

# EU policy, domestic interests, and the transposition of directives

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**Abstract.** Why do EU member states have difficulty transposing directives? How are the policies specified in these directives transformed into national policy? In this paper I analyze the transposition of EU directives. Discussing the current literature on EU compliance I develop a new approach to understand how domestic actors shape policy implementing EU directives. In this *policy-specific* approach the outcome of transposition depends on the institutional arena in which decision making takes place and the interests of the domestic actors involved. These institutional arenas can vary from parliament to national ministries and agencies. Domestic actors are taken as *policy-specific* veto players. Their preferences may lead to two different responses to the requirements of a directive. First, they can stick to the directive and transpose it in a literal way. Deviations between the directive and national policy are kept to a minimum. Second, domestic actors can adopt a non-literal interpretation of the directive, leading to more substantial deviations within the boundaries allowed by the European Commission. Both responses are illustrated by two cases of decision making concerning EU directives, the tobacco products directive and the animal trade directive. The analysis shows that the policy-specific approach proposed in this paper helps in understanding transposition. It clarifies how the splendid ambitions formulated in Brussels are transformed by national administrations.

## Introduction

When the member states of the European Union (EU) agree on a new directive, this policy instrument has a long way to go before it is finally implemented.<sup>2</sup> For directive to become ‘law in action’ the

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<sup>2</sup> The Constitution for Europe, which still has to be ratified, replaces the term ‘directives’ with ‘European framework law’ for instances where such an act is adopted by the European legislators (the Council of Ministers and Parliament) and ‘European regulation’ for cases of delegated decision

member states first have to transpose it into their national law, before national or subnational administrations or agencies start applying these rules. Transposition is important since it forms a precondition for effective implementation of EU policy. Without proper transposition, a directive will not be fully integrated into the national legal order. This creates the risk that implementing agencies are not informed about the new rules from Brussels, or that they get caught between conflicting requirements of these rules and national law.

Most EU member states appear to have some difficulty in transposing EU directives despite their obligation to comply.<sup>3</sup> This paper focuses on the important issue of transposition. Table 1 presents a recent overview of transposition based on Commission scoreboards. Even though the Stockholm European Council (2001) stressed the importance of full transposition and agreed that all member states have to reduce their transposition backlogs to less than 1.5% of the total number of directives in 2002, 9 member states, including the largest ones, have not yet achieved this target. The average transposition backlog in the Union is 1.7% or 42 directives. France and Italy each has a backlog of 2.6% (or 62 and 64 directives, respectively), while Germany has a backlog of 2.3% (or 54 directives). While the Commission data provides information on how many directives are not yet transposed, it does not indicate how long the transposition of these directives is delayed. This is supplemented by a recent study of Mastebroek (2003: 384), who finds, based on a sample of directives to be transposed by the Netherlands, that transposition was delayed for 42% of the directives. The delays varied

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making by the Commission. The latter category refers to the current Commission directives. In this paper I will adhere to the existing and accepted 'old' terminology.

<sup>3</sup> See Lampinen and Uusikylä (1998), Azzi (2000), Börzel (2001), and Dimitrakopoulos (2001) for general discussions of compliance in the EU. The obligation to comply is based on Articles 10 and 249 EC. ECJ rulings established that directives are binding in the sense that non-implementation by member states does affect a directive's applicability and that member states are liable for costs resulting from not or insufficiently complying with a directive.

between just a few days to up to 326 weeks (that is, more than 6 years) after the agreed deadline, while the average delay was about 50 weeks.

[Table 1 about here]

Why do member states have difficulty transposing directives? How are the policies specified in these directives transformed into national policy? The current literature on the European Union suggests different answers to these questions, drawing on arguments from mainstream perspectives in political science and public administration (Börzel and Risse, 2000). Some argue that problems with transposition are the result of an institutional ‘mismatch’ between the goals and instruments proposed by the directive and the existing domestic norms and ideas about policy (Knill and Lenschow, 1998; Knill and Lehmkuhl, 1999; Graver, 2002). This ‘mismatch’ requires some adaptation in the domestic area which sometimes does not take place leading to delay or misapplication of community law. Others point to domestic opposition to the implementation of the directive, which is based on different views among the decisive domestic actors about the preferred regulatory regime (Haverland, 1999, 2000; Dimitrova and Steunenberg, 2000). This may lead to delay of the implementation of the EU policy or adaptation of this policy to domestic preferences.

Empirical work, however, shows that neither distinct domestic norms nor resistance from ‘institutional’ veto players seem to provide a sufficient answer. Extensive case-study research on transport directives (Héritier et al., 2001) and environmental directives (Knill and Lenschow, 1998; Knill and Lenschow, 2000: 256) shows no straightforward relationship between general, country-based or sector-wide characteristics and the performance of a member state in transposing and implementing EU directives. This finding is supplemented with comparative work on the implementation of the parental leave directive (Falkner et al., 2002), which calls into question the usefulness of ‘mismatch’ as an explanatory factor. Recent quantitative research demonstrates that variables related to potential

political conflict within the national political arena, such as the number of national legislative veto players, the number of parties in government and whether the national political system is a federal one, have limited value in explaining compliance with EU law (Giuliani, 2003a; Mbaye, 2001, 2003).

These findings bring up the question of why these mainstream approaches fail to explain the outcomes of transposition. Remarkably, most work draws on general characteristics of the national political and administrative arena in order to understand the domestic reaction to EU policy. Transposition is regarded as a *national* responsibility and seen as related to overall characteristics of the domestic political system. In most member states, however, the actual work of adapting and changing national law is performed within administrative bodies, including ministries (Rhodes, 1986; Page and Wouters, 1995). The extent to which this occurs is illustrated by Mastenbroek's study (2003) of directives transposed in the Netherlands. In her sample of 241 directives, 19% required the adoption of a statutory law, while 81% were transposed through lower-level legal instruments.<sup>4</sup> These processes are not uniformly organized, but consist of different patterns of consultation, coordination and decision making in which numerous domestic actors play a role. These may include governing parties, or the political parties in parliament, but when a directive is transposed through lower-level legal instruments parliament is not involved. The context of transposition is therefore *policy-specific* and not *country- or even sector-specific* as presumed in most of the current work. Concentrating on country-specific characteristics, many existing studies and especially the quantitative work mentioned before focus on the wrong explanatory variables. For this reason, they are not able to provide a sufficient explanation

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<sup>4</sup> These percentages are broken down in the following way: 19% of the directives required the adoption of a statutory law (through a legislative act); 31% an order in council (adopted by government only); 37% a ministerial decree (adopted by a minister); and 12% through lower-level administrative decisions. In this sample, 1% of the directives were not yet transposed into national law. I am grateful to Ellen Mastenbroek for providing this data.

of how member states adapt to EU policy and why they sometimes have great difficulty in doing this within a certain period of time.

In this paper I take a different perspective on transposition and develop a *policy-specific* approach. My approach, which is embedded in an institutionalist perspective on decision-making, assumes that outcomes are a result of both the institutional structure of the decision-making process and the interests of the actors involved (see, for instance, Shepsle, 1979, 1989; Shepsle and Weingast, 1981, 1995; Ostrom, 1986). As applied to the US Congress, part of the institutionalist literature suggests that tools such as decentralized information gathering, ex post sanctions and political appointments (McCubbins and Schwartz, 1984; Weingast and Moran, 1983, Weingast, 1984), carefully designed administrative procedures (McCubbins, 1985; McCubbins, Noll and Weingast, 1987, 1989; Macey, 1992) and court review (Ferejohn and Weingast, 1992), ensure that the actions of administrative actors primarily reflect the preferences of the legislature. The approach taken in this paper, however, diverges from the strong principal-agent bent of this literature. Besides disregarding the existence of transaction costs which reduce the effectiveness of tools and hence administrative compliance to Congress (Moe, 1987; Horn, 1995), a perspective based on one principal and one agent has limited applicability to the more complex and multi-layered decision-making process of the EU. In the EU context, at least two principals can be distinguished at the national level. On the one hand, national parliaments are the traditional principals for domestic legislative decision making. On the other hand, the executive branch—that is, cabinet ministers and the administration—are the real legislators when it comes to the making of European policy by means of intergovernmental bargaining in the Council of Ministers. They are part of the overarching European decision-making with which national actors, including parliament, need to comply. As a consequence, no clear cut principal-agent relationship exists in the national political arena: when it comes to EU decision making, national administrations and national

parliaments are on a more equal footing. Since national administrations are better informed on EU policy than national parliaments, and national parliaments need not to be involved in the transposition of directives in most European legal orders, this may even lead to administrative dominance in the national decision making on directives.

The approach builds on the notion of *policy-specific veto players* who formally or informally have the authority to block decision making. This notion differs from the one used by Tsebelis (1995), who primarily focuses on formal veto players in the national legislative process (Tsebelis, 2002: 19). These formal veto players are of limited value in understanding transposition since this process does not always result in new legislation. The approach taken here also contrasts with the notion of *veto points* (Immergut, 1992; Haverland, 1999, 2000, 2003: 212-4; Börzel and Risse, 2000: 7), which are defined as “points of strategic uncertainty that arise from the logic of the decision process itself” (Immergut, 1992: 66), or as “stages in the decision-making process on which agreement is legally required for a policy change” (Haverland, 2000: 85). Veto points are crucial and potentially blocking stages in the political process, while veto players are actors who have the *authority* to block but may not want to use this possibility depending on their goals.

The framework elaborated in this paper employs insights from the spatial theory of voting (Enelow and Hinich, 1984; Hinich and Munger, 1997; Shepsle and Bonchek, 1997) and the theory of sequential games (Kreps, 1990: 355-432). It points out that depending on their preferences, domestic actors may react differently to the requirement of transposing a directive. On the one hand, domestic actors could stick to the directive and transpose it in a literal way. Deviations between the directive and national policy are kept to a minimum. On the other hand, domestic actors could adopt a non-literal interpretation of the directive which is not challenged by the European Commission. Under these circumstances, the national policy that will be implemented differs from the directive as decided by the

Council of Ministers. The paper further discusses the conditions under which these two different responses are expected.

