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De omzetting van Europese richtlijnen: Instrumenten, technieken en processen in zes lidstaten vergeleken

Steunenbergh, B.; Voermans, W.J.M.

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**De omzetting van Europese richtlijnen:
Instrumenten, technieken en processen in zes lidstaten
vergeleken**

Bernard Steunenberg en Wim Voermans

Universiteit Leiden

in opdracht van het Wetenschappelijk Onderzoek en Documentatiecentrum van het Ministerie van Justitie

met medewerking van Sara Berglund, Antoaneta Dimitrova,
Michael Kaeding, Ellen Mastenbroek, Anne Meuwese, Marleen Romeijn.

Inhoud

Voorwoord	9
Samenvatting en conclusies	11
Summary and conclusions	13
1 Aanleiding en opzet van het onderzoek	15
1.1 Achtergrond	15
1.2 Probleemstelling	17
1.3 Implementatie: begripsomschrijvingen	18
1.4 Opzet van de landenstudies	20
1.5 Methode: literatuuronderzoek en expert interviews	21
1.6 Opzet van het rapport	21
Deel I: Hoofdrapportage	23
2 Omzetting van richtlijnen in Nederland	25
2.1 Algemeen: Nederlands debat over versnelling van de omzetting van richtlijnen	25
2.2 Voorbereiding van het nationale standpunt	28
2.3 Omzetting: instrumenten en technieken	29
2.4 Nationale coördinatie van de omzetting	30
2.5 Verplichte adviesorganen	31
2.6 Rol van het parlement	31
2.7 Conclusies	32
3 Transpositie en de prestaties van de verschillende lidstaten	35
3.1 Vertraging in omzetting	35
3.2 Kwaliteit van omzetting: inbreukprocedures	37
4 Instrumenten en technieken	41
4.1 Speciale implementatieprocedures	41
4.2 Instrumenten	41
4.2.1 Instrumenten I: geen of trivia-instrument (rechtstreekse werking, van toepassingverklaring)	41
4.2.2 Instrumenten II: veegwetten en omnibuswetten	42
4.2.3 Instrumenten III: delegatieconstructies	43
4.4 Technieken	46
4.5 Conclusie	48
5 De nationale beleidscyclus	49
5.1 Algemeen	49
5.2 Voorbereiding van het nationale standpunt	49
5.3 Omzetting	52
5.4 Verplichte adviesorganen	55
5.5 De rol van het nationale parlement	56
5.6 De rol van andere, lagere overheden	58
5.7 De rol van belangengroepen	58
5.8 Voorrangsregels	59
6 Discussies in de onderzochte landen	61
7 Bepalende factoren bij omzetting	64
7.1 Inleiding	64
7.2 Verschillen in prestatie, instrumenten en organisatie per land	64
7.3 Analyse	67
8 Conclusies en aanbevelingen	72
8.1 Conclusies	72
8.2 Aanbevelingen voor Nederland	74
Deel II: De landenstudies	78

9	Denmark.....	80
9.1	General overview of the constitutional and political system	80
9.1.1	Constitutional characteristics	80
9.1.2	Political characteristics	80
9.1.3	Political administrative characteristics.....	80
9.2	Political or public discussion concerning EU directives and their transposition.....	80
9.2.1	Discussion of recent reports and their recommendations	82
9.2.2	Expectations regarding the process and results of these discussions	82
9.3	Description of judicial instruments and techniques	82
9.3.1.	Instruments.....	82
9.3.2.	Techniques	83
9.3.3	Character and level of implementing measure.....	84
9.3.4	Specific instruments.....	84
9.4	The national policy cycle concerning directives	85
9.4.1	General overview of the process.....	85
9.4.1.1.	National preparation of Commission initiatives.....	85
9.4.1.2	National treatment of Commission proposals	85
9.4.1.3	National transposition	88
9.4.2	Bureaucratic consultative and coordinating bodies.....	89
9.4.3	The role of compulsory advisory bodies.....	90
9.4.4	The role of parliament.....	90
9.4.5	The role of other, subnational or functional governments	92
9.4.6	The role of interest groups	92
9.5	Analysis of instruments.....	92
9.5.1	Advantages and disadvantages of instruments.....	92
9.5.2	Advantages and disadvantages of techniques	93
9.6	Analysis of national policy process	93
9.7	Conclusions	95
	Appendix: List of interviewees.....	96
10	France.....	98
10.1	General overview of the constitutional and political system	98
10.1.1	Constitutional characteristics.....	98
10.1.2	Political characteristics.....	98
10.1.3	Political administrative characteristics	99
10.2	Political or public discussion concerning EU directives and their transposition.....	101
10.2.1	Discussion of recent reports and their recommendations	101
10.2.2	Expectations regarding the process and results of these discussions.....	103
10.3	Description of judicial instruments and techniques	104
10.3.1	Instruments	104
10.3.2	Techniques.....	106
10.3.3	Character and level of implementing measure	107
10.3.4	Specific instruments	107
10.4	The national policy cycle concerning directives	107
10.4.1	General overview of the process.....	107
10.4.1.1	National preparation of Commission initiatives.....	109
10.4.1.2	National treatment of Commission proposals	109
10.4.1.3	National transposition	111
10.4.2	Bureaucratic consultative and coordinating bodies	114
10.4.3	The role of compulsory advisory bodies	115
10.4.4	The role of parliament	116

10.4.5	The role of other, subnational or functional governments.....	118
10.4.6	The role of interest groups.....	118
10.5	Analysis of instruments.....	118
10.5.1	Advantages and disadvantages of instruments.....	118
10.5.2	Advantages and disadvantages of techniques.....	119
10.6	Analysis of national policy process.....	120
10.7	Conclusions.....	121
Appendix: List of interviewees.....		124
11	Spain.....	126
11.1	General overview of the constitutional and political system.....	126
11.1.1	Constitutional characteristics.....	126
11.1.2	Political characteristics.....	126
11.1.3	Political administrative characteristics.....	128
11.2	Political or public discussion concerning EU directives and their transposition.....	128
11.2.1	Discussion of recent reports and their recommendations.....	128
11.2.2	Expectations regarding the process and results of these discussions.....	129
11.3	Description of judicial instruments and techniques.....	130
11.3.1	Instruments.....	130
11.3.2	Techniques.....	133
11.3.3	Character and level of implementing measure.....	134
11.3.4	Specific instruments.....	135
11.4	The national policy cycle concerning directives.....	135
11.4.1	General overview of the process.....	135
11.4.1.1	National preparation of Commission initiatives.....	135
11.4.1.2	National treatment of Commission proposals.....	135
11.4.1.3	National transposition.....	136
11.4.2	Bureaucratic consultative and coordinating bodies.....	140
11.4.3	The role of compulsory advisory bodies.....	141
11.4.4	The role of Parliament.....	142
11.4.5	The role of other, subnational or functional governments.....	143
11.4.6	The role of interest groups.....	144
11.5	Analysis of legal instruments and techniques.....	144
11.5.1	Advantages and disadvantages of instruments.....	144
11.5.2	Advantages and disadvantages of techniques.....	145
11.6	Analysis of national policy process.....	146
11.7	Conclusions.....	147
Appendix: List of interviewees.....		148
12	United Kingdom.....	150
12.1	General overview of the legal and political system.....	150
12.1.1	Constitutional characteristics.....	150
12.1.2	Political characteristics.....	150
12.1.3	Political administrative characteristics.....	151
12.2	Political or public discussion concerning EU directives and their transposition.....	153
12.2.1	Discussion of recent reports and their recommendations.....	153
12.2.2	Expectations regarding the process and results of these discussions.....	153
12.3	Description of judicial instruments and techniques.....	154
12.3.1	Instruments.....	154
12.3.2	Techniques.....	157
12.3.3	Character and level of implementing instruments.....	158
12.3.4	Specific instruments.....	159

12.4 The national policy cycle concerning directives	159
12.4.1 General overview of the process.....	159
12.4.1.1 National preparation of Commission initiatives.....	160
12.4.1.2 National treatment of Commission proposals	161
12.4.1.3 National transposition.....	164
12.4.2 Bureaucratic consultation and coordinating bodies	165
12.4.3 The role of compulsory advisory bodies	166
12.4.4 The role of the parliament	167
12.4.5 The role of other, subnational or functional administrations.....	168
12.4.6 The role of interest groups.....	169
12.5 Analysis of instruments and techniques	169
12.5.1 Advantages and disadvantages of instruments	169
12.5.2 Advantages and disadvantages of techniques.....	169
12.6 Analysis of the national process	170
12.7 Conclusions	170
Appendix: List of interviewees.....	172
13 Germany.....	174
13.1 General overview of the constitutional and political system	174
13.1.1 Constitutional characteristics.....	174
13.1.2 Political characteristics	174
13.1.3 Political administrative characteristics	175
13.2 Political or public discussion concerning EU directives and their transposition.....	176
13.3 Description of judicial instruments.....	176
13.4 The national policy cycle concerning directives	180
13.4.1 General overview of the process.....	180
13.4.1.2 National treatment of Commission proposal.....	180
13.4.1.3 National transposition	182
13.4.2 Bureaucratic consultative and coordinating bodies	183
13.4.3 The role of compulsory advisory bodies	184
13.4.4 The role of parliament	184
13.4.5 The role of other, subnational or functional governments.....	185
13.4.6 The role of interest groups.....	185
13.5 Conclusions	185
14 Italy.....	188
14.1 General overview of the constitutional and political system	188
14.1.1 Constitutional characteristics.....	188
14.1.2 Political characteristics	188
14.1.3 Political administrative characteristics	189
14.2 Political or public discussion concerning EU directives and their transposition.....	189
14.3 Description of judicial instruments.....	190
14.4 The national policy cycle concerning directives	192
14.4.1 General overview of the process.....	192
14.4.1.1 National treatment of Commission proposals	192
14.4.1.2 National transposition	193
14.4.2 Bureaucratic consultative and coordinating bodies	194
14.4.3 The role of compulsory advisory bodies	195
14.4.4 The role of parliament	195
14.4.5 The role of other, subnational or functional governments.....	196
14.4.6 The role of interest groups.....	196
14.5 Conclusions	196

References	198
Glossary of terms (on judicial instruments and techniques)	208
Begeleidingscommissie onderzoek	210

Voorwoord

In 2004 heeft het Wetenschappelijk Onderzoek en Documentatie Centrum (WODC) van het Ministerie van Justitie aan een groep onderzoekers verbonden aan de departementen publiek recht en bestuurskunde van de Universiteit Leiden de opdracht gegeven een onderzoek te doen naar de omzetting van Europese richtlijnen in een beperkt aantal lidstaten. Daarin zou vooral gelet moeten worden op de verschillende juridische instrumenten die deze landen hanteren en de wijze waarop dit instrumentarium een rol speelt bij de tijdigheid van omzetting. Het voorliggende rapport bevat het verslag van dat onderzoek, dat ten behoeve van de Directie Wetgeving van het Ministerie van Justitie werd uitgevoerd. Het onderzoek is verricht door een team bestaande uit drs. Sara Berglund, dr. Antoaneta Dimitrova, drs. Michael Kaeding, drs. Ellen Mastenbroek, mr. Anne Meuwese, drs. Marleen Romeijn en ondergetekenden.

In het kader van het onderzoek zijn 40 interviews gehouden met een groot aantal bij de omzetting van richtlijnen betrokkenen in verschillende Europese hoofdsteden. In dat kader willen wij graag de teams van de Nederlandse ambassades in Londen, Madrid en Parijs bedanken voor hun behulpzaamheid. Verder willen wij Mercedes Alda Frenández, verbonden aan *Universidad Rey Juan Carlos* in Madrid, bedanken voor haar bereidheid te assisteren bij het veldonderzoek in Spanje.

Gedurende het onderzoek hebben we dankbaar gebruik kunnen maken van de adviezen en commentaren van de door het WODC ingestelde begeleidingscommissie. Die begeleidingscommissie stond onder voorzitterschap van prof. mr. J. W. de Zwaan (Erasmus Universiteit Rotterdam) en werd ondersteund door mw. mr. E.C. van Ginkel (Ministerie van Justitie, WODC). Verder hadden zitting in de commissie, mr. drs. E.L.H de Wilde (Ministerie van Buitenlandse Zaken), mr. L.J. Clement (Ministerie van Verkeer en Waterstaat), mr. H.J.H.L. Kortjes (Ministerie van Justitie), opgevolgd door mr. A.L.C. Roos en mr. R. Boer (beiden Ministerie van Justitie), mr. M.L. van Emmerik (Ministerie van Binnenlandse Zaken en Koninkrijksrelaties), opgevolgd door mr. S.M. Koelman (eveneens Ministerie van Binnenlandse Zaken en Koninkrijksrelaties). We bedanken hen voor hun waardevolle inbreng.

Leiden, 1 juli 2005

Prof.dr. Bernard Steunenberg en prof.dr. Wim Voermans

Samenvatting en conclusies

In dit onderzoek staat de vraag centraal welke implementatietechnieken en -systemen in Duitsland, Denemarken, Frankrijk, Italië, het Verenigd Koninkrijk, en Spanje worden gebruikt om EG-richtlijnen zowel rechtmatig, zorgvuldig als snel in de nationale rechtsorde te bedden. Uit die buitenlandse voorbeelden – zo is de vooronderstelling in dit onderzoek – kan Nederland wellicht lering trekken. In het licht van de verschillende deelvragen die zijn geformuleerd, is de centrale vraag zo benaderd dat naast een inventarisatie van de beschikbare juridische instrumenten en technieken, ook is gelet op het nationale beleidsproces ten aanzien van richtlijnen. Aspecten van dit beleidsproces spelen een belangrijke rol bij de vraag of richtlijnen snel en zorgvuldig kunnen worden omgezet.

Inzicht in de ervaringen met de gebruikte instrumenten en technieken van omzetting en de wijze waarop het nationale beleidsproces is vormgegeven is in dit onderzoek verkregen op basis van uitvoerig vergelijkend literatuuronderzoek en expert interviews. Interviews zijn, gelet op hun vergelijkbaarheid met Nederland en hun gebruik van een verschillend juridisch instrumentarium, gehouden in Denemarken, Frankrijk, het Verenigd Koninkrijk en Spanje. De studies van Italië en Duitsland zijn alleen gebaseerd op literatuuronderzoek.

- Op basis van een vergelijking tussen deze zes landen, levert het onderzoek de volgende bevindingen op:
- de introductie van bijzondere juridische instrumenten en technieken is niet zelfstandig verklarend voor de blijvende bevordering van tijdigheid van de omzetting van richtlijnen;
 - de nationale wetgevingssystematiek vormt in de onderzochte landen veelal het uitgangspunt bij omzetting;
 - er bestaat in de onderzochte landen geen echte voorkeurstechiek voor de omzetting van richtlijnen die in Nederland nog niet wordt gebruikt;
 - vertragingen zijn veelal het gevolg van verschillende constitutionele/juridische, politieke en operationele factoren die in samenhang moeten worden gezien;
 - belangrijke juridische omzettingsversnellende factoren zijn het omzetten van richtlijnen op een zo laag mogelijk niveau, het voorkomen van het meenemen van nationale extra's en het meenemen van mogelijke complicaties bij de omzetting in de onderhandelingen over de ontwerprichtlijn of het anticiperen op de omzetting door in de eindfase van de onderhandelingen met de voorbereidingen op de omzetting te beginnen;
 - belangrijke politieke factoren zijn het geven van prioriteit aan omzetting en het activeren van het nationale parlement in de onderhandelingsfase; en
 - belangrijke operationele factoren zijn een duidelijke ambtelijke verantwoordelijkheidsverdeling, het werken met multidisciplinaire projectteams en een accurate en frequente voortgangsbewaking.

Op grond van deze bevindingen is bezien in hoeverre sommige daarvan relevant zouden kunnen zijn voor de situatie in Nederland. Op basis van die analyse komen wij in het rapport tot de volgende aanbevelingen:

- activeer het Nederlandse parlement door de introductie van een behandelingsvoorbehoud,
- voer een actief strategisch beleid ten aanzien van de omzetting van EG-richtlijnen door onder andere de verantwoordelijkheid voor de voortgangsbewaking beter te organiseren,

- zet richtlijnen op een zo laag mogelijk niveau om en benut daarbij de bestaande wetgevingssystematiek en instrumenten ten volle, in plaats van het inzetten van nieuwe - aan ons constitutionele systeem wezensvreemde – omzettingstrumenten of –procedures,
- werk aan een breed gedragen, gezamenlijke Nederlandse beïnvloeding van Europese dossiers.

Summary and conclusions

The central question of this research project is: What kind of transposition instruments and techniques are used in Germany, Denmark, France, Italy, the United Kingdom, and Spain to transpose EC-directives in the national legal order in a timely, precise and legally correct way.

The premise of this research is that the Netherlands can also learn from these foreign examples. In answering the central question – and the different sub-questions resulting from it – this project has made an inventory of the available transposition instruments and techniques which has been enriched and analyzed in relation to the context of national policy processes. The different dimensions of national policy process play an important role as regards the timely and correct transposition of EC directives.

We have performed a comprehensive comparative literature study combined with a series of in-depth, expert interviews to get an – as rich and accurate as possible - insight in the different national transposition instruments and techniques and the way in which the used techniques and instruments are embedded in the national policy processes. Interviews have been conducted in Denmark, France, the United Kingdom and Spain, based on the comparability of these countries with the Netherlands and the variety a legal instruments and techniques involved. The studies into the situation in Italy and Germany are based on a literature study only.

On the basis of our comparison between those six countries, the research reaches the following conclusions:

- the introduction of special legal instruments and techniques dedicated to the transposition of EC Directives is not in itself and on its own an explanation for the improvement of timeliness in the transposition of the directives;
- the regular national legal system (including the common procedure, and legal instruments) is the point of reference for transposition – and as a consequence commonly used - in the countries involved in this research ;
- there does not seem to be a preferred or best technique for the transposition of directives, which is not already in use in the Netherlands;
- delays in transposition are caused by combinations of several constitutional, legal, political and operational factors of which the effect cannot be judged independently but they can only be considered as interrelated elements of the national system;
- important sets of legal factors improving the transposition speed are the transposition of directives with delegated instruments (subordinated legislation), avoiding national extras when transposing directives and avoiding complications at the transposition stage by anticipating transposition-issues during the negotiation stage of a directive;
- important political factors are: giving priority to transposition and activating the national parliament at the negotiation stage; and
- important operational factors are a clear-cut lines of administrative responsibilities for transposition, working with multidisciplinary project teams and an accurate and frequent monitoring of progress.

Of these conclusions we have highlighted those which are particularly relevant for the Dutch situation.

On the basis of these findings we recommend the following:

- activate the Dutch parliament by the introduction of a parliamentary scrutiny reserve,

- pursue an active strategic policy with respect to the transposition of EC-directives by organizing more efficiently the responsibility for the monitoring of progress for the transposition,
- transpose the directive in the lowest possible legal instrument and use the existing legislative system and instruments to the full extent, instead of introducing new, special transposition instruments or procedures, alien to our constitutional system;
- try to come up with a broadly-based and joint Dutch influence on European dossiers.

1 Aanleiding en opzet van het onderzoek

1.1 Achtergrond

Lange tijd ging het niet goed met de omzetting van EG-richtlijnen in Nederland. Op 31 december 2003 waren 59 richtlijnen, waarvan de omzettingstermijn al verlopen was, nog niet omgezet. De Tweede Kamer uitte haar zorg¹ aangezien al enkele jaren actief geprobeerd wordt die achterstanden terug te dringen.² Dit vormde voor het Ministerie van Justitie (Directie Wetgeving) aanleiding om het initiatief te nemen om vergelijkend onderzoek te laten verrichten naar omzettingstechnieken in het buitenland.

In de volgende maanden liep de achterstand op van 59 tot 65 richtlijnen, zoals is weergegeven in Tabel 1.1. Met het oplopen van deze achterstand zakte Nederland in de omzettingsranglijst van de Europese Commissie van een derde positie in 2003 naar een tiende positie in 2004.³

Tabel 1.1: Achterstanden in Nederland in de omzetting van Europese richtlijnen: naar ministerie en voor de periode 2004-2005

peildatum: ministerie:	31 december 2003	31 maart 2004	30 juni 2004	30 september 2004	31 december 2004	31 maart 2005
BZK	0	1	0	0	0	0
EZ	7	8	1	1	0	0
Financiën	5	4	9	6	11	13
Justitie	9	10	7	4	5	3
LNV	2	3	3	2	0	0
OCW	0	0	0	0	0	0
SZW	1	2	1	1	2	1
V&W	13	14	14	12	3	2
VROM	5	15	6	8	6	7
VWS	3	8	7	7	3	3
Overig	14	0	1	0	0	0
Totaal	59	65	49	41	30	29

bron: Kwartaaloverzichten omzetting EG-richtlijnen, Kamerstukken Tweede Kamer 21.109.

Vanaf het tweede kwartaal van 2004 heeft zich een verandering ingezet, wat betreft het totaal aantal, nog om te zetten richtlijnen waarvoor de uitvoeringstermijn is verstreken. Terwijl er op 31 maart 2004 nog 65 vertraagde richtlijnen waren is dit aantal een jaar later, op 31 maart 2005, 29. Een reductie van maar liefst 55%. In het tweede verslag over de implementatie van de interne markt strategie 2003-2006,⁴ wordt Nederland door de Commissie gecompimenteerd voor de ijver bij het terugdringen van de omzettingsachterstand in de afgelopen periode. Het is Nederland gelukt om de omzettingsachterstand te

¹ Zie de motie Van Dijk c.s., *Kamerstukken II 2003/04*, 21.109, nr. 118.

² Zie het initiatief van staatssecretaris Nicolai, *Kamerstukken II 2003/04*, 21.109, nrs. 117 en 119. De Nederlandse veegactie (zie *Nieuwsbrief ICER* mei 2003, nr. 14, p. 1) die sinds het voorjaar van 2003 met het oog op het aanstaande voorzitterschap is ingezet is niet effectief gebleken.

³ Zie Progress in notification of national measures implementing directives referende date 30/04/2004, http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm#transpositions.

⁴ Mededeling van de Commissie aan de Raad, het Europees Parlement, het Europees Economisch en Sociaal comité en het Comité van de regio's. Tweede verslag over de implementatie van de internemarktstrategie 2003-2006, COM (2005).

reduceren tot minder dan 1,9% in het licht van de 1,5%-doelstelling van de Europese Unie en de dossiers waarbij de achterstand meer dan twee jaar beliep tot nul terug te brengen.

De extra inspanningen die Nederland ondernam in de aanloop naar het voorzitterschap gedurende de tweede helft van 2004 zullen zeker aan die inhaalmanoeuvre hebben bijgedragen. Dat laat echter onverlet dat de omzettingsachterstand in absolute zin—i.e. richtlijnen waarvan de implementatietermijn is verlopen en die nog niet zijn omgezet—nog steeds substantieel is. Verder bestaat de kans dat met de afsluiting van het Nederlandse voorzitterschap in december 2004 de aandacht voor omzetting in de komende jaren weer verslapt. Te late omzetting is in Nederland, zoals door Mastenbroek (2003) is aangetoond, een structureel probleem waarbij af en toe, en mede in het licht van een komend voorzitterschap, hard wordt gepompt om een groot aantal richtlijnen om te zetten.

Verder laat het overzicht in Tabel 1.1 zien dat de inhaalslag van 2004 vooral het gevolg is van het oplossen van achterstanden binnen de ministeries van Verkeer en Waterstaat (V&W), Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (VROM), Economische Zaken (EZ), Justitie en Volksgezondheid, Welzijn en Sport (VWS).⁵ Verder is het opmerkelijk dat het ministerie van Financiën verantwoordelijk is voor een toename van de achterstand met maar liefst 9 richtlijnen. Dat drukt de goede inspanningen van de andere ministeries. De wisselende prestaties maken duidelijk dat in Nederland nog niet alle obstakels voor een vlotte omzetting van EG-richtlijnen zijn opgeruimd. Het is zeer wel denkbaar dat in de komende jaren de achterstanden in Nederland weer kunnen oplopen aangezien het mogelijk nog niet duidelijk is wat de oorzaken zijn van achterstanden. Wat we in ieder geval wel vast kunnen stellen is dat Nederland het op het punt van de volledigheid en correctheid van omzetting (kwalitatief dus) niet slecht lijkt te doen. In vergelijking met andere landen worden tegen Nederland bijvoorbeeld weinig inbreukprocedures gevoerd wegens onjuiste omzetting. Een gelijksoortig beeld komt ook naar voor uit de aanmaningen en met redenen omklede adviezen wegens juist omzetting (zie paragraaf 3.1 en daar de tabellen 3.3 en 3.4). Ook daaruit blijkt dat Nederland in vergelijking met andere landen betrekkelijk weinig door de Commissie op de vingers wordt getikt voor onjuiste omzetting.

Dat doet echter niet af aan de constatering dat er, wat Nederland betreft, een betrekkelijk hardnekkige omzettingsachterstand bestaat. Over de oorzaken van die groeiende achterstanden wordt in Nederland, maar ook in andere landen, jarenlang druk gespeculeerd en gediscussieerd. Volgens sommigen zijn de lange wetgevingsprocedures en de wijze van implementeren debet aan de achterstanden (zie onder meer Mastenbroek, 2003; König c.s., 2005; Kaeding, 2005; Berglund et al., 2005).⁶ Anderen wijzen onder meer op gebrekkige coördinatie en onvoldoende politieke prioritering als voornaamste oorzaak (Voermans, 2004; Steunenbergh 2004; 2005). Verder wordt het zoeken naar oorzaken bemoeilijkt vanwege de grote onderlinge verschillen in aard en karakter van richtlijnen. De complexiteit van sommige richtlijnen en de mate waarin richtlijnen de lidstaten nog keuzes laten, lijken ook een rol te spelen (zie bijvoorbeeld Thomson et al., 2005). Vast staat dat het nog te vroeg is om met meer zekerheid aan te geven welke factoren vooral het oplopen van

⁵ Vergelijk hiervoor de achterstanden op 31 maart 2004 met die op 31 maart 2005 in Tabel 1.1: de absolute reductie is 12 richtlijnen voor V&W, 8 richtlijnen voor VROM en EZ, 7 richtlijnen voor Justitie en 5 richtlijnen voor VWS.

⁶ Zie bijvoorbeeld de analyse in de memorie van toelichting bij het wetsvoorstel totstandkoming en implementatie van EG-besluiten op het terrein van de energie, post en telecommunicatie *Kamerstukken II* 2003/04, 29 474, nrs. 1-3 (op 26 maart 2004 ingediend bij de Tweede Kamer).

een achterstand bepalen. Het empirische onderzoek dat op dit moment beschikbaar is, heeft daarover nog geen duidelijke conclusies geleverd (voor een overzicht zie Steunenberg en Rhinard, 2005).⁷

Hoewel de oorzaken van achterstand bij de omzetting soms moeilijk te achterhalen zijn, is dat voor de Nederlandse overheid geen reden geweest om stil te zitten. De huidige aanpak om verder oplopen van de achterstanden te bestrijden, bestaat er onder andere uit het parlement eerder bij de voorbereiding te betrekken en meer inzicht in het implementatieproces te verschaffen. Verder wordt, waar nodig en mogelijk, door de Nederlandse onderhandelaars een langere omzettingstermijn bedongen en probeert de regering te komen tot vormen van versnelde omzetting of implementatie.⁸ Veel pogingen om implementatie via juridische constructies te versnellen zijn tot nu toe gestrand. Weliswaar zijn tien jaar geleden verschillende wettelijke adviesverplichtingen afgeschaft in geval van implementatie van EU-besluiten,⁹ maar implementatieversnelling via bijzondere delegatieconstructies is tot op heden omstreden.¹⁰ De laatste stap op dit pad vormt het op 26 maart 2003 bij de Tweede Kamer ingediende wetsvoorstel totstandkoming en implementatie van EG-besluiten op het terrein van de energie, post en telecommunicatie, dat op beperkte terreinen machtigt tot implementatie van EU-besluiten via lagere regelingen die kunnen derogeren aan hogere nationale regelingen.

Deze Nederlandse discussie over de versnelde implementatie zoekt op dit ogenblik tastend een weg, omdat niet echt vast staat door welke factoren (en in welke mate) de implementatieachterstanden worden veroorzaakt. Evenmin duidelijk is of de inzet van juridische versnellings technieken (andere organisatie van of inbreng tijdens de voorbereiding, implementatie via delegatie- en machtigingsconstructies, verder terugbrengen van adviesverplichtingen, anders samenwerken met het parlement, etc.) blijvend bij zullen dragen aan de bestrijding van de implementatieachterstanden.

Alle reden om eens buiten Nederland te kijken en te zien hoe andere lidstaten proberen het hoofd te bieden aan een wassende stroom van implementatiebehoevende EU-besluiten. Uit buitenlandse ervaringen kunnen niet alleen ideeën voor een Nederlandse aanpak worden geput, ook kunnen ze inzicht geven in de oorzaken van het ontstaan van achterstanden en de wijze waarop die al dan niet effectief zijn bestreden.

1.2 Probleemstelling

In het onderzoek staat de volgende hoofdvraag centraal:

Welke implementatietechnieken en -systemen worden in Duitsland, Denemarken, Frankrijk, Italië, het Verenigd Koninkrijk, en Spanje gebruikt om EG-regelingen zowel rechtmatig, zorgvuldig als snel in de nationale rechtsorde in te bedden?

Deze hoofdvraag valt in dit onderzoek uiteen in de volgende zes deelvragen:

⁷ Op het moment van het schrijven van het rapport wordt door verschillende Europese onderzoeksgroepen werk verricht naar de oorzaken van deze achterstanden (o.a. Berlijn, Speijer, en een groep Nederlandse onderzoekers die vanuit de Universiteit Leiden wordt gecoördineerd). De resultaten daarvan worden in de komende jaren verwacht. Naast de reeds genoemde bronnen wordt, wat betreft het empirische onderzoek, ook verwezen naar Lampinen and Uusikylä (1998), Mbaye (2001, 2003) en Giuliani (2003a, 2003b).

⁸ *Kamerstukken II* 2003/04, 21109, nr. 120 (Een heel lijvig overzicht van 54 pagina's).

⁹ Zie de artikelen 1:7 en 1:8 Algemene wet bestuursrecht.

¹⁰ Zie de discussie die aanleiding gaf tot het kabinetsstandpunt Versnelde implementatie van EG- en andere internationale besluiten (*Kamerstukken II* 1998/99, 26200 VI, nr. 65) en een daarop betrekking hebbende vervolgotitie (*Kamerstukken II* 1999-2000, 26800 VI, nr. 79).

1. Wat zijn de belangrijkste *interne obstakels* die de in het onderzoek betrokken lidstaten hinderen bij het snel en zorgvuldig implementeren en omzetten van EG-regelingen?
2. Welke *preventieve maatregelen* worden o.a. gedurende de voorbereiding op de implementatie in de in het onderzoek betrokken landen genomen om implementatieproblemen te beperken of te voorkomen? Is er sprake van *implementatieketenbeheer*, i.e. een systeem waarbij tijdens de voorbereiding van Europese wetgeving al wordt geanticipeerd op de implementatie (= omzetting, uitvoering en handhaving) ervan?
3. Welke *omzettings- en implementatietechnieken* worden in de verschillende in het onderzoek betrokken lidstaten van de EU gehanteerd bij de implementatie van EU-regelingen?
 - a. Bestaan er speciale wettelijke regelingen die procedures en normen bevatten voor (versnelde of vereenvoudigde) implementatie en omzetting van EG-regelingen?
 - b. Worden adviesorganen geconsulteerd over implementatiemaatregelen, dan wel gedurende de voorbereiding van Europese wetgeving? Zo, ja is er dan sprake van verplichte advisering?
 - c. Wanneer en in welke vorm moet het parlement bij de implementatie van EG-regelingen worden betrokken?
 - d. Als EG-regelingen via wettelijke regelingen moeten worden geïmplementeerd, wanneer moet dan de implementatie plaatsvinden via een democratisch gelegitimeerde wet (Act of Parliament) en wanneer via een gedelegeerde regeling?
 - e. Bestaan er bijzondere wetgevingsprocedures om EG-regelingen sneller of eenvoudiger te behandelen en te implementeren dan vergelijkbare nationale wetsvoorstellen (e.e.a. via machtigings- of delegatieconstructies)?
 - f. Wat is bij benadering de kwantitatieve en kwalitatieve verhouding tussen implementatie via democratisch gelegitimeerde wettelijke regelingen en gesubordineerde vormen van regelgeving;
 - g. Welke zijn de effecten van de onderzochte implementatietechnieken, in termen van tijd, helderheid voor degenen die ermee werken (bijv. zijn de rechters bijtijds op de hoogte), flexibiliteit, effecten op het systeem van wetgeving?
 - h. Wat zijn de voor- en nadelen?
4. Spelen (indien relevant) *deelstaatoverheden, zelfstandige bestuursorganen en decentrale bestuursorganen* een rol bij de omzetting en implementatie?
5. Is er *politieke of maatschappelijke discussie* in de onderzochte landen aangaande dit onderwerp?
6. Welke van de gevonden elementen in het onderzoek zouden ook in Nederland bruikbaar zijn?

1.3 Implementatie: begripsomschrijvingen

Bij het analyseren van de implementatietechnieken en systemen in dit onderzoek hanteren we een ruim implementatiebegrip. Onder *implementatie* van EG-recht verstaan we ‘het treffen van alle algemene en bijzondere maatregelen die nodig zijn om de werking van het EG-recht in een land te kunnen verzekeren.’ Dat begrip omvat in het geval van de implementatie van EU wetgeving¹¹ een keten van activiteiten die lopen van:

- de voorbereiding van een EU-regeling,

¹¹ De EU kent geen materieel of formeel wetsbegrip, zoals we dat in Nederland kennen. We gebruiken ‘Europese wetgeving’ korthedshalve als aanduiding voor regelend primair en secundair gemeenschapsrecht (i.e. verordeningen, richtlijnen met een algemene strekking en beschikkingen met een algemene strekking en een algemeen verbindend karakter).

- de vaststelling ervan,
- de inbedding van Europese wetgeving in de nationale rechtsorde, wat in het geval van een richtlijn neerkomt op de omzetting van de richtlijn in nationale regelgeving, tot
- de uitvoering en handhaving (inclusief het toezicht daarop).

Voor het proces van het kiezen van de geëigende vormen en middelen om het door een *EG-richtlijn* gevergd resultaat te behalen wordt de aanduiding *omzetting* gebruikt.

Lidstaten zijn op grond van het huidige artikel 249 van het EG-verdrag vrij om de meeste geëigende vormen en middelen te kiezen om het door een EG-richtlijn gevergd resultaat te bereiken. Voor het realiseren van de omzetting van richtlijnen wordt in verschillende lidstaten gebruik gemaakt van verschillende instrumenten en technieken.

Onder *instrumenten* verstaan wij in het onderzoek de juridische instrumenten waarmee bepalingen van een richtlijn kunnen worden omgezet. In eerste instantie valt in Nederland dan te denken aan regelingsoorten zoals de wet in formele zin, algemene maatregel van bestuur, ministeriële regelingen, verordeningen van een decentrale regelgever (pbo-orgaan, zelfstandig bestuursorgaan, provincie, gemeente, etc). We huldigen in dit onderzoek een ruim instrumentbegrip. We verstaan onder juridische instrumenten ook regelingsoorten die geen algemeen verbindende voorschriften bevatten zoals beleidsregels, en zelfs alternatieve omzettinginstrumenten zoals convenanten en CAO's.

Onder *technieken* verstaan wij de *manier* waarop bepalingen in een richtlijn in een juridisch instrument worden omgezet. Voorbeelden van technieken zijn:

- de '1-op-1' omzetting (i.e. het letterlijk overnemen van onderdelen van de tekst van een richtlijn in een nieuwe nationale regeling);
- '1-op-1'-omzetting met kleinere of grotere (terminologische) aanpassingen (zie voor Nederland aanwijzing 56 van de Aanwijziging voor de regelgeving¹²);
- omzetting van een EG-richtlijn via bestaand juridisch regime (als voor de omzetting van een richtlijn geen nieuwe regeling hoeft te worden getroffen kan worden volstaan met loutere kennisgeving; zie aanwijzing 347);
- het omzetten via het inweven van een richtlijn in het systeem (corpus) van de bestaande wet- en regelgeving (ook wel *elaboration* genoemd);

Binnen deze technieken zijn weer modaliteiten te onderscheiden:

- omzetten via verwijzen (i.e. statistische en dynamische verwijzingen naar (bepalingen van) een EG-richtlijn);
- de annex-methode, waarbij de richtlijn als bijlage van een nationale omzettingsmaatregel wordt opgenomen;
- omzetting 'sec' (aanwijzing 337);
- omzetting gebruiken als vehikel voor extra nationaal beleid;

De wijze waarop een land van gedelegeerde regelingen gebruikt, valt onder de juridische instrumenten. Niet alle landen in het onderzoek hebben een met Nederland vergelijkbaar delegatiebegrip als het om het overdragen van de bevoegdheid tot het vaststellen van algemeen verbindende voorschriften gaat. Aan de

¹² In het vervolg bedoelen wij met een 'aanwijzing' een aanwijzing in het kader van de Aanwijzing voor de regelgeving zoals die in Nederland wordt gehanteerd. Zie Aanwijzing voor de regelgeving (2004), voor een overzicht.

oppervlakte lijken landen als Spanje, Italië en het Verenigd Koninkrijk weliswaar een met de Nederlandse dogmatiek overeenstemmend delegatiebegrip te hebben, maar als we dat relateren aan de verhouding die bestaat tussen basiswetgeving en regelgeving die in delegatie wordt vastgesteld door ‘lagere’ regelgevers, dan blijkt dat er in die landen heel anders tegen de hiërarchische verhouding tussen delegerende regeling en gedelegeerde regelingen wordt aangekeken. In dit onderzoek vermijden we dan ook om delegatietechnieken als zodanig met elkaar te vergelijken.

1.4 Opzet van de landenstudies

Voor de landenstudies is uitgegaan van een structuur waarmee de *nationale constitutionele en juridische context* en het *nationale beleidsproces* ten aanzien van Europese richtlijnen worden benadrukt.

Bij de beschrijving van de *nationale constitutionele en juridische context* waarin omzetting plaats heeft komen de verschillende instrumenten en technieken van omzetting naar voren, inclusief speciale of vereenvoudigde mogelijkheden waaronder bijzondere delegatiebepalingen die versnelde implementatie tot doel hebben.

Daarnaast wordt ingegaan op het *nationale beleidsproces* ten aanzien van Europese richtlijnen. Daarbij wordt uitgegaan van de idee dat omzetting en uitvoering onderdelen zijn van een langere keten van stappen die verband houden met Europese regelgeving, in het bijzonder richtlijnen. In grote lijnen bestaat deze keten uit de volgende schakels:

1. de voorbereiding van een Europese richtlijn,
2. de nationale en Europese besluitvorming over de voorgestelde richtlijn,
3. de nationale omzetting van de richtlijn,
4. de uitvoering, met inbegrip van de controle en handhaving, van de nationale beleidsmaatregelen bedoeld om de richtlijn uit te voeren,
5. het evalueren van de effecten van de nationale beleidsmaatregelen, en
6. de terugkoppeling van het nationale (de inhoud en effecten van de nationale maatregelen ter uitvoering van de richtlijn) en het Europese beleid (de inhoud van de richtlijn).

Met de analyse van enerzijds de beschikbare instrumenten en gebruikte technieken en anderzijds de wijze waarop het nationale beleidsproces is vormgegeven, wordt getracht een beeld te vormen over de mate waarin Duitsland, Denemarken, Frankrijk, Italië, het Verenigd Koninkrijk en Spanje in staat zijn Europese richtlijnen snel, zorgvuldig en rechtmatig in hun rechtsorde in te bedden.

Op grond van beide lijnen—constitutionele en juridische context en beleidsproces—zijn de landenstudies als volgt gestructureerd:

- algemene schets van het juridische en politieke systeem, waaronder de constitutionele, politieke en kenmerken van de organisatie van het openbaar bestuur/ministeries;
- politieke/maatschappelijke discussie ten aanzien van Europese richtlijnen en hun omzetting;
- beschrijving van juridische instrumenten en technieken;
- beschrijving van de nationale beleidscyclus ten aanzien van richtlijnen, met aandacht voor ambtelijke overleg- en coördinatieorganen in de procesgang, de rol van verplichte (geïstitutionaliseerde) adviesorganen, de rol van het nationale parlement, de rol van andere, lagere of functionele overheden en de rol van belangengroepen;
- analyse van instrumenten en technieken in termen van tijd, uitvoerbaarheid, volledigheid, flexibiliteit en samenhang met andere nationale regelgeving;

- analyse van de nationale procesgang met aandacht voor de tijdigheid van omzetting, de effectiviteit in standpuntbepaling, de samenhang in voorbereiding en uitvoering, en de betrokkenheid van het nationale parlement (democratische legitimiteit).

1.5 Methode: literatuuronderzoek en expert interviews

Inzicht in de ervaringen met de gebruikte instrumenten en technieken van omzetting en de wijze waarop het nationale beleidsproces is vormgegeven is gebaseerd op uitvoerig literatuuronderzoek en expert interviews.

Op grond van budgettaire overwegingen zijn alleen interviews gehouden in:

- Denemarken,
- Frankrijk,
- het Verenigd Koninkrijk, en
- Spanje.

Bij de keuze van deze landen spelen de volgende overwegingen een rol. In de eerste plaats is de constitutionele structuur van deze landen beter met Nederland te vergelijken dan bijvoorbeeld met die van Duitsland. De federale structuur van Duitsland levert eigen complicaties op ten aanzien van omzetting. In de tweede plaats is rekening gehouden met een spreiding over goed presterende (Denemarken en Spanje) en minder goed presterende landen (Frankrijk). Ten slotte is het Verenigd Koninkrijk een interessante casus vanwege het bestaan van specifieke instrumenten wat betreft de omzetting van Europese richtlijnen.

In het geval van Italië en Duitsland is in het onderzoek voor een beperktere opzet gekozen: voor die landen is de landenstudie uitsluitend gebaseerd op literatuuronderzoek.

In totaal zijn ten behoeve van het onderzoek 40 interviews gehouden (Denemarken 10, Frankrijk 9, Spanje 12 en Verenigd Koninkrijk 9) met personen uit de volgende categorieën. In de eerste plaats ambtelijke vertegenwoordigers die betrokken zijn bij de coördinatie van de omzetting van Europese regelingen en/of bij de zorg voor de kwaliteit van wetgeving (vergelijkbaar met vertegenwoordigers van Buitenlandse Zaken en Justitie, en deelnemers aan de ICER in Nederland). In de tweede plaats is gestreefd om tevens leden van het nationale parlement te spreken. Daarbij gaat het vooral om leden uit de commissie Europese Zaken dan wel commissies die nauw zijn betrokken bij de discussie over de besluitvorming over en de omzetting en uitvoering van Europese richtlijnen.

De interviews zijn semi-gestructureerd waarbij de interviewers na afloop een verslag hebben opgesteld en ter verificatie hebben toegezonden aan de respondent. De interviewronde in Denemarken is tevens gebruikt om de vragenlijst te beproeven. Dat heeft geleid tot nadere bijstellingen door een beperkter aantal open vragen te hanteren en de vragen af te stemmen op de positie van de geïnterviewde. De bijgestelde vragenlijst is in de overige landenstudies gehanteerd.

1.6 Opzet van het rapport

Het rapport valt in twee delen uiteen. Deel I is het hoofdrapport waarin de situatie in Nederland wordt geschetst en de bevindingen op basis van de landenrapportages worden vergeleken en geanalyseerd. Dit deel mondt uit in conclusies en aanbevelingen ten aanzien van de situatie in Nederland.

Deel II van het rapport bevat de landenstudies ten aanzien van Denemarken, Frankrijk, Spanje, Verenigd Koninkrijk, Duitsland and Italië. Zoals aangegeven zijn de studies ten aanzien van Denemarken, Frankrijk, Spanje en Verenigd Koninkrijk uitgebreider dan die voor Duitsland en Italië. Ten aanzien van deze twee

laatste landen hebben wij ons beperkt tot een literatuurstudie en zijn geen interviews ter plekke gehouden. In paragraaf 1.5 is de keuze voor deze werkwijze verder toegelicht.

Deel I: Hoofdrapportage

2 Omzetting van richtlijnen in Nederland

2.1 Algemeen: Nederlands debat over versnelling van de omzetting van richtlijnen

In Nederland is, zoals in paragraaf 1.1 aan de orde kwam, de discussie over en de beleidsontwikkeling terzake de implementatie van EG-richtlijnen gedurende de loop der jaren sterk afhankelijk geweest van de Nederlandse omzettingsprestaties. Die waren door de bank genomen tot het eind van de jaren tachtig van de vorige eeuw vrij behoorlijk, al valt op die analyse af te dingen (Mastenbroek 2003). Met de versnelling van de realisering van de interne markt en de daarmee gepaard gaande groei van het richtlijnenvolume begonnen ook in Nederland de omzettingsachterstanden op te lopen. Rondom de Nederlandse voorzitterschappen in de jaren negentig van de vorige eeuw is verschillende malen getracht de implementatie van EG-richtlijnen te versnellen. In een eerste fase (vanaf 1994) werd de versnelling vooral gezocht in de afschaffing van wettelijk verplichte advisering over voorstellen voor EG-richtlijnen¹³ en maatregelen in de sfeer van het wetgevingsbeleid. Vanaf 1999 breekt een fase aan waarin wordt gezocht naar nieuwe instrumenten en technieken (vooral delegatieconstructies) die kunnen bijdragen aan de versnelling van de implementatie. Dat heeft in Nederland tot op de dag van vandaag voortdurend debat opgeleverd over 'versnelde implementatie'. Een debat dat onlangs weer een impuls heeft gekregen in de aanloop naar het voorzitterschap in 2004 en met het Wetsvoorstel totstandkoming en implementatie EG-besluiten op het terrein van de energie, post en telecommunicatie.¹⁴

De aanstoot tot de tweede fase in de discussie vormde de poging om via artikel 18.2 in het voorstel tot wijziging van de Telecommunicatiewet¹⁵ de implementatie van richtlijnen op het terrein van de telecommunicatie te bespoedigen. Die bepaling maakte het mogelijk bij lagere regelgeving af te wijken van de wet indien EG-wetgeving daartoe dwingt. De Eerste Kamer verzette zich hiertegen en vroeg aan de regering om een breder afwegingskader. Dat kwam er in de vorm van een kabinetsstandpunt uit 1999 over de toelaatbaarheid van bevoegdheden tot versnelde implementatie. In dat kabinetsstandpunt gaat het vooral om de vraag of constructies toelaatbaar zijn die een algemene voorziening bieden om ter implementatie van toekomstige richtlijnen gedelegeerde regelgeving vast te stellen of, indien dat noodzakelijk lijkt, ook (tijdelijk) afwijking van een bepaling in een wet in formele zin toe te staan indien een dergelijke bepaling strijdt met een richtlijnbeepaling (buitenwerkingstellingsbevoegdheid).¹⁶ In het standpunt over versnelde implementatie komt het kabinet tot de slotsom dat de Grondwet zich niet verzet tegen de toekenning van buitenwerkingstellingsbevoegdheid aan lagere regelgevers. Indien Europese of andere internationale regelgeving van grote invloed is op een beleidsterrein, en de implementatietermijnen zó kort zijn dat implementatie volgens de gebruikelijke procedures illusoir wordt, kan, volgens het kabinet, worden voorzien in een bevoegdheid tot tijdelijke buitenwerkingstelling van wettelijke of amvb-bepalingen bij lagere regeling, onder gelijktijdige vaststelling van de nodige implementatieregels bij die regeling (indeplaatsstelling). Uit een oogpunt van de rechtsstatelijke kwaliteit van regelgeving moet, volgens het kabinet, van die bevoegdheid

¹³ Advisering over regelingen waarmee richtlijnen worden omgezet is ook teruggedrongen. De advisering van de Raad van State is gehandhaafd.

¹⁴ *Kamerstukken II*, 2003/04, 29474, nrs. 1-3.

¹⁵ *Kamerstukken I*, 1998/99, 25533, nr. 11b.

¹⁶ Kabinetsstandpunt Versnelde implementatie van EG- en andere internationale besluiten (*Kamerstukken II* 1998/99, 26200 VI, nr. 65) en de vervolgotitie (*Kamerstukken II* 1999-2000, 26800 VI, nr. 79).

echter zeer terughoudend gebruik worden gemaakt en moet voldaan zijn aan een aantal strikte voorwaarden.¹⁷

Het kabinetsstandpunt ondervond niet overal bijval. De Eerste Kamer stelde zich in de motie-Jurgens op het standpunt dat de implementatie van EU (c.q. EG)-besluiten in een normaal constitutioneel proces zou moeten plaatsvinden.¹⁸ Ook recent is nog wel vastgesteld dat vergaande delegatie omwille van snelle implementatie, zoals de buitenwerking- en indeplaatsstellingsbevoegdheid, op gespannen voet staat met het legaliteitsbeginsel, het primaat van de wetgever en het daarmee samenhangende verbod op blanco-delegatie (Besselink, 2003).

Na het debat over dat kabinetsstandpunt¹⁹ werd in twee wetsvoorstellen (aanpassing Mediawet en wetsvoorstel bereiding en het in het verkeer brengen van diervoeders)²⁰ een gemitigeerde buitenwerkingstellingsbevoegdheid opgenomen. De discussie over versnelde implementatie laaide onlangs op toen op 16 maart 2004 het wetsvoorstel totstandkoming en implementatie van EG-besluiten op het terrein van de energie, post en telecommunicatie bij de Tweede Kamer werd ingediend.²¹ Het wetsvoorstel kent een stelsel op grond waarvan richtlijnen en verordeningen bij lagere regelgeving kunnen worden geïmplementeerd. Het uitgangspunt van het voorstel is dat een richtlijn alleen bij lagere regelgeving kan worden geïmplementeerd als er geen wijzigingen op wetsniveau hoeven plaats te vinden. Die wetswijzigingen zijn, omdat op de beleidsterreinen elektriciteit, gas en post meer dan vijftien richtlijnen en verordeningen gelden, dikwijls nodig als één van de verordeningen en richtlijnen wordt gewijzigd (en dat gebeurt daar vaak). Om nu te voorkomen dat door die wetswijzigingen de implementatie wordt opgehouden, introduceert het wetsvoorstel een systeem van buitenwerkingstelling en indeplaatsstelling dat kool en geit probeert te sparen: het systeem van de concordantietabellen. Dat systeem, waarbij in bijlagen (concordantietabellen) bij de wet wordt aangegeven welk artikel uit de wet strekt tot implementatie van welk artikel uit een richtlijn of een verordening, maakt het mogelijk om, indien wijziging van Europese wetgeving daartoe aanleiding geeft, bij lagere regelgeving tevoren aangewezen bepalingen (genoemd in die bijlage) van de wet te laten vervallen. Het systeem wordt geflankeerd door het voornemen van de Minister van Economische Zaken om het Nederlandse parlement eerder te informeren over (de stand van zaken met betrekking tot) de totstandkoming van richtlijnen en verordeningen op het terrein van energie, post of telecommunicatie.²² Ook zal de Raad van State vroegtijdig advies worden gevraagd over belangrijke

¹⁷ Het kabinet noemt zeven voorwaarden, waaronder: strikte noodzaak, een bijzondere wet moet er toe machtigen (geen algemene machtigingswet), alleen voor implementatie, alleen buitenwerkingstelling via regeling op het naast-lagere niveau, voorhangprocedure bij implementatie van niet rechtstreeks werkende internationale regelingen, alleen tijdelijk en steeds plaatsing van de buitenwerkingstelling en indeplaatsstelling in het Staatsblad. Zie *Kamerstukken II 1998/99*, 26200 VI, nr. 65, p. 5-6.

¹⁸ Motie Jurgens, Kohnstamm en De Wolff, *Kamerstukken I 2000–2001*, 26200 VI nr. 65 en nr. 37b.

¹⁹ *Handelingen I 2000-2001*: 2-54.

²⁰ Het wetsvoorstel tot wijziging van de Mediawet met het oog op noodzakelijke verbeteringen van de wet en de uitvoering daarvan (*Kamerstukken I 2002/03*, 28 476, nr. 189) en het wetsvoorstel houdende bepalingen aangaande onder meer de bereiding en het in het verkeer brengen van diervoeders (*Kamerstukken I 2002/03*, 28173, nr. 212)

²¹ *Kamerstukken II 2003/04*, 29474, nrs. 1-3.

²² Daartoe zal de minister de Kamers informeren over: (a) het regeringsstandpunt op hoofdlijnen ten aanzien van een voorstel van de Commissie van de Europese Gemeenschappen voor een dergelijke richtlijn of verordening, alsmede, (b) het standpunt op hoofdlijnen dat hij wil innemen in de vergadering van de Raad van Ministers waarin al dan niet wordt besloten om een gemeenschappelijk standpunt vast te stellen, hetzij,

ontwerpen voor vast te stellen basisrichtlijnen op het voornoemde beleidsterrein, dit alles om het parlement uit te nodigen tot een actiever debat over voorgestelde EG-wetgeving.

In de discussie met de Eerste Kamer over de aanpassing van de Mediawet, die ook een buitenwerkingstellingsbepaling kent op de voet van het kabinetsstandpunt uit 1999 werd het kabinet voorjaar 2004 wederom in het veld gedaagd zijn standpunt ten aanzien van de wenselijkheid van bijzondere wettelijke bepalingen voor het waarborgen van tijdige implementatie te heroverwegen. Het kabinet stuurde de Eerste Kamer daarop een brief met het bijgestelde kabinetsstandpunt.²³ De Eerste Kamer wilde weten of er niet een grondwettelijke basis voor versnelde omzetting moest komen, dan wel bijzondere wettelijke machtigingsconstructies. De beleidslijn die het kabinet in zijn brief van 27 oktober 2004 daarop formuleert kiest voor adequate reguliere delegatie in plaats van bijzondere bepalingen. Voor implementatie is de bestaande wetgevingssystematiek in de ogen van het kabinet alleszins bruikbaar. Dat betekent dat er geen bijzondere delegatiebepalingen met of zonder mogelijkheid tot afwijking van de wet behoeven te worden ontwikkeld of toegepast. Verder streeft het kabinet naar een doelmatig niveau van implementatie en een eerdere betrokkenheid van de Kamers bij de voorbereiding en omzetting van richtlijnen. Voor noodsituaties, ten slotte, beveelt het kabinet maatwerk aan. De brief is in februari van dit jaar in kritische zin besproken in de Eerste Kamer, waarin kamerlid Jurgens zijn standpunt heeft herhaald dat waar delegatieconstructies toestaan dat bij lagere regelgeving wordt afgeweken via bijvoorbeeld in de plaatsstelling van een wet in formele zin, dit in beginsel in strijd is met artikel 81 van de Grondwet.²⁴

Inmiddels lijkt er de afgelopen maanden, omdat er dringend iets aan het voorkomen van de implementatieachterstanden moet worden gedaan²⁵, een derde fase te zijn aangebroken, waarin, in afwachting van de uitkomst met de discussie met de Staten-Generaal over versnelde implementatie, versnellingsmaatregelen worden getroffen in de procedurele sfeer. Het eerste initiatief gaat uit van de Kamer zelf. Op 15 september 2004 stelt het presidium van de Tweede Kamer aan de eigen Kamer voor om beter en duidelijker gewag te maken van de implementatietermijn van een wetsvoorstel dat een richtlijn omzet, voorrang te geven aan de behandeling van implementatievoorstellen en de mogelijke introductie van een facultatieve, verkorte behandelingsprocedure van implementatiewetgeving in de Kamer.²⁶ In zijn brief van 9 november 2004 kondigt de Staatssecretaris van Buitenlandse Zaken mede namens de Minister van Justitie een zestal maatregelen aan die op korte termijn om bespoediging van de omzetting van richtlijnen bij kunnen dragen.²⁷ Ze omvatten onder andere het opzetten van een planning en werkafspraken om een nieuwe golf richtlijnen op te vangen, het opzetten van een voortgangsbewakingsstelsel dat achterstanden snel signaleert, de vaststelling van een voorrangsregel, die inhoudt dat implementatiewetgeving – binnen de onderscheiden departementen – in beginsel voorrang krijgt op wet- en regelgeving van nationale oorsprong, tenzij de verantwoordelijke bewindspersoon in het concrete geval anders beslist, de maatregel dat

indien van toepassing, in vergaderingen van de Raad van Ministers waarin cruciale andere besluiten (politiek akkoord, algemene oriëntatie) worden genomen (waarbij hij in voorkomend geval bij het standpunt op hoofdlijnen de resultaten van de voorlichting door de Raad van State voegt).

²³ *Kamerstukken I* 2003/04, 29200 VI-F en – naar aanleiding van de discussie over de Mediawet, het bijgestelde kabinetsstandpunt over de wenselijkheid van bijzondere wettelijke bepalingen voor het waarborgen van tijdige implementatie, *Kamerstukken I* 2003/04, 29200 VI, F, tweede herdruk.

²⁴ *Handelingen I* 2004/05, 14645-649.

²⁵ Er zijn in april 2005 51 richtlijnen gepubliceerd die in 2006 omgezet moeten zijn.

²⁶ *Kamerstukken II* 2003/04 21109, nr. 142.

²⁷ *Kamerstukken II* 2004/05, 21109, nr. 144.

omzettingsregelgeving niet meer langs voorportalen of onderraden hoeft te lopen, maar rechtstreeks kan worden geagendeerd in de ministerraad, en de afspraak dat adviezen voortaan zo vroeg mogelijk (tijdens de onderhandelingsfase) worden gevraagd. Op 23 december 2004 heeft de Minister van Justitie in het verlengde daarvan enkele technische maatregelen aangekondigd die kunnen voorkomen dat in het parlement misverstand ontstaat over de vraag of (onderdelen van) een voorgestelde regeling nu wel of niet strekken tot omzetting van een richtlijn of communautaire verplichting anderszins.²⁸

2.2 Voorbereiding van het nationale standpunt

In Nederland worden voorstellen voor EG-richtlijnen via de bemiddeling van de permanente vertegenwoordiging naar de Minister van Buitenlandse Zaken toegezonden. De voorstellen worden mede aan de Werkgroep Beoordeling Nieuwe Commissievoorstellen (BNC) toegezonden, bestaande uit vertegenwoordigers van de departementen, en, sinds 2001, ook een vertegenwoordiging van decentrale overheden.²⁹ Het is de taak van de Werkgroep BNC een fiche op te stellen. In het fiche wordt de betekenis van het richtlijnvoorstel voor Nederland geanalyseerd.³⁰ Verder bevat het een voorstel voor het door Nederland in te nemen standpunt gedurende de onderhandelingen over het voorstel en de voorziene wijze van implementatie van het voorstel indien het wordt vastgesteld. Na goedkeuring in de werkgroep BNC gaat het ambtelijke fiche naar de CoCo (Coördinatiecommissie voor Europese Integratie- en Associatieproblemen). De CoCo is het ambtelijke voorportaal van de ministerraad en staat onder voorzitterschap van de staatssecretaris voor Europese Zaken. Via de CoCo gaan de fiches naar de ministerraad. De goedgekeurde fiches vormen de basis voor de Nederlandse inbreng bij de behandeling van de Commissievoorstellen in Raad en Raadswerkgroepen in Brussel. Van de fiches wordt ook een verkorte ‘politieke’ versie gemaakt om daarmee het Nederlandse Parlement te informeren over het aan de orde zijnde richtlijnvoorstel. De staatssecretaris van Buitenlandse Zaken fungeert hierbij als tussenstation. Op basis van de ambtelijke fiches zendt hij de Tweede Kamer periodiek overzichten van door de Commissie gedane richtlijnvoorstellen vergezeld van ‘politieke’ fiches.³¹ De gedachte hierachter is dat op basis van die fiches, aangevuld met de geannoteerde agenda van de betreffende vergadering van de Raad van Ministers, een discussie plaatsvindt tussen regering en parlement over de Nederlandse inzet in de Raadsbesprekingen zodat op basis van een met het parlement afgestemde instructie in Brussel wordt onderhandeld. Zo heeft het Nederlandse parlement invloed op de totstandkoming en inhoud van EG-wetgeving. Nederland kent geen systeem van schriftelijke lastgeving of schriftelijk mandaat en evenmin een parlementair voorbehoud: ook zonder behandeling van een fiche in de Kamer kan een Nederlandse minister standpunten innemen in de Raad.

Ambtenaren van de eerstverantwoordelijke departementen onderhandelen over EG-richtlijnen in de raadswerkgroepen van de Raad. Meestal zijn dit beleidsambtenaren van de ministeries en medewerkers van

²⁸ *Kamerstukken II* 2004/05, 21109, nr. 145.

²⁹ Vertegenwoordigd door de Vereniging van Nederlandse Gemeenten en Interprovinciaal Overleg.

³⁰ In een fiche komen aan de orde het behandelingstraject van het voorstel in Brussel, de consequenties van het voorstel voor de EG-begroting, een korte inhoud en doelstelling van het voorstel, de rechtsbasis; alsmede een beoordeling op gronden van subsidiariteit, proportionaliteit en deregulering, de Nederlandse belangen bij het voorstel en de consequenties voor nationale regelgeving.

³¹ Te vinden in de *Kamerstukken II*, onder het nummer 22112 getiteld: ‘Ontwerprichtlijnen Europese Commissie’.

de permanente vertegenwoordiging. Soms zijn dit alleen de medewerkers van de permanente vertegenwoordiging op het betreffende beleidsterrein. Soms zijn het uitsluitend ambtenaren van het verantwoordelijke ministerie in Den Haag. Het voornemen van de Nederlandse regering om steeds ook wetgevingsambtenaren mee te sturen, dit met het oog op de kwaliteit van EG-regelingen, is tot nu toe niet gerealiseerd. De Nederlandse permanente vertegenwoordiging kanaliseert, als intermediair, het verkeer tussen Brussel en Den Haag en stelt de Nederlandse regering op de hoogte van de actuele ontwikkelingen.

De omzetting van vastgestelde richtlijnen in Nederland gebeurt meestal wel door dezelfde ministeries als die onderhandelden, maar niet altijd door dezelfde ambtenaren. Waar de onderhandelingen meestal worden gevoerd door beleidsambtenaren komt het vaak voor dat de omzetting van de richtlijnen wordt uitgevoerd door wetgevingsambtenaren.

2.3 Omzetting: instrumenten en technieken

Nederland kent geen algemene delegatieconstructies voor de versnelde omzetting. Voor de omzetting van EG-richtlijnen wordt de normale wetsystematiek gebruikt. Die houdt in dat per geval wordt bekeken hoe een EG-richtlijn wordt omgezet. Door de werking van het primaat van de wetgever, dat verlangt dat de hoofdelementen van een wettelijk stelsel via wet in formele zin worden geregeld, en het grondwettelijke stelsel, dat soms regeling bij formele wet beveelt, komt het relatief vaak voor dat EG-richtlijnen via de trage route van een wet in formele zin worden geïmplementeerd. Reken daarbij dat het parlement de omzetting van EG-richtlijnen niet hoog prioriteert en ook weinig investeert in discussie over de onderhandelingen, dan betekent dit dat hier een belangrijke bron voor vertraging bij de omzetting ligt (Voermans, 2004). De Kamer maakt én geen voeten, en constateert vaak pas bij de discussie over de omzettingsmaatregelen dat er problemen of vraagstukken liggen. Te laat dus. Zoals hierboven al werd aangegeven heeft het kabinet aanvankelijk door voorstellen tot verfijning van delegatieconstructies (buitenwerkingstellingsbevoegdheden c.a.) en vervroeging van parlementaire inbreng hierin verandering proberen te brengen, maar ziet het kabinet de laatste tijd toch meer in aansluiting bij de reguliere delegatiemogelijkheden en wetgevingssystematiek.³²

Vertragingen bij de omzetting worden niet alleen veroorzaakt door de lange procedure, de wijze waarop het parlement zijn inbreng heeft, maar ook door de wijze waarop de omzetting wordt voorbereid door de departementen. Ook daar bestaan knelpunten. Al draagt de per 1 januari 2005 gewijzigde aanwijzing 335 van de Aanwijzing voor de regelgeving op om 18 maanden voor de afloop van de implementatietermijn de voorstellen voor omzettingsmaatregelen aan te brengen bij de ministerraad (met een kleine mogelijkheid van uitstel), die termijn wordt niet altijd gehaald. Het kabinet heeft daarom besloten ook het beleid wat betreft de interne voorbereiding aan te scherpen. Voortaan geldt een voorrangregel die inhoudt dat eerst richtlijnen moeten worden omgezet voordat nationale wetsvoorstellen in behandeling worden genomen. Er moeten op departementen actieplannen worden opgesteld om achterstanden weg te werken. Er komt een planning om een golf EG-richtlijnen op te vangen en een beter systeem van voortgangsbewaking. Omzettingsmaatregelen kunnen voortaan rechtstreeks bij de ministerraad worden aangebracht zonder behandeling in voorportalen of onderraden en verplichte toetsen en adviezen over omzettingsmaatregelen zullen in het proces naar voren worden gehaald.³³

³² Zie het eerder genoemde kabinetsstandpunt *Kamerstukken I* 2003/04, 29200 VI, F tweede herdruk.

