

# **Struggling with Europe**

## **How initiators of horizontal forms of governance respond to EU formal rules**

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**Pieter Johannes Zwaan**

### **Thesis**

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## Abbreviations and acronyms

AESs	agri-environmental schemes
ANF	Agriculture, Nature and Food quality
BKD	Bloembollenkeuringsdienst (Flowerbulb Inspection Service)
CAP	Common Agricultural Policy
DG	Directorate General
DG AGRI	Directorate General Agriculture and Rural Development
DG SANCO	Directorate General for Health and Consumers
EC	European Commission
ECA	European Court of Auditors
ECJ	European Court of Justice
EU	European Union
FVO	Food and Veterinary Office
HSPE	Housing, Spatial Planning and the Environment
IP	Institutional Processualism / Institutional Processual
IPO	Inter Provinciaal Overleg (joint Provinces)
KCB	Kwaliteits-Controle-Bureau (Quality Inspection Service)
LDP	Landscape Development Plan
MPs	Members of Parliament
<i>mssd</i>	most similar system design
NAK	Nederlandse Algemene Keuringsdienst (Dutch General Inspection Service for Agricultural Seed and Seed Potatoes)
NEPP	National Environmental Policy Plan
NGO	Non-governmental organisation
PPS	Plant Protection Service
WTO	World Trade Organisation
ZBO	Zelfstandige Bestuursorganen (agencies)



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The title of this book refers to the persistent efforts undertaken by actors to introduce initiatives of horizontal forms of governance within a constraining EU formal setting. At times, writing this book has been a struggle as well; like the introduction of the governance initiatives, finishing this dissertation required much dedication and sustained effort. The completion of this book makes the struggle worthwhile.

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's-Hertogenbosch, March 2012



**FOR SIMON**





# CHAPTER 1

## INTRODUCTION

### **Bidding on a tree**

On 15 September 2007 the first landscape auction ever was held in the Ooijpolder, a rural area near the middle-size city of Nijmegen in the Netherlands. At the auction, private actors and citizens could make a bid for the management of different landscape elements that were put on offer on the behalf of farmers. Successful bidders 'adopted' a landscape element by paying the farmer for the management costs of an element over a certain period of time. Companies and citizens paid over € 110 000 for the management of different landscape elements for a period of ten years.

The auction was considered a huge success by the organisers: an expertise centre in the field of ecology and economy, a local nature organisation and the landscape foundation that was founded by three municipalities in the Ooijpolder. In different national and regional media the auction was portrayed as an innovative financial instrument to attract private funding for landscape conservation and development, and to bond private actors and citizens with their natural physical environment.

In the media however, a different story that sheds light on the difficulty of involving farmers with landscape management activities also comes to the fore. This story illustrates that the turn to *private* finances resulted partly from the difficult relationship with EU state aid requirements which set limits to the amounts of *public* money that can be paid to farmers to reward them for their landscape activities. When regional governmental actors in the area wanted to reward farmers a market based price, the Dutch Ministry of Agriculture, Nature and Food quality (ANF)<sup>1</sup> informed them that their initiative may be in conflict with EU state aid rules. It required that the reward would be first notified to the European Commission. When initiating actors tried to get the conditions specified, they became entangled in a complex process with

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<sup>1</sup> Under the minority cabinet Rutte-Verhagen, the Ministry of ANF has merged with the former Ministry of Economic Affairs. The new Ministry is called the Ministry of Economic Affairs, Agriculture and Innovation.

officials of the Ministry of ANF and the European Commission on how to interpret the EU state aid requirements.

After a wearisome process, that eventually led to a strict interpretation of the EU state aid rules, regional actors partly escaped from the EU formal rules by turning to private financing that was raised by the landscape auction. By doing so, as stated by a participating farmer in a regional television report: 'you don't have to deal with all those administrative processes, state aid notifications and those sorts of complicated terms... If someone is willing to finance the landscape activities, that person can directly do business with a farmer!' (TV Gelderland News 15 September 2007).

## **1.1 Tensions between (shifts in) different forms of governance**

The focus of this study is the potential difficult relationship between EU formal rules and alternative forms of governance in which public actors work together or rely on private actors to provide for public services. The relationship between both is considered here in the light of a so-called 'shift in governance'. This shift in governance is briefly discussed below.

### **Horizontal shifts in governance**

Over the last decade we have seen an increasing scholarly attention for alternative forms of governing in the field of political science and public administration. Different scholars speak of a 'shift from government to governance', which has altered - some might even claim 'blurred' (Stoker 1998, 17) - the relation between public and private actors involved in public policy making and policy delivery. The term *governance* is used to capture this relationship, setting it apart from the term *government* that is generally associated with a more hierarchical or vertical style of policy making in which public actors dominate (e.g. Pierre and Peters 2000; Hajer and Wagenaar 2003; Van Kersbergen and Van Waarden 2004; Treib et al. 2007).

In the present study these forms of governance will be referred to more specifically as horizontal forms of governance (cf. Termeer 2009).<sup>2</sup> Horizontal forms of governance are defined broadly in the present study. Basically I will include all forms of governance in which public and private actors work together to provide for public services or goods or in

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<sup>2</sup> In the governance literature we also find reference to 'old' or 'new' modes of governance. I agree with Treib et al. (2007) that a classification in these terms is of little analytical value, as 'what is new in one area could be rather old in another field of study.' (ibid., 16).

which public and private tasks are combined. This broad conception of horizontal governance encompasses arrangements such as public-private partnerships or covenants, as well as the contracting out or delegation of public tasks to (semi)private actors.

Over the recent years, scholars of public administration and political science pay increasing attention to the relationship between horizontal forms of governance and existing institutions of traditional government. They do so from a normative or empirical point of view. The different views are briefly discussed below.

From a normative perspective scholars turn in particular to the values of representative democracy and the values of horizontal forms of governance. Scott and Trubek (2002), for example, reflect on the notion of authority in horizontal governance arrangements and traditional institutions of government. There are great differences between both: traditional institutions look for a unitary source of authority, horizontal governance is 'predicated upon a dispersal and fragmentation of authority, and rests upon a fluid system of power sharing' (ibid., 8). Other traditional democratic values are also discussed in governance literature. Van Kersbergen and Van Waarden (2004), for example, discuss the functioning of horizontal forms of governance in relation to notions of governability, accountability and legitimacy (ibid., 155-9). From a (representative) democratic point of view, the shift towards horizontal forms of governance is generally viewed with concern (Koppenjan et al. 2009, 769).

Other scholars adopt a more empirical view and turn to the question of how horizontal forms of governance interact with hierarchical structures of government in practice (e.g. Breeman et al. 2009; Termeer 2009; Boonstra 2006; Hill and Lynn 2005, 190). These scholars point out that traditional, hierarchical forms of government still play an important role for example through formal legislation and grants (Hajer and Wagenaar 2003, 3; Pierre and Peters 2000, 18). Often horizontal forms of governance operate under a 'shadow of hierarchy' (Scharpf 1994, 40; cf. Héritier 2002). Traditional forms of government and horizontal modes of governance exist next to each other and 'are actually much more intertwined than is implied by some governance theorists' (Jordan et al. 2005, 484; cf. Van Tatenhove 2006).

In this study I will follow the latter group of scholars in adopting an empirical perspective on the interaction between horizontal forms of governance and existing institutions. In the present study, to be more specific, I will locate the relationship between horizontal and traditional forms of governing in the light of an 'upward shift in governance'. This shift is discussed below.

### **Vertical shifts in governance**

Scholars have not only observed a horizontal shift from government to governance, but also a vertical shift. Besides a greater involvement of private actors, different scholars have remarked that we can also observe an upward vertical shift to the international or supranational level, such as the World Trade Organisation (WTO) or the European Union (EU). Through this upward shift, nation states have become subject to different international pressures and requirements (e.g. Schmidt and Radaelli 2004, 190; Van Tatenhove et al. 2006, 10). In this study I will focus in particular on the pressures that originate from the EU level.

EU pressures are exerted through a number of policy instruments. These instruments include non-binding instruments such as guidelines or opinions or forms of co- or self-regulation. Many EU pressures however, are exerted through traditional legal instruments like regulations, decisions or directives (Marks and Hooghe 2001; Idema and Kelemen 2006; Héritier and Lehmkuhl 2008). Vertical shifts of governance do not necessarily imply a move away from traditional and hierarchical forms of governing. In fact, EU formal rules may limit the capacity and autonomy of actors to introduce horizontal forms of governance at the Member State level. As such, the different shifts in governance can work against each other and lead to various tensions.

### **Tensions**

Tensions between horizontal modes of governance and EU formal rules can indeed be observed. A number of scholars have turned their attention, for example, to the tensions between EU competition law and so-called 'hybrid organisations' (e.g. Van de Gronden 2001; Van Montfort 2005). By definition these organisations combine public duties with commercial activities. In a number of reports, the Dutch Court of Auditors refers to the difficult fit between hybrid organisations and EU legislation, as the latter recognises either public or private organisations. According to the Court there is an increasing pressure from the European Commission on hybrid organisations to separate their public and private activities (Algemene Rekenkamer 2005; 2006; 2008).

An example of this pressure which has featured prominently in Dutch national media is the case of social housing corporations in the Netherlands (but see for other countries Oxley et al, 2008). It has been argued that housing associations can provide the public task of providing housing to households with a modest income, but can also promote variety in the housing stock through their commercial activities, exactly because of their hybrid status. They thereby provide a good foundation for tackling the problems of urban

renewal and social neighborhood development (e.g. Priemus 2006, 278). However, the European Commission was concerned that financial support coming from public authorities might leak away to other commercial housing activities, thereby undermining fair competition on the (EU) housing market. Over the last few years it has therefore posed a number of critical questions about the position of Dutch housing associations in the housing market. In response to these concerns, Dutch government has made a legal separation of those housing associations in a public and commercial unit (Priemus 2006; Gruis and Priemus 2008).

Tension has also been recognised between horizontal policy instruments such as covenants signed by government and industry and EU formal rules. The European Commission and the European Court of Justice (ECJ) have set restrictions on using covenants to implement EU directives. Even though covenants can help Member States to meet goals set out in EU directives or even go beyond that (see Haverland 2000 on the implementation of the Packaging Waste Directive in the Netherlands), they cannot be used alone to implement EU directives. The requirement of legal certainty, developed through the jurisprudence of the ECJ, requires Member States to provide for legislative back-ups in order to secure full conformity (EC 1996, 17-9).

## **1.2 Research objective and questions**

Attention for the potential restrictions set by the EU formal setting is of great importance when considering the likely further conversion towards more horizontal ways of supplying public goods and services at the EU Member State level. Increasingly horizontal forms of governance are regarded as having the potential to generate efficiency gains when formulating and implementing public policy (Klijn and Skelcher 2007). They are seen as a way of coping with complex policy problems, to connect government and society, to enrich policy proposals and increase their realisation (Termeer 2009, 300). As these horizontal modes of governance become increasingly accepted as legitimate and effective forms of policy making and delivering public goods and services, it is essential to understand how horizontal modes of governance relate to (existing) EU formal requirements. The relationship between EU formal rules and horizontal forms of governance is therefore further analysed in this study.

I do not assume that the impact of EU formal rules on horizontal forms of governance depends on the specific legal provisions alone. The implementation or application of (EU) formal rules can be uncertain or ambiguous and actors responsible for applying EU formal rules can respond to them in different ways. To understand how EU formal rules affect particular forms of horizontal governance we need to consider the application of these formal rules or perhaps better, the way initiating actors respond to these rules in concrete situations. The research objective of this study is therefore formulated in terms of:

*Gaining an understanding and explanation of how EU formal rules are responded to by initiators of horizontal forms of governance and what effect these responses have on the introduction of horizontal modes of governance at the Member State level.*

On the basis of the research objective I formulated the following research questions:

- 1) *Which EU formal rules apply to the horizontal governance initiatives?*
- 2) *How do actors (responsible for applying these rules) respond to them?*
- 3) *How can we explain actors' responses?*
- 4) *How do actors' responses affect the introduction of the horizontal forms of governance?*

### **1.3 Three case studies**

In this study I will analyse the application of different EU formal rules in three cases in the Netherlands. In the three cases the introduction of a horizontal governance initiative became troubled and delayed due to the involvement of particular EU formal rules that had to be applied. The three cases can all be found in the domain of the Life Sciences.<sup>3</sup> The cases consist of examples in the field of phytosanitary (plant health) policy, soil remediation policy and agri-environmental policy. The cases will be briefly introduced below (the case selection criteria will be further discussed in the methodological chapter):

- The first case study - the so-termed Phyto case - analyses the delegation of phytosanitary (i.e. plant health) inspection tasks. An agencification project - operation Plantkeur - was set up to delegate phytosanitary inspections tasks from the Ministry of ANF to four autonomous inspection bodies. The delegation of phytosanitary inspection tasks to the autonomous bodies, which already carried out plant *quality* inspections as

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<sup>3</sup> Life Sciences include policy domains related to food and the living environment.

agencies (in Dutch: Zelfstandige Bestuursorganen, ZBOs), had to clarify the responsibilities of different parties involved with the plant inspection system and reduce the inspection costs for the private sector. The case illustrates how the introduction of the governance initiative was affected by questions from the European Commission on the compatibility of the reform with the EU Phytosanitary Directive.

- The second case study - the Soil Remediation case - describes the introduction of a financial support scheme established by the Ministry of Housing, Spatial Planning and the Environment (HSPE).<sup>4</sup> The scheme was part of a covenant signed by the Ministry and the dry cleaning sector in order to speed up the rehabilitation of polluted sites. In the covenant it was agreed that the Ministry of HSPE would provide dry cleaning companies with financial assistance to overcome the risks of investing in the remediation of polluted sites. In return the sector as a whole would commit itself to participate in the scheme. This second case study shows how the introduction of the financial support scheme was constrained by different EU state aid requirements.
- The third case study - the Green Services case - was introduced briefly at the beginning of this chapter. This case analyses the establishment of a regionally developed agri-environmental scheme whereby landscape management activities are 'contracted out' to farmers. In return for their activities, farmers would receive a market-based payment on the basis of custom-made contracts. The third case, like the second case study, sheds light on how the introduction of the governance initiative was affected by different EU state aid requirements. Varying interpretations on the application of the EU state aid rules held by actors at different governmental levels frustrated the introduction of the scheme.

## 1.4 Outline of the book

The argument of this book develops through three main parts. The next three chapters, together with this introduction, constitute part one. It provides a theoretical and methodological foundation for the research. In chapter 2 I will review and discuss the current state of theories and explanations of EU implementation research. On that basis I will set out a so-called institutional processual approach in chapter 3, which will present a general framework to analyse the application of EU formal rules. A number of social

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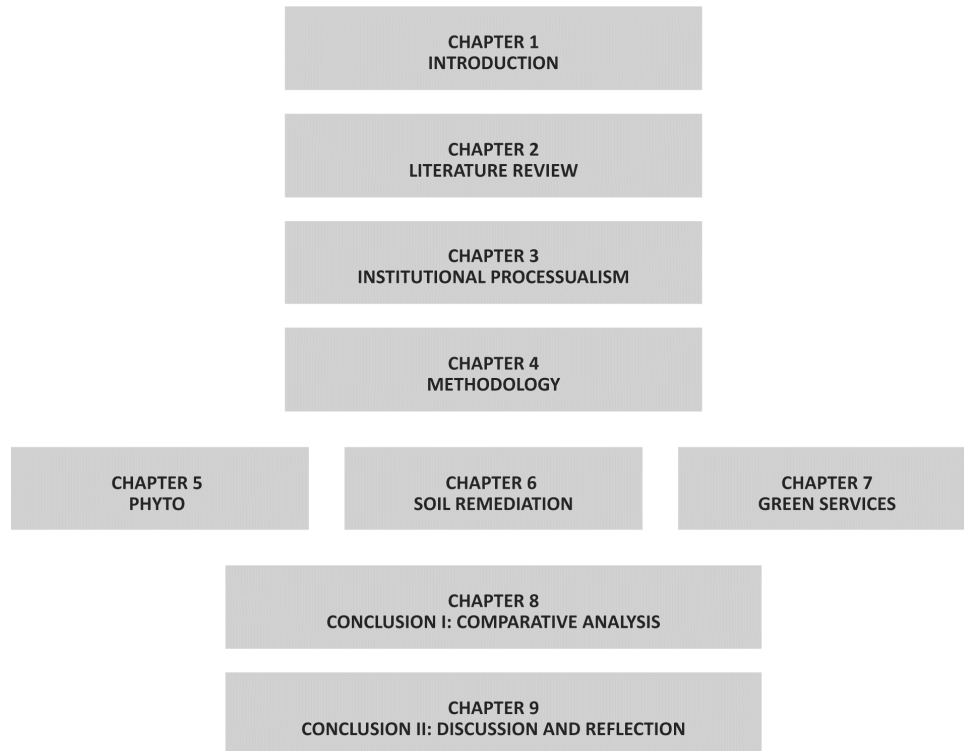
<sup>4</sup> Under the minority cabinet Rutte-Verhagen, the Ministry of HSPE has merged with the former of Transport, Public Works and Water Management. The new Ministry is called the Ministry of Infrastructure and the Environment.

mechanisms and contextual factors are outlined in this chapter to explain how actors respond to EU formal rules. Chapter 4 presents the research methodology.

The three subsequent chapters 5, 6 and 7 constitute part two. In the second part I will present the three case studies. After presenting historical narratives of the cases, I will analyse these narratives in terms of actor's pursued responses, social mechanisms and contextual factors in each separate chapter.

Chapters 8 and 9 conclude this study. Chapter 8 will first answer the research questions from a comparative perspective. Chapter 9 will then provide a more general discussion of the insights of this study, reflect upon the research approach and discuss a number of recommendations. The overall outline of the study is presented in figure 1.1 below.





**Figure 1.1: Outline of the book**

Note that different parts of this study are based on articles published elsewhere. Part of the literature review in chapter 2 is based on the article 'Domestic Change and EU Compliance in the Netherlands: Policy Feedback during Enforcement' (Breeman and Zwaan 2009). The narrative of the Green Services case is largely based on the article 'Making Sense of EU State Aid Requirements: the Case of Green Services' (Zwaan and Goverde 2010).



# **CHAPTER 2**

## **RIDING THE WAVES OF EU IMPLEMENTATION RESEARCH**

### **2.1 Introduction**

The objective of this study is to provide a better understanding of the impact of EU formal rules on the introduction of horizontal forms of governance at the EU Member State level, starting from the assumption that (EU) formal rules do not implement themselves. To begin I will first review EU implementation literature and assess its potential to contribute to this study's research objective.

This chapter has six other sections. Section 2.2 first discusses EU implementation literature in the light of the broader research field of Europeanisation. In section 2.3 I will discuss the 'goodness of fit' thesis that has been popular in explaining the implementation of EU formal rules. In section 2.4 and 2.5 I will review recent EU implementation approaches that draw on rational choice or sociological institutional literature to explain the implementation of EU formal rules. In section 2.6 I will critically review EU implementation literature and highlight four analytical shortcomings to be addressed in this study. Section 2.7 summarises the chapter.

### **2.2 Europeanisation and EU implementation studies**

After focusing on how the European Union (EU) would develop and function as a political system, political scientists have started to research the 'day to day politics' in the EU since the late 1980s (Peters 2000, 190; Jachtenfuchs 2001; Jordan 2001; Schmidt and Radaelli 2004, 183). Stimulated by the Single European Act (1986), which led to a steady increase of adopted EU formal rules, scholars paid increasing attention to the 'impact of Europe' (Radaelli 2004; Buller 2006; Treib 2006; Kaeding 2007). By the late 1990s, analysing this impact had become a popular theme in political science and became known as Europeanisation research.

Europeanisation quickly became a contested concept. Since its introduction, the concept has been widened to cover a range of observations related in some way with Europe (Radaelli 2000; Olsen 2002). In this study I will use the term Europeanisation to refer to

the effects of the EU on the domestic level. Of the different usages, this appears to be most accepted (e.g. Héritier 2001; Bache and Jordan 2006). It is important to note that Europeanisation does not necessarily imply that Member States become similar. Within literature it is stressed that Europeanisation is an open end, hence the term should not be equated with others such as harmonisation or convergence. In fact, Europeanisation literature has shown that the 'impact of Europe' can be rather different across Member States (Héritier 2001).

As a general concept Europeanisation, however, provides little understanding of how the EU affects the Member State level. To achieve this many EU scholars have adopted an implementation perspective. Increasingly it was recognised that 'a study which is concerned with domestic (...) changes emerging from supranational policy requirements is closely related to questions of policy implementation...' (Knill 2001, 17). Adopting an implementation approach enabled scholars to unpack in a more explicit fashion the way the EU affects national policies (O'Mahony 2007). Over the last decade, the implementation of EU formal rules and policies has developed as an important subfield of Europeanisation research (Treib 2008; Kaeding 2007). According to some it has become the 'classic way' to examine Europeanisation (Radaelli 2008, 239).

Before turning to the established implementation literature in the sections below, I will introduce some concepts that are needed to attain a correct understanding of the existing EU implementation literature.

Within the EU we find different legal instruments that must be implemented and applied at the Member State level. Directives constitute a large part of these legal instruments. They are not binding in their entirety, but only with regards to the goals to be achieved. Member States thereby have a substantial degree of flexibility to achieve the goals by their own means, within their own national legal systems (Glachant 2001, 16). Before being applicable at the Member State level, directives have to be incorporated into national legislation. This is known as the transposition stage (Prechal 2005, 5-6).

Besides EU directives, there are other legal instruments that Member States have to conform to, such as regulations, decisions or provisions that follow directly from the EC Treaty. These legal instruments are directly applicable at the Member State level. While similar theories have been used to explain the implementation / application of different EU legal instruments, it is worth noting that historically the focus of EU implementation literature has been on the implementation of EU directives, in particular their transposition into national legislation. The practical implementation or application of EU

formal rules is discussed only in a limited set of research; focus on it has even decreased over the recent years (cf. Treib 2008; a notable exception is Versluis 2003 on the enforcement of EU directives).

### **2.3 The goodness of fit thesis<sup>5</sup>**

In the political sciences and the field of public administration there is a long-standing tradition to examine implementation processes at the national level. After the seminal study of Pressman and Wildavsky (1973) on the implementation of a U.S. federal economic development programme in Oakland, implementation research developed as an important sub-discipline and would continue as such until the late 1990s (see Matland 1995; O'Toole 2000; Hill and Hupe 2002 for reviews on the implementation literature).

Surprisingly, traditional (domestic) implementation literature has affected EU implementation studies in a limited way (Sverdrup 2002; Berglund 2009; Treib 2008). EU implementation scholars tend restricting their use of it to what is described as the top-down implementation approach. This top-down approach views implementation foremost as an administrative (a-political) execution of decisions. Starting from the assumption that 'implementers' are in principle willing to conform and that clear provisions or effective national administrations can facilitate the implementation of EU formal rules, scholars have addressed the role of different administrative variables, such as the legal quality of directives or the legal expertise at the Member State level to explain the ease of implementing EU directives in different Member States (Siedentopf et al. 1988; Dimitrakopoulos and Richardson 2001, 346-348; Versluis 2003, 14; Falkner, et al. 2005, 14).

While traditional implementation literature provides a wealth of insights on the implementation of formal rules and public policies, much EU implementation literature is casted in terms of the general literature on comparative politics, in particular new institutionalism.

During the late 1990s scholars started to build upon the insights of historical institutionalism to explain differences in the implementation of EU policies in different EU Member States (Hall and Taylor 1998; Thelen 1999; Pierson 2000). Inspired by this literature, EU implementation scholars turned to the role of existing institutional

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<sup>5</sup> Parts of this section and section 2.4 have been adapted from Breeman and Zwaan (2009).

traditions or policy legacies of different Member States to explain differences between them in the ease of implementing EU policies.

An important concept developed in EU implementation literature is the 'goodness of fit' between EU policies and existing national practices (Börzel and Risse 2000). Scholars use this concept to describe how 'institutional and policy stickiness' in the EU Member States affect the implementation of EU policies (Romeijn 2008). In this view, domestic actors' willingness to implement EU formal rules is assumed to be determined by existing national structures and a motivation of domestic actors to 'guard the status quo' (Duina 1997, 157). Following this argument, scholars asserted that the degree of fit or misfit between European formal rules and existing institutional and regulatory traditions will affect the ease and speed of implementation (Duina 1997; Knill and Lenschow 1998; Héritier 2001). In case of a fit, the implementation of EU formal rules in the Member States can be expected to be smooth and relatively unproblematic. However, if EU policies do not fit existing institutional and policy traditions, implementation can be expected to be problematic, leading to delays or non-conformity (Hartlapp 2009, 471).

Despite its 'intuitive appeal', there is an ongoing debate on the value of the goodness of fit thesis (Mastenbroek and Kaeding 2006; Hartlapp 2009). A great number of studies have shown that 'misfits' or 'fits' are often accompanied by various other (mediating) variables, which either smooth (in case of a misfit) or trouble (in case of a fit) the implementation of EU directives. Börzel (2003) for example, points out that pressures towards conformity coming from below, through the mobilisation of public opinion at Member State level, or above, through the monitoring and enforcement activities of the European Commission, must be taken into account when explaining the implementation of EU directives. This 'push and pull model' explains how large misfits can be overcome at the Member State level. Other scholars have also shown that despite a high degree of misfit, directives can be used strategically by governments to push for a change (e.g. Stiller 2006, Hartlapp 2009). In these cases EU policies and formal rules are 'blamed' by governments for changing domestic policies or administrative structures.

Scholars also demonstrated that a moderate or a small misfit does not mean that the implementation of EU formal rules is unproblematic. Haverland (2000) for example highlighted that the German government, despite only a moderate misfit, implemented the packaging waste directive with a delay of two years. In a comparative study on the implementation of this directive, the number of veto points was identified as an important institutional factor in explaining the difficulty of transposing EU directives. A large number of veto points would negatively affect the timeliness and quality of transposition as they

provide opportunities for various actors to veto or delay the transposition process (Haverland 2000; cf. Börzel and Risse 2003; Falkner et al. 2007).

In general, these various studies have illustrated that to explain the implementation process, different (mediating) variables must be taken into account, besides the existing administrative structures and policies (Börzel 2003; Mastebroek and Kaeding 2006; Laffan and O'Mahony 2008).

The 'goodness of fit' thesis has also been challenged conceptually. Mastebroek and Kaeding (2006) for example, have critically questioned the 'added theoretical value of this [degree of misfit]' and its underlying assumption that domestic governments and administrations are committed to protecting their existing policies. In their view, the relationship between the 'power of the status quo' and the willingness of domestic actors to implement EU formal rules is spurious, as both depend upon the preferences of domestic actors at the moment of implementation. Mastebroek and Kaeding (2006, 338) therefore suggest making EU implementation theory more parsimonious by dropping the misfit variable altogether and to focus instead directly on the willingness of actors to conform to EU formal rules.

Increasingly EU implementation scholars turn directly to the preferences of actors and their interactions at the moment of implementing EU formal rules. The focus has been described as a 'third wave' in EU implementation studies - after a 'first wave' of analysing the role of administrative factors and a 'second wave' of testing and specifying the goodness of fit thesis (Mastebroek and Kaeding 2006; Treib 2006).

Within this third wave, there is also an additional focus on the 'horizontal' interactions between domestic actors to explain the implementation of EU policies (Mastebroek 2007; Berglund 2009; Asquer 2009). Where early implementation studies depicted the Member State as a unitary actor in the implementation process, it is increasingly recognised that we must take into account the interactions between different domestic actors to explain the ease of implementing EU formal rules.

This third wave, to conclude, can be characterised also by a greater theoretical elaboration and specification. More and more, implementation scholars explicitly theorise the role of actors' preferences, values and the interactions between actors, often as affected by the wider institutional setting (Treib 2008, Mastebroek 2005). To strengthen their arguments on the implementation of EU formal rules, these recent studies draw in particular on rational choice institutionalism or sociological (normative) institutionalism and international relations (IR) compliance literature. Below I will discuss a number of

prominent arguments inspired by these rational choice and sociological institutional approaches.

## **2.4 Rational choice institutionalism**

In rational choice approaches actors are assumed to act as self-interested actors that make calculated, yet bounded, decisions about how to react to formal pressures. In this view, actors' decisions are guided by a so-called logic of consequentiality. Confronted with a formal rule, an actor progresses through a series of steps to decide how to respond to it: it will start considering its goals and its alternative courses of action; it will evaluate the consequences of these actions and choose the course of action it believes will attain its goal (March and Olsen 1989, 39; cf. Suchman 1997).

In these approaches actors' goals are typically described in terms of material or political self-interests.<sup>8</sup> A more important assumption in these approaches is that actor's goals can be (fully) specified by themselves and remain fixed during the decision making process. On the basis of this assumption, EU implementation scholars have presented different arguments to explain the implementation of EU formal rules. Two prominent arguments are discussed below.

### **Monitoring and enforcement**

Starting from the assumption that the willingness of actors to conform to EU formal rules depends on the costs and benefits of conformity and on the (potential) costs and benefits of dismissing them, various scholars have paid attention to the role of monitoring activities and sanctions or incentives provided by third actors to deter defections and compel conformity (Beach 2005 23; Sverdrup 2004; Scott 2000, 52; Edelman and Suchman 1997, 487). Monitoring increases the chance that cases of non-conformity will be detected, while sanctions raise the costs to defect; this is expected to make non-conformity a less attractive option.

In EU implementation literature particular attention is given to the role of the European Commission that is designated as a 'guardian of the treaties'. The Commission is expected to fulfill this role by monitoring the activities of Member States and by initiating so-called infringement proceedings against Member States which are suspected of breaching EU law. By opening these proceedings the Commission can request additional information on

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<sup>8</sup> This approach is therefore also known as a materialist or instrumental approach.



the implementation of EU formal rules, set forward its own interpretation and finally refer a case to the European Court of Justice (ECJ) to decide on this.

Scholar opinion on how effective the Commission's monitoring and enforcement activities are in compelling domestic actors to conform varies. On the basis of a study on the implementation of EU environmental directives in Ireland, O'Mahony for example, concludes that the Commission's monitoring means that Irish authorities can no longer ignore objections from Brussels (2007). Also Börzel (2003) argues that the opening of infringement proceedings against Member States that failed to implement EU policies can 'push' domestic actors to conform to EU formal rules. Other scholars remark that the Commission often lacks the capacity or authority to oversee the implementation of EU formal rules (Bursens 2002; Beach 2005). Typically, the Commission has to make a choice about whether to open an infringement procedure. The decision to do so, it has been argued, often depend on its workload and the importance it attaches to the policy (Hartlapp and Falkner 2009, 297).