The analytical framework is applied to two cases of decision making concerning EU directives in the Netherlands, which illustrate the basic logic of the approach and show how it applies to different institutional settings.<sup>5</sup> The first case is the transposition of the tobacco products directive, which regulates the presentation and sale of tobacco products. It illustrates decision making in a parliamentary context leading to a literal transposition of the directive. The second case is an example of transposition within a single ministry without the involvement of the government or parliament. It concerns the transposition of the animal trade directive, which aims to reduce the spread of contagious animal diseases. In this case the resulting national measures deviate from the EU directive by providing much stricter rules for the handling and transport of swine and cows. The case descriptions are based on official publications, including the proceedings of the Dutch parliament, as well as interviews with government officials. In concluding this paper, I turn to the recent discussion in the literature on EU compliance and discuss whether the concept of policy-specific veto players contributes to our understanding of transposition.

### **Discussing transposition: towards a policy-specific approach**

Tallberg (2002: 609) distinguishes two different perspectives for understanding why member states sometimes do not, or not immediately, comply with EU law. The first perspective is the *management approach*, which suggests that insufficient administrative capacity, or the complexity of the legislative issues at hand, affects transposition. “Non-compliance, when it occurs, is not a result of deliberate decisions to violate treaties, but an effect of capacity limitations and rule ambiguity” (Tallberg, 2002:

613). Governments may lack the political ability to ensure the agreed commitments or the support of the implementing administration. Interestingly, in this approach governments as well as their administrations are regarded as unitary actors who are faced with political, legal or administrative limitations in their capacity to act and implement the *acquis*.

It is not clear in the context of the management approach whether certain ‘limitations’ in the implementation of directives are the unintended consequence of differences in views between member states. For this purpose Tallberg (2002: 611) introduces the *enforcement approach* which regards non-compliance as a ‘choice’ of a member state resulting from a difference between an international obligation and its interests. To achieve compliance, an international obligation has to be ‘enforced’ so that the state changes its ‘choice’. Focusing on the differences between unitary states, the question arises whether this perspective is helpful in understanding transposition and compliance as a national or domestic decision-making process. However, both the enforcement and the management approach ignore the fact that national positions are the result of the interactions of different national actors, each having their own interests. To understand why member states have difficulty accepting EU directives and adapting their laws, one has to move away from a *single-actor* perspective and adopt a perspective that takes into account *multiple actors* in the domestic political arena interacting in a multilevel perspective of EU politics (Marks et al., 1996).

Another perspective in the existing literature focuses on the domestic area in its explanation. Delays in transposition are regarded as a result of an institutional ‘*misfit*’ between existing domestic institutions, in particular the norms and ideas about policy, and the directive (Knill, 1998; Knill and Lenschow, 1998; Knill and Lehmkuhl, 1999; Graver, 2002). However, the ‘misfit’-approach comes

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<sup>5</sup> See Andeweg and Irwin (1993) and Smith (1976) for more information on the Dutch political system. See Kooiman et al. (1988) and Bekkers et al. (1995) for earlier work on transposition in the Netherlands. A recent study is Mastenbroek (2003).



has some limitations. First, there are conceptual difficulties with what ‘misfit’ actually entails, since it may refer to “mismatch between EU measures and domestic institutions, policy instruments, standards and problem-solving approaches” in either qualitative or quantitative nature (Falkner et al, 2004: 467). In addition, based on empirical research, it appears that ‘misfit’ on its own is not sufficient to explain substantial variations in transposition (Knill and Lenschow, 2000: 256; Héritier et al. 2001; Falkner et al. 2005). Héritier et al. (2001) also explored ‘misfit’ but went further by developing this concept as part of an approach focusing on both actors and ideas. This approach defines the existing ‘reform state’ as a starting point from which political actors may either resist or change policy influenced by dominant policy ideas. Falkner et al. (2002: 29) also suggest such an approach “...which takes into account both institutional and actor-based factors.”

This brings me to the last perspective on transposition. The *actor- or interest-based* approach focuses on the domestic decision-making structure and the way in which the preferences of political and administrative actors affect outcomes. Non-compliance is regarded as the unintended consequence of the differences in interests between these actors. Sometimes domestic actors may resist the introduction of new national law, which causes delay (Héritier, 1999: 14-6). In other instances, they may have a joint-interest in deviating from the policy specified in the directive leading to ‘legislative’ or ‘bureaucratic’ drift as part of the transposition process (Dimitrova and Steunenberg, 2000). A reason why some domestic actors prefer these shifts is that they did not participate in the EU legislative process. Consequently, as Mény et al. (1996: 7) point out, “national actors responsible for implementation may be tempted to claw back what they lost at the summit.” The question is whether they will succeed in doing so.

Within the actor-based approach differences occur concerning which domestic actors are involved in transposition. Mbaye (2001, 2003) and Giuliani (2003a) take a *legalistic* perspective by assuming

that decisions on transposition are typically made by national legislative actors including parliament. This view disregards the fact that the transposition and the implementation of directives is mostly in the hands of lower-level actors. Transposition is not a uniform process involving the *same* political actors for *all* directives but rather one that depends on the policy involved. In this paper I take a *policy-specific* perspective on domestic actors. Depending on the institutional characteristics of the policy process involved, *different* political and administrative actors will be involved. The question is how these actors will adapt their domestic law to the Union's *acquis*.

### **Explaining transposition**

Based on the perspective that transposition is affected by domestic interests, I approach transposition as a process in which at least two (political or administrative) actors have to approve a proposal that converts a directive into national law. These actors could be coalition parties in government, political parties in parliament, national ministries, implementing agencies, or any other political actor who, depending on the policy sector and the procedure that is used, plays a role in the decision-making process.

The need to reach agreement on the implementing instrument is represented in terms of veto power for each of the participating actors. In contrast to other decision-making processes like national lawmaking where the state of affairs or *status quo* is the current policy, the transposition process starts from the new EU directive. The directive is the starting point for the making of national law, but it may allow or require additional interpretation. Variation in transposition depends on the content of a directive, but it is more common than usually assumed.<sup>6</sup> It may comprise the choice of different

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<sup>6</sup> Directives as policy instruments especially allow for different means of achieving their objectives. As Nugent (2003: 239) indicates, “[t]hey are less concerned with the detailed or uniform application of policy and more with the laying down of policy principles that member states must seek to achieve but can pursue by the appropriate means under their respective national constitutional and legal systems”.

options provided by the directive, the way in which specific targets are achieved, the arrangements concerning the implementation and enforcement of the national regulations, and the interpretation of ambiguous parts. If all players agree on the transposition proposal specifying how to include the contents of the directive into national law, the directive is implemented according to this ‘national’ interpretation of its contents. If these players disagree for whatever reason and cannot adopt an interpretation of the directive, they are forced to stick to the directive’s actual wording.

These two different possibilities can be illustrated by assuming that political and administrative actors have single-peaked, spatial preferences. Each actor prefers a specific and unique policy, which is called a player’s most preferred position or ideal point. Moreover, the further away an alternative policy is from this ideal point, the less it is preferred. I label the ideal point for veto player  $i$  as  $V_i$ .

As indicated, implementation is monitored by the European Commission. The Commission may challenge a member state for failing to transpose a directive, or for transposing the directive in such a way that the content of the national regulations does not match the content of the directive. However, monitoring and enforcing the implementation of directives is costly. These costs, which depend on the contents of the directive involved, shape the Commission’s response to deviations. The Commission will challenge a national government when the difference between the original directive and national law is such that it exceeds the costs of enforcement. The Commission as the ‘guardian of the treaties’ is presumed to have an ideal point that corresponds to the policy specified in the directive.

National governments, national political groups and organized interests are well aware of the Commission’s monitoring role. They want to avoid being challenged by the Commission. If the Commission challenges them, they will lose face domestically as well as internationally. Furthermore, if the Commission findings are supported by the European Court of Justice, the domestic decision will be reversed and domestic actors will be confronted with severe sanctions. This means that there are

some costs involved when undesirable deviations from the directive are detected by the Commission, which reduces the payoffs to domestic actors.<sup>7</sup> We can now define a set of proposals that will not be challenged by the Commission, which I call the *set of sustainable proposals*. In view of the impossibility of perfect Commission oversight<sup>8</sup>, this set includes all points between  $d_{min}$  and  $d_{max}$  in Figure 1, with  $d$  as the policy specified in the directive.

[Figure 1 about here]

Which policy will be preferred by the veto players? When the veto players engage in a decision-making process over a new policy, the first issue is whether both prefer some alternative to the initial content of the directive. The existence of these policies, which I call *jointly preferred policies*, depends on the location of the directive vis-à-vis the preferred positions of both players. In the case of the preference configuration presented in Figure 1, the directive is located *between* both players. This makes it impossible for the players to suggest an alternative that is preferred by both. A change in the content of the directive to the right will be opposed by the first player, while the second player will oppose any change in content to the left. In other words, under the circumstances presented here, neither player can engage in bargaining and thus they will transpose the directive in a literal way. This general result can be presented as follows:

***Hypothesis 1:*** *If the policy specified in a directive is located between the most preferred positions of domestic veto players, the directive is transposed in a literal way.*<sup>9</sup>

The situation as envisaged in this hypothesis can also be associated with delay in the process of transposition. As different veto players prefer changes into opposing directions, they may hinder a

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<sup>7</sup> In this paper I assume that these costs are equal to all players. However, some players might be more affected than others by Commission oversight and the threat of EU sanctions resulting from an ECJ ruling. This points to further research on the distributional effects of sanctions.

<sup>8</sup> With regard to the impossibility of perfect control by a principal of an agent, see, for instance, Breton and Wintrobe (1975) and, more recently, Horn (1995).

swift decision-making process. Some may postpone their decision to the very last moment, while others try to resolve the existing deadlock by redefining the issues at stake, by adding new issues, linking the issues with other decision-making processes, or trying to change the preferences of the opponents (Héritier, 1999: 16-7). If not successful, opposing preferences result into a literal transposition of the directive.<sup>10</sup>

The result of hypothesis 1 is based on the sufficient condition that the directive is located *between* the preferred positions of the veto players. If veto players are found at different locations so that this condition is not satisfied, deviations *may* occur. This leads to the following corollary:

*Corollary: If the policy specified in a directive is not located between the most preferred positions of domestic veto players, these players may propose an interpretation of the directive.*

In contrast to hypothesis 1, the location of the veto players is a necessary but not a sufficient condition. This requires a further exploration of the circumstances under which players are able to interpret the directive differently.