³³ *Kamerstukken II* 2004/05, 21109, nr. 144.

Waar over constructies die (tijdelijke) afwijking van een bepaling in een wet in formele zin toe te staan indien zo'n bepaling strijdt met een richtlijnbeepaling (buitenwerkingstellingsbevoegdheid) nog wordt gedebatteerd is omzetting van EG-richtlijnen via gedelegeerde regelgeving als zodanig weinig omstrede.³⁴ Aanwijzing 339 beveelt met het oog op implementatie van communautaire regelgeving zelfs, voorzover en zolang het grondwettelijke stelsel en het primaat van de wetgever dat toestaan, delegatieconstructies aan. Zeker in geval er bij de omzetting geen ruimte meer bestaat voor het maken van inhoudelijke keuzes is omzetting via de snel vast te stellen ministeriële regeling aan te bevelen. Daar wordt ook op ruime schaal gebruik van gemaakt.

De Nederlandse wetgevingssystematiek, uitgedrukt via het primaat van de wetgever, verzet zich echter tegen omzettingsregels zonder een directe of indirecte grondslag in een wet in formele zin en tegen al te ruime delegatiemogelijkheden. De achterliggende gedachte is dat het parlement altijd een inbreng moet kunnen hebben in wetgeving. Tussen de Nederlandse wetgevingsinstrumenten bestaat een hiërarchie die met zich meebrengt dat als een lagere regeling in strijd komt met een hogere de lagere regeling in beginsel onverbindend is.

Richtlijnen worden veelal ingeweven in het bestaande systeem van de bestaande Nederlandse wet- en regelgeving. Hoewel de Aanwijzingen voor de regelgeving voorschrijven om bij het omzetten van EG-richtlijnen geen extra nationaal beleid mee te nemen³⁵, staat dit de inpassing van EG-wetgeving in nationale wetgeving niet in de weg. Het in het kader van de omzetting van EG-richtlijnen aansluiten bij bestaande instrumenten en regelingen heeft zelfs de voorkeur (Aanwijzing 338). De aanwijzingen adviseren verder waar mogelijk aan te sluiten bij de terminologie van communautaire regelingen (Aanwijzing 56) tenzij die terminologie onvoldoende is gepreciseerd, onjuist Nederlands oplevert, of dat het kiezen van een andere term beter aansluit bij bestaande Nederlandse regelgeving.

2.4 Nationale coördinatie van de omzetting

Als een richtlijn eenmaal op Europees niveau is vastgesteld, dient deze meestal in Nederland te worden omgezet, vaak via regelgeving. Welke regelingssoort wordt gekozen is afhankelijk van de inhoud van de richtlijn en de eisen die ons nationale recht stelt.³⁶ De omzetting wordt voorbereid op de departementen, meestal de departementen die ook bij de voorbereiding van het Nederlandse standpunt waren betrokken. De Interdepartementale Commissie Europees Recht (ICER), ingesteld na de Securitel-affaire in 1997³⁷, is belast met de coördinatie van de juridische advisering inzake de voorbereiding en de uitvoering van Europees recht.

³⁴ Zie voor een overzicht van de vele varianten waarmee implementatie van internationale en communautaire besluiten aan lagere regelgevers wordt overgelaten Besselink e.a. (2002: 112-113).

³⁵ Zie Aanwijzing 337.

³⁶ Ons constitutionele stelsel schrijft in een aantal gevallen voor dat belangrijke onderwerpen slechts via een wet in formele zin, dus met medewerking van het parlement, kunnen worden geregeld. Dat is bijvoorbeeld zo indien de Grondwet voor een onderwerp regeling bij wet in formele zin voorschrijft, of wanneer het primaat van de wetgever, opgetekend in Aanwijzingen 22 jo. 24, dat vergt.

³⁷ Naar aanleiding van de uitspraak van het Hof van Justitie in de Securitel-zaak van 30 april 1996 (C-194/94, *Jur.* 1996 p. I-2201) werd duidelijk dat Nederland onvoldoende alert was op juridische problemen die samenhangen met de implementatie van EG-recht. Zo was nagelaten een betrekkelijk groot aantal Nederlandse regelingen te notificeren bij de Europese Commissie. De oorzaak daarvan werd mede gezocht in een gebrek aan bewustzijn en effectieve inzet van expertise bij de departementen. De ICER beoogt in dat hiaat te voorzien.

De ICER wordt in beginsel gezamenlijk voorgezeten namens de Minister van Justitie en die van Buitenlandse Zaken.³⁸ De ICER kent, na een evaluatie in 2002, drie reguliere werkgroepen: de ICER-I (Implementatie); de ICER-N (Notificatie); en ICER-H (Hofzaken). Daarnaast worden ad hoc werkgroepen ingesteld. De eerste twee reguliere werkgroepen worden voorgezeten namens de Minister van Justitie en de laatste reguliere werkgroep namens de Minister van Buitenlandse Zaken. Bij de omzetting van richtlijnen wordt gebruik gemaakt van het implementatieplan³⁹ dat op basis van het richtlijnvoorstel al is opgesteld en, gaande de communautaire procedure, steeds is bijgesteld.

In Nederland geldt dat ongeveer 87% van de richtlijnen wordt omgezet via vormen van gedelegeerde regelgeving (algemene maatregelen van bestuur, ministeriële regelingen, etc.) (Bovens en Yesilkagit, 2005: 525). In een aantal gevallen echter moeten richtlijnen in een wet in formele zin worden geïmplementeerd. Dat neemt vaak een wat langere periode (gemiddeld 15 maanden) in beslag. Deze procedure wordt daarom als een van de belangrijkste verklaringen aangevoerd voor vertraagde omzetting.⁴⁰

Als richtlijnen via een wet in formele zin of algemene maatregel van bestuur worden omgezet gelden in beginsel de gewone procedures, waarbij de Raad van State moeten adviseren over het omzettingsvoorstel.

2.5 Verplichte adviesorganen

Bij de voorbereiding van EG-regelgeving gelden er sinds begin jaren '90, buiten de advisering door de Raad van State, geen wettelijke adviesverplichtingen voor wetsvoorstellen waarmee EG-richtlijnen worden geïmplementeerd. De Raad van State op zijn beurt wordt niet gehoord over voorstellen voor EG-richtlijnen. Wel heeft de regering in de periode 2000-2002 geëxperimenteerd met adviesaanvragen aan de Raad van State over EG-richtlijnvoorstellen. Dat lijkt goed te zijn bevallen.⁴¹ Advisering in twee ronden kan namelijk tijdswinst opleveren bij gelegenheid van de wel verplichte advisering over de voorstellen ter omzetting van de richtlijnen. De Raad van State kent die richtlijn a quo dan al en kan sneller adviseren. Het kabinet is, zoals aan de orde kwam in paragraaf 2.3, voornemens om ook de advisering over omzettingswetgeving te heroverwegen en waar nodig te vervroegen.

2.6 Rol van het parlement

Door de ficheprocedure en de toezending van de geannoteerde raadsagenda's wordt het parlement geïnformeerd over richtlijnvoorstellen, hun betekenis voor Nederland en Nederlandse wetgeving en over het voorgenomen Nederlandse standpunt. Toch werkt de ficheprocedure onvoldoende adequaat. De overleg- en onderhandelingscircuits in Nederland en Brussel zijn van elkaar gescheiden en nauwelijks op elkaar afgestemd. In Brussel wordt over commissievoorstellen eerst in Raadswerkgroepen onderhandeld door Nederlandse ambtenaren en daarna in het *Comité des Représentants Permanents* (Coreper). Terugkoppeling vanuit die circuits naar het Nederlandse parlement om hernieuwd over de Nederlandse inzet en de instructie

³⁸ Naast de ICER functioneren nog twee interdepartementale coördinatiegremia, die gespecialiseerd zijn in economische activiteiten van overheden: het ISO (Interdepartementaal Steun Overleg) en het IOEA (Interdepartementaal Overlegorgaan Europese Aanbestedingsvoorschriften).

³⁹ Aanwijzing 334 e.v.

⁴⁰ Zie bijvoorbeeld de memorie van toelichting bij het wetsvoorstel totstandkoming en implementatie EG-besluiten op het terrein van de energie, post en telecommunicatie, *Kamerstukken II* 2003/04, 29474, nr. 3.

⁴¹ Zie wederom de memorie van toelichting bij het wetsvoorstel totstandkoming en implementatie EG-besluiten op het terrein van de energie, post en telecommunicatie, *Kamerstukken II* 2003/04, 29474, nr. 3.

te spreken is buitengewoon lastig, zeker ook omdat de (prioriterings)klok in Nederland en Brussel verschillend tikt. Het ‘heen-en-weren’ tussen het Nederlandse parlement en de verantwoordelijke minister over de tussenstand van de onderhandelingen is buitengewoon tijdrovend en ook lastig.⁴² Del Grosso constateert dat het Nederlandse parlement té weinig, té fragmentarisch en vaak in een té laat stadium aandacht besteedt aan Europese vraagstukken. En daar waar parlementariërs wel de mogelijkheid hebben invloed uit te oefenen op de Nederlandse inbreng in het Europese integratieproces, benutten zij die vaak niet (Del Grosso, 2000). Tot een vergelijkbare conclusie komt ook de Raad van State in het Jaarverslag over 2004 (Raad van State, 2005).

De houding van het parlement wordt de laatste jaren ook wel opgevoerd als een mogelijke bron van vertraging bij de omzetting. Voor het parlement komt het wetsvoorstel waarin een richtlijn wordt omgezet soms als een (onaangename) verrassing. Vooral als het parlement niet met het gedane voorstel kan leven kan de totstandkoming van omzettingswetgeving het karakter krijgen van een achterhoedegevecht. (Raad voor het Openbaar Bestuur, 2004: 26). De Raad van State heeft inmiddels al een aantal keren aandacht gevraagd voor de rol van de Nederlandse actoren in de communautaire wetgevingsketen. Die rol begint met de voorbereiding van Nederlandse regels en eindigt met de vaststelling van de nationale implementatieregels. Door het communautaire medewetgeverschap verandert ook de rol van de Staten-Generaal bij omzettingsregelgeving in de richting van mandaatgever en controleur. Een en ander betekent ook dat effectieve inbreng in deze wetgevingsketen zo vroeg mogelijk dient te geschieden (Raad van State, 2005: 141-2).

De Tweede Kamer van de Staten-Generaal is zich inmiddels bewust van deze verantwoordelijkheid. De in 2003 ingestelde gezamenlijke commissie uit Tweede en Eerste Kamer voor de Europese wetgeving, eigenlijk bedoeld om de Kamers voor te bereiden op de nieuwe rol die voor de nationale parlementen ontstond onder de Europese Grondwet, is bezig om de Kamers te bewegen de behandeling van Europese wetgeving te prioriteren.

2.7 Conclusies

Nederland maakte als land geen deel uit van dit onderzoek, maar we hebben het hier kort besproken omdat het voor veel van de gebruikers van dit rapport waarschijnlijk het referentiepunt is. Op basis van de schetsmatige analyse valt vast te stellen dat Nederland al een tijdlang worstelt met het probleem van het voorkomen en terugdringen van achterstand. In een eerste fase (tot 1999) is vooral getracht via kleinere procedurele ingrepen de oplopende achterstanden te bezweren, daarna is in een tweede fase ook gezocht naar mogelijkheden om de versnelling van de omzetting van richtlijnen via flexibele implementatietechnieken op touw te zetten. Die discussie lijkt inmiddels wat op slot te zitten. Keer op keer blijkt met name de Eerste Kamer zeer kritisch over voorstellen voor nieuwe implementatieinstrumenten en -technieken. Dat heeft ook tot een debat geïnspireerd over de dieperliggende oorzaken van de omzettingsachterstanden. Ligt het aan de procedures (met name de formele wetsprocedure), ligt het aan de coördinatie⁴³, of juist aan een ontbrekend

⁴² De Denen hebben echter wel gekozen voor een systeem waarin het parlement een strikt en beperkt onderhandelingsmandaat meegeeft aan de regering. Dat systeem noodzaakt de regering tot terugkoppeling over de onderhandelingsresultaten.

⁴³ Die is in Nederland, volgens de Raad voor het Openbaar Bestuur (2004: 99-100), erg ‘gebeurtenis-gebaseerd’ en daardoor reactief in plaats van pro-actief. Zie de Goede (2005), voor nadere commentaren op dit rapport.

besef en daardoor adequate regie van het wederzijdse aandeel van de verschillende Nederlandse actoren in de communautaire wetgevingsketen?

Gaande deze tweede fase lijkt een derde fase aangebroken waarin net als vóór 1999 op dit ogenblik binnen de bestaande wetgevingssystematiek een aantal procedure oplossingen wordt gezocht om de meest dringende problemen het hoofd te bieden. De belangrijkste daarvan zijn het opzetten van een planning en een voortgangsbewakingssysteem, de prioritering van omzettingsregelingen in de ministerraad, en het kunnen overslaan van voorportalen en onderraden in geval van omzettingsvoorstellen.

3 Transpositie en de prestaties van de verschillende lidstaten

3.1 Vertraging in omzetting

De meeste EU lidstaten hebben ondanks hun verplichting van tijdigheid en volledigheid soms een probleem met de omzetting van EG-richtlijnen.

**Tabel 3.1: De omzetting van richtlijnen naar lidstaat:
interne markt richtlijnen versus totaal aantal richtlijnen**

Lidstaat:	Tweede rapportage interne markt strategie (interne markt richtlijnen)		Overzicht Secretariaat Generaal van de Europese Commissie		
	peildatum: 30 november 2004		peildatum: 10 januari 2005		
	aantal richtlijnen met vertraging*	% niet omgezette richtlijnen	aantal richtlijnen	aantal met vertraging	% niet omgezette richtlijnen
Litouwen	15	1.0%	2568	14	0.5%
Spanje	21	1.3%	2538	23	0.9%
Oostenrijk	33	2.1%	2525	30	1.2%
Denemarken	36	2.3%	2517	30	1.2%
Hongarije	32	2.0%	2546	34	1.3%
Finland	37	2.3%	2516	39	1.6%
Slovenië	51	3.2%	2550	40	1.6%
Polen	46	2.9%	2544	41	1.6%
België	54	3.4%	2575	42	1.6%
VK	40	2.5%	2515	45	1.8%
Nederland	31	2.0%	2517	47	1.9%
Frankrijk	50	3.2%	2520	48	1.9%
Ierland	38	2.4%	2533	50	2.0%
Zweden	32	2.0%	2502	50	2.0%
Duitsland	40	2.5%	2520	52	2.1%
Portugal	51	3.2%	2560	65	2.5%
Luxemburg	67	4.2%	2525	72	2.9%
Estland	79	5.0%	2528	77	3.0%
Cyprus	69	4.4%	2550	82	3.2%
Letland	110	7.0%	2566	90	3.5%
Italië	71	4.5%	2529	90	3.6%
Griekenland	80	5.1%	2524	92	3.6%
Malta	95	6.0%	2549	93	3.6%
Slowakije	99	6.3%	2561	96	3.7%
Tsjechië	151	9.6%	2552	121	4.7%
EU gemiddelde	57	3.6%	2537	59	2.3%

* Het totale aantal interne markt richtlijnen is 1579.

Bron: kolommen 2-4 zijn gebaseerd op Europese Commissie (2005a); kolommen 5-7 op Europese Commissie (2005b).

Een recent overzicht ten aanzien van richtlijnen op het terrein van de interne markt is te vinden in het tweede uitvoeringsrapport van de Europese Commissie ten aanzien van de interne markt strategie 2003-2006 (Europese Commissie, 2005a: 16- 21). Hieruit blijkt dat op 30 november 2004 het gemiddelde aantal vertraagde en nog niet omgezette richtlijnen 3.6% bedraagt. Verder realiseren de meeste lidstaten nog steeds

niet de doelstelling die tijdens de Europese Raad van Stockholm (2001) is afgesproken. De doelstelling was om die achterstand terug te brengen tot 1,5% van het totale aantal van kracht zijnde richtlijnen. Het overzicht van de achterstanden per lidstaat is opgenomen in tabel 3.1.⁴⁴

Een tweede overzicht over de omzetting van EG richtlijnen is afkomstig van het Secretariaat Generaal van de Europese Commissie (2005b).⁴⁵ Dit overzicht gaat uit van *alle* richtlijnen en beperkt zich niet alleen tot de interne markt richtlijnen. Dat betekent dat richtlijnen ten aanzien van flora, fauna, de leefomgeving van dieren, dierenbescherming, zwemwater, statistiek en export kredieten en verzekeringen ook zijn meegenomen. Verder zijn nog twee belangrijke verschillen tussen de cijfers uit de rapportage over de interne markt en het Secretariaat Generaal:

- de omgezette richtlijnen in het overzicht ten aanzien van de interne markt omvat richtlijnen waarvan de Commissie van oordeel is dat die richtlijnen ook volledig zijn omgezet; het overzicht van het Secretariaat Generaal is louter gebaseerd op de notificatie van lidstaten; en
- in het overzicht ten aanzien van de interne markt zijn alleen de van kracht zijnde richtlijnen opgenomen; in het overzicht van het Secretariaat Generaal zijn alle richtlijnen meegeteld, inclusief richtlijnen die niet meer van kracht zijn.

Deze gegevens zijn opgenomen in de kolommen 4 tot en met 6 van tabel 3.1. Op grond van deze cijfers, welke uitgaan van de situatie op 10 januari 2005, is de gemiddelde achterstand in de Unie 2.3%: voor de EU-15 (de lidstaten die voor 1 mei 2004 reeds lid van de Unie waren) is de achterstand in omzetting gemiddeld 2.0%; voor de EU-10 (de lidstaten die vanaf 1 mei 2004 lid zijn geworden) is dat 2.7%. Verder blijkt dat 12 van de 15 ‘oudere’ lidstaten de 1,5%-norm niet realiseren. Voor de ‘nieuwe’ lidstaten zijn dat 8 van de 10 landen.⁴⁶

Naast de achterstand in nog om te zetten richtlijnen waarvan de omzettingstermijn is verlopen, hanteert men binnen de EU een tweede indicator. Dat is het aantal nog om te zetten richtlijnen waarvan de termijn meer dan twee jaar geleden is verlopen. Ten aanzien van deze groep van richtlijnen is tijdens de Europese Raad van Barcelona (2002) een ‘zero tolerance’ doelstelling afgesproken: dit aantal moeten binnen de Unie tot 0% worden gereduceerd. Tabel 3.2 geeft een overzicht van het aantal richtlijnen dat meer dan twee jaar na afloop van de implementatie-termijn nog niet is omgezet.

Uit tabel 3.2 komt naar voren dat Nederland het relatief goed doet met, op dit moment, geen richtlijnen die meer dan twee jaar zijn vertraagd. De recente inhaalslag, waarmee tevens drie lang vertraagde richtlijnen zijn omgezet, lijkt op dit punt zijn vruchten te hebben afgeworpen. Het Verenigd Koninkrijk, Denemarken en Spanje hebben, op de peildatum, elk één lang vertraagde richtlijn. Voor Denemarken en Spanje geldt dat deze achterstand in de periode mei 2004-november 2004 is ontstaan. Minder goed presteert Frankrijk met vijf lang vertraagde richtlijnen. Tegelijkertijd is Frankrijk’s vermindering van negen naar vijf vertraagde richtlijnen indrukwekkend.

⁴⁴ Als gevolg van het hanteren van verschillende peildata en vertragingen in de verwerking van gegevens wijkt het aantal richtlijnen dat Nederland nog moet omzetten maar waarvan de invoeringsdatum is verstreken soms af van het aantal genoemd in tabel 1.1.

⁴⁵ Dit overzicht is te vinden op http://europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/mne_country_20050110_en.pdf.

⁴⁶ De prestaties van Litouwen en Hongarije zijn in dit opzicht opzienbarend. Tegelijkertijd merkt de Europese Commissie in de tweede rapportage ten aanzien van de interne markt op dat de cijfers voor de ‘nieuwe’ lidstaten voorlopige cijfers betreffen aangezien de nationale implementatie-instrumenten nog door de Commissie moeten worden geverifieerd (Europese Commissie, 2005: 16).

**Tabel 3.2: Het aantal richtlijnen dat meer dan twee jaar is vertraagd:
naar lidstaten van de EU-15**

Lidstaat:	Tweede rapportage interne markt strategie (interne markt richtlijnen) Peil datum: 30 november 2004	
	aantal richtlijnen	verandering ten opzichte van mei 2004
Portugal	0	0
Zweden	0	0
Nederland	0	-3
Finland	1	0
VK	1	0
Ierland	1	-2
Denemarken	1	+1
Spanje	1	+1
België	3	-1
Griekenland	3	+2
Italië	3	+2
Oostenrijk	3	+1
Luxemburg	4	+1
Duitsland	5	0
Frankrijk	5	-4

Bron: Europese Commissie (2005a: 20).

Meer in het algemeen variëren de prestaties van de landen die in dit onderzoek centraal staan. Uitgaande van het meest recente—en het meest volledige overzicht—van de Europese Commissie ontstaat het volgende beeld:

- *Spanje* en *Denemarken* hebben een omzettingsachterstand van respectievelijk 0.9% en 1.2%; beide landen voldoen daarmee aan de 1,5%-norm (uitgaande van het eerdere, interne markt overzicht haalt alleen Spanje deze norm met een achterstand van 1.3%; Denemarken heeft in die rapportage een achterstand van maar liefst 2.3%);
- *Nederland* (1.9%) en het *Verenigd Koninkrijk* (1.8%) worden in de middenmoot aangetroffen. Beide landen hebben in vergelijking met andere lidstaten een achterstand die ruim onder het gemiddelde voor de EU-15 ligt (dat gemiddelde is 2.0%), maar voldoen niet aan de 1.5%-norm;
- De positie van *Frankrijk* (1.9%) is in het laatste overzicht verbeterd. In het overzicht ten aanzien van de interne markt wordt Frankrijk nog steeds bij de hekkensluiters aangetroffen (met een achterstand van 3.2%). Verder kent Frankrijk een relatief hoog aantal richtlijnen dat meer dan twee jaar vertraagd is;
- *Duitsland* (2.1%) en *Italië* (3.6%) zijn notoire hekkensluiters in het overzicht voor zover het de EU-15 betreft.

3.2 Kwaliteit van omzetting: inbreukprocedures

Naast de vertraging in omzetting is het ook van belang een beeld te vormen van de kwaliteit van omzetting. Die kwaliteit kan voor een deel worden afgelezen uit het aantal inbreukprocedures dat ten aanzien van een

land wordt gestart. Naarmate de kwaliteit van de omzetting beter is, wordt een geringer aantal inbreukprocedures verwacht.

Voor de analyse van het aantal inbreukprocedures wordt op twee aspecten gelet. In de eerste plaats is dat het *aantal hofzaken* dat tegen een lidstaat aanhangig is gemaakt. De keuze voor het aantal hofzaken heeft te maken met de gedachte dat niet alle stadia van een inbreukprocedure even belangrijk zijn als een indicator voor kwaliteit. Het aantal door de Commissie verstuurd aanmaningen en het aantal met redenen omklede adviezen zijn stappen die voor een belangrijk deel het gevolg van vertragingen in de lidstaten zijn. Zoals uit onderzoek blijkt, daalt na het versturen van de aanmaningen en het opstellen van een advies het aantal gevallen scherp (zie Börzel, 2001; Tallberg, 2002). Een lidstaat zet alsnog een richtlijn om waarmee verdere stappen en uiteindelijk het aanhangig maken van een zaak bij het Europese Hof van Justitie wordt voorkomen. In die gevallen spelen veelal andere factoren een rol—bijvoorbeeld het tijdelijk uitstellen van de inwerkingtreding van omzettingsmaatregelen die een negatief effect hebben op het binnenlandse bedrijfsleven—dan problemen met de kwaliteit van de nationale omzettingsmaatregelen. Vandaar dat wij ons richten op het aantal hofzaken als eerste indicator.

In de tweede plaats letten wij op het aantal gevallen waarin, volgens de Europese Commissie, sprake is van een *onjuiste omzetting van een richtlijn*. Naast het onjuist omzetten van een richtlijn, onderscheidt de Commissie twee andere gronden die tot een aanmaning en een hofzaak kunnen leiden. Dat zijn het niet-notificeren van een nationale maatregel en het niet correct implementeren van een richtlijn waarvan de implementatietermijn is verstreken. Die gronden zeggen in veel mindere mate iets over de kwaliteit van omzetting. Wij nemen daarom die zaken niet mee in een indicator voor kwaliteit. De tweede indicator die wij hanteren is het aantal zaken tegen een land—in termen van aanmaningen, met redenen omklede adviezen en hofzaken—op grond van een onjuiste omzetting van een richtlijn.

Door beide indicatoren te hanteren hopen een voldoende betrouwbaar beeld te krijgen over de kwaliteit van omzetting in de verschillende lidstaten van de EU en in het bijzonder de door ons onderzochte landen.

Tabel 3.3: Het aantal hofzaken naar lidstaten van de EU-15 per 31 december van het betreffende jaar

lidstaat:	2000	2001	2002	2003	gemiddeld
Denemarken	0	2	2	3	2
Finland	4	2	1	6	3
Zweden	3	3	2	7	4
Nederland	12	5	7	9	8
Portugal	10	7	10	10	9
VK	4	14	16	11	11
België	5	13	8	19	11
Oostenrijk	8	7	15	22	13
Luxemburg	16	10	12	16	14
Duitsland	11	12	16	18	14
Ierland	17	13	9	18	14
Spanje	8	14	11	23	14
Griekenland	23	16	17	14	18
Italië	24	22	23	18	22
Frankrijk	27	22	31	21	25
EU	172	162	180	411	231

Bron: Europese Commissie (2004b).

Tabel 3.3 geeft, uitgesplitst naar land en per jaar, het aantal hofzaken dat aanhangig is gemaakt. Hieruit blijkt dat de Scandinavische landen het relatief goed doen. Die landen kennen gemiddeld genomen zo'n 3 zaken per jaar die bij het Hof aanhangig worden gemaakt. Nederland volgt die landen met gemiddeld 8 nieuwe hofzaken per jaar. Slecht scoren landen als Frankrijk, Italië en Griekenland. Ook Spanje kent een relatief hoog aantal van gemiddeld 14 zaken die door de Commissie bij het Hof aanhangig worden gemaakt. Dit kan erop duiden dat in deze landen de kwaliteit van de omzetting relatief laag is.

De tweede indicator van kwaliteit is opgenomen in tabel 3.4. In deze tabel is per lidstaat het aantal zaken vermeld waarin volgens de Commissie sprake is van een onjuiste omzetting van EG-richtlijnen. Het gaat hierbij om de periode 1999-2002. Uit deze tabel blijkt dat Italië, Frankrijk, Oostenrijk en België relatief veel gevallen kennen waarin de Commissie ingrijpt op het punt van onjuiste omzetting van richtlijnen. Hoewel er enige variatie is over het aantal aanmaningen, met redenen omklede adviezen en hofzaken, kennen deze lidstaten gemiddeld genomen de meeste zaken voor elk van de onderscheiden fasen van de inbreukprocedure. Na deze vier landen volgen Duitsland en Spanje. Daarmee lijkt de kwaliteit van de omzettingsmaatregelen in die landen relatief lager te zijn dan in landen als Denemarken, Finland en, op de derde plaats, Nederland.

Tabel 3.4: Het aantal zaken waarin sprake is van een onjuiste omzetting van EG-richtlijnen naar lidstaten van de EU-15 per 31 december van het betreffende jaar

	1999			2000			2001			2002			gemiddeld		
	<i>M</i>	<i>A</i>	<i>H</i>	<i>M</i>	<i>A</i>	<i>H</i>	<i>M</i>	<i>A</i>	<i>H</i>	<i>M</i>	<i>A</i>	<i>H</i>	<i>M</i>	<i>A</i>	<i>H</i>
Denemarken	4	0	1	2	3	0	2	2	0	1	1	0	2	2	0
Finland	2	3	0	2	3	0	10	3	0	1	8	0	4	4	0
Nederland	2	0	1	3	2	1	2	2	2	2	0	1	2	1	1
Ierland	3	4	1	0	2	1	2	2	1	0	0	2	1	2	1
Portugal	4	4	3	3	4	0	2	1	0	3	0	2	3	2	1
VK	2	4	1	5	1	0	3	4	1	3	2	3	3	3	1
Griekenland	4	6	1	4	2	1	3	1	1	4	1	0	4	3	1
Zweden	6	4	1	3	4	0	5	1	2	2	5	0	4	4	1
Luxemburg	10	5	2	1	7	0	4	2	2	2	1	2	4	4	2
Spanje	5	4	4	4	1	1	2	4	0	6	6	1	4	4	2
Duitsland	7	5	1	7	4	2	0	4	4	4	4	0	5	4	2
België	10	6	5	6	6	1	1	7	4	1	0	0	5	5	3
Oostenrijk	12	4	2	13	6	1	13	11	3	3	6	6	10	7	3
Frankrijk	3	11	2	8	6	5	7	4	3	8	9	2	7	8	3
Italië	4	8	4	15	4	5	6	8	5	7	3	6	8	6	5
EU	78	68	29	76	55	18	62	56	28	47	46	25	66	56	25

Verklaring : *M*=aanmaning, *A*=met redenen omkleed advies, *H*=aanhangig gemaakte hofzaak.

Bron: Europese Commissie (2003a).

Het algemene beeld dat uit beide indicatoren naar voren komt is dat Frankrijk en Italië relatief slecht scoren op het punt van kwaliteit. Deze landen kennen over de afgelopen jaren een relatief hoog aantal

gestarte hofzaken en relatief veel gestarte inbreukprocedures op grond van de onjuiste omzetting van richtlijnen. Duitsland en Spanje volgen deze landen met iets minder slechte scores, maar toch scores die op een tamelijk laag niveau van kwalitatief duiden. Deze lage scores nuanceren het eerdere beeld van Spanje als één van de landen die tamelijk snel is met de omzetting van richtlijnen en voldoet aan de 1,5% en 0%-doelstellingen van de Europese Raad. Klaarblijkelijk betekent snelheid niet altijd dat richtlijnen ook op een zorgvuldige wijze worden omgezet.

Landen die een zeer beperkt aantal hofzaken kennen en goed scoren op het punt van weinig zaken vanwege een onjuiste omzetting zijn Denemarken, Finland en Nederland. In die landen lijkt de kwaliteit van omzetting hoog te zijn. Soms gaat dit gepaard met een beperkte vertraging: Nederland voldoet, bijvoorbeeld, niet aan de 1,5%-norm van de Unie. Tegelijkertijd is Denemarken wél in staat om snel én zorgvuldig om te zetten. Dit land voldoet wél aan de 1,5%-norm en kent het kleinste aantal hofzaken in de periode 2000-03. Of meer zorgvuldigheid bij de omzetting meer tijd vraagt en dus tot vertraging leidt is nog maar de vraag.

4 Instrumenten en technieken

Voor de implementatie van EG-richtlijnen bestaat er een grote verscheidenheid in instrumenten en technieken die in de onderzochte landen worden toegepast. De variaties van de verschillende juridische instrumenten hangen vaak nauw samen met het constitutionele systeem van een land. Dat maakt onderlinge vergelijking van de gebruikte instrumenten een hachelijke zaak.

4.1 *Speciale implementatieprocedures*

In geen enkele van de onderzochte landen bestaan er speciale, verkorte implementatieprocedures voor de omzetting van EG-richtlijnen. De grondwetten van de onderzochte landen kennen geen speciale voorzieningen voor een snellere behandeling van EG-richtlijnen, noch bestaan er andere bijzondere procedures die vereenvoudigde of andere behandeling van EG-richtlijnen bij gelegenheid van de omzetting toelaten. De artikelen 1:7 en 1:8 van de Algemene wet bestuursrecht die toestaan dat advisering in geval van implementatie van EG-besluiten achterwege blijft, komen nog het dichtst in de buurt van een op implementatie gerichte aparte procedurele voorziening. Wel kennen verschillende landen zoals Frankrijk en het Verenigd Koninkrijk speciale wettelijke regelingen die toestaan dat bijzondere instrumenten worden gebruikt (bijvoorbeeld ruimhartig gebruik van gedelegeerde regelgeving) voor de omzetting van EG-richtlijnen. Het gevolg van het gebruik van dergelijke bijzondere instrumenten is dat de procedure voor de omzetting minder tijd neemt: het vaststellen van gedelegeerde regelgeving gaat, in alle onderzochte landen, nu in principe eenmaal sneller dan de vaststelling van parlementaire wetten.⁴⁷ Het juridische instrument bepaalt dus mede de duur van de procedure.

Al is er in de letterlijke zin van het woord geen sprake van (versnelde) omzettingsprocedures, de voorhangprocedures die in het Verenigd Koninkrijk op basis van de *European Communities Act 1972* worden gebruikt, worden vaak wél zo aangemerkt. De Britse regering heeft onder de *European Communities Act* een ruime mogelijkheid om via ministeriële regelingen richtlijnen om te zetten op voorwaarde dat het ontwerp van de regeling wordt voorgelegd aan het parlement. De twee voorhangvarianten, de *negative resolution procedure*, waarbij het parlement stilzwijgend het ontwerp ministeriële regeling kan goedkeuren, en de *affirmative resolution procedure*, waarbij het ontwerp de nadrukkelijke goedkeuring van het parlement behoeft, zijn ook werkelijk 'procedures'. Deze voorhangprocedures zijn echter niet exclusief gereserveerd voor de omzetting van EG-richtlijnen. Zij worden ook gebruikt in geval van reguliere delegatie aan een minister in gewone Britse wetten.

4.2 *Instrumenten*

4.2.1 *Instrumenten I: geen of trivia-instrument (rechtstreekse werking, van toepassingverklaring)*

⁴⁷ Als gevolg van andere dan procedurele factoren kan het zo zijn dat de introductie van lagere regelingen langer duurt dan de goedkeuring van formele wetgeving. Een voorbeeld dat in de interviewronde naar voren kwam is Frankrijk waar soms erg veel vertraging optreedt in het ministeriële proces als gevolg van onvoldoende prioritering.

Lidstaten zijn verplicht tot een getrouwe en volledige omzetting van EG-richtlijnen.⁴⁸ Weliswaar zijn lidstaten op grond van artikel 249 EG-verdrag vrij om de geëigende vormen en middelen te kiezen om het door een richtlijn geleverde resultaat te behalen, maar die keuzevrijheid is niet onbeperkt. De gekozen vorm moet geschikt zijn om het doel van de richtlijn mee te behalen. Getrouwe en volledige omzetting houden in ieder geval in dat lidstaten een afweging maken hoe de verschillende bepalingen in een richtlijn omgezet dienen te worden in de nationale rechtsorde. Het is lidstaten niet toegestaan om door stilzitten aan te sturen op de rechtstreekse werking van richtlijnen. En ook methoden waarbij geen afwegingen worden gemaakt terzake de omzetting en een richtlijn zonder meer – los van inhoudelijke overwegingen - van toepassing wordt verklaard in de eigen rechtsorde, kunnen niet altijd door de beugel. .

Aan de hand van deze criteria wordt direct duidelijk dat niet-omzetting van een richtlijn als methode of instrument (de richtlijn is dan zelf het instrument) onder het gemeenschapsrecht niet is toegestaan.⁴⁹ Omzetting via een verwijzende vantoepassingverklaring in een nationale wet is niet als zodanig verboden. Het hangt af van de inhoud van de richtlijn (of de onderdelen van de richtlijn waarnaar wordt verwezen) of dit is toegestaan. In een aantal van de onderzochte landen komt omzetting van richtlijnen via vantoepassingverklaring voor (*transposition through reference*), vooral in Italië, Denemarken en Duitsland. In Italië maakt dit trivia-instrument (eigenlijk geen ‘echte’ vorm of middel van omzetting omdat er niets inhoudelijks gebeurt) een enkele keer onderdeel uit van de Pergola-systematiek. Uit het onderzoek viel, omdat we in het kader van dit onderzoek geen interviews in Italië hebben uitgevoerd, niet exact op te maken hoe vaak dit instrument wordt gebruikt. Op basis van de literatuurstudie bestaat de indruk dat dit betrekkelijk zelden gebeurt.

4.2.2 Instrumenten II: veegwetten en omnibuswetten

Veegwet

Een omzettinginstrument dat we in verschillende van de onderzochte landen aantreffen is dat van de *veegwet*. Onder een veegwet verstaan wij een wet die in één keer een aantal richtlijnen waarvan de implementatietermijn is afgelopen omzet in de nationale rechtsorde. Dergelijke wetten hebben het karakter van een noodingreep. Vooral in Italië is eind jaren zeventig enkele keren gebruik gemaakt van dit instrument om achterstanden weg te werken.⁵⁰ In Spanje eenmalig ten tijde van de toetreding tot de Europese Unie. De veegwet in Italië droeg het karakter van een gewone parlementaire wet. De eenmalige veegwet uit Spanje was gebaseerd op een delegatiewet waarmee de regering de bevoegdheid kreeg per wetsdecreet (*real decreto-legislativo*) een groot aantal richtlijnen om te zetten.⁵¹

Omnibuswet

⁴⁸ Zie voor een recente uitspraak o.a. HvJEG C 194-01 Commissie v. Oostenrijk.

⁴⁹ Deze situatie moet worden onderscheiden van de situatie waarin een richtlijn wordt omgezet via ‘bestaand nationaal regime’, d.w.z. de situatie waarin een EG-richtlijn zonder totstandbrenging van een nieuwe regeling of wijzigingsregeling kan worden omgezet in bestaande regelingen. In Nederland wordt deze situatie geregeld in aanwijzing 347. Van een dergelijke vorm van omzetting moet in Nederland mededeling worden gedaan in de Staatscourant.

⁵⁰ Wet 42/87 implementeerde 97 richtlijnen en wet 183/87 100 richtlijnen.

⁵¹ *Ley de Bases 47/1985 de 27 diciembre, para la delegación al Gobierno para la aplicación del Derecho Comunitario.*

Ook een omnibuswet zet meerdere richtlijnen in één keer om in de nationale rechtsorde, maar is niet noodzakelijk bedoeld om, als noodgreep, achterstanden weg te werken. In Italië en Frankrijk vormen omnibuswetten in meer of mindere mate onderdeel van het reguliere omzettingssysteem. In Italië kunnen op grond van het systeem van de Pergola wet (*legge Pergola*)⁵² omnibuswetten worden vastgesteld. Het Pergola-systeem draagt de regering op jaarlijks een wetsvoorstel te maken waarmee direct of indirect omzettingsbehoefte EG-richtlijnen worden geïmplementeerd en dat gelijktijdig met een verslag over de betekenis van Europees beleid voor Italië en de Italiaanse positie daarin aan te bieden aan het parlement. Veelal worden in zo'n EG-wet meerdere EG-richtlijnen tegelijkertijd omgezet. De Franse DDAC-wetten (*Disposition d'adaption au droit communautaire*) kennen ook een dergelijk omnibuskarakter, zij het dat deze het periodieke karakter van de Italiaanse EG-wet ontberen en vaak (dat heeft de voorkeur) zich beperken tot één beleidsterrein.

4.2.3 Instrumenten III: delegatieconstructies

Buiten de veegwetten en omnibuswetten zijn we in de onderzochte landen geen bijzondere juridische instrumenten tegengekomen die speciaal met het oog op de omzetting of implementatie van EG-richtlijnen in het leven zijn geroepen. De instrumenten die in de landen ter omzetting van EG-richtlijnen worden ingezet komen allemaal voort uit het normale regelingsarsenaal en overige instrumentarium. Dat geldt eigenlijk ook voor de veegwetten en omnibuswetten die naar vorm gemeten reguliere parlementaire wetten zijn.

Wat wél veel gebeurt is dat landen binnen hun reguliere wetsystematiek proberen EG-richtlijnen via gedelegeerde regelingsinstrumenten om te zetten, om zo de vaak tijdrovende weg naar een parlementaire wet te omzeilen. Bij de pogingen die lidstaten ondernemen om op een zo laag mogelijk regelingsniveau richtlijnen om te zetten is het opvallend dat daar in geen van de onderzochte landen constitutionele concessies voor worden gemaakt. De bestaande instrumenten worden ten volle benut binnen de grenzen van het eigen constitutionele systeem en de eisen die het Hof van Justitie aanlegt aan getrouwe en volledige omzetting. In Spanje wordt ongeveer 84% van de richtlijnen via lagere regelgeving omgezet. In het Verenigd Koninkrijk houdt men het op 80-90%; in Denemarken op 85%. In Frankrijk wordt geschat dat ongeveer 60% van de richtlijnen via lagere regelingen worden omgezet. De Nederlandse score is in de vergelijking een van de hoogste: ongeveer 87% van de EG-richtlijnen wordt via andere vormen van regelgeving dan wet in formele zin omgezet (Bovens en Yesilkagit, 2005: 525). De verhoudingscijfers over Duitsland en Italië ontbreken omdat deze landen geen deel uitmaken van het veldonderzoek.⁵³

Om op het laagst mogelijke niveau te kunnen omzetten, wordt binnen alle onderzochte lidstaten gebruik gemaakt van delegatieconstructies. Hieronder worden eerst de delegatietypen besproken (algemene of bijzondere machtiging), daarna de delegatienormen (delegatieverboden en –beperkingen) en tot slot de delegatiestructuur (wettelijke of grondwettelijke basis, rechtstreekse of cascadedelegatie, normenhiërarchie).

a. Delegatietypen: algemene machtiging (parapludelegatie) of gespecificeerd

⁵² Legge 9 marzo 1989, n. 86, *Gazz. Uff.*, 10 marzo, n. 58.

⁵³ Jenny and Müller (2005) laten voor de federale overheid van Oostenrijk zien dat, wat betreft de periode 1995-2003, ongeveer 41% van de EG-richtlijnen via wet is omgezet. Ongeveer 59% van de richtlijnen is via een lagere regeling omgezet.

In verschillende van de onderzochte landen wordt gebruik gemaakt van *algemene machtigingswetten*. Algemene machtigingswetten maken het mogelijk dat een generiek aangeduide verzameling EG-richtlijnen via lagere regelgeving (regeringsdecreet of ministeriële regeling) wordt omgezet.

De *European Communities Act 1972* uit het Verenigd Koninkrijk is een machtigingswet met een buitengewoon brede portee. De wet staat toe dat nagenoeg alle EG-richtlijnen via een ministeriële regeling (*ministerial order, rules of regulations*) worden omgezet. Uitgezonderd zijn slechts de gevallen waarin de omzetting van EG-richtlijnen nieuwe belastingen met zich mee zou brengen, nieuwe regelgevingsbevoegdheid aan Britse autoriteiten toe zou kennen of belangrijke nieuwe strafrechtelijk overtredingen of misdrijven zou definiëren.⁵⁴ Aan deze ver doorgevoerde vorm van delegatie is wel een beperking gesteld. Voorstellen voor ministeriële regelingen waarmee EG-richtlijnen worden omgezet, moeten worden voorgelegd aan het parlement.

Deze in het Verenigd Koninkrijk gehanteerde voorhangprocedure kent twee varianten die al in paragraaf 4.1 aan de orde kwam. Het parlement kan ‘ja’ of ‘nee’ zeggen tegen het voorgehangen voorstel, zij het via een stilzwijgende goedkeuring (*negative procedure*), of een uitdrukkelijke (*affirmative procedure*). Het voordeel van deze algemene machtiging is dat ten opzichte van de normale parlementaire wetsprocedure veel tijd kan worden gewonnen. Het nadeel, in de ogen van de geïnterviewden, is verlies van parlementaire controle en daardoor ook van legitimatie en draagvlak. In het Verenigd Koninkrijk maakt het parlement weinig gebruik van de mogelijkheden om voorstellen voor ‘omzettende’ *ministerial orders of regulations* kritisch te behandelen. Het komt nauwelijks voor dat een voorstel door het parlement wordt geblokkeerd. Dit verlies wordt enigszins gecompenseerd door uitgebreide consultaties bij de voorbereiding van ‘omzettende’ regelingen en parlementaire controle achteraf (*Joint Scrutiny Committee on Statutory Instruments & Merits Committee*), maar niet helemaal.

In Frankrijk wordt gebruik gemaakt van algemene machtigingswetten, genaamd *lois d’habilitation*. Een dergelijke wet, mogelijk op grond van artikel 38 van de Franse grondwet, geeft de regering de bevoegdheid om een aantal richtlijnen via wetsdecreet te implementeren. Bijzonder aan deze Franse machtigingswetten is dat de machtiging slechts geldt voor een bepaalde duur en dat de *ordonnances* door het parlement moeten worden goedgekeurd (zonder mogelijkheden van amendement). Als zij op dat moment al in werking zijn getreden – dat kan – en het parlement keurt hen niet goed, dan zullen de gevolgen alsnog moeten worden teruggedraaid. Van deze mogelijkheid wordt slechts een enkele keer per jaar gebruik gemaakt. Nu de voorstellen steeds vergezeld moeten gaan van een lijst niet omgezette richtlijnen, hebben zij voor de regering een element van zelfincriminatie.

Deze vorm van machtigingswetten is ook in Spanje mogelijk op grond van artikel 82 van de Spaanse grondwet (*ley de bases*). Als in Frankrijk is deze vorm van delegatie in Spanje gebaseerd op een lijst van richtlijnen, voor een beperkte tijd geldig, en vervalt met de inwerkingtreding van regeringsdecreten (*real decreto-legislativo*). Tegelijkertijd is deze vorm van machtiging, zoals eerder gezegd, slechts éénmaal gebruikt, namelijk ten tijde van de Spaanse toetreding tot de Unie.

De Italiaanse EG-wetten op basis van het Pergola-systematiek kennen als vast onderdeel ook de algemene machtigingsdelegatie. Op basis van Artikel 76 van de Italiaanse grondwet heeft de wetgever de bevoegdheid de regering op deze manier te machtigen. Via een algemene machtigingswet krijgt de regering ten aanzien van een bepaald onderwerp—bijvoorbeeld omzettingen van EG-richtlijnen—de bevoegdheid wetsdecreten

⁵⁴ Schedule 2 European Communities Act 1972.

vast te stellen. De grondwet verlangt daarbij dat de wet beginselen en criteria voor de uitvoering van deze bevoegdheid inhoudt. Net als in het Franse geval mag de machtiging maar voor een bepaalde termijn worden gegeven en ook in Italië is parlementaire goedkeuring (zonder amendementsrecht) noodzakelijk.⁵⁵ Deze vorm wordt in Italië veel gebruikt.

In Denemarken en Duitsland prevaleert net als in Nederland het systeem van de bijzondere delegatie. Overigens, ook in de landen waarin met algemene machtigingswetten wordt gewerkt komen bijzondere delegatiemogelijkheden voor. Bijzondere delegatie houdt in dat per geval (bijvoorbeeld per onderwerp, specifieke bevoegdheid, of specifieke richtlijn) in parlementaire wetten bevoegdheden tot nadere regelgeving worden overgedragen aan de regering c.q. een minister. In veel landen varieert het sterk per beleidsgebied of er veel bijzondere delegatiemogelijkheden voorkomen. In Denemarken zijn het bijvoorbeeld vooral de Deense wetten die raken aan de traditionele, eerste pijler beleidsgebieden van de Unie die veel bijzondere delegatiemogelijkheden laten zien. Bij Deense wetten op het terrein van derde pijler onderwerpen is dat veel minder het geval.

Bijzondere delegatiemogelijkheden komen overigens in soorten en maten. Soms kennen delegatiemogelijkheden in een bijzondere wet (bijzondere delegatiemogelijkheden dus) een erg open karakter in die zin dat zij de regering of een minister een buitengewoon ruime bevoegdheid geven om elke en iedere richtlijn op het terrein van de wet om te zetten. Voorbeelden daarvan zijn in het onderzoek aangetroffen in Spanje. Ook in Nederland treffen we dit – niettegenstaande het gebod van aanwijzing 25 – wel aan.

b. Delegatienormen: delegatieverboden en –beperkingen

Bij het zoeken naar de laagst mogelijke vorm van omzetting gelden in veel van de onderzochte landen beperkingen aan de mogelijkheden tot delegatie. Zo kennen de Spaanse en de Duitse grondwet beperkingen ten aanzien van de wetgevingsbevoegdheid van de centrale c.q. federale overheid. Als de federale overheid grondwettelijk geen bevoegdheid heeft op een bepaald terrein kan vanzelfsprekend een EG-richtlijn die op datzelfde terrein ligt, niet via gedelegeerde vormen van regelgeving op federaal niveau worden omgezet. Ook in het Verenigd Koninkrijk hebben vrij recentelijk Wales, Noord-Ierland, en Schotland belangrijke autonome bevoegdheden gekregen. Bij de omzetting van richtlijnen leveren dergelijke autonome bevoegdheden van deelstaten of regio's nogal eens complicaties op omdat de centrale (federale) overheid verantwoordelijk is en blijft voor de volledige en getrouwe omzetting. Spanje en – in iets mindere mate – Duitsland lijken daar een modus in gevonden te hebben. In het Verenigd Koninkrijk heeft men nog wat aanloopproblemen.

Een tweede vorm van delegatiebeperking is ook van grondwettelijke oorsprong. In de meeste van de onderzochte landen bevat de Grondwet terzake van bepaalde onderwerpen in en of andere vorm delegatieverboden dan wel beperkingen. Expliciete voorbeelden daarvan zijn te vinden in artikel 34 van de Franse grondwet en de artikelen 81-92 van de Spaanse grondwet en de daarop gebaseerde organieke wet.⁵⁶

Zelfs indien er geen delegatieverboden bestaan wordt er in een aantal van de onderzochte landen soms toch voor gekozen om richtlijnen via een parlementaire wet om te zetten. In de landen die geen algemene machtigingswetten kennen, maar slechts bijzondere delegatiemogelijkheden, geldt dat indien een EG-

⁵⁵ Artikel 77 Italiaanse Grondwet.

⁵⁶ Een organieke wet is een parlementaire wet die uitvoering geeft aan een of meer bepalingen van de grondwet.

richtlijn een onderwerp regelt waarover nog geen nationale wetgeving bestaat, een dergelijke richtlijn in eerste instantie moet worden omgezet in een parlementaire wet. Daarnaast wordt in Denemarken en het Verenigd Koninkrijk het maatschappelijke, bestuurlijke of politieke belang van een onderwerp in een richtlijn wel als reden genoemd om te zetten in een parlementaire wet. In het Verenigd Koninkrijk is, net als in Frankrijk, consistentie met het nationale recht of beleidstraditie reden om een parlementaire wet te gebruiken. In het Verenigd Koninkrijk is bijvoorbeeld het vennootschapsrecht traditioneel via een Act of Parliament geregeld.

c. Delegatiestructuren

Over delegatiestructuren leerde het onderzoek dat sommige bevoegdheidstoekenningen tot regelgeving aan de regering soms rechtstreeks op de grondwet rusten. Zowel in Frankrijk als in Italië en Spanje is de regering rechtstreeks onder de Grondwet of daarvan afgeleide organieke wetgeving bevoegd om onder bepaalde voorwaarden, ter uitvoering van wetten, wetsdecreten vast te stellen. Van belang is dat in Italië en Spanje de grondwettelijke bevoegdheid van de regering om zonder parlementaire bemoeienis te decreteren, nagenoeg nooit wordt gebruikt om richtlijnen om te zetten. Die decreetbevoegdheid is in die landen bedoeld om in geval van dringende nood snel besluiten te kunnen nemen. Dergelijke wetsbesluiten zijn werkelijk gereserveerd voor uitzonderlijke situaties en behoeven in enige vorm posterieure goedkeuring van het parlement.

Anders ligt dat in Frankrijk, waar de regering een reguliere, eigen grondwettelijke bevoegdheid heeft om wetsdecreten te maken op die gebieden die niet worden bestreken door wetten of die ook niet vallen binnen het wetgevingsdomein (artikel 37 Franse grondwet). Dit is het gevolg van de, in Nederlandse ogen, complexe bevoegdheidsafbakening onder de grondwet van de vijfde republiek.

In verschillende landen bestaat geen regelgevingshiërarchie zoals we die in Nederland kennen. In Spanje, Italië en Frankrijk zijn bepaalde wetsdecreten vastgesteld door de regering (bijvoorbeeld *decreti leggi*, *real decretos-legislativos*, of *décrets*) van dezelfde orde en rang als parlementaire wetten. Volgens de algemene voorrangregel dat nieuwe regelingen voor de oudere gaan (*lex posterior derogat lege priori*) kan dat betekenen dat een decreet voorrang krijgt boven een parlementaire wet. In het Verenigd Koninkrijk is het niet alleen mogelijk dat ministeriële regelingen voorrang krijgen op parlementaire wetten, maar daar zelfs expliciet van af kunnen wijken of die amenderen. De bepalingen die een dergelijke bevoegdheid toekennen worden heel toepasselijk *Henry VIII powers* genoemd.

Uit het onderzoek viel niet op te maken welke regels in de onderzochte landen gelden ten aanzien van rechtstreekse delegatie en middellijke of cascadedelegatie. Dat zou een verdergaand onderzoek vergen.

4.4 Technieken

Het beeld van de technieken die in de onderzochte landen worden gebruikt bij de implementatie is gevarieerd. De verschillen zijn het gevolg van het antwoord van een lidstaat op de vraag welk systeem leidend is bij de omzetting: het nationale systeem of het Europese systeem? In Frankrijk, Denemarken⁵⁷ en Duitsland wordt bij de omzetting van EG-richtlijnen het nationale systeem van wettelijke regelingen als uitgangspunt van denken genomen. De materie van de richtlijn wordt in nationale regelingen ingeweven, wat

⁵⁷ Uit het onderzoek blijkt dat de één-op-één omzetting in Denemarken de laatste jaren populairder is geworden.

meestal aanpassing van de richtlijnterminologie met zich brengt. In het Verenigd Koninkrijk, Spanje, Italië en Nederland bestaat een voorkeur om ter bevordering van de snelheid, nauwkeurigheid en volledigheid van de omzetting zo dicht mogelijk te blijven bij de tekst van de EG-richtlijn en daar in beginsel bij aan te sluiten.

Het Nederlandse wetgevingsbeleid kent volgens aanwijzing 56, net als het Verenigd Koninkrijk, een voorkeur voor de één-op-één omzetting waar dat mogelijk is.⁵⁸ In de meeste landen die deze voorkeur delen geldt bijna als vanzelfsprekend dat waar het niet mogelijk is om één-op-één om te zetten dit ook niet wordt gevraagd. Het kan zijn dat bijvoorbeeld de richtlijntekst naar taal of inhoud verwarrend is, of dat de richtlijntekst en nationale regelingen niet op elkaar aansluiten. In die situatie wordt terminologieaanpassing (*re-wording*) aanbevolen.

Één-op-één omzetting is op verschillende wijzen te bewerkstelligen. Ten eerste zorgt omzetting via verwijzing er automatisch voor dat één-op-één wordt omgezet. Dat kan, als het voorbeeld van Nederland nemen wordt genomen, *dynamisch* gebeuren (d.w.z. in nationale wetgeving verwijzen naar bepalingen van een richtlijn zoals die met inbegrip van toekomstige wijzigingen daarvan zullen luiden) of *statisch* (verwijzing naar bepalingen van een richtlijn zoals die luiden op een gegeven tijdstip).⁵⁹ In paragraaf 4.2.1 kwam deze techniek van omzetting via verwijzing al aan de orde. Snelheid van omzetting is bij deze techniek een voordeel. De beperkte kenbaarheid en de gebrekkige wijze waarop recht wordt gedaan aan het karakter van het richtlijninstrument kunnen worden aangemerkt als nadelen. Omzetting vindt ook wel plaats via de zogenoemde annex methode: een artikel in een nationale regeling verklaart een bijlage van de regeling van toepassing. Op deze wijze worden nogal eens de vaak technische annexen van Europese richtlijnen door directe verwijzing van toepassing verklaard.

Verschil bestaat er tussen de lidstaten op het punt van de vraag of omzetting minimalistisch moet zijn of juist niet. In Nederland en het Verenigd Koninkrijk bestaat een - gezien het volume van om te zetten richtlijnen - begrijpelijk voorkeur zo 'sec' mogelijk om te zetten, dat wil zeggen louter om te zetten en af te zien van het vaststellen van extra nationale maatregelen of beleid.⁶⁰ Daarbij komt nog dat het stellen van extra eisen (*gold-plating*) de lasten die voor bedrijven en burgers gemoeid zijn met de regeling vaak doen toenemen. In het Verenigd Koninkrijk is dit vanuit een oogpunt van beter regelgeven een reden temeer om geen additionele eisen te stellen.

Een hiermee samenhangend vraagstuk is of de omzetting van een richtlijn via een nieuwe aparte regeling moet geschieden dan wel dat juist aansluiting bij bestaande instrumenten en regelingen dient te worden gezocht. Het onderzoek laat op dit punt zien dat landen daar vooral op gevalsbasis te werk gaan en geen werkelijk beleidslijnen hanteren. Natuurlijk wordt met veegwetten en omnibuswetten niet aangesloten bij

⁵⁸ In het Verenigd Koninkrijk de *copy-out* techniek geheten. In de laatste jaren is er in het VK een debat gevoerd over de vraag of copy-out de voorkeur verdiende of juist een zo goed mogelijke invlechting van de richtlijn in het systeem van de reeds bestaande Britse wetgeving (de techniek van de *elaboration*). De voorstanders van invlechting wezen er in het VK op dat dat niet alleen systematische voordelen had, maar een dienstbetoon aan de rechter was, die immers niet gewend was te werken met Europese regelgeving. Het debat is in het VK voordeel beslecht van de één-op-één omzetting die sneller en vaak ook nauwkeuriger, maar ook door de rechters zelf beter wordt gewaardeerd. Zij zijn het immers die het EG-recht moeten toepassen en dat is eenvoudiger als alleen met de originele tekst wordt gewerkt of daar dichtbij wordt aangesloten.

⁵⁹ Zie aanwijzingen 342 en 341.

⁶⁰ Zie bijvoorbeeld Aanwijzing 337 van de Aanwijzingen voor de regelgeving.

bestaande nationale instrumenten, en wordt met gedelegeerde regelingsinstrumenten vaak een richtlijn los van de bestaande nationale regelingen omgezet, maar van een werkelijke lijn lijkt geen sprake. Wel wordt in het Britse wetgevingsbeleid het naast elkaar laten bestaan van dubbele regimes over een zelfde onderwerp—nationaal en Europees—ontraden (dit wordt wel *double-banking* genoemd).

4.5 Conclusie

In de onderzochte landen wordt bij de omzetting van EG-richtlijnen in beginsel gebruik gemaakt van de normale wetgevingssystematiek. Er bestaan in wezen geen aparte procedures voor de omzetting van EG-richtlijnen, geen speciale instrumenten. Wel worden in de verschillende landen de mogelijkheden om op een zo laag mogelijk regelingsniveau om te zetten intensief benut. Opvallend is dat bij het omzetten van richtlijnen in regelingsinstrumenten van lager niveau dan een parlementaire wet dit in alle landen gebeurt binnen de bandbreedte van het normale constitutionele systeem, binnen het kader van de normale delegatietechnieken en het bestaande nationale regelingsarsenaal, kortom binnen de gewone nationale wetsystematiek. Wel kennen sommige landen vormen van parlementaire wetgeving (veeg- en omnibuswetten) en vormen van delegatie (algemene machtiging of autorisatie) die het mogelijk maken om of groepen richtlijnen tegelijkertijd, of richtlijnen per definitie via gedelegeerde regelgeving om te zetten. Andere landen zoeken het niet in generieke delegatievormen, maar juist in specifieke. Het voordeel van die laatste techniek is dat per wet kan worden bekeken wat de beste verhouding is tussen omzetting via parlementaire wet en omzetting in gedelegeerde regelgeving.

Met de omzetting van richtlijnen via instrumenten van lagere orde dan een parlementaire wet is veel tijdswinst te boeken, maar ze kennen in beginsel als nadeel dat er weinig parlementaire controle vooraf op het instrument kan plaatsvinden en dat daardoor de legitimatie soms laag is. Toch wordt in weerwil van die bezwaren vaak gebruik gemaakt van gedelegeerde instrumenten. In de meeste van de onderzochte landen wordt meer dan 80% van de richtlijnen omgezet via gedelegeerde instrumenten.

Op het vlak van de gebruikte technieken laat het onderzoek een gevarieerd beeld zien. Sommige landen proberen bij de omzetting zo dicht mogelijk bij de tekst van de richtlijn te blijven en ook zo minimalistisch mogelijk om te zetten. Andere landen hebben een voorkeur voor een zo zorgvuldige mogelijk inpassing in de nationale wetgeving wat vaak noodzakelijkerwijs meebrengt dat van de terminologie van de richtlijntekst wordt afgeweken. De laatste techniek heeft natuurlijk het nadeel dat die tijdrovender is en ook kwetsbaar maakt voor infractieprocedures. Het voordeel is dat de coherentie van het nationale systeem beter kan worden gewaarborgd. Ook het beeld ten aanzien van het al dan niet aansluiten bij nationale instrumenten, dan wel het maken van een nieuwe regeling voor iedere omzetting van een richtlijn is gevarieerd. Het hangt sterk af van de vraag via welke instrumenten geïmplementeerd kan worden.

5 De nationale beleidscyclus

5.1 Algemeen

De nationale beleidscyclus ten aanzien van Europese wetgeving begint met de voorbereiding van een initiatief door de Europese Commissie. In geen van de onderzochte landen is sprake van een systematische voorbereiding op en discussie van voorstellen die binnen de Commissie circuleren maar nog door de Commissie aan de Raad moeten worden aangeboden. Incidenteel is er aandacht voor bepaalde voorstellen, vooral wanneer de Europese Commissie daarover een nota publiceert. Weliswaar geven waarnemers aan dat het zinvol is om in een vroeg stadium kennis te nemen van ideeën die binnen de Commissie leven, maar dat heeft nog niet tot een bepaalde vaste procedure of werkwijze geleid. Ook proberen sommige nationale parlementen, mede in het licht van de door de Europese Grondwet te introduceren subsidiariteit- en proportionaliteitstoets, meer informatie over aankomende Commissievoorstellen te verzamelen door het onderhouden van nauwe banden met de nationale permanente vertegenwoordiging en het eventueel stationeren van een eigen vertegenwoordiger in Brussel. Maar ook binnen die parlementen wordt niet op systematische wijze een discussie over mogelijke prevoorstellen gevoerd. De publicatie van een nieuw Commissievoorstel is nog steeds het startschot voor de voorbereiding van de nationale standpuntbepaling.

5.2 Voorbereiding van het nationale standpunt

Aanvang. De voorbereiding op de nationale standpuntbepaling ten aanzien van een Commissievoorstel begint in de onderzochte landen na publicatie. Het ministerie dat het meest betrokken is bij het voorstel start de voorbereiding door het voorstel te analyseren en een inventarisatie van mogelijke problemen te maken. Alleen in Frankrijk wordt in deze fase systematisch de Raad van State betrokken vanwege het feit dat de Raad in het licht van de Franse grondwet moet beoordelen of het nieuwe voorstel uitsluitend ‘wetgevende’ of ‘uitvoerende’ elementen bevat, of beide. Deze beoordeling is van belang voor de verdere procesgang, aangezien het Franse nationale parlement uitsluitend een oordeel geeft ten aanzien van voorstellen of onderdelen daarvan met ‘wetgevende’ relevantie.

