on the national EU Presidency chapter 6.

by the magnitude of benefits to be gained from co-operation; the certainty of these benefits, and the relative influence (differential mobilization) of the producers groups representing economic interests (Moravcsik 1999, 517). One essential claim of yet another perspective, (social) constructivism is that interests would be ‘socially constructed’ instead of ‘given’ (Checkel 1999). A constructivist perspective may, for example, offer insights into how EU policy players are socialised into values and behaviour impacting on their presentation of national policy. This ‘social learning’ may lead to an adaptation of policy preferences. Constructivist analysis highlights the role of discourse as a means of understanding national government behaviour (Bulmer and Lequesne 2005, 15). In other words: it is important to look beyond ‘Eurospeak’ notions such as ‘member states’ of ‘national positions’ in order to find different types of norms and interests and their interaction. Policy-oriented perspectives such as the aforementioned ‘linkage’ studies have claimed that ‘the policies that governments pursue at the EU level are the outcome of complex processes of intergovernmental bargaining, bureaucratic policy and co-ordination of variable quality’ (Kassim 2000, 276). Empirical findings from comparative studies on how governments deal with the EU sustain this ‘pluralist’ view on public policy-making, according to which the outcomes of national government policy are the resultant of effective access by various types of interests (see Wessels 2003).

Apart from the systems for translating the preferences of various groups in government and society into negotiating positions (to be discussed in §3.3), another explanatory variable is the relative issue salience that the actors involved in this process attach to a particular issue (Nugent 2002, 412, Peters and Wright 2001, 172). This relevance generally determines how much time and resources an actor wants to spend on dealing with it. This factor may derive from a wealth of underlying factors including personal utility maximisation; considerations of a economic and social nature (as is the case with the structural and cohesion policy for the EU’s lesser developed regions or with the common agricultural policy for France); political pressures or external events which may increase attention arising for joint action regarding a particular topic (criminal matters, maritime safety)

A third variable to be discussed in relation to shaping preferences is, again, ‘goodness of fit’. It can be easily hypothesised that the activity of a government in forwarding its preferences is dependent on the congruence of existing legislation and new EU policies. After all, there is not much shaping

to do in case proposals for new EU legislation ‘fit’ with the way things work at home or with the way governments would want things to be arranged. If there is policy or institutional ‘misfit’, instead, governments can be expected to invest more actively in the shaping of binding EU legislation. Treib (2003) has pointed at an intermediate variable, which we may call ‘strategic shaping behaviour’. Even in the case of misfit, governments may be inclined to support EU proposals that run contrary to national laws or practice, in order to change the national status quo and thus use the EU level as a leverage to promote domestic change. ‘Goodness of fit’ should, consequently, not be mistaken as a static notion, as preferences may change during the process of uploading.

The link between ambitions, preferences and positions is even less unidirectional taking into account that as preferences, also negotiating positions can be taken strategically, as is underlined in negotiation analysis (see Meerts and Cede 2004). For example, a member state government can then take a position which is close to the European Commission, and decision analysis have demonstrated that the further the distance from the Commission, the more an actor loses in a negotiation (Bailer 2005, 115). For these actions, particular ambitions and objectives should be translated into ‘persuasive ideas’ and ‘compelling demands’ (Wallace 2005, 4).

Here we come to the potential of governments to shape the policy process.

### *§3.3 Capabilities*

A third group of variables is related to capabilities. A government may have far-going ambitions towards the EU, for their realisation it is dependent on its shaping potential: the sum of relatively stable capabilities for shaping EU policies and the quantity and quality of resources at a disposal. A number of exogenous or relatively stable variables determine national shaping capabilities.

First, capacities, just as ambitions, depend on the country’s relative level of economic development. Member states which score worse in this respect have been characterised as ‘policy-takers rather than policy-makers’ because the poorer member states would lack the capacity and money deemed crucial for investing actively in common policy-making (Börzel 2002). Moreover, domestic problems would take the most of governments’ efforts and thus the EU level would be neglected. However, some member states are known for



having used their relatively deprived position to plea very successfully for EU assistance. Most remarkable is the example of Ireland, which from a relatively poor agricultural society has developed into a ‘Celtic tiger’, not in the least because of a successful campaign for Brussels funds (Laffan 1998). The impact of economic position on shaping capacity is thus not unidirectional.

This holds the same for a second intuitively appealing variable, which is relative member state size or ‘political clout’. There is a lot of literature assessing the relative ‘weight’ of a member state in Council deliberations, relating to objective factors such as population size and economic power, reflected in voting weights in the Council (Hosli and Soetendorp 2001, Mattila and Lane 2001). The literature is ambivalent, however, about the question whether larger member states would be better suited to operate at an EU level. At first sight, size does matter. It translates itself into voting power, and although votes are not often cast, the ‘shadow of the vote’ determines the nature of the negotiations. Larger member states are better represented in the Parliament and at official level within the European Commission. And when it comes to the grand political summitry, the image of the ‘big’ pushing through with unwanted decisions haunts the public image of EU policy-making. However, a closer look brings up the question whether large member states are indeed as advantaged in their Brussels operations as their size would predict. Again, large and centralised administrations can be hampered by their lack of flexibility and difficulty to prioritise between European dossiers, something which smaller administrations may be forced to rely on. Second, the relative size of an individual government can be modified by the membership of winning or blocking coalitions. Size may be negated or diluted by other shaping variables related to motivation or potential (Peters and Wright 2001, 171). If a government is a regular outlier as regards to its concrete preferences or constitutional set-up, it remains inherently difficult to be accommodated no matter its political clout. Germany’s political clout was long negated by self-restraint (Bulmer and Paterson 1987). If a government organisation is fragmented, such is the case in Germany; this may complicate the setting of a coherent EU policy. If a government does not invest in EU-related resources to increase negotiating skills or anticipation capacity, this may dilute its potentially relevant size.

Another relevant factor, of which the impact on shaping capacity can be debated, is length of membership. It can be expected that the longer a

member state operates within an EU context, the more experience with EU related policy-making has been built. This experience may increase awareness at a domestic level of the opportunities and constraints that the European Union offers as a policy context. Experience may also work at the EU level, as it could increase the level of socialisation within EU networks and thereby the relative ease by which national negotiators find their way into the maze of EU committees and networks and are better enabled to voice national positions (Trondal 2004). However, length of membership of a member state may also work the other way, as EU-membership and dealing with its effects is taken for granted within national public administration and a certain 'EU-tiredness' is taking place. This is why long-standing member states often watch jealously the processes in new or candidate states where as a result of (the prospect of) membership and the need to take over the 'acquis communautaire', the EU is actively integrated within national administration.

At the domestic level, a prominent variable in much analysis focusing on member states 'shaping' and 'taking' EU legislation is the degree of fragmentation of the national polity. Political and administrative fragmentation generally includes issues such as organisation of the national administration, the state structure (federal or decentralised), state-society relations (corporatism) and the political party structure. Although most national systems for dealing with EU affairs include an interplay between ministries dealing with sectoral interests and co-ordinating authorities, they differ as regards to the position and role of the latter and the mechanisms for translating preferences into negotiating positions. The different models, their pros and cons, and the challenges they constantly face, have been extensively analysed in a great number of country studies and comparative volumes (Rometsch and Wessels 1996, Hanf and Soetendorp 1996, Mény, Muller and Quermonne 1996, Zeff and Pirro 2001, and Kassim 2000).

With the wealth of different systems, it is not easy to determine whether a particular national system is fragmented or centralised (Schout and Jordan 2005). It is clear for most observers, however, that fragmentation impact negatively on co-ordination capacity (cf. Metcalfe 1987, Schout 1999). The latter notion is the potential to aggregate preferences of various stakeholders into a negotiating position to be voiced by government representatives. In an attempt to devise a standard of reference with the purpose of facilitating comparison, Metcalfe (1994) developed a nine-point policy 'co-ordination

scale' on which governments can be ranked in terms of their coordination capacity. The scales goes up from the lowest level (independent decision making by government ministries); beyond the level of mere communication and consultation; avoiding divergence and searching for agreement to arbitration and setting parameters, up to an active search for agreement, central priorities and devising a government strategy to establish a general direction of national EU policy. Spence (1999) developed a 'co-ordination chart' for governments wishing to be effective.

From a review of these texts and related literature, a number of implicit standards can be deduced for the performance of national co-ordination systems:

A first criterion is the degree to which it contributes to the *coherency* and *consistency* of national preference formation and representation and the effectiveness (i.e. the achievement of pre-determined policy objectives). 'Effectiveness is generally perceived (sometimes mistakenly) as good positive co-ordination in an area as complex as that of the European Union' (Kassim 2000, 3). Some authors assume very readily that a high degree of concentration of EU authority within the national system leads to increased coherency in the national bargaining position and thus more favourable outcomes. The co-ordination and control over the framing of the national negotiating position in particular is considered 'a key instrument' in order to secure 'speaking with one voice' in EU level bargaining (Hosli and Soetendorp 2001). Other scholars are more sceptical as to the contribution of co-ordination to policy effectiveness (Wright 1996, Menon and Wright 1998).

Second, the *efficiency* of the process in terms of time and resources is relevant for judging a system. Some member states have a Brussels reputation of being extremely well organised, most notably Britain and France (Kassim 2000). Other member states are known for being incoherent and slow: the southern Club-Med countries and the new EU 10 member states. The clue is often found in the degree of centralisation, as the two centralised systems of France and the United Kingdom are often cited to be very efficient when it comes to coverage of meetings, the timing of interventions and circulating information between the capital and the EU Permanent Representation. However, this does not mean that centralisation is the solution for coordination problems. Organisational efficiency is

determined to a large extent by the political-administrative structure and organisation of the member state in question and to be assessed in terms of delivery and national objectives as regards to domestic EU co-ordination. Tightly organised systems, which may be able to guarantee consistency and coherency between positions taken in different venues at different times, are presumed to be better suited to deal with the large degree of fragmentation and sectoralisation of EU policy-making. These claims are based on the assumption that the efficiency of the system is the dominant criterion: to what extent does the system 'fit' and function satisfactory at a domestic level? Indeed, political conflicts of interests may lead to inconsistencies, such as a lack of coherence between positions taken in different Council meetings or lack of control over national members of the European Parliament. Although the issue of effectiveness is debated, research suggests that the link between organisational efficiency and European outcomes is weak (Sepos 2005).

A third criterion is the *legitimacy*, or the degree to which other stakeholders support the outcomes of co-ordination. A hierarchically organised, and thus supposedly more efficient system, may come to decisions which are not supported by the actors that are subsequently confronted with the implications. The relative weight of this criterion has increased due to changing circumstances in the position of national governments, which are confronted with new actors active in the EU arena.

The *anticipation* capacity of the system is a fourth consideration. Much work on EU policy co-ordination is based on the assumption that preference formation can be managed by national governments and that national officials effectively act as the gatekeeper for national interest representation. Not surprisingly, the main focus of co-ordination is thus on the Council phase, but some systems hold a firm grip on what is going on in the phase of Commission initiative, taking into account the estimate that after the tabling of a European Commission proposal, 'scope for changing it only exists at the margins, involving about 20 per cent of the total proposal' (Hull 1993, 83). A second much-cited estimate claims that 90 percent of all dossiers are settled before they reach the ministerial Council level (i.e., 70 percent in Council working groups and another 15 percent in the next stage of negotiations between permanent national representatives (Renshaw and Wallace 1997, 78). The anticipation capacity of the system; the potential to act pro-actively on developments at the EU level (Nugent 2004) is highly

relevant for that reason. A complex division of power between the central government and the regions may lead to horizontal and vertical fragmentation resulting in late preference building and minority positions.

Last but not least, co-ordination systems should produce positions that are sufficiently *flexible* for government representatives to have room for manoeuvre during the negotiations. The previously discussed requirements (timely; coherency; consistency) seem to necessitate a tightly organised co-ordination of negotiating mandates, preferably in the hands of one actor that is able to oversee and monitor related processes. At the same time, EU level negotiations create their own dynamics precisely because their complexity and multi-levelled character. Because of the negotiating nature of EU decision-making, amendments are proposed throughout the process and all outcomes involve intricate compromise. Instructions for negotiators need to be sufficiently flexible to be adapted to changing circumstances or to changing positions of the other negotiators, whereas tight domestic compromises may bind hands.

If these five standards are not identified and recognised, debates and tensions may arise. The problem is, of course, that the requirements may produce contradictory and unintended results. A tightly hierarchically organised and thus supposedly more efficient system may come to less supported decisions which subsequently hard to implement timely and correct. In contrast, a less tightly steered system which takes many possibly conflicting opinions into account may not be capable with the time constraints which are imposed by the EU negotiating order.

One variable closely related to coordination capacity is the quality and use of ‘linkage mechanisms’ between the national capitals and the EU level, or: Brussels. All member states are represented at Council level by an embassy to the EU, a Permanent Representation, led by an ambassador, which generally serves as the ‘eyes and ears’ for member states in Brussels (see De Zwaan 1995, Kassim 2000b). Comparative analysis of the work of national Permanent Representations to the EU show that their ‘upstream’ functions are performed rather similarly. Concerning their staffing policy, most governments have ensured that nearly all departments are represented in the national embassies to the EU. Seconded national officials from all government departments monitor policy developments and networks of a national capital – but also of national business and economic interests – in Brussels. Staff at the Permanent Representation to the EU also negotiates

national positions, which calls for more co-ordination between the relevant expert officials and the more generalist knowledge of the representative. Empirical research has demonstrated that officials working at the Permanent Representation due to their regular attendance of EU level committees tend to develop a strong ‘supranational’ affiliation (Trondal 2004). As officials usually circulate from ministries to the Permanent Representation and back, their experience may in time increase the EU-awareness of the national administration at a domestic level (Soetendorp 2000).

Comparatively, there are differences in the involvement of national Permanent Representations in what is going on at the domestic level of negotiations. In some cases, the Representation participates formally in the process, while in others it has no predetermined role. The degree to which Permanent Representation’s are ‘pro-active’ in foreseeing relevant EU level events and developments and reports to the national capital also differs. The Permanent Representation of the United Kingdom to the EU (UKRep) is known for its structured and rapid information flow to London of the minutes of all relevant meetings between member states and EU level institutions (Schout 2004), in other member states, such as the Netherlands, much leeway is left for national negotiators to ‘mould’ instructions to EU realities (Van den Bos 1991).

Increasingly, the Permanent Representation is used for recruitment policy, that is, for getting nationals into Brussels. If the Permanent Representation is the formal link with Brussels, informal links are personified by the fellow nationals who work at the EU institutions. Member state governments, to a varying degree, keep close watch on the developments in the EU institutions, by holding informal meetings and keeping lists of nationals who have ‘gone Europe’.<sup>4</sup>

As was the case with ‘will’, also as regards to national shaping potential it is often not clear whether variables are relevant at the domestic or the EU level. One example is the ability of a national government to build or join a blocking or winning coalition. Interestingly, “surprisingly little scholarly work has up till now been produced on coalition behaviour and coalition patterns within the EU” (Elgström 2001, 112). A coalition can be defined as

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4) For example, the Dutch government regularly publishes a booklet with all Dutch staff of the EU institutions (‘Nederlanders in Europa, Europa in Den Haag’, Ministry of the Interior, Den Haag, SDU: 2004).

a set of actors that coordinate their behaviour in order to reach certain pre-determined objectives. Governments do not only have to express their positions but also to make sure that they are supported, as a consequence of the increasing practise of majority voting (see for example Hosli and Soetendorp 2001). Coalitions serve to reduce the number of negotiating actors to a manageable amount. But coalition building between EU member governments is much more difficult than it is at the domestic level, if only because of the instability and unpredictability of the EU's policy environment (Dwight in: Richardson 1996, 152-153). A rough distinction can be made between macro-level coalitions, or more or less permanent alliances, and meso-and micro level coalitions as regards to particular policy-areas or dossiers.

At the macro-level, Meerts (1997) distinguishes between ten overlapping coalition groups of member states within the then-EU-15: large and small members; pro-Atlantic; the rich and green Nordics and generally poorer southern ('Club-Med') countries; neutral countries as well as two particular sub-groups (Benelux; Franco-German alliance). Although it is difficult to predict coalitions, much more research has become possible after the public availability of Council voting records since 1994. It has been suggested that coalitions are based upon power; interests; ideology and culture, whereas especially the north-south divide and the net contributor-recipient divide are explanatory (Kaeding and Selck 2005). Besides that, coalition building is cross-cutting (different alliances for different dossiers) which complicates the building of coalitions that last longer than one particular issue. At a micro-level, the EU is known for its 'text negotiations' (Elgström 2004, 113). Below the micro-level of particular dossiers, coalitions can vary constantly as every article or particular wording can bring about new alliances. Insiders' accounts of Council level negotiations have noted that in these text negotiations normally, two coalitions appear at each end of the spectrum with the large majority of delegations indifferent as regards to the issue under discussion (Bal 2004, 131).

The ability of a national government to build coalitions is dependent on the strategic use of resources: knowledge about procedures and positions and negotiating skills. Here we come onto the fourth category of variables distinguished in the framework.

### *§3.4 Resources*

A last group of variables falls under the heading of resources, the short-term capabilities of a government to influence EU level developments. From policy and practitioners' studies on EU-affairs, we may distinguish a number of resources that are deemed particularly relevant for national governments to invest in. There often is a direct relation with the contents and intensity of national ambitions, preferences and capabilities – which underlines the large degree of interrelatedness of the all variables discussed in this chapter.

At the EU level, negotiation is the dominant mode of decision-making. The use of bargaining tactics and strategies may thus affect shaping capacity positively, although too shrewd negotiators may only be regarded with suspicion. Negotiating textbooks proscribe that one essential requirement for EU negotiators is to have sufficient knowledge about the positions and mandates of (at least a selected group of) the other actors (supranational institutions; central and subnational governments; NGO's) deemed relevant (see Meerts and Cede 2004). Positions are only the surface, however, underlying is a web of ambitions and preferences ideally known by the negotiator in order to be able to use them during the negotiations. The fieldwork necessary for finding this information is one large part of the daily work of the people active in EU level negotiations. A related category of resources concerns the use of bargaining tactics and strategies. Much attention is devoted to this topic in the training of diplomats and officials to be active at the EU level.

For negotiators at different levels and locations, actively operating in an EU context implies a sound knowledge of procedures applying, linguistic skills and familiarity with 'Euro-jargon'. Although it is tempting to focus only on those active at the EU level, EU-related knowledge is particularly relevant also at the national level, in order to secure the aforementioned 'link' between processes at different levels. The degree of 'EU-awareness' of national politics and administration is particularly relevant for adequate 'process management' of dossiers with an EU dimension (Schreurs 2002). If government officials involved in these topics are sufficiently aware of this EU-link in order to assess the potential consequences, such as for the EU-related actions deemed necessary, problems at a later stage, such as implementation problems, may be prevented. This holds the same for early involvement of the political level in EU-dossiers, so that potential problems arise at the ministerial level are prevented in the stage of administrative discussions. This is the reason why studies focus on the 'taking' of EU



legislation by member states now tentatively takes the ‘shaping’ side into account.

Does size matter in this respect? Obviously, the capacity and size of the administration may enhance the human resources to ‘be present’ in Brussels. A government may be determined to direct actions at the EU level, but sufficient resources should be allocated for that particular action. Minimally, this presence concerns those groups and committees where relevant issues are discussed. More ambitiously, active presence is ensured in meetings or institutions where new legislation can be anticipated (Wright 1996) and opportunities to promote national interests can be foreseen (Spence 1995). At first sight, it would seem rather obvious that larger member states have more resources at their disposal – although even then, the sheer size of the EU playing field makes it impossible to be present everywhere or to control all developments. One may also argue that efficiency and strategic use of resources are more important than sheer size or volume. Simply investing in the size of the Permanent Representation, in order to deal with an expanded workload, would increase the danger of ‘the development of specialized filieres, prone to pursue their sectoral interests’ (Menon 2001, 89). Because of the complexities of the EU decision-making system in which national governments are deprived of specific resources that they possess at the national level (authority; agenda control; established networks; administrative traditions), it could be even more important to invest in the right capabilities at the right time (Kassim 2001, 12).

As far as the issue of timing is concerned: when discussing relevant resources related to EU level-actions are concerned, anticipation capacity is often explicitly mentioned (Peters and Wright 2001, Nugent 2004): a proactive approach of the issues that will dominate the European agenda in the near future with the aim of agenda-setting or issue-manipulation. Peters and Wright (2001, 171) claim that although almost all member states are weak in this respect, ‘governments are increasingly aware that anticipation is an important policy weapon’. As the number of issues and actors has increased, a government should possess the anticipatory ability to foresee new EU regulation and be involved in the crucial, Commission-led phase of pre-negotiation. Especially the United Kingdom is reputedly highly pro-active in tapping Brussels’ resources at a very early stage: when the responsible ‘chef de dossier’ still works with a white paper sheet. The link between anticipation and coordination capacity is obvious: in order to prevent

inconsistencies and make the most of presence and influence in this early phase, preparations should start in articulating a clear and coherent national position.

*Table 4.2 A framework for analysis of a national government's shaping capacity*

<b>Shaping capacity</b>	<b>Will</b>	<b>Potential</b>
<b>Stable variables</b>	<p><b>AMBITIONS</b></p> <p>'Core values' and policy constants; political and economic 'clout', including relative development and political constellation, public support for active EU membership; length of membership; 'Image'; 'goodness of fit' as regards to ambitions and objectives</p>	<p><b>CAPABILITIES</b></p> <p>Policy style; degree of fragmentation, co-ordination capacity; size and EU awareness of the political and administrative system; strategic capacity; coalition building capacity; quality and use of organisational/personal EU-national linkage mechanisms</p>
<b>Situational variables</b>	<p><b>PREFERENCES</b></p> <p>Relative salience of the issue; interest configuration; particular institutional conditions, incl. EU Council Presidency; relative fit and extremity of preferences and negotiating position</p>	<p><b>RESOURCES</b></p> <p>Interest configuration; knowledge, skills and competencies; ability to anticipate and act pro-actively; ability to use nationals within the system; flexibility of negotiating position; use of negotiating strategy and -tactics</p>

## §4. Discussion

It is clear from the previous sections that governments willing to become involved in EU policy-making are confronted with an immense challenge. The number of actors, levels and players is staggering, probably one prime reason why the notion of government shaping capacity, however relevant for the functioning of the EU, has thus far been largely unexplored. It is an important issue, however in light of the opportunity-structure governments are confronted with at the EU level. As governments are assumed to function in a multi-level context where they are circumvented by sub-national actors and organised interests, threatened to be outvoted by Council colleagues and forced to cooperate which supranational institutions in all stages of the policy chain, including those of decision making, governments are forced to actively invest into their capacity to be active and influence at the EU level. But which variables matter in this respect?

Overseeing the results from the previous sections and keeping in mind that this is merely a constructed categorisation of a complex reality, it is easy to

conclude that everything is interrelated. To quote one particularly relevant academic contribution, that of Peters and Wright (2001, 173): ‘the effectiveness of a country’s domestic EU co-ordination capacity must be judged according to the issue, the policy type, the policy requirements and the policy objectives’ ... To be able to frame the following country study of how a government deals with the shaping, however, it is important to group and select those variables, which are expected to be relevant. Which, now, are the variables deemed relevant for what may be roughly called the ‘national EU-related lobby’?

For a start, all national governments have to work with a context determined by a number of ‘constants’ largely determined by their history, characteristics or context such as the relative level of economic development; the degree of domestic political support for integration; and its relative political clout. However, public opinion in an allegedly pro-EU government may turn out to be reluctant to further integration; political clout may be diluted by external factors and a member state may adapt its constitutional structures and processes to EU realities. At the EU level, treaty reform negotiations are organised with increasing frequency in order to adapt the EU’s institutional and policy framework to changing circumstances. Although stable variables may thus be subject to change in the long term, for an analysis of national shaping capacity, they can be considered ‘exogenous’, as they are difficult to adapt during the course of shaping activity. In contrast, ‘endogenous’ variables can be used and adapted during the shaping process.

This distinction notwithstanding, for analytical reasons, a selection should be made of the plethora of factors discussed in the previous sections. The assumption behind this selection is derived from the insights discussed in the previous chapters, which have examined how the challenges to governments have led to a different playing field or ‘opportunity structure’. The ‘paradox of integration’ (see Hoffmann 1996) is that governments strive to cooperate to increase their grip upon cross-border developments, whereby the saliency of what happens at the EU level increases. As more is at stake for governments, the relevance of national claims increases and they are pressured to perform in the ‘struggle for a say’ (Beyers and Trondal 2002). At the same time, the traditional possibilities for successful performance have been seriously limited. For governments wishing to be active at the EU level, at a larger playing field with many more relevant actors, the quality of

interest representation is much more important than sheer political clout. For any EU-lobby, it holds that if it is not set up properly, it may be that those interests will ‘lose’ in the policy-shaping arena and thus be outvoted or irrelevant for the final outcomes. Those governments wishing to be relevant in EU policy-shaping will have to invest actively in getting their act together.

With this in mind, the following categories are identified as particularly relevant for national shaping capacity. First, the degree of ‘fit’ or congruence of national and EU level policies and ambitions; second, a number of variables associated with the potential of governments to be active (co-ordination anticipation and strategic capacity), third, the quality and quantity of resources made available for EU-related actions and, last but not least, the relative salience of the issue, as a strong ‘will’ may remedy scarce capacities or resources.

These variables will be highlighted in the next sections and subsequently serve as a guiding line for the empirical analysis in the next chapters.

The notion ‘*goodness of fit*’ has been very prominent with in Europeanisation studies concerned with the ‘taking’ of EU policies by governments roughly since the mid-1990s. But only in a remarkably late stage has the link to the ‘shaping’ been (re-) established. The concept, which is essentially about the degree of congruence between national and EU level arrangements, has become (perhaps too closely) related to explanatory studies concerned with national implementation performance. Misfit is assumed to increase the chance that problems will occur in the implementation stages, as adaptation costs are higher. However, Treib (2003) has convincingly argued that governments may also use what happens at the EU level as a political leverage to change existing legislation at home. Misfit may hence work as an incentive to be more active in the shaping stages. Thus, ‘goodness of fit’ is directly related to anticipation capacity. If existing national legislation is similar to new EU legislation, there is not much to shape. The prospect of misfit, in contrast, may inspire governments for timely contacts with, for example, the relevant units at the European Commission charged with elaborating the proposal. However, governments need not be passive when there is a relatively high degree of fit, as proposals are often subject to change during the negotiation and decision-making.

Then, at the macro level, governments' structure and practices may not correspond to the way things are being done at the EU level or in partner member states. This 'constitutional' misfit increases the chance of conflicting ambitions, organisation or policy styles between a member state and common policy-making.

A next group of relevant variables is concerned with the *strategic capacity* of a government at the domestic level. A strategy can be defined as a systematic action plan aimed at achieving a coherent set of goals and objectives for the middle-long and long term. A national EU strategy ideally includes an idea on the development of the European integration and the country's position and role within this process. This grand design may subsequently be translated into short-term priorities between competing interests and preferences for individual dossiers.

Strategic capacity may be considered the 'macro-level' variant of co-ordination capacity. Where the latter served to organise the national system of EU policy-making, in a way that negotiating positions mirror preferences formulated by different groups, the former serves to ensure that preferences are consistent with ambitions and long-term vision. Strategic capacity can be sub-divided into a number of elements. The ability to set priorities and recognise possible pitfalls is one condition. Moreover, it includes the ability to link 'macro', 'meso' and 'micro' level developments, in order to have a coherent EU policy, in other words, a strategy goes beyond particular dossiers and policy areas.

As described in the previous chapter, through the ongoing process of Europeanisation (to the effect that domestic policy, politics and the polity are increasingly subject to common policy-making) EU-awareness and engagement of domestic actors have increased. Another effect is more competition over EU policy-making at the national level, because there are more interested stakeholders to fight for a say in the national position. Third, Europeanisation has led to organisational adaptation in national administrative systems, aimed at increasing efficiency of the processes in which national EU policies are shaped (Knill 2002). Either way, governments need to invest in timely and efficient procedures for the formulation and consistent representation of coherent negotiating positions at different levels in the national capital and in Brussels.

It is to be analysed which direction of change induced by Europeanisation processes (increased competition; more awareness or more efficient arrangements) will dominate the outcomes for national shaping capacity. Any way, a government must be motivated and ambitious and ready to invest valuable resources to be active at the EU level. No member state government can be present and active on all fields touched by European integration. A government must thus be able to select the objectives of EU-related actions and the preferred outcomes as well as to assess the degree of realism and the pitfalls and opportunities to reach desired outcomes. Ideally, a government is able to select and prioritise between all possible actions. At least, selection implies a critical assessment and prioritisation of the other actors: possible partners and counterparts as well as adversaries. This presumes a combination of the aforementioned resources: knowledge of the agenda and the important moments in the policy cycle; a network of actors at the national and international level that can be mobilised for shaping attempts; co-ordination capacity to get the preferences into the system at the right time and the capacity to link expected or upcoming issues to national ambitions.

Strategic capacity is often linked to *coordination capacity*. The assumption is that timely and centrally organised action, for example directed at the European Commission drafting new policy proposals or at members of the European Parliament preparing amendments for the legislative process, may increase the chance that national positions are heard and taken into account in the shaping process. If so, fragmented governments are clearly at a disadvantage. It should be noted, however, that the impact of the variable ‘fragmentation’ on national shaping capacity is less clear-cut than accounts of EU coordination lead us to believe. If one departs from the assumption that national government representatives should voice a unitary position coherent and consistently in Brussels in order to successfully shape policies, fragmentation obviously complicates this process. But according to two-level game theories, by reference to an intricate domestic playing field with a relatively high number of veto points, negotiators can attempt to tie the hands of their counterparts in Brussels. They may use techniques of ‘scapegoating’ or remain fixed to a particular negotiating position as if ‘forced’ by powerful domestic opposition. Second, too much centralisation risks endangering the legitimacy of policies decided at the EU level, which may cause problems with the implementation of European legislation at a later stage. Third, a fragmented system with a low co-ordination capacity

may lead to different negotiation positions. But if a government succeeds in mobilising different groups for a common cause, shaping capacity may actually be increased. This argument is presented by Derlien (2000, 73) who argues in a description of Germany's EU policy ('failing successfully') that 'hundred of arrows may be more effective than one shot with Big Bertha'. This assumes, however, that all arrows are fired in one direction!

For designing and executing an EU-directed national strategy as described in the previous section, the quantity and quality of *resources* are vital. The knowledge, skills and competencies that national representatives hold about the contents and procedures of EU policy-making are considered to be valuable both for setting and organising EU policy at the national level; for securing a timely and procedurally correct link to Brussels and for instructing EU level negotiators or negotiate 'smartly' in the policy-shaping process. One particular category of resources is bargaining tactics and strategies.

There is a direct link between resources and all previously mentioned variables. To increase their anticipation capacity, governments could invest in network building at the level of the European Commission, the Parliament as wells the Council Secretariat. At the very least, this involves getting informed of policy initiatives, key positions, players and people. Using this information implies working differently than is demanded by the re-active nature of the decision making process, according to which member states wait for policy proposals to be developed from the side of the Commission.

Even more active is the quality of an EU staffing policy in order to be nationally represented with quality staff across the policy chain. This implies a focus on the European Commission and the Parliament, but also the Council secretariat and the expert committees advising the Commission. Although staff of the supranational institutions is supposed to be serving 'European' interests and function without a national mandate, the reality is much more complex. Analysis has highlighted the dependence of the European Commission, but also the Parliament on individuals or groups of experts because of a shortage of in-house staff and expertise. Information is actively sought not only from consultants, academics and professional experts, but also from representatives from national government bureaucracies. These consultations of 'knowledge-based' epistemic communities' (Sebenius 1992 as quoted in Richardson: 15) serve not only to design and optimally fine-tune technical and legal details, but also to investigate the legitimacy of new ideas and initiatives. In practice, European

Commissioners, Members of the European Parliament, and staff of the institutions, including the Council Secretariat, are willing to lend an ear to information, expertise and well-built arguments. For practical or ideological reasons, EU officials will not completely divest themselves of their national loyalties and information originating in the national capital may be particularly well received. Governments may thus invest actively in tapping the resources available. This does not simply mean sending people to Brussels – as the number of representatives is limited, it is important to invest in the quality of personnel considering leaving for Brussels or Strasbourg.

The relative *salience* or relevance of the issue impacts positively on shaping capacity. In a way, this variable is the link between ‘will’ and ‘potential’. Strong motivation of a member state to influence EU level proceedings may remedy low capabilities or resources. If a member state assigns a low priority to EU affairs, the management of EU affairs can be very efficient, but shaping capacity will not benefit. Within national systems of EU policy-making, issues that do not attract much attention are generally dealt with at the administrative level, where specialist officials are responsible for tracing the issue throughout the policy chain (Van den Bos 1991). As soon as a proposal gets ‘politicised’, governments are more willing to make resources available. Moreover, higher issue salience makes it more probable that priorities are set and a long-term vision is developed, which may benefit the strategic capacity of a government.

Although the previous selection of relevant variables is needed to structure the following analysis, a number of caveats should be voiced. First, it is important to stress that an identification of the ‘building blocks’ of shaping capacity does not pre-determine the outcomes. Consistent with neo-institutional reasoning, this book sketches a picture of EU policy-making in which actors which different, sometimes competing interact in an environment filled with ‘institutions’: formal and informal rules, norms and practices which affect outcomes both at the domestic and the EU level and in their interaction. The outcomes of EU level negotiations are dependent on a wealth of different factors including the total interest configuration; relations with other actors; political circumstances, global pressures, coalition formation, of which national shaping capacity is only one particular element. But, although the institutional context of the negotiations and the conditions and circumstances will be similar to a large extent for all interested parties, it



has been described in this chapter how member state governments may deal with these institutions in different ways, dependent on a complex mix of ambitions and capabilities, preferences and resources described in previous sections. How this mix works in practice can only be discerned through detailed case-study analysis.

A second challenge is that the variables discussed are difficult to ‘operationalise’: to be translated into ‘measurable’ units for the sake of the analysis. However, it is important to underline that the framework does not present fully-fledged hypotheses as to, for example, whether size dilutes co-ordination problems or whether ambition may overcome constitutional misfit. This is a particularly interesting topic to follow-up, which requires much more time and space than available in an explorative dissertation. What has been presented is rather a checklist of relevant factors. A next step is to analyse to what extent these particular factors are recognisable in the realities of EU-policy-making. The next chapters form the empirical part of this book, which focuses on the case of the Netherlands. The shaping capacity of this particular member state is explored with the help of a single-country review (chapter 5) and two case-studies (chapter 6). It is analysed which ambitions, objectives, capabilities and resources can be identified in Dutch EU policy. Moreover, two case studies concerning the negotiations over recent EU legislation and policy are examined in order to determine which variables and mechanisms have played a role in the shaping process by the Dutch government.

*Going Europe or Going Dutch*

# Chapter 5

## How the Netherlands Shapes EU-policies

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### §1. Introduction

This chapter discusses the shaping capacity for EU-policy-making of one particular long-standing EU member state: the Netherlands. The analysis is based upon a review of the ongoing debate amongst academics and practitioners on the European ambitions of the Dutch government and its potential to influence European policy-making processes. By applying the conceptual framework for governments' shaping capacity, long-standing and less stable shaping ambitions of the Dutch government (§2 and 3) as well as its potential to realize these objectives (§4) will be discussed.<sup>1</sup>

The discussion, in the 1990s, on Dutch EU policy and its organisation comprises two remarkable 'stereotypes' (Van Keulen 2004). First, analysts have pointed at the supposed 'watershed' between the traditional core values of Dutch foreign and more specifically EU-policy, and the recent trends towards more reluctance and ambiguity in the Dutch stance towards EU developments. The alleged result would be a growing uncertainty and unease about the Dutch position in the enlarged EU, which would explain why the central government lacks a broad strategy regarding the country's integration ambitions. Discussions on the EU and on national positions for EU level negotiations are claimed to be focused on incidents and 'hot potatoes', such

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1) Consistent with the empirical part of this study, the analysis is limited to the period up to the end of the 1990s. For a short review of more recent changes in Dutch EU policy objectives and positioning, see chapter 9.

as the costs and risks associated with European integration (see Court of Auditors 2004, Pijpers 2003, Rood 2004).