[Figure 2 about here]

A situation that differs from the one discussed occurs if the veto players have preferences as displayed in Figure 2. In this configuration, both players prefer a change in the directive to the right, which implies that some alternative and preferred policy options exist. To determine the range of these alternatives, it is important to identify the points that, in utility terms, are equivalent to the original directive to both veto players 1 and 2. Based on the single-peaked preference functions of both groups—for which the top of the utility function is equivalent to the indicated most preferred position—these points, which are called indifference points, are  $1(d)$  and  $2(d)$  in the figure. All points

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<sup>9</sup> See the appendix for this result that does not depend on the number of veto players.

<sup>10</sup> If successful, the decision-making situation changes and the case need to be classified under one of the other hypotheses that will be discussed.

between  $d$  and the indifference points form the set of alternatives that are preferred by these players. Since veto player 1 prefers the smaller deviation from the directive than veto player 2, 1's set of preferred points is smaller and thus more restrictive than 2's. The set of jointly preferred policies is the intersection of both sets of individually preferred points and is equal to the interval between  $d$  and  $I(d)$ , as indicated in Figure 2.

In making a choice, the sets of sustainable and jointly preferred alternatives play a role. If one of the players selects a policy that is not part of *both* sets, the proposal will be rejected by the other player, since it is not supported politically, and/or rejected by the Commission, leading to infringements. In any event, a proposal to transpose the directive differently will fail since it lacks sufficient political support. However, if a proposal is part of *both* sets, i.e. found in their intersection, support exists for an *alternative interpretation* of the directive. In other words, the possibility exists that the proposed national law includes a different interpretation of the directive's contents. These possibilities are found in the *set of feasible policies*, which includes all alternatives between  $d$  and  $d_{max}$  in Figure 2. Given these options, the next question is which policy will be selected.

To answer this question, I focus on the sequence of the decision-making process. As in many real world decision-making situations one of the veto players has the authority to make the initial proposal, which is subsequently discussed with the other player in the game. The veto player with this authority is called the *agenda setter*. With regard to the two players in our example, I assume that veto player 1 has the possibility to make the initial proposal on how to transpose the directive, while player 2 can only accept or reject the proposal. The sequence of play in this game is as follows: in the first stage, player 1 decides on an interpretation of the directive, which is submitted to the other veto players. In the second stage, all veto players decide to accept or reject the interpretation. In this case, player 2 has to decide whether to use his or her veto, next to player 1. If the interpretation is rejected, the directive

will be transposed in a literal way. If the proposal is accepted, the new interpretation will become national law and is the way in which the government seeks to comply with EU law. Finally, the Commission decides whether or not the interpretation is sustainable. If not, the government's decision will be (eventually) reversed, which can be expressed by an additional reduction of utility to each of the national players. Transposition, in this model, is the result of a three-stage game of perfect and complete information in which veto player 1 moves first.

The solution of this sequential game can be illustrated with the preferences presented in Figure 2. Starting with the last stage, the set of sustainable interpretations can be determined based on the contents of the directive and the Commission's ability to 'protect' the directive against alternative interpretations. The sustainable interpretations are all points between  $d_{min}$  and  $d_{max}$ . In the second stage, the veto players have to decide whether to veto an interpretation. Alternatives that are part of the veto players' win set will be preferred and thus not be vetoed. These alternatives are located in the area where the preference set of player 2 overlaps with player 1's preference set with regard to the directive. In other words, all interpretations between the original directive  $d$  and player 1's point of indifference  $1(d)$  are part of this set. Based on this consideration, player 1 seeks his or her best interpretation of the directive that is *sustainable* and *preferred*. Points that have both characteristics are located in the intersection of the two sets. In other words, player 1 can choose an interpretation from the points that are, in this case, located between  $d$  and  $d_{max}$ . Since these points include player 1's ideal position, this player chooses this point as the new, national interpretation of the directive.

Choosing interpretation  $S$  as the interpretation of the directive, player 2 will accept it and thus refrain from using his or her veto. In addition, the Commission will not challenge the member state, since the interpretation of the directive is within the set of sustainable interpretations. This combination of strategies is the Nash equilibrium of this game based on the preference configuration in

Figure 2. The equilibrium outcome is interpretation  $S$ .

This result, which holds for a broader range of different preferences, forms the basis of the following hypothesis:

***Hypothesis 2-A:*** *Domestic veto players adopt an interpretation that is equivalent to the most preferred position of the agenda setter if*

- (a) the policy specified in a directive is not located between the most preferred positions of the veto players, and*
- (b) the agenda setter has a moderate preference compared to the other veto players that is part of the set of feasible policies.*

Note that this result depends on four necessary conditions concerning the existence and location of the various veto players, including the agenda setter. Concerning the agenda setter—player 1 in the example—two things are important: first, the agenda setter must have an ideal position *in* the set of feasible policies; second, the agenda setter has to have a *moderate preference*—i.e. a preference closer to the location of the directive,  $d$ —than any of the other veto players. If these conditions are not satisfied, the result as expressed in Hypothesis 2-A does not hold.

Modifying the conditions concerning the *location* of the agenda setter, the following result applies, which is the mirror of the previous hypothesis:

***Hypothesis 2-B:*** *Domestic veto players adopt an interpretation that is equivalent to a feasible policy closest to the most preferred position of the agenda setter if*

- (a) the policy specified in a directive is not located between the most preferred positions of veto players, and*
- (b) the agenda setter does not have a moderate preference compared to the other veto players or this player's most preferred position is not part of the set of feasible policies.*



This result is illustrated by the preference configuration in Figure 3 in which the veto players changed preferences. Now the first player, who is also the agenda setter, has a more extreme position with regard to the directive,  $d$ , than veto player 2. In this case, the agenda setter is no longer able to propose an interpretation of the directive that is equivalent to his or her own ideal position  $G_1$ . The best interpretation that is both feasible and acceptable to the other veto player is the one equivalent to point  $d_{max}$ . The agenda setter, making his or her choice in the first stage of the game, will propose this point as the interpretation of the directive. This policy will be approved by the second veto player and does not trigger a reply by the Commission. It forms the equilibrium outcome.

[Figure 3 about here]

Both hypotheses indicate that domestic players may deviate from the directive, but that the potential for such deviations is limited. As discussed earlier, directives allow for some freedom of implementation. The possibility of domestic actors to adopt an interpretation that differs from the wording of the directive is specified by the *set of feasible policies*. First, this set depends on the Commission's willingness and ability to control transposition. However, control is costly so that even if the Commission could determine what the proper way of transposing a directive is, it cannot control all possible deviations from the directive's content. In addition, the policies specified in directives often vary in terms of how specific they are formulated affecting Commission abilities. A general obligation to member states to support the equal treatment of men and women leaves more discretion to member states than specific requirements ruling out any differences between men and women including those with regard to pay, social benefits, and pensions. Second, the set of feasible policies is shaped by the preferences of the domestic veto players. Only if these players jointly prefer a change in the contents of the directive will it result in an interpretation of the directive. Making such interpretations is an inherent part of the process of transposition since directives are the result of

political negotiations in the Union's legislative process.

Having formulated some hypotheses based on my policy-specific approach to transposition, the next step is to apply them to actual decision-making processes in the Dutch domestic arena. The first case is the tobacco products directive, which required the introduction of new legislation involving the national parliament. The second one is the directive on animal trade, which was transposed by administrative actors within the ministry of agriculture.

### **Tobacco products**

On 5 June 2001 the Council adopted, together with the European Parliament, a directive on the manufacture, presentation and sale of tobacco products.<sup>11</sup> This directive, which was proposed by the European Commission in November 1999, sets uniform standards for the maximum tar, nicotine and carbon monoxide yields of cigarettes, which have to be tested on an annual basis. Furthermore, the directive requires that unit packets of tobacco products carry a general health warning (for instance 'smoking kills') as well as information on the ingredients. According to the directive (Article 14), the member states had to comply with these new rules by 30 September 2002 at the latest. In addition, the directive provides for a longer sales period for cigarettes (one year) and other tobacco products (two years) after the transposition deadline in order to allow the industry to sell existing stocks.

The Dutch government supported most changes proposed by the Commission. In the information sheet which the government sent to Parliament, the government observed that reducing smoking would lead to a reduction in illness and mortality. It also indicated that the new directive was expected to be

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<sup>11</sup> Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, published in the *Official Journal of the European Communities* L194 (18.7.2001): 26-34.

transposed swiftly.<sup>12</sup> During the negotiations, the Dutch held an intermediate position concerning the banning of certain terms as well as the size of the health warning on packets and the extent to which the industry must disclose information on ingredients. In view of the preferences of other member states as well as the position taken by the European Parliament, the resulting directive took a strong stand against possible misleading terms, the size of the health warning and the obligation to disclose information on ingredients that are mentioned on a common list (Arregui, 2004: 52-6).

The tobacco products directive was transposed in the Netherlands using five different legal instruments. The most important one is an amendment of the Tobacco Law. This amendment, which was introduced to Parliament on 29 May 2002, included new definitions of tobacco products, tar and nicotine, the requirement for manufacturers and importers to provide information on the ingredients of tobacco products, the verification and disclosure of this information, and a ban on descriptions suggesting that a particular tobacco product was less harmful than others. The proposal was adopted by Parliament in January 2003 and came into force on 18 April 2003.<sup>13</sup>

[Figure 4 about here]

In addition to this change in the Tobacco Law, four lower-level legal instruments were used, which are included in Figure 4:

- an *order in council* amending existing decisions on the tar yield of cigarettes and the labeling of tobacco products. A draft version of this order in council was presented to Parliament and published in

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<sup>12</sup> See the Letter of the state secretary of Foreign Affairs of 28 February 2000, TK 1999-2000, 22.112, no. 147: 4-5.