Ministeriële voorbereiding. De wijze waarop het ministerie de discussie over het voorstel organiseert, varieert. Op dit punt kan onderscheid worden gemaakt tussen twee verschillende modellen:

- Een model van *brede consultatie* voor alle voorstellen, waarbij tevens verschillende belangengroepen en lagere overheden actief worden betrokken. Dit model wordt door Denemarken en het Verenigd Koninkrijk gehanteerd. In Denemarken heeft de discussie plaats in een groot aantal geïnstitutionaliseerde EU commissies op de verschillende beleidsterreinen. Deze uitvoerige discussie past bij de actieve betrokkenheid van het nationale parlement in de vervolgfase van de voorbereiding. In het Verenigd Koninkrijk wordt ook brede consultatie, waaronder met andere ministeries, aanbevolen, maar is de regie overgelaten aan de eerstverantwoordelijke minister. De informele consultaties worden vooral georganiseerd onder belanghebbende burgers, bedrijven en instellingen. Belanghebbenden worden tevens uitgenodigd om hun zienswijzen ook zelf uit te dragen in Brussel.
- Een model van *beperkte en soms alleen ambtelijke consultatie*, afhankelijk van het beleidsterrein: in dit model wordt vooral door de verschillende ministeries een inbreng gegeven in de standpuntbepaling. Soms worden afhankelijk van het beleidsterrein ook belangengroepen betrokken in de consultaties. Dit model

treft men in Spanje en Frankrijk aan, waar men primair ambtelijke *ad hoc* commissies instelt (via Buitenlandse Zaken—Spanje—of een specifiek op Europa gericht secretariaat onder de premier—Frankrijk—voor de voorbereiding van de standpuntbepaling.

Zodra een standpunt is bereikt, wordt dit veelal via een onderraad aangeboden aan de ministerraad.

Interne informatievoorziening en fiche. In alle onderzochte landen wordt, net als in Nederland, een document opgesteld dat als uitgangspunt geldt voor zowel de ambtelijke als politieke besluitvorming in het voortraject.

In Frankrijk wordt een fiche opgesteld met daarin vooral aandacht voor de wijze waarop het voorstel invloed heeft op het nationale wettelijke kader (*fiche d'impact*). Die aandacht heeft te maken met het Franse constitutionele onderscheid tussen 'wetgevende' en 'uitvoerende' maatregelen die het verdere verloop van het besluitvormingsproces bepalen (het al dan niet betrekken van het nationale parlement in het proces) en het feit dat men in principe in een vroegtijdig stadium inzicht probeert te krijgen in de vraag welke Franse regelgeving gewijzigd moet gaan worden bij goedkeuring van het voorstel. Dat kan aanleiding zijn om tijdens de onderhandelingen in Brussel onderdelen van het voorstel te wijzigen zodat problemen met omzetting worden voorkomen.

In Spanje wordt ook een fiche opgesteld dat uiteindelijk aan het parlement wordt toegestuurd. Het Spaanse fiche is uitgebreider dan het Franse, maar behandelt nogal formele punten.

De meest uitgebreide fiches treft men aan in het Verenigd Koninkrijk en Denemarken. Deze fiches zijn op punten vergelijkbaar met de situatie in Nederland, waar, naast een aantal formele punten (zoals verantwoordelijke ministerie, juridische basis en de achtergrond van de richtlijn), ook aandacht is voor de financiële, personele en administratieve consequenties van het voorstel, de consequenties voor nationale en decentrale regeling en beleid, consequenties voor ontwikkelingslanden en de haalbaarheid van de voorgestelde termijnen in het ontwerpvoorstel. Een verkorte versie van een fiche wordt in Nederland aan het nationale parlement aangeboden.

In het Verenigd Koninkrijk wordt het fiche (*explanatory memorandum*) door de regering bij binnenkomst van een EG-voorstel opgesteld ten behoeve van het parlement. In dat memorandum wordt op de verschillende aspecten van het voorstel ingegaan en wordt een verslag toegevoegd met als uitkomst een zogenaamd *regulatory impact assessment* waarin de economische, juridische, maatschappelijke en milieugevolgen van het voorstel worden behandeld. Daarbij wordt bijzondere aandacht besteed aan de gevolgen voor Britse bedrijven en burgers in termen van administratieve lasten. Het opstellen van een memorandum is sterk geprotocolleerd. Een speciale eenheid binnen het *Cabinet Office (Regulatory Impact Unit)* assisteert departementen bij het opstellen van *impact assessments*. Daarnaast fungeert een onafhankelijk *Scrutiny Team* dat via overtuiging tracht bij departementen en belanghebbenden de essentie van beter (lees: vooral bedrijfsvriendelijker) wetgeven (*Better Regulation*) over te brengen.

In Denemarken wordt in het voorbereidingsproces een nota gemaakt die uiteindelijk aan het parlement wordt voorgelegd (*grundnotat*). De Deense werkwijze is de meest uitvoerige in vergelijking met de andere, onderzochte landen. De Deense nota kent in totaal 13 aandachtspunten waarvan een beoordeling op financiële, sociaal-economische en milieu aspecten, de resultaten van consultaties met belangengroepen, de positie van de Deense Regering naast die van andere regeringen in de EU en het standpunt van Denemarken in vergelijkbare gevallen het meest in het oog springen.

Coördinatie. De coördinatie van de voorbereiding wordt in de onderzochte landen op verschillende wijze georganiseerd.

De meest gedecentraliseerde vorm van coördinatie heeft plaats in Denemarken. Daar wordt de voorbereiding hoofdzakelijk overgelaten aan de vakministeries. Via de geïnstitutionaliseerde commissies die per beleidsterrein bestaan en waarin ook belangengroepen zitting hebben, wordt het Deense standpunt voorbereid. Dit standpunt komt via een interdepartementale, ambtelijke coördinatiegroep en een onderraad in de ministerraad aan de orde. Het ministerie van Buitenlandse Zaken is penvoeder in dit proces.

Het Spaanse model komt hiermee enigszins overeen. Het verschil is dat de voorbereidingen in een *ad hoc*-werkgroep plaatshebben die op initiatief van het ministerie van Buitenlandse Zaken is ingesteld. In die fase worden, afhankelijk van het onderwerp, soms belangengroepen en de autonome regio's geraadpleegd door het vakministerie. Via een interdepartementale, ambtelijke coördinatiegroep en een onderraad komt het voorstel op de agenda van de ministerraad.

In het Verenigd Koninkrijk wordt de voorbereiding en omzetting van EG-richtlijnen centraal gecoördineerd door het *Cabinet Office*. Het *Cabinet Office* oefent regie uit daar waar dat nodig is. In veel gevallen wijst de verantwoordelijkheidsverdeling tussen de departementen, vastgelegd in de *Designating Order*, uit welk departement eerstverantwoordelijk is.

Het Franse model wijkt af van de modellen in Denemarken en Spanje. De standpuntbepaling in Frankrijk is een co-productie van twee coördinatieorganen die beide onder de premier vallen: het secretariaat voor Europese aangelegenheden—het *Secrétariat Général de la Comité Interministériel*, kortweg SGCI—dat de leiding heeft voor Europees beleid en het coördinerende secretariaat voor wetgevingsaangelegenheden—het *Secrétariat Général du Gouvernement Général*, kortweg SGG. Per dossier stelt het SGCI een ad hoc-commissie in waarin de betrokken vakministeries zijn vertegenwoordigd. Hoewel de SGCI de voorkeur heeft voor één vakministerie dat de leiding neemt in het voorbereiden van het Franse standpunt, komt het regelmatig voor dat meerdere ministeries de leiding opeisen. Dit is het gevolg van de relatieve autonomie van de Franse vakdepartementen en het feit dat een Commissie voorstel soms gevolgen heeft voor meerdere ministeries. Zodra de ministeries een conceptstandpunt hebben ontwikkeld en afgestemd wordt het door SGCI en vervolgens SGG aan de ministerraad aangeboden. Het Franse coördinatiemodel is formalistisch en complex. Bovendien kent het dus twee organen die zich, vanuit verschillende perspectieven, met de interne afstemming bezig houden.

Standpuntbepaling. Zodra de ministerraad een voorlopig standpunt heeft bepaald, verschillen de onderzochte landen wat betreft het vervolg.

- In Frankrijk is het vervolg afhankelijk van de vraag of een richtlijn ‘wetgevende’ elementen bevat. Zo ja, dan wordt het parlement op de hoogte gebracht via een fiche (*fiche d’impact*). Het parlement, en in het bijzonder de *Assemblée Nationale*, kan de regering via een motie vragen met een aantal punten rekening te houden. Dit komt in beperkte mate voor. De regering is niet gedwongen de motie uit te voeren, wat de beperkte belangstelling voor dit instrument verklaart, maar moet wel bij de Europese onderhandelingen een voorbehoud maken totdat het standpunt van het parlement bekend is. Voor richtlijnen die louter ‘uitvoerende’ elementen bevatten wordt het parlement niet nader geïnformeerd. De regering is voor die richtlijnen, of onderdelen ervan, autonoom.
- In Spanje worden alle Commissievoorstellen met een fiche aan het nationale parlement aangeboden. Het parlement kan daarover een standpunt innemen, maar de belangstelling daarvoor is gering. Dit komt mede

- omdat een standpunt van het parlement niet geldt als een mandaat waarbinnen de regering de onderhandelingen in Brussel moet voeren.
- In het Verenigd Koninkrijk geldt de *scrutiny reserve* hetgeen inhoudt dat de regering eigenlijk niet kan onderhandelen over EG-voorstellen die nog niet zijn behandeld door het Britse parlement. In de praktijk wordt soepel met die eis omgesprongen. Een aparte commissie van het Lagerhuis, de *European Scrutiny Committee*, bekijkt aan de hand van het fiche, met daarin een voorstel voor het Britse standpunt, welke EG-voorstellen door het parlement behandeld moeten worden en welke niet. Meestal worden slechts enkele voorstellen door de commissie voor behandeling doorverwezen naar het parlement. Van de doorverwezen voorstellen wordt een kleine minderheid uiteindelijk daadwerkelijk inhoudelijk behandeld in het Lagerhuis
 - In Denemarken worden alle Commissievoorstellen via een fiche (*grundnotat*) aan het nationale parlement aangeboden en uitvoerig met de regering besproken. De discussie vindt plaats met de Commissie Europese Zaken van het Deense parlement nadat andere, relevante vaste commissies hun visie op het voorstel hebben gegeven. Op basis van de discussie stelt de Commissie Europese Zaken het onderhandelingsmandaat van de regering vast. De Deense regering is verplicht de instemming van het nationale parlement te hebben voordat het een standpunt inneemt ten aanzien van de onderhandelingen in Brussel.

5.3 Omzetting

Aanvang. De voorbereiding van de omzetting van een Europese richtlijn vindt doorgaans plaats *nadat* het besluit over de richtlijn is gepubliceerd in de *Official Journal*. Hoewel door verschillende vertegenwoordigers de wens is aangegeven om eerder met de werkzaamheden te beginnen, is de praktijk nog steeds dat men na publicatie van de richtlijn begint.

Voorbereiding. Het voorbereiden van de omzetting wordt in de verschillende landen door de lijnministeries gedaan. Daarbij passen de volgende waarnemingen:

- in niet alle landen wordt de omzetting van de richtlijn door hetzelfde team gedaan als de onderhandelingen over de richtlijn (vooral in Frankrijk is dit nog een probleem);
- ten aanzien van de werkverdeling kampt vooral Frankrijk met het probleem dat meerdere ministeries zich een leidende rol in het omzettingsproces aanmeten, met als gevolg mogelijke ontwijking van verantwoordelijkheid voor de voortgang van omzetting;
- de ondersteuning bij de omzetting op juridisch vlak varieert per land: in Denemarken worden ‘multidisciplinaire’ teams gevormd die een dossier van de onderhandelingen tot de omzetting begeleiden. In het Verenigd Koninkrijk wordt bij voorkeur ook in multidisciplinaire projectteams gewerkt. In afwijking daarvan wordt de omzetting in *statutory instruments* meestal door departementale juristen uitgevoerd. De kwaliteit van hun werk wordt veel lager aangeslagen dan dat van de *Parliamentary Counsel’s Office* die de voorstellen voor *Parliamentary Acts* schrijft. In Spanje wordt juridische deskundigheid betrokken van de centrale stafafdelingen binnen het ministerie (*Secretario General Tecnicos*). In Frankrijk is de juridische ondersteuning niet systematisch en varieert sterk per ministerie.
- in sommige landen vindt in deze fase overleg plaats met betrokkenen (o.a. belangengroepen en lagere overheden). Dat betreft vooral Spanje en Frankrijk. Dit overleg is verankerd in het nationale wettelijke kader en daarmee, op de korte termijn, onvermijdelijk. In Spanje levert dit soms beperkte vertragingen in

- de procesgang op; in Frankrijk zijn die vertragingen soms erg groot vanwege het sterk autonome karakter van deze overlegfora;
- de procesgang van de omzetting van Europese richtlijnen wijkt in de onderzochte landen niet af van de procesgang voor nationale maatregelen. Men kent geen classificatiesysteem naar type richtlijn dat bepalend is voor de verdere aanpak (met uitzondering van de typering naar ‘wetgevend’ en ‘uitvoerend’ in Frankrijk);
 - niet alle onderzochte landen kennen aanwijzingen ten aanzien van de omzetting, of meer in het algemeen, ten aanzien van wet- of regelgeving. In Denemarken en het Verenigd Koninkrijk wordt gebruik gemaakt van nationale richtlijnen; in Frankrijk wordt gebruik gemaakt van verschillende circulaire van de premier; Spanje kent geen nauwkeurig omschreven uniforme aanwijzingen. Per ministerie zijn ‘eigen’ aanwijzingen geformuleerd, die tussen de verschillende ministeries sterk kunnen verschillen. Tegelijkertijd bestaat niet de indruk dat uniforme aanwijzingen een duidelijk positieve bijdrage leveren aan de snelheid en kwaliteit van omzetting.

Coördinatie. De ambtelijke coördinatie in de omzettingsfase heeft in de onderzochte landen verschillende vormen, waarbij Denemarken en Frankrijk de meest extreme posities lijken in te nemen. Spanje en het Verenigd Koninkrijk nemen middenposities in.

De volgende modellen zijn aangetroffen:

- *gedecentraliseerde coördinatie:* in Denemarken kent men een gedecentraliseerde vorm van afstemming tussen de verschillende vakministeries. In het Deense model is de omzetting van richtlijnen een verantwoordelijkheid van de ministeries, waarbij andere ministeries worden betrokken. Alleen wanneer een inbreukprocedure wordt gestart, komt een speciale commissie binnen het ministerie van Justitie bijeen om de situatie te bespreken. Het ministerie van Buitenlandse Zaken, dat de procesgang in de onderhandelingsfase coördineert, heeft in de omzettingsfase geen coördinerende taken.
- *gecentraliseerde interdepartementale coördinatie:* in Spanje is voor het model gekozen waarbij de ministeries primair verantwoordelijk zijn voor de omzetting en waarbij het ministerie van Buitenlandse Zaken mogelijke en verwachte achterstanden signaleert. Knelpunten komen in Spanje wekelijks aan de orde in de *Committee of State-secretaries and Sub-secretaries*, het ambtelijke voorportaal is voor de ministerraad. In deze commissie wordt de voortgang van omzetting besproken en komen mogelijke complicaties en problemen aan de orde.

In het Verenigd Koninkrijk fungeert het *Cabinet Office*, in overleg met het Ministerie van Buitenlandse Zaken, als oog-in-het-al. Het *Cabinet Office* is de centrale coördinator. Het *Cabinet Office* fungeert als intermediair tussen Londen en de permanente vertegenwoordiging in Brussel, grijpt in bij problemen tussen departementen tijdens de implementatie, neemt zelf het voortouw bij dossiers die raken aan vitale Britse belangen en bewaakt de voortgang van de omzetting. Het *Cabinet Office* is vlakbij de premier gepositioneerd en heeft daardoor gezag ten opzichte van de andere (vak)departementen.
- *coördinatie van de coördinatoren:* in Frankrijk ligt de coördinatie ten aanzien van de omzetting van Europese richtlijnen traditioneel bij de SGCI en, in tweede aanleg, de SGG (zie de fase van de voorbereiding op een Commissievoorstel). De SGCI vervult, met de junior minister voor Europese Zaken, de signaleringsfunctie ten aanzien van mogelijke problemen en achterstanden. Met de recente hervormingen van het Franse coördinatiesysteem is een nieuwe interdepartementale coördinatiecommissie ingesteld die door SGCI en SGG samen wordt voorgezeten en waarin problemen

met de omzetting van richtlijnen worden besproken (*réseau interministériel des correspondants de la transposition*). Deze nieuwe commissie tracht meer lijn te krijgen in de ambtelijke coördinatie in Frankrijk. De junior minister voor Europese Zaken moet de ministeries nadrukkelijker aanspreken op achterstanden.

Tot dusverre zijn de modellen in Denemarken en Spanje—maar ook het Verenigd Koninkrijk tot op zekere hoogte—het meest effectief gebleken. Daarbij komt bij dat in Denemarken het belangrijkste deel van het werk—en de daarbij behorende afstemming—in de fase van de onderhandelingen over een richtlijn wordt gedaan.

In Spanje valt de hoge frequentie op (wekelijkse discussie) van het benoemen van de achterblijvers in de tijdsplanning voor omzetting. Verder is de ‘naming and shaming’ in de *Committee of State-secretaries and Sub-secretaries* zeer effectief aangezien geen van de ambtelijke hoofden van de ministeries (en soms de beleidsdirecties binnen de ministeries) door de vice-premier keer op keer herinnerd willen worden aan de slechte prestaties van hun ministerie. Hardnekkige controverses tussen de ministeries worden op dit niveau in de meeste gevallen besproken en afgehandeld. Het is een unicum indien de ministerraad zich moet buigen over de omzetting van richtlijnen. Dat geldt ook voor het Verenigd Koninkrijk, maar daar ook al omdat de meeste omzettingen via gedelegeerde regelgeving wordt omgezet. In het Verenigd Koninkrijk komt het wel een enkele keer voor dat er een gerichte actie op touw wordt gezet vanuit het kabinet om omzettingachterstanden weg te werken.⁶¹ Enkele jaren geleden werd een staatssecretaris geïmmitteerd om in samenwerking met de departementen een actieplan uit te voeren erop gericht om versneld achterstanden weg te werken.

In Frankrijk speelt de complicatie dat de coördinatie van de omzetting van Europese richtlijnen (verantwoordelijkheid van de SGCI) en de coördinatie van de voorbereiding van wet- en regelgeving (verantwoordelijkheid van de SGG) in handen is van twee verschillende ambtelijke onderdelen. De recente introductie van een coördinatiestructuur waarbij zowel beide coördinatieorganen zijn betrokken als de belangrijkste ambtelijke én politieke ambtenaren binnen een ministerie, kan tot verbetering leiden. De leden van de nieuw ingestelde commissie—de zogenoemde correspondenten voor de omzetting—bestaan per ministerie uit een hoge ambtelijke vertegenwoordiger met verantwoordelijkheid voor omzetting en een lid van het ‘politieke’ kabinet van de minister (met andere woorden: per ministerie wordt door twee vertegenwoordigers aan het overleg deelgenomen). De hoop is dat controverses binnen en tussen de ministeries, voorzover die in een eerder stadium niet zijn opgelost, binnen deze commissie aan de orde komen. Lukt het niet tot een oplossing te komen, dan zal de junior minister voor Europese Zaken, die aan de vergaderingen deelneemt, het probleem in de ministerraad aan de orde stellen. Dit in samenhang met een overzicht van de algemene voortgang binnen de verschillende ministeries ten aanzien van omzetting. Opmerkelijk is dat in Frankrijk een structuur van coördinatie op coördinatie is ontstaan die het gevolg is van de zeer geformaliseerde en soms moeizame verhoudingen tussen de ministeries en de organen als SGCI en SGG. Daarmee bestaat in Frankrijk een wel zeer uitgebreide en zware coördinatiestructuur, zeker in vergelijking met een land als Denemarken.

⁶¹ Dit is vergelijkbaar met de situatie in Ierland waar ruim een half jaar voor de aanvang van het Ierse voorzitterschap de Taoiseach, Bertie Ahern, een gerichte actie heeft gestart met de slechte Ierse omzettingsscores te verbeteren. Door in het wekelijkse kabinetsoverleg aandacht te vragen voor de voortgang in omzetting—op basis van ‘naming and shaming’—werd in korte tijd het aantal vertraagde richtlijnen gereduceerd van 13 naar 3.

Gerelateerd aan de coördinatie van de omzetting valt op dat verschillen bestaan tussen de onderzochte landen ten aanzien van de prioriteit die omzetting krijgt. In Denemarken is ieder ministerie doordrongen van het feit dat EG-richtlijnen tijdig moeten worden omgezet. Géén van de ministeries maakt graag een gang naar de speciale commissie binnen het ministerie van Justitie die bijeenkomt op het moment waarop een inbreukprocedure tegen Denemarken is gestart. Vooral omdat Denemarken weinig vertragingen kent en nauwelijks met inbreukprocedures te maken heeft, is een slecht presterend ministerie al snel binnen het ambtelijke apparaat en de regering bekend. Dat levert, tot nu toe, een prikkel op tot goed presteren. De hoge prioriteit die het omzetten van richtlijnen in Denemarken heeft, lijkt vooral het gevolg te zijn van deze prikkel.

In Spanje wordt vooral politiek gewicht gegeven aan de omzetting van richtlijnen. Zoals aangegeven vindt een wekelijkse voortgangbewaking van omzetting plaats binnen de onderraad van de ministerraad, de *Committee of State-secretaries and Sub-secretaries*. Ook in het Verenigd Koninkrijk speelt politieke druk een rol. Dat vertaalt zich in het Britse systeem in de wakende rol van de *Cabinet Office* die nauw gelieerd is met de premier. Met de politieke steun van de premier in de rug kan de *Cabinet Office* vakministeries tot compromissen dwingen in het geval van een impasse.

De situatie in Frankrijk is op dit moment complex: met de steun van de premier lijkt de junior minister voor Europese Zaken tempo te kunnen maken met omzetting. Via de recent ingestelde *réseau interministériel des correspondants de la transposition* wordt de voortgang eens per twee à drie maanden besproken met de verschillende vakministeries en de traditionele coördinatieorganen voor omzetting (SGCI) en wet- en regelgeving (SGG). Wat opvalt is de lage frequentie van de bijeenkomsten van dit coördinatieorgaan en het beperkte politieke gewicht van de verantwoordelijke junior minister. Zodra andere prioriteiten de agenda van de premier gaan bepalen, zal omzetting een lagere prioriteit krijgen aangezien het niet op een structurele wijze is geborgd.

5.4 Verplichte adviesorganen

Ten aanzien van verplichte adviesorganen zijn er verschillen tussen de onderzochte landen. Het Verenigd Koninkrijk valt op met een nogal informele vorm van consultatie van andere ministeries en belangengroepen. Denemarken heeft een lichte vorm van verplichte advisering in de fase van omzetting ten aanzien van de juridische kwaliteit en administratieve lastendruk. Spanje en Frankrijk kennen ook verplichte juridische advisering in de vorm van een toetsing van voorstellen door de Raad van State. Daarnaast worden in die landen in de fase van omzetting met belangengroepen overlegd (zie verder paragraaf 5.7). Hierbij een overzicht:

- *informele consultatie*: het Verenigd Koninkrijk kent een stelsel van uitgebreide informele (i.e. niet wettelijk verplichte) consultatie van belanghebbenden (overheid en niet-overheid) voor zowel het EG-voorstel zelf als de voorstellen voor omzettingsmaatregelen.
- *beperkte verplichte advisering*: in Denemarken kan het leidende ministerie, indien nodig, gebruik maken van de deskundigheid van een specifieke afdeling binnen het ministerie van Justitie ten aanzien van Europese wetgeving en omzetting. Wel worden wetsvoorstellen beoordeeld op hun juridische merites (door het ministerie van Justitie) en administratieve lastendruk (op basis van een paneldiscussie met het bedrijfsleven georganiseerd door het ministerie van Economische en Bedrijfszaken);
- *uitvoerige, verplichte consultaties*: Spanje en Frankrijk. In Spanje bestaat de verplichte advisering tijdens omzetting, naast verplichte consultatie van belangengroepen, uit een toets op de juridische kwaliteit van

het voorstel door het Algemene Technische Secretariaat van het ministerie, verplichte advisering door de Raad van State over het voorstel, en overleg met de autonome gebieden in Spanje indien sprake is van een voorstel dat betrekking heeft op één van de competenties die door de centrale overheid en deze gebieden wordt gedeeld.

In Frankrijk is tijdens de voorbereiding van een omzettinginstrument sprake van verplichte consultatie van belangengroepen zoals dat in het Franse wettelijke kader is verankerd en verplichte advisering door de Raad van State. Gelet op de grote verscheidenheid tussen de Franse ministeries is het niet mogelijk aan te geven hoe de advisering binnen de ministeries is geregeld. Van een eenduidige lijn is in ieder geval geen sprake.

In Frankrijk wordt de Raad van State meerdere malen betrokken in het voorbereidings- en omzettingstraject. Aan het begin van de voorbereiding op de standpuntbepaling ten aanzien van een nieuw Commissievoorstel dient de Raad aan te geven hoe het voorstel moet worden getypeerd: is het 'wetgevend', 'uitvoerend' of bevat het zowel 'wetgevende' en 'uitvoerende' elementen. Die typering is van belang voor de verdere procesgang in Frankrijk en het type instrumenten dat moet worden voorbereid. Indien het Commissievoorstel als gevolg van de onderhandelingen ingrijpend wordt gewijzigd kan het zijn dat de Raad in het voorbereidingstraject van de richtlijn opnieuw een oordeel moet geven. In de fase van de omzetting toetst de Raad of de Regering de richtlijn conform de eerdere adviezen heeft omgezet en wordt gelet op de juridische kwaliteit van het werk. Ten aanzien van dit laatste, geeft de Raad aan dat die kwaliteit vaak te wensen overlaat. Dat kan leiden tot substantiële revisie van de oorspronkelijke tekst.

De juridische advisering door de Raad van State (Spanje, Frankrijk) of door het ministerie van Justitie (Denemarken) en de toets op administratieve lasten (Denemarken), wordt niet gezien als een belemmering van de procesgang van omzetting. Deze advisering lijkt een verbetering van de kwaliteit van de voorstellen op te leveren. Wel wordt in Frankrijk gewezen op het feit dat de verplichte consultatie van belangengroepen één van de hoofdoorzaken van vertraging is. Dit punt komt verder onder 5.7 ter sprake.

5.5 De rol van het nationale parlement

Het nationale parlement wordt op zeer verschillende wijzen bij het proces betrokken. Daarbij kunnen drie aspecten worden onderscheiden:

- a. de mate waarin het nationale parlement wordt betrokken bij de standpuntbepaling ten aanzien van nieuwe richtlijnen,
- b. het moment waarop het nationale parlement om een inbreng wordt gevraagd, en
- c. de wijze waarop het parlement op de hoogte wordt gesteld ten aanzien van het inhoud van de voorstellen.

Wordt het nationale parlement betrokken?

In de onderzochte landen worden de nationale parlementen niet altijd door de regering op basis van fiches geïnformeerd over nieuwe voorstellen voor Europese richtlijnen. In het Franse constitutionele stelsel wordt het parlement alleen op de hoogte gesteld van nieuwe Commissievoorstellen indien die voorstellen 'wetgevende' elementen bevatten. Indien het voorstel door de Raad van State als 'uitvoerend' wordt getypeerd, wordt het voorstel niet aan het parlement gestuurd, kan het parlement daarover geen standpunt innemen en wordt de uitvoeringsmaatregel, op het moment dat een richtlijn is aangenomen, vastgesteld door de regering zonder verdere tussenkomst van het parlement. Het Franse stelsel is op dit punt uniek. In

Nederland worden niet altijd fiches van alle Commissievoorstellen opgesteld. In Denemarken, Spanje en het Verenigd Koninkrijk wordt het parlement wél op de hoogte gesteld ten aanzien van alle nieuwe Commissievoorstellen.

Wanneer wordt een inbreng van het nationale parlement gevraagd?

De rol die de nationale parlementen vervolgens in de procesgang spelen valt uiteen tussen landen die het nationale parlement actief betrekken in de discussie over nieuwe Commissievoorstellen (Denemarken) en landen waarin enkele nadrukkelijk door het parlement geselecteerde onderwerpen worden besproken (het Verenigd Koninkrijk) en landen waarbij *de facto* de discussie pas in een later stadium wordt gevoerd (Spanje en Frankrijk).

De verschillen tussen het Verenigd Koninkrijk en Spanje en Frankrijk zijn niet zo groot. Ook in het Verenigd Koninkrijk buigt het nationale parlement zich niet diepgaand over ieder commissievoorstel. De *European Scrutiny Committee* die in het kader van de zogenoemde *scrutiny reserve* bepaalt welke Commissievoorstellen al dan niet voor inhoudelijke behandeling in aanmerking komen, fungeert als een sterke filter. Slechts een kleine minderheid van de commissievoorstellen wordt door de Commissie doorverwezen, waardoor het Britse parlement pas vaak in het stadium van de omzettingsmaatregel met een richtlijn wordt geconfronteerd. En zelfs dan gebeurt het niet vaak dat er een inhoudelijke behandeling plaatsvindt omdat de meeste omzettingen plaatsvinden via ministeriële regelingen die worden voorgehangen bij het parlement.

In Spanje en Frankrijk vinden in de nationale parlementen incidenteel debatten plaats over Commissievoorstellen en het door de regering voorgenomen standpunt. Die debatten vervangen de inhoudelijke debatten ten aanzien van nationale wetsvoorstellen ter implementatie van die richtlijnen niet. Met andere woorden, in deze landen is de inbreng van het nationale parlement vooral in de omzettingfase voorzover daarvoor wettelijke maatregelen vereist zijn.

Hoe wordt het nationale parlement geïnformeerd?

Ten aanzien van nieuwe commissievoorstellen ontvangen de nationale parlementen een fiche met daarop de belangrijkste informatie. In Denemarken zijn deze fiches (*grundnotat*) met 13 verplichte punten het meest uitgebreid; in Frankrijk is het fiche (*fiche d'impact*) met 5 verplichte punten het minst uitgebreid. Het Spaanse fiche is uitgebreider dan het Franse, maar behandelt voor een belangrijk deel vergelijkbare punten. Het Britse fiche (*explanatory memorandum*) gaat, althans in de bijlage, in op juridische, financiële, maatschappelijke en bedrijfseffecten van een richtlijn. Het Nederlandse fiche is, met 14 verplichte punten en aandacht voor juridische, beleidsmatige, financiële en administratieve effecten van de ontwerprichtlijn, vergelijkbaar met het Deense en Britse stuk.

De informatie in het fiche vormt de input voor de discussie tussen de regering en het parlement. Op dat punt zijn er opnieuw verschillen. In Denemarken vormt het fiche de basis voor de discussie die uitmondt in de bepaling van het onderhandelingsmandaat van de regering. In Spanje en het Verenigd Koninkrijk worden, als in Nederland, fiches af en toe in het nationale parlement besproken en kunnen deze leiden tot aanbevelingen. Ook in Frankrijk vindt soms een parlementaire discussie over nieuwe voorstellen plaats die kan uitmonden in een aanbeveling. Indien het Franse parlement aangeeft een aanbeveling te willen maken, is de regering gedwongen dit standpunt af te wachten voordat het met de onderhandelingen in Brussel begint. De regering bepaalt of en in hoeverre zij met de aanbevelingen van het parlement rekening houdt.

In het Verenigd Koninkrijk en in Frankrijk tracht men het fiche gaande de onderhandelingen en discussies aan te passen en verder te verfijnen. In Frankrijk wordt dit vooral ingegeven door de noodzaak onderscheid te maken tussen ‘wetgevende’ en ‘uitvoerende’ elementen van het voorstel, die voor de omzetting van groot belang zijn. Zodra een ontwerprichtlijn is goedgekeurd, vorm het fiche met een door de SGCI voorbereide implementatietabel de basis voor een implementatieplan. In het Verenigd Koninkrijk worden tegenwoordig *transposition notes* gevoegd bij de voorstellen voor omzettingsmaatregelen zodat direct goed zichtbaar is of het Verenigd Koninkrijk niet meer heeft gedaan dan strikt noodzakelijk was.

In de fase van omzetting vindt de informatievoorziening aan het parlement plaats via de reguliere procedure voor wetsvoorstellen.

5.6 De rol van andere, lagere overheden

Andere, lagere overheden worden alleen in Denemarken, het Verenigd Koninkrijk en Spanje betrokken wanneer het gaat om Europese richtlijnen. In Frankrijk spelen deze amper een rol.

In Denemarken nemen lagere overheden soms deel aan de speciale commissies die binnen de verschillende ministeries zijn ingesteld ten aanzien van de advisering over nieuwe Commissievoorstellen. De inbreng van lagere overheden kan dan naast dat van belangengroepen een rol spelen bij de bepaling van de Deense onderhandelingspositie.

In het Verenigd Koninkrijk spelen de *devolved governments* Wales, Schotland en Noord-Ierland een rol. Zij zijn gezien de nieuwe bevoegdheidsverdeling in wezen autonoom bevoegd op bepaalde terreinen richtlijnen om te zetten. De centrale overheid heeft wel steeds het voortouw bij de onderhandelingen en is uiteindelijk ook verantwoordelijk voor de omzetting. De nieuwe verdeling moet zich nog zetten en de huidige klacht is dat enkele van de nieuwe autonome gebieden niet voldoende hard werken aan het terugbrengen van de omzettingsachterstand.

In Spanje spelen de autonome regio's een rol wanneer een richtlijn een competentie betreft die tussen de centrale overheid en de regio's wordt gedeeld. In totaal gaat het in Spanje om 17 verschillende regio's. De autonome regio's worden in het voortraject door de ministeries geconsulteerd bij Commissievoorstellen die hun competentie mede betreffen. Bij de omzetting wordt via speciale conferenties tussen het vakministerie en de autonome regio's getracht de werkzaamheden te coördineren.

In het omzettingsproces moeten de autonome regio's wetgeving aanpassen aan de wetgeving van de centrale overheid. Doorgaans neemt de centrale overheid het initiatief en introduceert een soort kaderwet waarbinnen de autonome regio's hun aandeel verder kunnen uitwerken in de vorm van eigen wettelijke maatregelen. Indien de centrale overheid vertraagd is en een regio een wetsvoorstel heeft geïntroduceerd om te voorkomen dat de omzetting van de richtlijn te veel wordt vertraagd, kan dit tot de situatie leiden dat de regio de wetgeving moet wijzigen in het licht van de vertraagde centrale wetgeving. Soms zijn sommige regio's laat met het afronden van hun aandeel in het omzettingsproces, zodat nog sprake is van een volledige omzetting in Spanje. In dat geval probeert de centrale overheid de betreffende regio's via financiële prikkels tot versnelde omzetting te stimuleren.

5.7 De rol van belangengroepen

In de onderzochte landen wordt in wisselende mate met belangengroepen overlegd. Wat betreft de timing speelt daarbij een rol hoe een land de voorbereiding en uitvoering van richtlijnen heeft vormgegeven.

In Denemarken maken belangengroepen deel uit van de brede EU commissies die een belangrijke rol spelen in de advisering over de Deense positie ten aanzien van een nieuw voorstel. Naast ambtenaren van verschillende ministeries nemen, in toenemende mate, ook vertegenwoordigers van belangengroepen, gemeenten en andere organisaties die op een bepaald beleidsterrein actief zijn, deel aan dit overleg. Het aantal commissies is thans 34 en hun werkterrein overlapt de beleidsterreinen van de DG's van de Europese Commissie. Daarnaast benaderen belangengroepen soms de Commissie Europese Zaken van het nationale parlement. Deze commissie vervult een sleutelrol in het bepalen van het Deense standpunt. Door het actief betrekken van belangengroepen in het voortraject, vindt tijdens het omzettingsproces alleen consultatie plaats indien de door de Raad vastgestelde richtlijn nieuwe elementen bevat of een lidstaat bepaalde keuzemogelijkheden biedt. Daarnaast hebben belangengroepen, en in het bijzonder het bedrijfsleven, een inbreng in het omzettingsproces in het kader van de toets op de administratieve lastendruk.

In het Verenigd Koninkrijk wordt buitengewoon veel waarde gehecht aan brede consultatie. Dat gebeurt tijdens de onderhandelingsfase en ter gelegenheid van de voorbereiding van de omzetting. De *Code of Practice on Consultation* moedigt brede consultaties aan mede in verband met het creëren van draagvlak. In beginsel geldt dat voor omzettingsmaatregelen schriftelijke consultaties moeten worden gehouden en dat daarvoor twaalf weken moet worden ingeruimd. De consultaties staan de laatste tijd sterk in het teken van het voorkomen van bureaucratie, beperken van administratieve lastendruk en aandacht voor bedrijfseffecten. Er is geen wettelijk verplichte consultatie.

In Spanje ligt het accent, wat belangengroepen aangaat, op de fase van omzetting. Afhankelijk van verplichtingen die voortvloeien uit nationale wetgeving, worden belangengroepen, afhankelijk van het beleidsterrein, betrokken bij de wijze waarop richtlijnen worden omgezet. Dit overleg vindt in de fase van het opstellen van de concept-uitvoeringsregeling plaats. Die consultatie wordt niet als beletsel voor een vlotte omzetting gezien aangezien het veelal binnen een redelijke korte tijdspanne wordt afgerond. In een enkel geval kan dit overleg aanleiding zijn tot vertraging. Belangrijk is dat het ministerie het initiatief tot overleg neemt zodat de advisering doorgaans goed kan worden ingepast in de planning van het omzettingsproces.

Ook in Frankrijk vindt in de omzettingsfase overleg plaats met belangengroepen. Dit verplichte overleg is, als in Spanje, verankerd in nationale wetgeving. Het probleem van het Franse model is dat deze overlegstructuren onafhankelijk zijn gemaakt van de overheid, zodat het ministerie geen greep heeft op de voortgang van deze advisering. De vertragende werking van deze advisering wordt door sommigen geschat op gemiddeld drie tot zes maanden tijd (Philip, 2004). Die vertraging kan sterk oplopen indien de betreffende commissie slechts eens per jaar bijeenkomt en wellicht niet voldoende tijd meent te hebben om in één vergadering de advisering af te ronden. Tegelijkertijd wordt door verschillende waarnemers aangegeven dat deze advisering volstrekt overbodig is omdat het voorstel op veel punten niet kan worden gewijzigd aangezien het de tekst van de richtlijn volgt. Dat maakt deze advisering zowel voor de ministeries als voor de betrokkenen frustrerend. De wens is om advisering te verplaatsen naar het voorbereidingstraject. Tegelijkertijd wordt geconstateerd dat daartoe in deze landen geen voorbereidingen zijn getroffen.

5.8 Voorrangsregels

In paragraaf 2.1 kwamen bij de bespreking het Nederlandse streven de omzetting van EG-richtlijnen te versnellen al de in 2004 genomen maatregelen⁶² aan de orde om voorrang te geven aan wet- en

⁶² *Kamerstukken II 2004/05, 21109, nr. 144.*

regelgevingsvoorstellen waarin EG-richtlijnen worden omgezet. De landenstudies laten zien dat ook een enkel ander land omzettingsregelingen bij voorrang behandelt. In Spanje gebeurt dat soms door gebruik te maken van een door de grondwet geboden mogelijkheid om wetsvoorstellen als urgent aan te merken. Dergelijke voorstellen krijgen dan een snellere passage door het wetgevingsproces. Er geldt in dergelijke gevallen een versnelde procedure, enigszins vergelijkbaar met de procedure voorgesteld met door presidium van de Nederlandse Tweede Kamer 2004.⁶³

⁶³ Brief van het Presidium aan de Voorzitter van de Tweede Kamer der Staten-Generaal van 15 september 2004, *Kamerstukken II* 2003/04, 21 109, nr. 142.

6 Discussies in de onderzochte landen

In niet alle, onderzochte landen wordt een tijdige omzetting van richtlijnen als een dringend probleem ervaren, zodat nauwelijks sprake is van een politiek of publiek debat. In Denemarken en Spanje heeft dat ongetwijfeld te maken met de meerjarig gunstige omzettingsscore, in andere landen is de oorzaak voor de geringe aandacht voor het omzettingdeficit moeilijker te achterhalen.

In *Denemarken* staat niet zozeer de tijdige omzetting van richtlijnen in het brandpunt van de belangstelling, maar eerder de Europese samenwerking als zodanig. De Denen zijn erg gespist op de Europese invloed op Denemarken, getuige ook de verwerping van het Verdrag van Maastricht (1992) en de discussie over en verwerping van de euro (2000). Daarom is het eigenlijk verrassend dat de Denen zo loyaal en tijdig richtlijnen omzetten. Sommigen houden het er op dat de indringende wijze waarop de Denen zich inlaten met de totstandkoming van communautaire regelgeving tijdswinst oplevert bij de omzetting ervan.

Spanje heeft een goede reputatie als het aankomt op tijdige omzetting. Wellicht omdat Spanje die wil houden worden er op het ogenblik verschillende interne discussies gevoerd die bij zouden moeten dragen aan de versnelling en vereenvoudiging van de omzettingen van EG-richtlijnen. Zo werkt het secretariaat-generaal van het Spaanse Ministerie van Buitenlandse Zaken aan een voorstel voor een uniforme omzettingsprocedure in de verschillende ministeries. Niet duidelijk is of dit voorstel voldoende steun krijgt om ingevoerd te worden. Daarnaast wordt ook gedacht aan machtigingsconstructies die toelaten dat meer gebruik gemaakt kan worden van gedelegeerde regelingsinstrumenten bij de omzetting van technische richtlijnen. Een suggestie is om de *potestad reglamentaria*⁶⁴ te verbreden, zodat de regering zelfstandig richtlijnen kan omzetten die geen nadere inhoudelijke keuzes meer toelaten.

Net als Nederland maakt *Frankrijk* zich de laatste tijd zorgen over de oplopende omzettingssachterstand. De achterstand belooft, zoals in paragraaf 3.1 is gemeld, 3,2% voor de interne markt richtlijnen. Dat is merkwaardig omdat regelmatig raamwetten (*DDAC*) zijn vastgesteld die de regering toestaan via uitvoeringsregelgeving versneld een groot aantal richtlijnen te implementeren.⁶⁵ Philip (2004), lid van het Franse *Assemblée Nationale*, trekt de effectiviteit van deze raamwetten in twijfel. De oorzaken van de achterstanden liggen volgens hem niet zozeer in het gekozen implementatie-instrument, maar veeleer in vertragingen die het gevolg zijn van late regeringsinitiatieven (te laat indienen van wetsvoorstellen, of te laat vaststellen van *ordonnances*), te weinig indringende analyse van de gevolgen van een richtlijnvoorstel gedurende de onderhandelingsfase en de drang naar juridisch perfectionisme bij de omzetting. Het rapport, dat een uitvoerige rechtsvergelijkende studie naar implementatiepraktijken in andere lidstaten omvat, adviseert, mede op basis van aanbevolen *best practices* die de Europese Commissie (2004a) heeft gedefinieerd, het over een andere boeg te gooien. De Franse regering zal via verschillende wegen de

⁶⁴ Die de regering toekomt op basis van artikel 23 van de organieke wet *Ley 50/1997 de 27 noviembre, del Gobierno*.

⁶⁵ *Loi n° 2001-1 du 3 janvier 2001 portant habilitation du Gouvernement à transposer, par ordonnances, des directives communautaires et à mettre en oeuvre certaines dispositions du droit communautaire, JORF* 4 januari 2001. In deze raamwet delegeert het parlement de regering de bevoegdheid om 46 richtlijnen om te zetten. Meer recent is de volgende wet aangenomen: *Loi n° 2004-237 du 18 mars 2004 portant habilitation du Gouvernement à transposer, par ordonnance, des directives communautaires et à mettre en oeuvre certaines dispositions du droit communautaire, JORF* 19 maart 2004. Deze wet delegeert de bevoegdheid om 20 richtlijnen om te zetten.

omzetting van EG-richtlijnen moeten prioriteren. Dit is voor de Franse regering aanleiding geweest om te besluiten tot versnelling van de implementatie. De Franse regering heeft een actieplan in werking gesteld, gedeeltelijk vervat in een circulaire van 27 september 2004, waarin is vastgelegd dat voortaan alle regeringsleden zelf verantwoordelijk zijn voor de eigen achterstand. Verder is er een nieuw interdepartementaal comité tot stand gebracht dat de voortgang van de implementatie bewaakt, de ontwerp-implementatiewetgeving beter toetst en voorstellen voor EU-regelgeving beoordeelt op de juridische, sociale economische gevolgen voor Frankrijk.⁶⁶ Het ingestelde comité coördineert ook de interdepartementale afstemming van de Franse onderhandelingspositie. Ook wordt gestreefd de informatievoorziening naar het parlement te verbeteren, terwijl de mogelijkheden worden bezien de parlementaire behandelingsprocedure voor implementatiewetgeving te vereenvoudigen. Tenslotte is de gedachte, althans bij de regering, om raamwetgeving als regulier instrument te hanteren voor de implementatie van technische richtlijnen. Binnen het parlement bestaat een zekere weerstand tegen een veelvuldig gebruik van dit instrument.

Ook *Duitsland* heeft de laatste jaren een slechte omzettingsscore, maar de gevolgen daarvan zijn nog maar mondjesmaat tot het politieke debat doorgedrongen. De gemengde *Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung* die diende te adviseren over mogelijkheden tot vernieuwingen in de federale ordening van Europa is, naar aanleiding van de slechte omzettingsscore, ook gevraagd na te denken over structuren (procedures of instrumenten) die zouden kunnen bijdragen aan de versnelling van de omzetting van EG-richtlijnen. Die omzetting wordt namelijk bemoeilijkt doordat de deelstaten en de federatie (als gevolg van de constitutionele bevoegdheidsverdeling) ieder eigen verantwoordelijkheden hebben. Toch is voor Brussel de Duitse federale overheid het aanspreekpunt. De discussie binnen de gemengde Commissie zit echter op slot en zij is in december 2004 ontbonden. Op het ogenblik wordt nagedacht over de instelling van een nieuwe Commissie.

In het *Verenigd Koninkrijk*, dat een meerjarige redelijk tot goede omzettingsscore kent, is het publieke debat niet zozeer gericht op de omzetting zelf als wel op het wetgevingsbeleid. Het hart van het moderne Britse beter-wetgeven-beleid bestaat uit maatregelen die moeten voorkomen dat burgers en bedrijven onnodig administratieve en bureaucratische lasten en effecten van regelgeving hebben te dulden. Dat kleurt de discussie rondom tijdige en volledige omzetting. In het Verenigd Koninkrijk wordt er daarom kritisch gekeken naar de omzettingsscore met de vraag: zet het Verenigd Koninkrijk richtlijnen niet al te trouw en tijdig om, waardoor het Britse bedrijfsleven in relatieve zin nadeel lijdt. Een tweede discussiepunt is de vraag hoe moet worden omgezet. Moet een richtlijn goed in het Britse systeem worden ingeweven, of kan en moet worden volstaan met een loutere omzetting van het hoogstnoodzakelijke? Dat laatste element heeft de overhand in de huidige discussie, omdat daarmee ook wordt voorkomen dat de omzettingsmaatregel onnodige wordt opgeladen met extra nationaal beleid dat op zijn beurt extra lasten meebrengt voor burgers en bedrijven.

Van de laatste stand van de discussie in Italië bestaat geen goed beeld omdat dit land niet is meegenomen in de verdiepende landenstudies. Voor het debat over de voorkoming en bestrijding van omzettingssachterstanden in Nederland verwijzen we hier kortheidshalve naar paragraaf 2.1 van hoofdstuk 2.

⁶⁶ *Circulaire du 27 septembre 2004 relative à la procédure de transposition en droit interne des directives et décisions-cadres négociées dans le cadre des institutions européennes, J.O. no. 230 (2 octobre 2004): 16920.* Zie verder ook *Communication au Conseil des ministres du 20 décembre 2004 sur l'application des lois et la transposition des directives et décisions-cadres communautaires.* Voor een verdere discussie wordt verwezen naar het hoofdstuk over Frankrijk.

7 Bepalende factoren bij omzetting

7.1 Inleiding

De analyse in de voorgaande hoofdstukken laat overeenkomsten en verschillen zien in de wijze waarop de onderzochte landen de voorbereiding op nieuwe Commissievoorstellen en de omzetting van Europese richtlijnen organiseren. Daarbij is ook ingegaan op de beschikbare juridische instrumenten voor omzetting en de gehanteerde technieken. Tegelijkertijd bestaan belangrijke verschillen in de mate waarin die landen richtlijnen omzetten:

- Spanje en Denemarken staan al langere tijd in de top van de overzichten van de Europese Commissie;
- het Verenigd Koninkrijk en Nederland treft men in de middenmoot aan;
- Frankrijk is een notoire hekkensluiter.

Wat betekent dit voor de factoren die een snelle omzetting mogelijk kunnen maken of verhinderen? In hoeverre zijn speciale technieken van belang voor een vlotte omzetting? In hoeverre speelt de organisatie van het beleidsproces een rol? Voordat tot een inventarisatie van mogelijk bepalende factoren wordt gekomen, vergelijken wij eerst de verschillende landen op hun prestatie, beschikbare instrumentarium en organisatie van het omzettingsproces. Duitsland en Italië komen niet aan bod aangezien wij van die landen geen uitgebreide studie hebben gemaakt—deze landenstudies zijn beknopter en gebaseerd op alleen een literatuurstudie.

De opzet van dit hoofdstuk is als volgt. In paragraaf 7.2 geven wij eerst een overzicht van belangrijke factoren per land, op basis van onze landenstudies in deel II van het onderzoek. In paragraaf 7.3 wordt het perspectief van een analyse per land gekanteld naar een vergelijkende analyse over de onderzochte landen. Die analyse levert bepalende factoren op die rol spelen bij omzetting.

7.2 Verschillen in prestatie, instrumenten en organisatie per land

Denemarken

In Denemarken kent men geen bijzondere juridische technieken. De omzetting verloopt doorgaans probleemloos vanwege het feit dat het zwaartepunt van afstemming en overleg naar de voorbereidingsfase zijn verplaatst. Hoewel wordt getracht richtlijnen zoveel mogelijk op basis van ministeriële regelingen om te zetten, moet daarvoor wel een delegatiebepaling in bestaande wetgeving aanwezig zijn. Is dat er niet, dan wordt alsnog een wetsvoorstel bij het parlement ingediend. Bij het introduceren van een ministeriële regeling past een kanttekening die typerend is voor het Deense politieke systeem met minderheidsregeringen: indien de minister de indruk heeft dat de ministeriële regeling mogelijk controversieel is of elementen bevat waar leden van het parlement moeite mee zouden kunnen hebben, wordt de regeling vooraf met het parlement besproken. Dit gebeurt ondanks het feit dat de regeling formeel niet door het parlement bekrachtigd hoeft te worden.

Belangrijker dan het instrumentarium is het feit dat in Denemarken het politieke debat over richtlijnen is verplaatst naar de fase van de standpuntbepaling ten aanzien van het Commissievoorstel. In die fase vindt uitvoerige consultatie plaats met betrokken ministeries, belangengroepen en, in een aantal gevallen, gemeenten. De verplaatsing van de politiek leidt ertoe dat tijdens de omzetting geen uitvoerige ambtelijke of politieke discussies nodig zijn. Dit is een belangrijke succesfactor van het Deense model. Verder lijkt het succes in Denemarken mede te worden bepaald door een aantal andere factoren, waaronder de duidelijke

verantwoordelijkheidsverdeling ten aanzien van een richtlijndossier, het werken met breed samengestelde projectteams, het continueren van deze teams van onderhandelingen naar implementatie, de zakelijke en flexibele manier van werken binnen de verschillende ministeries en een zekere ‘trots’ in het goed en snel afhandelen van de omzetting van richtlijnen, gecombineerd met ‘naming and shaming’ van de ministeries die richtlijnen te laat of onjuist omzetten.

Spanje

In Spanje kent men in tegenstelling tot Denemarken wel een aantal bijzondere juridische instrumenten. In de eerste plaats wordt vaak gewezen op het bestaan van de *decreto-ley*, een instrument dat uitsluitend in zeer urgente of noodsituaties mag worden gebruikt. Soms, wanneer Spanje met een inbreukprocedure wordt geconfronteerd, wordt wel eens naar dit instrument uitgeweken. Deskundigen menen echter dat dit gebruik discutabel, zo niet ongrondwettelijk is. Kortom, de *decreto-ley* speelt geen noemenswaardige rol bij de omzetting van Europese richtlijnen. Bovendien is het geen instrument dat speciaal met het oog op de omzetting van EG-richtlijnen is ontwikkeld.

Een tweede instrument is de *real decreto legislativo*, dat gebaseerd is op een aparte autorisatiewet die eerst door het parlement goedgekeurd moet worden. Deze wet geeft aan welke richtlijnen de regering binnen een vooraf bepaalde periode mag omzetten met de *decreto legislativo*. Zodra de maatregelen zijn aangenomen vervalt de autorisatie. Aangezien voor dit instrument een aparte wet noodzakelijk is, is de besluitvormingsprocedure niet veel sneller dan die voor normale wetten. Ook deze autorisatiewetten zijn geen instrumenten die alleen in het kader van de omzetting van richtlijnen worden gebruikt: het is een regulier constitutioneel instrument, dat ook wordt gebruikt voor de omzetting van richtlijnen.

Het gros van de Europese richtlijnen wordt in Spanje via lagere regelingen omgezet (dat wil zeggen, via overheidsdecreten en ministeriële regelingen). Dit betekent dat de vlotte omzetting van richtlijnen in Spanje niet kan worden verklaard door het gebruik van bijzondere instrumenten. Het succes van het Spaanse model zou het gevolg kunnen zijn van politieke wil; wellicht neemt Spanje als relatief nieuwe lidstaat de verplichtingen van het lidmaatschap, implementatie inclusief, serieus. Daarnaast mag niet worden vergeten dat Spanje, als netto-ontvanger, een duidelijk en direct (financieel) belang heeft bij de Europese Unie. Verder wordt het Spaanse model getypeerd door een zeer accurate bewaking en wekelijkse discussie over de voortgang van de omzetting van richtlijnen op het hoogste ambtelijke niveau gecombineerd met politieke steun voor een snelle en vooral soepele afhandeling. Op deze wijze bestaat er een duidelijke prikkel om richtlijnen op tijd om te zetten. Tot slot wordt omzetting in Spanje getypeerd door een nogal pragmatische aanpak.

Het Verenigd Koninkrijk

Het Verenigd Koninkrijk kenmerkt zich door een constante redelijke omzettingsscore. Een van de belangrijkste redenen voor de huidige prestatie is ongetwijfeld de werking van de *European Communities Act 1972* die via een systeem van algemene machtiging de Britse regering toestaat via ministeriële regelingen richtlijnen om te zetten. Dit systeem is wel omgeven met een aantal waarborgen die zorgen voor balans en controle. De wet zelf tracht via de *negative* en *affirmative resolution procedure* te garanderen dat het parlement via een soort voorhangprocedure geïnformeerd wordt over de (ontwerpen voor) ministeriële omzettingsmaatregelen. Verder tracht men het verlies aan parlementaire controle en inbreng bij de omzetting te compenseren door een formele inbreng van het parlement bij de onderhandelingen (*scrutiny reserve*) en

brede consultatie zowel ten aanzien van het commissievoorstel voor een richtlijn als over de voorgenomen Britse omzettingsmaatregel.

Een andere snelheidsbevorderende factor is de rol van het *Cabinet Office* als procesbewaker bij de onderhandelingen en de omzetting. Het *Cabinet Office (CO)* is verantwoordelijk voor voortgang van de onderhandelingen en de omzetting. Het opereert dicht in de buurt van de Engelse premier en is daarmee een gezaghebbende spin in het web. Het *Cabinet Office* volgt de voortgang van de onderhandelingen nauwgezet en onderhoudt nauwe contacten met de permanente vertegenwoordiging. Belangrijke dossiers worden door het *Cabinet Office* zelf behandeld. Verder coördineert en bemiddelt het *Cabinet Office* tussen de regering en het parlement en de ministeries onderling. Wekelijks komt het hoofd van de *European Desk* van het *Cabinet Office* bijeen met de permanente vertegenwoordiging (*Grant Darroch meeting*) om onderwerpen die de aandacht vragen te bespreken. Afhankelijk van de onderwerpen worden ambtenaren van de vakministeries voor dit overleg uitgenodigd. In geval de voortgang in het geding komt, grijpt het *Cabinet Office* in bij het eerstverantwoordelijke departement. Indien nodig, kunnen het *Cabinet Office* en de permanente vertegenwoordiging een onderwerp naar zich toe trekken. Die dreiging betekent dat ministeries voldoende worden gestimuleerd om de afstemming met andere ministeries goed te laten verlopen.

Een discussie die op het ogenblik het omzettingsdebat in het Verenigd Koninkrijk domineert is die van de *Better Regulation Policies*. De Britten zijn op dit ogenblik erg gespist op bedrijfs- en burgerfreundelijke regelgeving die de lasten van regelgeving voor het Britse bedrijfsleven probeert te minimaliseren. Dat resulteert in een baaiert van maatregelen, zoals verfijnde impactstudies van richtlijnvoorstellen en voorgenomen omzettingsmaatregelen, schriftelijke consultaties van belanghebbenden, zowel bij het commissievoorstel als de omzettingsmaatregel en *common commencement dates*, bedoeld om het bedrijfsleven niet te vaak te hinderen met nieuwe wettelijke regels.

Een opvallend kenmerk van de huidige omzettingstrategie is de *Realpolitik*-benadering. In het Verenigd Koninkrijk wordt op dit ogenblik binnen bepaalde departementen gediscussieerd over de vraag of de Britse omzettingsprestatie eigenlijk niet té goed is en het Verenigd Koninkrijk niet te euroloyaal is in zijn omzettingsgedrag. Sommigen vinden dat in een economisch lasten-baten perspectief het niet altijd verstandig is om keurig op tijd te implementeren.

Frankrijk

Frankrijk kent verschillende bijzondere juridische instrumenten om de omzetting van richtlijnen te versnellen, zoals de introductie van een autorisatiewet (*loi d'habilitation*) en de mogelijkheid van een veegwet (*DDAC*). De introductie van een autorisatiewet heeft als voordeel dat de regering maatregelen (*ordonnances*) mag treffen op terreinen waar onder normale omstandigheden de vaststelling van meerdere wetten noodzakelijk is. Het instrument van een veegwet voorkomt dat de regering gedwongen is meerdere wetsvoorstellen aan het nationale parlement voor te leggen. De behandeling van die verschillende voorstellen zou meer tijd vergen dan de introductie van één wet vanwege de volle parlementaire agenda en het feit dat per voorstel per kamer een apart debat geregeld moet worden (en, indien er verschillen in standpunten bestaan, een poging om tot verzoening komen).

Verder maakt het Franse grondwettelijke systeem onderscheid tussen 'wettelijke' en 'uitvoerende' onderwerpen, waardoor het mogelijk is dat sommige richtlijnen op het moment dat deze als 'uitvoerend' worden geclassificeerd, geheel buiten het parlement om en autonoom door de regering kunnen worden afgehandeld. Deze vorm van grondwettelijke delegatie van bepaalde onderwerpen aan de regering is uniek.

Het zou een bijdrage kunnen leveren aan de snelheid van omzetting aangezien een aantal richtlijnen meteen na goedkeuring op het Europese niveau afgehandeld kunnen worden.

Het opmerkelijke is dat ondanks deze technische mogelijkheden de prestaties van Frankrijk slecht zijn. Zelfs wat betreft de introductie van ministeriële regelingen wordt door sommige waarnemers gesteld dat deze, tegen de verwachting in, soms meer tijd vergen dan een wetswijziging. Cijfermatig materiaal is hierover niet beschikbaar zodat het niet duidelijk is of dit inderdaad het geval is. In ieder geval is Frankrijk een land waar het beschikbare juridische instrumentarium niet tot snelle omzetting leidt.

De factoren die de Franse prestatie beïnvloeden moeten daarom vooral gezocht worden in het nationale beleidsproces, inclusief de organisatie van de omzetting. Factoren die een snelle omzetting in de weg kunnen staan zijn onder meer de relatieve autonomie van de Franse vakministeries, onduidelijkheid over wie verantwoordelijk is voor omzetting tussen ministeries, de overdracht van dossiers op het moment dat de onderhandelingen in Brussel zijn afgesloten, de uitgebreide, verplichte consultaties van belangengroepen, de uiteenlopende politieke prioriteiten binnen de ministeries, het feit dat de regering niet altijd voorrang geeft aan omzetting, de betrokkenheid van verschillende coördinatieorganen in het omzettingsproces (hoewel dat met de introductie van een structuur in het najaar van 2004 beter kan gaan werken) en over de tijd wisselende politieke belangstelling voor omzetting.

7.3 Analyse

Vertragingen bij de omzetting van richtlijnen worden veroorzaakt door een complex van verschillende op elkaar inwerkende factoren. In paragraaf 1.1 merkten we al op dat er in de literatuur veel mogelijk oorzaken voor het oplopen van omzettingsachterstanden worden gegeven.

Het onderzoek laat zien dat vertraging bij de omzetting nooit door één factor wordt bepaald, maar altijd door meerdere. De landenstudies laten op dit punt verschillende uitkomsten zien. Zo wordt de bewaking en de coördinatie van het omzettingsproces door het eigen ministerie in Denemarken als succesfactor gezien (Denemarken), terwijl in een ander land de meer centrale coördinatie over de verschillende ministeries als belangrijk wordt aangemerkt (Spanje). Coördinatie is belangrijk, maar de arrangementen kunnen verschillen. Verder kent Spanje als Frankrijk nogal autonome ministeries die hun eigen werkwijze bepalen. In Spanje leidt dit niet tot grote vertraging, terwijl in Frankrijk dat wel het geval is, mede als gevolg van onduidelijke politieke prioriteiten en doublures in de coördinatiestructuur. Dezelfde factoren kunnen dus in combinatie met andere factoren tot afwijkende uitkomsten leiden. Hetzelfde geldt voor de procedures, instrumenten en technieken die landen inzetten om achterstanden te voorkomen. Ook daar zijn combinaties van factoren bepalend voor de vraag of de omzetting er al dan niet tijdig door wordt bespoedigd.

Al blijft het lastig een antwoord te geven op de vraag welke obstakels de omzetting van EG-richtlijnen bemoeilijken of vertragen, laat een vergelijkende analyse een aantal factoren zien die daarbij een rol kunnen spelen:

1. *bijzondere instrumenten*: het hebben van bijzondere juridische instrumenten, zoals veegwetten en de delegatie van de omzetting aan de regering, kan in een aantal specifieke gevallen helpen, maar is niet bepalend voor de algemene prestatie in een land in termen van een tijdige omzetting. Frankrijk, dat over verschillende bijzondere instrumenten beschikt, presteert beduidend slechter dan Denemarken, waar geen bijzondere instrumenten worden gebruikt. Een tweede voorbeeld is Spanje. Spanje kent bijzondere instrumenten, maar die instrumenten worden nauwelijks voor de omzetting van richtlijnen gebruikt.

Italië spant de kroon. Dit land heeft een rijk arsenaal aan algemene machtigings- en delegatiemechanismen onder de Pergola-systematiek, maar heeft een langjarige povere omzettingsscore. Wat de algemene prestatie van een land ten aanzien van omzetting betreft, is het hebben van bijzondere juridische instrumenten geen voldoende en wellicht geen noodzakelijke voorwaarde voor het realiseren van tijdigheid. De *European Communities Act 1972* kan hier gelden als de uitzondering, omdat de redelijke Britse omzettingsscore waarschijnlijk goeddeels te danken is aan de ruime mogelijkheden tot het omzetten van richtlijnen via ministeriële regelingen. Daarbij kan men zich wel afvragen waarom, gezien het brede bereik van het machtigingssysteem van de *European Communities Act 1972*, het Verenigd Koninkrijk er zelfs met dit instrument niet in slaagt andere landen die dit instrument niet kennen steeds de loef af te steken op het terrein van de omzettingsscore. Daarnaast is zelfs binnen het Verenigd Koninkrijk niet vast te stellen in welke mate het systeem van *European Communities Act 1972* bijdraagt aan een betere dan wel slechtere omzettingsscore van het Verenigd Koninkrijk omdat de wet vanaf het moment van toetreding van het Verenigd Koninkrijk tot de Unie van toepassing was.