The second stereotype concerns the supposedly weak potential of the Dutch government to actively shape EU policies. This would be due to a number of structural conditions and characteristics, such as the relatively high degree of fragmentation of the national political system and administration and the strive for consensus that has characterised the renowned Dutch ‘polder model’. This would negatively impact upon the co-ordination and anticipation capacity of the government, so that some observers even speak of the ‘poorly organised preparation’ of Dutch negotiation positions (Andeweg and Irwin 2001, 170).

These two stereotypes merit more systematic analysis, to examine whether and to what extent the Dutch government is ‘well placed’ or, in contrast, ‘ill suited’ to influence Brussels.

## **§2. Stable core values in the Netherlands’ EU policy**

### *§2.1 Three constants in post-war foreign policy*

From 1945 up to the early 1990s, the integration ambitions of the Dutch government have been characterised by a long-term continuity and consensus (Harryvan 2001, 17). Three constants have been distinguished: a strong transatlantic orientation in terms of foreign and security policy; a push for ‘instrumental supranationalism’ as regards to the modes of EU policy-making; and a traditional preference for economic integration over political cooperation initiatives (see Brinkhorst 1978, Harryvan and Van der Harst 1994).

The preference for transatlantic relations in post-war Dutch foreign policy was manifest in an emphasis on the role of NATO. This security organisation was traditionally considered as a primary vehicle for international co-operation (Van Staden 1974), which explains why the Dutch government was rather hesitant towards the first initiatives for a common European foreign and security policy. One key motivation was fear for dominance of political cooperation by the larger member states (Tonra 2001). An example is Dutch Prime Minister Luns’ outspoken and hostile ‘no’ to the *Fouchet* plan for an European political Union in 1961-2, to which all other member states agreed (see Griffiths 1980, 280, Silj 1980).

But remnants are also visible in the contents of the draft treaty for European Union, which the Dutch Presidency proposed for the Intergovernmental Conference to be concluded in Maastricht in 1991 and which allowed a common security policy only as complementary to NATO.

Dutch EU-politics, it is argued, have been consistently pragmatically driven, instead of embedded in an ideology or pushed by a strive for power. This ‘balancing act’ is also visible in the strive for economic cooperation rather than political integration. The Dutch focus on trade rather than on power politics has been defined as ‘... a reluctance to accept changes in the status quo, or downright conservatism’ (Andeweg and Irwin 1993, 213). Participation in European integration initiatives was primarily considered instrumental to secure national economic benefits, not in the least securing access to European export markets. A hilarious quote in this respect is that of Robert S. Wood (1978, 285): ‘A well-known expression inside the European Communities is: “the Dutch speak of supranationalism but what they really mean is cheese”.’ And still, the economic dependence of the EU member states is huge,<sup>2</sup> while active membership of the EU gives the Netherlands easy access to other trade blocs and organisations.

This push for supranationalism has often been mistaken for a ‘federalist ideology’. See for instance the quote by Hans Daalder (1991, 8): ‘Dutch politicians were traditionally amongst the most active proponents of “federalism”.’ In an article about the 1981 national Presidency of the Council of Ministers, Jansen (1985, 209) describes the then-prevailing view of the majority of government officials as follows: ‘the European Community is devised as a supranational organisation – therefore we must support all initiatives to strengthen its supranational character and resist all attempts to upgrade intergovernmental aspects’. And Wolters (1992, 20, own translation) claims that ‘the Dutch government traditionally takes the view that European integration in the future should become a federation of its member states’.

The preference of successive Dutch governments for the Community method of common policy-making should, however, rather be understood as instrumental for enhancing the position of the Netherlands vis-à-vis the larger states, most notably Germany and France. Fear for a ‘directorship’ of

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2) Centraal Planbureau, Macro Economische Verkenning 2006, hoofdstuk 6.

the large member states was indeed a key reason for the successful plea, of the Dutch government for the insertion of an ‘intergovernmental’ Council of Ministers to provide a check on the independence of the European Commission (then: High Authority) within the emerging Community decision-making structure.<sup>3</sup> For this reason, the Dutch stance towards the design of European co-operation has been adequately described as ‘pragmatic’ or ‘instrumental supranationalism’ (Harryvan et al. 1996, 109). In past and present, Dutch coalition cabinets have never been very enthusiastic for the idea of ‘ever closer union’ and have carefully refrained from proclaiming any, let alone any *federal* visions of a future united Europe.<sup>4</sup> It has been argued that this pragmatic attitude of the Dutch government regarding initiatives for further co-operation has been enforced by successive treaty changes and EU enlargement in the 1990s.<sup>5</sup>

### *§2.2 The conditions: a strive for consensus and unity*

These three relatively stable ambitions should be understood in the context of two particular country-characteristics: the long-standing ‘permissive consensus’ over European integration and the strong degree of constitutional, political and administrative fragmentation of the Netherlands.

The first background variable is the large degree of ‘permissive consensus’ that characterises EU policy-making (Hix 1999). Public opinion was consistently of the highest pro-EU in the Union, which has led Van Herpen (1981, 79) to claim that the average Dutch citizen could be considered a ‘homo supranationalis’. At the same time, foreign policy-making was reserved to an exclusive elite of politicians, senior civil servants, diplomats and academia (Baehr 1978). With the development towards an European

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- 3) See Van der Stoel 1975, 8: ‘The thought of a “inner circle” or, even, a directorate of the larger member states should be dismissed’ (Lecture on 20 November 1975, Royal Institute of International Relations, Brussels).
  - 4) See Spinelli (1966, 112) on the position of the Dutch within the EC: ‘In the abstract they are generally favourable to solutions which imply real transfers of authority to united European organizations. But in the concrete they always demand long and minute preliminary intergovernmental negotiations, which invariably help to strengthen that very Europe of the nations which, as a matter of principle, they say they abhor’.
  - 5) See chapter 9 for related developments towards more Euro-pragmatism in the 2000s.

single market, membership of this elite club was gradually extended to representatives of the private sector; sub-national levels of government and other groups of organised interests. However, until the mid-1990s, public debates on the merits and pitfalls of EU membership did not occur. This should be understood in the more general perspective of the particular politico-administrative and cultural traditions of the Netherlands as a 'consensual democracy' (Lijphart 1998). As a result of a tradition of political pacification through de-politicisation of controversial issues in a system of dependent minorities, different groups in Dutch society for long were rather passive in expressing their political choices. Although after the 'depillarisation' of society in the late sixties, the political system has become less stable, Dutch society has for long been regarded as extremely permissive (Thomassen and Van Deth 1999). This rather passive stance of politicians and the general public as regards to European integration has been compared to that related to the weather: 'sometimes it is fine and sometimes it is inclement, but little can be done to change it' (Andeweg and Irwin 2002, 171). Publicly questioning the benefits and merits of the European integration country was considered 'not done' – a tacit convention for the first time publicly breached in the mid-1990s by liberal party leader Frits Bolkestein.

Second, the Dutch government policy towards European integration and the EU should be regarded in light of the particular constitutional structure of the Netherlands. The country is organised as a 'decentralised unitary state' of twelve provinces and around 470 municipalities. The once sovereign provinces, which dominated the Republic of the Netherlands, have developed into what has been called 'the most impotent layer of government' (ibid. 160). Provinces are much too small to be treated on equal footing with the German Lander or Spanish Comunidades. However, in particular in the field of implementation of environmental and regional policy, Dutch provinces and municipalities have exclusive competencies. For that reason, their interest organisations are formally engaged in EU-policy-making at the central government level, both in the preparatory and implementation phases. At the EU level, Dutch provinces and municipalities operate through their respective lobby organisations. The provinces and the urban region of the Randstad operate in geographical entities, having their own lobby office in Brussels and there are also bilateral ties in the Euregions.

The Netherlands is traditionally governed by coalition cabinets, in which government policy is a collective ministerial responsibility and all ministers have equal constitutional status. This necessitates much co-ordination, both between departments and their interests and between governing parties and their ideologies (Soetendorp and Andeweg 2001, 219). And also administratively, the Dutch system is known for a strong degree of departmental autonomy and strong policy networks. The government departments have developed strong policy-making structures and this departmental segmentation is mirrored in the policy-making processes both regarding domestic and foreign, including EU-policy-making. The tacit rule of non-intervention makes that individual governments have much leeway to pursue their own policy goals. Only at the level of Cabinet, conflicts of interest may come out in the open. The position of the Prime Minister is one of *primus inter pares* (first amongst equals) and also this position lacks the formal competencies to arbitrate and set binding decisions.

### **§3. The growing doubts of a founding father**

In the course of the 1990s, Dutch EU policy has become less attached to its original core values. The consequences of the 1992 ‘Maastricht’ treaty on European Union constituted a ‘rude awakening to the realities of the Europe of the 1990s’ (Hoetjes 2002, 217). Slowly but gradually, Dutch policy towards the EU has shown a more variable course, influenced, amongst others, by the personal perspectives held by politicians most involved. This development has been described as the new ‘pragmatism’ of successive Dutch governments towards the EU (Langendoen and Pijpers 2002) or ‘the growing doubts of a loyal member’ (Soetendorp 1998). Three causes for change may be identified: the growing concerns on the costs of membership; the effects of Europeanisation and the consequences of EU enlargement (Sie Dhian Ho and Van Keulen 2004).

One key element in Dutch EU policy in the 1990s that is hard to neglect is the dominance, in political discourse, of the issue of the presumed ‘costs’ of EU membership and the financial contribution of the Dutch government to the EU’s budget. Up to the 1990s, the Netherlands received more from the EU funds than its national contribution (Griffiths 1980, 294-5). The rapid deterioration in the early 1990s of the national ‘net position’ (the sum of revenues and expenditure to the common budget) resulted from an increase



of the national contribution to the EU's agricultural policies and structural funds, and a parallel (but downward) trend in return payments from Brussels. This negative balance further deteriorated well into the 2000s, but the first effects of the debate were visible in the time period central to this study.

In the mid-1990s, the realisation of this budgetary disproportionality compared to more prosperous member states made the Dutch government very aware of possible budgetary consequences of imminent EU enlargement.<sup>6</sup> Then-liberal leader (and later European Commissioner) Frits Bolkestein fuelled the debate during the two successive coalition governments Kok-I and II (1994-2002). Bolkestein claimed that the Netherlands has '[...] played the accommodating, self-effacing, mealy-mouthed goody-goody for too long and to little effect'.<sup>7</sup>

The gradual shift, in the course of the 1990s, of EU integration initiatives from the field of market liberalisation towards those policy fields formerly under national control, most notably those of justice and home affairs and foreign policy co-ordination, has been a related cause for growing 'EU-awareness' of the Dutch government. In particular as regards to foreign policy, initiatives at the EU level for policy co-ordination forced the government to reconsider its traditional preference for transatlantic co-operation. A major 1995 Foreign Policy Brief, (*Herijkingsnota*) stated that '... a combination of factors points our country in the direction of a stronger continental commitment: the reunification of the two Europe's, shifts in the power balance within the Union and the more distant American leadership. It is clear that the Netherlands can not turn its back on the continent.' (Ministry of Foreign Affairs 1995, 8).

On the question *how* to realise this new European commitment, there was less agreement, however. In 1991, the government explicitly pursued a strategy for embedding the EU's new Common Foreign and Security Policy (CFSP) within the then-EC's legal order. This ambition was reflected in the unitary structure of the new draft treaty, tabled by the 1991 Netherlands EU Council Presidency. This proposal was met with downright hostility and in

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6) Quoting State Secretary for European Affairs Atzo Nicolai, in an interview issued on the eve of the Dutch 2004 EU Council Presidency: 'Dutch citizens still consider peace important (...), but they do not understand why they have to pay 500% more for it than the Danish fellow Europeans' (Nicolai 2004).

7) Quoted in *The Economist*, 2 May 1998.

the course of the negotiations; the Presidency was forced to return to an alternative draft that had been proposed by the preceding Luxembourg Presidency. According to analyses, this event on 'Black Monday' in September 1991 has contributed to a more pragmatic stance of the Netherlands towards the European Union (Van Hulten 1996, Pijpers and Vanhoonacker 1997, Langendoen and Pijpers 2002).

The increase of EU level involvement in sensitive policy area's, which has taken a high course due to successive treaty changes and a very active European Commission policy in the field,<sup>8</sup> has negatively impacted upon the degree of acceptation that common policies enjoy, both at the political level and in public opinion. Here, the effect of five successive enlargement rounds of the EU should not be underestimated. Within the inner circle of six founding member states, the Dutch played a 'surprisingly large role' (Griffiths 1980, 298). This has been attributed to a number of preponderant, but temporary factors, including the post-war economic and political weakness of the large member states; the need for a mediator between adversaries France and Germany and the dual position of the US over European unity, which offered the Dutch government a large degree of action capacity (Brinkhorst 1978). Gradual enlargement of the EU diluted the 'special status' of the Netherlands to that of the largest of the small member states. The enlargement from 6, to 12, to 15 and the prospect of an EU of more than 25 member states impacted upon the working methods in common policy-making, increasing the need for early involvement and coalition building. Enlargements are also related to changes in the relative weight of individual policy areas. The accession of relatively poor 'Club Med'-member states (Greece, Portugal and Spain) in the 1980s impacted upon the regional and cohesion policies and contributed indirectly to the net payer position of the Netherlands towards the common EU budget. The accession of Austria, Finland and Sweden as relatively well-developed and green member states gave a boost to EU environment policy and gave the Dutch government more possibilities for coalition formation in this particular policy field.

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8) This holds especially for the area Justice and Home Affairs (De Zwaan and Bultena 2002).

A related cause for increased pragmatism is, perhaps rather paradoxically, the ongoing Europeanisation of Dutch central administration. In the course of the 1990s, all government ministries (in particular those of Agriculture, Environment, Transport and Economic Affairs) have become active in voicing their preferences, both domestically and at EU level meetings, on new policy initiatives from Brussels. Departmental EU units have been set up and continuously upgraded in terms of resources and staff. Individual government departments have come to invest in (inter-) ministerial training programmes offering advice on ‘how to lobby the EU’, they regularly send their personnel to Brussels for temporary postings and attempt to institutionalise international expert -networks, for instance by drafting special ‘Who’s who’-guides. There is a parallel increase of attention for EU affairs among the management and political leadership of government departments. Generally speaking, experience has shown that the position of expert officials from individual government departments frequently turns out to be less progressive and more reluctant when it comes to further policy integration, than those of the more ideologically driven rationale dominant at the Foreign Affairs Ministry. Combined with their relative autonomy and low coordination capacity of the system, this leads to more difficulty in pursuing a coherent and consistent national EU policy.

With the benefit of hindsight, it is actually rather surprising that the domestic debate on the merits of an active Dutch EU-membership took so long to develop. It was in this relative silence that a small circle of government officials continuously formulated and represented the negotiating positions for EU level negotiations. This process is described in the following section.

#### **§4. The shaping potential of the Dutch government**

Referring to the framework for analysis on shaping capacity, this section discusses variables that impact upon the potential of the Dutch government to shape EU policy-making.

The first factor that cannot go unnoticed in this respect is *fragmentation*. It has been claimed that: ‘nowhere (...) the fragmentation of Dutch policy-making [becomes] more visible than in comparison with the unified political systems of other West European countries’ (Andeweg and Irwin 2002, 169). Dutch administrative and political structure and culture are characterised by

a strong tradition of departmental autonomy. The Prime Minister formally still depends on a Foreign Ministry mandate to discuss matters with his EU colleagues in European Council settings (Harmsen 2000). This makes it more difficult for the coordinating authority to decide upon conflicting preferences, than is the case in member states with a more centralised government organisation.

How fragmentation of the government organisation impacts upon its co-ordination capacity has been discussed, in more general terms, in the previous chapter. In the Netherlands, the organisation of the national co-ordination system for dealing with EU affairs has not been fundamentally changed since its design in 1958 (see the annex). It is relatively decentralised, its structures are designed to focus on the Council phases of EU policy-making and the 'co-ordination capacity' of the system, i.e. the potential to set binding and authoritative decisions on the course and contents of EU policy has been the subject of discussion amongst academics and practitioners. As to shaping potential variables, this has two particular effects.

First, the fact that procedures are focused on the Council-level of negotiations makes that the anticipation capacity of the system is endangered. The risk is that proposals are only reviewed at the moment when much of its contents and format have already been decided during the agenda setting and drafting phases. Moreover, the legislative competencies of the European Parliament risks to be neglected so that the Dutch government may miss out a relatively new but important venue for access and influence in the law-making system.

Second, the focus on the Council makes that the opportunities to 'get' nationals into the supranational institutions have long been less co-ordinated than in other member states. This should be understood by the alleged 'esprit communautaire' of the Netherlands which made these influence attempts politically 'not done'. This explains why a co-ordinated government strategy was lacking and for long, seconding officials to the EU institutions was left to individual government departments.

Then, about *size and resources*. A conclusion in the previous chapter was that 'size matters' to a certain degree for shaping capacity. In comparison with other EU member states, the Dutch bureaucracy is relatively small and expert-oriented. New recruits tend to be specialists, rather than generalists and there is no uniform training system, such as the Fast Stream programme

for government officials in the United Kingdom, in which EU courses as well as a traineeship at the EU level institutions are included (Andeweg and Irwin 2002, 150). This may be remedied, on the one hand, by the expertise Dutch negotiators bring into EU level meetings, by the fact that the same representatives are often present throughout the policy chain (expert committees; Council working groups and comitology committees) and by the positive effects of the experience with EU policy-making both at the national and the EU level that has been built after fifty years of active membership.

On the other hand, this experience may actually hamper EU awareness and adaptation, as EU membership and its consequences is largely ‘taken for granted’ and consequently seldomly subject to political attention. This may be one explanation for the low involvement of the Dutch *parliament* (First and Second Chamber) as regards to EU policies and EU policy-making. The legislative is generally acknowledged to be amongst the latecomers in EU-affairs in many member states (Wessels 2003), but the Second Chamber (‘Tweede Kamer’) was amongst the last to set up a parliamentary Europe Committee (in 1986). Formally, a summary of all new European Commission proposals is sent to parliament, in order to inform MP’s about the negotiating position to be taken by representatives of the executive. However, parliamentary involvement in the negotiations, let alone interventions, seldomly occur during the negotiations. This implies that the stage of implementation of binding rules and directives is often the first stage for the parliament to get involved in EU dossiers and that the discussions then emanating may cause costly implementation delays.<sup>9</sup>

There is one exception: the Second Chamber does possess limited mandatory powers confined to Justice and Home affairs. This necessitates the relevant government minister to inform parliament of the government position to be taken in the Council of Ministers meeting for Justice and Home Affairs (Andeweg and Irwin 2002, 174). However, compared to the way Danish parliament ‘controls’ all government actions in the Council, this mandatory power is not often used in practice. Explanations may be found in the time pressure inflicted by the EU’s rolling agenda; the workload of domestic dossiers (with a higher direct political salience) and lacking

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9) See also the reconstruction of national debate in one of the case-studies in this study, the Biopatent Directive 98/44/EC, see chapter 8.

knowledge of the EU policy process and the binding character of EU laws.<sup>10</sup> Individual efforts by a handful of members specialised in European dossiers in the largest political factions notwithstanding, parliamentary discussion of EU affairs is rather ad hoc, focusing on political incidents (such as appointment) and, a particularly prominent issue: the Dutch contribution to the EU budget. The situation has been called a ‘vicious circle’: European affairs are not the subject of domestic political and public debates and just because the issue is politically uncontroversial, there is no incentive for individual politicians to ‘score’ with bringing up European dossiers in the domestic political debate (see Del Grosso 2000, Hoetjes 2001).

Another relevant variable for national shaping capacity is the ability to form *coalitions*. The Netherlands has a number of ‘traditional allies’ (Meerts 1995, 14, see also Pijpers 1997) that include the United States and Great Britain (as for transatlantic orientation and security policy), Germany (due to close economic ties and a shared preference for economical integration) and Belgium and Luxembourg as direct neighbours and partners in the Benelux. The latter organisation was founded in 1948 as a predecessor of wider forms of economic co-operation. Over the decades, it has served as a forum for regular consultations at ministerial or administrative level, for example before European Council meetings. It has been argued, however, that individual members of the Benelux coalition have not much in common in their foreign policy orientation, shared ideas on the ‘finalité’ of integration and national policy styles, which makes the future of this sub-group debatable (Brower 2003).

The widening and deepening of the EU playing field requires more in terms of flexible coalitions, as new ‘coalitions patterns are fluid, rather than stable’ (Elgström 2001, 86). This was one driving factor for the initiative of the Ministry of Foreign Affairs, in 1998, to attach more value to bilateral relations with the EU’s capitals. Based on an intricate set of criteria including geographical closeness; position in international organizations; affinity towards Dutch point of view; historical relations and particular policy issues with a relative importance for sectoral government ministries

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10) In the run-up to the ‘big’ enlargement of the EU, only a few MP’s were able to correctly indicate more than five of the EU’s new member states (De Volkskrant, 12 December 2002).

(Pijpers 1999, 204), a list of ‘preferential partners’ was drafted: Belgium, France, Germany, Italy, Luxemburg, Spain and the United Kingdom. It is not clear, however, whether these partners have indeed proven to be preferential in Dutch EU policy since then. What is clear is that considering the large number of possible coalition partners and issue areas, the ability of the Dutch government to build coalitions requires much in terms of knowledge on positions and procedures. As the next section will show, a number of procedural innovations have served to improve the capacity of the system to respond to these needs.

## **§5. Relevant developments in the 1990s**

In the course of the 1990s, discussions about the ways to ‘organise Europe’ developed in many long-standing member states (Kassim 2000). Also in the Netherlands, many initiatives and reform suggestions have been proposed and partly implemented, with the aim to increase national expertise and knowledge about EU developments and to strengthen inter-ministerial procedures. Two such initiatives are highlighted in this section: first, the efforts to centralise the management of EU affairs, both at home and in relation with Brussels, second, a co-ordinated policy to strengthen relations with other Brussels actors: the European Commission; the European Parliament and bilaterally with other member states.

In response to the criticism earlier mentioned, from the mid-1990s onwards, it has become a customary practice that coordination procedures are tightened as soon as large politically salient or cross-sectoral negotiation rounds appear on the EU agenda. A first example were the preparations of decision-making on the multi-annual financial package Agenda 2000, which was set at the Berlin European Council in 1997. In this particular case study of negotiations, the co-ordinating authority was strengthened and the political level was explicitly committed to the dossier at stake (Van Keulen 2000). With the benefit of hindsight, Agenda 2000 has been claimed to be an example of a particularly coherent and consistent Dutch negotiation strategy (IOB 2002). According to academics, however, the strategy aimed at securing financial benefit from the EU’s common budget has turned out considerably less valuable, when placed in the longer term considerations of coalition-formation and networking (Van Schendelen 2002).

In the run-up to the 1997 Dutch EU Council Presidency, inter-ministerial co-ordination procedures were centralised and strengthened, in order to manage the risk of turf battles between government departments over priorities, negotiating tactics and strategy. For this particular Presidency, the Agricultural Ministry introduced special inter-ministerial ‘dossier-teams’, which were charged with the monitoring of particular files. Working with these teams aims to enable, more than with the routine co-ordination structure, a focused and co-ordinated approach to EU level negotiations. Their mere introduction implied a strategic prioritising between particular topics as it had to be decided for which dossiers teams would be set up. Although these measures, aimed at improving inter-ministerial dealing with EU affairs during intensive negotiating periods, were explicitly intended to be temporary, they have proved worthy to be continued in successive ‘grand’ dossiers such as accession negotiations and the 2004 Council Presidency.<sup>11</sup>

The preparations for EU policy-shaping in The Hague were for long predominantly focused on the Council-level of decision making. Attempts to influencing what happens within the supranational institutions (European Commission, let alone Parliament) were traditionally considered ‘not done’. When, in the post-Maastricht years, government departments became rapidly more Europeanised, this ‘honest’ way of dealing with the original community method of decision making was considered outdated. As to the European Commission bureaucracy, the Netherlands has long lagged behind in filling its share in postings that it could claim on the basis of (informal and disputed) overviews national representation. Already in 1991, it was argued that key reasons are the lack of practice with entry examinations in the Netherlands and the mismatch of national administrative culture with that prevalent in Brussels (Daalder 1991, 13-14). Relatively late compared to other member states, i.e. only in 2000, driven by worries about under-representation in Brussels and decreasing Dutch influence after EU-enlargement, the Cabinet has initiated a special training programme for the EU entry exams, aimed at getting more Dutch officials into the EU institutions.

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11) The debate on strengthening co-ordination capacity at the level of central government has further developed after the period under examination in this study – see chapter 9 for a review.



With the engagement of government departments in the management of EU affairs, departmental EU units have been upgraded, ministries have invested in EU training programmes, they regularly send their personnel to Brussels for temporary postings and there are attempts to institutionalise expert EU-networks – for example by drafting special ‘who-is-who’ guides. Since the early 1990s, individual government departments have actively worked on strengthening relations with the European Commission. This has been done by facilitating secondments and traineeships of national officials within EU institutions and increasing awareness of civil servants, through training courses, about the useful work being done by their ‘European’ colleagues. The regular Council Presidency, which the Netherlands held in 1991 and 1997, has played a crucial role in this respect. But recent initiatives for strengthening the network in Brussels have not exclusively focused on the European Commission. Since the mid-1990s, in parallel with the increase in competencies for co-legislating new EU policies in collaboration with the Council, the European Parliament has also been at the centre of influence attempts. One example is the Ministry of Transport, which is responsible for many co-decision dossiers and therefore makes use of a semi-permanent posting of one official in the Parliament’s staff (Boerboom 2002). At the Permanent Representation, which traditionally focused on co-ordinating Council activities, two staff members are now charged with managing relations with the European Parliament. And the national parliament has also considered its processes and procedures related to EU policy-making which has led to reform proposals aimed, amongst others, to realise early parliamentary engagement in discussions about new European Commission proposals (Van Baalen 2002). In 2001, the First Chamber (‘Eerste Kamer’) set up an European Bureau, which co-ordinates (input for) European legislation for the parliamentary members, an innovation that is planned to be followed by the Second Chamber.

Relatedly, mention should be made of the Foreign Affairs Ministry initiative to strengthen bilateral relations with the capitals of the member states. Although this initiative has been discussed as contrary to earlier emphasis on the community method of Brussels decision-making, it has led to a strengthening of bilateral relations and more structured contacts, not only at a diplomatic level but also between government ministries and their EU counterparts. It should be noted however, that consistent with Dutch politico-administrative traditions, these innovations, such as structured relations with the European Commission and the European Parliament; EU

training programmes and bilateral initiatives – have been dispersed over different parts of the central government organisation, instead of co-ordinated by one undisputed authority.

## **§6. Discussion**

A government's shaping capacity is considered a complex interplay between stable, long-term factors determining ambition and capabilities and situational variables related to preferences and resources, as summarised in table 5.1. What, then, is the starting position of the Dutch government when it comes to shaping EU policies?

In the previous chapter, a number of variables have been identified to 'matter more' in an examination of national shaping capacity. To begin with, the '*goodness of fit*' between the EU and the national level has been discussed. This degree of congruence would be relevant both at the macro-level, that of constitutional structure; practices and policy style, but also as regards to preferences and resources concerning particular dossiers. At first sight, the length of membership of the Netherlands decreases possible problems with constitutional misfit. Its relatively long experience with EU participation may overcome initial problems with new policies, as one would assume that Dutch negotiators have learnt their way around in the EU level venues. From the findings, we may argue that in terms of potential, notwithstanding long experience, this is still administrative mismatch. For example, in the field of water policy, a competency of the Transport Ministry, which at the EU level deals with the Commission's DG Environment. The fact that the Netherlands is a long-standing member may rather paradoxically actually hamper EU awareness and adaptation as the EU is taken for granted and no subject of special attention at the political and administrative level, such as is the case in newer member states. In terms of 'policy fit', the Dutch government has always been very active in terms of 'first pillar' economic and related policies. This 'fore-runner' position may at first sight increase shaping capacity. However, getting to a coherent and consistent negotiating position is increasingly difficult due to the active involvement of different government departments and sectoral interests. This holds the same for the newer fields of European co-operation, those related to internal and external security policy and foreign policy. Here, the relative salience of issues is

often considered higher as these issues are closer to what is considered the ‘core’ of national sovereignty.

Table 5.1 A Framework for analysis of the Dutch government’s shaping capacity

Shaping capacity	Will	Potential
<b>Stable variables</b>	<p><b>AMBITIONS</b></p> <p>Founding member; traditional Trans-Atlantic orientation; well-developed, open economy; fore-runner as regards to liberalisation; ‘instrumental’ supranationalism; Tacit public and political support for integration; relative ‘fit’ of national and EU policy ambitions in the first pillar</p>	<p><b>CAPABILITIES</b></p> <p>High political and administrative fragmentation; co-ordination capacity contested; consensual policy style misfits with French administrative style EU; long-time experienced in international relations; small, expert oriented administration; medium-size political clout; fixed coalitions: focus on Benelux / liberal members alliance</p>
<b>Situational variables</b>	<p><b>PREFERENCES</b></p> <p>Emerging debate on financial implications membership; more fragmented preference configuration due to more stakeholders; growing concerns over the merits of political integration causes misfit of positions; experiences with EU Presidency in 1991, 1997, 2004</p>	<p><b>RESOURCES</b></p> <p>Ongoing discussion on strategic and co-ordination capacity; decentralised linkage mechanisms capital-BRX; flexibility of negotiating position debated; political and administrative awareness and expertise EU affairs gradually increases; emerging staffing policy towards EU institutions; ability to anticipate and act pro-actively questioned; use of bargaining tactics debated</p>

This *issue salience* matters as regards to the ways in which an EU-related dossier is managed in the interplay between The Hague and Brussels (Van den Bos 1991). Routinised dossiers related to the internal market are generally dealt with at the administrative level, to be finally hammered off at the ministerial Council level. Politicised dossiers, including those related to the second and third pillars of the EU, generally attract more attention. For example, following a mandatory procedure, the parliament is more involved in setting negotiating instructions for justice and home affairs.

If the issue salience of a dossier is considered to increase, more ‘*co-ordination capacity*’ is made available. But co-ordination is always difficult in the Dutch setting, as the fragmentation of the system is relatively high, which is visible not only through the departmental autonomy within the administration, but also within the Cabinet diverging views may be voiced. Thus, also with more regular policy dossiers, continuous efforts are necessary to ensure that departments are not ‘going alone’ in determining

negotiating strategies and all relevant parties, including the political level, are being sufficiently informed and committed. For this reason, the provinces and municipalities participate in initial discussions on new European Commission proposals and the division over different government department. If all goes well, many relevant stakeholders are prepared for new EU policies since they have been involved in the ‘uploading’ of preferences and the subsequent ‘down-loading’ process (transposition, implementation and enforcement) of binding decisions may be considerably facilitated. Consistent with academic contributions to the debate on Europeanisation, also in practitioners accounts of Dutch EU policy-making, the implementation gap as regards to EU directives to be transposed into national law, which became prominent in the 1990s, was directly associated with lacking potential for timely and correct transposition of EU directives and less efficient co-ordination in preparatory stages of EU negotiations (Van Haersolte and Van Den Oosterkamp 2003).

However, in case these stakeholders are *not* satisfied with the negotiating position decided upon in intricate consultation procedures at central government level, they may turn to EU level venues in order to make their voice heard and thereby undermine the efforts to present a ‘national position’. The previous chapters have described the opportunity-structure, which offers multiple venues for access and influence in this respect. An example of such a ‘bypass’ were discussions over the reform of the EU’s structural and regional funds, money flows which the central government wished to cut back due to concerns over the national ‘net payer’ position, but which the decentralised levels of government had an interest to retain.

These and related experiences invariably initiate discussions to strengthen national EU procedures for dealing with EU policy preparations in The Hague.

Until the mid-1990s, the Dutch government was hardly ever confronted with parliamentary or public debate on EU rules, legislation or treaty change. This is not common to all small and longer-standing member states – for example, Danish Council delegations often have to express ‘parliamentary reservations’ due to delays in the mandatory procedure in the national parliament. This characteristic of the Dutch system may at first sight positively impact upon the shaping capacity of the national government, as no delays occur during the negotiations. But the fact that EU policy is generally not considered controversial – in fact, it is generally not considered

at all by national parliament – threatens its democratic legitimacy and makes for incomplete control upon its effects upon national structures and legislation. Although procedures ensure that national parliament can make use of an ‘early-warning’ system, because it is informed of every new European Commission proposal, the policy-specialists within the legislative are not sufficiently aware of the EU-dimension to their domain which is dealt with by foreign policy specialists. As the parliament is responsible for agreeing upon the transposition of binding EU decisions at a later stage, this may account for implementation problems.

The *strategic, co-ordination and anticipation capacity* of the system by which the Dutch government deals with the demands of membership has been the subject of much discussion, including criticism from influential advisory councils (Social Economic Council 2003, 4, the Council of State 2003, 20-3, 2005 and the Council for Public administration ROB 2004). It is remarkable that while criticism comes from national EU watchers, foreign observers tend to judge rather positively about the capacity of the Dutch system (see Beyers 2000, 60). By lack of clear standards, it remains difficult to weigh the clear disadvantages of a fragmented system, including the potential lack of coherency and consistency of national positions and thereby the difficulties of realising a long-term strategic capacity, against the potential advantage of increased legitimacy of EU decisions making ‘at home’ and the level of expertise that a decentralised system guarantees. For example, a positive side-effect of a less tightly run co-ordination system is that expert and working groups are followed by specialist officials from the responsible government ministries, instead of by less well-informed co-ordinating authorities. This is important as comparative research has shown that participants in committee meetings value expertise more than nationality (Egeberg et al. 2004, see also chapter 2). In fact, expertise is generally also valued by the European Commission and the Parliament – although it must be acknowledged that due to the traditional focus on the Council, these ways for access and influence were, in the period under discussion, not consistently sought by Dutch government departments.

Given the context of Dutch EU-policy-making sketched in this chapter, two case-studies will be examined in order to analyse to what extent the framework for analysis and the variables highlighted in the previous sections do ‘match’ with the empirical realities. Chapter 6 introduces the research design, the Gas and Biopatient directive are reconstructed in chapters 7 and 8.

*Going Europe or Going Dutch*

# Chapter 6

## Research Design for the Case-Studies

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### §1. Introduction

For the collection, analysis and interpretation of data for the case-studies in the next chapters, a case-study methodology is used (Yin 1991, Swanborn 1999). Case studies are a methodological design prone to pitfalls and their validity and reliability of studies making use of cases depend largely on the research method applied. This study applies a particular process tracing technique: intensive process analysis. This method has been designed and applied with the purpose of analysing political decision-making at the national level (Huberts 1988, Peters 1995, Arts 1998). To be of use in a study on EU policy-shaping, the method needs to be adapted. The next sections are concerned with elaborating the central concepts of the study, (§2), introducing the research method (§3) and explaining the case study selection (§4).

### §2. In search of a research method

The central notion of this book is shaping capacity, defined as a government's ability to perform in the process of formulating new EU policies. Elements of shaping capacity are a national government's ambitions, preferences, potential and resources for EU-policy-making. For applying this framework to a reconstruction of day-to-day EU policy-making processes, insights can be borrowed from a particular branch in political science, concerned with influence analysis.