<sup>13</sup> See Decision of 4 April 2003 to determine the moment at which the Law of 6 February 2003 comes into force, *Staatsblad* 2003(155). The new law is published as: Law of 6 February 2003 to adapt the Tobacco Law to directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ L 194), *Staatsblad* 2003(89). The parliamentary discussions leading to this law can be found under the dossier number 28.401.

the Government Gazette (*Staatscourant*) in order to allow Parliament as well as industry to respond to the proposed measures.<sup>14</sup> After these consultations, the initial proposal was changed by making a separate proposal for hand-rolling tobacco.<sup>15</sup> In contrast to the directive, the government preferred to apply the same (and thus higher) standards to this product as cigarettes. The new decision came into force in May 2002;<sup>16</sup>

- two separate *ministerial decrees*. The first one dealt with measurement methods for tar, nicotine and carbon monoxide. This decree, based on the previous decisions on the labeling of tobacco products and the tar, nicotine and carbon monoxide yield in cigarettes, implemented the requirements on maximum yields of cigarettes and the labeling of packets. The decree was adopted shortly after the consultations that led to the new decisions on yield and labeling of tobacco products.<sup>17</sup> The second decree regulated the way in which industry had to provide information on the ingredients of tobacco products. This decree elaborated the new regime as introduced by the new Tobacco Law and came into force after the adoption of the new law in April 2003;<sup>18</sup> and, finally,

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<sup>14</sup> Draft-change of the Decision tar yield cigarettes (*Besluit teergehalte sigaretten*) and the Decision labeling tobacco products (*Aanduidingsbesluit tabaksproducten*), *Staatscourant* 2001 (26: 6 February): 19; and Draft-change of the Decision tar yield cigarettes (*Besluit teergehalte sigaretten*) and the Decision labeling tobacco products (*Aanduidingsbesluit tabaksproducten*), *Staatscourant* 2001 (135: 17 July): 13.

<sup>15</sup> Decision of 21 January 2002 amending the Decision tar, nicotine and carbon monoxide yield in cigarettes (*Besluit maximumgehaltenes aan teer, nicotine en koolmonoxide in sigaretten*) and the Decision labeling tobacco products (*Aanduidingsbesluit tabaksproducten*), *Staatsblad* 2002(84).

<sup>16</sup> See the Decision of 21 January 2002 amending the Decision tar yield cigarettes (*Besluit teergehalte sigaretten*) and the Decision labeling tobacco products (*Aanduidingsbesluit tabaksproducten*), *Staatsblad* 2002(83).

<sup>17</sup> Ministerial Decree on measurement methods on tar, nicotine and carbon monoxide of cigarettes and hand-rolling tobacco (*Regeling methoden van onderzoek ten aanzien van teer-, nicotine- en koolmonoxidegehaltenes in sigaretten en shag*), *Staatscourant* 2002 (78: 23 April): 11.

<sup>18</sup> Ministerial Decree on list of ingredients of tobacco products (*Regeling lijsten tabaksingrediënten*), *Staatscourant* 2003 (79: 24 April): 18.

- an *order in council* to implement ways to enforce the new regulations on labeling, yield and product information of tobacco products. This decision came into force on 1 September 2003.<sup>19</sup>

The coming into force of this decision on enforcement can be regarded as the last step in the process of transposing Directive 2001/37/EC. The Dutch government was almost one year late in implementing this directive. This delay was partly due to the late submission of the bill amending the Tobacco Law to the Second Chamber of the Dutch parliament at the end of May 2002. The amendment was submitted 10 months after the official publication of the directive and only four months before the deadline. As an official commented, it was “due to the simultaneous overhaul of the Tobacco Law based on national priorities, which required substantial effort of the ministry.” When the proposal was presented to parliament, the minister of Health, Welfare and Sport stressed the urgency of passing the bill in view of the deadline.<sup>20</sup> Nevertheless, the parliamentary discussions lasted until 28 January 2003 when the First Chamber voted in favor of the bill.

A second factor influencing the delay is the unexpected changes in government during the period in which the transposition of the directive was prepared. The preparations for transposition, including the drafting of the changes in the Tobacco Law and its introduction to Parliament, were made under the responsibility of the minister of Health, Welfare and Sport, Els Borst. As a member of D66, she was a minister in the second ‘purple’ cabinet in the Netherlands.<sup>21</sup> After the unexpected fall of the government and the early elections in May 2002, her responsibility for this dossier was taken over by the new minister Eduard Bomhoff in July 2002. He was a member of the List Pim Fortuyn (LPF) in the

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<sup>19</sup> Decision of 13 May 2003 amending the Appendix of the Tobacco Law, *Staatsblad* 2003(222).

<sup>20</sup> See the Explanatory memorandum to the changes of the Tobacco Law, TK 2001-2002, 28.301, no. 3: 5.

<sup>21</sup> Cabinet Kok II, which governed from August 1998 until July 2002. The coalition parties in this cabinet were Labor Party (PvdA), the Liberals (VVD), and Democrats 1966 (D66). This cabinet resigned on 16 April 2002 after the publication of a critical evaluation of the government’s handling of the Srebrenica-crisis.

newly formed Balkenende cabinet.<sup>22</sup> Bomhoff defended the draft law in the Second Chamber in Parliament. Disagreement within the LPF led to the fall of the cabinet and the resignation of Bomhoff in October 2002. The next state secretary of Health, Welfare and Sport, Clémence Ross-van Dorp (Christian Democrats), became responsible for the changes in the Tobacco law. She discussed the proposal with the First Chamber in Parliament as a member of the Balkenende I-cabinet, and finalized the transposition of the tobacco products directive in June 2003 as part of the newly formed Balkenende II-cabinet.<sup>23</sup>

The relevant veto players in the transposition process of this directive are the coalition parties and the minister of Health, Welfare and Sport. Due to the already mentioned changes in government, two different governing coalitions and preference configurations are relevant:

- the coalition between the Labor Party, the Liberals and D66 as part of the Kok II-cabinet: these parties played a role in the period of the drafting of the new Tobacco Law; and
- the coalition between the Christian Democrats, LPF and Liberals as part of the Balkenende I-cabinet: these parties played a role in the period of discussing and approving the bill in Parliament.

The minister and later the state secretary of Health, Welfare and Sport can be regarded as the agenda setter in the process. In the Dutch political system ministers are individually responsible for their policies, meaning that they have to defend their policies in Parliament. Ministers may also deviate from views of parliament as long as a majority—and *de facto* one of the political parties supporting the government—does not lose its confidence in the minister.

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<sup>22</sup> Cabinet Balkenende I, which governed from July 2002 until May 2003. This cabinet was supported by a coalition of the Christian Democrats (CDA), the List Pim Fortuyn (LPF), and the Liberals (VVD).

<sup>23</sup> After the fall of the Balkenende I-cabinet in October 2002, new elections were held in January 2003. Based on these results the cabinet Balkenende II was formed, which started in May 2003. This cabinet is supported by a coalition of the Christian Democrats (CDA), the Liberals (VVD), and the Democrats (D66).

The main issue that was brought up during the parliamentary discussion of the bill concerned the interpretation of the regulations about the packaging of tobacco products. Article 7 of the directive indicates that "...texts, names, trade marks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used on the packaging of tobacco products."<sup>24</sup> Terms such as 'other signs' and 'suggesting' allow for some leeway about how restrictive this article has to be interpreted. At the same time, as one of the considerations in the directive indicates, member states "should be able to adopt more stringent rules concerning tobacco products which they deem necessary to protect public health".<sup>25</sup> Within certain limits, the directive allows for more restrictive national law. These two elements suggest that member states, in principle, could adopt different interpretations of the prohibition of tobacco packaging. It also suggests that the European Commission will have difficulty in challenging any deviation from the literal text of the directive, which leaves some scope for alternative views in national law. In other words, a set of sustainable proposals exists. This set, which is skewed towards more restrictive rules, is illustrated in Figure 5.

[Figure 5 about here]

The responsible minister in the Kok II-cabinet, Borst (D66), took a restrictive stand on this issue, despite the fact that during the negotiations the Dutch team favored less restrictive rules (Arregui, 2004: 39-40). The minister indicated in the explanatory memorandum of the bill that 'lighter color schemes' compared to the colors used for the packaging of non-'light' tobacco products of the same

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<sup>24</sup> Initially, the Dutch version of Directive 2001/37/EC did not include the addition of 'or other signs' after 'figurative' in the wording of Article 7. The minister mentioned this at the beginning of the parliamentary discussion of the bill and indicated that this was due to a translation error (Explanatory memorandum to the changes of the Tobacco Law, TK 2001-2002, 28.301, no. 3: 8). This addition was included in the English, French and German versions of the directive. Since the negotiations on the directive were done in English, the state secretary felt that this text should be followed; see: *Handelingen Eerste Kamer* 2002-2003, no. 13 (17 December 2002): 415. The Dutch version of the directive has been changed by the Rectification of 26 February 2003, published in the *Official Journal of the European Communities* No. L 51 (26.2.2003): 23.

brand were not allowed.<sup>26</sup> During the first phase of the parliamentary discussion in the standing committee on Health, Welfare and Sport, this view was supported by the coalition partners in the Kok II-cabinet. The Labor Party and the Liberal Party had no comments on the proposal, while D66 only pointed to the additional costs to the industry introducing the changes in packaging.<sup>27</sup> The preferences of the players, which were part of the Kok II-cabinet, are summarized in Figure 5-A.

The situation changed with the new government in the summer of 2003. During the plenary discussions in Parliament in September, the speaker of the Liberal Party, Geert Wilders, took a less restrictive view and suggested that the law should not prohibit the use of different color schemes at all. He proposed to explicitly exclude from the prohibition in the law “the use of different color fields” on the packaging of tobacco products.<sup>28</sup> This view came as a surprise to most of the other speakers, since the Liberal Party did not reveal this preference earlier in the discussions. They took this sudden change in the position of the Liberal Party to be a result of a successful intervention by the tobacco industry. The less restrictive position of the Liberals was supported by the Christian Democrats and the LPF, the other coalition parties in the newly formed Balkenende I-cabinet. The minister of Health, Welfare and Sport in this cabinet, Bomhoff, held an outspoken view against smoking and in favor of discouraging the use of tobacco products. As one official commented, “Bomhoff was known to be a teetotaler and was in favor of prohibiting smoking as much as possible.” His position may not have been as extreme as his predecessor, minister Borst, but he did not share the views of the Liberals, the Christian

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<sup>25</sup> See consideration 24 of the tobacco products directive.