2. *lagere regelingen*: de omzetting van Europese richtlijnen geschiedt meestal op een zo laag mogelijk niveau. In de onderzochte landen is er een duidelijke tendens om dit ter wille van de snelheid te doen. Zowel de landen die werken met veeg- en omnibuswetten en/of algemene—dat wil zeggen, buiten parlementaire wetten omgaande—machtigingen als de landen die met specifieke delegatiebepalingen in wettelijke regelingen werken, blijken in staat om tussen de 60 en 80 procent van de richtlijnen om te zetten via gedelegeerde regelgeving. In nagenoeg alle onderzochte landen wordt als voordeel van omzetting via lagere regelingen de tijdwinst genoemd en als nadelen gebrek aan parlementaire inbreng bij de omzetting en daardoor afnemende democratische legitimatie.
3. *geen extra's*: in verschillende onderzochte landen, waaronder Nederland en het VK, wordt aangenomen dat het nemen van extra nationale maatregelen en het precies inweven van richtlijnen in nationale wetgeving, met aanpassing van bijvoorbeeld de richtlijnterminologie de omzetting vertragen. Verschillende landen prefereren daarom omzetting *sec*.
4. *vroeg beginnen*: een gedegen anticipatie op de omzetting tijdens de onderhandelingen levert tijdwinst op bij de omzetting.
5. *ambtelijke verantwoordelijkheid*: eenduidige en duidelijke ambtelijke verantwoordelijkheid voor de voorbereiding op en omzetting van richtlijnen is een belangrijke factor voor tijdigheid. Die eenduidigheid en duidelijkheid komt bijvoorbeeld tot uitdrukking in:
 - het werken met één ministerie dat verantwoordelijk is voor de procesgang ten aanzien van een richtlijn;
 - een duidelijke structuur binnen het ministerie die aansluit bij degenen die ook het feitelijke werk verzetten ten aanzien van voorbereiding en omzetting (*bottom-up*);
 - frequente bewaking van de voortgang van de werkzaamheden op departementaal en/of interdepartementaal niveau.

Deze elementen komen naar voren op grond van de ervaringen in zowel Denemarken als Spanje. De ervaringen in Frankrijk wijzen op het belang van deze elementen, hoewel de Franse praktijk vaak

strijdig is aan de genoemde punten. In dit verband kan ook worden verwezen naar een recente aanbeveling door de Europese Commissie (2004a). Verder is het belangrijk dat sprake is van een gedecentraliseerde, zakelijke samenwerking tussen ministeries. Die samenwerking is belangrijk om tegenstellingen te kunnen bespreken en conflicten te voorkomen.

6. *projectteams*: het inzetten van dezelfde nationale projectteams in de fase van de voorbereiding van het nationale standpunt én de omzetting lijkt een gunstig effect op de omzettingssnelheid te hebben. In verschillende landen worden multidisciplinaire projectteams ingezet om op die manier de consistentie van behandeling te borgen (met daarin beleidsinhoudelijke en juridische expertise). De goede ervaringen in Denemarken met het werken met multidisciplinaire teams naast de slechte ervaringen in Frankrijk met het ontbreken van een goede en vooral juridische ondersteuning duiden op deze factor. Overigens betekent het instellen van deze teams niet dat alle teamleden deelnemen aan de onderhandelingen. Dat kan een taak zijn van één van de teamleden of van een medewerker van de permanente vertegenwoordiging. De werkwijze in teamverband heeft verder als voordeel dat ontwerpmaatregelen in een vroeg stadium op hun mogelijkheden van omzetting in de nationale rechtsorde kunnen worden beoordeeld.
7. *frequente voortgangbewaking*: tijdigheid wordt positief beïnvloed door een accurate en frequente bewaking van de voortgang van de omzetting van richtlijnen op hoog ambtelijk (en interdepartementaal) niveau. Deze factor is gebaseerd op de positieve ervaringen in Spanje, waar een interdepartementale commissie wekelijks de voortgang bespreekt. In het Verenigd Koninkrijk houdt de *Cabinet Office* zeer nadrukkelijk de vinger aan de pols wanneer het gaat om de voortgang van de omzetting door de verschillende vakministeries. De situatie in Frankrijk is de keerzijde met twee coördinatieorganen (SGCI en SGG), die sinds kort gezamenlijk hun coördinatie concentreren in een nieuwe commissie—de *réseau interministériel des correspondants de la transposition*. In Denemarken blijft interdepartementale coördinatie in belangrijke mate achterwege, maar wordt in het geval van een dreigende inbreukprocedure het betreffende ministerie ontboden bij de *Special Legal Committee* van het ministerie van Justitie. Daarvan gaat een zodanige dreigende werking uit dat dit in de Deense situatie voldoende is om de vakministeries tot medewerking te dwingen.
8. *politieke prioriteit*: als de regering politieke prioriteit geeft aan omzetting, resulteert dat in versnelling. In zowel Denemarken als Spanje heeft omzetting prioriteit. Het is een taak waarvoor op hoog ambtelijk én politiek niveau aandacht is. In Frankrijk wordt omzetting vaak overschaduwed door andere, nationale prioriteiten:
 - binnen ministeries bestaat geen speciale aandacht voor omzetting;
 - ministers geven vaak de voorkeur aan ‘eigen’ prioriteiten en daarbij passende wetgevingstrajecten die omzetting vertragen;
 - binnen SGCI en SGG die de omzetting moeten bewaken bestaan ook verschillende accenten; en
 - binnen de Franse regering—en met name bij de premier—heeft omzetting nu de aandacht maar dat kan na verloop van tijd weer verslappen, zoals dat in het verleden is gegaan.Het belang van politieke prioritering blijkt ook uit veegoperaties die in verschillende landen en vaak in aanloop naar het EU-voorzitterschap hebben plaatsgehad (bijvoorbeeld Ierland en recent Nederland).

Dit punt sluit nauw aan bij het vorige punt ten aanzien van de effectiviteit van de voortgangsbewaking: welk systeem men ook hanteert, zonder politieke steun is geen enkele vorm van voortgangsbewaking effectief. Dit laatste kan op verschillende manieren worden geregeld: van politiek voorzitterschap van een coördinatiecommissie ten aanzien van omzetting tot het hebben van korte lijnen met de premier die een snelle omzetting onvoorwaardelijk steunt.

9. *parlementaire betrokkenheid*: het betrekken van het nationale parlement in de onderhandelingsfase kan de omzetting bespoedigen. De richtlijnonderhandelingsfase en de omzettingsfase zijn in de meeste van de onderzochte landen communicerende vaten. Een gedegen voorbereiding levert zeker wanneer het parlement daarbij intensief wordt betrokken tijdwinst op bij de omzetting, naar het oordeel van de betrokkenen. Het succes van het Deense model is hier het meest uitgesproken voorbeeld van. Door de uitvoerige consultatie van het nationale parlement, waarbij de visie van het parlement ook wordt meegenomen in de onderhandelingen in Brussel, bestaat minder behoefte aan uitvoerige behandeling van de ‘implementerende’ wet- en regelgeving. Dit versnelt de omzetting.
10. *brede consultaties*: het breed en vroeg consulteren van belangengroepen, waaronder het bedrijfsleven en mogelijk lagere overheden, verrijkt de nationale standpuntbepaling en kan het draagvlak van een richtlijn en de omzettingsmaatregel vergroten. Dat heeft vervolgens ook een positief effect op de uitvoering van het nieuwe beleid. De voorbeelden van Denemarken en het Verenigd Koninkrijk laten zien dat brede consultatie niet per sé vertragend hoeft te werken, en voordelen kent bij de nationale standpuntbepaling ten aanzien van een richtlijn. Daarnaast vergroot het de kwaliteit van de omzettingsmaatregel in termen van uitvoerbaarheid en kan het overmatige lasten voor burgers, instellingen en bedrijven voorkomen. Wel is het belangrijk om, indien mogelijk, deze consultaties naar de fase van de nationale standpunt bepaling te verplaatsen. Verder wordt in sommige landen consultatie gezien als een belangrijke aanvulling om het gebrek aan parlementaire controle en het verlies aan legitimiteit te compenseren dat ontstaat als gevolg van omzetting van richtlijnen in lagere (niet-wettelijke) regelingen.

8 Conclusies en aanbevelingen

In dit onderzoek staat de vraag centraal welke implementatietechnieken en -systemen in Duitsland, Denemarken, Frankrijk, Italië, het Verenigd Koninkrijk, en Spanje worden gebruikt om EG-richtlijnen zowel rechtmatig, zorgvuldig als snel in de nationale rechtsorde door te voeren. Om deze vraag te beantwoorden is naast een inventarisatie van de beschikbare juridische instrumenten en technieken, ook een analyse gemaakt van het nationale beleidsproces ten aanzien van richtlijnen. Aspecten van dit beleidsproces kunnen mede een rol spelen bij de vraag of richtlijnen snel en zorgvuldig worden omgezet.

8.1 Conclusies

Op grond van de ervaringen in de verschillende, onderzochte landen komen wij tot de volgende conclusies.

1. *De introductie van bijzondere juridische instrumenten en technieken is niet zelfstandig verklarend voor de blijvende bevordering van tijdigheid van de omzetting van richtlijnen.* In de eerste plaats moeten wij constateren dat er géén verband bestaat tussen de introductie van nieuwe omzettingsinstrumenten van een niveau lager dan parlementaire wet en een blijvende verbetering van de omzettingsprestatie. In de meeste van de onderzochte landen heeft, met uitzondering van het Verenigd Koninkrijk, de introductie van machtigingsinstrumenten en delegatietechnieken een beperkt en tijdelijk positief effect. Een bijzonder instrumentarium kan in een aantal specifieke gevallen helpen, maar is niet bepalend voor de algemene prestatie van een land in termen van een tijdige omzetting. Het is, met andere woorden, geen *voldoende* voorwaarde voor een structureel tijdige omzetting van Europese richtlijnen.
2. *De nationale wetssystematiek vormt veelal het uitgangspunt bij omzetting.* In de onderzochte landen is in de meeste gevallen zo uitputtend mogelijk gebruik gemaakt van instrumenten die zijn voorzien binnen het reguliere constitutionele bestel. De normale nationale wetssystematiek vormt uitgangspunt en grens bij de omzetting van EG-richtlijnen. Géén van de landen—zelfs niet het Verenigd Koninkrijk— heeft de Grondwet of het constitutionele systeem aangepast met het oog op snellere omzetting van EG-richtlijnen. De constitutionele afhankelijkheid van de omzettingsinstrumenten compliceert het maken van vergelijkingen tussen de omzettingsstrategieën en prestaties van de onderzochte landen vanwege hun verscheidenheid. Tegelijkertijd hebben wij in geen van de onderzochte landen omzettingsinstrumenten aangetroffen waarvan het gebruik exclusief is voorbehouden voor de omzetting van richtlijnen.
3. *Er is geen echte voorkeurstechniek voor de omzetting van richtlijnen.* Op het punt van de gebruikte technieken laat het onderzoek een gevarieerd beeld zien. In enkele landen is het nationale wetscorpus leidend voor de wijze van omzetting in andere landen niet. Dat brengt dan een voorkeur voor een zo goed mogelijke inweving van de richtlijn in de nationale wetgeving met zich mee. Het mogelijke tijdverlies wordt daarbij op de koop toe genomen als prijs voor consistentie en integriteit van het nationale systeem. Andere landen verkiezen zo dicht mogelijk bij de tekst en inhoud van de richtlijn te blijven, zelfs als dat de consistentie van het nationale systeem aantast. Deze landen, waaronder Nederland en het Verenigd Koninkrijk, hebben daarbij ook vaak een voorkeur voor wat in Nederland

implementeren 'sec' wordt genoemd, dat wil zeggen, het vermijden van het meenemen van extra nationaal beleid bij gelegenheid van de omzetting.

4. *Vertragingen zijn het gevolg van verschillende factoren.* Een tijdige en zorgvuldige omzetting is het gevolg van verschillende *constitutionele/juridische, politieke en operationele* factoren.⁶⁷ Elk kan bepalend zijn voor het resultaat van omzetting en is daarmee een noodzakelijke voorwaarde voor tijdigheid en zorgvuldigheid. Tegelijkertijd wordt in het onderzoek duidelijk dat géén van deze factoren op zichzelf voldoende is voor een tijdige en zorgvuldige omzetting.
5. *Juridische factoren.* Hoewel het hebben van een bijzonder juridisch instrumentarium als zodanig geen structureel effect lijkt te hebben op de tijdigheid van omzetting, spelen andere juridische factoren wel een rol. Uit het onderzoek blijkt dat de volgende elementen belangrijk zijn:
 - het omzetten van richtlijnen op een zo laag mogelijk niveau;
 - het voorkomen van het meenemen van nationale extra's; en
 - het anticiperen op (complicaties in) de omzetting door in de eindfase van de onderhandelingen met de voorbereidingen op de omzetting te beginnen.Verder wordt in een enkel land met pakket-inwerkingtredingsdata gewerkt, waarmee getracht wordt de administratieve lasten voor bedrijven en instellingen te beperken.
6. *Operationele factoren.* Het belang van deze factoren is recent geconstateerd door de Europese Commissie (2004a). In ons onderzoek komen vooral drie elementen naar voren:
 - *verantwoordelijkheidsverdeling*: een eenduidige en duidelijke ambtelijke verantwoordelijkheidsverdeling ten aanzien van de voorbereiding en omzetting van richtlijnen;
 - *projectteams*: het is belangrijk te werken met dezelfde projectteams in de fase van de voorbereiding en omzetting, waarbij in deze teams verschillende disciplines (en in ieder geval beleidsinhoudelijke en juridische) aanwezig zijn. Overigens pleiten wij er niet voor dat deze teams de feitelijke onderhandelingen in Brussel voeren. Dat kan door een vertegenwoordiger worden gedaan, al dan niet gedetacheerd bij de permanente vertegenwoordiging. Het gaat er, wat ons betreft, om dat binnen de vakministeries de voorbereiding van de Nederlandse standpuntbepaling en de omzetting van richtlijnen vanuit verschillende invalshoeken worden voorbereid. Dit voorkomt problemen en daarmee vertragingen in latere stadia van het beleidsproces;
 - *voortgangsbewaking*: een accurate en frequente bewaking van de voortgang van de omzetting van richtlijnen op hoog ambtelijk niveau. Dit vergt in de eerste plaats een goed administratief systeem dat in staat is de voortgang van de omzetting te bewaken. Zonder informatie over voortgang is het niet mogelijk een beleid ten aanzien van die voortgang te voeren. Informatie is in dit verband een noodzakelijke (maar goed voldoende) voorwaarde voor de bewaking van tijdigheid. In de tweede plaats is een beleid ten aanzien van omzetting noodzakelijk zodat het duidelijk is wat de verwachtingen zijn ten aanzien van de verwerking van de verschillende EG-richtlijnen.

⁶⁷ Zie Kiser en Ostrom (1982), voor dit onderscheid.

7. *Politieke factoren.* Deze zijn van belang voor de prioritering van omzetting en de effectiviteit van de voortgangsbewaking. Uit het onderzoek blijkt dat de omzetting van richtlijnen in de meeste van de onderzochte landen hoofdzakelijk een zaak is van de regering. Dit hangt samen met de keuze om richtlijnen op een zo laag mogelijk niveau om te zetten, dat wil zeggen, via regeringsdecreten of ministeriële regelingen. Een beperkt deel van de richtlijnen geeft aanleiding tot wetgeving en dus een procedure waarbij het nationale parlement wordt betrokken. Voor de snelheid van omzetting wijzen wij vooral op de volgende politieke factoren:
- *omzetting moet politieke prioriteit hebben:* Het belang van deze factor is duidelijk op het moment dat er politieke geprioriteerde veegoperaties—vaak in aanloop naar het voorzitterschap van de EU—plaatshebben. Dit geldt bijvoorbeeld voor de actie in Nederland met het oog op het voorzitterschap in het najaar van 2004 die thans haar vruchten lijkt af te werpen. Soortgelijke acties hebben plaatsgehad in Ierland, terwijl op dit moment een inhaalslag plaats heeft in Frankrijk. Zonder politieke steun is de voortgangsbewaking van de omzetting, in welke vorm dan ook, minder effectief.
 - *actief betrekken van het nationale parlement:* door het activeren van het nationale parlement in de onderhandelingsfase hoeft minder tijd te worden besteed aan discussie in de fase van omzetting. Op dit moment lijkt alleen de Deense situatie tot een actieve belangstelling van het parlement te leiden bij het bepalen van het onderhandelingsstandpunt. De rol van de andere nationale parlementen bij de onderhandeling over Commissievoorstellen is in de praktijk klein met als gevolg soms uitvoerige debatten en daarmee vertraging in de omzettingfase.

8.2 Aanbevelingen voor Nederland

Op basis van de bevindingen in dit onderzoek kan een aantal aanbevelingen worden geformuleerd ten aanzien van de situatie in Nederland. Rekening houdend met recente bijstellingen in het omzettingsbeleid die een verdere verbetering van de Nederlandse prestatie beogen, zijn dat de volgende:

1. Activeer het Nederlandse parlement door de introductie van een behandelingsvoorbehoud

Voor een tijdige omzetting is het van groot belang om het parlement meer systematisch te betrekken in de fase van de voorbereiding van het Nederlandse standpunt. Vooral voor onderwerpen waarvoor in de fase van omzetting een wet in formele zin noodzakelijk is (en in mindere mate voor een algemene maatregel van bestuur met voorhangprocedure) zal dit de behandelingsprocedure versnellen.⁶⁸ Meer in het algemeen zal het actief betrekken van het nationale parlement voordelen hebben in termen van het beter gebruiken van de nationale wetsystematiek bij omzetting (het anders gebruiken van bestaande mogelijkheden binnen het bestaande grondwettelijke kader) en democratische legitimiteit.

Om een meer actieve rol van het parlement te garanderen, stellen we de introductie van een behandelingsvoorbehoud voor, zoals dat op dit moment ook in het Verenigd Koninkrijk wordt gebruikt.⁶⁹

⁶⁸ Ingevolge artikel 1:7 Awb zijn voorhangprocedures bij implementatieamvb's overigens alleen van toepassing wanneer voorwaardelijke delegatie is geregeld, en daarvan is slechts in een minderheid van de voorhanggevallen sprake.

⁶⁹ In Denemarken wordt ook met zo'n voorbehoud gewerkt aangezien alle voorstellen door het nationale parlement moeten worden besproken. In Frankrijk wordt een voorbehoud gemaakt op het moment dat het

Om een behandelingsvoorbehoud – dat in de kern inhoudt dat de regering niet kan onderhandelen over een Europees wetgevingsvoorstel voordat het parlement dat heeft besproken – te realiseren, zouden de Tweede Kamer of de kamers gezamenlijk een selectiecommissie in kunnen stellen die, net als de *scrutiny committee* van het Britse parlement, beoordeelt welke voorstellen wél en welke niet aan de kamer(s) ter inhoudelijke bespreking worden voorgelegd. Dit voorkomt ook dat belangrijke dossiers waarvoor, om welke reden dan ook, geen of weinig belangstelling bij het parlement onbesproken blijven liggen. Selectie zorgt er ook voor dat de behandelingslast van voorstellen door de vaste kamercommissie aanzienlijk wordt gereduceerd, waardoor ook meer ruimte voor inhoudelijke behandeling ontstaat. Wordt een voorstel door de selectiecommissie voor inhoudelijke bespreking doorverwezen naar een vaste Kamercommissie dan kan die na behandeling de regering gericht aandacht vragen voor punten die in onderhandelingen zouden moeten worden meegenomen. Het voorbehoud houdt in dat in de regel de regering de bespreking van de Kamer ook af moet wachten alvorens zelf een standpunt namens Nederland in de onderhandelingen in te brengen. De ervaringen in het Verenigd Koninkrijk laten zien dat dat niet tot vertragingen hoeft te leiden bij de onderhandelingen. De Britse ‘scrutiny’-procedure is flexibel opgezet, kent verschillende uitzonderingsmogelijkheden, en de scrutiny committee werkt snel en deskundig. De Britse procedure kan vanzelfsprekend niet zomaar in Nederland worden geïmplementeerd, maar kan wel tot inspiratie dienen bij het nader doordenken van de Nederlandse behandeling van EG-voorstellen.

Bij de vraag welke commissie dan – als we het Britse voorbeeld zouden willen volgen - als sluiswachter (scrutiny committee) zou moeten fungeren, kan in de eerste plaats aan de bestaande commissies Europese Zaken van beide Kamers worden gedacht. Een alternatief is om de recent ingestelde Gemengde commissie toepassing subsidiariteit die, op dit moment als proef, de subsidiariteits- en proportionaliteitstoets in het kader van de protocollen bij de – niet goedgekeurde - Europese Grondwet uitvoert, in enige vorm met deze taak te belasten.

Wil het Nederlandse parlement zijn kansen nemen om beter betrokken te worden bij de onderhandeling over en de omzetting van richtlijnen dan is het daarnaast van groot belang dat de kennis van de volksvertegenwoordigers over de Europese agenda en het Nederlandse aandeel in de Europese wetgevingsketen wordt vergroot.

2. *Voer een actief, strategisch beleid ten aanzien van de omzetting van EG-richtlijnen*

De voortgangsbewaking van de omzetting van richtlijnen is in Nederland in handen van de ICER. Dit is een interdepartementale commissie voorgezeten door vertegenwoordigers van de ministeries van Justitie en Buitenlandse Zaken, die onder meer de kwaliteit van de omzettingsmaatregelen moet bewaken. Ondanks het werk dat de commissie heeft verricht, is de ICER(-I)⁷⁰ op dit ogenblik onvoldoende toegerust voor de voortgangsbewaking van de omzetting in de verschillende ministeries. De commissie is niet in staat om de vakministeries op de voortgang aan te spreken en afspraken te maken over de wijze waarop achterstanden worden opgelost.

Het ligt daarom voor de hand deze voortgangsbewaking op hoog ambtelijk niveau en wellicht op het niveau van één van de onderraden van de ministerraad te plaatsen, die dan speciaal wordt belast met de centrale verantwoordelijkheid voor de voortgangsbewaking. Op een dergelijk niveau kan met

parlement heeft aangegeven een motie over een dossier te willen opstellen. Verder kent ook Ierland een behandelingsvoorbehoud op basis van *EU Scrutiny Act*.

⁷⁰ ICER (-I) is de werkgroep van de ICER die is belast met implementatie.

vertegenwoordigers van de betrokken ministeries worden overlegd over de voortgang en afspraken worden gemaakt over het moment waarop bepaalde richtlijnen worden omgezet. De huidige Coördinatie Commissie (CoCo) is daar nu nog niet op toegerust of op ingericht.

Naast deze structuur is het gewenst een strategisch beleid te ontwikkelen aangaande de omzetting van richtlijnen. Dit beleid zou het gewenste tempo van omzetting kunnen aangeven, waarbij tevens rekening kan worden gehouden met de belangen van de betreffende sector, vanzelfsprekend binnen de kaders die door de Europese Commissie worden gehanteerd.

3. Zet richtlijnen op een zo laag mogelijk niveau om en benut daarbij de bestaande wetgevingssystematiek en instrumenten ten volle

Wij bevelen aan om de mogelijkheden die de bestaande wetgevingssystematiek biedt – met gebruik van de reguliere instrumenten en delegatiemogelijkheden – beter te benutten en daarmee de omzetting van EG-richtlijnen op een zo laag mogelijk regelingsniveau te bevorderen. Het staat niet vast dat nieuwe generieke omzettinginstrumenten of –procedures een groot en blijvend voordeel op het vlak van de omzettingsversnelling teweeg zullen brengen, zeker als we dit afzetten tegen het latente potentieel van de huidige instrumenten en delegatiemogelijkheden. Daarnaast kleven er nogal eens constitutioneelrechtelijke nadelen aan vergaande machtigingsconstructies in omzettinginstrumenten. Het (nog beter) benutten van de bestaande wetgevingssystematiek maakt het bovendien beter mogelijk recht te doen aan de eigenheid van de om te zetten richtlijnen op een specifiek beleidsterrein.

4. Werk aan een breed gedragen, gezamenlijke Nederlandse beïnvloeding van Europese dossiers

Met de uitbreiding van de Europese Unie neemt de invloed van Nederland, als één van oprichters van de Unie, in absolute maar ook relatieve zin af. Tot nu toe lijkt in Nederland vooral een houding te hebben bestaan dat wat goed is voor Europa is ook goed voor Nederland. Dat is naar verwachting in de komende jaren niet meer houdbaar. Dat noopt ertoe de wijze waarop door Nederland in Brussel wordt geopereerd te wijzigen. Hierbij valt te denken aan een versterking van de rol van het nationale parlement in de fase van onderhandelingen, nauwere banden met leden van het Europese Parlement en een brede consultatie in de onderhandelingsfase met belangengroepen.

Deel II: De landenstudies

9 Denmark

9.1 General overview of the constitutional and political system

9.1.1 Constitutional characteristics

Denmark is a constitutional monarchy with its first constitution dating from 1849 and several subsequent revisions, most recently from 1953. Legislative powers are formally divided between the Parliament and the Queen (article 3 of the Danish constitution).

The parliament, the Folketing, consists of one chamber. It has 179 members, directly elected for a mandate of 4 years. Seats are distributed using a mixed district based and proportional system (Thomsen and Pennings, 2002).

9.1.2 Political characteristics

The Danish government is formed in coalition between parties in the Folketing. The future Prime Minister is responsible for forming a coalition. Minority cabinets are frequently formed. Remarkably, no single party has had a parliamentary majority since 1909 (Danish Ministry of Foreign Affairs at www.denmark.dk, consulted at 19 January 2005). Ministers are chosen from the ranks of parliament and remain members during their executive term of office. They can also be occasionally recruited outside the parliament.

9.1.3 Political administrative characteristics

The Danish executive has 18 ministries. There are also a number of government agencies, which play a central role in EU policy making. They operate under the responsibility of the Minister, but enjoy a great degree of discretion (Steenbeek and Gilhuis, 2003: 86). Importantly, the bulk of administrative staff is in the agencies and ministries are small, compared to the Netherlands (Mandrup Thomsen and Pennings, 2002: 17).

Another important characteristic of the Danish political-administrative system is the high level of autonomy of local and regional authorities, seen by the Danes themselves as some of the most extensive in the world. The local authorities' right to manage their own affairs is enshrined in the constitution of 1849. There are 14 counties and 275 municipalities. A reform of the municipal system is due to take place after the parliamentary elections due on 8 February 2005 (Danish Ministry of Foreign Affairs).

A third important feature is the important role played by interest groups. A high degree of (neo-) corporatism is present in most policy fields (Jørgensen, 2002: 2). Denmark has a high density of societal organization in a wide range of areas. Policy-making is generally highly corporatist, with interest groups playing a crucial role.

Finally, the Danish politico-administrative system is generally considered open and informal, mainly oiled by unwritten rules. Policy making is very much decentralized, individual ministers being responsible for their policy areas. (Von Dosenrode, 1998: 52)

9.2 Political or public discussion concerning EU directives and their transposition

There is little wide public discussion on the transposition of directives in Denmark. Timely transposition for a long time was not considered an issue, because of Denmark's good record. Yet, sometimes relevant public or professional debate occurs. Public debate focuses on general topics of Denmark's involvement with the

EU, while recent professional debate has involved some limited discussion of transposition linked to the latest scoreboard results.

Public debate is mostly focused on the general issues of Denmark's EU membership and controversial decisions such as the adoption of the Euro. These discussions need to be understood in the general context of Denmark's attitude to the EU ever since the country's accession in 1973.

Denmark's accession to the EU and the ratification of subsequent EU treaties were based on referendums held in accordance with Article 20 of the 1953 Danish constitution. Article 20 is a provision allowing Denmark to commit itself to international treaties if a five-sixths majority in the Folketing, or alternatively a simple majority in a referendum, can be established. According to *the Economist*, Article 20 represented a significant shift in the Danish constitution by providing for the transfer of some sovereignty to international institutions.

The Danish system of incorporating international treaties is dualistic, with the principle of incorporating international treaties enshrined in the abovementioned article 20 of the Constitution. Yet is it arguable whether this dualism has much impact on the transposition of directives since the development of the doctrines of direct effect and supremacy of EC law by the ECJ in the 1960s⁷¹ has eroded national autonomy with secondary legislation from the EU. The direct effect of EC law has led to some debate in Denmark (Steenbeek en Gilhuis, 2003:70-71) and the erosion of sovereignty has not been accepted easily. As *the Economist* noted, the rejection of the Treaty on European Union (Maastricht treaty) in a referendum in 1992, as well as polls that consistently show that the population has some concerns about the EU encroaching upon national sovereignty, seem to indicate that a large part of the population disagrees with any transfers of sovereignty.⁷²

On the whole, Danish attitudes to European integration can be described as cautious or even Eurosceptic. In September 2000, the Danes rejected participation in the common European currency, the Euro, in a referendum which was the culmination of an intense societal discussion. Their foreign policy is described as 'torn between its activist stance and a very cautious approach to integration into the EU' (The Economist Country report).

In the light of this it is even more remarkable that Denmark has a very good record of transposing EU directives. Some experts suggest an indirect link, in the sense that the Danes' skepticism at the political level has led to procedures of extensive consultation which in their turn ensure smooth transposition once a measure is passed. And, interestingly, good transposition is seen in specialist circles as a way to ensure Denmark's room for maneuver at the negotiation stage and a positive stance from the Commission towards Danish positions. Interview evidence suggests that the Danes see their good transposition record as a key to their standing in the EU.

Also, occasionally there is public debate on the transposition of a particular directive, especially in the rare case that transposition is problematic for political reasons (interview ISA). An example is the directive on personal data protection.

⁷¹ HvJEG 5 February 1963, 26/62, *Jur.* 1963, p. 1-59, *Van Gend en Loos* and HvJEG 15 July 1964, 6/64, *Jur.* 1964, 1209-1259, *Costa/ENEL*).

⁷² The Economist Country Reports at

http://www.economist.com/countries/Denmark/PrinterFriendly.cfm?Story_ID=2920616, consulted at 18 January 2005.

Professional debate has recently focused on the deterioration of the Danish position in the latest edition of the internal market scoreboard. Danish civil servants have taken pride in their excellent transposition record and thus recent results have been some cause for concern, but it is clearly limited to a narrow circle of specialists. The Ministry of Economic Affairs has taken the lead in this respect, because the scoreboard concerns the area of the internal market. In terms of press comments, the Danish business newspaper has devoted a couple of articles to the worsening of the Danish position.

9.2.1 Discussion of recent reports and their recommendations

As a measure taken to improve the standing of Denmark in the last scoreboard, the Minister for economic and business affairs has recently written a letter to his colleagues responsible for directives on the scoreboard for Denmark. In the letter the minister urges his colleagues to pay attention to the obligations of securing correct and timely transposition. The ministry has also sent around a list of non transposed directives, the idea is to make the list shorter.

There has been also some reaction to a Commission idea of appointing a transposition coordinator. Most of our respondents found this would not be a good idea for Denmark as it would create a center of coordination that would potentially take away responsibilities from the line ministries. The Danes prefer that line ministries continue to take responsibility for transposition. Furthermore, no Ministry seems particularly keen to have such a position, although the Ministries of Justice and Economic affairs have been mentioned as potential centers where the coordinator could be placed.

Following a recent report, there has also been some professional discussion regarding the role of Parliament in the EU decision making process. One of the issues discussed was how to integrate the sub-committees and the entire parliament into the EU decision making cycle. The need was seen to balance the need for coordination with the need for substantive treatment. The Secretariat of The European Affairs committee (EAC) recognizes that in recent years they have been overwhelmed by information – nowadays members of parliament want not so much more information as they want better and specific information from us. The next step is simply to integrate EU policies in the entire Parliament.

9.2.2 Expectations regarding the process and results of these discussions

The expectation of most interviewed civil servants is that the Danish record will soon be improved again, mostly because they see the slip up in the scoreboard ranking as a result of failure to notify by ministries and difficulties with the electronic system of notification, rather than real cases of non-transposition.

9.3 Description of judicial instruments and techniques

9.3.1 Instruments

We can distinguish the following instruments (see Table 9.1 for an overview):

- Laws or amendments of existing laws
- Ministerial orders or amendments thereof: addressing the wider public, published in the State gazette. A particular form this instrument may take is the Technical Regulation, which addresses the professional world, and is published in the Notices of the implementing agency. Otherwise, the status and procedure of these two instruments is the same (Asser Instituut, 2004a: 24).

Laws and ministerial orders are by far the most important instruments, technical regulations are used only in a limited number of sectors, namely transport (air, motor vehicles, maritime) and electrical safety rules. According to experts from the Ministry of Justice, technical regulations are essentially the same as Ministerial orders. Only rarely is a totally new law required for transposition, as most policy areas are already densely regulated. Furthermore, there is no difference in speed between adopting a new law and amending an existing one. The same is claimed to hold for ministerial orders.

The bulk of transposition, about 85% of all directives, takes place by means of Ministerial orders (*bekendtgørelse*). Over time, the trend has been to use more and more delegation to a Minister to pass certain provisions. The use of delegation varies in time but also from policy area to policy area. While in agriculture and fisheries, all measures are transposed by delegated measures, in an area such as Justice and Home Affairs delegation is not used so much, due to the policy's sensitivity and the fact that these areas are only now beginning to be regulated by the European Union. Other highly sensitive areas are taxation, financial regulation, and financial services. Most internal market directives are transposed through ministerial orders.

Delegation is specific and contained in a law relevant to a certain sector, a parent law. The delegating provision contained in a specific law stipulates that 'The Minister of so-and-so can enact the necessary orders in order to fulfill Denmark's obligations under EU law.' This can only be done if it is clear what to do, that is if the necessary changes are quite specific. However, when the issues concerned is highly political, even if delegation is possible, a law may be used after all. Also, it is sometimes not clear to a civil servant which of the two is to be used.

Alternative instruments are never used. It is generally known that these cannot be used for transposition, as they are not binding. Denmark sometimes uses collective labor agreements, but then a backup law is used, covering those not included in the collective agreement and providing minimum guarantees.

Table 9.1: Danish legal instruments used for transposition

	<i>love</i>	<i>bekendtgørelse</i>
		<i>anordning/ kongelig anordning</i> ⁷³
	act	ministerial order
Main features	adopted by Parliament, often taking the form of framework laws	Based on delegation
Advice State Council	Not required (Denmark has no State Council)	Not required (Denmark has no State Council)
Parliamentary approval	Required	Not required formally, but sometimes informally needed
Remarks	All bills submitted in one parliamentary year must be concluded in the same year. If not, submitted again.	Sometimes these are called technical regulations.

9.3.2. Techniques

The two most important techniques or methods used in Denmark according to the interviewed officials and experts are copying and re-wording. Whereas for a long time rewording was the most popular technique, nowadays copying is increasingly used.

⁷³ According to our Danish sources, all these are identical.

A. Copying, one to one, the contents of a directive in a Danish translation into one law. This law is then an exact copy of the directive. Sometimes, but not always, such a law is then appended to the ‘original’ version of a law. However, the annex is in most cases for information and is not meant to be the legal text in force. Thus copying is sometimes combined with annexing, which is mostly used in technical areas.

- *Annexing*: the directive is annexed to a new Danish regulation. Annexing the directive is not very popular, mainly used in technical areas. E.g. transposing measures in industrial regulation can consist of 1 article: ‘The annex to this law is now in force’
- *Referencing*: As above, the passing of a law with only one article, which states that ‘this law is in force in Denmark’, with the directive as an appendage. We have not found many cases of using of this method alone. According to most interviewed experts, dynamic referencing is not used at all!

B. Re-wording: putting the directive into an own version. It seems to be the preferred strategy in Denmark, although respondents differ in their opinion as to how often it is used in relation to copying. It is a sort of unpacking of directives to be put into the Danish legal order. Sometimes the annex method and re—wording are combined, whereby certain sections are re-worded and in others the annex method is used.(Asser Instituut, 2004a: 18)

In addition to these, the following types of amendments should be differentiated: A common procedure is the adoption of subordinating legislation under an umbrella act (also called ‘parent act’ by experts) as in the case of transport directives described in the Asser report. In the case described by the Asser report, the umbrella law delegates to the Danish maritime agency the adoption of subordinate legislative acts, such as regulations. If the umbrella Act does not provide a legal basis for the transposing measure, the Act itself is amended.

Agencies or ministries responsible for negotiation of a directive check already at the negotiation stage whether subjects in a directive are in conflict with existing Danish law.

Finally, in densely regulated areas, one directive will often require changes in various existing laws/orders. In this case, one transposing measure is adopted, listing all the changes. As a next step, the various laws/orders thus changed are then consolidated into one piece. Ministries make sure we consolidate the act immediately so that the most advanced version is available to make it clear to the user. Also, sometimes several directives are combined into one transposing measure, which is called the ‘*package law*’ method.

9.3.3 Character and level of implementing measure

Directives are transposed at the levels of:

- Primary legislation: laws and amendments of Laws/acts
- subordinate/secondary legislation such as ministerial orders and technical Regulations.

9.3.4 Specific instruments

As said above, there are no possibilities for other instruments.

9.4 The national policy cycle concerning directives

9.4.1 General overview of the process

9.4.1.1. National preparation of Commission initiatives

There is no formal procedure for signaling and preparing Commission initiatives in an early stage. Even though the formal preparation procedure (see below) may be set in motion with an initiative that has not yet the status of a formal proposal, government and Parliament to a large extent have to rely on the Commission and informal contacts for information. Yet, individual ministries try to anticipate on forthcoming Commission proposals, and start working earlier (interview). At the same time, since 1991 the Folketing has had a representative in Brussels, which is to inform Parliament as early as possible on EU initiatives (Folketing et al., 2002: 18).

9.4.1.2 National treatment of Commission proposals

The process of EU policy making in Denmark has been described as having two sides: a government side and a parliament side, related to the activities of the Danish Parliament's European committee (Danish Ministry of Foreign Affairs). It mirrors the decision-making process at the European level, and it is characterized by high time pressure (Pedersen, 2000: 221). There are four levels: the EU special committees, the EU committee, the government's foreign policy committee and the Folketing's European Affairs Committee (see Table 9.2).

Table 9.2: Key meetings on EU decision-making on a weekly basis

	Government		Parliament
Ad hoc	Tuesday (if needed)	Thursday (if needed)	Friday
EU special committees	EU committee	Foreign Affairs Committee	European Affairs Committee

National decision making on EU matters starts in the *EU special committees (EF-special udvalgene)* based in the line ministries (Nedergaard, 1995:118). These committees have the task of coordinating the viewpoints of the different ministries involved and recommend a Danish position (Von Dosenrode, 1998: 55). Also, the special committees are the place for internal consultation involving interest groups at a very early stage. Already in 1972, it was formally stated that the special committees are responsible for hearing relevant interest groups (Von Dosenrode, 1998: 55). They are hence seen as real negotiating bodies in which public and private interests are merged (Asser Instituut, 2004a: 9). The special committees also hold the technical expertise necessary for deciding on many of the legislative proposals to be put forward by the Commission (Nedergaard, 1995:118-119).

There are currently 34 standing special committees, which largely reflect the division of policy areas in the European Commission's directorate-generals (Pedersen, 2000: 223). In addition, there may be ad hoc committees, concentrating on temporary matters. The committees are usually quite large; that of environmental affairs has 75 members (Pedersen, 2000; 223). They are normally chaired by a civil servant from the responsible ministry, typically the head of division and composed of civil servants from other

relevant ministries (interview). EU cases are generally handled by the sections that are responsible for the corresponding 'Danish' cases (Von Dosenrode, 1998: 57). Increasingly, committees have interest groups as their members (i.e. committees for environmental affairs, transport, and labor), though in some cases they are simply heard (i.e. finance). According to one of our respondents, the reason for the increased participation of interest groups is to prevent them 'taking revenge' when the proposal goes to Parliament. Because of its coordinating role vis-à-vis EU questions, the Ministry of Foreign Affairs is represented on all special committees.

The basis for deliberations in the special committees is formed by draft position papers. These are drawn up by the responsible ministry, and discussed by the other members of the committee. (Pedersen, 2000: 225). Also, the committee draws up memoranda for Parliament, which serve as the basis for discussions there (see section 9.4.4).

The process enters the second stage when the special committee presents its draft proposal to the leading ministry. Then the minister makes a proposal based on the advice of the special committee. This proposal is coordinated at the interdepartmental level⁷⁴ in the *EU Committee (EF-Udvalget)*, which meets when needed on Tuesdays⁷⁵. The ministries which are most involved in EU matters are permanent members of the Committee. Other Ministries participate on an ad-hoc basis. The head of the so-called North group of the Ministry of Foreign Affairs holds the chairmanship and secretariat of the EU Committee. Originally, the committee consisted of high-level civil servants, typically heads of division, but according to Pedersen (2000: 223-224) it is now usually attended by juniors.

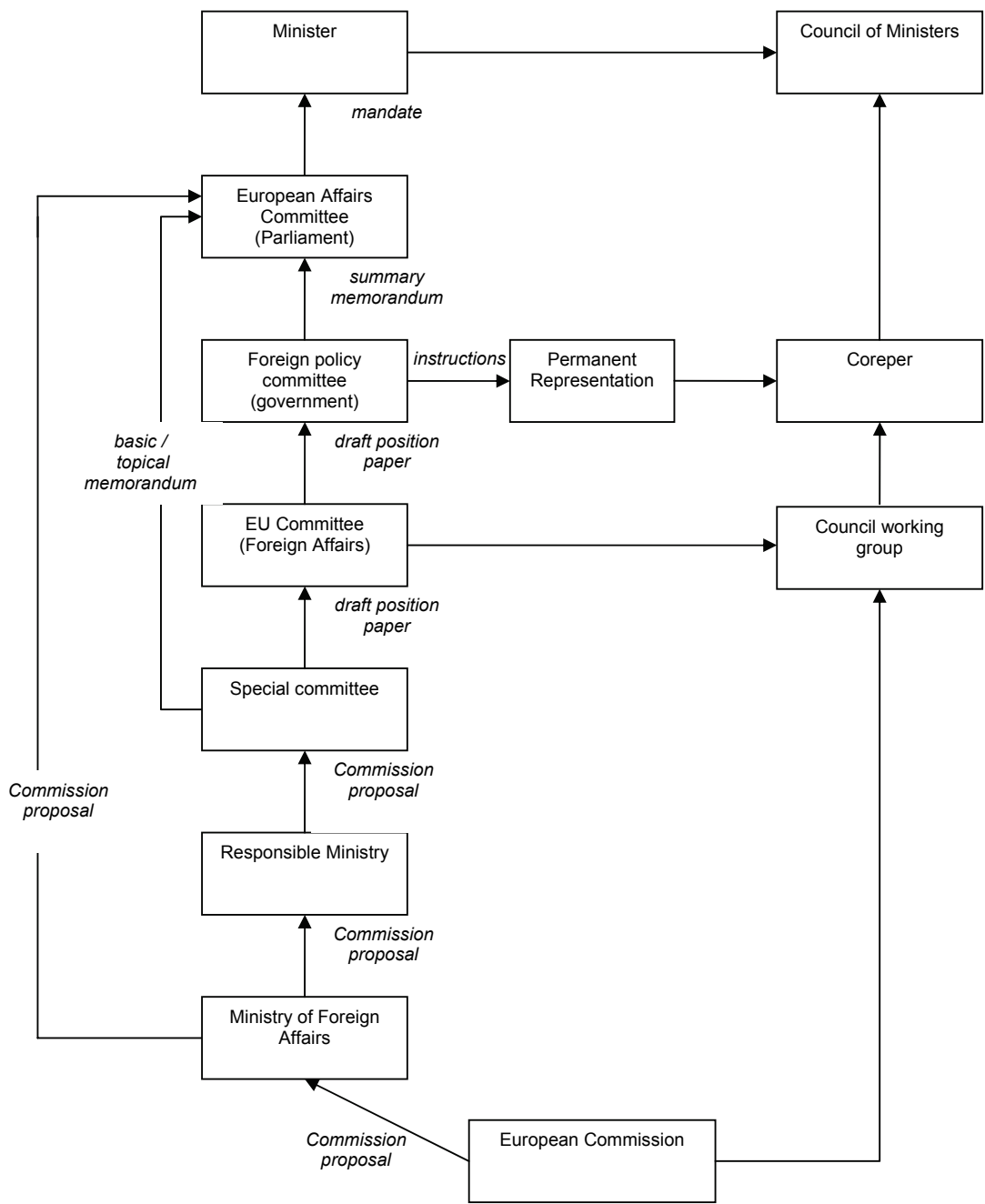
Nowadays, the role of the EU Committee is to a great extent symbolic, in that agreement in the majority of the cases is reached in the special committees.⁷⁶ Politically sensitive issues are passed on to the higher level. For this reason, the EU committee deals in particular with EU questions that have horizontal, fundamental or sensitive aspects. It should be noted, though, that the committee over time seems to have lost power to the Government's Foreign Policy committee, which has taken to deciding all politically sensitive acts (Pedersen, 2000: 223). The task of the Committee hence seems to have been reduced to 'helping the government separate technical and administrative cases from political cases'. (Nedergaard, 1995: 121).

The third tier in the system is the *Government's Foreign Policy Committee (Regeringens Udenrigspolitiske Udvalg)*. This committee has as its members the Prime Minister, the Minister of Foreign Affairs, and eight sectoral ministers. Chaired by Foreign Affairs, it is the highest coordinating body. The committee is chaired by the Minister of Foreign Affairs and includes the prime Minister and other Ministers from Ministries most involved with European affairs. It meets on Tuesdays, if needed- which is not very often (Pedersen, 2000: 224). According to one of our interviewees, it often communicates through e-mail, as 'they don't want to meet on issues where everyone agrees.' The central task of the government's foreign policy committee is to formulate the political guidelines for the Danish position

⁷⁴ As a convention we use the term 'interdepartmental' for discussions between officials from different ministries, while the term 'interministerial' is reserved for discussions between different ministers.

⁷⁵ This is not to be confused with the Government's Foreign Policy Committee which lays down the Government's position in EU matters on a higher, 'political level'. The Chairman is the Minister for Foreign Affairs. In addition to the permanent members all other ministers are normally invited to the meetings. The Committee meets when needed on Thursdays.

Figure 9.1: The Danish EU decision making process



⁷⁶ In the field of environment, this is estimated to be the case for some 95 per cent of the Commission proposals (Pedersen, 2000: 222).

As a final step, the government's position has to be coordinated with the Folketing. Here, sectoral committees may play a role in evaluating proposals but the main role is reserved for the *European Affairs Committee (Europa Udvalget)* and its secretariat (see also Section 9.4).

All in all, the different steps in the decision-making process can be depicted as follows (see Figure 9.1).

9.4.1.3 National transposition

There is a stark contrast between the phases of decision-making and transposition with respect to centralization and formality. Whereas the first stage is well-regulated and coordinated by Foreign Affairs the second stage is the responsibility of the ministries (Mandrup Thomsen and Pennings, 2002: 15).

Coordination here is completely absent, except for the Special Legal Committee at the Ministry of Justice, which supervises all infringement cases (Biering, 2000: 959). There is no central body that keeps information on the progress made with transposition; The Ministry of Foreign Affairs is no longer involved. The general feeling is that to install coordinating bodies would lead to unnecessary bureaucracy, and at the same time take away the responsibility from the ministries, which take their job very seriously. For these reasons, it is hard to sketch a general picture of transposition; practices and procedures may differ from ministry to ministry, and agency to agency. Yet some commonalities exist.

Concerning the preparatory stage, one important characteristic is the absence of so-called Chinese Walls: the civil servants and ministers responsible for negotiating are also responsible for transposition (Biering, 2000: 959, Mandrup Thomsen and Pennings, 2002: 15). Moreover, Denmark has no clear dividing line between legislative and policy civil servants. Bills are drafted by lawyers who also have policy responsibilities (Mandrup Thomsen and Pennings, 2002: 9). This practice is sustained by the interviews we held at the Ministry of Economic and Business Affairs, the Danish Financial Supervisory Committee, and the Ministry of the Environment, which together are responsible for a great part of the directives. Most ministries have an EU law section, which is involved in transposition (Mandrup Thomsen and Pennings, 2002: 15). Yet often the several policy divisions are responsible for transposition in their own area.

A second crucial characteristic of Danish transposition is that, in principle, all substantive discussions are held during the decision-making stage. Generally, the tight coordination procedure in the first stage prevents further debates during transposition. In the words of one of our interviewees: 'We have a very participatory approach that creates a lot of awareness, so when we transpose we don't start from scratch.' There generally is no duplication (interview). What is more, the general attitude is 'to go by the rules, even if we are outvoted' (interview).

There is no special procedure for transposition; the regular procedures for adopting statutes or ministerial orders apply. In drafting statutes, the ministries are guided by the Guidelines on Quality of the Legislation (*Lovkvalitetsvejledning*). However, these only contain minimal provisions that specifically concern the process of transposition. Notably, these are that a transposing bill must clearly refer to the directive in question, as well as state the type, contents, and deadline of the directive in the explanatory notes. What is more, it must be clearly stated which parts of a transposing bill are EU relevant, and which are not. Gold-plating should also be explicitly stated. (*Lovkvalitetsvejledning*, art. 2.3.3. g).

When the draft of the bill is complete, it is sent to the Ministry of Justice for the usual advisory procedures (see 9.4.3.). Changes are not made very often. Then, the bill is discussed in Cabinet (*Ministersmøde*) (Steenbeek and Gilhuis, 2003: 90). If everything goes well, the bill can then be submitted to the Folketing. There are no 'Raad van State', nor advisory bodies that need to be heard. In Parliament, the

European Affairs Committee is no longer involved (Folketing et al, 2002, 9). Parliament treats every bill three times, at increasing levels of specificity. The sectoral committees play an important role here. After the third reading, the minister signs it, as well as the King, after which it is published in the Law Gazette (*Lovtidende*) (Steenbeek and Gilhuis, 2003: 91). The legislative process is hence much shorter than in the Netherlands. In reality it is even shorter, though, because generally transposing bills are not discussed in committees, but rubberstamped in the plenary. According to our interview partner at the Folketing: ‘The Danish parliament is not a legislator when it comes to already adopted EU issues.’

For ministerial orders, the procedure is even shorter. Drafts are not seen the Ministry of Justice, but by internal evaluators (Mandrup Thomsen and Pennings, 2002: 17).

9.4.2 Bureaucratic consultative and coordinating bodies

As said, the Danish politico-administrative system is generally informal and decentralized in nature. A puzzling exception to this general qualification is Denmark’s EU coordination system, which is remarkably formal and centralized (Von Dosenrode, 1998: 57; Nedergaard, 1995: 114). Yet this seeming contradiction in reality is more of a paradox, since the formal and centralized procedures are underpinned by flexibility and strong informal networks. What is more, over time centralization has been countered by a process of sectorization (Pedersen, 2000: 220), so that in reality individual ministries play the key role in the process (Nedergaard, 1995: 115). The role of the ministry of Foreign Affairs has developed from ‘police-patrol’ to that of a backstop (Pedersen, 2000: 226-228). Furthermore, ‘the wheels of the rigid procedure are oiled’ by a culture of pragmatism and informality, and a strong wish to reach consensus (Nedergaard, 1996: 115, Pedersen, 2000: 221). Finally, the formal and centralized coordination procedure only applies to the EU decision-making stage. Transposition is characterized by the common pattern of decentralization and informal rules. Coordination in this stage is virtually non-existing, ministries are on their own (Nedergaard, 1996: 115; interviews).

All, in all, the following institutions play some coordinating role:

- At the lowest level, the EU special committees coordinate positions with other ministries and interest groups.
- At the second tier, coordination takes place in the EU Committee composed of civil servants and chaired by the Foreign Affairs Ministry
- The highest coordinating actor is the Foreign Policy Committee of the cabinet
- Coordination in parliament is undertaken by the Parliamentary European Affairs committee and its secretariat which coordinate the positions of specialized standing committees
- The Ministry of Foreign Affairs plays the central coordinating role in the decision-making process. The North group of the Ministry participates in all meetings of the special committees, chairs the EU committees, functions as secretary for the government’s foreign policy committee, and attends all meetings of the Folketing’s European Affairs Committee. In addition, it acts as a clearing house for communications to and from the EU, and to the Folketing. Finally, it presents the final negotiating instruction to the Danish EU representation. All in all, it is a central node in the coordination system.
- In the transposition stage, an important role is played by the Special Legal Committee, chaired by the Ministry of Justice. This Committee meets biweekly to discuss all infringement cases, also the relevant ones against other member states. Here, each line Ministry has to explain what went

wrong. Being called for the Committee is considered harmful to a Ministry's professional pride and reputation (interview).

9.4.3 The role of compulsory advisory bodies

Denmark does not have any advisory bodies, nor an advisory institution similar to the Dutch *Raad van State* (Mandrup Thomsen and Pennings, 2002: 11). However, each department is required to consult with relevant interest groups and the public. Furthermore, all draft law proposals coming from the government, including those for implementation, are subject to a quality of legislation check by the Legislative Department of the Ministry of Justice (Mandrup Thomsen and Pennings, 2002: 15). The Ministry of Justice also has a division EC law which controls compatibility of proposals with EC law (Mandrup Thomsen and Pennings, 2002:9). This section may also be consulted about particular issues concerning transposition (Mandrup Thomsen and Pennings, 2002: 15). Finally, a compulsory assessment of the administrative burdens resulting from new legislation is made by the Ministry of Economics and Business Affairs in a panel with business representatives. The line ministries have to include the results of these assessments in their advice on the proposed legislation (Asser Instituut, 2004b: 9).

9.4.4 The role of parliament

Denmark has an unparalleled system for democratic control over EU policies: the Folketing has an extremely powerful role in the preparation of Danish European policy. For each negotiation process, government is required to obtain a mandate from Parliament. The rationale for this construction, is twofold. First, because Denmark has a strong tradition of minority government, it is deemed important to prevent cabinets from being voted down by Parliament (Nedergaard, 1995, 129). Second, due to Denmark's EU-skeptical stance, most political parties want to keep a firm check on EU policy. This system is not known in any other member state, even though the UK and Sweden come close.

The key player in Parliament is the European Affairs Committee, previously called the Market Relations Committee. It has seventeen members, proportionally representing the political parties represented in Parliament. It is mostly comprised of senior MPs, among whom many former ministers (Von Dosenrode, 1998: 60). It is supported by a secretariat consisting of 22 staff members and some 8 interns, which is the largest staff of all Parliamentary committees (Folketing et al, 2002: 23, Von Dosenrode, 1998; 61). The meetings of the European Affairs Committee normally take place on Fridays and deal with all the Council meetings taking place in the following week. The meetings typically take 2 to 5 hours (Eliason, 2001: 200).

Parliament's powers in EU policy-making are laid down in the 1972 Law on Denmark's accession to the EC, and have been further specified in reports by the Committee, agreed by the government (Folketing et al, 2002: 5). Originally, the Government was obliged to consult with the Parliament's European Committee in EU matters of essential importance. The mandate obligation follows from the first report from the Committee in 1973, which holds that 'Prior to negotiations in the EC Council of Ministers on decisions of a wider scope, the Government submits an oral mandate for Negotiation to the Market Committee. If there is no majority against the mandate, the Government negotiates on this basis'. Thus, the Danish government cannot conduct negotiations without receiving a mandate from the Parliament (Nordic Parliaments Report, (2002:7). The political development has been such, that the mandate procedure now applies to every proposal for a new directive. The mandate is never set in writing and is not legally binding, yet in the context

of Danish politics it has decisive weight in determining the positions of Danish Ministers in the Council of Ministers (Rehof, 1996:68-69).

Deliberations in the EAC's meeting are structured on basis of a so-called summary memorandum, which is an annotated agenda of an upcoming Council meeting (Folketing et al, 2002: 13). This is distributed Friday morning at the latest, so 8 days before the Council meeting, and a few hours before the EAC meeting (Nedergaard, 1995: 124). For each pending proposal, the responsible minister has two options (Von Dosenrode, 1998: 60). First, he or she may simply brief the committee, if no decision by the Council of Ministers is to be expected. The second option is to propose a negotiating mandate (*forhandlingsopslæg*). If the latter is the case, the parties proceed by giving their positions, after which discussions may ensue. Finally, the Chairman of the Committee presents the conclusion, after counting the number of votes. The mandate is not written, but oral, even though a stenographic record is kept (Eliason, 2001: 200). It contains agreement on the subject matter, the allies to be sought, and the degree of discretion for the negotiator (Von Dosenrode, 1998: 60).

Table 9.3: Contents of Danish basic memorandum

1	Title and nickname of initiative
2	Parallel distribution to sectoral committees
3	Identification, relevant dates and legal basis
4	Previous presentation to the EAC
5	Resume of contents
6	Most important elements
7	Consequences for Danish law
8	Principles of subsidiarity and proportionality (<i>new</i>)
9	Financial, socio-economic, and environmental consequences
10	Hearings of interest groups
11	Danish attitude (<i>new</i>)
12	Public attitudes of other member states (<i>new</i>)
13	Relevant Danish decisions on European policies

Source: European Affairs Committee, 2004: 23-24.

In forming its opinion about a proposed mandate, Parliament to a great extent relies on the so-called basic memorandum (*grundnotat*). This is a standardized document, composed by the special committee, which must be sent to the EAC within four weeks after a Commission proposal is made. Over the course of the negotiation process, the memo may be modified, after which it is called a topical memorandum (Folketing et al, 2002: 13). Its main elements are: a description of the Commission proposal, its legislative and financial consequences, previous considerations by the EAC, possible compromise proposals by the Presidency, amendments proposed by the European Parliament, its itinerary through the EU institutions, and the opinion of interest groups (Folketing, 2002: 7; Pedersen, 2000: 230; Von Dosenrode, 1998: 61; see Table 9.3 for a full overview). For a long time, it did not contain the government's opinion, but this has changed in January 2005, when a new EAC report entered into force. Parliament is generally satisfied with the documents it gets. They are usually rather elaborate, comprising 5 to 20 pages (interview). Finally, Parliament receives all Commission proposals directly from the Ministry of Foreign Affairs, as well as lists of all the proposals received (Folketing, 2002: 5-6).

9.4.5 The role of other, subnational or functional governments

Local government is represented in the special committees, as they represent employers throughout the country. According to one of our interviewees (ENV), this is really important, as local government often needs extra resources to comply with European directives.

9.4.6 The role of interest groups

Interest groups are involved throughout the process of EU policy-making and implementation. First, they are member of or heard by the special committees that make the initial policy proposals. They are consulted at the early stage of preparation of legislation. Second, they play a role in preparing transposition, and the actual application of directives, just like normal Danish law (Von Dosenrode, 1998: 55). Third, they have a rather close relationship with the European Affairs Committee in Parliament. They have rather good access, as all interest groups can present a delegation to the EAC. Usually they present their point of view right before a minister appears for the EAC. In this way, the committee benefits from their expertise. Groups that often make their appearance are the Unions, anti-federalist movements, the anti-constitution movement, fishermen organizations, and industry representatives. Generally, no attempts are made to lobby Parliament during the transposition stage (interview).

9.5 Analysis of instruments

9.5.1 Advantages and disadvantages of instruments

As one expert pointed out, the pro-s and con-s of instruments are different depending on whom you ask: the opposition prefers using laws so that they get debated in parliament, the government prefers administrative orders.

Undoubtedly, ministerial orders are faster. They are used much more frequently and considered much faster as they do not have to pass through Parliament. It takes much longer to get a bill through parliament and ministers can never be quite sure of success as linkages with other issues might occur. Still, in general the parliament does not make problems at the transposition stage since they have been consulted extensively at the negotiations stage. A rare example of a difficult act to pass was the law transposing the personal data protection directive where the parliament felt it had not received all the relevant information during the first stage of the policy process.

However, in terms of speed laws present another problem. Ministries and agencies are bound by the regularity of Parliamentary meetings and the preparation of the legislative program for the whole year. The way the parliamentary year is organized, all bills must be dealt with within one and the same parliamentary year. On the 2nd Tuesday in October, the new year starts. All outstanding bills must be withdrawn and submitted again in the new year (Mandrup, Thomsen and Pennings, 2002: 6). To deal with this civil servants often combine and make a lot of changes in 1 act.

As for Ministerial orders, even though in legal terms the government is not obliged to go to the Parliament, in practice, since Denmark operates with minority governments sometimes there is a political agreement or pressure/imposition from parliament for a draft of the administrative order to be seen by parliament before being adopted.

As mentioned before, delegation differs from area to area and there are areas where one cannot avoid using legislation as they are so politically sensitive. Examples of such areas are: Justice and Home affairs, taxation, financial regulation, and financial services.

There is no difference between amendments and new laws in terms of speed as the debates look at the substance. The reason for that is that any piece of legislation, whether it is original or an amendment, has a written explanation with comments and reasoning by the government, also anticipated impact on the administration and on finance. This enables the politicians to focus on the substance.

However, another expert points out that sometimes amendments of existing laws are problematic because national concerns are re-examined and other issues may be added to the list. Ministries and agencies busy with transposition try not to have this and limit the discussion to transposition, because it can be a problem when the agency is pressed for time.

9.5.2 Advantages and disadvantages of techniques

For a long time, re-wording was the preferred strategy, because this is considered more user-friendly. Problems of interpretation are solved in an early stage, rather than pushed to the end user. The **re-worded** directives, are therefore evaluated as clearer for the citizens. In the words of one official, ‘we try to make it fit the Danish legislation and use legal language used here’. Another expert points out that ‘Directives are not ‘microwave ready’ text. They need to be unpacked and put into our legal order.’ Thus re-worded directives are also considered more compatible with national legal frameworks rewriting then has the clear preference of the Ministry of Justice. However, rewording is considered more difficult, which makes it slower than rewriting. Also, according to some, if you re-word there is a risk you may be using the wrong words. That’s because there is not so much leeway in transposition as there should be.

Copying is seen as faster and according to at least one interviewed expert is used increasingly as a way to cope with the growing number of directives. However, it is also seen as unfriendly to the end user. Another expert pointed out that copying is done ‘if we can’t make up our minds’, when a directive is considered difficult. Again, it is seen as undesirable as it transfers responsibility for understanding and interpreting the provisions to the next user – local government, businesses and courts.

9.6 Analysis of national policy process

The Danish transposition record has been consistently good, one of the best in the EU. According to Nedergaard, this is due to the fact that the Danish position in the EU is based on domestic consensus which is achieved by a time-consuming process of consultation of a multiplicity of interests before a policy proposal is negotiated in Brussels (Nedergaard, 1995:114). Similarly, the Asser report attributes the success of implementation in Denmark to the attention for internal consultation during the drafting of national position phase. In this internal negotiation phase, all stakeholders are consulted, including Parliament (Asser Instituut, 2004b: 3; Nedergaard, 1995: 114; interviews). This implies there is no political force attempting to stop transposition and implementation later.

Parliamentary involvement is generally evaluated rather positively. Even though Parliament is said to reject a mandate only rarely⁷⁷ (Folketing et al, 2002: 10), government usually anticipates on the EAC’s

⁷⁷ According to Nedergaard (1995) this happens only in some 95 % of the cases. According to one of our interviewees, the frequency has increased over the last three to four years, due to the generally Euro-skeptical stance of the Dansk Folkeparti. It allegedly has been especially difficult in the fields of GMOs and

stance (Pedersen, 2000: 30). Furthermore, its power is boosted by seniority of its members. All in all, the strong role of parliament is considered one of the factors ultimately facilitating transposition as it 'ensures that sudden surprises do not occur when new legislation is necessary' (Biering, 2000: 959). According to one of our interviewees, the procedure ensures that 'the train is set in motion, and it will arrive at the next station.'

Yet, some weaknesses are also reported. It is positioned rather late in the EU decision/making process, when the Danish position has already been formulated in Coreper (Nedergaard, 1995, 126). What is more, it depends almost fully on the government for information, and must trust the latter that it followed its mandate, due to the secrecy of Council meetings. The biggest concern, though is that it suffers from work overload (Pedersen, 2000: 231). The staff is considered wholly inadequate (Eliason, 2001: 201). For this reason, debate has ensued about the role of the sectoral committees. For a long time, EU affairs were the sole responsibility of the EAC. EAC could forward memoranda to the sectoral committees, or informally hear their opinion, but this was completely optional. If it happened, the committees were usually not very interested (Nedergaard, 1995: 128; Pedersen, 2000: 231). Therefore, in May 2001, the Parliamentary European Affairs committee recommended that memoranda are sent by the government simultaneously to the specialized committees and the European Affairs committee (Danish Parliament information fact sheet, at <http://www.ft.dk/?/samling/20041/menu/00000005.htm>). This has been effected in the most recent Folketing report (2004), which has made EU issues a formal responsibility of the sectoral committees. Their instruments for exerting influence are that they can call the minister, make recommendations to the EAC, and arrange public hearings, something which is often done for Green and White papers (interview, Folketing).