### **Veto points and players**

In addition to a focus on the monitoring and enforcement activities by the Commission, scholars have turned their attention to implementation difficulties that result from the strategic interaction between different domestic actors. In recent years, as mentioned, scholars have paid increasing attention to the strategic interaction between various *domestic actors* which are involved in implementing EU formal rules such as ministries, (Members of) Parliament, stakeholders or advisory bodies (Falkner et al. 2005; Mastenbroek 2007).

Particular attention is given to the (formal) institutional setting in which these strategic interactions take place and that provides actors with particular opportunities or constraints within which to act. Scholars turn to the informal and formal rules which determine which actors have the formal power to do what, when and how (Hartlapp 2009).

Building on the argument of Haverland (2000) that a great number of veto points negatively affect the timeliness and quality of transposition, scholars have given greater attention to the preferences of the actors that make use of the veto points. The distance between the preferences of these actors (the veto players) rather than the number of veto-points is argued to affect the transposition process (Hartlapp 2009, 472). On that basis, different formal models on the interaction between veto players have been

developed to explain the transposition of EU directives (e.g. Steunenberg 2000, Romeijn 2008).

## **2.5 Sociological (normative) institutionalism**

Alternative arguments to explain the implementation of EU formal rules can be found in EU implementation approaches that are based on sociological (normative) institutional literature (e.g. Dimitrova and Rhinard 2005; Mastenbroek 2007). In these approaches, actors' decisions to conform are not assumed to be based on the material or political costs and benefits of conformity but depend on their ideas on what is morally right. Following Suchman (1997), I make a distinction between normative approaches that stress the *direct effect* and those that stress the *indirect effect of morality* to explain actors' conformity to formal rules.

### **The direct effect of morality**

Scholars that address the direct effect of morality stress that the (normative) content of the EU formal rules itself affects actors' willingness to conform. It is assumed that actors, instead of looking for the direct benefits of conforming to a rule, will take into account whether conforming to a rule is 'the right thing to do' given their identity and situation (Suchman 1995, 576). Actors, in this view, act on the basis of a so-called *logic of appropriateness* (March and Olsen 1989; March 1994).

A prominent example of this argument in the field of EU implementation is found in the work of Dimitrova and Rhinard (2005). To explain the transposition of EU directives, the authors suggest analysing the compatibility between EU directives and a so-called domestic 'norm-set'. Inspired by the work of Hall (1993), the authors distinguish between three different 'levels of norms' that will have different effects on the implementation of EU formal rules in the case of a conflict. First-order norms refer to the normative ideas regarding the policy instruments that are used; these are shared only within a specific group of policy-relevant actors. Second-order norms are broader and relate to the appropriateness of particular regulatory 'styles' and objectives; they are shared by a wider section of the political community. Third-order norms, finally, refer to more deeply rooted societal norms and are more generally shared.

Dimitrova and Rhinard argue that incompatibilities between EU directives and second- and third-order norms will lead to more implementation difficulties than conflicts

between the directive and first-order national norms. When second- and third-order norms come into effect a larger group of actors at the national level will be affected and involved in the transposition process.<sup>9</sup> Breeman and Zwaan (2009) relied on this argument to explain the difficulties of enforcing the EU Foot and Mouth Directive in the Netherlands. After successfully *transposing* the directive into national legislation, many years later the *enforcement* of the directive led to difficulties. The *enforcement* of the directive affected a larger group of actors - whose norms had also changed since the adoption and transposition of the directive - and conflicted with more widely shared normative ideas; this gave rise to much resistance.

### **The indirect effect of morality**

Other scholars have addressed the 'indirect effect of morality' on actors' conformity to EU formal rules. Whether actors conform to EU formal rules is argued to depend also on the 'authority' of the regulator or the legitimacy of the procedure by which EU formal rules are formulated (Hurd 1999, 381; Scott 1991, 175; Suchman 1995, 580; March and Olsen 2004, 6). Before conforming to a formal rule, actors will assess whether the rule is passed in a generally accepted manner, or whether the actions of the regulator are 'desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.' (Suchman 1995, 574).

An interesting use of this argument is found in the work of Mastenbroek (2006) who suggests that we must focus (as well) on the procedural legitimacy of the implementation process at the national level. The transposition of EU directives is viewed by her as a process of deliberation in which different domestic actors, which hold different normative views on the EU formal rules, attempt to persuade each other of adopting these views. To explain the delay of transposing EU directives, she focuses on the possibilities provided to actors to participate in these processes. Inspired by the literature on deliberative democracy she argues that a lack of 'discursive quality' can lead to stalemates that frustrate the timely transposition of EU directives.

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<sup>9</sup> Drawing on social constructivist literature in the field of international relations, it is suggested that to overcome problems caused by third-level norms domestic actors need to be socialised and must internalise new norms. Norm entrepreneurs or advocacy coalition can play an important role in persuading other actors to value particular norms. Eventually this will ease the implementation of EU directives at the Member State level (Börzel and Risse 2000; Dimitrova and Rhinard 2005).

## 2.6 Assessing EU implementation literature

EU implementation literature clearly demonstrates that EU formal rules do not implement or apply themselves: different actors may attempt to influence how EU formal rules are implemented, making this process a potentially troublesome exercise.

The review shows that EU implementation scholars have increasingly adopted a political perspective to analyse the implementation of EU formal rules. Informed by rational choice or sociological (normative) institutionalism, scholars focus on the preferences and values of different actors, their interactions and the particular institutional settings in which these interactions take place. On the basis of this review, four shortcomings can be identified in EU implementation literature. These shortcomings are discussed below:

First, EU implementation scholars have not identified uniform support for the different variables or factors they have put forward on the basis of rational choice or sociological (normative) institutionalism. Aside from the efforts of scholars to provide more systematic arguments on the basis of rational choice or sociological (normative) institutionalism to explain the implementation of EU formal rules, both approaches are only partially and 'sometimes true'. There is an increasing recognition in recent EU implementation literature that we must integrate the (insights of) rational choice and sociological institutional approaches; to explain the implementation of EU formal rules we need investigate the interactions between the different variables (Falkner et al. 2005, 17; Sverdrup 2005, 23-4; Berglund 2009).

A similar stance is advocated in institutional literature on law and organisations, where various scholars adopt such an integrative approach (see in particular Suchman and Edelman 1996; Edelman and Suchman 1997; but also Scott 2001). Instead of overdeveloping a particular institutional approach at the expense of another, these scholars call for 'a stance of balanced eclecticism' based on both (Suchman 1997, 501). Interestingly, these scholars not only suggest integrating the insights of rational choice and sociological (normative) approaches, but also the insights of social-cognitive (or discursive) institutional approaches that stress the importance of social-cognitive ideas. These authors stress that actors are not passive acceptors of their institutional environment to which they simply respond, but must interpret their environment (Edelman and Suchman 1997). Formal rules in this view do not trigger an automatic response, but often trigger multiple questions such as 'does this apply to us? Who says so? Is this something to which we should respond? What might we do about it?' These

different questions become moments of interpretation and sensemaking (Scott 2001, 169).

The limited attention for social-cognitive ideas and interpretive processes presents a second shortcoming in recent EU implementation literature. It is worth noting however that this has not been completely neglected. This aspect has been addressed for example, in the work of Knill and Lenschow (1998, 611) in relation to the misfit thesis. The authors stress that the degree of fit is *not given* but needs to be interpreted and defined by domestic (political) actors; social-cognitive ideas shape what is considered a fit or misfit (Schmidt and Radaelli 2004, 178). By turning to rational choice and sociological (normative) institutionalism, the role of interpretive processes and social-cognitive ideas has been somewhat omitted in recent EU implementation literature.

The third and fourth shortcoming largely results from the aim of EU implementation scholars to explain why Member States succeed or fail in implementing EU formal rules. Scholars' focus on 'implementation deficits' results in two additional shortcomings. The third shortcoming in EU implementation literature is that it provides us with only a partial understanding of *how* implementation processes actually unfold. Although implementation *processes* are reflected in different case studies, EU implementation literature generally provides for a range of explanatory *variables* that affect the *ease* or *correctness* of implementing EU formal rules. By focusing on the impact of these variables, these approaches limit our insights about the manner in which final outcomes are reached.

A fourth shortcoming, to conclude, follows from defining implementation outcomes in terms of a deficit (a delay or incorrectness). As a result, the precise way in which actors *respond* to EU formal rules remains somewhat unspecified in the EU implementation literature. The focus on implementation deficits keeps the researcher from an open observation of the efforts of implementing actors (cf. Hill and Hupe 2002, 483). While we can find reference to different responses in the different case studies on the implementation of EU formal rules, the responses actors exactly pursue is not systematically addressed in EU implementation literature.

### **Addressing the shortcomings**

In this study I will adopt a so-called institutional processual (IP) approach to address these various shortcomings (Barzelay 2004; Barzelay and Gallego 2006). This approach is 'less

cultural in orientation than much of (...) [sociological institutionalism], more actor-centered than much of historical institutionalism, and less choice-theoretic than much of rational choice institutionalism.’ (Barzelay 2004, 31). I believe the IP approach is thereby capable of bringing together different insights that have been provided by EU scholars on the basis of rational choice or sociological (normative) institutionalism. The IP approach, secondly, can also address a number of other aspects that are important for understanding and explaining the implementation of EU formal rules, such as the role of social-cognitive ideas and processes of (strategic) learning.

In line with a recent suggestion by Hartlapp and Falkner, I turn to the IP approach to do something ‘more than (...) highlighting individual factors that may or may not have an impact, but less than [providing] a general theory of compliance [or implementation of EU formal rules]...’ (2009, 299). In a recent critical review of EU implementation literature, these authors present a strong argument to move away from research strategies in which contradictory evidence is used to ‘falsify’ former insights and arguments about EU implementation. They suggest that we should develop an *approach* to structure our diverse and sometimes contradictory knowledge about the implementation of EU formal rules, rather than advance or refute specific hypotheses. ‘Crucial building blocks in this endeavor’, the authors continue, ‘would be catalogs of potentially relevant factors and of causal mechanisms...’ (ibid.).

The IP approach, as will become clear, aims to do exactly this. In the next chapter the IP approach will be discussed in relation to new institutionalism and further specified to explain how actors respond to EU formal rules.

## **2.7 Summary**

The review presented in this chapter illustrates that the study of the implementation of EU formal rules has developed into an important subfield of Europeanisation research over the last decade. In substantive terms EU implementation literature has demonstrated that EU formal rules do not implement themselves; it has drawn attention to the fact that implementing or applying EU formal rules can be a difficult exercise. To explain these difficulties, EU implementation scholars increasingly adopt an institutional perspective and address a variety of factors inspired by rational choice or sociological (normative) institutionalism. While there is an increasing theoretical sophistication in recent EU

implementation literature, I identified four shortcomings in it. In the next chapter these shortcomings are addressed by adopting an institutional processual approach.





# CHAPTER 3

## AN INSTITUTIONAL PROCESSUAL APPROACH

### 3.1 Introduction

In the previous chapter I reviewed EU implementation literature in order to improve our understanding of how actors implement EU formal rules. More specifically, I focused on a number of recent prominent arguments that have been inspired by rational choice and sociological (normative) institutional literature.

The review demonstrated that the implementation of EU formal rules is not an automatic process: the implementation of EU formal rules can be affected by the preferences and values of different (domestic) actors, the interactions between these actors and the particular institutional settings in which these interactions take place. Despite an increasing theoretical sophistication in recent EU implementation literature I identified four shortcomings: (i) the limited efforts to integrate rational choice and sociological institutional approaches; (ii) the limited attention given to interpretive processes and social-cognitive ideas; (iii) the limited insights on the *dynamics* of application / implementation processes; and (iv) the little systemised understanding of how actors actually respond to EU formal rule.

To address these shortcomings, I set out a so-called institutional processual (IP) approach. The IP approach was originally presented in literature on public management reform. In many ways the literature on public management reform resembles EU implementation literature by drawing on new institutionalism; historical, rational choice and sociological institutionalism are all well represented in this literature (see Barzelay and Gallego 2006). A somewhat alternative research program can also be found in this field. Barzelay and Gallego (2006) have come to label this approach as 'institutional processualism'. Over recent years, this approach has gained increasing recognition and has been applied to a broad range of topics relevant to institutional and policy change and (to a lesser extent) stability (e.g. Barzelay 2003; Mele 2008; Barzelay and Gallego 2010a).

IP has affinities with new institutional theory but adopts a more explicit *processual* outlook by drawing on processual literature in organisation studies such as that on

organisational sensemaking (Weick 1995, 2001) or learning (Levitt and March 1988) and policy science literature on policy change (e.g. Kingdon 1995). From this position it is 'attentive to flows of interaction, the subtle interplay between beliefs and action as experience unfolds, and to context in motion.' (Barzelay and Gallego 2006, 538; cf. Beuselinck 2008, 72; Butler et al. 2010, 151; Mele and Compagni 2010, 830). To explain how policy processes unfold it adopts an explicit social mechanisms approach.

I start this chapter by discussing the institutional processual approach in more general terms. Section 3.2 will introduce the approach and briefly discuss its relationship with new institutional literature. After doing so the foundations of the approach are presented by drawing on the work of Hay (Hay and Wincott 1998, Hay 2002, 2006). Section 3.3 will discuss the distinct analytical strategy adopted by institutional processualists: a social mechanism approach. Section 3.4 will further specify the institutional processual approach to systematically analyse how actors actually *respond* to EU formal rules. After specifying the IP approach, section 3.5 will discuss a number of social mechanisms that can affect actors' responses. In section 3.6 different contextual factors that are expected to affect the operation of these social mechanisms will be discussed. Finally, section 3.7 presents a typology of responses that will be used to structure the analysis. Section 3.8 summarises and concludes this chapter.

### **3.2 Institutional processualism**

Before presenting the IP approach, it is worth noting that the feasibility of setting institutional processualism apart from new institutionalism depends on a particular interpretation of this literature. In the article that introduces the IP approach, Barzelay and Gallego note a strong resemblance between the foundations of historical institutionalism as formulated by Hay and Wincott (1998) and the IP approach. After reviewing the work of Hay and Wincott, they even go as far as to suggest that Hay and Wincott's account provides 'a satisfactory foundational account of institutional processualism' (2006, 551). However at the same time Barzelay and Gallego stress that the view of Hay and Wincott is not universally accepted as an accurate account of historical institutionalism. On that basis they argue it is justified to set institutional processualism apart as a distinct (institutional) approach (2006, 551).

I follow the argument of Barzelay and Gallego. I concur with their statement that the view of Hay and Wincott is not generally shared amongst scholars (see in particular Hall

and Taylor 1998). Moreover, I feel there is a clear need to present the IP approach as a distinct institutional approach in the present study given the strong association between historical institutionalism and the ‘misfit thesis’ in EU implementation literature. On the basis of the IP approach, as will become clear, quite different arguments will be presented on the implementation or application of EU formal rules.

### **Foundations of institutional processualism**

Below I will draw on the work of Hay and Wincott and further elaborations by Hay (1998, 2002, 2006) to present the *foundations* of the IP approach. After doing so I will return to the work of Barzelay (and colleagues) to further develop the IP approach. To be clear, Hay does not refer to the label institutional processualism in his own work. The label of IP, as noted, is attached to it by Barzelay and Gallego (2006).<sup>10</sup>

Drawing on a dialectical view between agency and structure (Giddens 1984; Hay and Jessop 1995 in Hay 2002), Hay sets out the foundations of his approach by referring to a number of basic features. These features are discussed below (Hay and Wincott 1998, 954):

*‘Actors are strategic, seeking to realise certain complex, contingent and (...) changing goals.’*

Actors are assumed to have a capacity to act strategically on the basis of particular goals or ambitions. In contrast with rationalist approaches these goals are not assumed to be solely or directly based on material or political self-interest. Actors will often be oriented towards wider purposes or values. Actors may have different motives to act. In as far as actors are oriented towards apparent self-interests these interests must be understood in more subjective terms. Interest-based behavior certainly exists, but it is based on interpretations of material or political costs and benefits.<sup>11</sup>

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<sup>10</sup> It is worth noting that Hay has also relabelled and elaborated this account. He now calls his approach a *constructivist* institutional approach (2006). For matters of clarity I decided not to refer to this label in the main text. The approach of Hay has a close affinity with discursive or ideational institutionalism (see Borrás and Radaelli 2009). All these recent institutional approaches try to overcome ‘stasis’ in institutional thinking and emphasise the role of (socio-cognitive) ideas in institutional dynamics (Arts and Buizer 2009). The variety of adjectives that is used illustrates that these approaches are still under construction.

<sup>11</sup> Note that by doing so the existence of material reality is not denied, although the conflation of material reality and interests into material interests is. Rather the material reality is seen as the setting within which actors conceive their interests (Schmidt 2010).

Another important element in the approach is that these preferences or goals (i) are not assumed to form a hierarchical or even a consistent system and (ii) are not assumed to be fixed (Hay and Wincott 1998). Strategic action, in this regard, is less about the pursuit of given interests or goals but rather about the balancing of the different and changing goals (Hay 2006). For the researcher this implies that actors' goals must be empirically ascertained and cannot be imputed on the basis of (objective) material or social conditions (Hay 2006).

*'They do so within contexts that favour some strategies over others...'*

It is assumed that actors will consciously and strategically orientate themselves towards their environment in pursuit of particular goals (Hay 2006). When choosing between potential courses of action, actors will inform themselves of the context in which action occurs and assess the options to realise their goals. Institutions - viewed as formal and informal rules that regulate actor's behavior - are considered to provide an important element of the context; the institutional context constraints and enables actors' behavior in complex and changing ways (Hay 2006, 8).

*'...and must rely upon perceptions of that context which are at best incomplete...'*

The (institutional) context is not considered to be a group of objective factors that have a determining influence on actors' behavior; rather the context is subject to interpretation. Actors can only respond to their environment to the extent that it is perceived and interpreted (Edelman and Suchman 1997, 496; McAdam, Tarrow et al. 2001). While this approach recognises that action takes place in an institutional context (Hay 2006, 8), actors' interpretation allows for a significant amount of 'play' within the institutional rules they are expected to follow (cf. Streeck and Thelen 2005). Importantly, this also implies that the knowledge on which actors must base their actions is often incomplete at best, and can in some instances be demonstrably false (Hay 2002, 196). These different understandings of the context will in an important way affect the ability of actors to act successfully within or with the institutional context.

On the basis of these basic features we must analyse the interaction between institutions and actors *over time* to understand institutional change and stability (cf. Barley and Tolbert 1997). Institutional change and stability in this view are assumed to result both from ongoing and dynamic processes (cf. Termeer and Kessener 2007). While the institutional setting provides an important aspect of context in which actors act, actors'

choices affect this context as their actions impinge on it. This changing context, in turn, presents a new setting in which actors must act, and so on (cf. McAdam et al. 2001).

In explaining these dynamics we need to pay attention to the role of (social-cognitive) ideas which shape actors' perceptions and interpretations of the (institutional) environment (cf. Klijn et al. 1995; Campbell 1998; Arts and Buizer 2009). One of the approach's aims is to identify how particular ideas become accepted or come to operate in the background of peoples' minds as taken-for-granted assumptions (cf. Berger and Luckman 1967; Campbell 1998).

This does not mean that these ideas need to remain tacit or cannot change. While actors may not always be in a position to reflect on their ideas, they do not lack the capacity to do so. These ideas for example may be brought to the fore and made explicit under unexpected, uncertain or ambiguous conditions (Weick 1995; Schmidt 2010). Under such conditions, actors are likely to 'seek out' the interpretations of others, combine different frames of meaning, or deliberate on how to interpret the situation in order to act. Through such sensemaking processes actors may reflect upon and change their ideas and perceptions (Weick 1995).

Equally, changes in ideas may result from an actor's unfolding experience: actors may reflect on previous actions and consequences and change their perceptions of what is feasible and possible (Klijn et al. 1995; Hay and Wincott 1998, 956; Weick 1995). Of course, there is no guarantee that actors learn the 'right' lesson (Hay 2002).

### **3.3 Explaining outcomes by social mechanisms**

Guided by these foundations, Barzelay and Gallego present a distinct analytical approach to explain policy processes. In agreement with Hay they argue that to account for the dynamic and evolving relationship between changing structure and actors' choices a processual approach is needed (Barzelay and Gallego 2010a, 210). In pursuing this idea, they do not suppose it is necessary to resort merely to thick description or narrative explanation to explain policy processes; IP scholars argue that we can turn to more *general analytical concepts* that can be used in other research contexts (Barzelay 2004). Institutional processualism aims to develop such general understandings by making explicit reference to so-called *social mechanisms*.

Social mechanisms receive lively commentary by sociologists, political scientists, organisation scholars and philosophers of social science (e.g. Gross 2009; McAdam et al.

2008; Gerring 2010; George and Bennett 2005, 135; Breeman 2006; Mayntz 2004; Mahoney 2001; Hedström and Swedberg 1998).<sup>12</sup> One conclusion that can be drawn so far, from reviewing literature on social mechanisms, is that there is still much confusion about what is exactly meant by social mechanisms: scholars have adopted rather different definitions of the concept, if they define it at all. For example, Mahoney (2001) identified no less than 24 definitions of social mechanisms provided by 21 authors. The view on social mechanisms adopted in this study is therefore briefly discussed below.

In this study social mechanisms are defined as *analytical constructs* that refer to recurring *causal tendencies or processes* and provide the link between a specified outcome and (one or more) specified contextual conditions or factors (Swedberg and Hedström 1998). This definition can be considered as a minimal description of social mechanisms (Gerring 2010); it is presented in figure 3.1 below.



**Figure 3.1: The causal role of a social mechanism**

To explain actual outcomes, the operation of a social mechanism is considered necessary, but not sufficient to provide for an explanation (George and Bennett 2005, 145). To explain an outcome we must analyse the interaction between the social mechanism and the contextual factors. It also follows that similar social mechanisms may operate in different contexts in which they will generate different outcomes. The influence of social mechanisms thus, is contingent on contextual factors (McAdam, et al. 2001; Barzelay, Gaetani et al. 2003; Falleti and Lynch 2009; Came and Campbell 2010). This relationship is reflected in the work of ‘mechanism scholars’ who use words such as ‘fuel’ (Came and Campbell 2010), ‘activate’ or ‘trigger’ (Barzelay 2003; Ongaro 2006) to describe how contextual factors affect the activation and operation of social mechanisms.

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<sup>12</sup> The terms causal or social mechanisms are often used interchangeably in literature. In the present study I refer to social mechanisms or simply mechanisms.

It should be noted that not all scholars who use social mechanisms to explain particular phenomena treat contextual factors as broadly as processual institutional scholars do. Often scholars single out a particular contextual factor and link them via a social mechanism with a particular outcome. These scholars do acknowledge that the operation of social mechanisms depends on a variety of factors. However, a distinction is made between factors that are 'inside' the theory and contextual factors that reside 'outside' the theory, but which nevertheless affect the operation of the causal mechanism (Falleti and Lynch 2009, 3).

The analytical distinction between factors inside and outside the theory is not found in the IP approach. IP scholars typically adopt a holistic understanding of the context. In fact, for them, the value of working with social mechanisms is that they can link a great number of different factors to a particular outcome. A range of contextual factors that activate the operation of a social mechanism is typically presented by IP scholars to provide an explanation of a particular outcome (e.g. Barzelay and Shvets 2006; Came and Campbell 2010).

IP scholars moreover are keen to stress that social mechanisms, once activated, typically join with other mechanisms and form larger configurations (McAdam et al. 2001, 27). To explain particular phenomena we must turn to different social mechanisms and analyse how they *combine* (at a particular moment in time) or form a longer *sequence* (Hedström and Swedberg 1998; Breeman 2006; Barzelay 2007; Ongaro 2006).<sup>13</sup> In social mechanism literature this interaction between mechanisms is referred to as the 'concatenation' of mechanisms (Gambetta 1998, 105).

Social mechanisms in this view can be considered as 'building blocks' that, depending on their interaction and the context in which they operate, create 'synergetic effects' (McAdam et al. 2001, 24; Barzelay and Gallego 2010a). The explanations for particular phenomena have thereby both a deductive and an inductive component. They are deductive because they draw on a number of well-defined social mechanisms and general contextual factors to guide the analysis of their cases. They are inductive because the researcher determines the variable interactions between mechanisms and contextual factors in concrete situations.

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<sup>13</sup> Some scholars argue that these longer patterns or processes can be regarded as mechanisms themselves - as long as they have sufficient recurrent features (e.g. McAdam et al. 2001). This view can also be found in historical institutional literature on institutional change. Here we find different 'mechanisms' of institutional change such as conversion, layering and drift (Streeck and Thelen 2005).

Another characteristic of the work of institutional processualists is that they do not only focus on the *final* outcome of particular processes. In order to improve the understanding of longer processes, the focus is typically moved from a 'final' outcome to 'intermediate' outcomes (e.g. Ongaro 2006, 738). On the basis of these intermediate outcomes, larger processes (or episodes) are disaggregated into smaller parts (Askim 2005; McAdam et al. 2001). These intermediate outcomes often shed light on the trajectory of the episode but also provide a focal point on which to 'anchor' parts of the investigation and to provide for a detailed explanation (Pettigrew 1997, 340-2).

### **3.4 Specifying the IP approach to explain how actors respond to EU formal rules**

The institutional processual (IP) approach is broad in theoretical scope. Scholars working with the IP approach use a number of social mechanisms that operate in different contexts to explain different phenomena (e.g. McAdam et al. 2001; Ongaro 2010). For an actual research project it is necessary to narrow or specify the IP approach by choosing an appropriate case outcome, relevant contextual factors and social mechanisms (Barzelay 2004, 41).

With regards to the case outcome, I have chosen to focus and explain the *responses* pursued by initiating actors that are responsible for applying the EU formal rules. I believe that a focus on pursued responses can facilitate a detailed understanding of the impact of EU formal rules on the introduction of governance initiatives. In the end, these efforts will define the precise impact EU formal rules have on horizontal governance initiatives. This focus can be described as a bottom-up perspective (Schmidt and Radaelli 2004, 191; Hjern and Porter 1981; Hjern and Hull 1982; Elmore 1979).

The responses actors pursue, importantly, are not only chosen as *final outcomes* in this study; they are also considered as *intermediate outcomes* that may be generated *during* the process of applying EU formal rules. As we cannot assume that actors will or can always directly conform to EU formal rules or will be successful in their attempts to respond in a different way, we need to analyse actors' responses during the application process to shed light on the trajectory of the application process.

To explain actors' responses, I refer to a range of social mechanisms that is used in the work of institutional processualists to explain actors' efforts. In addition, I will turn to different categories of contextual factors that can affect the activation and operation of



these different social mechanisms. The different social mechanisms and contextual factors are discussed below in sections 3.5 and 3.6. Section 3.7 finally, will present a typology of responses to help structure the analysis and explanation of actors' responses.

### 3.5 Social mechanisms to explain actors' responses

In this study I will draw on a number of social mechanisms that have been cataloged by Barzelay to explain the outcome of public management reforms (2003). These various social mechanisms refer to well defined recurrent tendencies that either involve the effect of actors' identities, perceptions and beliefs on action or involve a feedback effect of action upon beliefs. These mechanisms have been described also as agency or action-formation mechanisms (Hedström and Swedberg 1998, 21-4; cf. Weick et al. 2005, 417; Anderson et al. 2006; Weber and Glynn 2006, 1640). These mechanisms provide a *causal link* between different contextual factors and the *efforts* of individual or collective actors (Barzelay 2003, 254; Barzelay and Gallego 2006, 552).

The inventory of social mechanisms is drawn from a variety of intellectual sources; they include the *logic of appropriateness*; *the attribution of opportunity and attribution of threat*; *certification and decertification*; and *the attribution of success and attribution of failure*. These mechanisms have been used by various other IP scholars to help explain the efforts of actors in different other policy processes, including processes of EU implementation (e.g. Asquer 2009). These social mechanisms are discussed below and summarised in table 3.1.

#### *Logic of appropriateness*

To explain actors' efforts, the logic of appropriateness is used in the institutional processual approach as a social mechanism (Barzelay 2003, 265; Ongaro 2009).<sup>15</sup> Under the logic of appropriateness, as was already noted in chapter 2, behavior is explained by referring to an actor's identity, the situation in which an actor finds itself and an actor's motivation to act appropriately. The *logic of appropriateness* mechanism, put differently, involves the process by which an actor considers its situation and identity, and follows or reimagines the legitimate standards (norms) attached to the situation and its identity (McAdam et al. 2001, 48; cf. Barzelay 2003, 265). It should be noted that doing what is

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<sup>15</sup> It is difficult to determine what kind of analytical construct this 'logic of action' exactly is. Scholars differ on whether it is to be seen as a perspective, a theory, a social mechanisms or an ideal type (see Goldmann 2004).

appropriate is not always an easy or automatic decision. Actors may find it hard to define their salient identity, to interpret the situation or find a fit between both (March 1999, 44).

*Attribution of opportunity and attribution of threat mechanisms*

According to Barzelay (2003, 266) the logic of appropriateness mechanism can be 'fruitfully combined' with different other social mechanisms to provide for a more complete explanation of the efforts of actors. Two additional social mechanisms that can be used for explaining actors' efforts are the attribution of opportunity and the attribution of threat mechanism (Barzelay 2003, 276). Both mechanisms are drawn from a catalogue of mechanisms provided by McAdam et al. (2001) to explain contentious politics, such as revolutions or social movements. These mechanisms have been identified also elsewhere as crucial in mobilising actors to undertake particular efforts (cf. Baez and Abolafia 2002).<sup>16</sup>

The *attribution of opportunity* mechanism involves the process by which an actor interprets its situation, comes to a view that the situation provides an opportunity for realising its goals and seizes this opportunity (McAdam et al. 2001; Barzelay and Shvets 2006, 65; Barzelay and Gallego 2010). Barzelay relates this mechanism to the work of Kingdon (1995) on agenda setting who has argued 'that policy entrepreneurs respond with intense effort to situations when they perceive that a window of opportunity may open.' (Barzelay 2007, 534). The same, he argues, can be said of the *attribution of threat* mechanism that involves the process by which an actor interprets its situation, comes to see it as a threat to the realisation of its goals and decides to remedy or prepare against it (McAdam et al. 2001; Came and Campbell 2010).