<sup>26</sup> See Explanatory memorandum to the changes of the Tobacco Law, TK 2001-2002, 28.401, no. 3: 8).

<sup>27</sup> See Report on the parliamentary discussions of the standing committee on Health, Welfare and Sport, TK 2001-2002, 28.401, no. 4: 1-2.

<sup>28</sup> See the amendment proposed by Wilders and others of 19 September 2002, TK 2002-2003, 28.401, no. 7.



Democrats and his own party, the loosely organized LPF.<sup>29</sup> His preference is therefore located to the right of the directive in Figure 5-B.

The preference configuration for the Kok II-cabinet (Figure 5-A) satisfies the conditions mentioned in *Hypothesis 2-B*. The Liberals and D66 did not object to a more restrictive prohibition on tobacco packaging, while the minister and the Labor Party favored the most restrictive regime. Based on this configuration, the hypothesis predicts that *minister Borst* as the agenda setter would have been able to pass the proposal successfully, which was close to her ideal position (that is, policy *S* in Figure 5-A). However, the new elections that resulted in the victory for the LPF and the subsequent change in government, made it impossible to test this expectation empirically.

The preference configuration for the Balkenende I-cabinet (Figure 5-B) satisfies the conditions mentioned in *Hypothesis 1*. The Liberals, Christian Democrats and the LPF advocated a less restrictive prohibition, while the minister preferred a regime comparable, or perhaps even more restrictive than the directive. In this instance, the hypothesis predicts that *the outcome is a literal interpretation of the directive*. No deviation from the text of the directive is expected to occur.

On 6 February 2003 the amended Tobacco Law was adopted, which included the following new article: “Starting from 30 September 2003 it is forbidden to use texts, names, trade marks and figurative or other signs on the packaging of tobacco products which suggest that a particular tobacco product is less harmful than others.”<sup>30</sup> This prohibition is a literal rendering of the text of Article 7 in the directive. Moreover, the more restrictive interpretation of minister Borst in the explanatory memorandum of the bill concerning the limited use of different colors on the packaging of tobacco

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<sup>29</sup> See Bomhoff’s reply to Parliament, *Handelingen Tweede Kamer 2002-2003*, no. 6 (26 September 2002): 354.

<sup>30</sup> See Article I(D) of the Law of 6 February 2003 to adapt the Tobacco Law to directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws,

products<sup>31</sup>, was no longer supported by minister Bomhoff. This position as well as the text of the new law confirms the prediction made on the basis of Hypothesis 1. The literal transposition of the tobacco products directive is in line with the policy-specific framework developed in this paper.

The change of the interpretation of the directive was triggered by the amendment introduced by the Liberal Party Member of Parliament Wilders. With the support of the Christian Democrats and the LPF, Wilders introduced an amendment of the bill to exclude the use of color fields from the prohibition. At the time of the discussion, these parties formed the governing coalition and held a majority in Parliament. During the discussion of the bill in Parliament, minister Bomhoff indicated that he did not want to modify the bill in view of the amendment. In his opinion, the amendment was “not necessary, or in conflict with the EU directive”. At the same time, Bomhoff stressed that he did not want to introduce a more restrictive regime on color schemes since “there are more effective ways to discourage smoking.”<sup>32</sup> Wilders withdrew his amendment when Bomhoff confirmed that after the introduction of the law differences in color schemes would be still possible.<sup>33</sup> With this statement, the more restrictive view, proposed by Borst in the explanatory memorandum, was no longer authoritative.

In line with the suggestion of Giuliani (2003a), Treib (2003) and others, the national legislative actors are the relevant veto players in this case. However, the case also shows that the number of veto players involved did not affect the content of the national measures transposing the directive. Using a formal or legalistic perspective, there were four veto players active in the period of the Balkenende I-

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regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ L 194), *Staatsblad* 2003(89).

<sup>31</sup> The idea was that the more restrictive statement in the explanatory memorandum of the bill would be used in interpreting the new law during implementation as well as future court cases. In this way, the memorandum clarified the policy transposing the directive.

<sup>32</sup> *Handelingen Tweede Kamer* 2002-2003, no. 6 (26 September 2002): 354.

<sup>33</sup> *Handelingen Tweede Kamer* 2002-2003, no. 6 (26 September 2002): 355.

cabinet (see Figure 5-B), who are expected to hinder the making of a decision (Börzel and Risse, 2000:7). Still, the domestic players changed the law and transposed the directive literally.

### **Animal trade**

The second case concerns Directive 97/12/EC on animal trade adopted by the Agricultural Council on 17 March 1997. This directive amends Directive 64/432/EEC on animal health problems, which affects the trade of cows and swine in the European Union.<sup>34</sup> New elements in the amended Directive 64/432/EEC are standards to avoid contamination of cattle in assembly centers and on markets (Article 11), the registration of animal transport and additional sanitary standards for transport (Article 12), and the registration of animal dealers and standards for the areas where the animals are kept before they are transported to other EU member states (Article 13). The directive also allows for the introduction of an optional system of surveillance networks for animal holdings (Article 14). Although the Commission wished for introducing an obligatory network in order to establish a level playing field in Europe for bovine animals and swine, it was not a realistic goal at that time in view of the existing state of affairs in various member states. All these measures aimed at preventing the spread of contagious animal diseases. According to the directive, the new rules should have been applied by the member states before 1 July 1998, that is, about one year after the passage of legislation. However, this period of one year turned out to be too short for most of the member states, specifically with regard to setting up the required checks and monitoring of contagious animal diseases in the field. Directive 98/99/EC therefore postponed by one year the deadline for complying with the new rules until 1 July 1999.<sup>35</sup>

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<sup>34</sup> Council Directive 97/12/EC of 17 March 1997 amending and updating Directive 64/432/EEC on health problems affecting intra-Community trade in bovine animals and swine, *Official Journal of the European Communities* No. L109 (25.4.97).

<sup>35</sup> Council Directive 98/99/EC of 14 December 1998 amending Directive 97/12/EG amending and updating Directive 64/432/EEC on health problems affecting intra-Community trade in bovine animals and swine, *Official Journal of the European Communities* No. L358 (31.12.98).

The Dutch government has been quite aware of the dangers of various contagious animal diseases, including swine fever and foot-and-mouth disease. Especially the outbreaks of swine fever in 1980 and 1992 had a huge impact on the agricultural sector and led to substantial financial losses. Already as early as 1993, the Minister of Agriculture, Nature Management and Fisheries responded to these problems with several policy measures reducing the risks of the transmission of diseases by setting sanitary standards for the areas where swine is kept and the conditions under which these animals were handled by dealers and transporters. In subsequent years these rules were further extended with regard to the keeping and transport of swine. The strong focus on animal transport was partly due to the suspicion that animals were mostly infected at shipment stations where they were brought together for transport.

When the Netherlands faced yet another outbreak of swine fever at the beginning of 1997, it was holding the Presidency of the EU. The urge to avoid further spread of the disease caused by conditions in international animal transport provided a strong incentive to propose more rigorous regulation at the EU level. Interestingly, the new directive requires the registration of dealers and sets sanitary standards for the handling, transport and market places of animals much along the lines of existing Dutch law. At the same time, there are important differences as well. First, the directive applies to trade and transport *between* EU member states, while there were already strict rules in force for the transport and handling of animals *within* the Netherlands. Second, the directive provides the same regulatory regime for swine and cows, while in view of the recent outbreak of swine fever the domestic rules for handling and transporting swine were much stricter than for cows.

[Figure 6 about here]

The transposition of Articles 11, 12 and 13 of Directive 97/12/EC in the Netherlands is summarized in Figure 6. Based on existing Health and Welfare Law for Animals, the Minister of Agriculture,

Nature Management and Fisheries could transpose the relevant elements of the new directive into secondary legislation. The new rules concerning the bringing together of swine in assembly centers were included in the new decree amending the regulation on the grouping of animals and the regulation on the trade in live animals and live products.<sup>36</sup> The decree amending the regulation of the trade in live animals and live products provided less strict rules for the bringing together, handling and transport of cows as it only applied to trade between EU member states.<sup>37</sup> Finally, the decree amending the regulation on sanitary requirements concerning contagious animal diseases provided the necessary standards with regard to the transport of animals.<sup>38</sup> Based on the adoption of the third decree, the three articles of the directive were transposed on 6 July 1999, a little over two years after the adoption of the directive and only a few days after the official deadline.

The transposition of Directive 97/12/EC in the Netherlands is an example of transposition within a single ministry in which the government or Parliament did not play a role. The process was handled by the Ministry of Agriculture, Nature Management and Fisheries.<sup>39</sup> Within this ministry two departments were important: the central legal department (Department of Legal Affairs), which was responsible for transposing the directive, and the policy department that prepared the Dutch position during the preparation of the directive and was involved in the negotiations at the EU level (Department of

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<sup>36</sup> Ministerial Decree amending the Regulation on the grouping of animals and the Regulation on the trade in live animals and live products (*Wijziging Regeling bijeenbrengen van dieren en Regeling handel levende dieren en levende producten*) of 29 July 1998, *Staatscourant* 1998 (148: 7 August): 10.

<sup>37</sup> Ministerial Decree amending the Regulation on the trade in live animals and live products (*Wijziging Regeling handel in levende dieren en levende producten*) of 28 June 1999, *Staatscourant* 1999 (122: 30 June): 14.

<sup>38</sup> Ministerial Decree amending the Regulation on sanitary requirements concerning contagious animal diseases (*Wijziging Regeling inzake hygiëne-voorschriften besmettelijke dierziekten*) of 5 July 1999, *Staatscourant* 1999 (125: 5 July): 8.