Influence is amongst the most contested concepts in political science. For the adherents of Realism, the most prominent International Relations (IR) theory, state actions are said to be understandable through their power structure and, as EU studies rooted within IR, it is not surprising that power, influence and related concepts such as ‘persuasion’, ‘lobbying’, ‘manipulation’ and ‘authority’ are particularly widespread. Most authors seem to agree on what power and influence have in common: both concern a relation between at least two actors; both are related to the use of capacities or resources, be it knowledge; finances; skills; ideas or competencies; and there is always a causal relation: the presence, thoughts or actions of one actor lead to different decisions of another actor. However, many authors seek recourse from a difficult debate by simply not defining influence or power<sup>1</sup> as, as regards to their precise distinction, opinions diverge. In Robert Dahls’ famous writings on power in political science, power, influence and related notions such as ‘authority’ and ‘control’, are lumped together. Others relate power to a capacity, and influence as its effect.<sup>2</sup> This is reflected in the legal use of power in the sense of ‘competencies’ – particularly relevant in the EU context, where any action of the institutions should always rest upon a competency attributed by the treaties: the ‘legal base’. Influence, then, has to do with working practice reality – the ‘flesh and blood’ of the policy process (Van Schendelen 1996, 28). A related definition of ‘influence’ is offered by Huberts (1994, 39): an actor exercises influence if his presence, thoughts or actions causes a decision-maker to meet his preferences more than would have been the case had this actor been absent.

This book is focused on the *process* of shaping, instead of the performance or influence achieved, but the study of power and influence may yield relevant methods. This does not mean that assessing influence is an easy task, especially in the complex politico-administrative setting of EU policy-making. Results are not quantifiable and in a social, i.e. non-experimental

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- 1) See for instance: Arter, D. (2000): Small state influence within the EU: the case of Finland’s ‘Northern dimension, initiative’, in: *JCMS*, 38(5), p. 677.
  - 2) “Political power is a psychological relation between those who exercise it and those over which it is exercised. It gives the former control over certain actions of the latter *through the influence* which the former exert over the latter’s minds. That influence may be exerted through orders, threats, persuasion, or a combination of any of those.” (Morgenthau 1948, 14)



research context, conditions cannot be adapted and there is thus no question of ‘*ceteris paribus*’ clauses. In the end, the fact that an individual government successfully influences the outcomes of a negotiating process may just as well be attributed to other variables: the decision context; the position and actions of other actors or external conditions. Influence analysis is thus limited to thoroughly assessing, first, to what extent the outcome mirrors the preferences of the actor under examination and second, which activities have possibly increased this ‘fit’ of preferences and outcomes (Everts 1990, 81). The second question is obviously relevant for this book, as from these findings, insights into the shaping capacity of one particular government can be distracted.

How, then, to assess shaping capacity? Two central problems each social scientist is confronted with are the validity and the reliability of the research outcomes (see also Babbie 1998). Validity refers to the degree to which a study accurately reflects or assesses the specific concept that the researcher is attempting to measure. In this study: the question whether shaping capacity is indeed under study. Reliability is the extent to which an experiment, test, or any measuring procedure yields the same result on repeated trials and is concerned with the accuracy of the research method. To ensure validity and reliability, much depends of the choice of the research method for collecting case data and how to structure and analyse a story about the results.

Particularly in the 1950s and 1960s, assessing political power was a popular subject and different methods were developed (Hunter 1953, Dahl 1961, Van den Bos 1991). The three ‘traditional’ methods are the position (-al) method, the reputation method and the method of decision (Huberts and Kleinnijenhuis 1994).

In the position method, influence is based on a singular power resource, namely the position of an actor in a political constellation. The position method is thus very much based on assessing formal power instead of influence, i.e. the different possible ways these actors handle their position or ‘office’ are not taken into consideration.

The reputation method is based on the assumption that an actor is deemed influential; he or she will be treated as such and thus become influential. The answer of actors involved to the question who holds

influence or which actor has been influential may thus become a prime example of a 'self-fulfilling prophecy'.

Problematic with the reputation and position methods is the validity of the outcomes, as both are essentially indirect and rather subjective. Even more so because they are based on interviews as a primary source, which is problematic for the validity because of the inherent bias of respondents as to their own role in the process.

An alternative method is the method of decision, as used by Robert Dahl in the 1960s and 1970s and applied in the 'process method' (Braam 1973). Central to the latter is the analysis of particular political decisions, in order to determine the extent to which participation and interventions were 'successful'. A key characteristic of this method and – according to commentators – its main flaw is that 'goal attainment' is equalled to influence, which is a rather one-dimensional view on policy processes (Peters 1999, 67). The finding that the preferences of the actor under study are mirrored in the outcomes may also be caused by external conditions or the intervention of another or multiple other actors. A second limitation concerns the fact that 'non decisions' are not taken into account, i.e. the possibility that actor y does not take a decision because of actor x's successful influence attempts. Finally, in its focus on one particular actor or category of actors, the process method should be adapted to make it suitable for analyses of complex decision-making processes with many actors and interests involved (Huberts 1988, 41).

A newer method, 'intensive process analysis', pretends to repair these flaws, although its principles are firmly rooted in the process method. The aim of this research method, designed and applied by a number of Dutch policy analysts in the late 1980s and 1990s, is to come to valid conclusions about the influence of either one particular actor or a group of actors in a political decision making process about public policy (Huberts 1988 and 1994, Peters 1999, Arts 2000). In process analysis, a single decision making process is studied intensively with the help of a precise reconstruction (hence its name), in order to determine which actors influenced the shaping of the final decision at which moment and to what effect. This method has been applied in this study.

Table 6.1 Intensive process analysis reconstruction phases

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| <ol style="list-style-type: none"><li>1. Selection of a decision context</li><li>2. Selection of cases</li><li>3. Determining the central actor A</li><li>4. Determining the actors B-Z and their relations</li><li>5. Determining the 'key issues'</li><li>6. Reconstructing the decision process</li><li>7. Reconstructing the shaping attempts of actor A</li><li>8. Assessing shaping capacity of actor A</li></ol> |
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### §3. Intensive process tracing and analysis

As process analysis is designed to answer questions about which actors influence certain policy fields or a certain decision making process, the basics of this method have been applied in this study. Two disclaimers are relevant however. First, the focus is not on determining a (most) relevant actor, but on relevant variables. Second, process analysis has been designed for assessing decision-making processes at the national level with two players: one NGO influencing a decision maker (Huberts 1988). The EU policymaking process is explicitly multilateral, text negotiations include to many sub-decisions and the end result is generally not a choice between a selected number of alternatives but a multiple-sum game. Third, the original method was designed for one level of policymaking, that of the central level of government in the Netherlands. In the EU context influence is not only exercised through bilateral contacts, but through a multi-level negotiation system. Many actors and locations are involved, which seriously complicates the possibility of methodological analysis. Therefore, in the following, we will dissect the method into successive steps and analyse how these can be adapted to be used for analysis of decision making in an EU setting.

#### *Step 1. Selection of a decision context*

Case-study analysis starts with the selection of a context and a decision-making process to be examined. At the same time, the delineations and limitations should be clear. This study deals with EU-policy-making and its context is the pattern of EU-member state interaction within that process. EU legislation is shaped according to cumbersome institutional rules and procedures. Policy-making competencies are divided in an intricate interplay amongst the EU's institutions (Council; Parliament and the European Commission). The reconstruction is limited to the phases in the policy cycle of agenda setting, negotiations and decision-making. As for the decision

type, the focus is on specialised and sectoral policies over ‘bread and butter’ topics. In contrast to the political, ‘history-making’ (Peterson 2000) decisions over ‘horizontal’ issues such as treaty reform or budgetary frameworks, which have been the focus of impressive analyses (e.g. Moravcsik 1999), this category of policies does not attract much public and media attention. However, they constitute the bulk of the EU’s regulatory output and it may be argued that their impact upon national governments is even more direct.

The empirical research is limited to one particular area of regulation in the ‘first pillar’ of the EU, which concerns economic, social, monetary and related policies. Between and within the three pillars, a different balance is struck between ‘supranational’ and ‘intergovernmental’ modes co-operation. With a few exceptions, most policies in the first pillar are decided conform the Community method of policy-shaping. Governments must share the initiative and legislative competencies with the European Commission and the European Parliament. The vast majority of decisions are made under the ‘majority-voting’ procedure. This implies that member states can be overruled by a winning or blocking coalition of member states according to an intricate voting procedure. In the more intergovernmental pillars, concerned with foreign, security justice and home affairs cooperation, governments can act relatively autonomously. Governments are thus confronted with different ‘opportunity-structures’ for shaping EU-policies, dependent on the relevant policy area. As the supposedly constraining effects of EU policy-making upon national governments’ shaping capacity are by far largest in the first pillar, this has been chosen as the focus of attention.

For reasons of temporal distortion, as well as for practical reasons, it helps to analyse relatively recent processes. As the changes described in newer EU studies perspectives are closely associated with a number of procedural changes and policy developments in the course of the 1990s, this has been chosen as the time frame of this book. In 2000, the Council and the Parliament issued 11.414 legal acts (Alesina 2001, 61), two of which are being examined in the cases.

The object of study is the shaping capacity of one particular government: the Netherlands. This limitation to a singly country, which has been inspired by practical reasons (including the limited time frame and easy accessibility of

data sources), makes ‘thick’ case-studies and a detailed country study possible. The choice for the Netherlands is even more interesting, as chapter 5 has described how both the European ambitions of the Dutch government and its potential to influence EU level developments are questioned in an ongoing debate amongst academics and practitioners, to which this book aims to contribute. Although King et al. (1994) claim boldly that no valid conclusions can be drawn from a single case-study (‘with only one implication of the causal theory observed, we have no basis on which to decide whether the observation confirms or disconfirms a theory, or is the result of some unknown factor’ (p. 211)) Moravcsik (1998) has convincingly argued that a single case may comprise a ‘structured set of (...) observations’, i.e. a collection of observations so that there are multiple points for measurement. The two cases of Dutch government shaping EU policies will provide a plethora of such observations.

### *Step 2. Selection of cases*

The two case studies of recent legislative dossiers have been selected according to a ‘most-similar’-systems design (Przeworski and Teune 1970, 32-34). The two cases are highly similar as regards to a large number of characteristics and conditions. They differ regarding one particular characteristic: voting behaviour, which makes it possible that possible effects on shaping capacity can be tested in relative isolation. The first case study is the directive regulating the natural gas market, the Gas Directive (98/30/EC).<sup>3</sup> In 1995, at the EU level, the governments of the member states started discussing the European Commission proposal for a new European *Gas* directive, regulating a gradual opening of the national markets for natural gas. The second case study concerns a reconstruction of the shaping of what became known as the Biopatent Directive (98/44/EC),<sup>4</sup> dealing with the complex and controversial matter of patenting biotechnological inventions. The negotiations on shaping this piece of legislation, which

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3) European Parliament and Council directive concerning *common rules for the internal market in natural gas*, Official Journal L/1998/204/1, Bulletin 1998/6/1.3.93.

4) European Parliament and Council Directive on the *legal protection of biotechnological Inventions*, Official Journal L 1998/213/13, Bulletin 1998/7/-8 1.3.36.

resulted in heated political debates over the implementation at the national level, are reconstructed and analysed.

The directives are similar as to the following characteristics. First, their origins and objectives: both the Biopatent and Gas directive aim at a harmonisation of national policies in order to realise a common European internal market. Both originate from the desire of the European Commission to get involved in a new policy area and are thus strongly 'Commission-driven'. Also, their legal-institutional characteristics are highly similar. Both directives were decided under the procedures of co-decision and majority voting.<sup>5</sup> The intricate co-decision procedure, introduced in the Maastricht Treaty on European Union extended the competencies of the European Parliament, making it an equal partner of the member states, united in the Council. Essentially, the Council and the European Parliament agree jointly upon legislative proposals in a negotiating process, with the possibility of two separate readings in which amendments can be submitted followed by a direct dialogue ('conciliation') between the institutions. The scope of the co-decision procedure has been considerably enlarged since the Treaty of Amsterdam. This had led to emerging inter-institutional practice of intensive contacts in the process of discussing amendments both at Council and Parliamentary level.<sup>6</sup>

At the domestic level: the Dutch government department for Economic Affairs and, at the EU level, the European Commission DG Internal Market, Competition and (for the Gas Directive) Energy were involved in shaping both directives. Decision-making took place in the Council formation of Internal Market and with a co-legislative role of the European Parliament. Decision-making on both directives coincided partly with the Dutch 1997

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- 5) Under the system of qualified majority voting (QMV), at the time of negotiations on both case-studies, voting weights of the member states differed between 2 and 10 votes for small and larger countries. For a qualified majority at least 62 out of 87 votes should be in favour. A 'blocking minority' should have 26 votes at the minimum.
  - 6) 'On the whole, the co-decision procedure has been found to work well, with a significant increase in the proportion of matters going to conciliation (now nearly half of all cases)', see: general report of the Commission, 1998, Chapter VIII: Institutional matters, Section 3: Legislative role of the European Parliament (1/2), no 1077.

Council EU Presidency. This is important, as opinions differ as regards the impact of holding the chair on the shaping capacity of that particular member state. The functions of the Council chair include that of organiser, broker, political leader and national representative (see O’Nuallain 1985, Elgström 2004, Schout et al. 2004). These roles will sometimes be balanced, but they may also conflict, in particular when it comes to organisational control and providing political impetus for the Council business. Once in the chair, a government representative can hardly ignore national negotiating positions and function as a completely neutral arbitrator (Dinan 1999, 240). However the degree to which governments use the Council Presidency as a vehicle for advancing national preferences differs, depending on, amongst others, the relative size of the country and external and domestic conditions and circumstances.

Another reason for choosing internal market directives is that this is one of the Council formations in which voting occurs most frequently (Mattila and Lane 2000, 42).<sup>7</sup> This is a relevant consideration in respect to the variable as regard to which the two directives under consideration differ: the voting behaviour of the Dutch government.

The Gas Directive was agreed in the Council meeting of December 1997 with all member state delegations voting in favour. However, in the case of the Biopatent Directive, the Netherlands delegation voted against the political agreement in the Council meeting of 27 November 1997. As a qualified majority was reached, the directive was passed.

The fact that the Biopatent directive was voted upon is special. As outlined in chapter 3, the Council is characterized by a clear preference for unanimity. In the words of the European Commission: ‘the Council Presidency normally seeks as broad a consensus as possible on Commission proposals, resorting to the majority rule only where consensus proves impossible’ (European Commission 1999, section 2). Interestingly enough, from voting records, it appears that the Netherlands, though middle-range

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7) The authors suggest that an explanation may lie in the relatively high level of integration reached in these long-standing policy sectors, which would complicate the building of consensus. However, it may just as well be argued that the high degree of integration *facilitates* interstate bargaining, for instance because of socialisation effects between Council members (the Agriculture Council meets most frequently of all Council formations).

when it comes to abstentions, ranks as the third-most frequent ‘no-voter’ in the period of the negotiations on both case-studies.

If voting is so uncommon, how can its occurrence be explained? It is intuitively appealing to assume that diverging preferences – (dis-) agreement with the contents or the legal form of the dossier on the table – explain voting behaviour. However, the previous chapters have explained how the EU’s policy-shaping process provides multiple opportunities for getting a possibly extreme policy position in line with the others and finding a consensus ‘in the middle’. Obviously, delegations with ‘extreme’ policy preferences on certain issues are generally more difficult to be accommodated. If a government cannot be accommodated it may choose to take its loss or abstain from voting, or to resist openly. However, a no-vote that does not lead to the rejection of the text is largely symbolic. It may serve as an indicator to a domestic constituency that the government representatives have acted as ‘tough negotiators’. Mattila and Lane (2001) pose that certain governments, due to their policy style, put a low value on unanimity. Interestingly, large countries turn out to be more often in the category of ‘no-voters’ that contradicts the image of EU policy-making as power politics in which size matters. But no-votes can also be related to broader concerns. Member states that worry about the financial aspects of membership, for example net contributors to the EU budget, are often reluctant when it comes to the financial aspects of particular proposals. This could explain the outstanding position of the Netherlands in voting records since the mid-1990s.<sup>8</sup> Although the purpose of the case-studies is to offer a detailed descriptive analysis of the process of how one government attempts to influence the making of two directives, attention will be paid to the differing voting behaviour of the Dutch government in the case of the Biopatent directive and possible explanatory factors.

### *Step 3. Determining the central actor A*

Intensive process analysis departs from a detailed reconstruction of the policy process. All actors and the relations between them, these will have to be charted into a ‘case record’ which pulls together and organises voluminous case data and (...) includes all the information that will be used

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8) Actually, the intermediary variable was suggested to be support for the EU, which can be expected to be higher in countries benefiting from membership. Mattila: 24.



in doing the case analysis and case study' (Patten 1987, 148). The study is confined to the Dutch government: the central government level of the Netherlands: the *Rijksoverheid*, including Cabinet and all ministries. But this notion hides a variety of actors and preferences, amongst which the key actor in both case studies: the lead government department of Economic Affairs. The actions of representatives of this department will be traced throughout the negotiations.

#### *Step 4. Selecting other actors and their relations*

Subsequently, all influence attempts and their direction, timing and results should be mapped, including the actions and position of all actors involved, from the moment at which the preferences were formed up, to the point at which the decision was taken. It is in this requirement that lays one of the potential flaws of process analysis, as it demands that the preferences, thoughts, objectives and demands from each actor are clear from the outset and that it is possible to reconstruct all activities (Huberts 1988, 45). Obviously, this is virtually impossible in complex politico-administrative settings. Things become even more difficult when the influence of a certain type of actor in international or European level policy processes is assessed. Not only is an immense range of actors involved, the international level is characterised by 'positive sum' games (decisions are compromises between the demands of a range of actors involved), and multi-level games (the outcomes of decision making at one level affect those elsewhere). For the sake of simplicity, a selection and elimination is necessary. This excludes:

- actors not involved in the decision making process and those which see none of their position reflected in the outcomes. Although in theory, all then-fifteen member states were involved in the decision making around the two case studies certain member states had only minimal interests as regards to particular text proposals and these can be more easily disregarded.
- decisions made autonomously by the European Commission (as influence analysis is rather senseless).
- actor without any access to the actor making the final decision-making in a particular policy phase.

In applying process analysis to the complicated European context, it is even more necessary to select very carefully the relevant decisions and actors and consequently eliminate less relevant factors from the start. It is obvious that,

regardless of the exact decision making procedure applying, the EU institutions at the European level (the European Commission, the Parliament and the Council) should be taken into account. Moreover, in line with the pluralist theories argued for in previous chapters, these actors should not be seen in their entirety ('the European Commission') but according to the relevant sub-unit (DG Environment; members of European Parliament of a particular group or a sectorised Council working group).

*Step 5. Determining the key issues*

As the EU is known for its 'text negotiations', the directives concern numerous pages of legal texts, which can be subdivided into smaller or 'partial' decisions. Since it would be impossible to analyse all aspects, both dossiers have been subdivided into partial decisions. These key issues have been determined by document analysis and semi-structured interviews, resulting in five particular 'hot potatoes' which were most prominently discussed during the negotiations. This selection has been based on two criteria: whether and to what extent the decision was to be considered *radical*, i.e. with large consequences for those actors involved, be it financially, organisationally or otherwise; and second, whether the discussion was *controversial*, i.e. many conflicting interests were at stake. These criteria indicate that actors attach a certain importance to the issue at stake and influence relations may be particularly visible in that respect. The dissection of each dossier will be checked with the actors involved.

*Step 6. Reconstructing the decision making process*

Analyses of the EU policy-making process risk to have a too narrow focus on the Council-dominated phases of decision-making. However, what happens in other phases of the policy chain (agenda setting, formulation, negotiation and implementation) may have a crucial impact on the final outcome of the policy process. For applying process analysis as a method, this means that the reconstruction will have to be 'stretched' across these phases, instead of taking a 'political decision making process' as the unit of analysis.

*Step 7. Reconstructing the influence attempts*

Influence attempts by the Dutch government in the three successive stages of the policy cycle: agenda setting; negotiations and decision-making, will be meticulously reconstructed. Subsequently, a critical evaluation is presented of the influence attempts of the Dutch government in these stages. The

possibility of intertwined domestic and EU level policy preferences, pointed at by multi-level approaches, leads to another difficult analytic point. Although the analysis will be focused on national governments, it is not possible to isolate this actor. If actors, consistent with governance analysis, define their preferences within the context of the continuous EU process, and if we then observe a shift in policy position, is that to be classified as a change of preferences? In order to find out more about the supposed ‘intertwined-ness’ of preference formation, it is thus important to reconstruct the ways by which and the moments at which preferences are constructed, formulated, translated into negotiating positions, articulated and (re-) formulated both at the level of national government and at the EU level. When comparing different positions taken at different instances, a certain development in the process of preference formation can be reconstructed.

*Step 8. Assessing shaping capacity*

The last section of chapters 7 and 8 is concerned with a critical assessment and evaluation of the ways in which the Dutch government delegation has attempted to influence the proceedings. It focuses on the variables that have been identified and defined into the framework for analysis from chapter 4 in order to single out which elements or variables can be highlighted and which have not been relevant for the analysis.

#### **§4. Sources and methods of data collection**

There are several ways of increasing both the validity and the reliability of research outcomes. For this purpose, this study has made use of triangulation; ‘member checks’ as well as ‘peer reviews’.

Triangulation means that a variety of data sources has been consulted: people and papers. The data source ‘papers’ refers to the written academic analysis and policy documents that have been consulted and analysed. Document analysis involved the archives of the Dutch Ministries of Foreign Affairs and Economic Affairs. Examples of the official documents that have been examined are negotiating instructions for the case studies, minutes of co-ordination meetings in The Hague, as well as the official minutes of Council-level meetings collected with the help of the Council Secretariat. With the personal assistance of helpful officials, also less formal accounts, letters, e-mails and notes of phone conversations could be used in the

reconstruction. The case report to be constructed from this documentation could lead to a detailed chronological description of the policy process, with the help of a time line, which has served as the basis for the influence analysis presented in the next chapters.

*Table 6.2 Respondents interviewed for the case-studies*



Using people as a data source refers to the interviews that have been carried out with a number of respondents.<sup>9</sup> These respondents are government officials, politicians, and lobbyists for particular interests and non-governmental organisations, which have been involved in the shaping of both case studies and Dutch EU policy-making in general. The interviews have been 'semi-structured' (Weiss 1995), in the sense that questionnaires were developed in advance, including variable questions depending on the knowledge and experience of the actor involved. The purpose of interviews has been to select and structure the information obtained from written sources.

Especially the conversations with directly involved policy-makers provided a personal and – inevitably – selective view of events. To remedy this, additional methods applied for corroborating the findings were 'peer reviews' and member checks. The latter refers to the process by which the interpretation of data is discussed between the researcher and those who provided the data. As to peer reviews, the author has profited from field research in Council working groups and training and research projects. These would be not directly related to this study, but nonetheless involve

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9) Data for the case-studies have been collected in close collaboration with Ellen Mastenbroek, for a related analysis on the 'goodness of fit' thesis. See Mastenbroek and Van Keulen 2006.

regular contacts and interviews with officials from different government ministries, directly involved in EU policy-shaping at the domestic and EU level. Through consultation of relevant academics in the field in working environment, conferences and workshops, the impressions from the literature review have been thoroughly discussed. This and the numerous conversations on the subject of this study have suggested that the country study in chapter 5 and the following case studies do sketch an adequate picture of the way the Dutch government deals with the EU.

*Going Europe or Going Dutch*

# Chapter 7

## Shaping the Gas Directive

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### §1. Introduction

The two case-studies discussed in this study are the directive regulating the natural gas market, the Gas directive<sup>1</sup> (98/30/EC) and the directive regulating the legal protection of biotechnological inventions, hereafter referred to as the Biopatent directive<sup>2</sup> (98/44/EC, see chapter 8). The purpose is to analyse how the Dutch government has attempted to shape these directives and which variables have determined its shaping capacity. The cases are reconstructed with the help of a policy tracing technique, ‘intensive process analysis’, the successive phases of which determine the organisation of this chapter.

After a brief introduction of the backgrounds of EU involvement in the subject matter, the key actors in the negotiations are identified (§3). Then, the focus is on what happened in the shaping process concerning the Gas directive as regards to the subsequent phases of agenda setting and initiation; negotiations; decision-making and implementation (§4), followed by a reconstruction of the negotiations focusing on five contested issues (§5). The analytical phase consists of a review of the attempts, by Dutch government

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- 1) European Parliament and Council directive concerning common rules for the internal market in natural gas, Official Journal L/1998/204/1, Bulletin 1998/6/1.3.93.
  - 2) European Parliament and Council Directive on the legal protection of biotechnological Inventions, Official Journal L 1998/213/13, Bulletin 1998/7/-8 1.3.36.

representatives, to influence the stages of agenda setting, negotiations and decision making over the directive text concerning the five key issues (§6).

## **§2. The decision context: backgrounds**

Until the end of the 1980s, the responsibility for developing national energy policy rested firmly in the hands of national governments. Large differences have characterised the then-twelve EC-member states as regards their national energy markets. After the initiative to complete the single internal market in 1988, then-DG XVII (now DG Energy) of the European Commission wanted to increase competition and to discourage state regulation and monopolies within the member states. Driving factors for introducing competition into the EU's energy sector included the growing share of natural gas in the demand for energy, increased competition that EU suppliers encountered on the international gas markets (for example by Russia and Norway) and the general trend towards a more liberal perspective on government regulation in the energy sector (Van Oostvoorn and Boots 1999).

Member state governments, however, feared that as a result of market opening, they might lose important policy steering instruments and revenues. Indeed, because of the strong degree of interwovenness of the industry and national governments (George 1985, 100),<sup>3</sup> first attempts to develop a common European energy policy were a 'spectacular failure': '(S)uccessfully did the Continental European gas industries enlist the support of their governments, that nearly a decade passed before an EU directive dealing with the opening up of gas industries to competition and liberalised access to networks was agreed' (Stern 1998, 7).

Despite opposition, the idea to create an internal market for energy was kept alive by the European Commission, in particular by the DG's Internal

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3) The proposal for liberalisation of the internal gas market, that DG Internal Market of the European Commission issued in 1990 only had support from the British government delegation. It is one of the few examples where the Council has refused to handle a Commission proposal according to the (two-hearing, qualified majority) procedure.



Market and DG Energy. After issuing two directives concerning price transparency (1990) and pipeline transit (1991), DG Energy issued two proposals for liberalisation of the internal market for electricity and (natural) gas.<sup>4</sup> Discussions at administrative and political level between the member state governments on these texts continued to mirror disagreement. The Dutch government actively participated in consultations with a group of 'like-minded' member states, in which the European Commission approach was criticised for not taking the national differences and the particular distinction of the gas and electricity markets into account.<sup>5</sup>

In November 1994 Energy Council conclusions,<sup>6</sup> the then-twelve national governments acknowledged that action at the EU level could generate additional value as regards to research and technology policy, environmental protection, competition and security of energy supply. At the same time, a majority of delegations (with the exception of the United Kingdom) voiced objections against a too large degree of market opening as far as natural gas was concerned and negotiations initially focused on the electricity market.<sup>7</sup>

The European Commission continued to push for common action, for example in political discussions about an energy chapter in the revised (Amsterdam) Treaty. In the meantime, officials at DG Energy submitted a White Paper on Energy Policy and drafted a text proposal for a directive proposal for the liberalisation of the natural gas market.<sup>8</sup> The text was discussed at the administrative level of the Council working group for Energy from December 1996 to October 1997. Coreper-I<sup>9</sup> discussed the directive in November 1996 and June and October 1997. The Council of

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4) COM (1991)548 def. and COM (1993)/643 def.

5) 10 Febr 1992, internal paper on like-minded consultations, E/EG/92012623.

6) Doc. 11700/94 RV/CONS 80 ENER 149.

7) See: Common Position of the Council of 25.07.1996 (see doc.8811/2/96 REV 2 ENER 105 CODEC 441). The Directive on the electricity market was adopted in December 1996 (1996/92/EC) It has been argued that part of the change in national positions was motivated by threats, from DG Competition, with Court cases for violating competition law.

8) White Paper COM (1995)682. Note that Austria, Sweden and Finland acceded to the EU on 1 January 1995.

9) COREPER-I consists of Deputy Permanent Representatives of the member states. See the appendix on EU-policy-making.

Energy ministers discussed the issue four times. In the spring of 1997, the Dutch EU Council Presidency discovered that, although there was agreement on principles, a small number of crucial issues remained as regard which government preferences were still far apart. Under the Luxembourg Presidency, the Council managed to agree upon a common position in December 1997, which was endorsed by the European Parliament's plenary in May 1998.

*Table 7.1 Key dates in the shaping of the Gas directive 98/30/EC*

1991	February: DG Energy forwards proposals for Electricity and Gas directives Negotiations in the Council working party for Energy stalled in 1994
1995	European Commission issues White paper on Energy
1996	Irish Presidency revives Directive: negotiations in working party continue
1997	November: Common position in Council
1998	February: European Parliament accepts common position in second reading May: signature Council and European Parliament
2000	May: Deadline for implementation

### **§3. Identifying key actors**

This section highlights the major actors in the shaping of directive 98/30 at the domestic level in the Netherlands and at the EU level.

#### *§3.1 Key actors at the national level*

The key actor on which the reconstruction will be focused is the Directorate-General for Energy (DGE) at the Ministry of Economic Affairs, in charge of national energy policy. The Dutch government's policy as regards to natural gas has been developed from the 1960s, after the discovery of huge gas stocks in the northern province of Groningen.<sup>10</sup> The assumption that these huge stocks could not be marketed without public control inspired the construction of a centrally co-ordinated national gas policy (the 'Gasgebouw').<sup>11</sup> The objectives of national policy as regards to natural gas were to market supply on the basis of 'market value'.<sup>12</sup> Through this key

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10) The Dutch natural gas reserves constitute 25% of the total reserves in the European Union + Norway and add up to 1,2% of the world gas reserve (2003).

11) As outlined in the report De Pous (1962).

12) Market value principle implies that the natural gas price follows the price of substitute fuels, e.g. gasoil or fuel oil. This way customers are sure that they do

principle, the government could secure supply to consumers for reasonable prices and obtain revenues on sales profits and dividends.<sup>13</sup> Gas production and supply were to be regulated by a contract between gas utilities and the government – Shell and Exxon, united in the Netherlands Oil Company (NAM), were granted a concession to produce the gas offered to Gasunie, the private company for supply and transport.<sup>14</sup> At the same time, the Netherlands is a country with many energy-intensive economic sectors (glass horticulture, chemical industry; transit transport), for which energy is an important cost. This dilemma between the ‘consumer perspective’ and the ‘producer perspective’ was reflected in the Dutch stance as regards to gas liberalisation (Arentsen 1999, 34).

The Ministry for Economic Affairs is not considered as a ‘unitary actor’ or monolith. Within this organisation, different (groups of) actors advanced preferences in sometimes-heated discussions over the contents and direction of national economic policy. For understanding the way in which the Dutch government responded to the European Commission initiatives, it is important to know that this first-responsible DG was widely regarded as ‘the odd man out’ in the Ministry. Although the Ministry of Economic Affairs is generally known for its liberal stance as regards to market regulation and in favour of enhancing competition (Schout 1998, 142), DG Energy has up until the mid-1990s been ‘amongst the staunchest defenders of the controlled market’ (Correljé 2003, 133). The Netherlands delegation at EU level negotiations, composed of representatives of DGE, was vehemently opposed to Commission-led attempts to discuss proposals for energy liberalisation, as these would endanger the supply functions of the Groningen field and the principle of ‘market value’.<sup>15</sup> In mid-1995, when the electricity directive was

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not pay more than they would have to pay for substitute fuels, while the gas producer gets no less than the price for the substitute fuel.

- 13) In the late 1990s, the gas revenues (aardgasbaten) were estimated 5% of Gross Domestic Product (see: Correljé et al. 2003).
- 14) Gasunie was a 25/25/50% venture of Shell/Exxon and the national state, represented by the Ministry of Economic Affairs/DG Energy.
- 15) The Commission proposal on what would become Directive [91/296/EEC](#) of 31 May 1991 on the transit of natural gas through grids [Official Journal L 147 of 12.06.1991] was strongly opposed by the gas companies. It has been described how Gasunie and Ruhrgas were very active in the no-camp and were backed by the Dutch and German governments. The gas industry was not united, however,

discussed, the Dutch preference for the French proposal for a ‘single buyers system’ (instead of the European Commission proposal for negotiated access) was not so much a matter of principle, but the negotiating instruction explicitly took into account the consideration that in future discussions about gas about similar issues, the gas building could be sustained.<sup>16</sup>

Within DGE, Commission initiatives towards an internal market for energy were generally regarded with suspicion. It was feared that an emphasis on competition could lead to a fall in gas prices and forced reduction of overcapacities, which were considered necessary for absorbing peak demands. Internally, the objective of the Dutch government strategy was bluntly formulated as ‘frustrating further plans of the Commission’.<sup>17</sup> For discussions with EU partners, this objective was translated into a negotiating strategy aimed at coalition-formation with a group of likeminded government delegations. When the UK Presidency took over in mid-1992, the Dutch position was clearly outlined and discussed with member states that – for various reasons – voiced a similar critical stance, including France, Germany and Spain. In sum: although DGE was principally reluctant as regards to possible consequences of energy liberalisation, at least formally, it declared to wish to be involved in the discussions at the EU level in a constructive way.

As the responsibility in Dutch EU-policymaking lies with the individual departments and departmental autonomy prevails,<sup>18</sup> DGE was for long able to put its mark on national energy policy. However, its conservative stance did not match the Ministry’s generally supportive approach to European integration (Schout 1998, 144). That the state monopoly on natural gas should inevitably be relaxed due to international developments was the conviction prominent at the prominent DG for international and EU affairs at the Ministry for Economic Affairs, the Department for External Economic

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and periphery member states were anxious for the infrastructure support this directive could give. The directive was adopted in 1991 under Luxembourg Presidency, Germany and the Netherlands voting against (Stern 1993, 189).

16) Letter to the Minister about Energy Council 1 June 1995, doc E/EB/95040685, 8 June 1995.

17) Internal paper E/EG/92007017, 23 January 1992.

18) See the annex for an overview of the EU-policy co-ordination procedure.

Relations (BEB) which traditionally holds strong ties with the Ministry of Foreign Affairs. It is interesting to see how this watershed has impacted upon the shaping of the directive.

Political impetus for a change of national energy policy came from the coming to power of a 'purple' coalition cabinet in 1994, which actively pursued a liberalisation strategy. Minister of Economic Affairs Hans Wijers held a long career in the private sector. From the beginning, Hans Wijers put his mark on national energy policy. The Third Energy White Paper, issued in December 1995, was the written proof of change. This paper has 'affected (...) the harmony of the Dutch gas market in the second half of the 1990s and beyond' (Arentsen 1993, 109).<sup>19</sup> The Third Energy Paper argued how national energy policy should adapt to international market developments and how the role of the Netherlands in the international gas market could be improved. The paper discussed possibilities for moderate forms of access for third parties and a stepwise opening of the gas market (ibid. 111). For this, the European Gas directive, which after a long period of standstill of negotiations between the member states was revived by the Irish Presidency in early 1996, was identified a key dossier: 'the Gas directive will be leading and decisive for the precise determination of measures related to the gas market'.<sup>20</sup> Considering the state of play of the negotiations, if pressured by the upcoming Dutch EU Council Presidency, these could be brought to a conclusion in the first half of 1997.<sup>21</sup>

A discussion of relevant actors cannot be complete without discussion the role of Gasunie, the private company assigned with natural gas supply and storage under the aforementioned 'gas edifice'. Although analysts have claimed that Gasunie did not actively anticipate the upcoming changes in the European gas scene 'until late 1998' (Arentsen 1999, 334); the board noted in its 1996 annual report that competitive pressures on the market position

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19) Third White paper on energy, second chamber of parliament, 1995-6, 24 525 nrs 1-2.

20) Ministry of Economic Affairs document BEB/DEI/IM 96066134, sent to Ministry of Foreign Affairs, 21 October 1996.

