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Norway and the EU's Return Directive

Uta Henrich-Gaarder

Masteroppgave i statsvitenskap

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Summary

This thesis explores how Norwegian actors navigate the EU's Schengen institutional structures and how they choose to transpose EU immigration policy. The EU's area of Justice and Home Affairs is an institutional setting where more and more internationally binding decisions regarding immigration and border control are taken. Norway, albeit not a member, has the opportunity to participate in EU policy making in this area but is faced with a dynamic institutional environment. The neo-institutional approach presented in this paper claims that by studying the logic of behaviour activated in different settings, including the domestic one, we can understand more of the underlying dynamics in multilevel policy making. Taking the EU's Return Directive as a case, this study shows that Norwegian actors and interests are heard, but restricted by rules of appropriateness. In transposition, EU Schengen immigration related policy is implemented according to prevalent rules, a fact that is attributed to general governmental interests and congruence of legal provisions, but also a lack of timely public domestic debate on controversial EU issues like the Return Directive.

To my daughters, F. and R.

Preface

Writing a thesis is like climbing a big mountain and finding the way back down again. I would have never thought that it would be so hard to accomplish this trip. I feel deep gratitude towards many people who have helped me on the way.

First and foremost my advisor, Meng-Hsuan Chou, senior research fellow at the Arena institute in Oslo. She guided this project through all of its stages on her personal free time, impressively swift in giving constructive feedback and offering me new challenges and ideas for improvement. She also provided me with fresh theoretical food for thought and, if necessary, a relaxingly ironic view on the scientific circus.

The Fritt Ord institute generously supported this empirical project with a student grant, enabling me, among other things, to travel to Brussels and back. I appreciate this deeply and hope that my work, at least partly, meets Fritt Ord's high standards.

My interview partners in Brussels and Oslo offered their scarce working time to answer questions from a puzzled stranger. They showed considerable openness and patience towards a foreigner interested in very national affairs and tricky administrative procedures. They are the ones who really brought this project to life. Thank you.

The last two years at the institute of political science at the University of Oslo have been inspiring and rewarding. Everybody I talked and worked with has, in some way or the other, contributed to me finishing this project. All credit therefore goes to the instructors and fellow students I met, all mistakes in this thesis are entirely my own.

Last, but not least, I have to thank a very special family: my husband Andreas, his parents Tora and Jon as well as my parents, Christel and Gernot. All of them continuously supplied me with large amounts of love, patience, consolation, distraction, food, discussion, proof-reading and babysitting when I needed it the most.

Uta Henrich-Gaarder

Oslo, May 2011

Contents

Glossary

AID	Arbeids- og Inkluderingsdepartementet (Ministry of Labour)
ALDE	Alliance of Liberals and Democrats for Europe
Ap	Arbeiderpartiet
Cion	European Commission
COREPER	Committee of Permanent Representatives
CoE	Council of Europe
COM	Document issued by the EU Commission
DG	Directorate General
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EMN	European Migration Network
EP	European Parliament
FrP	Fremskrittspartiet (Progress Party)
JD	Justisdepartementet (Ministry of Justice and the Police)
JHA	Justice and Home Affairs
LIBE	EP Committee on Civil Liberties, Justice and Home Affairs
UDI	Utlendingsdirektoratet
UNE	Utlendingsnemnda
UNHCR	The Office of the UN High Commissioner for Refugees

MEP	Member of the European Parliament
MS	Member States
NOAS	Norwegian Organisation for Asylum Seekers
OJ	Official Journal of the European Union
POD	Politidirektoratet (Norway's Central Police Directorate)
PPE	EP Group of the European People's Party (Christian Democrats)
PSE	EP Group of the Progressive Alliance of Socialists & Democrats
PU	Politiets Utlendingsenhet (Norwegian Police's Foreigner's Unit)
QMV	Qualified Majority Voting Procedure
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SIS	Schengen Information System
SV	Sosialistisk Venstreparti (Socialist Left Party of Norway)
Sp	Senterparti (Centre Party)
TCN	Third Country National
VIS	Visa Information System

1 Introduction

> As a small country, a coordinated and harmonised global policy of migration is in Norway's interest. In order to realise such an ambition, the EU will have to take on a key role. The government, thus, puts great emphasis on the strengthening of the cooperation with the EU in the area of refugee and migration policy. The Schengen- and Dublin-agreements form a natural framework for this.
>
> Minister of Justice and the Police, Knut Storberget, March 19th 2010

This thesis is about Norwegian civil servants and their participation in the European Union's Schengen policy making. More precisely, it is about the way in which they respond to institutional change within and resulting from this policy area. The aim of this chapter is to introduce the reader to an international institutional area which directly affects Norwegian domestic policy making. It will demonstrate how national migration institutions are actively participating in EU's Schengen structure and that there has not been enough scientific focus on the actual behaviour of Norwegian civil servants engaged in policy creation. Subsequently, the chapter introduces Norwegian institutions connected to the EU's Justice and Home Affairs sector and the empirical case for this study – the EU's Return Directive 2008/115/EC. After discussing the state of the art of relevant theories, a neo-institutional approach is chosen to highlight the empirical findings. The end of the chapter provides a short overview of the structure of the thesis.

1.1 EU's Justice and Home Affairs – a dynamic area of policy making

Commonly, 'Schengen' refers to the freedom of personal movement within the European borders. It also refers to a tight international policy cooperation in order to control the consequences of this freedom. As a functional result of the four freedoms (movement of goods, services, capital, and persons) in the Agreement on the European Economic Area (EEA), the Schengen cooperation is sometimes called its little brother (Borgvad 2007: 2.1). This little brother is, however, different. Schengen is the only part of EU governance where non-member states have direct access to the formation of the Union's legal rules. Norwegian representatives and civil servants are allowed to sit in EU Council meetings and contribute actively to information exchange and debate between the member states. The Schengen 'Mixed Committee' setting thereby offers Norway, Iceland, and Switzerland participation at

an early stage of policy development (Kvam 2008: 40; Bøckman Finstad 2008: 336, Borgvad 2007: 2.5). On the other hand, Norway – if it does not want to jeopardize the whole Schengen agreement – is obliged to implement the resulting legislation. Formally speaking, the Schengen agreement is one of the best established links Norway has to the EU structure. It is, however, an area of strong institutional dynamics which is under-examined in the Norwegian debate (Bøckman Finstad 2008: 336).

The EU field of Justice and Home Affairs (JHA), which subsumes Schengen, has experienced substantial changes in the past decade: common policies regarding visas, asylum, illegal immigration, border security and co-operation with non-EU states have been established and are meant to level out the great differences between member states (Geddes 2008:111). Norwegian policy regarding irregular immigration, being a part of Schengen, is directly and indirectly connected to this. Standards of the Common European Asylum System (CEAS)[1] and their implementation in other countries have implications for Norwegian policy makers as well (Vevstad 2006: 139). The Treaty of Lisbon abandoned the three-pillar system of Maastricht, where Justice and Home Affairs used to be subsumed under the intergovernmental 'third pillar'. In 2005, the traditional unanimity voting process was exchanged with the 'more effective' qualified majority voting (QMV) and the introduction of co-decision with the European Parliament (Uçarer 2010)[2]. Although this is supposed to democratize the European Union, the associated states, among them Norway, Iceland, Switzerland, are not represented in the European Parliament. In addition, the EU has begun to construct policy packages which are not confined to one policy area alone (Bøckman Finstad 2008: 337). It is therefore relevant to look at how Norwegian actors navigate this dynamic institutional context, especially in the field of migration.

1.2 Norway and its EU Relationship – State of the Art

The extent to which Norwegian actors are involved in EU policy making has been looked at from several scientific angles. Some scholars analyse the possibilities of 'outsider' nation

[1] In addition to the Schengen agreement, Norway forms part of the Dublin II agreement (Vigdis Vevstad 2006). This implies that asylum seekers who put forward a claim for protection in Norway, but have been apprehended in another EU country before, can be sent back and vice versa. This sets Norway into a connection to the other EU countries' ways of handling asylum and refugee issues (Vevstad 2006: 58; St.meld.9).

[2] As of 2008, 22 states were participating in the Schengen free movement area. Of the EU's member countries only Ireland, Great Britain, Cyprus, Bulgaria and Romania were not completely incorporated in the operative Schengen cooperation at the time when the negotiations on the Return Directive started. (St.meld.9: 18).

Norway to lobby its interests in EEA affairs (Andersen 2000). Others are concerned with the adaptation of bureaucrats to European committee structures (Trondal/ Veggeland 2003). Trondal (2002), inspired by March/ Olsen (1998) and Haas (1992), observes some tendencies for evocation of supranational loyalties of European expert representatives in EU committees. This 'esprit de corps' towards the other professionals they interact with is – according to Trondal – a supplement to "pre-established national and sectoral allegiances" (Trondal 2002: 484). Egeberg and Trondal observe a certain stable degree of double-hattedness in the Norwegian central administration, where bureaucrats relate to Brussels and to national authorities (Egeberg/Trondal 2011: 5). Erik Fossum is concerned with domestic politic's 'gag rules' which lead politicians from all parties to be silent about the ever closer entanglement of Norwegian policy making with the EU's (Fossum 2009: 75). A Norwegian master's thesis from 2007 addresses the question of how autonomous the European representation in Brussels acts in matters of security policy (Claussen 2007). Another master's thesis at the institute for political science of Oslo analyses the Europeanization of the Norwegian migration administration following the Schengen agreement (Ruud 2003). But compared to this body of research on Norwegian EEA entanglement, there is not very much published literature on Norwegian Schengen participation (Egeberg/ Trondal 2011: 13). Norway's relationship to the EU's Justice and Home Affairs is characterized by change, legal complexity and, often, a lack of public debate (Sejersted 2008: 316, Vevstad 2006: 18).

This is remarkable, because matters of migration control are sensitive sovereignty issues in all member states (Bøckman Finstad 2008: 337). If one takes into account that the EEA agreement has been described as a problem of sovereignty for the Norwegian state (Eriksen 2008: 373), the 'little brother' agreement and the role government and administration play should be moved into the spotlight, too. Norwegian Studies which focus on the implementation of European legislation and its importance in the domestic Norwegian context describe Norway as an 'enthusiastic' adaptive outsider (Sverdrup 2000: 75). Does this hold for the Schengen context too? Some indications to this effect are there: in March 2010, the Norwegian government expressed the clear will to develop future domestic migration management in close cooperation with the EU (St. meld. 9 2009/ 2010). It is therefore relevant to look at the way Norwegian domestic civil servants handle developments in the EU's JHA migration policy and how they act when 'it hits home' (Börzel/ Risse 2000).

1.3 Schengen – useful and relatively unobserved

The initial Schengen agreement was signed in 1985. Five European countries decided to abolish their internal border controls and, in compensation for the inner security deficit, strengthen outer border control (Kvam 2008: 33). The Schengen Convention was signed in 1990 and came into effect in 1995. When Sweden, Finland and Denmark showed the intention to join the area without inner border controls, this created a problem for Norway who had benefitted from the free movement of its citizens within the Nordic region since 1957 through the Nordic passport union (Kvam 2008: 36). The question of national sovereignty made an association to Schengen problematic. Norway's 1996 association agreement to Schengen therefore established an Executive Committee structure in Luxembourg that should take the role of an external policy coordinator (Kvam 2008: 36f.). Because this structure implied no direct impact by an international body, it accorded with the Norwegian constitution (Kvam 2008: 38). In 1999, the Treaty of Amsterdam incorporated the Schengen Protocol into EU structures. The Schengen Convention was expanded to include more countries and Norway had to negotiate a new association agreement (OJ 1999). Norwegian association was thereafter subsumed under the so-called Mixed Committee structure within the Council, and the Luxembourg body was never formally established. After the Schengen protocol to the Treaty of Amsterdam in 1997, questions of visum, asylum, refugee an immigration were moved to the first, 'supranational' EU area of cooperation[3]. As a consequence, the EU-outsider Norway, in matters regarding the necessary coordination in questions of asylum, visa and border control, began to take part in supranational EU decision making procedures (Lie 2007: 169). After this period, Schengen has become a rarely discussed commitment (Kvam 2008: 17, Bøckman Finstad 2008: 345).

The opening of the inner borders between Norway and the EU countries led to a chain of compensating security measures, including the implementation of Schengen Information System (SIS) as well as 'third-pillar' police cooperation and judicial cooperation (Kvam 2008: 33f.). Every time a rule in the Schengen Code is being developed further, modified or expanded, Norway is asked to participate in decision making (Kvam 2008: 18). There is almost always some discussion whether new EU rules are to be considered as Schengen-relevant. The associated states (Norway, Iceland, Switzerland since 1.11. 2008) sometimes

[3] This shift was toned down by a lot of opt-out clauses and intergovernmental elements in the time to follow (Joppke 2002: 265).

have different opinions on this. But Norway, in general, is interested in having access to as many decision processes in the field as possible (Borgvad 2007: 5.1, St.meld. 23: 21).

The Norwegian Schengen cooperation came into operative force on March 25, 2001 (UDI 2009: 5). The Norwegian Ministry of Justice describes the cooperation in Schengen matters (in the institutional forum of the Mixed Committee) as good and respectful (St.meld 23: 21). Norway participates at all consultation levels: working parties, Strategic Committee Committee of Immigration, Frontiers and Asylum (SCIFA), permanent representatives (COREPER, the ambassador's level) and, finally in the top "Mixed Committee", where ministers (from the Departments of Justice and/ or Interior) meet their counterparts (Bøckman Finstad 2008: 340). When the associated states (Iceland, Norway, Switzerland) are included in the meetings, they do not have voting, but full participation and speaking rights. The participation gives associated states a good overview over the process of Schengen relevant policy formation. Additionally, non-member states have the opportunity to lobby their cause before and while the Commission develops policy propositions. As long as decision making gravitates towards consensus, the lack of an actual Norwegian vote is considered as not as important. If one or several EU countries have contradictory interests to Norway, however, negotiating becomes more complicated (St. meld. 23: 21).

Because the Mixed Committee at diplomatic and ministerial level is an institution that has a rather narrow agenda compared to the main Council JHA agenda, and it is not always clear which processes are Schengen relevant and which ones not, Norwegian representatives are formally excluded from some decision making developments (Borgvad 2007: 5.1). Norway is aware of JHA developments in the EU where more and more 'policy packages' across policy areas are developed and the Schengen cooperation becomes but one part of the deal, a fact which can be problematic for the associated states (St. meld 23: 21). This applies for instance to the external dimension of JHA policy making (Uçarer 2010: 319). Article 8.2 (a) of the 1999 association agreement states that Norway and Iceland shall decide independently whether to "accept its content and implement it into their internal legal order". If one of the associated states independently would decide not to implement part of the agreement, a process of scrutiny in the Mixed Committee would be initiated, in order to assess whether a termination of the whole agreement is necessary (Bøckman Finstad 2008: 341). This has, so far, never happened. In practice, the development of Schengen rules often implies administrative adaptations and can therefore be dealt with within the responsible ministries. If

a change of law is required, the EU directives need to be transposed into Norwegian law text and approved by the Storting (Kvam 2008: 41). This leads us to the first research question:

RQ1: How do Norwegian actors adapt to institutional change in EU Schengen policy making?

The area of Justice and Home Affairs has hereto mainly been the domain of students of law (Bøckman Finstad 2008, Kvam 2008, Vevstad 2006). This thesis argues that it is relevant to take a political scientist's perspective on the actual work and perceptions of bureaucrats involved in policy creation. It takes as a point of departure the idea of multi-level government, inspired by the thought that Norwegian institutions are already solidly involved in a 'European administrative space' (Hofman 2008: 662). If we want to study the behaviour of Norwegian actors navigating international institutional environments and their own domestic institutional settings, this approach carries several advantages. Instead of looking at only one stage of the European "policy cycle", it is possible to analyse structures involving multiple levels of governance (Egeberg 2006: 1, Trondal 2010: 1). After all, "the transformation sparked off by Europe is an interactive process and not a one-way street in which European institutions impose their policy decisions upon member states" (Héritier 2001: 2). The field of migration within the EU has a strong multilevel governance aspect, with mixed responsibilities between European and domestic level (Lavenex 2001: 15). In order to fully illustrate the multilevel process of Norwegian influencing and implementing, we will follow a directive from its origin to its transposition.

1.4 Masters of Schengen coordination – Norwegian ministries and directorates

The Norwegian administration of immigration is split between several departments and directorates and has been subject to frequently shifting responsibilities from one ministry to the other (NOU 2006: 61). In the period relevant for this study, The Ministry of Justice and the Police was the primary responsible for developing new rules and regulations regarding Schengen relevant immigration, sharing some tasks with the Ministry for Local Government and Regional Development (KRD). In St. meld. 23 (2005-2006) on "gjennomføring av europapolitikken", the third authority mentioned is the Ministry of Labour and Inclusion (AID), at that time in charge of immigration policy and visas (St. meld 23: 21). In September

2009, the political responsibility regarding immigration was moved from the Labour and Integration Ministry to the Ministry of Justice and the Police. As of 2010, the former AID was renamed into the Ministry of Children, Equality and Social Inclusion.

Throughout the period of negotiation and transposition of the Return directive, the governing coalition of Arbeiderpartiet (Ap), Sosialistisk Venstre (SV) and Senterpartiet (Sp) had a majority in the Norwegian Parliament, a fact that allowed for swift implementation of any policy that the governing parties could agree upon[4]. The Ministry of Justice and the Police (JD) was under the lead of Knut Storberget (Ap). This ministry was and is, in the Schengen context, the main responsible for coordination in visa questions, border control, SIS and return (St. meld. 9: 42). The Ministry of Foreign Affairs (UD), on the other hand, is responsible for the coordination of interior immigration matters affecting the foreign policy of Norway. It is supposed to be the 'single voice' of Norway when dealing with foreign countries and international organizations like the EU (www.regjeringen.no). In matters of return, this includes i.a. the responsibility for negotiating readmission agreements with third countries. The Norwegian state has the possibility to be included in the EU ones, but Norway often chooses to negotiate bilateral additional agreements with countries it shares a migration relation with (St. meld. 9: 48)[5]. UD is also responsible for running the Permanent Representation of Norway to the EU in Brussels. Nevertheless, the majority of representatives are seconded to the Delegation by governmental bodies (ministries) in Oslo[6]. UD also observes the formal process when Norway is faced with new legislation affecting the Schengen Code. The two Ministries JD and UD coordinate in a high official Koordineringsutvalget (Coordination committee) for matters of Justice and Home Affairs, parallel to the one for EEA-affairs (St. meld. 9: 42). The table on the next pages roughly illustrates the Norwegian administrative structure relevant to this research project.

[4] Seat distribution after the 14 September 2009 Parliamentary election: Ap 64 (+3), FrP 41 (+3), H 30 (+7), KrF 10 (-1), V 2 (-8), Sp 11, SV 11 (-4), total of 169 seats (www.regjeringen.no).
[5] In February 2010, Norway has agreements with 24 countries, 21 of which are in force (ibid.).
[6] http://www.eu-norge.org/Om_delegasjonen/delegasjonen.

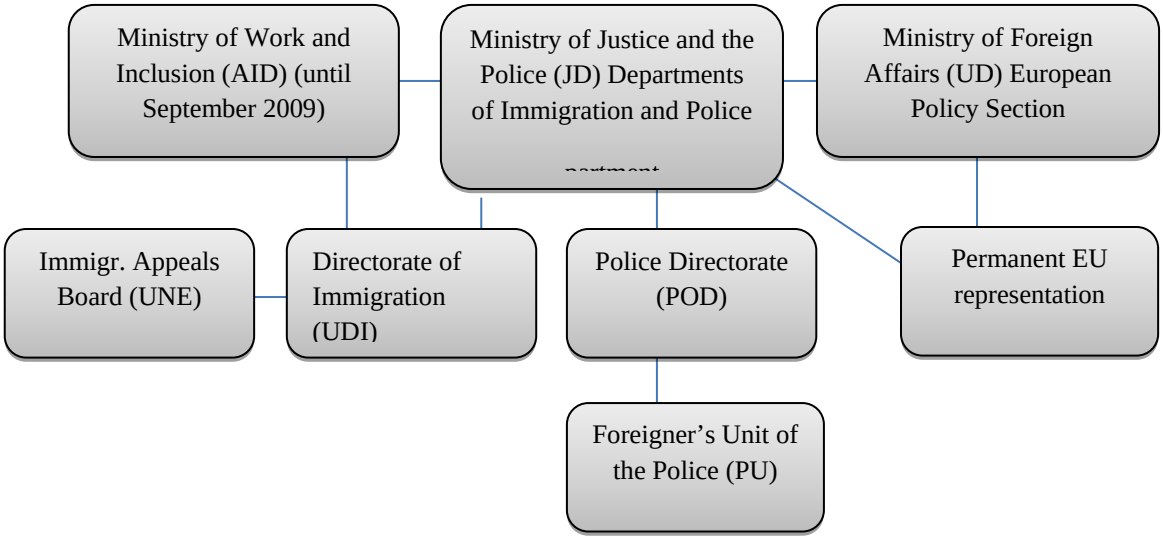

Figure 1.1 Immigration administration concerned with return and readmission

The Police Directorate (POD) under the Ministry of Justice is entrusted with the professional leadership, overview and coordination of national police administration. Its 140 employees view themselves as closely connected to Norway's 27 police districts. POD has also a central role in the fight against international and organized crime and is therefore actively involved in Schengen related processes (www.politi.no). In practical terms, the subordinate foreigner's unit of the Norwegian Police (PU) is entrusted with the registration of immigrants and the deportation of illegally staying persons[7]. Utlendingsnemnda (UNE), the Immigration Appeals Board, created in 2001, is a court-like independent institution entrusted with processing the second appeals of asylum applicants.

The focus of this study lies on the efforts of the Ministry of Justice, its Immigration and Police departments and its subordinates to affect EU policy making and to transpose the Return Directive into the Norwegian body of law and practice. Apart from the newly incorporated immigration department, the preparations for this involved the Norwegian Directorate of Immigration (UDI). As the coordinative agency for all matters regarding immigration, it processes applications for visas, work and study permits, family immigration, citizenship and asylum, and it also decides on rejection and expulsion. Since October 2010, UDI is responsible for promoting voluntary return (a task that before lay with the Norwegian police) (Politiet 2010). UDI has also functions as a central 'fagorgan', providing practical expertise in the development of new rules (UDI 2008a: 2). It aims to incorporate research and

[7] PU was created in 2004 in order to provide a more specialized and effective workforce entrusted with the registration of asylum claims, identity issues and forced return (PU 2004).

international analysis into its work. It is in this function that UDI in 2008 commissioned a comparative study on entry bans in several other Schengen countries (UDI 2008a: 2).