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<sup>16</sup> The attribution of opportunity and of threat mechanisms provide an alternative to the so-called logic of consequentiality. The two mechanisms help explain actor's behaviour without assuming that this necessarily follows from a process that involves an explicit consideration of one's goals, the alternative courses of action available to attain these goals and an explicit evaluation of the consequences of these actions. Underlying these two social mechanisms lies an assumption that 'choices' are often made in a more reactive fashion (such an understanding of making choices of behavior fits that of Lindlom 1969, cited by Mintrom and Norman 2009, 654).

#### *Certification and decertification mechanisms*

Two other social mechanisms that can help explaining how actors respond to EU formal rules are the social mechanisms of certification and decertification. This set of social mechanisms is also adopted from the catalogue of McAdam et al. (2001); they refer to two common processes. The mechanism of *certification* involves ‘the [recognition and] validation of actors, their performances, and their claims’ (ibid. 121; cf. Asquer 2009; Came and Campbell 2010). This mechanism involves the process by which an actor interprets the behaviour or the claims of another actor, assesses whether these meet acceptable criteria for acting or claim making and validates them. These acceptable criteria may include established norms or values, but can also include other standards such as accurateness, authenticity or reliability. On the basis of this assessment an actor will accept a particular claim or owe the claim maker some deference.

The mechanism of *decertification*, conversely, involves the process by which an actor denies or withdraws the validation of other actors or their claims as it assesses that these fail to meet particular standards of claim making. The activation of a decertification mechanism may cause actors to reject particular claims.

#### *The attribution of success and attribution of failure mechanisms*

A final set of social mechanisms that could assist for explaining actors’ efforts is the attribution of failure and the attribution of success. These social mechanisms are drawn by Barzelay from the work of Levitt and March (1988) on organisational learning. Both mechanisms allow actors to take corrective actions on the basis of their observations of and inferences from direct ongoing experience. The *attribution of success* involves the interpretation of the outcome of particular efforts and assessing them in the light of previously established goals and ambitions. When an effort becomes associated with success it will be repeated or reinforced by actors. By contrast, the *attribution of failure* refers to the process through which an action is associated with failure and will be terminated or cancelled. The strength of these mechanisms’ operation will be affected by the perceived significance of these successes / failures. Their strength may also affect actors’ emotions (Weick 1995, 49). Successful action, for example, could highlight capabilities an actor was not aware of possessing and generate a sense of optimism and confidence (Barzelay 2003; Termeer 2009). Failure, on the other hand, can create negative feelings and can lead to frustration or arousal (Weick 1995, 47).

Social mechanism	Involves:
Logic of appropriateness	the process by which an actor considers its situation and identity; and follows or reimagines the legitimate standards (norms) attached to the situation and its identity.
Attribution of opportunity	the process by which an actor interprets its situation; comes to a view that the situation provides an opportunity for realising its goals; and seizes this opportunity.
Attribution of threat	the process by which an actor interprets its situation; comes to a view that the situation provides a threat for realising its goals; and decides to remedy or prepare against it.
Certification	the process by which an actor interprets the behaviour or the claims of another actor; assesses that these meet acceptable criteria for acting or claim making; and validates these claims or the actor as a claim maker.
Decertification	the process by which an actor interprets the behaviour or the claims of another actor, assesses that these fail to meet acceptable criteria for acting or claim making and denies the validity of these claims or the actor as a claim maker.
Attribution of success	the process by which an actor interprets the outcome of particular efforts; assesses that these are successful in the light of previously established goals and ambitions; and repeats or reinforces these efforts.
Attribution of failure	the process by which an actor interprets the outcome of particular efforts; assesses that these are unsuccessful in the light of previously established goals and ambitions; and terminates or cancels these efforts.

**Table 3.1: A catalogue of social mechanisms**

### 3.6 Contextual factors

Social mechanisms, as noted, may generate different outcomes depending on the contextual factors that activate and sustain their operation. In order to explain how actors respond to EU formal rules, we must therefore identify those features of the context that affect the operation of these different social mechanisms. When it comes to the context in which actors operate, the IP approach pays specific attention to institutions and ideas (Barzelay and Gallego 2006; Asquer 2010). Within the IP approach these contextual factors are used as more general categories to provide an indication of the type of contextual factors that need to be taken into account when explaining actors' efforts.

In this study I will follow IP scholars in defining the context in terms of these more general categories as I aim to take into account a wide range of different factors (and their combination) to explain how actors respond to EU formal rules. I will use the general category of 'activities of other actors' as an additional contextual factor. These general categories of contextual factors are discussed below.

### *Institutions*

Within the IP approach the institutional context is considered as 'containing potentially important causal factors' that condition actors' efforts (Barzelay and Gallego 2006, 547). In the different studies that adopt an IP approach we find a broad conception of the institutional context or institutions. Generally speaking, institutions include formal and informal rules and governance arrangements that allocate responsibilities, authorities and capacities over particular actors and situations. In this respect thus, institutions are primarily seen as (formal and informal) rules or roles that regulate the behaviour of and between actors (e.g. Barzelay and Shvets 2006).

In common with recent EU implementation literature, IP scholars have moved away from overly concentrating on the characteristics of national institutional structures to explain policy processes. In a recent study, Barzelay and Gallego explicitly reject such a focus; they argue that 'a focus on general [institutional] features of governmental systems is misplaced, especially when [institutional] features that are specific to (...) a policy domain remain outside the analysis' (2010b, 297). This statement strongly aligns with the argument of, for example, Steunenberg that the institutional context of implementing EU formal rules is 'predominantly policy-specific rather than country-specific' (2007, 24).

EU formal rules themselves, evidently, are an important feature of the institutional context in which the governance initiatives are introduced. Like other contextual (institutional) factors, these rules may activate different social mechanisms and thereby affect the responses actors pursue. For clarity, I will single out EU formal rules as a distinct contextual factor in this study. The general category of institutions will be restricted to describe and analyse the wider institutional setting in which the EU formal rules are responded to.

### *Activities of other actors*

Actors involved with the introduction of the governance initiative, of course, do not operate in a social-political vacuum. It is very likely that other actors will attempt to affect

the responses actors pursue to EU formal rules. This aspect of the context must be considered. The institutional context can greatly affect which other actors can be involved in the application process. By providing others with particular responsibilities and capacities, institutions will structure which others are involved and how they can affect the response of those directly responsible for applying the EU formal rules. Within the IP approach these (institutional) actors are therefore typically considered a feature of the institutional context (Barzelay and Gallego 2006). However, taking into account these institutional actors alone may not always be sufficient in explaining how other actors affect the responses of those directly responsible for conforming to the EU formal rules. Recent EU implementation studies demonstrate that a range of other (non-institutional) actors may (try to) affect the implementation of EU formal rules.

### *Ideas*

Ideas, finally, are used as a general category to address those features of the context that shape how actors make sense of their environment. Ideas as well take rather different forms in the IP approach. In different studies we find references to narratives, guiding ideas, (policy) programs or instruments, or shared experiences. Ideas moreover, have different content: they can take a normative content that provides actors with ideas of 'what is appropriate' or take a (social-)cognitive content providing actors with a more general sense of 'what is' (going on).

To explain how actors respond to EU formal rules, a variety of ideas can be relevant. In the context of this research, it makes sense to include ideas related to the horizontal governance initiative. Ideas on the meaning of the EU formal rules and the actions needed to conform to the rules obviously, can also be expected to be of much importance to explain how actors respond to EU formal rules (Edelman and Suchman 1997; Asquer 2010). In the previous chapter I noted that little attention is given to such ideas in EU implementation literature.

To explain actors' responses however, we should not only turn to actors' ideas of the EU formal rules. Actors' responses, as was suggested above, will also be affected by the wider environment including the institutional setting and the activities of other actors. In explaining the responses of actors we must therefore focus more generally on how particular ideas mediate the impact of the context on actors' responses.

### 3.7 A typology of responses

So far, no specific expectations have been provided on the combinations of different social mechanisms and contextual factors. How these factors and mechanisms exactly combine and generate a particular effort or response has to be determined by the researcher. To structure the analysis of the interaction between different contextual factors and social mechanisms during the implementation process, I will rely on a typology of responses to institutional pressures that actors may pursue.

In this study I will use a typology of ‘strategic responses to institutional processes’ that has been developed by Christine Oliver (1991). Based on the work of resource dependence scholars and institutional scholars in organisation studies, Oliver presents a detailed typology of responses to different types of institutional pressures. Rather ‘then to argue a priori that passive conformity or alternatively strategic non-conformity is the appropriate mode of response to the institutional environment’, she stresses that the likelihood of these responses, amongst others, depends on institutional pressures themselves, the wider environment and the meaning actors attach to this (1991, 172).<sup>17</sup>

It should be noted that not all responses discussed by Oliver are equally useful or relevant to describe how actors react to EU formal rules. For this reason I excluded the responses of *habit* and *imitating* (that are more applicable to cognitive or normative institutional pressures) and the response of *co-opting* (that refers to the importing of influential constituents). I also decided to exclude the response of *controlling*, as this would have taken the analysis beyond the application of EU formal rules. Finally, I decide to exclude the response of *balancing* different institutional pressures. I considered this response too imprecise, as actors can balance different institutional pressures in various ways. It is more informative to specify these different responses. The selected responses are described below and summarised in table 3.2.

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<sup>17</sup> While Oliver presents a detailed typology of different responses of actors to institutional processes, she stays away from ‘typological theory’ to explain these responses. Instead, she formulates a number of more general hypotheses on when actors will adopt a more conforming or resistant strategy on the basis of a number of institutional factors (for example ‘the lower the degree of economic gain perceived to be attainable from conformity to institutional pressures, the greater the likelihood of organisational resistance to institutional pressures’ (Oliver 1991, 160-1).

### *Conforming*

The first response is conformity. This response needs little explanation. Following Oliver, it can be defined as a conscious obedience to particular formal requirements or demands. This response refers to an effort to act in agreement with a particular set of rules.

### *Dismissing*

The response of dismissing formal rules is the opposite of conformity. It includes a failure or refusal to conform, or to pay attention to particular rules. In response to formal rules actors remain passive.

### *Challenging*

The response of challenging can be seen as a more active form of refusal to a formal rule. It describes the response by which actors go on the offensive: in the case of challenging, actors will resist institutional pressures and do so in a more open manner. Actors, for example, will publicly deny or reject the validity of particular rules or demands.

### *Attacking*

The response of attacking differs from challenging by the intensity and the aggressiveness of the resistance of an actor to particular institutional pressures. Attacking actors will assault or denounce particular institutional rules, as well as the 'constituents' that express these demands.<sup>18</sup>

### *Concealing*

The response of concealing refers to a response of covering up non-conformity behind a façade of conformity. This response equates to 'window dressing' by which actors create a good impression but do not show the real fact. One example would be that in anticipation of inspections or monitoring, actors display expected activities that are not a part of their normal routines.

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<sup>18</sup> The efforts of actors described by the responses of challenging and attacking can be found in EU implementation literature. Often they are referred to more generally in terms of contestation. A more detailed categorisation of these responses, as is done in this study, is not found.



### *Pacifying*

The response of pacifying refers to a response by which actors show a minor level of resistance to institutional pressures and devote their energy to appease the 'guardians' of the formal rules. It is an attempt to calm these guardians in the hope it can bring an end to a dispute on how to apply particular formal rules.

### *Bargaining*

The response of bargaining is more active than pacifying and involves the effort of an actor to extract some concessions from an institutional guardian in its demand or expectation. For example, an actor may negotiate the scope of its conformity to a formal rule or the discretion provided in a rule. Different EU implementation scholars have portrayed the EU implementation process in terms of bargaining.

### *Influencing*

The response of influencing refers to the effort by which actors attempt to manage the view of their activities or try to persuade others of adopting particular definitions of acceptable practices. It refers to an attempt to change the interpretation of a rule or its application, and to gain acceptance of particular practices that would not strictly have been seen as being in conformity with a formal rule (cf. Hall and Thelen 2009).

### *Escaping*

A more dramatic response is that of escaping. Oliver describes this response as the attempt to exit the domain in which institutional pressures are exerted or the attempt of an actor to significantly alter its own activities to avoid conformity altogether. An example of this response in the EU context has been provided by Töller (2004, 2007). In relation to environmental policy, she illustrates how German federal government pursued this response - she speaks of 'evasion' - to achieve domestic environmental goals through self-regulation. As it was unclear to them whether a formal policy would be possible under EU legislation, federal government chose to realise the same policy goals in a less contested way.

### *Buffering*

The response of evasion has been used by Schmidt also in relation to actors responses to (procedural) EU state aid rules (2008, 305). She refers to evasion to describe the example provided by Blauburger (2006) in which Member States decide to notify entire aid

schemes rather than notifying different individual acts of aid to the Commission. In this study, and following the typology of Oliver, I will refer to buffering to describe this response and distinguish this response from that of escaping. Buffering can be defined as an attempt to reduce the extent to which actors are inspected, scrutinised or evaluated by detaching particular activities from external contact.

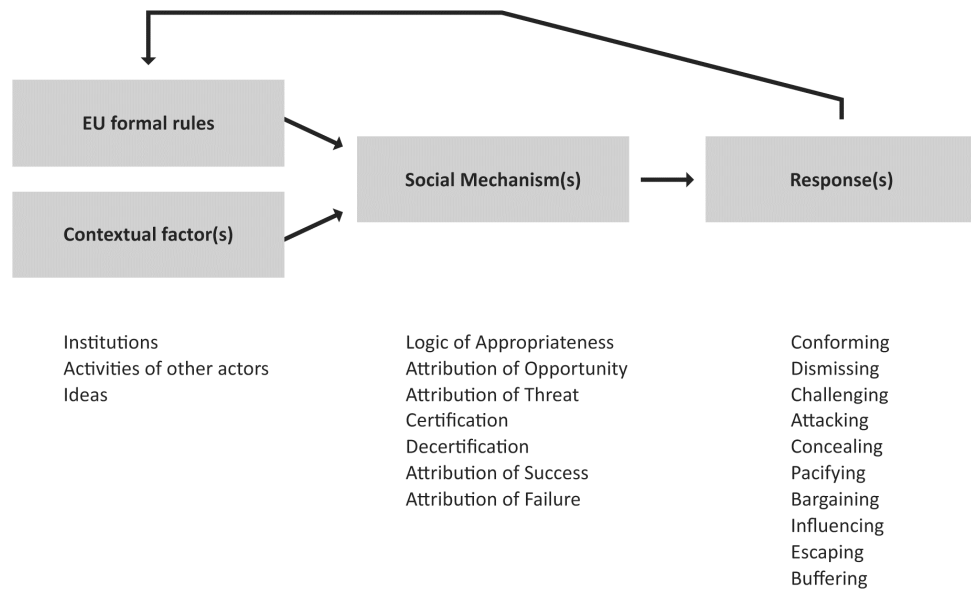
Response	Example
Conforming	Obeying rules
Dismissing	Ignoring explicit rules
Challenging	Contesting rules and requirements
Attacking	Assaulting the sources of institutional pressure
Concealing	Disguising non-conformity
Pacifying	Appeasing institutional stakeholders
Bargaining	Negotiating with institutional stakeholders
Influencing	Shaping values or criteria
Escaping	Changing goals or a domain
Buffering	Loosening the number of inspections

**Table 3.2: Responses to EU formal rules (selected from Oliver 1991, 152)**

### 3.8 Conclusion

In this chapter, I presented an institutional processual (IP) approach to understand and explain how actors respond to EU formal rules. I started this chapter by setting out the foundations of the IP approach on the basis of the work of Hay and Wincott and later elaborations by Hay. After doing so, I presented in general terms the social mechanisms approach that is adopted by IP scholars to explain particular phenomena. The IP approach was further specified to explain how actors respond to EU formal rules. On the basis of the work of Barzelay a range of social mechanisms and contextual factors were presented. The latter were defined in terms of three general categories of (i) institutions, (ii) activities other actors and (iii) ideas. I relied on the work of Oliver to present a typology of responses that actors may pursue when confronted with EU formal rules. Actor's

responses, social mechanisms and contextual factors provide the main analytical concepts or building blocks for this study (see figure 3.2 below).



**Figure 3.2: Analytical framework**

For analytical purposes, as noted, I singled out the EU formal rules as a distinct contextual factor. While these rules are clearly a part of the institutional setting, these rules together with actors' responses are the main object of this study. An arrow between actors' response and the contextual factors has been included in figure 3.2 to illustrate that actors' response can feed back and can generate intended and unintended consequences on the context. In the next chapter I will discuss how I operationalised the various theoretical concepts and carried out this study to answer the research questions.



# CHAPTER 4

## RESEARCH METHODOLOGY

### 4.1 Introduction

The previous chapter presented the theoretical approach adopted in this study to explain how actors respond to EU formal rules. This chapter sets out the methodological aspects of the study: the methodological choices I have made regarding the research design, the data collection strategy and the analysis of the data. Section 4.2 starts by briefly reflecting on the ontological and epistemological assumptions of this study. Section 4.3 discusses the case study method and the ‘within case study’ strategy of process tracing. Section 4.4 discusses the comparative research strategy and presents the selected cases. Section 4.5 presents the operational framework that provides the ‘indicators’ for the different theoretical concepts introduced in the previous chapter: (i) actors’ responses, (ii) contextual factors and (iii) social mechanisms. After presenting the operational framework, the research techniques used for collecting and analysing the data are presented in section 4.6. Section 4.7 concludes this chapter, paying specific attention to the trustworthiness of this study.

### 4.2 Ontological and epistemological assumptions

Before addressing the methodological choices, I will briefly reflect on the ontological and epistemological assumptions that are adopted in this study. Ontology, epistemology and methodology are closely related; ideally, the research methodology follows directly from ontological and epistemological assumptions (Hay 2006, 83). The ontological and epistemological assumptions of this study are in part reflected in the previous theoretical chapter; they will be casted more explicit in these terms below.

Ontology refers to the ideas on the ‘character’ or ‘being’ of the social and political world. In the field of political science, these ideas are typically defined in terms of the causal relationship between *agency* and *structure* and the *material* and *ideational world*. In the present study, the relationship between agency and structure, as suggested in chapter 3, is considered to be a dynamic one: structure and agency are mutually constitutive. With regards to the relationship between the material and ideational world I accord a crucial

role to the ideational world; to understand and explain actors' behaviour we need to take into account actors' interpretation of the environment. This does not imply that the material world has no causal effect; the character of the material world itself limits the interpretation that can be given to it, or, at least, how long such an interpretation can be sustained. The position with regards to ontology adopted in this study can be described as a 'thin constructivist' and a 'critical realist' ontology (Hay 2006).

Epistemology refers to our ideas and assumptions of how we can understand the world and the confidence we have in the extent to which our claims about the functioning of the world can be generalised beyond the immediate context. Underlying the mechanism-process approach adopted in this study first of all there is an assumption that the dynamic relationship between structure and actors' choice (agency) must be understood in terms of processes. In understanding this relationship moreover, we must accord a crucial role to the meaning actors give to the (unfolding) context in which they are involved.

As noted in the previous chapter, I believe that these processes can be analysed in more general terms by referring to a number of recurrent social mechanisms. In doing this we can 'create a synthesis between the thick descriptions of an interpretive mode of inquiry and the generalisations that are produced by an explanatory mode of inquiry' (Griffin and Ragin 1994 in Stevenson and Greenberg 1998, 742; cf. Elster 1998, 45 who locates the social mechanism approach between [causal] laws and [narrative] descriptions).

### **4.3 Case study research and process tracing**

Case study research provides an appropriate research method given the ontological and epistemological assumptions, as will be argued below.

Firstly, the case study method allows researchers to derive a comprehensive understanding of the research object due to the in-depth focus. The method presents an opportunity to consider the importance of a range of different factors, to consider various causal connections and to take into account changes in these connections over time (Ragin 1987, 50-1; Yin 1994, 13). The case study method fits with the holistic and processual approach adopted in this study to explain how EU formal rules are responded to.

Secondly, case studies are particularly suited to address actors' motives, interpretations and behaviour. In case study research a focus on the wider context can be combined with an interpretive method in which the researcher construes how actors interpret and act upon the situation (Ragin 2000, 29; Barzelay et al. 2003; Blatter and Blume 2007).

Generally, the case study method is considered to allow for a thorough analysis and reconstruction of decision-making processes ‘that involve preferences, expectations, intentions, motivations, beliefs, or learning at the individual or organisational level.’ (George and Bennet 1997).

### **Process tracing**

The ‘within case study’ strategy of process tracing, to be more specific, is used in this study to provide a detailed reconstruction of the application process. In principle, the method of process tracing is straightforward: the predominant suggestion in literature on the method is to explore temporal evidence for explaining particular phenomena. Process tracing in this respect involves a commitment ‘with the most continuous spatial-temporal sequences we can describe at the finest level of detail that we can observe’ (George and Bennett 2005, 140, 208-9).

However, implementing the method can be problematic as process data typically consists of a variety of accounts about events, where they happened and who did what when. As such, it may not be easy to reconstruct longer processes when there are many events that are in motion, or when processes unfold in multi-level or multi-actor contexts (Langley 1999; George and Bennett 2005, 212). In practice, the method of process tracing is therefore often an iterative activity in which different aspects are brought together in a historical narrative<sup>19</sup> while other aspects are regarded as irrelevant for explaining the case’s (intermediate) outcomes.

The iterative character of preparing a narrative offers a clear opportunity to increase the strength<sup>20</sup> of the story. In preparing the narrative it becomes clear where data coverage is weak or missing; gaps in the temporal order of the narrative for example often highlight data that needs to be collected or reinterpreted (Barzelay et al. 2003). By providing a so-called ‘thick description’ of the process under study an elaborated and detailed account can be provided.

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<sup>19</sup> Note that historical narratives are distinct from postmodern approaches that are based on stories or storytelling.

<sup>20</sup> From a variable oriented perspective it would be more appropriate probably to speak of ‘internal validity’, which refers to the (accurate) demonstration of the causal relationship between different variables. Because of their detail, narratives (and process tracing) can help to assess whether potential variables can or cannot be ruled out as having a causal significance; narratives can identify different causal paths between variables and check for spuriousness (George and Bennett 2005, 215).

Obviously, there is an element of selectivity in writing down the narrative and organising the empirical data in such a way that it acquires coherence within the overall story. Data can be organised in different ways; this will be informed in part by the theoretical background of a scholar. In addition to my own reflections on the solidity of the narratives, I therefore used feedback that was provided by colleagues and peers during presentations and discussions on the individual case studies.<sup>21</sup>

In addition to this feedback, importantly, I drew on the feedback provided by various persons involved in the cases that had been interviewed for this study (see below). Draft narratives were sent to and discussed with key actors in the application processes to check for the chronology of particular events or to report on factual errors or on missing events.<sup>22</sup> I felt this was a crucial step to increase the credibility of the narratives. In general, actors' feedback on the narratives was positive and affirmative.

#### **From 'historical narratives' to 'analytical causal narratives'**

The outcome of a process tracing exercise typically takes the form of an historical narrative (Gerring 2007, 179). A historical narrative alone can be the sole result when the aim of a research project is to achieve a close understanding of a particular phenomenon and to provide a story in all its richness and complexity (George and Bennett 2005, 210). In this study, constructing the narrative is considered a first step in the research: the narrative is used to prepare a 'chronology for subsequent analysis' (Langley 1999, 695). After the narratives of the cases were prepared, they were used to provide a more explicit causal explanation of the application episode; they are cast in terms of a so-called 'analytical causal narrative' (Sewell 1996 in Mahoney 2000; George and Bennett 200, 211).<sup>23</sup>

To provide for a causal reconstruction of the episode I divided the narrative into a number of smaller sections on the basis of the various responses initiating actors pursued during

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<sup>21</sup> The narratives of the individual cases were presented at various occasions and in different scientific fora. On the basis of this feedback, to give an example, I have given greater attention to the operation of attribution of failure mechanisms during the application processes / episodes.

<sup>22</sup> For the narrative of the Green Service and Soil Remediation case feedback was provided by e-mail. For the Plantkeur case a feedback session was organised at the Ministry of ANF. During the feedback session the case description and part of the analysis was presented and discussed.

<sup>23</sup> Narratives by themselves can but do not have to provide causal explanations of social processes. Narrative description by itself, in fact, can obscure explanation (Griffin 1993). On the other hand there is a trade-off between 'the rhetorical clarity of informal narrative presentations' and the rigor explicit causal analysis (see Mahony 2000, 417).



the application process. These responses, as noted in chapter 3, can be considered as intermediate and final outcomes of the application episode.

Specifying these intermediate outcomes allows us to reduce the complexity and dynamics of the application episode; it can assist us in analysing the impact of different constellations of contextual factors and activated social mechanisms at specific stages during the process (Pettigrew 1997; Tilly 1984; George and Bennett 2005, 113). Having a clear (intermediate) outcome, moreover, can help in so-called 'counterfactual analysis'. By posing and answering questions about what would have happened to a particular response if certain factors or social mechanisms were or were not present or activated it becomes possible to examine in a more explicit way the relationship between different social mechanisms, contextual factors, and responses (Weber 1949 in Griffin 1993, 1101).

#### **4.4 A variation finding strategy**

Three cases will be compared in this study. In this research, a case will refer to the *process* or *episode* through which EU formal rules are applied to a horizontal governance initiative. I refer to this as the 'application episode'.

Episodes, importantly, are not natural entities with a clear beginning or end; they are constructed by participants, witnesses and analysts (McAdam et al. 2001, 29). In the present study, the application episode has been delineated through a bottom-up vision. To find the beginning of the episode I decided to turn to the moment actors started pursuing a response related to the application of particular EU formal rules. Starting from this point, I first traced back the prior events and aspects of the context that must be considered in explaining this response. I then moved forward, analysing subsequent pursued responses, up to the moment the horizontal governance initiatives were introduced.

The three cases will be compared in this study on the basis of a so-called 'variation finding' (Tilly 1984) or 'variation oriented' comparative strategy (Ragin and Zaret 1983; Ragin 2000, 71-3). The goal of this comparative strategy is 'to show how different settings, sequences and combinations of [social] mechanisms produce contrasting (...) processes and outcomes.' (McAdam et al. 2001, 83-5). The presumption is that divergent cases can often reveal more information on particular phenomena because they include more and different contextual factors and social mechanisms across the researched cases than they would do in isolation (see also Flyvbjerg 2006, 230).

The variation finding strategy, it is worth noting, differs in a fundamental way from those comparative research strategies that are based on holding particular *variables* constant while allowing other variables to vary across different cases to explain particular outcomes. Within the field of comparative politics these comparative strategies are well-known as the ‘most similar system design’ (*mssd*) or as ‘most different system design’ (*mdsd*). In the example of the latter design, cases are selected based on a similar dependent outcome, while allowing different independent variables to vary; in this way it becomes possible to uncover the independent variable that is the same in different cases. In using *mssd*, scholars attempt to keep as many independent variables constant while allowing variation on the dependent variable. This allows the researcher to identify an independent variable that also varies.<sup>24</sup>

In contrast to variable centred research studies, the goal of a variation finding strategy is not to identify the separate influence of explanatory independent variables; rather it aims to examine cases holistically, taking into consideration the interaction between different variables (Gallego and Barzelay 2004). In general, variable-centred comparative research strategies do not allow for the analysis of multiple explanatory factors or the interaction effects between them (Mahoney 2000, 392). A variation finding strategy, by contrast, explicitly aims to gain insight into ‘how different conditions or causes fit together in one setting and contrast [this] with how they fit together in another setting’ (Ragin 1987, 13; cf. Tilly 1984, 82).

### **Case selection**

An important prerequisite for a variation finding comparative strategy is ‘that such variety is analysable and relevant to research knowledge.’ (Barzelay and Gallego 2010a, 212). To meet this requirement, I decided to select three cases in which the introduction of a horizontal mode of governance was ‘frustrated’ by particular EU formal rules. In the selected cases first of all the governance initiatives were *adjusted* before they were introduced. In none of the cases however, initiators did so immediately. Before adjusting the governance initiatives, initiators undertook different activities related to the application of EU formal requirements. Both with regards to the trajectory of the application episode as their final outcome the application episodes thus, have been far

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<sup>24</sup> Underlying these variable centred comparative methods there is an (implicit) assumption that variables or factors operate as necessary or are sufficient cause of an outcome (Mahoney 2000, 392). In the present study, I assume that many factors are neither necessary nor sufficient, but rather have a probabilistic character.

from smooth in all three cases. The selected cases however, also display variance in the trajectory of the application episode and the adjustments that were eventually made to the initiatives (see further below).

It can be hard to diverge between cases on each and every aspect that is possibly relevant for explaining differences across the cases. This would require an in-depth analysis of all aspects of the cases before selecting them. In practice the variation finding approach is adopted more loosely; cases do not have to differ on every aspect of the context as long as they vary on some of these aspects (e.g. Barzelay 2003, 255). To allow for sufficient variety across the cases, I decided to rely on more general criteria in this study: I varied between the cases on the basis of the (public) initiators, the horizontal governance initiative, the policy fields in which the initiatives were introduced (though within the domain of the Life Sciences) and the EU formal rules applicable to the initiatives.

To find commensurable cases, orientating interviews were held at an early stage in the research with individuals involved in a more or less direct way with initiatives of horizontal governance. With these individuals I discussed the relationship between EU formal rules and horizontal forms of governance more in general; I also asked them whether they knew of any interesting examples in which EU formal rules frustrated the introduction of a horizontal governance initiative. In addition, I surveyed various popular and professional media for relevant cases.

In selecting the cases, I focused on those that had recently ended or were soon about to end as I considered it important to recapture actors' interpretations and knowledge of the cases accurately. However doing so, as will become clear below, came with a cost: it was not always easy to gain access to people or documents as information was politically sensitive or processes on-going. In addition, it was important to select cases that were independent from one another; if cases influence each other, clearly, they cannot be compared as independent cases.

After making a first selection of case studies, orientating interviews were held with project leaders of the governance initiatives or other actors closely involved. These interviews provided an opportunity to gain an additional view of the trajectory of the application episode and the eventual adjustments that had to be made to the initiatives; these interviews provided a final check on whether selecting the case was appropriate.