21) Letter of BEB/DEI 96082135 to Parliament, 23 December 1996 and an interview with the DG Energy policy, published on the Internet at [www.profundo.nl](http://www.profundo.nl).

were increasing.<sup>22</sup> But Gasunie apparently for long not openly voiced concerns over the policy shift towards liberalisation at the Ministry (Correljé 1997, 171). It was clear, though, that the new paradigm would diminish the traditionally high degree of interwovenness of Gasunie and the Economic Affairs Ministry, which could be seen in the strong personal links and regular contacts between the Ministry and Gasunie. Interestingly, Gasunie did act pro-actively on Commission plans to revive plans for a Gas directive. As soon as the Irish Presidency tabled new text proposals in 1996, Gasunie set up an EU level oriented company lobby, with the aim to influence EU decision-making. These lobby efforts were directed both individually at the European Commission and through the European industry association Eurogas.

As for relevant organised interests and lobbies, in the mid-1997, a strong lobby of large consumers and small and medium enterprises was gradually emerging, in favour of a more liberal national gas policy. From documentation and interviews, the following organisations were identified as having contacted DGE about the shaping process of the Gas directive: EnergieNed; Gasunie and others. At the same time, large consumer and industry associations directed their influence attempts co-ordinated at the EU level.

### *§3.2 Key actors at the EU level*

At the EU level, the European Commission has proven to be a strong actor in the drive to liberalise EU energy policy and has been called ‘remarkably successful’ in this respect (Newbery 2004, 70). In particular DG IV (Competition) pressed hard to convince DG Energy to realise an EU regulatory policy in these sensitive policy fields. However, the ‘deep mistrust’ by governments and companies led the European Commission to design a step-by-step approach, whilst pushing for new legislation in the field (Stern 1993, 188).

At the EU level negotiations on energy policy, expert officials represented member state governments from central government departments, mostly those of Economic Affairs, of permanent representatives and the relevant government ministers. As an overview provided by the European

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22) Press release, Gasunie, Groningen: 8 April 1997.

Commission early in the negotiations shows, there were much differences between the member states at the start of the negotiations on liberalisation of the gas market. Roughly, four groups of member states positions can be identified.

Firstly, the UK and the Irish delegations, as well as the Netherlands and Germany generally sustained the push for liberalisation.<sup>23</sup> The position of the government of the UK towards gas market liberalisation was ideologically and practically inspired. An important supplier of natural gas, the British gas market had been liberalised in the mid-1980s, a move motivated and legitimated by a revival of liberal ideology in economic policy (Thatcherism). A system of short-term natural gas sales has been introduced. It has been argued that the United Kingdom ‘initiated the EU reform, but knew that it would take time, and in the meantime the national market could be protected and developed’ (Andersen 1999, 18).

Ireland is geographically dependent upon these developments and mirrored the liberal position taken by the United Kingdom. The Netherlands and Germany were characterised by a highly organised state-owned gas sector but driven by a liberal ideology. The Dutch government regarded energy as an industry of primary national importance and interest (Correljé 1997, 165).<sup>24</sup> In Germany, the dominant position of Ruhrgas prevented rapid political changes.

Upon their accession to the EU in 1995, Finland and Sweden also generally favoured liberalisation, although these member states were not particularly active during EU level discussions.

The second group of member states included France, Austria and Belgium. These member states were very active in the deliberations on public service obligations and market access. From the first meetings onwards, the French delegation expressed a reservation due to concerns regarding the preservation of existing regulation of security of supply and public service obligations. A third group of actors are the ‘developing’ or

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23) In the working group meeting, a reservation was made because one particular formulation deemed ‘not to be sufficiently pro-competitive’ (Interinstitutional file nr 5097/97, 9 januari 1997).

24) The Netherlands natural gas reserve contains 1,2% of the world gas reserve and supplies almost 20% of the 4000 billion m<sup>3</sup> that the EU uses on a yearly basis (2000). Moreover, the country hosts energy-consuming market sectors (greenhouse horticulture; chemical industry; transport).

‘emerging’ markets and regions. This issue was not originally in the Commission proposal but tabled by Denmark, Greece and Portugal during the first working group meetings, pressing for a consideration introducing a special regime for less mature gas markets or developing markets, as was stressed by Spain and Luxembourg. Spain, however, was like the Netherlands characterised by a pronounced change in attitude to the new directive. In both countries governments decided to move towards opening up market more quickly than dictated by the directive (Andersen 1999, 19). Finally, a group of member states was hardly present in the Council discussion and served as fence sitters. These included Finland,<sup>25</sup> Sweden and Luxembourg. As large gas supplier and member of the European Free Trade Area, the Norwegian government followed the discussion closely but was not directly involved in the negotiations between the member states.<sup>26</sup>

The European Parliament’s first reading of the combined proposal on electricity and gas was co-ordinated by its internal Committee on Research, Technological Development and Energy. This standing committee, composed of representatives of all different political groups, appointed Claude Desama (Belgium; PES) as the rapporteur for this directive in February 1992. He was charged with assembling the amendments to the draft directive in order to prepare for proceeding in the plenary. In November 1993, the plenary delivered its opinion at first reading on the common position established by the Council, issuing 38 amendments.<sup>27</sup> Immediately, DG Energy drafted an amended proposal.<sup>28</sup> Then, a period of

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25) During the Irish presidency, Finland suggested adding an paragraph about member states with a national gas market not connected with any other gas market within the EU to be able to apply for transitional regime with derogations from access to the system. The Greek delegation supported this proposal but it was not included in the final text.

26) Through the 1994 European Economic Area Agreement, Norway, Liechtenstein and Iceland are committed to take over EU legislation relevant to the functioning of the internal market. Norwegian officials are present with observer status at relevant preparatory meetins where new relevant EU regulation is discussed.

27) Legislative report, 1st reading OJ C 296 01-NOV-93, 8 October 2003, nr PE A3-0281/1993.

28) OJ C 329, 6.12.1993, p. 182.



deadlock occurred, until the revival of the directive by the European Commission and the Irish Presidency at the end of 1995.

In February 1998, the President announced that it had received the common position reached at political level of the Council and considered at its plenary meetings of March and April 1998. At the latter meeting it adopted the draft decision unanimously with 3 abstentions,<sup>29</sup> considering upon the advice of its rapporteur that the Council text mirrored many of the amendments made in its first reading, five years earlier.

The most active and directly involved organised interests were those of the industry and consumer organisations. On the one hand, there was Eurogas, representing the European gas industry. Although the positions of the national industry representatives differed, as was shown during the consultation phases of the directive, industry generally was very reluctant as regards to because of vested interests in national infrastructure – for example pipelines –, which the European Commission wanted to open up for competitive use. A second group of industrial interests that however, supported the Commission's initiative and lobbied for extension were large industrial customers (like the chemical industry). Organised interests (e.g. the chemical industry, the international federation of industrial energy consumers) issued several position papers to the Commission, members of European Parliament in relevant committees and member state delegations. These delegations pressed hard for ensuring further market access, regulated instead of negotiated access, as well as a limitation of derogations for long-term contracts and emerging markets.

#### **§4. A bird's eye view on the decision-making process**

##### *§4.1 Agenda setting*

The first discussions on the Gas directive had been taken place in the working group on Energy since 1994 where, due to diverging national situations, national government positions differed considerably. In 1994, deadlock was proclaimed. One staunch opponent of the Commission plans was the Dutch delegation, whose main critique focused on (the risks for) security of supply and the proposed separation of supply, transport and

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29) Legislative report, 2nd reading PE A4-0140/1998, OJ C 152 18 May 1998.

distribution, which it opposed. For the time being, DG Energy of the European Commission took the proposal back, although the Italian Ministry of Energy worked on a revised draft in the second half of 1995, about which some bilateral discussions were held.<sup>30</sup>

Upon a co-ordinated initiative of the European Commission and the Irish Presidency, the Gas directive proposal was 'revived' six months later.<sup>31</sup> On 16 July 1996, the working group on energy had an information exchange with responsible Commission officials based upon delegations' positions as formulated in 1994. The Presidency explained that EU level organisation Eurogas had failed to reach agreement in the 'consultation phase' with national gas companies. There was strong disagreement between the national representatives, although a majority had argued that, due to the particular market structure for national gas, resembling an oligopoly, and the investments needed for developing new gas fields and ensuring continuous storage and supply, it was impossible to introduce an obligation for holding separate accounts for production and distribution.<sup>32</sup>

During the working group meeting, some government delegations argued for more flexible EU level regulation, whereas others claimed that for developing an internal energy market, existing Treaty provisions would suffice and no new proposals were deemed necessary. In order to take stock of the particular country situations, DG Energy issued a short questionnaire, on the structure of the national energy market in the member states, the nature of existing public service obligations and existing regulations and contracts.<sup>33</sup>

In September (3, 10) and October (21, 22 and 28), the Working Group discussed a text including delegations' remarks in footnotes. On the basis of the Presidency compromise proposal and the four key questions

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- 30) Letter to DG Energy, Rome from Dutch DG Energy, 28 November 1995 about provisional remarks to the Italian draft proposal for the natural Gas directive.
  - 31) Document 5653/94 ENER 19 - COM(93) 643 def. COD 385.
  - 32) Document 9325/96 overview of proceedings working group Energy 31 July 1996.
  - 33) The Dutch reply was sent to the Commission at 21 October 1996. It stresses that information on long-term contracts is considered confidential, it gives a general overview of existing contracts.

subsequently identified,<sup>34</sup> on November 5, the High Level Working Party on Energy, composed of senior officials from all member states, debated the different issues raised. Subsequently, COREPER considered the state of affairs on 19 November 1996, concluding that on four key questions, ‘guidance by the Council will be welcomed’. In the first week of December 1996, the Energy Council debated a Presidency compromise proposal and adopted Council conclusions.<sup>35</sup> These recognized the compromise proposal as a ‘basis for progress in further discussions’ but noted a considerable convergence of views on a number of issues.<sup>36</sup>

#### *§4.2 Shaping the text: negotiations during the Dutch Council Presidency*

In January 1997, the Netherlands took over the Council Presidency. Consistent with the principle of ministerial autonomy, government departments were largely responsible for setting priorities in various policy sectors for the Dutch stint at the helm.<sup>37</sup> As for the Economic Affairs Department, the Gas directive was identified a key dossier on which progress could be made. In fact, in national parliament, the Economic Affairs Minister claimed that the text was supported by a majority of the member states and a decision was near.<sup>38</sup> The Presidency organised an informal High Level meeting in The Hague in February 1997 and drafted a compromise on the basis of the outcome of these discussions, the Dutch Presidency. In April 1997, the working group reached agreement on the issues of emerging markets and market access. Because several issues were discussed in parallel, however, it was difficult to estimate whether there was a majority in favour of the integral final text. On April 29, a second High Level meeting discussed a possible common position, to be reached on 24 June during an extra Energy Council meeting. Member states were invited to address primarily the questions on market opening and long-term contracts.

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34) Doc. 11140/1/96 ENER 146 CODEC 619.

35) See doc. 12381/96 PV/CONS 79 ENER 180, Annex I.

36) The Council conclusions noted, inter alia, a considerable convergence of views on five key issues (Public Service Obligations; Unbundling/Transparency of Accounts; Access to the System; and Take-or-Pay Contracts and Market Opening). See doc. 12381/96 PV/CONS 79 ENER 180, Annex I.

37) Clingendael Report on the 1997 Presidency, Clingendael Institute The Hague 1998.

38) Sources: letter of BEB/DEI 96082135 to Parliament, 23 December 1996 and interviews.

In May 1997, a new Presidency proposal was examined in COREPER.<sup>39</sup> The discussion during the Council of the 27th May 1997 focused on three particular issues: market opening, take-or-pay contracts and emergent markets and regions. The Presidency indicated to decide within a few weeks whether the progress made justified one extra Energy Council in June. However, due to the French elections in June, the French were not able to move their position and the June Council was cancelled.

#### *§4.3 Final negotiations and decision-making*

On 22 July 1997, the Luxembourg Presidency presented a compromise proposal<sup>40</sup> based upon the Dutch compromise proposals, but including less ambitious targets for market opening and new unbundling provisions. The negotiations at working group level proceeded and in October and the file was sent upwards to Coreper in order to settle unresolved issues. A Council meeting on 27 October was exclusively devoted to the Gas directive. In December, the member state government representatives meeting in Luxembourg reached an agreement on a common position, including statements to be entered in the Council's minutes. A Council common position reached in December 1997 was adopted in February 1998.

In May, the European Parliament discussed the common position reached by the member state delegations. Considering that it represented a delicate compromise, which embodied much of the Parliament's first reading. The rapporteur, Mr Desama (PSE-B), recommended that it be adopted without the one amendment submitted by the Committee on Research, Technological Development and Energy. This amendment related to the insertion of a three-year period for the review clause provided for in art. 28.<sup>41</sup> The

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39) The Presidency considered it appropriate to focus the debate in the Energy Council on some of the key issues: market opening, take-or-pay contracts and emergent markets/regions. This approach was contested. An annex to the Council conclusion stated that the French delegation would point out that the Presidency conclusions are binding only on the Presidency and that there has been no agreement on their contents. (draft minutes of the 2007th Council meeting, 8306/97, 3 June 1997).

40) Doc. SN 3267/97.

41) See recommendation for secon reading on the common position established by the Council with a view to the adoption of a European Parliament and Council

rapporteur also recommended rejecting the three amendments that related to the eligibility of combined heat and power producers, presented by the PSE and ELDR Groups. All political groups expressed support for the rapporteur's conclusions, although a number of members of the PSE and the ELDR Group endorsed the amendments presented. Although the European Commission could accept amendment 1, the plenary session rejected the four amendments put to the vote and approved the Council's common position.<sup>42</sup> Thus agreed upon by both Council and Parliament, the final text of the directive was signed by the Presidents of both Council and Parliament on 22 June 1998.<sup>43</sup>

#### *§4.4 Implementation and evaluation*

The final directive, aimed at a gradual liberalisation of the European gas market, has been called a rather 'open' directive, cautious in its scope and in any case far less reaching than the electricity directive. Although the provisions provide an alternative to the pre-existing monopolised system, the direct and immediate requirements as to market access are limited. The directive has been called weak on unbundling, access and regulatory supervision. Even in 2008 member countries can refuse small customer the choice of supplier as long as 43 per cent is covered by liberalised system. Systems for regulating third party to pipelines are still to be developed on the national level. Companies may apply for exception from the third party access article, if serious economic and financial problems should arise.

The directive contains very few supranational regulations, and the more protectionist member countries have achieved considerable freedom to regulate national markets in the future. 'The value of the directive, therefore, lies not so much in its specific provisions, which are likely to be rapidly overtaken by events, but rather in the fact that it established both the principle of access to (pipeline) networks, and the assurance that opponents of competition and liberalisation cannot indefinitely procrastinate in the opening up of their gas markets' (Stern 1998, 18).

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Directive concerning common rules for the internal market in natural gas (C4-0103/98 - 00/0385(COD)).

42) Decision on the common position adopted by the Council with a view to adopting a European Parliament and Council Directive concerning common rules for the internal market in natural gas (C4-0103/98 - 00/0385(COD)).

43) Official Journal L 204, 21.07.1998.

## §5. Reconstructing negotiations around key issues

This section focuses on the main issues during the negotiations on the text of the directive at Council level. During these negotiations, several types of comments can be identified, which are registered in footnotes at the bottom of a text proposal.

- First, there are the proposals for clarification of the text proposed by the European Commission or to align the text with other articles.
- Second, national delegations can voice a scrutiny reservation over (parts of) the text, because new proposals have to be closely examined at the domestic administrative or political level before a position can be taken.
- Third, delegations can express a reservation as regards to the contents of the text proposed, but not advance alternatives.
- Finally, delegations, including the Presidency can forward specific text proposals.

The analysis of the shaping process has focused primarily on the latter, as these interventions are most related to the advancement of national preferences into the negotiation process.

Table 7.2 *Controversies in the Gas directive*

Issue	Article original proposal	Article in final text:
Public service obligations	Art. 3.2	Art. 3 and 4
Regulated or negotiated market access and Degree of market opening	Art. 17 Art. 18	Art. 14-16 Art. 18
Unbundling and transparency of accounts	Art. 13	Art. 12 and 13
Derogations for long-term, 'take or pay' contracts	Art. 20	Art. 25
Derogations for emergent regions / markets	–	Art. 26

A close reading of the minutes of successive meetings of delegations at the administrative and political level reveals that the key issues during the shaping of the directive included the following five issues.<sup>44</sup>

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44) Selection is based upon interviews and paper texts, incl. Internal paper on the Dutch position concerning the directive proposals for the realization of internal markets for electricity and gas, E/EB/960187, 9 August 1996.

§5.1 *The imposition of 'public service obligations' (art. 3 and 4)*

The original commission Proposal had included an article 3.2, stating that governments can impose public service obligations on gas companies as regards to the security, regularity and prices of supplies. France and Denmark stressed from the first meetings of the group that this provision should be extended to include considerations related to security of supply and environmental protection, for which a related provision (art 3.3) in the electricity directive would be taken over. This proposal was supported by the Austrian, Belgian, Spanish, Greek, Luxembourg and (from January 1997) the Portuguese delegation, in successive working group sessions. The German and the Netherlands delegations argue instead that there is no need for public service obligations in the gas market, as other fuels could easily substitute gas. The United Kingdom suggests that any obligations should not hamper the development of a competitive market. The Irish Presidency initially forwarded a compromise proposal for 3.2, which introduced a text similar but more limited as compared with the Electricity Directive.<sup>45</sup> This was included in the final text, but the issue whether to include a new paragraph similar to art. 3.3 of that directive, excluding the provisions to grant licences if public service obligations would be necessary for the general economic interest. This was a proposal of Belgian, French and Austrian delegations, opposed by Denmark, Germany and the Netherlands that had been effectively downplayed during the Irish and Netherlands Presidencies but only came up again in the negotiations on Luxembourg presidency draft. The opponents argued that the treaty regulations would have prevalence and that such a paragraph would add nothing to that. This issue was only solved at the political level, the Council common position including a paragraph 3.3 into the final text of the common position and included in the final text.<sup>46</sup>

Another bone of content focused upon the issue of granting licences and setting criteria for companies applying to operate gas facilities, storage and transmission and distribution lines. Some delegations argued that the issue of granting licences should be optional, according to German and Netherlands delegation, others that criteria should be determined by the member state

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45) Art. 3.3 of the electricity directive is not taken over, see 11839/96, COREPER to Council, Interinstitutional file 93/365 COD, 7 October 1996.

46) See 13347/97 common position, 12 February 1998.

governments (French and Danish delegations). The Irish presidency proposal included a more flexible formulation, limited to 'in circumstances where authorisation is required' and leaving the criteria to the member states.

*§5.2 Market access: regulated or negotiated and degrees of market opening (art. 14)*

To provide for access to the market for third parties (Third Party Access, *TPA*) is the central aim of the directive. Before the directive, a company with pipelines transmitted its own gas. According to the proposal, it would be possible for competitors to gain access to this network. The infrastructure also concerns the storage facilities and those for quality conversion. Because the national situations diverged, there was much discussion about the degrees and modalities of regulating market access.

Third party access was considered a very sensitive topic in a highly regulated market. As regards to access to the market, The Commission proposal of summer 1996 only included two articles (art. 17 and 18) based upon 'voluntary commercial agreement', i.e. *negotiated* access of third parties to the network. Traders must negotiate with the supplier about tariffs and conditions. As becomes clear from the notes, Sweden, Denmark, Italy and the Netherlands expressed their support for this formulation (the Dutch delegation suggesting simplification). However, the United Kingdom delegation suggested that national experience had shown that the alternative, regulated third-party access, would give better results. The draft Irish Presidency compromise proposal, issued in October 1996 introduced a choice for governments to be made between negotiated third party access or regulated access. All delegations agreed on the need for dispute settlement bodies. The discussion focused on two elements: the possibility for exclusion in the case of public service obligations (a proposal of the Belgian and French delegations) and the obligation to publish tariffs (which was opposed by the government representatives of Belgium, France, Denmark, Germany Italy and Austria). The first was discarded during the Irish Presidency, the latter issue was only included in the final text of the common position at political level in December 1997.

Discussion about the minimum threshold for market opening proved particularly difficult. A quantitative approach would lead to uneven market opening because of uneven starting conditions. In September 1996, most delegations agreed with the Irish (Presidency) approach on a once-off



opening ('all producers and suppliers able to produce and supply by means of a direct line'),<sup>47</sup> leaving the eligible customers to the member states. The French delegation however, preferred a gradual approach in line with that for Electricity. In October, the Commission delegation proposed an approach for market opening 'at least up to a significant level' – the minimum percentage resting upon the share of the annual average Community consumption taken up by a type of consumers consuming more than ... annually, to be calculated by the Commission. It took some time before delegations expressed themselves on this proposal, as it was linked with the data on market structure to be composed by the European Commission on the basis of a questionnaire to be filled out by the member states. Then there were derogations proposed, for example by the Portuguese delegation pleading for emergent markets, which did not make it in the final text.

In May 1997, the Dutch Presidency in a brief concluded that 'the criteria of the present Presidency proposal have not been completely satisfactory to all member states, in particular with respect to thresholds, percentages and the consequences'.<sup>48</sup> It forwarded a new compromise solution, eligible customers being at least power generations and those consuming more than 25 m<sup>3</sup> annually.<sup>49</sup> This provision (in art. 18.2) should lead to a 'progressively increasing' market opening, ranging from 30% up to 40 and 50% after, respectively, 5 and 10 years (art. 18.3). It should result in market opening for those consuming more than 10 m<sup>3</sup> after 5 years and more than 1 m<sup>3</sup> after ten years (art. 18.4). For the government delegations of Belgium, France, Luxembourg, Austria and Denmark, these criteria were far too ambitious, for Germany, Finland and the United Kingdom delegations too restrictive.

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47) See art. 18 of the original proposal.

48) See 7547/97, Presidency to HLWP, 22 April 1997.

49) The compromise opens the market for all customers consuming more than 25 million m<sup>3</sup> of gas. Five years after implementation of the directive, the customers using more than 10 million cubic meters will follow and after ten years, those from 1 million cubic meters. The text sets a minimum degree of market opening at 30% and a maximum of 50% after ten years, in order to take account of the differences in the market structures within the Community. Most delegations could support the Presidency's proposed approach. However, the Luxembourg proposal cut back these volumes to less ambitious quantities.

Not surprisingly, the Luxembourg Presidency text proposal for the directive cut back the volumes to less ambitious quantities, setting the percentages at respectively 15 and 5 m<sup>3</sup>/annually (art. 18.5) and relaxing the percentages for market opening to a gradual approach ranging from 28% to 35% up to 40% after ten years (art. 18.5).<sup>50</sup> At a political level, the thresholds and percentages were discussed in November and December 1997 and finally fixed at 33, 38 and 44%.

### *§5.3 'Unbundling' and transparency of accounts (art. 12 and 13)*

In order to harmonize the conditions under which gas undertakings operate and to ensure a neutral management of the different functions within vertically integrated undertakings, measures were proposed by the European Commission to separate the internal accounts for production, transmission, storage and distribution activities.

First, the question was whether there should be unbundling at all. At the first open deliberation in July 1997, the German and Netherlands delegations explicitly expressed reservations, on the grounds that the confidentiality of commercial data is crucial for the negotiating position of gas companies in dealings with third country suppliers. Greece, on the other hand, explicitly supported the idea of unbundling. The Commission delegation argued that some degree of access to information is necessary to obtain transparency of competition. Many vertically integrated gas companies do also have a production component, and some of their transmission costs could otherwise be hidden in the production costs. In December 1996, the Irish Presidency compromise proposal suggests a stringent unbundling of accounts, combined with the possibility of safeguarding commercially sensitive information. This was the basis for the final text.

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50) The final text (art 14-23) of the directive sets the quantitative standards for market opening as follows: eligible customers including gas-fired power generators and those consuming more than 25 million cubic meters gas per year should result in market opening of at least 20% of the total annual consumption of the national gas market. After five years this increased to 28% and after 10 years to 33%. In 2005, the customers using more than 15 million cubic meters will follow and in 2010 those from 5 million cubic meters.

As to article 13, there was consensus over keeping separate accounts as to transmission and distribution (i.e. the natural monopoly activities). A first disagreement arose as to the activities to be included in art. 13(3). The French, British and Dutch delegations argued for the deletion of production in this respect, which the European Commission opposed for reasons of transparency. Not surprisingly, the Netherlands presidency compromise proposal issued in April took out the reference to non-gas activities and production. All delegations but the United Kingdom pressed to re-include non-gas activities. Eight delegations argued to add production in art. 13(3), which was opposed by the Dutch and British delegations and the Luxembourg Presidency drafted a new article 13, similar to the original text. This was the basis for the common position.

There was also disagreement on the question whether these separate accounts should be published, the French, German, Greek and Irish delegations arguing that control by designated authorities would be sufficient. Although the Austrian, Spanish, Swedish and British delegations suggested including it, it was not taken up in the final text.

#### *§5.4 Derogations for long-term contracts (art. 25)*

One important characteristic of the existing natural gas market before the Gas directive was the use of long term ‘take-or-pay’ contracts. For a period of 10 to 20 years, these contracts oblige clients of suppliers to take and pay minimally up to 90% of the contracted volume, notwithstanding the amount that is actually used. The use of these contracts provides sales security to the producer and the pipeline investor, upon which they can invest in gas production, transport and undertakings. However, long-term contracts could also (be invoked in order to) hamper the development of third party access. During the negotiations on the Gas directive, three issues were relevant: which contracts are eligible for derogations from the market opening that the directive proposed, which institution determines this and what the derogation would entail.

As to the contents of the derogation, article 20 of the original proposal stated that a reason for refusing access would be serious economic difficulties of natural gas undertakings resulting from take-or-pay commitments. In that case, the member state government should announce the measures to be taken to the European Commission. This Commission proposal was actively supported by the Netherlands and the United Kingdom. Instead, France,

Spain Greece and Italy, concerned about possible market disorder, argued for a 'preventive' approach, whereas Germany argued that this is a case for the member states and the article should be deleted. According to the Irish presidency proposal, member states can apply for a transitional regime if sales fall below a level agreed upon in a contract signed before a certain date. The Commission could then grant this regime on the basis of certain criteria. The Netherlands compromise proposed that the derogation would apply to past and future contracts whereas the UK and Irish delegations protested that it could not accept any protection for future contracts, as this would limit market opening.<sup>51</sup>

As to the lead institution to decide upon derogation the French delegation, supported by Belgian, Danish and Austrian government delegations proposed that it should be up to the member state to decide. In July 1997, the Luxembourg Presidency introduced a more extensive procedure, in which it is in first instance the company can refuse access when economic problems are encountered. In the final provision, both the member state and the European Commission are involved.

#### *§5.5 Derogations for emergent markets and regions (art. 26)*

Some parts of the EU have a lesser-developed market for natural gas. The issue of 'emerging markets' was not included in the Commission proposal. During working group examinations in September, Denmark, Spain, Greece and Portugal suggested to include a special consideration in the clauses to the directive concerning the specific situation in emerging, in contrast to mature, national natural gas markets. The Irish Presidency text included a new provision that member states which could demonstrate that problems would arise for the operation of their emergent markets would also apply for transitional regimes (art. 24(2)). However, several member states stressed that the derogations for these markets and regions should be limited in time and in scope.

The discussion then focused on the definition of 'emerging markets' and how these could be protected. The Irish Presidency in a recital defined an 'emergent market' as a Member State in which the first long-term gas supply contract is in effect for less than ten years on 2000. Member states could also

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51) Art 23 and footnotes, Presidency to high level working group, 7547/97, 25 April 1997.

take measures to protect pipeline construction in emerging markets (new art. 20). This text was redrafted by the Dutch Presidency in a new article 23a, which also included a new provision about derogations for member states not directly connected to the system of any other member state and having only one main external supplier, taking over a request by Finland and Greece.<sup>52</sup> The Spanish delegation wondered whether it would be possible to have similar provisions for ‘developing markets’ and Luxembourg was sympathetic to this proposal, including a new provision 23a(3) on emergent regions, the latter being defined in the final text as a ‘geographically limited area’.<sup>53</sup>

The issue was dealt with by an informal High Level Working Party meeting in The Hague on 20-21 February 1997. Two alternatives were proposed: adding an annex to the Directive, listing emergent regions, and leaving the qualifications as an emergent region to the Commission as a part of the procedure for granting derogations. The idea of an Annex to the Directive was widely supported and member states were invited to put forward the regions they want to be included in the Annex. However, in the successive working group meetings it turned out that designing the annex was very complicated. Consequently, attention turned again to the definition. Finally, it was decided to mark the whole of Portugal and Greece as emerging markets and to add a list to the directive of the regions considered immature.

## **§6. A reconstruction of Dutch shaping attempts**

This section sets out by reconstructing influence attempts by the Dutch government in the three successive stages of the policy cycle: agenda setting; negotiations and decision-making. Subsequently, upon the basis of this reconstruction, a critical evaluation is made of the influence attempts of the Dutch government in these stages.

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52) See footnote 69, p 16 doc 11839/96, 21 November 1996.

53) See doc. 11839/96, COREPER to council, 21 November 1996

*§6.1 Reconstruction of the shaping process*

*Agenda-setting*

In §3.1 reference has been made to studies estimating how much text proposals would resemble final decisions. However, in the case of the Gas directive, the text has been considerably adapted and reformed in the course of the negotiations, to the extent that only a small number of provisions are still recognisable in the final text.<sup>54</sup> This can be explained by the differing positions of the member state delegations, only a minority (the UK, Irish, Netherlands and (to a lesser extent) German government delegations) sharing the Commission's drive for liberalisation.

From interviews, it appears that there were no regular contacts with the relevant European Commission services (DG Internal Market; Competition) aimed at influencing the internal processes of drafting the proposal, during the period when the directive proposal was drafted (1994-1996). This can mostly be due to the fact that at that time, the Dutch government was in the middle of a mind shift towards liberalisation of the energy sector and was preoccupied by intensive internal discussions about the conditions for liberalisation. The revival of the negotiations by the Irish presidency in the spring of 1996 paralleled an internal reorganisation of the Ministry of Economic Affairs, in which, as one respondent puts it, 'a number of the share holder protagonists were replaced by more liberally minded officials'.

From internal documents, it becomes clear that the apparent shift in position towards a more liberal energy policy causes internal discussions well into 1996. In May, the Cabinet of the Dutch Euro-Commissioner demands clarification of the negotiating position taken, arguing that this can be detrimental to national economic interests. A special brief was drafted in order to explain the Dutch position during a high-level meeting.<sup>55</sup> Although the initiative for liberalisation can be supported, not all elements of the proposal are deemed acceptable, such as the issue of cost transparency, which should be 'avoided', and the issue of unbundling, an alternative for which could be the introduction of a regulatory agency. In the internal

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54) Upon the basis of a limited comparison of the proposal and the final decision.

55) Document E/EOG/G/96035245, 30 May 1996, letter from coordinating official to DGE.

preparations for its 1997 Council Presidency, starting in Spring 1996, the Ministry of Economic affairs tabled the Gas directive as one of the key dossiers. It was decided that a common position should be reached during the Dutch Presidency, although the government minister warned that this would be not an easy task.

During a high level meeting in November 1996, the key elements of the Dutch negotiating position were set. The most important issues were *market access*, *long-term contracts* and *emerging markets*. The first and latter were relatively easy, but the second issue concerned a sensitive issue for the Dutch, which insisted on derogations for future contracts against the wish of a majority of the participants. The Irish draft, which had been discussed with the Irish representatives during bilateral meetings, was regarded as close to national preferences and negotiating positions. However, for tactical reasons the Dutch delegation voiced a number of reservations, concerning the issues of unbundling and public service obligations.<sup>56</sup>

### *Negotiations*

From several sources, including a spring 1997 brief to Parliament, it can be concluded that the Ministry of Economic Affairs initially was rather optimistic over its chances to reach political agreement over the directive. ‘A compromise is in sight’ as regards to the issue of market opening (Van Gelder 1997) and the same held for the emerging markets.<sup>57</sup> As far as these issues were concerned, the Netherlands held a relatively liberal position, which is clear from the nature and frequency of its contributions that are registered in the accounts of the working group meetings. Its coalition partners are the United Kingdom and Ireland, at the more liberal dimension. The main opponents were the more protectionist member states, most prominently France, Italy and also Germany where the market is dominated by strong monopolies. The Director-General of Energy visited the latter three member states and the EU, while his deputy visited a number of other member states. These visits aimed at taking stock of preferences and positions and getting to know key players.

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56) See internal paper Developments Directive Internal Market Gas, to the Minister, E/EOG/G/96066000, 17 October 1996.

57) See Second Chamber 1997-8, 21 501 – 14 nr 39, p. 5.

The issue of take-or-pay contracts proved one of the most difficult issues to solve during the Dutch Presidency, as this issue was particularly sensible due to the large economic interests of the Netherlands.<sup>58</sup> To Parliament, the government minister explicitly promised to take the Dutch position into account and ‘not to act directly contrary to Dutch interests, even more so because the Netherlands is one of the most important players in this regard’. However, the feasibility of this promise had to be doubted, as the run-up to working group meetings in March 1997, the issue was formulated ‘differently than NL would wish’.<sup>59</sup>

During the Presidency, two high level meetings were organised. In February, the senior officials from the member states were invited in at the natural gas site in Slochteren, where a tour of the site was offered and informal deliberations on the directive proceeded. According to one anonymous respondent, the compromises discussed here have influenced the proceedings, although the mood in the industry at that time was still predominantly sceptical about the possibility of reaching a compromise.<sup>60</sup>

During the second high-level meeting, agreement seemed possible. An internal note of the Ministry discusses how ‘the member states are moving towards each other’.<sup>61</sup> However, some crucial issues still stood out, including the discussion on TOP, emerging markets and emergent regions. In June, it was concluded by the officials involved that even without the upcoming French elections, which made the French position difficult, the chance for success was regarded small.<sup>62</sup> For that reason, the informal Energy Council scheduled for 24 June was cancelled by the Presidency. This result was

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58) Note that long term contracts are important to Gasunie, although their relevance is limited in comparison to long distance suppliers. In 1996, Gasunie’s sold 40 billion m<sup>3</sup> gas to Germany, Belgium, France, Italy and Switzerland under long-term contracts.

59) Letter to the Minister of Economic Affairs in February 1997, E/EOG/G/9716120, 11 March 1997.

60) An electronic survey showed that a majority of industry representatives present at the meeting ‘Europen Gas Strategies’, 25-27 February 1997 in Amsterdam did not believe in political agreement reached before June 1998 (Gelder, J.W. van: A Free market without Gas? In: Profundo, April 1997).

61) Document E/EB/97028045, 1 May 1997.

62) E-mail letter 6 June 1997 from co/ordinating official to colleagues.



considered disappointing – but in a letter to all delegations, the co-ordinating officials indicated that they still considered the process as satisfying.<sup>63</sup>

In response to a grateful letter sent out by the Dutch delegation to their negotiation partners upon the end of the Presidency, it is explicitly remarked by the French and British delegations, that given the limited time and resources at their disposal the Dutch have done the best they could to steer the negotiations towards a decision acceptable to all. As a main disturbing factor, delegations point at the coincidence of French central government elections that made it virtually impossible for the Dutch delegation to reach political agreement in June 1998.

### *Decision-making*

In a letter to parliament about the proceedings of the Presidency, the Minister estimates the chance for political agreement to be ‘larger than 50% but less than 90%’.<sup>64</sup> During the final months of negotiations, three essential issues are highlighted in the instruction to Dutch delegation: an ambitious degree of market access; clear derogations for take-or-pay contracts including a distinction between existing and new contracts and in regard to unbundling, to leave production out of the final text. Other issues, including emerging markets and public service obligation were relevant were indicated to serve as ‘change money’. Several member states have particular objectives (Greece and Portugal: emerging regions; Netherlands: unbundling). At this point it is clear that if the Presidency proceeds to voting, a majority could be reached. The instruction signals that the constructive tone should be kept but reservations should be maintained ‘when France and affiliated parties do not show any willingness to move’.<sup>65</sup>

However, due to the French elections that made the French position unclear, the extra Council meeting on 24 June was cancelled at the last moment. The Luxembourg Presidency issued a draft which became the basis for the final text. To the regret of Dutch negotiators, as regards to unbundling and Chinese walls, the Luxembourg draft was considerably more ambitious than the Dutch draft.