The administration of border control, inner security and immigration lie at the heart of a nation state's sovereignty. Police departments are therefore inherently reluctant to admit international policy interference in very national affairs. But how do they respond to change when they have been a part of the actual policy creation? This thesis therefore has a second research question:

RQ 2: How do Norwegian domestic actors respond to change resulting from EU Schengen policy?

1.5 The Return Directive – A Case of Conflict and new Procedures

The Return Directive, proposed in 2005 by the Commission, was the first directive composed under co-decision procedure within the field of asylum and migration. Co-decision introduced a stronger supranational element into the formerly "transgovernmental" area (Lavenex/ Uçarer 2004: 427). The directive's content balances on the sharp edge between restrictiveness of the sovereign nation state and individual human rights, protected by international conventions. The directive was highly controversial at the European level, because it revealed strong tensions between the EU's human rights ideals and the perceived need to prevent irregular immigration (Acosta 2009). Member states in Council were quite reluctant to accept 'rights' based provisions in the Commission's proposal, whereas the European Parliament demanded amendments to its 'control' features. Only in a series of informal trilogies, these inter-institutional tensions could be resolved (Lutz 2010). There has been discussion on whether EU migration policy is all about securitization, offering nation states an excuse and opportunity to pursue restrictive policies (Guiraudon 2001: 7, Guiraudon 2000: 256). Others would not go that far but acknowledge that there has been a certain movement into the creation of a multilevel system of governance which treats 'third country nationals' (TCN) differently than its own citizens (Lavenex 2001: 20, Geddes 2001: 13). For our purposes, the Return Directive offers a good illustration of inter-institutional change in a contentious policy environment directly concerned with national sovereignty.

1.6 Theoretical approaches to reality – a long search

This thesis does not aim to test theory, but to shed light on a specifically dynamic as well as under-discussed element of Norwegian administrative involvement with the EU. Scholars often treat the two levels of EU policy making in different forums of discussion. It turned out that the greatest challenge of this empirical project was to find the theoretical approach that would allow me to look at the interface of European policy development: the people engaged in Brussels negotiations as well as in transposition at home.

At first, policy network theories seemed the correct approach. The Advocacy Coalition Framework of Paul A. Sabatier and Hank Jenkins-Smith, developed in the field of environmental policy, analyses several stages of policy making. The main idea is that belief-based coalitions of actor networks try to influence the policy process. (Sabatier/ Weible 2007: 196, Sabatier 1998: 121). This theory is comparable to the approach of Peter M. Haas who, with his concept of 'epistemic communities'[8] tries to assess the role of policy-relevant technical information in a complex world of international interdependence. Haas argues that increasingly complicated societal processes and technical issues demand more and more specialized policy experts to solve them (Haas 1992: 1). Haas' main hypothesis, namely that "the diffusion of new ideas and information can lead to new patterns of behavior and prove to be an important determinant of international policy coordination" (Haas 1992: 3), was an inspiration for this study. But since my case focused on a rather short period of time (2005-2010), a special group of people (Norwegian civil servants participating in EU policy making and affected by Schengen changes) and included a strong bilateral perspective (Norway-EU), neither the Advocacy Coalition Framework nor the concept of an epistemic community could in the end meaningfully highlight my material.

The field of implementation, meaning "processes through which European norms are transposed, adhered to and enforced at the domestic level" (Sverdrup 2004), is equally difficult to pinpoint. Most of this field has a comparative angle to it, or is concerned with quality of implementation. Adrienne Héritier names the match and mismatch of European and domestic policy as a factor for national reaction patterns (Héritier 2001:5). Knill (1998) argues that effective implementation of European policy legislation depends largely on the 'embeddedness' of national administrative traditions. Another factor, according to Knill, is the

8 "… a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area" (Haas 1992: 3)

national capacity for reform, a third national actor coalitions. According to the constellation of these factors, Knill predicts divergent degrees of implementation success (Knill 1998: 8). Falkner et al. argue that it is the cultural factor which determines how fast and well countries comply with EU legislation (Falkner et al. 2007: 410).

All these findings are valuable contributions when thinking about implementation. But in order to connect the two levels of analysis and to try to cut through the dense net of theoretical approaches, I decided to focus on the civil servants themselves. This thesis therefore starts out from the assumption that institutional conditions frame the possibilities of individual human action. Inspired by March and Olsen's seminal article on institutional dynamics (March/ Olsen 1998) as well as Risse's article about arguing behaviour in world politics (Risse 2000), it further acknowledges that three ideal-typical rationalities of individual action are at play at any given moment. In the context of this study, these three are labelled the 'logic of consequences', the 'logic of appropriateness' and the 'logic of arguing'. Depending on the surrounding institutional conditions, one of them is expected to dominate. In order to understand which contextual factor triggers which logic of behaviour, the study accompanies the historical process of the genesis and transposition of the Return Directive through the eyes of Norwegian civil servants. So, instead of theoretically separating steps of policy making, this study argues that a closely connected group of actors tends to adopt different logics of behaviour in different institutional settings and situations of interaction.

In the process tracing project sketched above, this approach makes it possible to illustrate how the institutional structure affects actor's behaviour and roles. Do procedures continue in their own, traditional paths like they used to ('logic of appropriateness' March/Olsen 1996)? Or is there a swift adaption with a new kind of levelled power game ('logic of consequences' Putnam 1988)? Where do small outsider actors like Norway find opportunities to constructively contribute with valid arguments ('logic of arguing', Risse 2000)? A special focus on the deliberative character of the process is relevant because a directive is 'born' in endless discussions. Civil servants are collecting and processing information, they discuss practical matters with their colleagues at home, they consult other experts from neighbouring nations and, in the end, either make a deal or comply with other actor's wishes. How they go about in obtaining their goals and in which ways they communicate back home has implications for the policy that is realized later. This thesis takes the reader on a journey through the stages of EU Schengen policy making, with a special focus on Norwegian

behaviour and their reactions to institutional change. The matching of consequentialist and the more constructivist view of the logic of appropriateness is expected to grant as us a fuller picture of reality (Checkel 2001: 219). I will present more in-depth thoughts about my approach in chapter 3 on the analytical framework. The next part of the chapter describes the general set-up of the thesis.

1.7 Structure of the thesis

In order to prepare the ground for my analysis of how Norwegian actors approached the EU's evolving institutional setting, chapter 2 follows the directive through the different stages of EU decision making, explaining official frames for negotiation and informal approaches to finding agreement. It shows that the institutional conditions surrounding the Return Directive are good examples to illustrate recent dynamics in the field of Justice and Home Affairs: Its subject matter was highly contentious, the decision making path unexplored and the relations between the EU's institutions evolving.

The following chapter 3 presents the three theoretical 'ideal types' this thesis employs in order to guide the analysis. I argue for a neo-institutional approach to the empirical matter. Norwegian civil servants are expected to adapt to different institutional settings by reverting to either the 'rational' logic of consequence, the 'sociological' logic of appropriateness or the 'deliberative' logic of arguing. Subsequently, I present my operationalization of six indicators as well as the methodological approach to this case study.

Chapter 4 addresses the first research question: how do Norwegian actors navigate changing conditions in the EU's institutional environment? The different institutional settings are described from a Norwegian point of view. The chapter recounts perceptions and reactions to changing dynamics within the Council/ Mixed Committee structure and matches them with the expectations derived from the three logics. It shows that Norwegians adapt to the EU Schengen setting by reverting to a cooperative logic of consequence framed by strong 'appropriateness' expectations to their behaviour. It also illustrates that co-decision has considerable consequences for Norwegian participation in the Schengen context.

Chapter 5 tends to research question 2: how do Norwegian civil servants respond to change resulting from a EU Schengen directive? The transposition process is described from the initial presentation of the Return Directive in the Storting to the adoption of the immigration

code amendments. Parallel developments in the Norwegian migration context are accounted for. The analysis shows that Norwegians strongly activated the logic of appropriateness in order to follow the directive's demands. This general inclination to revert to standard operating procedures was intermingled with instances of arguing resulting in preference changes.

The final chapter 6 sums up the findings of this thesis, acknowledges the merits and some deficiencies of the 'three logics' approach and sketches possible research gaps to be filled in the future. The conclusion is that the three ideal types yield valuable insights into human behavioural patterns, but that some elements of the process could not be shed light upon. The case of the Return directive is considered a good example of possible future developments within the EU's field of Justice and Home Affairs and the Norwegian response to it.

2 The Negotiations on the Return Directive

Norwegian participation in the negotiations on the Return Directive has to be analysed on the backdrop of continuous legal and institutional changes within the EU. The following section presents the legal foundations and decision rules applying to the Return Directive. We will see how co-decision is connected to EU actors treading new paths of decision making. Thereafter, the chapter sketches inter-institutional positions and dynamics from the publication of the Commission proposal in September 2005 up to the final adoption in Parliament in June 2008. The chapter shows that the Commission's functional arguments for the harmonization of EU return policy did not fall on fertile grounds in all member states. Several presidencies tried to put their mark on the decision process, but only when Parliament pressured the Council into movement, informal negotiations between the institutions could begin. Consensus was reached in negotiations among a handful of policy specialists. Taking these developments into account, several specific research questions regarding Norwegian participation and transposition are developed. At the end of the chapter, I summarize the final content of the Return Directive.

2.1 Co-decision and migration– Treading a new path

Justice and Home Affairs (JHA) had long been an area of legislation which lay under the intergovernmental 'third' pillar of the Maastricht Treaty on the European Union (TEU). The Treaty of Amsterdam of 1997 moved the cooperation in asylum and border control to the first, supranational pillar (Uçarer 2010: 311). In the spirit of an establishment of a common area of "freedom security and justice", the Tampere European Council of October 1999 had called for a coherent approach in the field of immigration and asylum. This should comprise a common asylum system, legal immigration policy and a joint approach to combating illegal immigration (European Council 1999: 4). In 2002, the Commission's Green Paper on a Community Return Policy (Commission 2002) had envisioned a better coordination between EU member states and thereby initiated a process of public consultation (Commission 2005b: 3). The Brussels European Council of November 2004 called in its Hague programme for the establishment of common standards for an "effective removal and repatriation policy" with respect for fundamental rights and the dignity of individuals (European Council 2004). A few

months before the proposal for the EU directive was introduced, the Council of Europe[9] in Strasbourg had also issued 20 Guidelines on Forced Return (Lutz 2010: 453). The scope and formulation of these 20 Guidelines often acted as guideline and inspiration for the negotiations on the Return Directive.

In December 2004, the decision making procedure for measures regarding illegal immigration had been moved over from consultation (unanimity in Council and advisory role of European Parliament) to co-decision (Lutz 2010: 11). Parliament thereby formally became a legislator. Its opinion, other than in the consultation procedure, carried the same legal weight as the Council's (Hayes-Renshaw/ Wallace 2006: 207f.). Co-decision follows several stages or decision 'loops'. The first step of the decision-making process is the development of the Commission proposal (Stie 2010: 92). The Commission, in its executive function, starts internal and external consultation procedures and simultaneously presents the two legislators with the document. The two institutions subsequently work on the proposal and eventually present amendments to it. At the 'end' of the first reading, Parliament presents an opinion and the Council can either approve of the Parliament's amendments or issue a diverging common position (Acosta 2009: 24). In this case, the second reading is initiated. The Parliament has now three months to make amendments to Council's common position which, after another three months, can either be accepted or rejected. Should the second reading not lead to agreement between the two institution's positions, a conciliation committee between the three institutions involved will try to find a consensus. This consensus text will need a qualified majority in Council and an absolute majority of members in Parliament to be adopted. In the first reading, Parliament only needs a simple majority to approve of a negotiated text (Acosta 2009: 24). European institutions have therefore begun to explore informal ways to find consensus, namely informal trilogues (EP term) or trialogues (Council term). In these, each institution is represented by a few people in central positions. The triloges as inter-institutional forums are considered efficient, though also less transparent than the formal procedure (Stie 2010: 90).

Q1: This raises the question of how a possible lack of transparency affected Norwegian participation in the Mixed Committee setting.

[9] Not to be confused with the European Council or the Council of Ministers, the Council of Europe in Strasbourg is not an EU body, but comprises 47 member states. Founded in 1949, it is an institution rooted in the ideas of human rights and aims at the development of democracy in Europe (http://www.coe.int/).

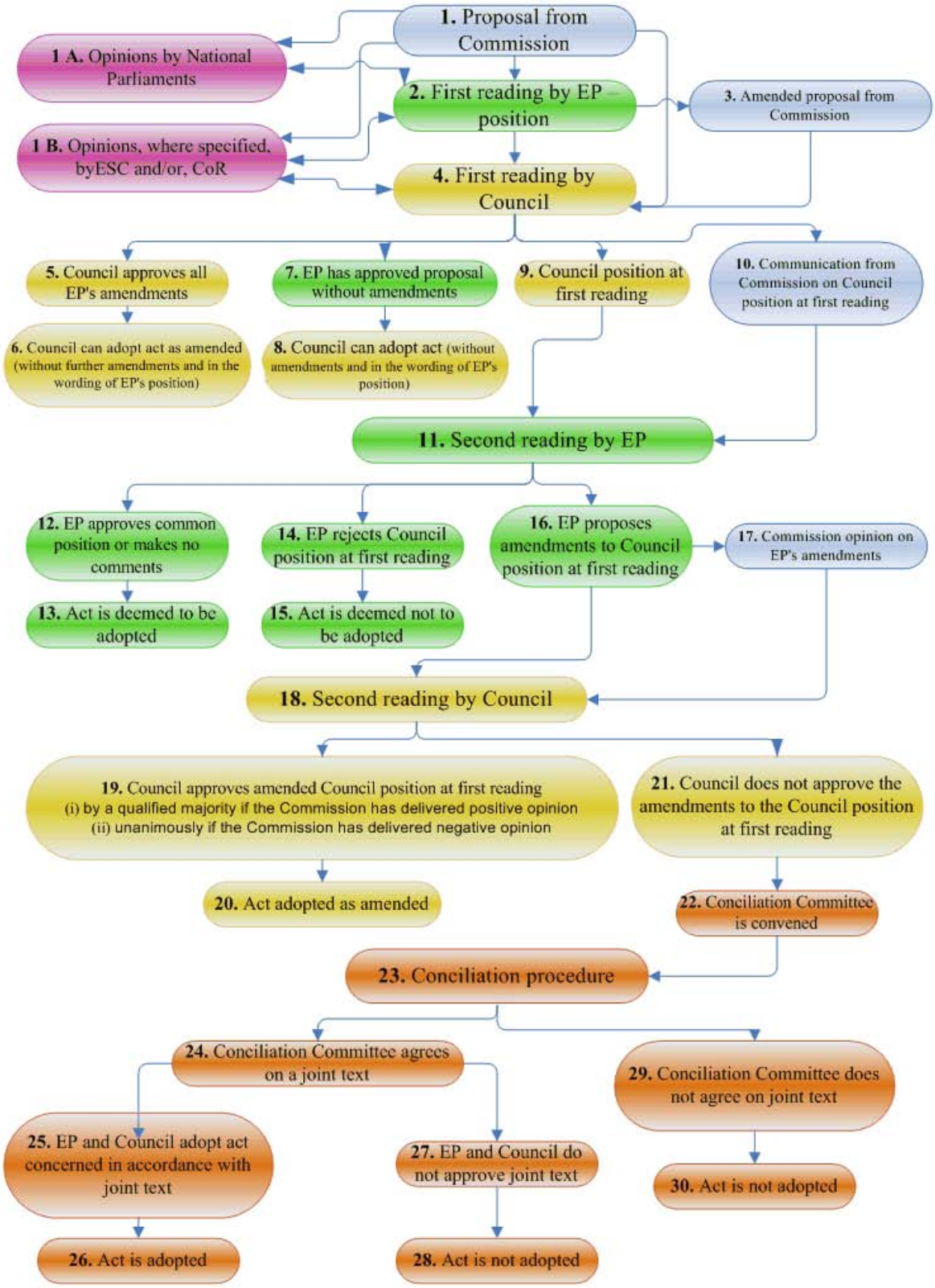

Figure 2.1 The co-decision procedure (source: EU 2011)

2.2 The Commission – Functional argumentation for the directive

In the case of the Return Directive, the Commission, along with its proposal (Commission 2005a), presented an impact assessment of the current state of affairs in member states. It stated that member states' legislation differed widely and that legal terminology regarding return, removal, use of force, temporary custody and re-entry were creating problems in "situations involving more than one member state" (Commission 2005b: 1). For example, the understanding of the term "expulsion" was different from nation to nation. This state of affairs was perceived to have a "distorting effect" on the movement of illegal immigrants, leading to unequal distribution and maybe even "legal remedies shopping" (ibid.). A common return policy was also meant to reduce illegal human trafficking and weaken the anti-migration arguments by extremists (Commission 2005b: 2). According to the Commission's assessment, other reasons to initiate and work for this directive were the need to "increase mutual trust in each other's systems" (Commission 2005b: 3), and to develop a common terminology in order to enhance information exchange. A directive - as policy 'tool' - gradually harmonizes procedures throughout the EU without regulating the way things are actually to be done. It allows for national adaptation to EU standards by a form of legal 'translation' into the present institutional system. Taking into account the given circumstances at the national level, it was chosen as the most effective measure in order to reduce costs and time effort (Commission 2005b: 4).

2.3 The Proposal - between control and rights

The Commission's proposal of September 2005 was meant to introduce a horizontal set of rules "applicable to any illegally staying third-country national, whatever the reason of the illegality of the stay" (Commission 2005a: 1). This means that this directive addresses not only asylum applicants, but all people who do not fulfil the conditions for legal stay according to article 5 of the Schengen Border Convention (Commission 2005a: 2). According to the Commission representative, Fabian Lutz, the proposal was purposefully designed to contain protective 'rights' elements as well as restrictive 'control' elements (Lutz 2010: 79). On the protective side, the proposal aimed to assure procedural safeguards (for instance by prescribing a written return decision with a possibility for appeal). It introduced minimum protection for people rejected at the border or in transit zones, gave a priority to voluntary return and stressed the special needs of families and minors (Commission 2005a: 5). The

protective principle of non-refoulement was given special attention. On the restrictive side, the proposal introduced the obligation to return illegal immigrants and the idea of a universal entry ban applying to the whole Schengen area. It regulated the length of temporary custody to a maximum of 6 months, and instituted a removal order separate from the return decision (Commission 2005a: 4f.). In principle, more favourable provisions in member states should not be overridden by the directive (Commission 2005a: 13). The Commission's role after issuing the draft proposal was to defend the legal quality and the 'added European value' of the text against the Council and Parliament, but also to function as a 'mediator' between the institutions (Lutz 2010: 83).

2.4 Member states in the Council: Sceptical at first

The Council had – in order to ease Schengen related co-operation - already addressed some issues of return[10]. Member States were, however, not easily convinced of the added value of this directive. Many of them principally saw the use of general guidelines for return, but were reluctant to give up their own way of dealing with things. Progress was therefore slow (Lutz 2010: 17). Within the Council's Mixed Committee structure – the relevant working group was Migration and Expulsion – EU member states had the opportunity to voice concerns and reservations. A whole range of elements of the directive triggered extensive discussions in the working group on migration and expulsion, e.g. the definition at what point exactly illegal stay began (Acosta 2009: 26). The Council minutes of the Working group on Expulsion and Migration reveal quite a large number of reservations and objections[11]. The major technical concerns and arguments during the Migration and Expulsion working group negotiations were the following:

- Dividing the return and removal decision into two separate steps would entail great administrative costs / would likely turn out to be overly bureaucratic in practice.
- "Persons rejected at the border" / in a transit zone should be excluded from the scope of the directive.
- People who entered the territory of the member state illegally in the first place should be excluded from the scope of the directive.

[10] Council decision on Joint flights for removal (Decision 2004/573/EC), transit/ removal by air (Directive 2003/110/EC), mutual recognition of expulsion decisions (Directive 2001/40/EC) (Lutz 2010: 12).
[11] The complete list of Mixed Committee negotiation documents on the Return Directive can be found at http://consilium.europa.eu/ under document search with the interinstitutional file number 2005/0167 (COD).

- Many member states were of the opinion that individuals falling under the scope of bilateral or European Community agreements should be excluded from the directive.
- The legal remedies (like the envisioned possibilities for appeal) were too generous.
- The proposed maximum detention period of 6 months was too short, especially with regard to people difficult to return to a home country which was not cooperating or documents identifying the person were lacking (Lutz 2010: 18).

Q2: What was the Norwegian administration's response to this proposal – and did its interests compare to other member states' priorities?

2.5 The Presidencies – Driving the Council negotiations

The discussions on the proposal stretched the negotiations within the Council structure over more than two years and a total of six Council presidencies[12](Lutz 2010: 17). In the second half of 2006, when Finland took over the chair from Austria, its representatives introduced a compromise paper modifying the initial Commission proposal. These papers were also discussed at SCIFA[13] (Directors level Council Committee) level. However, the Council did not arrive at a common position. The subsequent German presidency managed to promote its strong scepticism towards the directive, abandoning the Commission proposal completely (Franßen de la Cerda 2008: 379). In order to collect support for a more minimalistic approach, the presidency inquired as to the member states' preferences and proposed its own list of necessary measures (Council 2007a: 2). The Commission representative was at this point (May 2007) doubtful that the directive would be realized at all (Lutz 2010: 21). But when the Portuguese presidency entered in the second half of 2007, a "very dynamic and energetic chairperson" was "sent into the battle of reconciling Member States interests in the Council working group and bridging the gaps with the emerging position of the EP" (Lutz 2010: 22). This presidency took up the initial Commission proposal again and proposed the idea of an accelerated procedure (including a standard form) for illegal entries at the border (Council 2007c: 16). Commission representative Lutz names the Slovenian Presidency (beginning January 2008) as the next decisive factor. It was the Slovenian Interior minister, Dragutin

[12] 2005: UK, 2006: Austria/ Finland, 2007: Germany/ Portugal, 2008: Slovenia (www.consilium.europa.eu).
[13] Strategic Committee on Immigration, Frontiers and Asylum, positioned under COREPER (Committe of Permanent Representatives) and JHA (Justice and Home Affairs) Advisors/Counsellors (Hayes-Renshaw/ Wallace 2006: 71). Created after ToA (1997) to ensure coordination of preparatory work in matters relating to the free movement of persons (Hayes-Renshaw/ Wallace 2006: 86).