On the whole, even though the Danish process of EU policy making at first sight seems rather formal and centralized, in reality it is highly informal (interview). It is a bottom up approach, starting with the sectoral committees and the individual teams of civil servants in Ministries/agencies and then ending up there again for transposition. One and the same team is responsible for the whole process of negotiation and implementation, which creates a sense of ownership and prevents 'Chinese walls' between those who negotiate and those who implement. Furthermore, the coordination style is informal, except for the part where Parliament is involved, but also there the stress is on obtaining an oral mandate and not on increasing the paper trail. A final important factor seems to be the rule of law, which is one of the fundamental building blocks of Danish politics and administration. The basic attitude is that EU laws must be implemented properly, even if they go against Denmark's wishes.

Despite the good Danish record, sometimes transposition is delayed. The major reason for delay, according to our respondents, is formed by notification problems (also see Von Dosenrode, 1998, 58). Sometimes the European Commission has not registered notification, or sometimes it is forgotten by the ministries. Real delays are generally said to be very rare. One of our respondents reports that on average once a year transposition is problematic for substantive reasons. Other reasons for delays reported are a lack of manpower, and the ambiguity and difficulty of some directives.

food directives. According to our interviewee at the Folketing, however, there are no particular sectors in which mandates are hard to obtain.

9.7 Conclusions

- The swift transposition of EU directives in Denmark is not a direct result of the use of special legal instruments or techniques. In fact, Denmark knows only two legal instruments used for transposition. The very simplicity of the legal options seems to contribute to swift transposition. Most transposition happens through ministerial orders, but this does not diminish the role of Parliament.
- The extensive involvement of the Danish Parliament at the pre-negotiation stage is seen by many experts and civil servants as key to Denmark's success in transposition. Interviewees have all stressed that the process of obtaining a mandate from Parliament before negotiations on a proposal have taken place in the Council of Ministers is crucial. Parliament takes its task of scrutinizing EU proposals highly seriously, which prevents surprises during transposition.
- Consultation and domestic consensus building at the pre-negotiations stage contribute to swift transposition. The extensive consultation not only with Parliament but also with interest groups at a very early stage creates awareness which also helps successful transposition later.
- Ministerial powers of delegation are important, but delegation is specific and based on sectoral laws. As proposals have been already discussed in parliament, at the transposition stage powers can be delegated to a Minister to pass the necessary legislation by a Ministerial order.
- Another reason for Denmark's good transposition record is that lines of responsibility are clear and final responsibility is not in a centralizing authority but in the line ministries. On this bottom up basis, administrative coordination is maintained throughout the policy cycle. More specifically, the same civil servants/teams which negotiate a directive are involved in transposing it, so that there are no 'Chinese walls between negotiation and transposition.' Teams consist of both lawyers and practitioners, drafting of transposing acts is done by the same people. This means that those who negotiate are familiar with the domestic situation and are aware of the EU policy context in which a decision is made.
- Flexible consultation mechanisms and an informal manner of coordination save time and make the Danish approach highly effective.
- A culture of obeying the law is credited with ensuring that directives are transposed even when they were seen to be to Denmark's disadvantage. The values and beliefs of administrators play a crucial role in this process. Danish civil servants take a pride in transposing directives well and on time, and conversely, it is considered shameful for ministries to have been late with transposition.
- The naming and shaming of laggards among ministries in the Special Legal Committee based in the Ministry of Justice is a helpful mechanism that reinforces the rule of law culture that exists in Ministries.

Appendix: List of interviewees

- Peter Biering, Legal adviser to the Danish government, Law firm Poul Schmith
- Susanne Isaksen, Department of EU Coordination, Ministry of Foreign Affairs
- Peter Riis, European Affairs Committee of the Folketing
- Klaus Werner, International Unit, Ministry of Economic and Business Affairs
- Leif Thomassen, Senior EU Coordinator, Danish Financial Supervisory Authority
- Christina Toftegaard Nielsen, EU Affairs Unit, Department of Law
- Nikolaj Aaro-Hansen, EU Affairs Unit, Department of Law
- Jørgen Molde, EU Law Department, Legal Service, Ministry of Foreign Affairs
- Merete Voetmann, EU Law Department, Legal Service, Ministry of Foreign Affairs
- Lise Wesenberg Jensen, Specialkonsulent Legal Affairs, Danish Environmental Protection Agency

10 France

10.1 General overview of the constitutional and political system

10.1.1 Constitutional characteristics

France is a decentralised unitary state in which the central government takes the lead with regard to the preparation of the French position on new Commission initiatives and the transposition of EU directives. Subnational governments do not have their own competences for the transposition of legislation even though their cooperation may be required for effective implementation at a later stage.

In contrast to the United Kingdom, whose constitution does not consist of a single solemn document but a multitude of texts, laws, traditions and conventions, France is ‘attached to the idea of a written, solemn and rigid constitution’ (Mény, 2000: 120). So rigid is this attachment, that, if the existing constitution is unable to deal with a problem, there is a change in the regime and a new constitution is adopted to deal with the questions not resolved by the preceding version.

The French constitution makes a clear distinction between legislative and executive power and attributes to each of these branches of government autonomous rulemaking power. Article 34 of the constitution specifies the issues for which Parliament needs to be involved by the executive for the passing of law. These areas, which are labeled as *législatives*, include public liberties, the determination of serious crimes and other major offences, taxation, the budget and the fundamental principles of national defence, the self-government of territorial units, education, ownership issues, labor law and social security. In 1996 these areas were expanded to include also the financing of social security. All other issue areas are regarded as *executive* and can be autonomously arranged by government using regulations (that is, government decrees and ministerial orders). The State Council and the Constitutional Council ensure that the government and parliament observe the distinction between ‘legislative’ and ‘executive’ issues. In applying this distinction the State Council (*Council d’Etat*) has to assess a proposal and decide whether the proposal belongs to the ‘legislative’ or ‘executive’ domain.

10.1.2 Political characteristics

France is sometimes characterized as a ‘rationalized’ parliamentary system. In principle, France is a parliamentary system in which law has to be approved by parliament. At the same time, as indicated above, the French constitution makes a distinction between issues that require the adoption of law and those that can be directly regulated by the ‘executive’. In this way, the role of parliament in France is more limited than in some other European countries.

In France, the President has in many respects the advantages and privileges of the Head of State in a presidential system. In other respects he enjoys the prerogative powers of a head of state in a parliamentary system. This ambiguous combination of roles secures for the President an independent and powerful position in the French political system, simultaneously giving them ‘complete political irresponsibility and the strength to make decisions and pressure other constitutional bodies’ (Mény, 2002: 117-118). The head of state appoints the prime minister and, conjointly with the prime minister, appoints Ministers. The head of state can address messages to both Houses but, in conformity with ‘republican tradition’, cannot speak direct to parliamentarians. To these powers belonging specifically to the President are added those shared with the

prime minister and government, in particular the signing of regulations and decrees, appointments to various civilian and military posts and all measures decided in the Council of Ministers (Articles 20-23 and 34-51 of the Constitution). While the Constitution does not guarantee that the President will be directly involved in the day-to-day running of the country, he is undoubtedly an integral part of the political process. As Elgie (2003: 98) indicates, the President is only an 'independent and autonomous actor of either the first instance or the last resort'.

The French party system is characterized by competition between two opposing forces: the 'left' and the 'right'. However, the 'left' and 'right' are not strong and stable 'blocs' but consist of a substantial number of different political parties. The rivalry and competition between these different parties makes the French party system rather 'fragile, instable and weak and reduces the effectiveness of Parliament with regard to government' (Mény, 2002: 104).

Parliament has two chambers:

- the upper chamber or Senate (331 members, elected for 6 years by indirect suffrage (electoral college);
- the lower chamber or National Assembly (*Assemblée Nationale*) with 577 members elected by direct universal suffrage for five years using majority voting in a two-categorical ballot.

The members of the National Assembly (deputies) and the government are entitled to initiate legislation.

Government bills are called *projets de loi*; bills introduced by deputies are called *propositions de loi*.

Effective parliamentary influence lies almost exclusively with the National Assembly.

In addition to national lawmaking the National Assembly and the Senate also have a role in foreign policy by examining government bills authorizing ratification of a treaty or approval of an international agreement negotiated by the President of the Republic or on his behalf. Major international treaties—such as peace treaties, commercial treaties, treaties or agreements concerning international organizations, state finances, status of persons, and agreements that modify statutory provisions—do not commit France until passed by a ratification statute.

Amendments of the constitution are also matter for Parliament. The amending bill has to be passed by both chambers, but does not have effect until it has been approved by referendum or, in the case of a government bill, by the Congress (a joint session of the National Assembly and the Senate in the Palace of Versailles) if the President of the Republic prefers this procedure. Approval by Congress requires a majority of three fifths of the votes.

10.1.3 Political administrative characteristics

The French government consists of the prime minister and his ministers, who meet weekly as part of the Council of Ministers. The prime minister directs the operation of the government and has a superior position to the ministers. He is responsible for national defense and ensures the implementation of legislation (including the transposition of EU directives). Within the government, he has the right to initiate legislation (Article 39 Constitution). Moreover, the prime minister has the power to make regulations. The regulations proposed by the prime minister are countersigned, where required, by the ministers responsible for their implementation. In addition, he/she may sometimes delegate some powers to ministers. During the annual budgetary process, the Prime Minister is responsible 'for arbitrating between the conflicting demands of the spending ministers' (Carcassonne, 1997: 400).

Moreover, the prime minister has a special constitutional position towards parliament (Articles 34-50 Constitution) and plays, in contrast to the President, a full role in the parliamentary process. The Prime

Minister is closely involved in setting the parliamentary timetable, which is important for the prioritization of discussions on legislative proposals (Article 48). He also acts as the government's main spokesperson in parliament, most notably during the weekly session of questions to the government in the National Assembly.

Within the government, and next to the Prime Minister, there are three different kinds of positions: minister:

- 'full' minister (*ministre*), who is positioned directly under the prime minister and have a separate portfolio for which they are within the government responsible. Ministers participate in the Council of Ministers;
- junior minister (*ministre délégué*), like the Junior Minister for European Affairs, who are positioned under a 'full' minister; and
- state secretary (*secrétaire d'Etat*), are either 'autonomous' heading a ministerial department or attached to the Prime Minister or a Minister; inferior to the position of a minister; they only participate in the Council of Ministers if their portfolio is concerned. From a protocol point of view, state secretaries are referred to as 'minister'.

According to the composition of government from 25 February 2005 there are 17 full ministers, 13 junior ministers and 10 state secretaries. Junior Ministers and state secretaries are allowed to sign all acts falling under the supervision, but government decrees (*décrets*) which require the countersignature by the full minister.

An important characteristic of French civil service is a strong linkage between the government and the administration (and sometimes the courts). This is reflected in political cabinets supporting the Prime Minister and the individual ministers, and the membership of various consultative bodies and committees of key actors from the highest administrative level. These multiple positions and close personal connections are part of extensive political-administrative networks in France. These networks, which include members occupying various positions in the administration as well as consultative bodies and the courts, affect daily politics and policy. Moreover, these networks are partly maintained through training at France's prestigious public administration school (*École Nationale d'Administration* or *ENA*), which 'has been attended by most of the currently high-level civil servants and some of the political actors' (Elgie, 2003: 144).

The senior officials can be characterized as dynamic, innovative, confident and highly trained. In part this reflects the fact that civil servants are often appointed to ministerial posts.⁷⁸ It is still the case that many political leaders, including President Chirac, began their careers as civil servants and then moved into politics. Such a move can be easily made due to the rather liberal employment provisions, which allow civil servants to leave the public service and return to it without losing any seniority.

French senior civil servants mostly identify themselves as a member of one of the 'great corps'. There are several of these services such as the State Council, the diplomatic corps and, for instance, depending on their technical vocation, the Corps of Roads and Bridges. The members of these services tend to monopolize the senior positions in the administration. Each corps is independent from the others and provides a separate identity to its members. Senior officials identify themselves as being a member of one of these services and will be loyal to his or her corps rather than to the civil service as a whole. This feature of French administrative culture may cause rivalries between units within a ministry and between ministries.

Elgie (2003: 135-139) characterizes the French administration by the following three features: First, the administration is still ‘top-down’ and *centralistic* in its nature. Second, the administration is characterized by a strong division of labor and a lack of cooperation and collaboration. Consequently, it is marked by a profound set of rivalries within and between the ministries which can be very difficult to manage and affects the coherence of a ministry’s policy. Ministries are split on a functional basis into divisions headed by a director, each having responsibility for a particular area of the ministry’s work (Rouban, 1995: 42-47).⁷⁹ Divisions are then split on a functional basis into subdivisions, each having responsibility for a separate aspect of the division’s work. A subdivision is headed by a sub-director.⁸⁰ These subdivisions are further split on a functional basis into bureaus. Third, the administration is characterized by deconcentration instead of decentralization. At the local level French departments have a well-developed range of deconcentrated services, which work closely with civil servants at the local level. These features make the central administration rather powerful in specific policy areas, but at the same time fragmented and difficult to manage, especially if government-wide priorities have to be fulfilled such as the transposition of EU directives.

10.2 Political or public discussion concerning EU directives and their transposition

10.2.1 Discussion of recent reports and their recommendations

At first sight, there seems to be an increasing awareness in France about its rather poor performance with regard to transposition, as indicated by the Commission scoreboards. Currently, France has a transposition deficit of 3.2% for the internal market directives (European Commission, 2005a: 18) and 1.9% for all directives in force (European Commission, 2005b). In addition, a substantial number of infringement cases against France have been brought before the European Court of Justice. Until now, none of these cases have led to a fine imposed on the French state. There is the possibility that, as part of the *Merlus case*, the French state might be faced with a substantial fine, which has increased awareness among parliamentarians as well as the government aware of the need to seek for improving France’s performance. This need has become apparent through a number of reports and communications which have been issues over the last three of years.

The Parliament, for example, has started a debate of the transposition problematic. In July 2003 and July 2004 respectively, Christian Philip (2003; 2004), member of the Delegation for European Affairs in the National Assembly, issued annual reports on transposition to the National Assembly. Whereas the first report focuses on the overall evaluation of the French transposition process, the second report also compares the national transposition mechanisms in all fifteen member states. Philip summarized the major problems in the French transposition process as follows:

- lack of coordination between ministries;

⁷⁸ This was made easier by the fact that the 1958 Constitution did not require ministers to be members of the National Assembly, but actually forbade it.

⁷⁹ For example, in 2002 the Ministry for Civil Engineering, Transport, Housing, Tourism, and the Sea comprised thirteen separate divisions, such as the Roads Division and the Air Transport Division, as well as the ministerial information service which had the equivalent status to a division.

⁸⁰ For example, in the Roads Division of the Ministry for Civil Engineering there were four subdivisions, including the Subdivision for Motorways and Toll Roads and the Subdivision for Road-Building Investment.

- numerous interventions of compulsory advisory bodies;
- irregular and poor drafting of impact data sheet.

Based on his analysis, Philip recommended three main points:

1. systematic making of the impact assessment studies;
2. resisting legal perfectionism; and
3. reinforcement of collaboration with the European Commission.

Furthermore, he suggested to give transposition a heavier political weight in the overall policy-cycle by involving the prime minister because transposition is not only a Community obligation, but also a constitutional demand. Second, he suggested setting up a new interdepartmental committee. This committee could meet regularly to strengthen the political accountability of individual ministries and could be led by the Junior Minister for European Affairs ‘empowered’ and explicitly supported by the prime minister. Moreover, he recommended for ministries to improve their administrative structure towards transposition, by setting up a legal service helping to draft the legal texts. He suggested consultation with advisory bodies to be transferred to the earlier, negotiation phase. Finally, he argued for a reinforcement of parliament’s role in the transposition process by more frequent consultations.

The Philip report caught the attention of politicians. It was immediately followed by a communication on transposition by Prime Minister, Jean-Pierre Raffarin.⁸¹ This communication followed an earlier communication from 3 July 2002 in which the Prime Minister declared transposition to be high on the political agenda in order to catch up with France’s backlog. In view of this declaration, the Junior Minister for European Affairs presented a communication to the Council of Minister on 6 November 2002. In this communication Claudie Haigneré announced the setting up of an action plan to clarify the administrative responsibilities and to further involve parliament in transposition.

In the new communication of September 2004, the Prime Minister again underlined the importance of transposition. In addition, he urged ministers to take the necessary steps to make up for the delay which could be very costly and disadvantageous for French competitiveness and credibility in the European Union.⁸² He suggested the following: (1) an improved effort in drafting impact assessment studies; (2) a better coordinated transposition planning and process-tracing with a regularly updated transposition scoreboard for all the ministries; and the (3) the setting up of an interdepartmental committee coordinating transposition (in line with Philip report).

Based on this communication, high-level officials were given responsibility for transposition in each of the various line ministries, including a member of the (political) cabinet of each minister. These officials meet regularly to discuss the progress on transposition in the newly established interdepartmental committee on transposition (*réseau interministériel des correspondants de la transposition*). In this committee the Junior Minister for EU Affairs presents the results on progress, ‘naming and shaming’ the laggards. Additionally, the information on progress is also presented to the Council of Ministers.

⁸¹ Communication of the Prime Minister (2004) *Circulaire du 27 septembre 2004 relative à la procédure de transposition en droit interne des directives et décisions-cadres négociées dans le cadre des institutions européennes*, J.O. no. 230 (2 octobre 2004): 16920.

⁸² The Prime Minister underlines the importance of swift and proper transposition in the last meeting of the Council of Ministers before Christmas in 2004; see Communication of the Prime Minister (2004) *Communication au Conseil des ministres du 20 décembre 2004 sur l’application des lois et la transposition des directives et décisions-cadres communautaires*.

On 2 February 2005, the Junior Minister for European Affairs, Mme Haigneré, issued a first scoreboard on transposition. She outlined the earlier improvements in transposition, but stressed that more needed to be done to consolidate these improvements and to improve France's performance on transposition. She concluded with some comments on future strategy and developments and the need to prepare for transposition already during the negotiation phase.

10.2.2 Expectations regarding the process and results of these discussions

The new measures underscore the political awareness of the rather poor performance of France in the various Commission scoreboards. After the communication of the Prime Minister in July 2002 the number of delayed directives for which the deadline already expired was reduced. The latest scoreboards indicate that France seems to succeed in improving its performance. For instance, the absolute number of not yet transposed directives is smaller than before (48 compared to 92 in February 2002) while the number of directives delayed for more than two years is reduced by half. Despite the government communications and proposed changes and reforms, France is still not performing that well in relative terms, partly because other EU member states are improving their performance as well. Furthermore, France is still far from reaching the objective of the 2001 Stockholm European Council to reduce the transposition backlog below 1.5% of all directives in force or the zero-tolerance objective of the 2002 Barcelona European Council.

Some observers indicate that the current political interest in transposition could be temporary because previous prime ministers already issued communications on transposition. Michel Rocard, for example, issued communications in 1986, 1988 and 1990. Then, in 1998, Lionel Jospin presented a communication to the Council of Ministers on the poor French performance on transposition underlining the importance of the negotiation process in Brussels for later transposition in France.⁸³ The communication stresses that during the bargaining process in the working groups, COREPER and the meetings of the Council of Ministers, the French delegation should prevent directives from including definitions in the introduction which could make it very difficult and time-consuming to ensure coherence with the national framework of law at a later stage. Negotiation teams for a directive should be involved in the later transposition phase and in a timeframe of *one* month after the adoption of the directive, the line ministry should work out an impact assessment study. But in 1988 and 1990 respectively, Prime Minister Rocard had already drawn the ministers' attention to problematic transposition of EU law.⁸⁴ He outlined and specified the different tasks of the SGCI and the SGG in the transposition process in order to improve coordination. In addition, he asked every ministry to take responsibility for the transposition of directives falling under their supervision. He stressed the need to keep transposition requirements in mind from the moment on a Commission proposal is being discussed in the Council's working groups.

Hence, the current attempt made by Prime Minister Raffarin to increase the ministries awareness for transposition and to improve France's performance seems to be a recurrent issue on the French political agenda. If these more attempts, like in the past, do not lead to structural changes within the administration and the way in which transposition is handled, the 'new policy' will appear to be a symbolic one. However, if these communications are embedded in a well-established belief that France's performance should become

⁸³ *Circulaire du 9 novembre 1998 relative a la procédure de suivi de la transposition des directives communautaires en droit interne.*

⁸⁴ *Circulaire du 25 janvier 1990 relative a la procédure de suivi de la transposition des directives communautaires en droit interne.*

better, as part of the notion that France should play an important but also exemplary role in Europe, which includes the transposition and implementation of the *acquis communautaire*, current developments may be more long lasting.

10.3 Description of judicial instruments and techniques

10.3.1 Instruments

In France, the choice of an instrument to transpose an EU directive is affected by the question whether its contents requires ‘legislative’ or ‘executive’ actions, that is, the introduction of law or government regulations. The State Council determines whether the contents of a directive fits to the ‘legislative’ or ‘executive’ domain in its advice to the government (see also Section 3.4.3). Based on this advice, the preparation of draft measures to transpose a directive can be started. Clearly, France does not have an integrated vision on the transposition of directives. It does not use, for example, a typology of directives. The legal instruments used in France in order to transpose directives are:

- law (*loi ordinaire*), based on Article 34 of the constitution, which need to pass Parliament based on a bill (*projet de loi*); this instrument includes the possibility of an omnibus bill (*disposition d’adaptation au droit communautaire* or DDAC), which is equivalent to law, but transposes a number of directives preferably in the same policy area;
- authorization law (*loi d’habilitation*) based on Article 38 of the constitution, which allows the government to transpose of directives by ordinances (*ordonnances*); and
- government regulations (*règlement*), which includes government decrees (*décrets*), ministerial orders (*arrêtés*), and communications (*circulaires*).

These instruments and their main characteristics are summarized in Table 10.1. We will discuss each of these instruments separately.

Law (Loi)

Based on Article 34 of the constitution, Parliament needs to be involved in issues of ‘legislative’ nature. For those issues, a law has to be passed. As indicated, before the start of any transposition process, the State Council has to determine whether an issue is part of the ‘legislative’ or the ‘executive’ domain. If the State Council decides that a directive, or some of its elements, requires the introduction of a new law or the amendment of existing ones, a bill has to be prepared.

The initiative for the making of a new law (*projet de loi*) lies with the line ministries. Depending on the contents of the directive, several line ministries may be involved, each starting preparations for the introduction of new legal measures. Although the government aims for some coordination by having only one ‘lead’ ministry, it is rather common that two and sometimes three ministries jointly have the lead in the preparatory process. After consulting the State Council, the proposal is discussed by the Council of Ministers. With the Council’s approval, the proposal is submitted to parliament for debate. Government bills are debated by both chambers. In each chamber these discussions normally start within the standing committees and are then followed by a discussion at the floor. The discussion results in amendments of the text submitted by the government, which are subsequently sent back and forth between both chambers. The aim of this procedure is to arrive at a common text, which can be approved by both chambers. However, if this is not immediately possible, there is special procedure of conciliation to resolve the differences. If this

procedure fails and both chambers are incapable of adopting the same text, the National Assembly has the last word (Article 45 of the Constitution).

Table 10.1: French legal instruments

	<i>Loi ordinaire</i>	<i>DDAC</i>	<i>Ordonnance</i>	<i>Régulations</i>		
				<i>Décret</i>	<i>Arrêté</i>	<i>Circulaire</i>
	Law	Law with the format of omnibus bill	Ordinance	Government decree	Ministerial order	Communication
Main features	Issues for which the Constitution calls for settlement through law	Transposes a number of directives preferably in one policy area	Government measure with the status of law based on parliamentary authorization (<i>loi d'habilitation</i>)	Provisions issued by government without explicit authorization through law for 'executive' issues, or with authorization for other issues	Provisions issued by the minister without explicit authorization through law for 'executive' issues, or with authorization for other issues	Provisions issued by a minister without explicit authorization through law
Advice State Council	Required	Required	Required	Required	Not required	Not required
Parliamentary approval	Required	Required	'Required', Parliament must approve the ordinances after its adoption	n.a.	n.a.	n.a.
Procedure	Simple majority in Parliament	Simple majority in Parliament	Emergency procedure	Decision by the Council of Ministers on a proposal of a minister		
Remarks			Temporary decree, sometimes used in case of an infraction procedure			As such not sufficient to transpose directives

Omnibus bill (diverses disposition d'adaptation au droit communautaire or DDAC)

This instrument is equivalent to law, and follows the same procedure as a bill. This only difference with a 'normal' bill is that this proposal contains a text that transposes a number of directives. Normally, these directives refer to related policy areas.

The introduction of an omnibus is usually discussed with the presidents of the National Assembly and the Senate in order to see whether the list contains issues that might be politically sensitive. If that is the case, parliament as well as the government prefer to introduce a separate bill for those issues to avoid that the omnibus bill is delayed in the parliamentary process. As indicated, if a bill triggers amendments, it has to go through a lengthy and time consuming negotiations process in which both chambers first try to find some common text, before the National Assembly can make a final decision. Without substantial amendments, the bill can be passed at rather short notice.

Ordinances based on an authorization law (loi d'habilitation)

Based on Article 38 of the Constitution, the government may propose to Parliament the authorization to transpose a number of directives by government ordinances (*ordonnances*) for issues that normally would require the adoption of law. Hence, they contain detailed provisions that fall within the scope of the

legislative purview of the Parliament. The authorization, however, is limited in time. Moreover, the ordinances need to be ratified by Parliament in a ‘yes-no’ vote. Since these ordinances have the status of law, they can only be changed by law (or a new authorization law that again provides government this authority).

In general, parliament only prefers the use of ordinances in rather exceptional circumstances. The main disadvantage of this instrument is that parliament no longer has the possibility of amendment. Once the government has adopted an ordinance, parliament only has the possibility to approve or reject the measure.

The use of authorization law is a derogative and exceptional procedure which allows for an expeditious way of dealing with a subset of legal matters that are not overly politically sensitive but represents a part of the transposition backlog. So far, the use of authorization laws as a way to transpose directives is limited to one or two proposals per year. This rather small frequency is not surprising since each authorization law includes a list of directives, especially those which are delayed. Most recently, the government proposed an authorization law in March 2004, which includes 20 different directives.⁸⁵

Government decree (Décret).

Based on Article 37 of the constitution, the government can independently adopt decrees using its executive power. Decrees can also be based on the delegation of authority to government by law. Decrees are not considered by parliament (the possibility of call-back is not used for decrees in France). Proposals for decrees have to be submitted to the State Council, which considers the legal quality of the draft, its consistency with the constitution and other national laws, and its compatibility with EU law.

Ministerial order (Arrêté)

Based on Article 37 and 21 of the constitution, ministers may also issue ministerial orders in order to further develop ‘executive’ issues within their ministerial portfolio. These orders are approved by a minister without the approval of parliament or the Council of Ministers. However, they need an authorization to do so based on a government decree or a law.

10.3.2 Techniques

Mostly, EU directives are transposed into the French legal order using *incorporation* in the system (corpus) of already existing laws (rewording). Copying and transposition through referencing does not occur. Transposition through incorporation is very time-consuming. The existing system and concepts of the French legal order are maintained as much as possible. This sometimes leads to rather peculiar situations. For instance, as one official commented, it is not customary in France to include definitions in a legal text.⁸⁶ For more recent directives, which start by defining the most important concepts, these definitions are not included in the French text. In addition, if a directive is transposed through law, the introduction of a new bill is often used to add elements of national policy, which are not necessary. These new elements may trigger additional discussion, which could cause delay.

France also uses two other techniques:

⁸⁵ *Loi n° 2004-237 du 18 mars 2004 portant habilitation du Gouvernement à transposer, par ordonnance, des directives communautaires et à mettre en oeuvre certaines dispositions du droit communautaire, JORF 19 Mardi 2004.* This law delegates the government to transpose 20 directives, which contain ‘legislative’ issues, by ordinance.

⁸⁶ A problem already identified in the 1990 communication of Prime Minister Rocard.

1. the introduction of an omnibus bill (*DDAC*), which transposes a number of directives, and
2. transposition through the passing of a law (*loi d'habilitation*) delegating the government to pass measures (ordinances) to transpose a number of directives.

10.3.3 Character and level of implementing measure

In France, there is little information available concerning the use of these instruments in transposing directives. The SGCI and the various line ministries keep track of the directives that still need to be transposed. The moment this has been achieved, the information about the transposed directives is no longer preserved. The general perception is that about 40% of the instruments used to transpose directives are laws (including *DDAC* and ordinances). About 60% are government decrees and ministerial orders. Here it is important to point out that some directives may require both the introduction of a law and decrees since they cover both 'legislative' and 'executive' issues. Furthermore, based on the existing French legal system, the transposition of a directive may require the change of several instruments due to the hierarchical specification of legal norms. A directive may require a change in law, government decrees and ministerial orders since it introduces general legislative principles next to executive principles, which both have to be further specified by additional decrees or ministerial orders.

The latter is often referred to as the cascade-model, which is typical for French law. The legal system is regarded as a hierarchical system of norms in which similar but new norms need to be specified in the same way as already existing ones. This way of categorizing legal norms may contribute to coherence, but is, at the same time, rather time consuming.

10.3.4 Specific instruments

In addition to the 'regular' legal instruments mentioned in Section 10.3.1 no other specific instruments are used in France.

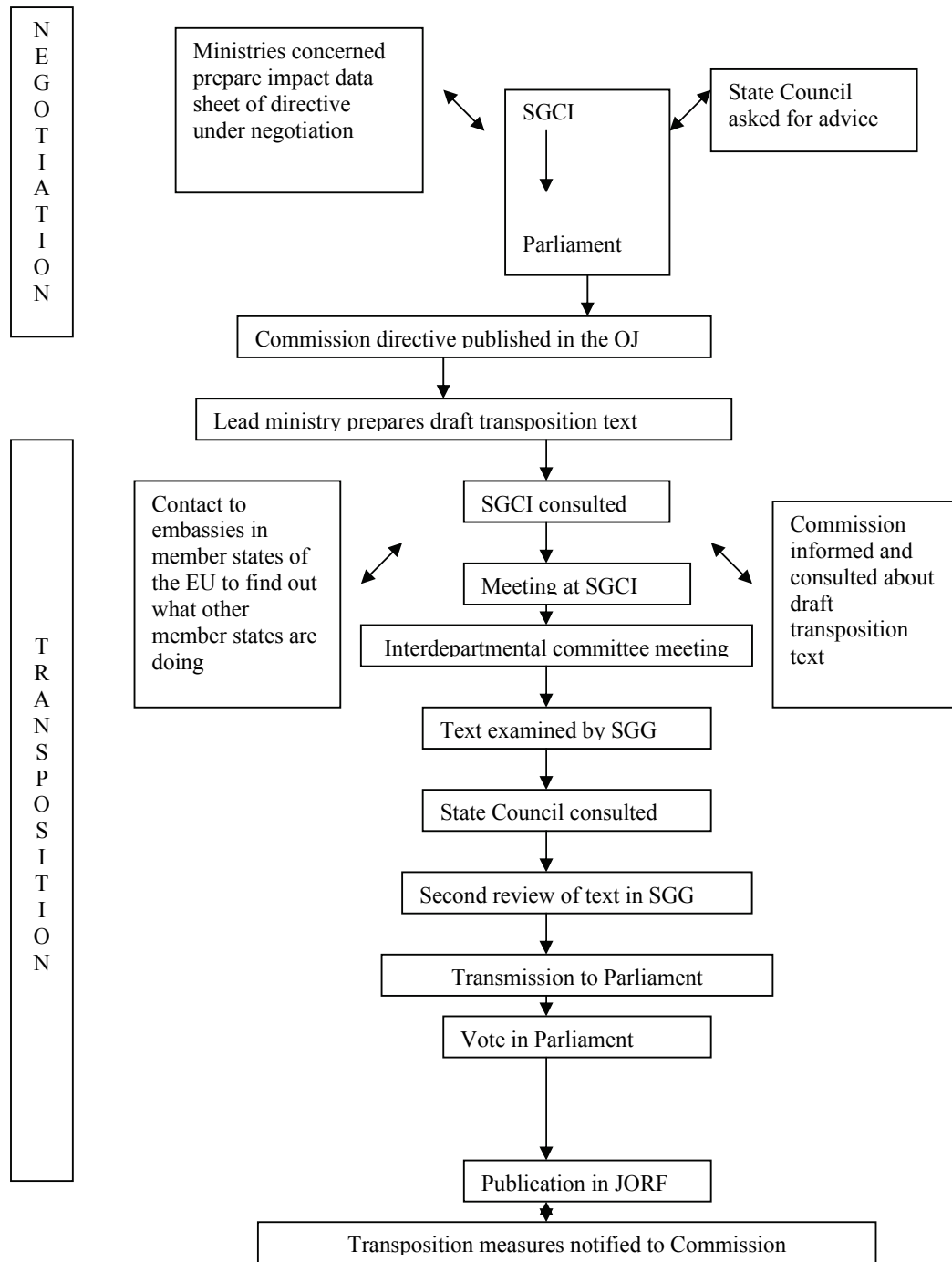
10.4 The national policy cycle concerning directives

10.4.1 General overview of the process

In the French EU policy cycle, the central government takes the lead. The general coordination on EU policy is in the hands of the *Secrétariat Général du Comité Interministériel pour les questions de coopération économique européenne* (SGCI), which is one of the interdepartmental coordination units under the supervision of the Prime Minister.⁸⁷ The SGCI is responsible for European Affairs, while other units focus on different issues. The SGCI has a staff of about 180 persons. The desire of successive presidents to influence European issues has meant that the President has paid close attention to the organization and work of the SGCI. On occasions the head of the SGCI '...has been a personal friend and collaborator of the President' (Elgie, 2003: 111-2). At the same time, since 1958 the Secretary General of the SGCI has always been the personal adviser for European affairs of the Prime Minister.

⁸⁷ Such as the *comité interministériel pour la société de l'information* or the *comité interministériel sur la sécurité routière*.

Figure 10.1: Transposition of EU Texts into National Law under Circular 27 September 2004



Source: Based on Sauron (2000: 135).

With regard to transposition, another coordination unit is also important, the *Secrétariat Général du Gouvernement* (SGG). The SGG is in charge of the coordination of the making of law and government decrees in the administration. It is an administrative partner of the Prime Minister's cabinet. With regard to both the preparation of the French position on new Commission initiatives and the transposition of adopted directives, SGCI and SGG have to work together as their responsibilities overlap. While SGCI is functionally involved with European issues, SGG manages, among others, the national measures to transpose EU directives into the French legal order.

This 'dual' responsibility for EU directives translates into an additional coordination structure that has been recently installed as part of the Prime Minister's communication on transposition: the interdepartmental committee. It is a network of about 20 people—*les hauts fonctionnaires de transposition*, i.e. civil servants including the legal directors and the secretary generals of the ministries, representatives from the SGG and the SGCI.

Finally, within the Ministry of Foreign Affairs there is a special post of the Junior Minister for European Affairs (*Ministre Délégué aux Affaires Européennes*). This minister and her supporting unit are responsible for the horizontal coordination of French policy-making in the EU has, however, little power in the transposition process whatsoever.

The French coordination of the policy process concerning EU directives can be briefly characterized as a rather formalized process, which is coordinated by several bodies: although the SGCI takes the lead in coordinating the French position on new Commission initiatives, SGG is involved since new Commission proposals may have consequences for the French legal order. At the stage of transposition, the responsibilities of SGCI and SGG become even more interconnected. Furthermore, the Junior Minister for European Affairs within the Ministry of Foreign Affairs seems to have taken responsibility in presenting overviews of the progress in transposition to the line ministries. Finally, the recently installed interdepartmental committee, which meets once per two to three months, brings together these different actors as well as the line ministries. Figure 10.1 presents an overview of the French policy process concerning directives.

10.4.1.1 National preparation of Commission initiatives

There is hardly any systematic and early discussion of Commission initiatives in the French political and administrative system. The SGCI, with the help of the Permanent Representation, keeps itself informed about major Commission initiatives. This may lead to the presentation of important Commission papers to the administration and sometimes Parliament. However, there is no systematic way in which information on (all) forthcoming Commission proposals is collected and channeled through the French administration.

10.4.1.2 National treatment of Commission proposals

In the negotiation phase in Brussels, the SGCI is the supreme coordinating authority. Under Article 88-4 of the French Constitution, the SGCI receives draft texts of Commission measures from the Permanent Representation in Brussels. When agreement on the French position is reached, the SGCI communicates the position to the Permanent Representation. Line ministries or bodies such as the SGG do not formally communicate with the Permanent Representation. All correspondence is sent by the SGCI. The cooperation between the Permanent Representation and the SGCI includes the 'drafting of alternative proposals for the negotiations as part of the Council working parties, additional expert advice from the line ministries on

technical matters, and legal advice on some of the proposals' (Sauron, 2000: 88-89). In this way, the SGCI functions as the linking pin between the national administration and the negotiations in Brussels, maintaining consistency in the French position throughout the EU legislative process.

After receiving the draft texts of Commission measures from the Permanent Representation, the SGCI sends these proposals immediately to the State Council and the SGG. The State Council has to determine the legislative or executive nature of these drafts. It has seven working days from receipt to inform the SGCI and the SGG of its findings. The determination of the boundary between legislative and executive contents often causes agitated discussions in the State Council, since the reasons to classify an issue as 'legislative' or 'executive' are not fixed and may differ per policy area. The distribution of fire arms is, for instance, covered by a law from 1936 which indicates that it falls under 'executive'.

The SGCI's role in the negotiation phase is to achieve the coordination of the French position on the proposal among the various ministries involved. The SGCI selects the line ministries and starts discussions in ad hoc committees typically at middle-management/expert levels which are formed for each Commission proposal. In these discussions, the SGCI plays an important role in shaping the French position by raising questions above and beyond what Ministries will suggest as possible positions and by balancing a range of conflicting arguments in order to achieve a consensus is the SGCI primary goal at this stage. If needed, key issues may be brought to the attention of the Ministers' advisers and Prime Minister's advisers for 'political' arbitration. The most affected line ministry will act as the 'leading' ministry in the process, but often this includes two or sometimes three different ministries. The leading ministry (or ministries) sends its opinion on the principles of subsidiarity and proportionality (if they apply) to the SGCI. Within one month after dispatch of the draft measure to the lead ministry, the latter prepares an assessment of the implications of the proposal and how it will affect French law. The results of this assessment together with other key data on the proposal are organized as an impact data sheet (*fiche d'impact*).⁸⁸ This data sheet identifies the difficulties with the proposal including those related to the transposition of the current proposal into national law. If the assessment suggests that the proposal may raise important transposition problems, the SGCI seeks advice from the State Council.

Hence, in the early stages of the negotiation, the French representatives to the working groups of the Council are often not fully equipped with the detailed legal impact assessment of the Commission's proposal or of possible amendments.

Within 24 hours of receiving the advice of the State Council, the SGG sends to the presidents of each chamber of parliament the draft text of the Commission proposal which has provisions of a legislative nature, together with the opinion of the State Council. Parliament lists these proposals in the parliamentary information bulletin (Sauron, 2000: 110). After being informed by the SGG, the SGCI also distributes to the EU select committees of the two chambers of Parliament the opinions of the State Council on those drafts which do not contain provisions of a legislative nature.

A reduced version of the impact data sheet or *fiche* is sent to Parliament for those proposals that were labeled as *législative*. During the negotiations in Brussels start, the SGCI checks whether Parliament has indicated an intention to adopt a position on a proposal based on the *fiche*. The National Assembly and the Senate, however, have to adopt an opinion if the Commission's proposal falls under Article 88-4 of the French Constitution. Otherwise, it does not have a compulsory mandate. In general, Parliament 'rarely'

discusses new Commission proposals based on the fiches. If Parliament, however, has indicated its intention to adopt a position on the proposal but fails to react while agreement of a proposal by the Council of Ministers is expected (6 weeks according to the Treaty of Amsterdam), the minister responsible for the negotiations or the Junior Minister for European Affairs can ask Parliament to accelerate their examination.

During the negotiations in Brussels, the impact data sheet may need to be updated, especially if the Commission proposal is substantially amended by the member states during the negotiations in the Council working parties. This update, however, is not systematically pursued. The updates in quality and never include any financial assessment at the negotiation stage.

10.4.1.3 National transposition

Until 1986 there had not been a central mechanism for coordinating the transposition of EU directives in France. In his 1986 communication Prime Minister Rocard transferred this additional task to the SGCI and the SGG which made the coordination between these two institutions crucial for swift transposition.⁸⁹ This coordination of the transposition process was fine tuned in the subsequent communications of the Prime Ministers Rocard (1990), Jospin (1998) and Raffarin (2004) and is summarized in Table 10.2.⁹⁰

The preparations for transposition normally start after the agreement on a new measure by the EU and its publication in the Official Journal. The SGCI allocates the task of transposing the directive to the ministries which have already participated in shaping the French position. Again preferably one, but often several ministries have the lead in this process of preparing legal measures reducing the autonomy of the lead ministry. The leading ministry, other relevant line ministries and the SGG are informed about the proposal. The leading ministry, and possibly some of the other line ministries affected by the directive, start preparing the measures to transpose the directive. The way in which the various ministries handle transposition varies, however, and is not based on similar rules of procedure. As Sauron (2000: 138) indicates ‘no ministry has a central structure with the task of ensuring the sound integration of EU law into the positions adopted by the ministry, and attempting to prevent legal disputes arising’. In practice, ministries have not reviewed their structures with the demands of EU work in mind, but rather they have been concerned not to disturb the internal administrative balance between the old central directorates. This runs counter to the earlier communications of the prime minister of 9 November 1998 and 27 September 2004, which state that ‘the central administration should include a clearly identifiable structure, specifically responsible for overseeing transposition in all the areas for which the ministry is responsible.’ As the communications indicate, ‘this role may, for example, be given to the directorate responsible for legal affairs or for international affairs.’ However, most ministries do not have a legal affairs unit at the level of a directorate or as a staff unit of the minister. The only exceptions seem to be the ministries of Foreign Affairs, Defense, and Economy and

⁸⁸ The impact data sheet as used within the administration is sometimes more detailed than the one sent to Parliament.

⁸⁹ *Circulaire du 23 janvier 1986 relative a la procédure de suivi de la transposition des directives communautaires en droit interne*.

⁹⁰ *Circulaire du 25 janvier 1990 relative a la procédure de suivi de la transposition des directives communautaires en droit interne ; Cirulaire du 9 novembre 1998 relative a la procédure de suivi de la transposition des directives communautaires en droit interne ; Circulaire du 27 septembre 2004 relative a la procédure de transposition en droit interne des directives et décisions-cadres négociées dans le cadre des institutions européennes.*

Finances (see also Sauron, 2000: 140-1) and Agriculture, National Education and the Interior, traditionally having *direction des libertés publiques et des affaires juridiques* which comes close to legal affairs units.

The SGCI also informs the Junior Minister for European Affairs or the responsible minister about how the possible resolutions of the parliament were taken into account during the negotiations, if the proposal, or parts of it, were labeled as ‘legislative’.

Table 10.2: Main stages and average time frame for transposing EU directives in France: laws, government decrees and ministerial orders

Stage	Actor	average duration	law	decree	order
1	Allocation of administrative responsibility	SGCI	•	•	•
2	Preparation of draft text	Lead ministry	•	•	•
3	Comments on draft text	Other ministries interested	•	•	•
4	Discussion of draft text	Interdepartmental meeting	•	•	•
5	Distribution of text	SGG	•	•	•
6	Advice on delicate legal issues	State Council	•	•	•
7	Examination of text in SGG	SGG	•	•	•
8	Parliamentary review and approval	Committees in National Assembly and Senat	•		
9	Consultation with interest groups	Interest groups and compulsory advisory bodies	•	•	
10	Check by interested ministries	Ministries			•
11	Compulsory rule to inform the cabinet about a ministerial decree	Cabinet			•
12	Reinforcement	President of the Republic	•	•	•
13	Forwarding of legislative text for publication		•	•	•

Then, regular meetings at the SGCI allow for interdepartmental discussion, coordination and approval of the proposals prepared by the ministries. The ministries must draw up a time-table for the transposition process within *3 months*. In choosing the ‘type of legal instrument that will be appropriate for the transposition of the directive’, the lead ministry must take into account the opinion of the State Council—which was presented at the beginning of the negotiation process—if the directive is one of those on which it has been consulted under the procedure laid down in the communication of 21 April 1993 on the application of article 88-4 of the Constitution. If there is persistent disagreement on such measures, the prime minister can be asked to resolve the dispute.

Two activities come together at this point: (1) the impact data sheet, prepared at the start of negotiation and containing detailed information on how the new directive affects French law and which legal instruments need to be adapted or added in order to comply with the obligations based on the new measure; (2) the implementation table to be prepared during the transposition process by the SGCI and the Junior Minister for European Affairs, i.e. the impact data sheet is reworked into an implementation plan for the stage of transposition in which the text becomes more elaborated and precise (Sauron, 2000: 136). The circular of 9 November 1998 introduced the procedure according to which the SGCI sends a list of all pending directives directly to the SGG every six months. The SGG should ‘...draw it to the attention of the relevant members of the Prime Minister’s cabinet, and to the director of the cabinet of each minister and junior minister concerned.’ The SGCI attends the regular meetings with the directors of the cabinets of all ministers to agree on their work programs (including the transposition of directives) organized by the SGG. During these meetings SGCI brings transposition deadlines to the attention of the cabinets and may resolve some of the

difficulties. If there are disagreements between ministries, the Prime Minister's cabinet can be asked to intervene, and the SGG will arrange a meeting.

It is the responsibility of the SGG to send the drafts of the most important national legislative texts to the appropriate administrative sections of the State Council. In practice the State Council considers all laws and regulations before they reach the agenda of the French Cabinet, and also about half of all regulatory decrees before they are published (Sauron, 2000: 139). Because of the missing experience and lack of legal services, Sauron argues that the quality of work of ministries differs considerably. Whereas the drafting quality of the big, old, traditional ministries like justice, economics and finances and foreign affairs is high, the drafting quality of the rather new, inexperienced and smaller ministries is low (environment). Advice is given in the form of a new draft text based on the draft prepared by the government and a note explaining briefly the reasons for any disagreement with the text originally proposed. The government, then, has to choose between its initial text and that of the State Council. The SGG has to be particularly careful to take account of the advice when it has concluded that a proposed legal provision is unconstitutional or that a provision within a decree is contrary to a law. Normally, the advice is followed, fearing otherwise that the text will subsequently be rejected or annulled either by the State Council judicial sections or by the Constitutional Court.

The circular of 27 September 2004 results in a new simplified structure for the set-up of the impact data sheet. In order to speed up the delivery of the study, they are directly sent to parliament. The SGCI, then circulates it to the other ministries involved which have 2 weeks to react. Then, there is a meeting of representatives of ministry of lower-level (international and European affairs civil servants in each ministry) conducting a provisional and conservative assessment. In the past the SGCI was very conservative in these meetings, addressing only those questions asked by the ministries themselves. Then, on the Cabinet-level the instruments are discussed in several rounds and more political issues are addressed.

Then, normally, the SGG sends the draft text to the Parliament which has to vote in both chambers in favor, first, in the permanent committee under which supervision the text fall and then in the full plenary. Here, the consultation with interest groups and compulsory advisory bodies is important and time-consuming. Although hearings and consultations of advisory bodies and interest groups cannot change any text of the national legislation, they are compulsory and cause considerable delay: *3 to 6 months* (Philip, 2004).

Moreover, the compulsory rules to inform the cabinet of the Prime Minister about a ministerial decree before it can be published in the Official Journal causes additional delays between *several hours and up to 2 to 4 months*.

Once it has been finally adopted, the Act of Parliament is transmitted to the Government. The President of the Republic promulgates the Act within fifteen days of its transmittal. Before this period has expired the President may still ask Parliament to reconsider the Act or some of its provisions. Lastly, an Act of Parliament may be referred to the Constitutional Council, before promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty deputies or sixty senators. Any statute or statutory provision, found unconstitutional cannot be promulgated or implemented.

The transposition process in France may also involve the consultation of French representations in the other member states to find out how they transpose the directive, and if there have been any difficulties they have encountered (Sauron, 2000: 136). Such enquiries yield information on the legal position in the other

member states, and thus enable the transposition in France. It takes this information into account and avoids putting national operators at a disadvantage by comparison with their competitors. This procedure may be preceded by consultation with the Commission, either on a voluntary basis, or as a requirement of the EU text. In these cases the relevant DG of the Commission is asked for advice on the text of the draft national law.

10.4.2 Bureaucratic consultative and coordinating bodies

The main administrative consultative and coordinating bodies in the French administration on EU law are:

- the *Secrétariat Général du Comité Interministériel* (SGCI), which coordinates the preparation of the French position during the negotiations in Brussels and the transposition of directives in the French administration;
- the *Secrétariat Général du Gouvernement* (SGG), which is the general coordinating body with regard to the making of law and government decrees;
- the interdepartmental committee on transposition (*réseau interministériel des correspondants de la transposition*), which has been recently installed based on the 2004 communication of Prime Minister Raffarin; and
- the Junior Minister for European Affairs, who plays a role in the monitoring of the progress in transposition and supervises whether the line ministries keep to the time-tables made at the beginning of the transposition process. He also cooperates with the SGCI on the preparation of the overviews on a quarterly basis which are used in the interdepartmental committee on transposition and eventually the Council of Ministers for ‘naming and shaming’ the laggards.

The most important body with regard to the preparation and the implementation of EU policy is SGCI in collaboration with the SGG. SGCI is an administrative unit under the prime minister without much political authority, whereas the SGG is the administrative arm of the Prime Minister. Coordination of these two institutions is important for successful transposition of EU law. The SGCI arranges meetings with each ministry two or three times a year to review the progress in transposition of each directive. At these meetings line ministries are asked to commit themselves to a precise time table for transposition. The SGG scrutinize and delivers draft text back and forth to the State Council and the Parliament.

Since 1993 the SGCI maintains an overview of all directives requiring transposition (implementation table). Regularly updated, this overview allows SGCI to check whether line ministries are respecting the time-table for transposition envisaged in each directive. This data-base also provides information on how the workload associated with transposition is divided between areas in which parliamentary law is required and those in which governmental regulations will suffice.

Based on the recent communication of Prime Minister Raffarin, a new interdepartmental coordination body is installed in 27 November 2004 in order to improve the coordination and France performance on transposition.⁹¹ It consists of an informal group of about 20 people, the *hauts fonctionnaires de transposition*, i.e. senior managers (either the legal director of the Secretary General of the Ministry, the Secretary General of the SGG and the Secretary General of the SGCI joined by some personal advisers to key Ministers).

⁹¹ *Circulaire du 27 septembre 2004 relative à la procédure de transposition en droit interne des directives et décisions-cadres négociées dans le cadre des institutions européennes, JORF 2004 2 octobre 2004.*

Stressing that every member of government to be responsible for their deficit as from that date⁹² the interdepartmental committee on transposition is in charge of the preparation of transposition. Its members are of the line ministries and of the political cabinets of each minister. The committee is jointly chaired by the SGCI and the SGG. The committee supervises the implementation of EU legislation by regularly discussing detailed overviews on the progress of transposition. It aims to ‘coordinate’ the coordinators as well as motivate the line ministries in making progress. The relative autonomy of the line ministries, the existence of several coordinating bodies, the infrequent meetings of the overarching interdepartmental coordination committee, and perhaps the still insufficient political backing for introducing more substantial changes within the administration, makes the French coordination structure on transposition rather weak.

Based on one of these reports presented in the transposition interdepartmental committee by the Junior Minister for European Affairs, there are rather substantial differences in the performance of individual ministries. Whereas the ministry for Agriculture handles transposition quite efficiently, traditionally autonomous ministries, such as the ministries of Finances and Economic Affairs lag behind. Based on a recent overview 83 directives⁹³ were not transposed on time. They were distributed over the various line ministries as follows:

- Economy, Finance and Industry: 28 directives
- Environment: 13 directives
- Agriculture: 9 directives,
- Health and Family: 9 directives,
- Transport and Tourism: 9 directives
- Justice: 7 directives,
- Education and research: 3 directives,
- Interior and Security: 2 directives,
- Employment and Social Cohesion: 2 directives,
- Culture and Communication: 1 directive

So far the committee has met three times, suggesting that it meets once per two to three months. The last three meetings could identify 14 directives whose transposition problematic was resolved immediately.

10.4.3 The role of compulsory advisory bodies

Three compulsory advisory bodies can be identified in the French transposition process: the State Council, interest groups and the Economic and Social Affairs Council. One of the standard and traditional procedures within the French administration is the consultation of the ‘chronically work-overloaded’ State Council by the SGG on legislative proposals while they are in preparation. There are two options of action: First, the State Council concentrates on determining whether the text will require legislative action or can be dealt with by government regulation. And second, the State Council gives its opinion in a very short space of time, eight days on average (Sauron, 2000: 120). Moreover, an emergency procedure has been established to respond very rapidly to the SGG and the SGCI when the latter indicates that a decision by the EU Council of Ministers is imminent. It is the responsibility of the SGG to send the drafts of the all national legislative texts to the appropriate administrative sections of the State Council. In practice the State Council considers all

⁹² Already mentioned in the circular by Michel Rocard from 1990.

laws and regulations, before they reach the agenda of the French Cabinet, and also about half of all regulatory decrees before they are published.

Although hearings and consultations of interest groups cannot change any text of the national legislation, they are compulsory and cause considerable delays (especially relevant in the field of health and environment). According to Philip (2004) these delays are on average between 3 to 6 months. Philip argues that it would be preferable to have consultations with interest groups during the negotiation phase and not afterwards. First these interventions come too late and could be held earlier during the preparation of the national negotiation position. Second, the institutionalized meetings often cause delay due to their low frequency. The *Commission spéciale des installations nucléaires de base secrètes* and the *Agence française de sécurité sanitaire des aliments*, for example, meet only once a year. The committee of public health meets every three months.

The Economic and Social Council is a consultative assembly. It does not play a role in the adoption of statutes and regulations, but advises the lawmaking bodies on questions of social and economic policies. The executive may refer any question or proposal of social or economic importance to the Economic and Social Council. Before adopting statutes, Parliament may consult the Economic and Social Council; this body, comprising the whole range of the country's economic and social forces, is regularly entrusted with studies on the major economic and social issues affecting the life of the nation. According to Articles 69-71, the Economic and Social Council, on a reference from the Government, gives its opinion on such government bills, draft ordinances or decrees, and Members' bills as have been submitted to it. A member of the Economic and Social Council may be designated by the Council to present, to the parliamentary assemblies, the opinion of the Council on such bills or drafts as have been submitted to it. The Economic and Social Council may likewise be consulted by the Government on any economic or social issue. Any plan or program bill of an economic or social character shall be submitted to it for its opinion.

10.4.4 The role of parliament

The French Parliament has hardly any influence in the bargaining phase whereas during the transposition process it can delay the process considerably. Still during the bargaining process in Brussels, the French Parliament is immediately informed via a *fiche* of new Commission proposals. The items on the French fiches are presented in Table 10.3. Next to information about the background and legal base of the Commission proposal, the *fiche* includes an assessment of the impact of the proposal on the French legal order, the relevance of the proposal to France and the initial position of the government, based on the discussions between the line ministries and the SGCI, on the proposal.

The *fiche* sent to parliament is based on the impact data sheet, which is made to assess how the proposal affects the French legal order. Parliament only receives fiches for proposals with 'legislative' content. The impact data sheet is primarily an administrative instrument, which is the basis of the less detailed and more concentrated *fiche*. The quality of the fiches, and the underlying impact assessments, however, varies considerably and is sometimes not reliable. Moreover, they do not include any assessment of financial and administrative issues related to the proposal. Apparently, members of Parliament hardly use the fiches to prepare their opinion on the new Commission initiatives. Instead, they meet with representatives from the

⁹³ *Communication de Mme Claudie Haigneré, Ministre déléguée aux Affaires européennes sur la transposition des directives.*

SGCI and the ministries concerned in order to make their recommendation and stay in regular contact with the attachés of the National Assembly and Senate at the Permanent Representation of France in Brussels.

Since 2003 the government aims to intensify the debate in the preparation phase with the help of monthly consultations with the parliament. Parliament can discuss with the government the French position during the negotiations, but parliament cannot impose its will on the government, or presents the government with a mandate for the negotiations.

Table 10.3: Contents of French fiches

1	<i>resumé</i> of content, background and objectives
2	judicial base
3	assessment of proposed legislation
4	special France's interest in the proposal
5	position of the government

The government has to comply with a period of one month in which parliament has the chance to present its position, before taking its final bargaining position in the European Council. The Delegation on European Affairs has 6 weeks to draft recommendations on the report sent to parliament by the SGG. The latter sends the comments as soon as possible to the SGCI, which on its turn has to ask Parliament to present a report. During this period, the French delegation negotiation a proposal has to ask for a scrutiny reservation until the recommendation of Parliament is available. If the Parliament's deadline to adopt an opinion passes the parliamentary reserve is lifted because its lack of action.

During the transposition phase, in most cases bills are transmitted by the SGG for consideration to the Parliament. A rapporteur is appointed and after studying the bill presents a draft report or opinion. Bills are included on the Assembly's agenda by the Chairmen's Conference, which meets each week under the chairmanship of the President of the Assembly. Its other members are the Vice-Presidents, the chairmen of standing committees, the general rapporteur of the Finance Committee, the chairman of the Delegation for the European Union, the chairmen of political groups and a representative of the Government. The Chairmen's Conference determines the agenda for the following three weeks. Precedence is given to discussing bills in the order determined by the Government. The Constitutional Act of 4 August 1995 specifies, however, that precedence is given at one sitting per month to business determined by the Assembly; by a resolution carried in March 1998 the Chairmen's Conference may determine how the items remaining on this agenda are to be debated.

After debating the committee adopts the report recommending either adoption of the bill or rejection. Government bills are debated on the basis of the text proposed by government. After closure of the general debate, the bill is considered clause by clause. On each clause, any amendments are first debated and voted upon, and then the clause itself, when all clauses have been considered in turn, the chairman puts the entire bill to vote. Consideration of a bill on the floor of the Assembly may also be dealt with more rapidly. Changes made in the Assembly's rules of procedure in March 1998 introduced the simplified examination procedure. Before it is finally adopted by Parliament, a bill must be passed in identical terms by both assemblies. If the Senate amends a bill brought from the Assembly, the Assembly has to reconsider the clause amended (*'navette'*). This shuttle procedure can take up to 3-4 months.

10.4.5 The role of other, subnational or functional governments

Subnational governments do not play a role in the process of transposition. Transposition in France is an activity in the line ministries of the central government. Since France does not have functional governments, they do not play a role either.

10.4.6 The role of interest groups

The interest groups are normally consulted by the lead ministry, i.e. relevant lobby groups, unions, employees- and employers organizations (*partenaires sociales*) and the plenary sessions. However, their opinions are not binding on the government. New text proposals cannot be considered. This is extremely frustrating for all affected and, moreover, cause considerable delays (3 to 6 months according to Philip, 2004).

10.5 Analysis of instruments

10.5.1 Advantages and disadvantages of instruments

Timeliness. The rather slow and often late transposition of EU directives in France is not a direct result of the lacking of special legal instruments, which may increase the speed of the transposition process. Although a substantial number of directives are transposed through lower-level instruments, that is, government decrees and ministerial orders, two possibilities exist to adopt legislative measure at rather short notice. These possibilities are:

- an authorization law (*loi d'habilitation*), which provides the government with the authority to adopt ordinances. This instrument helps since it bypasses a lengthy political debate in both chambers of Parliament and the shuttling of a proposal back and forth between the National Assembly and the Senate. An ordinance only needs to be approved by Parliament in a yes-no vote, without the possibility of amendment. In 2000 50 directives were transposed using this instrument, in 2004 an authorization law was approved for the transposition of 23 directives. For important political issues like telecommunication and transport the government prefers to use ordinances;
- a package law (*DDAC*), which includes the legislative measures transposing of a number of directives. The use of a package law helps to coordinate the order of the day in the parliament. Whereas the National Assembly could be monthly convened to vote on legislative measures to transpose EU law, the *DDAC* procedure accommodates the parliament's organization of the hearing plan. Twice a month for half a day the parliament has reserved time to examine package laws, which helps to speed up the parliamentary procedure to adopt a new law. In contrast to ordinances, the package law follows the normal parliamentary procedure, which also means that members of parliament may propose amendments. The package laws are mostly reserved for politically non-controversial and often technical directives. In the last couple of years about three package laws have been introduced per year.

Interestingly, ministerial orders are often adopted at a very late moment despite the fact that the preparatory procedure is rather straightforward. Often the delay is caused by the obligatory consultations with stakeholders, which is based on the specific, national law regulating a policy area. Based on these provisions, the independent consultative bodies have to review proposed measures. The ministry or the government cannot impose any pressure on them resulting into a rather uncontrollable delay in transposition.

Completeness. In France the completeness of transposition (that is, are all elements from the directive included in the national legal instrument) is not associated with specific instruments. At the same time, ministers decide how many different ministerial orders they want to adopt in order to fully transpose. Since these decisions are no further assessed, there may exist some omissions.

Clarity for those involved and practicability. As such the adoption of specific instruments does not have so much an impact on the clarity of the rules to executive agencies and courts. The use of several government decrees and ministerial orders to transpose a directive is intended to place those elements of a directive there where similar national rules are located. It therefore intends to improve the clarity of the French legal system. It is difficult to assess whether these intentions have the desired effect.

Flexibility. When introducing a new directive amending a previous directive in the same field, the use of government decrees and ministerial orders provide for more flexibility in the sense of being able to change existing rules at, in principle, rather short notice (except when extensive consultations with institutionalized stakeholders are required). As indicated, the procedure of introducing new law requires more time, which reduces flexibility.

Ordinances do not lead to more flexibility the moment these rules need to be: the initial delegation of lawmaking power to the government applies only for a number of specific directives. The moment one of these directives is amended, the amendments need to be introduced by law if they involve ‘legislative’ issues. In other words, the flexibility of ordinances is, with regard to ‘legislative’ issues, the same as law.

Systemic purity of the legal system. Maintaining systemic purity is not so much related to the use of the different legal instruments. It is more related to the French method of extensively re-writing the text of a directive (See Section 10.5.2).

10.5.2 Advantages and disadvantages of techniques

The techniques and methods of transposition in France are best characterized as extensively re-writing the text of a directive in order to introduce it as closely as possible to existing French law. Sometimes re-writing leads to a complete overhaul of the text with the risk that its meaning is affected. Furthermore, the new rules included in the directive are located there where similar French national rules are found. This mostly requires the adoption of several legal instruments, including government decrees and ministerial orders. In addition and due to the existence of linkages between different laws or regulations, additional decrees and/or ministerial orders need to be adapted. This ‘snowball’ effect in changing French law is often referred to as cascade. A large number of new measures may originate from the introduction of only one new directive.

By re-writing the text of the directive and introducing it there where it best fits to existing French law has the advantage of preserving the consistency of the French legal order. The disadvantage of this method is, is that the contents or the intentions of a directive may change in the process of transposition. Moreover, it also comes at the expense of extensive and foremost time consuming work, including the adoption of multiple legal measures per directives, which contributes to the slow speed of transposition.

As some observers have indicated, the French tradition does not include definitions of key concepts in a legal text, which causes problems when directives include rather precise and detailed definitions of the main concepts used in the directive. This has led to a greater awareness to comment on the text of a proposal for a directive at the stage of the negotiations in Brussels. The impact data sheet, which is made the moment a new Commission proposal is released, needs to pay attention to these complications. Moreover, the advice of the

State Council at this stage could also be used in order to renegotiate the text of the proposed directive. This may speed up the subsequent process of transposition.

Since other techniques are rarely used in France, they are not included in our assessment.

10.6 Analysis of national policy process

The coordination of the preparation of the French position in Brussels as well as the transposition of EU directives is in the hands of the SGCI in cooperation with the SGG.

At the start of the preparations for the negotiations, the State Council prepares an advice on whether the proposal contains ‘legislative’ and/or ‘executive’ issues. This distinction is important to the procedure that will be followed, that is, whether or not parliament needs to be involved in the discussion on the directive. If directives refer to ‘executive’ issues, parliament does not play a role in the shaping of the French position. If a proposal contains ‘legislative’ issues, Parliament may issue a recommendation to the government, which may affect the French position.

