



Master of European Affairs Thesis  
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# When European Union Directives open the Pandora's Box

A structural analysis into implementation difficulties  
accompanying directives on several levels in the European Union

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# Abstract

This Master-thesis assesses the possible difficulties that surround the implementation of EU directives into the legal systems of the EU member states. The aim of the thesis is twofold. Firstly, It introduces a structural framework that is able to structure the analysis of implementation in the European Union. It starts from the premise that the EU can be studied as if it was a Federation. The framework builds upon the division in selected *actors* and *factors* that have a stake in implementation problems. Subsequently, selected concepts from the Europeanization and Implementation theory are added to augment the explanatory strength of the framework. Moreover, underlying *can* and *will* problems found in a detailed literature and empirical research are used in the last stage of the framework; the compliance with EU directives. The preliminary application of the structural framework upon two empirical case-studies of Germany and The Netherlands seems to indicate that the aggregate framework is able to structure the study of implementation problems on the supranational, national and local level. Secondly, the aim of the thesis is to answer the question which of the *actors* and *factor* are involved in the majority of implementation problems. This study shows that across all EU levels the decentralized character of enforcement by the Commission, the constitutional set up of a member state, the content of a directive the adequate technical and scientific infrastructure in place on national level, shifting national interests, the room for national bureaucracies to decide on policy details and strong domestic pressure are the most explanatory problems found inherent to the actors and factors studied.

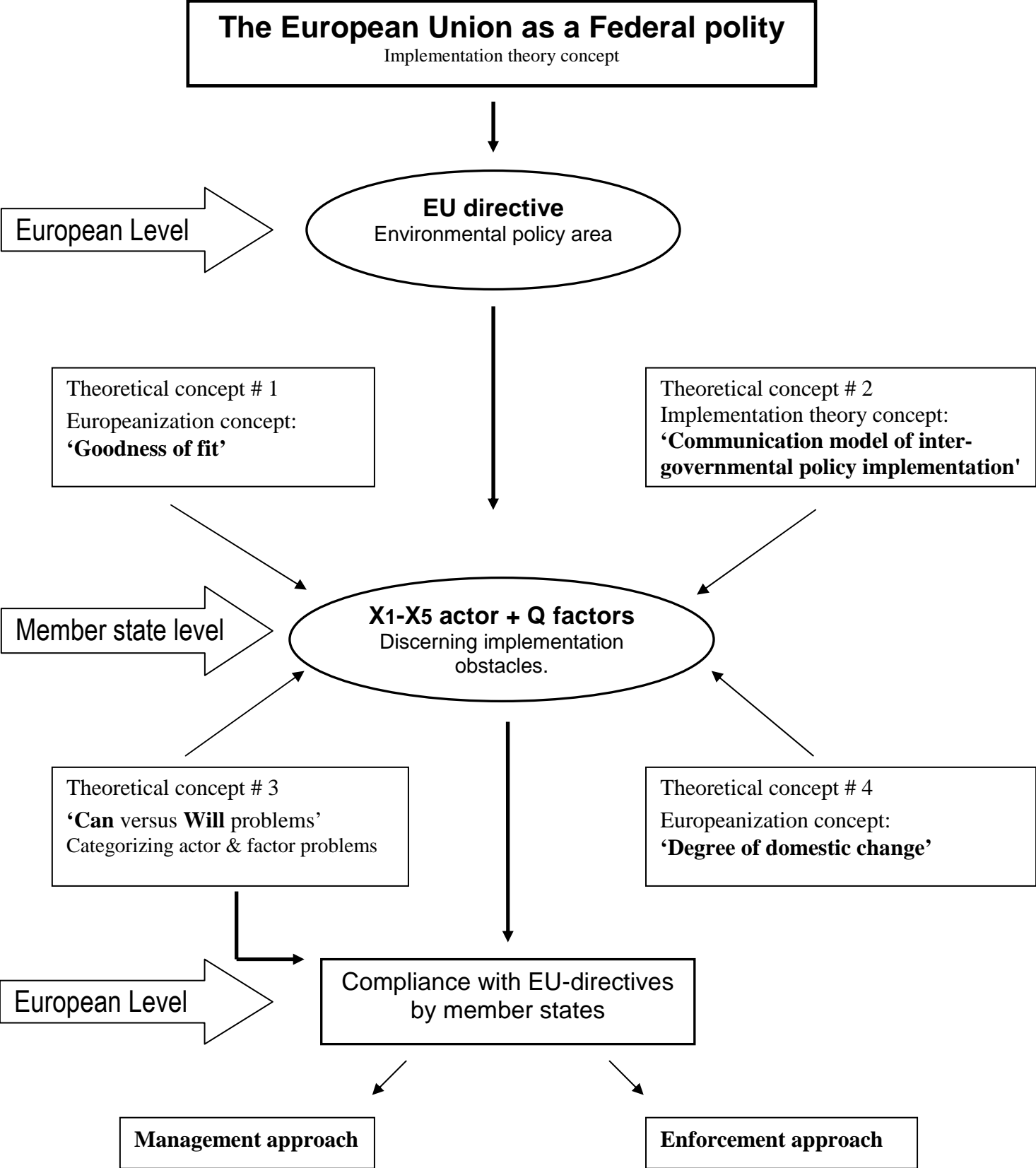
*Key words:* EU directives, Implementation, Compliance, Europeanization, Implementation theory.

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**Figure 1.** Proposed Structural Framework for analyzing EU directive implementation problems. By: Pieterjan Rozenberg.



# I Introduction

## *1.1 The subject of the study*

Every year the institutions of the European Union (EU) reaches hundreds of decisions in various policy areas where it possesses the relevant competences. The EU can hence be called a law-intensive organisation. The majority of these laws which are decided upon by the European Council and the European Parliament, on the initiation of the European Commission need to be *implemented* into national legislation, in order to produce their full effects. Implementation is, like the rest of the European Union, somewhat *sui generis*. Implementation of EU directives forms the end stage of the EU policy making process and is a significant part of this policy process. It may therefore be wondered why do member states whose interests seem not to be neglected in the policy formulation fail to transpose and implement correctly EU legislation?<sup>2</sup>

Late and faulty implementation is problematic because it endangers the credibility and the effectiveness of EC law. In the words of former Internal Market Commissioner Bolkestein, ‘Delays in putting directives into effect cause enormous harm to business and to citizens.’<sup>3</sup> The correct implementation of EU law is indispensable for the effective working of Community law, i.e. the same laws should be applicable in the same and consistent manner throughout the EU. In addition from a political science perspective, implementation has become what Pressman and Wildavsky call a ‘decision point’, where clarification is required for the implementation of the policy embodied in a directive.<sup>4</sup> During the European Council in Stockholm in 2001, the member states agreed that the backlog in the implementation of EU directives should not be more than 1.5% of the total of all directives in force<sup>5</sup>, however as the monitor results of the Commission for 2006 show, many member states are not able to fulfil this promise.<sup>6</sup> However, it seems that for 2007, the results are slightly better.

Within this study of the implementation of EU regulations into member states, the directive is the central. The directive is one of the main instruments of harmonization used by the Community institutions to bring together or coordinate the disparate laws of the Member States in various fields. Directives are

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<sup>1</sup> I am very grateful to Professor Ole Elgström of the department of Political Science at Lund University, Sweden who has helped me with advice and supported me in order to reach this end result.

<sup>2</sup> M. Mendiou, ‘Non compliance and the European Commission’s role in integration,’ in: *Journal of European Public Policy*, 3, 1, 1-22 (1996) p 8.

<sup>3</sup> European Commission, 2004, Internal Market Report: Big disparities between member states in implementing and applying results. IP/04/33, 12 January 2004. p 52.

<sup>4</sup> J.Pressman and A. Wildavsky, ‘Implementation. How Great Expectations in Washington are Dashed in Oakland, 3<sup>rd</sup> edition. (University of California Press, 1984). P 24.

<sup>5</sup> Bernard Steunenbergh en W. Voermans, ‘De Omzetting van Europese Richtlijnen: Instrumenten, technieken en processen in zes lidstaten vergeleken. *Report for Dutch ministry of Justice*. (Leiden 2005) P 35-36.

<sup>6</sup> See European Commission tables in the appendix number 7.1 on page 41.

binding as to the end to be achieved, but it leaves some choice as to form and method open to the Member States.<sup>7</sup> However, member states have the task to implement a directive in time and correct, in order to avoid discrepancies between community law and national law. Under article 226 of the EC Treaty the European Commission is given the right to initiate infringement procedures against member states that have not succeed in implementation correctly and in time. The proceedings of the infringement are specified in Figure 7.2 at page 42 of the Appendix.

## *1.2 The Purpose of the Study*

The complexity of the implementation process causes that the European Union frequently encounters considerable problems with the implementation of directives. The aim of this paper is bipartite. The first aim is (1) *to construct a structural framework for the analysis of implementation problems in the European Union policy process*. The second aim is (2) *to draw a cautious conclusion as to which of the actors and factors studied are pivotal in the causes of implementation problems in the European Union*. The purpose of the framework is to structure the analysis of the problems that can arise in the implementation process of EU directives. Were most studies focus on one or a couple of actors on either the domestic or the supranational level, an attempt will here be made to develop a framework that is able to analyze the problems that can arise around the implementation of EU directives. From the moment a EU directive is decided upon after European level negotiations, to the moment where the European Commission and European Court of Justice (ECJ) have to step in and use their power to ensure compliance with an EU directive by a member state.

The structural framework endeavours to emphasize the fact that causes of implementation problems can be found and analyzed on both the domestic and supranational level. The structural framework that will be proposed in this thesis will make use of existing theoretical concepts, taken from the Implementation, Europeanization and Compliance theory and a distinction will be put central between selected *actors* and *factors* that are central in analyzing implementation problems in the European Union. Recall figure 1 at page 5 for a graphical reflection of the in this thesis proposed structural framework.

## *1.3 The Method and Material of the Study*

The research design of the thesis is constituted in the following way; After having introduced the structural framework in chapter one, in chapter two the actor and factor component of the framework will be studied in a study of the existing implementation-literature. Sources of implementation problems that according to the literature can arise during the implementation process will be categorized under the respective actors and factors. Subsequently, an provisional empirical study in chapter three will investigate to what extent the problems discerned from

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<sup>7</sup> Paul Craig and Gráinne de Búrca, 'EU Law, text, cases and materials' (Oxford 2003) p 114.

the literature research can also be found empirically in the process of the implementation of the Water Framework directive 2000/60/EC in Germany and the Netherlands. With the insights from these two studies the remainder and the applicability of the structural framework will in chapter five be discussed. Finally, in the conclusion an answer will be given to the two central research questions.

The analysis will be based firstly upon academic political science literature, but use will also be made off legal material in order to shed light on the legal dynamics that form the fundament of the implementation and compliance process. Secondly, for the empirical study extensive use will be made of German and Dutch primary sources, to be able to get detailed information on the implementation of directive 2000/60/EC. Joined together, both primary and secondary literature are able to answer the two central research questions.

In sum, the EU implementation-process is definitely a fascinating, although somewhat ignored part of the EU decision making process. It is crucial in the European integration project. The member states, with the help and pressure of the Commission and European Court of Justice, are responsible for the correct and in time implementation of EU directives and for law abiding to these directives afterwards. Implementation is the moment Without a strong attention for implementation, the EU-project runs the risk of being delayed and marginalized. Therefore, big interests are at stake in EU implementation and this paper would like to underline this importance.



## II Theoretical Concepts on Implementation in the European Union

The EU being ‘*un object politique non-identifié*’ it will be attempted in this chapter to develop a structural framework, that is able to study problems with the implementation of directives in the European Union in a structured manner. The framework tries to combine an ‘actor and factor distinction’ on the one side with concepts from both the Implementation theory and the Europeanization approach on the other side. The framework starts with the assumption that the implementation of EU directives in the European Union can be analyzed as if it was a federal polity. The main reason for this is when this has been proven, federal implementation theory can be applied. However, it is not a straightforward procedure to apply (federal) implementation theory on the EU, as the EU does as yet not constitute a state. A graphical representation of the structural framework can be found on page [5].

### *2.1 The European Union as a Federal Polity.*

What differentiates a federation from an unitary system is the fact that there is constitutional and political status of lower-level governments in relation to central authorities. The EU is highly decentralized and federal arrangements can be said to be present when ‘the principle of the division of powers between centre and regions is established constitutionally, and citizens hold an identity at both levels.’<sup>8</sup> The application of the theory of regulatory federalism, developed by Kelemen, on the European Union confirms the notion that the EU can be analysed as a federal state.

Kelemen states that ‘regulatory federalism’ is an institutional arrangement that divides the public authority to establish and implement regulatory policy between one ‘federal’ and two more ‘state’ governments.<sup>9</sup> A system of regulatory federalism should have three basic attributes. Firstly, ‘two regulators.’ The system is divided in two primary levels of government, a federal and a state level. Both levels have the authority to regulate economic activity, however the federal government can do this for the whole system, the state governments only for their own jurisdictions. Secondly, there exists a ‘common market’. The group of states which together form a federation have agreed among themselves (for example in a constitution or treaty) to establish free interstate commerce. Thirdly, there should exist what Kelemen calls ‘High Court Adjudication’. In this situation both the

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<sup>8</sup> McKay, David., ‘Designing Europe – Comparative Lessons from the Federal Experience. (Oxford 2001) p 20.

<sup>9</sup> R. Daniel Kelemen, ‘Regulatory federalism, EU environmental regulation in comparative perspective,’ in: *Journal of Public Policy* (2000) Vol. 20, p 136.

federal and state governments recognize a high court to be the ultimate arbiter of disputes between them

To come back to the matter of implementation of directives in federal states Kelemen notes that leaving implementation of federal regulations in the hands of state governments inevitably leads to uneven implementation. When states have different preferences than the federal government, they also take different approaches to implementation. Therefore, Kelemen states, 'a division of competences persists in which the federal government is primarily responsible for policy making, while state governments are primarily responsible for policy implementation.'<sup>10</sup> The theory of regulatory federalism therefore provides useful conceptions in order to analyze the implementation of EU directives.