Mate, who could on June 17th present the Parliamentary plenum with a negotiated consensus paper (Lutz 2010[14]: 407). This raises the following question for this thesis:

Q3: How did Norwegians approach the task of promoting their national interests vis-à-vis the different actors?

2.6 From 2005-2007: Parliament - Advocating rights-based provisions

The European Parliament (EP) ignored the control-oriented Council tendencies and aimed to introduce more human rights elements into the legal framework (Lutz 2010: 19). The responsible committee for dealing with the directive was the Committee for Civil Rights and Justice and Home Affairs (LIBE). Traditionally, the Parliament was known for its clear human-rights based approach to matters of migration (Acosta 2009, Ripoll-Servent 2010: 4). But the members of different groups approached the question of the Return Directive from different angles. The debate within Parliament was marked by a deep rift between idealists (e.g. Group of the Progressive Alliance of Socialists & Democrats (PSE), Greens/ European Free Alliance (EFA)) and pragmatists (Group of the European People's Party (Christian Democrats) (PPE). Some members of the Alliance of Liberals and Democrats for Europe (ALDE) formed part of this wing (Ripoll-Servent 2010: 4).

The pragmatists approved the idea of a European directive with 'control' elements, but wanted to introduce more humanitarian standards. The idealists were more interested in designing a directive fully inspired by humanitarian principles (Lutz 2010: 19). This lead the discussions into the more protective direction of including protective elements like the "absolute prohibition to remove minors; suspensive effect[15] of appeals in all cases; a prohibition to return persons to countries of transit; an absolute prohibition to remove persons who can get better medical treatment in the EU than in their home countries" (Lutz 2010, ibid.). These issues were, according to Commission representative Lutz, 'no-gos' for the Council. In its draft resolution on the Commission proposal, the LIBE committee presented 73 amendments (European Parliament 2007a). One of its major modifications included the creation of a European Parliament Ombudsman for Return (amendment no. 68) as well as the

[14] A full record of the Parliamentary Debate can be found at www.europarl.europa.eu. For the sake of precision, I will refer to its content by citing the page numbers in Lutz 2010, where it is reprinted on page 407-450.
[15] This refers to the protection against removal when a legal appeal is in process

institution of a monitoring by non-governmental organizations like UNHCR and IOM[16] in temporary custody facilities as well as removal procedures (amendments 65, 48 respectively) In the attached explanatory statement, the rapporteur, Manfred Weber, clarified the Parliament's position: "One of the objectives of the amendments tabled by your rapporteur is to strengthen Parliament's role as a champion of human rights and humanity."

On the other hand, the Parliament also needed and wanted to prove that it could act as a reliable negotiation partner in sensitive migration issues like return (EP final debate, statement by rapporteur Manfred Weber, EPP, in Lutz 2010: 411). In order to facilitate inter-institutional communication, the Parliament suspended the vote in the plenary until May 2008, thereby allowing it to enter into direct dialogue with the Council (Lutz 2010: 23). As bargaining 'chip', the Parliament used its budgetary authority over the approval of the Return Fund, to be established in 2007[17]. (European Parliament 2007b: 3).

2.7 November 2007: The trilogue Setting – Decisions behind closed doors

Up to the first trilogue contacts in the second half of 2007, communication and meetings between Parliament and the Council were practically non-existing[18]. The crucial phase of negotiations began in October/November 2007, when the first trilogue at high official level took place (Lutz 2010: 23). In the following series of meetings, the Parliament was alternately represented by the rapporteur Manfred Weber and his LIBE staff assistant (both EPP). The Council participated with the respective responsible official in the chair, the Commission had two policy officers participating. The Commission dealt head-on with the most difficult points and composed a table of the most contentious issues. In the hot phase of the negotiations (end of 2007/ beginning of 2008), the meeting frequency at technical level increased (Lutz 2010: 23). In this atmosphere, a "spirit of mutual trust" emerged which facilitated cooperation (Lutz 2010: 86). At the end of the trilogue phase, the political level (Commissioner, chair of LIBE Committee, Interior minister) took over the last pieces of negotiation (e.g. legal aid) and, after some last hectic back and forth between EP and Council, came to a compromise in May 2008 (Lutz 2010: 24). This leads to the following question:

[16] The Office of the UN High Commissioner for Refugees / International Organization for Migration
[17] This return fund had a frame of 676 million Euro for the period of 2008-2013 (Norway EU delegation 2009: 2)
[18] Commission official Fabian Lutz attributes this partly to the fact that a rapporteur as a 'contact point' was only appointed at this time (Lutz 2010: 82).

Q 4: How did the different settings affected negotiation patterns – and how did Norwegians respond to the challenge of defending national interests in this co-decision context?

The most contentious elements in the trilogue were the directive's scope, the compulsory nature and length of the entry ban, detention (especially its length), return and its monitoring, substantive safeguards (i. a. the protection of minors) as well as procedural safeguards (the possibilities for appeal and free legal aid) (Lutz 2010: 27). On all points, the Parliament defended more rights-based provisions and the Council more control-oriented elements (Acosta 2009). In a tight technical level series of meetings from January to April 2008, single issues were taken up and slowly resolved. Due to space restrictions, it is not possible to recount all elements of the discussion, but one example can highlight the way things were dealt with:

The Commission proposal had provided for an exemption to the protective scope of the directive, namely people who had been refused entrance in a 'transit zone'. This created a difference between "in" and "not fully in" (Lutz 2010: 30)[19]. The EP wanted to define the term 'transit zone' more narrowly in order to prevent extensive use of this clause by the member states (Lutz 2010: 30). It proposed an amendment to the proposal's article 3 specifying a 'transit zone' as

> "… a clearly designated and limited area located in an airport, in a port or at the external land borders on the territory of a Member State, where a third-country national, who has not crossed a border control and has not yet passed a checkpoint, is temporarily placed until a decision concerning the entry or the refusal of entry into the territory of the Member State in question is taken by the competent authorities of that State." (EP 2007a, amendment no. 16)

The Council, on the other hand, intended to exclude from the scope of the directive also individuals that had crossed the border illegally. The proposed formulation targeted individuals "apprehended in circumstances where there are reasons to believe that they have illegally entered within a period of no more than 72 hours the territory of the Member States" (Lutz 2010: 31). This lead to a discussion on the definition of border and border-like cases. A

[19] Also these individuals should be provided with minimum safeguards, and the Commission made a connection to the directive's safeguards applying in articles on the postponement of removal (article 9), removal (article 8), safeguards pending return (article 14) and detention (article 15).

compromise on ‘border-like’ was finally found in lending the wording from the Eurodac Regulation: “apprehended in connection with the irregular crossing by land, sea or air of the external border of a Member State” (article 8(1), and with referring to Article 13 of the Schengen Borders Code for the definition of ‘border’ (Lutz, ibid.). The final content of the directive as published in the Official Journal of the European Union can be summarized as follows:

General provisions	**Directive 20087115/EC of the EP and of the Council**
Article 1	declares the subject matter: common standards and procedures for returning illegally staying third country nationals
Article 2	sets out the scope of the directive, possible exemptions for border and border-like cases, subjects of criminal law sanctions
Article 3	defines the terms third country national (TCN), illegal stay, return, removal, entry ban, risk of absconding
Article 4	ensures that the directive shall not override more favourable 'rights' provision already existing in national law and bilateral agreements
Article 5	recounts fundamental rights principles like non-refoulement, best interests of the child, family life, state of health
Article 6	introduces a compulsory, administratively separate return decision (6.6: option for a one-step/two-step procedure)
Article 7	sets a period of 7-30 days for voluntary departure (with some exceptions)
Article 8	regulates removal and the proportionate use of force, introduces monitoring system
Article 9	gives substantive reasons for the postponement of removals
Article 10	addresses safeguards for the return and removal of unaccompanied minors
Article 11	introduces a Schengen-wide entry ban of minimum one to max. five years if the TCN to be returned did not receive a period for voluntary return or did not comply with it
Article 12	introduces procedural safeguards, prescribes a written return decision and entry ban with information on legal remedies (including translation if requested)

Article 13	prescribes legal remedies for subjects of return (appeal, free legal aid if necessary)
Article 14	sets out safeguards postponing return (family unity, health care, minors)
Article 15	regulates the detention of illegally staying third country nationals, orders periodical administrative or judicial reviews, determines its maximum length to 6, exceptionally 18 months
Article 16	sets out the conditions of detention in specialised facilities

Table 2.2 General provisions of EU Directive 2008/115/EU (OJ 2008)

We can conclude that this directive was a special case in several respects: it was the first opportunity for Parliament and Council to experience co-decision in the field of migration policy. It was also exceptionally controversial, because the two legislators had developed fairly different opinions. And third, the directive stretched over a wide field of immigration policy, addressing 'control'-oriented security issues – like border control and the compulsory entry ban – as well as 'rights' provision like legal remedies and procedural safeguards. In the Norwegian domestic context, it thereby affects several institutions: the Ministry of Justice and the Police (Immigration and Police department), which was responsible for writing the new legislation and instructions resulting from it, the Police directorate which registers immigration (POD), the Foreigner's Unit of the Norwegian Police (PU), concerned with the administration of e.g. detention, identification and forced return, the Department of Immigration (UDI), as well as the Norwegian Directorate of Immigration and the Immigration Appeals Board (UNE). The question that arises from this condition is:

Q 5: How did the Norwegian administration and the politicians in the domestic Parliament react to the challenge of transposing this directive into Norwegian law?

The next chapter presents the theoretical approach which will highlight my analysis of empirical events.

Year	Month/Date	Event	Function/Result
2005	September 1st	Commission proposal COM (2005) 391	Presented to Parliament and WP Migration & Expulsion
2006 Austrian/ Finnish presidency	January-June	First series of readings	WP/MixCom discussions
	September-December	Finnish presidency puts forward several compromise papers	No agreement in Council at this point
2007 German / Portuguese presidency	February	German presidency proposes a 'phased' approach	Exclusion of e.g.voluntary departure, length of re-entry ban, legal remedies and legal aid
	May	Stand still in negotiations	
	September 12th	EP Civil Liberties Committee (LIBE) presents its draft report	73 'rights' amendments to Commission proposal
	October	Agreement on preliminary draft Council position at SCIFA level	First informal trilogue meeting at high-official level
	November	Informal trilogues	Presidency, EP and Commission
	December 7th	Portuguese Presidency presents SCIFA with results of meetings	
	December 18th	First 'political' trilogue	Cion Vice-president Frattini & Portuguese and Slovene ministers
2008 Slovenian presidency	January - February	Series of informal trilogue 'staff' meetings	Accompanied by parallel JHA counsellor meetings
	February 20th & 28th	COREPER and later ministers discuss results of trilogue	Scope, voluntary return, re-entry ban, remedies and unacc. minor issues close to agreement
	March 7th	JHA Counsellors	Discussion of compromise prop.
	throughout March	Series of trilogues	Followed by JHA Counsellors
	April 1st	Presidency submits compromise suggestions	
	April 18th	JHA Council at ministerial level	Ministers indicate that more work is required
	April 23rd	First trilogue compromise between presidency and rapporteur	Presidency forwards compromise paper to COREPER (April 25) in order to 'test' it
	May 7th	Discussion within COREPER	Voluntary return, re-entry ban and legal aid still debated
	May 16th	Compromise amendments to the proposal forwarded to trilogue partners	Voluntary return period, length of re-entry ban and costs of legal aid
	June 2nd	New compromise suggestion by Slovenian Presidency	Article 12(4), free legal aid to be implemented with one year's delay
	June 5th	Text politically endorsed by Council	Luxembourg 'A' point for JHA ministers
	June 18th	Plenary vote in Parliament	369 in favour, 197 against and 106 abstentions

Table 2.2 The timeline of EU negotiations (content based on Acosta 2009 and Lutz 2010)

3 Responses to Change - Three Logics of Action

Science rests on the assumption that a smaller set of critical relationships underlies the complexity of this world (Sabatier 2007: 5). In this spirit, most theories regarding social processes try to simplify a complex reality by highlighting its inherent rules. This chapter presents the theoretical approach which shall guide me through the analysis of Norwegian civil servants' behaviour. Generally, I assume a modest realist perspective, arguing that valid insight into human action is possible (George/ Bennett 2005: 130). In order to determine how Norwegian actors responded to change in institutional settings, this thesis relies on the analytical tools of neo-institutionalism. This chapter will first present three relevant theoretical approaches for the interpretation of human behaviour. It argues that these perspectives can be analytically combined in order to understand patterns in the reactions of EU negotiators and EU policy implementers to changes in their environment. Based on the assumptions derived from the three approaches, this chapter develops six guiding hypotheses on how Norwegian interaction with the EU's changing Schengen environment and policy output takes place.

3.1 Social interaction in institutions - Three ideal typical approaches

A neo-institutionalist approach claims that human agency is influenced by the institutional setting it takes place in. Institutions can be defined as a relatively stable collection of practices, routines, understandings and rules prescribing appropriate behaviour for specific groups of actors in specific situations (March and Olsen 1998: 944, March/Olsen 1989: 21 ff.). If we acknowledge that "institutions matter" and that they structure human behaviour (Aspinwall/Schneider 2000: 3), we can try to detect behavioural patterns emerging from different constellations of factors, or institutional scope conditions. A neo-institutional perspective also acknowledges the importance of an institution's environment and the influence of individual decision making (Olsen 1992: 248). Several branches of neo-institutional theory coexist. Depending on the logic of action they emphasize and on the focus of their studies, these can be subsumed under different categories (Aspinwall/ Schneider 2000: 7; Hall/ Taylor 1996: 955). This study is not concerned with an in-depth discussion of these theories, but forms rather an empirical illustration of their heuristic value. Together with March/Olsen (1998) and Risse (2000: 18), we can assume that different logics of actions are

present in all social situations but that, depending on certain conditions, one of them can dominate and put its mark on the actual outcome.

> "The descriptive question is whether (or when) one logic is more likely than the other to be observed as the basis for actual behavior." (March/Olsen 1998: 949)

In the realm of this thesis, we will be considering three different kinds of logic of action. The first, the logic of consequences, is loosely based on the idea of Weber's "zweckrationales Handeln", the second, the logic of appropriateness (March and Olsen), on his idea of "wertrationales Handeln" (Aus 2007b: 7), the third on Habermas' normative idea of "verständigungsorientiertes Handeln" which presupposes the search for a reasoned consensus among equals (Habermas 1984: 285f.; Risse 2000: 9). This variant can ontologically be subsumed under the logic of appropriateness, but for the purpose of defining institutional scope conditions for the different logics, this chapter will present it separately as the logic of arguing. All three logics of action consist of several currents of discussion. As we will see, some of these strands of theory approach one another, especially if one takes the more moderate proponents of each (Risse 2000: 3). If understood as ideal types in the Weberian sense, they can serve as heuristic tools to enhance our understanding of an empirical process. I argue that whether and how one of these logics of action marks a context, is dependent on the setting actors encounter.

3.2 The logic of consequences: Acting in our best interest

> "Those who see actions as driven by expectations of consequences imagine that human actors choose among alternatives by evaluating their likely consequences for personal or collective objectives, conscious that other actors are doing likewise" (March/Olsen 1998: 949).

Ontologically, rational choice theory is based on an idea of methodological individualism. Human action is explained by looking at individual preferences and the calculative process of weighting opportunity costs. The goal for individuals is the maximization of their utility functions (Aus 2007b: 8). Rational choice inspired institutionalists do recognize that individuals act within institutional frames. In general, institutions are seen as a collection of rules and incentive structures that restrain and enable individual action (March/ Olsen 1996: 251). Whereas sociologically inspired scholars look at institutions as structures of identity

formation, rational choice scholars usually emphasize the regulative aspects of institutions (Peters 2005: 51). Intergovernmental meeting places are expected to be institutions conducive to bargaining behaviour. This means that the governmental representatives arrive with a set of fixed preferences and a certain amount of assets they can use for their negotiations. Agreements are negotiated along constellations of priorities, means, ends and (often) short-term strategies (Risse 2000: 3). The outcomes of a process of negotiation can be interpreted as equilibriums, or attempts to maximize aggregated welfare (Scharpf 1994: 35). In the EU context, governments are expected to represent the interests of their constituents (governments, ministries, voters).

Neo-institutionalists have also proposed theories for the interplay of domestic structures with the international level, the most prominent probably being Pollack's principal agent approach (Pollack 1997), Putnam's two level game theory (Putnam 1988) and Scharpf's concept of a joint decision trap (Scharpf 2006). If we follow for instance Scharpf, governments are not only representing the aggregated interest of their constituents, but represent an institutional self-interest in power and influence. Although in need of efficient international coordination, governments will therefore always be expected to be very reluctant to give up their competencies (Scharpf 2006: 849). If nations and their representatives insist on defending purely national interests, and are not willing to budge on their positions, negotiations can take a long time. It is therefore possible to assume that it is in the common interest of all states to seek a co-operative consensus that every nation can live with, especially if consecutive games, side-payments or parallel games promise a pay-off in other policy areas (Scharpf 1994: 31)[20]. On the domestic side, rational actors within the administration would aim at a swift transposition of a directive, especially if it is supported by the government (Falkner et al. 2007: 399).

3.3 Hard bargaining and soft bargaining behaviour

Interpreting this in the context of the Return Directive, we can assume that the member states, as often in the JHA context, were highly reluctant to give up on their sovereign border management (Uçarer 2010: 310). The same assumption counts for the Norwegian government. The reason for this is, apart from the principle of national sovereignty, often

[20] This tendency towards more effective tit-for-tat co-operation can be strengthened by the presence of an 'honest broker' that acts as a mediator between member states (Scharpf 2006: 850).

purely financial – adaptation and restructuring are costly. Roughly relying on the logic of two-level games (Putnam 1988), we should expect that national executives aim to minimize the costs arising from a strong mismatch between their domestic institutional practice and an EU norm like a directive (Börzel 2002: 194). The representatives in negotiations face two kinds of pressure: at home, the executive is supposed to give way to societal demands. And in Brussels, the national government must negotiate as effectively as possible to circumvent policy misfit (Börzel 2002: 195, Putnam 1988: 434). So the general assumption is that the higher the stakes for the involved institutions are, the stronger the classic bargaining behaviour. The bargaining is being done by actors representing their home government and/or their institution. Every negotiating party has a certain range of possibilities, and the more these 'win-sets' overlap, the easier opposing parties can come to an agreement (Putnam 1988: 438)[21]. To understand the Norwegian position and strategies vis-à-vis EU institutions, this thesis will therefore identify national priorities, institutional traditions and policy interests from the viewpoint of Norwegian institutions (Börzel 2002: 195).

As stated in chapter 1, the overall first research question of this study is how Norwegian actors adapt to institutional change in EU Schengen policy making. Based on the theoretical approach just presented, the following hypothesis arises:

H1: *If Norwegian actors adapt to institutional settings in EU policy making by following the logic of consequence, we would expect them to revert to strategic behaviour using means (like information, arguments and short-term alliances) to obtain ends (e. g. avoidance of policy mismatch), because protection of national priorities is their primary driving force.*

The second research question is how domestic Norwegian actors and institutions respond to change resulting from EU Schengen policy. The answer, according to rational choice oriented institutionalists, would be:

Hypothesis 2: *If the dominant logic of action at the home level is the logic of consequence, we would expect civil servants to observe transposition pursued in a strategic way, because we assume the actors to be driven by institutional efficiency goals as well as political priorities responding to aggregated voter's preferences.*

[21] In two-level games, a smaller win-set can also mean a better negotiating position at the international meeting arena. As Putnam puts it: "I'd like to accept your proposal, but I could never get it accepted at home" (Putnam 1988: 440).

Sketching this approach against the logic of appropriateness, the decisive moment of trespassing over from one logic to the other is hard to pinpoint (Lewis 2010: 650). The borders between hard bargaining and more cooperative styles of interaction (based on the norm of reciprocity) are fluid. Generally, the preferences of actors are seen as externally fixed, but some scholars acknowledge that strong institutions can shape the preferences of actors to a certain degree, so that a form of collective rationality can emerge (Peters 2005: 48f., Ostrom 1998). Since the focus of this study lies on institutional contexts affecting behaviour, this thesis draws the line where group processes and norms put restrictions on hard bargaining and the pursuit of self-interest. Social norms are defined as "an injunction to act or to abstain from acting" (Elster 2007: 354).

If there is a clear self-interest which cannot be realized because of normative, value-laden prescriptions to the situation, the logic of appropriateness comes into play. We will therefore, at the EU level, work with the two concepts of 'hard' bargaining and 'soft' or 'cooperative' bargaining (Lewis 2010: 648). We expect that Norwegians, as representatives of a small, outsider state, profit from institutional conditions conducive to cooperative behaviour, meaning 'soft bargaining'. Cooperative bargaining is characterized by an emphasis on mutual trust, norms of reciprocity and the importance of personal reputation. The EU institutional context has often been described as prone to these developments (Lewis 2010: 649). In the terms of institutional rational choice theory, certain kinds of adaptation to an institutional situation can be seen as part of rational behaviour. In the long term, net benefits of participants are expected to rise. Shared norms can therefore develop, also in a 'rational' environment (Ostrom 1998: 13). This abandons the methodological individualism of rigid rational choice accounts for a more 'bounded rationality' (Simon 1957) and leads us towards the mutual constitution of social norms and human agency, the realm of the logic of appropriateness (Risse 2000: 4).

3.4 The logic of appropriateness: The proper thing to do

A more sociological perspective on politics assumes an independent and dominant role for institutions and organizations (March/ Olsen 1998: 17).

> "Action involves evoking an identity or role and matching the obligations of that identity or role to a specific situation. The pursuit of purpose is associated with

> identities more than with interests, and with the selection of rules more than with individual rational expectations" (March/Olsen 1998: 951).

More specifically, interests are "not pre-set but rather the product of interaction between actors" (Rosamond 2010: 112). Individuals affect structures and are influenced by them (Risse 2000: 5). In this 'cultural' understanding of institutions, actors prefer applying their usual routine and opt to follow already established role perceptions (Hall and Taylor, 1996: 939). Acting 'appropriately' entails fulfilling a social contract out of a sense of duty (March/ Olsen 1998: 957). Roles, communication, argument and persuasion are central to this approach (Rosamond 2010: 112f.). In the Schengen Mixed Committee setting, this viewpoint would highlight the importance of collective expectations directed at people. According to this logiv, the representatives of Norwegian institutions would encounter formal and informal restrictions to their behaviour, the crossing of which could entail certain sanctions. Their discourse would be expected to meander between normative borders, setting limits to the discussion (Risse 2000: 23). The stronger and more engrained the institution, the stronger and often more implicit (internalized) its norms become.