On the basis of the various criteria, three cases were selected:

#### *Green Services case*

The Green Services case was selected as a first case study in this study; the research was carried out over the years 2006-2008. In this case study, regional actors wanted to involve farmers in landscape management activities. These activities were to be contracted out by governmental actors. Crucial elements of the governance initiative were that (i) farmers would be rewarded for these activities with a market-based price and (ii) that custom-made contracts would be set up. As mentioned in chapter 1, there was much discussion in this case on how to apply the EU state aid rules for the agricultural sector. The Province of Gelderland (the initiating public actor) pursued a variety of responses during the application of these rules and the introduction of the initiative was frustrated in different ways.

With regards to the trajectory there was a clear delay in introducing the initiative. This resulted largely from a contested discussion at the national level between the Province of Gelderland and the Ministry of Agriculture, Nature and Food quality (ANF) on the need to notify the initiative to the European Commission. In terms of the outcome, the result was mixed. Eventually the governance initiative had to be adjusted considerably to meet different substantive state aid rules; a way was found to partly escape these requirements as well. Regional actors, in this case, also found a way to buffer various procedural state aid requirements.

#### *Soil Remediation case*

The Soil Remediation case describes the relationship between a financial support scheme in the field of soil remediation policy and EU state aid rules for environmental aid. This case was researched over the period 2008-2010. By setting up a financial support scheme, the Ministry of Housing, Spatial Planning and the Environment (HSPE) and the dry cleaning sector sought to break through stagnation in soil remediation policy. The introduction of the financial scheme in this example was frustrated largely by a discussion on the application of the EU state aid rules to dry cleaning companies operating near the border. The Ministry of HSPE and the European Commission interpreted the application of the formal rules differently. Throughout the episode the Ministry pursued a range of responses to introduce the support scheme. Eventually it found a way to *escape* from particular state aid requirements.

### *Phyto case*

The so-termed Phyto case describes the relationship between the delegation of phytosanitary (plant *health*) inspections tasks (from the Ministry of ANF) to different autonomous inspection bodies and the EU Phytosanitary Directive. These inspection bodies already carried out plant *quality* inspection tasks. The case study was conducted over the period 2007-2009. The delegation of phytosanitary inspection tasks to the inspection bodies aimed to (i) clarify the responsibilities of different parties involved with plant quality and phytosanitary inspections and (ii) reduce the costs associated with the inspections borne by the private sector. The introduction of the governance initiative was frustrated by questions from the European Commission on the compatibility of the delegation with the EU Phytosanitary Directive. After pursuing a number of responses the governance arrangement had to be adjusted to meet EU formal requirements.

## **4.5 Operationalisation**

In chapter 3, a number of analytical concepts have been introduced and discussed. Before empirical data on the application process can be collected and analysed, we must consider whether these building block have to be further operationalised in order to be 'measured'. Below I will therefore discuss the operationalisation of (i) actor's responses (ii) contextual factors and (iii) social mechanisms (the data collection itself is further discussed in section 4.6).

### **Actors' responses**

The pursued responses of initiating actors can be considered as the 'dependent variable' or (intermediate) outcome of the research. In this study, it is worth noting, I will generally refer to the responses pursued by *collective public* actors. This is appropriate to the study; when it comes to the application of the EU formal rules in the selected cases it is a collective public actor that is responsible for conforming to EU formal rules. Of course, it is individuals that will act on the behalf of a collective actor; when needed, aspects of individuals will be taken into account.

As already mentioned in chapter 3, I rely on a typology of different responses provided by Oliver to describe actors' efforts. This typology provides a detailed range of responses that actors can pursue in reaction to particular institutional pressures. I considered the description of the different responses provided in chapter 3 and the table with examples sufficiently clear to give an indication of the type of efforts that characterise each

response - although it may be the case, of course, that actors will combine different responses. I believe most of these responses can be readily used to observe the particular efforts of actors subject to the EU formal rules and did not further operationalise these different responses.

To identify the occurrence of any of these responses I made use of different sources of information. First of all I relied on my own observations of actors' efforts to differentiate between their responses. A number of responses can be observed in a more or less direct way by analysing documentary information. The (formal) correspondence between actors involved in the application episode in particular, provides a means to identify a response. These documents have been examined for statements that indicate the occurrence of a particular response. For example, a response of *influencing* can be identified by searching for particular arguments that are provided to justify an interpretation of the application of particular formal requirements.

Sources of documentary information, such as internal memos or emails were used in a more indirect manner to identify a pursued response; actors themselves may use these documents to set out planned responses or reflect upon previously pursued responses. Interview accounts were used as another indirect but crucial source. I often relied on statements of actors who reflected on their own efforts or the efforts of others. As most responses defined by Oliver refer to common idiom, references to these responses or substitutes of them were used to identify these responses.

In observing actors' responses I did adopt a cautionary stance for the responses of conformity. This response was not always easy to observe as actors held different views on whether particular actions are in line with formal requirements. When it comes to defining whether actors conformed to a particular rule I relied largely on the view and judgement of the European Commission for the purpose of this study.

### **Contextual factors**

In this study I aim to take into account a broad set of contextual factors that may be relevant for explaining how actors respond to EU formal rules. These various aspects of the context, as noted, are analysed in a holistic way instead of focusing on the impact of individual contextual factors. For that reason general categories of contextual factors are used to provide an indication of the type of factors that should be taken into account when explaining how actors respond to EU formal rules: (i) institutions, (ii) the activities of other actors and (iii) ideas.

Within this study these categories of factors 'do not have a status of a defined set of variables that can be systemised and operationalised to serve as [single] explanatory factors...' (Scharpf 1997, 29-30). The exact way these categories are specified has to be answered empirically.<sup>25</sup> This is done in this study on the basis of actors' interpretation and knowledge of the context, in particular of those actors directly involved with the introduction of the horizontal governance initiatives. This information on the context is therefore based on the analysis of interview data and documentary information in which actors reflect upon the environment or situation in which they found themselves.

For explanatory purposes though, I will at times provide a more detailed description of some of the contextual factors from an observer perspective. In the different narratives, for example, I will discuss particular formal institutions or aspects of the ideational context in greater depth than was done by interviewees. Such detailed information was not always made fully explicit by actors in interviews, but helps understanding the context as outsiders to the application episodes.

### **Social mechanisms**

To explain how the different contextual factors are causally linked to actors' responses, I refer to a number of social mechanisms that have been catalogued by Barzelay. These social mechanisms provide a causal link between the (aggregate) properties of the context and the concrete efforts of actors.

To identify the operation of any of these mechanisms I turned to information about 'actors' options in relation to their (perceived) situation and their reasons, beliefs and intentions for responding the way they did.' (Barzelay 2003; cf. Carter and New 2004, 3; cf. Blatter and Blume 2008, 32). To deduce this information I turned to the reasons for action that are provided by actors themselves. This information is gathered from interviews and documentary sources. Actors' explanations for their behaviour (or that of others) will likely include a reference to a perceived situation and contain arguments of *how* this situation exactly influenced actors' efforts. The prevalence of specific words or arguments in these accounts was used to identify the operation of a particular social mechanism. These different specific words (indicating a mechanism) are listed in the table 4.1 below.

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<sup>25</sup> Of course, after reviewing EU implementation literature specific contextual factors identified in established literature affected my expectations and knowledge of the role of specific factors. These factors operated in the background of my mind when approaching the empirical data.

<b>Social mechanism</b>	<b>Involves:</b>	<b>Indicated by words such as:</b>
Logic of appropriateness	the process by which an actor considers its situation and identity; and follows or reimagines the legitimate standards (norms) attached to the situation and its identity.	<i>Appropriate, right, correct</i>
Attribution of opportunity	the process by which an actor interprets its situation; comes to a view that the situation provides an opportunity for realising its goals; and seizes this opportunity.	<i>Chance, opening, possibility</i>
Attribution of threat	the process by which an actor interprets its situation; comes to a view that the situation provides a threat for realising its goals; and decides to remedy or prepare against it.	<i>Risk, danger, harm, jeopardy</i>
Certification	the process by which an actor interprets the behaviour or the claims of another actor; assesses that these meet acceptable criteria for acting or claim making; and validates these claims or the actor as a claim maker.	<i>Valid, legitimate</i>
Decertification	the process by which an actor interprets the behaviour or the claims of another actor, assesses that these fail to meet acceptable criteria for acting or claim making and denies the validity of these claims or the actor as a claim maker.	<i>Not valid, illegitimate</i>
Attribution of success	the process by which an actor interprets the outcome of particular efforts; assesses that these are successful in the light of previously established goals and ambitions; and repeats or reinforces these efforts.	<i>Accomplishment, victory</i>
Attribution of failure	the process by which an actor interprets the outcome of particular efforts; assesses that these are unsuccessful in the light of previously established goals and ambitions; and erminates or cancels these efforts.	<i>Loss, defeat, unsuccessful</i>

**Table 4.1: Operationalisation of social mechanisms**



Quotes from interviews and passages of documentary sources that indicate particular responses, contextual factors or the operation of specific social mechanisms will be included in the historical narratives at different moments. These excerpts help to provide a more coherent narrative of the episodes by giving a more or less direct sense of what happened or what had been the situation. They also give an indication of the data on which the narrative and the subsequent causal analysis is based; this allows others to assess my interpretation / analysis of the application episodes or to create their own.

#### **4.6 Data collection**

Process tracing requires an in-depth understanding of a specific process as each piece of evidence can be relevant to the central argument. Process-tracing thus leans upon multiple aspects of a causal account and exploits a wide range of data that each has its own weaknesses and strengths. In providing a plausible account, researchers usually rely heavily on the ordering of evidence that can be collected from a variety of sources (Gerring 2007, 179). This *triangulation* of data is therefore a key element to my data collection approach. By drawing on various different complementary sources of data we will gain more reliable insight into the issue that is under investigation (Flick 2005, 179).

##### **Documentary information**

To conduct this research I draw on a variety of documentary information, such as formal correspondence between actors, minutes of formal meetings, legislation, Parliamentary documents, newspaper articles and press releases. Such data can provide detailed information on processes and provide anchors from which to organise the course of particular events. From the outset these documents can be used to establish the chronology of the process and to identify key actors within it (Pettigrew 1997). Documentary data available for this study differed considerable across the cases. Below I will discuss this information for the individual cases.

##### **Interviews**

In addition to the documentary information, I made use of interviews to corroborate earlier findings: interviews help to get the facts straight and to fill in blanks, but also to understand the dynamics of a policy process. Interviews are particularly useful in refining descriptions of how and why situations evolved. Moreover, interviews in particular are

able to capture ideas, values, opinions and the behaviour of relevant actors (Barzelay et al. 2003). Interviews in this regard, in particular those with initiating actors, are crucial for answering the research questions formulated for this research.

In the study I used semi-structured interviews for which interview protocols were prepared. The interview process was designed to reveal information about the responses of initiating actors, the different aspects of the context that featured the application episode and the evolving relationship between them. These protocols were tailor-made for the different cases and the different interviewees on the basis of previous and on-going research. Hence, during the interview stage the protocols were modified as findings re-orientated priorities and aspects (cf. Barzelay et al. 2003).

Besides questions about the general role of actors in the application process, the horizontal governance initiatives and the EU formal setting, and interviewees' general view on the application episode, the protocols contained specific questions that were organised around particular responses or around specific events or contextual features of the case that were identified on the basis of previous (desk) research. These questions were organised in the order of their manifestation in the application episodes.

Interviewees were selected on the basis of their potential ability to answer the research questions, the organisation they represented and the variety of perspectives they offered. In all cases I began by contacting public actors directly involved with the introduction of the initiatives, held orientating interviews and requested access to archives. Following on from this I selected other actors involved in the process. I mainly interviewed officials that worked on the initiative on a regular basis and had a strong recollection of how the episode had unfolded. In addition, I decided to interview various individuals that had a (close) observer position on the process. This provided an opportunity to fit the pieces of information together that were obtained from several different points of view.

The semi-structured interviews lasted between 45 minutes and 1,5 hours and were conducted largely face-to-face or on the telephone. Most interviews were digitally recorded; these recordings were later (partly) typed-out verbatim before analysing them on the basis of the different analytical building blocks.

### **Data access**

In the different cases, as noted, I relied on different (types of) data. This is explained below for the different case studies. In general, access to the archives of the European Commission was denied because of secrecy rules.

- The analysis of the Phyto case is largely based on interviews with domestic actors involved in this process and publicly accessible documents, such as Parliamentary documents, policy documents, reports and newspaper articles. At the start of this research national officials were willing and interested to cooperate in the research project. However after I already conducted various interviews and analysed a range of policy documents, the policy field of phytosanitary policy became politicised. A related discussion on the role of private laboratories in the phytosanitary inspection system drew attention of Members of Parliament. This discussion led official of the Ministry of ANF to being cautious when participating in and providing for research on this case. National officials moreover, feared that interviewing the Commission could draw attention to the Dutch inspection system and complicate the reform of the inspection system.

Initially, I agreed on a pause of my research. Later on, the Ministry was moving in the direction of a more general withdrawal of their participation. After some persistence, national officials agreed to continue to participate, but only if the interviews would be restricted to actors at the national level. For the same reason, I did not have full access to archival material of the Ministry of ANF; confidentiality withheld most documents from public analysis.<sup>26</sup> Access to the personal archive of an official of NAK was provided in this case.

- The analysis of the Soil Remediation case is largely based on information found in the archive of the Ministry of Environment. This archive consists of transcripts of meetings, e-mail correspondence, recommendations and (draft) formal correspondence with the Commission. The documentary evidence in this case, more than in the other cases, allowed me to adopt the position of a close observer who followed the process from week to week and to present a precise account of the series of events that took place. To corroborate this data and to fill in gaps, I conducted additional interviews with key actors that were involved in this process. This was only a selective group of actors, consisting of three officials from the Ministry of Environment (two policy experts and a legal expert) and an official of the European Commission.
- The analysis of the Green Services case is based on interviews with actors from all governmental levels. These included regional, national and Commission officials. For this case most actors readily participated, although legal experts of the Ministry of ANF were

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<sup>26</sup> A request for access to the archives was considered by the Ministry of ANF in the light of the 'Wet openbaarheid van bestuur', but denied. In the Soil Remediation case I made a similar request. In this case access was granted.

somewhat reluctant to do so. After some persistence, they agreed to cooperate by answering detailed questions in written form. At the national and regional level access was provided to parts of the archives. This data consisted of transcripts of meetings, policy documents and recommendations, and (draft) formal correspondence between actors.

### **Assessing the evidence**

The data for this study is gathered from multiple sources. In assessing and analysing the data I took into account that statements of actors during interviews or in documents may not always be equally reliable; actors (i) may have reasons to conceal their true motives, (ii) may forget particular events, or (iii) may make up explanations for their behaviour retrospectively.

With regards to the first limitation, I offered respondents anonymity and agreed to make reference only to their organisational affiliation (a full list of interviewees is presented in the Annex). To deal with the other two limitations, I used existing data to 'help' actors recall their experiences by setting particular scenes. As said, I organised the questions around particular moments and responses during the episode that were identified on the basis of on-going research. In the interviews themselves, furthermore, I tried to triangulate, by questioning interviewees about the motivations of other actors and confronting them with these statements.

I decided not to treat all statements as having equal value. First, I have accorded more weight to statements that were raised by more than one actor. Second, I prioritised statements that actors made in private settings, such as closed meetings, revealed in private memoranda or internal correspondence. I assume that actors will be more likely to reveal their actual beliefs, concerns and aims when in private (cf. Jacobs 2004).

## **4.7 Conclusion**

In this chapter I presented the research methodology to answer the different research questions. After specifying the ontological and epistemological assumptions of this study, I described the case study strategy and the within case study method of process tracing. I then turned to a discussion on the comparative research strategy adopted and presented the three selected cases. I continued the chapter by 'operationalising' the main analytical concepts and by reflecting on the collection and assessment of the empirical data.

By doing so, I have given a general indication of the quality of this research. By discussing how I prepared the narratives and discussing the role of member check I disclosed how I increased the trustworthiness and credibility of the case narratives. The discussion of the operationalisation of the different analytical building blocks showed how the case narratives are translated into causal analytical terms. This step, it is worth noting, is also made in the different case chapters. I will first present the historical narratives of the episodes before I will turn to their causal analysis.

Regarding the ability to project the insights of the cases onto other situations, it must be noted that this study is modest in its ambitions. By analysing and comparing the three selected cases I do not intend to make any general claim about either the difficult overall relationship between horizontal modes of governance initiated at the Member State level and EU formal rules or how actors respond to EU formal rules. By providing a detailed insight into the activation and operation of different social mechanisms under particular conditions, the three selected cases do aim to provide for insights that could be *transferable* to different other situations in which similar conditions feature the context. This study thereby does aspire to provide for 'limited analytical generalisations' on how actors respond to EU formal rules.



# CHAPTER 5

## AGENCIFICATION UNDER THE ‘SHADOW OF BRUSSELS’

### 5.1 Reforming the Dutch phytosanitary inspection system

This chapter presents an account of the reform of the phytosanitary (plant *health*) inspection system in the Netherlands and its troublesome relationship with the EU Phytosanitary Directive. In the present case phytosanitary inspection tasks were planned to be delegated from a contract-agency of the Ministry of Agriculture, Nature and Food quality (ANF) to different autonomous inspection bodies. These autonomous inspection bodies were already designated as agencies (ZBOs) with plant *quality* inspection tasks under Dutch law. The delegation of phytosanitary inspection tasks to the autonomous bodies had to clarify the responsibilities of different parties involved with plant quality and health inspections and reduce the inspection costs for the private sector (e.g. producers, traders).

During the introduction of the reform, the Ministry of ANF was confronted with (critical) questions of the European Commission on the fit of the reform with the EU Phytosanitary Directive. After the Ministry informed the Commission about the reform, the latter expressed concerns on whether the reform was in line with the Phytosanitary Directive (2000/29/EC), in particular Article 2(g)1. This article lays down that ‘responsible official bodies in a Member State may delegate tasks to be accomplished under their authority and supervision to any legal person, whether governed by public or private law, which under its officially approved constitution is charged exclusively with specific public functions, provided that such person, and its members, has no personal interest in the outcome of the measures it takes.’

In this first case study, the meaning of the application of Article 2(1)g was subject to different points of view. The case shows how different ideas and discussions on how to interpret the application of the article frustrated the reform of the Dutch plant inspection system.

Section 5.2 below will first briefly introduce the EU plant policy and discuss its development since the 1970s. Section 5.3 describes the formal organisation of the plant

inspection system in the Netherlands prior to the reform. Section 5.4 continues discussing a number of developments and ideas that gave reason to delegate the phytosanitary inspection tasks to the different autonomous inspection bodies / ZBOs. Section 5.5 will then present a historical reconstruction of the episode in which the Phytosanitary Directive was applied to the reform operation. The reconstruction of the application episode starts shortly before the moment the Ministry of ANF decided to contact the Commission on the reform; it ends the moment the reform was introduced and accepted by the Commission. After presenting the historical narrative of the episode, section 5.6 will provide an explicit causal analysis of the application episode. The application episode will therefore be casted in terms of pursued responses, contextual factors and social mechanisms. Section 5.7 concludes this chapter.

## **5.2 EU plant health and plant quality policy**

The trade of plants (such as fruits, vegetables, cut flowers, bulbs or seeds) and plant products within the EU and their import from third countries is regulated by two types of EU policy. The EU phytosanitary policy, firstly, aims to protect the *health* of plants and plant products within the EU. The EU marketing policy, secondly, regulates the *quality* of plants and plant products that are being traded within the EU. The two policies are briefly discussed below.

### **EU plant health policy**

The EU phytosanitary policy aims to take protective measures against the introduction of organisms that are harmful to plants or plant products into the EU Member States. The basic structure of the current EU phytosanitary policy was already conceived in 1977 with the adoption of *Council Directive 77/93/EEC on protective measures against the introduction into the Member States of harmful organisms of plants or plant products*. This directive has been amended on a number of occasions. Since 2000, the legal framework of the EU's plant health policy has been provided by *Council Directive 2000/29/EC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community* (EC 2011; Mourits et al. 2010, 235-242).<sup>27</sup>

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<sup>27</sup> A comprehensive evaluation of the existing EU plant health regime has been carried out in the period 2009-2010. The adoption of a proposal for a *new* plant health law of the Commission is



Until the 1970s plant health policy was largely a national responsibility of EU Member States. Traditionally, the health of plants was secured through national control measures and border controls. In 1977 it was decided that national plant health provisions needed to be harmonised within the EU: the control of harmful organisms within the EU would have a greater effect if protective measures against the introduction and spread of harmful organisms would be applied at the same time in different Member States (EC 2011).

An important event in the development of the EU phytosanitary policy was the creation of the Single Market in 1993 that removed the restrictions on trade and free competition between Member States. The creation of the Single Market called for a new EU strategy in the field of plant health policy; it required an increased harmonisation of the plant health controls carried out within the EU. The new EU phytosanitary strategy had 'to strike a balance between opening the EU's internal borders (i.e. minimising internal border controls) and sufficiently protecting the EU's territory from the introduction and spread of harmful organisms' (Food Chain Evaluation Consortium 2009, 4).

With the creation of the Single Market a so-called *plant passports* system was introduced to allow for the free movement of plants and plant products between and within the EU Member States. The plant passport is an official label that travels with plants and plant products. It indicates that plants and plant products have been produced under officially controlled conditions and are free from harmful organisms.<sup>28</sup>

### **EU plant quality policy**

Besides phytosanitary requirements, the EU has laid down different quality requirements for plants and plant products that are traded within the EU. Various so-called 'marketing standards' have been specified in different EU directives and regulations that provide for quality requirements for specific plants, plant products or groups of products. The EU plant quality regime restricts the trade of plants and plant products to those that meet

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foreseen by 2012. The evaluation of the regime is justified, amongst others, by the enlargement of the EU, developments concerning international treaties, changed expectations from society and the decreasing resources for public services (see [http://ec.europa.eu/food/plant/strategy/index\\_en.htm](http://ec.europa.eu/food/plant/strategy/index_en.htm) last visit 4 July 2011).

<sup>28</sup> Plant passports may replace international 'phytosanitary certificates' of products originating in third countries upon the entry in the EU. Products originating in third countries should in principle be subjected to plant health checks on first introduction into the Community. If the results of the controls are satisfactory, third country products should be issued with a plant passport.

these standards and that have been officially examined and certified under the authority of the Member State (EC 2008).

The rationale behind the marketing standards was the creation of a Common Agricultural Policy (CAP) and a common market for agricultural products in the early 1960s. The creation of a common market was accompanied by the establishment of so-called common market organisations which regulate the production and trade of different major products within the EU and with third countries. As an element of the common market organisation, marketing standards have been provided to support fair competition (Ministry of ANF et al. 2004; Van der Meulen and Van der Velde 2009, 429). By specifying definitions of products and categories, minimum product standards and certain labelling requirements, producers and traders can describe their products and give indications of their market value without requiring physical presentation. Nowadays, the plant quality policy is used more and more to increase the quality of products and competitiveness of the European agricultural sector. The high quality of EU produced agricultural products should be an important strength of competitive advantage of EU producers that gives them an edge over competitors outside the EU (EC 2008).

### **5.3 Dutch plant inspection system**

To ensure that these phytosanitary and quality requirements are met, the EU legal framework specifies a number of inspection and monitoring activities that need to be carried out under the authority of the Member States. Member States must therefore organise inspections and allocate the necessary resources for carrying out this task. The organisation of the Dutch plant health and plant quality inspection system established to meet these requirements is briefly discussed below.

#### **Organisation of phytosanitary inspections**

Traditionally, phytosanitary inspections have been carried out by the Plant Protection Service (PPS, in Dutch: Plantenziektenkundige Dienst, PD). The Plant Protection Service is the so-called Single Authority for plant health in the Netherlands (as per Article 1(4) of the Phytosanitary Directive). It operates under the authority of the Ministry of ANF that bears the responsibility for the Dutch phytosanitary *status* and the long-term development, implementation and management of Dutch phytosanitary *policy*.

Under the Ministry's authority, the PPS was responsible for implementing EU phytosanitary policy and the direct control on harmful organisms (EC 2008a). In formal terms, the PPS operates as a so-called contract-agency (in Dutch: *agentschap*) of the Ministry of ANF. As a contract-agency the PPS is located outside the Ministry and has a delegated discretion to take managerial decisions. Like other contract-agencies, it has no independent legal status and its decisions are subject to full ministerial accountability.

The PPS was made into a contract-agency by the Ministry of ANF in a broader trend of 'agencification' in the early 1990s. In these years the idea grew that it could be more effective and efficient to grant executive parts of ministries more managerial autonomy. The delegation of managerial tasks to contract-agencies, still operating close to a Ministry, has been described as 'internal agencification' (Kickert 2010, 504).

The internal agencification of phytosanitary tasks was considered the right thing to do in these days by the Ministry of ANF, which, as noted, was responsible at a general level for maintaining the phytosanitary status of the Netherlands. The task of guaranteeing a high phytosanitary status of the Netherlands was strongly related to the economic importance attributed to the plant sector by the Dutch government. The intensive plant sector in the Netherlands and the amount of trade of plants and plant products was seen as an important pillar of the Dutch economy.<sup>29</sup> The Ministry realised that the importation of harmful organisms could close down the intensive plant sector in the Netherlands while the exportation of harmful organisms could harm the reputation of the Netherlands as reliable exporter of plants and plant products (Ministry of ANF 2005; see also De Vries et al. 2002).<sup>30</sup> It was believed that the phytosanitary status could be best guaranteed by carrying out phytosanitary inspections by a contract-agency that would operate in close liaison with the Ministry.

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<sup>29</sup> In 2009, the *intra* community export of live trees and other plants; bulbs, roots and the like, cut flowers and ornamental foliage by the Netherlands had a value of € 6363 million (this accounts for almost 72 % of the total export (in terms of money) of these commodities in the EU); the *intra* community import had a value of € 546 million euro (7% of the EU). The *extra* community export had a value of € 1269 million (23%); the import had a value of € 113 (almost 14% of the EU). (FVO website: country profile Netherlands, valid as of November 2010; [http://ec.europa.eu/food/fvo/country\\_profiles\\_en.cfm](http://ec.europa.eu/food/fvo/country_profiles_en.cfm), last visit 22 October 2011).

<sup>30</sup> The lethal outbreak of the enterohaemorrhagic E.coli (EHEC) bacteria linked to contaminated vegetables in May 2011 illustrates the economic consequences of doubts on the status of plant products being exported; confusion over the source of the EHEC bacteria and uncertainty on the phytosanitary status of EU produced vegetables made different countries ban imports of plant products.

### **Organisation of plant quality inspections**

Plant *quality* inspections in the Netherlands had been delegated to different agencies (in Dutch: Zelfstandige Bestuursorganen, ZBOs) operating at a greater distance from the Ministry of ANF. Based on national legislation, four specialised autonomous inspection bodies had been recognised by the Ministry of ANF to carry out various public tasks related to plant quality inspections as ZBOs. The four ZBOs are all private (judicial) actors but perform contracted services in the public interest. Plant quality inspection tasks are thereby carried out under the *external control* of the Ministry of ANF ‘without an immediate hierarchical relationship’; the different ZBOs are competent to make independent decisions (EC 2008; see Van Thiel 2004 on ZBOs). In comparison with the role and position of the PPS, the delegation of plant quality inspection tasks can be described in terms of an ‘external agencification’ (see figure 5.1). The four ZBOs are:

- BKD (Bloembollenkeuringsdienst / Flowerbulb Inspection Service), responsible for flower bulbs;
- KCB (Kwaliteits-Controle-Bureau / Quality Inspection Service), responsible for end products (e.g. cut flowers, vegetables, fruit);
- NAK (Nederlands Algemene Keuringsdienst / Dutch General Inspection Service for Agricultural Seed and Seed Potatoes), responsible for arable crops (e.g. potatoes, maize); and
- Naktuinbouw (Netherlands Inspection Service for Horticulture), responsible for plant horticultural crops (in particular propagation material).

The origin of the different ZBOs dates back to the early 1900s and resulted from mergers between different other autonomous inspection bodies. Originally the inspection bodies had carried out quality inspections on behalf of the private sector to guarantee the quality of agricultural plant products that were exported to other countries. The different inspection bodies were drawn into the public realm by the Ministry of ANF when the EU started to set different quality standards. It was considered a logical step to extend the tasks of the autonomous inspection bodies to include the responsibility for monitoring the EU marketing (quality) standards (EC 2004; Second Chamber 2009). The division of plant inspection tasks is depicted in figure 5.1 below.

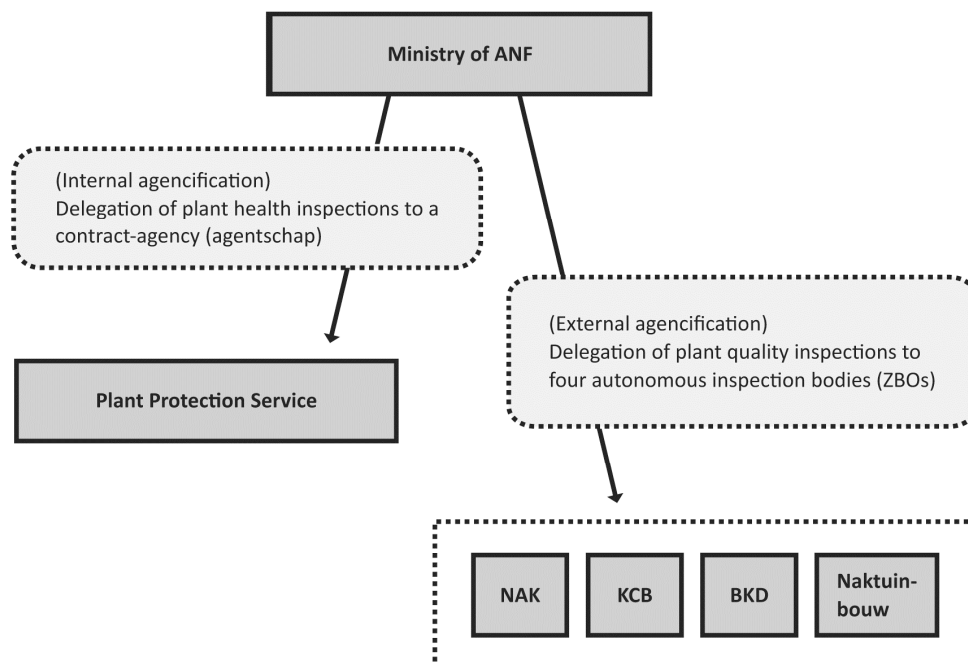


Figure 5.1: Organisation of the Dutch plant inspection system prior to the reform

## 5.4 Operation Plantkeur

### A phytosanitary ‘patchwork’

In practice, the inspection tasks and responsibility of the different inspection bodies had become rather indistinct. As most plants and plant products require quality and phytosanitary controls, inspection duties had been taken over by the different agencies often for pragmatic reasons (Ministry of ANF et al. 2004, 5). In the fruit sector, for example, both the PPS (responsible for phytosanitary inspections) and the KCB had been involved with quality and phytosanitary controls. In the seed potato sector, the NAK was involved in phytosanitary inspections by testing a number of diseases for seed potatoes, such as ‘ring rot’ and ‘brown rot’ (EC 2006; interview NAK 3 April 2009). Finally, the PPS had delegated various tasks for issuing plant passports to different ZBOs (I return to this below).