From the European level the framework descends to the domestic level. The *actor* and *factor* are the central analyzing mechanisms in the framework. In the framework the analysis of influence of the five actors, descending from supranational to domestic, on implementation problems and the factors form a central aspect of the framework.<sup>11</sup> The analysis is modelled in a  $\mathbf{X} \rightarrow \mathbf{Y}$  research. Here,  $\mathbf{Y} = \textit{implementation problems with directives in the European Union}$ . I assume that certain actors ( $\mathbf{X}^1$  to  $\mathbf{X}^2$ ) have a stake or influence in these problems. These are ( $\mathbf{X}^1$ ) The European Commission. ( $\mathbf{X}^2$ ) The European Court of Justice. ( $\mathbf{X}^3$ ) National Governments. ( $\mathbf{X}^4$ ) Bureaucracy in the Member States. ( $\mathbf{X}^5$ ) Interest Groups on the Domestic Level. These actors will be systematically investigated and it will be attempted to explain their individual influence. However, with the focus only on *actors* the analysis would lose its explanatory strength, unless the relevant *factors* would be analysed as well. Factors can be the capacity of national administrations to implement a new directive, the characteristics of a particular directive itself or the policy area in which the directive tries to introduce new rules. In chapter three the actors and factors are further introduced and analyzed. In the remainder of this chapter, the other theoretical concepts of the structural framework will currently be discussed.

## 2.2 Theoretical Concepts at the Domestic level – Implementation Failure explained

### 2.2.1 Theoretical Concept #1 'Goodness of Fit'

The first concept that will be introduced in the framework is 'the goodness of fit argument' advanced by Risse, Cowles, and Caporaso. The goodness of fit is one of the central aspects in the Europeanization literature and it stresses the upon the 'fit' between EU level processes, policies, and institutions and those found at the domestic level.<sup>12</sup> The main idea is that Europeanization matters only if there is

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<sup>10</sup> R. Daniel Kelemen, 'Regulatory federalism, EU environmental regulation in comparative perspective,' in: *Journal of Public Policy* (2000) Vol. 20, p137-138.

<sup>11</sup> Recall the graphic of the structural framework on page 5.

<sup>12</sup> Thomas König, Brooke Leutgert and Lars Mäder, 'Troubles with timelines: explaining trends in transposition delay,' (2005) p 7.

divergence, incompatibility, or ‘misfit’ between European level institutional processes, politics and policies, and the domestic level. In order to produce domestic effects, EU policy must be somewhat difficult to absorb at the domestic level.<sup>13</sup> Radaelli states that when adjustment pressure is low, because the content of EU policy is already present in a member state, there is no need to change domestic institutions. Simply, because there exist a good fit between national policy and the EU policy. On the other side, when the distance between EU policies and national ones is very high, member states will find it very difficult to implement the European policy.<sup>14</sup> However, one should be careful not to conclude that goodness is an encompassing explanation for the Europeanization of domestic institutions. Factors like bureaucratic structures, corporatist or pluralist style of decision making, the centralization or decentralization of power are often also indispensable.<sup>15</sup> Börzel and Risse present a testable goodness of fit hypothesis. They argue: ‘The lower the compatibility between European and domestic processes, policies, and institutions, the higher the adjustment pressure.’

### 2.2.2 Theoretical Concept #2 ‘Communication model of Inter-Governmental Policy Implementation’

The Communication model developed by M.L. Goggin in 1990<sup>16</sup> is the second concept introduced in the framework. This American based model is largely pointed to a federal system. It endeavours to construct a model for the analysis of implementation, with a strong emphasis upon what affects the acceptance or rejection of messages between layers of government. See Figure 7.3<sup>17</sup> for a graphical sketch of this model. The underlying conceptualization is the intergovernmental policy making as an ‘implementation subsystem full of messages, messengers, channels, and targets operating within a broader communications system.’<sup>18</sup> State-level implementers form in this constellation the connection for communications coming from both national and local level senders. The Communication model discerns two independent variables. Firstly, the federal level inducements and constraints (coming from ‘the top’) and secondly, the state- and local level inducements and constraints (coming from ‘the bottom’). The federal, state, and local inducements and constraints impact a state’s decisional outcome, as well its capacity to act. The decision of the state decision makers to act is influenced by their perception of the messages flowing from the federal, state and local levels. The capacity of a state to act is of great

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<sup>13</sup> Simon J. Bulmer and Claudio M. Radaelli, *The Europeanization of National Policy*. In: *The Member States of the European Union* (Oxford 2005) p 346.

<sup>14</sup> Claudio M. Radaelli, *The Europeanization of Public Policy*. In: Kevin Featherstone and Claudio Radaelli (eds) *The politics of Europeanization*. (2003) p 44-45.

<sup>15</sup> *Ibidem.*, p 45.

<sup>16</sup> M.L Goggin et al., *Implementation Theory and Practice: Toward a third generation*. (1990).

<sup>17</sup> Michael Hill and Peter Hupe, *implementing public policy* (London 2003). p 67.

<sup>18</sup> Kurt D. Cline, *Defining the implementation problem: organizational management versus cooperation*. In: *Journal of Public Administration Research and Theory* July 2000; 10, 3. p 554.

influence of a state's ability to perform in compliance with a national mandate.<sup>19</sup> Subsequently there are two intervening variables. Firstly, organizational capacity. This is the structure, personnel and financial resources of a state. Secondly, ecological capacity. This is the environment wherein a state government operates, for example the state's economic, political, and situational capacity.<sup>20</sup> The central aspect of this model is the communication between the federal, state, and local level of the government. It sees national policy as 'federal messages.' Goggin states that 'state implementation behaviour is a function of inducements and constraints provided to or imposed on the states from elsewhere in the federal system, above or below the state level, as well as of the state's own propensity to act and its capacity to effectuate its preferences.'<sup>21</sup>

### 2.2.3 Theoretical concept # 3 'Degree of Domestic Change'

Constituting the third theoretical concept absorbed in the framework, domestic change will occur in the case that an EU directive contains a significantly different set of policy concepts than that already existed in national laws. This was shown in the discussion of the 'Goodness of fit' approach. The degree of domestic change in response to this Europeanization can however vary greatly. Börzel and Risse discern three degrees of domestic change. Firstly, there can be question of *absorption*. In this case Member States will incorporate European policies or ideas into their domestic structure. However, the policy coming from the EU level will not greatly change the national processes and policy in place. The domestic change will therefore be small. Secondly, the adoption and implementation of an EU directive can lead to *accommodation*, where EU policies will be accommodated into existing national structures. Also here the underlying principles will not change. For example the policy can change, but the institutions will stay the same. The domestic change will be modest. Thirdly, an EU directive can lead to a *transformation* where member states replace existing policies, processes and institutions by new, highly different ones. Here, the degree of domestic change is very high.<sup>22</sup>

### 2.2.4 Concept # 4 Can versus Will Concept.

So far, consequences from either the deeds of certain actors or the influence of certain factors have been assigned. As will be introduced in this thesis, it is useful to not only ascribe the cause of certain implementation difficulties to an actor, factor or a combination of both, but also to classify whether the causes have a voluntarily or involuntarily background. Discerning the voluntary or involuntary character of the implementation deficit of a particular member state is highly important for the Commission in selecting the right mechanism to ensure

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<sup>19</sup> Kurt D. Cline, Defining the implementation problem: organizational management versus cooperation. In: *Journal of Public Administration Research and Theory* July 2000; 10, 3. p 554.

<sup>20</sup> *Ibidem.*, P 554.

<sup>21</sup> M.L Goggin et al., *Implementation Theory and Practice: Toward a third generation.* (1990) p 31.

<sup>22</sup> Börzel and Risse, Conceptualizing the domestic impact in: Kevin Featherstone en Claudio Radaelli (eds.) *The politics of Europeanization.* (2003) P 71.

compliance. This is also the core of the compliance literature. However, the line between can and will is rather thin. It can be stated that most of the causes of problems of *actors* can be ascribed as voluntarily decisions. The Commission's decision to strike a political deal with a member state is obviously voluntarily, but the problems arising from the principle of decentralized enforcement of the Commission has a more involuntary connotation. However, most of the *factors* can be framed as involuntarily actions. A member state chooses not voluntarily to have a low level of GDP or a modest level of consensus in its society. For the following discussion of the third stage of the framework it is indispensable to have a mechanism to categorize an implementation problem as being of voluntary or involuntary nature.

## 2.3 Theoretical Concepts at the EU level– ensuring compliance with EU directives.

Within the European Integration literature, several scholars have attempted to analyze and theorize the law abiding by member states. Compliance means not only the on-time and correct implementation of directives and regulations, but also the avoidance of non-compliance with already existing directives, regulations and the EC Treaties. Within the EU institutional set-up the main focus of this research is on the European Commission and the ECJ and their involvement of the compliance of internal market law. With this the circle is round and we are back at the Kelemen theory of the regulatory state. Herein are the two primary levels of government; the European Commission (together with the European Council) and the National Governments. Is the 'High Court Adjudication' the ECJ and lastly there exists also a common market.

### 2.3.1 *The Enforcement approach*

This approach assumes that the member states of the European Union have defection incentives and that states violate voluntarily international norms and rules. The reason is that they do not want to bear the costs of compliance. The enforcement approach therefore states that compliance problems are best solved by increasing the likelihood and costs of detection through *monitory* and the threat of *sanctions*.<sup>23</sup> Haas states: even if a state may believe that signing a treaty is in its best interest, the political calculations associated with the subsequent decision actually to comply with international agreements are distinct and quite different.<sup>24</sup> Non compliance can also have an economic cause, in that member states do not comply because compliance is distributing scarce resources that could be put to alternative uses. Transparency is increased with monitoring, and

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<sup>23</sup> Jonas Tallberg, 'Paths to compliance: Enforcement, Management, and the European Union,' in: *International Organization*, Vol. 56, No 3. (2002) p 611.

<sup>24</sup> Peter M. Haas, 'Compliance with EU directives: insights from International Relations and Comparative Politics,' in: *Journal of European Public Policy* 1998 p 19. In; Jonas Tallberg, 'Paths to Compliance.'

sanctions raise the costs for member states of non-compliance. Together, monitoring and sanctions carry the capacity of deterring defections and compelling compliance.<sup>25</sup> The effectiveness of the enforcement approach varies with the level of behavioural changes required by a directive. However, non compliance or free riding becomes less attractive to states the more likely they are to get caught and punished.<sup>26</sup>

### 2.3.2 *The Management approach.*

The management approach departs from a very different assumption about the reasons for the non-compliance of a member state. Börzel states about the management approach: 'States are in principle willing to comply with international rules to which they once agreed.'<sup>27</sup> In this approach, non compliance is conceived as a problem of 'involuntary' defection. Tallberg notes that the management approach assumes that capacity limitations and rule ambiguity are the reasons for non-compliance.<sup>28</sup> However, instead of punishing the member states for this caused non-compliance, the management approach stresses the importance of capacity building and rule specification. The Commission is in place not only to monitor and sanction, but also to provide financial and technical assistance for member states with weak implementation capacities.<sup>29</sup> Chayes and Chayes also state that 'if we are correct that the principal source of non compliance is not wilful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly.'<sup>30</sup> The management approach states that the mechanisms of rule interpretation need to be formal adjudication in international courts; informal and non-binding meditative processes can also clarify treaty rules.

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<sup>25</sup> Jonas Tallberg, 'Paths to compliance: Enforcement, Management, and the European Union,' in: *International Organization*, Vol. 56, No 3. (2002) p 612.

<sup>26</sup> Tanja A. Börzel, 'Guarding the treaty: The Compliance Strategies of the European Commission,' in *The State of the European Union Vol 6.: Law, Politics and Society* (Oxford 2003) p 199.

<sup>27</sup> *Ibidem.*, p 200.

<sup>28</sup> Jonas Tallberg, 'Paths to compliance: Enforcement, Management, and the European Union,' in: *International Organization*, Vol. 56, No 3. (2002) p 613.

<sup>29</sup> Tanja A. Börzel, 'Guarding the treaty: The Compliance Strategies of the European Commission,' in *The State of the European Union Vol. 6.: Law, Politics and Society* (Oxford 2003) p 200.

<sup>30</sup> Chayes and Chayes, *The New Sovereignty- Compliance with International Regulatory Agreements* (Cambridge 1995) p 22.

# III Literature Research

## 3.1 *The European Commission – (X1)*

The analysis of the selected actors and factors start in this section with the role and influence of the European Commission on the process implementation with EU directives. The Commission is not a monolithic bloc, but can be discerned into two parts. The ‘College of Commissioners’ and the ‘Commission’s services.’<sup>31</sup> If political and administrative tasks could be disentangled, the College would be responsible for politics and the services for administration. It is the latter that has the focus in this section. The services have always been small in size compared with national administrations. The reason for this is that the Commission itself rarely implements EU policies, an activity that requires a large number of civil servants. It collect and asses data through ‘in-house’ monitoring on whether the European law is properly applied and enforced in the member state.<sup>32</sup> Since this function is labour intensive and time consuming, the Commission depends for this function also heavily on the national implementation authorities as its own sources are relatively limited.<sup>33</sup>

The EC Treaty delegates the competence to the European Commission and the European Court of Justice to monitor and sanction non-compliance. The Commission shall according to Article 211 EC ‘ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied.’ If the state concerned does not comply with the opinion of the Commission, it may bring the matter before the ECJ under Article 226 EC.<sup>34</sup> In the different stages of the infringement procedure, see figure 7.2 in the appendix, the Commission act as the prosecutor and the ECJ as the judge. The Commission central task is to monitor compliance, when problems are discerned it sends a ‘Formal Letter’ to the concerning member state in which problems are stated and a request to the member state to give its own observations on the matter, with a deadline of two months. The formal letter is not part of the official proceedings, but is part of the preliminary stage that serves the purpose of information and consultation.<sup>35</sup> It gives the member state the opportunity to get back in position without any further consequences. If a member states than still has not implemented the obligations of an EU directive, the Commission sends a ‘Reasoned Opinion’, which is the start of the official proceedings against a Member State. The Commission states in the

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<sup>31</sup> Liesbet Hooghe and Neil Nugent., ‘The Commission’s Services,’ in: *The Institutions of the European Union*. (Oxford 2002) p 149.