Institutions therefore differ in the informal ways they impose role prescriptions (Hayes-Renshaw/ Wallace 2006, Egeberg 2006). In the European context, we would expect the different institutions of Council, Commission and Parliament to follow their own logic and way of thinking. The Council is described as being an intergovernmental structure with an unusually strong effect on individual identities. Participants in negotiations are strongly accepted to surrender to the all-prevailing norm of consensus finding (Hayes-Renshaw/Wallace 2006: 303). This kind of cooperative negotiating behaviour is expected to depend on an institutional setting with a high density of norms (Lewis 2010: 656). Norwegian actors would be expected to adapt to the Council setting and pursue their objectives within the frame of obligations with a certain meaning to them.

On the level of organizations, the logic of appropriateness presupposes that institutions and identities as entities often evolve in rationally unpredictable, but historically path-dependent ways. They are robust bodies of rules and procedures, in constant interaction with their environments. Changes are therefore expected to be incremental (March/Olsen 1998: 959). Since the co-decision procedure was new to the actors involved, we could anticipate adaptive behaviour – and this behaviour might not necessarily correspond to the procedure written down in law. Since the co-decision procedure in migration matters was relatively new to the

JHA and migration counsellors (as well as to the Commission representative), a certain inertia in adapting to the new procedures is to be expected (March/Olsen 1998: 968). This 'inherent inertia' expectation also applies to institutions at the national level, like for instance the Norwegian Ministry of Justice and the Police (JD) or the Directorate of Immigration. If we accept that Scandinavian politicians and administrators are, by tradition and culture, inclined to comply with EU rules once they are adopted, Norwegian administration should have a tendency to follow the same pattern (Falkner et al. 2007: 404, Sverdrup 2004: 39).

Hypothesis 3: *If Norwegian actors react to change according to a logic of appropriateness, they would be expected to follow inherent moral expectations directed at them in the EU context, because they and their counterparts would interpret this behaviour as adequate and desirable.*

Hypothesis 4: *If domestic actors, reacting to change resulting from a EU directive, follow the logic of appropriateness, they are expected to revert to their standard operating procedures, prevalent norms and conceptions of what is 'right' and 'wrong', because their role and culture prescribes them to do so.*

An interesting element of the logic of appropriateness is its focus on inter-institutional collisions and conflict (Aus 2007b: 10). Since institutions develop different normative systems or cultures, and have an interest in preservation if not expansion of competences, new conditions of policy making will lead to minor or major frictions. Existing tension and competitive tendencies between EU institutions do often result in changes of the power balance (Aus 2007a: 23f.). Power balance shifts, on the other hand, would lead again to adaptive behaviour.

3.5 The logic of arguing: What happens when norms collide

The logic of appropriateness is not only about 'written' and engrained rules. It can also be understood to include the situations where there is actual debate about rules and interests (Risse 2000: 2). If we subsume the logic of arguing under the logic of appropriateness, it is expected to be encountered under processes of institutional and normative re-structuring (March/Olsen 1998: 966, citing Habermas 1996: 468). Arguing behaviour is more likely "whenever roles, preferences and identities are in conflict or in doubt" (Risse 2000: 6). The Return Directive offers several opportunities to observe rules and identities in flux: co-

decision as a novelty in inter-institutional relations and, on the other hand, a policy content which meanders between the juxtaposed JHA values of 'control' vs. 'rights'. As other Schengen related policy products, it was modelled against the backdrop of two conflicting values: the normative expectation of respect for and protection of individual human rights, as inscribed in the European treaty, as well as the national and regional norm of efficient protection of the sovereign state's territory (Aus 2007a: 23)[22]. Reason-giving and the referral to higher principles should therefore be present. The new situation of co-decision between the European Parliament and the Council also points in this direction. There are different kinds of arguing: deliberation can circle around the rules underlying procedures (pre-bargaining) as well as be conducive to problem solving by agreeing on a common normative framework (Risse 2000: 2).

This logic is particularly relevant in the context of this study, because Norwegian (and other EU outsider's) negotiation position in the Schengen Mixed Committee relies on the power of argument. In order to promote its own goals, the Norwegian participants of meetings need to convince another EU member state – or the Commission - of their national preferences. At home, legal transposition and practical implementation of a EU directive involves discussion and debate how to best interpret it. If social interaction is defined as a process by which interests and/ or identities change, this interaction is marked by argumentation (Checkel/ Moravczik 2001: 220). A deliberative atmosphere, where arguments flow freely and power relations seize to determine the outcome of a decision process, can be a sign for democratic quality. Although this thesis will not try to assess the democratic quality of the Schengen structures, it is very aware of the idea that open access to deliberative processes is an important feature of democratic participation (see for example Stie 2010: 7, Dryzek 2000: 22, Eriksen/Fossum 2000: 1).

3.6 Scope conditions for deliberation: When is it likely to happen?

According to Habermas, there are several preconditions for the initiation of truth-seeking behaviour: Actors should be sharing a 'common lifeworld' (Habermas 1984: 13). This lifeworld can be defined as culture, or a common system of legitimate norms. Power relations are assumed absent or recede into the background (Risse 2000: 10). In the arguing mode,

[22] Or, as Joppke puts it: "immigration and asylum policy are based on fundamentally different principles. The principle of immigration policy is state interest, the principle of asylum is the right of individuals for elementary protection (Joppke 2002: 267)."

representatives of smaller states and/or formally 'subordinate' (domestic) institutions should be listened to as if they were equals. True 'truth-seeking' behaviour aims to arrive at a reasoned consensus which can constitute the basis for mutual understanding (*verständigungsorientiertes Handeln*) (Risse 2000: 2, Habermas 1984: 307f.). If agreement is found, preference structures are altered and identities changed. In order to persuade, actors have to give good reasons for their preferences (Naurin 2010: 32). Interlocutors would be expected to refer to commonly accepted validity principles (like, for instance the assumption that a lax return policy will lead to more illegal migration) or commonly accepted norms (like e.g. the belief that Europe should become an area of freedom, justice and security)[23]. This focus on the dynamics of communication and its interaction with cultural elements makes this approach a constructivist one (Ruggie 1998: 868).

The scientific discussion on deliberative democracy is mainly normative and relies on reasoning for an ideal world free of coercion and manipulation (Dryzek 2000: 22). The empirical turn in deliberative research, however, relaxes the assumptions somewhat (Naurin 2010: 31). If we conceptualize the EU setting as a 'common lifeworld', where shared rules and beliefs exist and define situations, we can apply the tools of deliberative theory in defining scope conditions conducive to persuasion and, possibly, a reasoned consensus (Risse 2000: 15). At the Norwegian domestic level, a 'common lifeworld' or common frames of reference are highly likely. But deliberation does not happen everywhere: The circumstances surrounding the decision making create the opportunity structures or institutional agora for truth seeking (Risse/Kleine 2010: 713f.). Since we are focusing on a concrete historical chain of events, it becomes very hard to reconstruct the actual character of argumentation. This thesis therefore does not directly address the question of discourse quantity or quality (Steenbergen et al. 2003: 21), but is rather concerned with detecting institutional scope conditions under which deliberative behaviour happened (Naurin 2010: 34).

> "We are looking for environments where individuals are more likely to change their minds, abandoning the strategic exchange of benefits (Naurin 2010: 36)"

Hayes-Renshaw and Wallace report that, within Council, the institutional conditions for communication and persuasion change considerably from the working group level to SCIFA,

[23] The validity claims that can be challenged in a discourse are: 1) truth (does illegal immigration really endanger the asylum institute?), 2) moral rightness of norms underlying arguments (does border protection count more than individual rights?), 3) the speaker `s authenticity (does the rapporteur really mean what he says?) (Risse 2000: 10).

COREPER and the level of ministers (Hayes-Renshaw/ Wallace 2006: 72). The character of interaction evolves from presentation of rather technical, national positions to wider, strategic issue negotiation and more 'esprit de corps' thinking at the ambassador level (Lewis 2010: 655). At this point, the logic of consequences and the logic of appropriateness move in the same direction: more cooperative styles of bargaining as well as deliberative behaviour are depending on similar institutional conditions (Lewis 2010: 651, Risse 2000: 9). Interaction intensity, the density of informal norms, the presence of 'honest brokers' and issue scope all play a role in facilitating cooperative behaviour (Lewis 2010, Risse/ Kleine 2010: 714). This question is relevant for Norway and its representatives in the EU context, because as a small actor, Norwegian authorities heavily rely on cooperative and deliberative inclusion into the Schengen system.

Hypothesis 5: *If the dominant logic of action in EU policy making is the logic of arguing, we would expect Norwegians to approach inter- and inner-institutional change in an argumentative way, because they and their negotiation partners are searching for a reasoned consensus.*

In the domestic setting, this inquisition is of importance, too. When and how were Norwegian Parliamentarians, the public and representatives of civil society involved in deliberations on the re-adjustment of migration administration? Who was participating in the formulation of rules guiding return? How was the change resulting from the Return Directive legitimized (Risse 2000: 7)?

Hypothesis 6: *If the dominant logic of action at the domestic level is the logic of arguing, we would expect civil servants and politicians to respond to the task of transposing the Return Directive by deliberating on its normative and practical content, because they were searching common understanding in order to redefine Norwegian institutional structures.*

More about operationalization follows in the next section.

3.7 Operationalization of the three logics

Since the three logics are understood as ideal types guiding the analysis, none of them will be 'tested'. We must rather picture them as end poles of a continuum, or, as Risse describes it, a triangle with one of the logics at each of its ends (Risse 2000: 2). Operationalizing norms, beliefs and motivations of actors and persuasion is very difficult (Checkel 2001: 221). In the

next section, I will pinpoint the most important indicators which were used in the development of the interview guides as well as analysis of the document and interview data.

No.	*Indicators*	**Consequences**	**Appropriateness**	**Arguing**
1	*Situational Constraints*	Rules of the game	Norms and role expectations	Common (cultural) lifeworld
2	*Principal orientation*	Bringing through own preferences	Role fulfillment	Openness for persuasion, searching understanding
3	*Reason giving*	Strategic / rhetorical	Norm adherence	Reference to beliefs of truth and 'right & wrong'
4	*Cooperation*	Short term alliances	Long term commitments, cultural closeness	Reasoned argument
5	*Resources for influence*	Voting power, tit-for-tat, information	Allocated authority, legitimacy	Reference to commonly accepted principles
6	*Result of the interaction*	Negotiated equilibrium, 'haggled' compromise	Contract, consistent with prevalent norms and rules	Reasoned consensus, preferences altered

Table 3.1 Indicators for the three logics

3.7.1 Situational constraints

Since the rational agent is expected to perceive the interactive situation within a set of rules that constrain his (institution's or government's) self-interest, but would not identify with any of its norms, we would expect him or her to perceive of institutional change as change of opportunity structure. In general behavioral terms, there would be swift adaptation to a new situation (March/ Olsen 1996: 255). The question in the context of this thesis would for example be whether Norwegian actors in Brussels quickly utilize new channels of lobbying when the opportunity structures changed. In interviews, this can be revealed for instance by statements like: "We saw the possibility to act in Norwegian interest, and we did so." Or, speaking of strong constraints, "In this situation, it was simply impossible to do that." If we take the other ideal type, the logic of appropriateness, there would be internalization of the shared norms ruling the social situation (March/ Olsen 1996: 249). In order to distinguish this kind of logic from the other two, it is important to probe whether Norwegians as EU 'outsiders' question the norm of consensus. In interviews, one can probe for normative prescriptions to behaviour: "What is the right thing to do in this situation?" or "How do you

usually approach this kind of job?" At the national level, an institutional 'situation' includes the formal and informal rules guiding Norwegian transposition of EU documents. In documents, politicians and civil servants could for instance refer to founding principles, prevalent norms or standard operating procedures. Interview partners, on the other hand, would refer to situations in terms of "one should never" or "my position demands of me". The logic of arguing, last but not least, emphasizes the common lifeworld of interlocutors. This lifeworld is based on shared understandings of a situation and allows participants of a dialogue to approach each other's views through reasoned argumentation. In documents, this logic can be detected when participants of an interaction describe incidences of free exchange among equals. In the context of the Return Directive, we expect argumentative rationality to emerge in contexts where established norms are in motion, mutual trust has been established and the stakes in the discussion are not so high as to prevent free exchange of thought.

3.7.2 Principal orientation

In rational choice, the principal orientation of actors is the maximization of their own utility function. They would therefore care about other state's interests and preferences only if they correspond to their own and / or can be instrumentalized. The logic of 'games' and outplaying others has been formalized in many ways (Ostrom 1998, Peters 2005). But in the context of this study, we will focus on the clearness and stability of preferences: how strongly stood the Norwegian government's instructions and the political will against the Council norms? Where Norwegian actors inclined to engage in 'outplaying' other states or institutions in order to achieve their goals? In the document and interview context, this is tapped by checking for how fixed the positions of the involved institutions were – did Norwegians budge on their position, and why? If we relax the assumption on fixed preferences, actors can also be conceptualized as looking for an agreement satisfying, not optimizing their outcomes (Putnam 1988: 437).

Expressions like "country X wanted this, we wanted something else and started negotiations" are taken as indicators for the logic of consequences. At the national level, government and opposition preferences and the ministry's interaction with its partners in transposition are checked for this kind of rationality. A misfit between EU policy and domestic rules can also be used to initiate politically opportune restructuring (Falkner et al. 2007: 399).

The logic of appropriateness, on the other hand, is encountered when interview partners stress the social expectations prevalent in an institutional setting: “in this context, it is expected of us” or “I felt responsible of”. The logic of arguing, being subsumed under the logic of appropriateness, comes into play when the roles and rules are shifting and people within institutions, instead of strictly opposing each other, express a readiness to discuss and to learn from each other (March/ Olsen 1996: 252; Hall/ Taylor 1996: 950).

3.7.3 Reason giving

Reason giving, in the sense of explaining one’s priorities, is prevalent in all three logics, but with a very different character. On the very far end of the logic continuum, reason giving is pure threats or power play (“if you do not budge on this, we will not pay for…”). In interviews, this kind of ‘rational’ reason giving is seen as prevalent when civil servants stress that they propose their arguments in terms of mutual benefits: “this is how it works for us, and it could work for you, too”. Other rational choice theories acknowledge reason giving which takes place in order to strategically convince others by norm-based arguments but without the inclination to self be persuaded – rhetorical action (Schimmelfennig 2001: 47). Compared to the logic or arguing, it is not ‘honest’, truth-seeking behavior. The logic of appropriateness is more engrained and not easy to detect in terms of reason giving, but it could for instance appear when role bearers have to be explicitly ‘reminded’ (or remind themselves) of what appropriate behavior is (“the right thing to do would be”). In indication for this is e.g. the reference to institutional traditions or legal documents. The logic of arguing is seen as prevalent when respondents stress the importance of free argumentative flow and/ or the reference to commonly accepted higher ranking norms – like human rights or the founding principles of the EU. At the domestic level, this logic would – ideally - translate into a free and open debate on the merits and pitfalls of transposition. The line between arguing and rhetorical, manipulative action is a fine one (Risse 2000: 6). Cooperative bargaining behaviour and arguing can approach each other as well. In all three instances, actors give reasons for their standpoint in order to persuade. Exactly why actors give reasons for their arguments is hard to ascertain often even for themselves (Risse/ Kleine 2010: 711). Instead of trying to measure motivations of actors (for a methodological argument, see Naurin 2010), this thesis follows the idea that sudden persuasion and surprising outcomes indicate deliberative behaviour, leading to results that would not have been expected from a process dominated by bargaining or rule following (see indicator 6).

3.7.4 Cooperation

As one would expect from a logic of consequences, cooperation happens along interest structures. Alliances are means (exchange of assets) to an end (goal attainment) and can shift quite swiftly (March/ Olsen 1996: 248). In interviews, this is taken to be the case when interview partners recount considerations like "countries with our kind of provision could not accept the proposal's article X, and therefore we started looking for possible partners." At the domestic level, this could for instance be detectable in a power game between parties or within the government coalition. This kind of behavior also includes giving and receiving something in return. The line to the logic of appropriateness is fuzzy, because ideas of reciprocity and consensus seeking also emerge in consecutive bargaining games.

We therefore conceptualize only a clear cultural and normative alliance as an element of the logic of appropriateness. This could for instance be detected when civil servants first and foremost consult with cultural neighbors or ally – against their own interest – along traditional lines. At the home level, the analysis focuses on influences from the European realm: If implementers at home interpret the norms originating from the European setting as appropriate, the implementation should happen without normative conflict. If however, the content of the Return Directive seems unclear, the civil servants would be expected to turn to higher normative principles or the established domestic way of doing things 'appropriately'. Coalitions and cooperation, according to the logic of arguing, also emerge along shared validity claims and ideas of truth. It would follow from this logic that Norwegian actors who have been involved in negotiations at the EU level (and persuaded by certain arguments) would defend or explain the normative content of its provisions. This highlights the important factor of reasoned argument: if some other party has been convinced by the 'good' reasons behind a position, and afterwards sticks to this new opinion, this is taken as an indicator for the logic of arguing.

3.7.5 Resources for influence

March and Olsen mean with resources "assets that make it possible to do things or to make others do things" (March/Olsen 1995: 93). These can be money, property, time, information, facilities and equipment, and can be 'owned' by single persons or institutions (March/ Olsen 1995: 94). In the Council context, much of the 'rational' resources for influence rely on voting power and information about the position of other countries. Large member states have more voting

weight and therefore, more influence. In the terms of the logic of appropriateness, resources are allocated by the institution. There can for instance lie authority in the Commission's position and role, even though it has no voting voice after it has presented its proposal. If Norwegian actors accept e.g. the presidency in the Mixed Committee setting as an authority, this can be taken as an indication for the logic of appropriateness. In the national context, references to legal authority and obligations resulting from the 'usual way of dealing with this' indicate the logic of appropriateness[24]. If, on the other hand, smaller actors in the interaction by the power of their argument and the virtue of their knowledge and expertise manage to persuade larger actors to alter their own preferences, this is taken as an indication for the logic or arguing. Argumentation could happen along the line of "if we all agree on principle X, we must agree on derogation Y." Also practical considerations can be subsumed under this kind of argumentation, if the persuader is considered an expert in his or her field. This kind of reason giving is checked for in documents, interviews as well as Parliamentary debates at both levels, the European and the domestic one.

3.7.6 Result of interaction

The perceived result of the interaction is a central indicator for all three logics, because here, the three logics differ fundamentally from each other. Actors driven by the logic of consequence perceive it as a negotiated equilibrium among overlapping interest structures (Putnam 1988: 437). The outcome of the 'deal' is often not optimal for everybody, but satisficing certain objectives. The better the match with initial preferences, the better the outcome, even if it only could be achieved by a long series of tit-for-tat exchanges. If Norwegian civil servants frame the policy result as a 'haggled' compromise between themselves and others, this indicates the logic of consequences. If, on the other hand, they perceive it as a social contract resulting in mutual obligations, consistent with prevalent norms, rules and standard operating procedures, this is taken as an indication for the logic of appropriateness. The logic of arguing, on the other hand, is encountered when there is a certain surprise element to the outcome, a consensus that could not have been anticipated by looking at preference structures and institutional resources alone. Chapter 5 and 6 will go

[24] It is important to note that, ideally, these rules are unquestioned and perceived as part of an institution's and actors identity. Mere adherence because of possible legal sanctions can be part of it, but is not enough to determine normative appropriateness (Elster 2007: 357).

through empirical material addressing the questions which were raised to this point. The remaining paragraphs of this chapter will present how my data was gathered and analysed.

3.8 The selection of case and data – Return Directive 2008/115/EC

In order to understand how the Schengen participation affects Norwegian actors and structures (and vice versa), this thesis employs the qualitative methods of a case study. The assumptions of the three logics of action act as a 'template' compared to the empirical results, structuring and shaping my analysis (Yin 2009: 38). This method offers several advantages, such as the possibility to arrive at strong conceptual validity and gaining insight into causally complex processes (George/Bennett 2005: 19). The Return Directive was chosen because it represents a case of institutional adjustment to the conditions under co-decision *and* a normative discussion in the JHA policy area. Because the analysis included several levels of observation, I gathered data from the national as well as the international context that dealt with the directive. My initial analysis of the EU level rested mainly on Council Mixed Committee minutes. These documents display the Commission proposal in detail. National comments and reservations regarding the directive are noted at the foot of every page. An initial 2005 Commission impact assessment and proposal formed also part of the data. In order to understand the position of the European Parliament, I reviewed the draft proposals of the LIBE-committee, some committee minutes and the final debate before the adoption of directive 2008/115/EC. The trilogue tables used in the informal meetings between Commission, Parliament and Council presidencies (published in Lutz 2011) highlighted the otherwise 'inaccessible' discussions in this negotiation process.

At the domestic level, official government documents like Soria Moria I & II as well as Storting notifications and propositions related to migration policy and Norway's EU were the starting point for my analysis. General indications on Norwegian preferences and reflections on the subject of return and Schengen participation were derived from official notifications to the national Parliament (St. meld. 9 and St. meld 23) as well as some media articles from aftenposten.no. A list of these documents is attached in the annex to this thesis. In general, EU documents as well as Norwegian papers connected to the discussion of the transposition of the Return directive (Parliamentary hearings, committee positions and debates) were easily accessible via the internet. This applies also to many return and migration related UDI reports as well as circulars regarding new rules following from it. Still, documents can only lead us so

far. Although Norwegian government documents are often instructively written, an additional perspective by the people who have participated in writing them makes it easier for an outsider to understand the processes and reasoning going on within institutions. Meeting the people who were actually involved in the process was essential to understand the behavioural side to it. I therefore interviewed Norwegian participants in the negotiations on the Return directive as well as central people in the EU administration.

3.9 Searching and finding the right interview partners

The Return Directive was negotiated in the years of 2005-2008 and transposed into Norwegian law in 2010. I noted, if possible, authors of the documents or contacted the institution in order to find out who could tell me more about the decision and transposition process. In studies of small numbers of cases, random selection can result in stronger bias than intentional selection (King et al. 1994: 124-127). The processes of snowball sampling (which started at different angles, beginning with different people and at different institutions) lead me often to the same people. Nevertheless, obvious time restrictions and some actors being too busy or otherwise unavailable resulted in a sample of 15 relevant actors representing the Commission, the Council secretariat, the Norwegian delegation in Brussels, the European Parliament, the German presidency, JD (immigration & police department), UDI and the Norwegian Parliament (Tansey 2007: 770).