The line ministries have to assess the Commission proposal, which results into an impact data sheet (*fiche d’impact*). However, the quality of these assessments varies. Moreover, these assessments are not always made, or not on time. As Philip (2004: 52) shows, from the 47 proposals sent to the National Assembly between 1 September 2003 and 18 June 2004 only 26 proposals included an impact assessment. From January 2002 on the line ministries are obliged to make these assessments within three weeks after the release of the new Commission proposal. Here several problems within the French administration become appeared:

- ministries are rather autonomous in France and often there are several ministries that are ‘leading’ in the process of preparing (and later transposing) Commission proposals;
- the organization of legal expertise varies substantially within the ministries. Moreover, there is sometimes a lack of a central juridical service which could support or monitor the legal work.

These problems are also present at the stage of transposition. Moreover, the civil servants in charge of the negotiations are hardly involved in the preparation of the legal measures. When finished, the transposition is moved to another unit within the ministry. Moreover, there exists the impression that the French administration hardly consults the European Commission in relation to transposition, while consultations could help to identify and solve problems.

More in general, the transposition process in France is complicated and therefore often delayed due to a number of reasons, which all seem to be mutually dependent:

- the substantial autonomy of the line ministries and the fact that sometimes several line ministries take the ‘lead’ in the preparatory and transposition process⁹⁴;
- the rather unsystematic way in which legal expertise is organized within the line ministries;
- the excessive consultations with stakeholders based on French national law at the stage of transposition;
- the existence of different priorities within the administration, which do not always provide high priority to transposition, or lead to the inclusion of additional unrelated issues in a legislative proposal that could delay the process due to extensive parliamentary discussion;

⁹⁴ In the cases of directives 2000/53 and 2003/17 two ministries were about taking the lead in the transposition process. Being asked Philip, ‘who is in charge of the transposition process?’, none of these ministries seemed to take the leading part which does not facilitate swift transposition (Philip, 2004: 52).

- the involvement of different coordinating bodies, like SGCI and SGG, which may have different priorities in the process of passing legal measures through the Council of Ministers and, in the case of law, through Parliament. Furthermore, both SGCI as well as SGG organizes *ad hoc* meetings with the line ministries to monitor the progress of work. These meetings are often ‘*doublées pour être suivies d’effets*’ (Philip, 2004: 62), which reduces the effectiveness of coordination;
- the limited political power of the junior minister for EU Affairs, who is involved in monitoring the progress on transposition and reports to the Council of Ministers. This minister is not in the position to stand up against the line ministries (or their ministers);
- limited involvement of Parliament at the negotiation stage leading to sometimes extensive discussions in parliament on legislative proposals transposing directives that are labeled as *législative*.

Based on these factors France performance remains rather poor despite the fact that the SGCI has substantial capacity, the State Council is involved at a very early moment to assess how the proposed measures affect the French legal order, and the government obliges the ministries to use impact data sheets and implementation plans to guide their work on new Commission directives.

Recently, the French government has introduced some changes in the coordination of transposition. These include

- the assignment of high-level officials responsible for transposition in the various line ministries, including a member of the (political) cabinet of each minister, and
- regular discussions between these officials on the progress on transposition in the newly installed interdepartmental committee on transposition (*réseau interministériel des correspondants de la transposition*).

The new committee meets one per two to three months to discuss and resolve bottlenecks in the transposition process by ‘naming and shaming’. The Junior Minister for EU Affairs leads these discussions and presents the results on transposition, which also be discussed in the Council of Ministers. At the moment, the work of the junior minister seems to be supported by the prime minister. It remains an open question whether this system will improve the French performance, especially since the political will to improve the performance of the line ministries seems to be crucial. Both the European Commission and Philip suggest that France needs to make transposition a national political priority, like Spain, Portugal and Ireland (Philip, 2004: 60).

As mentioned before, the national parliament is hardly involved in the preparation of the French position on new Commission initiatives. First, the distinction between ‘legislative’ and ‘executive’ in French law means that Parliament’s role is limited to ‘legislative’ Commission proposals. Second, although Parliament may adopt recommendations on Commission initiatives, which could shape the French position in Brussels, the government is clearly in the lead with regard to these negotiations. Discussions on new EU measures are concentrated at the stage in which the government introduces legislative proposals to Parliament. At that point, and in view of the delay in transposition that has accumulated during the preparatory administrative phase, the introduction of an authorization law might be necessary to avoid any further delay in the process and possible Commission infringements. However, Parliament perceives this as a way to avoid discussion on issues that are regarded as important to Parliament.

10.7 Conclusions

- In France different legal instruments are available, which would allow the government to transpose EU directives in a swift and timely manner. First, the distinction between ‘legislative’ and ‘executive’ spheres

in French law provides the government with autonomous power to adopt measures to transpose directives or parts of directives that refer to ‘executive’ issues. Second, for ‘legislative’ issues, the instrument of authorization law (*loi d’habilitation*) allows the government, after parliament’s approval, to transpose directives through ordinances in areas where law is required. Despite these possibilities, the French performance is far from impressive.

- In case of emergency, the government proposes an authorization law in order to transpose a list of directives in a short period of time. Based on this law, the government is able to adopt ordinances on legislative issues which later have to be approved by Parliament (in a ‘yes-no’ vote). A major drawback of the use of this instrument is that Parliament feels that it is bypassed by the executive on legislative issues.
- Another often used technique is the package law or *DDAC*, which transposes a number of non-controversial directives preferably in a similar or related policy area. This package law is often more swiftly passed through Parliament than separate laws transposing each directive individually since it only requires the scheduling of one *projet de loi* instead of several. The technique is mostly used for rather technical issues which, in the French legal order, need to be introduced by law.
- The French legal system makes a distinction between ‘legislative’ and ‘executive’ issues, that is, issues that need to be regulated by law or by government regulation. If directives refer to ‘executive’ issues, they can be directly transposed by government independently from parliamentary approval. If a directive contains ‘legislative’ issues, it requires change in law through a parliamentary procedure and, most likely, the adoption of government decrees and/or ministerial orders.
- The process of drafting the French position in Brussels as well as the transposition of directives at a later stage is a detailed, formalized procedure in which the SGCI plays a key coordinating role, while as regards the development of national implementing instruments supplemented with the SGG, which monitors the making of national law and decrees. Despite:
 - the substantial capacity of the SGCI;
 - an early involvement of the State Council to present advice on the way in which a proposed measure can be transposed in the French legal order;
 - the use of an impact data sheet (*fiche d’impact*) in the stage of the negotiations in Brussels containing information of the expected effects of the proposed measures to France and the French legal order and the development of an implementation plan at the beginning of the stage of transposition, which presents an overview of the work that needs to be done, including a time table;
 the performance of France remains rather poor.
- Recent changes in France focus on:
 - the assignment of high-level officials responsible for transposition in the various line ministries, including a member of the (political) cabinet of each minister;
 - regular discussions between these officials on the progress on transposition in the newly installed interdepartmental committee on transposition (*réseau interministériel des correspondants de la transposition*);
 - which meets one per two to three months;
 - to discuss and resolve bottlenecks in the transposition process by ‘naming and shaming’; and
 - where the junior minister for EU Affairs presents the results to the Council of Ministers;
 - supported, at the moment, by the Prime Minister.

It remains an open question whether this system will improve the French performance, especially since the political will to improve the performance of the line ministries seems to be crucial.

- Complications in the French system, which may delay transposition include:
 - The substantial autonomy of the line ministries, which translates into the fact that often more than one ministry takes the lead in the transposition process as various legal instruments need to be prepared to transpose the contents of one directive;
 - The rather unsystematic way in which legal expertise is organized within the line ministries;
 - Excessive consultations with stakeholders based on French national law;
 - The existence of different political priorities within the administration, which do not always provide high priority to transposition, or lead to the inclusion of additional unrelated issues in a legislative proposal that could delay the process due to extensive parliamentary discussion;
 - The involvement of different coordinating bodies, like SGCI and SGG (in particular the cabinet of the Prime minister), which may have different priorities in the process of passing legal measures through the Council of Ministers and, in the case of law, through Parliament; and
 - The limited political power of the junior minister for EU Affairs, who is involved in monitoring the progress on transposition and reports to the Council of Ministers.
- The techniques and methods of transposition in France are best characterized as extensive incorporation (that is, re-wording of the directive). There is a strong preference of maintaining the current structure of French national law and putting the contents of a directive there where similar elements are found based on national priorities. Moreover, the French legal tradition sometimes goes up against the drafting of some directives leading to a complete overhaul of the text with the risk that its meaning is affected.

Appendix: List of interviewees

- Christian Philip, Member of Parliament, National Assembly.
- Thierry Anjubault, Administrator, Delegation of the European Union, National Assembly.
- Jean-Michel Linois, Cabinet Deputy Director of the Junior Minister for European Affairs, Ministry of Foreign Affairs.
- Jean Maña, Legal Counselor and *maître des requêtes* of the State Council, SGCI.
- Serge Lasvignes, Director of the General Secretariat of the Government, SGG.
- Xavier Lapeyre-de-Cabanes, *Chargé de mission* for defense and foreign affairs, SGG.
- Jean-Luc Sauron, Professor at IEP Strasbourg and *maître des requêtes* at State Council.
- Isabelle Pingel, Professor of European law, Panthéon-Sorbonne Université Paris 1.
- Philippe Manin, Professor of European law, Panthéon-Sorbonne Université Paris 1.

11 Spain

11.1 General overview of the constitutional and political system

11.1.1 Constitutional characteristics

Spain joined the European Union in 1986. From this moment, Community law ranks above Spanish national law. This is partly an effect of Community law itself, but also a result of Articles 93 and 96 of the Spanish Constitution which defines it as a comprehensive monistic system. In view of Spain's accession to the EU the relationship between the Constitution and Community law has been extensively discussed. Based on this the principles of precedence and direct applicability of EU law are well established in the Spanish constitutional order.⁹⁵

11.1.2 Political characteristics

Spain is a parliamentary monarchy. The King is head of state, but has in constitutional terms little political power. In accordance to the principle of separation of power, the power of the state is divided among parliament, government, and the courts.

The national parliament or *Cortes* has two chambers:

- the upper chamber or *Senate* (259 members, of which 208 members are elected by provinces, and 51 members appointed by the Legislative Assembly of each Autonomous Communities);
- the lower chamber or the *Congress of Deputies* (with 300-400 members).⁹⁶

Effective parliamentary influence lies almost exclusively with the lower chamber or Congress. In particular, Congress alone designates the prime minister, and hence indirectly the entire cabinet.⁹⁷ Although both chambers may be used to initiate legislation, Congress ultimately approves legislation and in doing so may override concerns from the Senate. According to observers, the Spanish parliament has failed to act as an effective scrutinizer of government for much of its recent history.⁹⁸ It rather serves as a compliant channel (Heywood, 1995: 100). The relative dominance of the government over parliament, and to some extent also

⁹⁵ As Villiers (1999: 145-6) indicates, the autonomy and precedence of EU law vis-à-vis Spanish law are pragmatically founded on (at least) five arguments: (1) the conscious acceptance of the *acquis communautaire* (including the precedence rule) as one of the conditions to Spain's accession to the Union, (2) Articles 93 and 96 of the Constitution, (3) the jurisprudence of the European Court of Justice, (4) the signing and ratification of the EC and EU Treaty by Spain (and the subsequent limits to national sovereignty), and (5) the fact that the Community is established for an indefinite period of time.

⁹⁶ The law (ley Orgánica del Régimen Electoral General de 19 de Junio de 1985) establishes the number of 350 deputies. The Congress is based on the d'Hondt system of proportional representation, favoring larger parties over smaller ones (Heywood 1995: 165-7; Newton and Donaghy 1997: 46). The Senate is based on a first-past-the post or majority system (Newton and Donaghy 1997: 47). Regardless of the population size of the province 208 senators are elected directly by voters (each mainland province elects four senators, the island provinces elect three, and the cities of Ceuta and Melilla elect two senators each). Additionally each region appoints through its Legislative Assembly one senator, plus one more for every million inhabitants living in the respective region, resulting in 51 regional representatives in the Senate (<http://www.senado.es>).

⁹⁷ The President of the Government composes the cabinet.

⁹⁸ Depending on the prime minister the Congress has one day per week to have a session to control the government. See the 'control instruments' on their website: <http://www.congreso.es>.

over the judiciary, is shaped by a number of factors. First, executive dominance is a result of the Constitution, which provides the government with regulatory authority to adopt executive measures in accordance with the Constitution and existing laws (Article 97). In addition, the proportional electoral system developed in the Constitution did not lead to the envisaged coalition or minority governments but a succession of single party governments.⁹⁹ Moreover, the discipline within the party in government proved to be much stronger than expected, increasing the power of the government.

As a consequence, actual political power in the Spanish system is concentrated in the hands of the prime minister or, in terms of the Spanish Constitution, the *President of the Government* and the *President of the Council of Ministers*. Elected by Congress, the prime minister enjoys considerable powers and can only be dismissed from office by a constructive censure motion or resign if Congress withholds its confidence from the government. Nonetheless, political reality leaves some room for varying outcomes: Adolfo Suarez, for example, did not succeed in imposing his will on the government, while Felipe Gonzalez, who won the 1982 elections, became one of Spain's most dominant figures (Heywood, 1995: 91).

The Constitution recognizes and guarantees the principle of autonomy of nationalities and regions. As a result three different levels of government exist for which the Constitution specifies their domain. These levels are the state, Autonomous Communities, and municipalities.¹⁰⁰ At the same time, the Constitution stresses the un-separable and indivisible unity of the Spanish state. This makes Spain formally a unitary state, while the way in which autonomy has been granted to the 17 Autonomous Communities and the cities of Ceuta and Melilla suggests materially that Spain is a federal system (Schagen and Koelman, 2003: 1).

The Autonomous Communities as well as cities have considerable competences in areas such as spatial planning, environmental protection management, social assistance, public safety, public health, culture, tourism, sports, language teaching, and some issues in the area of agriculture.¹⁰¹ The actual authorities of the Autonomous Communities and cities are selected as part of their Statute of Autonomy (*Estatutos de Autonomía*), which are adopted by national parliament as organic law. As these statutes are developed and adopted on an individual basis, the selected competences of Autonomous Communities vary. Navarra and the Basque Country are authorized to levy taxes, while Catalonia and the Basque Country have their own police force. Moreover, non-endorsed competences remain with the state, and, more specifically, central government. Given the type of competences that have been granted to them, the Autonomous Communities implement approximately 20 per cent of the rules enacted by the European Union (Schagen and Koelman, 2003: 10), which seems a considerable amount. Yet, the proportion shows as well that it is the central government that plays a major role in the transposition process¹⁰².

⁹⁹ Spain has had a number of minority governments and coalition governments. Spain's current prime minister Rodríguez Zapatero, for example, was elected with the votes of PSOE and a few minor parties.

¹⁰⁰ Four on islands (Canary Islands and Balears) where the '*cabildos*' represent the island and are elected for a period of four years.

¹⁰¹ See Article 148 of the Constitution for these competences. Article 149 lists the exclusive competences of the state.

¹⁰² Even in cases in which the Autonomous Communities have the exclusive competence to transpose directives.

11.1.3 Political administrative characteristics

Central government consists of the prime minister, his deputies (currently two: Maria Teresa Fernandez de la Vega who is first deputy prime minister and minister of the presidency, and Pedro Solbes, who is the second deputy prime minister and minister of economy), ministers, and any other members appointed by *real decreto* signed by the prime minister and the King. Even though the Constitution allows government to include members other than ministers, this provision has never been used.

The prime minister is the central and most important post in government. Ministers are *subordinate* to the prime minister since their positions depend on the prime minister who can propose the appointment and dismissal of his ministers. At the same time, they are relatively immune from parliamentary pressures since parliament cannot force their resignation by censure motion. Furthermore, ministers are not necessarily members of the governing political party. They cannot combine their ministerial post with a membership of parliament; when a member of parliament becomes minister his/her post goes to a substitute on the list.

In contrast to the prime minister and, at times, his deputy, who both may have a general political responsibility, each minister is responsible for a specific portfolio or policy area. In addition, the Constitution provides for the appointment of ministers without portfolio.

While the ministries prepare draft legislation and government decrees, ministers need to submit these proposals to the *Council of Ministers*, which is the weekly meeting of all ministers chaired by the prime minister. The decision making in the Council is prepared in various Council committees of which the prime minister and his deputy are automatically members. In addition to laws and decrees, which are issued by government as a whole, ministers are authorized to issue by themselves ministerial orders.

EU membership has affected the Spanish political-administrative system, although, according to some, these changes have been rather modest (Closa and Heywood, 2004: 59). Interestingly, Molina (2001) argues that EU membership has led to a reinforcement of the executive's role in the Spanish political system. First, through EU membership, the executive could position itself above parliament, political parties and the civil society in Spain. Second, membership has encouraged a further presidentialization of the country's policy style, strengthening the hierarchically superior position of the prime minister vis-à-vis ministers.

11.2 Political or public discussion concerning EU directives and their transposition

11.2.1 Discussion of recent reports and their recommendations

In view of the rather impressive performance of Spain on transposition, as revealed by the Internal Scoreboards of DG Internal Market and the overall scoreboards of the General Secretariat of the European Commission, no recent reports have emerged on these issues. At the same time, there are some informal and not yet politically visible discussions about the way in which Spain is transposing directives.

The General Secretary of European Affairs of the Ministry of Foreign Affairs is currently preparing a proposal to introduce a general and unified procedure for the transposition of directives, which includes when to start transposition, what advices need to be included on legislative instruments to be used, and which agencies have to be consulted. The General Secretary is also trying to establish discussions with political parties with regard to laws implementing EU directives. These discussions aim to provide parliamentarians more information on their margins with regard to the original proposal. Alternatively, an option is to use more often the instrument of authorization law (*ley de bases*) for rather technical directives or directives that

do not allow for further ‘national’ interpretation. However, parliament has some reservations with regard to the government’s use of this instrument.

Another discussion is on whether the government should have a broader authority. Presently the Spanish *Potestad Reglamentaria* (Article 23 of *ley 50/1997 de 27 noviembre, del Gobierno*), which indicates in which instances a law is required, is under discussion in the State Council. Since the use of government decrees and ministerial orders is limited to develop existing law, it cannot be used for incorporating new elements which are not covered by existing law. Revision of the *Potestad Reglamentaria* allowing for a broader introduction of autonomous government regulations (*autonomos reglementos*), that is, extending the possibility to use government decrees or ministerial orders in transposing EU directives, could increase the power of the government to transpose EU directives without further involvement of parliament. This discussion in Spain is related to the current discussion in the Netherlands of providing broad and rather open delegation clauses to the government in order to transpose directives in the areas of telecom, gas and electricity. The reasons for considering this possibility is that some directives are very technical and do not offer any possibilities for national interpretation. As more and more directives resemble European regulations, it becomes questionable whether parliament needs to be involved in the putting into national law of these directives. The main advantage of the introduction of such an instrument is that transposition can be done in a speedy way. The major disadvantage of the proposal concerns the reduction in national democratic legitimacy.

Alternatively, the *decreto-legislativo* offers the government similar advantages, although they still require the decision of parliament to delegate its legislative power. In the case of a *decreto-legislativo* delegation has to be arranged in each specific instance, which allows parliament to check whether the directive indeed does not lead to any national discretion in the national adoption process.

11.2.2 Expectations regarding the process and results of these discussions

Current discussions have a rather limited scope and are mainly located in specific institutions. It is not expected that under the current circumstances—a rather impressive performance of Spain in the Commission scoreboards—much will be changed.

An additional issue here is that the ministries in Spain are rather autonomous in the transposition process. The existing coordination structure, which will be described in Section 11.4.2, draws on a high-level, frequently arranged assessment of the ministries’ progress in transposing directives. Each line ministry is therefore strongly motivated to organize its internal working processes in such a way that the job is done on time. The Maritime Marine DG, for example, reformed its organization and working processes in 1999, which had a positive impact on the timely transposition of directives (Asser Institute, 2004c: 14). More in general, as Molina (1997), Dastis (1995: 349) and Closa and Heywood (2004: 65) suggest, EU membership has encouraged a further departmentalization of the Spanish administration. Each line ministry has strengthened its functional specialization and developed vertical networks in its policy sector. Not surprisingly, the rather different individual efforts and the relative autonomy of the various ministries have not yet resulted in the development of a ‘best practice’ manual or strict guidelines on transposition in Spain.

11.3 Description of judicial instruments and techniques

11.3.1 Instruments

The Spanish legal system is a hierarchical one, meaning that laws of lower jurisdiction cannot conflict those of a higher jurisdiction. Apart from the 1978 Constitution, international agreements¹⁰³ and rules of the Autonomous Communities, the available legal instruments are the following (from higher to lower level ones):

- law (*leyes organicas* and *leyes ordinarias*),
- governmental dispositions ranked as laws (*reales decretos-leyes* and *reales decretos-legislativos*), and
- government regulations (*reglamentos*), which include government decrees (*reales decretos*), ministerial orders (*ordenes*), resolutions (*resoluciones*), instructions (*instrucciones*) and communications (*circulares*).

The main characteristics of the Spanish legal instruments are summarized in Table 11.1.

The extent to which the various Spanish legal instruments are used to transpose EU directives that are currently in force is presented in Table 11.2. It appears that government decrees are the most popular transposing instrument. With regard to all transposing instruments that are used, 42% is of this type. The government decrees are followed by ministerial orders, which rank second with 40%. The usage of law is limited. Ordinary law ranks third and is used in only 11% of the total number of instruments employed for transposition. The table also indicates that organic law (0.6%), *decreto-ley* (0.6%) and *decreto-legislativo* (2.6%) are rarely used as transposition instruments. Similarly, resolutions, instructions and communications are hardly ever used in Spain.

Organic and ordinary law (Articles 81-92 Constitution)

The constitution requires that specific issues including the statutes founding Autonomous Communities and electoral issues, as well as fundamental rights and the others established in the Constitution, are regulated by organic law. The adoption or change of organic law requires an *absolute* majority in parliament. For ordinary laws, that is, all other issues regulated by law, a *simple* majority suffices. The initiative to issue a bill for ordinary law can be taken by government, each chamber of parliament, Autonomous Communities, or based on an initiative of 500.000 voters. Governmental bills are referred to as *proyectos de ley* as opposed to *proposiciones de ley*¹⁰⁴, which refers to all other initiatives. More precisely, depending on their status within the administration (depending on issues), governmental bills are—before they passed the Council of Ministers—labeled as *ante-proyecto de ley*, while after approval of the Council of Ministers the bill has the status of *proyecto de ley*, and becomes *ley*, after the approval of parliament.

Considering government bills, the Senate which as a rule has two months to veto or amend a bill, can be called to deal with it within a fixed period of time. Article 90.3 of the Constitution authorizes government to label a bill as ‘urgent’, which imposes stricter deadlines on its treatment. Congress knows a similar

¹⁰³ International agreements become part of Spanish law immediately after they have been officially announced in Spain.

¹⁰⁴ The Assembly of the Autonomous Communities can ask to the Government to adopt a ‘*proyecto de ley*’, or it can send to Congress (*Mesa del Congreso*) a ‘*proposición de ley*’, which needs to be supported by at least three members of the Assembly in order to become a proposal.

emergency procedure as part of its standing order (*procedimiento de urgencia*), which allows for a reduction of the review term by half (Prakke and Schutte, 2004: 814).

Table 11.1: Spanish legal instruments

	<i>Ley organica</i>	<i>Ley ordinaria</i>	<i>Real decreto-ley</i>	<i>Real decreto-legislativo</i>	<i>Reglamentos</i>		
					<i>Real decreto</i>	<i>Orden</i>	<i>Resolucion, Instruccion, Circular</i>
	Organic law	Ordinary law	Law-by-decree	Delegated law by decree (based on <i>ley de bases</i>)	Government decree	Ministerial order	Resolutions, instructions, communications
Main features	Issues for which the Constitution calls for settlement through organic law (including Statutes of Autonomy and electoral law)	All other cases	Emergency measure ranked as law	Delegated government decree ranked as law on issues of which Parliament has given its approval	Provisions issued by government without explicit authorization through law	Provisions issued by the minister without explicit authorization through law	Provisions issued by the minister without explicit authorization through law
Advice State Council	Required	Required	Required	Required	Required	Required	Required
Parliamentary approval	Required	Required	Required, Parliament must approve within 30 days after release	n.a.	n.a.	n.a.	n.a.
Procedure	Absolute majority in Parliament	Simple majority in Parliament	Emergency procedure*	Decision by the Council of Ministers on a proposal of a minister, which is based on basic or ordinary law**	Decision by the Council of Ministers on a proposal of a minister		
Remarks			Temporary decree, sometimes used in case of an infraction procedure against Spain	Decree based on delegation law specifying concrete goal and time period (<i>ley de bases</i>)			

* Enactment of urgency laws leaves room to summon the Senate to shorten its review term from 2 months to 20 days. Similarly, parliament may delegate its review competence to the standing parliamentary legislative committee herewith replacing plenary meeting of both Houses.

** Article 82 of the Constitution provides parliament power to delegate substantial legislative competence to the government by law (*ley de bases*).

Real decreto-ley

Based on Article 86 of the Constitution, the government may issue a special type of decree with the status of law in case of *extraordinary* and *urgent need*. The provisions of this so-called *real decretos-ley* are directly applicable, but they may not affect the legal system of the basic state institutions, civil rights and freedoms of citizens, the Autonomous Communities and the general electoral law. Furthermore, the law-by-decree is temporary since it must be immediately submitted to parliament, particularly Congress. Concerning the treatment in Congress the following rules apply:

- Congress must be convened, if not already in session, and take a decision on the decree within 30 days;
- Congress must ratify the decree or repeal it using a special summary procedure (as provided in the standing orders of Congress);

- Congress may process the decree as a government bill by means of the urgency procedure, which implies that the treatment of the bill is delegated to a parliamentary committee which decides on the proposal in only one reading.

The law-by-decree procedure is sometimes used in cases of the start of an infraction procedure against Spain. It is however a rather weighty and as such regarded as an unlawful instrument for ironing out transposition delays (Nanclares and Castillo, 2003: 30-1).

Table 11.2: The use of various legal instruments for the transposition of EU directives in Spain

Legal instrument		%
<i>a/ instruments at the level of law</i>		
Organic law	Ley organica	0.60%
Ordinary Law	Ley ordinaria	11.41%
Temporary law-by-decree	Real decreto-ley	0.64%
Delegated law-by-decree	Real decreto-legislativo	2.59%
<i>b/ lower-level instruments</i>		
Government decree	Real decreto	42.06%
Ministerial order	Orden	40.31%
Resolution	Resolucion	0.88%
Instruction	Instruccion	0.02%
Communication	Circular	0.80%
Decree (before 1976)	Decre	0.70%
Total		100%

Source: Subdirectorate General de Asuntos Juridicos, D.G.C. de Mercado Interior y Otras Politicas Comunitarias, Secretaria de Estado de Asuntos Europeos (situation on 23 February 2005).

Real decreto-legislativo

A second type of law-by-decree is based on a clear and preceding authorization by parliament. As Article 82 of the Constitution indicates, parliament may delegate the government the power to adopt a decree with the status of law. This legislative delegation must be granted by the legislator by a

- authorization law (*ley de bases*) if the objective is to draw up texts comprising various articles, or
- ordinary law (*ley ordinaria*) if the objective is consolidating several existing legal texts into one (Article 82.2 Constitution); in this case existing laws are put into one derogating the old laws.

The delegation law has to express the concrete matter and range of delegation and a fixed time period within which the government is authorized to adopt a measure (Article 82.3 Constitution). In addition, delegation expires as soon as the decrees are adopted.

With regard to transposition, this instrument has been used in order to transpose a large number of directives during the Spanish accession to the EU. Law 47/1985 (*Ley de Bases 47/1985 de 27 diciembre, para la delegación al Gobierno para la aplicación del Derecho Comunitario*) made it possible that the government could transpose 68 EU directives and 3 EU decisions by changing 36 national laws. This work was done through the adoption of 15 decretos legislativos in a period of merely 6 months (Nanclares and Castillo, 2002: 31, note 110).

This large-scale adoption of directives by using the instrument of a law-by-decree has had no successors. The general opinion is that this instrument should only be used for rather exceptional circumstances. Parliament is rather reluctant to provide government with the power to draft laws since it is no longer involved and it could lead to unwanted measures.

Moreover, the *decreto-legislativo* is as an instrument not very suitable for the speeding up of transposition in case of a single directive. The passing of a *ley de bases* requires time and effort and will further delay the preparatory process leading to the adoption of the *acquis communautaire*. Furthermore a *decreto-legislativo* is said to be inflexible. Amendments to a directive that has been transposed through a *decreto-legislativo* have to be transposed through law or *decretos-legislativos*, if the relevant issues are regulated by law. In this respect, the passing of law is regarded as a preferred instrument since it could be adopted within a similar timeframe. With regard to rather detailed directives which resemble EU regulations and do not provide for further national choices and other adaptations, the *decreto-legislativo* is considered as the way to go.

Reglamentos

In Spain, the government is entitled to issue provisions of a regulatory nature, which as Prakke and Schutte (2004: 796) indicate, provide the government “a general right to regulate for the execution of laws”. This is the so-called *potestad reglamentaria*, which is the general competence of the government to issue regulations for the execution of a law, also if this law does not ascribe this competence (Article 23 of *Ley 50/1997, de 27 noviembre, del Gobierno*).

Based on this competence, the government may adopt decrees and ministerial orders that further develop issues covered by a law. These measures do not require specific delegation within the law in question (or ‘parent’ law). Furthermore, the lower-level regulations must be in accordance with the Constitution and existing law (Article 97 Constitution). An ordinary judge, instead of the Constitutional Court, may assess the (constitutional) legality of these measures.

Due to the existence of a multitude of laws in Spain, the government often has the possibility of transposing directives through government decrees (*reales decretos*) and ministerial orders (*ordenes*). If, however, a directive includes elements that are not regulated by Spanish law, or elements that are not consistent with Spanish law, it is not possible to transpose the directive through governmental regulations. The government has to introduce a new law through a parliamentary procedure. The introduction of law is also required if transposition requires the introduction or amendment of crimes, offenses, sanctions or fines or other public charges which are not already enforced through existing legislation.

Depending the importance of the issue, the government may choose to transpose a directive either through a *real decreto* or authorize a minister to regulate certain issues by ministerial order, which are hierarchically lower than decrees and typically regulate, for example, the dispatch of ships, while the settlement of boundary recognition for guaranteeing the ship’s crew’s security, calls for a *real decreto*. Unlike decrees which have to be adopted by the government in a meeting of the Council of Ministers, an order may be based on a decision by a single minister. Similar to laws, decrees as well as orders that transpose directives require an obligatory advice of the State Council.

Incidentally, directives are transposed through lower-level measures while it is not clear whether the elements introduced in this way fit to the scope of existing national law. This may raise questions about the legality of some of these measures.

11.3.2 Techniques

Mostly, EU directives are transposed into the Spanish legal order using the following techniques:

- *One-to-one transposition* or copying; and

- *One-to-one with some (terminological) adjustments*; these adjustments refer mainly to the introduction of legal terms that are commonly used in Spanish law and which have not been incorporated in the text of the directives as published in the Official Journal. These adjustments are regarded as necessary in order to relate the requirements of the directive to Spanish law, but the general impression is that too often the European Commission is not willing to accept these changes in terms. As a consequence, the more literal copying of directives which is imposed on the ministries creates potential frictions in Spanish law. Especially, in the case of commercial and civil law problems occur since the Spanish legal tradition differs strongly from the one embedded in EU directives.

To a lesser extent the Spanish use:

- *Incorporation* in the system (corpus) of already existing laws (rewording), and
- transposition through the passing of a law (*ley de bases*) delegating the government to pass a number of measures.

The Spanish rarely use a package law to transpose several directives (the only example is *Ley de Bases 47/1985 de 27 diciembre, para la delegación al Gobierno para la aplicación del Derecho Comunitario*). Transposition through reference is rather uncommon in Spain.

With an average of 1.7 legal measures per directive, the number of transposing instruments is limited. Often only one instrument is used. Sometimes more instruments are needed, especially if a new law or a change in law is required. The introduction of law is often combined with the introduction of a government decree or a ministerial order. With regard to the implementing measures mentioned in Table 11.2, 19% of the government decrees transposing a directive the decree is combined with the introduction of law. In a similar way, 14% of the ministerial orders, the order is combined with the introduction of law in order to fully transpose a directive. If a directive has to be transposed by the Autonomous Communities as well, the number of implementing measures often will be at least 18 (a specific law adopted by each of the 17 Autonomous Communities and at least one instrument adopted by the central government or state).¹⁰⁵

Spain does not have provisions that prescribe the method of transposing a directive ‘sec’. At the same time, many officials seem to have a rather pragmatic attitude towards transposition. If additional, national regulations do not affect the speed of transposition, they do not see the point why these regulations have to be left out. If, however, these are controversial, they will not be added. In this respect, the actual working practice seems to be more nuanced.

According to previous studies, the national additions regularly occur in the field of public health and consumer rights (Senden, 2004: 39-40). In those cases it is common to explain in the preamble of the legislative measure which parts serve to transpose the directive and which parts introduce new national legislation.

11.3.3 Character and level of implementing measure

Most transposing instruments used in Spain are of a lower level than law (about 84%). Most frequently, a directive is transposed through a government decree (42%), followed by ministerial orders (40%). The use of law to transpose directives is limited in Spain: only in 12% of the cases of transposition, a law has been

¹⁰⁵ In our report on transposition we mainly focus on instruments and working practices of the central government in Spain. In the section on other, subnational, governments we further discuss the role of the

introduced (both organic and ordinary law). Law-by-decree is even rarer: *reales decretos-ley* are used in 0.6% of the cases and *reales decretos-legislativos* in only 3%. A complete overview is presented in Table 11.2. Ministerial orders are mainly used for the transposition of directives that introduce or amend technical norms and standards and as such relate to rather specific and detailed elements of national legislation. An example is the introduction of new standards and technical requirements of equipment on board of vessels, as mentioned in the report of the Asser Institute (2004c: 11).

11.3.4 Specific instruments

Spain does not use special instruments for the transposition of directives. Instruments such as instructions and communications are only used in very exceptional cases: based on all transposed directives currently in force only instructions are used in 0.02% and communications in 0.08% of the cases. Most likely, these instruments are used in combination with some of the other legal instruments.

11.4 The national policy cycle concerning directives

11.4.1 General overview of the process

In the national policy cycle concerning transposition of EU law, the central government takes the lead in Spain. The coordination of this process is in the hands of the ministry of Foreign Affairs (*Ministerio de Asuntos Exteriores y de Cooperación*). This ministry is responsible for EU affairs since the removal of the ministry of EU Relations in the early 1980s (Closa and Heywood, 2004: 62). At the same time, the process is supported by high-level administrative and political coordinating bodies:

- for the preparation of the Spanish position these bodies are the *Inter ministerial committee for EU Affairs (Comisión Interministerial para Asuntos de la Unión Europea)* meeting every 2 to 3 weeks and the *Delegated committee for Economic Affairs* of the Council of Ministers meeting on a weekly basis;
- for transposition and implementation the main body is the *Committee of State-secretaries and Sub-secretaries*.

The Spanish coordination of the policy process concerning EU directives can be briefly characterized as a frequently meeting monitoring structure at high administrative level with strong political backing.

11.4.1.1. National preparation of Commission initiatives

There hardly exists a systematic and early discussion of Commission initiatives in the Spanish political and administrative system. With the exception of the Permanent Representation, which keeps itself informed about major Commission initiatives, and which keeps contact with the civil servants of the ministries, each having members in the Permanent Representation, there is no systematic way in which information on forthcoming Commission proposals is channeled through the Spanish administration.

11.4.1.2 National treatment of Commission proposals

With regard to formulation of the Spanish position, the *Secretariat of State for the European Union* in Madrid, and the *Permanent Representation* in Brussels are the two principal bodies responsible for EU

Autonomous Communities in Spain. In general, the legislative action of the Autonomous Communities is confined to further development of national transposing legislation.

policymaking within the ministry of Foreign Affairs (Closa and Heywood, 2004: 62-3). Members of the Permanent Representation, sometimes supported by civil servants from Madrid, are engaged in the negotiations in Brussels, in accordance with instructions coming from Madrid. Often these instructions are drafted by the line ministries which are responsible for implementation.

The ministry of Foreign Affairs allocates Commission proposals to a first-responsible line ministry. Only one ministry is responsible. If at this stage problems occur since a ministry does (or does not) want to be involved, the issue is discussed in a first coordination meeting among the ministries. If this meeting does not lead to a solution, advice is asked to the Secretary of State for the EU. If the participants still do not agree, the *Inter ministerial committee for the EU Affairs* is involved.

The involvement of other ministries in the shaping of the Spanish position is discussed in the *Inter ministerial committee for EU Affairs*, which is chaired by the Secretary of State for the EU of the ministry of Foreign Affairs, consists of high-level administrative officials from the different ministries, sometimes even political, and meets once per 2 to 3 weeks. At its meetings, the committee discusses which ministries need to be involved in the making of the Spanish position in the event that EU legislation involves interests of several ministries. In addition, this committee also sometimes discusses the progress in transposition and the judgments of the European Court of Justice.

The first-responsible line ministry prepares the Spanish position, partly in *ad hoc* meetings with representatives from other ministries. In this phase, and depending on the proposal, the line ministry may involve other stakeholders to put forward their views on the proposal. Especially when these groups are consulted under Spanish national law, the line ministry has to discuss the proposal with them. The State Council, which provides legal advice on draft legislation and government decrees, does not play a role at this stage. The Autonomous Communities are being consulted by the Spanish executive in this particular phase, but only if Commission proposals affect their autonomous competencies. Parliament is, at this stage, informed about the European legislation by means of a *fiche*-procedure.

The proposed position of Spain as well as unresolved issues are first submitted to the *Inter ministerial committee for EU Affairs*, which is chaired by the Secretary of the State for the EU. It confirms the proposed position or tries to find common ground for a position on the Commission proposal. If the committee fails, the issue is discussed at the weekly meeting of the *Delegated committee for Economic Affairs*. This committee is one of the subcommittees of the Council of Ministers. It includes all ministers involved in economic affairs and is chaired by the second deputy prime minister and minister of Economic Affairs (currently Pedro Solbes). The Secretary of the State of the EU assists the deputy minister. Issues related to the Justice and home affairs pillar are not discussed in this committee (and the same holds for issues related to defense and foreign affairs), but are directly referred to the Council of Ministers.

11.4.1.3 National transposition

After the adoption of the directive and its publication in the Official Journal of the European Union, the line ministry that also had the lead in preparing the Spanish position, is in most cases also the one responsible for the transposition of the directive. Usually, the same policy unit involved in the preparatory process starts the preparations for the drafting of a legal measure to transpose the directive. The preparatory work of the unit includes:

- inter ministerial consultations, which are handled through ad hoc committees composed on the basis of the earlier decision of the Inter ministerial committee for EU Affairs on which line ministries needs to be consulted;
- consultations with the relevant social and economic stakeholders towards whom the directive is directed. The unit also consults, if necessary, academics and particular advisory boards;
- in case of competences that are shared between the central government and the Autonomous Communities, also consultations are initiated (see also Section 11.4.5).

Before the proposal is submitted to the minister, it is sent for legal advice to the *General Technical Secretariat (Secretario General Tecnicos)* of the line ministry. Although variations exist, in most ministries the General Technical Secretariat plays the role of the central legislative unit which has to be consulted as part of the preparations within the ministry of legal measures. The General Technical Secretariat has to approve the proposed measure before it is submitted to the minister and possible the Council of Ministers. In the case of proposals for transposing Community legislation, whether it is through law, government decree, or ministerial order, the *State Council* has to be consulted and provides ministers with legal advice particularly regarding the issue whether a proposal is compatible with the Constitution and other national legislation (Ross, 2002; Schagen and Koelman, 2003: 3).

If the proposed transposing instrument concerns a law or a government decree, the proposal also has to pass through the *General Technical Secretariat* of the *ministry of General Affairs (Ministerio de la Presidencia)*. This Secretariat plays a more general and coordinating role in the government’s decision making process. Its main task is to coordinate and monitor the submission of proposals for discussion in the Council of Ministers. It forwards proposals to the other ministries for comments. A proposal is scheduled for the meeting of the Council of Ministers if no objections are received. If, however, substantial differences in view exist between the ministries involved, the proposal might be scheduled only if it concerns a politically important issue. Under other circumstances, the proposal will be referred back to the responsible line ministry with the instruction to settle the differences with the other ministries. An overview of this process is presented in Table 11.3.

Table 11.3: Key government meetings on transposition on a weekly basis

Monday	Tuesday	Wednesday	Thursday	Friday
		Ministry send proposal 1 to General Affairs Ministry	Time for questions and answers among ministries	Time for questions and answers among ministries
Monday	Tuesday	Wednesday	Thursday	Friday
Time for questions and answers among ministries	Proposal 1 has to be completed before 20:00 hrs. to go to the Committee.	Committee of State-secretaries and Sub-secretaries		Council of Ministers

By Wednesday the *General Technical Secretariat* of the *ministry of General Affairs* sends the available documents to all ministries, which have until next Tuesday (20:00 hrs) to make comments, while the ministry submitting the proposal may provide additional clarification. Depending on the contents of the comments, the leading ministry may have to discuss certain issues with the other ministries before it is submitted to the *Committee of State-secretaries and Sub-secretaries*. This committee discusses all proposals,

which need to pass the Council of Ministers. When the committee accepts a proposal in its Wednesday meeting, it will be scheduled for the next meeting of the Council of Ministers on Friday.

The procedure for transposing EU directives does not differ from the ones used for preparing national regulations and law. Each legal initiative, whether it is inspired by national interests or EU law, follows the same procedure. The Law of 27 November 1997 (*Ley 50/1997, de 27 noviembre, del Gobierno*) provides the general framework. Regardless of the kind of directive, its nature (for instance, harmonization, basic legislation, amendment or technical standards), or the issues at stake, the Spanish do not make an *ex ante* distinction in procedure.

Table 11.4: Main stages and average time frame for transposing EU directives in Spain: laws, government decrees and ministerial orders

Stage	Actor	average duration	Law	decree	order	
1	Allocation of administrative responsibility	Ministry of Foreign Affairs	1 month	•	•	•
2	Preparation of draft text	Lead line ministry	2 months	•	•	•
3	Public consultation and inter ministerial discussion	with other ministries and relevant social and economic stakeholders	2 months and sometimes more	•	•	•
4	Comment and approval	General Technical Secretariat of the line ministry	1 month	•	•	•
5	Ministerial approval	Sectoral Minister	few days	•	•	•
6	Legal assessment and comments	State Council	up to 3 months	•	•	•
7	Executive approval	Council of Ministers	?	•	•	
8	First parliamentary review and approval	Congress (Committee)	?	•		
9	Second parliamentary review and approval	Senate	20 days to ** months	•		
10	Reinforcement	King	Up to 15 days	•		
11	Forwarding of legislative text for publication		up to 2 weeks	•		

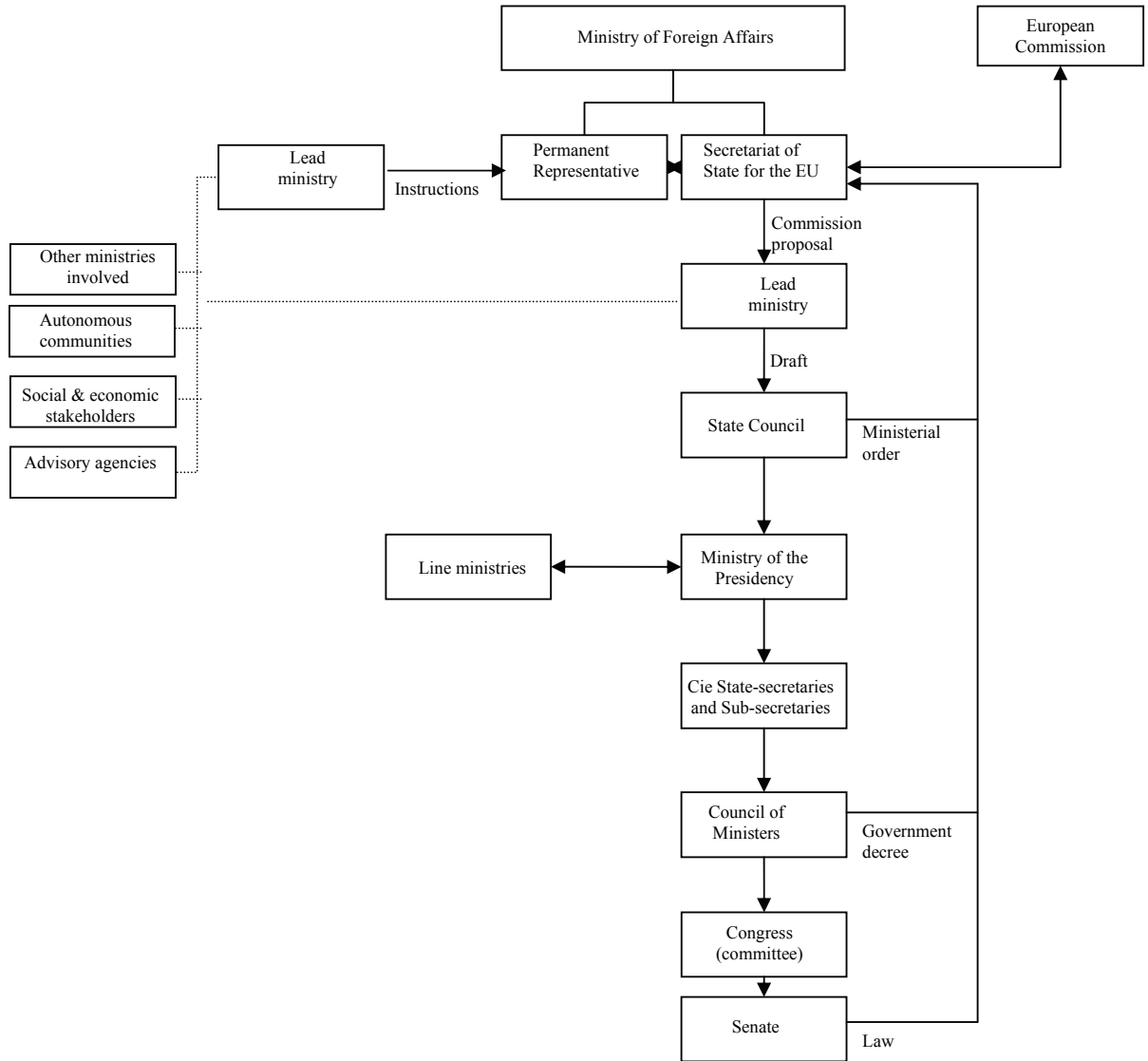
Source: the information in this table is partly based on Prakke and Kortmann (2004: 810-7) and Asser Institute (2004c: 16-7)

The main stages of the different procedures leading to law, government decree and ministerial order are illustrated in Table 11.4. This table also contains a conservative estimate about the time needed in order to conclude the various stages in the process. If a directive has to be transposed through law, the average transposition time will take about 18 months (Asser Institute, 2004c: 19). It is not so much the parliamentary procedure that slows down the process, but rather the political debate. Transposition through a government decree or ministerial order takes less time. On average a directive using one of these instruments will be transposed within about 12 months (Asser Institute, 2004c: 16-7). For the transposition of directives that introduce technical norms, for example, approximately 3 months extra time is needed. This delay is a consequence of the type of directive and the actors involved in the decision making process, that is, depending on the policy area, different consultation practices and timetables apply. It is in particular the longer consultation period with sectoral stakeholders and with other ministries that causes delay (Asser Institute, 2004c: 16).

Table 11.4 briefly indicates the procedure which parliament uses for legislative proposals. Once a bill is submitted (see also Prakke and Kortmann, 2004: 812-4):

- Congress forwards it to either its Permanent Committee (*Comision Legislativa Permanente*) or a special committee. A sub-committee, especially appointed for this task, prepares the review of the bill for the Committee;

Figure 11.1 Transposition process



- After Congress' approval, the bill will be submitted to the Senate, which has to decide within two months, or, in case of urgency procedure, within 20 days;
- If the Senate rejects the bill, Congress can overrule the Senate's rejection immediately by absolute majority, or after two months by simple majority of votes. Congress can overrule the amendments made by the Senate by simple majority;
- Acceptance of the proposal by Parliament means that the government is required to submit the bill within 15 days to the King for its reinforcement.

Two possibilities exist to accelerate the decision making process. The first option is based on Article 90.3 of the Constitution, which provides the government the opportunity to label a legislative proposal as urgent. This offers a shortened procedure for parliamentary consideration of the bill. Depending on the urgency of the transposition, completion of the parliamentary stages might run faster, yet none of these stages can be skipped (Asser Institute, 2004c: 14). The second option is the introduction of a *real decreto-ley*. However, the use of this instrument is not regarded as a legitimate one for reducing transposition delays. Finally, parliament may decide to delegate its review competence to the standing parliamentary legislative committee, which procedure replaces the plenary meeting of both Houses. The standing committee may nonetheless demand the plenary to debate and vote upon the bill.

The progress in transposition, independently whether the directives is implemented through law, government decree or ministerial order, is weekly monitored by the *Committee of State-secretaries and Sub-secretaries*, which consists of the highest civil servants from the different ministries, who are politically appointed by ministers. This committee is extensively informed about the state of affairs regarding all directives not yet transposed, including actual and projected delays and their causes. As the schedule presented in Table 11.4 indicates, the meetings of this committee are well embedded in the administration and precede the meeting of the Council of Ministers.¹⁰⁶ The ‘naming and shaming’ as part of this high-level discussion on the progress of transposition leads to a setting in which none of the state-secretaries or sub-secretaries prefer their ministry to have a problem.

Figure 11.1 presents a flow-chart featuring a directive’s course from negotiation to transposition among the main parties involved in the Spanish process.

11.4.2 Bureaucratic consultative and coordinating bodies

The transposition progress is an item which weekly returns on the agenda of the interdepartmental meeting at the highest administrative level: the *Committee of State-secretaries and Sub-secretaries*. This committee, chaired by the deputy prime minister—currently Mrs. Fernandez de la Vega—prepares the Council of Ministers. State-secretaries are the highest ranked central civil servants at a ministry. Furthermore, general-secretaries and sub-secretaries, who are responsible for a specific policy area, are rather similar with regard to their rank within the ministry (comparable with DG’s in the Netherlands). In some cases, i.e. if on the same ministry several State-secretaries are in charge of a specific domain, the sub-secretary may not be involved in the transposition process

It is the State-secretary for the EU who introduces the first substantive item on the agenda of the Committee of State-secretaries and Sub-secretaries, which is the progress in the transposition of EU directives. In the board of the *SubDG of Coordination of European Juridical Affairs* at the *Secretariat-General to the European Union* of the ministry of Foreign Affairs, a fulltime position is assigned for the preparation of this item. This official receives weekly information from the other ministries on the progress in transposition. A committee member, who is challenged about delay, will mostly see to it that his ministry takes the required measures. If nevertheless progress fails to occur, the ministry of Foreign Affairs reports directly to the Council of Ministers.

¹⁰⁶ In case of conflict between ministries about the transposition of a directive, the issue is either referred to a standing inter ministerial committee, if it concerns agriculture or health policy or to *ad hoc* committee’s initiated by the ministry of Foreign Affairs. In principle, politically important issues could be discussed at the Council of Ministers, but this hardly ever occurs.

11.4.3 The role of compulsory advisory bodies

To assess the quality of draft legislation two different advisory bodies are important, which are the General Technical Secretariat (*Secretario General Tecnicos*) and the State Council (*Consejo de Estado*).

The *General Technical Secretariats* are staff units within each line ministry, which have technical or legal expertise. The staff of the General Technical Secretariat assesses the quality of a proposal. The policy units within the line ministries, which have the lead in the process ending in the transposition of directives, need to call for the advice of the General Technical Secretariats before their proposal can be submitted to the minister.

If the proposed transposing instrument concerns a law or a government decree, which requires the approval of the Council of Ministers, the proposal also has to pass through the *General Technical Secretariat* of the *ministry of General Affairs*.

This Secretariat plays a more general and coordinating role in the government's decision making process. Its main task as discussed in Section 11.4.1.3 is to coordinate and monitor the submission of proposals for discussion in the Council of Ministers.

The State Council evaluates the Spanish legislative initiatives in terms of legality, opportunity, quality and legitimacy. The organic law of 22 April 1980 (*Ley Orgánica 3/1980, de 22 de Abril, Del Consejo de Estado, modify by Ley Orgánica 3/2004, de 28 de diciembre*) specifies which initiatives require the consultation of the State Council. Apart from proposals involving constitutional reforms, which are initiated by other bodies than the State Council, government is obliged to obtain the opinion of the Council on:

- proposals for delegated legislation and for *decretos legislativos*;
- proposals for law (*ley*) dictating the execution, completion or development of treaties, conventions or international agreements and European Community law;
- the interpretation or fulfillment of international treaties, agreements or agreements in which Spain is part;
- the interpretation or fulfillment of acts and resolutions emanated from international or supranational organizations;
- issues of special importance recognized by the government;
- every other issue where, by law, the State Council has to be consulted.

For the transposition of Community directives the advice of the State is obligatory, regardless of the type of instrument used. Hence, apart from laws, and government decrees, also rules of a lower order (for example, ministerial orders) are reviewed by the State Council.

Although government is not required to comply with State Council's opinion, most proposals are in conformity with the Council's advice.

In its advice the Council may make two types of observations: *essentials* and *remarks*. While essentials have to be taken into account, remarks do not need to be addressed. Essentials normally refer to problems related to the Constitution or important legal principles, which, if they were not taken into account, could lead to the annulment of the law when adopted. In preparing legislation, the ministry has to report to parliament on the advice of the State Council. If the State Council has no observations, it gives an indication, which is attached to the legislative proposal.

The organic law of the State Council does not require government to consult the Council when preparing its opinion on Commission proposals. A change is not expected since the involvement of the State Council at

this earlier stage of the policy process is expected to have an unwanted, delaying effect (Tribunal Supremo de España 2004: 14).

11.4.4 The role of Parliament

Parliament receives information on new Commission proposals and documents immediately after their release. Since 1994 this information is passed to Parliament through a *fiche*. The main elements of a *fiche* are presented in Table 11.5.

Table 11.5: Contents of Spanish fiches

1	area of competence and ministries involved
2	judicial base, procedure
3	background, contents and objectives
4	Assessment of proposed legislation
5	special Spanish interests in relation to the proposal
6	position of other EU members
7	proposals to change or improve the legislative proposal
8	situation and expected date of approval
9	contact person within the Spanish administration

Although parliament occasionally discusses these *fiches* and presents its views on new Commission initiatives, it is not actively involved in the preparation of the Spanish position. This observation is supported by Nanclares and Castillo (2002: 32) who indicate that parliament is less concerned with the contents of the government's mandate, while its actions are focused on monitoring and commenting afterwards. Schagen and Koelman (2003: 10) emphasize that the Spanish parliament does not have a direct role or competencies in the European legislative process. Furthermore, Parliament's limited involvement may be partly due to the occurrence of single party governments in Spain in combination with strong party discipline. In addition, it may be an effect of the "predominant perception of EU policy as being part of Spain's foreign policy", an area in which government takes the lead (Closa and Heywood, 2003: 74).

Parliament does not have special committees which deal with the preparation of the Spanish position on new Commission proposals. There is however a joint committee of Congress and Senate—*la Comisión mixta para las Comunidades Europeas*— There is however a joint committee of Congress and Senate—*la Comisión mixta para la Unión Europea*— which maintains relations between the Spanish Parliament and the European legislative bodies. During each parliamentary session the joint committee reports on its activities to both Houses. These reports include governmental guidelines and activities as regards EU policy, information on EU legislation, information on the implementation of EU law, and the creation of sub-committees (potencias) which are assigned to study and follow-up specific issues (Closa and Heywood, 2004: 77).

11.4.5 The role of other, subnational or functional governments

In the case of competencies shared by central government and Autonomous Communities, both central government and the communities play a role in the transposition process.¹⁰⁷ Shared competences may exist in two different situations (Villiers, 1999: 95):

1. the central government has a legislative competence, while the Autonomous Community has an executive competence in the field of one and the same topic, or
2. on the basis of Article 149.1 of the Constitution, the central government may be authorized to issue basic law (framework legislation), while the Autonomous Community is qualified to issue or add detailed legislation on the basis of such framework legislation.

This situation of shared competences mostly occurs for directives on issues related to the environment protection management. Disputes over the shared competences may lead to the involvement of the Constitutional Court (*Tribunal Constitucional*). For example, in case CTR 102/1995, the Constitutional Court had to give its judgment on a Spanish law (4/1989), which was meant to implement parts of the Habitat directive (92/43 EEC), an area which actually belonged to the competences of the Autonomous Communities. The jurisprudence on the division of competencies is still developing, which is a complicating factor to the transposition and implementation of some directives (see also Ross and Crespo, 2003: 227).

Mostly the central government and the Autonomous Communities start working at the same moment on the transposition of a directive for which they have shared competences. This has a positive impact on the period needed to transpose the directive, but may lead to substantial revisions at the side of the Autonomous Communities depending on the contents of the legal instrument that will be eventually adopted by central government. This practice might not be very efficient, but, at least, prevents that substantial delays occur in the transposition and implementation.

The line ministries may discuss new Commission initiatives, new directives and relevant rulings of the European Court of Justice with the Autonomous Communities as part of *sectorial conferences*. These conferences are organized by the line ministry involved (*Ley 30/92*). At these conferences, the government and the Autonomous Communities exchange views and, if possible, aim to reach agreement on how they want to proceed in transposing a specific directive. The actual transposition is in the hands of the Autonomous Communities, which, and depending on their competences, may require the introduction of 17 additional laws (one by each Community) if all communities have to transpose a specific directive.

The central government has a difficult task in directing the implementation of directives that are at the core of the competencies of the Communities. Sometimes a Community fails to implement legislation, leaving the central government relatively powerless to change the situation, although the central government will pass the more general, framework legislation. Spain was, for example, held responsible for the incomplete implementation of directive 96/62 EC (HvJEG case 417/99, Commission t. Spain, *Jur.* 2001, I-6015). The only way that is left under these circumstances is to impose accountability measures (including financial incentives) on the Communities that failed to correctly implement some directive.

¹⁰⁷ See Articles 148 and 149 of the Constitution, which describes the Spanish system of competences between the central government and the Autonomous Communities. Furthermore, as indicated before, the competences of these communities vary slightly, as laid down in their Statutes of Autonomy. From the 17 Communities, 2 have different economic competences and 2 have their own police force. In addition, there are some minor differences in competences between the Communities, including competences with regard to nature preservation (Basque Country and Navarra).

Sometimes the reversed situation occurs in which the central government is late in transposing a directive. In those circumstances, the Autonomous Communities can transpose a directive (Article 149 Constitution) if the directive is concerned with the Communities' exclusive competences (see, for instance, Article 27 *Estatuto de Autonomía* of the Autonomous Community of Madrid). This is what one's calls 'a directive with direct effect if the central government is late'. For example, with regard to a directive on waste management, the Communities started to develop some plans before the adoption of a law at the central level. If the Autonomous Communities establish a law while the central government is, and the central law contradicts the laws adopted by the Communities, the Communities have to change their initial law. Normally, this does not happen since the Communities tend to copy the text of the directive in their legislation.

The Autonomous Communities are not yet in a position to attend the negotiations in Brussels, even though they have tried, without success, to get more involved in the making of EU law. These efforts failed partly because the Communities were unable to formulate a common view (Schagen and Koelman, 2003: 10). Yet, the Communities are consulted by the central government in this phase, but only if Commission proposals affect their autonomous competencies. Furthermore, they keep contact with the developments in the EU through their offices in Brussels.

11.4.6 The role of interest groups

Each line ministry determines with whom it will discuss draft measures, which include proposals for law, decrees and ministerial orders. Public consultations may become a bottleneck in the process especially if directives call for the involvement of socio-economic stakeholders and other ministries. In those cases, consultations tend to become time-consuming, depending on the stakeholders involved (see also Asser Institute, 2004c: 20). In general, the government aims for rather swift consultations, which may take about 10 to 15 days. At most, ministries may wait for a period of 2 to 3 months to obtain advice before they are requested by the ministry of Foreign Affairs (for instance, in the meeting of the *Committee of State-secretaries and Sub-secretaries*) to move on and speed up the transposition process.

11.5 Analysis of legal instruments and techniques

11.5.1 Advantages and disadvantages of instruments

Timeliness. The swift transposition of EU directives in Spain is not a direct result of the use of special legal instruments. In Spain directives are mostly transposed through lower-level instruments, that is, government decrees and ministerial orders.

As discussed in Section 11.4.1.3 the speed of the legal instruments used in Spain depends on whether they need to be approved by parliament or not. The adoption of law requires more time than the adoption of a government decree, while a decree requires in principle more time than a ministerial order. Additional stages in the procedure leading to the adoption of an instrument increase the risk of delay.

The Spanish legal system has a special legal instrument—the *real decreto-ley*—which is only used in situations of urgency or emergency. This instrument is sometimes used when Spain is faced with an infringement procedure. In general, this instrument is regarded as unsuitable or even unlawful for transposition, since it is intended to deal with rather different situations.

Another special legal instrument—the *real decreto legislativo*—is based on a delegation law passed by Parliament (*ley de bases*), which specifies for which purpose the government is allowed to adopt a decree

with the status of law. Since this instrument requires a separate law, its procedure is not much faster than the adoption of other laws. In addition, a change of the rules adopted by a *real decreto-legislativo* requires again the adoption of law. The advantage of this instrument is that rather detailed and mostly technical legislation can be passed without extensive parliamentary discussion.

Completeness. In Spain the completeness of transposition (that is, are all elements from the directive included in the national legal instrument) is not associated with specific instruments.

Clarity for those involved and practicability. As such the adoption of specific instruments does not have so much an impact on the clarity of the rules to executive agencies, legal advisors and the courts. The substantial number of government decrees and ministerial orders which have been used to transpose the *acquis communautaire* also do not improve the clarity of the legal system. It has led to a situation in which executive agencies, citizens, and the courts are faced with a large number of rules from various sources which potentially may challenge each other.

Flexibility. When introducing a new directive amending a previous directive in the same field, the use of government decrees and ministerial orders provide for more flexibility in the sense of being able to change existing rules at rather short notice. As indicated, the procedure of introducing new law requires more time, which reduces flexibility. The introduction previously of law-by-decree (*real decreto-legislativo*) will not lead to more flexibility the moment these laws-by-decree need to be changed: the initial delegation of lawmaking power to the government was only valued for the adoption of a decree. Furthermore, if the enacted decree has to be changed, it can only be done by law (which could be an new authorization law providing the government the authority to introduce yet another *decreto-legislativo*). In other words, the flexibility of this instrument is the same as law.

Systemic purity of the legal system. The rather pragmatic attitude towards transposition and the strong emphasis to transpose directives on time have led, according to some, to a large number of ‘special’ laws next to the more traditional ‘codes’. This developed is also fed by the European Commission’s insistence that national provisions should only include the requirements of a directive and no other provisions, including provisions that already exist on the subject matter. This makes, according to some observers, the Spanish legal system less clearly organized than one would wish. A number of related laws are sometimes consolidated in order to improve the clarity of the legal system. As one interview partner commented: “I prefer changes in present law and not the addition of yet another new law. The adoption of yet another law for the transposition of directives leads to too many laws. Put every article of a directive in its place. This avoids obsolete legal requirements which may otherwise remain to exist and require, at a later stage, codification.”

11.5.2 Advantages and disadvantages of techniques

The techniques and methods of transposition in Spain are best characterized as pragmatic. There is a preference for copying. If the main concepts used in a directive differ from the common concepts of Spanish law, one aims to reformulate some of the wording of the text of the directives. This has a positive impact on timeliness and completeness of transposition.

A problem frequently mentioned by civil servants in Spain is that the European Commission often insists on copying directives even when some of the terms used in the directive have no legal meaning in Spain. The position of the Commission has already led to the inclusion of terms in Spanish law, which are ‘foreign’ and have a rather dubious status.

Since other techniques are not or hardly used in Spain, they are not included in our assessment.

11.6 Analysis of national policy process

The coordination of the preparation of the Spanish position in Brussels as well as the transposition of EU directives is in the hands of the ministry of Foreign Affairs. The Inter ministerial committee for EU Affairs (allocation of responsibility for new Commission initiatives) and the Committee of State-secretaries and Sub-secretaries (discussion of the progress of transposition) play an important role. Still, for the discussion of concrete issues, ministries make use of ad hoc committees, which makes the overall coordinating structure in Spain rather light and informal. Line ministries have the lead in the actual work, both in shaping the Spanish position and the transposition of directives. The overarching coordination structures, which are part of the regular structure of Spanish government, provide a sufficient incentive to the line ministries to deliver on their commitments.