<sup>32</sup> Tanja A. Börzel, ‘Guarding the Treaty: The Compliance Strategies of the European Commission,’ in: *The State of the European Union Vol. 6 Law, Politics, and Society* (Oxford 2003) p 203.

<sup>33</sup> B. Guy Peters, ‘The Commission and implementation in the European Union: ‘Is There an Implementation Deficit and Why?’ in: Neill Nugent (eds), *At the heart of the Union* (London 1997) p 191.

<sup>34</sup> Ulf Sverdrup, ‘Compliance and Conflict Management in the European Union, Nordic Exceptionalism,’ in: *Scandinavian Political Studies Vol. 27, 1* (2004) p 8.

<sup>35</sup> Tanja A. Börzel, ‘Non Compliance in the EU; Pathology or Statistical Arthefact?’ *Journal of European Public Policy* 8: (2001) P 806.

letter the legal justification for starting legal proceedings and detailed prove why the member state has infringed Community law and states a deadline for which the irregularities must be solved.<sup>36</sup> The last stage in which the Commission has a stake is the 'Referral to the ECJ.' This is the last means if a member state is persistent in its non-implementation.<sup>37</sup>

From the literature it is proven that the Commission will assist member states technically when a member state is in the process of implementing an EU directive but lacks the sufficient expertise and administrative resources necessary for a correct implementation. Börzel notes that 'while the European Union has expanded its legislative competencies, the implementation and enforcement of European law firmly rests within the responsibility of the member states. Mbaye notes that the Commission has many programs that 'help actors interpret policy, that extend aid to poor states, and that encourage cooperation.' But, as Mbaye states, compliance problems remain.<sup>38</sup>

The Commission generally tries to avoid formal sanctions stage and prefers to negotiate<sup>39</sup> and discuss the matter informally with the concerning member state. However, the Commission possess considerable discretion in deciding whether and when to open proceedings and to move from state of the infringement procedure to the next.<sup>40</sup> The Commission communicates with member governments and declares its readiness to use economic sanctions against them.<sup>41</sup> When the Commission has send its first letters of notice the number of delays diminish generally very quickly. As Snyder remarks, it seems that negotiation and adjudication are two alternative forms of dispute settlement. But in the daily practice and working ideology of the Commission, the two mechanisms are complementary. Snyder states that the main form of dispute settlement used by the Commission is negotiation, and litigation is simply a part, sometimes inevitable, but generally a minor part, of this process.<sup>42</sup>

Dimitrakopoulos point out some critics on the Commission. It is sometimes seen 'as an unhelpful and occasionally unreliable source of assistance in the transposition stage.'<sup>43</sup> It has been argued that the principle of decentralized enforcement of Community law leaves the Commission, which does not enjoy any direct political legitimization, in a weak and 'invidious position.' Mbaye remarks in another article that the Commission may act strategically when selecting cases that are to go before the ECJ.<sup>44</sup> Börzel concludes that the Commission may treat some member states more carefully than others because they are more powerful; this can be because they contribute significantly to the

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<sup>36</sup> Paul Craig and Gráinne de Búrca, 'EU law, text, cases and materials' (Oxford 2003) p409.

<sup>37</sup> Ibidem., p 411.

<sup>38</sup> Heather A.D Mbaye., 'Compliance in the European Union, Administrative and Judicial Phase Policy Implementation Barriers, 1960 to 1999,' p 5.

<sup>39</sup> Jonas Tallberg., 'Making States Comply, the European Commission, the European Court of Justice and the Enforcement of the Internal Market.' Studentlitteratur Lunds Universitet; doctoral dissertation' (1999) p 39-40.

<sup>40</sup> Tanja A. Börzel, 'Guarding the Treaty: The Compliance Strategies of the European Commission,' in: *The State of the European Union Vol. 6 Law, Politics, and Society* (Oxford 2003) , p 209.

<sup>41</sup> Bernard Steunenbergen W. Voermans, 'De Omzetting van Europese Richtlijnen: Instrumenten, technieken en processen in zes lidstaten vergeleken. Report for Dutch ministry of Justice. (Leiden 2005). P 38

<sup>42</sup> Francis Snyder, 'The effectiveness of European Community Law (1993) and, 1993, Jönsson and Tallberg, 'Compliance and Post-Agreement Bargaining (1998). p

<sup>43</sup> Dionyssi G. Dimitrakopoulos, 'The Transposition of EU law: 'Post Decisional Politics' and Institutional Autonomy,' *European Law Journal* Vol. 7, No. 4. (2001) P 448.

<sup>44</sup> Heather A. D. Mbaye, 'Why National States Comply with Supranational Law- Explaining Implementation Infringements in the European Union, 1972-1993. *European Union Politics* Vol. 2. (3) (2001) P 268.



EU budget, have considerable voting power in the Council, or their population is very 'Euro sceptic' and the Commission is careful to avoid upsetting public opinion in these member states by officially shaming them for non-compliance with Community law.<sup>45</sup> Susanne Schmidt notes that the Commission is in comparing to the ECJ much more restricted in its actions. The ECJ is independent, but the member states have various mechanisms at their disposal to control the Commission.

The Commission itself also has advantages by achieving good implementation records by the member states. Mastenbroek states that 'Implementation problems put a drain on the Commission's scarce time and personnel, because investigating instances of alleged late or incorrect implementation is cumbersome and time-consuming.'<sup>46</sup> Having analyzed in this section on the functions the European Commission performs, a number of problems, inherent to the functions the Commission performs in the implementation and compliance process, have been discerned.

### 3.2 *The European Court of Justice – (X2)*

The second X under investigation here, is the European Court of Justice and its the role and the position in the implementation process of EU directives into national administrations. The analysis of the role of the ECJ has received less attention from political scientists and is largely confined to legal scholars. As has been shown in the previous section, the ECJ comes into play when the Commission has made the decision in the third stage of the infringement procedure to take a member state before the Court. In this stage the ECJ as the decisive arbitrator between the Commission on the one hand and the concerning member state on the other hand.<sup>47</sup> The EC Treaty sees a complaint at the Court as the *ultimum remedium*, a final measure.<sup>48</sup>

The role of the ECJ in the implementation process is stressed by numerous scholars. Tallberg for example states that 'once a case has been referred to the ECJ, the room for bargaining (the preferred dispute settlement mechanism of the Commission) is significantly reduced. However, it happens that member states are becoming afraid with the prospect of a negative ECJ judgment. This possibility is very reasonable, as about 90 percent of all infringement judgments are in favour of the Commission.'<sup>49</sup> Member states will transpose a directive to avoid further steps and the eventually a case before the ECJ, in which, as has been stated already, the chance that the ECJ will rule in favour of the Commission or other complainants is very large.<sup>50</sup> The ECJ has started to impose

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<sup>45</sup> Andrew Jordan, 'The implementation of EU environmental policy: a policy problem without a political solution', *Environment and Planning C: Government and Policy* 17 (1999) 69-90.

<sup>46</sup> Ellen Mastenbroek and Mendeltje van Keulen., 'Beyond the Goodness of Fit, Europeanization of Member States- A Preference-based Account of Europeanization,' (2006) p 21.

<sup>47</sup> Tanja A. Börzel, 'Non Compliance in the EU; Pathology or Statistical Artefact? *Journal of European Public Policy* 8: (2001) P 808.

<sup>48</sup> F. Amtenbrink. and H.H.B Vedder, *Recht van de Europese Unie* (Den Haag 2005) p 215.

<sup>49</sup> Jonas Tallberg, 'Paths to compliance: Enforcement, Management, and the European Union,' in: *International Organization*, Vol. 56, No 3. (2002). P 11.

<sup>50</sup> Geoffrey Garret et al., 'The European Court of Justice, National Governments, and Legal Integration in the European Union,' *International Organization* Vol. 52 (1) (1998) p 159.

financial penalties on member states for failing to implement EU directives.<sup>51</sup> It is clear from the literature that the ECJ has a threatening purpose.

The literature names the infringement procedure, with the Court as final enforcer, effective.<sup>52</sup> However, as is argued, implementation varieties still persist. We might conclude here, that this implicitly states that the Court is not effective or powerful enough to enforce correct and equal implementation. Apparently, other forces are also at work that hinder a correct and equal implementation of EU directives. Dimitrakopoulos points at the importance of the ECJ in implementation by pointing at the fact that institutions do not change easily. They often only adjust to external pressures, in this case the obligation to transpose EU law under the guidance of the jurisprudence of the Court of Justice.<sup>53</sup>

Dimitrakopoulos also points at the fact that the jurisprudence has restricted the capacity of national authorities to utilize institutional autonomy in order to undermine implementation. Connected to this the Court has repeated that a state cannot invoke 'special circumstances' for not implementing a certain directive. The reasoning here goes that the negotiations in the Council allows them 'to assess the implications of a draft piece of EU legislation and to make the appropriate provisions.'<sup>54</sup> Using the principle agent principle, as Tallberg does, the high degree of independency the ECJ possess to act against the preferences of its principals, the member states can be explained. He states that the Commission is 'subject to participation based monitoring by national governments through the comitology system and that there is no such direct effect and intrusive monitoring in the Court's decision making process.'<sup>55</sup> The functioning of the European Court of Justice within the implementation and compliance stage has been analyzed in this section. It is an indispensable actor in enforcing the solving of implementation problems by member states.

### 3.3 *The National Governments- (X3)*

The third X under investigation are the National Governments. In this section the role of the national governments in implementation of EU directives will be investigated. As has become clear, the responsibility for the practical implementation of an EU directive rests largely with the Member States. For the purpose of implementing directives, as Giuseppe Ciavarini Azzi states, the member states could almost be regarded as 'an extension of the Community institutions.'<sup>56</sup>

The role of the national government is pivotal both in the 'uploading' and 'downloading' process of an EU directive. The uploading process takes place during the

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<sup>51</sup> Ulf Sverdrup, 'Compliance and Conflict Management in the European Union, Nordic Exceptionalism,' in: *Scandinavian Political Studies* Vol. 27, 1 (2004) p 9.

<sup>52</sup> Heather A. D. Mbye, 'Why National States Comply with Supranational Law- Explaining Implementation Infringements in the European Union, 1972-1993. *European Union Politics* Vol. 2. (3) (2001) p 281.

<sup>53</sup> Dionyssi G. Dimitrakopoulos, 'The Transposition of EU law: 'Post Decisional Politics' and Institutional Autonomy,' *European Law Journal* Vol. 7, No. 4. (2001) P 445.

<sup>54</sup> Dimitrakopoulos, 'The Transposition of EU law, p 12. See also: Case 30/72 Commission of the European Communities v. Italian Republic. (1973) ECR 161.

<sup>55</sup> Jonas Tallberg, 'Supranational Influence in EU enforcement: The ECJ and the principle of state liability,' *Journal of European Public Policy* (2000) Vol. 7 (1) p 111-112.

<sup>56</sup> Giuseppe Ciavarini Azzi, 'The slow march of European Legislation, the implementation of directives.' In: Karlheinz Neunreither and Antje Wiener (eds), *European integration after Amsterdam* (Oxford 2000) P 52.

negotiations about an EU directive on the EU level between member states. The member states will try to get its preferences in the final provisions of the EU directive. With downloading is meant the process whereby EU directives are absorbed in the national administrations of the member states.<sup>57</sup> Héritier states that member states seek to shape European policy-making according to their interests and domestic interests. At the same time they have to adjust their institutions to European legislation once the latter has been enacted.<sup>58</sup>

When applied on the EU as a federal system with two different levels of government (national and European) this concept suggests that the preference formation processes of the lower-level polity and the higher-level polity are clearly distinct.<sup>59</sup> This concept predicts that when a certain member state has not been very successful on the European level to see its preferences back in an EU directive (the 'uploading' of its preferences), it will try to resist the implications of the EU directive during the implementation stage. Börzel points to another reason of problems in the downloading process. the state's substantial interests and preferences might change over time, either because of domestic changes or because of environmental changes. Between the adoption and the implementation of a directive are often two to three years. This provides incentives for defection and for non-compliant action as a consequence.

If changes do meanwhile occur in the specific policy field, this can create incentives for defection and for non-complaint action as a consequence. In situations where states have to cooperate, states often have an incentive to come back on their promised commitments. In the literature it is stated that member states sometimes gain often more from benefiting of the directive, without 'putting in their own fair share'<sup>60</sup> Here we touch upon the problem of free riding. Dimitrikapolous states that how EU law is actually transposed in the member states is largely determined by national constitutional rules.<sup>61</sup> The *principle of institutional autonomy* is hereby important. This is the right of the member states to perform the tasks that stem from membership of the EU on the basis of their own constitutional rules, stated in article 249 EC.<sup>62</sup>

Generally, if a government can ensure an atmosphere of corporatism, it can reduce the management problem at the moment an EU directives is ready to be implemented.<sup>63</sup> Corporatism is a cooperative relationship between government and interest groups, a constellation which is necessary for stability and predictability when EU law is implemented. A close and cooperative arrangement between the state and interest groups

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<sup>57</sup> Tanja A. Borzel, 'Pace-Setting, Foot-Druggin, and Fence-Sitting: Member State Responses to Europeanization,' *Journal of Common Market Studies* Vol. 40 (2) (2002) p 196.