If some members of my target population were too busy to make time for an interview, I resolved to either phone conversations or interviews with close collaborators, for instance the LIBE staff assistant of the Parliamentary rapporteur Manfred Weber. Some people from the Commission's Directorate General (DG) Home as well as the Council secretariat granted me time for conversation. This triangulation greatly enhanced my understanding of the situation (Yin 2009: 70). In the Norwegian domestic realm, interview partners included employees of the department of Justice (including former AID), UDI and a member of Parliament. Some of them were directly involved in both negotiations *and* the coordination of implementation, some of them only in one of these steps. In both contexts, there was hardly any time to talk to every country representative involved. In Brussels, Slovenian and Portuguese representatives unfortunately left my query unanswered, so my analysis did also rely on secondary, interpretative material on the Return directive. Most prominently, this list included the book of Commission representative Fabian Lutz (2011), as well as a reflective report on the

Norwegian Schengen cooperation, authored by Norwegian former JHA counsellor Anne Marie Borgvad (Borgvad 2007, unpublished), articles of German administrators (Franβen de la Cerda 2008) and other political scientists and international observers (Acosta 2009; Ripoll Servent 2010). Naturally, these documents were analysed with special care (who is talking to whom, how and why?) (Kjelstadli 1992: 162). Time restrictions also hindered me to contact all relevant institutions in the Norwegian context (notably, POD, PU and UNE), but since my analysis focuses on transposition only and there was a large amount of written information obtainable on this part of the process, I left it at that.

3.10 Approaching the interview situation

In process tracing research, data collection techniques are not standardized. The method is comparable to detective work, relying on the sometimes failing memory of the researcher or of respondents. This lack of established routine requires special alertness - at every step of the case study, new information or a re-evaluation of findings can be required (Yin 2009: 68, George/ Bennett 2005: 219). The actual "design work" of this case study has therefore continued throughout the research process. (Yin 2009: 40/41). On the basis of the documents and the suggestions by the three theoretical approaches, a loosely structured interview guide (see annex) was developed, but adapted under each conversation to its own dynamic, new relevant information and the special informant qualities of the interview partner. Naturally, the actual questions posed were second-order 'translations' from the actual research questions (Yin 2009: 87). In order to assure concept validity and reliability, most of the interviews were conducted in English, although in some instances Norwegian or German was more appropriate and therefore chosen as a means of communication. Respondents' comments were as far as possible counter-checked with the views of other colleagues involved in Schengen matters as well as representatives of EU or national institutions.

According to Rubin and Rubin (Rubin/ Rubin 2005: 79), it is best to see the interview partners not as subjects, but as partners in research. A certain degree of mutual trust is necessary to establish an informative conversation, so I tried to make the interview partners feeling as 'safe' as possible. Most of the interview situations were marked by an open and friendly, if somewhat initially reserved atmosphere. This is understandable, especially for the people busily involved in EU policy making or currently working with the implementation of the Return directive. In Norway, the subject of return of illegal immigrants had, quite

independently from the Return directive, just undergone a massive media discussion in January/February of 2011, and representatives of Norwegian immigration authorities were still apprehensive of this. When the subject of the Maria Amelie case[25] was set aside, the conversations returned to the questions at hand. The interviews were conducted in two rounds, the first in March, the second in April 2011. Eventual clarification questions were sent via email and (mostly) answered by phone conversations, the transcripts of which were double-checked by the respondents. In general, my interview partners tended not to diverge from the statements they had made in the live encounter, which makes these (longer and recorded) conversations the central source of information on communicative dynamics at hand. To protect the privacy rights of informants, citations to illustrate the analysis are anonymous. This is of special importance because the case is very contemporary (Yin 2009: 73).

3.11 Inner and outer validity of the findings

This study tries to establish a causal connection between human behaviour and changing institutional structures. It is therefore important to elaborate on the notion of causality (or 'inner validity'). Studying a single case makes it difficult to determine the relative causal weight of several variables. But process tracing and the attempt to match three different theory-induced predictions with social reality can indicate certain 'contributing causes' and favourable factors (George/ Bennett 2005: 27). Spurious factors, like for example general international developments in the asylum and migration field (or national events, for that matter) were as far as possible controlled for (see narratives in the following chapters). To not overstate the influence of the European 'Schengen' factor, I have tried my best to include institutional, national and international backgrounds in the analysis (Goetz 2001: 217). This allows for a contextualisation where European influence is but one of several drivers of change of national structures and Norway only one of many countries in the Schengen Mixed Committee context (Goetz 2001: 225). George and Bennett emphasize that within-case comparison can compensate for lack of comparison to other cases (George/ Bennett 2005: 111). But since the single case of the Return directive presents many more possible factors than variables, the results do not allow for universal conclusions (Aus 2009: 174). Norwegian responses to institutional developments in other areas regarding the EU's Justice and Home

[25] Aftenposten 22.1.2011: "EU kan nekte Maria Amelie innreise."

Affairs might differ from my findings. Since I was working with guiding hypothesis on the three logics of behaviour, I did not interpret the data completely freely but matched ideal types and real events, according to different indicators (see table 3.1). In order to keep track of exact formulations and enhance reliability of the data, the main interviews were taped – even if this meant that some things remained unsaid. Transcription and analysis began immediately after the interview was completed, in order to capture the mood of the conversation as well as undertones (Yin 2009: 70). Afterwards, I categorized evoked concepts according to the three theoretical templates (Rubin/ Rubin 2005: 202). The next two chapters present my narratives and analysis of the way Norwegian actors adapted to changes in EU and national policy making, highlighted by the case of the Return Directive.

4 Norwegian Participation at the EU level

This chapter will describe the institutional changes and settings encountered by Norwegian representatives in the negotiations on the Return Directive and their way of approaching them. In order to do this, it presents chronologically the formal and informal venues relevant to decision making. The way in which Norwegians tried to adapt to change in EU policy making is highlighted by focusing on which logic of action dominated the setting and which logic of action Norwegian actors adopted in return. This chapter will show that Norwegians are well-integrated in the Council's Mixed Comittee setting and participate actively in opinion formation. Nevertheless, they are bound by a strong sense of appropriateness when pursuing national objectives. In order to show this, every paragraph will first describe the setting and then match the expected behaviour with empirical findings from documents and interviews. Because Norwegian representatives – like the representatives of most member states - were not direct participants of the decision process in the informal triloges, some parts of the chapter will discuss the behaviour of Commission, Parliament and Council representatives as well, but afterwards return to the task of answering my two research questions.

4.1 Norwegian Actors navigating the Council setting

According to Norwegian JHA and migration counsellors, the Norwegian involvement with the Return Directive began when the Commission presented its proposal in Council (interviews 3, 1). Representatives of national administrations are, according to a logic of consequences, expected to defend current practice in order to avoid costs of adaptation and loss of sovereignty (Hypothesis 1). Generally, the working group setting is a forum for information exchange on each other's policy practice (interview 7). In the case of the return directive, it was a 'reservation taking exercise' against the Commission's formulations: The Commission explained and defended the proposal and member states came with objections or other comments (interview 5, Commission representative). A logic of consequence would therefore expect the Norwegians to act accordingly, to try to maximize their 'profit' by minimizing EU policy impact (hypothesis 1). In order to obtain this goal, they would be expected to gather information instrumentally in order to develop short-term alliances with other member states. In the Soria Moria Statement of 2005, the Norwegian government had stated that it considered a "quick return" of rejected asylum seekers as central to the legitimacy of the institution for asylum Soria Moria I. On the basis of this principle, the

coalition of Labour party (Ap), Socialist Left (SV) and Centre Party (SP) intended to "strengthen the efforts to evict foreigners who are residing illegally in Norway" and "intensify the effort to draw up return agreements with more countries" (Soria Moria I: 75). Norwegian participants in the negotiations confirm that the Norwegian government was generally interested in achieving a better level of European coordination (interview 2). Simultaneously, the government expressed the need for a humane treatment of those residing illegally in the country (Soria Moria I, ibid.). This indicates that Norwegian priorities corresponded on the 'control' side to mainstream Council ones, but that they also included 'rights' elements.

Norwegian ministry representatives as well as the JHA and migration counsellors at the permanent representation in Brussels nevertheless had the clear instruction to avoid a strong mismatch with current Norwegian immigration practice regarding return (interview 7). One of the main reasons given is that the Ministry of Justice and the Police (JD) was about to introduce the new 'utlendingsloven' (UDI 2008b), and feared costs of adaptation.

> "It has been a central principle that we just had introduced a new immigration act and we do think that Norway has very good practices for the return of third country nationals and good legal safeguards for foreigners. So the continuation of the rules we had was a main goal." (interview 11, immigration department JD)

According to a logic of consequences, the principal orientation of the representatives of Norwegian authorities should be to promote the self-interest derived from this position. Examining the data, we can see that when Norway made remarks on the 'control' side, it was usually in relation to practical reservations. One example was the restricted length of the re-entry ban – which used to be unlimited in Norway (Council 2007b: 19; Council 2007d: 8). Also on the practical 'control' side, Norway objected strongly to the two step differentiation between "return decision", and "removal order" (Prop 3 L: 21). Together with Iceland and Switzerland, Norway expressed practical concerns about the scope of the directive and that its own citizens should not fall under the definition "third country national" (Council 2006b: 4). Norway also issued reservations (together with Belgium) on the automatic, compulsory character of the entry ban, "on the grounds of proportionality and compatibility with the Schengen Borders Code" (Lutz 2010: 200, footnote 91). It was equally sceptical towards the idea of a short, limited period of detention. This position resulted from practitioner's experiences with people who had been denied asylum (interview 3). It was strongly suspected that these individuals, once released, would abscond instead of returning home (Council

2006b: 3). Another point was the suspected increase in administrative workload by handing out written confirmation of delays in the return process (Council 2006a: 7; Council 2007d: 26). The Norwegian position therefore, along with other Council member states, proves a strong interest in keeping its own measures. On a few occasions, Norwegians also issued reservations in accordance with human rights principles, for instance by supporting the Finnish presidency in matching the proposal's article 10 on removal safeguards with the guidelines put out by the Council of Europe (Council 2006a: 4).

According to a logic of consequences, the alliances in which rationally inclined Norwegians engaged should be instrumental and short-term. In issues of national concern, Norway cooperated with other countries, and according to respondents, these alliances were not fixed (interview 2). The main alliance was member states against Commission (interviews 3, 7). There were, naturally, countries which were much more exposed to irregular border crossings, like Spain, Malta, Greece and Italy. These tended to be more sceptical towards rights-oriented elements like e.g. the possibility of providing free legal aid (interviews 3, 2). But according to several people involved in the process, the reservation towards the protective elements (e.g. possibilities for appeals) also came from countries that actively returned a lot of people, for instance the Netherlands, Belgium and Germany (interview 4, German representative). These had, in their own opinion, procedural and substantive safeguards that worked just fine and were not interested in a directive that introduced extra protective elements (Council 2007a)[26]. Norway was, according to its interests, always part of a majority or large minority (interviews 3, 2). This indicates, in practical and 'control' matters, shifting cooperation along interest structures and therefore a prevalence of the logic of consequences.

Regarding resources, the logic of consequences presupposes a rational information seeking behaviour. The collected information could then be used in order to form strategic alliances. In the Working group on Migration and Expulsion, Norway was represented in the same way as the member states: with policy experts from the capital (in this case, coming from POD and AID's immigration department) as well as Brussels-based counsellors. In order to support the coordination of the growing policy field, in 2004, the Norwegian representation had introduced the position of a counsellor for migration issues. At the permanent representation, a total of three officials (the two others being entrusted with JHA and police affairs) were responsible for keeping up the communication with Oslo. The JHA and migration counsellors

[26] Compare for instance also to the note from the Dutch delegation (Council 2006d).

– as all other representatives in the Norwegian permanent representation - were expected to be actively involved in information gathering (interview former migration counsellor 3).

In order to acquire as much information on current debates and the priorities of other countries as possible, all Brussels-based representatives were expected to directly approach colleagues from the member states to find out more about policy preferences and developments. This information gathering indicates rational collection of means to achieve ends. In the same line of thought, they describe how they meticulously went through the current EU migration programmes (Tampere, Hague) in order to understand the underlying ways of thinking in the Commission:

> "That's the key to working in Brussels, to understand the Commission. Because if you understand how they think and the logic of their thinking, then you can to a large degree predict how they are going to reason when they go into the subjects." (interview 3, Norwegian migration counsellor)

Working at the representation also involved establishing direct contacts with EU institutions, most importantly with the Commission:

> "People of the Commission, there are so many things they do not say in the meetings, so you try to small talk with them and ask questions so you get a better understanding of what they really think." (interview 1, JHA counsellor)

This indicates that formal contacts with the institutions and their representatives had to be supplemented by informal personal contacts at all levels. The Norwegians were conscious of this fact and went about it systematically. Contacts by Norwegian representatives into Parliament were in this period still sporadic (interview 1). All of this indicates a rational and functional orientation towards being well-informed and equipped with the necessary information before entering the actual meetings in the Mixed Committee. The information exchange with the domestic institutions was also high: contacts with the ministry of Justice and AID in Oslo were frequent, via daily email contacts and updates. When meetings at working group level were scheduled, the ministries JD and AID (and, on fewer occasions, the directorate of immigration, UDI) would send policy experts to Brussels, where coordination meetings before and after the actual working group meeting would take place (interviews 3, 7). Although the Ministry of Foreign Affairs was the employer of Brussel-based JHA- and

migration counsellors, most of their reporting and communication was directed towards the Norwegian justice and migration authorities[27].

According to the logic of consequence, the constraints on Norwegian argumentation and action should be perceived as rules of the game, without 'moral' impact on the personal identities of the people exposed to the EU context. The logic of appropriateness, on the other hand, would expect a certain internalization of prevalent norms. In the case of the Council, this should be the informal norms and ways of doing things established by years of European cooperation. The general expectation towards the representatives of associated states would be to comply with the informal rules about proper way of argumentation and consensus-oriented negotiation in the Council setting.

All respondents recount the very open and cooperative atmosphere within the EU institutions (interviews 3, 1, 2, 11). The attitude of EU member states and the Commission towards the Norwegians is described as positive and polite, but the counsellors who were there before EU enlargement acknowledged that the sudden presence of 10 additional member states at the table did make a difference (interview 3). From the standpoint of the Commission and Council secretariat, the associated states are considered the few among the many. As long as they did not step outside of their 'expected' roles and came with comments that were considered 'unreasonable', they were accepted as equal partners in dialogue (interviews 6, 5). Norwegians were perceived as active participants under the whole negotiations of the Return Directive (interview 6, Council secretariat). According to Norwegian representatives, they were contacted by and discussed things with other member states in advance of meetings, probing possible multilateral alliances.

> "So you would get these mini-negotiations ahead of meetings which could be on very minor, but also bigger points. And as a Norwegian, we would always have to remember that the only weight we could carry was the weight of the argument and certainly not the weight of the body count." (interview 3)

This indicates that Norwegian actors are conscious about their role as Schengen associates and representatives of a small state. Especially the Norwegian counsellors based in Brussels

[27] This is due to the fact that the law governing the Norwegian foreign service (utenriksloven) and ist guidelines (utenriksinstruksen) define special representatives as a category separate from other categories of staff in its diplomatic missions (diplomats; administrative envoys, and other personnel). It is recognised that these special representatives take instructions from both their line ministries and from the ministry of foreign affairs (through the ambassador or head of mission) (UD 2002).

perceived an expectation to behave according to the 'unspoken' diplomatic rules of politeness and patience. They were themselves very conscious of their role as 'associates' and aimed to be extremely well-prepared (interview 3). Norwegian comments were appreciated, but especially so if they were constructive and to-the-point (interview 1, confirmed by 3, 2 and Commission/ Council secretariat interview 5, 6). Their inclination towards couching their language in normative terms understandable for the interaction partner indicates a strong frame of 'appropriateness' to Norwegian strategic bargaining behaviour. Another expectation derived from the perspective of appropriateness would be that Norwegians should be inclined to ally themselves with cultural neighbours like for instance Sweden. One occasion where Norway stood together with its Nordic neighbours was when Norway could not accept a derogation of the principle of non-refoulement. Here it opposed, together with Sweden, initiatives by bordering Southern states to dilute this element of the directive. The reason given for this was Norway's general standing in human rights issues (interview 3). This can be interpreted in terms of the logic of appropriateness: the Norwegian role as a defender of human rights would not allow a behaviour supporting these kinds of dilution.

According to the logic of arguing, the exchange of truth-seeking arguments implies a common lifeworld – understood as 'common context-forming horizon' (Habermas 1984: 337) and the normative re-evaluation of validity claims based on common norms, like for instance the norm of protecting European borders ('control') or vulnerable groups ('rights'). There were special consultations with Scandinavian countries ahead of working group meetings, where Norwegian ministry officials invited their colleagues to the representation in Brussels in order to exchange thoughts and experiences (interview 7). The subject of this meeting series was the one-step / two- step return decision procedure:

> "I had a contact in Sweden and I suggested that the Nordic countries should have common preparatory meetings in 2006. There were three Nordic meetings under Norwegian leadership in our permanent representation, in the mornings before the meetings of Migration and Expulsion. And there, we had an exchange of views. This was not to coordinate a Nordic approach, but to exchange opinions. In the end, we actually achieved coordination. And that was very useful for us." (interview 7, JD Police department)

As a result of this interaction, the Finnish delegates changed views. The emphasis on the 'usefulness' of this argumentative process indicate that the outcome of this meeting was based

mainly on practical arguments. This indicates rather a logic of consequence than of appropriateness. According to the data, in the context of the Return directive, most, if not all, member states in the working group context had similar sets of values: The underlying norm interpretation was to prevent misuse of immigration and asylum systems, and to reduce illegal immigration (interviews 3, 6). This positioned the Norwegians in the mainstream of Council thinking.

4.2 The year 2007: Different logics at action in different settings

The name of the SCIFA committee indicates its function: Strategic Committee on Immigration, Frontiers and Asylum. It is in this forum that alliances sounded out at the working group level should induce persuasive action into one or the other direction. Norwegians participated with representatives from the Immigration and Police departments (interviews 7, 13). Participants at these meetings come from the higher level of national administration (director general or directly under) and have more room for manoeuver than the working group participants (interview 2). Nevertheless, witnesses recount that SCIFA was rather undecided in the case of this directive (interviews 6, 13). That there was no more movement in the SCIFA context indicates that the positions of countries against the Commission proposal had hardened and persuasive compromise attempts by presidencies like Finland (second half of 2006) were unsuccessful. One of the Norwegian representatives describes the situation as a constant back and forth between the levels of Council:

> "And that went on for quite some time, because it was going from the working groups to SCIFA, from SCIFA to working group. And then, as time went by, and the Parliament started to get impatient, it was clear that the Council would have to move and quit playing ping-pong between SCIFA and working groups." (interview 3)

When the Parliament took the initiative to contact the (then German) presidency, the two institutions had already developed into opposite directions (interviews 12, 4). As it became clear how far the positions of the two co-legislators were from each other, the Commission, the following Portuguese presidency and the rapporteur jointly began to sketch possible ways of meeting each other (interview 12). According to the logic of arguing, truth seeking and openness for argumentation are connected to a situation where roles and norms of interaction are contested (Risse 2000). It also assumes that a common lifeworld is a precondition for an exchange of reasoned arguments. In the case of the Return Directive, participants of the new

and informal meetings stress that they soon succeeded to create an atmosphere of mutual understanding (interviews 6, 5, 12). This common frame of reference was facilitated by the fact that basic conceptions of the problem to be approached were similar: The EPP and ALDE agreed with the underlying idea (or 'validity claim') of the Commission proposal that inconsistent return policies in Europe would lead to unwanted spillover effects in illegal immigration (interview 12). Since there was only one representative of the presidency, a member of the Council secretariat, a Commission representative with one staff assistant and the Parliamentary rapporteur with his staff assistant involved in this period of argumentative re-definition, the member states including the associated states were, as a group, only indirectly linked with this decisive moment. The sudden progress in the Fall of 2007 indicates that the first period of the informal trilogues was marked by arguing and mutual agreement.

4.3 Spring of 2008: Informal staff-level negotiations

After the grounds for this new negotiating forum were laid, a new round of negotiation could start. The meetings at technical level took place in embassies or at the Parliament (interview 12). All participants and close observers of the informal trilogue meetings stress the importance of trust and reciprocity. Frequent contacts enabled the bureaucrats to develop a common code of communication and made agreement possible (interview 6, Lutz 2010: 63). According to both the logic of consequence and arguing, the presence of a mediator or 'honest broker' can facilitate cooperative behaviour in negotiations. Both the presidency and the rapporteurs stood for the positions of their own institutions. The Commission acted as a "secretaire", lending its legal expertise to the negotiating parties, all the while interested in bringing the directive through (interviews 6, 5). According to a logic of arguing, a cooperative spirit and open atmosphere surrounding argumentation can result in sudden, suprising outcomes. But, according to interview partners, the time pressure and political sensibility of the subject let the conversations often circle around the 'nitty gritty', technical language issues (interview 6). The results of the trilogue were, in Council, presented by the Presidency, with a clear margin on what Parliament was not going to accept (interview 3). Within EP, there were frequent meetings of the shadow rapporteurs. Weber also made sure to inform relevant NGOs in debriefing meetings (interview 12).

The Norwegian counsellors, along with the member states, experienced this bargaining process through indirect presidency reports (interviews 3, 2, 7). The Parliamentary rapporteur

Manfred Weber faced strong opposition by some shadow rapporteurs in the LIBE committee. But, along with his staff assistant, he apparently managed to convince the member states that he represented the whole scope of opinion in Parliament:

> "He was obviously doing his rapporteur work well, so the committee was always standing behind Weber. When the Council met Weber, they knew, here's the Parliament. A person like this gets to have an enormous amount of power." (interview 3)

This indicates that, as soon as the legal texts had to be agreed upon, that participants to the discussion returned to the logic of - albeit cooperative – consequentiality. Norwegians were, by virtue of their representation in Council, indirectly involved in this.