The historically developed plant inspection system was critically assessed in a discussion paper that was prepared by researchers of Leiden University in 2002 (De Vries et al. 2002). Different crises in the (adjacent) veterinary sector (e.g. Food and Mouth Disease) had encouraged the Ministry of ANF to commission a study that would reflect upon the functioning of the Dutch phytosanitary policy. The study had to investigate whether similar crises could be foreseen in the phytosanitary policy field that could lead to political consequences.

A key conclusion of the report was that the division of tasks and responsibilities in the plant inspection system was unclear. Even though the plant inspection system functioned correctly in daily practice, the phytosanitary policy field had developed into a 'patchwork'; the tasks and responsibilities were blurred and the policy was not guided by any underlying philosophy. The existing inspection system, moreover, was at times impractical and inconvenient for the private sector that had to deal with a number of different inspection bodies (De Vries et al. 2002).

#### **'Ensuring, rather than taking care of'**

In response to the discussion paper, the Ministry of ANF stated that the phytosanitary policy field would be reconsidered and reinforced. The Ministry set out the ambition to develop a more rational and transparent inspection system that would guarantee that the Netherlands would meet the standards set in international norms. In setting out its ambitions the Ministry of ANF also put forward that the private sector would take its fullest responsibility to meet these standards (Ministry of ANF et al. 2004).

The greater involvement of the private sector followed from a renewed interest in deregulation under the two centre-right government coalitions of Balkenende I and II. The latter government coalition - consisting of the Christian Democrats (CDA), the Conservative Liberals (VVD) and the Liberal Democrats (D66) - published an action program for '*Another Administration*' (*Andere Overheid*) in 2004. The program was aimed at modernizing the entire public sector; it aimed to achieve a smaller government that would provide fewer rules but perform its tasks better. The program would therefore critically assess the tasks, responsibilities and authorities of government and search for *alternative governance* arrangements that would allow the private sector to take a greater responsibility (Ministry of the Interior and Kingdom Relations 2004; see also Steijn and Lesink 2007, 37; Kickert 2010).

The Ministry of ANF had translated the action program in the catchphrase '*Ensuring, rather than taking care of*' ('van zorgen voor, naar zorgen dat') which (re)defined the role

of the Ministry of ANF in relation to the policy domains of agriculture, nature and food quality. In this new role the Ministry would remain responsible for setting particular norms or standards, but would provide room for and facilitate initiatives of the private sector to meet these norms (Ministry of ANF 2005a).

### **Slimfruit**

The ambitions of the Ministry of ANF with regards to the phytosanitary inspection were advanced in the pilot project *Slimfruit*. In the project the Ministry of ANF, the PPS, the KCB (one of the ZBOs) and representatives of the private sector (e.g. farmers, packers, processors, traders and retailers) explored how the different inspection agencies could collaborate better in the fruit sector (Ministry of ANF et al. 2004).

The private sector was motivated to participate in the pilot project by reasons of cost-efficiency. In the view of the private sector, their products were inspected too often. The inspections were burdensome, as they were often carried out by more than one control authority. The inspections on plants and plant products often led to duplication of efforts: one party controlled the application of the marketing (quality) standard and another party inspected the application of plant health rules. The inspection costs of the PPS moreover, were considered too high by the sector compared to the inspection costs of the autonomous inspection body KCB. During negotiations between the PPS and the private sector on the inspection tariffs in the summer of 2003, both parties agreed to explore how smarter inspection methods could be developed in the fruit sector (ibid, 5).

In the context of the Slimfruit project it was investigated (i) how and where inspections could be better focussed and reduced in number and (ii) whether the administrative burden on the private sector could be lightened. In relation to the latter aspect, the Slimfruit project investigated the possibility to delegate phytosanitary inspection task to the ZBOs under the responsibility of the PPS / Ministry of ANF. This option was one of three alternatives developed in the context of the project and considered the right way forward by the Ministry. The wish to accredit a greater role to the private sector in the phytosanitary inspection fitted with the so-called framework of *'Supervising Control'* (toezicht op controle) which provided an operationalisation of the motto of *'Ensuring, rather than taking care of'* (Ministry of ANF et al. 2004).<sup>31</sup>

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<sup>31</sup> Different pilot projects have been set up in the context of the supervising control framework. The Plantkeur project was not designated as one of these specific projects, though it was variously referred to by the Ministry of ANF as an example of the supervising control concept (see also De Bakker et al. 2006).

Central to the 'Supervising Control' framework is the reliance of government on the self-regulating capacity of the private sector to address public interests while maintaining ministerial responsibility. The framework set out the conditions under which the Ministry could supervise the self-controlling activities by other private or autonomous actors. The Ministry of ANF expected this would result in a more efficient and effective assurance of public interests and reduce the administrative burden for the private sector (Ministry of ANF 2004).

In the context of the Slimfruit project the international legal environment in which the reform had to take place and the possible constraints this would impose was also assessed. Based on a close inspection of the formal (international) legislation, the department of legal affairs of the Ministry of ANF concluded that, under specific conditions, the phytosanitary inspection tasks could be delegated to the ZBOs. It was stressed, however, that the transfer of tasks had to be organised carefully. Concerns were expressed in the project's final report on whether the reform could be well explained to other parties and countries (Ministry of ANF et al. 2004). It was therefore advised to further investigate how the delegation of the inspection tasks would be perceived and experienced by others (I return to this below).

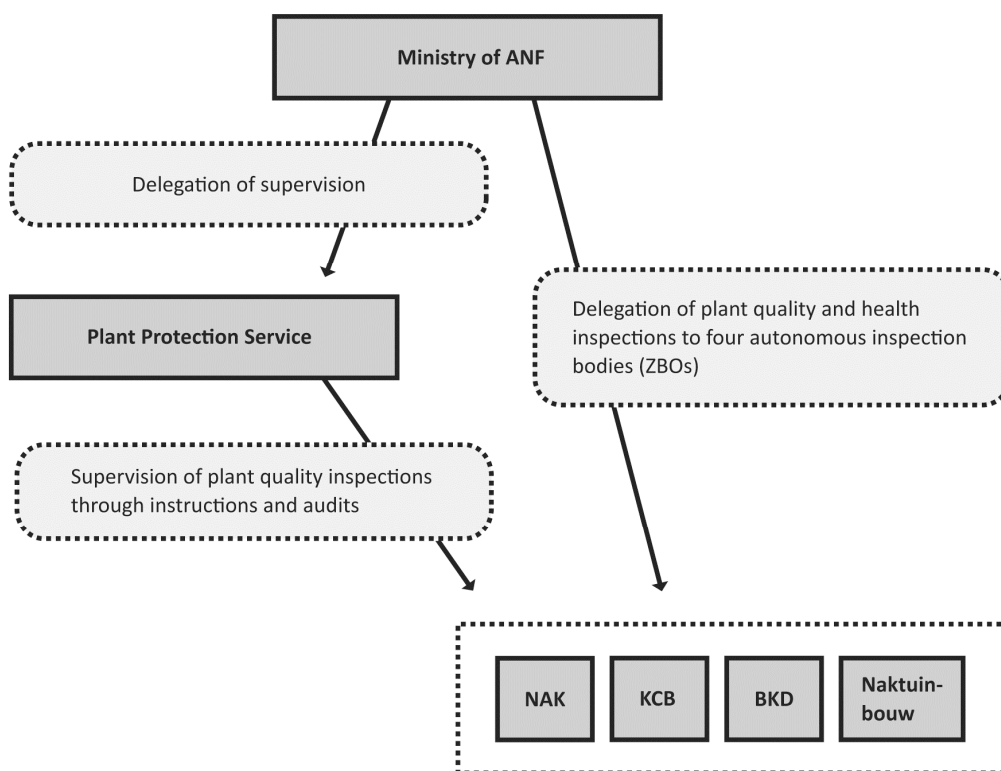
#### **Concept Report Project Plantkeur**

Shortly after the conclusions of the Slimfruit project were presented in September 2004, the Ministry of ANF decided to further develop the project's ambitions for the complete phytosanitary sector in a project called *Plantkeur*. Earlier on it was recognised that the result of the Slimfruit project had to provide input for a wider reform of the Dutch plant inspection system (interview with PPS official 7 April 2009). The *Plantkeur* project officially took off in April 2005. The private sector, the different ZBOs, the PPS and the Ministry of ANF drew up an inventory of the major constraints found in the plant inspection system and formulated the preconditions for addressing them. The *Concept Report Project Plantkeur* was presented in September 2005 (Ministry of ANF 2005).

The ambition of transferring all phytosanitary tasks from the PPS to the different existing ZBOs was made explicit in the concept report. Under the authority, responsibility and supervision of the Ministry of ANF and the PPS, all phytosanitary inspection tasks had to be delegated to the different ZBOs. In the planned new situation, phytosanitary import and export inspections, certain diagnostic tasks and the issuing of plant passports would be delegated to the ZBOs while the PPS would focus on management and supervision



tasks. For the private sector this would mean that they could deal mostly with a single inspection body. It was expected that this would lead to a 30% cost-reduction for the private sector (ibid, 8). A simplified overview of the planned reform is depicted in figure 5.2.



**Figure 5.2: (Simplified presentation of) Planned reform of the plant inspection system**

The need to maintain the high phytosanitary status of the Netherlands was also made explicit in the Plantkeur report. Given the economic importance attributed to the plant sector and the trade of plant products, maintaining the credibility and acceptance of the new inspection system by other EU Member States and third countries was considered essential (Ministry of ANF 2005). Although the Ministry had concluded the different ZBOs

*could* carry out the phytosanitary inspections as the responsibility for the inspections would remain with the Ministry of ANF, it was aware that other parties could be more critical of the reform (ibid., 15). Given the size of the plant inspection reform and the important position of the Netherlands in the trade of plants and plant products in Europe, the Ministry of ANF recognised that introducing the reform without clear communication was not an option. As stated by an official of the PPS during an interview (Interview with PPS official 7 April 2009):

‘Within the EU [the Netherlands] takes a special position as a small Member State with an enormous amount of trade....So, you are put under a glass bell. Being transparent about your plans is the only way ahead...’.

Within the project group a special working-group was established and assigned with the task of analysing which aspects had to be taken into account to gain and maintain the international confidence in the Dutch phytosanitary inspection system. On the basis of its analysis, the working-group concluded that (Ministry of ANF 2005):

- clarity had to be provided on the authorities and responsibilities of the different parties and in particular the monitoring and control of the Dutch government;
- guarantees had to be given on the expertise and independence of the inspection bodies; and that
- clear communication on the reform was needed, rather than a unilateral imposition of the changes.

The Ministry of ANF perceived a particular risk with regards to the ZBOs. It anticipated that other parties may be skeptical about the role of the ZBOs. On the basis of its experience with explaining the role of the different public and private organisations involved in the Dutch plant inspection system, the Ministry (and the PPS) estimated that it could be difficult to explain the reform to other countries that are used to a more traditional top-down governance culture.<sup>32</sup>

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<sup>32</sup> This difficulty is reflected for example, in the different inspection reports of the Commission’s Food and Veterinary Office (FVO, see below) that provide a description of the organisation of the Dutch phytosanitary inspection system. In these reports the ZBOs are variously described as semi-public or as private inspection bodies (e.g. EC 2004; 2010b).

‘The whole structure with ZBOs....That is uncommon in other countries. It is very difficult to explain that you have non-governmental administrative bodies [involved in the plant inspection system] that act as governmental bodies... Because that is how it sounds...’ (interview with PPS official 7 April 2009).

Notwithstanding these anticipated difficulties, the Ministry assessed that by keeping the formal responsibility for the phytosanitary inspection system with the Ministry of ANF, it could demonstrate that sufficient guarantees would be in place to uphold the phytosanitary status of the Netherlands. To accentuate that not much would change it was decided that officials of the Ministry / PPS involved already with (EU) phytosanitary policy on a daily basis would communicate and explain the reform to other parties.

## **5.5 Contacting the European Commission**

As part of the Ministry’s communication strategy a first meeting was organised with the European Commission in November 2005. The meeting was organised to inform the Commission on the planned delegation of the phytosanitary inspection tasks to the different ZBOs:

‘That is how it goes. As a Member State you must conform to certain formal requirements and when you have certain ideas, you discuss them with the Commission (...)....and the Commission appreciated that we came and provided them with information on our plans and wanted them to think along with us....That’s how we gradually proceeded....it is just a form of communication....You need to inform the Commission and take them with you in your argument....’ (interview with national official 8 April 2009).

Convincing the Commission that the reform of the inspection system would be in line with the Phytosanitary Directive, however, turned out difficult. The attempt of the Ministry to do so was frustrated in particular due to a recent inspection mission that was conducted by the European Commission’s so-called Food and Veterinary Office (FVO) in October 2005.

### **FVO inspection mission: the application of Article 2(1)g**

The FVO - a directorate of the Directorate General for Health and Consumers (DG SANCO) - plays an important role in ensuring that EU legislation on food safety, animal health, plant health and animal welfare is properly implemented and enforced by the Member States. The FVO, in this respect, directly supports the Commission to fulfil its role as a guardian of the treaties that it is formally granted. Inspections on *plant health* controls at the Member State level, more specifically, can be carried out by the FVO on the basis of Articles 21 and 27(a) of the Phytosanitary Directive (2000/29/EC). The two articles specify that the European Commission may check and visit places (i) where plants and plant products are grown, produced, processed or stored or (ii) where inspections are carried out.

On the basis of a yearly inspection program, the FVO carries out on-the-spot inspections in Member States. The findings of the inspections are presented in an inspection report, together with recommendations to address any shortcomings revealed during the inspection. The FVO can request Member States to present an action plan on how it intends to address any shortcomings and can monitor, together with other Commission services, the implementation of the action plan through follow-up activities.

In the monitoring program for the second half of 2005 the potato sector in the Netherlands was scheduled to be inspected by the FVO (EC 2005). During this inspection, the FVO, amongst others, visited NAK, one of the autonomous inspection bodies to which the phytosanitary inspection tasks were delegated under the Plantkeur operation. NAK, as mentioned above, was already involved in the issuance of plant passports for seed potatoes and different inspections. With regard to the issuing of plant passports, FVO officials started asking questions about NAK and its relationship with its commercial subsidiary NAK Agro. During the inspection mission it became clear to the FVO that there was a close relationship between both organisations and that staff working for NAK Agro had been involved in the issuance of plant passports. FVO officials considered this situation a breach with the Phytosanitary Directive; in its report of the inspection mission the FVO commented that:

‘the fact that [the] NAK shares its staff, equipment and has financial connection with its commercial subsidiary, NAK Agro, is not fully in line with Article 2(1)g of Commission Directive 2000/29/EC which stipulates that the ‘responsible official bodies in a Member

State may delegate tasks to be accomplished under their authority and supervision to any legal person, whether governed by public or private law, which under its approved constitution is charged exclusively with specific public functions, provided that such person, or its members, has no personal interest in the outcome of the measures it takes'. In this case NAK employees may have a personal interest in the outcome of the measures taken when charged with public functions to the advantage of NAK Agro.' (EC 2006, 33).

In the report the recommendation was given that the competent authorities in the Netherlands would ensure that NAK would conform to the directive - in particular in relation to the 'exclusivity of public functions and potential conflict of interest' - and that 'the tasks provided for by Council Directive 2000/29/EC which are delegated to NAK are accomplished under the PPS authority and supervision' (ibid., 34).

At that moment, NAK and the PPS / Ministry of ANF were somewhat surprised by the questions and recommendations of the FVO on the organisation of the phytosanitary inspections in the Netherlands. However, all parties believed that things would blow over. The existing arrangement, in which the issuance of plant passport was delegated to NAK, had been in place since the mid-1990s and had not previously prompted discussions with the FVO /the Commission. The FVO had controlled parts of the phytosanitary inspection system a few years before; at no point had any comments on the role of NAK and its relation with NAK Agro been made (interview with national official 28 July 2009).

The initial reaction of the PPS to a draft report of the FVO inspection mission was that there was no breach with EU law. The PPS stated that the delegation of tasks was in accordance with the Phytosanitary Directive (EC 2006, 40). It stressed that NAK is charged exclusively with public functions and argued that the constitution and organisation of NAK are such that its staff cannot have a personal interest in the outcome of the measures NAK takes. In its reaction to the FVO inspection report, the PPS argued that:

'the sharing of staff, equipment and financial connection with its commercial subsidiary, NAK Agro is in itself not a violation of (...) article 2(1)g, which does not preclude such a construction.'

In the discussion with the Commission on the reform of the plant inspection system however, the conclusions of the inspection report drew specific attention. The questions of the FVO on the 'exclusivity of public functions' and the 'potential conflict of interests' of

NAK motivated the Commission to adopt a critical stance and ask questions about the reform and its fit with the Phytosanitary Directive, in particular Article 2(1)g.

### **Being right and proving right...**

The Ministry of ANF realised that it was pushing the boundaries of what would be allowed under the Phytosanitary Directive. It continued to believe though, that it could introduce the reform without making substantial adjustments to constitution of NAK as the Ministry of ANF remained formally responsible for the phytosanitary status of the Netherlands (interview with national official 17 April 2007). The Ministry of ANF, moreover, had a strong belief in the effectiveness and feasibility of the reform of the inspection system. As a result, the Ministry showed little interest in the (legal) reasoning of the Commission. The Ministry instead, acted from a - what a national official called -‘national rightness’; not so much the strict conformity to the EU formal legislation was put central by the Ministry but rather the effectiveness of the Dutch plant inspection system (interview with PPS official 7 April 2009). The Ministry of ANF therefore maintained that the Plantkeur reform was in line with the Phytosanitary Directive; it disputed the interpretation of the Commission that the reform would not be in line with the Phytosanitary Directive and continued its attempt to convince the Commission of its own interpretation of the feasibility of the reform.

‘We believed that if we would inform them and be transparent, it would be accepted [by the Commission]... however, to be right and to prove right are two different matters.’ (interview with national official 17 April 2007).

The difference between being right and proving right became clear when the Commission sent a letter to the Ministry of ANF in August 2006.<sup>33</sup> In the letter, additional information on the position of NAK and its commercial daughter NAK Agro was requested by the Commission. Restating the earlier FVO comments, the Commission stressed that (i) it was not clear that NAK and NAK Agro were separated and (ii) NAK Agro appeared to be accredited with public tasks. The Commission put forward that the imprecision with regards to the interests of NAK and its commercial daughter NAK Agro could have a negative impact on the phytosanitary inspections and lead to a conflict of interests. In the

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<sup>33</sup> Note that this letter was *not* a so-called *letter of formal notice* that is part of the official infringement procedure that can be started by the Commission in case it suspects a breach with EU law.

letter, the Commission therefore asked which efforts had been taken to meet the criteria specified in Article 2(1)g of the Phytosanitary Directive (EC August 2006 quoted in CBb 27 June 2008).

The official letter of the Commission was rather unexpected for the Ministry of ANF. As stated, the Ministry had a strong belief that there was no conflict of interest and that it could convince the Commission that the reform would be in line with the Phytosanitary Directive. The official letter demonstrated the Commission was taking the issue seriously and could not be convinced by the information provided by the Ministry of ANF on the reform. As mentioned by a national official: the Commission wanted 'more flesh on the bones' (interview with national official 28 July 2009). The letter of the Commission focussed the Ministry's attention on the compatibility of the Plantkeur operation with the Phytosanitary Directive; it made the Ministry aware they should approach the matter more cautiously.

'In hindsight, actually... we should have chosen to be more careful. 'Brussels' is not ready for this construction and we should stay on the safe side....we should be very precise on the legal basis of and how we can guarantee the independence [of the ZBOs]...' (interview with national official 17 April 2007).

The Ministry realised it had to adjust its strategy to gain approval of the Commission on the reform of the inspection system.

### **A nearing deadline**

The need to take the concerns of the Commission serious was strengthened by the ongoing preparations of the Plantkeur operation. An agreement on the Plantkeur operation was signed on the 15<sup>th</sup> of May 2005 between the Ministry of ANF, the PPS, the private sector and the ZBOs, in which the main decisions were taken on the transfer of tasks from the PPS to the different ZBOs and on the transfer of personnel. Plantkeur was planned to be implemented on the 1<sup>st</sup> of January 2007. As the implementation date of the reform drew nearer and preparations were started, the Ministry of ANF realised that it would be very costly to recover the entire operation if the Commission would not accept the reform (interview with representative of NAK 3 April 2009; interview with PPS official 7 April 2009).

In November 2006 the Ministry responded by letter to the concerns of the Commission (Ministry of ANF 9 November 2006 quoted in CBb 27 June 2008):

‘The correspondence (...) gives rise to examine whether changes are necessary with regards to the roles of NAK and NAK Agro. Apparently, the Dutch government has been unclear on its conformity to the directive.’

Following the Commission’s letter, officials of the Ministry tried to determine to what extent the EU directive required an adjustment of the constitution and the operation of the ZBOs. In an attempt to address the concerns of the Commission on the independence of the inspections, the Ministry announced that it would amend the constitution of NAK. It would indicate more explicitly that NAK is exclusively responsible for undertaking legal tasks and related specific public tasks.

The Ministry of ANF however, decided by its interpretation that a formal separation of staff and finances of NAK and NAK Agro was not needed. With regards to the sharing of staff, the Ministry was not convinced that this separation was necessary to guarantee the independence of the inspections.

In response to the concerns of the Commission, the Ministry *did* stress that the inspection activities would be accredited under so-called (private) ISO standards (Ministry of ANF 2006). This accreditation would ensure the independence of the inspections of NAK at the operational level.

In further discussions with the Commission however, it became increasingly clear to the Ministry of ANF that a more formal separation in the personnel of NAK and NAK Agro had to be made to mobilise the Commission to withdraw its objections (Ministry of ANF 2006a). Moreover, the Commission demanded a stricter separation of the equipment and finances of NAK and NAK Agro, a point that was already stressed in the FVO report. Without doing so, the Commission would not accept the plant inspection reform.

Eventually, the Ministry of ANF realised that it had no other option but to conform to these requirements of the Commission; in order to allay the concerns of the Commission a ‘Chinese wall’ was placed between NAK and NAK Agro: both organisations were formally split into a public and commercial subsidiary with separate and transparent accountings for their public tasks and commercial activities.



### **Domestic contestation**

The strict interpretation of the application of the directive caused tensions between the Ministry of ANF and NAK / NAK Agro. At the end of 2006 it had become increasingly clear to NAK / NAK Agro that the entanglement of public and private tasks could become a problem for transferring the phytosanitary inspection tasks to NAK and that a number of adjustments had to be made (interview with representative of NAK 3 April 2009).

At the beginning of 2007 the Ministry of ANF more officially contacted NAK to resolve this, addressing in particular the independence of NAK staff. Initially, NAK had little sympathy for these changes. Like the Ministry of ANF before, it had a strong belief that the independence of its staff was already sufficiently guaranteed under the existing arrangement. NAK did not understand the need to change the existing situation that was in place since the early 1990s. The requirement to make an adjustment to its constitution and operation caused a heightened discussion with the Ministry of ANF (interview with national official 17 April 2007; interview with representative of NAK 3 April 2009). As was remarked by a representative of NAK (interview 3 April 2009):

‘We did not immediately accept the requirement (...) I wouldn’t exactly call it enraged... but, we did not agree. (...) And maybe, there has been some emotion, because letters were going to Brussels that concerned us... without involving us in the discussion.’

Representatives of the private sector (farmers, packers, processors, traders and retailers) also criticised the separation. What in their view had started as an operation to deregulate the plant inspection system had turned into a stricter division of responsibilities between public and private activities of one of the ZBOs. The sector openly questioned whether the expected cost reduction would be realised by sending a pressing letter to the Ministry of ANF and contacting the media. In the letter to the Ministry of ANF, it was remarked that the separation would ‘degenerate into a too bureaucratic, sluggish and expensive entity’ (Agrarisch Dagblad 28 March 2007). A Member of Parliament moreover, asked different questions to the Minister of ANF on the delay of the Plantkeur operation on the basis of an article on the reform in the Agricultural Daily (Second Chamber 3 May 2007).

The pressure by NAK and the private sector however, could not change the Ministry’s decision to abstain from further efforts to avoid the need to separate NAK and NAK Agro. The Ministry realised that it had no other option but to conform to the Commission’s demands and that it would be futile to further dispute the need to do so. Without changing the constitution and operation of NAK and NAK Agro, the concerns of the

Commission on the introduction of Plantkeur could not be removed. The changes had to be accepted by NAK if it wanted to take over the phytosanitary inspection tasks.

After the initial shock had ceased, NAK also realised that it had to conform to the requirements to satisfy the concerns of the Commission and that there would be no other option (interview with representative NAK 3 April 2009). In June 2007, NAK therefore agreed to change its constitution. From then on, NAK alone would carry out public phytosanitary inspection tasks and would commit itself to avoid any form (or appearance) of conflict of interest with its commercial subsidiary NAK Agro (Ministry of ANF 2007). After implementing these changes it would become possible for the Ministry of ANF to mandate the inspectors of NAK to carry out phytosanitary inspections as of 1 September 2007.

#### **FVO follow up mission**

After the formal delegation of the inspection tasks to the ZBOs in September 2007, the Ministry of ANF maintained contact with the Commission to explain how the concerns of the Commission on the independence of the ZBOs, in particular NAK, had been addressed and functioned in practice. To make sure that the new inspection system was in line with the Phytosanitary Directive, the Commission's FVO also carried out an inspection on the functioning of Plantkeur and its effect on the phytosanitary inspections at the end of 2007. On the basis of the audit the FVO concluded that the inspection system functioned in line with the Phytosanitary Directive and gave a positive assessment. The Commission concurred with the conclusion of the FVO and accepted the functioning of the Dutch phytosanitary inspection system (Second Chamber 2008).

### **5.6 Analysing the application episode**

In this section I will provide a more explicit causal analysis of how the Ministry of ANF responded to the Phytosanitary Directive and why it did so. Guided by the analytical framework presented in chapter 3, I start discussing (i) the EU formal rules that applied to the initiative, (ii) the various responses pursued by the Ministry of ANF and (iii) the various causally relevant aspects of the context in which the Ministry responded to the directive. In a final sub-section I will introduce a number of social mechanisms to provide a causal link between the EU formal rules, the contextual factors and the pursued responses.

### **5.6.1 Phytosanitary Directive**

During the reform of the plant inspection system the Ministry of ANF was faced by a specific EU formal requirement: Council Directive 2000/29/EC (the Phytosanitary Directive). This directive requires Member States to take protective measures against the introduction and spread of organisms harmful to plants or plant products. It lists a number of inspection and monitoring activities that need to be carried out under the authority of the Member States. The reform of the plant inspection system was affected in particular by Article 2(1)g of the directive. This article specifies that: ‘...Member States may delegate tasks (...) under their authority and supervision to any legal person, whether governed by public or private law, which under its approved constitution is charged exclusively with specific public functions, provided that such person, or its members, has no personal interest in the outcome of the measures it takes.’

### **5.6.2 Responses**

The narrative demonstrates the Ministry of ANF did not straightforwardly conform to the Phytosanitary Directive. Before eventually conforming to the directive (in a way acceptable to the Commission), different other responses were pursued. At least four different responses can be identified in the application episode. The responses are discussed below in order of occurrence.

#### *Influencing*

At an early stage the Ministry of ANF decided to contact and inform the Commission about the Plantkeur operation. The narrative shows the Ministry attempted to take away any (potential) doubts of the Commission on the compatibility of the reform with the EU Phytosanitary Directive. On the basis of the typology of Oliver, this response can be described as influencing. In chapter 3, this response was defined as the effort by which actors attempt to manage the view of their activities or attempt to shape others’ interpretation of the application of a particular rule. This response can be clearly observed in this case: by stressing that the Ministry of ANF would remain formally responsible for the Dutch phytosanitary status, the Ministry attempted to shape the Commission’s interpretation of the plant inspection reform and its fit with the Phytosanitary Directive.

#### *Between challenging and dismissing: downplaying*

The narrative reveals the Commission expressed reservations about the feasibility of the reform as one of the ZBOs that would be designated with phytosanitary inspection tasks (NAK) had (too) close connections with its commercial subsidiary (NAK Agro). The Commission held that the reform would conflict with Article 2(1)g of the Phytosanitary Directive as this would bring into jeopardy the independence of the phytosanitary inspections. Confronted with the concerns of the Commission, the Ministry maintained that the delegation of the phytosanitary inspections tasks to the NAK was in line with the Phytosanitary Directive; the case narrative reveals that the concerns of the Commission were somewhat brushed aside and disputed by the Ministry. It is somewhat difficult to qualify this specific response of the Ministry on the basis of the typology of responses. In part, the stance of the Ministry reflects what Oliver labels challenging, a response by which actors resist particular demands or legal pressures and question these demands in an open manner. The response pursued by the Ministry, however, can also be interpreted in terms of dismissing; the narrative illustrates that the concerns of the Commission were somewhat ignored by the Ministry of ANF. A more apt label for the pursued effort of the Ministry in this example might be that of downplaying.

#### *Pacifying*

A different more recognisable response pursued by the Ministry is that of pacifying. Following Oliver, pacifying can be defined as a response by which actors adhere to a level of non-conformity and devote their energy to appease the concerns of others about this non-conformity. This response can be used in this example to describe the effort of the Ministry to calm down the Commission's concerns on the independence of the inspections by referring to specific private ISO standards. Instead of conforming to the Commission's call to alter the constitution of NAK and make a formal separation between the staff of NAK and NAK Agro, the Ministry attempted to appease the Commission on this issue by stressing that specific ISO standards would guarantee the independence of the inspection tasks.