<sup>58</sup> A. Héritier, 'Leaders' and 'Laggards' in European clean air policy,' in: B. Unger and F. van warden (eds) *Convergence or diversity: Internationalization and economic policy response* p 278.

<sup>59</sup> Gerda Falkner et al., 'Non-Compliance with EU directives in the Member States: Opposition through the Backdoor?' *West European Politics* (2004) Vol. 27 (3) P453.

<sup>60</sup> Jonas Tallberg., 'Paths to compliance: Enforcement, Management, and the European Union,' in: *International Organization*, Vol. 56, No 3. (2002) p 611.

<sup>61</sup> Dionyssi G. Dimitrakopoulos, 'The Transposition of EU law: 'Post Decisional Politics' and Institutional Autonomy,' *European Law Journal* Vol. 7, No. 4. (2001) p 444.

<sup>62</sup> (...) *A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods* (...).

<sup>63</sup> R. Lampinen and P. Uusikylä, 'Implementation Deficit- Why Member States do not Comply with EU directive?' *Scandinavian Political Studies* (1998) Vol. 21 (3) p 238.

will improve compliance.<sup>64</sup> To conclude, implementation problems can arise when the government does not have the adequate, technical and scientific infrastructure to implement efficiently EU directives and must undertake major investments to attain the necessary mechanisms a EU directive is demanding.<sup>65</sup> As the central actor between the EU supranational institutions and the various national actors in the implementation and compliance of directives, the national governments are indispensable actors both at the negotiation and decision upon the content of the EU directive, as well as during its subsequent implementation and compliance process.

### 3.4 *The Bureaucracy in the Member States- (X4)*

With the analysis of the bureaucracy in implementation, the investigation descends again to a lower level of analysis. However, closely connected to the previous actor, the national governments, the bureaucracy inserts its own dimension in the downloading of EU directives into the national administration. Simon Hix clarifies this point in his book. He points at the fact that governments are not unitary actors. Within the government, it are politicians and bureaucrats that have different interests. Hix states that politicians are seeking re-election, where bureaucrats seek more influence over policy outcomes, for example through larger budgets or greater freedom to shape their organizational structures and policy choices.<sup>66</sup> As Steunenberg remarks, administrations can be of big influence in the different phases of implementation, 'National actors responsible for implementation may be tempted to claw back what they lost at the summit.'<sup>67</sup>

Until recently politics and administration were two separate domains. In this set up administration was the neutral, instrumental and scientific carrying into effect of policies chosen by politics. Later research showed that public administration was not the same as politics, but was a part of politics and a stage in the policy making process.<sup>68</sup> The literature is quite in agreement about the fact that legislators on the EU level are often unwilling or unable to write detailed, clear, consistent, unambiguous legislation. The fact that the national administrations subsequently have to make choices about the policy details, makes them relatively influential. An EU directive can be simple, vague or incomplete, or even incorporate two different or inconsistent policy goals. This could have been done deliberately by the EU governments, because they could not agree on a firm policy choice, but wanted anyway to state and get praised for having passed an new EU directive.

Obviously, under these conditions and with its access to detailed information and its skills, the national administration can play an highly important role in the absorption of a new EU directive. Shapiro predicts caution about this influence. He states that 'everyone knows that it would be a miracle if all Member States administrations were

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<sup>64</sup> Michael Keating, 'Determinants of Transposition Delay in the European Union.' *Journal of Public Policy* Vol. 26 (1) p 240.

<sup>65</sup> Geoffrey Pridham, 'National Environmental Policy-making in the European framework: Spain, Greece, and Italy in Comparison' *Regional Politics and Policy* Vol. 4 (1994) p 86.

<sup>66</sup> Simon Hix, *The Political System of the European Union* (London 2005) p 367.

<sup>67</sup> Bernard Steunenberg, 'A Policy Solution to the EU directives' transposition puzzle: Interaction of interests in different domestic arenas,' *West European Politics* (2007) Vol. 30, No. 1 p 8.

<sup>68</sup> Martin Shapiro, 'Implementation, Discretion and Rules' in: *Compliance and Enforcement of European Community law.* (J.A.E Vervaele). (The Hague 1999) p 28.

implementing most EU regulations, let alone directives, in even approximately the same way.<sup>69</sup> That national bureaucracies have their own interest agenda is also confirmed by Tallberg who states that an EU rule that require changes in well established administrative structures, procedures and practices at the national level meet with resistance from bureaucracies with vested interests in existing arrangements.<sup>70</sup>

The make up of the national administration is of major importance in explaining the way the administrations deal with EU directives. Generally, the lower the administrative and political capacities of a state and the tighter the timetables for implementation are, the higher is the number of non compliance cases and the lower are the prospects for a successful transformation of non compliance into compliance during the different stages of the European infringement procedure.<sup>71</sup> Börzel adds to it that larger administrative capacity brings about fewer violations of European law. In order words, the composition and size of the national administration does matter for a member states' performance in absorbing EU directives. An important factor inherent to the characteristics of the bureaucracy is the lack of financial or personnel resources. Azzi states that most member states, especially when they are confronted with an increase in the number of directives have to devote extra man-power in a certain policy area.<sup>72</sup> When this extra man-power or means are not present the absorption will be delayed. The implementation and compliance literature shows that the administrative and political capacity of the member states and the tightness of timetables for implementation plays an important role.

### *3.5 The interest groups on the Domestic Level- (X5)*

The analysis of the interest groups at the domestic level brings this part of the paper to the lowest level of the analysis of the implementation process of EU directives. It might be argued that this is a highly important level when it comes to the absorbing of new EU directives into a new member states. After all, most EU directive concern private persons, the content of these various directives is directly concerning them and affecting their lives, in all thinkable respects.

More than in the previous X-es under investigation it is necessary to demarcate and categorize the actors that can be headed under 'interest groups on domestic level.' Although it is widely agreed in the EU implementation literature that interest groups are very important actors at the end of the policy process, most often interest groups are not categorized. That is what will be tried in this chapter. Here, the role of national parliaments, national courts and regional governments will be included under this heading, as these actors are able to formulate their own preferences at the moment an EU directive arrives in the member states.

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<sup>69</sup> Martin Shapiro, 'Implementation, Discretion and Rules' in: Compliance and Enforcement of European Community law. (J.A.E Vervaele). (The Hague 1999) p 30.

<sup>70</sup> Jonas Tallberg., 'Paths to compliance: Enforcement, Management, and the European Union,' in: *International Organization*, Vol. 56, No 3. (2002) p 628.

<sup>71</sup> Tanja A. Börzel, 'Who's afraid of the ECJ? Member States, Court Referrals, and (Non-) Compliance.' *Paper prepared for the ECPR Joint Sessions, Granada 2005*. P 14.

<sup>72</sup> Giuseppe Ciavarini Azzi, 'The slow march of European Legislation, the implementation of directives.' In: Karlheinz Neunreither and Antje Wiener (eds), *European integration after Amsterdam* (Oxford 2000) p 57.

### 3.5.1 Private Interest Groups on the Domestic Level.

The Commission states that 'it is not unusual for a government to succumb to 'pressures from domestic industries who urge it to delay the implementation of EU legislation in order to keep their sectors protected for just a little bit longer.'<sup>73</sup> The literature however also notes another viewpoint on the way the government of a member state will deal with domestic interest groups. Some scholars argue that government will most often not bend too soon for alternative the preferences of interest groups in the implementation process. The stakes for EU governments are high in the application of EU directives, especially when the possibility of financial liability in the face of the 1991 'Francovich'<sup>74</sup> case is taking into account.<sup>75</sup> These financial consequences make that it is often not very likely that governments will give in to interest groups' demands that it does not share.

Tallberg claims that the ambition of the Commission to make the infringement a powerful enforcement tool would be doomed to have failed if citizens and companies had not made such much use of the complaint procedure. The same might be said from the ECJ, it would never have been able to develop the EU's compliance system if individuals had not brought cases and if national courts had not referred cases to the ECJ for interpretation. Also Börzel states that the Commission is largely dependent, due to its limited resources, on the information from domestic actors in the different stages of the implementation process.<sup>76</sup>

Logically, the number of the actors that have the possibility to block political decisions will have an important influence on the autonomy of a state to make the necessary changes to the status quo for the implementation of EU directives. Here, we arrive at the veto player analysis of George Tsebelis.<sup>77</sup> It can be expected that the higher the number of domestic veto players is during the implementation of an EU directive, the higher the probability is that this will slow down the process of legal implementation.

### 3.5.3 Public interest groups on the domestic level.

Under this heading we can basically place three important actors. This is firstly the national parliament, secondly the national courts and thirdly the local governments. In their article Dimitrova and Steunenberg identify a range of public veto players; political parties or fractions, parliamentary committees, interest groups and regional and local governments.<sup>78</sup> To start with the national parliaments it can be concluded that in most member states the role of parliaments in implementation is rather weak. The national parliament go hardly ever against a government proposal to transpose a particular

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<sup>73</sup> Francis McGowan, 'State Strategy and Regional Integration- The EU and Enlargement,' in: *The Emerging Industrial Architecture of the wider Europe: the Co-evolution of Industrial and Political Structures*. p 18.

<sup>74</sup> With the Francovich case (C6&9/90) the principle of state liability to provide compensation for breach of EC law was introduced. This judgement was an important move in the direction of improving the effectiveness of non or incorrect directives.

<sup>75</sup> Mastenbroek, Ellen, and Mendeltje van Keulen., 'Beyond the Goodness of Fit, Europeanization of Member States- A Preference-based Account of Europeanization,' (2006) p 13.

<sup>76</sup> Tanja A. Börzel, 'Non Compliance in the EU; Pathology or Statistical Arthefact? *Journal of European Public Policy* 8: (2001) P 808.

<sup>77</sup> George Tsebelis, 'Decision making in Political Systems. Veto players in Presidentialism, parliamentarism, multicameralism and multipartism.' *British Journal of Political Science* (1995) 25 (3): p 306.

<sup>78</sup> Antoaneta Dimitrova and Bernard Steunenberg, 'The Search for Convergence of National Policies in the European Union: An Impossible Quest? *European Union Politics* ( 2000) Vol. 1 (2) p 215.

directive. This can have several reasons, like unfamiliarity with EU legislation, but this situation contributes to the so called democratic deficit that characterises the domestic dimension of the EU policy process.<sup>79</sup> The strict deadlines that go along with implementation and the legally binding nature of the directive cause that the role of the governments vis-à-vis the parliaments, but also domestic groups, have been strengthened.

It can be noted in this respect that according to the literature the number of domestic veto players is actually inversely correlated with national compliance records. It would make sense to assume that parliamentary involvement to increase implementation delay, because the legislative process will then take much longer. Even though, national parliaments are rarely involved in the implementation process, it seems that the more the parliament is involved, the less delay is associated with this process.<sup>80</sup>

When the national courts are considered, these can be named part of the 'decentralized compliance system', wherein individuals and national courts are active. Tallberg states the national courts after complaints of individuals and companies are performing the task of a 'fire alarm' and monitors state behaviour and clarifies EC law and sanctions non-compliance.<sup>81</sup> This means that interest groups have manners to influence that are stated in the EC Treaty.

Constituting the lowest level of analysis, the influence of domestic interest groups is generally more diffuse and covert than the previous actors. As the literature has shown, the implementation stage creates for domestic interest groups good opportunities to block or veto an EU directives, on which content they did not have a say when it was decided upon.

### *3.6 Factors- (Q1)*

One of the concepts introduced in this paper is the distinction in two types of variables that have their influence on the implementation stages of an EU directive in an member state. Now as the first 5 *actors* have been analyzed, this chapter will shift the centre of attention to the *factors* of influence in the absorption of EU directives by member states. The various factors will be analyzed in one chapter. The factors can roughly be divided in two groups, the first on the level of the member state and the second on the level of the EU directives.

#### *3.6.1 Member State Level*

Considerable attention in the literature is given to factors that are inherent to the institutional set-up of the member state. The core of the argument is that states with a federal or regional system, where power rest with Länder (Germany and Austria), regions (Belgium and Italy), or autonomous communities (Spain), will have 'a priori' a worse

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<sup>79</sup> Dionyssis G. Dimitrakopoulos, 'The Transposition of EU law: 'Post Decisional Politics' and Institutional Autonomy,' *European Law Journal* Vol. 7, No. 4. (2001) P 454.

<sup>80</sup> Peter Bursens, 'Why Denmark and Belgium have different Implementation Records: On transposition Laggards and Leaders in the EU,' *Scandinavian Political Studies* Vol. 25 (2) (2002) p 186.