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63) E/EOG/G 97037653, 18 June 1997.

64) Second Chamber, 1997-8, 21501-14 nr 39.

65) COREPER instruction paper, 28 November 1997.

§6.2 *Development of positioning and influence on key issues*

Although the issue of exclusive concessions for *public service operations* was welcomed in the Italian draft discussed at the end of 1995, the more liberal stance of the Dutch government was clearly visible in the negotiations from 1996 onwards. The dominant view of the Dutch delegation was that public service obligations should not hamper the degree of market access. The main opponent in this respect was the French delegation. A bilateral meeting at the level of Directors-General served to clarify a few points related to the directive.<sup>66</sup>

The Irish draft text included internal *unbundling* of accounts but did not regulate publication of tariffs. Initially, the Dutch government was reluctant as regards to the issue of account unbundling, considering the dominant position of Gasunie. The Irish proposal could serve as a compromise, but for tactical reasons, the Dutch delegation stressed that confidentiality of company data should be secured. This position was advanced during the Dutch presidency but the Luxembourg Presidency draft included much stricter provisions for ‘Chinese walls’ between the different parts of the company.

During a bilateral meeting in November 1996, the French delegation makes it clear that it will not block progress and is open to ‘some’ liberalisation. However, it is opposed to gradual market opening, it rather would support one principal step and successive revisions.

Initially, DGE was very reluctant towards the discussions on *third party market access*, as this could allegedly damage the central coordination of supply and demand by Gasunie and thereby the investment planning (Moor and Boels 1995). The Dutch position was based upon a strong preference for negotiated access to the market. This was in line with the preference of Gasunie, the major pipeline owner. The degree of market opening should be a rapid and uniform, in line with the Commission proposal. Because the United Kingdom expressed a very strong preference for a system of regulated access, the Irish Presidency proposal to leave the choice to the member states was included in the final text. As to the degrees of market opening, in line with their preference for a level playing field and the results

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66) Document E/EB/960243.PP, visit report to Paris for EU Presidency, 27 November 1996.

of the high level working group meeting, the Dutch pressed for ambitious levels in a draft issued early March. To their regret, these were pressed back by the Luxembourg presidency, the draft of which proved to be the basis for the final text.

The Dutch delegation had a strong interest in the issue of derogations for *existing take or pay obligations*, due to the long-term contracts that Gasunie held throughout Europe. This was a relatively easy position as this point was effectively taken up by a coalition of member states. The minutes of the different Council-level deliberations do not show any Dutch interventions as regards to this issue. However, the Dutch were vehemently opposed to the issue of including future contracts, which became very hot during the Presidency and as to which the Dutch finally had to give in.

The issue of *emerging markets* and regions unexpected proved to be one key difficulty in the course of the negotiations. The Dutch delegation did not have strong preferences at the beginning but this emerged as a key issue during its Presidency. This forced the Presidency delegation to come up with text proposals, including an annex listing the different emerging markets and regions.

## **§7. Discussion**

This section is concerned with an assessment and evaluation of the ways in which the Dutch government delegation has attempted to influence the proceedings resulting in the European Gas directive 98/30/EC. For this, we deploy the framework for analysis that has been introduced (see table 7.3), according to which shaping capacity of a national government regarding EU policy-making is a combination of its motivation to shape policies and its potential to realise these ambitions and preferences.

A first relevant variable in this case study was relative *issue saliency*, from which the Gas directive could benefit from the start. A respondent compared the proposal to a ‘rubber duck’ – largely due to the strong pusher role of the European Commission, assisted by subsequent Council Presidencies, it emerged again and again.

Table 7.3 Relevant variables for the Dutch' governments shaping capacity in the case of the Gas directive

Shaping capacity	Will	Potential
<b>Stable variables</b>	<p><b>AMBITIONS</b></p> <p>Supplier of 25% of EU natural gas; economic heavyweight semi-monopoly of natural gas sector; policy shift from foot-dragger to pace-setter</p>	<p><b>CAPABILITIES</b></p> <p>High expertise as regards to energy, expert co-ordination; institutionalised relation with private sector (Gasunie); departmental autonomy; strategic competencies in wake of Presidency; member of core group of 'liberal' countries; dense bilateral network, close contacts with DG Energy</p>
<b>Situational variables</b>	<p><b>PREFERENCES</b></p> <p>Initially: bad fit, adapted to changing domestic preferences; Commission initiatives for liberalisation ran parallel with domestic political impetus; role of personal pusher Minister; negotiating position not extreme; coincidence with Council Presidency 1997 impacted upon preferences</p>	<p><b>RESOURCES</b></p> <p>Issue salience increased during Presidency: more resources allocated; dossier coordination at junior official level; later upgrading of delegation; close co-operation with the national Permanent Representation to the EU; no institutionalised contacts EU institutions; flexible use negotiating position; use of bargaining tactics disputed</p>

The influence of the Commission has thus been strong in the phases of initiation and agenda setting, but its impact is less visible in the negotiations, which were dominated by text proposals by conservative government delegations. That the Directive remained salient was due to disagreement between the member states both to the idea of liberalisation and the elaboration of the directive text and the divergence of national situations and preferences. But due to the active involvement of successive Council Presidencies, the issue was kept alive.

The Dutch government negotiation position took some time to materialise, a finding that can be explained by two variables: the initial *misfit* between the directive and existing Dutch policy arrangements in combination with the large degree of fragmentation of the domestic playing field. First, the account of the shaping of the Gas directive shows that unstable political preferences can work wonders in overcoming 'misfit'. Its initially reluctant stance is can be explained by its economic situation as a supplier country with a national oligopoly for natural gas production, for which the government was a shareholder. The draft Gas directive provided for liberalization of the Dutch gas market, which ran counter to the position of

Gasunie as a monopolist in the market. It hence implied a great policy misfit and also, the institutional misfit was large. Since there were no legal rules concerning the transport and delivery of gas, a whole new regulatory framework needed to be erected.

As to *fragmentation*: the Ministry of Economic Affairs, the key player representing the formal link between the domestic and the EU level, was internally divided. DGEnergy was for long able to put its mark upon the discussion at the EU level, by suppressing the Commission proposals and allying with likeminded coalition partners. Its reluctance against liberalisation was translated into a strategy that was aimed at frustrating further plans.<sup>67</sup> The document analysis shows that for achieving this goal, coalitions and alliances with the likeminded were actively sought, although influence attempts focused on the administrative level venues in the Council. According to observers, the controversy surrounding the first European Commission initiatives towards IEM has meant that Economic Affairs has ‘placed itself on the sidelines’ (Schout 1998, 145) during the policy initiation phases. In the meantime, internal discussions were ongoing between the more conservative departments, most notably the energy specialists with strong ties with the industry, and the propagandists of change within the Ministry and at the Foreign Affairs department. At the other side, the more internationally oriented DG Foreign Economic Relations pressed for the formulation of realistic negotiating positions. Although policy experts normally retain a relatively large impact upon the process in which Dutch negotiating positions for EU-policy are determined (Van den Bos 1991), DGE became convinced of the need for a new policy paradigm.

Here, the variable *political pressure* is relevant, more specifically the political change initiated by the coming into office of the first ‘purple coalition cabinet’ (Social-Democratic, Liberal and Social-liberal parties). At the Ministry of Economic Affairs, it was Social-Liberal Minister Wijers who took up the task of getting the ministry towards liberalisation. It is not easy to determine whether it was indeed the political drive, personified by Wijers, which was responsible for the change in policy paradigm. It has been argued that the purple coalition was in general more internationally oriented than its predecessors, putting more emphasis on global developments in the field of liberalisation. Ideological factors would hence explain its favourable stance

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67) Internal paper E/EG/92007017, 23 January 1992.

towards the realisation of an internal energy market. However, this political impetus came at a time in which already many interdepartmental discussions were taking place within the government between more liberally oriented actors and the traditional stakeholders of national energy policy. For that reason, it is difficult to deduce whether and to what extent the process of domestic political change, instigated by the coming into office of a new coalition government, and the continuous push, of the European Commission, for energy liberalisation, are to be considered as separate or interrelated.

During the negotiations at Council level, however, the Dutch government ranked as an active shaper. Apart from political pressures and a resulting policy paradigm, this can be explained by the coincidence of the negotiations with the Netherlands *EU Council Presidency* in 1997. Probably largely due to the office of the Presidency, the Dutch government delegation has been very active in anticipating, planning and elaborating a negotiating strategy aimed at reaching political agreement over the text of the new Gas directive as soon as possible. The Presidency made the Dutch even more responsible for reaching results. This was very clearly formulated in negotiation instructions.<sup>68</sup> This particular period in the chair offered the Dutch government delegation the ‘power of the pen’: the possibility to formulate compromise texts according to its own preferences. The ambition to conclude the negotiations on the directive text under their national Presidency led to an effective increase in resources that could be used in terms of human capacity and political involvement. Where, during negotiations under the Italian and Irish Presidencies, the Dutch position was represented by a junior government official with only little experience in the field, during the Presidency the dossier was followed by a departmental task force. Three officials were involved in the negotiations on a day-to-day basis and there was close collaboration between the delegation and the working group chair, a high level official from the Dutch Permanent Representation to the EU.

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68) See for example preparatory documents for the High Level group meeting on Gas, 5 November 1996, E/EB/96069271, 1 November 1996: ‘Considering the Presidency, it is not wise to be bound to extreme positions’ (p. 2).

The focus thereby was on the *Council-level* of interstate negotiations, whereas the European Commission and – even more so – the Parliament were only side-players. The few contacts that materialised focused on providing information about the Dutch position and were channelled via the Permanent Representation. One relevant official notes in this respect “it was hard enough as it was to reach agreement in the Council, this compromise was so fragile, and the European Parliament should not have intervened”. In contrast, the Gasunie lobbyist spoke extensively with MEPs in the relevant committees, for example through the European Energy Foundation, a group hosting dinners on a monthly basis.

Then, about *co-ordination*. Interestingly, notwithstanding the MFA’s formal co-ordination authority for EU affairs, which has been intensified during Council Presidencies (see Van Keulen and Rood 2004), the documents and interviews show that as regards to this particular dossier, its involvement was limited to their participation in the interdepartmental venues where progress was reported. This is interesting in view of the high issue salience of the topic. Apparently, the tradition of departmental autonomy is stronger than the push for intensified co-ordination that surrounds peak periods of national EU policy, such as a Presidency.

Where its economic clout and position as a chairman during the last phase of negotiations facilitated Dutch shaping attempts, the degree of internal *fragmentation* in combination with *conflicting preferences* as regards to the desired degree of market opening have negatively impacted upon Dutch shaping capacity. The Dutch government position was not consistent, for example, the delegation pushed for market access, whereas as to the issues of publication of confidential company information and the push for derogations for long-term contracts, its position was far less progressive. The latter issues were motivated by the wish to preserve the strategic interests of the Netherlands as a supply country, or more adequately: the national gas building.

The capacity of the Dutch government to shape the Gas directive has been determined by its relative economic clout in the energy sector; by the domestic political drive towards introducing forms of market access in the energy sector and thereby its capacity to overcome initial misfit of the draft directive with existing rules. Negatively impacting upon its shaping capacity was the internal fragmentation and discord about future energy policy.

Internal efforts to overcome initial reluctance to liberalisation impeded effective influence attempts at an early stage of Commission deliberations. However, this relatively re-active stance in the pre-negotiation phases could be remedied by one particular situational variable, namely the coincidence of the decision making process with the national EU Council Presidency which contributed to the resources available and strengthened the negotiating strategy at Council level.

Finally: has the Dutch government been *successful* in its attempts to shape this directive? Although this study is about the *process* of government shaping, instead of assessing influence on the negotiation results, it should be noted that there is broad consensus amongst respondents that the Gas directive can be considered a case of successful Dutch interest representation. At the same time, an internal evaluation at the leading department has concluded that more could have been done in terms of strategy and prioritising at an early stage. It is interesting to compare this process with the negotiations on a largely similar EU dossier, which ran in parallel with deliberations on the Gas directive. The next chapter will focus on the shaping of the Biopatent directive.



# Chapter 8

## Shaping the Biopatent Directive

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### §1. Introduction

The directive on the legal protection of biotechnological inventions (or *Biopatent* directive 98/44/EC) has been judged one of the most hotly contested pieces of EU legislation ever. Rapid politicisation of ethical concerns made the shaping of this initially rather technical directive particularly contentious (Earnshaw and Judge 1995, Kamstra et al. 2002). The Dutch government delegation initially classified as being particularly active in the negotiation phases. However, due to a parliamentary reservation, it voted against adoption of the directive in the final Council meeting where the text was passed with a qualified majority of delegations voting in favour.

This chapter is concerned with a reconstruction of the negotiations over the draft text of this directive in the period 1995-1998. The purpose of the analysis is analyse how the Netherlands government shaped this particular piece of legislation and which of the variables identified in chapter 4 can be identified in this process. The reconstruction is structured according to the principles of ‘intensive process analysis’, a method for public policy analysis aimed at assessing the influence of actors within a decision-making process.<sup>1</sup>

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1) See for more on the research design chapter 6.

## **§2. The decision context: backgrounds**

A legal patent entitles the holder to prohibit others to commercially exploit an invention. To be eligible for patenting, an invention should concern a new product or process, which is industrially applicable and sufficiently innovative. The key bone of contention of Biopatent legislation is the distinction between inventions and discoveries from nature, such as plants and animals, which are generally considered as non-patentable. National law may regulate the exploitation of inventions, according to standards such as safety, public health, animal welfare and/or ethical standards.

Whereas all EU member states have national patenting laws, they are also members of the 1973 European Patent Convention.<sup>2</sup> This convention set general requirements for patentability of inventions that originate in one of the signatory states. However, when it came to newer processes and products, such as those in biotechnology, this legal framework was considered insufficient. This at least was the opinion of DG Internal Market of the European Commission, which in a 1988 proposal for new legislation argued that this uncertainty could hamper the functioning of the internal market.<sup>3</sup> EU legislation on patents was deemed indispensable in order to increase the global competitiveness of the biotech industry in the member states. The proposal for a directive regulating the legal protection of biotechnological inventions aimed at the harmonisation of national legislation on biotechnology patents.

The draft of the 'first' Biopatent directive was technical in character.<sup>4</sup> Government delegations in the Council voiced reservations, for example about patenting human gene sequences, but these could be accommodated in the course of two years of negotiations. However, because the Council was

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- 2) The European Patent Office in Munich is an intergovernmental treaty organisation not related to the European Union. In 2000 and 2001, it published 25024 applications concerning new patents for biotechnological products and processes. 10 per cent of these applications originated in Dutch companies.
  - 3) COM (88) 496 final – SYN 159, 17 October 1988; OJ No C 10, 13.1.1989, p. 3.
  - 4) Explanatory note with the new Commission draft proposal (COM/1995/663/final): '(...) not that the ethical dimension was ignored but, at that time, it appeared that the exclusion from patentability of inventions, the publication of exploitation of which would be contrary to public order or morality [...], met the need to take into account the ethical dimension' (p. 5).

unable to accept Parliament's amendments issued in its 'second reading' of the text, a 'conciliation procedure' was initiated in September 1994. After long deliberations, this group meeting of national government representatives and members of the European Parliament approved a text for an adapted proposal and paved the way for a political solution. However, the absolute majority for adoption of the compromise was not reached and the proposal was rejected.<sup>5</sup> This has been explained by political inexperience: it was the first time that the Parliament used its right to veto a directive according to the 'co-decision-procedure'.<sup>6</sup> Moreover, the Parliament's delegation in this committee was internally divided, so that in the plenary they 'failed to act cohesively, let alone strategically' (Judge and Earnshaw 2003, 261). Third, MEPs were most probably influenced by the 'No Patent on Life' campaign by Greenpeace and pro-life organisations, protests voiced during a 2-day public demonstration outside the plenary.<sup>7</sup>

The European Commission and the member state delegations, which had approved the text in earlier instance, were 'infuriated' to go through the whole process again (Paterson 2003, 339). But mounting criticism on the ethical considerations of biopatenting notwithstanding, DG Internal market, led by Commissioner Mario Monti decided to draft a new proposal.<sup>8</sup> This text, issued in December 1995, was to become Council and Parliament Directive 98/44/EC. The reconstruction of the agenda setting and negotiations and decision-making on this Biopatent directive is central to this chapter.

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- 5) It has been suggested that the fact that the plenary took place in Brussels also contributed to the defeat of the vote of the committee, as plenary meetings in Brussels tend to be less well organised than those in Strasbourg (Earnshaw and Wood 1999, 296).
  - 6) The co-decision procedure was introduced in the Maastricht Treaty, which entered into force in 1993. This suggestion is forwarded in an internal letter on the EP's voting behavior to the State Secretary of Economic Affairs, 3 March 1995.
  - 7) For adversaries, the Biopatent directive is known as the Life Patent Directive.
  - 8) COM/95/661/final

Table 8.1 Key dates in the shaping of the Biopatent directive 98/44/EC

1988	December: proposal Biopatent directive issued by DG Internal Market
1995	January: Joint text conciliation committee rejected by the European Parliament December: DG Internal market issues new text
1996	WG intellectual property discusses proposal
1997	July: First reading European Parliament November: Internal market Council reaches common position
1998	May: European Parliament accepts common position July: signature Council and European Parliament
2000	July: Deadline for implementation

### §3. Identifying key actors

#### §3.1 Actors at the domestic level

In comparison with other member states, patent law is relatively important for the Dutch economy, which is composed of many R&D-intensive company sectors. At the time of the negotiations over the Biopatent directive the Department of Legal Affairs at the Ministry of Economic Affairs was responsible for co-ordinating biotechnology policy. When specific issues, such as human genomes or breeder's rights came up, the government departments of Public Health and Agriculture were involved in the drafting of the Dutch negotiating position. However, central co-ordination was in the hands of a senior Economic Affairs official. It was this official who was responsible for representing the Dutch government position in the Council working group on Intellectual Property / Patents / Biotechnology. In order to ensure the link with the implementation phases, the responsible official was assisted by an expert from the national Patent Office (Bureau Industriële Eigendom),<sup>9</sup> the office responsible for the implementation of the directive.

Both delegates sat as observers on the Netherlands biotechnological industry's interest organisation (NIABA: Netherlands' Biotech Industry Association) Committee on Industrial Property Rights, in order to 'facilitate information exchange' between the industry and the government department responsible for national biotechnology regulation.<sup>10</sup>

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9) Since 2005: Nederlands Octrooiencentrum.

10) Source: anonymous interviewee.

As to the organised interests, on the pro-side of the directive was the national biotechnology industry, organised in NIABA. This organisation represents the majority of the Dutch biotechnological companies in healthcare, food, agriculture and environment and is active in the fields of lobbying and advising governments as regards to biotechnology. It is a member of Europabio, the European Association for Bio-industries representing 25 national associations, which deals with information exchange and interest representation as regards to EU biotechnology legislation. NIABA works through Europabio when it comes to influence attempts directed at the EU level, but also operates individually, for example by organising formal and informal discussions with Dutch MEP's.

Opponents of the subject matter were animal welfare organisations (Dierenbescherming) and environmental lobby groups (Alternatieve Konsumentenbond, Milieudefensie). The reconstruction shows that their shaping actions were primarily directed at the Ministry of Economic affairs, during the phases of agenda setting and negotiation. The main bone of content was the scope of protection of animals suffering from biotechnology and whether this provision should include a proportionality clause. Once the Biopatent directive was adopted, the NGO's were quoted as being 'deeply unhappy' with the directive text<sup>11</sup> and continued their lobbying efforts directed at national parliamentarians held responsible for transposition and implementation into national law.

### *§3.2 Key actors at the EU level*

DG Internal Market at the European Commission was without doubt the main pusher behind the agenda setting and drafting of both the 1988 and the 1995 text proposals for common Biopatent legislation. The speed by which a new text was drafted in 1995, just after the European Parliaments' plenary rejection of the first draft, has been explained by both economic and political reasoning (Kamstra 2001, 215). Interest organisations uniting biotech and the pharmaceutical industries were furious about Parliament's rejection. Large economic interests were claimed to be at stake by the legal vacuum between national and international patent laws and.

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11) According to a spokesman for the Netherlands animal welfare group Dierenbescherming, quoted in Reformatorisch Dagblad, 12 May 1998.

The Commission argued that the uncertainty as regards to the scope of legal protection for biotechnological inventions had only increased since 1988. This view was disputed, however. Respondents question the added value by the new directive claiming, first, that the issue matter was actually sufficiently regulated by the European Patent convention and, second, that biotech research advances at a pace in which keeping legislation up to date is virtually impossible. Third, experts are of the opinion that the legal requirements for patenting should not be confused, in principle, with ethical considerations as to the effective granting of patents. The latter can always be regulated at the national level. Thus, political considerations played an important role in the Commission-drive exhibited in the agenda-setting phases. DG Internal Markets' push for the directive is understood by its desire for EU involvement in the 'booming' biotechnology sector and to broaden the scope of its competencies.

In drawing up the proposal, the Commission departments consulted with industry associations, relevant experts and various interest groups.<sup>12</sup> During the shaping process, the 'chef de dossier' had frequent contacts with the MEP rapporteur and a number of Committee delegates as well as the representatives from the member states, EPO and WIPO and the industry. He was also heading the Commission delegation at the working group level.

During the negotiations, the member state governments were represented at Council level by experts, permanent representatives and the relevant government ministers. The delegations' positions can roughly be summarised in two groups. First, the Spanish, Belgian and Danish delegations were very active in proposing working documents including text amendments for specific articles in a number of instances and the French delegation was active in proposing rewordings of particular articles.<sup>13</sup> Regular comments as to the contents of the directive were put forward by the Italian, French, Netherlands, Austrian, German and UK delegations. Second, with the exception of issuing a number of scrutiny reservations, the Irish, Swedish, Greek, Portuguese, Luxembourg, Finnish, Belgian and Italian

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12) See the proposal text for an overview of consulted parties.

13) See the comments made in the consolidated text 21 October 1997.

delegations were less active in shaping the proposal text. They may have bandwagoned with other delegations, but seldomly put forward initiatives.<sup>14</sup>

The draft text of the new Commission proposal was received by the European Parliament in January 1996, in order for the text to be examined in parallel with Council deliberations. After some initial discussion, the responsible committee on Legal Affairs and Citizens' Rights appointed Willi Rothley (GER/PES) rapporteur for the directive; an unprecedented number of five other committees were also charged with drafting opinions. In June 1996, the Committee held a hearing of experts, followed by monthly meetings to June 1997. On 15-16 July, the plenary meeting in Strasbourg voted on the amendments in the first reading, of which many emanated from the European Parliament's Green group, which had delivered three of the five draftsmen in the committees. The Legal Affairs Committee tabled 64 amendments and 2 additional amendments by the Socialist group. The Commission had already signalled before the vote to take in an amended proposal, which it immediately issued in August 1997.

The European Parliament received the common position of the Council in March 1998. Almost all of the EP's amendments were taken over in this position although opponents fought for support for introducing only a single amendment, which had been adopted in first reading. This could have led to a 'conciliation procedure'. However, upon advice of the rapporteur the directive was adopted unamended by a majority in the May plenary. Even at this point, the directive remained highly contentious and many MEP's voted against.<sup>15</sup> Whereas Dutch MEP Elly Plooy (ELDR) was quoted as being very content with the directive –fellow national MEP Maartje van Putten (PES) claimed that the directive gives too much freedom to 'commercialism'.<sup>16</sup>

As to organised interests and lobby groups active at the EU level, from the first parliamentary deliberations, the directive was targeted by interest

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14) Their tacit support notwithstanding, Belgian and Italian delegations in the end abstained from voting in the Council meeting of November 1997. See below.

15) Report of the EP's plenary meeting, 12 May 1998.

16) Quoted in: *Reformatorsch Dagblad*, 12 May 1998.

groups and patient and industry associations (Patterson 2000).<sup>17</sup> Support came from the biotech and pharmaceutical industry, including the European Board of Chemical Industry Federations (EBCIF), from patent organisations, including the European Patent Office (EPO), as well as from patient's organisations interested in the exploitation of inventions (under the heading 'no patents no cures'). On the other side of the spectrum, the moral, ethical, health and environmental dangers and risks associated with exploiting scientific knowledge were highlighted by interest groups such as Greenpeace, Friends of the earth and pro-life organisations. The European Coalition On Biotechnology Patents, including 40 NGO's, was created in December specifically as a lobby-platform for the second reading in European Parliament.<sup>18</sup>

#### **§4. A bird's eye view on the shaping process**

##### *§4.1 Agenda setting*

Although the Commission underlined the similarities between the 1988 and 1995 proposals, the latter was obviously more carefully drafted as regards to a number of contentious issues discussed in the European Parliament. The text explicitly aimed to make clear which issues were patentable and which were excluded from patenting. One of the main features concerned the principle that inventions concerning plants and animals (art. 4.2) as well as isolated human elements (art. 3.2) may be patentable, provided that the legal requirements for patentability apply. Moreover, the directive defined the exceptions, amongst which the exclusion of patentability of plant and animal varieties (art. 4.2) and inventions where exploitation is deemed conflicting with considerations regarding public order and morality (art. 9). The draft text was not subject to much controversy within the European Commission and was sent to the Parliament and the member states in December 1995.

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17) Rapporteur W. Rothley at his address to the plenary on 15 July 1997: 'The European Parliament has been under considerable pressure over the last few days, not only here in the House. The Protestant Church in Germany, my own church, allowed Greenpeace to stage a children's crusade against this Directive at its General Assembly'.

18) See for example: Press statement: Greenpeace calls on European Parliament to halt patenting of life, Brussels, Greenpeace, 14 July 1997.



§4.2 *Shaping the text: 1 ½ year of negotiations*

The Working Group on Intellectual property/patents/biotechnology discussed the draft text during a number of (bi-) monthly meetings under Irish Presidency in January, March, April and June 1996. Text proposals were issued, inter alia, by the Spanish delegation, which suggested a number of reformulations of the original proposal, and by the Belgian delegation as regards to the incorporation of an EP amendment.<sup>19</sup> Within the European Parliament, the regular processes of ‘inter-service consultation’ about the directive took a relatively long time, because of the complex subject matter and so many committees were involved. The Committee on Legal Affairs and Citizens’ Rights appointed Mr Willi Rothley rapporteur. In June 1996, the Committee on Legal Affairs and Citizens’ Rights held a hearing of experts followed by meetings in January, February, April, May and June 1997.

From the beginning of the examination of the second draft proposal, MEP’s were actively lobbied by interest organisations. These represented environmental concerns, patient organisations, developing countries and animal welfare groups. It took until Summer 1997, when the amendments on the draft text, as formulated in six Committees were discussed in the plenary. The plenary accepted the proposal with 66 amendments. These related, inter alia, to the difference between discovery and invention in connection with the isolated elements of the human body; the exclusion from patentability of animal races and plant varieties; procedures for human reproductive cloning and processes for modifying the germ line genetic identity of human beings; the requirement that the ethical dimension must always be taken into account and the possibility that this dimension can be suitably appraised; the substantial medical usefulness of the inventions in question must be balanced with the suffering that certain inventions could inflict on animals and redefining the farmers’ privilege concerning the sale of breeding stock animals. The Parliament also requested the incorporation of a reference to a new Advisory committee on ethical implications (art. 7), which would assess biotechnological dimensions.<sup>20</sup>

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19) Interinstitutional file nr 95/0350 COD, nr 6673/96, 19 April 1996.

20) The Commission on Legal Affairs voted on the draft with 16 votes to 5, with 3 abstentions. The plenary voted 513 MEP’s, 388 in favour (more than 75%), 110 against (Kamstra et al, 2001, 8). OJ C 286 22 Sept 1997, p. 87.

The comments by member state delegations and the amendments of the first reading were incorporated by those responsible at the Commission's DG Internal Market. The amended text, including 65 of Parliament's 66 amendments, was approved by the College in August 1997.<sup>21</sup> In response to the comments, the draft, *inter alia*, made more explicit the unpatentability of the human body *in all stages of its development*.<sup>22</sup> Moreover, it mentioned explicitly the non-patentability of human cloning and techniques for modifying the germ line genetic identity of human beings and techniques making use of embryos and proposed a non-exhaustive list of issues deemed contrary to the public order and morality (art. 6(2)), including cloning, methods using a human embryo and methods likely to cause animal suffering without any substantial medical benefit. In response to the Parliament's request for a particular committee, the Commission delegation proposed to have the ethics committee replaced by its standing group on biotechnology. The latter and one final amendment, concerning the international commitments of the Union, were contested by the Commission delegation.

When the working group continued its examination of the amended proposal, it was agreed that the Luxembourg Presidency aimed for political agreement be during the December Internal Market Council meetings. From this moment, the Danish and Netherlands delegations maintained scrutiny reservations, because of domestic parliamentary opposition to the draft directive.<sup>23</sup> The working group continued the examination of the amended proposal in September and October, a consolidated draft being published on 21 October.<sup>24</sup> Two questions regarding the reference to international agreements (art. 1) and a new ethics committee (art. 7) were put before a COREPER meeting on 31 October. Both issues were solved at the level of the permanent representatives, there being broad consensus with the

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21) Amended proposal COM 10510/97, August 1997.

22) From the first negotiations on the draft text, the Spanish delegation had been very active in proposing the use of human being instead, but this suggestion was discarded by the majority of delegations in September 1997 (see nr 10893/97).

23) Summary of proceedings of the working party meetings 10 and 11 July, 10285/97, 31 July 1997.

24) General Secretariat to working party: Consolidated text, 11252/97, PI 45, CODEC 528, 21 October 1997.

exception of the reservations of the Netherlands and Danish delegations regarded the patentability of (inventions concerning plants and) animals. For its meeting in November, COREPER was invited by the Presidency to see whether these reservations could be withdrawn, but the committee was not successful in this respect.

#### *§4.3 Final decision-making*

In December 1997, the internal market Council voted on the amended text of a common position, the result being a Luxembourg presidency compromise over the last remaining issued. A common position was reached with a qualified majority, the Netherlands delegation voted against conform its reservation. The Belgian and Italian delegations abstained from voting. Interestingly, Italy had changed its position at the last moment, due to an intensive lobby campaign by four NGO's including Greenpeace and WWF Italy which managed to involve parliamentary committees on Biotechnology and thereby made the Italian government reverse its opinion.<sup>25</sup>

The Council common position being sent to Parliament, the Parliamentary Committee on legal affairs adopted the common position without any amendment. In the plenary, however, 60 amendments were discussed, but all were rejected because the necessary majority could not be found.<sup>26</sup> Especially the Greens expressed their furiousness about what they considered the 'weakness of the Parliament to surrender to lobbyists'.<sup>27</sup> The

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25) In October 1997, WWF Italy and Greenpeace launched an appeal against the 'life patent directive' with was subscribed by dozens of NGO's. In November, the government delegation abstained from voting. According to respondents, this change of position can be directly attributed to the domestic public unrest as regards the issue, as Italy had not been active in the shaping stages thus far (source: interviews).

26) In its recommendation to the plenary, the Commission on Legal Affairs on 30 April 1998 again voted divided: 17 votes to 7, with 2 abstentions. In the plenary, 432 members voted in favour, 78 against. Whereas in the second reading of the co-decision procedure, an absolute majority of 314 votes were needed, no amendment reached more than 221 votes. See note from GS, 11 May 1998, nr 8400/98.

27) The European Parliament clearly placed commercial interests over ethical values' Magda Aelvoet MEP, Co-President of the Green Group in the EP said after the final vote.

Council in its meeting of 25 May adopted the directive in accordance with its common position as an A-item and the directive was published in the official journal and is referred to with number 98/44/EG.

#### *§4.4 Implementation and transposition*

Opinions diverge on the impact of the Biopatent directive on the practices of patenting biotechnological inventions. According to industry representatives in favour of harmonization of diverging national patenting practices, the directive is ‘merely a compilation of existing legislation and case law’ (source: anonymous interviewee). From interviews, it can be assessed that the European Commission is satisfied with the final result – the *Biopatent* directive is considered a relatively clear and consistent directive, which leaves little scope for interpretation to the member states. Critics have argued, first, that the directive confuses the practical regulation of patent applications with ethical considerations regarding public order and morality whereas the latter should be regulated at the national level. This divergence of opinions has led to a politicisation of an otherwise technical subject matter. A second critique is that because the text is a fragile compromise, its complex provisions can be interpreted freely (Beylevelt et al. 2000, 158).

Although this analysis focuses on negotiating the directive, it is relevant to outline the subsequent processes of implementation and transposition in the member states (see also Mastenbroek and Van Keulen 2005). With hindsight, pushers for the directive could argue that was adopted ‘just in time’, considering the debates in civil society and amongst organised interests about the ethical dimension of biotechnology, which emerged in the implementation phase, for example in France. The directive, which had to be implemented in national legislation by January 2000 has been contested in eight member states, which were taken to Court by the European Commission in September 2003.<sup>28</sup> This Court case included the Netherlands as in the eyes of a majority in the Dutch Second Chamber, the directive

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28) According to the Commission: ‘Non-implementation of this Directive is putting the European biotechnology sector at a serious disadvantage. Despite the Commission’s efforts to co-operate closely with them in order to try and accelerate the implementation procedure, the member states concerned failed to reply satisfactorily to formal requests in the form of reasoned opinions – sent by the Commission in December 2002’, Source: Press Release 10 July 2003.

conflicted with the national patent law (*Rijksoctrooiwet* 1995). Just after the adoption of the text at the EU level, the Dutch Second Chamber requested the government to lodge legal action with the Court of Justice to have the directive annulled.<sup>29</sup> The bone of contention lied in the provisions on patentability on genetically modified plants and animals. Most notably the PvdA and the CDA factions argued that the government could have done more to uphold the exclusion of inventions concerning plants and animals. In October 2001, the Court denied the request for annulment, making clear that the Netherlands had to implement the directive.

In the following debates between government and Parliament, which focused on the interpretation of provisions from the directive and national patent law, both sides requested advice from different authoritative institutions, such as the University of Amsterdam.<sup>30</sup> Most amendments, including the most controversial nr 11, dealing with the patentability of inventions concerning plants and animals, were adopted by Parliament in April 2002. The Upper Chamber subsequently dealt with the issue, but delay occurred due to a period of domestic political unrest after the murder of Pim Fortuyn in May 2002 and the coming into office of the successive coalition governments Balkenende I and, shortly thereafter, Balkenende II. Finally, on the basis of a special *novelle*-procedure,<sup>31</sup> the Upper Chamber endorsed the implementation in November 2004. The ECJ has withdrawn the pending court case from its registers in February 2005, thereby for once and for all taking away the fear that the Netherlands could still be penalised for transposition the directives five years after the deadline.

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29) Lower House Parliamentary papers 19744 nr 23, ECJ Case C-377/98; October 19, 1998. The objections were primarily ethical in nature, but the Netherlands primarily challenged the proposal's legal base, claiming, inter alia, that the directive should have been adopted using Unanimity instead of Qualified Majority Voting, that it infringes upon subsidiarity provisions (Kamstra et al. 2001, 67).

30) Lower house parliamentary papers 26568 nr C, p. 4.

31) A *novelle* is a bill correcting a bill that is pending in the Upper Chamber.

## §5. Reconstructing negotiations around key issues

This section will focus on the main issues during the negotiations on the text of the directive at the legislative stages of Council and Parliament deliberations. During these negotiations, three types of comments can be identified: clarification proposals, scrutiny reservations and specific text proposals. The analysis of the shaping process has focused primarily on the third category, as these interventions can be supposed to be most related to the advancement of national preferences into the negotiation process. The successive phases in the reconstruction are based on the method of process analysis (see for more on the research design chapter 7).