The administration aims to maintain a relationship between the preparatory work as part of the negotiations in Brussels and the transposition of the directive. The policy unit which is involved in the drafting of the Spanish position in the EU legislative process is mostly also the unit in charge of transposition. The Spanish line ministries regard the fact that they use the same legislative instruments and procedures for both national initiatives and EU directives as a positive feature of the Spanish system. Also the fact that all proposals of the ministry are assessed by the *General Technical Secretariat* of the ministry leads to a high level of technical uniformity and consistency.

The Spanish administration has a highly accurate and detailed monitoring system on the progress of transposition, which supports the coordination of the transposition of EU directives by the ministry of Foreign Affairs. Connected with

- a. a weekly monitoring of the progress of transposition at the level of each directive,
- b. at the highest administrative level,
- c. which includes the ‘naming and shaming’ of the ministries that are delayed in transposition (in both the prognosis and the actual passing of the deadline of transposition),
- d. which is backed by strong political will at the highest political level in Spain to transpose directives on time,

this system provides a substantial incentive to transpose directives in a pragmatic way and on time.

Another factor that may enhance the speed of transposition in Spain is the existence of an inexhaustible number of national laws and rules which facilitate a smooth integration of EU directives by means of government decrees and ministerial orders. These instruments are used in about 82% of the cases of transposition. In addition, the administration rarely decides to ameliorate or complicate the text of the directive, which means that one-to-one transposition is more or less common practice.

The national parliament is hardly involved in the preparation of the Spanish position on new Commission initiatives. With regard to transposition, Parliament plays a role if a new law has to be adopted or an existing law needs to be changed. Since this occurs only for a small number of directives, also at this stage of the policy process parliament’s involvement can be regarded as limited.

A possible complication in Spain is that in some policy areas, and specifically environmental protection, part of the *acquis communautaire* has to be transposed and implemented by the Autonomous Communities. In those cases, the central government has to rely on the Communities, which and depending on their individual enacting statutes have to take care of part of the work.

In recent years Spain's transposition rates are very high and impressive. But in spite of this achievement, the number of Spanish cases for presumed noncompliance in terms of insufficient or non implementation of the *acquis communautaire* is relatively high. This requires some further nuance about the effectiveness of Spain's performance with regard to the implementation of EU policy.

11.7 Conclusions

- The swift transposition of EU directives in Spain is not a direct result of the use of special legal instruments or techniques. In Spain directives are mostly transposed through lower-level instruments, that is, government decrees and ministerial orders.
- The Spanish legal system has a special legal instrument—the *real decreto-ley*—which is only used in situations of urgency or emergency. This instrument is sometimes used when Spain is faced with an infringement procedure. In general, this instrument is regarded as unsuitable or even unlawful for transposition.
- The other special instrument—the *real decreto legislativo*—is based on a delegation law passed by parliament (*ley de bases*), which specifies for which purpose the government is allowed to adopt a decree with the status of law. The delegation expires the moment the instrument has been adopted. Since this instrument requires a separate law, its procedure is not much faster than the adoption of other laws. In addition, a change of the rules adopted by a *real decreto-legislativo* require the adoption of a law. The advantage of this instrument is that rather detailed and mostly technical legislation can be passed without extensive parliamentary discussion.
- The Spanish administration has a highly accurate and detailed monitoring system on the progress of transposition, which supports the coordination of the transposition of EU directives by the ministry of Foreign Affairs. Connected with
 - a weekly monitoring of the progress of transposition at the level of each directive,
 - at the highest administrative level,
 - which includes the ‘naming and shaming’ of the ministries that are delayed in transposition (in both the prognosis and the actual passing of deadline of transposition),
 - which is backed by strong political will at the highest political level in Spain to transpose directives on time,this system provides a substantial incentive to transpose directives in a pragmatic way and on time.
- The techniques and methods of transposition in Spain are best characterized as pragmatic. There is a strong preference for copying. If the main concepts used in a directive differ from concepts common in Spanish law, one aims to reformulate some of the text of the directive.
- The pragmatic attitude towards transposition and the strong emphasis to transpose directives on time have as a drawback that Spain has many laws next to its more traditional ‘codes’. It makes, according to some observers, the Spanish legal system less clearly organized than one would wish. This may cause lack of clarity and potentially inconsistency in the daily practice of applying Spanish law, which could be a problem to both courts and those who are subject to these laws.
- An additional complication in Spain is that in some policy areas, and specifically environmental protection, part of the *acquis communautaire* has to be transposed and implemented by the Autonomous Communities. In those cases, the central government has to rely on the Communities, which and depending on their individual enacting statutes have to take care of part of the work.

Appendix: List of interviewees

- Miguel Angel Navarro Portera, General Secretary for the European Union, Ministry of Foreign Affairs, State Secretariat for the European Union
- José Maria Roche, General subdirector of Juridical affairs, Ministry of Foreign Affairs, State Secretariat for the European Union, General directorat for coordination and additional Community policies
- Eleuterio Alcocer García, Ministry of Foreign Affairs, State Secretariat for the European Union, General directorat for coordination and additional Community policies
- Diego Chacón Ortiz, General technical secretary, Ministry of the Presidency
- Juan Luis Morell Evangelista, General subdirector for cooperation and international studies, Ministry of the Presidency
- Julio Carlos Fuentes Gómez, General subdirector Legal affairs, Ministry of Justice
- Miguel Herrero y Rodríguez de Miñón, ex Legal advisor, State Council
- Jesús Avezuela, Legal advisor, State Council
- Alfonso Moreno Gómez, General technical secretary, Autonomous Community Madrid
- Pedro Baena Pinedo, director of juridical and normative affairs, Autonomous Community Madrid
- Maribel Jimeno, Autonomous Community Madrid
- Carmen Lopez de Zuaso, regional lawyer, Autonomous Community Madrid

12 United Kingdom

12.1 General overview of the legal and political system

12.1.1 Constitutional characteristics

The UK has a parliamentary, bicameral system. Parliament consists of two Houses, the House of Commons - the more representative body – and the House of Lords. Both Houses are involved in the process of debating, amending, rejecting or enacting Acts of Parliament, but ever since the Parliament Acts of 1911 and 1949, the influence of the House of Lords in the legislative process in the last resort amounts to that of a suspensory veto.

The British legal system is quite different from the legal systems of some of the other Member States of the European Union. Most remarkably, the UK does not have a written constitution. This means that there is no established procedure for making changes of a constitutional character, but that constitutional conventions and constitutional law evolve over time and well from different sources (Craig and De Búrca, 2003). As regards the issue of transposition of European directives in the UK, two basic principles of the British legal system are important. Firstly, the UK has a *dualist* approach to international law. This means that international treaties, which are signed by the UK, do not automatically become part of the British legal system, but they need to be transformed into the national legal system by an Act of Parliament in order to become applicable. Secondly, there is the principle of the sovereignty of Parliament. Once this principle held – as some feel it still does - that no Parliament can bind a future Parliament. Another aspect of Parliament's sovereignty is that its will ranks above the will of government, the administration or – for that matter - the judiciary if parliamentary will has been enshrined into legislation. These connotations of Parliamentary sovereignty of course sometimes run contrary to the idea of the supremacy of EC Law.

The European Communities Act 1972 and its subsequent Amendment Acts reconcile the potentially conflicting interests of the UK dualistic tradition, the principle of sovereignty of Parliament and the supremacy of EC Law. The Act transfers sovereign powers to the EC, establishes the supremacy of Community law, and makes Community law directly applicable in the UK (Craig and De Búrca, 2003). The Act also makes it possible to implement European directives by means of delegated legislation (so called 'Statutory Instruments') on a wide scale. This might seem inconsistent with the principle of the sovereignty of Parliament. However, this is less contradictory than it appears, since Parliament can exert influence through an extensive process of parliamentary scrutiny during the negotiation of e.g proposed EC directives.

12.1.2 Political characteristics

The political institutions in the UK are characterized by a parliamentary government with the power centralized in the Cabinet supported by a majority in the House of Commons. Due to the mechanics of the parliamentary majority system, and the absence of a written constitution¹⁰⁸ substantially limiting the scope of the UK government, UK governments, supported by the majority in Parliament, are very powerful. The party mandate and party discipline system give government a strong position vis-à-vis Parliament. The relation between government and Parliament is monistic to a high extent. In addition it is extremely rare that

government legislation is challenged in the courts. However, there are practical limits to the power of the government. Most importantly, the government does not have deconcentrated, local administration branches of its own, but must largely rely on other, not subordinated, bodies for the implementation of its policies. Furthermore non-governmental organisations, like trade unions, interest groups etc. are able to influence policies. Nonetheless, the UK government is one of the most powerful in Europe. The relative autonomy of the government is justified by the party mandate doctrine, according to which the government has received a mandate from the electorate that entitles it, or even requires it, to implement its party program. This severely limits the importance of the Parliament, and it also secures strict party discipline (Budge 1996).

As a result Parliament is not a strong constraint on government power. However intense the debates in Parliament maybe, they do not often have an unforeseen outcome, nor do they frequently succeed in tackling or changing government policies. The debates in the Houses do not only aim to change the minds of Members of Parliament (MPs) but also try to influence public opinion. The official opposition, the main party not in possession of government power, has a recognized role independent of the government. However, its aim in the parliamentary debates is often not to provide constructive criticism of government policy, but to win the next elections. This explains the adversarial quality of the debates.

Faced with an authoritative and powerful government it is difficult for MP's to really scrutinize government policies. So called 'official secrecy', which substantively restricts government and the bureaucracy to communicate information on government business and policies (see sections 22 through 44 of the Freedom of Information Act 2000), adds to these restraints. For example members of the civil service are not allowed to give certain information to parliamentary committees investigating government policies. These problems have, to a certain extent, been overcome by investigative journalism and select committees of the House of Commons that, for example, specialise in investigating the work of a specific ministry in a specific area. However, their work is held back internally by party loyalty and externally by official secrecy. Select committees in the House of Lords often work better, since they are less troubled by adversarial politics, and they are able to rally cross-party support. However, their influence is diffuse. Their non-elective base works to their disadvantage, and they have no final veto power over primary legislation, but can merely delay it (Budge 1996).

12.1.3 Political administrative characteristics

Both the operation of the cabinet government and the work of the UK civil service are formed by two fundamental constitutional principles, namely the principle of collective responsibility and the principle of ministerial responsibility. These two principles necessitate extensive coordination between the government and ministries (Kassim, 2000). The principle of collective responsibility involves that decisions taken by the Cabinet are agreed to by all members, and as a consequence, a dissenting minister should resign from the government. The principle of ministerial responsibility means that ministers are responsible for the actions of their officials. Loyalty and consistency are therefore important. Officials function as servants to ministers, and once an issue is settled, the professional task of the official is to implement it as efficiently as possible. In this context, neutrality is very important, and a good civil servant should be able to adapt to changes in policy easily (Wallace 1996; Kassim, 2000).

¹⁰⁸ The UK does have a number of statutes on discrete constitutional issues, it does however not have a written constitution in the sense of an overarching, consolidated and written Constitution.

The central bureaucracy is grouped into fairly autonomous ministries and departments. There are about 15 centrally important ministries, which are represented by their political heads in the Cabinet, and about 70 fairly important ministries and offices. There are usually two or three junior Ministers in each ministry who are appointed by the government, and the government is exceptionally dependent on independently appointed bureaucrats for policy implementation and advice. A minister spends on average two years at a particular department, and he or she is dependent on the civil servants for information and guidance. This opens up possibilities for the department to influence the minister into supporting the departmental view in cases when the government has no clear line on the policy in question (Budge 1996).

Over the years, an extensive network of cabinet committees and subcommittees has developed in order to handle the increased scale and complexity of government responsibilities. The administrative procedures in Whitehall are organized to support the far-reaching requirements of coordination, and the administration is obliged to ensure that all interested departments are consulted. The Cabinet Office has a central role in monitoring progress and stepping in as a coordinator when necessary. This system of coordination has amounted to an administrative culture with norms and values that support information-sharing, instinctive consultation, cross-departmental contact, a spirit of mutual trust, group loyalty and corporate endeavour (Wallace 1996; Kassim, 2000).

At the top of the civil service hierarchy, the policy-making level, about 6000-10000 people are employed. Although there have been some changes in recent years, this group is still dominated by 'Oxbridge' graduates. One consequence of this is that the top of the civil service have a shared ethos. They are resistant to change stemming from the government, have a preference for shutting off discussions from ill-informed intervention and they have a generalist approach to policy-making. The civil servants perceive their roles as advocates of the interest of their department, which is partly formed in the interaction with interest groups (Budge 1996).

The UK administration has traditionally been characterized by homogeneity of the higher civil service, loyalty to the government (rather than to the administrative corps or individual departments), high morale and a strong sense of professionalism. The interviews confirmed this impression.

These characteristics have been somewhat weakened in the past 25 years, since changes have been made to make the conduct of the government more businesslike and to privatise some public functions. Because of these changes, managerial skills have become more valued in the definition and implementation of policy (Wallace 1996; Kassim, 2000). One important part of this process of change is the 'Next steps initiative', which was initiated by the government of Mrs Thatcher in 1984. This process of restructuring the civil service was based on criticism of British civil servants for being inefficient, particularly regarding the delivery of services, and Thatcherite ideas about modelling the delivery of services on the free market. The reform was aimed at reducing the scope of government and to render it more efficient while limiting the costs, and basically it has involved reducing the government departments in size. The idea is that they focus on policy-making and handling legislation in Parliament, while the implementation of policy is transferred to autonomous agencies (Budge 1996). It is also important to note that this initiative has had as one of its consequences that about half of the British civil servants currently work at semi-independent agencies, and this is of course a challenge to the traditional administrative culture and procedures of Whitehall (Christoph 1993).

It is possible that membership in the EU has also led to changes in the British civil service. Bulmer and Burch (1998) have argued that adapting to membership in the EU has been possible within Whitehall's

established approach of handling policy, and that the formal, informal and cultural characteristics of the British civil service have remained intact. They also argue that the machinery put in place before and in the process of acceding to the EC for handling European business has remained largely unchanged. On the other hand, Christoph (1993) argues that changes in attitudes of British civil servants who participate in European Union policy making has added to the domestic pressure for change, which is present for example in the 'Next steps initiative'. For example, some of the civil servants belonging to the European 'cadre' are more open to limiting the secrecy in policy-making and the hierarchical structure of the civil service.

According to the respondents in the interviews civil servants are encouraged to work for some time in Brussels in one form or other. Although off late it has proved to become more difficult to recruit stagiaires or 'temporaires' for posts in Brussels there is an ongoing exchange of – interested - staff between Brussels and London. There is, on the face of things, no official policy to encourage and accommodate staff exchange. E.g. a temporary Brussels' position is not a fixed career requirement. The London-Brussels staff exchange however does blend in quite well with the system of job-rotation in the British civil service. Changes in position every three or four years are customary the civil service. Life long positions are very rare. A stay in Brussels is certainly not a career-disadvantage.

12.2 Political or public discussion concerning EU directives and their transposition

12.2.1 Discussion of recent reports and their recommendations

The UK takes implementation of EC legislation very seriously, and it is the stated goal of the government that directives should be transposed according to the Community goals of effectiveness and timeliness. It is also important that the measures used for implementation should be in accordance with UK policy goals, including minimising the burdens on business (Cabinet Office, 2005). This policy, combined with the high level of professionalism and loyalty in the civil service and the skills of government lawyers, has resulted in a good implementation score in the past and present. The actual debate on the implementation of EC directives however is not focussed on the implementation score, but rather on better regulation policies. The policies aim to avoid administrative burdens for economic operators and excessive bureaucracy, so-called red tape. Current topical questions are whether or not the British government is over-zealous when implementing EC directives both in respect to the speed of transposition as well as to the substance of it. There are two distinct strands in the discussion. The first one has to do with speed of transposition. At this moment – some of the respondents tell us - the UK is looking to its implementation score from a new angle: are we not doing too much? In a cost-benefit equation timely implementation is not always per se beneficial to British businesses. A second strand relates to the way in which the UK transposes EC directives. At this moment there are concerns regarding over-implementation (Cabinet Office, 2005). Present government policies favour transposition by way of copying-out (i.e. sticking as close to the wording of a directive as possible, as opposed to the technique of elaboration i.e. reshuffling or translating a directive text in order to get a better fit with British legislation). These new policies also frown on 'gold-plating' i.e. implementation that goes beyond the minimum necessary to comply with a directive.

12.2.2 Expectations regarding the process and results of these discussions

The ambitions of the UK government policy seem to be successfully followed in practice, since the UK has one of the best transposition records in the EU. In May 2003, for example, the UK was one of only five

member states that reached the goal of a transposition deficit of 1.5% or smaller (European Commission, 2003b). On the other hand, there are signs that the transposition record of the UK is getting worse (van den Brink, 2004). Respondents in the interviews confirm this, but note that the UK until recently was not really preoccupied with the transposition record since it had a respectable performance. In the run up to the Barcelona summit in 2002 the transposition record slacked to a 3.3% deficit (12th position) and was made more or less on strategic grounds an issue. A high level project was set up to ‘sweep up’ the backlog and did so with considerable success. Some of the respondents think that a similar project is needed in the advent of the upcoming British EU presidency.

Table 12.1: British legal instruments used for transposition

	<i>Act of Parliament</i>	<i>Order in Council</i>	<i>Ministerial orders, regulations or rules (Statutory Instruments)</i>
	Law		Ministerial order
Main features	Used for transposition when the European Communities Act cannot be used as delegating legislation, and when there is no other suitable delegating legislation, or when there is an already existing tradition in the specific area concerned of using primary legislation for transposition	A ‘Designation Order’ is used to decide which minister or state secretary is competent to adopt Statutory Instruments in order to transpose directives in a certain area	Statutory Instruments used for transposition are usually based on delegation by the European Communities Act, but can also be based on more specific Acts of Parliament
Advice State Council	Not required (The UK has no State Council)	Not required (The UK has no State Council)	Not required (The UK has no State Council)
Parliamentary approval	Required	Required	In principle required (the parent act determines)
Procedure	Proposed by government and passing through both Houses of Parliament	Proposed by government enacted by the Privy Council	Negative resolution procedure (most common): the Parliament can pass a motion to annul (a ‘prayer’) within 40 days Affirmative resolution procedure: Parliamentary approval is needed

12.3 Description of judicial instruments and techniques

12.3.1 Instruments

In the UK EC directives can be transposed either into primary or secondary legislation. Primary legislation in the UK is called ‘Acts of Parliament’. A common term for delegated or secondary legislation, i.e. legislation that is based on an Act of Parliament, is ‘Statutory instruments’. Examples of this type of legislation are ministerial rules, orders or regulations. No clear hierarchy among these instruments exists (House of Commons Information Office, 2003). There is also a tradition in the UK of using ‘quasi-legislative’ devices, for example administrative circulars and codes of practice. These instruments, however, are unsuitable for the transposition of EC directives containing rights and obligations (EC Court of Justice, C-102/79 *Commission v. Belgium* and C-29/84, *Commission v. Germany*) (see section 12.3.3 for further reference). In the UK the bulk of all EC directives (80-90%) is—most of the time by virtue of section 2(2) of the European Communities Act 1972—implemented in statutory instruments, but on occasion directives are transposed using an Act of Parliament. There may be various reasons to take the long route. For instance if

directives – e.g. for reasons of consistency - have traditionally been transposed in Acts of Parliament new directives in the field will be implemented in primary legislation as well. This is for instance – the respondents tell us - the case in the field of British company law. Another reason to implement by way of primary legislation can be the situation in which the use of a statutory instrument is impossible. Schedule 2 of the European Communities Act of 1972, for instance, resists transposition into subordinated legislation when EC directive provisions for instance impose or increase taxation, attribute legislative power, or create substantive new criminal offences.

In Table 12.1, the main characteristics of the legal instruments that are used in the UK for the transposition of directives and the procedure by which they are adopted are briefly presented. In order to get an accurate insight in how the system works both the processes for adopting Acts of Parliament and statutory instruments are described in more detail below.

Procedure for adopting Acts of Parliament

Before an Act of Parliament is adopted, the proposed legislation is called a bill. In order to become an Act of Parliament, a bill has to go through different stages in both Houses of Parliament, and it can start in either House. Typically, it takes weeks or months for a bill to pass through all the stages, but if the Government finds it necessary and the Parliament agrees, the process can be accelerated. As the respondents in the interviews made clear, the actual passage of a bill through Parliament does not take all that much time. It is the bidding for a timeslot for parliamentary debate on a bill that can truly be time consuming. Bills are not debated in order of their arrival. The Government determines the order of business in the Commons, with some consultation of the opposition parties. In the different circumstances of the House of Lords, the Government's management of business needs to be more accommodating. Other priorities can and do prevail over transposition issues, which can tie up the transposition for months.

There is a distinction between public bills and private bills. A public bill seeks to alter the general law, and a private bill relates to a matter of individual, corporate or local interest. The term public bill includes both Government bills, which are initiated by the government and Private Members' bills, which are initiated by individual Members of Parliament. Below, the stages of a Government bill that starts in the House of Commons are described.

The preparatory stages of a bill involve drafting by lawyers in the Parliamentary Counsel Office (PCO), which is part of the Cabinet Office. The drafting is performed on instructions of the Government department concerned. During the drafting, there is consultation with other departments and interested parties, and sometimes use is made of green (consultative) or white (policy statement) papers.

The first formal step takes place at the beginning of each session of Parliament, when the sponsoring minister presents the bill to the Commons. The bill then receives a formal first reading and is then printed and published.

The next step is the second reading, when the House debates the general proposals contained in the bill. The House considers the principle of the bill, and there is usually widespread debate. Some non-controversial bills are dealt with in a special second reading committee instead of the whole House. Usually the second reading takes place in the second week following the printing of a bill.

After the second reading, the bill enters the committee stage. Usually the bill is referred for consideration to a standing committee, but sometimes it is considered by a committee of the whole House. Examples of bills that were considered by a committee of the whole House are the European Communities Act 1972, and

the European Communities (Amendment) Act 1993, which approved the Treaty of the European Union (TEU). The name standing committee is a little misleading in this context, since a new standing committee is appointed for each bill. The committee must consider each clause and Schedule of the bill, and agree or disagree. It may also make amendments. Short bills may pass through this stage in a single sitting, but long and controversial bills may take many weeks.

Next, the bill enters the consideration or report stage, and is reported as amended to the whole House. The House may make further amendments and reverse or amend changes made by the Standing Committee, but otherwise it does not consider clauses and schedules not amended in the committee stage.

The final stage in the House of Commons is the third reading. This stage usually commences directly after the conclusion of the report stage. No amendments may be made, and if there are debates, they are usually very short. For controversial bills, the opposition may wish once more to vote against it.

After the third reading, usually on the next sitting day, the bill is sent to the House of Lords where a broadly similar process is followed. The House of Lords may amend the bill, and the bill as amended is then considered by the House of Commons. The Commons may agree to these amendments, agree to them with amendments or disagree. If the Commons agree to the Lords amendments with amendments, the Lords will be asked to agree to the amendments. The bill may travel back and forth between the two Houses several times, and the Lords and Commons must agree on a text. However, in a case of deadlock, an identical bill may be passed the following year without the consent of the House of Lords. This means that the House of Lords may delay a piece of legislation that has started in the House of Commons, but it cannot block it indefinitely.

Finally, the bill will need the royal assent, by which the bill becomes an Act. An Act can enter into force immediately, at a date specified in the Act, by Commencement Orders or by a combination of the three (House of Commons Information Office, 2001).

Procedure for adopting Statutory Instruments

The legal department in a ministerial department concerned usually drafts statutory instruments itself. The departmental drafters do not have the same level of skill or experience as the senior drafters of the PCO. To monitor and review some aspects of the technical quality of the statutory instruments (SIs) the parliamentary Joint Committee on Statutory Instruments (sometimes called the Scrutiny Committee) scrutinises SIs. The Scrutiny Committee does not consider the merits of SIs, but only tests whether a Minister's powers are being carried out in accordance with the provision of the enabling (parent) Act (House of Commons Information Office, 2003a). Because the Scrutiny Committee has a limited scope of review, and some scrutiny on the merits of SIs was felt necessary, on 17 December 2003 the House of Lords appointed the Select Committee on the Merits of Statutory Instruments. The Committee functions quite satisfactorily. A Special Report of the House of Lords of 2004, reviewing the work of the Merits Committee, recommends that the Merits Committee should be made a regular 'sessional' committee (House of Lords, 2004).

Which minister or state secretary is competent to draft and enact SIs, such as ministerial orders, rules or regulations, whatever the case may be, is decided by an Order in Council made by the Privy Council, the so called 'Designating Order'. The Privy Council however does not have the lead in attributing the designation, nor does it decide on issues of conflicting competence. The Council mechanically takes the requests for new designations – submitted by the different ministers or state secretaries - on board. Since the Privy Council

only meets every three months it requires some strategic planning on behalf of the departments when they need to draft a ministerial order or regulation for which no designation exist as of yet. The Cabinet Offices organises regular trawlers within the departments to see whether new designating orders are needed.

As a rule of good practice interested bodies and parties are often consulted during the process of drafting statutory instruments. When the drafting is finalised, the instrument is either made in the name of the responsible minister or secretary of state, or it is issued in draft requiring the approval of both Houses of Parliament. Statutory instruments apply to the whole UK or to some of the individual countries. Frequently used terms in the context of statutory instruments are 'laid' and 'made'. When an instrument is laid before the House of Commons, a copy of the instrument is placed with the Votes and Proceedings desk in the Journal Office. A statutory instrument is made when it has been signed by the minister with authority under the Act. When an instrument has been made, it is no longer in draft.

The parent Act determines whether or not an instrument is subject to parliamentary procedure. If it is subject to parliamentary control, either the negative resolution procedure or the affirmative resolution procedure is followed. The instrument can either be laid in draft or laid after making. Instruments based on the European Communities Act 1972 are subject to parliamentary procedure, and the government decides upon whether the negative or affirmative resolution procedure is followed. The negative resolution procedure is the most commonly used one.

The most common procedure is the negative resolution procedure. Instruments subject to the negative procedure are usually laid after making. They come into force on the date stated on them, but are subject to annulment if a motion to annul, known as a 'prayer', is passed within 40 days. Any Member of Parliament can put such a motion, but the chance that it will be dealt with is greater if it is tabled by the Official Opposition or if there are a large number of signatories. Prayers are exceptionally rare when it comes down to (draft) statutory instruments implementing EC directives. It is the experience of the respondents that it virtually never happens that a statutory instrument is actually rejected as a result of a prayer with a negative outcome.

A very small number of instruments are laid in draft under the negative procedure. These instruments cannot be made if the draft is disapproved within 40 days.

The affirmative resolution procedure provides more efficient parliamentary control, since the instrument must receive the approval of Parliament. Most commonly, instruments subject to the affirmative procedure are laid in the form of a draft Order, and cannot be made unless both Houses approve the draft. If an instrument is laid after making there are two procedures. Either, it cannot come into force unless and until it is approved, or it will come into effect immediately, but cannot remain in force unless approved within a certain period (usually 28 or 40 days).

Statutory instruments cannot, except in rare cases when the parent Act provides for it, be amended or adapted by either House. Thus, Parliament can only accept or reject the instrument in its entirety.

12.3.2 Techniques

In principle, there are two methods that are used for transposition, namely 'copy-out' and 'elaboration'. If the copy-out method is used, domestic legislation merely reproduces provisions contained in directives.

Elaboration means 'coming down on one side or the other of choosing a particular meaning, in accordance with the traditional approach in UK legislation, according to what the draftsman believes the provision to mean' (Cabinet Office, 2005). Depending on the contents of a directive one of them or

combinations of two are used. The importance of not over- or under-implementing directives is emphasised by the Transposition Guide. Recent better regulation policies are especially critical of gold plating, i.e. transposition that goes beyond the minimum necessary to comply with the directive. Gold plating is to be avoided since it could lead to extra administrative burdens for businesses. In much the same way so called double-banking, i.e. the situation in which EC legislation covers the same ground as domestic legislation, is burdensome. It is preferable to prevent double regimes and aim for some form of consolidation e.g. by merging EC and domestic legislation into one piece of legislation (Cabinet Office, 2005).

The technique of 'copy out' is becoming increasingly popular in the UK, since it means that judges and lawyers can focus on one instrument instead of two (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 2004). The Bellis report makes a connection between the use of copy out and the fact that directives are becoming more and more detailed (Bellis, 2003). In the past, the British need for detailed legislation that leaves the judge with little room for interpretation, has proved to be a problem in the process of implementation. When the directive contained many vague expressions, 'elaboration', i.e. a more precise expression of the content of the directive, was often used as technique for implementation. This – in some cases - inevitably led to more detailed regulations that sometimes went beyond the goal of the directives, or led to over-regulation ('gold-plating'). However, that does not mean that copy-out is exempt of any risk of over-regulation. Copy-out also runs the risk of over-regulation, if stake-holders interpret the regulation in a burdensome way due to the lack of clarity of the source (directive) text.

The growing popularity and government endorsement of the copy-out technique does however not mean that it has become the most commonly technique. According to the experience of some of the respondents, elaboration and rewriting are still the prevalent approaches to transposition, at least in relation to directives that do not merely contain a few amendments of legislation already in place. In this respect Cabinet Office Guidance encouraging copying-out is one thing, drafting practice is another.

12.3.3 Character and level of implementing instruments

The bulk of EC directives is transposed into statutory instruments. These statutory instruments are either based on the European Communities Act 1972, which then functions as a general basis for delegation, or any other act, which provides appropriate powers. This delegated legislation, which is adopted by a rather swift procedure, can amend and in some cases even diverge from existing primary legislation (*R v. Secretary of State for Employment ex parte Unison* (1997) 1 CMLR). The European Communities Act 1972 contains an explicit so-called Henry VIII power, i.e. a provision that enables primary legislation to be amended or repealed by subordinate legislation (House of Lords, 2002). This is a strange feature of British law in continental eyes. Powers like this, enabling subordinated legislation to override primary legislation, are called Henry VIII powers. In a special report on these Henry VIII powers the House of Lords in 2002 takes the view that there are occasions that the use of these powers is justified for instance when amendments to primary legislation would disproportionate increase of the length of a Bill or when it is very difficult to anticipate the full extent of necessary (future) amendments. When Henry VIII powers are used according to the House of Lords parliamentary scrutiny is called for, preferably the affirmative procedure (House of Lords, 2002).

Both Houses of Parliament, indeed, must be informed of all statutory instruments based on the European Communities Act 1972, but it is left to Ministers drafting the statutory instruments to decide whether the

affirmative or negative resolution procedure applies. In most cases the negative resolution procedure is used (see paragraph 12.3.1).

The powers that the European Communities Act 1972 creates for lower level legislators does not affect the power of the formal legislator to adopt (parallel) legislation (Usher 1995).

Concerning statutory instruments used for the transposition of directives that are based on the European Communities Act 1972, Section 2(2) and Schedule 2(2) of the Act are the relevant parts. Section 2(2) provides for the implementation of Community obligations, and makes it possible to implement Community obligations by delegated legislation. No new Act of Parliament is needed, but the delegated legislation used to transpose directives can be based directly on the European Communities Act. Section 2(2) also states that the responsible minister or department is to be designated by an Order in Council. Paragraph 1 of Schedule 2 provides exceptions when it is necessary to use an Act of Parliament to transpose a directive. For example, this is the case when taxation is being imposed and for provisions with retrospective effect. Apart from these exceptions, there could also be other reasons for using primary rather than delegated legislation for the transposition of directives. One example of this is if the UK government wishes to do more than the minimum requirements of a directive (Drewry 1995; House of Commons Information Office, 2003). In addition, primary legislation is used when the issue is of great importance or if important policy change is necessary (Van den Brink, 2004), or when directives in a certain policy field traditionally have been transposed into primary legislation (e.g. Company Law, see Section 12.3.1)

Section 2(2) is frequently used as basis for delegation, either alone or in combination with sector specific legislation. It is widely acknowledged (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 2004) that the construction for delegation of the European Communities Act is a useful and even essential method in order to implement European law on time. Judges have seldom or never accepted arguments based on constitutional considerations against the use of section 2(2) in legal procedures. Detailed guidance is available to government lawyers on the use of section 2(2).

Initially, 'quasi-legislative' instruments were used for the transposition of some directives. However, in the early 1980s rulings by the European Court of Justice (ECJ) signalled that this was inadequate. The ECJ stated that the ambiguous status of quasi-legislation 'may create uncertainty about the nature of legal obligations, and its use may also deprive those adversely affected of effective legal redress in the courts'. Although administrative means are currently only used for transposition of directives in certain limited circumstances, they are still often used as a complement to the legal instruments (Drewry 1995; House of Commons Information Office, 2003).

12.3.4 Specific instruments

Aside from the instruments discussed above we have not come across any other special instruments. Most of the instruments based on the European Communities Act 1972 are not unique to transposition. Ministerial regulations, orders, etc. are also used as a result of normal domestic delegation.

12.4 The national policy cycle concerning directives

12.4.1 General overview of the process

The UK system of co-ordination of EU policy is considered very efficient, and it has been widely admired. UK representatives are reputed to be well briefed and able to present the common position of the

government. The European Secretariat (placed in the Cabinet Office), the Foreign and Commonwealth Office (FCO) and the UK Permanent Representation are together responsible for EU policy co-ordination. They communicate on a very regular basis and keep each other well informed. There is no real secret or elaborate co-ordination procedure between London and Brussels, apart from the fact that both London and the Brussels-UK-representation are plugged in very well in European processes, and that they react very quickly to European initiatives ('when the glimmer is in the eyes of the Commissioner').

The UK system for co-ordinating EU policy has many things in common with the domestic administrative system, among them mechanisms for ensuring horizontal and vertical co-ordination. The norms and values of the domestic system are also reflected in the way the UK handles EU matters (Kassim, 2000; Kassim, 2003).

The main actors involved in EC business are ministers and civil servants in the ministries. Other actors are Members of Parliament, especially those involved in scrutiny of EC proposals in one of the European Committees, UK members of the European Parliament, and personnel of other public sector bodies (local authorities, public corporations etc). The last category are involved in EC business in a variety of ways, for example as agents of implementation and as lobbyists (Drewry, 1995).

The UK goals for co-ordination are ambitious, and involve ensuring for any EU proposal that agreement is reached on a UK policy well in advance, and that account is taken of affected interests and overall government policy. It also involves that the policy agreed upon is pursued consistently in the negotiations, and that, once the decision is taken in Brussels, it is put into effect in the UK. The UK has a broad co-ordination ambition, which is not only focused on particular policy areas as in many other member states, and the co-ordination system is centralised (Kassim, 2001; Kassim, 2003). The effective transposition of EC directives is an important part of the UK co-ordination ambition (Bulmer and Burch, 1998).

In the UK, there are various internal guidelines concerning the implementation of European legislation. The two most important documents are the Cabinet Office Transposition Guide, and the Regulatory Impact Assessment Guide (Cabinet Office, 2005; Cabinet Office, 2003). The Transposition Guide expresses the policy and goals of the government concerning transposition and contains recommendations on how to handle Commission proposals, the use of options contained in directives, and how domestic legislation should be drafted. The Transposition Guide is a tool for policy-makers and lawyers across the government, although some requirements only apply to those laying legislation before the UK Parliament. It is not legally binding, like legislation, but rather consists of a collection of best practices.

Parliament is actively involved in the adoption of European legislation, in a threefold manner: a. through scrutiny of proposed EC legislation, b. scrutiny of Statutory Instruments transposing EC directives, or, c. as the co-author of primary legislation if EC or EU legislation is implemented by way of Act of Parliament. We will elaborate on the negotiation, preparation and transposition as well as on Parliament's role in it, in the upcoming sections.

12.4.1.1 National preparation of Commission initiatives

The transposition process in the UK starts very early on. From the moment 'the glimmer is in the eyes of the Commissioner' – the respondents say - the UK tries to influence EU policies and legislative proposals in the making. This 'glimmer' may be read from expert meetings that the EU Commission organises to consult experts and interested parties prior to initiatives. The UK has a tradition of monitoring EU policies very closely and 'upstreaming' its influence. During this embryonic phase the UK tries to assess the possible

impacts of the EU plans and tries to organise informal consultations. UK based stakeholders are, by their government, encouraged to engage directly with the EU institutions too in this stage in order to transmit their views early on (Cabinet Office, 2005; Cabinet Office, 2003).

The UK transposition process officially commences when the Commission issues its draft proposal for a directive and the process by and large proceeds parallel to the process of negotiation of the EC directive. When a draft proposal is published two subsequent processes start. The first process aims to arrive at a common British negotiation strategy on the basis of an impact analysis and consultations on the proposal, and the second aims to put together a project plan for the transposition of the directive once it has been enacted. The processes of negotiation and the preparation of the transposition are closely interlinked and – according to some of the respondents in the interviews - ideally the team of policy-makers, lawyers and other civil servants that worked on the preparation and negotiation-strategy on the draft EC directive should also work on the actual transposition. Continuity is considered good practice. Due to job-rotation – a change of position every three to four years is quite common in the civil service – this ideal is very difficult to achieve given the length of European legislative processes.

Once the draft Commission proposal is published a lead department is charged with the treatment of the dossier. Sometimes more than one department is involved. The assignment of the dossier to the lead department is a relatively informal process supervised by the cabinet. Judging from the interviews the assignment hardly ever causes major problems. In our view two factors account for that. First of all the British system is based upon the system of collegial responsibility or prime ministerial responsibility (Prakke Kortmann, 2004; 879-880) which to a certain extent prevents adversarial departmental entrenchment. Secondly there is a tradition of strong co-ordination from the Cabinet Office.

Table 12.2: Information regarding EU proposals presented to the British parliament

Document	Contents
Explanatory memorandum	Legal and procedural issues
	Policy and financial implications of the proposal
	Timetable for transposition
Regulatory Impact Assessment (RIA)	Examination of the economic, social, environmental and legal effects of the proposal
	Negotiation strategy

12.4.1.2 National treatment of Commission proposals

This stage in the process starts, as we noted in section 12.4.1.1, with the presentation of a proposal for a directive by the Commission. The lead department provides the Cabinet Office with an ‘explanatory memorandum’ (a formal communication to Parliament) and a partial ‘Regulatory Impact Assessment’ (RIA) as soon as possible. The Cabinet Office in its turn passes it on to Parliament. The explanatory memorandum includes information on legal and procedural issues and policy and financial implications of the proposal and a timetable for transposition. In principle separate memoranda – each dealing with a separate aspect - are prepared for each document. This is also the case when the original proposal is substantially amended. The partial RIA, in which the (economic, social, environmental and legal) effects of the proposed directive for the UK are examined, is developed on the base of the initial RIA prepared before the proposal was presented.

The RIA, which is updated as the negotiations proceed, serves to inform the relevant minister of the negotiating line, to seek agreement with other departments, and to inform the parliament of the negotiation strategy. Table 12.2 gives an overview of the information that is presented to the parliament.

Before the Common Position by the Council is adopted, a project plan for the transposition should be put together by the responsible department in agreement with Ministers, other departments, Cabinet Office and, where appropriate, with the Devolved Administrations (Cabinet Office, 2005). Informal consultation is also initiated.

At this stage, in most cases, a project team consisting of policy officials as well as lawyers and sometimes technical specialists from Whitehall, agencies, devolved administrations or local government is created. A project team (or 'bill team') does not necessarily have an interdepartmental composition: its composition varies according to the specifics of the directive at hand.

The tasks of a project team is twofold: a) to forge a negotiation strategy and b) to make a transposition plan, including the identification of provisions in the directive that will require transposition, division of tasks, timetable, and risks connected with the coming transposition. In interviews conducted with officials in the Cabinet Office and the Department of Transport in the course of a study by the Asser Institute, it was confirmed that those teams have been created since 2001 and that they form an efficient tool securing timely transposition of directives. The use of project teams is encouraged, though, as some of the respondents pointed out, not always feasible or practical. Some departments like the Department of Trade and Industry pool staff members in order to be able to allot sufficient personnel power to different project teams over time.

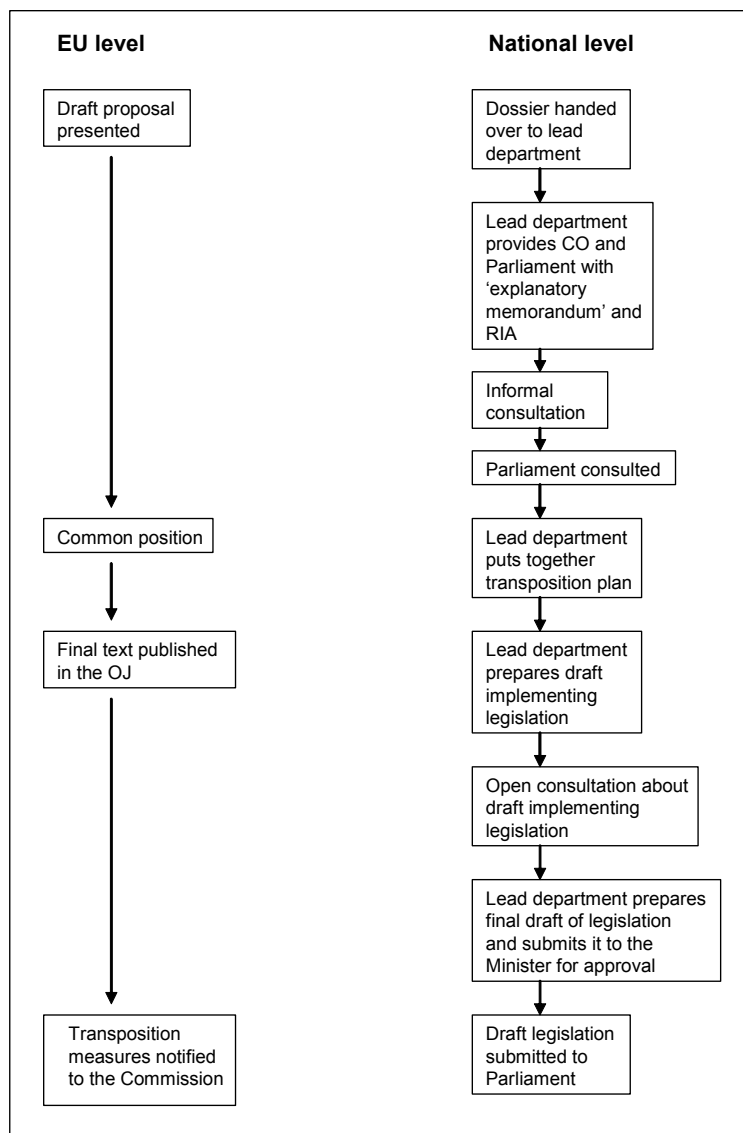
The project team - or civil servants within the lead department - take the lead in the formulation of the negotiation line. Depending on the nature and contents of the proposal this may require the involvement of various authorities. In cases of inter-departmental conflicts the European Policy Committee at the Cabinet Office acts as co-ordinator. This may also involve resolution of conflicts with the devolved authorities, although this sometimes may prove difficult because they are not hierarchically subordinated to the Whitehall authorities.

Before a negotiation line is decided the lead department will have – as a result of the so-called scrutiny reserve (see section 12.4.4) – to consult Parliament, the fellow ministers (via the European Policy Committee of the Cabinet) and relevant interested parties, governmental and non-governmental alike. Consultation is considered very important in the UK. After initial informal consultations in most cases formal consultations on more important directive proposals are initiated. In January 2004 the Regulatory Impact Unit of the Cabinet Office issued a Code of Practice on Consultation laying down some important do's and don'ts as regards consultation (Cabinet Office, 2004). The Code of Practice advocates wide consultations, and requires a minimum of twelve weeks for a written consultation. Respondents in the interviews reported the threat of consultation fatigue. At this moment (spring 2005) the Cabinet Office is considering more dynamic and less time consuming forms of consultation.

In spite of its efficient co-ordination of EU policy, the UK has for the most part not been very successful in securing favourable outcomes in the negotiations. The UK has been the most successful in the area of economic policy, and particularly in the development and implementation of the single market programme. However, for other policy types, for example constitutional and institutional reform, and social policy, the UK has not been able to shape policy outcomes according to its preferences. One explanation for this lack of success could be that the preferences simply have not converged with the preferences of other member states.

Inability to form coalitions could also stem from the fact that the administrative culture among British civil servants is different to the administrative culture in most other member states. While the EU policy environment is characterised by accommodation and consensus building, the British civil servants are schooled in the tradition of neutrality and are used to single party government in an adversarial party system. Also, the co-ordination system itself could have adverse effects, since the focus on a centralised strategy severely limits the flexibility of the UK in the negotiations (Kassim, 2000).

Figure 12.1: Main features of the UK transposition process



12.4.1.3 National transposition

The second task of a project team, or – if no project team was set up – the lead department is to examine the directive proposal with respect to its transposition implications. In order to secure timely transposition the Transposition Guide of the Cabinet Office recommends that – after the European legislative procedure on the directive proposal has reached the stage of the Common position - a Transposition Project Plan is formulated. Important elements of this plan are the relationship of the proposed directive to the existing legal UK framework, the choice of enforcement regime, transposition deadlines, and the clarity of the proposal and its impact on future domestic legislation. The main features of the process of transposition in the UK in relation to the timing of the decision making process at the European level is outlined in Figure 12.1.

Best practices concerning the options for transposition are elaborated on in the Chapter 3 of the Transposition Guide. The Guide calls for particular attention to the margins of discretion that are left to the Member States in implementation. Other key issues to be discussed and resolved at this stage are enforcement regimes, including sanctions, (if appropriate) the monitoring and administrative regime and the legal remedies along with the possibility of producing practical guidance for the economic operators. The RIA covering the economical, social, environmental, and legal costs and benefits of the directive is, at this particular stage, refocused to include options for implementation. Once the draft domestic implementation legislation is considered this upgraded RIA and the draft of the implementing regulations is used for open consultation on the different implementation options. Again, in principle, at least 12 weeks need to be provided for a written consultation on the implementation options.

While this may slow down the process of transposition, it can – according to the Code of Practice on Consultation - lead to better solutions, especially when the directive in question leaves some discretion to the Member States. On the face of things implementation consultation does not seem to seriously hamper timely transposition in the UK. The aforementioned ‘consultation fatigue’ seems, judging from the interviews, to be more of a concern.

When the consultation is concluded, the final draft of the legislation is prepared. At this stage, the final RIA is presented and attached to the draft legislation. In the next step the proposal is submitted to the Minister for approval and subsequently for approval by the Parliament (Asser Institute, 2004d).

When the transposition of a directive in the UK is completed, a letter of notice is sent to the Commission by the responsible department, and the transposing measures are laid before Parliament. Since November 2001, UK legislation laid before Parliament that transposes a European directive, must be accompanied by a so-called Transposition Note. In the Transposition Note, it is explained how the main elements of the relevant directive has been or will be transposed into UK law. Exceptions can be made for situations in which the costs of producing such a note outweigh the benefits (Cabinet Office, 2003). The Transposition Notes allow MP’s to check instantly whether or not a directive was gold-plated (see Section 12.3.2).

Reducing bureaucracy, avoiding administrative burden and cutting red tape are the pinnacles of the Better Regulation policies. In order to reduce the burdens of – quickly changing – EC directives and national legislation implementing it for – chiefly - economic operators, the UK has of recent resorted to the concept of ‘common commencement dates’. The idea of common commencement dates is that only twice a year new legislation pertaining to businesses or other economic operators in a certain sector enters into force. Common

commencement dates also offer opportunities to improve and focus the guidance on sets of forthcoming legislative measures. Guidance is, some of the respondents tell us, becoming an increasingly critical factor to policy success.

12 4.2 Bureaucratic consultation and coordinating bodies

Individual departments play—as was pointed out in Section 12.1—the leading role in the co-ordination system, and each department deals with Community matters that fall within their area of responsibility. Experts within the technical divisions of the department concerned take the lead in formulating the UK's position, and consult other departments. How this is organised differs between the departments, but many departments have set up special units to co-ordinate European activities internally. The two departments that are most extensively involved in EU affairs are the Department for the Environment, Food and Rural Affairs (DEFRA) and the Department of Trade and Industry (DTI). They have created respectively an EU Division and a European Directorate, which oversee EU related work and implementation of EC law. DEFRA and the DTI also encourage their officials to build a 'European' career (Drewry, 1995; Kassim, 2000).

Although the initiative lies with the individual departments, all directives in negotiation must be commented upon by the European Secretariat and the Foreign and Commonwealth Office (FCO). However, the domestic departments feel that they have the necessary expertise, and therefore the co-ordinating function of the Secretariat is seen more as a formality (Siedentopf and Hauschild, 1988). Still, the machinery that is set up is rather efficient, and it plays an important role in helping the government form a common position.

In the UK, in contrast to most other member states where the main co-ordinating role is played by the Foreign Ministry, the key role in co-ordination of EU policy is played by the European Secretariat of the Cabinet Office. One advantage of this is that the Cabinet Office is a more neutral body than the FCO, which has interests over a wide range of issues. A second advantage is that the Cabinet Office has an important role in coordinating domestic policy as well, and it presides over a large network of Committees. The role of the European Secretariat is therefore a natural extension of this role (Drewry, 1995). One of the main tasks of the European Secretariat is to oversee that European directives are transposed properly into domestic law (Bulmer and Burch, 1998). It also makes sure that other departments with an interest in a particular issue are consulted in the process of negotiation. The officers keep in close touch with the experts in the responsible departments and with the UK Permanent Representation (Kassim, 2000). The head of the European Desk of the Cabinet Office meets with the Permanent Representation on a weekly basis in the so called Grant Darroch meeting. If problems occur within or between departments handling European dossiers the Cabinet Office will intervene. If the European Secretariat is not able to resolve the differences informally, formal procedures follow in one of the committees. The subcommittee on European questions is divided into three levels. Routine policy matters are handled on official level by EQO, which meet at least 100 times per year. All departments are entitled to send representatives to meetings. The committee at senior level is called EQO*, and at the ministerial level (E)DOP. Legal aspects of EC business are dealt with in the EQO(L), an offshoot of the EQO. This committee also coordinates legal advice across departments (Drewry, 1995; Kassim, 2000). In some respects the Cabinet Office is the nerve centre of British European policies. It acts as an intermediary between the Permanent Representation in Brussels, the Foreign and Commonwealth Office and other departments during the very early stages of a directive proposal, it takes the lead on proposals for directives that are considered very important to UK interests or policies, it monitors whether good practice (e.g. the implementation of the Better Regulation targets, legislative quality) is observed by the lead

departments, (implementing) agencies or regulators. To this last end a Regulatory Impact Unit was set up within the Cabinet Office offering advice and guidance to government departments e.g. to help them conduct impacts assessments and more generally make them aware of notions of better regulation (i.e. aiming for fair and effective regulation and reducing bureaucracy and red tape to the bare minimum) (Cabinet Office, 2002). In order to give better regulation a more permanent foothold, all departments have set up a Departmental Regulatory Impact Unit (DRIU), which acts as the first point of contact within Departments on regulatory issues. Although there are no formal, procedurally engrained, relations with the Better Regulation Taskforce during the negotiation (or transposition for that matter) of EC directives, the spirit of Better Regulation is – at this moment - very much present at all levels of government. The Blair administration is trying to convince the relevant stakeholders of the benefits of Better Regulation rather than to impose it. This is illustrated by the example of the Scrutiny Team. This Team acts as an independent promoter of Better Regulation policies and – in order to convey the message – it works together with the Cabinet Office Units, other departments, regulators and the regulated, focusing on those regulations which impact on business, charities, and the voluntary sector.

The strong position of the Cabinet Office is both beneficial to effective negotiation and timely transposition, respondents in the interviews feel. The Cabinet Office keeps close track of the transposition processes and results and can therefore spot bottlenecks and act upon it. This however does not prevent transposition backlogs from occurring every now and then. Raising the game of the transposition results and reducing backlog – often felt necessary in the advent of a UK presidency or an important EU summit – needs - as in most member states – strong political backing.

Although the European Secretariat of the Cabinet office plays the key role in coordination of EU matters, the FCO also still plays a central role. The FCO has set up three European Union Divisions, one external (EUDE), one internal (EUDI) and one for bilateral relations (EUB). The divisions report to the Director for Europe who has the general responsibility for EU policy. The main roles of the EUDI are adding a FCO perspective to dossiers going through the EU legislative process, keeping the Foreign Secretary up to date with EU developments, taking the lead on broad issues and organizing coordination on these issues together with the European Secretariat. It also operates the communications infrastructure connecting London with Brussels and other capitals, distributes EC documents to other departments, provides briefings for European Council meetings and is the main link with the UK Permanent Representation. The role of the EUDE is more like the roles of divisions in other departments, and it takes the lead in issues dealing with the foreign policy of the EU (Drewry, 1995; Kassim, 2000).

12.4.3 The role of compulsory advisory bodies

The UK does not have a overall system of mandatory consultation on draft legislation. Scrutiny is exercised by both Houses of Parliament, the House of Lords acting as a *Chambre of reflexion*. Parliamentary scrutiny of statutory instruments implementing EC directives is intensifying over the last years.

Consultations during negotiations are conducted at the government's discretion, but are considered ever more important and best practice. During the negotiation and transposition of EC substantive EC directives even double consultation is encouraged (Cabinet Office, 2004) (see for further reference section 4.1). Sometimes legislation makes consultation mandatory. E.g. Section 5 (1) of the Regulatory Reform Act 2001 does oblige ministers to consult interested parties before they make an order on the basis of the 2001 Act.

The Cabinet office serves as a go between for the co-ordination and an observer of good form as regards these consultations. There is no distinct compulsory advisory body nor is there a form of formal review during the negotiation or implementation phase in the UK.

12.4.4 The role of the parliament

As mentioned above, the parliamentary scrutiny of EC legislation is underpinned by the understanding that ministers should not normally agree to EC legislation without giving Parliament an opportunity to scrutinise the legislation (House of Commons Information Office, 2003). This principle is called the 'scrutiny reserve' and it is enshrined in the Scrutiny reserve resolution passed by the House of Commons in 1998 (House of Commons, 1998).

Upon the adoption of a Commission proposal, the British government presents the proposal, including an 'explanatory memorandum' to the Lower and Upper Chamber, which can then debate the proposal and can in principle disagree and push for certain amendments. The negotiator in Brussels should then respect the mandate of the parliament. However, due to overload, differing timetables and difficulties for the Parliament to access information about the governments position in the negotiations, it is far from always the case that Parliament has a say in negotiations on European legislation (Miers and Page, 1990). The lack of the technical knowledge necessary to sufficiently understand certain issues further limits the influence of the Parliament. The problems of parliamentary scrutiny could also be explained by underlying weaknesses in the position of the Parliament, the most important of which is that the Parliament is, for the most part, politically dependent on the government. However, the UK Parliament has a more prominent role in EU business than parliaments in most other member states, with the Danish Folketing as an outstanding exception (Drewry, 1995; Kassim, 2000).

The parliamentary scrutiny of EU proposals is supervised by the European Secretariat. Among other things, the Secretariat makes sure that the departments supply the scrutiny committees in the Parliament with information about Commission proposals accompanied by explanatory memoranda (Kassim, 2000). However, it is also of great importance that the UK Parliament, as opposed to the national parliaments of many other member states, asks for EC documents on its own accord and does not sit and wait for EC material to be forwarded by the government. In addition to traditional methods for scrutiny, for example the tabling of parliamentary questions and the holding of debates, special procedures and mechanisms have been developed. In the House of Commons a select committee, the European Scrutiny Committee, has been established. The European Scrutiny Committee is informed on EU issues, including legislative proposals. It focuses on matters of political importance, and decides on which proposals (about 1100 per year) should be considered by the Parliament. The Committee receives an explanatory memorandum on each document from the relevant Minister. All documents deemed politically or legally important are discussed in the Committee's weekly Reports. Debates recommended by the Committee take place either in a European Standing Committee or (more rarely) on the Floor of the House. There are only three EU standing committees: A. which includes Agriculture, B. which includes Home Affairs and C. which includes Trade. Some of the respondents feel that these committees have too broad a scope which results in lukewarm interest for the debates.

Documents that are not selected for debate can be negotiated by the government. The scrutiny reserve involves that the scrutiny procedure should be finished before the minister agrees in the Council. However, if

it is urgent, the reserve might be breached. This happens about 20 times a year, and the reason can be that otherwise the UK would not be able to vote because of the time schedule.

In the House of Lords, there is a Select Committee on the European Union, which mainly evaluates Community policies and proposals. The Committee publishes reports on any area of EU business, and the reports are extremely well respected. However, the Committee has not escaped criticism, and it has been argued that the reports have little effect on government policy (Miers and Page, 1990; Kassim, 2000).

Paragraph 2 of Schedule 2 of the European Communities Act contains provisions for scrutiny of delegated legislation used for the transposition of EC law. There are two possibilities. Either, a draft of the implementing measure has to be approved by Parliament ('affirmative resolution procedure'), or otherwise, the implementing measure can be annulled by either House of Parliament ('negative resolution procedure'). In the 'affirmative resolution procedure' approval by both chambers is required. In the negative resolution procedure, which is the most commonly used, the implementation measure is presented to both chambers of parliament. They then have 40 days to adopt a resolution against the regulation, which, partly because of the tight time schedule, very seldom occurs. Statutory instruments used for the implementation of EC law can thus be annulled by either House of Parliament. However, this is more or less a formality, since statutory instruments used for the implementation of EC law are seldom effectively scrutinized and almost never obstructed by Parliament (Drewry, 1995).

12.4.5 The role of other, subnational of functional administrations

European integration has been important for emerging challenges of the unitary British state. Scotland, Northern Ireland, Wales and the English regions have all seen new opportunities that European integration has brought with it, for example inter-regional alliances (Bulmer and Burch, 1998). Perhaps partly because of European influences, important constitutional changes were made in 1997, which lead to the devolvement of certain areas of government to different parts of the UK. Based on referendums in Scotland and Wales, a Scottish Parliament and a Welsh Assembly were created. In Northern Ireland, there already was an Assembly, but it was not in operation. The Northern Ireland Assembly is currently suspended through the Northern Ireland Act 2000 (Suspension of Devolved Government Order, 2002).

Although the power over important policy areas such as agriculture, fisheries, environment and structural funds has been transferred to the devolved administrations, this has, at least not yet, brought about a transformation of the system for coordinating UK policy. A Scottish Executive EU Office and a National Assembly for Wales EU Office have been set up in Brussels. However, the UK Permanent Representation has maintained its central position in the coordination of EU policy at the European level. On the domestic level, there are three territorial ministries, the Scotland Office, the Wales Office and the Northern Ireland Office, which participate in the coordination of EU policy. However, they do not take the lead in any policy area, but remain dependent on the sectoral departments (Kassim, 2000; Kassim, 2001).

Traditionally the process of transposition is highly centralized, and the county councils are not consulted. However, for Scotland and Northern Ireland, separate transposition measures have often been used (Butt Philip and Baron, 1988). The Government of Wales Act 2000 makes it possible to transfer rights of implementation of EC law to the National Assembly of Wales. The Scotland Act indicates that some implementation rights should be transferred to Scotland. It seems that whether transposition is done on a central or regional basis depends on the policy area. For example, food, agricultural and environmental measures seem to be transposed on a devolved basis, i.e. England, Scotland, Wales and Northern Ireland.

Transport measures are transposed on a UK basis. Several measures are transposed on a parallel basis in Great Britain and in Northern Ireland. Since devolution is a quite new phenomenon the way devolved government partake in the implementation of EC directives is only now settling in. It proves quite difficult to manage the different responsibilities. The UK government handles most of the negotiation, but for some areas – like fisheries – transposition of EC Directives is a joint responsibility. Some devolved governments have some trouble with timely transposition, which in its turn is a problem for the UK government that is at the end of the day responsible for transposition deficits.

12.4.6 *The role of interest groups*

Each department has its own ‘policy network’, on which they rely for information and for gaining compliance for policies. The policy preferences of the departments are influenced by these networks. There are advantages for both sides. The interest groups have opportunities of influencing policy and legislation before it is adopted, and the departments, partly due to their generalist nature, are dependent on advice from the interest groups. The process of interaction is not open, but in order to influence policy, interest groups need to obtain insider status with the department. As mentioned above, the department responsible for the transposition of a directive usually consults affected interests during the process of drafting and adopting the necessary transposition measures (Drewry, 1995).

12.5 Analysis of instruments and techniques

12.5.1 *Advantages and disadvantages of instruments*

The obvious benefits of the use of statutory instruments are speed and flexibility. The system of the European Communities Act 1972 allows the UK government to transpose EC directive very quickly, since transposition by way of SIs is less time-consuming than transposition by way of Acts of Parliament. An additional benefit is that the EU origin of the legislation is clear, since there is a mandatory reference to the directive in the Explanatory Memorandum attached to each statutory instrument. The downsides are as obvious too. The disadvantages are that the degree of parliamentary scrutiny is at best modest, that the level of public transparency is low and that the quality of the instruments is generally is of a different standard than is the case with Acts of Parliament.

Parliamentary scrutiny on statutory instruments is in most cases only really possible after the SIs have been made. The volume of the instruments, almost all of them subject to the negative resolution procedure, is such that it is very hard for Parliament to keep track. Consequently it almost never happens that a proposal for a statutory instrument is blocked by Parliament. Prayers are seldom successful. When we combine that with the aloof scrutiny exercised by the Joint Committee on Statutory Instruments – even with the Merits committee in place - the transposition and the resulting instruments are very much government centred and controlled.

At least there is a systematic review of statutory instruments to check whether or not they are ‘ultra vires’, since the Joint Committee on Statutory Instruments scrutinises all statutory instruments.

12.5.2 *Advantages and disadvantages of techniques*

The debate on copying-out (merely reproducing provisions contained in directives in British law) or elaboration (trying to integrate EC provisions in British law by bending and twisting the text somewhat) has

definitely turned out in favour of copying-out as the default option, although there are circumstances where elaboration is still necessary. Still in the recent past a lot of British lawyers felt that copying out would confuse English judges, since the style and system of EC legislation differ from that in British law. This argument is countered by the judges themselves who – as the ones having to apply and interpret EC legislation – increasingly prefer to consult the ‘raw’ text of EC directives in order to see what was actually meant.

In the wake of the Better Regulation policies the present-day focus in the UK is on preventing gold plating, i.e. transposition that goes beyond the minimum necessary to comply with the directive, and double banking.

12.6 Analysis of the national process

There are at least two characteristics of the UK transposition process that account for speedy transposition. The first is the fact that the European Communities Act makes it possible to implement EC obligations with statutory instruments without the adoption of a new Act.

The second characteristic is that the departmental lawyers, who also draft the legal texts for statutory instruments, ought to be involved in the transposition process from the very start and should therefore be able to indicate at an early stage in the negotiations if there will be problems with introducing certain provisions into national law. Since these lawyers tend to circulate among the departments and have a culture of their own, it is unlikely that the drafting styles differ between the departments. However, a technicality, which could make transposition more difficult, is that the drafting style of British lawyers differs from the style used by draftsmen in the EU.

Administrative culture also seems to play a role, and Kassim (2000) suggests that the efficient transposition and implementation in the UK, which seems to be unaffected by the substance of the directive, reflects deeply entrenched values in the UK administration.

As mentioned above, the coordination effort of the UK is very ambitious. This can partly be explained by the principles of the domestic system of government in the UK. Another explanation could be derived from the facts that the UK entered the EC/EU late, and that the attitude in the UK towards membership has been rather sceptical in nature. This could explain the adoption of a system that ensured that the UK interests are carefully safeguarded (Kassim, 2000). Yet another explanation could be found in the legalistic attitude of the UK towards the implementation and enforcement of directives. Since directives are implemented and enforced in the same way as domestic law, it is important that the directives are acceptable and possible to implement (Butt Philip and Baron, 1988).

12.7 Conclusions

- In the UK, most directives are transposed by Statutory Instrument (delegated legislation). While specific legislation is sometimes used as the basis for delegation, an important feature in the UK is that it is possible to base delegated legislation that aim to transpose European directives on the European Communities Act 1972. While this certainly is important for speedy transposition, it cannot in itself account for the good transposition record of the UK.
- Another factor that facilitates prompt transposition is the efficient system for coordination of EU affairs in the UK. The central position of the Cabinet Office in this system is also of importance for transposition,

since its central position can be used to put political weight behind efforts to reduce the transposition backlog.