<sup>81</sup> Jonas Tallberg., 'Paths to compliance: Enforcement, Management, and the European Union,' in: *International Organization*, Vol. 56, No 3. (2002) P 620.

implementation record than centralized states.<sup>82</sup> In the decentralized states the local entities are to some extent responsible for implementation, but in a centralized system the state remains legally answerable to the Community institutions. Greater autonomy among sub national actors should result in more infringements. Generally, centralized states have less difficulty, in contrary to a decentralized, federal system to transpose, implement and ensure compliance with an EU directive.<sup>83</sup> Haverland states also that the domestic political constellation is crucial, as the more institutional veto points, stages in the policy process or sub national government layers where the agreement of domestic actors is needed, the more problematic implementation will be.<sup>84</sup> Veto players<sup>85</sup> can be present that have objections against a particular EU directive and therefore constrain the capability for the domestic institutions to produce change to live upon the demands of the EU directive. Government reluctance to implement the appropriate policy changes may not be due to lack of will, but rather the result of being held back by domestic veto points.<sup>86</sup>

In the literature various other factors are mentioned that can influence the implementation performance of a member state. Underlying factors can be the economic or military power of a member state or the duration of EU membership. The length of membership is generally negatively associated with compliance.<sup>87</sup> Connected to these factors of power, the level of GDP of a member state can be of influence. Firstly, a high GDP can lead to high expenditures on administration, which will generally improve its implementation performance. Secondly, rich member states may transform their financial resources into political weight as they contribute more to the EU's budget than poor states.<sup>88</sup> The literature also stresses the factor of population size. The five biggest member states (Germany, France, the UK, Italy and Spain) are home to 69 per cent of the European population, but account for about 75 per cent of the complaints lodged in the last eighteen years.<sup>89</sup>

Another important factor is the level of public support for the European Union in a particular Member State. For member state governments it is much easier to implement an EU directive when the public support for the EU is high, as governments are always watchful to make policy choices that promote re-election. Another factor stressed in the literature is the intra-departmental and inter-departmental mobility of officials. Generally, mobility is important to keep the management of human resources in public administration efficient. But as Dimitrikapoulos notes the movement of officials to other posts after the negotiation and adoption of a directive, causes that their experience and knowledge are not directly accessible to the officials that replace them.<sup>90</sup> In other words,

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<sup>82</sup> Ciavarini Azzi, 'The slow march of European legislation: The Implementation of Directives. In: European Integration after Amsterdam, institutional dynamics and prospects for democracy (Oxford 2000). p 56

<sup>83</sup> Heather A. D. Mbye, 'Why National States Comply with Supranational Law- Explaining Implementation Infringements in the European Union, 1972-1993. *European Union Politics* Vol. 2. (3) (2001) p 364.

<sup>84</sup> Markus Haverland, 'National Adaptation to European Integration: The Importance of Institutional Veto Points,' *Journal of Public Policy* Vol. 20 (1) (2000) p 83.

<sup>85</sup> G. Tsebelis., 'Decision making in Political Systems' *British Journal of Political Science* (1995) 25 (3) p 292.

<sup>86</sup> Claudio M. Radaelli, 'The Europeanization of Public Policy. In: Kevin Featherstone and Claudio Radaelli (eds) *The politics of Europeanization*. (2003) p 46.

<sup>87</sup> Bernard Steunenberg, 'hare or turtle? Member states catching up with the transposition of EU directives. P 8.

<sup>88</sup> Tanja A. Börzel, 'Who's afraid of the ECJ? Member States, Court Referrals, and (Non-) Compliance.' *Paper prepared for the ECPR Joint Sessions, Granada 2005*. P 14. P 3.

<sup>89</sup> *Ibidem*. P 20.

<sup>90</sup> Dionyssi G. Dimitrakopoulos, 'The Transposition of EU law: 'Post Decisional Politics' and Institutional Autonomy,' *European Law Journal* Vol. 7, No. 4. (2001) p 448.



the public administration will in this case not be able to learn from the experiences acquired during the negotiations.

### *3.6.2 Level of the Directive.*

Here, various factors inherent to the content and the formulation of an EU directive are discussed. An EU directive can have a high degree of vagueness. A directive that is vaguely worded or has ambiguous goals leads to a situation in which implementation is not just the technical application of EU legislation, but where important policy choices have to be taken. There is generally criticism at the national level that points at the lack of precision in EU legislation.<sup>91</sup> Falkner shows with 29 empirical cases that inherent legal ambiguity of some European Directives may give rise to interpretation problems which subsequently have to be clarified by infringement proceedings.<sup>92</sup> However, as Dimitrakopoulos notes, vagueness is most often not the decisive factor in implementation problems; Falkner's analysis of the case law of the (European) Court shows that a relatively small number of cases where the real issue is one of interpretation of a secondary Community law in isolation.<sup>93</sup>

The content of a directive also plays a role. Implementation difficulties can rise from the impact a directive can have on the national policy. When a directive does not simply require the implementation of rules, but asks for active (and expensive) steps to be taken, difficulties can arise. For example when the directive introduces a new topic of EU regulation or a fundamental revision, the member state will have more difficulty in the absorption of an EU directive. Especially EU directives that cause great economic consequences, can lead national governments and sub national authorities to have concerns about employment and regional development and can therefore be sensitive to the calls from firms that have difficulties with the implications of a EU directive.

Connected to the content of a directive, Steunenberg takes a more policy specific perspective on domestic actors. This perspective pays attention on the fact that implementation takes place in various domestic arena's varying from national lawmaking to decision-making within ministries or administrative bodies. Depending on the peculiarities of these arena's domestic actors may react differently to the requirement of transposing a directive.<sup>94</sup> The last factor discussed here is the timing of European policies. When a country in a certain policy area is already putting reforms into place, for example the liberalization of the electricity markets, an EU directive in this field with the same objective will not cause too much difficulties. If, however, a country has not yet started these reforms, the same EU directive will ask close to a 'transformation' of the specific national policy terrain.

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<sup>91</sup> Lord Denning in: R. Wainwright, 'Techniques of drafting European Community Legislation: Problems of interpretation', (1996) 17 *Statue Law Review* 1, p11.

<sup>92</sup> Gerda Falkner, et al., 'Non-Compliance with EU directives in the Member States: Opposition through the Backdoor?' *West European Politics* (2004) Vol. 27 (3) p 465.

<sup>93</sup> *Ibidem*, p 12.

<sup>94</sup> Bernard Steunenberg, 'A Policy Solution to the European Union's Transposition Puzzel: Interaction of Interests in Different Domestic Arenas,' *West European Politics* Vol. 30 (1) p 40.

## IV Empirical Analysis – Directive 2000/60/EC.

This section will apply the actor and factor division as has been set out in the previous chapter. Most importantly it will shed light on the discerned underlying processes of the actors and the factors in a ‘real world’ empirical situation; the implementation of directive 2000/60/EC in both Germany and the Netherlands. It will follow the same order of analysis as the previous chapter.

The environmental directive under investigation in this section is an encompassing and important directive that builds a framework for Community action in the field of water policy. It creates a new and integrated governance structure for European river basins. The directive is ambitious and technical and therefore the preparation and the negotiations for member states on EU level were difficult. However, in 2000 a compromise text was achieved. This compromise text received a sceptical welcome by some member states.<sup>95</sup> But the Commission, the European Parliament and many member states were convinced of the value of a directive that would improve the environmental quality of EU rivers. Germany and the Netherlands both had great difficulties with the implementation of the water framework directive. The European Commission started against both member states article 226 EC infringement procedures because they were accused of not having implemented significant parts of the directive.

In the case of Germany, the article 226 EC infringement procedure started with the reasoned opinion, which was called the ‘final written warning,’ that it received from the Commission at July 16<sup>th</sup> 2004.<sup>96</sup> The European Commission subsequently referred a case on February 11<sup>th</sup> 2005, and Germany was charged with ‘failing to adopt all the laws, regulations and administrative provisions necessary to give effect to directive 2000/60/EC.’<sup>97</sup>

The Netherlands received as well a reasoned opinion on July 16<sup>th</sup> 2004 and was subsequently also taken to the Court on April 1<sup>st</sup> 2005 and charged with ‘having not taken all necessary legal and administrative measures to comply with directive 2000/60/EC.’<sup>98</sup> However, the case against the Netherlands was closed without any financial penalties for the Netherlands. On November 14<sup>th</sup> 2005 the Court declared that the European Commission had decided by a letter dated on October 14<sup>th</sup> that the Commission would pull back its allegations against the Netherlands, because the latter had meanwhile taken the necessary measures to fulfil the remaining implementation obligations.<sup>99</sup>

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<sup>95</sup> Official Journal of the European Communities. ‘Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a framework for Community action in the field of water policy.

<sup>96</sup> Rapid Press Release July 16<sup>th</sup> 2004. IP/04/941.

<sup>97</sup> Notice for the OJ, ‘Action brought on 11 February 2005 by the Commission of the European Communities against the Federal Republic of Germany. (Case C-67/05).

<sup>98</sup> Notice for the OJ, ‘Action brought on 1 April 2005 by the Commission of the European Communities against the Kingdom of the Netherlands. (Case C-147/05).

<sup>99</sup> EUR Lex, Decision of the President of the Court. Case C-147/05 Concerning an appeal on the non compliance pursuant to article 226 EC, opened on April 1st 2005. Judgment: 14 November 2005. (languages; Dutch, French).

Germany, on the contrary, was indeed convicted on December 15<sup>th</sup> 2005 by the ECJ. The Court stated that the necessary implementation measures were still not taken and Germany was ordered by the Court to bring the implementation of the directive in line as rapid as possible.<sup>100</sup> The outcomes of the infringement procedure are thus in both cases different. This will be analyzed in detail.

#### *4.1 Germany- Implementation of Directive 2000/60/EC*

Commenting on the implementation failure of Germany, the then Environment Commissioner Margot Wallström said: ‘Germany, like any other EU member state, must implement agreed EU environmental law in full and at the agreed deadlines. I welcome the ongoing efforts in Germany, but every delay in meeting the requirements continues to put the environment at risk.’<sup>101</sup>

Starting with the Commission, the role of the Commission as an source of assistance and the decentralized enforcement character of Community law, leaving the Commission in a relatively weak position are very much present in the German case study. During the implementation stage of the directive the Commission and the member states had agreed to work closely together. Central in this approach was the fact that there was information sharing, development of guidance on technical issues and information and data management from the Commission to Germany.<sup>102</sup> These findings do not correspond with the critics from the literature research, wherein the Commission is sometimes seen as an ‘unhelpful’ source of assistance. In this case the Commission as the enforcer was indeed in a relatively weak position because of the decentralized enforcement of the directive. The implementation of directive 2000/60/EC in Germany was the responsibility of the ‘Bundesländer’, not of the Federal Government.<sup>103</sup> Because of the limited political legitimization the European Commission has on local domestic level, it was not able to enforce the ‘Bundesländer’ directly into compliance., but had to address the German federal government instead.

When the role of the ECJ is observed in the implementation and compliance of directive 2000/60/EC, no structural problems have been found in the analysis. It might however be argued that the ECJ did not have enough silent power to let Germany put extra pressure on its local implementation authorities to avoid legal punishment by the ECJ.

On the level of the national government of Germany the directive demanded great legal and behavioural adjustment which contributed to the fact that the German government was unable to ensure implementation throughout the country. The directive required the implementation of highly technical provisions, but also a thorough reorganization of organizations that deal with water policy in Germany.<sup>104</sup>

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<sup>100</sup> EUR Lex, *Kommission der Europäischen Gemeinschaften gegen Bundesrepublik Deutschland*. Urteil des Gerichtshofes, Vertragsverletzung eines Mitgliedstaats – Richtlinie 2000/60/EG. 15. Dezember 2005. (Languages; German, French).

<sup>101</sup> Rapid Press Release July 16th 2004. IP/04/941.

<sup>102</sup> European Commission working staff document SEC (2007) 362, first stage in the implementation of the Water Framework Directive 2000/60/EC. [COM 2007 128 Final] page, 43 and 48-49.

<sup>103</sup> European Commission working staff document SEC (2007) 362, first stage in the implementation of the Water Framework Directive 2000/60/EC. [COM 2007 128 Final] page 63.

<sup>104</sup> Mitteilung der Kommission an das Europäische Parlament und den Rat. *Nachhaltige Wasserbewirtschaftung in der Europäischen Union*. March 23th 2007. [7768/07] p 2-4.

Germany knows traditionally a relatively high degree of corporatism in its society and economy.<sup>105</sup> However, this degree of corporatism has not been able, as the literature would predict, to diminish the management problems that came into existence when the comprehensive water policy directive had to be implemented. There has been found little evidence of the level of public opinion in Germany for the water policy directive. In general the public support in Germany for EU affairs is relatively high<sup>106</sup> and the effect of the provisions of the directive were less concentrated on the German citizens directly, but most of all on the national bureaucracies.

The German Lander bureaucracies had to implement the directive and had to put into place higher environmental standards, new measuring methods and different administrative practices. The German legislative and executive responsibilities for water management are divided between federal, state and local authorities<sup>107</sup>, that all have interest in their particular part of the water policy area. The new administrative division in river basin governance caused a major shift in concerning ministries of environment in the Bundeslander. As the literature predicts, if an EU directive demands changes in well established structures, procedures and practices this can meet resistance of national bureaucracies that have vested interests in the existing arrangements. In its letter to the Commission the German ministry for environment emphasized the sizeable assignments that the water policy directive puts upon the bureaucracies of the Bundeslander.<sup>108</sup>

Having arrived at the lowest level of analysis, the national interest groups, the number of actors involved in the implementation of the water policy directive in Germany should be investigated. Specific information about German public involvement in the implementation of directive 2000/60/EC is scarce, but several documents conclude that while implementing the directive 'the experience with non-formalised forms of interest group consultation or public participation is as a rule very limited.'<sup>109</sup>

Moving away from the analysis of the selected actors in this implementation analysis, several factors and their applicability can be confirmed in this case study. In the literature research it has become clear that large autonomy among sub nationals should result in more infringements. Germany is without doubt one of the most decentralized member states of the European union. The central problem for Germany was that directive 2000/60/EC was not implemented in 5<sup>110</sup> of its Bundeslander.<sup>111</sup> These implementation problems could according to the German government not be attributed to the federal government of Germany<sup>112</sup>, as the implementation of this directive was delegated to and under full control of the German Länder. But the Court rejected this argument according its settled case-law that a Member State may not plead situations in

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<sup>105</sup> The Financial Times, *Lobbyists fume over cold shoulder from Merkel* July 19<sup>th</sup> 2006 and *Merkel's marriage of convenience looks shaky* July 10<sup>th</sup> 2006. The Economist, *Land of Cliques* February 11<sup>th</sup> 2006.