4.4 Bargaining among JHA Counsellors: Cooperation under pressure

Norway, participated actively in the Council groups, represented by two JHA and migration counsellors in the informal JHA counsellor's group. In this intense negotiation period, the Brussel-based counsellors would get a central role since they had participated at all levels of Council meetings: working group, SCIFA and COREPER. While at the working group level, they had taken the floor and directly contributed to the discussion, they acted as information provider and advisors to the permanent representatives (ambassador) at the COREPER meetings (interviews 3, 1). Since most of the information exchange at working group level was of fairly technical character, they themselves perceived their own 'value added' more in following the issue through the stages and sitting with the overview on the dynamics of discussion at all levels (interview 1, former JHA counsellor).

According to the expected scope conditions for cooperative bargaining, the propensity to engage in more constructive kinds of interaction rises with the scope of the issue, the interaction intensity of the group as well as the density of informal norms. Within the Council structure, these conditions are more prevalent at higher levels (Hayes-Renshaw/ Wallace 2006, Naurin 2010, Lewis 2010).

> "At the ambassador's level, you start to get considerations of: if we do this and this area, they might oppose us in that other area, which is also of importance to us. So you get sort of lateral considerations to a much larger extent. And this kind of political consideration also opens up for more compromises." (interview 3)

In addition, the external negotiating with Parliament raised the pressure for achieving consensus within Council: “It would get much more complicated for one member state to act difficult. Because you would be driving the whole group into a difficult situation.” (interview 3) This indicates that the ‘hard bargaining’ logic of consequences was abandoned by conceding to the general EU rule of consensus (appropriateness). The Norwegian participants recount that, also in this phase of the process, the prevalent ‘spirit’ in Council was of “making everybody as happy as possible” (interview 3). The presidency, although conscious of the relative voting power of each country, would try to accommodate the views of smaller member states, including Norway. Voting was rarely observable, but, according to Norwegian representatives, the introduction of co-decision and qualified majority voting had changed the tone (interview 3). After the introduction of qualified majority voting, it was more about building coalitions, outmanoeuvring others, “until you are put into a corner alone, and then you’re out.” (interviews 3, 1, 2) Anticipation of possible developments was therefore a crucial priority for Norwegian migration and JHA counsellors. If strong majorities of opinion would emerge, the countries in the minority would have to have very convincing arguments in order to not lose their voice (interview 3). The JHA counsellors had the mission to facilitate communication between the capitals. As opposed to SCIFA participation, the JHA meetings were conducted with people based in Brussels, “used to the compromise making business (interview 6)” and in direct connection with the COREPER ambassador’s level. High meeting frequency, informal setting and common experience characterized the meetings of the JHA counsellors group, linking COREPER and home administrations by keeping everybody updated. According to several interviews, this forum cleared the way for important steps forward.

> “The friendly atmosphere the JHA counsellors maintain among themselves plus their experience during the COREPER negotiations etc. give them the tools in order to get to a compromise. Of course, they always wait for the instructions from their capitals. But they are sometimes more proactive, more prone to try to convince their capitals.” (interview 6, Council secretariat)

Norwegian participants of the JHA counsellor’s group confirmed this view (interviews 3, 2).

4.5 Turning to instructions from home: Appropriate procedures

The JHA counsellors never act on their own accord, but based on instructions from the domestic ministries. In the Norwegian case, these JHA counsellors took precautions in order to ensure that these positions were "open for compromise" (interviews 3, 2). Since they were the ones knowing the subject from 'both sides', being informed about the positions of the other countries in Brussels, they were actively persuading into two different directions:

> "We would have to anticipate the big discussions and then we would make a memorandum to the minister stating that on this and this point, the discussion goes in this and this direction and the most likely outcome is this and that. And we would do that point after point and then we would ask for a mandate from the minister to go for these and these solutions." (interview 3)

At the home level, general developments of the Schengen association are usually discussed in a 'spesialutvalg' among high-ranking civil servants of JD, UD, UDI, POD and UD, the customs authorities, the prime minister's office (interview 3, 15). This group corresponds to the special coordination group entrusted with strategic discussion of EEA matters (UD 2004: 4). The Norwegian administration of EU and Schengen matters is therefore, formally, designed to accommodate a high degree of coordination and informational exchange between different branches of government. But in 'clear' immigration cases, the migration authorities draft the Schengen rammenotat with a proposal for a Norwegian position themselves, pointing out problems, challenges and what Norwegian position should be. If something is politically difficult, civil servants within the administration "play it up" to the political level before the issue goes to the Schengen spesialutvalg (interview 15). In contentious issues, the question can be forwarded to 'koordineringsutvalget' for Justice and Interior matters between JD & UD, and – if no agreements ensues – further forwarded to the political masters. "But it is not always that they are in the loop. If the positions are clear or have been cleared politically, it is not necessary to go through this structure" (interview 15). It also depended on what kind of detail the negotiations were dealing with. 'Rammenotater' were usually concerned with broader perspectives (interview 3). The actual material for the SCIFA and, later, JHA meetings came therefore often directly from practitioners and the minister's office at home:

> "Before the SCIFA meetings, a draft outline for an instruction was prepared, based on the suggestions from the internal working group. The outline was

> distributed to the ministries, JD and UD. Following feedback from the other ministries, the instruction was finalized. If it was considered necessary, for instance if there were some political issues, the proposed instruction was submitted to the Ministers cabinet. The Norwegian delegation to the SCIFA meetings then acted on the basis of these instructions. They were more or less precise, depending on the nature of the issue." (interview 13, involved in the SCIFA negotiations)

Once with instructions, Norwegian representatives in the JHA group could start acting. In order to strike deals with other member states, they started looking for short term alliances. Since Norway was usually part of the majority opinion or part of a large minority, they would generally not be leading a group (interviews 3, 2, 1). In the issue of detention period, Norway acted for instance in alliance with Germany and other countries which took the lead (interview 3). The main impulses for discussion within Council came from the trilogue meetings. The back and forth in communication was time consuming (interview 12). Also from the outside, the process was described as a slow, patient bargaining process:

> "All the three parties involved, Council, Commission and Parliament, knew that they had to give something in order to get a solution. And the advancement towards a solution went in a very slow and circular manner. So it was that kind of thing. Not a breakthrough, but like a fruit that had matured." (interview 3)

This perception of the result of the interaction again indicates the dominance of the logic of consequence. The instructions towards the end of the process regarding the Return Directive came from EU-coordinators in Oslo and their clearance with the secretary general and the minister of justice (interview 3). In the case of the Return Directive, many specific instructions to representatives in Brussels were therefore cleared without involving the Schengen 'spesialutvalg' (interview 3). This indicates that many possible tensions between 'control' and 'rights' elements of the directive could be resolved internally (interview 15). It is therefore relevant to see what kind of internal consultation happened *within* the ministry or with the underlying departments.

4.6 Opinion formation among civil servants: Indications for arguing

Since the Return Directive would touch upon the practical realm of almost all of Norway's immigration related institutions, the need for coordination was seen very early. In 2006, AID had entrusted a member of the Police department with coordination of the preparations for working group meetings. This soon happened within an informal group involving several institutions:

> "It was my opinion that in this preparatory group, we should consider each other's arguments and try to get a common opinion. There are some participants who are nominally subordinated to the ministry of Justice, coming from POD and UDI. But in my opinion, a preparatory group like this has its value when there is a free flow of information and a comfortable group environment. In this way everybody can more easily come with the points they want to emphasize." (interview 7)

This indicates a basic orientation towards truth seeking without power play. In the negotiations on the Return Directive, e.g. UDI was involved by providing know-how in this informal working group. On several occasions in 2008, representatives of UDI joined their colleagues from the Police directorate on their trips to Brussels, although the information flow got thinner when the JHA counselors started meeting (interview B). The informal working group, which continued to exist during the course of 2009, 2010 and the start of 2011, was, also from the side of 'subordinates' in UDI, considered a forum giving possibilities for informal exchange of information and opinions (interview 8, UDI):

> "If I was sending an email to JD, this email would have to 'go in line' This means that the director would get a copy before it leaves the house. But if you have a working group like that, you can exchange views. I still act as a representative, but am a bit more free." (interview 8).

This indicates that at least some of the Norwegian positions were derived from a logic of arguing. But the general inclination was, on the other hand to send things 'in line', following standard operating procedures of inner- and inter-ministerial consultation.

4.7 April/ May 2008: Last phase of negotiations – Political bargains

After the discussions at the technical level in the early months of 2008, the results were passed on to the high official (SCIFA) and political level (COREPER, ministers) to resolve the politically contentious elements of the directive like the length of the detention period and compulsory free legal aid. In the final phase leading up to the European Council, the small country of Slovenia acquired an important role. Charged with chairing Council meetings in the first half of 2008, and being the first of the new EU member states to occupy this important post, it was eager to get things accomplished (interviews 12, 5). The Slovenian interior minister made it his personal priority to bring the directive through and travelled back and forth between capitals in order to participate in trilogue meetings in spring 2008 (interviews 6, 12). The importance of mutual trust (or the lack thereof) is illustrated by one problem: Some members of Council demanded a last minute change in the deal on the article on legal aid, the modification of a 'shall' into a 'may' clause. EP reacted strongly, and by virtue of the moderating efforts of the Slovenian presidency, the issue was resolved by giving some concessions to the member states (transposition delay of one year). Commission representative Lutz attributed this 'hiccup' to the fact that actors had changed because the political level (Commissioner, pres. of the LIBE committee, Interior minister) had taken over the negotiations:

> "This led to a situation in which the established informal communication channels could not work as efficiently as they used to do and in which 'bureaucratic diseases' (such as delays in communication, loss of information, (…)) could show their negative impact" (Lutz 2010: 63).

The common spirit of trust, an indicator for a strong frame of 'appropriateness' for the cooperative bargaining, was missing in this instance and the purely interest driven amendments by the higher 'political' Council level created sudden, new friction between the institutions.

4.8 June 2008: Debate in Parliament – Reluctant adoption

According to theory, the European Parliament should be the place of deliberation, where directly elected representatives of EU member states publicly discuss legislation. Although according to our approach all three kinds of logics (appropriateness, consequence and

arguing) should also be present in a debate in Parliament, ideally, the better argument is expected to count more than the fulfilment of certain roles or tit-for-tat policy deals. The actual discussion revealed a deep rift between conservative EPP, liberal ALDE party group representatives and Socialist/Green Parlamentarians. Members of the Parliament were also divided within their own groups and were voting separately (interview 12). A last minute persuasion of only a few voters could have meant the end for the agreed 'first reading' text. The dominant coalition (conservative/liberal) therefore stressed the length and tediousness of the Council discussions as well as the complicated process in the trialogue process (statement rapporteur Weber).

The more left-wing party groups, headed by PSE and Greens, generally criticized the restrictiveness of measures and the lack of real progress in human rights respects (Claudio Fava, PSE in Lutz 2010: 421). In the final debate in Parliament, the rapporteur recounted the difficulties of the negotiations and pleaded his colleagues to "show ourselves capable of acting" (Weber, EPP in Lutz 2010: 413). The shadow rapporteur, Jeanine Hennis-Plaesschaeert (ALDE), added in her own statement that the directive also introduced protective measures: "the compromise package puts in rules where none exist at present" (Lutz 2010: 415). Another important argument for the more pragmatic wing of Parliament was the 'exemplary' (in the sense of precedence setting) character this directive could have as the first example of co-decision in migration matters. Pointing to the same fact, left-wing party groups asked for a symbolic 'no' to the current state of the directive, in order to set an example and lift its minimum standards to a more humane level (Moreno Sanchez, PSE, Lutz 2010: 431).

Some exceptions in the PSE wing (Wolfgang Kreissl-Doerfler) reminded the assembly of the fact that, if some of the larger member states had gotten their will, there would be no EU directive at all. He therefore recommended retreating from opposition in order to help "the people who have to work in this area and those who are stuck in the countries that do not have any guidelines" (Lutz 2010: 434). The major argument of the European left, namely that this Directive could be used to 'water down' currently existing more favourable standards in the member states (Inger Selstrom, PSE, Lutz 2010: 431), did not resonate with the 'pragmatic' fraction of Parliament. The directive was adopted on June 18th with the final record of 369 votes to 197, with 106 abstentions. This indicates that the 'pragmatic' Parliamentarians were able to defend the trilogue compromise. They did so by referring to the difficult bargain and

the loss a failure of this compromise could entail. This indicates a rational inclination towards satisficing, not optimizing the outcome of negotiation. Norwegians, as non-members, were not part of this final debate.

4.9 Final analysis: A logic of 'consequential appropriateness'

Research question 1 was how Norwegian actors adapt to institutional change in EU Schengen policy making. The data presented above shows that Norwegian actors navigate the EU setting by relying on a combination or sequence of logics. The 'hard' logic of consequences with its focus on practical reservations was dominant in the first part of the negotiations, especially in the working group setting, when member states stood against the Commission ('hard' bargaining/ logic of consequences). Norwegian representatives were well adapted to this process of stock-taking, participated actively and used information instrumentally. Due to their role as a small state, however, they lacked bargaining resources and concentrated on providing expertise and practical know-how. Norwegians also cooperated with Nordic neighbours like Sweden and Finland, especially when they were conscious of their role as a nation with certain human rights obligations (logic of appropriateness, hypothesis 3). They were actively integrated into all levels of discussions, but often chose to join alliances instead of creating their own persuasive movement. One notable exemption to this rule was the positioning among Nordic colleagues in matters of the one-step-two-step procedure (logic of arguing, hypothesis 5).

Looking at the EU level, we can conclude that the different negotiation settings did lead to different patterns of negotiation behaviour. The informal trilogue was the opportunity to discuss new ways of approaching the matter and to restructure the interaction between institutions (logic of arguing). The intense final phase of negotiation was still marked by a mutual spirit of trust, but high pressure and relatively hard positions created a 'negotiated equilibrium' ('soft' logic of consequence), not a reasoned consensus marked by surprising outcomes or preference changes. Since Norwegians were generally in favour of more European coordination, their preferences more or less matched the outcome of proceedings. All the while, Norwegian participants - especially the Brussel-based counsellors - were conscious of their role as a small, associated state and couched their arguments in ways acceptable and reasonable to the Commission and other member states (logic of appropriateness). Due to the new decision rules applying in the case of the Return directive,

Norwegians – like other member states - were excluded from the informal trilogue forums where the logic of arguing prevailed. They responded by adapting to the general spirit of cooperative bargaining within the JHA group. From a Norwegian point of view, the central role in this decision making process was the brokerage by the Brussel-based JHA and migration counsellors, who were involved at every stage of the decision making. By following the standard 'clearing' procedures within the ministry of Justice and the Police, they were able to create room for negotiation (Logic of appropriateness). The next chapter will highlight the developments at the domestic level. We will see how the Norwegian authorities reacted to the directive's content and highlight the most important steps of transposition of 2008/115/EC by following the three logics.

5 Transposing the Directive into Norwegian Law

This part of the analysis addresses the Norwegian institutional context in which the Return Directive was dealt with. Following a loosely chronological order, the first part of the chapter will outline general developments leading to a strong government focus on return issues. In a second step, it addresses the question of how Norwegian civil servants handled the transposition of the directive into domestic law. The third part looks at the final debate in Parliament before the directive was adopted. Congruent to the previous chapter, I will in each paragraph first sketch the developments in the relevant institutional settings. Then, actor's responses to changes induced by the Return Directive are highlighted by matching them with the expectations derived from the three logics. The general finding is that deliberation, arguing and persuasion happened, but mainly in forums not easily accessed by the public. In order to accomplish transposition, actors involved in the process generally displayed a logic of appropriateness by employing already existing legal provisions and practices as well as international standards. The general inclination to comply with EU law as well as a high congruency of Norwegian laws with its normative content, were conducive to on-time transposition. Elements of the directive which still remain unimplemented in early 2011 were, at the time of writing, discussed in European level forums, in a mutual exchange between member state, Non-governmental organisations and Commission representatives.

5.1 2008-2009: Rises in asylum claims – Politically motivated action

This paragraph presents what kind of policy priorities Norwegian authorities displayed at the time the Return Directive was about to be transposed. According to a logic of consequences, interests of the national government and administration – like winning voter support as well as cost efficient administration – would be the dominant determinant of behavior. Adaptation within the responsible institutions should happen according to means-ends analysis and, if conflicts emerge, by bargaining behavior between different stakeholders. Conflict of interests could for instance emerge within the government coalition or between the rights-provisions of the coming Return Directive and some 'control' or practical aspects of national administration.

In the time following the negotiations on the Return Directive, Norway had experienced a period of rises in asylum claims. While in a general European context, the numbers of asylum

applications lay relatively stable around a total number of 300.000, with a tendency to decrease after 2009 (UNHCR 2011: 2), Norwegian administration was faced with a sudden surge in numbers of applications, especially from Iraq and Afghanistan. In 2007, the asylum applications lodged in Norway lay around 6.500. In 2008 and 2009, there were over 14.400 and 17.200, respectively (SSB 2010: table 94). This meant a major challenge to the Norwegian administration of migration, especially UDI and the Police (Storberget 2009: 1). National Parliamentary elections were approaching in September 2009. In the run-up to these elections, the Ministry of Work and Intergration (AID) had presented 13 measures to reduce numbers of asylum seekers without actual need for protection (AID pressemelding 03.09.2008).

Contemplating on the question why suddenly so many more asylum applicants immigrants chose Norway as a destination for their claims, the government named possible factors like "wrong impressions" of Norway being comparatively liberal and with a high demand for workforce (St. meld. 9: 34). In general, the Norwegian government did not consider Norwegian asylum measures to be very different from measures in the UK, Denmark, Sweden and the Netherlands. (St. meld 9: 21). According to Norwegian authorities and the UNHCR, Sweden's readmission agreement with Iraq might have led to a spillover of asylum applications to Norway (ibid.; UNHCR 2011: 9).

Shortly after his re-election, the minister subsequently linked the enforcement of return decisions to a more "humane asylum policy" (Storberget 2009: 2). JD's interest in a more 'focused' implementation regarding return was also perceived by civil servants in the immigration administration (interview 8, UDI). 'Harmonization' of Norwegian measures with other EU country's policies were presented as an important possibility to avoid spillover effects (AID ibid.). Since 2008, returns in accordance with Dublin II had been enforced on a greater scale (ibid.). In 2007, 'utvisninger' (in the terms of the Return Directive, 'return with entry ban') for the breaching of the Immigation Code had counted 683, in 2008 they summed up to 805, in 2009, ca. 1.500, in 2010, more than 2.100 (UDI 2010). The numbers for implemented forced return procedures rose from 3.300 in 2009 to 4.600 in 2010 (UDI 2010: 1). Due to the specifically sharp rise in unaccompanied minors seeking asylum in Norway,

UDI was also considering the possibility of sending minors from Afghanistan back to so-called reintegration centres in for instance Kabul (Dagsavisen 2009)[28].

5.2 Government Goals - Connecting to European migration policy

In its "White paper on Norwegian refugee and migration policy in a European perspective" of March 2010, the Norwegian government attached great significance to the fact that the EU had decided upon a harmonizing directive on common standards and procedures for the return of third country nationals. This directive was perceived to assure a "dignified" (verdig) and "lawful" (rettssikker) "ending" (avslutning) to the illegal stay of a third country national (St. meld 9: 46). That the directive did not set out more than (minimum standards to protect human rights and vulnerable persons was acknowledged. But in the eyes of the Norwegian government, this harmonizing set of rules for return could level out the large differences in standards and procedures that existed in Europe at the time: "persons without legal stay will get a better protection by this law than they had before" (St. meld 9: 47). This corresponds to the Commission's argumentation that the Return Directive addresses both sides, 'control' and 'rights' and that a leveling of European measures would result in better protection of illegally staying individuals. Norway's perception of the function of return is therefore comparable to the mainstream thinking among member states that a credible return policy serves as a deterrent for illegal migration (interview 5).

The official legislative process in Norway began with the announcement of the upcoming transposition of the Return Directive in Parliament. In his report on important EU and EEA subjects of 23 and 24 October 2008, Norway's Foreign Minister Jonas Gahr Støre accounted for several Schengen relevant developments in 2008, one of them the Return Directive (Storting 2008: 236)[29]. Only few speakers in Parliament reacted to the subject of EU immigration policy and requested more information about it (e.g. Dagfinn Høybråten, KrF, Storting 2008: 292). Some ascertained that a more effective asylum policy (including shorter periods of processing and 'good return procedures') would result from a more co-ordinated return approach in Europe (Anne Margrethe Larsen, V, Storting 2008: 295). Otherwise the

[28] In this article, these 'control' oriented reactions of the governing coalition were attributed to the pressure issued by the immigration sceptic Norway's Progress Party, the second largest fraction in the Norwegian Parliament.

[29] The others mentioned being France's initiative to annual meetings on asylum and immigration, the upcoming electronic enhancement of SIS II, as well as the Prüm convention.

question of the Return Directive was not really debated at this point[30]. One other Christian People's Party (KrF)-representative briefly mentioned questions of return, but in connection with pleading for the possibility of amnesty for those who have been living illegally in Norway for a long time: "These people are practically unreturnable" (Bjørg Tørresdal Storting 2008: 302 f.). The notable exception making the Return Directive a prominent subject at this point was FrP-representative Ib Thomsen, who "would have liked the Foreign Minister to mention that the EU realizes more and more of the Progress Party's immigration policy, and that the red-green government parties are not synchronized with Europe." (Storting 2008: 300). He labelled the government's policy towards immigration 'snillistisk' ('do-goodish') and 'naïve' and claimed that the Return Directive's content "sounded almost exactly like the Progress Party's proposition for a new utlendingslov." (ibid.). Thomsen specifically referred to the 'fact' that the new Return Directive opens for "18 months detention of asylum seekers" and that it legitimizes the use of prison facilities if closed asylum centres are unavailable[31]. The overall opinion of the Norwegian government was, however, that the Return Directive brought a good opportunity to adjust Norwegian practice to European developments, from the 'control' side and on the 'rights' side (member of Parliament, interview 14). The above indicates that the Norwegian government was inclined to implement the Return Directive and that civil servants were encouraged to comply with this priority. In order to analyze how civil servants reacted to the coming Return Directive, the next part of the chapter looks at challenges posed by the transposition. The following section will describe the institutional conditions before the implementation of the Return Directive.

5.3 2008: Conditions before the transposition of 2008/115/EC

Even before the official announcement of the forthcoming transposition of directive 2008/115/EC, the Norwegian Directorate of Immigration (UDI) in the summer of 2008 commissioned a report about forced return measures in several other European countries (France, Sweden, Poland), comparing their return policies (with a special focus on entry bans and SIS registration) with the Norwegian ones. The main findings of this report, conducted between September 2008 and March 2009, were that Norway had:

[30] The overshadowing EU/EEA subjects that day were: Iceland and financial crisis, EU's Services in the Internal Market Directive 2006/123/EF and the relationship between Russia and Georgia.
[31] Whether Thomsen intended the confusion of 'asylum seekers' and the concept of an 'illegally staying third-country national', is unclear.