A close reading of the minutes of successive meetings of delegations at the administrative and political level reveals that the key issues during the shaping of the directive included the following five issues.<sup>32</sup>

Table 8.2 Controversies in the Biopatent directive

Issue	Article original proposal	Article in final text:
Scope of protection	2 and 4	2 and 4
Relation to international agreements	17 and 7	1
Requirements biological material	–	26 and 27
Farmer's privilege	13	11
Ethics committee	–	7

### §5.1 Scope of protection of biotechnological inventions (art. 2 and 4)<sup>33</sup>

The proposal of the European Commission stated in art. 4.2 that 'biological material including plants and animals (...) except plant and animal varieties as such shall be patentable'. During the first deliberations in the working group on intellectual property-patenting, several government delegations including that of the United Kingdom proposed to add a definition of *plant variety* to the definitions in article 2. This proposal was opposed by the

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32) There were issues around which negotiations centred for some time, such as the order of articles which was redrafted by the Commission to include the definitions before the other provisions and the wish expressed by the delegation of the United Kingdom to provide for the possibility of a redraft, upon which the Commission reacted that it was entitled to send a redraft to the member states any time it wished.

33) Article numbers refer to the final text.

Spanish, French and Commission delegation, which argued that such a definition is included in Regulation 2100/94/EC and it would necessitate a definition of animal variety. Subsequently, the Belgian and Spanish delegations argued to include a definition of animal variety. The Commission delegation argued that animal variety had never been defined and would lead to complications. The French delegation proposed a redraft, so as to avoid the need to include a definition of animal variety, but this imitative was opposed by the Danish delegation, which insisted on avoiding all possible references to a product patent for animals in the text, this issue was not taken over in the final text of article 2.3.

When the working group at its meeting in July 1997 took up examinations of the amended proposal, after the ‘first reading’ by the European Parliament, two reservations were voiced, both related to the scope of the directive. The Danish delegation voiced concerns about the exclusion of processes for modifying the somatic genetic identity of human beings for cosmetic purposes. The working group did not go into this discussion, arguing that nothing in the directive prevented the Danish government to include its concerns (which it did in an unilateral statement concerning article 6(2b)). The Netherlands delegation indicated that, although it was ‘prepared to consider the proposal favourably’, it continued to oppose the issue of patentability of inventions concerning plants and animals.<sup>34</sup> This reservation originated in national parliamentary concerns: in a June 1996 motion, members of parliament had warned the responsible Minister of Economic Affairs that it would oppose European legislation that it considered conflicting with relevant national legislation. In particular, reference was made to a provision in the national bill on patents (*Rijksoctrooiwet*) in which the possibility of patenting inventions concerning plants and animals had

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34) ‘Summary of proceedings’, working party on intellectual property (patents/biotechnology), 31 July 1997, interinstitutional file nr 95/0350, nr 10285/97. This position is explained to the Parliament in a letter of the state secretary for Economic affairs, 19744 nr 21, 26 September 1997. It states that ‘In case the positions of the member states do not change, the possibility that a directive is issued including a provision that has been explicitly deemed undesirable by your Chamber should be taken into account’ (p. 3).

been explicitly excluded after long discussions between the executive and the legislative during debates on the new bill in 1993.<sup>35</sup>

When negotiations proceeded between the member states at Council working group level from summer 1997 onwards, the Netherlands delegation expressed its reservations on art. 4 during all subsequent Council-level meetings. The delegation attempted in vain to have the difference between scientific discovery and patentable inventions, in particular as regards to art. 5 of the amended proposal relating to human body parts, applied explicitly to inventions concerning plants and animals. This suggestion was rejected by the other delegations, which explicitly doubted the need for this provision.<sup>36</sup> The Netherlands Council delegation finally voted against the common position, which was endorsed by a qualified majority in May 1998.

*§5.2 Relation to international commitments (art. 17 (deleted) and art. 7)*

The relation to international commitments of the EC and the member states was relevant in two instances. Firstly, as regards to the provision related to the burden of proof. This was regulated in art. 17 of the original proposal, where the burden of proving that a *new* product is not the same as a patented process, lies with the producer of the new product taking into account the legitimate interests of the protection of the defendant's business secrets. This provision was explicitly supported by a number of delegations (German, Spanish, Austrian, Portuguese, United Kingdom and Danish). However, the Italian delegation argued that the corresponding article 34 of the Agreement on Trade-related Aspects of International Property Rights (TRIPS) allows the burden of proof to be reversed also if there is a substantial likelihood that the identical product was made by the patented process. Supported by the French and Netherlands delegations, it argued that the directive proposal should not be confined to only one of those conditions.

In a later meeting, the German delegation argued that it had received information that the second option in the TRIPS treaty had been included to

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35) Second Chamber: Motie 18(19744), 27 June 1996. Opposition came from social-democratic (PvdA) and christian-democratic (CDA) parties, as the liberals and social-liberals were not very outspoken as to this dossier.

36) Summary of proceedings working group meetings 10 and 11 September 1997, issued 25 September 1997, nr 10893/97, p. 2.



satisfy a third country whereas the EC had been accepting only the first option, that was now included in the draft proposal.<sup>37</sup> Having considered these remarks, the Commission delegation decided, after the working group meeting in July, to delete article 17, since this would add nothing to existing international commitments. Second, in its first reading, the European Parliament proposed replacing the original reference to national and EC legislation in 7.2. with a reference to the rights and obligations of the member states pursuant to international agreements, in particular the 1992 Biological Diversity Convention and the TRIPS Agreement.<sup>38</sup> The Council legal service delegation argued that this would add nothing to the existing obligations in view of the case law. However, it was judged by all delegations in the working group and the Commission delegation that ‘given the sensitivity of the subject matter of this directive (...), transferring the content of this provision to the recitals could be interpreted negatively’ by the European Parliament.<sup>39</sup> This consideration was taken over by Coreper in November and in its common position, the Council concurred with the Commission on this point. A new recital was added, stating that this group may be consulted only where biotechnology is to be assessed. The Council was motivated by the wish ‘to remove all doubt about the possibility of this Group being involved in the procedure for issuing a specific patent’.<sup>40</sup> The TRIPS agreement was also subject of a proposal by the Belgian delegation to bring art. 6(1) on the concept of public policy, fully in line with the working of art. 27 TRIPS. This was discarded by the other delegations.<sup>41</sup>

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37) Outcome of Proceedings, working party meeting 15/16 April 1996, doc 8334/96, 18 June 1996, p. 5

38) This amendment was nr 45 tabled by the rapporteur and nr 67 by the ELDR group. See information note on the outcome of the 1st reading, General Secretariat, nr 10103/97, 22 July 1997.

39) Doc. 11559/97 presidency to CORPER 24 October 1997, interinstitutional file 35/0350.

40) Statement of the Council’s reasons, Common Position, nr 12882/1/97, 3 March 1998, p. 7.

41) Summary of proceedings of the working party meeting on 6 November, nr doc 12688/97, 24 November 1997.

*§5.3 Requirements concerning inventions consisting of biological material (recitals 26-27)*

In first reading, the European Parliament proposed a new article 8a in its amendment 76, requiring patent applications to indicate the geographical origin and to provide evidence that the material was used in accordance with the export provisions, and an application of human material should publish the name and address of the person of origin. According to the European Commission delegation, this amendment could not be taken over in the proposal, as these provisions would go beyond the international commitments of the member states and the Community in the *1992 Biodiversity Convention*, as well as be contrary to requirements on the protection of personal data. The latter were also relevant in the discussion on a new article proposed by the Danish government delegation, taking over recital 16f included by the Parliament (about the free and informed consent required if body material is taken from a human being). The Danish delegation insisted on the inclusion of a new article, the issue was submitted to COREPER and Council-level. This request was joined by the Belgian delegation including a new wording of recital 16f.<sup>42</sup> A majority of delegations including that of the European Commission argued that this would constitute exclusion additional to the list already collected in article 6(2). The question whether this should be a unilateral statement by the Danish delegation or the Council and the European Commission was put to the Council.

These concerns were taken over by the government ministers meeting in a plenary Council session in December. They argued, furthermore, that the patent's office would not be able to verify the compliance with foreign legislation or that the agreement and consent of the person involved had been given. However, in the recitals, features of this amendment relating to the opportunity of the person from whose body material is taken to express 'free and informed consent' (recital 26) and the information on the geographical origin of the material (recital 27).

*§5.4 Derogations for farmers or 'farmers' privilege' (art. 11)*

The Commission delegation had foreseen in the proposal an important agricultural derogations from patent rights: when the material is sold to a

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42) See note P to Council, 21 November 1997, nr 1249397 p. 11.

farmer to use the product of its harvest or the protected livestock for further propagation or breeding purposes on his own farm. This derogation is called the ‘farmer’s privilege’ and was regulated in article 13 of the original proposal. In June, the working group took over a text proposal by the Committee on Agricultural Organisations and the General Committee on Agricultural Cooperation’s to change the wording of article 13.1 (‘the sale of propagation material’) to ‘the marketing of reproduction material’. This suggestion was explicitly supported by the Belgian, German, Irish, Austrian and British delegation, under the condition that the text would be agreed upon by the Parliament. The text proposal was taken over by the Parliament and included in the final text by the Commission delegation.

#### *§5.5 Reference to an Ethics Committee*

The European Parliament proposed in its amendment 78 to introduce a new article concerning an Ethics committee to be set up to assess all ethical aspects of biotechnology, for which the European Commission should propose a composition and terms of reference. The Commission felt it appropriate not to set up a new body to this aim and referred instead in a new article 7 to its Advisers Group on the ethical implications of biotechnology, which existed since 1991.<sup>43</sup> The Council legal service argued that the legislative was not empowered to assign tasks to a group set up by the Commission and suggested to refer this new article 7 to a recital, which was supported by the Italian delegation, whereas the Danish delegation wished to keep it as an article. COREPER finally decided to take over the Commissions proposal but included a provision to art. 7 that the ‘group may be only consulted where biotechnology is to be assessed at the level of basic ethical principles, even where it is constituted on patent law’.

### **§6. A reconstruction of Dutch shaping attempts**

This section sets out by reconstructing influence attempts by the Dutch government in the different stages of shaping of the directive, as identified in §3. Subsequently, upon the basis of this reconstruction, a critical evaluation is made of the process and results of these influence attempts.

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43) Presidency to COREPER, 24 October 1997, nr 11559/97.

*§6.1 Reconstruction of the shaping process Agenda setting*

The prime responsibility of the Ministry of Economic Affairs for the co-ordination of the decision-making process and subsequent implementation of EU legislation concerning biotechnology and intellectual property was never disputed. This role was considerably facilitated, as the Dutch attitude towards harmonising national regulation concerning biotechnological patents was rather favourable. More specifically, the Economic Affairs Ministry is closely related to industry and favours ‘communitarisation’ of the single market and related initiatives for policy harmonisation at the EU level. The negotiating position of the officials involved in formulating and representing the Dutch government position was therefore rather positive as to the objectives of the first drafts of the Biopatent directive. It should be noted that these officials have close relations with the national biotechnology industry organisation and there is regular expert feedback between the industry associations and the Ministry. In the case of the Biopatent directive, during the negotiations, comments on text proposals for the directive have been regularly exchanged.

With hindsight, it is remarkable to note that the first drafts of the Biopatent directive did not draw any attention from organised interests – with the exception of the (traditionally strong) agricultural lobby. The ethical dimension was completely absent from what was considered a largely technical harmonisation debate. Although some delegations had voiced some concerns about the application to human material, a majority of delegations, including that of the Netherlands, stood firmly behind the compromise agreed upon at a political level between European Commission and the Council in 1994.<sup>44</sup> However, the first Biopatent directive failed because of the effective engagement of various organised interests opposed to what was called ‘patenting life’ (see Paterson 2000, Kamstra et al. 2001). The political level effectively took up these public concerns in the phase of the second reading by European Parliament, which ultimately led to rejection of the text in March 1995. However, although Dutch NGO’s were involved in this EU level lobby campaign, from the documents and interviews consulted it does not appear as if this ‘rapid politicisation’ of the draft directive in 1994-1995

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44) Letter to Second Chamber, 19744 nr 15, 17 April 1996, p. 10: ‘The Netherlands has exercised the necessary influence as regards the draft-directive, which has been rejected by the European Parliament’.

was mirrored at the domestic level. There is no mention of contacts with the Dutch government and the European Commission in order to influence the shaping of a new text, which was the subject of discussion between the Commission and member state delegations from January 1996 onwards.

### *Negotiations*

In the first six month of discussions at the administrative level, the Dutch delegation appears as a moderately active participant. The delegation did express concerns and reservations but usually bandwagoned with concerns voiced by other delegations. No text proposals were issued. At the domestic level, the debate started in April 1995, when the working group had already discussed the directive several times. Dutch Parliament had just passed in 1995 a revision of the national law on patents (*Rijksoctrooiwet*) including provisions that explicitly excluded the patentability of inventions concerning plants and animals, articles that ran contrary to the European Patent Convention and the proposed directive text. During parliamentary deliberations on this bill, there had been important political battles over an amendment sustained by a majority of the House, declaring inventions concerning plants and animals unpatentable. This was eventually taken up in the bill (art. 3).

During these parliamentary proceedings, no reference was made to proceedings at the EU level, where the European Commission had been drafting a directive with precisely this controversial issue as a defining element. This is remarkable considering the fact that the coordinating actor in both cases was the Economic Affairs Ministry. However, the ‘BNC-fiche’, a summary by which parliament is informed about the consequences of Commission proposals, defined the main point of departure of the proposal: the difference between unpatentable discoveries and patentable inventions (if new and technological) and that plants and animals are not excluded from patentability. The paper explicitly did not identify implementation problems.<sup>45</sup> The Dutch delegation had agreed with the common position on the draft directive in 1994 and the State Secretary of

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45) Second Chamber Parliamentary Papers, 1995-1996: 22112, nr 60, p. 3.

Economic Affairs claimed not to foresee any problems with the ‘fit’ of a new directive.<sup>46</sup>

### *Decision-making*

When, in spring 1996, national parliamentarians made it very clear to the responsible Cabinet minister that there could be no question of any circumvention of national patent legislation through new EU legislation, negotiations on the Biopatent directive had just been suspended in attendance of the Parliament’s second reading.<sup>47</sup> When negotiations resumed in summer 1997, the Dutch negotiating instruction was explicitly adapted to take into account parliamentary opposition concerning the provision on plant and animal patenting. However, as this concerned an element considered ‘central to the text’,<sup>48</sup> the Dutch concerns could not be accommodated in the course of the negotiations. Thus, when on 27 November 1997, the Luxembourg presidency compromise text was approved by a majority of delegations in the Environment Council meeting, the Dutch delegation voted against, with the Belgian and Italian delegations abstaining. It should be noted that the document analysis reveals that the State-Secretary for Economic affairs initially preferred to abstain from voting during the formal adoption of the Biopatent directive. However, the colleague within Cabinet responsible for European affairs convinced her of the desirability of a no-vote.<sup>49</sup>

### *§6.2 Development of positions and influence on the key issues*

The proposal of the Commission stated in article 4.2 that ‘biological material including plants and animals (...) except plant and animal varieties as such shall be patentable’. The reconstruction has made clear how the discussion focused on the *inclusion of definitions* of plant and animal varieties.

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46) Second Chamber Parliamentary Papers, 1994-1995, Parliamentary question nr 653 appendix.

47) ‘... We do not want to be governed by the EU’s directives’, quote MP R. Poppe, source: Second Chamber proceedings, nr 81-5232.

48) Quote from fax letter Ministry of Economic Affairs, to the Netherlands Permanent Representation to the EU, 3 March 1997, p. 2.

49) Internal Letter dated 12 April 2005.

In April 1996, when working group deliberations at the EU level were in full course, the State Secretary sent a letter to Parliament explaining the provisions in the draft directive relating to the patentability of plants and animals.<sup>50</sup> The rather complex explanation deals with art. 4.2 of the draft text and stresses that ‘the exclusion of plant and animal varieties [from patenting] cannot be interpreted that inventions of which the protection extends to plants and animals should fall outside the scope of patent law’. In a subsequent legal interpretation, the state secretary claimed that the scope of protection would only extend to those elements, which have been changed by technical, human intervention. It was stressed, however, that this is a mere interpretation of an otherwise legal subject and may be contrary to the explicit inclusion of plants and animals in article 4.2. Because the state secretary argued that the directive provides otherwise clear provisions as regards to the grounds for exclusion of patentability (art. 3 and 9), including those related to morality and public order and included a farmers’ and live stock breeders privilege, ‘in broad lines’, it would merit the support of the Dutch government and the Ministry pleaded for a constructive position of the Netherlands government in the negotiations over the directive at Council level. This would favour the creation of a level playing field in biotechnological industry.

In subsequent exchange of letters and a plenary debate over the congruence of the existing patent bill with the new directive proposal, this interpretation was opposed by a majority of the House. The Second Chamber requested the State Secretary by means of two political motions to oppose the issue of patenting plants and animals at Council-level.<sup>51</sup> At that point, the state secretary expressed her concerns about the feasibility of this request. In October 1996, she avoided answering the question whether the Ministry would have pleaded by the European Commission for changing art. 4.2, stating that the deliberations *at Council level* were momentarily suspended

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50) Second Chamber 18(19744), 27 June 1996. Opposition came from social-democratic (PvdA) and Christian-democratic (CDA) parties, as the liberals and social-liberals were not very outspoken as to this dossier.

51) Second Chamber 1995-6, 19744 nr. 17 and 18.

during the Parliament's second reading.<sup>52</sup> From the moment that deliberations continued over the amended proposal including parliamentary amendments, in July 1997, the Netherlands delegation expressed its reservations. This position was held during all subsequent Council-level meetings and voted against the common position endorsed by a qualified majority in May 1998.

The *relation to international commitments* of the EC and the member states was an issue coming up in the course of the negotiations. From the documents, it can be concluded that the Dutch government delegation was moderately active in the discussion as regards to art. 17, related to the burden of proof and the relation with TRIPS. The Italian and the German delegations have largely dominated this discussion, the latter arguing on the basis of information gathered over the interpretation of this particular international treaty. This resulted in the European Commission withdrawing its proposal for an article text.

There is no written proof of any intervention from the Netherlands delegation as regards to the amendment of the European Parliament proposing an explicit reference, in art. 1, to the rights and obligations of the member states pursuant to international agreements. There was unanimity as regards to the political sensitivity of the subject matter and the need to take over the EP's proposal in the final text.

In the first reading, the European Parliament proposed a new article 8a in its amendment 76, requiring patent applications to indicate the geographical origin and to provide evidence that the material was used in accordance with the export provisions, and an application of human material should publish the name and address of the person of origin. According to the Commission delegation, this amendment could not be taken over in the proposal, as these provisions would go beyond the international commitments of the member states and the Community in the 1992 Biodiversity Convention, as well as be contrary to requirements on the protection of personal data.

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52) Question asked by MP's Witteveen and Voute concerning biotechnology, sent 31 October 1996, answered 12 November 1996, Second Chamber, 1996-1997, nr 283.



These concerns were taken over by the government ministers meeting in a plenary Council session in December. They argued, furthermore, that the patent's office would not be able to verify the compliance with foreign legislation or that the agreement and consent of the person involved had been given. However, in the recitals, features of this amendment relating to the opportunity of the person from whose body material is taken to express 'free and informed consent' (recital 26) and the information on the geographical origin of the material (recital 27).

The *farmers and breeders privilege* was an issue explicitly welcomed by the Dutch government in its brief to Parliament. This can be explained by the traditional national economic importance of agriculture. The text proposal by the two agricultural interest organisations was not explicitly supported by the Dutch delegation but consensus was reached over inclusion of this wording in the amended Commission proposal.

The Dutch government has not been explicitly mentioned in a summary of proceedings over the debate concerning European Parliament amendment 78, to set up a new article about an *ethics committee* to be set up to assess all ethical aspects of biotechnology.

## **§7. Discussion**

This section is concerned with a first assessment and evaluation of how Dutch government representatives have attempted to influence the proceedings leading to the adoption of the directive on the legal protection of biotechnological inventions. For this, we deploy the framework for analysis that has been introduced in chapter 4 is deployed (see table 8.3).

At the time of the first steps of the European Commission into the field of biotechnology, in the late-1980s, the legal base for Commission involvement in this field was contested. The subject matter was considered to be regulated sufficiently by the European Patent Office. But when the first text proposal for the Biopatent directive was published in 1995, the legal base for community-level action was no longer a source of dispute between member states delegation. DG Internal Markets' push for the directive should be understood in the context of its desire to increase the EU's involvement in the 'booming' biotechnology sector.

Table 8.3 Relevant variables for the Dutch' governments shaping capacity in the case of the Biopatent directive

Shaping capacity	Will	Potential
<b>Stable variables</b>	<b>AMBITIONS</b>  Signatory to of European Patent Organisation; strong national biotechnology industry supports harmonisation; image of 'pusher' for internal market harmonisation	<b>CAPABILITIES</b>  Expert co-ordination at MinEA includes industry interests (green lobby goes European); high knowledge and expertise; ad-hoc coordination; strategic competencies disputed; active shaper, due to economic position; knowledge and expertise on topic
<b>Situational variables</b>	<b>PREFERENCES</b>  'Goodness of fit' of directive w. existing Rijksoctrooiwet disputed; difference of opinion government vs. parliament as regards to patentability plants/animals; activity NGO's in lobbying govnt/parl; active shaper changes position resulting in rather extreme position as regards to plant/animal patentability; national Council Presidency	<b>RESOURCES</b>  Issue salience increases from expert topic to politicised dossier; parliament bound hands of government delegation; linkage with Brussels through experts; ability to anticipate disputed; no institutionalised contacts EU institutions; flexibility of negotiating position; use of bargaining tactics disputed

Its activity was not limited to the stages of policy initiative, but stretched well into the negotiations. The Commission delegation was very active in pursuing agreement upon elements of the text, either helped by delegations of submitting own text proposals. This strong Commission involvement is clearly recognisable in the final text of the directive: the published text is largely similar to the original proposal submitted in December 1995.<sup>53</sup>

The starting position of the Dutch government with respect to the new Biopatent directive was rather positive. Macro-level conditions that have impacted on its shaping ambitions include its membership of the European Patent organisation and the large biotechnology industry within its borders. Moreover, the Dutch government and the key actor in this case-study, the Ministry of Economic Affairs traditionally supported internal market

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53) The recitals have been considerably extended and specified, mostly after the incorporation of the European Parliament's 65 amendments. About half of the original 20 articles have been subject to only small wording changes and at least the original text proposals nrs. 1.1; 6; art 7; 9; 10; 11; 12; 15; 16; 18; 19; 20 have been integrally taken over in the final text.

harmonisation initiatives as this was considered an important element of the creation of a ‘level playing field’ for industry. This ambition was mirrored in the preferences voiced by the Dutch government delegation, which was praised for its expertise on the complicated subject and can be ranked as a modestly active shaper. Although it did not often put forward particular text proposals, the minutes show how the delegation regularly commented upon proposals and forwarded arguments in favour or against particular elements of the text.

Relevant variables in terms of shaping potential are the importance of expertise and knowledge, both at the national level as well as brought into the negotiations by Dutch government representatives. At the domestic level, the directive was the responsibility of experts at the Ministry of Economic Affairs. In order to ensure the link with the implementation phases, the responsible official was assisted by an expert from the national Patent Office (Bureau Industriële Eigendom), the office responsible for the implementation of the directive. The Dutch government negotiating position at Council level was actually formulated and represented without any high level debates taking place about the form and contents of the directive. The formulation and representation of the Dutch position did not attract attention outside the small circle of national experts involved. The consulted documents mention regular visits of nationally-based NGO’s to the government department and the Second Chamber – one official even noted the animal welfare group *Dierenbescherming* directly instructing parliamentarians for a vote on the directive in the plenary meeting.<sup>54</sup> However, the reconstruction demonstrates that the supposed positive effects of patent harmonisation were valued, whereas relatively little attention paid to ‘green’ and animal welfare concerns voiced by lobby organisations in letters to the executive and the parliament. There is a traditionally high degree of interwovenness between the co-ordinating ministry for Economic Affairs and the industry. Respondents explained this by the specialist knowledge needed for insight into the intricate field of biopatenting. As one respondent mentioned, it is regarded as particularly useful for both sides to have close contacts and to exchange information about positions and developments. The reconstruction suggests that similarly close contacts with NGO’s are apparently regarded considerably less interesting.

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54) Source: anonymous interviewee.

Notwithstanding its positive contribution to the negotiations on the basis of a solid expertise and interest in the subject matter, the negotiating position of the Netherlands has not been overly consistent over the years. In contrast with the case of the Gas directive, this inconsistency was not due to conflicting preferences within the executive, but rather to parliamentary reservations about a central provision in the draft directive text, which was considered as contrary to national legal provisions. One important variable in this respect is ‘goodness of fit’. During the negotiations, the fit of the legal text of the directive with existing national legislation in the Netherlands became source of hot parliamentary debates. Here, a conflict of opinion existed between the responsible ministry and a small number of interested MP’s of the Labour and Liberal parties. On the one hand, as the directive closely followed existing case law, and for some experts it ‘changes the substantive law of patentability in Europe relatively little’ (Kamstra et al. 2002, 45). On the other hand, the subject matter was highly sensitive which made the directive in the course of the negotiations a symbol and a focal point for ethical concerns. The issue salience and thereby the political interest into the shaping of an initially highly technical directive increased in parallel.

The dispute between Dutch parliament (Second Chamber) and the responsible ministry of Economic Affairs came to focus on one particular element: the exclusion from patentability of genetically modified plants and animals. From April 1996, members of parliament came to voice concerns over the alleged misfit between the infamous article 4.2 of the draft directive with national patent law. This issue was extremely salient to political parties and interest groups. Parliamentary concerns were fed by NGO’s, in particular patient groups and animal rights movements, such as the animal welfare group *Dierenbescherming*. The latter was prominently present in debates both in national parliament and the European Parliament.

Although the responsible ministry tried to convince parliament about the supposed ‘fit’, parliament forced the executive to voice its concerns in the ongoing negotiations. The resulting change in position of the Netherlands government on the article in question was voiced for the first time at working group level in July 1997. At this point in time, negotiations had just been resumed after the European Parliament’s first reading. That the Dutch delegation voiced concerns about an article so crucial to the text came as a surprise to the European Commission and the national delegations but there

was general apprehension about the need to take a parliamentary reservation into account.

Referring to the framework for analysis, this very interesting conflict between parliament and the responsible ministry does call into question the anticipation capacity, both of the executive and the MP's themselves. In the 'fiche' sent to parliament with a summary of the Biopatent proposal in 1995, explicitly no implementation problems were foreseen.<sup>55</sup> From that point in time, there was no regular exchange of opinions between parliament and the ministry during the negotiations. The conflicting issue about the provision in question did not come up until the last stage of Council working party negotiations. The government delegation was bound to make a political reservation at Council level once the strength and impact of the parliamentary reservations became clear. Responsible officials from the Economic Affairs Ministry, all too aware of the political pressures from the European Commission, member state delegations and industry for agreement upon the Biopatent directive were from that moment stuck between a rock and a hard place. Already a clear majority emerged in favour of the texts as they had been agreed in earlier negotiations. This observation, combined with the favourable stance of the Dutch government delegation until then may explain why there are no indications both from the side of the government, nor from EU level sources, about representatives actively contacting the Commission during the stages of drafting and negotiating the proposal in order to influence its contents. The answer to relevant parliamentary questions in October 1996 does not shed more light on this matter.<sup>56</sup>

Neither is there proof of contacts between the Dutch government and the European Parliament, which is remarkable as the Biopatent directive has later been called one of the most prominent cases of European Parliament

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55) Second Chamber Parliamentary Papers, 1995-1996: 22112, nr 60, p. 3.

56) The question to the State Secretary, sent in 31 October 1996, was formulated as follows: 'Did you plea (...) at the European Commission for adaptation of the relevant directive so that plants and animals cannot be patented? If so, how did other parties react on the Dutch input?' The answer did not mention the Commission, however, it referred to the proceedings in the Council working group, which would not convene before 1997 because of the second reading in parliament (Lower House Parliamentary papers, 1996-7, annex, nr 283).

involvement in the shaping of an EU directive (Earnshaw and Woods 1999). Considering the fact that the Dutch national EU Council Presidency of 1997 coincided with the preparations for Parliament's second reading, it would have been normal if contacts between Parliament and Council would have been intensified. The Council presidency offers member states multiple opportunities in this respect (Elgström 2004). The reconstruction offers no indication, however, that the Dutch government has specifically attempted to influence the voting behaviour of individual or groups of MEPs, be it in favour or opposed to the directive. A possible explanation is the fact that the controversial issue of patentability of plants and animals is so central to the directive text that it is not fit to serve as a basis for any amendments by the EP.<sup>57</sup>

In the plenary meeting in which the second reading of the Council common position was tabled, several Dutch MEPs tabled or supported at least one of the 60 amendments on the directive text (Maartje van Putten (NL/PES); Doeke Eisma (NL/ELDR); Hans Blokland (NL/EPP)). However all amendments were rejected because the necessary majority could not be found.<sup>58</sup> Elly-Plooy (NL/ELDR) was quoted in the minutes referring to the 'strange position of the Netherlands, which was the only member state voting against' (the directive).

Having discussed two particular case studies of EU legislation and the shaping actions of Dutch government representatives in this process, the question is what these empirics learn us about national shaping capacity from an analytical point of view and for the shaping of EU policies in general and the efforts of the Dutch government in particular. This is the subject of the next, concluding chapter.

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57) Therefore, one official was quoted by stating that 'the Netherlands has finished all its options in the preparation of and the voting over the Council's common position'. Letter to Permanent Representation EU, 3 March 1998.

58) Whereas in the second reading of the co-decision procedure, an absolute majority of 314 votes were needed, no amendment reached more than 221 votes.

# Chapter 9

## Discussion and Conclusions

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### §1. Introduction

Which variables are relevant for the shaping capacity of a member state government within the EU? This concluding chapter seeks to tentatively answer this question by reference to the analyses and findings presented in the previous sections. In the first section (§1) the empirical data from the country analysis and both case studies are examined. In §2, these findings are compared with the framework for analysis. Then, the results are discussed from an analytical perspective, to come to conclusions as to the ability of the Dutch government to influence the formulation of new EU policies (§3). A last section stretches these conclusions to avenues of further research to be explored.

### §2. Discussing the Dutch government's shaping capacity

#### *§2.1 ... According to analysts and practitioners*

Chapter 5 has presented an analysis of the ability of the Dutch government to influence the formulation of new EU policies. Consistent with the framework for analysis, the discussion included both the contents and direction of national EU policies and the capabilities and resources that the Dutch government can deploy, in order to realise these objectives. Interestingly, both dimensions of shaping capacity – ‘will’ and ‘potential’ – have been subject to debate between policy analysts and practitioners.

As for its European ambitions, the Netherlands can be characterised as a ‘multiple-issue’ member state. This qualification refers to the finding that EU-related actions by government representatives are generally not guided by a pre-determined selection of dossiers or policy priorities. In contrast, ‘single-issue’ member state governments are primarily interested in the ‘pragmatic purposes’ of co-operation, such as a fair share from the structural funds or EU contribution to internal democratization processes. One explanation for this broad-ranging involvement in EU-affairs lies in the fact that the Netherlands is a founding member state of the EU. The government has from the beginning been closely involved in the development and broadening of *all* policy domains affected by European cooperation. This can be an advantage: the fact that Dutch negotiators are omnipresent increases the action radius for coalition formation and facilitates the emergence of package deals and trade-offs between dossiers. On the other hand, investing time and energy in formulating and expressing its preferences on such a large variety of topics also has disadvantages. Aiming at the common policy-shaping process with many ‘arrows’ (Derlien 2000, 73) requires much of a national government in terms of resources and capacity. For a relatively small administration, this is a considerable requirement.

For decades, national and foreign policy-making was a matter for representatives of different societal groups or ‘pillars’. A small political elite dominated the shaping of a national EU policy and neither its actions ‘at home’, nor those at the EU level were ‘disturbed’ or constrained by political or public debates. This permissive consensus was challenged in the course of the 1990s, when the alleged costs of integration came to feature in gradually developing political debates on the merits of further EU enlargement and cooperation in new policy fields regarded as politically sensitive, such as justice and home affairs. The vigour of debates on the height of the national EU contribution has developed since then to a point at which the influential advisory Council for Social and Economic Affairs has warned that the public ‘fixation on the financial aspects of European co-operation threatens to become a serious political handicap’ for EU-related actions (Sociaal-Economische Raad 2004, 191).

The prospect of enlargement, the growing political salience of policies decided largely at the EU level and the deterioration of the budgetary position of the Dutch vis-à-vis the EU’s common budget contributed to a



further ‘weakening’ or ‘loosening’ of the relatively stable objectives, which have traditionally characterised the Dutch government stance towards the EU. That core values have not been replaced by new ambitions or strategy has caused some ambiguity and uncertainty (Van Grinsven and Rood 2004, 119). Since the mid-1990s, prominent politicians and policy-makers have shown doubts as regards to the role and position of the Netherlands in the enlarged EU. This unease has sometimes resulted in a rather bold and confrontational stance of Dutch politicians during EU level Council meetings, which has surprised fellow negotiators (Van Keulen 2004).

A review article on national EU policy-making by the former Dutch Permanent Representative to the EU, Bernard Bot, may serve as an illustration. This text comments rather critically on the presumed change from a ‘supranational’ and consensus-oriented EU policy to a more pragmatic stance in which the ‘Dutch interest’ featured more prominently (Bot 2002). Interestingly, Bot would later become Foreign Minister in the Balkenende-II government, the coalition in which the State Secretary for European Affairs has publicly proclaimed a departure from the traditional ‘European evangelism’ of the Netherlands, and to take ‘the national interest’ as a new guiding line for EU-directed operations (Nicolai 2004).

This debate on how to deal with the increasing impact of policies jointly decided at the EU level is not exclusive to the Netherlands. In many long-standing member states, authorities have been confronted with a steady polarisation of opinions over the merits of co-operation within an enlarged and deeper Union. However, due to a lacking tradition of debate on the direction and contents of national EU policy, in the Netherlands, this debate hit harder. The effects have been visible in public approval ratings: since the late 1990s, the percentage of Dutch citizens thinking EU membership is ‘a good thing’ decreased from 72 to 64%. The number of those who think that the Netherlands profits from membership fell from 65 to 55%.<sup>1</sup> Although these are still relatively high figures, the trend is clearly decreasing.

In parallel, there is discussion on the potential of the Dutch government to influence EU level developments. A number of serious incidents since the mid-1990s have reinforced the impression that the Dutch administration at central and decentral level has some problems in adequately meeting the

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1) Source: Eurobarometer 59, European Commission, Brussels, 2002

demands of membership. First, the 1997 ‘*Securitel*’ case law of the Court of Justice demonstrated that the government had not taken EU policy implementation obligations sufficiently serious and focused political attention to the impact of EU laws and regulation and the need to take legal obligations seriously.<sup>2</sup> Then, in 2001, the European Commission required a considerable amount of EU funds granted to the Dutch central and decentral governments to be repaid into the EU’s coffers, because of alleged financial mismanagement.<sup>3</sup> And, last but not least, consistent with recent contributions to the growing body of Europeanisation-literature, the transposition deficit of the Netherlands as regards to EU directives has been related to the allegedly insufficient capacity at the central government level to absorb EU legislation adequately and in time (see Van Haersolte and Van den Oosterkamp 2003, Verschuuren 2004).<sup>4</sup>

### *§2.2 ... and shaping in practice*

It has been concluded in the theoretical part of this study that existing EU studies and Europeanisation-literature has thus far focused on either the domestic effects of EU policies making, or the ways in which national administrations organise their national EU-policy. The purpose of the case study analysis presented in chapters 7 and 8 has been to single out relevant variables for national shaping capacity, by means of a detailed reconstruction of the negotiations around two EU directives in the field of energy liberalisation and biotechnology patents, in order to find out how one particular member state attempts to influence the EU-policy-making process. A second purpose was to trace the motivation and actions of the Dutch

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- 2) In 1997, it emerged that some 400 national laws and regulations concerning technical product specifications had not been duly notified to the European Commission and could thus be declared invalid. This caused much political and parliamentary debate, after which the ministries of Economic Affairs and Justices were forced to take emergency measures. The debacle became known as the ‘*Securitel*’-case (referring to Court of Justice Case C-194/94 *CIA Security International SA v. Signalson SA and Securitel Sprl.* (1996)).
  - 3) See Hoetjes (2001): *ESF Affaire geeft burgers krachtig anti-Europees signaal*, in: *NRC Handelsblad*, 1 August 2001.
  - 4) On an implementation scoreboard issued by DG Internal Market on 5 November 2005, the Netherlands ranked 17th of the EU 25 as regards the number of directives not transposed in time.

government, in order to test the framework for analysis designed in chapter 4.