<sup>39</sup> Currently, the Ministry of Agriculture, Nature and Food Quality.

Environmental Quality and Health). This department was also responsible for further implementation of the new policy.<sup>40</sup>

The domestic actors in the Netherlands preferred stricter regulation than provided by the directive. Especially in view of the outbreak of swine fever, which forced the ministry to impose severe restrictions on the transport and handling of swine, it was, as one government official commented, “...not the time for a minimal implementation of the directive.” The directive also allowed for some leeway. A frequent use of words like ‘appropriate’, ‘sufficient’, ‘at least’, and ‘if necessary’ permitted national interpretation of various aspects of the directive, especially concerning the conditions of assembly centers and the premises of animal dealers, and the cleaning of trucks. In terms of the analytical framework of this paper, there existed a considerable set of sustainable proposals, which is illustrated in Figure 7. The minister as well as the policy department preferred a higher level of prevention than could be based on the directive. In other words, their ideal positions were located to the left of strictest legally sustainable policy, which is indicated by  $d_{max}$ . The legal department held a more reserved position during the transposition process. Its ideal position was within the set of sustainable proposals and to the left of the directive.

[Figure 7 about here]

The preference configuration as illustrated in Figure 7 satisfies the conditions mentioned in *Hypothesis 2-B*. First, the policy specified in the directive is located to the right of the domestic players, that is, both departments within the ministry of agriculture and the minister. Second, the minister as the agenda setter in this process prefers a higher level of prevention, which is not part of the set of sustainable proposals and thus the set of feasible policies. For this instance, the hypothesis predicts that *the outcome is the policy equivalent to the feasible policy closest to the most preferred*

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<sup>40</sup> Currently this is the Department of Food Quality and Animal Health.

*position of the agenda setter*. Since the minister as the agenda setter is located to the *right* of strictest feasible policy, that is, policy  $d_{max}$ , this policy is expected to be selected.

With the adoption of three ministerial decrees, the Dutch introduced a strict level of regulation, which stretched the rules laid down in the directive as much as possible. The new rules, which were intended for trade between member states, also applied the trade of swine and bovine animals within the Netherlands. In addition, stricter rules were introduced concerning the cleaning and disinfection of assembly centers and trucks (from 50 kilometers on), the separation of different herds on the premises of animal dealers, and a ban on bringing together animals that did not come from ‘primary’ holdings.

In the case of the ministerial decree on sanitary requirements, the Dutch even adopted too stringent an interpretation on the cleaning of trucks carrying swine and bovine animals coming from other member states. The European Commission commented that these rules had to be changed so that trucks that were sufficiently cleaned and disinfected in another member state did not need to be disinfected again upon arrival in the Netherlands.<sup>41</sup>

The prediction based on Hypothesis 2-B is confirmed by the new rules introduced by the three decrees adopted in the Netherlands. The ministry achieved the highest level of protection that was allowed under the amended Directive 64/432/EEC. Still, most domestic veto players were not satisfied. As Figure 7 illustrates, both the minister and the policy department preferred an even higher level of regulation in order to avoid the spreading of contagious animal diseases. During the transposition process, the ministry already prepared the two additional measures, which were intended to replace two of the three ministerial decrees. These two measures proposed stricter regulatory regimes for the

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<sup>41</sup> See the Ministerial Decree amending the Regulation on sanitary requirements concerning contagious animal diseases (*Wijziging Regeling inzake hygiëne-voorschriften besmettelijke dierziekten*) of 12 July 1999, *Staatscourant* 1999 (136: 20 July): 5. Based on a notification procedure with regard to the original regulation, the European Commission indicated that the Netherlands could not set

Netherlands than were possible under the directive. The government had to notify the European Commission of both measures.<sup>42</sup> After the notification procedure, which led to some changes in these measures based on comments by the Commission, two new measures for swine and bovine animals were adopted in July 2000 and July 2001, respectively. These new measures mark a further shift of the Dutch regulatory regime towards a high level of prevention under close EU supervision.

This case breaks with the suggestion in the literature that national legislative actors are the relevant veto players. Nor parliament or any of the political parties were relevant in deciding on the national legal measures transposing the animal trade directive. In this case administrative players determined transposition. Furthermore, these administrative players had quite some impact on the final outcome. Although their number is almost the same as in the case of the tobacco products directive, the outcome of the transposition of the directive is very different. Instead of transposing the directive literally, the minister together with the judicial and policy departments of the ministry agreed to a stricter interpretation. While the number of players appears to be irrelevant, what matters is that these players *preferred* changing the provisions of the directive towards a stricter regulatory framework. This led to the adoption of a domestic policy that differs from a literal interpretation of the directive.

## Conclusions

This paper proposed a policy-specific approach to the transposition of EU directives into national law. According to this approach, transposition takes place in various domestic arenas varying from national

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additional requirements to transports from other EU member states that satisfy Article 12 of Directive 65/432/EEC.

<sup>42</sup> See Ministerial Decree on the grouping of animals (*Regeling betreffende het bijeenbrengen van dieren 2000*) of 23 June 2000, *Staatscourant* 2000 (121: 27 June): 12, which concerns the handling and trade of swine. This measure was notified to the European Commission on 8 September 1998 and came into force on 1 July 2000. See also the Ministerial Decree amending the regulation on the trade in live animals and live products (*Wijziging Regeling handel in levende dieren en levende producten*)



lawmaking to decision making within ministries or administrative bodies. Depending on these arenas, the framework developed in this paper shows that domestic actors may react differently to the requirement of transposing a directive.

A first response is for domestic actors to keep to a literal interpretation of a directive, as in the case of the tobacco products directive. This response is a result of opposing veto players who obstruct a discussion on how national rules can be adapted to domestic demands. In the case of tobacco, the governing parties preferred a less strict interpretation of the directive than the minister of health. As a consequence, the minister stuck to the wording of the directive on the use of different color fields on the packaging of tobacco products and no longer supported the deviating interpretation introduced by his predecessor.

A second response is for domestic actors to adopt a different interpretation of the directive, as in the case of animal trade directive. Both the minister of agriculture and the departments within the ministry preferred a stricter interpretation of the directive in order to prevent the spreading of contagious animal diseases. Their agreement about how to transpose the directive resulted in the adoption of strict rules on the transport and handling of swine within the boundaries of Commission oversight. Since their interpretation was not challenged by the European Commission, it remained the basis of the national policy based on the EU directive. Both cases analyzed in this paper confirm the predictions based on the hypotheses developed using the framework of policy-specific veto players.

The developed framework identifies the conditions under which these distinct domestic responses to EU directives are expected. Literal transposition is the consequence of mutually divided domestic actors, while different national interpretations arise when all relevant domestic actors jointly prefer a change of EU policy. The extent to which deviations are possible is further shaped by the preferences

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of 5 March 2001, *Staatscourant* 2001 (46: 6 March): 8. This measure concerns the handling and trade

of these actors, differences in policymaking authority among these actors, and the leeway that is permitted by the European Commission's review of national implementing measures.

The analysis presents a contrasting view on how European policy is transformed in the national political arena than the one proposed by Börzel and Risse (2000: 7).<sup>43</sup> Following a rational choice argument, they suggest that “[t]he more power is dispersed across the political system and the more actors have a say in political decision-making, the more difficult it is to foster the domestic consensus or ‘winning coalition’ necessary to introduce changes in response to Europeanization pressures.” This hypothesis is based on the number of domestic actors involved, which is seen as a function of the distribution of power within a political system. It suggests that the participation of a large number of domestic actors leads to an inability to adapt to EU law. The hypotheses developed in this paper, however, point to other explanatory factors and predicted effects. First, the preference configuration of actors is important and not just their number. Clearly, if all actors would prefer the same policy, their number is irrelevant. Second, in the case of transposition, decision making is about changes in the national legal order and not about the adoption of the directive (which was the topic of the preceding legislative process at the EU level). Since directives must be transposed, domestic actors can only adjust the policy to national circumstances. Consequently, fostering domestic consensus will have a different impact. If domestic actors are unable to reach consensus, a literal transposition of the directive is the only way. At the same time, this process may be hindered by opposing actors thus leading to delay. However, if domestic agreement or consensus exists, national actors adopt, within certain margins, an interpretation of the directive. Domestic consensus enables deviations from the agreed European policy instead of literal implementation.

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of cows. It was notified to the Commission 10 September 1999 and came into force on 1 July 2001.

<sup>43</sup> Similar claims are made by others as well; see, for instance, Falkner et al. (2004: 466).

The framework presented in this paper also points to the importance of the interplay between veto-power and preferences. The interaction of policymaking power and preferences is often neglected in the literature, especially in empirical work that takes ‘the number of veto players’ as a valid indicator of rationalist explanations of compliance (see Mbaye, 2001, 2003; Giulliani, 2003a, 2003b). Only if the views of veto players are far apart and widely dispersed over the political spectrum, is veto power important and will lead to effects similar to the ones discussed in this paper. However, if veto players hold similar views, their power becomes less important. In the extreme, if veto players have similar preferences, they act *as if* they are a *single* player.

The empirical analysis in this paper shows that a variety of domestic actors can be regarded as the relevant veto players. In the case of the tobacco products directive, the minister and the governing parties in Dutch national parliament were the relevant veto players. This is somewhat similar to Treib’s claim that national political parties play an important role in transposition (Treib, 2003). However, the tobacco products directive required a change in the existing tobacco law by means of passing legislation in parliament. But not all directives require a change of statutory law. In the case of the animal trade directive, the required changes could be introduced by ministerial decree. Existing law allowed the minister of agriculture to decide on issues related to the prevention of contagious animal diseases without further involvement of parliament or the government. In contrast to the framework used by Treib and others in which national parties play a role, here the relevant veto players were administrative actors.<sup>44</sup>

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<sup>44</sup> These actors include cabinet ministers, who are ‘formally’ independent agents within the Dutch constitutional context. Although these ministers could be ‘controlled’ by the political party they suppose to represent, this informally shaped principal-agent relationship is affected by transaction costs as well as ambiguity due to the existence of multiple principals within the party leadership. A possible impact is expected on a limited range of issues, that is, those which are regarded as the main political priorities of the party. Preventing the spread of contagious animal diseases were not part of these priorities.