1) a rather centralized administration of immigration and return, which could indicate uniformity of processing but also a lack of involvement of heterogeneous societal actors (like general administrative courts, civil actors, NGOs)

2) a law practice that distinguished between "bortvisning" (rejection or return without re-entry ban) and "utvisning" (expulsion and return with re-entry ban), a practice which would have to be changed in order to comply with the Return Directive (the specific Norwegian practice in deciding on entry bans is described at length in Econ Pöyry 2009: 21 f.)

3) Norway lacked a maximum time period for detention, a measure specifically asked for in the directive

4) the practice of legalization and amnesty for illegal immigrants was not as developed in Norway as in other European countries. The same accounted for voluntary return assistance. (Econ Pöyry 2009: 2f.)

Other general features of return administration before the Return Directive can be described as follows: Individuals who did not have a permit to live permanently in Norway were asked to leave the country voluntarily. If they did not comply, the police could, according to the Immigration Act, ensure that they left the country and, if necessary, force them to do so. Entry bans with a minimum of two years were an administrative option, not an obligation. Forced return procedures were carried out, but considered very costly, so voluntary return was already then regarded as a preferable and more humane measure (Prop 3L: 27). The International Organisation for Migration (IOM) cooperated with the Norwegian government in order to promote and carry out the voluntary return of rejected asylum applicants (ibid.). Up to January 2005, foreigners applying for asylum had a general right to judicial assistance. This was replaced by a consultative arrangement involving NOAS, the Norwegian Organisation for Asylum Seekers (NOU 2010: 65).

The following part of the chapter is concerned with actor's and institution's responses to change. If the civil servants entrusted with implementing the Return Directive in the Norwegian context would be acting according to a logic of consequence, civil servants would be expected to calculate, negotiate and adapt domestic measures to EU demands as swiftly and effectively as possible. If they acted according to the logic of appropriateness, individuals would succumb to the more 'normative' interpretation of roles as well as the path dependency

of previous decisions. Choosing among different roles and standard operating procedures and an affirmation of normative expectations to the roles of certain positions would indicate a prevalence of this kind of adaptive behavior. The logic of arguing, on the other hand, would apply in instances where norms and roles are conflicting or undefined. Adaptation would then happen by deliberation, especially if scope conditions for the free exchange of reasoned arguments were given (density of informal norms, mutual trust, lack of power play etc.).

5.4 2009-2010: Consultations at the EU level – Arguing?

Usually, the working group meetings in Council had given the domestic practitioners a fairly good indication on how the practice in other member states was functioning (interview 7):

> "In expulsion and migration, we could have long discussions on formulations and articles. And on the basis of these discussions, we got a pretty clear understanding of a country's attitude. The problems were highlighted by pro and contra arguments, formulations, and we got an understanding of how these formulations should be interpreted once they should be enacted." (interview 7)

The Norwegians civil servants could therefore analyse and interpret what the other countries had in mind and thus follow the European train of thought. The involvement of the European Parliament in the decision making process had led to several points of the directive which needed clarification (e.g. the return monitoring provision (article 8 (6)) and conditions for the return of unaccompanied minors (article 10)). The Commission therefore initiated a so-called Contact Committee, where national practitioners could meet, compare national practices and get legal advice by the Commission (interview 7, 11, 5). Lacking the bargaining element, this committee is of a slightly different character than Council negotiations:

> "What we have been doing over the last two years is to invite the member states to a contact committee to discuss open questions of interpretation, to try to achieve a common understanding on certain formulations in the text." (Commission representative, interview 5)

The open questions turned out to be more than expected and the initially planned two 'interpretative' meetings were extended to at least six (interview 8, 11)[32]. Norway was

[32] At the time of writing, these bi-monthly meetings in Brussels were still going on.

actively involved in this exchange of views (interviews 7, 11, 5). The Norwegians, like other member states, were free to ask questions before the meeting, and the Commission compiled all the questions. “At the meeting, we go through them article by article and see if we can achieve common views“ (Commission representative, interview 3). As an example, Norwegian civil servants mention their consultation with the Commission also in official documents (Prop 3 L: 56). This indicates that the argumentative influence of other member states and the EU structures continues while transposition is going on. This process, of course, is mutual and links several levels of government: Indirectly, actors from the Norwegian immigration department (as well as POD, PU and UDI) were involved in this process by contributing with their own questions and suggestions (interview 8). This indicates that within the ministerial structues, civil servants were engaging in arguing (hypothesis 5).

5.5 Spring of 2010: Internal hearing in preparation of transposition

The inter-institutional working group on return which had accompanied the negotiations in Brussels was also involved in the practical preparation of the hearing procedure for the Return Directive’s transposition. Questions that need to be cleared were often technical, but induced also normative considerations:

> “For example since the Return Directive reduces the length of the entry ban in the Immigration Act, the question follows: shall we harmonise the duration of an entry ban for those which used to get five years, to two years. We are concerned with these kind of questions.” (interview 8, UDI)

This kind of balancing of ‘rights’ versus ‘control’ related issues was also present when the length and proportionality of en entry ban affecting family life was discussed (interview 8). This, again, indicates a certain amount of arguing behavior. The bureaucrats involved in transposition were caught in a constant process of re-evaluation, re-adjusting current practice by deliberating on values, possible consequences and the effectiveness of new procedures. UDI worked with the regulation and revisited the foreigner's regulation (utlendingsforskriften). It sent notice to the ministry about necessity for changes, more precision in the regulation, probable costs of adaptation and where there was need for guidelines in the foreigner's regulation (interview 8).

> "What we hoped for was that if we were part of this now, we would have greater control on the result, and that we could help the ministry of Justice to speed up the process. Because we are very depending on getting things clear ahead of time in order to prepare implementation in our institution." (interview 8, UDI)

The above indicates a dominance of the logic of appropriateness, with a strong inclination towards the exchange of arguments. Participants of the procedure were concerned to do the right thing. In a process of constant communication were exchanged. Arguments by subordinate actors counted, not always, but especially if they argue from the standpoint of experience and expertise (interview 7). The following part of the chapter will describe the content and composition of the most important document in transposition, Prop 3 L.

5.6 March-November 2010: The hearing – appropriateness in action

The Norwegian Parliament is the central law making institution in Norway, entrusted with a political control function towards the government and great budgetary powers. The plenary sessions of the Storting are supposed to be an arena of democratic discussion, where parties mark their ground and debate issues of national concern (www.stortinget.no). Before a law proposition for a new law is presented in Parliament, it usually goes through an extensive hearing procedure under the auspices of the responsible ministry – in this case of Justice and the Police - which includes a list of potentially affected organizations in civil society (Prop 3 L: 10). After comments are included into the proposition, its text is assessed in the relevant parliamentary committee(s) and voted on in plenary (Storting 2011a).

As we shall see in the part investigating the hearing, actors in the ministry of Justice approached this task with a 'professional' attitude of merging the directive's provisions into Norwegian law as effectively as possible. In order to do so, they refer to already existing norms and procedures as often as possible. The hearing procedure was initiated on February 3rd, 2010. The Prop 3 L was presented on March 19th. The process of legal transposition ended with the adoption of the government's legal proposition on December 17th. Within the administration, neither the directive's content nor the general obligation to comply with Schengen directives was questioned, whereas some civil rights organizations objected to certain elements of it.

The transposition of the Return Directive followed the standard Norwegian consultative law making process: After the Ministries responsible for working out the law proposition had done their internal coordinative work, they sent the proposal through a consultative hearing process, where relevant organizations (public and NGOs) were asked for comments. The Ministry incorporated relevant responses and amended a few formulations[33]. The proposition by the Ministry was also referred to the relevant Standing Committee in Parliament, which published an 'innstilling' (Innst. 137 L) with its comments to the proposal. Immigration policies, including Schengen matters and the Return directive, were also officially discussed in the White Paper of the Norwegian government on Immigration Policy in a European perspective, published in March 2010. Respondents involved in the transposition recall that the directive was first mentioned and to a lesser degree discussed in the Parliamentary party groups at this point. But the attitude prevailing can be subsumed by the following comment of a member of Parliament:

> "I cannot remember that the EU Return Directive was a special problem. There was no discussion in the Norwegian public on it. When autumn came, we started to reflect on what this would entail in terms of change in our system of rules. And my judgement at that point was simple: EU directives come. And when they come, one has to largely comply with them." (interview 14)

In Prop. 3 L, the corner stone of the legal transposition process, the Ministry of Justice stresses the Norwegian obligation to follow its Schengen obligations. In the background description of the law proposal, the Ministry refers to the history and other features of the Schengen Borders Code. The Return Directive in principle addresses the cases of every illegally staying third country national, but opens for the exclusion of individuals stopped at the Schengen external border, persons who are expulsed in connection with a conviction as criminals and persons who are extradited. The Norwegian government opted for not applying the principles of the directive to these people (Prop 3 L: 5).

[33] Later, the administration is expected to not only interpret the actual text of the law, but to use the comments in this proposition (Prop.) as guidelines for the interpretation of cases.

5.7 Opinions from external stakeholders - A certain disagreement

Some media articles and interviews with Knut Storberget on the implementation of the Return Directive appeared, expressing critical reflections on the Return Directive's content (Aftenposten 2010, Klassekampen 2010). But generally, none of the civil servants interviewed recall a strong debate and public engagement on the matter before the controversial Maria Amelie case in 2011 (Aftenposten 2011, interviews 11, 8, 3). It is not possible to present all hearing comments[34] in the framework of this thesis (Prop. 3 L: 13). Many of the organisations who answered were concerned with the rights of families and children, as well as the restrictiveness of a compulsory entry ban. Quite a few of the NGOs involved in the hearing procedure stress that the period for voluntary return should be longer. The police, on the other hand, argued for a shorter period. The ministry followed the stricter line and stated that only if special reasons, for instance the consequences for children in school, persist, should a longer period be granted (Prop 3 L: 28). This indicates that external actors did not have the necessary resources (media attention, public support) to put pressure on political actors at this point.

The question of free legal aid and other protective elements in the directive's articles 12, 13 and 14, hotly debated in the Council setting, did not trigger big discussions within the Norwegian system either. Most institutions involved agreed that the guarantees for individual rights protection in Norway had an equal to higher standard than the ones in the directive. Some Norwegian NGOs disagreed, for instance Advokatforeningen and Juss-Buss[35]. They interpreted the directive in the way that article 13 (4) imposes the introduction of free legal aid to all third country nationals who have received a return decision. Juss Buss extended this right to people who receive an entry ban because of criminal acts (Advokatforeningen 2010: 6; Juss-Buss 2010: 2). The ministry however, in its argumentation, referred to the scope of the directive as well as relevant law texts in Norwegian practice and considered the access to possibilities for appeal as well as legal aid as provided for, the latter in immigration code § 92 (Prop 3 L: 48). The respect for non-refoulement and considerations of vulnerability of persons

[34] The list of non-governmental organizations invited to participate in the official hearing is included in the document. The ones who responded with comments were: Advokatforeningen, Amnesty International, Barneombudet, Domstoladministrasjonen, Fellesorganisasjonen, Juss-Buss, KIM, Mellomkirkelig råd for den norske kirke, NOAS, Norsk Folkehjelp, Norsk psykologforening, Oslo politidistrikt, Politidirektoratet, Politiets utlendingsenhet, Redd Barna, Riksadvokaten, Statistisk sentralbyrå, Tunsberg biskop, UNHCR, Utenriksdepartmentet, Utlendingsdirektoratet og Utlendingsnemnda (Prop 3L: 11).

[35] These are two voluntary organisations of (respectively) lawyers and law students involved in advising individual immigrants free of charge.

(e.g. health questions) were, according to the ministry, congruent with the directive and did not introduce changes (Prop 3 L: 19). According to Norwegian international human rights commitments, measures that are more favorable to the legal position of the individual automatically override Norwegian administrative practices that might be in conflict with it (Prop 3 L: 7)[36]. This was considered sufficient to ensure the protection of individual rights.

The directive uses some vocabulary that is foreign to the Norwegian practice, for example "return decision" ('returvedtak') and "removal order" ('vedtak om uttransportering'). Where possible, these concepts were not incorporated into Norwegian law, but legal correspondence was considered enough (ibid.). For the interpretation of the directive, the Norwegian government referred to the 20 guidelines for forced return issued by the Council of Europe in 2005 (Council of Europe 2005). The document's principles were used as guidelines during the final phase of the EU's negotiations and the Norwegian authorities considered this useful for interpretation (Prop 3 L: 9). Another procedural guideline, also for the incorporation of hearing contributions, were the ministry's own guidebook "Lovteknikk og Lovforberedelse", the FAD's "Instructions for Official Studies and Reports"[37] as well as the Foreign Ministry's handbook for EU/EEA work (interview 11). The above reveals a general 'appropriateness' (hypothesis 4) orientation 1) to comply with EU law as well as general human rights standards, 2) a respect for existing national procedures and practice, and 3) an obligation and expectation to involve and consult relevant actors of civil society – although their arguments are not necessarily incorporated.

5.8 Amendments of the law - Turning to prevalent practices

This section will address the elements of the directive which actually resulted in amendments of the Norwegian law text. In its presentation and explanation of necessary amendments, the government focused on six points in the directive which needed to be incorporated:

- Definition of risk of absconding
- Voluntary return
- Expulsion with compulsory entry ban
- Monitoring system for forced return procedures

[36] Reference to European Convention of Human Rights article 3.
[37] Ministry of Government Administration, Reform and Church Affairs (Fornyings-, Administrasjons- og Kirkedepartementet (FAD))

- Return of unaccompanied minors
- Detention length

5.8.1 Definition of risk of absconding

A term central to the directive is the term "risk of absconding" ('unndragelsesfare') which, prior to the directive, did not exist in the Norwegian law. The department of Justice therefore looked at current police procedures (especially regarding forced returns in the Dublin II practice) for inspiration. The fact that Germany, Switzerland and the Netherlands already had introduced a list of indicators for risk of absconding was also worth a consideration (JD 2010b: 16f.). This indicates that the principal orientation within the ministry was to follow standard operating procedures. They also consulted what other countries saw as appropriate. The new §106a in the Norwegian immigration code makes clear that a complete assessment of the illegal immigrant's situation has to precede the establishment of a risk of absconding. The nine indicators[38] listed are supposed to be seen in their combinations and individually weighted against the other factors. (Prop 3 L: 17 f.). This blend of referrals to prevalent procedures as well as the 'consultation' of other countries indicates logic of appropriateness.

5.8.2 Voluntary departure

Following the directive's definition, a return decision is supposed to state that a TCN resides illegally on the territory and that this person has the obligation to leave. As a novelty to Norwegian law, this decision had to include an explicitly stated period for voluntary return. The individual right to a period for voluntary return needed to be incorporated more explicitly (Prop 3 L: 24 f.).The current domestic practice had been that the denial of an application for legal stay was *implying* an obligation to leave the territory. Norway had, in agreement with other member states, under the negotiations argued against the institution of several separate decisions. This resulted in the directive's article 6.6, which opened for the possibility of simultaneously issuing a return decision as well as a removal order. The period of voluntary departure could therefore be included in the denial of an application for legal stay (Prop 3 L: 20). Generally, the Ministry considered the new focus on voluntary return as very positive. It

[38] The factors listed in the directive are not the only ones which could count for establishing a risk of absconding. The ministry cites the incidents of rejected and disillusioned asylum seekers setting fire to the removal reception centers in the summer of 2010, and incorporates this kind of 'disturbing public order' as another possible indicator for risk of absconding (Prop 3 L: 18).

stressed that already in 2009, 1019 individuals left Norway in cooperation with the IOM. In the description of possible exemptions to the period of voluntary return, the directive's "threat to public order" was found in the Norwegian paragraph's § 90 formulation "fundamental national interests", and the ministry systematically evaluated this and other legal formulations and practices against each other, referring to the former St.Prop. of 2006-2007 which had introduced the new foreigner's act (Prop 3 L: 29f.). The responsibilities in cases where the granted period for voluntary return needed to be interrupted lay traditionally in the hands of the police, which expressed the wish to continue the practice (Politiet 2010: 2). JD agreed with this view: Although UDI in October 2010 was to overtake the responsibility for the organization of voluntary return, the Police was also in the future considered to be the authority entitled to extradite the individual if a risk of absconding was determined (Prop 3 L: 32). All of the above indicates a dominance of the logic of appropriateness: legal standards – which are strong, enforceable normative standards – rule the transposition. The more informal respect for current practices was also an indication of the perception that roles, traditions and competence in a certain field needed to be respected and taken into account. The following three paragraphs describe the adjustments made to the four most controversial issues in the directive: entry ban, return and its monitoring, the return of unaccompanied minors and detention.

5.8.3 Entry ban

In connection to the directive's article 11, which deals with the entry ban for TCNs who have not received a period for voluntary return or have not followed the request to leave the country within a certain period, the Norwegian government states that the Norwegian practice and law had to this date had a connection between expulsion (utvisning) and entry ban (innreiseforbud). The latter could not come without the former, but expulsion could happen without an entry ban (Prop 3 L: 41 f.). Rejection at the border and the normal announcement of end to a legal stay (bortvisning) used to come without entry ban. The entry ban could have a minimum of two years, the maximum was unlimited. The directive thereby provoked a stricter response to overstay and other breaches of the immigration code. This fact did not go uncommented by the NGOs involved in the hearing (Prop 3 L: 42). UDI, arguing from the practitioner's point of view, mentioned that many foreigners do not realize the potentially severe consequences of an 'overstay'. It therefore recommended the introduction of a premonition into the return decision's text, something that could provide for administrative

efficiency, better legal certainty as well as a promotion of voluntary return measures (UDI 2010a) That this idea was taken up by JD, was a result of this argumentation (interview 8), an incident which shows that practical expertise could be resource for persuasion.

The politicians had already in spring of 2010 recognized that the compulsory entry ban would pose administrative problems (interview 14). But how an actual control system for people obliged to leave the country should be realized, was still unclear in February 2011 and also subject to discussion within the Commission's contact committee (interview 8). In its legal proposition, the ministry conclusively aimed at continuing the current practice as far as possible (Prop 3 L: 46). This indicates inertia in decision making, which can be interpreted as a certain path dependency of current institutional conditions. The Return Directive's article 21 replaced Schengen convention's article 23, which was the former rule guiding Norwegian administration in questions of rejecting people at the border ('bortvisning'). The Norwegian framework for entry denial had mainly been a 'may' formulation, leaving it up to the administration to decide whether to let people in out of humanitarian reasons. The European directive has a stronger 'shall' formulation, with a few possible exemptions. Also here, the Norwegian government chose to continue its current practice, with an explanation of how procedures under the old article 23 were carried out as well as a reference to the Swedish assessment of the situation, which came to the same conclusion. (Prop 3 L: 22).

5.8.4 Monitoring system for forced return

One of the more controversial issues in the Norwegian hearing was the use of force in the enforcement of return decisions. The current practice (written in 'rundskriv' and Royal resolutions) was that Politiets Utlendingsenhet (PU) had the responsibility to return asylum seekers whose protection claim had been denied. The use of force in these cases had been regulated through the general law of the police and instructions to the police (politiinstruksen). Some NGOs (Amnesty, NOAS) asked for more precisely framed instructions, specifically designed for the act of enforcing return (Prop 3 L: 35). The ministry, on the other hand, saw the directive's article 8 requirements on the use of force as fulfilled in Norwegian law and practice (Prop 3 L: 35). Regarding the institution of a monitoring system, the authorities referred to already existing institutions like the tilsynsråd at Trandum utlendingsinternat, Sivilombudsmannen, head of PU, etc. and otherwise indicated to wait for further definition by government, EU Commission research results and other instructions

(Prop 3 L: 36). This, again indicates that civil servants engaged in transposition were looking for instructions by authorities and otherwise intended to adapt to change by reverting to what was already tried and tested (hypothesis 4).

5.8.5 Return of unaccompanied minors

The return of unaccompanied minors and their special need for protection (article 10 (2) of the directive) was interpreted as being not sufficiently explicit in the Norwegian law text, only present in circulars issued by the Department of Justice. These commanded that minors are only to be returned to a relative or qualified caretaker in the country of origin (Prop 3 L: 38). The explicit formulations in the directive were taken as an occasion to re-formulate the law text in § 90 to make clear that the return of unaccompanied minors could only take place if a caretaker, family member or proper caretaking institution had been identified. It was up to the government to specify what a 'proper caretaking institution' is (Prop 3 L: 39). This new formulation, according to UDI, was not going to change current Norwegian practice (UDI 2010a). Nevertheless, also this issue was taken up in the Commission's contact committee (interview 11) – an indication for the fact that arguing was activated when norms or roles were unclear.

5.8.6 Detention conditions

Detention conditions and detention period have been the most difficult elements of the directive under negotiations. The ministry discusses and explains the question of detention over the length of seven pages. In the Norwegian hearing process, relevant NGOs like Advokatforeningen and NOAS stressed the importance of separating criminal prisoners from people detained in order to be returned. UDI also recommended a new point in the immigration code's § 107:

> "If there is no place accessible in the utlendingsinternat and it is necessary to place the foreigner in an ordinary prison, this foreigner should in general be kept separate from other inmates." (Prop 3 L: 55)

The risk of absconding, again, was a central concept in the directive (article 15) for determining whether a foreigner needs to be imprisoned or not. In order to define more precisely the length of detention in Norwegian law, the government proposed a new element

in paragraph § 106, and set the usual time period to a maximum of 12 weeks, something Norwegian practitioners had been working with before. Only if the foreigner would not cooperate and special difficulties arose in obtaining necessary documents from other countries, could the period for detention be extended to more than three months. As in the previous legal practice on such issues, only a court could decide whether special reasons to detain the foreigner persist after 12 weeks (Prop 3 L: 53). A period of a maximum of 18 months was set following the directive. In this case, the directive introduced a 'rights' element into Norwegian law. The detention period had been unlimited before. Norway had argued against a limit to detention, but was now obliged to implement it. Regarding the directive's articles 16 and 17, the ministry presented the recently reformed Norwegian conditions for imprisonment as congruent with the directive's requirements (Prop 3 L: 54). It argued in general that the arrest and detention of foreigners to be deported was an important instrument to ensure the return of those who do not travel voluntarily (see also PU Årsmelding 2009: 2). This referred to both detention in order to ascertain identities as well as detention in order to implement a return decision (Prop 3 L: 54). This indicates an inclination to continue current practice (hypothesis 4).