<sup>106</sup> Eurobarometer, no. 66 Die Öffentliche Meinung in der EU, Herbst 2006. Nationaler Bericht Deutschland. P 35-36. [http://ec.europa.eu/public\\_opinion/archives/eb/eb66/eb66\\_de\\_nat.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_de_nat.pdf). Seen on May 8th 2007.

<sup>107</sup> Timothy Moss, *the governance of land use in river basins: Prospect for overcoming problems of institutional interplay with the EU water framework directive*. In: Land Use Policy 21 (2004) page 90.

<sup>108</sup> Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit. *Gemäß Artikel 3 abs. 8 und Anhang I der EG-Wasserrahmenrichtlinie (RL 2000/60/EC)* May 2004. p 3-5.

<sup>109</sup> Timothy Moss, *the governance of land use in river basins: Prospect for overcoming problems of institutional interplay with the EU water framework directive*. In: Land Use Policy 21 (2004) p 90.

<sup>110</sup> Ländern Berlin, Hessen, Mecklenburg-Vorpommern, Nordrhein-Westfalen und Sachsen-Anhalt.

<sup>111</sup> Paragraph 4; C-67/05 *Kommission der Europäischen Gemeinschaften gegen Bundesrepublik Deutschland*.

<sup>112</sup> Paragraph 5; C-67/05 *Kommission der Europäischen Gemeinschaften gegen Bundesrepublik Deutschland*.

its internal legal order, including those resulting from its federal organization and confirmed the arguments of the Commission.<sup>113</sup> In this case the federal structure of Germany hampered seriously its implementation results.

Another factor of importance found here is the fact whether a member state possesses an adequate, technical and scientific infrastructure to implement efficiently EU directives. As can be recalled, directive 2000/60/EC demands highly far reaching and technical changes in terms of national water policy. From the founded evidence, it might be argued that in the five Bundeslander that failed to transpose this necessary infrastructure was not in place. From these five Bundeslander, *four* are situated in former Eastern Germany. Evidence shows that these Lander have a relatively underdeveloped environmental regulation infrastructure in comparing to former West-Germany.<sup>114</sup> This case confirms the fact that an underdeveloped infrastructure can lead to a higher chance on implementation problems. This case study also seems to confirm the validity of the factor of population size. Where the 5 biggest member states, with their 69 per cent of the EU population, they account for 75 per cent of the infringement procedures. Germany being the largest member state, this factor can be confirmed.

#### *4.2 The Netherlands - Implementation of Directive 2000/60/EC*

The analysis is shifted from Germany to the Netherlands, which was also confronted with implementation problems concerning directive 2000/60/EC. The then Environment Commissioner Stavros Dimas stated: 'The Netherlands has not implemented the directive despite our final warnings last summer. I appreciate that the Netherlands is taking action to move towards conformity but its progress is not fast enough. EU legislation contains clear deadlines and these have to be respected if we are to deliver the level of environmental protection that Europe's citizens expect from us.'<sup>115</sup>

Also for the Netherlands, on every actor level, processes can be discerned that argue in favour or against the conclusion drawn about each actor in the literature research. Having in mind the fact that the case against the Netherlands was withdrawn on the last moment, it is expected to find different processes in this case study that explain the sudden change of the Dutch non-compliance behaviour.

The mechanisms applied by the Commission seem to have contributed to the fact that the infringement procedure against the Netherlands was prematurely closed. Evidence has been found that already in the stage between the formal letter and the official start of the infringement procedure, the reasoned opinion, the Commission and the Netherlands have pursued numerous bilateral meetings to clarify aspects of the water policy directive, but most of all to push the Netherlands into compliance. In a letter to the Dutch parliament, dated May 25<sup>th</sup> 2004 the under-secretary for 'Transport, Public Works and Water management' warns that negotiations between Dutch officials and the Commission had been without result and that the Commission was determined to start

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<sup>113</sup> Paragraph 9-10; C-67/05 *Kommission der Europäischen Gemeinschaften gegen Bundesrepublik Deutschland*.

<sup>114</sup> Volker Lüderitz, *Resources Management - a case study from Saxony-Anhalt, Germany*. P 2.

<sup>115</sup> Rapid Press Releases. *Netherlands: Commission takes Netherlands to Court over violations of EU environmental laws*. Date: 13/01/2005 [IP/05/33].

infringement procedures against the Netherlands.<sup>116</sup> Even though the Commission has the political powers to condemn member states, it resorts for political reason more often to bilateral negotiating. From December 22<sup>nd</sup> 2003, the date when the period for implementing the directive in national law expired, to April 1<sup>st</sup>, the date when the Commission referred a non-implementation case to the ECJ, the Commission tried to reach compliance by bilateral negotiations.<sup>117</sup> However, this strategy failed in the first instance. But by a letter signed on October 14<sup>th</sup> 2005 the Commission withdrew its complaints, as the Netherlands had taken the necessary obligations.

When the role of the ECJ is observed in the implementation and compliance of directive 2000/60/EC, no structural problems have been found in the analysis. This is especially caused by the fact that the ECJ referral was prematurely withdrawn, before the Court could come in action and make a judgment about the infringements. However, from the literature it could be confirmed that the Court has a deterrent function, where member states comply before a ECJ judgment has been reached. As has been stated in the literature, the far majority, about 90 percent, of the infringement cases end negatively for the member state.<sup>118</sup>

On the level of the national government of the Netherlands it can be confirmed that the more demanding the directive is, the less inclined member states are to comply. For the Netherlands the water policy directive means considerable adaptations in its water management. Because of the densely populated and therefore intensive land use, it is for the Netherlands difficult to live up to specific provisions of the directive.<sup>119</sup> The prediction that national governments often protect domestic concerns seems to be confirmed here. A considerable level of public participation has been reached during the implementation. Especially, considerable economic concerns were raised from the various Dutch trade and business groups that the strict directive, would lead to a 'lock' on the economy.<sup>120</sup> In contrary to what the literature research predicts, the corporatist character of the Netherlands<sup>121</sup> has not been strong enough in this case to ensure correct implementation with directive 2000/60/EC.

Moving to the level of bureaucracies, the empirical evidence proves that directive 2000/60/EC required changes in well established administrative structures, procedures and practices at the national level. The directive obliges the Netherlands to change the governing of the water quality of its rivers from the provinces to newly created 'river basin authorities.'<sup>122</sup> This is only one of the provisions, but it leads to a thorough reorganization of water management within the department of water management, an

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<sup>116</sup> Ministerie van Verkeer en Waterstaat (Ministry of Traffic and Water management), *Brief aan de voorzitter Tweede Kamer betreffende de Kaderrichtlijn Water (2000/60/EC)* May 25th 2004.

<sup>117</sup> C-147/05 Kingdom of the Netherlands v. The Commission of the European Communities. April 1<sup>st</sup> 2005.

<sup>118</sup> Jonas Tallberg, 'Paths to compliance: Enforcement, Management, and the European Union,' in: *International Organization*, Vol 56, No 3. (2002) p 618.

<sup>119</sup> Ministry of Transportation, Public Works and Water management. *Decembernote KRW/WB21 2005 Beleidsbrief*. P 35.

<sup>120</sup> VNO-NCW (Employer's lobby), *Bedrijfsleven schrikt van gevolgen Europese waterrichtlijn: een ijsskoude douche*. January 27th 2005. p 5.

<sup>121</sup> Arendt Lijphart and Markus M.L. Crepaz, *Corporatism and consensus democracy in Eighteen Countries: Conceptual and Empirical Linkages*. In: *British Journal of Political Science*, Vol. 21, No. 2. (1991) p 243.

<sup>122</sup> Staatsblad van het Koninkrijk der Nederlanden (Publication journal of the Netherlands), *Law of April 7th 2005, houdende wijziging van de wet op de waterhuishouding en de wet milieubeheer ten behoeve van de implementatie van richtlijn nr. 2000/60/EC*. [Staatsblad 2005/303].

institution that exists already more than 200 years and which has vested bureaucratic interests in the traditional governing structure.

Descending to the lowest actor of analysis in this thesis the interest groups on the domestic level are touched upon. In contrary to the case of Germany, where evidence of public involvement was relatively scarce, the evidence of strong interest involvement in the Dutch implementation case seems to confirm the literature prediction that the implementation stage creates good opportunities for domestic interest groups to block or veto an EU directive, on which content they did not have a say when it was decided upon. Moreover, the number of veto players in the Netherlands was considerable. Interesting is that this is not inherent to the Dutch system, which is relatively centralized.

In its communication the Commission states that for the Netherlands, the competent implementation authority is solely the Ministry of Transport, Public Works and Water management, whereas for Germany the governments of all the Bundeslander are listed.<sup>123</sup> Therefore a centralized implementation effort would have been possible for the Netherlands, but the Dutch government decided implementation to be on the lowest governmental scale as possible<sup>124</sup> and to let societal interests have generous opportunities to express their views<sup>125</sup>, the advantage of centralized implementation has thereby been annulled, but transparency risen. Even though the business and economic interest groups were lobbying the government intensively, afraid as they were that the Water Framework Directive 2000/60/EC would hinder their economic activities, no strong direct prove has been found that the literature prediction can be confirmed that the Dutch government succumbed to domestic pressures which would have caused delays in implementation, but it will not have improved the speed of implementation.

Moving again away from the analysis of the selected actors in this implementation analysis, and subsequently basing on the literature research, several factors and their applicability can be confirmed in this case study. As one of the environmental leaders of the EU member states and a water abundant country, the infrastructure was in place to implement directive 2000/60/EC correct and in time. The last factor under discussion here, the degree to which a directive inserts a new topic of EU regulation, has the most explanatory power. Bringing drastic changes in the water management and the cleanness levels of its waters, the Netherlands had difficulty in finding a balance between its obligations to the European Union and the strong domestic economic interests that feared the Dutch economy would be locked.

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<sup>123</sup> Communication from the Commission to the European Parliament and the Council. *'First stage in the implementation of the Water Framework Directive 2000/60/EC*. Brussels, 22.3 2007. [ SEC (2007) 362.

<sup>124</sup> VNO-NCW (Employer's lobby), *Bedrijfsleven schrikt van gevolgen Europese waterrichtlijn: een ijskoude douche*. January 27th 2005. p 6.

<sup>125</sup> Ministry of Transportation, Public Works and Water management. *Decembernote KRW/WB21 2005 Beleidsbrief*. P 47.

# V The Structural Framework and the Implementation of Directives in the EU

The empirical analysis of the implementation of directive 2000/60/EC in Germany and the Netherlands has shown that the framework of studying separately the actors and factors of influence in the implementation process is useful. It contributes in specifying the problems that the implementation of a complicated environmental directive can cause, but most interestingly it is able to discern whether the implementation problems can be ascribed to one of the selected actors, factors or a combination of both. In this chapter the application of the remaining part of the framework will be discussed. It will be attempted to analysis whether the separate theoretical concepts are together able to shed light on implementation difficulties. In order to do so, the three selected theoretical concepts, the *can* and *will* categorization and the compliance concepts and their applicability on the results drawn from the previous literature and empirical research will be discussed. It will be seen whether the study of problems that can surround the implementation process of EU directives can be analyzed from a perspective that treats the EU as a federal state. The discussion will follow the order of the framework, recall figure 1 on page 5 for a graphical overview of the framework, in the end some critics and failures of the framework will be pointed out.

## 5.2 Theoretical Concepts at the Domestic level – implementation failure explained

### 5.2.1 Theoretical Concept #1 ‘Goodness of Fit’

The ‘Goodness of fit’ hypothesis was emphasized in many implementation studies during the literature research. The hypothesis can be stated to apply to several predictions in both the actors and the factors of the literature research. For the national bureaucracy actor and the factor that stresses the content of a directive the goodness of fit gives theoretical support. In the empirical analysis it has been proved that the specific content of a directive, its fit with existing domestic policies in the water policy area, was one of the major reasons for the Netherlands to be faced with implementation problems. In the case of Germany, another ‘Goodness of fit’ problem was pivotal concerning the directive, where on the sub national level it lacked in five Bundeslander the necessary infrastructure to comply. The absorption of the goodness of fit hypothesis in the framework proves that participation in EU policy making is extremely demanding for Member States. In the words of Wright; they’re locked into a ‘continuous policy making process of both an active and reactive nature’<sup>126</sup>

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<sup>126</sup> Wright, V. (1996). ‘The national Co-ordination of European Policy Making Negotiating the Quagmire’, in: J.Richardson (ed.), European Union. Policy and Policy Making (London). P 149.



### 5.2.2 *Theoretical Concept #2 ‘Communication model of Inter-Governmental Policy Implementation’*

The selected concepts from federal oriented implementation theory require more elaborate discussion as they have far less often been applied on implementation and compliance problems in the *European Union*. Connected to the ‘top down’ character of the used framework, the selected ‘communications model of intergovernmental policy implementation stresses the communicational interaction between the federal, state and local layer of the government. Recall figure 7.3 in the appendix. Having proved that EU can be analysed as a federal polity, the Communications model seem to be very much complementary to the actor/factor framework. Both in the literature research and in the empirical analysis of Germany and the Netherlands it has been proved that member states face during the implementation process strong inducements and constraints from both the state and local level. Especially in the case of the Netherlands the state decisional outcome to not implement correctly was influenced by *inducements* of certain parts of the bureaucracy that saw change in the national water policy governance as a threat to its bureaucratic interests and a strong pressure from domestic trade and industry that feared a standstill of the Dutch economy. Simultaneously, Germany’s implementation endeavours were *constrained* by its decentralized implementation system.