#### *Conforming*

Eventually the Ministry of ANF did conform to the Commission's interpretation of the application of the Phytosanitary Directive. The narrative shows the Ministry agreed to make a formal separation between NAK and its commercial subsidiary NAK Agro (as required by the Commission). Before the phytosanitary inspection tasks were delegated to

NAK, the Ministry required that the constitution of NAK was changed and a 'Chinese wall' was established to (formally) guarantee the independence of the delegated phytosanitary inspection tasks.

### 5.6.3 Contextual factors

The narrative of the application episode shows that taking into account the EU formal rules alone will not suffice to explain the different responses pursued by the Ministry. In order to provide an explanation of the different responses we must take into account the broader context in which the Ministry operated. The most important contextual factors (and changes within them during the episode) are discussed below under the headings of (i) institutions, (ii) activities of other actors and (iii) ideas.

#### *Institutions*

A first feature of the institutional context that must be considered to explain the responses of the Ministry of ANF is its formal responsibility to take care for the Dutch phytosanitary status and its direct involvement with the implementation and management of Dutch phytosanitary policy.

The role of the European Commission to monitor and enforce Member States' conformity to EU formal rules, as granted by the Treaty, is another crucial aspect of the institutional context in this case. The Phytosanitary Directive, more specifically, awarded the Commission's Food and Veterinary Office (FVO) the capacity to carry out 'on the spot' inspections, make recommendations and request Member States to address any shortcomings.

The narrative reveals the Commission acted on these prerogatives and enforced the application of the Phytosanitary Directive when the Ministry failed to do so (according to the interpretation of Commission). By asking various questions on the application of Article 2(1)g and by (eventually) sending a letter to the Ministry, the Commission increased its pressure on the Ministry of ANF during the application episode to conform to the Phytosanitary Directive.

While the monitoring and enforcement activities of the Commission were largely institutionally shaped it is important to appreciate the role of chance in the present case. The narrative illustrates that the Commission's monitoring and enforcement activities were strongly affected by previous monitoring activities by the FVO. Somewhat unfortunately, a recent inspection mission by the FVO had monitored the *potato sector*

and found a possible instance of non-conformity with the Phytosanitary Directive. The identified breach induced a critical stance of the Commission; it was not easily persuaded to give the Ministry the benefit of doubt on the compatibility of the reform with the Phytosanitary Directive.

#### *Activities of other actors*

The private sector and the ZBO NAK also expressed particular expectations and put pressure on the Ministry of ANF. At the start of the application episode these parties had agreed on contacting and informing the Commission on the reform. During the application episode, the private sector and NAK, however, became increasingly aware of the considerable adjustment that had to be made to the organisation and constitution of NAK before the phytosanitary inspections tasks could be delegated. The case reveals that NAK and the private sector were critical of the decision of the Ministry to make a more strict separation between NAK and NAK Agro and put pressure on the Ministry of ANF not to do so - amongst others, by mobilising the media and a Member of Parliament.

#### *Ideas*

The ideational context first of all, included different ideas about the organisation of the plant inspection system in the Netherlands. The discussion paper made by researchers of Leiden University in particular, provided for a critical reflection on the functioning of the plant inspection system: the plant inspection system had developed into an ambiguous system in which the division of responsibilities of the different inspection bodies was unclear and in which the administrative burden on the private sector was heavy. The image of a 'patchwork' used in the discussion paper provided a clear representation of the functioning of the plant inspection system, highlighting its different failures and difficulties.

The ideational context also featured different normative ideas. An important idea concerned the question of what would be an appropriate role of the Ministry of ANF in implementing or carrying out specific policies. The catchphrase 'Ensuring, instead of taking care of' pictured a new role for the Ministry in which it would remain responsible for setting particular norms or standards, but would provide room for private initiatives to meet these norms. The framework of 'Supervising control' offered a more operational standard for behavior that would fit this new role. The framework put forward the idea of

granting the private sector more self-regulating tasks, while the Ministry would supervise these activities.

Another important ideational factor that must be considered in this case is the great economic importance that was attributed by the Ministry to the Dutch plant sector on the basis of the intensity of the plant sector in the Netherlands and the great amount of trade of plants and plant product. This provided an important rationale for protecting the (high) phytosanitary status and reputation of the Netherlands.

To explain the responses of the Ministry, finally, we must take into account its belief that the phytosanitary inspection tasks could be delegated to the different ZBOs. While the Ministry realised that it was pushing the legal boundaries, it believed that the reform could be introduced as long as the Ministry remained formally responsible. In part, this belief was based on the shared experiences of the Ministry with the inspections of the Commission's FVO; so far, the FVO had never expressed any concerns about, for example, the involvement of the ZBO NAK in the issuing of phytosanitary plant passport. At the same time though, it was recognised that other parties could have difficulties with understanding the precise role and functioning of the ZBOs. On the basis its involvement in international fora, the Ministry realised that the role of the ZBOs is not always clear to others.

#### **5.6.4 A mechanism-based explanation of the pursued responses**

To help explain how these different contextual factors (together with the Phytosanitary Directive) exactly affected the responses of the Ministry, I will introduce a number of social mechanisms below. These mechanisms include the logic of appropriateness, the attribution of threat and attribution of opportunity, and the attribution of failure.

##### *Explaining the Ministry's commitment: activating a logic of appropriateness mechanism*

In order to explain the various responses pursued by the Ministry, we must start explaining why the Ministry was committed to introduce the reform in the first place. To account for this commitment, I will turn to the activation and operation of a *logic of appropriateness* mechanism. Doing so, requires taking into account actors' definition of the situation, their identity (role) and the (normative) ideas that specify what is reasonable or right given this identity and situation (role).

The definition of the situation was greatly influenced by the discussion paper prepared by the researchers of the University of Leiden. The image of a 'patchwork' provided the

Ministry of ANF with a clear problem definition and reason for changing the existing inspection system. During interviews with involved officials of the Ministry, the 'patchwork' image was repeatedly invoked to explain what was wrong with the existing plant inspection system and why a reform was needed.

In the view of this (problematic) situation, the Ministry of ANF - responsible for the Dutch phytosanitary status and the implementation and management of Dutch phytosanitary policy - turned to the framework of 'Supervising Control' for guidance to better focus and reduce the number of inspections, and to lighten the administrative burden on the private sector. On that basis, it decided to delegate the phytosanitary tasks to the different ZBOs under the responsibility of the Ministry. Doing so was considered appropriate given the new role of the Ministry that was reflected in the slogan of 'Ensuring, instead of taking care of'.

*Explaining influencing: activating the attribution of threat mechanism*

The operation of the logic appropriateness mechanism generated a committed stance to introduce the reform. To explain why the Ministry decided to influence the Commission, we need to combine the operation of the logic of appropriateness mechanisms with the activation and operation of an *attribution of threat* mechanism.

The narrative shows that on the basis of its shared experience, the Ministry of ANF anticipated that the delegation of phytosanitary inspection tasks to the ZBOs could trigger questions and doubts by other parties. Given the economic importance attributed to the sector, the mounting of potential doubts on the phytosanitary status of the Netherlands activated an *attribution of threat* mechanism. The activated mechanism mobilised the Ministry of ANF to contact, amongst others, the Commission and inform it about the planned changes in the Dutch phytosanitary inspection system. By pursuing a response of influencing, the Commission's interpretation of the reform could be managed and the potential threat that it would start doubting the Dutch phytosanitary status could be alleviated. The case reveals that the Ministry was confident that this response could be pursued successfully.

*Explaining challenging and dismissing: activating the attribution of threat mechanism*

Instead of providing its consent for the reform, the Commission, as noted, adopted a critical stance. The Commission was particularly concerned about the relationship between one of the ZBOs to which the phytosanitary inspection tasks would be delegated (NAK) and its commercial subsidiary (NAK Agro). The Commission expressed doubts on



whether the reform would be in line with the Phytosanitary Directive given this close relationship; it suggested that a stricter separation had to be made between NAK and NAK Agro before the reform could be implemented.

The critical stance of the Commission activated another *attribution of threat* mechanism: conforming to the Commission's (strict) interpretation of the application of the Phytosanitary Directive would imply that a considerable adjustment had to be made to the reform. The strength of this mechanism, however, was somewhat weakened by the confidence of the Ministry that the reform *was* in line with the directive and that it could convince the Commission of the feasibility of the reform. On the basis of its experience with the monitoring activities by the Commission's FVO and the absence of any complaints about the issuing of phytosanitary plant passport by NAK, the Ministry held a strong belief that the reform would eventually be accepted as long as the Ministry remained formally responsible for the phytosanitary status of the Netherlands. The concerns of the Commission, as a result, were somewhat ignored and questioned by the Ministry; the weakly operating attribution of threat mechanism mobilised the Ministry to pursue a response of what I called downplaying (a response in between challenging and dismissing).

*Explaining pacifying: activating the attribution of failure, of threat and of opportunity mechanism*

To motivate the Ministry to take its concerns seriously, the Commission eventually sent a letter to the Ministry in which it requested a clear answer to its concerns about the relationship between NAK and NAK Agro. The letter activated a so-called *attribution of failure* mechanism. This social mechanism involves the process by which previous actions are evaluated and failed actions are discarded. Until that moment, the Ministry, as noted, strongly believed it could persuade the Commission to adopt the view that Plantkeur was compatible with the Phytosanitary Directive. After receiving the letter, the Ministry, however, realised that the Commission would not be persuaded to adopt a different interpretation. The letter of the Commission, in this respect, functioned as a so-called 'focusing event'; it made the Ministry realise that these concerns had to be addressed and that further attempts to convince the Commission of adopting a different interpretation on the compatibility of the reform with the Phytosanitary Directive would be futile.

Given the Ministry's commitment to introduce the reform, the letter however, also further strengthened the operating *attribution of threat* mechanism: conforming to the (strict) interpretation of the Commission would imply that an adjustment had to be made to the reform. The attribution of threat mechanism mobilised the Ministry to look for

other ways to introduce the reform without having to further separate NAK and NAK Agro (as was demanded by the Commission). The narrative revealed that an *attribution of opportunity* mechanism was fueled by private ISO standards. The existence of these standards was perceived as a chance to introduce the reform without having to separate NAK and NAK Agro. By stressing that these private standards would be conformed to, the concerns of the Commission on the independence of the inspections of NAK could be hopefully appeased.

#### *Explaining conforming: activating the attribution of threat mechanism*

The Commission however, could also not be appeased. It stressed the reform would not be accepted unless NAK and NAK Agro would be formally separated. The firm position of the Commission activated another *attribution of failure* mechanism which strengthened the belief that there were little other options for the Ministry but to follow the Commission's requirement.

While conforming to the demands of the Commission would lead to a change in the reform, the Ministry realised that the Commission would take corrective action if it would not follow its demands; this could bring into jeopardy the phytosanitary reputation of the Dutch plant sector. The possible consequence of introducing the reform without the Commission's approval, as such, activated an even stronger operating *attribution of threat* mechanism. Even though various domestic stakeholders to the reform exerted pressure on the Ministry of ANF not to conform to the strict interpretation of the Commission, the Ministry was convinced it had no other choice.

## **5.7 Conclusion**

This first case study described and analysed the episode through which the EU Phytosanitary Directive was applied to a reform of the phytosanitary inspection system in the Netherlands. Through the reform, inspection tasks would be delegated from the Ministry of ANF to four different autonomous inspection bodies. The case showed that a number of responses were pursued by the Ministry of ANF.

In pursuing these responses the Ministry was guided by different ideational factors such as the problematic image of the functioning of the plant inspection system, different (changing) ideas on the role of the Ministry and particular (normative) standards of behavior attached to it. Through the activation of a *logic of appropriateness* mechanism

these various factors mobilised the Ministry to introduce a reform of the Dutch plant inspection system by delegating the phytosanitary inspection tasks to the different ZBOs. The lasting presence of these ideational factors during the episode induced a persisting stance of the Ministry to introduce the reform.

From the moment the Ministry was confronted with the restricting provisions of the Phytosanitary Directive, it pursued a number of responses, including influencing, downplaying, pacifying and conforming to gain and maintain room for manoeuvring to introduce the reform.

The causal analysis showed that much of the the variation in the pursued responses can be explained by considering the European Commission's (strict) interpretation of the directive and its increasing monitoring and enforcement activities during the application episode. As 'guardian of the treaties', the Commission undertook different efforts to ensure that the Ministry of ANF would conform to the Phytosanitary Directive.

Initially, the Commission's activities mobilised the Ministry to look for ways to avoid the need to conform to a strict interpretation of the Phytosanitary Directive, though in a way that would be accepted by the Commission. Without the Commission's approval of the reform, the Ministry feared, the reputation of the Dutch phytosanitary status could be in jeopardy. Over the course of the episode the Ministry increasingly formed the belief, as a result of the activation of different attribution of failure mechanisms, that a continuance of 'active' responses would be futile. Eventually, the Ministry realised it had no other option but to conform to the demands of the Commission. After a dynamic application episode, a substantial adjustment was made to the reform: one of the ZBOs (NAK) to which the phytosanitary inspection tasks would be delegated had to change its constitution and set up a 'Chinese wall' between its commercial subsidiary NAK Agro to guarantee the independence of the phytosanitary inspections.



# CHAPTER 6

## SOIL REMEDIATION AND THE EU STATE AID REGIME

### 6.1 Introducing a support scheme for the Dutch dry cleaning sector

The second case study describes and analyses the relationship between a financial support scheme and the EU state aid regime. The scheme was a crucial part of a covenant signed by the Ministry of Housing, Spatial Planning and the Environment (HSPE)<sup>34</sup> and the Dutch dry cleaning association Netex. The covenant was signed by the two parties to regenerate the stagnated remediation of contaminated industrial sites. Often the remediation of polluted sites was too costly for individual (small) dry cleaning companies; this had caused remediation plans to be put on hold. The covenant and support scheme had to speed up the cleaning of contaminated sites: by making the financial support of the Ministry conditional on a high participation-rate of dry cleaning companies, the impasse of cleaning up polluted sites had to be surmounted.

After the Ministry of HSPE notified the financial support scheme to the European Commission in order to get its formal approval, it got entangled in a lengthy discussion on whether the scheme would be compatible with the EU state aid regime. How the activities of dry cleaning companies had to be defined in relation to the functioning of the EU common market and which state aid provisions exactly applied to the support scheme was subject to different interpretations. This second case study sheds light on the various efforts of the Ministry of HSPE to get the approval of the Commission and introduce the financial support scheme.

The structure of this chapter largely follows that of the previous one. I will start this chapter by presenting a brief background and history of the development of Dutch soil remediation policy in 6.2. Section 6.3 will briefly discuss the covenant and financial support scheme that was developed to break through the stagnated soil remediation policy. Section 6.4 will then provide a detailed reconstruction of the episode through

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<sup>34</sup> Under the minority cabinet Rutte-Verhagen, the Ministry of HSPE has been merged with the Ministry of Transport, Public Works and Water Management. The new Ministry is called the Ministry of Infrastructure and the Environment.

which the EU state aid requirements were applied to the support scheme by the Ministry of HSPE. The reconstruction starts just before the moment the Ministry sent its notification of the support scheme to the Commission; it ends when the Ministry found a way to *escape* different (constraining) state aid requirements. Section 6.5 will further analyse the application episode by explaining in detail the different pursued responses of the Ministry of HSPE. Section 6.6 concludes this chapter.

## 6.2 Dutch soil remediation policy

The discovery of large scale soil pollution in the Dutch town of Lekkerkerk is generally associated with the founding of an overarching soil protection policy in the Netherlands. In 1980 it was discovered that new houses had been built on landfill containing chemical waste. Media attention to the soil pollution and public arousal speeded up the adoption of the 'Interim Soil Remediation Act' in 1983 by the Ministry of Housing, Spatial Planning and the Environment (HSPE) that was responsible for the sustainable use of the soil (Meuleman 2008). The Interim Act included the first set of soil quality standards aimed at reducing the risks to human health (Vanheusden 2007; Souren 2006; Aarts 1997).

In 1987 the Interim Soil Protection Act was incorporated in the 'Soil Protection Act'. The concept of *multi-functionality* was introduced as a guiding principle for Dutch soil remediation policy by the Act. The Ministry of HSPE decided that all contaminated sites had to be fully cleaned within a period of about ten years allowing them to be suitable for multi-functional use: the policy was targeted on achieving a quality of soil that would enable any use at any time and place.

Under the Act, government would take the lead to register and remediate polluted soil, although the obligation to pay for the remediation costs would rest - in line with a 'polluter pays principle' - on the owners of affected sites (Dirkzwager-De Rijk 2007). In 1989 a total of 110 000 contaminated sites - including landfills, gas sites and industrial sites - was registered by the Dutch government. The remediation costs were estimated to be € 25 billion. Over the years the number of identified and registered polluted sites steadily grew. In 1996, no less than 350 000 sites were registered, with an estimated remediation cost of € 50 billion (Tiersma 1998, 14). It became increasingly clear that full remediation of all polluted sites was no realistic option. To achieve multi-functional usage for each and every occasion - and with an expenditure of € 0,5 billion a year - the clean-up operation would take more than a hundred years (Ministry of HSPE 2006a).

Remediation of the polluted sites, moreover, stagnated as the 'polluter pays principle' was only limited in its application. In practice, government found it difficult to reimburse all remediation costs on polluters. Under Dutch law, companies could not be held liable for the costs of remediating polluted industrial sites on which the pollution had taken place before 1 January 1975. In various court cases at the beginning of the 1990s, the Dutch Supreme Court decided that undertakings causing pollution of industrial sites were not able to judge the economic and environmental consequences of that pollution prior to 1975. The often complicated and long lasting legal litigation of individual cases resulted in an increasing delay of the remediation of the polluted soil (Könings 2002; Van der Wilt 2002).

The delayed clean-up of polluted sites called for a reflection on the governmental soil policy and resulted in a flow of reports, advices and assessments during the 1990s. The *multi-functionality* principle was criticised in particular in the various reports; the principle was too ambitious and expensive to meet and put a hold on urban renewal (Souren 2006; Meuleman 2008, 125). In 1997, the Ministry of HSPE set out the ambition to 'increase the efficiency of the [soil pollution] approach and speed up the soil remediation operation' (Second Chamber 1997).

The guiding principle of multi-functionality was replaced by the Ministry of HSPE by a principle of *functional remediation* for sites with soil pollution dating back to before 1987. A more cost-efficient, (pragmatic) risk-based approach was adopted by the Ministry; a complete clean-up of polluted sites was no longer required as long as health and ecological risks were sufficiently controlled (Ministry of HSPE 2006a). On the basis of this principle, contaminated soil would be cleaned for different land uses based on the risk of exposure (Souren et al. 2007, 700-1). Soil used for building a road for example, would require less intensive remediation than soil to be used for agriculture. By moving away from the multi-functionality principle, soil remediation could become less expensive and it would be easier for private parties to honour their responsibility to remediate contaminated soil (Van der Wilt 2002).<sup>35</sup>

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<sup>35</sup> Functional remediation of polluted soil is estimated to be 35-50% cheaper than multi-functional remediation (Meuleman 2008).

### 6.3 Covenant soil remediation

To further reduce remediation costs and increase the speed of remediating polluted sites a set of fiscal and juridical changes was introduced by the Ministry of HSPE. These changes had to reduce the reluctance of private parties to invest in soil remediation plans (Tiersma 1998, 16). To give soil remediation further impetus a covenant for soil remediation of polluted industrial sites was signed by the Ministry of HSPE and representatives of business, trade and industry in 2001.<sup>36</sup>

The covenant concluded a long period of negotiations with the industrial sector. Since the late 1980s, the Ministry had given particular attention to polluted industrial sites and attempted to develop a strategy to remediate these sites together with representatives of the industrial sector on the basis of voluntary actions (Vanheusden 2007, 120). By signing the covenant in 2001 owners of industrial sites committed themselves to remediate the soil in case of urgent pollution. In return, government was willing to contribute parts of the costs for the pollution created before 1975 (Ministry of HSPE et al. 2001).

#### A target group approach

The signing of the covenant fitted well with the *target group approach* of the Ministry of HSPE. This approach had been a major aspect of Dutch environmental policy since the late 1980s and had developed as a general steering philosophy within the Ministry of HSPE.

The target group approach was introduced in the National Environmental Policy Plan (NEPP) in 1989. To meet the (ambitious) environmental targets set in the NEPP, consultation with specific groups of the private sector was considered a necessity by the Ministry of HSPE (Ministry of HSPE 1989). Faced with increasing difficulties to implement environmental policies, the top-down imposition of legislation was no longer perceived the best way for achieving environmental goals (Van Tatenhove and Goverde 2002, 55). To increase the support for environmental policies, intensive consultation with representatives of target groups was needed.

The turn towards the target group approach also reflected changing ideas on the relationship between the state and the market (Glasbergen 1998; Verbeeck and Leroy 2007, 245; Van Tatenhove and Goverde 2002, 55). The target group approach was entangled with a more general turn towards new public management ideas, which had to

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<sup>36</sup> The covenant was signed by the national authorities, the provincial executives, the association of Netherlands municipalities, the confederation of Netherlands Industry and Employers and the Royal Association MKB-Nederland (an organisation of Small and Medium-sized Enterprise (SME) employers).



make government more efficient. Deregulating, privatising and delegating public tasks were considered an important way to achieve this aim (see also the Phyto case); another way to achieve the aim of efficiency was by coordinating government policy with private interests (Glasbergen 1998; Zito 2001, 25; Meuleman 2008, 127). In this context, there has been an increasing reliance on voluntary agreements and covenants since the early 1990s in which government and representatives of target groups agreed on the realisation of environmental goals (Glasbergen 1998, 133).

#### **A financial support scheme for the dry cleaning sector**

As part of the covenant with industry the Ministry set up a so-called *financial strength support instrument* for situations in which a remediation obligation would lead to serious financial difficulties for a company. To avoid that soil remediation would be postponed by these companies a financial support instrument was introduced by the Ministry of HSPE (Dirkzwager-De Rijk 2007). A specific financial scheme was set up for the dry cleaning sector. This sector had caused severe contamination to the soil and groundwater by its use of so-called chlorinated solvents. The pollution caused by the dry cleaning sector posed an urgent health and ecological risk because the solvents persist for decades - due to their resistance to degradation - and are mobile in the environment.

The remediation of these polluted sites was considered an urgent matter by the Ministry of HSPE. The costs for remediation and follow up activities, however, were often too high for these in general small and local dry cleaning companies. In many cases, the continuity of these companies was put in jeopardy as a result of the formal obligation to remediate polluted soil (RIVM 2009). Uncertainties on the exact remediation costs made dry cleaning companies reluctant to take their responsibility to remediate polluted sites.

Since the end of the 1990s the Ministry of HSPE had therefore consulted the dry cleaning association Netex to find a way to deal with the soil pollution and to distribute the remediation costs among public authorities and the dry cleaning sector. A covenant signed by the State Secretary of Environment and Netex in October 2005 made it possible to break through the stagnated remediation of contaminated sites. The covenant provided for a collective agreement for the dry cleaning sector and included a specific financial support scheme; in return for the financial support, the Ministry required a high number of participating dry cleaning companies. By signing the covenant, Netex committed itself to recruit dry cleaning companies and motivate them to take their responsibility for cleaning the polluted soil: within two years after the signing of the covenant either over

80% of the members of Netex, or alternatively, over 150 dry cleaning companies,<sup>37</sup> had to agree to participate in the scheme (Ministry of HSPE et al. 2005).

In the covenant it was further agreed that the financial support and remediation activities would be coordinated by a newly established foundation called Bosatex. Bosatex would provide the dry cleaning companies operational support to remediate the contaminated soil. Bringing together the different remediation activities within a single foundation, moreover, provided an opportunity to build up expertise related to the remediation of pollution caused by dry cleaning companies and to maximize the cost efficiency of the remediation (Ministry of HSPE et al. 2005).

To participate in the scheme, companies had to become a member of the foundation and pay a 'contribution' to Bosatex. The contribution was determined by paying 25% of their average yearly turnover (either at once or over a period of ten years) or by paying 75% of the estimated remediation costs of a polluted site at once. The additional costs for the soil remediation would be provided to the foundation by the Ministry of HSPE. By paying this 'contribution' and becoming a member, the responsibility for remediation would be passed on to Bosatex. Dry cleaning companies would thereby obtain certainty on the remediation costs (Dirkzwager-De Rijk 2007).

#### **6.4 Contacting the European Commission**

In the covenant signed by the Ministry and Netex it was explicitly agreed that the support scheme would be notified to the European Commission - in line with the EU state aid notification procedure (see below). Approval of the Commission on the compatibility of the scheme with the EU state aid regime was considered essential before financial support would be granted to dry cleaning companies and remediation would take place.

Before I recount the episode through which the EU state aid rules were applied to the scheme - which started by notifying the Commission - I will briefly introduce the EU state aid regime as it operated at the time of introducing the support scheme.<sup>38</sup>

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<sup>37</sup> Note that not all dry cleaning companies in the Netherlands are members of Netex.

<sup>38</sup> During the episode the EC Treaty (Treaty of Nice) was still in force. In this Treaty the state aid rules are covered under articles 87-89. In the Treaty on the Function of the European Union (Treaty of Lisbon, TFEU) the state aid rules are laid down in 107-109.

### **EU state aid regime**

The EU state aid regime is directly based upon the Treaty. In principle, the Treaty prohibits 'any aid granted by a Member State or through State resources (...) which (threatens) to distort competition by favouring certain undertakings or the production of certain goods, insofar as it affects trade between Member States...'. This requirement is laid down in Article 87(1) of the EC Treaty. Various exemptions, however, are provided to this general prohibition on aid. The EC Treaty itself lists various categories of aid that *are* (Article 87(2)) or *may be considered* (Article 87(3)) compatible with the functioning of the common market.

Under the Treaty, the application of these exemptions rests exclusively with the Commission. The Treaty endows the Commission with the authority to determine whether an aid measure is compatible with the common market or whether it qualifies for exemption. Different scholars have pointed to the substantial autonomy and discretion of the Commission to decide on cases as EU state aid provisions are rather open-ended (e.g. Cini 2001; Le Gales 2004). Aid granted by Member States in the absence of Commission's approval is classified, in principle, as 'unlawful aid' and must be recovered (when discovered) from its beneficiaries by the Commission when the aid is incompatible with the common market.

To assess planned aid, the EC Treaty lays down various procedural requirements that are detailed in secondary legislation. *Regulation EC 659/1999* provides for a system of ex ante approval: it requires Member States to inform the Commission of any plans to grant state aid and wait for the Commission's approval. After receiving a notification of planned aid, an informal consultation of two months starts in which the Commission has to decide on the aid, provided the Member State has given complete information on the planned support. After this informal consultation the Commission can decide (i) that a measure does not constitute aid; (ii) to raise no objections; or (iii) to initiate a formal investigation procedure when it has doubts about the compatibility of the aid with the common market. The opening of a formal investigation procedure enables the Commission to gather all the information it needs to assess the compatibility of the aid.

In order to improve the legal certainty for Member States and to guide its own decisions, the Commission has publicised many of the criteria it uses when deciding on whether aid measures qualify for an exemption as specified in the Treaty. Over the years, a system of so-called 'soft law' has evolved consisting of a number of Community guidelines and

communications (Cini 2001). These documents specify the criteria for when aid can qualify for an exemption to the general prohibition, taking into account, for example, the size of companies to which aid is granted, their location, the sector concerned and the purpose of the aid. In the present case, as will become clear below, specific guidelines on aid for environmental protection played an important role.

In addition to the exemptions in the Treaty, the Commission has introduced secondary legislation to provide for 'block exemptions' to the general ban on state aid. These rules have been introduced over the years mainly to deal with the workload of the Commission. Over time, taking decisions on all state aid cases had become a large burden for the Commission (Cini 2001; Blauburger 2009). Through these rules, specific categories of State aid can be considered compatible with the Treaty if they fulfil certain conditions. A relevant piece of secondary legislation in the present case is *Regulation (EC) 69/2001 (amended Regulation (EC) 1998/2006; see below)* on so-called *de minimis* aid. Through this regulation state aid of minor importance can be considered compatible with the Treaty and exempted from notification to the Commission.

#### **Notification for reasons of legal certainty**

Interviews with national officials of the Ministry of HSPE reveal that the decision to notify the scheme to the Commission was taken largely on behalf of a representative of the dry cleaning association Netex. The Ministry itself was not fully convinced that it was necessary to notify the scheme to the Commission. From its shared experience with the state aid notification procedure, the Ministry knew that a notification could easily delay the introduction of the financial support scheme. Often, the two month period granted to the Commission for taking a decision is exceeded due to additional requests for information from the Commission. The Ministry moreover, had little fear for the monitoring capacity of the Commission. Attentive to the fact that the Commission has limited capacity and staff to monitor Member States' compliance with EU state aid rules, it expected that it would be unlikely that an investigation would arise if support would be given without notifying the Commission. The risk that the support scheme would (i) be investigated by the Commission; (ii) be deemed illegal; and (iii) lead to a recovery of the aid was considered low (interviews with national official 26 August 2009 and 30 September 2009).

The representative of Netex, however, desired that the financial support scheme would be made 'Brussels-proof'. The possibility that the financial support had to be recovered or cancelled during the soil remediation operation, he feared, could undermine the

willingness of dry cleaning companies to participate in the scheme. Netex wanted certainty that dry cleaning companies need not worry about unforeseen costs.

The Ministry acknowledged these concerns. The Ministry had been aware of the efforts of the representative of Netex to motivate dry cleaning companies to join the scheme and realised that the promise of ruling out financial risks had been an important aspect of the scheme that had won over dry cleaning companies to participate. The Ministry felt it could not let down Netex' representative and committed itself to notify the scheme and reach a positive decision by the Commission (interviews with national officials 26 August 2009).

To provide this certainty, the Ministry of HSPE decided to notify a 'non-aid measure which is notified to the Commission for reasons of legal certainty'. In the notification, the Ministry put forward its argumentation of why the trade on the common market of dry cleaning between Member States would not be distorted by the aid and thus, was compatible with Article 87(1) EC Treaty. In case the Commission would not support this view, the Ministry suggested approving the scheme otherwise directly on the basis of Article 87(3)c EC Treaty. This article 'allows for aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' (Ministry of HSPE 2006b).