- A third factor that is important for timely transposition is the link between the stages of negotiation and transposition. In the UK, project teams responsible for the negotiation strategy and the transposition plan are set up when appropriate. According to good practice, the same officials should be involved in both stages. While job-rotation makes this difficult in practice, the teams provide a certain degree of continuity throughout the process. It is regarded as important to ‘think transposition’ already at the negotiation stage.
- An important feature of the UK system is the so called ‘scrutiny reserve’, which gives the Parliament a possibility to be involved already at the negotiation stage. The ‘scrutiny reserve’ involves that ministers should not agree to EC legislation before the Parliament has had an opportunity to scrutinise it.
- Legislation that transposes European directives is subject to an open consultation procedure, and in principle at least 12 weeks should be provided for this. It is possible that this could slow down the transposition process, but on the other hand, it could lead to better solutions for transposition.
- One possible cause for transposition delays is the recent devolvement in the UK. In some cases, it is necessary to adopt separate transposition measures for the devolved administrations. Since this is a relatively new phenomenon, difficulties could arise in managing the different responsibilities.
- The debate on transposition in the UK is not so much about timely transposition. Since the UK score is usually good, there rather seems to be a concern that the UK is too zealous in transposing on time. The debate is more about ‘gold-plating’ or ‘elaboration’, and it is generally regarded as important that the UK does not do more than is required by the directive.

Appendix: List of interviewees

- Lady Justice Arden, Royal Courts of Justice
- Philip Bovey, DTI
- Natasha Coates, Cabinet Office
- Alison Rose, Cabinet Office
- Liam Laurence Smyth and Gunnar Beck, House of Commons
- Stephen Parker, Treasury Department
- Frances Nash, Treasury Solicitors
- Clive Fleming, DTI
- Simon Manley, Foreign & Commonwealth Office

13 Germany

13.1 General overview of the constitutional and political system

Germany is a federal republic in which political parties and interest groups play a central role in national policy-making. Like other federalist systems Germany's political system is far more complex than the structure of a centralized unitary state, such as the UK, France, and the Netherlands. It is a country with seventeen governments. Each of the sixteen constituent states of Germany's federalism has the full outfit of government. A minister-president heads each state and is elected in the state parliament. Each state has its own constitution, government, legislation, and administration. Most of the states have a constitutional court. In contrast to the pre-unification period, in which Germany comprised ten economically relatively homogeneous states and West Berlin, the post-1990 federalism has been characterized by sharp economic disparities between the poor states in the eastern part of the country, and wealthier states in the western part. The difference between the poorest and the richest state is 'twice the difference between the poorest and the wealthiest state in the USA' (Schmidt, 2003: 57).

13.1.1 Constitutional characteristics

The codified character of German law means that there is little judge-made or common law. The judge in a codified system is only to administer and to apply the codes. He fits the particular case to the existing body of law as found in them, i.e. the judge may not set precedents and thus make law, but he must be only a neutral administrator of the existing codes. This lies at the base of the 'dominant philosophy of legal positivism, or analytical jurisprudence' (Conradt, 2001). Legal positivism contends that existing general law as found in the codes sufficiently encompasses all the rights and duties of citizens. Judicial review is not necessary. Politics, accordingly, must be kept strictly distinct from law.

13.1.2 Political characteristics

One key feature of the political system in Germany is the *Kanzlerdemokratie*. Article 65 German constitution says that the Federal Chancellor determines and is responsible for the general guidelines of policy. Federal Ministers are appointed and dismissed by the Federal President upon the proposal of the Federal Chancellor. Within these limits each Federal Minister conducts the affairs of his department independently and on his own responsibility. The Cabinet resolves differences of opinion between Federal Ministers. It is the Federal Chancellor who conducts the proceedings of the Federal Government in accordance with rules of procedure adopted by the Government and approved by the Federal President.

The second key feature is Germany's federal structure. The power of the states is institutionalized in the *Bundesrat*, the collective representation of the states at the federal level. Here the states play a key role in the lawmaking process. This largely reflects the central position of the upper house in federal legislation, which turns Germany into a 'case of strong symmetrical bicameralism' (Lijphart, 1999: 214, 314). Although legislative power is mainly concentrated in the federation¹⁰⁹, the *Länder* have conferred a considerable

¹⁰⁹ First, it enjoys exclusive legislative powers according to Art. 73 German Constitution (foreign affairs, citizenship, immigration, currency, air transport). Secondly, it has exercised legislative power in almost all fields of concurring legislation according to Art 74 German Constitution which can only be exercised by the *Länder*, as long as the Federation does not legislate. Concurring legislative powers include most legislative

number of legislative competences to the federal state to ensure equal living conditions in the whole republic. They have kept competences in particular in cultural matters, police law, local government, construction law and commercial law, but also in transport, social policy, food, and utility policies.

Furthermore, Germany is a densely organized society. Interest groups are a 'vital factor in German policy making process' (Conradt, 2001: 131). Germany is a 'neo-corporatist' state (Lehmbruch, 1979: 147-188), i.e. there is a strong corporatist tradition of institutionalized cooperation between government and industry, regulator and operator¹¹⁰. These associations become in effect 'quasi-governmental groups, training, licensing, and even exercising discipline over their members with state approval' (Héritier, Knill and Mingers, 1996: 59). In addition to parliamentary recruitment and extensive consultations between government and interest groups, the practice of appointing group representatives to the many permanent ministerial advisory committees and councils affords the interest groups still more input into the lawmaking process.

Another key feature is the role of parties in Germany. Germany has been notorious for the dominant part played by the political parties on all levels of government.¹¹¹ However, the role played by parties differs from one policy area to the other. In some of these areas the role of political parties is strong, for example in social and transport policy, in others moderate or weak (Schmidt, 2003: 49). Examples of the latter include mainly policy domains governed by experts, such as monetary policy and competition policy.

13.1.3 Political administrative characteristics

German administrative units are very hierarchical but not centralized. The bureaucratic pyramid is very steep, but there is little actual direct control from the top of the activities in the middle and at the base. It is highly fragmented and 'discourages comprehensive policy planning or major reform initiatives that require extensive interdepartmental, interministerial, or federal-state cooperation' (Mayntz and Scharpf, 1975: 69-76). Because the top political officials in each ministry have little staff, they cannot exercise the control in practice they have in theory. However, the small size of each section and the practice of making the section head personally and legally responsible for the section's decisions make success or failure highly visible (Schmidt, 2003).

Despite the decentralized structure of the state, civil servants generally share a common background and training. Recruitment to the service is closely tied to the educational system. The higher level, still the

subjects, such as civil law, criminal law, court organization and procedure, the legal profession, foreigners' residence, public welfare, economic affairs, labour relations, land law, and road traffic. Thirdly, the Federation has the right to enact skeleton or framework legislation carried out in detail by the Länder according to Art. 75 German Constitution which includes general principles of higher education, legal status of the press, nature conservation, regional planning. Once the Federation has exercised its power to legislate relevant law of the Länder becomes void.

¹¹⁰ Corporatism is an old term in social and political thought, referring to the 'organization of interests into a limited number of compulsory, hierarchically structured associations recognized by the state and given a monopoly of representation within their respective areas' (Schmitter, 1981: 300).

¹¹¹ One indicator of the important role played by political parties is the attention given to the parties in the German constitution (Art. 21 I German constitution). A second indicator of the major part played by the parties is that they are entitled to receive subsidies from public budgets of up to one-half of their total annual revenue. A third indicator of powerful role for the parties can be derived from the weakness of plebiscite institutions at the level of the federation.

monopoly of the university-educated, was once restricted in that a legal education was required. Today lawyers still dominate the upper ranks, and surveys have shown that they remain the ‘most privileged of the privileged’ (Brinkmann, 1973: 150). A recent comparative study shows that over 60 percent of top German civil servants have been lawyers, as compared to approximately 20 percent of high-ranking American bureaucrats (Aberbach et al., 1990: 7). But there are no graduates of elite schools whose members are distributed throughout the various ministries, as in Britain and France since there are no elite schools.

Given the background of German civil servants are a status-conscious group of people committed to the Republic and the EU and to the values and processes of them respectively (Pag and Wessels, 1988; Anderson, 2005). The civil servant’s perception of the political character of the job, however, has increased. In a comparative study of top administrators, German respondents were found to be as equally conscious of the ways in which work affects the stability and effectiveness of the democracy, as are civil servants in Britain, and more aware than Italian bureaucrats (Putnam, 1973: 257-290). A study of assistant section heads in the Economics Ministry found that most recognized and accepted the political character of their job. 67 percent perceived that they were involved ‘in politics’ and were not merely administering the laws as ‘neutral’ agents of a state above society, parties and parliament (Conradt, 2001: 217).

13.2 Political or public discussion concerning EU directives and their transposition

In August 2002, the European Commission stated that Germany had only transposed 95.2% of EC directives. According to the 2004 Internal Market Scoreboard from 13 July, Germany has not notified 3.5% of directives, placing it close to the bottom of the transposition league. Moreover, Germany is considered to be the second worst ‘offender regarding the number of directives whose transposition is over two years late’ (Asser Instituut, 2004e: 19).

In 2004, a federal government committee (*Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung*) has been discussing the reform of the German federal legal system, including issues related to speeding up the processes of to implementation of EC directives, as well as making the negotiations in Brussels more effective. The main aim of this committee, however, has been to disentangle the relations between the Bund and the Länder. This committee, however, was dishonored in December 2004. A remake is currently under consideration.

13.3 Description of judicial instruments

In Germany EC directives are implemented in accordance with constitutional law and the legal procedures relation to national law and ministerial orders, as set out in the German constitution, or the state constitutions. The draft laws and ordinances are developed by the Ministry which is competent with respect to the subject matter of the EC directive and they are then agreed with the relevant Ministries (Asser Instituut, 2004e: 6) There is no specific ‘implementation act’ (Asser Instituut, 2004e: 6). The EC directives are either implemented as laws (*Gesetze*) or ministerial orders (*Rechtsverordnungen*).

Law (*Gesetz*)

More than 75 percent of all EC measures requiring further transposition into national law fall within the competence of the federal state (Winkel, 1997:116; Brinkmann, 2000), i.e. fall under the exclusive competence of the federation (*Bund*).

The draft law formulated by a civil servant in a ministry is circulated within the Ministry and then a consultation process starts which involves other federal Ministries which are concerned in the specific case,

the Länder ministries and also associations concerned. Then the lead Ministry redrafts the law and again consults with the other federal ministries concerned, among them always the Ministry of Justice and the Ministry of the Interior (Asser Instituut, 2004e: 13). These constitutional ministries (*Verfassungsressorts*) scrutinize all draft bills drawn up by the other Federal Ministries as to their compatibility with the German federal constitution of the Bund (*Grundgesetz*). Then the cabinet votes on it and submits it to the chamber of the Länder (*Bundesrat*).

Table 13.1: German legal instruments

	<i>Gesetz</i>	<i>Verordnung</i>	<i>Verwaltungsvorschrift</i>
	Law	Ministerial order	Circular
Main features	Issues for which the Constitution calls for settlement through law	Provisions issued by government with explicit authorization through law (<i>Ermächtigungsgrundlage</i>)	Provisions issued by a minister without explicit authorization by law
Advice constitutional ministries	Required	Required	n.a.
Parliamentary approval	Required	Not required	n.a.
Procedure	Simple majority in Parliament		
Remarks		Fastest instrument	

The Government thus has an opportunity to take the counterproposals of the Bundesrat into consideration or attach to the draft a written statement of its position on these proposals. The comments of the Federal Government on any objections the Bundesrat may put forward are known as a counterstatement; like the comments of the Bundesrat, which have to be submitted within 6 weeks, this counterstatement is attached to the original bill. Thus the following documents are submitted to the Bundestag: the draft bill drawn up by the Federal Government together with an explanatory memorandum; the comments of the Bundesrat; and the counterstatement of the Federal Government on the comments of the Bundesrat. The documents submitted to the Bundestag at the beginning of the legislative process thus already reveal important aspects which may possibly give rise to conflict between the Federation and the Länder at a later stage.

Once copies of the bill have been distributed, the bill is considered by the parliamentary groups. As soon as the parliamentary groups have given the bill their initial consideration, the Council of Elders of the German Bundestag decides the date on which the bill will be given its first reading in the plenary.

The Bundestag generally deals with bills in three readings in the plenary. During the first reading, a debate is only held if this is recommended by the Council of Elders or demanded by one of the parliamentary groups. Debates tend to be held on bills of topical interest or political significance if the Government wishes to state its reasons for introducing them and if the parliamentary groups wish to make public their initial position.

The bill is always referred to one or more committees of the Bundestag at the end of the first reading. If a particular bill covers different subjects, it is referred to one or more committees in addition to the committee responsible. These committees submit their comments and proposed amendments to the committee responsible, which is required to take these into account in its report to the plenary. The deliberations of the

committee responsible conclude with the submission of a report and recommendation to the plenary, on the basis of which the bill is given a second reading.

Often bills cannot be dealt with conclusively during committee discussions even if the preparatory work by the parliamentary groups has been very detailed. If the subject matter of the bill is very complex, and the bill concerns a politically controversial piece of legislation, then a public hearing of experts and representatives of interest groups is held. This is now almost always the case when a bill of any importance is introduced.

Once the committee has discussed the bill the rapporteurs begin the second part of their work. They submit a written report to the plenary of the Bundestag in which they present the course the discussions have taken in the committee responsible and the committees asked to give their opinions. In their report, the rapporteurs focus in particular on reasons why the committee may have deviated from the Government's bill.

Once the committee has completed its work, the parliamentary groups must decide what position to take on the bill in its present form. Although the experts from the parliamentary groups are thoroughly familiar with the bill, it is important that all Members now have an opportunity to form an opinion on the bill. Further discussions are held if necessary by the relevant working groups or working parties, and after the executive committees of the parliamentary groups have been informed, the topic is placed on the agenda at a full meeting of each parliamentary group.

As a matter of principle, the Bundesrat participates in the passage of every law adopted by the Bundestag. The extent of its participation, however, depends on whether the bill in question is one to which the Bundesrat may lodge an objection or one requiring the Bundesrat's consent.

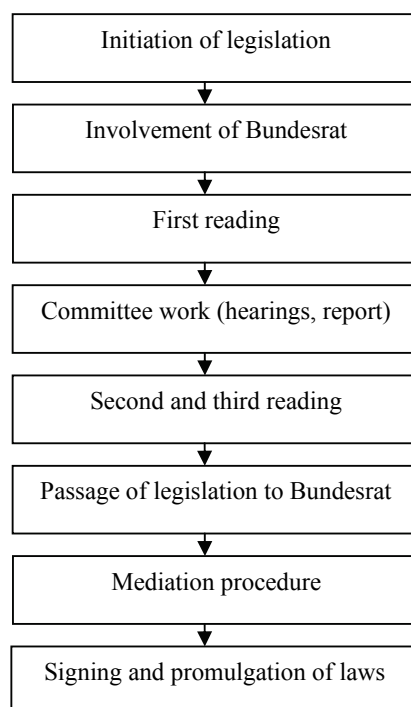
The Bundesrat may therefore exercise an absolute veto in cases a bill requires the consent of the Bundesrat. If it refuses to give its consent, then the bill has failed. The Bundestag cannot override this veto, no matter how large a majority of its Members supports the bill, and even if support for the bill is unanimous. A bill is considered to require the consent of the Bundesrat if it substantially affects the interests of the Länder. A bill may fall into this category if it affects the finances of the Länder or if it has a particular effect on the Länder's implementation of legislation, the organization of the Land administrative authorities or the implementation of any other measures by the Länder. As most federal laws are not implemented by the Federation itself but by the Länder 'in their own right' (Art. 83 of the German constitution), the Länder put in place the necessary authorities and administrative procedures for this purpose; if federal lawmakers wish to adopt specific provisions in this regard, they must first seek the consent of the Bundesrat. In practice, approximately half of all the laws passed require the consent of the Bundesrat (Binkmann, 2000).

The purpose of the mediation procedure, which is convoked in case of disagreement between upper and lower chamber, is to amend the bill in question in such a way that the Bundestag and the Bundesrat are equally satisfied with the final result. The Mediation Committee is a body composed of Members of the Bundestag and members of the Bundesrat. It comprises 16 Members of the Bundestag, who reflect the relative strengths of the parliamentary groups in the Bundestag, and 16 members of the Bundesrat, one for each Land. When the deliberations are over, the Mediation Committee submits a compromise proposal to the Bundestag and the Bundesrat.

In keeping with Article 82 of the German constitution, the above law was sent to the Federal Government to be signed by the appropriate Federal Minister and the Federal Chancellor. This procedure, referred to as countersignature, is laid down in Article 58 of the German constitution and ensures the validity of orders and directives of the Federal President. Following countersignature, the law was sent to the Federal President to

be signed. Finally, it is promulgated in the Federal Law Gazette (*Bundesgesetzblatt*) and takes effect according to the relevant provisions.

Figure 13.1: Federal law making process (Art. 76-78 Constitution)



Ministerial Order (*Rechtsverordnung*).

Ministerial orders have statutory status and have the status of laws in a material sense. The major difference from laws made by parliament is that they can be declared void due to illegality not only by the constitutional court, but by any court. A ministerial order is normally passed by the government executive. An explicit legal authorization, specified in the law as to contents, end and extent, is required. Article 80 of the German constitution states that a ministerial order must be based upon an enabling power set out within an existing law (*Ermächtigungsgrundlage*) in order to be passed into German law for a minister or the government of the federal state as a whole or a government of a Land to legislate by way of ordinances (Streinz and Pechstein, 1995: 136). It 'ranks' lower than a law. A ministerial order simplifies legislation and keeps laws free of individual provisions, thus enabling the executive to 'carefully rule on technical and practical items and to use the administration's expert knowledge' (Pag and Wessels, 1988: 170). This method of ministerial order is, in fact, to a certain extent indispensable for transposing EC directives in time (Scheuing, 1985).

To note, administrative instructions (*Verwaltungsvorschriften*) have been used as a third kind of instrument to transpose EU directives up to the early 90s. Two kinds of such instructions could be differentiated: those ruling internal organization and procedures and those forming the higher executive to

subordinated bodies regarding the interpretation of laws and the use of discretion. Several ECJ ruling in the late 1980s and early 1990s, however, have made clear that these administrative instructions (also known as circulars) were not adequate for transposition of EU directives.

Techniques

In exceptional cases, clauses have been included in laws which provide for the automatic transposition of EC directives at the moment that they enter into force in the EC. In rare cases where EC law must be implemented word for word, ‘automatic implementation’ allows the smooth implementation of a directive (Asser Instituut, 2004e: 15). An automatic implementation clause has been included, for example, in the Road Traffic Ordinance (*Strassenverkehrs-Zulassungs-Ordnung*).

13.4 The national policy cycle concerning directives

13.4.1 General overview of the process

The coordination of EU policy making in Germany is ensured at different levels of government by a set of institutions in the broad meaning of the term. Although the different coordination mechanisms have not been officially established by law, they have a long tradition and have influenced the structure of the federal government’s decision making process to a considerable extent.

13.4.1.2 National treatment of Commission proposal

In general, the negotiations at the EU level are lead by the Federal Government. The lead Ministry which is responsible for a given issue will conduct the German negotiations. If more Ministries are concerned, the joint procedure rules of the Federal Government (*Gemeinsame Geschäftsordnung der Bundesregierung*) provides the distribution of responsibilities between the relevant Ministries. The subsidiary Ministry will agree with the lead Ministry with respect to the position on given provisions of the EC directive.

The principle of ministerial responsibility would suggest that all ministers are equal in the face of the EU. But because of the evolution of EU policy fields, but also results from the historical evolution of the ministries in the Federal Republic some are more equal than others.

Due to the original ECSC and EEC treaties with their concentration on a few economic policy areas, only the Ministry for Economics had established a European affairs division. In absence of a foreign minister until 1955, the Federal Ministry for Economics took on the lead-role in the day to day policy management for the European Coal and Steel Community (Maurer, 2003). These original arrangements established the Ministry of Economics in a strong position on matters of functional – economics – integration, although there had been no formal agreement on the division of labour with the Chancellor’s Office. The entry into force of the Rome Treaties ‘ pushed the Ministries of Economics and Foreign Affairs to an agreement on European policy responsibilities, reached in 1958’ (Koerfer, 1988: 553-568). The Ministries for Agriculture, Finance and Foreign Affairs created European departments and directorates during the 1960s. In 1993, after the entry into force of the Maastricht Treaty, the Ministry of Foreign Affairs established a separate European affairs division. In addition, the Ministries of Justice and of the Interior provide legal expertise to the so called ‘Musketeers’ (Fisahn, 2001). The involvement of other ministries only became relevant within the context of the SEA and – with regard to the creation of divisions dealing with substantial aspects of co-operation in the fields of justice and home affairs – with the entry into force of the Maastricht Treaty.

With a view to instructing the Permanent Representation of the German position in Brussels, the Ministry of Finance – until 1998 the Ministry of Economics – coordinates the meetings in relation to COREPER I, whereas the Ministry of Foreign Affairs is responsible for the management of the Berlin based work in relation to COREPER II (Bulmer, Maurer and Paterson, 2001).¹¹² In order to give instructions to COREPER I and its subsequent working units, every ministry has a European Delegate (*Europa-Beauftragter*). They meet on a monthly basis. Since October 1998 the location and the chairmanship have been transferred from the Ministry of Economics to the Ministry for Foreign Affairs. Below this level, there are regular contacts between the heads of division (*Referatsleiter*) in order to settle disputes between the ministries concerned on issues related to the Council's working group meetings.

The Chancellor claims a certain 'domaine reserve' within the European Council. He disposes of a so called 'guidance competence' (*Richtlinienkompetenz*), which can be defined as a capability to set the strategic guidelines of the federal government in general, to resolve inter-ministerial disputes, and to determine the final governmental approach on a given issue (Scheuing, 1989).

Although according to Art 32 German constitution external relations are the exclusive power of the Federation at national level, the Länder gradually could make their voice heard in European law making. During the negotiations on the Rome Treaties, the Länder and the federal government also agreed on the institution of a 'Länder observer' (*Länderbeobachter*), who is located in Berlin as well as in Brussels, to provide information to the Bundesrat and the Länder. The Länder observer is entitled to participate at each meeting of the Council of Ministers and to report on the latter's proceedings to the Länder and the Bundesrat (Bulmer, Maurer and Paterson, 2001). However, due to its rather modest administrative support, until 1998 there were only two full-time and one part-time civil servants working in its Berlin and Brussels offices, the Länder observer did not become a key position in the decision making process between Brussels and the Länder governments (Dette-Koch, 1997:169-175).

The principle of subsidiarity, as provided in Art. 5 of the EC Treaty was an important demand of the German Länder. A new version of Art. 23 German constitution, allows the Länder to act as German representatives in the Council when their exclusive competences are concerned in the legal act in question. The direct participation of the Länder in the external representation of Germany in European affairs has been made possible through the amendment of Art. 146 (Art. 203) TEC at Maastricht that allows Länder ministers to be representatives in the Council.

These provisions were complemented by two Acts, one of which is the Act on cooperation of the Federation and the Länder regarding European affairs¹¹³, the other one is the Act on cooperation of the Federal Government and the Bundestag¹¹⁴, and by an Agreement between the Federal Government and the Governments of the Länder.¹¹⁵ The involvement of the Länder is now as follows (Maurer, 2003):

¹¹² There are exceptions: COREPER II meetings with regard to the Councils on ECOFIN, Budget, Finance and Tax policy are coordinated by the Ministry of Finance. The same rule applies to the instructions for the German COREPER II.

¹¹³ *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* (EuZBLG), BGBl 1993 I S. 313.

¹¹⁴ *Gesetz über die Zusammenarbeit von Bundestag und Deutschem Bundestag in Angelegenheiten der Europäischen Union* (EuZBBG), BGBl 1993 I S. 311.

¹¹⁵ *Vereinbarung vom 29. Oktober 1993 zwischen der Bundesregierung und den Regierungen der Länder über die Zusammenarbeit in Angelegenheiten der EU in Ausführung von Paragraph 9 des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der EU*, Bundesanzeiger No. 226 of 1993, p.

- the Länder have to be informed through the Bundesrat by the Federal Government in matters concerning the European Union,
- the Bundesrat has to be involved in the decision making process of the Federation in so far as it would have to be involved in a corresponding internal measure or in so far as the Länder would be internally responsible,
- in case of federal legislative power, if Länder interests are affected the opinion of the Bundesrat has to be taken into account,
- if Länder legislative powers, the establishment of their authorities or their administrative procedures are essentially affected the opinion of the Bundesrat shall prevail while, at the same time, the responsibility of the Federation for the country as a whole shall be maintained,
- if Länder exclusive legislative powers are essentially affected the exercise of rights of Germany as EU member is transferred by the Federation to a representative of the Länder while, once again, the responsibility of the Federation for the country as a whole shall be maintained.

As a response to the growing amount of EC legislation after the entry into force of the SEA, the Länder also opened information or liaison offices in Brussels between 1985 and 1987. Initially being criticized by the federal government as instruments of an ‘competitive foreign policy’ (*Nebenaussenpolitik*), they quickly became a necessary tool for the Länder to secure and pass on information from the European Commission and the German Permanent Representation during the decision preparation phase. Compared with the Länder observer, the Länder offices have far more administrative staff. In autumn 1997, there were 141 civil servants working in the offices of which 90 belonged to the higher service. Lander offices in Brussels have the following tasks: information gathering, attention for the special interests for each Land and presentation (Bulmer, Maurer and Paterson, 2001).

Besides the special cooperation between the Länder which have established a joint office in Brussels, all Länder are interested in coordinating as much as possible their activities in Brussels. They have therefore installed working parties on special topics. There is also a common interest in taking into account the workload on the information sources (EC authorities) and in asking them once only for information, not sixteen times (Streinz and Pechstein, 1995: 152)

The participation of the Bundestag in the elaboration and negotiation of European legislation is nearly non-existent. This is firstly a consequence of the system of separation of powers organized by the German constitution, which assigns external power to the government and not to the legislature. Secondly, the fact that even the information of the Bundestag is not systematically organized seems to be the consequence of neglect on the side of the Bundestag itself. Only in the last years have two parliamentary committees of the Bundestag been established: on EC matters, and on EU law (a branch of the law committee).

13.4.1.3 National transposition

The decisive actors in the German implementation of EU directives are the same as in the preparation and making phases of the EC policy cycle. Winkel (1997: 116), however, states that these actors tend to be ‘more concerned about the first two stages of European decision-making and are less sensitive to what comes after a given agreement’. To underline is that the coordination ministry shifts from the Ministry of Economics/Finance to the Ministry for Foreign Affairs with the government change in 1998.

10425; supplemented by the Vereinbarung of 8 June 1998 in order to deal in future with framework

Commission drafts of proposals for new or amended EC legislation are transmitted from the Permanent Representation to the Ministry of Economics and, since October 1998, to the Ministry of Finance. At the ministerial stage of policy development, a complex process of bargaining and negotiation takes place among the experts at the base, the section head, the department and subdepartment chiefs, and the executive. Any policy matter is attributed to one department of a ministry (the *Referat*, the basic working unit, roughly corresponding to a division of the Commission), as well as to the Bundestag and Bundesrat. Thus, for each directive there is a head of a department who is responsible for implementation. The competent department works out the draft of the legal act. If several departments or ministries are concerned, the principle of ‘*Federführung*’ is applied, i.e. one department is assigned the leadership and the final responsibility for the preparation. A civil servant responsible for the preparation and negotiation of a draft legislative act is also likely to draft the implementation measure (*Referentenentwurf*) (Maurer, 2003).

The influence of interest groups, parties and consultants is most directly felt at the executive and departmental levels. The sections are relatively insulated and secure in the knowledge that they have as much expertise, if not more, as anyone else in the ministry.

Technical issues are dealt with in one or two meetings per month of the so-called Group of European Specialists presided by the Ministry for Foreign Affairs. Here, technical policy issues are discussed and exchanged by officials in charge of the transposition of the EU legislation.

Where certain sections lag behind the time schedule required by a EC directive, these cases are discussed at high-level in regular meetings within the ministry but also within the federal government. These meetings take place about twice every month, attended by the relevant directors and subsequently, monthly meetings of the secretaries of state for Europe (*Europastaatssekretäre*) (Bulmer and Paterson, 1987). Currently, a new database is being put in place in order to better deal with the administrative challenges. The average implementation duration of the individual ministries is not documented.

13.4.2 Bureaucratic consultative and coordinating bodies

The bulk of the political coordination is carried out by the Interministerial Committee of State Secretaries on European Affairs (*Europastaatssekretäre*). Table 13.2 provides an overview of the various committees in Germany, including this committee. It was set up in 1963 in order to deal with ‘controversies in relation to European Affairs’ (Sasse, 1977:12). Meeting approximately on a bi-monthly basis, it brings together the State Minister dealing with European Affairs in the Chancellery and the Permanent Representative of Germany in Brussels. Other ministries participate in the meetings when the chair considers it as appropriate.

Table 13.2.: Interministerial coordination bodies for EU policy-making including transposition:

Body	Level	Frequency	Chair	Nature of issue
Cabinet	Ministerial	Agenda items as needed	Chancellor	Important political matters
Committee of State Secretaries for European Affairs	State permanent secretaries	Approx. monthly	Minister of State for Europe, AA, BMF	Political
Group of European Specialists	European specialists	Approx. 1-2 months	AA	Exchanges on policy by officials
Preparation of COREPER I	Section heads	weekly	BMF	Instructions to COREPER I

Source: Bulmer, Maurer and Paterson (2001).

decisions of Art. 43(2) (b) TEU as adopted in Amsterdam.

In October 1998 the secretariat shifted from the Ministry of Economics to the Ministry for Foreign Affairs underlining the latter's strengthened role in coordinating German EU policy. The minister's main task is to settle controversial questions and to prepare dossiers of a political and strategic nature with regard to the Council of Ministers meetings. Decisions taken by the Council of Ministers are taken by common accord and are politically binding for the ministries.

o coordinate European policy making between the federal state and the Länder more efficiently, every Land government nominated its own European affairs Commissioner (*Europabeauftragter*) or European affairs delegate (*Europabevollmächtigter*) occupying a post either as a minister or as a state-secretary. Such delegates act as a 'bridge' between their Land and the other levels of European policy making by representing their Land in the 'Europe chamber' of the Bundesrat, a special institution for the coordination of the Bundesrat's European policy, and vis-a-vis the federal government (Maurer, 2003). For this reason, most of these posts have been located at the Representation of the Länder at the federal state level in Berlin.

13.4.3 The role of compulsory advisory bodies

The only compulsory advisory bodies in the transposition process are the so-called constitutional ministries: Ministry of Justice and the Ministry of Interior. The lead ministry in the transposition process drafts the law or the ordinance and consults next to the other federal ministries concerned always the Ministry of Justice and the ministry of the Interior. They scrutinize all draft bills and ordinances as to their compatibility with the German federal constitution of the Bund (*Grundgesetz*).

13.4.4 The role of parliament

Originally, the Bundestag disposes of very limited scrutiny powers (Schmidt, 2003). The federal government has to inform the two parliamentary chambers before any decision that would become binding law in Germany. These general rules have been never applied effectively for three reasons: First, the Art. 2 EEC procedure focused on information of parliament about European affairs but has not foreseen a right of consultation. Consequently, the parliament can not affect the federal government's stance in the Council of Ministers. Second, both houses have only informed about relevant EC documents at a rather late stage. 'About 65 per cent of EC documents debated on the Bundestag's floor between 1980 and 1986 were already in force at the time of debate' (Ismayr, 1992: 330). Consequently, scrutinizing the government in EC affairs has been limited to some kind of 'ex-post' control and has not provided parliamentarians with an effective involvement in EC policy making. Third, the Bundestag has been shown little interest in scrutinizing European affairs. Furthermore, the first parliamentary institution for dealing exclusively with EC affairs – the EC Committee set up in 1991 – faced almost the same structural problems as its predecessors,¹¹⁶ since it was not empowered to give the Bundestag a central voice vis a vis the government. The EC Committee has been only rarely nominated as committee in charge (Brinkman, 2000).

In clear contrast to the Bundestag, the Bundesrat adapted its institutional structure and instruments at a rather early stage of the European integration process. The European Union Affairs Committee (EUAC) (*Ausschuss für Fragen der Europäischen Union*) was established on 1 November 1993, though its general tasks and structure date back to 20 December 1957 when the Bundesrat created the first parliamentary Committee for European issues. Unlike in the Bundestag, the members of the committee can be replaced by civil

¹¹⁶ Integrations-Ältestenrat, and the Sub-Committee on European Affairs of the Foreign Affairs Committee

servants. The EUAC normally holds a meeting every three weeks to prepare the decisions of the Bundesrat. If a decision must be made on an EU document before the next Bundesrat plenary session is scheduled then the so called 'European chamber' (*Europa Kammer*) will be convened. If operating, the chamber replaces and acts on behalf of the Bundesrat's plenary.

As a general rule, the EUAC is always nominated as committee in charge. Consequently, it exercises much more power in setting the Bundesrat's EU agenda than its counterpart in the Bundestag.

13.4.5 The role of other, subnational or functional governments

According to the ECJ the duties and obligations flowing from the EC Treaty in a federal state not only bind the federal level but the federation as a whole, i.e. including the Länder or other entities such as local authorities.¹¹⁷ This EC law position is in line with German legal doctrine according to which the Länder are under a constitutional duty to implement EC law if they have the power for a given subject according to the German constitution. This follows from Art 23 German constitution the duty of the Länder to federal loyalty (*Bundestreue*). This unwritten legal principle derived directly and explicitly from the notion of federalism. It is meant to establish for the Länder, in their relations with each other and with the 'greater whole', respect with regard to the whole interest of the Federation and the concerns of the Länder.¹¹⁸

13.4.6 The role of interest groups

In principle, the relevant subject matter association or unions are already informed when the EU plans to put in place a new EC directive. This will provide them with an opportunity to already present their position and interest in Brussels during negotiations at the EU level. During the law-making procedure, they participate in accordance with the usual procedures defined by German law.

13.5 Conclusions

- Since implementation in Germany depends to a large extent on previous involvement in the decision-making process of the law to be implemented, involvement of the Länder as regards the rules and practices of decision-making at national and European level are crucial. Transposition of EC legislation by up to seventeen governmental actors is certainly more complicated, cumbersome and time-consuming than by only one central governmental actor.
- Germany has been notorious for the dominant part played by the political parties on all levels of government. An often reoccurring picture is that the first and second chambers consists of different political majorities, which leads often to deadlock or the so-called *Politikverflechtungsfälle* (Lehmbruch). Political or public discussion concerning, among other things, EU directives and their transposition fail because of strategic positioning of political parties in those chambers leering with one eye to the next regional elections. In 2004, a federal government committee (*Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung*) has been discussing the reform of the German federal legal system, including issues relating to speeding up the processes relating to implementation of

¹¹⁷ ECJ Case C-8/88 Germany v Commission (1990) ECR I-2321 at 2359; Case 9/74 Casagrande (1974) ecr 733 AT 779. To a considerable extent in Germany the local authorities are in charge of application of EU law such as of provisions of freedom of movement of migrant workers and of federal legislation; the local authorities issue residence permits and decide on social benefits.

¹¹⁸ BverfG 92, 203

EC directives, as well as rendering the negotiations in Brussels more effective. But since this discussion was combined with a discourse about disentangling the relations between the Bund and the Lander, the committee did end up in stalemate and was dishonored in December 2004. A very sensitive issue here was higher education, a policy field that falls under the concurrent legislative authority of the *Bund* and the *Lander*. Powerful minister presidents of the *Länder* lurking to at least preserve if not further increase existing legislative competences could not cooperate on the proposal put forward by the federal government. Party politics further aggravated the situation considerably.

- The lead in the negotiation phase and the transposition phase is performed by different coordinating ministries. With a view to instructing the permanent representation of the German position in Brussels, the Ministry of Finance – until 1998 the Ministry of Economics- coordinates the meetings in relation to COREPER I, whereas the Ministry of Foreign Affairs is responsible for the management of the Berlin based work in the relation to COREPER II. However, there are exceptions: COREPER II meetings with regard to the Council on ECOFIN, Budget, Finance and Tax policy are coordinated by the Ministry of Finance. The same rules applies to the instructions for the German COREPER II. Adopted texts are then transmitted from the permanent representation to the Ministry of Economics, and since October 1998, to the Ministry of Finance. But the major part of the political coordination, then, is carried out by the interministerial committee of State Secretaries on European Affairs. Meetings are only bi-annual and furthermore, the secretariat shifts continuously from one ministry to another. In October 1998, with the new socialist government the secretariat shifted from the Ministry of Economics to the Ministry for Foreign Affairs. The 1-2 meetings per months by the Group of European Specialists headed by the Ministry of Foreign Affairs to discuss technical issues concerning the transposition of EU legislation are also not very frequent.
- Interdepartmental and interministerial meetings are not very frequent. Political coordination meetings carried out by the interministerial committee of State Secretaries on European Affairs take place only bi-annually. Technical coordination meetings by the Group of European Specialists headed by the Ministry of Foreign Affairs only 1-2 per months.

14 Italy

14.1 General overview of the constitutional and political system

The Constitution sketches the main features of a bicameral parliamentary system, which is to be a unitary state, though it also prescribes the division of the national territory into 20 regions (Putnam, 1993). In October 2001 the Italian constitution was modified providing Italy with a federal framework. Article 5 of the constitution enshrines both the principles of national unity and autonomy.

14.1.1 Constitutional characteristics

Since 2001, after the amendment of the Italian constitution, Italy has shifted from a unitary state to a decentralized state with more independent provinces and regions. The regions have gained a considerable number of legislative competences following Article 117.3 of the Italian constitution.¹¹⁹ Article 117.4 of the Italian constitution mentions the areas that fall exclusively under the legislative competence of the regions. This is a rest category including everything which does not fall under the central government's authority. As long as the regions and provinces do not act in these fields, however, the central government has still the right to act.

14.1.2 Political characteristics

Italian parliamentary regime shows three main political institutions: the Parliament, the Government and the President of the Republic. While legislative and executive powers are in the hands of the first two institutions respectively, the President of the Republic is symbol of the nation and guardian of the Constitution.¹²⁰

The Italian Parliament is made up of two chambers: the upper chamber is called *Senato della Repubblica* (315 members), the lower *Camera dei Deputati* (630 members). Both chambers are elected every five years and they present some internal articulation, as MPs can sit in permanent as well as in *ad hoc* commissions. Until the mid-1990s, the Government and its leader were in a weak position in front of the Parliament and political parties: political competition between the numerous parties was in fact not limited to specific situations (elections) but it was an ever-lasting and pervasive attribute of domestic politics. Institutional barriers to 'insulate' government from the encompassing political struggle were weak so that the former was continuously exposed to threats coming from the parties forming governmental coalition. The Constitution designed 'weak institutions and strong parties' (Bindi and Cisci, 2005: 146). This penetration of political

¹¹⁹ The areas include: International and European union relations of the regions; foreign trade; protection and safety of labour; education, without infringement of the autonomy of schools and other institutions, and with the exception of vocational training; professions; scientific and technological research and support for innovation in the productive sectors; health protection; food; sports regulations; disaster relief service; land-use regulation and planning; harbours and civil airports; major transportation and navigation networks; regulation of media and communication; production, transportation and national distribution of energy; complementary and integrative pensions systems; harmonization of the budgetary rules of the public sector and coordination of the public finance and the taxation system; promotion of the environmental and cultural heritage, and promotion and organization of cultural activities; savings banks, rural co-operative banks, regional banks; regional institutions for credit to agriculture and land development.

¹²⁰ The President of the Republic detains some power in the legislative process that will be analysed in the related section.

institutions by political groups (*partitocrazia*) was thus a typical feature of the Italian political system during the First Republic (Giuliani and Piattoni, 2001). The consequences have been the very short duration of cabinets and the high level of conflict within the latter. In the 1996-2000 legislatures, some forty different political groups were represented in parliament, with an eight party coalition in government. As a consequence, the 'over fifty –five cabinets of the republic have been large and unstable four-five party coalitions, with some of the parties further subdivided into influential streams, each one with its own agenda and leaders' (Bindi and Cisci, 2005: 147).

14.1.3 Political administrative characteristics

The executive power belongs to the Government, which is formed by the Council of Ministers (*Consiglio dei Ministri*) led by the Prime Minister (*Presidente del Consiglio*). The latter is appointed by the President of the Republic after lengthy consultations with party leaders. The lack of a direct investiture of the Chief of the Executive in a 'polarized pluralist system' (Sartori, 1982) determined a situation in which for a long time - i.e. since 1948 to the transition from the so called 'First' to the 'Second Republic' during the 1990s - the Prime Minister did not emerge as an actor able to firmly lead the cabinet and the related majority in Parliament towards the accomplishment of governmental program, being much more devoted to conciliate the different interests of the numerous parties represented in governmental coalitions (Gallo and Hanny, 2003). The latter were in fact usually made up of more than three parties, due to the high number of competing political formations and to proportional electoral rule. However, after the crisis of traditional parties in the early-1990s and the modification of the electoral system in 1993, such a situation has started to change so that in recent years the Chief of the Executive has acquired a more prominent and effective role (Bindi and Cisci, 2005).¹²¹

The Council of Ministers is a collegial body but is often referred to as an ineffective centre for policy coordination. The 'level of collegiality has usually been low' (Bindi and Cisci, 2005: 146), while interministerial competition has always been predominant.

According to the revised constitution of October 2001 every Italian region has a directly elected assembly (*Consiglio regionale*), provided with legislative powers and an executive body (*Giunta regionale*). All regions have legislative and administrative powers, but only the *Regioni a Statuto speciale* (Val D'Aosta, South Tyrol, Friuli, Sicily and Sardinia) enjoy exclusive legislative competencies as compared to the concurrent legislative competencies characterizing the other regions (Bindi and Cisci, 2005: 148). Giuliani and Piattoni (2001: 120) characterize Italian bureaucracy as bureaucratic and particularistic, 'coupled with a low level of professionalism and its crisis-driven approach stand in clear contrast to the technical and 'impartial' problem-solving approach of the EU'. However, bureaucratic inefficiency is not only an Italian peculiarity.

14.2 Political or public discussion concerning EU directives and their transposition

From 1987 onwards the Italian government started preparing systematically for the preparing and implementation of European legislation.¹²² The reforms started with the *legge Fabbrì* and the *legge La Pergola* which both strengthen Italian participation and its coordination in the EU policy-making process and

¹²¹ This change was also induced by the reform of the Presidency of the Council of Ministers in 1988 (Law 400/88).

¹²² In 1992 there were 78 directives waiting for transposition.

the national actors involved including ministerial, regional and local administrations and parliamentary bodies. A decree of the Prime Minister No. 150 of 1990 deals with the organization of the prime minister's administrative infrastructure and the tasks for the department for the coordination of European affairs in the prime minister's office. In 1997, the *leggi Bassanini* introduced a 'kind of administrative federalization of the system' (Gallo and Hanny, 2003: 276) changing the relationship between the regions in EU affairs considerably. Moreover, the constitutional reform in 2001 further increased the power of Italian regions.

Although, in 1992 the minister responsible for the coordination of Community policies, Mr Costa stated in an article in the daily paper *Il sole 24 ore* of 17 September 1992 that Italy had to prepare itself to be among the leading European countries when it comes to the transposition of Community directives into domestic law, current figures show that this is still an ambitious aim to meet in the early future. After the first reform package was adopted in the late 1980s, Italy has still a considerable implementation deficit.

14.3 Description of judicial instruments

To address the implementation deficit in Italy, there are a handful instruments to transpose national legislation. Laws and legislative decrees represent 60% of all Italian implementing measures whereas ministerial orders are applied in about 40% of the cases¹²³.

Table 14.1: Italian legal instruments

	<i>Legge</i>		<i>Decreto legislativo</i>	<i>Decreto legge</i>	<i>Decreto ministeriale</i>
	Law	Law with the format of omnibus bill	Ordinance	Government decree	Ministerial order
Main features	Issues for which the Constitution asks for settlement by law	Transposes a number of directives covering different policy areas	Government measure with the material status of law based on parliamentary authorization (<i>legge delegata</i>)	Provisions issued by the cabinet before approval by parliament to become law	Provisions issued by the minister
Legal scrutiny	required	required	required	required	
Parliamentary approval	required	required	required	required	n.a.
Procedure					
Remarks	Long and cumbersome	Rarely used	Complex matters	Urgent matters	

Law (legge)

In Italy there are two kinds of law: constitutional and normal law. According to Article 138 of the Italian constitution the procedure of a constitutional law is cumbersome, i.e. has two readings.¹²⁴

In practice the process of adoption of a normal law usually starts with the draft of a governmental bill (*disegno di legge*) or a law proposal formulated by a MP (*progetto di legge*).

After the bill has been presented in one of the two chambers, the ordinary procedure for approval is defined as follows: the Assembly passes on the bill to pertinent committees to be analyzed and evaluated. In this case committees are asked to formulate an opinion about the law proposal before returning it to the assembly. To become law, a bill must be approved – article by article - in the same identical form by the two chambers; if one of the chambers modifies the legislative text, it must be re-transferred to the first assembly for a further vote on the amended text. At the end of legislative process the bill must undergo the final

¹²³ In 2004, for example, out of 87 notified Italian transposition measures 52 were ministerial orders; 31 ordinances and 1 law.

approval by the President of the Republic that, in case of constitutional or formal irregularities has the possibility to send the bill back to chambers. However, this may not be considered as an actual veto power in the hand of the Head of the State as Parliament can overcome its act by approving the bill again, even without changing any part of the text.

However, in reality things are more complicated and the legislative process can assume different forms, as legislative burden on the Parliament together with the complexity of many law proposals made the transferal of the latter to committees a frequent practice, with the commissions playing diversified roles. In fact committees can perform three different tasks (Bindi and Cisci, 2005). As just illustrated, 1) they may be asked to formulate an opinion about a law proposal (*Commissione in sede referente*) or 2) they can draft the final version of a bill and submit it to chambers (*Commissione in sede redigente*): in these two cases the adoption of a bill follows the ordinary procedure once it returns to the assembly. In the last case, however, the legislative process is substantially modified as 3) committees can pass themselves a bill (*Commissione in sede deliberante*), which has not to be further approved by the whole assembly.

Omnibus bill

This instrument follows the procedure as a bill. Whereas a law normally only covers one European directive, this omnibus bill transposes a number of directives covering different policy areas. One example is the omnibus bills in the late 1980s through which transposed ca. 100 directives of different kind in once.¹²⁵

Ordinance (decreto legislativo) based on an authorization law (legge delegata)

Parliament may delegate the Government to legislate, especially in case of very complex issues specifying in the delegation law (*legge delegata*) the limits of legislative power of the cabinet as well as the main lines to be followed by the latter in the preparation of subsequent legislative decrees (*decreti legislativi*). Ordinances contain detailed provisions that fall under the legislative authority of the parliament. They need to be ratified by parliament

Government decree (decreto legge)

When urgent action is needed, a decree (*decreto legge*) may be issued by the cabinet, and such decree is immediately in force though it has to be later approved by Parliament to become ordinary law. Moreover, government decrees normally are issued to authorize ministers to draft a ministerial order.

Ministerial order (decreto ministeriale)

Ministers may issue ministerial orders. These orders are approved by the lead minister without approval of the Council of Ministers. But, they need an authorization to do so via government decree (*decreto legge*).

To note Pasquino (2002: 149) underlines that the law-making process in Italy is very unreliable. The structural reason here lies in that all legislation must as a first step be referred to rather powerful parliamentary committees. Sometimes those standing committees are given the power to pass legislation without even going through the floor vote. Another reason why the Italian law-making process is somewhat erratic is that there is too much legislation that comes before the parliament for approval. 'This is due largely

¹²⁴ Applicable to amendment of constitutions, amendments of statutes of regions, boundaries of regions etc.

to the nature of the Italian legal and bureaucratic system' (Pasquino, 2002: 150). Even minor decisions have to be translated into laws, or small specific laws (*leggine*).

Apart from formal rules, legislative process is usually made up of interactions between members of cabinet (ministers), their administrative agencies and the social groups involved in the proposed regulation.

14.4 The national policy cycle concerning directives

14.4.1 General overview of the process

In the post-Maastricht period, the Italy's coordination of administrative and political actors in the preparation, making and implementation of European legislation has been shaped by a set of regulations: *legge Fabbri*, *legge La Pergola* and *leggi Bassanini*.

14.4.1.1 National treatment of Commission proposals

In the process, both at the level of the cabinet and of the interministerial bodies, the two most important ministers are the Minister of Foreign Affairs and the Minister for the Coordination of European Union policies. On the one hand, the Minister of Foreign Affairs is heading a structure specifically appointed to examine EU policy and has the responsibility for the relations with third countries and international organizations. The Italian system is organized on the basis of the predominance of the Minister and the Ministry of Foreign Affairs. It has acted through Bureaus 1 and 5 and the Permanent Representation in Brussels. However, in the late 1990s the role of the Permanent Representation has been reshaped¹²⁶: it must now transmit the available information about EU political and administrative processes to the department for the coordination of EC policies and not to the Foreign Affairs Ministry (della Cananea, 2001: 111).

On the other hand, the Minister for the Coordination of EU policies has no portfolio and acts under the Prime Minister. Following the *Legge Fabbri*¹²⁷ Italy has a department of EU affairs since 1990. This department (*Dipartimento per le Politiche Comunitarie*) is headed by a minister without portfolio under the Italian minister president who is responsible for European affairs and European integration issues.¹²⁸ It is divided into six offices.¹²⁹ The tasks of the minister for European Affairs are derived from the delegated tasks by the Italian prime minister.

Recently, the Minister for the Coordination of EU policies tends to acquire more power in the phase of policy formulation although his main competence lies within the field of implementation of EU policies. More and more, the Directorate General for European Integration, however, oversees European integration activities related to issues and negotiations of the treaties of the EU, European Community, the ECSC and Euroatom. In particular, the Directorate General is increasingly responsible for formulating Italy's position

¹²⁵ Law 42/87 transposed 97 directives and law 183/87 100 directives.

¹²⁶ For a detailed overview of the Italian Permanent Representation's work consult della Cananea (2000).

¹²⁷ *Legge Fabbri*, n. 183/1987

¹²⁸ Legislative decree 30 juli 1999, *Suppl. Ord. Gaz. Uff.* 1 september 1999, n. 205.

¹²⁹ Office I: Economic issues and sector policies for the European Union; Office II: External relations for the European Union; Office III: Economic cooperation and development cooperation between the European Union and third countries. Implementation of internationalization policies for local areas; Office IV: Common foreign and security policy. European correspondent; Office V: EU cooperation for justice and home affairs; Office VI: Judicial and institutional affairs.

with the EU's institutions and bodies and oversees relations with the European Commission and other institutions of the European Union.

There are two scenarios when it comes to Italian European policy making (Giuliani and Piattoni, 2001): If an issue negotiated at the European level is of only one ministry's interest, it prepares the Italian contribution, which is then channeled via the specialized units of the Foreign Affairs Ministry in Rome to the Italian Permanent Representation in Brussels (Senato della Repubblica, 1991). If the Commission's proposal falls under the competences of more than one ministry, the coordinating bodies mentioned above produce a coherent Italian contribution. It is the responsibility of the interministerial Committee for Economic Prospects (CIPE), in which the Minister for European Affairs takes part, and the coordination department of the prime minister's office to merge the different positions in the ministerial administration. In theory, the minister of European Affairs has to inform the regions and the parliament on European matters.

The member of Italian delegations participating in EC policy-making are proposed by the different ministries and are officially appointed by the Foreign Affairs Ministry, and not by the Minister of European Affairs or the coordination department of the prime minister (Gallo and Hanny, 2003). Behind the formal distribution of competencies and the coordination tasks there is apparently 'fragmented access for different ministerial units to the European level' (Gallo and Hanny, 2003: 279). Most of these units have direct contacts with their Brussels counterparts and quite often ignore the formal competencies of coordinating bodies at the national level. Gallo and Hanny (2003: 279) argue that a major problem for the definition of coherent national positions within the ministerial administration in the preparation phase of EC policies seems to be a kind of 'privatisation' of information. Important details concerning difficulties with the implementation are always well known somewhere in the administrative apparatus, but seldom spread among all interested actors in the system.

The monopoly of the central state over EU affairs, however, has remained stable. Regions have demanded a greater role in the preparation of EC policies (della Cananea, 2000: 108). In 1995 a special body has been set up to enable regions to participate in EU policy coordination, the *Conferenza Stato-Regioni* and regions have been allowed to establish permanent offices in Brussels. The 'state-as-a-unit paradigm' which has long influence EU policy making in Italy under the supervision of the Foreign Affairs Ministry has been abandoned (Sirianni, 1997). The amendment of the Italian constitution in 2001 led to a growing role for the regions and provinces, though limited to areas of relatively minor significance.

14.4.1.2 National transposition

In Italy, the transposition of EC directives into national law takes place by means of the annual 'Community law' (*legge comunitaria annuale*) which was created by another reform package the *Legge La Pergola* (Law 86/1989). Whereas in the past implementation of EC legislation relied on a variety of techniques, the Community law offers a specific and 'systematic method for the harmonizing of domestic regulations to EC norms' (Bindi and Cisci, 2005: 150). By 31 of March of each year, the government – namely the Minister for EU affairs – submits to Parliament a bill including all legislative texts in need of national implementing measures. The law allows different techniques to be chosen for direct and indirect transposition: (1) parliamentary abrogation or modification existing domestic legislation; (2) delegation of legislative powers at to the government; (3) authorization to the government to adopt regulations in subject areas beforehand regulated by primary sources, and (4) administrative acts (Giuliani and Piazotta, 2001).

Whereas the preparation of EC law within the ministerial bureaucracy tries to ensure the effective integration of different views, the situation is slightly different with regard to the transposition of EC law. Whereas the Foreign Affairs Ministry dominates the preparation phase, the coordination department for Community policies in the Prime Minister's office plays a decisive role in the transposition phase (Sepe, 1995). The prime ministerial department for Community policies organizes the drafting of the annual *legge comunitaria*, the main instrument for introducing EC decisions into the national legal apparatus. This *legge* is presented at the beginning of each year to the Italian parliament by the Minister of European Affairs or the Prime Minister. The specific legal measures are initially drafted in the lead ministry, i.e. mostly affected by the EC legislation. Note that the interdepartmental conflicts of competences could be mentioned as functional obstacles for the transposition. The distribution of the directives between ministries is not always rational and functional: the ministries keep directives that should fall within the competence of other ministries or the competence of several ministries.

Nevertheless, the coordination department brings them together into one draft text and sends it to the parliament. From here on the draft text follows the same logic as ordinary Italian legislation, depending on the performance of different ministerial and regional bodies (Ziller, 1988: 141). The department for the coordination of Community policies only returns in the case of complaints from by the European Commission.

The procedures following the different legal instruments to transpose EU legislation are outlined in section 14.3.

The *Legge La Pergola* was designed to improve the transposition rates of European legislation in Italy. It brought in a more systematic approach but, if the annual Community law itself became held up in parliament, the consequences for transposition could be serious (Giuliani and Piattoni, 2001: 118). The instability of the political system hindered the timely presentation of the bill and delayed its parliamentary approval. The zenith of inefficiency was reached with the 1995 Annual Community law: first added to the 1996 bill, it was then attached to the 1997 bill only to be finally approved in April 1998 (Giuliani and Piattoni, 2001: 118).

14.4.2 Bureaucratic consultative and coordinating bodies

Gallo and Hanny (2003) identify three coordinating bodies that play a role in the national preparation and implementation of European decisions: the interministerial Committee for Economic Prospects (CIPE), which is considered to be a 'heavyweight' among the Italian interministerial committees, the Minister for European Affairs in the Ministry for Foreign Affairs and the department for the coordination of the Community policies in the prime minister's administration. But, in Italy there is no dominant body charged with the interministerial coordination of European affairs, such as exists in France with the SGCI or with the Cabinet Office European Secretariat in the UK. Intra- and interministerial coordination thus remain unsolved problems in the Italian government (Bindi and Cisci, 2005: 152).

Whereas the Ministry of Foreign Affairs coordinates the policy-making process, the Ministry for the Coordination of EC policies has become more and more central figure in the transposition process. It was created in 1980 within the Presidency of the Council. Its lack of resources was such that it was once defined 'cinderella of the Italian Ministries' (Grottanelli de Santi, 1992: 186). In 1995 it was suppressed and its tasks attributed to the Undersecretary of State for Economics; in 1996, they were further shared between the Undersecretary of State at the Presidency of the Council and the Undersecretary of State for Foreign Affairs

charged with European Affairs. In 1998, the renamed Minister for Community policies was reintroduced and given enhanced means and political role. They concern above all the transposition of EC directives into national law. Apparently, the fortunes of the department for Community policies have varied over the years: it is only from 1998 that it was given substantial new means and resources (Bindi and Cisci, 2005: 151).

In the ministries, the level of intra-ministerial coordination on European affairs varies from no coordination at all (Ministry of Environment) to little coordination (Ministries for Telecoms, Health, Treasury and Transport) to the only example of effective coordination: Ministry of Finances where the *unita di indirizzo* has been set up in 1999 at the Director General's level to coordinate EU issues (Bindi and Cisci, 2005: 152). The lack of intraministerial coordination and interministerial rivalry have prevented any attempt at creating a body entrusted with interministerial coordination on EC matters (Bindi and Cisci, 2005: 152).

14.4.3 The role of compulsory advisory bodies

There are hardly any compulsory advisory bodies in the Italian transposition process.

14.4.4 The role of parliament

With the mentioned reform laws the parliament has the right to be regularly informed about EC laws which is in preparation or adopted at the European Council of Ministers since 1987. It has the right to ask the government or individual ministers for an 'evaluation of the conformity of EC law with the national legal system' (Gallo and Hanny, 2003: 281) or to hear them on concrete policy issues and to be informed about the general development of the Union. Furthermore, the parliament has the right to submit comments on these matters to the government. With the *legge Fabbri* the parliamentary committees and the regions have received regularly all the draft EC decision that the Minister of European Affairs receives from the permanent representation via the Foreign Affairs Ministry in Rome. With the extension of its formal rights of access to and information and the incorporation of EC law, with the instrument of the *legge comunitaria*, the procedures in both houses have been improved and the parliament regained some control over the activities of the ministerial bureaucracy in comparison to the former 'unsystematic delegation of legislative competencies to the government for the incorporation of EC decisions (Gallo and Hanny, 2003: 282; Seppe, 1995: 325).

In 1990, the parliament set up a special committee for EC affairs (*Commissione speciale per le politiche comunitarie*). Both were ad hoc committees, equal to the standing committees in size, structure and functions, but without full legislative power. The permanent committees thus had the primary responsibility for reviewing proposals for European legislation in their subject area (Bindi and Cisci, 2005: 153). In August 1996, the ad hoc committee of the chamber of deputies was transformed into the standing committee of EU policies. With the Community law 1995-97, the parliament's scope of action in European affairs was expanded. However, notwithstanding the so-called 'perfect bicameralism' of the Italian parliament, as far as control over EU affairs is concerned there is a clear imbalance between the two chambers (Bindi and Cisci, 2005: 154). While in the chamber of deputies the committee on European policies now coordinates the other standing committees and is in charge of the examination of 'Community law', in the Senate the *Giunta per gli affari delle Comunità Europee* is still a consultative body.

14.4.5 The role of other, subnational or functional governments

For a long time, the Italian regions had a very weak role in European affairs, both in the making and transposition of EC law (Bindi and Cisci, 2005: 155).

Article 9 of Law No 183/1987 started to stipulate that the regions have to be consulted on the proposals for regulations and directives submitted by the institutions of the EC. They have the right to submit their observations which have no binding result for the policy adopted by the Italian government however. Furthermore, since 1987, Italian regions and autonomous provinces have their own regional offices in Brussels to maintain direct contacts with administrative units and political actors at the European level.¹³⁰

Furthermore, Law No 400/1988 which concerns the organization of the Prime Minister's Office established the Permanent Conference for the Relations between the State and the Regions. This conference is responsible for informing and consulting the regions on issues of general policy that may affect their competence.

The Italian regions only recently do actively participate in the process of the formulation of the Italian policy on EU affairs. Information rights for the regions and new mechanisms for the cooperation of national and sub-national administrative units have been established. The main aim here has been to institutionalize regional access to the national preparation on the European level. The *legge comunitaria* of 1998 introduced an obligation for the government to inform the parliament and the regions and autonomous provinces at an earlier stage. However, the regional opinions expressed still have not been binding for the central government (Gallo and Hanny, 2003: 283). Furthermore, the regions seem to receive draft EC laws from the Foreign Affairs Ministry via the Minister of European Affairs 'only at the point when these drafts have already been prenegotiated at the European level' (Gallo and Hanny, 2003: 283). Consequently, any input would be too late to be effective.

14.4.6 The role of interest groups

In the transposition process, interest groups are only consulted in exceptional cases by the Ministry of Foreign Affairs and the Ministry for Regional affairs.

14.5 Conclusions

- Italy has been slow to create effective and efficient mechanisms for coordinating the formulation and transposition of EU law despite its centrality. Fragmentation and duplication seem to be very dominant in Italian EU policy-making.
- The absence of one undisputed coordinating institutional is predominant problem. In the post-Maastricht period, there is a shift of activities and coordination competencies in the national preparation and transposition phases. Whereas the Foreign Affairs Ministry dominated the scene for decades, the prime minister's office has become already the crucial actor in the transposition phase. This administrative fragmentation has led to struggles for direct access to the EC policy-making process at the European level. This situation has been aggravated in a way that the fortunes of the department for Community policies have varied over the years: it is only from 1998 that it was given substantial new means and resources.

¹³⁰ Decree of the President of the Republic of 31 March 1994 GURI 167

- The Italian law-making process is very unreliable. The structural reasons can be found in the rather powerful parliamentary committees. Sometimes those standing committees are given the power to pass legislation without even going through the floor vote. Moreover, there is too much legislation that comes before the parliament for approval. Because of the Italian legal and bureaucratic system, even minor decisions have to be translated into laws, or small specific laws (*legge*)
- The personal and partisan competition among those who should have favored a smooth connection with Brussels, compounded by endemic governmental instability, reduces the credibility of the Italian government at the EU level and diminished its complying capacity at the national level

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Glossary of terms (on judicial instruments and techniques)

In de verschillende onderzochte landen worden aan implementatie-instrumenten en –technieken verschillende betekenissen toegekend. Dat maakt het vergelijken af en toe lastig. Om semantische problemen te voorkomen hebben we tijdens het onderzoek gebruik gemaakt van een Engelstalig glossarium. Daar waar mogelijk is tussen haakjes de zo goed mogelijk aansluitende, Nederlandse term vermeld.

annex method (annex methode): the text of a directive is annexed to a very short legal text, which puts it into the national legal order. Users have to consult the annex for obligations or rights stemming from the directive.

authorization law (authorisatiewet): the adoption of a law delegating the transposition of one or more directives to a specific actor, including sometimes procedural requirements and a time frame (sometimes also called a blanket provision law)

copying (één-op-één omzetten): creating a legal measure which is equivalent to the wording of the directive.

elaboration (uitwerken): the tendency to make directives more specific and detailed when transposing (it does not go as far as gold plating).

gold plating: when transposition goes beyond the minimum necessary to comply with a directive by adding national elements to the legal measure, which aims to transpose a directive. The national additions may include: (1) extending the scope, (2) not taking full advantage of any derogations which keep requirements to a minimum, (3) providing sanctions, enforcement mechanisms and matters such as burden of proof which go beyond the minimum needed, or (4) implementing early, before the date given in the directive.

incorporation (inweven): putting the directive into the system (corpus) of already existing national law (also sometimes called *re-wording* or *re-writing*).

one-to-one transposition (één-op-één omzetten): taking over the text of a directive in a national legal measure. Sometimes this is done through the *annex method*. See also *copying*.

one-to-one with some (terminological) adjustments (één-op-één omzetten met enkele terminologische aanpassingen): taking over the text of a directive making with some adaptations in terms and/or formulations used in the directive, which stem from existing national law.

package law (pakket- of veegwet): combining several directives into one legal measure, which transposes these directives (is also sometimes called an *omnibus bill* when the proposal has the intended status of law and has not yet passed parliament).

referencing (verwijzen): transposing by passing a legal measure which refers directly to a directive (see also the *annex method*).

re-word or re-writing method (methode van herformuleren of herschrijven): working out the contents of a directive using the terms, formulations and style used in national law.

Begeleidingscommissie onderzoek

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