In the case studies, a number of ‘macro-level’ conditions have been identified. First, as a stable variable relevant for Dutch shaping potential, respondents have repeatedly referred to the relative length of membership of the Netherlands of the EU, which is believed to have enhanced the level of trust this founder member enjoys with its European partners. Second, the relative economic and political clout of the Netherlands, a small but internationally oriented member state, combined with the positive approach of the Dutch government towards initiatives for internal market harmonisation is said to have facilitated the position of Dutch government representatives. Third, as variables considered relevant for understanding national shaping potential, key words are departmental autonomy; ad-hoc co-ordination, expert-oriented shaping and a relatively re-active way of dealing with EU level developments. These particular characteristics of national EU policy-making have been discussed extensively in chapter 5. The often-assumed consequences for the day-to-day shaping are sustained through the empirical analysis (see table 9.1).

Overseeing the empirical findings, it is interesting to examine which variables from the framework can be ‘highlighted’ and which variables do not come up in the case studies.

Overseeing the reconstruction of the two directives, a factor that cannot be neglected is ‘*goodness of fit*’. Although both cases concerned ‘first-pillar’ issues – and were thus expected less conflictuous, considering the generally positive attitude of the Dutch government for this policy domain – the Commission plans for energy liberalisation and biotechnology regulation caused concerns in The Hague. In the case of Gas, there was initially strong policy misfit. This was overcome by ‘ambition’: the political pressures for opening up a former monopoly. The Biopatent Directive seemed in line with the ambitions, of the leading department, to increase the international level playing field for the Dutch biotechnology industry. The alleged legal incongruence between the Commission proposals and Dutch law was only remarked by the parliament in a relatively late stage. This misfit explained the Dutch no-vote and later problems with the implementation of the directive, once decided.

Table 9.1 The framework for analysis revisited

Shaping capacity	Will	Potential
<b>Stable variables</b>	<p><b>AMBITIONS</b></p> <p>Strong economic position both as regards to energy and biotechnology; image of 'pusher' for internal market harmonisation and creation of a level playing field; policy fit</p>	<p><b>CAPABILITIES</b></p> <p>Departmental and expert autonomy; ad-hoc coordination; strategic competencies disputed; linkage with Brussels through experts; regular contacts with national capitals; ability to anticipate disputed; no institutionalised contacts EU institutions</p>
<b>Situational variables</b>	<p><b>PREFERENCES</b></p> <p>'Goodness of fit' with national legislation disputed; government is an active shaper; relatively extreme policy position; EU Council Presidency 1997 has impacted on preferences</p>	<p><b>RESOURCES</b></p> <p>Issue salience increased from expert topic to politicised dossier, especially during the Presidency; more resources available; expert dominance in shaping stages; strategic competencies enhanced in wake of Presidency; flexibility of negotiating position; use of bargaining tactics disputed</p>

In line with recent academic literature, the cases also demonstrate that 'goodness of fit' is not a static notion. Governments can push for misfitting legislation in order to accommodate domestic change, which is demonstrated by the case of the Gas Directive. Neither is the degree of fit always undisputed: in the case of the Biopatent directive, the congruence with existing legislation was subject to internal discord between the executive and the legislative.

The findings about the relevance of the fit between existing and new legislation relate to another variable in the framework: '*issue salience*'. Both cases-studies suggest that the higher the relevance of the topic, and thereby: the motivation of a government to shape actively, the better initial constraints or limitations on shaping potential – such as fragmentation or small size – can be overcome. Although the Dutch government ranks as a small member state with corresponding political clout, in the two cases, representatives of the Dutch government acted according to their colleagues as particularly active 'shapers' of the final text. Not only in the case of the Biopatent directive, which was initially undisputed, but also in the case of the Gas Directive. In the latter case, the issue salience was disputed at first. The Netherlands' position, as an international gas supplier with a carefully constructed national gas policy, made the lead department initially

particularly reluctant as regards to EU liberalisation initiatives. As a result of international pressures for globalisation, which were picked up by a new coalition government, this position became untenable. Although there was widespread reluctance within the government administration, due to strong political pressures a process of domestic change occurred, up to the point at which the emerging liberal stance of the Dutch government fitted with the Commission initiatives for keeping plans for creating an internal energy market alive. When the switch towards a new energy policy was made, the same national experts who had originally resisted European initiatives, became strong pushers for the Gas Directive, which was listed as a priority for the 1997 national EU Council Presidency.

In terms of *resources*, the knowledge and expertise of the negotiators light up as particularly prominent. Both at home, i.e. in the Hague, and at the EU level the process of shaping has been dominated by energy specialists (Gas directive) and patent lawyers and biologists (in the case of the Biopatent directive). This is consistent with academic observations about the leading role of national experts both in the technical elaboration of decisions in intricate webs of committees, ‘comitology’, as well as in the subsequent phases of transposition, implementation and enforcement at the national level (Rhinard 2002). As expertise turns out to be so prominent in these two cases, it should be assessed critically from a normative perspective. Expertise is by no means a neutral policy instrument. Through processes of socialisation, experts can form ‘advocacy coalitions’ or ‘epistemic communities’ held together by shared values and knowledge, which can and will be used strategically.<sup>5</sup> This is sustained by the case study of the Biopatent directive, where technical expertise collided with the ethical dimension associated with the sensitive topic of biopatenting.

At first sight, when it comes to the shaping, national government representatives take the lead. In the case of the Gas directive, there been hardly any involvement of other stakeholders. However, before jumping to intergovernmentalist conclusions, the findings merit closer examination. The behaviour of the sole exception, Gasunie, the former, partly state-owned

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5) See for more on theories of social action and the role of expertise and ideas in policy analysis the work of Paul Sabatier (1988), Peter Haas (1992) and Giandomenico Majone (1989).

monopolist company directly affected by new liberalisation plans pushed by the European Commission is consistent with governance-studies analysing the ‘bypass’ of the national level. Apparently, Gasunie purposely favoured Commission oriented venues over the traditional national route in order to voice its concerns over the effects of a too large degree of market opening. And, although the Biopatent directive was much more controversial, also in this case, the degree by which the national government and the parliament have been lobbied by interested parties has been overshadowed by the volume and intensity of lobbying efforts at the EU level, most notably directed towards the European Parliament deliberations over the proposal. Apparently, interest groups hold the impression that the national government constitutes a more indirect, secondary way to influence EU level proceedings, than the primary way: direct access to actors and institutions operating at the EU level.

In both case studies, there was dissensus about the direction and contents of the preferences and negotiating positions to be voiced by the government delegations, with negative effects on *anticipation capacity*. Due to the relatively low *co-ordination capacity* within the Dutch government, which hampered the active pursuit of a coherent and consistent negotiating position, disagreement within the executive could sustain long into the negotiating phases. In the case of the Gas directive, the fact that for long, no coherent position could be reached internally made that the Commission-phase was ‘missed out’ and that there could be no question of actively influencing the internal process of drafting the proposal within this EU-institution. In the case of the Biopatent directive, political fragmentation and discord over the interpretation of the text between the lead ministry and parliamentarians who came to contest the Dutch negotiating position, explains why influence attempts have neither been directed at the European Commission, busy re-drafting the proposal at that stage, nor the European Parliament. The latter opportunity was even less suitable as different political parties disagreed on the stance to take. At that point in time, the government delegation had already come a long way in pursuing consensus in the EU level negotiations, before it was stopped by the national parliament. From the moment at which parliamentary concerns came out in the open, the Dutch delegation acted as if no other option was available than to bluntly veto the final text. This finding is consistent with the traditional tendency of the Dutch government delegation to focus its influence attempts on the member state dominated-Council phases. Although this would

confirm intergovernmentalist assumptions about member states focusing on the Council, this perspective cannot satisfactorily explain why internal discord within the Dutch government about the national position could not be solved at the domestic level.

As for *strategic capacity*, neither of the two cases reveals a government strategy about the desired negotiating outcomes and the actions to be pursued to achieve these objectives. As for the Gas Directive, once the national policy shift towards energy liberalisation had been effectuated, internal discussion about the Gas Directive were not so much about ideology, but rather concerned with the concrete design of legal articles. What is striking in this respect is the high degree of flexibility offered to individual negotiators. The reconstruction shows that if Dutch negotiating mandates and text instructions proved impossible to accommodate, it was in the hand of government representatives to decide and find solutions. As, dependent on issue at stake or the article under consideration, many different and highly flexible coalitions characterised the negotiation process, the Dutch delegation was able to put its mark on the discussion without needing extensive consultations with the home front.

In the case of the Gas directive, Dutch shaping capacity was evaluated very positively. The Dutch government made its policy shift to liberalisation at the right moment to be able to put its mark on the shaping of the text of this directive, which proved to be an essential first step in the opening up of formerly nationally organised energy markets. Considering the implementation problems that arose at a later stage, the case of the Biopatent directive can hardly be evaluated so successfully. In this respect, the fragmentation and decentralisation of the Dutch system of managing EU affairs can be recognised as crucial for the gap between the legislative and executive. But these internal problems have actually had very little impact upon the way the Dutch government representatives operated at the EU level. There, expert government representatives, which did not share the objections raised by the parliamentarians, quickly accepted the inevitable: the Dutch position would be outvoted by a majority in the decision-making phases. No special efforts were made to influence the process through the venues offered by the European Commission or, even more markedly, the European Parliament. As the national parliament did also not press for such actions, the Council vote was cast accordingly in order to satisfy the domestic constituency. This remarkable reconstruction only sustains the

image of national experts charged with EU negotiations ‘moulded’ into the EU level context, even when strong domestic objectives arise.

Overseeing this and the previous section, it can be concluded that the case studies sustain to a very large extent the findings of the country study. The largely decentralised Dutch system of preparing EU negotiations favours a wide responsibility for experts and specialists. This makes for relatively flexible negotiating positions, which facilitates a strong Dutch role in the making of trade-offs and package deals in the EU’s system of text negotiations. Due to relatively low co-ordinating and strategic capacity, experts are not hampered by top-down assigned priorities or strategies. What do these findings mean for our understanding of shaping capacity?

### **§3. Confronting results with theory**

#### *§3.1 Discussing suggestions from theory*

In chapters 2 and 3, divergent academic perspectives on national shaping capacity have been discussed. The central position and the dominant role of member states within ‘classical’ integration theories have been somewhat differentiated in more recent EU studies approaches. In the new ‘opportunity-structure’ described by governance and Europeanisation studies, governments are confronted with potentially threatening conditions, most notably the partial autonomy of supranational institutions, the growth of majority voting and the ‘bypass’ of nationally based actors which are directly active at the EU level. Opportunities for governments emanate from their omnipresence at all levels of the policy process, which is consensual by nature, and their internal adaptation to the demands of membership that served to increase the effectiveness of national interest representation. It has been discussed in chapter 3 how these ideas have not yet been described and tested as well-developed hypotheses. In this early stage of theoretical development within the nascent ‘third wave’ of EU studies, they are best regarded as suggestions, which merit further elaboration, testing and evaluation. It is relevant at this point to link re-connect empirics with theory.

To begin with, the supposedly dominant role of the supranational institutions in the process of shaping new EU policies– most notably, the European Commission and the European Parliament – is considered as having a negative impact on the shaping potential of governments. Looking at the



cases, the ‘pusher’ role of the European Commission has indeed been pivotal. If not for the strong incentive provided by the Commission to keep the issue of energy liberalisation and patent harmonisation on the Council’s and Parliament’s agenda, it is not clear to what extent the legislation would have been shaped in its current form. As both cases were subject to the co-decision procedure, also the European Parliament has put its mark upon the final texts by adding many amendments to the common position reached between the member states in the Council. Interestingly, this impact of European Commission and Parliament is not mirrored in Dutch shaping behaviour, in which the traditional focus on the Council is strongly present. Nor is the supposed positive effect for governments to make use of ‘fellow nationals’ within the EU administration, often pictured as one way for governments to make up for the competencies lost to supranational institutions, sustained by the empirical analysis. The cases provide no traces of any benefit that the Dutch government may have had of having Dutch officials or representatives in both institutions. To be sure: this does not mean that ‘getting nationals inside Brussels’ is an irrelevant element of national shaping capacity. It cannot be concluded on the basis of these two-case studies to what extent this finding can be explained by country-specific considerations, such as the earlier mentioned dominance of the Dutch government on the Council-phases of policy-making, by situation variables, or whether there is generally no impact for governments of having nationals within the Commission and Parliament’s staff bureaus.

Another suggestion prominent in newer EU studies perspectives is concerned with the effects of the increasing practice of majority voting which would take from national governments a once-prominent instrument of interest representation: the national veto. Empirical analysis of voting records however show that voting is not a common practice. Consensus is an important norm in EU policymaking – a finding sustained by the two case studies in this study. In the case of the Gas directive, the possibility of a vote was mentioned not once during the negotiations. The ‘shadow of the vote’ can obviously not be reconstructed, however, all findings seem to indicate that this case-study offers a prime example of the text negotiations for which the EU is famous, aimed at getting every delegation on board as regards to the acceptance of the final text.

As to the issue of voting, the case of the Biopatent directive was sharply different. This case study constituted one of the rare cases of a no-vote of a

national delegation, complemented with two abstentions (Belgium and Italy) – which did not impede decision-making on the final text. Interestingly, the data analysed for the reconstruction of this case-study do not explain *why* the latter two delegations abstained. The paper trail shows that Dutch delegation, once confronted with parliamentary dissensus over one prime element of the directive text, at a point also considered to abstain from voting. The formal reason is perhaps exemplary for the consensual nature of the negotiating process: notwithstanding domestic opposition, the government delegation explicitly did not want to impede the directive from being agreed. No doubt, this consideration can be explained by the fact that the lead ministry did not share parliamentary concerns. In the final Council meeting the Dutch government minister indeed cast the only no-vote. But, taking into account that no proof has been found for other influence attempts by the Dutch government to prevent the directive from being adopted, this vote seems primarily driven by the desire to make a symbolic gesture towards national parliament. Consistent with the analyses in chapter 6, in the EU's consensus culture, the prevailing 'shadow of the vote' is thus a relevant variable for explaining national shaping behaviour.

Was the central government 'bypassed' by other stakeholders that were not – or did not feel – included in preference formation processes in The Hague? In the two particular cases examined, the lower tier of government – provinces and municipalities – was not directly affected and hence not involved. But respondents in both cases offer confirmation of active involvement – albeit to a varying degree – by different categories of non-state actors, including industry associations and lobby groups. At the domestic level, industry association's views were explicitly taken into account when the Dutch position was being formulated. This finding can no doubt be explained to the traditionally strong ties of the Economic Affairs ministry with domestic producer and consumer groups. In case of environmental legislation, the lead department of the Environment would probably have lend a welcome ear to the 'green' lobby groups. In this case, as groups concerned about the negative effects of energy liberalisation and biotechnology soon found out that they could not be accommodated 'at home', they found ways to influence the policy-shaping process at the EU level. Organised interests in the private sector, which could rely upon strong – personal – ties with the Ministry, opted for a two-level strategy, directed at The Hague and Brussels. The latter venue was dealt with through their EU-wide interest associations for getting their point across to decision-makers.

Then, the suggestion that ‘Europeanised’ governments would be better suited for EU-directed actions as a result of the advantageous effects of internal adaptation to EU demands. What is clear is that the leading government ministry in both cases has made the most of its discretionary powers. There is no proof of active involvement of the co-ordinating authority both within the ministry – the department for internal affairs (BEB) or at the inter-ministerial level – the Ministry of Foreign Affairs. In this respect, the results of Europeanisation were clear: the Economic Affairs ministry was willing and able to deal with the Gas directive on its own. The actions of the lead department are to a large extent explanatory for national shaping capacity in both cases. The policy shift towards liberalisation and the resulting pusher role for the Gas Directive, which had been supported by the Foreign affairs ministry in earlier stage, could not be effectuated before the ministry itself, under political pressure, made the turn. Before and during that shift, the Dutch position in the energy working group was downright negative.

In the case of the Biopatent directive, although it was properly informed when the directive proposal was issued, parliament only awoke to the consequences of the directive in the final stages of decision-making. Even then, the lead ministry did not respond to explicit calls by a handful of parliamentarians to voice the Dutch concerns to the European Commission and the Parliament. Even when a rare national veto was imminent, there seems not to have been any interest in the matter from the side of the co-ordinating authorities. Although it is difficult to say whether more coordination could have impeded the problems arising in later stages, it is interesting that such a controversial issue did not attract more interdepartmental or high-level involvement. On the one hand, it can be concluded that the Europeanisation of national government has been successful, to the extent that lead ministries and officials consider themselves able to operate at the EU level without any domestic strings attached. On the other hand, from an intergovernmentalist perspective of national interest representation under a co-ordinated domestic heading, the findings of both cases are rather surprising.

This holds even more, considering the coincidence of both cases with a national EU Council Presidency, a period considered a welcome incentive for re-thinking national ambitions and potential as regards to EU policy-making. For the Dutch government, this particular Council Presidency, in 1997, has served as impetus for a temporary strengthening of national

coordination procedures (Rood and Van Keulen 2004). However, this effort is not mirrored in the two cases analysed in this study. It should be noted that in the case of the Gas directive, the prospect of holding the Presidency during the negotiations facilitated a structured approach to the decision-making stages and Dutch input therein. In the run-up to the stint at the helm, ‘plans of attack’ were developed by a special project-team assigned to the directive and a number of informal meetings at the EU level were organised in which some hot potatoes were discussed. At the same time, the Dutch stint at the helm has not reinforced contacts, about the dossiers, with the Council Secretariat and the European Parliament. Perhaps it is due to the pressing workload of the Presidency for the small central organisation, that in this case, the Presidency may have reinforced the tendencies – already present in the Dutch administration – to focus on the Council phases of decision-making.

### *§3.2 Evaluating national shaping capacity: a matter of differing perspectives*

Similar to the puzzle that Europeanisation studies are concerned with (‘to what extent are member states Europeanised?’), a question driving this study has been ‘to what extent is the EU nationalised?’ Overseeing the analysis and findings of this study, it can be concluded that the answer to this question depends on the perspective of the observer regarding national interest representation.

At first sight, the findings will appeal to an intergovernmentalist, who has a strong allegiance to the ‘traditional’ image of the member states purposely advancing national interests through interstate co-operation. To begin with, the cases do not sustain the much-cited estimate by Hull (1993, 83): that the first Commission proposal determines the final text for up to 80%. Indeed, in both cases, the European Commission was a strong pusher in the agenda setting phases and it can be debated whether there would be question of community involvement in the field without the strong activity of the European Commission. However, once negotiations between member states advanced, the proposed texts were considerably watered down in order for all delegations to be accommodated. From this perspective, the conclusion that in both cases, the Dutch government focuses on the Council level, is not very surprising. Although newer EU studies tend to highlight the opportunities for the shaping offered by supranational institutions, the Council phase remains the prime channel for influence for national

governments. Government representatives are omnipresent at strategic positions within the structures of EU policy-making and continue to hold a key position in both the ‘shaping’ and setting of new EU policies and the subsequent ‘taking’ or implementation into national legal systems (Börzel 2003, 3). This finding is difficult to explain from the perspective offered by governance studies: that of continuous interaction between state and non-state actors in self-steering networks. Notwithstanding the limited scope of these case studies, the findings indicate a central role of government representatives, who rely upon deliberations amongst equals, i.e. representatives of other member states.

But there is more to it than meets the eye at a quick glance. The literature review and the case studies discussed in this study suggest that the relevance of domestic conditions and characteristics for national shaping capacity is enormous. The shaping capacity of the Dutch government can be explained for a large part by variables related to the national polity; policy and politics. Consistent with the perspective coined ‘bureaucratic politics’ (Allison and Zelikov 1999, see also chapter 3 §4.2), the political and administrative fragmentation of the playing field at home and the incapacity to overcome this with timely and high-level co-ordination hampers timely formulation and subsequent coherent representation of the negotiating positions put forward by the Dutch government representatives. This finding contradicts the image, offered by (liberal) intergovernmentalists, of government representatives operating at the EU level with coherent mandates that have been formulated in effective co-ordination systems ‘at home’. Rather, it sustains the finding in comparative volumes such as that of Kassim (2000, 259): ‘[...] the policies that governments pursue at the EU level are the outcome of often complex processes of intra-governmental bargaining, bureaucratic politics and co-ordination of variable quality’. For understanding the motivation and potential of a government to be active at the EU level a profound knowledge about domestic policy style and organisation is thus vital.

The ability of a government to influence EU level proceedings depends on ‘what happens at home’. A finding from the case-study analysis is that internal fragmentation of the Dutch government has actually facilitated the role of Dutch government representatives. In the EU level system of text negotiations, flexible positions and changing alliances are in high demand. In this expert-oriented negotiating process with its own dynamics, official

positions provided only the broad framework for particular issue, for example: pro or contra market opening and liberalisation, pro or contra EU level arrangements for biopatenting. The case reconstructions show that preferences for text elements were traded off and combined in package deals by the experts around the table. It is telling that this procedure is regarded by many respondents as explanatory for the shaping capacity of the Dutch government. Because Dutch government representatives were very informed as to the matters at hand, due to their relative autonomy and the fact that they were not constrained by intricate domestic co-ordination procedures, their positions were so flexible to be easily reshaped and accommodated in the negotiations.

This does not mean, however, that the processes and outcomes of EU negotiations can be exclusively explained by processes, procedures and actors within national capitals. The performance of nationally-based actors is, from the first stages of policy initiation up to the setting of the final texts, closely linked to processes of policy formulation and representation by other member states. Instead of clearly separate processes of domestic formulation and subsequent representation, the negotiating positions represented by government officials were defined and reformulated in interaction with both state and non-state actors and in negotiation with the European Commission and other member states. This contests the image of national preference formation taking place in “splendid (...) isolation” (Kassim and Wright 2001, 298). The picture that emerges is thus one of ‘the Monnet-method revisited’. Thereby, the claim central to intergovernmentalism and its the modern variant, that of member states as unitary actors and domestic preference formation processes as clearly distinct from EU level negotiations, is contradicted. However, again, key players in this process continue to be formal representatives of national governments. Where the playing field is thus mainly intergovernmental, the game being played in expert-networks has many characteristics of a multi-level game.

The multi-level nature of the shaping capacity implies difficulties for national democratic control, transparency and accountability. The finding that EU policy is shaped through technical and specialist processes governance feeds into horror images of the ‘bureaucratisation’ of the EU. By Euroskeptics, it is even argued that bureaucrats would push for the establishment of a super-state at the EU level (Gillingham 2003). The EU’s democratic deficit refers to the finding that EU legislation often falls

between the prerogatives of national parliaments on the one, and the European Parliament on the other hand, so that no institution provides for effective parliamentary during the process of ‘shaping’ new policies. As the case studies suggest, one clear problem of routinised EU policy-making is that national politicians responsible are not actively engaged in national- or EU level processes related to the shaping of new EU policies. Comparative research projects on the role of national parliaments deal with the impact of Europe suggest that in most member states, national parliament do have a similarly low degree of involvement on EU policy-making and politics (Wessels 2003). Although the arrangements for involving parliament in the making of national EU policy-making differ across the member states, even the much-cited example of Denmark, where an active parliamentary ‘European Committee’ plays an important role in devising mandates for Danish EU policy, demonstrates how due to lack of information and resources the role of parliament remains too re-active to play an effective role.

In normative contributions to EU studies, many solutions for this problem have been suggested (Risse-Kappen 1996, 74). These include not only strengthening procedural involvement of politicians and parliamentarians in EU policy-making, for instance by reinitiating the ‘double mandate’ for MP’s to sit both at the European and the national parliament. One condition is, more generally, that the awareness of member of parliamentary bodies and politicians with regard to EU affairs and dossiers is increased. If the close link (and, sometimes, the causal relation) between ‘national’ policies and those decided at the EU level would be clear in an early stage, the artificial separation between the EU, as one dimension of foreign policy-making, and nationally organised policy areas could be bridged. A related suggestion is to stimulate critical publicity of the EU in the member states, as media accounts of what happens in the EU are generally focused on European Council summitry instead of the day-to-day policy-making structures which have been the subject of this study.

#### **§4. Avenues for further research**

A recurrent section in studies and reports is concerned with possible directions of future related research projects. Overseeing the findings of this study, the following types of research deserve priority.

*1) ... More thinking about the 'shaping'*

In providing an overview about the current state of play in EU-member state relations, with a special emphasis on one particular member state, this study aimed to serve as a first step in the direction of more shaping-based studies. One recurrent observation has been that existing EU studies analyses discussing relevant moments and variables for how a member state government attempts to influence the EU are rare. Contributions focus either on analysing landmark decision-making, such as treaty changes or budgetary issues (Moravcsik 1999); they serve to explain implementation performance (Treib 2004) or focus on one particular element of EU policy-making, such as Presidencies (Hosli and Soetendorp 2000) or voting analysis (Schneider and Bailer 2004).

A new strand of academic thinking about EU-member state relations seeks to avoid the one-sided loop of either 'top-down' or 'bottom-up' studies, by relating what happens in the implementation phases with the policy-shaping phases. This has been called the 'third wave' of EU studies, after classical integration theory and 'impact of Europe' Europeanisation studies. The purpose is to come to a more complete picture of what happens in the *interaction* between national governments and the EU level of common policy-making and the role and position of other stakeholders that play a role in these processes. Where multi-level governance has sketched a picture of how different jurisdictions and their stakeholders interact, the continuing dominant role of national representatives in the shaping and implementation of EU policies risks to be underestimated. It is recommended that future studies dare to go beyond this artificial separation of what has so eloquently been called the 'taking' and the 'shaping' to link these interrelated phases of EU policy-making and the key role of national governments therein.

As European integration has deepened and widened over the past decade, research into the ways in which national officials are involved in these processes may serve both academic and practical use. The added value for academic research on the EU has been discussed. For practitioners, insights into how a government may use particular variables and conditions to influence processes at the EU level increase the opportunity to operate 'efficiently' as well as 'effectively'.

This study has focused on a particular member state government – which permits in-depth study of how EU policies are formulated and negotiated. The obvious advantage of comparative research projects is that it clears the



framework for analysis from ‘disturbing’ country-specific variables, so that more general conclusions can be drawn about the ambitions and capacity of governments to be active within the EU.

2) ... *Replication and further case-study research about influencing EU policies*

One added value proposed by this study was to provide ‘thick’ case studies, in the form of detailed reconstructions of the policy process, which serves as an empirical base to test hypothesis of the role and influence of particular groups of actors. Due to limitations concerned with time and resources, the scope and time frame of this study have been limited. Problems with the general validity and reliability can be partly solved by choosing a methodological design. In this study, the method of process analysis has served this aim. It has been adapted to be fit for an analysis of international rather than national decision-making and the complexities of a multilateral playing field. A framework for analysis has been developed, which structures different variables that are supposed to have an impact on national shaping capacity. However, due to the scope of cases and time frame, it is impossible to make binding statements about shaping capacity. For example: at the moment of their reconstruction, the directives had been decided almost five years ago. This is a recurrent problem, as the EU is a ‘moving target’. However, a broader overview of EU policy-shaping would necessarily involve more and more recent cases; covering multiple policy domains (see for a worthy multiple-case study design: Sepos 2005). To understand the policy process and to determine which actor has influence in determining the outcomes of this process, the preferences of all actors, the relationship between actors and all institutional constraints and opportunities must be analysed. It is obvious that studies with this purpose requires much more time and resources. but add to our understanding of how the EU policy process works and generate practical insights for actors, such as governments. One example of a related question that has already been tentatively discussed in existing Europeanisation studies (Falkner 2004, Treib 2003) is to what extent implementation performance is related to national efforts in the (pre-) negotiating stages.

Another challenge lies in the choice of a method for examining EU policy practices, key for ensuring validity and reliability. Traditional influence analysis departs from the assumption that actors have predefined positions, which are subsequently brought into an interaction in order to make another

actor change position. Establishing the causal relation is central to determining influence, but also its key problem. Influence analysis supposes a high degree of stability of preferences and institutional situations that has not been found in the cases. If the key actor regularly changes positions during the interactions with multiple other players, causality is very difficult to reconstruct. This holds even more in the EU setting, in which inevitably, more than two actors are involved and where institutional situations vary within negotiating situations. This is one pitfall that may be remedied when the researcher may profit from insight in multiple cases.

3) ... *encompassing the second and third pillars of the EU*

Within the EU, national governments are confronted with different 'opportunity structures', dependent on the relevant policy area. This research has discussed national shaping capacity in the EU's 'first pillar', which concerns economic, social, monetary and related policies, mostly decided conform the supranational or 'community' method of policy-shaping. Governments must share the initiative and legislative competencies with EU level institutions and actors. In the more intergovernmental second and third pillars, governments can act relatively autonomously. The issue salience of these issues tends to be higher, as the issues at stake are perceived as closer to the core of national sovereignty. These policy areas are generally dominated by traditional co-ordinating authorities, mostly Ministries of Foreign Affairs, which have less difficulty of getting sufficient resources and political attention than those involved in routinised first pillar legislative processes. At the same time, governments are less pressured to anticipate policy developments and act pro-actively, as under the second and third pillars, they have a formal right of initiative shared with the European Commission. This facilitates the setting of a coherent and consistent national policy – however, as the impact of EU level decisions grows, more discussions take place about the co-ordinating capacity. This can be witnessed in the Netherlands as regards to the role of the Ministries of Justice and Home affairs in third pillar co-operation. Discussions on national shaping capacity will probably become only more frequent with the growing Europeanisation of second and third pillar policies, which only increases the relevance of systematic academic analysis.

4) ... continuing the academic and practitioners debate on Dutch shaping capacity

This study has demonstrated that it is highly valuable to combine academic and practitioners insights' in an evaluation of the shaping capacity of the Dutch government and for advancing proposals for reform. Probably the most obvious pitfall in the particular 'Dutch system' of dealing with EU affairs is the difficulty for the central government to pursue a consistent and rational EU policy, if specialised experts socialise to the extent that pre-determined national positions are 'given away' for the sake of common agreement. As the influential advisory body 'Council of State' concludes in a recent advice to the Dutch government: 'In many European groups, Dutch [negotiators] participate who do not represent the Dutch interest, but a departmental, sectoral interest' (2005, 8). As government ministries are given the free reign, both co-ordination and implementation capacity are endangered. The complications to set a coherent strategy and to assure that all involved stick to the framework agreed may lead to particular implementation and legitimacy problems at a later stage. Political and parliamentary involvement comes only at the end of the process, experts from the line ministries often overrule the co-ordinating authority, and procedures for early consultation suffer from time and capacity problems. This increases the risk of expensive –in terms of both money and 'image' – implementation deficits (see Steunenberg and Voermans 2004, Rood et al. 2005).

This finding is particularly problematic if the EU is regarded as a dense intergovernmental organisation, involved in zero-sum negotiating games between unitary governments. Seen from this perspective, the Dutch government may be ill-equipped for dealing with Europe, as it is confronted with cumbersome processes for formulation and defining 'national interests' and representing these coherently and consistently in the form of 'national positions'. It is thus no surprise that a fairly consistent call is concerned with the need for increasing co-ordination capacity at the level of the Dutch central governments. A first solution is the introduction of interdepartmental task-forces to increase information exchange in the Council working group phases of EU policy-shaping, which would remedy the 'black hole' of lacking coordination in the crucial working group phases (Gemengde Commissie 2005). Relatedly it has been proposed to transform the high level coordinating body (Cocohan), which currently convenes irregularly, into a standing committee that could contribute to the engagement of senior top-

level departmental officials in EU policy-making (De Zwaan 2004). A related solution is either to introduce a co-ordinating ministry for European affairs, which has been repeatedly discussed and dismissed (see the Van Veen Rapport 1971, Rozemond 1987), or to increase the European competencies of the Prime Minister's department of General Affairs (ROB 2004, Raad van State 2005). An important argument underlying the latter suggestion is the ever-growing European engagement and involvement of the Prime Minister, due to the increased political saliency and the prominence and frequency of European Council meetings.

From a radically different angle, the EU may be regarded as a specific negotiation arena, in which governments 'move from a position of "decision maker" to that of "co-decision maker"' (Wessels 1991, 136). In this view, the Netherlands may actually be relatively well positioned, due to the relatively high degree of relevant expertise and experience with Council negotiations. This expertise, if anything, facilitates relations with supranational institutions, where national positions are generally regarded with suspicion but added value as regards to the contents of policy proposals is gratefully welcomed. This 'unique selling point' of the Dutch system should not be underestimated in the ongoing discussions on system reform. Although a call for strengthening internal coordination mechanisms is a tempting Pavlov response to the fear of loss of competences, all measures proposed in order to improve and enhance national shaping capacity will have to be seen in the particular context of the Dutch 'polder model'. In line with neo-institutionalist claims (Aspinwall and Schneider 2000), the limitations concerned with 'path-dependency' should be taken into account when groundbreaking changes, such as a radical repositioning of the co-ordinating authority, are considered. To quote a Dutch saying: 'the child should not be thrown away with the bathwater': system reform dealing with EU procedures should not touch the elements of the system that do prove valuable, such as individual expertise and experience with EU matters.

5) ... *while taking into account the changed negotiation context*

The empirical analysis in this study focused on the 1990s, a period in which the EU experienced and foresaw profound changes in terms of its 'deepening' and 'widening'. The enlargement of the EU from 15 to 25 member states with a 'big bang' on 1 May 2004 has required new working

methods, to ensure the efficient management of the negotiations.<sup>6</sup> These include the need to avoid table rounds and to submit positions in writing, while individual positions that do not add value to the search for compromise, are interrupted by the chair.<sup>7</sup> This brings with it ‘... an increasing necessity for coalition building and bilateral consultations in the earlier stages of the European political process’ (Pijpers 2000, 9). In parallel, since the 1990s, processes of ‘deepening’ have been visible in the emergence of new policy instruments often referred to as ‘soft’ instruments, including methods such as co-ordination and benchmarking, distinguishing best practices and consulting stakeholders are increasingly common in policy fields such as social affairs; research policy and education. For governments, this shift from ‘hard legislation’ to elaborating common standards in regular consultation implies a new approach on preparing European policies, focusing on knowledge management and networking. For example, at home, ‘best practices’ should be identified, in order to come to common norms and framework agreements at the EU level that satisfy domestic stakeholders. The growing scope of issues to be dealt with during and after elaborate accession negotiations is most prominent in the realm of ‘high politics’, the development of the EU’s second and third pillar, policy areas in which, according to integration theorists, co-operation would be least likely (Haas 1967, 323; Lindberg and Scheingold 1970, 264). From the perspective of ‘national interest representation’, it is tempting to look at these developments in terms of ‘losses’ and ‘problems’. This study has demonstrated that the evolving ‘opportunity-structure’ offers new challenges for governments. As the debate continues, the results from this study merit an update, in order to encompass recent debates and developments, as well as an extension into the wider and politicised range of European dossiers.

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- 6) A revised Code of Conduct was agreed in December 2003 and is part of Annex IV of the Council’s rules of procedure.
  - 7) Quote from the United Kingdom Presidency Guidance for Working Group Chairs, p. 13: ‘If colleagues are setting out familiar and similar positions [...] you could try to draw a conclusion about the emerging consensus and ask if anyone disagrees or has anything to add’. (European Secretariat, Cabinet Office, London, November 2004).