By making a direct reference to the Articles 87(1) and 87(3)c EC Treaty, the Ministry of HSPE wanted to avoid the possibility that the scheme would be assessed by the Commission in the light of the *Community guidelines on state aid for environmental protection*. The Ministry anticipated that the Commission would turn to these guidelines to assess whether the support scheme could qualify for an exemption to the general prohibition on state aid. In these guidelines, the Commission laid down specific provisions for state aid for the remediation of polluted industrial sites. Point 38 of these guidelines sets out that aid to support interventions by companies to remediate polluted industrial sites, in principle, may qualify for an exemption to the general ban on aid. Point 38, however, also specifies that 'where the person responsible for the pollution is clearly identified, that person must finance the remediation in accordance with the polluter pays principle, and no state aid may be given...'

The Ministry realised the financial support scheme was not fully in line with point 38 of the guidelines: as a collective solution for the dry cleaning sector was sought, it could not be guaranteed that financial support would not be provided to companies responsible for

the pollution. The Ministry expected that the Commission would be therefore critical about the support scheme and was mindful not to stress the possible participation of these companies. Neither did it make any reference to the guidelines on aid for environmental protection in the notification (Ministry of HSPE, archival document: email national official 1 May 2006). Instead, the Ministry emphasised that the scheme would (i) not distort the functioning of the common market (and be therefore in line with Article 87(1) EC Treaty), or (ii) would not counter the interest of the EU (and therefore be in line with Article 87(3)c EC Treaty).

To support the argument that the scheme would not distort the common market, a report was prepared by Netex on the operation of the market of dry cleaning companies and attached to the notification. In the report it was stressed that dry cleaning is mainly a local activity, although it mentioned that there are four large internationally operating companies in the Netherlands. Netex, however, remarked that these companies would probably not participate in the scheme as they were not known to have soil contamination problems (see further below).

With respect to dry cleaning companies operating near the Belgian and German border, Netex argued that these companies had only a marginal turnover that could be attributed to German or Belgian costumers. On this basis it was concluded that no market distortion would result from the provision of financial support to these dry cleaning companies (Netex 2006).

The possibility that internationally operating companies could participate in the financial scheme had been somewhat of a concern for the Ministry. The Ministry of HSPE expected that the Commission would ask additional (and critical) questions about the role of the internationally operating dry cleaning companies. It was therefore of the opinion that excluding these companies from participating in the scheme would strengthen the argument that the financial support would not have a distorting impact on the common market. The Ministry foresaw that waiting for the Commission to ask questions, rather than anticipating a critical stance, could lead to additional questions and a delay of introducing the scheme (archival document: emails national official 12 and 28 April 2006).

Netex, however, wanted to have a single scheme for the complete dry cleaning sector; it did not want to exclude internationally operating companies straight away. Doing so could undermine the support of other dry cleaning companies to join the scheme. Again, the Ministry of HSPE expressed sympathy for the position of Netex; it decided not to exclude the international companies. In the official notification letter the option for these

companies to participate in the scheme was held open (interview with national official 8 August 2009a). The notification was sent to the Commission on the 17<sup>th</sup> of May 2006.

#### **Requests for additional information**

On the 30<sup>th</sup> of June 2006 the Commission sent a request for additional information to the Ministry of HSPE (EC 2006). As expected by the Ministry, the questions of the Commission - about twenty - were targeted at the internationally operating companies and the responsibility (and liability) of the participating companies for the pollution. Without receiving additional detailed information on these issues, the Commission would not be in a position to examine the proposed aid measure and take a decision.

The questions of the Commission were answered by the Ministry in September 2006. In response to the Commission's questions the Ministry provided additional information on the responsibility and liability of the participating companies and made clear that the dry cleaning companies that would receive support could possibly be responsible for the pollution. This issue, as mentioned, was somewhat concealed in the original notification but was no longer kept silent.

Regarding the internationally operating companies, the Ministry of HSPE restated that it would not be very likely that these companies would participate in the scheme. The Ministry made clear that the support scheme was designed with small dry cleaning companies in mind. For large dry cleaning companies it would be less attractive to participate as they would either have to contribute 75% of the remediation costs or contribute 25% of their average yearly turnover. The Ministry stressed that large companies would have sufficient financial means to deal with soil remediation in a different way. Largely on behalf of Netex the option to allow these companies to participate in the scheme remained open. In response to the questions by the Commission, the Ministry did state however, that if these companies would decide to participate, their participation would be additionally judged on the basis of the state aid criteria (Ministry of HSPE 2006c).

#### **Informal contacts: de minimis?**

Next to the formal correspondence on the scheme, there were various informal contacts between the Ministry and the Commission. Over the recent years a number of other soil remediation schemes had been notified to the Commission; this had resulted in more direct and informal contacts between the Ministry and the Commission.

From these informal contacts it became clear that the proposed support scheme would not be accepted by the Commission. The Commission remained critical of the fact that internationally operating companies could participate in the scheme; if these companies were not excluded it could not be maintained that the scheme would have no effect on the functioning of the common market (archival document: email national official 28 November 2006). The Commission, moreover, made clear that it was also concerned about the involvement of dry cleaning companies operating near the border. Support to these companies, it argued, would lead to a distortion of the common market (archival document: email national official 7 February 2007).

During these informal contacts the Commission also raised the question whether it would be an option to introduce the scheme within the scope of the so-called 'de minimis Regulation' (Ministry of HSPE 2006d). The Commission made clear that a new regulation would come into force on the 1st of January 2007 by which the ceiling for de minimis aid (which was until that moment € 100 000) would be raised. Under the new regulation it would become possible to provide aid of up to € 200 000 (over a period of three years) without notifying the aid to the Commission (interview with national official 26 August 2009a). The Commission inquired whether this would offer a possibility for setting up a scheme in which companies near the border could also participate.

On the 6th of December 2006 the Ministry of HSPE responded to the questions and suggestions of the Commission. In response to the strong objection of the Commission on the participation of internationally operating companies in the scheme, the Ministry eventually decided to change the scheme. The need to do so, as noted, was recognised by the Ministry from the beginning of the notification but not given a follow up because of the expectations of Netex. After a somewhat opportunistic attempt to allow these companies to join the scheme, the Ministry realised that it would be pointless to continue this attempt and could jeopardise the introduction of the scheme. The condition - specified in the covenant - that a participant to the scheme had to be a dry-cleaner was amended by introducing the additional requirement that the dry-cleaner would not be active on the international market or owned by foreign investors / companies (Ministry of HSPE 2006d). However, with regards to the dry cleaning companies located near the border, the Ministry made clear that it did not accept the Commission's view that the participation of these dry cleaning companies would distort the functioning of the common market.



Interviews with national officials reveal that the Ministry of HSPE expressed an understanding for the role of the Commission and its critical stance (interview with national official 26 August 2009b):

‘They [the Commission] must make an in-depth assessment of every state aid case. They must scrutinize a notification and ask the questions to get all the information that is needed to take a decision... that is their role; that is why they [the Commission] are there.’

The Ministry, nevertheless, maintained its position that financial support to these companies could be granted; it questioned the Commission’s view by drawing on various cases in which the European Court of Justice (ECJ) had decided that aid to small companies operating near the border (e.g. aid for swimming pools) can be considered compatible with the common market. The Ministry of HSPE disputed the interpretation of the Commission and argued, on the basis of this case law, that the support to dry cleaning companies near the border would be compatible with the EU state aid regime.

Finally, the Ministry also made clear that the new *de minimis* Regulation would not offer a solution for introducing the scheme because of the character of the contamination caused by the dry cleaning companies. Without providing a detailed argumentation, the Ministry stressed that in most cases the cleaning costs would be higher than € 350 000 which would make it impossible to meet the criteria of the *de minimis* Regulation.

The Commission interpreted the case law more cautiously and argued that these cases could not be compared to the dry cleaning case. Directorate General (DG) Competition of the European Commission, which was directly responsible for approving the scheme, anticipated that DG Legal Affairs, would not approve the provision of aid in this case, as it could lead to appeals in other cases that would likely not be sustained by the European Court of Justice (interview with former Commission official 15 September 2009). DG Competition therefore maintained that the aid to dry cleaning companies near the border would distort the functioning of the common market and could not be accepted.

On the 8<sup>th</sup> of February 2007 the Commission therefore asked once more why the *de minimis* Regulation would not make it possible to introduce the support scheme; after all, for those companies that would decide to contribute 75% of the soil remediation costs this would imply that the remediation costs up to € 800 000 would be possible. The Commission stated this would be more than double the estimated average costs of € 350 000 and provided a way to support the dry cleaning companies.

In March 2007 the Ministry of HSPE responded that the example given by the Commission was unrealistic. In a case where the remediation costs would be € 800 000, a company would probably only opt to contribute 75% of these costs when this part (€ 600 000) would be less than 25% of its average yearly return. This would mean that a company's returns would be more than € 2,4 million. The Ministry argued that this would be the case for only a small number of companies. The Ministry, however, did investigate whether the *de minimis* Regulation could offer a possibility when companies would opt to contribute 25% of their returns. On the basis of a calculation of the average returns of companies and average remediation costs, however, it was concluded that the *de minimis* criteria would provide no option for between 28% and 62% of the companies. For these companies a contribution of 25% of their returns plus € 200 000 governmental support would not be sufficient to cover all the remediation costs. As Netex wanted to have the scheme open for as many dry cleaning companies as possible, the Ministry considered it no option to follow the suggestion of the Commission. In sum, the Ministry had to conclude that *de minimis* Regulation did not provide an option to introduce the scheme (Ministry of HSPE, email national official 23 April 2007).

#### **A looming formal investigation**

Slowly, the Commission began to increase its pressure to bring the scheme in line with the EU state aid requirements by threatening to open a formal investigation procedure. In line with its internal procedures, the Commission moved towards the opening of a formal investigation after issuing two requests for additional information on the scheme as long (informal) negotiations with Member States were believed to weaken the credibility of the Commission. Before opening the formal (and time consuming) investigation, the Commission however, first invited the Ministry for a direct meeting to discuss the possibility to introduce the support scheme and look for a solution. Often such direct meetings give Member States time to think about whether it would be wise to enter the formal investigation stage or whether it is better to withdraw the notification (interview with former Commission official 15 September 2009).

During the meeting, held the end of April 2007, the Commission stated once more that in the case of an unchanged scheme, no approval could be given. The Commission stressed that the scheme would distort the functioning of the common market and no exemption could be made as the scheme was not in line with the polluter pays principle, as laid down in the Community guidelines for environmental aid. To avoid the start of a formal investigation procedure - which would also result in an additional workload for the

Commission - the Commission turned to the *de minimis* Regulation for a last time; this time it suggested raising the contribution of companies to Bosatex to 30% of the average yearly turnover. That way, less aid would have to be granted by the Ministry whereby the *de minimis* criteria could be met (archival document: report of meeting 28 April 2007).

Once again, the Ministry of HSPE stated that this would offer no way out; a number of dry cleaning companies could still not be assisted under this scenario. As the scheme needed to provide a solution for as many dry cleaning companies as possible, this was not considered an option. However, the direct meeting with the Commission was seized as an occasion by the Ministry to change the course of the discussion and propose something different altogether...

#### **A changing underlying policy principle**

Since the signing of the covenant at the end of 2005, a change had incrementally occurred within the soil remediation field; the so-called *management and control* of polluted soil had become an increasingly important underlying principle of Dutch soil remediation policy. The management and control principle differs in an important way from the functional remediation principle that was in place at the moment of signing the covenant. It differs from the existing principle by making a distinction between the top soil (and the pollution source) on the one hand and the deep soil and groundwater (and the pollution plume) on the other.

Different types of remediation activities can be carried out in these different types of soil on the basis of the management and control principle. Under the new principle it was no longer considered necessary that all pollution on a site would be functionally remediated; it would be more efficient to *clean-up* the pollution source and to *minimise* the pollution of the deep soil and groundwater by controlling and managing the spread of the pollution plume.

The principle was perceived as an opportunity to alter the division of responsibilities of governmental authorities and private companies for carrying out soil remediation tasks as it would be more effective and efficient to control and manage the pollution plume at a larger scale than the individual site. Under the principle, individual companies would no longer be granted the responsibility for the control and management of the pollution plume located in the deep soil and groundwater. It was considered reasonable that governmental authorities would take care of the control and management of the pollution plume. Private companies would be granted the responsibility to take care of the top soil and pollution source (Interview with national official 26 August 2009b). The remediation

costs for dry cleaning companies could thereby decrease, making it possible to bring the financial support provided by the Ministry within the limits of the *de minimis* criteria.

In order not to complicate the on-going discussion with the Commission, the management and control principle had not been discussed with the Commission so far. However, as the discussion moved towards the opening of a more formal investigation procedure and the Commission proposed a more direct meeting, the moment to present this new direction to the Commission was perceived to be right.

‘At a certain moment we said... ‘if we cannot find a solution on these fundamental issues with the Commission, it becomes time to bring this [change of policy] in the discussion.’ Yet, at that time we did not had a law proposal or anything that we could hand over [to the Commission]. In that regard it is always going to be tight whether they will accept it in that stage. Anyway, at a certain moment we brought it in...’ (interview with national official 26 August 2009a).

Even though the Ministry of HSPE was still convinced that the scheme would be feasible under the EU state aid requirements and established case law, it did not want to have a formal investigation opened and opted for a more pragmatic solution (Ministry of HSPE 2007). During the direct contact with the Commission, the Ministry of HSPE made clear that it would determine whether an adjustment could be made to the covenant so that companies would get aid for the clean-up of the top soil only. The Ministry committed itself to have concluded this before the 1<sup>st</sup> of July 2007 or otherwise withdraw the notification.

In a formal letter, sent to the Commission in July 2007, the Ministry of HSPE confirmed its ambitions and presented its plans to make a different division of responsibilities for soil remediation possible. In the letter, the Ministry made clear that it was still convinced that the scheme would be possible under the state aid regime, but opted for this solution in order to avoid the opening of a formal investigation. Moreover, it requested for another direct meeting to further clarify its ambitions and get approval of the Commission (Ministry of HSPE 2007).

In informal contacts with the Ministry, the Commission, however, made clear that this change in policy could imply a withdrawal of the notification anyway; as the support scheme would meet the *de minimis* criteria there was no need to get formal approval by the Commission. After all, the *de minimis* Regulation was established precisely for avoiding notification and explicit approval. The Commission made clear that it would not be

necessary to further inform it on the financial support scheme (interview with former EC official 15 September 2009).

The suggestion of the Commission to simply withdraw the scheme led to some uncertainty at the national level. The representative of Netex after all, wanted explicit certainty that the aid would not have to be repaid. The Ministry yet, realised that continuing the discussion with the Commission and awaiting an official approval would lead to a longer procedure and would further delay the introduction of the scheme (archival document: email national official 23 July 2007). The legal department at the Ministry advised to withdraw the notification; this would lead to a close of the dossier. The eventual decision yet, was left to the policy department that had closest contacts with Netex (archival document: email national official 7 August 2007).

The policy department eventually decided to withdraw the notification of the scheme. Before it did so however, informal contact was sought with the Commission in which the Ministry explained the changed scheme. During a meeting with the Commission on a different financial scheme for soil remediation at the beginning of 2008, the new situation was explained. That way, the Ministry of HSPE reasoned, it could not be accused of doing something without the Commission knowing. Informing the Commission had to safeguard the scheme from being judged incompatible with the EU state aid requirements. The concerns of Netex to get certainty were thereby somewhat addressed (interview with national official 30 September 2009).

## **6.5 Analysing the episode**

The narrative above illustrates the struggle of the Ministry of HSPE to introduce a financial support scheme within the limits of the EU state aid regime. To explain the various responses the Ministry pursued I start this section by first discussing the various EU state aid requirements that (potentially) applied to the support scheme. After doing so, I will describe the different responses to these requirements in sub-section 6.5.2. In sub-section 6.5.3 I will turn to a number of causally relevant features of the context in which the Ministry operated. In sub-section 6.5.4, finally, I will introduce a number of social mechanisms and show how the various state aid requirements and different contextual factors are linked to the pursued responses.

### 6.5.1 EU formal rules

A set of different EU state aid requirements was (potentially) applicable to the financial support scheme in the present case. The most important formal provision was the general prohibition of state aid which (threatens to) distort the functioning of the common market - as specified in Article 87(1) EC Treaty. A number of other formal requirements possibly applied to the scheme as well, providing for an exemption to the general prohibition of aid. An important requirement in this case followed from the 'Community guidelines on aid for environmental protection'. Point 38 of these guidelines specifies that aid for the remediation of polluted soil can be exempted from Article 87(1) EC Treaty except for those instances 'where the person responsible for the [soil] pollution is clearly identified'. Another relevant EU formal rule which provided an exemption to the general ban on aid was the '*de minimis* Regulation'. This regulation provides derogation for aid of minor importance. Crucially, a new *de minimis* Regulation came into force during the episode by which aid up to € 200 000 could be qualified as aid of minor importance.

In the present case, finally, different decisions of the European Court of Justice (ECJ) on the granting of state aid to companies near the border played a role. Different cases in which the ECJ had decided that state aid to companies near a border can be granted featured the EU formal setting.

### 6.5.2 Responses

On the basis of the typology of responses specified in chapter 3, at least five different responses can be identified in this case that help describe how the Ministry reacted to the various EU state aid requirements. These responses are discussed below in chronological order.

#### *Influencing and escaping*

The narrative shows the Ministry of HSPE initially attempted to affect the Commission's interpretation of the Dutch dry cleaning market. In its formal notification the Ministry stated that dry cleaning companies operated on a local (national) market. With respect to dry cleaning companies operating near the border, more specifically, the Ministry suggested that only a marginal share of these companies' turnover could be attributed to German or Belgium costumers. On this basis the Ministry argued that financial support to dry cleaning companies would not lead to a distortion of the functioning of the common market and hence, would be compatible with Article 87(1) EC Treaty.

This effort of the Ministry of HSPE can be qualified as a response of *influencing* - a response that refers to the effort of actors to manage the view of their activities or to shape the interpretation (of the application) of a particular rule. Clearly, this is what the Ministry did at this early stage of the episode. The narrative, however, also demonstrates that by pursuing a response of influencing the Ministry attempted to avoid that the scheme would be scrutinised by the Commission on the basis of the Community guidelines for environment support. The effort of the Ministry in this respect can also be related to *escaping* - a response by which actors attempt to exit the domain in which particular institutional pressures are exerted in order to avoid the need to conform to them.

#### *Pacifying*

Another response in this case is *pacifying* - a response by which actors adhere to a (minor) level of non-conformity and devote most of their energy to appease the concerns expressed by others on their conformity to a rule. The narrative shows the response of pacifying was pursued by the Ministry of HSPE at different stages during the application episode to allow for giving support to internationally operating companies. The Ministry initially tried to (preventively) appease possible concerns of the Commission about the participation of international companies to the scheme by stressing that these companies would likely make no use of it. At a later stage, the Ministry attempted to appease the Commission by stating that the impact of aid for these companies on the common market would be specifically assessed on the basis of Article 87(1) in case they would decide to participate in the scheme after all.

#### *Conforming*

After its attempts to appease the concerns of the Commission about the participation of internationally operating companies, the Ministry turned to a response of *conforming*; it excluded internationally operating companies from participating in the scheme - in line with Article 87(1) EC Treaty. In response to informal signals of the Commission, the Ministry recognised that the functioning of the common market could be distorted if these companies would participate in the scheme.

#### *Challenging*

With regards to the participation of dry cleaning companies operating near the border in the scheme, the Ministry continued its efforts to influence the Commission's view that financial support to companies near the border would be in line with Article 87(1) EC

Treaty. The Ministry also started to pursue a response of *challenging*. This response refers to the effort of actors to resist particular institutional demands and question them in an open manner. The narrative clearly shows that the Commission's interpretation of the application of Article 87(1) became questioned by the Ministry when it suggested that companies near the border could not receive financial support. The Ministry challenged this interpretation and openly argued that it *would be* possible to support these companies under the provisions of Article 87(1) EC Treaty.

#### *Escaping*

The application episode was ended by another response of escaping. The narrative illustrates the Ministry pursued a response of escaping again towards the end of the episode and succeeded in doing so by changing the underlying goals of the financial support scheme. Instead of providing aid to remediate the polluted top and deep soil, the scheme was altered to provide support for the remediation of the top soil only. By doing so, the amount of financial support to dry cleaning companies could be lowered and brought under the cap of € 200 000, as specified in the *de minimis* Regulation. That way the scheme qualified for an exemption to the general prohibition of aid.

### **6.5.3 Contextual factors**

A number of aspects of the wider context must be considered to explain the different responses of the Ministry of HSPE. In line with the theoretical framework I grouped these contextual factors below under the broad categories of (i) institutions, (ii) activities of other actors and (iii) ideas.

#### *Institutions*

A first and obvious institutional feature to consider in the present case is the established responsibility of the Ministry of HSPE to look after a sustainable use of the Dutch soil. This responsibility included the task to develop (effective) policies on soil remediation.

Another important institutional factor involved in this case is 'Regulation EC 659/1999' that sets out the procedural state aid requirements. These provisions require Member States to inform the Commission of any plans to grant state aid and wait for the Commission's approval. The Commission, in turn, has to decide on the aid, provided the Member State has given complete information on the planned support. After an (informal) consultation of two months the Commission can decide (i) that a measure does not



constitute aid, (ii) to raise no objections or (iii) to initiate a formal investigation procedure. Self-imposed rules specify that the Commission carries out the informal procedure for a limited time as long discussions can do harm to the Commission's credibility as a supervisor of state aid. These procedural state aid rules, finally, oblige the Commission to recover illegal aid from recipients when it conflicts with the functioning of the common market.

The Commission largely observed these institutional prerogatives. After it was informed of the support scheme, the Commission asked for additional information on the functioning of the scheme to take a decision. After various requests for additional information, it moved in the direction of opening a formal investigation during the application episode as it continued having doubts on the support scheme.

The narrative demonstrates that the Commission was not only strictly enforcing the different state rules. To avoid the need to take a negative decision or open a formal investigation, it suggested at different stages to introduce the support scheme under the so-called *de minimis* Regulation. As was shown in this case, this Regulation also provided an opportunity for the Commission to reduce its monitoring activities.

#### *Activities of other actors*

Next to the Commission, the Ministry of HSPE had to deal with the (representative of the) dry cleaning sector Netex. On the one hand, Netex placed an expectation on the Ministry to inform the Commission of the financial scheme and gain its approval; Netex wanted to have certainty that the support scheme would be 'Brussels-proof' and rule out the possibility that the financial support had to be recovered from the dry cleaning companies. On the other hand, Netex expected the Ministry would do its utmost best to get approval for a scheme that would allow as many dry cleaning companies as possible to participate (even though this would likely conflict with the EU state aid regime).

#### *Ideas*

The ideational context featured different problem definitions. From a societal and environmental perspective, the problem image was one of severe contamination to the soil and groundwater caused by the dry cleaning sector; this contamination posed an urgent environmental and health risk. From a policy perspective there was a different perceived problem - as had become clear from a number of studies. To remediate the contaminated soil, a soil remediation policy had developed in the Netherlands in which

the functional remediation of contaminated soil operated as an underlying principle. The existing instruments and arrangements in place to implement this principle - i.e. the top-down obligation to remediate polluted soil and a reimbursement of the costs on the polluter - were increasingly considered ineffective.

In the ideational context we also find various normative ideas. Of particular relevance were the established and shared ideas within the Ministry of HSPE on the appropriateness of signing covenants with industry to put policies into practice. Sharing responsibilities between the public and private sector was considered appropriate for achieving environmental goals in particular for those situations in which top-down instruments proved ineffective. These ideas featured prominently in the ideational context and remained largely stable. During the application episode, however, changes *did* take place in the functional remediation principle which had guided the Dutch soil remediation policy. The narrative shows that there had been an incremental change from a *functional remediation* principle toward a *management* and *control* principle.

A final ideational factor that must be considered in this case is the shared experience of the Ministry of HSPE with the state aid notification process. On the basis of its involvement with the EU state aid notification procedure, the Ministry was knowledgeable of the implications of entering a particular stage of the notification process. This understanding must be taken into account to explain the responses pursued by the Ministry.

#### **6.5.4 Explaining the responses by the activation of social mechanisms**

In this final sub-section I will, as noted, explain why the Ministry of HSPE responded to the state aid regime the way it did by connecting the different state aid rules and various contextual factors to the Ministry's responses via a number of activated social mechanisms. These mechanisms include the logic of appropriateness, the attribution of threat and of opportunity and the mechanism of certification.

##### *Explaining the Ministry's commitment: activating a logic of appropriateness mechanism*

Before explaining the different responses, I will start explaining why the Ministry of HSPE considered it important to introduce the financial support scheme in the first place. To do so I will describe how a logic of appropriateness mechanism was activated by the

Ministry's definition of the situation, its identity and particular (guiding) ideas attached to this identity and situation.

The situation was considered problematic. The problem image, as noted, was one of severe pollution caused by dry cleaning companies and a stagnated soil remediation policy; the top-down obligation to remediate polluted soil proved ineffective to mobilise small companies such as dry cleaners to engage in soil remediation.

Confronted with this perceived problematic situation, the Ministry turned to the policy instrument of covenants. Doing so was considered appropriate given the perceived problematic situation and the responsibility of the Ministry to guarantee a clean soil and to develop (effective) policies on soil remediation. The activation and operation of the logic of appropriateness mechanism mobilised the Ministry to sign a covenant and introduce the financial support scheme.

To explain the specific responses the Ministry of HSPE pursued in reaction to the different EU state aid requirements, the activation of this logic of appropriateness mechanism must be combined with different other activated social mechanisms. I turn to this below.

*Explaining influencing and escaping: activating the attribution of threat and certification mechanism*

The narrative shows the Ministry was aware from the start that different EU state aid rules were applicable to the financial support scheme and that notification was needed to get approval of the Commission. However, it also realised that a notification could lead to difficulties. On the basis of its shared experience with the state aid notification procedure the Ministry anticipated that notification could delay the introduction of the support scheme: once being informed of the scheme, the Commission would be in a position to ask additional and difficult questions. Given this shared experience and the Ministry's commitment to introduce the scheme, the notification requirement activated a so-called *attribution of threat* mechanism. In this example the activated attribution of threat mechanism mobilised the Ministry not to notify the scheme. Doing so was considered to be without much risk given the limited amount of aid and the limited monitoring capacity of the Commission; the Ministry anticipated that it would be unlikely that the Commission would find out about the support scheme and would deem it illegal.

The narrative reveals the Ministry eventually *did* decide to notify the support scheme. How can we explain this decision? To do so we need to consider the expectations of the representative of Netex. The case evidence reveals this representative wanted certainty

that the scheme would not breach the EU state aid requirements, although it also wanted a scheme that was open for all dry cleaning companies; it put an expectation on the Ministry to notify the scheme to the Commission. To explain how and why this expectation became influential we must turn to the activation of a so-called *certification* mechanism. This social mechanism refers to the process by which particular claims or the actors making them are validated after assessing their behaviour or claims in the light of particular standards for acting and claim making. The case-evidence suggests that this mechanism was activated by the Ministry's interpretation of the previous (considerable) efforts of the representative of Netex to motivate dry cleaning companies to participate in the scheme. On this basis, the expectation of the representative to have the scheme notified to the Commission was validated. The activation of this *certification* mechanism mobilised the Ministry to follow this expectation.

The validity of Netex' expectations to get approval of the Commission and the risk of having to go through a lengthy notification procedure had to be balanced by the Ministry. The Ministry did so by pursuing a response of influencing. In the notification letter, as noted above, the Ministry depicted an (selective) image of the Dutch dry cleaning market and argued that the financial support to dry cleaning companies would be in line with the Treaty. By doing so, the Ministry met Netex' expectation to inform the Commission; at the same time, the response of influencing provided a way to avoid a detailed scrutiny of the scheme (in particular, on the basis of the Community guidelines for environmental support).

*Explaining pacifying: activating the attribution of threat and certification mechanism*

To allow for financially supporting *internationally operating* dry cleaning companies, as discussed above, the Ministry of HSPE decided not to pursue a response of influencing / escaping. The narrative shows it anticipated that the Commission would not accept a different interpretation on the application of the EU state aid rules to these companies; pursuing a response of influencing would be therefore futile. The narrative, in fact, shows that the Ministry considered it a threat to include these companies in the scheme as it could lead to questions.

Expectations of Netex, also in this example, mobilised the Ministry to include these companies anyway. Even though the Ministry expected that the participation of these companies would not be accepted by the Commission, the wish of Netex to allow these companies to join the scheme was considered valid; this caused the Ministry to give it a try anyway. As it had no arguments to include these companies, the Ministry pursued a

response of pacifying: by stressing that these companies would probably not participate in the scheme and would be checked additionally, it hoped to calm down (possible) concerns by the Commission.

*Explaining conforming: activating the attribution of threat mechanism*

The Commission, however, could not be appeased and stressed that the participation of internationally operating companies to the scheme would be incompatible with Article 87(1) EC Treaty. If these companies would not be excluded, the support scheme could not be approved. This strong stance of the Commission activated an *attribution of threat* mechanism: without approval of the Commission the scheme could not be introduced. The Ministry of HSPE conformed to the state aid requirements in order to address this threat.

*Explaining challenging: activating the attribution of threat mechanism*

With regards to dry cleaning companies near the border, the response of influencing (escaping) was also little successful: the Commission could not be convinced that aid to these companies would imply no risk of distorting the common market.

The Commission's interpretation of the application of the state aid rules to dry cleaning companies near the border also activated an *attribution of threat* mechanism. Conforming to the Commission's interpretation would mean that a considerable number of dry cleaning companies - i.e. those near the border - could not participate in the scheme. Action was needed to prevent this. In this example, the Ministry, however, did not follow the Commission's conclusion that these companies had to be excluded. The narrative shows the Ministry was strongly convinced of its own interpretation according to which the scheme *was* compatible with the state aid regime. It found support for this stance in previous decisions by the ECJ. Given its commitment to introduce the scheme and the perceived threat of excluding dry cleaning companies near the border, the Ministry's strong belief that companies near the border could participate mobilised it to challenge the Commission's interpretation.

*Explaining escaping: activating the attribution of threat and of opportunity mechanisms*

The Commission could not be persuaded by the Ministry to change its interpretation and warned that it would open a formal investigation procedure to decide whether support to dry cleaning companies near the border could be allowed.