The animal trade directive clearly illustrates the importance of national administrations in the transposition of EU directives. Deciding on how to interpret the directive in the Netherlands, the administrative players in the ministry of agriculture acted without any involvement or interference of the national parliament. Nor were the directive or the proposed and adopted rules discussed in parliament. The minister of agriculture decided on the new rules based on discussions between the legal and policy departments within the ministry. This example contradicts the view introduced in the first part of this paper that lower-level decisions are a reflection of the wishes of parliament (see, for instance, McCubbins and Schwartz, 1984; Weingast and Moran, 1983). Decisions on transposition are often solely taken within the national administration implying a more prominent role of these actors in national policymaking than the ‘Congressional dominance’ perspective suggests.

The analysis also sheds some light on delays in transposition. As indicated, opposing interests may hinder a swift decision-making process leading to the required adaptation of the national legal order. Although domestic actors have no other choice than to transpose the directive in a literal way, the process may take some time. Agreement, however, may lead to deviations from the directive, but may also provide the conditions for a speedy decision-making process. These conjectures are supported by the empirical analysis. The tobacco products directive required the member states to transpose the deadline in about 14 months, while the Dutch government took more than two years in order to complete this task. Opposing interests between the governing parties and the government played a role here. In addition, this directive needed to be transposed through new legislation, which required more time than lower-level legal instruments (see also Mastenbroek, 2003). The animal trade directive set a transposition period of about two years, including an extension granted to the member states by the Council of Ministers. The Dutch government completed the work a few days after the deadline. Agreement among the minister and the two relevant departments within the ministry of agriculture

made it possible to keep this deadline, despite the fact that these departments were overloaded due to the 1997 outbreak of swine fever.

In a more general way, the paper shows that European policymaking, to the extent that it concerns directives, does not end at the last stage of the legislative process in the Council of Ministers. After adoption, directives are further shaped by the member states when they are put into national rules. In this process, and within the limits of Commission oversight, domestic actors can adopt an interpretation that somewhat deviates from the directive. In this way, EU policymaking is best described as a long chain of mutually dependent decisions that cuts across multiple levels of government. Despite this complexity, the current literature on the EU tends to put a strong emphasis on the EU legislative stage in which policy is shaped by the interactions between the Council of Ministers and the European Parliament (see Steunenberg, 2000; Dowding, 2002). However, from a policy perspective, such a view is insufficient and does not show how the splendid ambitions formulated in Brussels are transformed and implemented in the national and sometimes regional and local administrations of the member states. The policy-specific approach proposed in this paper can help to disentangle and clarify these complex processes and their unexpected outcomes.

## Appendix

Let  $i$  be a domestic veto player,  $i \in V$ , who has simple Euclidean and separable preferences for the outcome space  $\mathbb{R}$ , which are defined by a utility function  $U_i(x)$ ,  $x \in \mathbb{R}$ . The ideal position of this player is denoted as  $V_i$ . Let  $d$  be the policy specified in the directive,  $d \in \mathbb{R}$ .  $P_i(d)$ , or simply  $P_i$ , is the preference set of veto player  $i$  with regard to  $d$ , that is,  $P_i = \{x \mid U_i(x) > U_i(d)\}$ . Let  $W = \bigcap P_i$  be the win set of a group of veto players,  $i \in V \subset N$ , with regard to  $d$ . Finally, the oversight of the Commission of a member state's compliance with directive  $d$  involves a policy-dependent (positive) cost,  $c \in \mathbb{R}^+$ . The Commission, which is assumed to prefer  $d$ , accepts the interpretation  $p$  when it is located between  $d_{min} = (d - c_i)$  and  $d_{max} = (d + c_j)$ ; costs may vary depending on the direction of interpretation (that is, for instance, lower or higher levels of regulation); define the set of sustainable policies as  $S = \{x \mid x \geq d_{min}$

and  $x \leq d_{max}$ . Note that since  $c$  is not equal to zero, the set  $S$  always exists. The set of feasible policies can now be defined as  $F = S \cap W$ . By definition,  $F = \emptyset$  if and only if  $W = \emptyset$ .

The structure of the game is that: (1) a veto player with agenda setting power,  $a \in V$ , makes an offer to deviate from  $d$ ,  $p \in \mathbb{R}$ , to the other players; (2) the other veto players,  $i \in V - \{a\}$ , decide individually whether or to accept or reject the proposal; if they do not agree,  $d$  will be implemented; and (3) if the proposal is accepted by all, the Commission decides whether to challenge the interpretation of the directive (it does if  $p \notin S$ ).

### Hypothesis 1

Define  $l$  as the left-most veto player, and  $r$  as the right-most one along some policy dimension  $R$ . Based on the sequence of play as described above, the veto players implement  $d$  if  $V_l \leq d \leq V_r$ .

Proof. The condition is *sufficient*: by assumption, the Commission as well as the directive  $d$  is located between veto players. Since veto player  $l$  prefers a change to the left, while veto player  $r$  prefers a change to the right, these players cannot agree on a new interpretation  $p$  and therefore have to accept the transposition of  $d$ . The condition is *necessary*: assume that  $d < V_l$  (the mirror case is if  $d > V_r$ , which I will no further discuss). Note that  $d_{max}$  is found to the right of  $d$  and thus allows for some change. In this case, like all other veto players, including  $r$ , veto player  $l$  prefers a change to the right ( $W = \cap P_i \neq \emptyset$ ). Since a win set exists, which, by definition, overlaps with the set of sustainable policies, all veto players accept a new interpretation  $p$ . This contradicts that no new interpretation is selected.

### Hypothesis 2

Define  $i(d)$  as player  $i$ 's point of indifference with regard to  $d$ . Based on the sequence of play:

(a) the veto players choose an interpretation  $p = V_a$  if (i)  $d < V_l$  or  $d > V_r$  and (ii)  $V_a \in F$ .

Proof. I focus on  $d < V_l$  ( $d > V_r$  is the mirror case for which the same logic applies). Both conditions are *sufficient*: by assumption, the directive  $d$  is located to the left of the veto players. Since *all* veto players prefer a change to the right, these players can agree on new interpretations, which are found in the set of feasible policies,  $F$ . In addition, since ideal position of the agenda setter is found in  $F$ , this player proposes  $p = V_a$ , which is accepted by all other veto players and the Commission. Both conditions are *necessary*. Assume that  $d \geq V_l$ ;  $l$  now prefers a change of  $d$  to the left and thus disagrees

with the other players, including  $r$ , on a new interpretation. So  $d$  is implemented, which contradicts that a new interpretation is chosen. Assume that  $V_a \notin F$ : the agenda setter,  $a$ , cannot select his or her most preferred position since this position is not part of the set of feasible interpretations. This contradicts that the new interpretation is equal to  $a$ 's most preferred position.

(b) the veto players choose an interpretation  $p = \min\{d_{max}, l(d)\}$  if (i)  $d < V_l$  and (ii)  $V_a \notin F$ ; or  $p = \max\{d_{min}, r(d)\}$  if (i)  $d > V_r$  and (ii)  $V_a \notin F$ .

Proof. Again I focus on  $d < V_l$ . Both conditions are *sufficient*: see also before. Since the ideal position of the agenda setter,  $V_a$ , is not found in  $F$ , this player proposes the feasible interpretation that is closest to his or her ideal position. The relevant endpoint of  $F$  is either the highest value of  $S$  (i.e.  $d_{max}$ ) or the highest value of  $W$  (i.e.  $l(d)$ ) depending on which of the two values is smallest.

Consequently, the agenda setter chooses interpretation  $\min\{d_{max}, l(d)\}$ , which is accepted by the other players and the Commission. Both conditions are *necessary*. See before. Now assume that  $V_a \in F$ : the agenda setter,  $a$ , can select his or her most preferred position since this position is part of the set of feasible interpretations. This contradicts that the new interpretation is not equal to  $a$ 's most preferred position.

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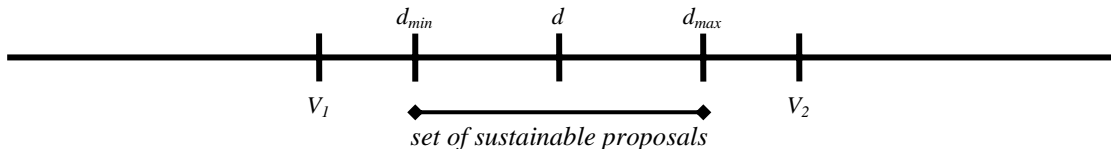
**Table 1. Transposition of directives by member states**

member state	number applicable directives	number transposed directives	number <i>not</i> transposed	% <i>not</i> transposed directives
Spain	2428	2414	14	<b>0.6%</b>
Denmark	2413	2392	21	<b>0.9%</b>
Finland	2406	2383	23	<b>1.0%</b>
Ireland	2424	2398	26	<b>1.1%</b>
UK	2407	2379	28	<b>1.2%</b>
Portugal	2449	2418	31	<b>1.3%</b>
Austria	2413	2373	40	1.7%
Sweden	2395	2354	41	1.7%
Belgium	2465	2415	50	2.0%
Netherlands	2412	2359	53	2.2%
Germany	2411	2357	54	2.2%
Luxembourg	2414	2355	59	2.4%
France	2411	2349	62	2.6%
Italy	2419	2355	64	2.6%
Greece	2414	2346	68	2.8%
<b>Mean</b>	<b>2419</b>	<b>2376</b>	<b>42</b>	<b>1.7%</b>