## **§5. To conclude**

As the salience of EU policy increases, member state governments attempt to strengthen their grip on these processes, for example by tightening national co-ordination procedures and strengthening national representation within EU level institutions. This is the paradox described by Stanley Hoffmann (1966): member states strive to cooperate, so that EU processes gain importance, which makes national interest representation more difficult. At the same time, this leads to an increased relevance of national claims as more is at stake for governments. Seen in this light, national governments remain key players in the shaping and implementation of binding decisions and European integration is thus fundamentally intergovernmental in character. However, the findings of this study, which demonstrate the continuous interaction of preferences and positions at the domestic and EU level, suggest that this is a kind of ‘intergovernmentalism-light’ (Rood 2001). Governments remain relevant, but instead of relying upon this dominant position and simply pushing their weight, the new ‘opportunity-structure’ forces them to professionally invest in the quality of the process of formulating and representing national preferences.

This study has enhanced insights in the capacity of governments to contribute to the shaping of new EU policies by analysing the variables and moments relevant for such actions. The title refers to the two locations of EU policy-making explored in this study: ‘at home’ and in ‘Brussels’. It suggests that the central government of the Netherlands would find itself at the crossroads of ‘Going Europe’, on the one hand, and ‘Going Dutch’, on the other hand. ‘Going Dutch’ obviously refers to the current emphasis on the financial costs and requirements of EU membership in the political debate on the EU, which has finally ‘gone public’ with the referendum on the Constitutional Treaty in June 2005. The only shared element in current political contributions on the topic of Dutch EU membership seems to be the fact that the Netherlands has developed into the largest per capita net payer to the EU’s budget (Raad van State 2005, 10). Because of lacking traditions of open debate on the vices and virtues associated with EU membership, the picture of the EU as a political arena in which the Dutch government would often lose out easily feeds into broader unease of the general public about the negative consequences of internationalisation for welfare state arrangements, culture and identity. But also for the central government, adjusting its self-image from that of ‘founding father’ of the integration process, to just one of

many small member states, has proven a painful process. While there is yet no agreement on new directions for future Dutch EU policy, the policy of the central government towards the EU has recently shown a variable course. Some upsurges of confrontation have been prominent, including harsh threats by Dutch government representatives to veto EU decision-making. This strategy of ‘Going Dutch’ is potentially harmful, as it may turn the Dutch off Europe (Van Grinsven and Rood 2004). What is more, the findings of this study show how the two locations where EU policy is made, the national and the EU level, cannot be analysed separately. The interaction between the EU level and ‘home’ (i.e. the level of the member state) is a two-way process. Member state governments are not simply ‘confronted’ with new rules and legislation coming from ‘Brussels’ – they have multiple opportunities to be actively involved in the shaping of these decisions. Similarly, the EU level institutions are not operating autonomously in their contribution to the policy process, but are dependent on input and support from its member states. Congruently, for a government of a small, open and highly dependent economy as that of the Netherlands, there is no real choice of ‘going national’ – other than purposely setting out on a detrimental course of parochialism and isolation.

This does not mean, however, that a strategy of ‘Going Europe’ is self-evident. Recent processes of widening and deepening of the EU offer governments new venues and opportunities for influence. But any member state government’s ability to perform is increasingly dependent upon an investment in its strategic use of resources and potential and thereby by the ways it ‘goes national’. For example, the art of ‘European process-management’ at the domestic level (Schreurs 2002) requires close cooperation between specialized experts and trained diplomats with sound knowledge of the negotiating positions of the other players and a horizontal overview of the different issues being discussed. As the EU spills over to policy-areas predominantly decided at the national level, EU knowledge should not be confined to those directly involved in shaping EU policies. Due to its considerable experience and expertise, the Dutch government seems actually relatively well-fit for ‘going Europe’. However, extending its shaping potential beyond the realms of first-pillar issues to politicised domains of EU policy-making requires an ex-ante identification of national ambitions and preferences, ideally based upon a long-term vision on the role and position of the Netherlands in an enlarged Union. ‘Going Europe’ also requires broad acceptance of the intrinsically consensual nature of EU

policy-making processes, in which ‘you win some, you lose some’ – a policy style for which those with long experience in a much-praised ‘polder model’ would seem particularly well-prepared. If the Dutch government is thus able to match the clear advantages of the current system with an impulse to its national strategic and co-ordinating capacity, the Netherlands may be very well positioned for influencing future EU policies.



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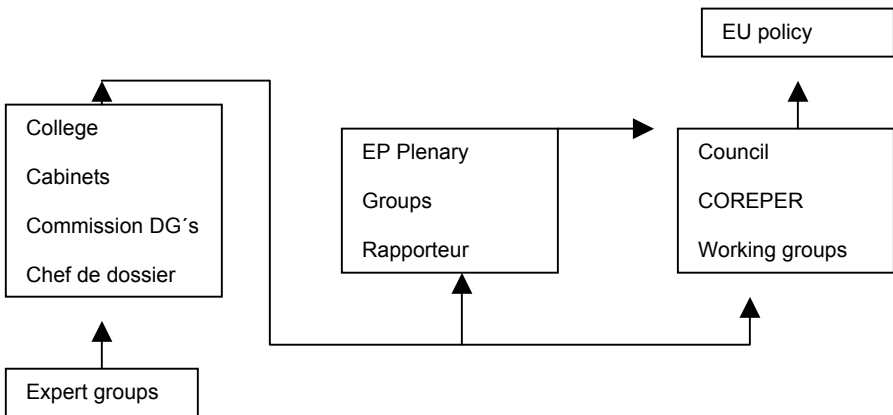
# Appendix

## The EU Policy Process in Brussels and The Hague

### 1. The EU policy process

The scope of regulation and policies decided at the EU level has considerably increased over the past decades. The development, since the 1990s, of the ‘second’ and ‘third’ pillars of the Union (foreign and security policy and justice and home affairs) has been very important.<sup>1</sup> However, regulation to improve the internal market and to enhance the freedom of goods, services, capital and human beings continues to constitute the vast majority of EU output. In this ‘first pillar’, the former European Community, policies are formulated in an interplay between the European Commission, the Council of ministers and the European Parliament (see figure 2).

Figure 2 Commission, Parliament and Council interaction in EU policy-making



1) See table 1.3 for an overview of the EU's pillar system.

According to the ‘community method’, the EU policy process begins with a text proposal submitted by the European Commission, which has the monopoly of initiative. The European Commission is headed by a college of 25 Commissioners, one for every member state, and organised in Directorate Generals in which some 16.000 policy administrators (‘European civil servants’ recruited within the member states, but not representing them) co-operate. Proposals for new policies are worked out by a ‘chef de dossier’ after consultation with the public and private sector in expert groups. This drafting phase already attracts much lobbying efforts from interested parties, including governments, which deliver input through direct contacts with Commission staff and via expert committees. Formally, the Commission represents ‘the European interest’, but due to shortage of staff and the need for political support of policy proposals at a later stage, its staff is generally eager for information and expertise from the member states. Political influence from governments is also directed through the Cabinets, which prepare the weekly deliberations on new proposals by the College.

Once agreed by the Commission, proposals are sent to the two legislative institutions: the Council and the European Parliament. The Council, where the twenty five member states are represented, meets in nine different formations of ministers in charge of policy areas. Apart from the Council meetings, where each member state is represented at the ministerial level, an ambassadors committee (*COREPER*) and some 150 working groups convene on a daily basis in which national government officials prepare Council decisions. In these venues, the member state holding the rotating six-month Presidency is in charge of agenda-setting and mediation. The choice of the procedure for policy-shaping and thereby the competencies of the institutions is dependent on the ‘legal basis’ of the initiative in the Treaty. Although the Commission normally proposes a legal base, this is often subject to intense negotiations between member state representatives and other interested parties in the phases of agenda-setting and initiative as it can have far-reaching consequences for the procedure. Since 1987, the Council has increasingly made decisions under “qualified majority voting” (QMV) rather than under unanimity voting. Majority voting implies that a government can be overruled by a coalition of member states representing a majority of votes and that a ‘blocking minority’ can impede legislation to be agreed.

The competence of the European Parliament, a plenary composed of 732 directly elected representatives of political groups across the member states, varies from advice to co-legislation. The procedure within the Parliament is led by a rapporteur responsible for collecting amendments on the proposed text. With the treaty revision in Amsterdam, in 1999, the Parliament came on equal footing with the Council through considerable extension of the ‘codecision procedure’ (to which the two cases examined in this study have been subject). Under this regime, new legislation requires the support of a qualified majority in the Council and an absolute majority in the Parliament’s plenary. Both institutions need to sign the final decision. Once this is published in the Official Journal, ‘comitology committees’ with national and European Commission officials may further work on technical specifications and annexes.

EU decisions come in different forms, which differ in their impact upon national governments. The large majority is issued in the form of directives, which should be transposed into national law before a certain date, leaving governments the choice for method and format. Late or incorrect transposition may lead to a Court case initiated by the European Commission.

## *2. Procedure for EU policy-making at central Dutch government level*

Mainly due to this direct effect of binding EU decisions, each member state tries to ensure that its negotiating positions for EU level deliberations are adequately and timely formulated and represented. For this, elaborate systems of national EU co-ordination function in all capitals, linked to Brussels through their Permanent Representation to the EU. In comparative perspective, the system for coordination of EU policies at the level of the Dutch central government has been compared to a ‘patchwork’ of inter-ministerial committees, working groups and high-level groups. Most co-ordination efforts to determine the Dutch stance as regards to EU policy initiatives take place at the administrative and interdepartmental level.

The interdepartmental coordination procedure (see figure) starts when the inter-ministerial committee for evaluating new Commission proposals (BNC) appoints the lead ministry for each new draft decision. Within the committee, new dossiers or policy proposals are assigned to the most relevant ministry. Officials of this department draft a summary of each new legislative text proposal, including an estimate of its financial consequences,

as well as possible implications of the proposal for sub-national government, which serves to inform the national parliament. It should be noted, however, that this paper or 'fiche' rarely leads to parliamentary discussions on the stance to take in the EU level negotiations. Delivering input for subsequent meetings of the relevant Council working groups is from then on largely left to technical experts and specialist civil servants. How much information exchange takes place between ministries and with the Permanent Representation at the EU depends on the individual initiative of these 'chefs de dossier'. An important variable is the degree to which a proposal is considered politically salient and, consequently, how much interministerial co-ordination is deemed necessary by the lead ministry. Generally, negotiating positions for proposals that are estimated to be of higher political importance are closely followed and often represented by the Netherlands Permanent Representation.

The Ministry of Foreign Affairs was appointed co-ordinating authority for EEC affairs in 1970, after a power struggle with the Economic affairs ministry. This turf battle is said to have 'weakened attempts to impart some unity to the overall direction of EU policy' (Griffiths 1980, 286). Congruent to the Dutch 'polder'-culture of consensus, consultation and compromise and a tradition of autonomy of individual government departments, the Foreign Ministry has no formal competencies to establish priorities and to arbitrate between conflicting views. Much is left to the responsible ministries, only in the weekly instruction meeting, chaired by a senior Foreign Affairs official to set the negotiating instructions for the Permanent Representation delegation at COREPER meetings, positions on individual dossiers are linked. It is at this level that conflicts of interest may come out in the open. As no formal authority rules, however, the result of these inter-ministerial co-ordination efforts is often an intricate compromise, which leaves not much flexibility for the hands of diplomats and officials at the national Permanent Representation to the EU. When negotiations at the EU level proceed and adaptation is considered necessary, direct personal contacts between the Mission and the department provide for ad-hoc and on the spot co-ordination of the Dutch position during negotiations.

The Junior Minister (Dutch: Secretary of State) for European Affairs, who functions at the Ministry for Foreign Affairs and is charged with co-ordinating European policy, forms the link between the administrative and the political levels of co-ordination. He or she chairs the weekly Co-

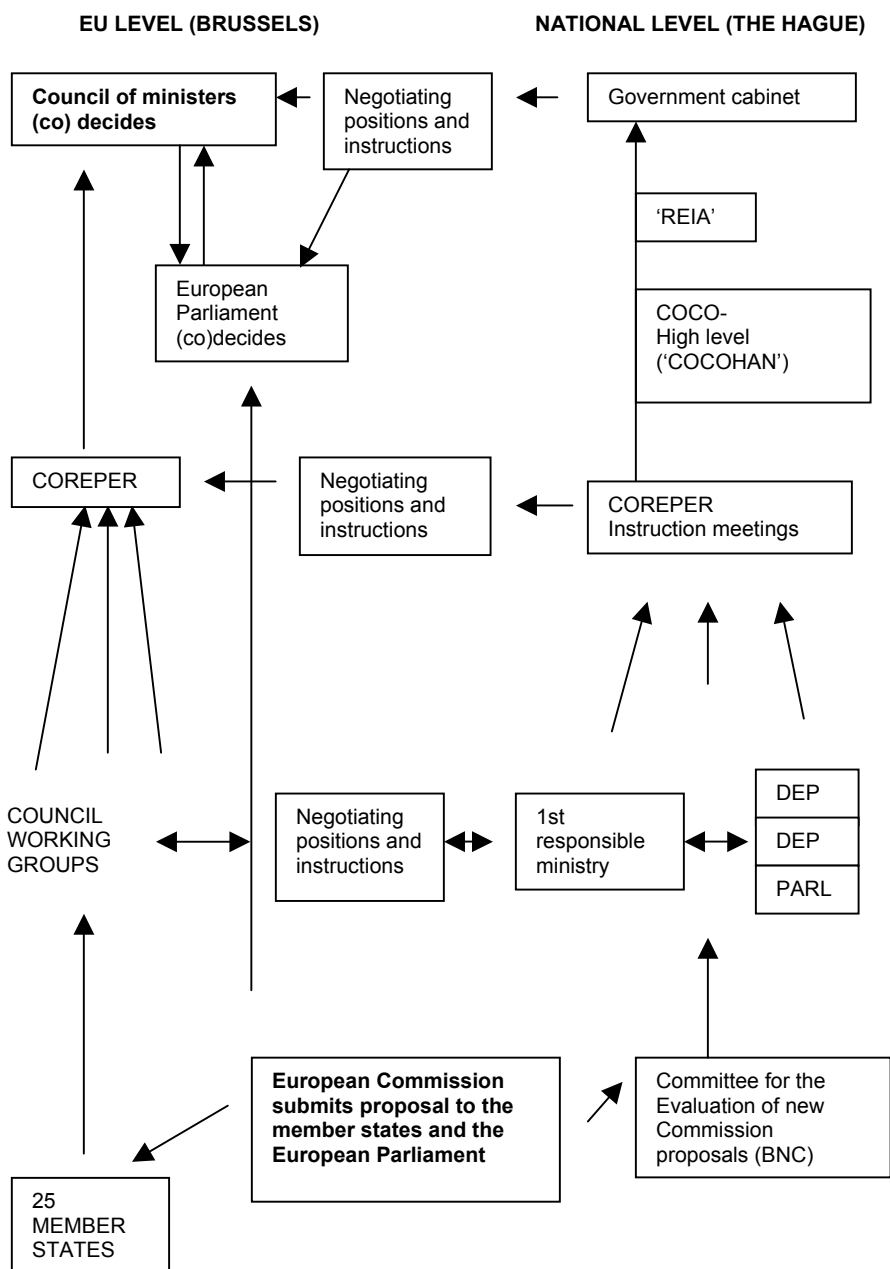
ordination Committee, the ‘antichambre’ for the Cabinet meeting, which sets the negotiating instructions for upcoming Councils. In case of conflicts, Cabinet discussions may take place. In Council meetings, the representative of the Netherlands, a Council minister or in case of absence the permanent representative, has to stay within the limits of the negotiation mandate. However, because of changing realities, this may necessitate ‘on the spot’ co-ordination with The Hague, or a formal scrutiny reservation of the Dutch delegation.

As regards to the ‘Brussels’ part of the national EU-coordination system, responsibilities lie with the Dutch Permanent representation of the Kingdom of the Netherlands towards the European Union (est. 1958). The ambassadorial rank of representative, who has a standing invitation to attend all Cabinet meetings, is considered one of the most important diplomatic postings. Both the structure as the functioning of the permanent representation is highly segmented, reflecting the departmental structure of the central government organisation. In 2001, only 38% of its staff was Foreign Ministry employees (Soetendorp and Andeweg 2001, 215), the others being seconded from all twelve other government departments. One unique feature of the working methods at the ‘*PV/EU*’ is the daily meeting of all officials, serving as an informal exchange forum on information, strategies, positions and developments. The meeting is confidential and no minutes are taken, which makes it a good opportunity to search for common solutions or seek the limits of instructions from the capital. The permanent representative serves as an essential link from the capital to the European arena and has vital information and negotiation tasks. Especially in the early stages of the policy process, its officials often seek the assistance of the numerous unofficial co-ordination channels via nationals of the member states employed by the European institutions.

This ‘decentralised’ system has advantages as well as weaknesses. The responsible ministry has the necessary knowledge to deal with the subject matter, and expert co-ordination increases flexibility and efficiency of organising the negotiations. At the same time, experts qualify the system as ‘reactive’ and ‘passive’, as ministries not primary responsible are forced to

put much efforts into securing information and input.<sup>2</sup> That interdepartmental co-ordination is not formally facilitated during working groups negotiations has been referred to as the ‘black hole’ of Dutch EU co-ordination (Gemengde Commissie 2005, 11). This is increased by two political characteristics of the system: the practice of coalition governments implies that individual government ministers have a large degree of freedom, and ministries dealing with (parts of) foreign policy departments are generally not held by ministers of the same party, which does not facilitate co-ordination. Since the 1990s, multiple proposals for reform have been debated. Many are concerned with the need for more EU engagement and knowledge throughout politics and administration in order to close the artificial gap between those involved in EU policy-making and those focused on supposedly ‘national’ politics. Returning suggestions are concerned with upgrading the coordination authority to the level of the Prime Minister and his Ministry of General Affairs, analogous to a trend visible in many newer member states.<sup>3</sup>

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- 2) The contrasting system of ‘active information’, characteristic of EU co-ordination arrangements in the United Kingdom – implies that the expert official most involved is supposed to inform relevant others of the progress in the file ‘The rationale for keeping others informed, from a selfish or [ministerial] point of view, is to try to avoid the introduction of new objectives to the position of the United Kingdom towards the end of a negotiation ... For this reason, copying papers is not necessarily enough. The implications of [Commission] proposals have to be made clear [to other ministries] ...’, quote taken from Humphreys (1997).
  - 3) See chapters 5 and 9 for a discussion of these suggestions and their ‘fit’ with the Dutch system of preparing EU policy-shaping.



*Going Europe or Going Dutch*



# Nederlandse samenvatting

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Hoe kan een nationale overheid de totstandkoming van nieuw EU-beleid beïnvloeden? In een tijd van voortschrijdende Europeanisering lijkt de relevantie van deze vraag onbetwist. Niettemin toont de literatuurstudie in dit onderzoek dat in de Europese (EU-) studies tot nog toe verrassend weinig aandacht is geschonken aan de systematische analyse van nationaal ‘invloedsvermogen’. Deze term (‘shaping capacity’), gedefinieerd als het vermogen van een overheid om nieuw EU beleid te beïnvloeden, staat centraal in deze dissertatie, waarin de belangenbehartiging van EU-lidstaat Nederland wordt geanalyseerd. Doel van het onderzoek is om, aan de hand van een landenstudie en reconstructies van het beïnvloedingsproces rond twee specifieke EU-richtlijnen, een bijdrage te leveren aan het actuele academische Europeaniseringsdebat. De analyse biedt tevens handvatten aan zowel beleidsmakers als politici voor hun werkzaamheden in het kader van de totstandkoming van nieuw EU-beleid en nationale belangenbehartiging.

Het eerste hoofdstuk behandelt ter inleiding de onderzoeksvragen en definities, de theoretische plaatsbepaling en ook de onderzoeksopzet van de studie. Hoofdstuk twee bespreekt de resultaten van een zoektocht, in de literatuur, naar inzichten over de rol en positie van overheden in de EU. De eerste academische golf hierbinnen analyseerde de interactie tussen lidstaten en het EU-niveau van besluitvorming ‘van onderaf’. Belangrijke vragen waren die naar het wezen van het integratieproces en de mogelijkheden om tot duurzame samenwerking tussen staten te komen. De belangrijkste twistappel tussen de twee belangrijkste ‘klassieke’ integratietheorieën uit de jaren vijftig, intergouvernementalisme en neofunctionalisme, behelst de vraag of het Europese integratieproces de positie van nationale staten uiteindelijk versterkt, danwel verzwakt. Deze tegenstelling wordt in de

literatuur uitvoerig besproken, maar het gaat in dit onderzoek met name om de *rol* van overheden in dit proces. In dit verband is intergouvernementalisme vooral relevant door de visie op de rol van overheden als ‘vormers’ en ‘ontvangers’ van Europees beleid die in deze theorie centraal staat. Neofunctionalisme, een theorie die op het eerste gezicht wellicht minder relevant lijkt vanwege de nadruk op de verzwakking van de nationale staat, biedt daarentegen interessante inblikjes in de interactie van overheden met supranationale instellingen, in het bijzonder de Commissie en het Parlement. Bovendien beschrijft neofunctionalisme relevante processen van ‘socialisatie’ van tussen nationale ambtenaren en politici en hun internationale collegae in het proces van besluitvorming.

In de jaren zeventig raakten ook politicologen en bestuurskundigen geïnteresseerd in het Europese integratieproces, dat tot dan toe vooral onderwerp van studie was binnen de leer der internationale betrekkingen. Meer academische analyse van het beleidsproces op Europees niveau en binnen de lidstaten was hiervan het gevolg. Deze zgh. ‘tweede golf’ binnen de Europese studies staat centraal in het derde hoofdstuk van dit onderzoek. De jaren negentig van de twintigste eeuw – een tijdperk van opeenvolgende verdragsherzieningen die de reikwijdte en invloed van het Europese besluitvorming verder vergrootten – bleken een buitengewoon vruchtbare periode voor de ontwikkeling van nieuwe concepten binnen de EU-studies. Voor dit onderzoek zijn twee daarvan in het bijzonder relevant: ‘multi-level governance’ en ‘Europeanisering’.

Multi-level governance beschrijft de interactie tussen verschillende niveaus of locaties van beleidsvorming: regionaal, nationaal en Europees. Teneinde grip te houden op grensoverschrijdende beleidsproblemen en ontwikkelingen zoals migratie, globalisering en milieuverontreiniging werken overheden actief samen. Voortschrijdende Europese integratie betekent echter ook een verlies aan invloedsmogelijkheden. Er staat immers steeds meer op het spel, terwijl de regie moet worden gedeeld. Derhalve wordt het nationale belang en de druk van succesvolle nationale belangenbehartiging van grotere importantie. Als de belangenbehartiging niet goed of niet tijdig is georganiseerd, kan men als lidstaat ‘verliezen’ en de schade daarbij kan groot zijn. Lidstaten moeten bindende Europese wetgeving immers implementeren, wat de nodige bestuurlijke, financiële kosten met zich mee brengt. Bovendien is er een levendige vorm van beleidsconcurrentie tussen nationale actoren (overheden op centraal en decentraal niveau, private

belangen en belangengroepen) die allen hun zegje willen doen op het Europese vlak. Hoe dan ook moeten nationale overheden aldus investeren in procedures om ten aanzien van nieuwe beleidsvoorstellen tussen alle betrokkenen een gezamenlijk ‘nationaal’ standpunt te formuleren en dit op consistente wijze te vertegenwoordigen op het EU-niveau.

Overheden die relevant willen blijven, moeten hun ‘Europese zaken’ dus goed op orde hebben. De academische literatuur over ‘Europeanisering’ zou in potentie aan deze ordening een nuttige bijdrage kunnen leveren. Echter, uit de literatuurstudie in hoofdstuk drie blijkt dat deze tot nog toe vooral is gericht op wat er binnen de lidstaten gebeurt, terwijl de interactie tussen de hoofdsteden en Brussel daarbij onvoldoende wordt betrokken. Veel studies zijn in algemene termen geformuleerd of richten zich daarentegen op een specifiek element van belangenbehartiging, zoals de uitgebreide literatuur over de stemmacht van (individuele) lidstaten in de Raad. Daarmee wordt ook de vraag relevant, welke invloedsmogelijkheden ‘ge-Europeaniseerde’ nationale overheden (nog) hebben om de vorming van nieuw beleid te beïnvloeden. Een belangrijke doelstelling van dit onderzoek is een bijdrage te leveren aan deze nieuwe zgh. ‘derde’ stroming binnen de EU-studies.

Voor een omvattend onderzoek naar het optreden van een lidstaat bij de totstandkoming van EU beleid is een eerste stap het ontwerp van een analysekader, om de verschillende factoren en variabelen en hun verhouding ten opzichte van elkaar in kaart te brengen en te categoriseren. Dit kader wordt in hoofdstuk vier opgebouwd vanuit twee hoofdcategorieën: “ambitie en voorkeuren” en “capaciteit en hulpbronnen”, die hetzij voortvloeien uit structurele factoren, danwel verbonden zijn met of zich manifesteren in een specifieke situatie. Naast voor de hand liggende factoren, zoals grootte en stemmacht van een lidstaat, die samen als het ware de ‘massa’ van een land vormen, zijn ook de mate van Europa-gezindheid van nationale politiek en de kennis en kunde van onderhandelaars van belang.

Het is overigens van belang te benadrukken dat dit analysekader niet als oogmerk heeft, een recept te bieden voor succesvolle belangenbehartiging, doch daarvoor slechts mogelijke ingrediënten biedt. De invloed van een land binnen de Unie is immers afhankelijk van zoveel meer variabelen dan de eigen inzet. Ook de condities, de context en de positie van andere actoren zijn hiervoor relevant.

<b>Capaciteit om te beïnvloeden / ('Shaping capacity')</b>	<b>Wil</b>	<b>Potentieel</b>
<b>Stabiele variabelen</b>	<p><b>AMBITIES</b></p> <p>Kernwaarden en beleidsconstanten; politieke en economische 'massa', w.o. relatieve economische ontwikkeling en politieke constellatie; publieke steun voor actief EU lidmaatschap; lengte lidmaatschap; imago; 'passendheid' van ambities en doelstellingen</p>	<p><b>VERMOGEN</b></p> <p>Beleidsstijl; mate van fragmentatie; coördinatie-capaciteit; (Europees bewustzijn binnen de) bestuurlijke en politieke organisatie; strategisch vermogen; vermogen coalities te bouwen; organisatorische en personele verbanden tussen het nationale en het EU niveau</p>
<b>Situationele variabelen</b>	<p><b>VOORKEUREN</b></p> <p>Belang dat aan het onderwerp wordt gehecht; belangenconstellatie; institutionele omstandigheden, w.o. EU voorzitterschap; 'fit' en extremiteit van het standpunt / positie</p>	<p><b>HULPBRONNEN</b></p> <p>Belangenconstellatie; kennis, vaardigheden; competenties; anticipatievermogen; mogelijkheden om nationale contacten te gebruiken; flexibiliteit van de onderhandelingspositie; onderhandelingsstrategie en -tactieken</p>

Het analysekader wordt in hoofdstuk vijf toegepast op de gevalstudie 'Nederland', dat begint met een korte inleiding op de grondslagen van het Nederlandse EU beleid in de afgelopen decennia: de traditioneel sterke transatlantische oriëntatie en de Nederlandse voorkeur voor economische integratie, alsmede het 'instrumentele' supranationalisme dat voortkwam uit welbegrepen eigenbelang. In de specifieke constellatie van de op brede consensus gerichte gedecentraliseerde eenheidsstaat stonden deze waarden lang niet ter discussie. In de jaren negentig ontstond echter onder academici en beleidsmakers geleidelijk aan meer debat over de invulling van de 'Europese roeping' van Nederland en de inhoudelijke en procesmatige aanpak van het nationale EU beleid, waarin het als gevolg van een aantal politieke en bestuurlijke kenmerken moeilijk zou zijn om strategie en lijn te brengen. Deze kenmerken zijn de grote mate van politiek-bestuurlijke fragmentatie; de traditie van departementale autonomie en de decennialange depolitisering van het nationale Europabeleid, dat werd gevormd en uitgevoerd door een relatief kleine groep politiek-bestuurlijke insiders. Afgemeten aan het analysekader zouden deze kenmerken schadelijk zijn voor het vermogen tot beïnvloeding van de Rijksoverheid. Tegelijkertijd versterkt de departementale autonomie ook de inzet van kennis en expertise in EU onderhandelingen op basis van een lange ervaring met EU-lidmaatschap, één van de sterke punten van het systeem.

De Nederlandse onderhandelingsinzet wordt sindsdien gekenmerkt door meer pragmatisme, een focus op de kosten van het integratieproces en aarzeling ten aanzien van de politieke samenwerking op terreinen van buitenlands beleid en interne en externe veiligheid.

Het analysekader wordt getoetst in twee specifieke gevalstudies van interne marktwerking op het terrein van energiebeleid en biotechnologie. Het analyseren van relevante momenten en factoren in het onderhandelingsproces is binnen het veld van de EU studies relatief onderbelicht. Derhalve is bij de reconstructie van de onderhandelingen die leidden tot de Gasrichtlijn (98/30/EG) en de Biopatentrichtlijn (98/44/EG) gebruik gemaakt van een uit de politicologie geleende methode van dossierstudie en, meer specifiek, invloedsanalyse: intensieve procesanalyse. Bij toepassing van deze methode, die in hoofdstuk zes wordt uitgelicht, op internationale onderhandelingsprocessen is een ex-ante selectie van actoren en beslissingen des te noodzakelijker. De acht stappen van de methode worden gevolgd bij een analyse van de besluitvormingsprocessen teneinde te reconstrueren welke actoren, momenten, voorwaarden en kenmerken mogelijk relevant zijn geweest bij de beantwoording van de vraag hoe vertegenwoordigers van de Nederlandse overheid trachtten dit proces te beïnvloeden.

De empirische data die deze twee gevalstudies leveren worden in hoofdstuk negen vergeleken met het analysekader, met het oogmerk na te gaan welke variabelen hierbij ‘oplichten’. Een eerste conclusie is dat de uit de Europeaniseringsliteratuur bekende hypothese van ‘goodness of fit’ – die stelt dat de mate van ‘passendheid’ van nieuwe EU regelgeving met bestaande nationale arrangementen voorspellend zou zijn voor het succes van de belangenbehartiging – minder statisch blijkt dan de literatuur aangeeft. Door actieve belangenbehartiging kunnen overheden deze ‘misfit’ voorkomen. Bovendien geven de cases aan dat de (interpretatie van) mate van passendheid onderdeel kan worden van het politieke debat en bovendien door vertegenwoordigers van een nationale bewust gestuurd kan worden op nieuwe juridische of bestuurlijke arrangementen die via het Europese niveau nationaal (zullen) worden opgelegd.

Dit laatste is dan met name bepaald door een tweede factor die uit de cases naar voren komt: de politieke en bestuurlijke relevantie die aan een beleidsonderwerp wordt toegekend en die in een representatieve democratie een functie is van de politiek-economische belangenconstellatie en de

publieke opinie. Deze relevantie kan vervolgens beperkingen van capaciteit of hulpbronnen overkomen. Met name het belang van expertise en kennis van Europese processen komt hierbij naar voren.

De cases suggereren, ten derde, dat de rol van overheidsvertegenwoordigers in het Europese – en dan met name op Raadsniveau – een aanzienlijke is. Er is in beide gevalstudies weinig sprake geweest van invloedspogingen gericht op de Europese Commissie of het Europees Parlement, hoewel de invloedspogingen van beide instellingen effect hebben gehad op de totstandkoming van de uiteindelijke compromistekst van beide richtlijnen. Met de toegenomen relevantie van EU beleid trachten alle nationale overheden van de lidstaten hun grip op de totstandkoming daarvan te vergroten, bijvoorbeeld door te investeren in de kwaliteit en menskracht van nationale vertegenwoordiging binnen de instellingen. Hoewel dit op het eerste gezicht lijkt te duiden op een bekrachtiging van de stelling van de intergouvernementele theorieën, duiden de bevindingen van dit onderzoek op een vorm van ‘intergouvernementalisme-light’. Overheden zijn en blijven relevant, maar kunnen door hun onderlinge afhankelijkheid die het gevolg is van meer (politiekere) samenwerking slechts kritische massa vormen in samenwerking met elkaar en met de EU-instellingen.

De titel van deze studie en de illustratie op het omslag suggereren dat de Nederlandse overheid zich zou bevinden op het kruispunt van twee wegen: die richting Europa en de ‘nationale’ weg. De woordspeling ‘going Dutch’ refereert daarbij vanzelfsprekend aan de politieke fixatie op de kosten van het integratieproces zoals die zich in de afgelopen jaren heeft gemanifesteerd en die volgens sommige invloedrijke adviescolleges het enige strategische element zou zijn in het hedendaagse Nederlandse EU-beleid. Deze eenzijdige blik op het integratieproces doet geen recht aan de complexe inhoud en processen van Europese integratie. De Nederlandse overheid heeft sinds de jaren negentig het zelfbeeld moeten aanpassen van dat van een actieve oprichter, met relatief veel invloed binnen een kleine EG, naar dat van één van de kleinere lidstaten in een steeds politiekere Unie. Dat de nationale weg, geplaveid met een parochialistisch discours en politieke isolatie, voor Nederland geen reële is, al was het maar om economische redenen, moge voor de lezer van deze studie duidelijk zijn. Het inslaan van ‘de Europese weg’ is daarmee echter nog geen vanzelfsprekendheid.

Voor een actieve bijdrage aan de totstandkoming van ‘normaal’ EU beleid in onderhandelingen die over het algemeen worden gedomineerd door experts en specialisten, lijkt het Nederlandse systeem van standpuntbepaling

en -behartiging relatief goed geëquipeerd. Al was het maar door de lange ervaring opgedaan in EU fora en de autonomie van departementale organisatieonderdelen om instructies aan de laatste stand van zaken en inzichten aan te passen. In dit licht is het opmerkelijk dat in de vele discussies tussen academici en deskundigen uit de beleidspraktijk, de nadelen van het Nederlandse systeem van EU beleid – zoals de gebrekkige mogelijkheden voor strategiebepaling en onderlinge afstemming – welhaast onevenredig worden benadrukt.

Niettemin tonen deze analyses wel aan dat het model van belangenbehartiging binnen de Nederlandse overheid voor de *politieke* dimensie van het integratieproces minder toegesneden lijkt te zijn. Politieke betrokkenheid komt slechts aan het einde van een proces waarin het optreden van departementen op individuele dossiers niet wordt opgehangen aan een vooraf bepaalde onderhandelingsstrategie. Er worden nauwelijks prioriteiten bepaald en afstemming op hoog niveau blijft, mede als gevolg van eerder genoemde politiek-bestuurlijke kenmerken, een moeizaam proces. Dat het risico met zich meebrengt van late en incorrecte implementatie van in EU kader afgesproken beleid wordt aangetoond door recente empirische data. Zoals bediscussieerd in dit onderzoek blijft, naast politieke massa, voor doelgerichte Europese actie ook de strategische inzet van menskracht en andere hulpbronnen van belang, evenals het tijdig maken van keuzes en het stellen van prioriteiten. De Nederlandse overheid heeft met zo'n actief lidmaatschap binnen EU kaders inmiddels ruim vijftig jaar ervaring. Wanneer zij in deze ruime ervaring en kennis blijft investeren en dit koppelt aan een breed gedragen lange-termijn visie op de Europese prioriteiten, is zij goed gepositioneerd voor toekomstige actieve invloedsposingen.

*Going Europe or Going Dutch*



## About the Author

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Mendeltje van Keulen (1975) completed secondary school at the Stedelijk Gymnasium Johan van Oldenbarnevelt in Amersfoort. She studied at the École Supérieure d'Administration et de Management in Paris, before earning a Master's degree in European Public Administration from the University of Twente. During her studies, she was a student member of the Faculty Board and Council and worked as a trainee at the Netherlands Institute for International Relations 'Clingendael'.

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*Going Europe or Going Dutch*