The Federal level inducements and constraints were in both studied member states visible. Firstly, in the form of a complicated environmental directive. A fact that is however beyond the scope of this paper, but the chance is present that directive 2000/60/EC did not suit the preferences of Germany and the Netherlands, as most environmental legislation is decided on the basis of qualified majority voting.<sup>127</sup> The chance to be outvoted is then present. Secondly, strong federal inducements to both the Netherlands and Germany flew from the monitoring and controlling function of the European Commission, that started in both cases an infringement procedure, which is a strong inducement mechanism. The peak in inducement in the EU federal system comes from the highest adjudicator, the European Court of Justice. The threat of a conviction by the Court and the possibility of subsequent article 228 EC proceedings that can lead to considerable fines for a member states did both member states quickly correct their implementation irregularities. This applies especially to the case of the Netherlands, that quickly after its referral to the Court corrected its implementation deficit. But also in the case of Germany were the implementation problems after the conviction of the Court quickly solved, to avoid the costly article 228 EC procedure.<sup>128</sup>

The Communications model predicts that two intervening variables are of influence on the implementation performance of a member state. The structure, personnel and financial resources of a state, the organizational capacity, have a large impact on the implementation performance of member states, as the literature and empirical research shows. In the case of Germany and the Netherlands, the financial resources were of less importance, but one might imagine that complicated directives can be put a strain on the

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<sup>127</sup> Simon Hix, *The political system of the European Union* (London 2005) p 252.

<sup>128</sup> Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit, *Bericht des Bundes 2005-2006 an die Umweltministerkonferenz* (November 2006) p 76-77.

financial resources of one of the recently admitted Member States. Less evidence has been found in the empirical research of the ecological capacity variables; the state's economic, political and situational capacity. However, the literature predicts that variables as the size of a member states or its GDP have statistical consequences for a wretched implementation record.

### 5.2.3 Theoretical concept # 4 'Degree of Domestic Change'

This concept, derived from the Europeanization theory, offers a clear classification of the extent to what an EU directive causes domestic change, the most significant aspect of the Europeanization literature. In the case of the Netherlands, with a developed policy infrastructure in the area of water management, the implementation of directive 2000/60/EC lead to 'accommodation.' The directive could be transposed in existing national structures. In the Germany however, the picture is less defined. It might be argued that directive 2000/60/EC caused a transformation in the water policy field, replacing existing policies, processes and institutions, especially in the five Bundeslander that had implementation problems.

### 5.2.4 Can versus Will Concept

The in this thesis introduced *can* and *will* concept seems to be useful in categorizing the problems that Germany and the Netherlands faced. For Germany it might be argued that most of its problems had a clear *can* connotation in that the largest obstacles to correct implementation were its federal structure, and connected to this the fact that the Commission was not able to enforce directly and through the lack of the right infrastructure in particularly the former Eastern German Bundeslander. In the case of the Netherlands a far more stronger *will* component can be found in its implementation problems. Having in place a centralized governance structure and the necessary infrastructure, it was more lenient towards the societal economic interests which delayed the implementation. The premise here is that it is important to differentiate in an early stage the character of the implementation problems in *can* and in *will* categories. The reason for this is that it is highly important for the European Commission and the European Court of Justice in the *compliance stage* of the implementation of an EU directive to know whether the implementation problems of a member state were caused mainly voluntarily or involuntarily.

## 5.3 Theoretical Concepts at the EU level– ensuring compliance with EU directives

On the basis of the literature and empirical research, in this section a short survey will be made of the usefulness of the *can* and *will* distinction in the last component of the propose framework; the compliance phase. As was noted by Börzel; while the European Union has continuously expanded its legislative competencies, the implementation and enforcement of European law firmly rests within the responsibility of the member

states.<sup>129</sup> Both approaches are pointed towards the improvement of compliance to European rules by EU member states.

### 5.3.1 *The Enforcement approach*

This approach assumes that the member states of the European Union have defection incentives and that states violate voluntarily international norms and rules. The reason is that they do not want to bear the costs of compliance. The enforcement approach therefore states that compliance problems are best remedied by increasing the likelihood and costs of detection through monitoring and the threat of sanctions.<sup>130</sup> It can be stated that in the case of the Netherlands, the problems around the implementation process of directive 2000/60/EC had preponderant voluntary causes. The Dutch government made a deliberate choice to succumb to domestic pressure, at least no fundamental ‘can’ problems have been found. Another factor was the fact that a complicated environmental directive has enormous economic consequences for a densely populated country, consequences the Dutch government was hesitating to bear. The compliance strategy followed by the Commission and the ECJ had in the beginning a strong ‘enforcement’ character with the referral to the ECJ and the subsequent outlook on high fines. In the middle of the referral process a more ‘management’ character developed from the Commission’s side. Intensive bilateral negotiations were pivotal in ensuring compliance with the water policy directive, which fits the management approach more than stresses the importance of capacity building and rule specification.

### 5.3.2 *The Management approach*

In this approach, non-compliance is conceived as a problem of ‘involuntary’ defection. Tallberg notes that the management approach assumes that capacity limitations and rule ambiguity are the reasons for non-compliance.<sup>131</sup> The implementation problems of Germany would argue for a management approach in ensuring compliance. Its Federal structure and the inadequate water policy infrastructure in five of its member states were clearly not directly voluntarily chosen. The Commission could have taken a management approach and provide financial and technical assistance.<sup>132</sup> However, in this case a clear enforcement approach was applied. The Commission, and subsequently the ECJ as well, did not accept capacity problems as excuses for implementation problems.<sup>133</sup> A more enforcement was applied here.

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<sup>129</sup> Tanja A. Börzel, *guarding the treaty: the compliance strategies of the European Commission*. P 197.

<sup>130</sup> Jonas Tallberg, ‘Paths to compliance: Enforcement, Management, and the European Union,’ in: *International Organization*, Vol. 56, No 3. (2002) p 611.

<sup>131</sup> *Ibidem.*, p 613.

<sup>132</sup> Tanja A. Börzel, *guarding the treaty: the compliance strategies of the European Commission*. p 200.

<sup>133</sup> Paragraph 3-4, C-67/05 *Kommission der Europäischen Gemeinschaften gegen Bundesrepublik Deutschland*.

## 5.4 Critics

The proposed framework can also be criticized at some points. The framework is far from all-encompassing. It lends the insights from several theoretical concepts, but that does of course not preclude for the argument that more theoretical concepts could have been absorbed, especially more in depth concepts that can be adapted for specific policy areas. Moreover, the EU might be studied as a Federal state, it is not yet one. Especially, the highly politicized nature of the actions of the Commission and the ECJ in the compliance process makes it that in the interchange between the state and federal level of the EU, more politics is involved as in the US Federal System. Another critic could be the fact that the actor and factor distinction is useful, but that the empirical analysis of directive 200/60/EC proved that some causes of implementation problems are hard to categorize in one actor and constitute simultaneously a factor as well. To conclude, the usage of the enforcement and management method has not been confirmed by the empirical research. It follows however the conclusion that Tallberg also made, that the two approaches are complementary.<sup>134</sup>

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<sup>134</sup> Jonas Tallberg, 'Paths to compliance: Enforcement, Management, and the European Union,' in: *International Organization*, Vol. 56, No 3. (2002), p 609-610.

## VI Conclusion

Most EU member states are generally very much willing to implement directives in time and in a correct manner. However, all member states have to deal at times with obstacles that hinder a smooth implementation of a directive into the national law. The aim of this thesis was to shed light on this particular process of implementation difficulties. On the basis of the preceding analysis an answer will be formulated here to the two research questions posted in the introduction.

The first aim to develop a *structural framework for the analysis of implementation problems in the European Union policy process* has been attained. The framework was introduced in chapter two and subsequently worked out and preliminary tested. As the point of departure the framework takes the presumption that in order to investigate implementation problems with directives, the European Union can be analysed as a federal state. The framework puts centrally the introduction of a division in *actors* and *factor*. This was a successful tool in analyzing the literature and performing the empirical research. It made it possible to discern whether particular implementation problems can be ascribed to one of the selected actors, factors or a combination of both. A point of critic was that not all implementation problems are easily being categorized under one actor or factor. Subsequently, other theoretical concepts from the Europeanization theory and Implementation literature were inserted in the model to contribute to explanation of the processes surrounding the actor and factor division.

Firstly, the 'Goodness of fit' concept was useful in the empirical research to explain for the case of the Netherlands the reasons that it was faced with implementation problems. Due to the densely populated and therefore intensive land use, it was for the Netherlands difficult to live up to specific provisions of the directive. Secondly, the 'Communication Model of Inter-Governmental Policy Implementation' was able to shed light on the interplay between the federal, state and local layer of the government. It found prove that the national governments of Germany and the Netherlands faced strong inducements and constraints from both the federal and the local (domestic) level during the implementation process of directive 2000/60/EC. Thirdly, use was made of the categorization in 'Degrees of Domestic Change.' Less a explaining concept, it is able to categorize the degree of change a directive will cause into the national system. In the case of Germany the degree of change varied per Bundesland, on the overall a transformation was accomplished, whereas in the case of the Netherlands the implementation of directive 2000/60/EC lead to accommodation. Fourthly, an new concept was introduced. The distinction between *can* and *will* causes of implementation problems. It lead to the conclusion that Germany suffered mainly from *can* problems, principally due to its federal governance system and a deficiency of the necessary technical infrastructure in some of its Bundeslander, whereas the Netherlands saw more *will* problems, in that it was relatively lenient to domestic trade and business interests. The last stage of the structural framework centred again on the European level and focused on the compliance stage of the implementation of EU directives. With the insights of the structure of the problems and the voluntarily or non-voluntarily character of these problems the European

Commission decided its strategy to use a management or a enforcement approach. It has been proven that in both instances the Commission applied a combination of the two mechanisms. Critics have been given as to the fact whether the Commission should have followed a harder enforcement approach towards the Netherlands, and a more management approach towards Germany, which suffered mostly from involuntarily structural governance problems.

The objective of developing a structural framework for the analysis of implementation problems has been obtained. The discussion of the framework has shown that it is able to offer explanatory concepts for the various sorts of problems that can accompany the implementation of an EU directive by a member state. Moreover it offers explanations for the policy choices of the European Commission and the ECJ during the implementation process. Finally, it presents several concepts from the Europeanization and Implementation literature that are able to put the discerned implementation problems of *actors* and *factors* in a wider theoretical context.

The second research question was *to draw a cautious conclusion as to which of the actors and factors studied are pivotal in the causes of implementation problems in the European Union*. The answering of this question flows logically from the establishment, discussion and preliminary application of the structural framework and the outcomes of the literature and empirical research. The conclusion can here be drawn that in terms of compliance of implementation, the European Commission and the National Governments are the pivotal *actors*, but the other three actors are in essential in many instances, inherent to the specifications of a certain directive. A clear conclusion cannot be drawn solely on the basis of this research. Concerning the *factors*, it can be concluded that especially the constitutional set up of a Member State and the content of a directive are often decisive factors hindering or facilitating the implementation of a directive.

Regarding the Commission, it can be pivotal in offering technical assistance and clarification to the member states during the implementation process. The case of the Netherlands confirmed this argument. The principle of decentralized enforcement of Community law is a serious contribution to implementation problems, as it leaves the Commission in a weak position to ensure correct implementation. The case of Germany confirms this, which aggravated the Commission's weak position even more due to its federal system. It can be concluded that the ECJ has no direct stake in implementation problems. It has been discussed however that a even larger deterrent working of a Court's judgement would contribute to a better implementation record. The analysis has shown that national governments form the linchpin of causes for implementation problems, as confirmed by the Communications model. Governments can surrender to domestic interests that run contrary to the provisions of a directive. Moreover, the state's substantial interests and preferences might change over time, either because of domestic changes or because of environmental changes. This provides incentives for defection and for non-compliant action as a consequence. Descending to the national bureaucracies, the fact that they often have to make decisions about policy details, make them influential and prone to interpret the directive differently, leading to incorrect implementation. Moreover, as confirmed in the case of both Germany and the Netherlands, a far reaching directive can cause resistance from national level bureaucracies which have vested interests in the status quo. On the level of the domestic interest groups the following most important causes for implementation problems were discerned in the application of the

framework. Domestic interests, in the shape of veto points have been proved to be very influential implementation problems. The case of the Netherlands has confirmed this clearly. From the analysed factors, the factor stressing the constitutional set up of a member state is an important forecaster of implementation problems, as greater autonomy for sub-national actors result in more infringements. This is confirmed in the German case. The requirement of an adequate technical and scientific infrastructure and the content of a directive is the last factor that has been discerned as a significant cause for implementation problems, as proved by the implementation difficulties of the studied German Bundesländer.

The purpose of this thesis was to study the dimensions of the moment European rules concretely show their repercussion on the domestic sphere of a member state. It was attempted to study the behaviour of a full range of public and private actors in this process, but in a structured way. During this study it was proven that several theoretic insights were useful in enlighten certain aspects of the distinguished characteristics of the implementation stage. From this process a framework grew that contains many existing, but also newly introduced concepts, that hopes to contribute to a better understanding of the implementation process of directives in the European Union.

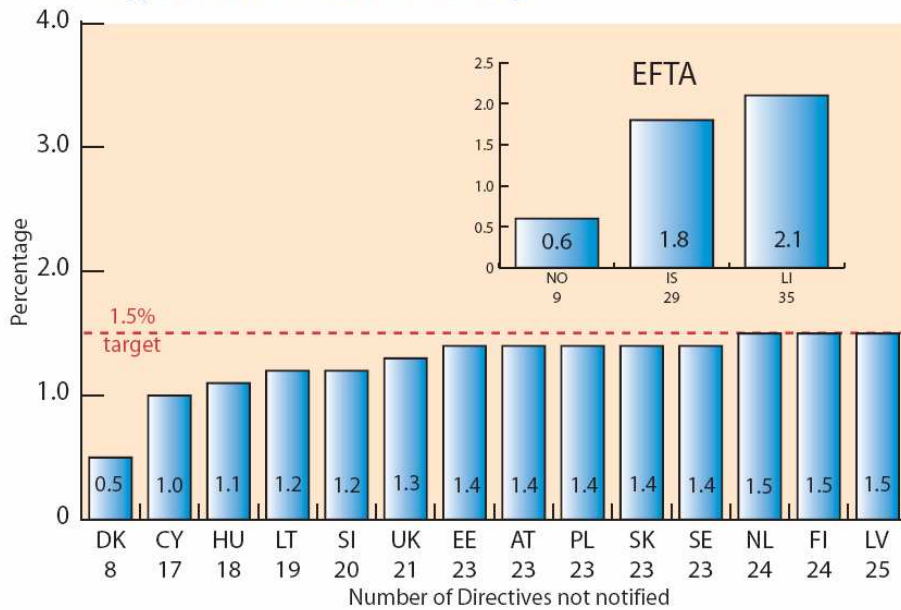
# VII Appendices

## 7.1 Appendix 1 Absorption of Directives by the EU (25)

Source: The European Commission, scoreboard internal market July 15<sup>th</sup> 2006.