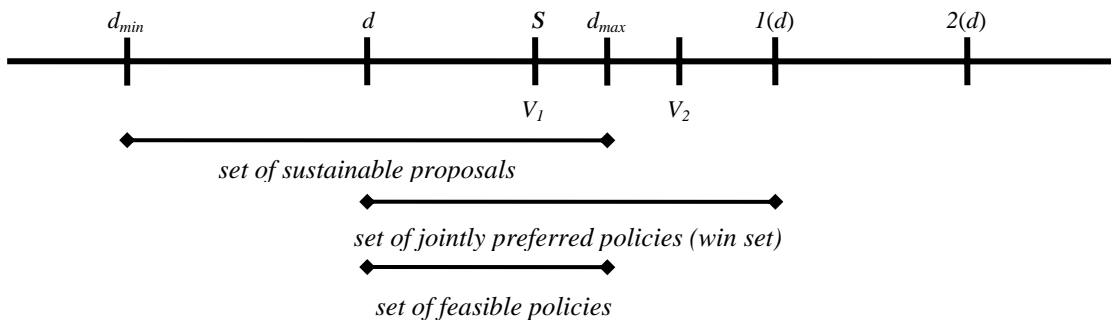
Source: number of applicable and transposed directives from Secretariat General, European Commission (29 February 2004):

[http://europa.eu.int/comm/secretariat\\_general/sgb/droit\\_com/pdf/mne\\_country\\_20040229\\_en.pdf](http://europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/mne_country_20040229_en.pdf)

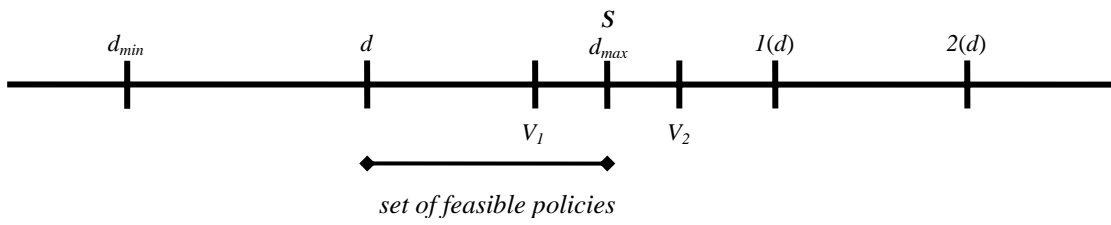
**Figure 1**



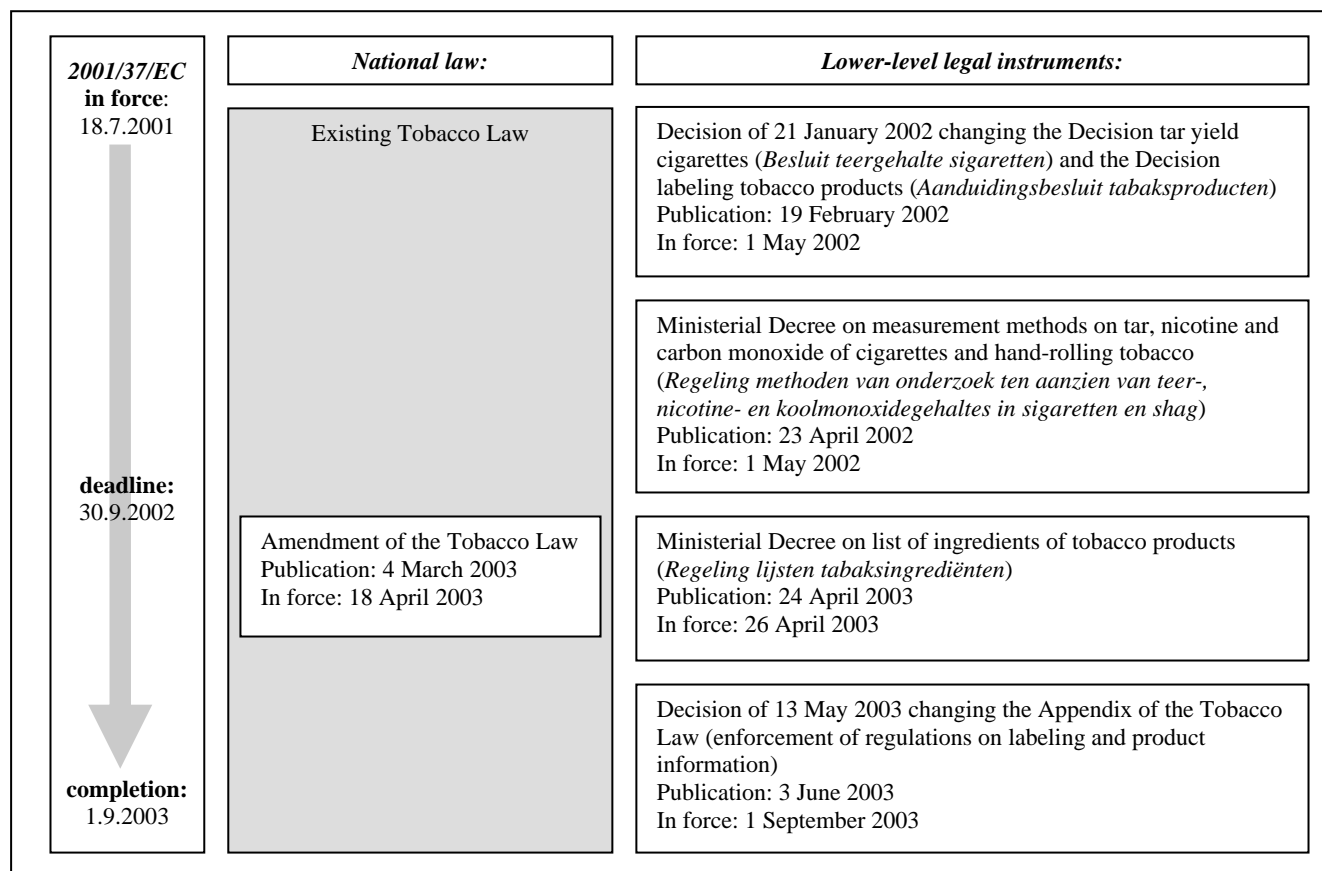
**Figure 2**



**Figure 3**

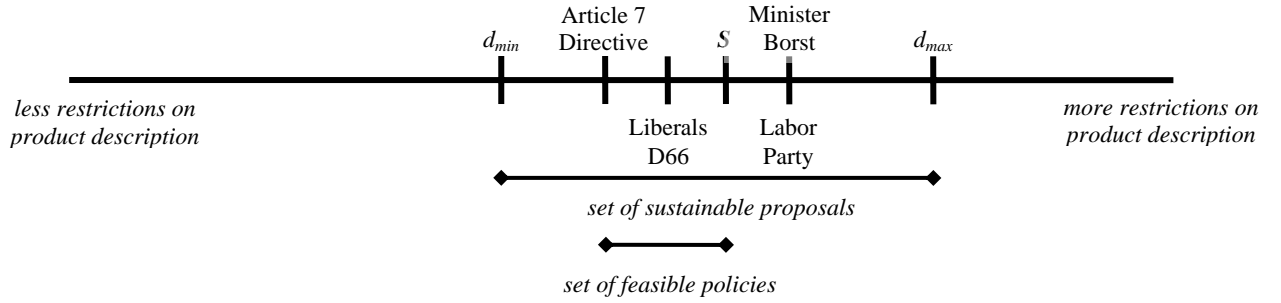


**Figure 4: Transposition of Directive 2001/37/EC in the Netherlands**

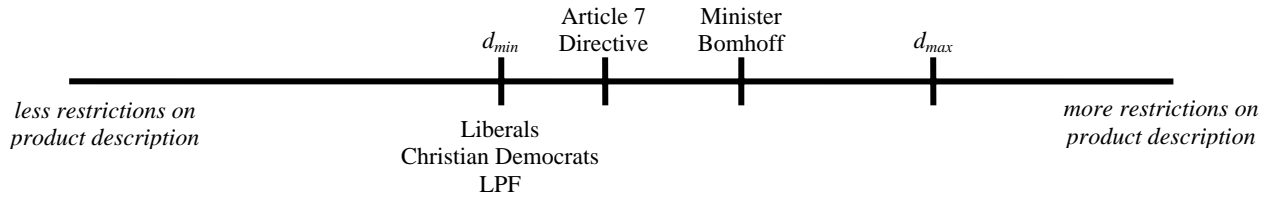


**Figure 5: Preferences of the veto players on the transposition of Directive 2001/37/EC**

**A: period 2001-July 2002 (cabinet Kok II)**



**B: period after July 2002 (cabinet Balkenende I)**





**Figure 6: Transposition of Directive 97/12/EC in the Netherlands:  
Articles 11, 12 and 13 of Directive 64/432/EEC**

<p><b>97/12/EC in force:</b> 25.4.1997</p> <p align="center">↓</p> <p><b>initial deadline:</b> 1.7.1998</p> <p><b>98/99/EC new deadline:</b> 1.7.1999</p> <p align="center">↓</p> <p><b>completion:</b> 6.7.1999</p>	<b>National</b>	<b>Lower-level legal instruments:</b>	<b>Transposing the article of 64/432/EC:</b>
	Existing Health and Welfare Law for Animals	Ministerial Decree amending the Regulation on the grouping of animals and the Regulation on the trade in live animals and live products ( <i>Wijziging Regeling bijeenbrengen van dieren en Regeling handel levende dieren en levende producten</i> )* Publication: 7 August 1998 In force: 9 August 1998	<b>11</b>
		Ministerial Decree amending the regulation on the trade in live animals and live products ( <i>Wijziging Regeling handel in levende dieren en levende producten</i> )** Publication: 30 June 1999 In force: 1 July 1999	<b>11, 12, 13</b>
		Ministerial Decree amending the regulation on sanitary requirements concerning contagious animal diseases ( <i>Wijziging Regeling inzake hygiëne-voorschriften besmettelijke dierziekten</i> ) Publication: 5 July 1999 In force: 6 July 1999	<b>12</b>

\* After notification replaced by Ministerial Decree on the grouping of animals (*Regeling betreffende het bijeenbrengen van dieren 2000*) of 23 June 2000.

\*\* After notification replaced by Ministerial Decree amending the regulation on the trade in live animals and live products (*Wijziging Regeling handel in levende dieren en levende producten*) of 5 March 2001.

**Figure 7: Preferences of the veto players on the transposition of Directive 97/12/EC amending Directive 64/432/EEC: preventing the spread of contagious animal diseases**