5.9 December 2010: In Parliament – 'rhetorical appropriateness'

The central instance of legal transposition is the Norwegian Parliament, Stortinget. As in all Parliaments, deliberation and argumentation can take different forms: strategic rhetorics alternate with truth-seeking exchange of arguments based on commonly accepted norms and the following of roles and procedures. This final part of the chapter is not meant to give a full-fledged analysis of deliberative quality, but meant to illustrate whether instrumental thinking (benefits/means ends) was present and which kind of norms (control/rights) were prevalent in argumentation by different parties. In analogy to the debate in the European Parliament, the position of the responsible committee as well as the debate in Parliament of December 2010 are therefore examined for indications of the three logics.

In its instilling 148 S and 137 L at the beginning of December 2010, the Standing Committee for Local Government and Public Administration expressed its support for the coming directive (Innst. 148 S: 2, Innst. 137 L). The committee, in accordance with Prop 3L, came to the conclusion that many aspects of the directive were already present in the Norwegian law: the protection of children's rights, the respect for the family and individual health, that the

return decision was issued when the immigrant's application for legal stay was refused, that the directive's article 8 on removal was congruent with national law. Only the Progress Party's member of the committee objected to some of the content of the instilling: he demanded a two year entry ban, a detention period of full 18 months, not 12 weeks like the government suggested (Per-Willy Amundsen, FrP, Storting 2010a: 1694). Members of Parliament do not remember that the directive was discussed much further:

> "The committee is not the place for discussion, we have interventions, comments and proposals. So there is no special drafting in the committee. Especially if a majority is already established. In this case, there is neither a discussion between government and opposition." (interview 14, member of Parliament)

In the actual debate, other members of Parliament, notably from the opposition, expressed their consent to the directive: "… there is noticeable general agreement on this (…) Norway sends a signal that we stand united around an effective, but humane return policy" (Trond Helleland (Høyre), Storting 2010a: 1695). None of the involved parties had major objections (interview 14). Many government representatives repeated the claim that it was very difficult to fight illegal immigration without an effective return policy. Third-country nationals would, on the other hand, also have a better protection by the law than before. The promotion of voluntary return was seen as very positive. Simultaneously, it is seen as "absolutely decisive that foreigners that do not return voluntarily must be expelled and transported from Schengen-countries." (Innst 148 S: 2). Only the Christian People's Party voiced some concerns on children's rights (Kjell Ingolf Ropstad (KrF), Storting 2010a: 1695). The final word in the parliamentary debate was given to Knut Storberget, minister of Justice (Ap): "Let me express satisfaction about the fact that we manage to unify around this important aspect of Norwegian refugee policy" (Storting 2010a: 1695). This indicates that the discussion was not a truth seeking dialogue, but a rhetorical confirmation of each other's opinions, and, in the end, a 'contract', consistent with prevalent norms, rules and standard operating procedures.

5.10 2011: Implementation Processes – Intentions to Comply

The final chapters of Prop 3 L recount possible economical and administrative consequences of the directive's implementation (Prop 3 L: 58 f.). The repercussions of the transposition were about to be felt in the administration for some time to come. But, overall, civil servants in JD acknowledged how much of the Return Directive could actually already be found in the Norwegian law text (interview 11). Some practical challenges therefore remained also after the legal transposition. Although the Return Directive introduced mostly minor adjustments in the law, these entailed major shifts in for instance electronic administration systems (interview L). Also UDI interpreted the current Norwegian law as mostly congruent with the Return Directive's elements:

> "In the beginning we thought that this transposition would be difficult, but when we looked at our own practice, we saw that many of the standards in the directive already existed in Norwegian law. Nevertheless, the directive entails a lot of small adjustments. That is a lot of work. For example that the period for voluntary return in the directive is defined to lie between seven and 30 days. We didn't have that before, and have to implement it now." (interview 8, UDI)[39]

None of the respondents questioned the Norwegian obligation to comply with the upcoming Schengen directive (interviews 7, 11, 14, 8). The directive was transposed just in time in December 2010, but several points of it were still unclear after January 2011. Interview partners state that they wished to transpose all elements of it and all of them worked hard "in order to live up to the ambitions of the directive" (interview 8). The responsible people in the Ministry and directorate showed high motivation to seek dialogue and clarification, both among each other as well as in Brussels at the Commission's Contact Committee. The heart of the transposition process was, as usual, the hearing procedure, where relevant experts from civil society were involved in arguing about the merits and pitfalls of legal formulations proposed by the Ministry. But the preferences in the whole Norwegian Parliament were so clearly in favour of transposition, that contrary arguments resulting from concerns in civil society and media remained in the background[40].

[39] The paragraph this UDI employee refers to is § 90 of the new Immigration Act, which in 7.2 stressed that the period to leave the country was usually set to three weeks (UDI 2008b).
[40] A scheduled live hearing in the Parliament's responsible Committee (10. November 2010) was cancelled because no relevant institution had applied to take part in it (www.stortinget.no).

Year	Month/Date	Event
2008	June 2nd	Deadline of applications for a comparative UDI report on European return policies
	June 16th	European Parliament adopts directive 2008/115/EC
	October 8th	Norwegian Foreign minister mentions Directive in his report on EU/EEA
	December 24th	Publication in the EU's Official Journal L 348
2009		JD prepares a "White Paper on Norwegian Migration Policy in a European perspective" (St. meld. 9)
2010	February 3rd	Start of official parliamentary hearing procedure for the legal transposition of the Return Directive
	March 8th	Presentation of White Paper "Norwegian refugee and migration policy in European perspective" (St.meld. 9)
	March 31st	Deadline for sending in comments for the hearing procedure regarding Return Directive 2008/115/EC
	April 19th	Storting hearing regarding St. meld. 9, participants: NHO, Norsk Folkehjelp, Flyktningehjelpen, NOAS
	June 4th	Publication of Kommunal- og Forvaltningskomite's Innst. 327 S regarding St. meld. 9
	July 7th	Initiation of hearing procedure on changes in the Immigration Code regarding detention preconditions
	August 30th	Initiation of hearing procedure for amendments of return related regulation
	October 1st	Publication of Prop. 3 L (JD) and 2 S (UD)
	November 10th	Scheduled hearing on the Return Directive in the resp. Standing Committee of Parliament, cancelled
	December 7th	Publication of Innstilling 137 L by the Committe of Local Government and Public Administration regarding transposition of the Return Directive
	December 9th	Publication of Innstilling 148 S by the Committe of Local Gov. and Publ. Admin.
	December 13th	First treatment in Parliament (presentation)
	December 17th	second treatment in Parliament, publication of Lovvedtak 33 (enactment)

Table 5.1 Timeline of transposition in Norway

5.11 Final Analysis: Appropriateness and professional arguing

The question to be answered in the realm of this thesis was how domestic Norwegian actors and institutions respond to change resulting from EU Schengen policy. Since there was no strong opposition to the upcoming directive, neither within government nor within Parliament, civil servants could concentrate on efficient and 'appropriate' implementation. In defining the law and regulation amendments, the prevalent reaction of Norwegian civil servants was to revert to norms and procedures already known and accepted (logic of appropriateness). There were, however, some instances where the coming EU directive posed challenges to the administration: overlapping competences and understandings of new provisions required the exchange of opinions and experience (hypothesis 6). We can observe that participants in the Norwegian debate shared a common lifeworld – most of them were politicians, bureaucrats or working with return from the legal angle of civil rights organizations. Normative, truth-seeking exchange about commonly accepted rules and persuasion happened. But many decisions in the process were molded in small, professional forums. Here, also formally subordinate institutions were invited to voice their opinions and arguments. Although not all of their suggestions were taken in, some policy adjustments were directly connected to their comments. This indicates that the logic of arguing was at play in certain instances where practitioner's expertise was pivotal (logic of arguing). The inter-administrative dialogue also involved EU member states and EU institutions like the Commission. The search for a reasoned consensus was thereby largely limited to inter-ministerial coordination groups and inter-institutional forums.

The hearing procedure in itself was the usual opportunity for Norwegian civil society to express its opinion. External input by NGOs was taken into account, but most often their arguments could not convince the Ministry of Justice to amend its proposal. Civil servants, working intensely with the directive since 2005, had entered the hearing procedure well prepared and thoroughly informed about the Commission's priorities as well as the opinions of its own directorates and departments. After intensive work on the directive's content and transposition, they concluded that it generally fitted Norwegian practice and was in accordance with Norwegian norms and interests. This indicates a prevalence of the logic of appropriateness. The arguments brought forward by 'outsider' hearing instances were not relevant enough to convince the ministry of including new elements in the law text. This indicates that 'outsiders' would need other resources to back their arguments: a timely public

debate in the media, for example. This did not happen in the case of the Return Directive. The ministry of Justice could in addition count on a stable majority in Parliament to bring its proposition through. The logic of appropriateness, indicated by a referral to authoritative norms and prevalent procedures, dominated the process (hypothesis 2). Even though the consultation procedures were public (hearing, parliamentary debate), general interest for the transposition – as perceived by politicians - was low. The next chapter will sum up findings from chapter 4 and 5 and provide an outlook on possible further research.

6 Conclusion – Between Advocacy and Adherence

This concluding chapter begins with a final interpretation of the findings from the empirical analysis. It first summarizes how Norwegian actors navigated the EU Schengen setting and transposed its outcome by applying a certain combination of logics. In a second step, the chapter gives some arguments for and against the methodological approach chosen. At the end of the chapter, ideas for further research are sketched. These include other Schengen policies, actual implementation at the national level and the emerging relationship between the Norwegian and European Parliament.

6.1 Results emerging from the data

According to Olsen, an institutional perspective aims to match "principles and standards underlying Europeanization processes and the identity, history and internal dynamics of specific nation states or institutions" (Olsen 1992: 264). This thesis has tried to accomplish this in the field of Schengen related migration policy.

This thesis initially put the question how Norwegian actors responded to institutional change at the EU level. As chapter 4 could show, Norwegian civil servants responded to change proposed by the Return Directive's provisions and shifting institutional environments mainly by reverting to a logic of cooperative consequence (Hypothesis 1). Nevertheless, their range of possible reactions as a small country and EU outsider was restricted by normative expectations and structural constraints. They responded to these restrictions by arguing in the 'appropriate' terms of practical expertise. The return directive case offers several instances of truth seeking discourse, especially the initial trilogue meetings, when a general framework for negotiations was being put in place. But these institutional settings were not directly accessible to the representatives of Norway. The case of the Return Directive shows how institutional developments in co-decision restrict the possibilities of influence.

As participants of cooperative bargaining, e.g. in the JHA counsellor group, Norwegians were informed about the content of informal negotiations between Parliament, Commission and Council presidency. In the context of the Return Directive, Norwegian interests were in line with a majority or large minority of member states (depending on the concrete issues being negotiated) and there was no need to be very proactive. Another indicator for this response in

this controversial context is that they did not swiftly attempt to contact and influence e.g. the Parliament or the presidencies. As long as Norwegian interests lie in the middle of European developments, Norway can meander between positions of member countries and seek alliances where it is opportune. Norwegian practitioners can also 'download' policy ideas and sometimes, as in the case of the one-step-two-step procedure, 'upload' practical contributions. The response of civil servants might have been very different if there had been a development which diverged strongly from Norwegian interests. As we could see in chapter 5, the interest of the Norwegian government was very close to the directive's content. Even before the asylum numbers rose drastically in 2008, the coalition had declared that "A quick return of each foreigner whose application for asylum is rejected is of great importance for the legitimacy of the institution of asylum" (Soria Moria I: 75). Norwegian civil servants transposed the directive into Norwegian law by reverting to already existing standards and rules. Some of the new elements like the monitoring system for forced return triggered arguing behaviour, especially in civil servant groups directly concerned with transposition and implementation.

It is, however, salient that the adoption and transposition of the Return Directive in the Norwegian Parliament took place without any major debate, especially if one compares its reaction to the controversial discussion (e.g. on detention) within the European Parliament. This may be understood on the basis that the directive was, broadly speaking, in line with overall Norwegian interests and in the field of return policy and that the government commanded an absolute majority at the time. But the lack of a Norwegian discussion on the restrictive elements of the Return directive, like for instance the compulsory entry ban, became suddenly salient in January 2011. The highly emotional public debate which accompanied the so-called Maria Amelie case made Norway's migration administration tailor a so-called 'Lex Amelie' which creatively circumvents the compulsory entry ban of the Return Directive (interview respondent J, member of Parliament). The subject of return and entry ban obviously had a high potential for debate and the media discussion actually resulted in innovative legal outcomes in Norwegian society. But this happened only when a single person's destiny was brought to the TV and tabloid debate forums, pressuring the Norwegian government and its immigration administration to move. Apparently, Norwegian politicians and the public were much less inclined to discuss EU policy while it actually was in the process of creation.

6.2 Reflections on approach and method

This is a single case study. Generalizations and further development of theories are therefore hard to achieve. But thanks to the three logics approach, I could compare different institutional settings with each other. A focus on the behavioural response of civil servants in AID, JD and UDI shed light on the link between policy levels. The timeline of the directive illustrates how different settings in EU and domestic institutions result in different behavioural responses and, in the end, policy outcomes. At the EU level an object of bargaining and debate, the Return Directive became an instance of 'following the procedures' in the Norwegian context. The study focuses on a time period in which new decision-making procedures were introduced. Its neo-institutional perspective allowed me to illustrate the 'clash' of different institutional cultures as well as a certain inertia in adaptation to new situations. Although this is a very special case, it does indicate that the involvement of the European Parliament in decision-making has consequences for Norwegian Schengen participation. Further research is necessary to evaluate how co-decision affects other processes of Norwegian Schengen engagement (for example the visa cooperation) or maybe even some EEA strategies when the Parliament is engaged. The three 'logic' perspectives were complementing each other, with gliding transitions from predominantly cooperative logics to competitive logics of behaviour (Lewis 2010: 652). Although this theoretical approach was not very parsimonious, it could indicate tendencies of behaviour in different EU settings, for instance when the member states came together *after* the directive's adoption and engaged in a much freer exchange of thoughts than before.

The multilevel approach used in this thesis has, however, one deficiency: following a directive through its stages means meandering between many different institutional forums, confronting a multitude of possible actors, interests and influences. This means that this thesis could not dedicate its attention to in-depth features of either the EU or the national setting, but had to stay with rather general impressions on actor responses and interpretations of the situation. New questions are raised, for instance the question of 'personality' in negotiations, a factor which interview partners often named. Single actors like the Commission representative, the EP rapporteur and the Slovenian interior minister were identified as drivers of the process. The data indicates that their mediating role was pivotal, but how and why exactly could not be ascertained.

It is obvious that, at the domestic level, only the implementation practice following the transposition of the Return Directive will show how far or near Norwegian interpretation of its rules actually lie from the European average. Actors from implementing institutions like UNE and POD were not represented in my interviews (only in the document research), so there is definitely a gap to be filled. The quality and character of deliberation on migration and return in Norwegian society could only be hinted at in this study, but offer a rewarding field of research, where European arguments could be compared to Norwegian validity claims.

6.3 EU-Norway – what comes next?

It is hard to trace whether and how European ways of reasoning resonate in Norwegian government discourse. But this study indicates that the Norwegian administrative 'lifeworld' in Schengen and immigration matters is strongly connected to European ways of reasoning. This trend is likely to continue. Norwegian migration and research institutions started participating in the European Migration Network (EMN) in 2010 to keep updated on general developments in European migration policy, especially the field of asylum (St. meld. 9: 78). One could be concerned that the Norwegian Parliament's role is weakened and that the government's and administration's role is strengthened in this constellation (Eriksen 2008: 373). Some indications are there: Jan-Paul Brekke claims that Norwegian governments, no matter from which side of the political spectrum, have shown a special interest in the 'control' side of EU integration developments (Brekke 2011: 16). In one way, this is true. The Norwegian government is apparently highly motivated to keep up the close coordination with the EU's return policy. It stresses Norway's present and future participation in Frontex, the European bureau for border control in charge of coordination of realizing returns to countries of origin (St. meld. 9: 79). The Stockholm programme is aiming to intensify European cooperation in matters of asylum and Norway reacts by joining the European Migration Network (EMN). Norway is also planning a participation in the European Asylum Office (EASO) (Brekke 2011: 10). The Norwegian authorities' initiative to assess Norway's relationship to the EU's migration policy in a public forum (Europautredningen) indicates that the full extent of EU entanglement is far from clear.

On the other hand, a closer look at civil servants in this multilevel system of policy making shows that bureaucrats see both sides of the value spectrum, 'control' and 'rights' represented

in EU developments. They stress that they would actually welcome to have more informed and earlier debates on Schengen related issues in order to develop their positions under negotiations (interviews 9, 11, 15). Migration counselors from Brussels publish their reports on new developments in migration and asylum policy (Lexau 2009). The Maria Amelie case has shown that Norway has a responsive democratic system once it is activated by public pressure. But the lack of public attention to the field of EU Schengen policy making has, so far, not been conducive to democratic discussion at the time when policy is decided upon.

Norwegian institutions have recently shown a response to co-decision: While this thesis was under production, the Norwegian Parliament established the position of a Parliamentary coordinator at the Norway House in Brussels (Norway's EU delegation: 2011). Time will show whether this contact will also cover Schengen and migration related policies in the EU's evolving Justice and Home Affairs.

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Annex

a) List of interview partners

Interview partner code	Professional position	Date of conversation	meeting / phone
1	Former Norwegian JHA counsellor	02.03.2011	meeting
2	Former Norwegian JHA counsellor	09.03.2011	meeting
3	Former Norwegian migration counsellor	18.02. / 18. 03. 2011	meeting
4	representative German Ministry of the Interior	06.04.2011	phone
5	Commission representative	03.03.2011	meeting
6	Council secretariat representative	03.03.2011	meeting
7	Norwegian Police department representative	09.03. / 02.04. 2011	meeting / phone
8	UDI coordinator 1	01.03.2011	meeting
9	UDI coordinator 2	28.04.2011	phone
10	Norwegian lawyer and EU migration expert	28.03.2011	phone
11	Norwegian JD immigration representative	03.03.2011 / 15.04.2011	meeting / email
12	EP LIBE staff assistant	18.04.2011	phone
13	Norwegian AID representative at SCIFA	04.04.2011	phone
14	Norwegian MP	13.04.2011	meeting
15	JD international coordination, former JHA counsellor	09.04.2011	meeting

b) Interview Guides Three Logics

RQ1: How do Norwegian actors respond to institutional change at the EU level?

RQ2: How do Norwegian domestic actors and institutions respond to EU change?

Logic of Appropriateness

Focus: Path dependency and identity. Norwegian representatives and their relation to institutional norms and constraints. Attachment of certain values and meanings to prevalent rules.

Measuring in text and interviews:

EU level:

Which institutions are normally represented in EU negotiations?

What do national representatives usually do in the Mixed Committee setting?

What is expected of representatives a Norwegian representative in this situation?

How do representatives act in instances of conflict between different sets of norms (e.g. HR versus national interest)?

What do Norwegian actors think should a committee like the Mixed Committee deliver?

How does the directive (e.g. entry ban, procedural rights, judicial remedy, detention, humanitarian safeguards) connect to other migration measures already agreed upon?

National level:

Which institutions are responsible and most affected by the returns directive? How did they participate in policy making?

What characterizes daily practice in coordination of EU and domestic level?

How well does the directive (entry ban, procedural rights, judicial remedy, detention, humanitarian safeguards) fit the Norwegian practices?

How much do the institution and its representative feel compelled to comply with the directive?

In which respects did representative and /or organization feel most stress on standard procedures?

Would representative rather do without the influence of EU on Norwegian administration?

Are there elements of the directive that Norway did not comply with? Why? (normative/practical reasoning)

Logic of Consequences:

Focus: Short-term preferences. Instrumental view on negotiations, information obtainable, clear goals: e.g. avoid dissonance with national law and practices, flexible intergovernmental and inter-institutional trade-offs.

Measuring:

EU level:

How clear were the instructions from home (e.g. entry ban, procedural rights, judicial remedy, detention, humanitarian safeguards) that representatives received?

What were their bargaining resources?

What were the preferences/resources of other countries? How did they behave?

How much information / what kind of information did reps have about the goals of other countries?

What restricted possibilities for action?

What kinds of bargains were struck? (cooperative/hard) When?

Did Norway /other countries seek a trade-off? If yes, with what could they bargain?

Did Norway act strategically in coordination/coalition with other countries?

If unsuccessful, do Norwegians go venue shopping for other possibilities to influence e.g. the Presidency, Parliament, Commission?

National level:

How do the preferences of different institutions (UDI, UD, JD, PU, UNE) compare to the central elements of the directive (e.g. entry ban, procedural rights, judicial remedy, detention, humanitarian safeguards)?

What are the preferences of the Norwegian government coaltion (Ap/SV/SP)?

What was/is the dominant institution in the current situation?

Which institution / which actors have most resources?

Is the directive useful for purposes other than the harmonization of return?

Logic of Arguing:

Focus: true reasoning. power play between states/institutions recedes to the background, equal partners meet, exchange of validity claims with the goal to persuade and find consensus. Precondition: openness to be persuaded, truth-seeking

Measuring:

EU level:

When were countries inclined to move on their positions (e.g. entry ban, procedural rights, judicial remedy, detention, humanitarian safeguards)?

Did Norwegians witness "true" discussions about what the best instruments for an effective European migration policy are (based on common principles)? If yes, when & where?

Did Norwegians observe instances of open arguing, were countries or the Commission actually moved on their position? Were there sudden, surprising agreements?

How much importance was given the actual know-how of the experts present?

Were there smaller actors which noticeably influenced the decision process by arguments?

Which networks and channels did Norwegians use for additional information & know-how exchange?

National level:

How prominent was/ is the return directive (e.g. entry ban, procedural rights, judicial remedy, detention, humanitarian safeguards) in parliamentary and institutional discussions?

At what points were bureaucrats / the Norwegian civil society / public involved in expressing their views about measures in transposition?

How much freedom did institutions /individuals have in implementing the directives rules?

Do implementing institutions share the idea that a credible return policy is a deterrent for illegal immigration?

Are there other channels through which respondents exchange practices and views with other national and EU practitioners?

c) List of Council Prep. Bodies (11761/07) Borgvad (2007) *) = evtl. Norw. participation