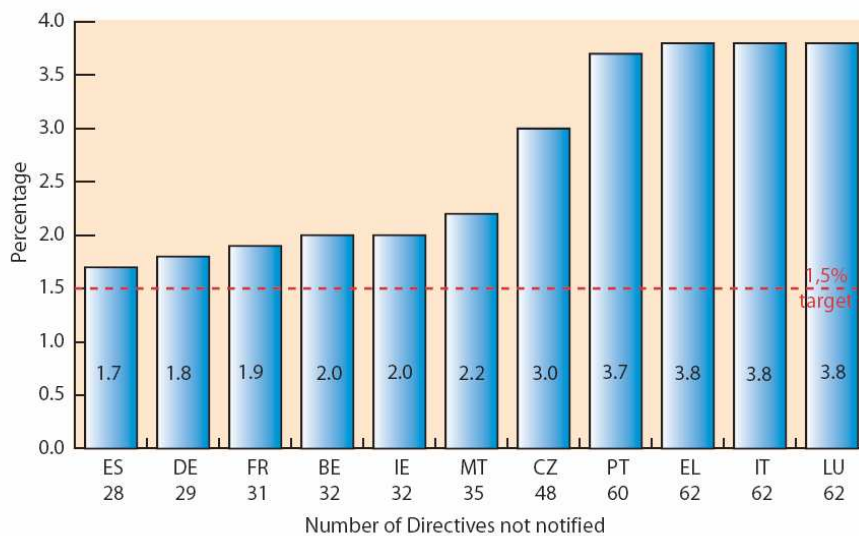
### Performance as against the 1.5% transposition deficit interim ceiling.

Figure 2: Only 14 Member States now do not exceed the 1.5% interim ceiling as opposed to 17 of them six months ago



Transposition deficit, by Member State, as at 1 June 2006.

Figure 3: the Czech Republic, Portugal, Greece, Italy and Luxembourg perform very poorly

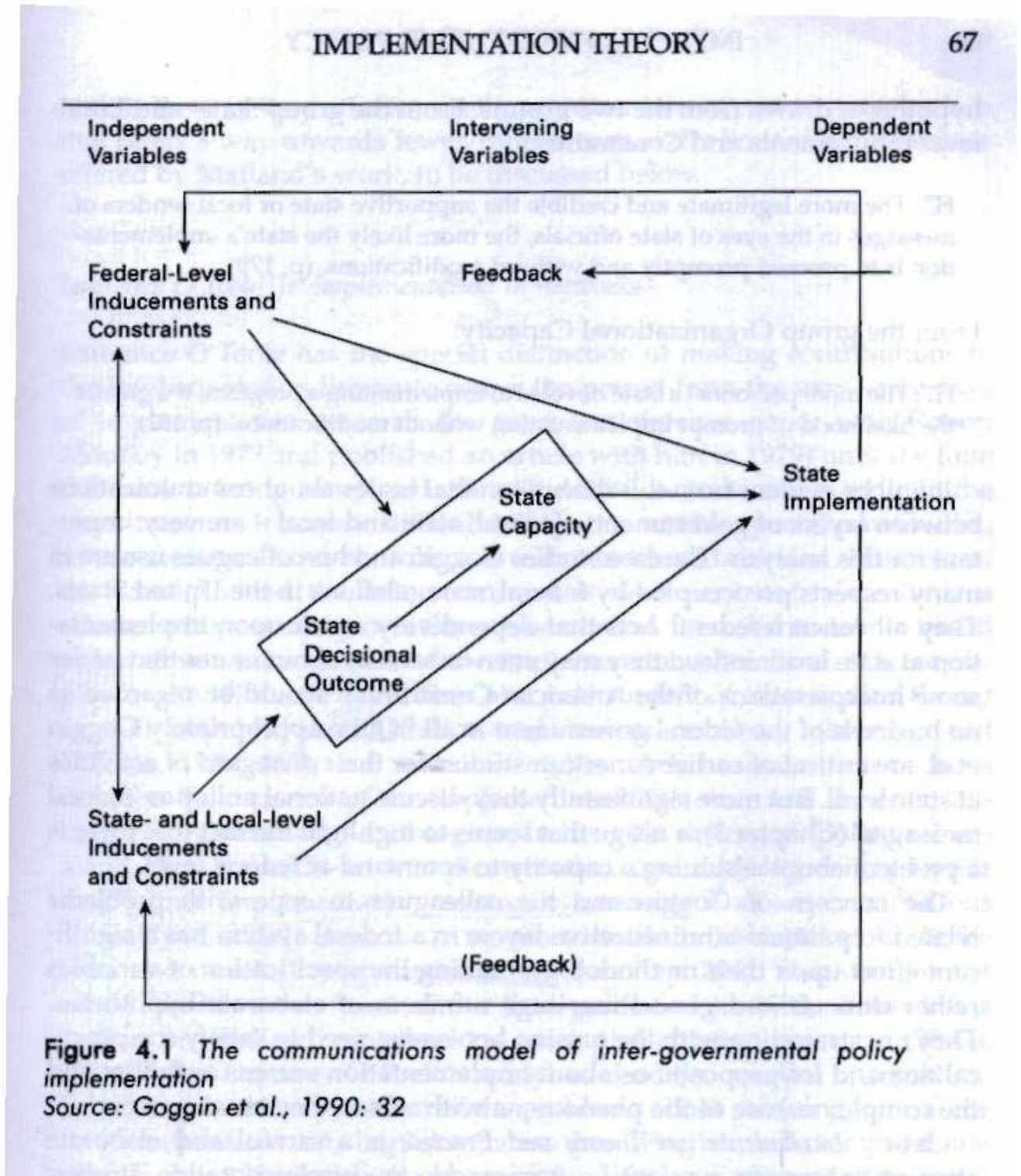


Transposition deficit, by Member State, as at 1 June 2006.



## 7.2 Appendix 2 The Communications Model of inter-governmental Policy Implementation

Source: Michael Hill and Peter Hupe, *Implementing Public Policy* (London 2003) p 67.



## 7.3 Appendix 3 Infringement Procedure

Source: Tanja A. Börzel, 'Non Compliance in the European Union; Pathology or Statistical artefact?' *Journal of Public Policy* Vol. 8 (5) (2001) p 807.

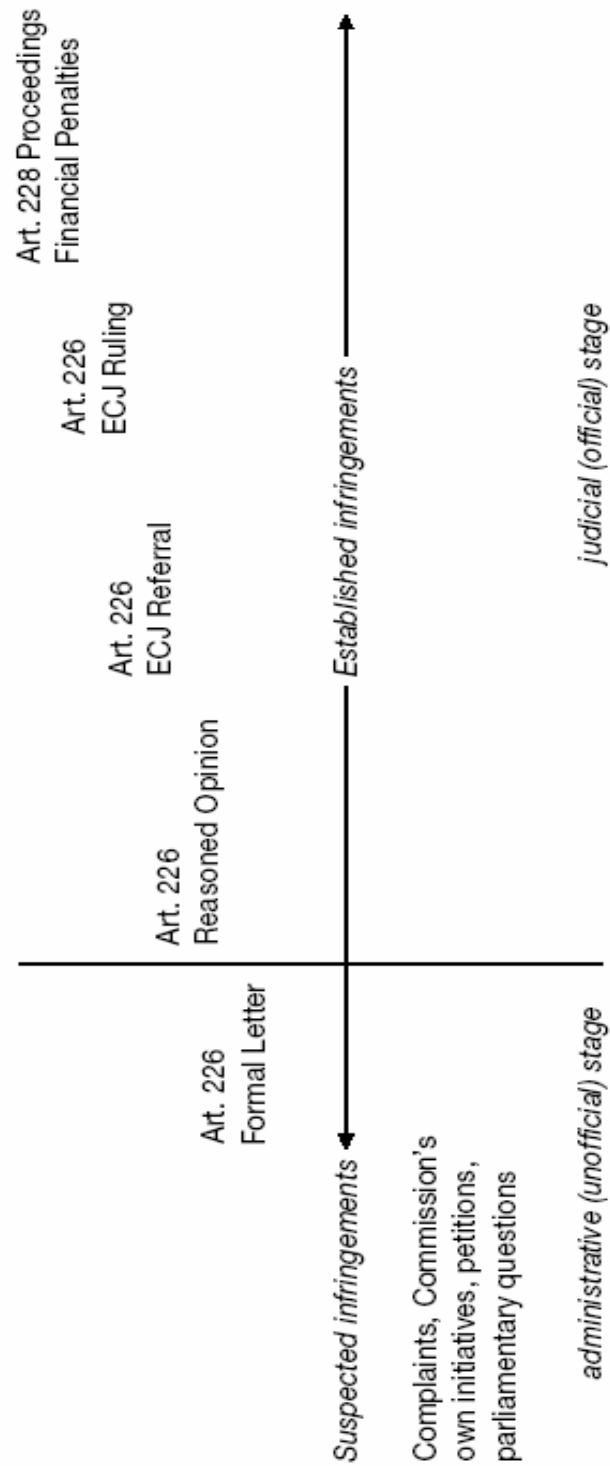
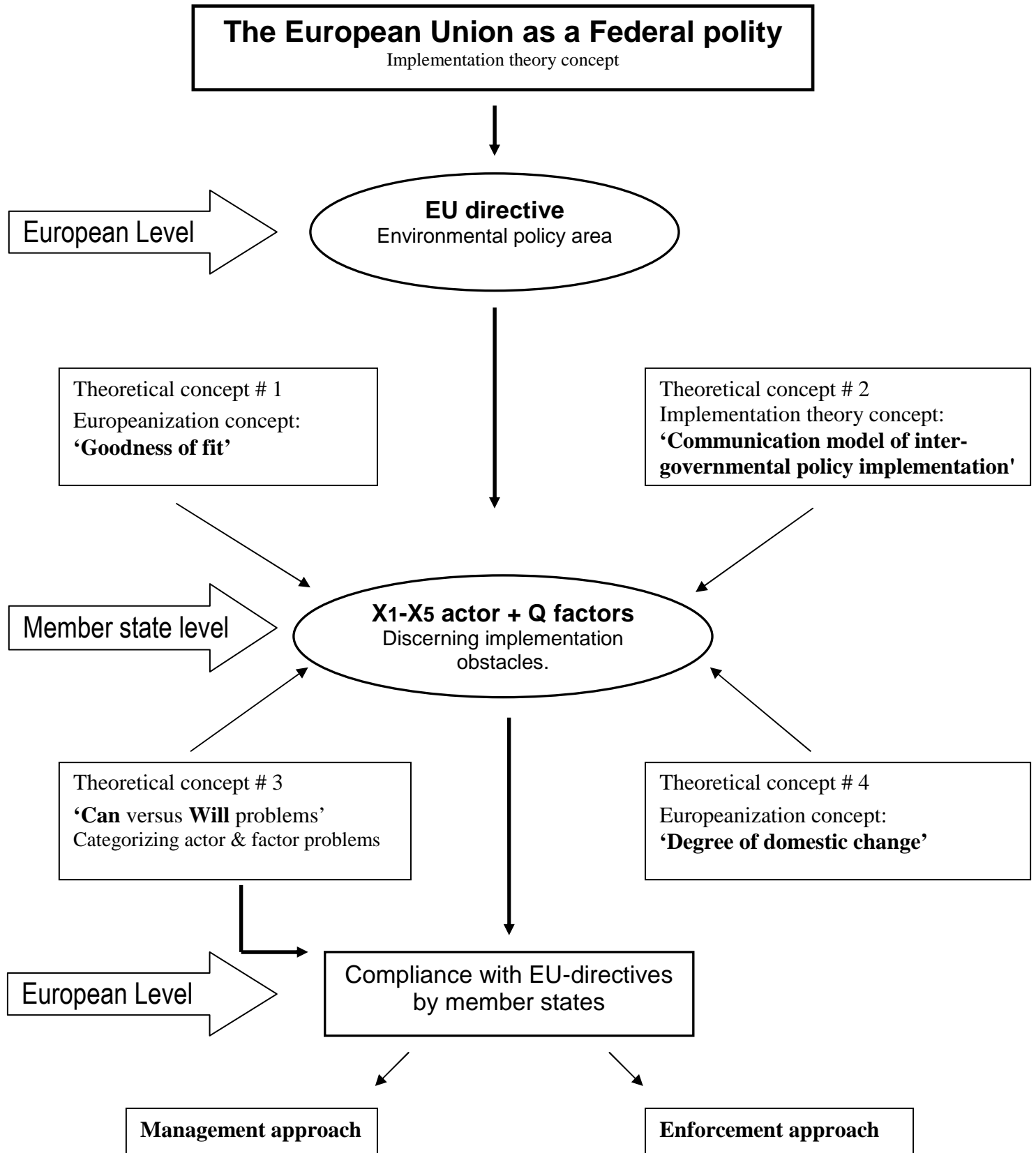


Figure 2 The infringement proceedings and its different stages

## 7.4 Appendix 4 Structural framework for analyzing EU directive implementation problems

Source: own.



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