On the basis of its shared experiences with the state aid procedure, the Ministry realised that this procedure could seriously delay the introduction of the scheme. Moreover, it knew that it would be unlikely to succeed in convincing the Commission at this stage. As such, the opening of a formal investigation generated an *attribution of threat* mechanism which mobilised the Ministry to look for ways to avoid entering this stage.

The narrative reveals that a number of events and developments provided an opportunity to do so without having to conform to the Commission's interpretation of the application of the state aid rules. The possible opening of a formal investigation first of all, motivated the Ministry to re-evaluate earlier suggestions of the Commission to modify the scheme in such a way that it would meet the so-called *de minimis* criteria. The Commission had suggested at different moments that a lower amount of financial support would be granted; this would make it possible to escape Article 87(1) EC Treaty and the Community guidelines for environmental aid.

So far, lowering the amount of aid was considered no viable option as this would exclude various dry cleaning companies from participating in the scheme. In the light of the Commission's threat to open a formal investigation, however, it became a more acceptable option to alter the scheme in order to meet the *de minimis* criteria. The alternative would be possibly no scheme at all.

A change in the underlying guiding principle of Dutch soil remediation policy strengthened the recognition of the *de minimis* Regulation as a way out. Due to a shift from a *functional remediation* toward the *monitoring and control* principle, the precise remediation activities supported by the scheme could also be changed. As a result of this change, the amount of financial support for the remediation costs could be lowered and brought in line with the *de minimis* criteria.

So far, the Ministry of HSPE was uncertain about whether this 'escape-route' would be accepted by the Commission and feared that this change in the scheme would lead to ambiguities and a further delay of the notification procedure. The Ministry looked for an occasion to explain this change to the Commission. This occasion was provided when the Commission invited the Netherlands to discuss the scheme in a direct meeting.

Altogether, the suggestion of the Commission to meet the *de minimis* criteria, the change in the guiding principle of Dutch soil remediation policy and the invitation for a direct meeting with the Commission activated the operation of an *attribution of opportunity* mechanism. This opportunity was seized by the Ministry to introduce the scheme and escape from conforming to Article 87(1) EC Treaty or having to enter the formal investigation procedure.

## 6.6 Conclusion

This second case study has provided an account of the application of the EU state aid regime during the introduction of a financial support scheme. This support scheme had to give a push to the remediation of soil contamination caused by dry cleaning companies. The narrative and analysis illustrated how the Ministry of HSPE - responsible for applying the EU state aid rules - pursued a number of responses to introduce the financial support scheme after it was faced with Article 87(1) EC Treaty, which in general, prohibits the granting of state aid.

The different responses were affected by different interacting institutional and ideational factors, by the activities of other actors and a number of activated social mechanisms.

A number of these contextual factors remained relatively stable in the present case. Throughout the episode many of the ideational factors, for instance, remained constant. Ideas on the situation, such as those related to the limited effectiveness of the existing top-down instruments to remediate polluted soil remained in place. Ideas on the appropriateness of using a covenant and a financial support scheme also persisted. By activating a *logic of appropriateness* mechanism these factors generated a committed stance of the Ministry to introduce the financial support scheme. Another relatively constant contextual feature had been the expectation of the dry cleaning association Netex to introduce the scheme and get approval for the scheme by the Commission. Due to the activation of a so-called *certification* mechanism, this expectation of Netex was validated and largely followed by the Ministry. In concert, these different factors and activated mechanisms mobilised the Ministry to seek approval of the Commission, but also to find sufficient room to introduce the support scheme. It attempted to do so by pursuing the responses of influencing, / escaping and pacifying.

A number of contextual factors were in motion during the episode. The most important change was the increasing pressure of the Commission to make the Ministry conform to the EU state aid requirement. This pressure followed from its formal role to supervise state aid and the failure of the Ministry to provide sufficient information on the scheme and conform to the state aid rules. The responses of influencing / escaping and pacifying, in this respect, altered the context in which the Ministry had to apply the state aid rules. At the same time, however, the Commission also made various suggestions to introduce the scheme within the scope of the *de minimis Regulation*. By meeting the *de minimis* criteria, the scheme could be exempted from having to meet Article 87(1) EC Treaty.

It was not until the Commission threatened to open a formal investigation that these suggestions were taken into account by the Ministry of HSPE. The possible opening of a formal investigation stage, made it realise that it had to adopt a pragmatic stance. Going through this formal stage could further delay the introduction of the scheme. Finding a compromise, importantly, became less hard because of an incremental change in the underlying principle of the Dutch soil remediation policy and a direct meeting with the Commission to discuss these changes. Together, these developments mounted to an opportunity to modify the scheme and to escape from having to meet Article 87(1) EC Treaty or entering the formal investigation procedure. A support scheme could be introduced that would be open for most dry cleaning companies.



# CHAPTER 7

## WHEN A BOTTOM-UP INITIATIVE MEETS 'BRUSSELS'<sup>39</sup>

### 7.1 Green Services Ooijpolder-Groesbeek and the EU state aid regime

The final empirical chapter of this study discusses the relationship between a regionally initiated agri-environmental scheme and the EU state aid regime. In order to preserve and develop the countryside in the 'Ooijpolder-Groesbeek' area, regional actors (governmental and non-governmental) attempted to involve farmers in landscape management and development activities on the basis of custom-made contracts. In return for their activities, farmers would receive a market-based price.

In this case, it took a number of years before the first contracts with farmers could be signed. From the start of the project, the Province of Gelderland searched for ways to avoid the 'EU state aid requirements for the agricultural sector.' Conforming to these requirements would restrict the duration of the contracts and the level of farmers' payments. A financial-juridical construction was devised to allow the possibility of paying a market-based price. However, the suggested construction was not readily accepted by the Ministry of Agriculture, Nature and Food quality (ANF) and the European Commission. The (legal) definition of farmers' landscape activities and the application of different EU state aid requirements led to much ambiguity and discussion between the Province of Gelderland, national governmental actors and the European Commission that frustrated and delayed the introduction of the regional initiative.

In difference with the two other case studies, I will focus on the actions of a regional actor - the Province of Gelderland - in this final case study. The activities of actors operating at the national level do play an important role in this case study. Their activities however, are interpreted in this chapter as part of the context in which the Province operated and had to apply the EU state aid requirements to the initiative.

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<sup>39</sup> Parts of this chapter, in particular the narrative of the Green Services case, are based on Zwaan, P. and Goverde, H. (2010) *Making sense of EU state aid requirements: the case of Green Services*. Environment and Planning C: Government and Policy, 28: 768-782.

Section 7.2 sets out various developments in the Ooijpolder-Groesbeek area that gave rise to the governance initiative. In section 7.3 the regional initiative will be linked to a broader national change in ideas about the role of farmers in sustaining and developing an attractive landscape. The chapter continues in section 7.4 by presenting a detailed reconstruction of the episode through which EU state aid requirements were applied to the initiative. The narrative starts with a brief discussion of the EU state aid regime, after which it explores how the Province acted to address these EU rules. In section 7.5 I will cast the narrative in analytical terms of formal rules, responses, contextual factors and social mechanisms to provide an explicit causal analysis of the application episode. Section 7.6 concludes the chapter.

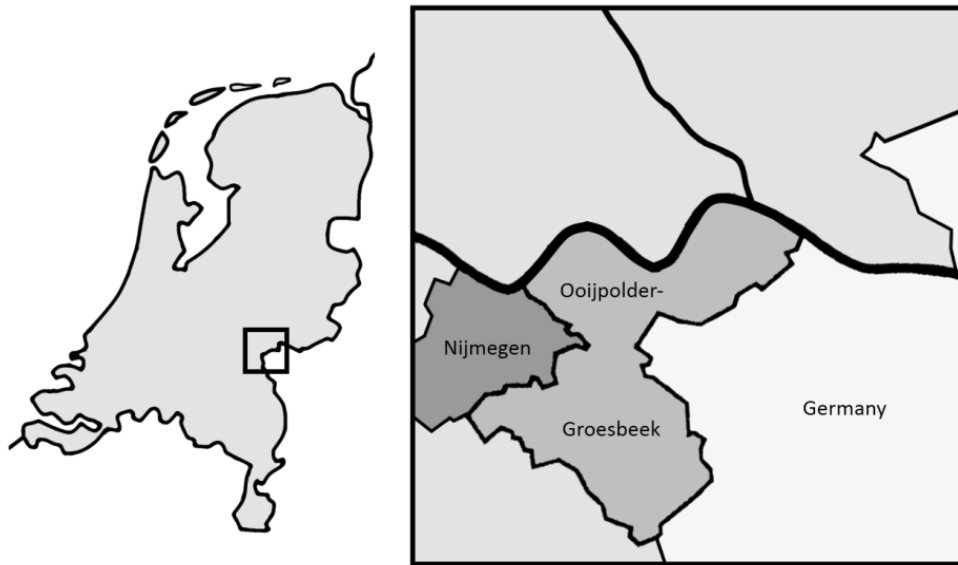
## **7.2 A bottom-up initiative**

The Ooijpolder-Groesbeek area is situated in the Netherlands south of the Waal river between the city of Nijmegen and the Dutch-German border (see figure 7.1). Formally, the area is located in the Province of Gelderland and in three municipalities: Ubbergen, Millingen aan de Rijn and Groesbeek. With regard to its physical geography, the territory has two main characteristics: one part of the area is a polder area occupied by farms, villages, dykes and nature. The other part is a kame terrace with arable land, meadows, forests and residential settlements.

At the beginning of the millennium two local non-governmental nature / landscape organisations and an agrarian nature association took the initiative to sustain the mixed landscape of cultural and natural grounds in the countryside. The cultural landscape in the area was threatened by a variety of developments, such as commercial and housing developments, the transformation of agricultural land into 'high nature' - due to the termination of farming practices - and plans to designate parts of the area as a retention basin in case of unavoidable river floods.

To preserve the existing cultural landscape in the area, the different non-governmental actors adopted a pro-active stance. A vision had to be articulated for the area that would be oriented towards the development of the landscape and would maximise the opportunities provided by different other (positive) functional changes, such as the increasing recreational function for urban dwellers. The general ambition to create an accessible agricultural landscape with a high natural and cultural value was formulated. In order to realise this ambition farmers in the area, amongst others, had to be involved in

the management and development of the landscape. The extra income received from these activities moreover, would enable farmers in the area to continue farming, which was considered a precondition to sustain the cultural landscape.



**Figure 7.1: The city of Nijmegen and the Ooijpolder-Groesbeek area**

In 2001 the initiative was included in a pilot project by the Ministry of Agriculture, Nature and Food quality (ANF). The 'Garden for Experiments' pilot was established by the Ministry to support and facilitate bottom-up initiatives that would increase the quality of the rural landscape outside the national Main Ecological Structure. The pilot was created to develop alternative methods to meet nature and landscape goals that would include different private stakeholders and governmental parties. In the context of the pilot project, the Province of Gelderland was awarded the responsibility for facilitating the project at the operational level by the Ministry of ANF.

The involvement of farmers can be considered an example of the shift towards more horizontal forms of governance and alternative ways of supplying (public) goods and services by involving private parties. The involvement of farmers in landscape development, however, is not a new phenomenon. Since the early 1980's, agri-

environmental schemes (AESs) designed to motivate farmers to decline more intensive (and more profitable) farming practices have been in place in the Netherlands. Increasing pressure on the countryside due to the modernisation and intensification of the agricultural sector during the 1970's called for measures to preserve the rural area (e.g. Eshuis 2006, 6). To integrate agricultural practices with nature conservation and landscape management activities, various AESs that provide a compensation for agri-environmental measures undertaken by farmers have been established. By adopting the EU 'Agri-environment Regulation' in 1992, the establishment of agri-environmental programs, in fact, has become compulsory for EU Member States as an element of their national Rural Development Policies. A variety of schemes has been developed in the EU Member States (Daniel 2008; Smits et al. 2008; Hodge 2001).

In this case, however, regional actors wanted to move away from the existing AESs. A survey, commissioned by local actors in the area and the Province, revealed that farmers were willing to carry out landscape management activities but wanted to move away from the existing AESs (Schrijver 2002). The existing schemes were increasingly considered unattractive due to (i) the fixed agri-environmental measures, (ii) the high transaction costs and administrative burden (various governmental bodies are involved in the application, monitoring and payment of the schemes), (iii) the limited payments (based on a compensation for dealing with suboptimal external production circumstances) and (iv) the limited duration of the contracts (six years). Instead of working with a fixed set of measures, farmers in the area wanted to draw up custom-made contracts for a longer period of time and receive a market-based price for their activities.

### **7.3 Green Services**

The alternative ideas about the involvement of farmers in the management and development of the landscape in the Ooijpolder-Groesbeek area were paralleled in other regions and projects in the Netherlands (Westerink et al. 2008). At the national level, these ideas were captured in particular by the concept of *Green Services* that was introduced in the Dutch national 'Structure Scheme on the Green Environment' (Ministry of ANF 2002) and further elaborated in advice of the Council for the Rural Area (2002).<sup>41</sup> Green Services were presented as an alternative to existing AESs. The Green Services concept moved away from existing AESs to allow for bottom-up and custom-made

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<sup>41</sup> In 2002 the Council for the Rural Area advised the Dutch government and both chambers of Parliament on strategic policy questions in the rural area.

initiatives at the regional level. Importantly, the concept of Green Services reframed the maintenance of landscape and nature from a negative external circumstance for farming into a desirable societal demand. Instead of *compensating* these landscape management activities through government subsidies to cover additional labour costs, these landscape activities should be *rewarded* with a market-related price (Council for the Rural Area 2002). In contrast to existing AESs, the payment to farmers should not only reflect their management activities but also the (societal) benefits of their activity.

In recent years, various Green Services (projects) have been developed in different regions in the Netherlands (Van Moorsel and Dijkman 2007). A number of these projects received financial support from the Ministry of ANF at an early stage. After the introduction of the Green Services concept in national policy documents, different pilot projects were established by the Ministry of ANF; these were referred to as 'Exploration Green Services' (Second Chamber 7 July 2003). The 'Ooijpolder-Groesbeek' initiative was included in the Exploration Green Services in 2003 when the 'Garden of Experiments' pilot was cancelled due to financial cutbacks. The Ministry of ANF reserved a budget of € 2 million for the Ooijpolder-Groesbeek project.

In the context of the pilot, the Province continued to be trusted by the Ministry of ANF with the responsibility to facilitate and manage the project (Provincial Executive of Gelderland 1 June 2004). Financial support for the project by the Ministry, used to develop the Green Services, would be provided to the Province of Gelderland. The contribution of the Ministry would be matched by an equal share of money originating from the region.

The Exploration was established by the Ministry of ANF partly to further develop the concept of Green Services with an eye on the forthcoming discussion on a new EU 'Regulation on support for rural development' (part of the EU Common Agricultural Policy (CAP) for the period 2006-2013). This regulation presents the EU framework for the co-financing of rural development (Second Chamber 1 October 2005). The Ministry of ANF wanted to make it possible to use EU funds to finance the Green Services. To make use of EU funding, the Ministry of ANF established a lobby at the EU level to change the EU regulation.

From the start however, the Commission stated that market-based payments to farmers granted by governments would be considered as a market distortion and therefore would not be allowed. Payments to farmers could be based only on the loss of revenues and additional labour costs, in line with existing EU 'state aid requirements for the agricultural sector' (see below) (interview with former national official 7 July 2008; Second Chamber

13 October 2005). These state aid requirements could not be amended, according to the Commission, because of WTO agreements.<sup>42</sup> The Commission acted cautiously on this issue, as payments for agri-environmental measures had become politically sensitive in the international political context. Agri-environmental payments were regarded by various other parties and countries as a disguised form of state aid to farmers. To avoid international disapproval the Commission committed itself to act in strict accordance with international requirements (cf. Fouilleux 2004, 247-8).

The restrictive stance of the Commission was further strengthened by the long-lasting criticism of the European Court of Auditors (ECA) on the accountability of the EU Rural Development Policy (interview with former national official 7 July 2008). Through Article 248 EC Treaty, the ECA is mandated to 'provide (...) a statement of assurance on the reliability of the annual accounts of the (...) Commission, and on the legality and regularity of the underlying transactions'. Since its first statement of assurance in 1994, there have been limited positive assessments with regards to the spending on the Rural Development Policy. In one of the latest reports from the ECA, it remarks that 'the imprecise definitions in national legislation of some eligibility conditions and the often complex rules, particularly those related to agri-environmental measures, adversely affect the quality of the controls carried out to verify the farmers' compliance with the relevant requirements. These controls have *once again*, been found deficient' (ECA 2008, *italics mine*).

As the concept of Green Services was not clearly defined and matured at that time, the Commission deemed it irresponsible to consider the concept in the revision of the EU 'Regulation on support for rural development'. The Commission instead suggested that if the Ministry of ANF wanted to set up custom-made contracts with farmers it would be more appropriate to do so by using national finances and introducing the Green Services directly under the conditions of the EU 'state aid rules for the agricultural sector' (interview with former Commission official 10 June 2008).

#### **7.4 The application of EU state aid rules**

In the section below I will discuss the process by which the EU state aid rules were applied to the Green Services project in the Ooijpolder-Groesbeek area. To do so I will start with a brief discussion of the EU state aid regime (a similar discussion was provided in the Soil

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<sup>42</sup> Market-based payments to farmers were argued to fall outside the so-called 'green box' which includes those agriculturally related subsidies that are not restricted by trade agreements as defined under the terms of the Uruguay round of the World Trade Organisation.

Remediation case; in this case a number of other specific state aid provisions applied to the initiative).

### **EU state aid rules for the agricultural sector**

Article 87(1) EC Treaty specifies that state aid which 'distorts or threatens to distort competition (...) in so far as it affects trade between Member States, [will] be incompatible with the common market' and can, in principle, not be allowed. Articles 87(2) and 87(3) EC Treaty contains general exemptions from this prohibition, setting out the different criteria under which state aid can be granted. Further to these general exemptions the Commission has developed various guidelines and communications as well as secondary legislation which together provide for additional criteria that balance the general state aid prohibition against possible exemptions (cf. Blauberger 2009, 1034).

In the present case, *Regulation (EC) 1257/1999* was an important instrument of secondary legislation in force. This regulation lays down the criteria for 'state aid to the agricultural sector.' It stipulates that aid can be provided for agri-environmental measures provided that they go beyond what is legally obliged and the aid is calculated on the basis of the income forgone and the additional costs that result from undertaking the measures. As agri-environmental activities must 'go beyond what is legally obliged' and the definition of what is legally obliged can change as formal rules are regularly updated, the regulation further specifies that contract periods cannot exceed six years.

Besides these substantive requirements, the EU state aid regime also provides for different procedural rules. As the application of EU state aid rules can be uncertain, the Treaty requires that Member States notify any planned aid to the Commission and wait for the Commission's approval. Regulation (EC) 659/1999 specifies this ex ante notification procedure. On the basis of the Treaty the Commission has the duty to scrutinise planned aid and take a decision on their acceptability.

To be certain that the pilot projects included in the 'Exploration Green Services' would be compatible with the EU state aid rules, the Ministry of ANF required that the different projects would meet the state aid requirements for the agricultural sector. This implied that the contracts for the Green Services would be based on a compensation of the additional costs and foregone income; the projects in addition would have to be notified to and approved by the Commission before support would be given. This requirement, as will become clear below, was not readily accepted by the Province of Gelderland...

### **Landscape Development Plan and innovative financial-juridical construction**

In anticipation of their involvement in the pilot, local Non-Governmental Organisations (NGOs) and the Province had mobilised the different municipalities in the Ooijpolder-Groesbeek area (Groesbeek, Millingen aan de Rijn and Ubbergen) to become involved in the initiative and to develop a so-called Landscape Development Plan (LDP) for the area. The development of the LDP was considered a way to retain the 'energy' in the area and to provide a framework for the development of the Green Services (Province of Gelderland December 2003).

The LDP presented a general ambition to make the area more accessible and its cultural history more visible; it set out the vision to create a network of natural and landscape elements in the area. In addition, a long term realisation plan that included circa 90 specific projects was drafted. Besides the long-term management and conservation projects that had to be carried out by farmers, i.e. the actual Green Services, the LDP also included single investment projects like the removal of hiking barriers or the building of bridges. The 90 projects had to give concrete examples of projects to carry out the LDP, although the plan did not want to exclude any new projects that would suit the objectives of the LDP (Municipality of Groesbeek, et al. 2004). The LDP was formally approved by the three municipalities in the area in 2004.

During the LDP policy-making process it became clear to the different regional parties that a specific financial-juridical construction had to be elaborated, one that could support the financing of the Green Services but would not be in conflict with the state aid requirements for the agricultural sector. When the payments of the Green Services would be subject to these state aid requirements, restrictions would be set, as noted, on the level of the payment and the length of the contracts. In order to create a financial-juridical construction that would not be subject to the EU state aid rules for the agricultural sector, the Province of Gelderland invited an independent consultancy firm to prepare advice and look for alternatives (KPMG 2004).

On the basis of its understanding of the EU state aid regime, the consultancy firm advised that the Province should qualify the Green Services as 'services of general interest' and that the contracts with farmers should meet the so-called 'Altmark-criteria'. These criteria state that, when a service of general interest is a clearly defined obligation and the compensation has been defined in advance, these payments need not be notified to the Commission and the actors that carry out these services can make a reasonable profit (see table 7.1)



In the Altmark arrest (Case C-280/00, Altmark Trans GmbH, 24 July 2003) the European Court of Justice clarified which amount of state aid a company may be entitled to when it provides a 'service of general interest'. The ECJ decided that state aid for a 'service of general interest' is acceptable, provided that four criteria are satisfied:

1. The service of general interest is a clearly defined obligation;
2. The compensation scheme has been defined clearly in advance;
3. The compensation scheme covers the cost of the service, taking into account both the revenues generated by the service and making allowance for a reasonable profit; and
4. The company is selected through a public procurement procedure or, failing this, the compensation is calculated on the basis of what would be required to make a company take on this obligation.

**Table 7.1: The Altmark-criteria**

To qualify the Green Services as services of general interest, the agrarian function of a farmer's land would be disconnected from its recreational or natural function. By separating these functions it was possible to bypass the 'state aid requirements for the agricultural sector' as the farmer would not carry out any agrarian activities on this land; formally, he would only be landowner of the recreational or natural land.

Via a 'building and planting right' natural elements would be placed on this land through the landscape fund. By consequently vesting a 'servitude', farmers would be obliged to undertake certain activities, such as maintaining these elements or to allow certain activities on the land, such as the recreation of others. By relying on this construction, the activities of the farmer could be qualified as a service in the general interest, to which the state aid requirement for the agricultural sector would not apply.

Moreover, the consultancy office advised to establish a 'landscape fund' for the area. The landscape fund would be 'filled' with both public money from different governmental bodies and private money from local businesses or for example, profits from building projects. The fund had to guarantee a more sustainable financing of the landscape development and management activities. Trustees of the fund moreover, would directly sign contracts with farmers for their landscape management activities. Direct contacts had to reduce the transaction costs and build trust among the farmers in the area, encouraging them to participate in the project (interview with regional official 19 April 2007).

### **Increasing contestation**

As advised by the consultancy office, the duty of the Ministry of ANF to meet the state aid requirements for the agricultural sector and notify the Green Services to the Commission was not readily accepted by the Province of Gelderland that would be responsible for preparing the notification of the projects to the Commission. The Province strongly believed the suggested juridical-financial construction provided a way to avoid the state aid requirements for the agricultural sector. Moreover, the alternative construction allowed the Province to avoid the time-consuming and uncertain EU state aid notification procedure, making it easy to seize upon new projects that would fit the Landscape Development Plan (LDP). This would be difficult to achieve when having to notify every new project to the Commission (interview with regional official, 18 August 2008). Instead of conforming to the requirement of the Ministry of ANF, the Province attempted to convince the Ministry, on the basis of the consultancy report, that the project would need no formal approval by the Commission and could be started straight away.

The Ministry of ANF was not completely convinced by the conclusions of the report. According to the Ministry, the complex financial-juridical construction suggested by the consultancy office remained imprecise about whether the Green Services would be acceptable as service of general interest by the Commission within the EU legal state aid framework. The Ministry of ANF emphasised that one could not conclude unambiguously that the construction would be allowed by the Commission and that a notification of these projects to the Commission was not needed (Second Chamber 22 November 2004). The Ministry therefore did not drop the precondition that the Green Services projects must be notified and approved by the Commission before any support would be given.

Instead of following the requirements of the Ministry, the Province continued its own route and continued its attempt to persuade the Ministry of its interpretation of the application of the EU state aid regime. It felt supported by 'independent' legal experts who argued that the proposed construction would be 'Brussels proof' (interview with regional official 19 April 2007). To further support its interpretation, the Province sought informal contact with officials of the Directorate General (DG) Competition of the Commission. DG Competition stated, according to a regional official, that the suggested construction should in principle be possible. However, it did stress that DG Agriculture and Rural Development (DG AGRI) had to decide on this (interview with regional official 19 April 2007). Regional actors found support for their interpretation in the statements of DG

Competition and the advice of 'independent' legal experts, and continued to look for leeway in the state aid rules.

The Ministry of ANF acted more cautiously. Where the Province argued that the Green Services could be interpreted as services of general interest, the Ministry of ANF argued that things were not that simple (interview with national official 21 March 2008). The Ministry maintained its position that notification of the project to the Commission was needed to gain certainty (Ministry of ANF 2005).

The Province, however, was of the opinion that the Ministry was departing too much from existing AESs that had been previously notified to the Commission and had been evaluated in the light of the state aid rules for the agricultural sector. According to the Province, the Ministry made insufficient use of the room for manoeuvre provided for in European legislation (interview with regional official 19 April 2007):

'The discussion gave me the impression that the civil servants of the Ministry were (too easily) blaming 'Brussels'...and for a part this was justified, but I also had the idea that actors were... that they acted on the basis of their prior ideas and routines...'

The Province openly questioned the stance of the Ministry of ANF and argued that the Ministry wrongly assumed that 'once a farmer is involved, Green Services automatically qualify as state aid for farmers' (Provincial Executive of Gelderland 5 October; Member of Provincial Executive Keereweer 5 November 2004). The Province moreover, started to involve other parties in an attempt to increase pressure on the Ministry to define the Green Services as services of general interest and to provide room for the juridical-financial construction. Amongst others, Members of Parliament (MPs) (coming from the area) became involved in the discussion. Initially, MPs called for a more detailed argument by the minister of ANF as to why the construction proposed by the consultancy office was not possible. Later on, other MPs asked more generally whether the Green Services specified in the LDP could be qualified as services of general interest (Second Chamber 26 April 2005).

The Ministry of ANF would not be influenced; it would not change its stance and give financial support without notification to the Commission. The Province, in turn, adopted a similar inflexible stance on how to interpret the state aid requirement and became even more committed to its own interpretation (interview with national official 21 March 2008; interview with regional official 26 June 2008).

Interviews with officials of the Ministry of ANF and internal documents reveal that the Ministry of ANF felt it had spent sufficient time explaining the EU state aid requirements (interview with national official 18 August 2008; Ministry of ANF 2005). The Province however, held a different view; it believed the Ministry avoided a true discussion on the interpretation of the EU state aid requirements.

‘...they [the Ministry of ANF] did not react to our reports and our ‘homework’... In my opinion, you have to discuss [this matter] on the basis of arguments... and that did not happen... it was never made clear why it was not possible [to introduce the juridical-financial construction]...’

The lack of discussion created frustration and irritation which was expressed through direct contact with the Ministry of ANF. In e-mails sent to senior officials, regional actors expressed specific complaints about the stance taken by the Judicial Affairs department of the Ministry of ANF (Ministry of ANF 2005). The Province moreover, expressed criticism in its formal correspondence to the Ministry. In an official letter, a Member of the Provincial Executive of Gelderland called upon the Minister of ANF to ‘use his authority to let his civil servants follow the opinion of the independent legal consultants’ hired by the Province, and to start implementing the projects of the LDP without further delay (Member of the Provincial Executive Keereweer 5 November 2004).

The Minister of ANF yet, rejected the complaint of the Province and argued that the implementation of the LDP had been hampered by the actions of the Province of Gelderland itself, due to the constant discussion on the interpretation of the EU state aid requirements (Minister of ANF 25 January 2005).

### **Going to Brussels**

Meanwhile the Province of Gelderland had begun preparing the state aid notification procedure for the Green Services in the LDP. The Province increasingly realised that it would not be fruitful to continue the discussion with the Ministry of ANF. The debate on whether or not the project had to be notified moreover, created much uncertainty and delay and started to undermine the credibility of the project. Action was needed to ensure the project continued and maintained the support of participating actors (e.g. farmers) at the local level. While the Province complied with the requirement of the Ministry of ANF to notify the project to the Commission, it continued to insist that the Green Services were not subject to the EU state aid requirements for the agricultural sector. The Province set

out this position in a draft 'non-aid measure which is notified to the Commission for reasons of legal certainty' (Province of Gelderland 31 January 2005).

Before sending in the notification, the Province of Gelderland took the initiative to organise a meeting with the Commission (DG AGRI) and the Ministry of ANF. It intended to find out what precise criteria the Commission would use to decide on the Green Services and to discuss whether the Green Services could be interpreted as a service of general interest (Provincial Executive of Gelderland 5 October 2004; Second Chamber 26 April 2005). After some persistence by the Province, the Ministry was willing to organise a meeting in April 2005 with officials of DG AGRI, the Ministry of ANF and the Province of Gelderland (interviews with regional officials 19 April 2007 and 26 June 2008).

The Province believed it had a good chance to convince the Commission of the juridical-financial construction of the Green Services in the LDP. During the meeting it quickly became clear, however, that the Commission could not be motivated to define the Green Services as services of general interest. The Commission argued that the land use of a farmer is interconnected; it is impossible to separate the different functions and qualify a separate activity as a service of general interest. It would be difficult, for example, to check whether a farmer leaves a piece of land fallow only for bird breeding (a service of general interest), or whether this allows him to access his arable land more easily (interview with former national official 7 July 2008). The 'Altmark arrest' could consequently not be accepted by the Commission as a basis to pay market based prices to farmers. The Commission stressed that payments had to be based on a 'loss of revenues and additional labour costs' as the payments would favour certain (agricultural) undertakings in the Netherlands.

The Province was shocked by the legal stance of the Commission. It could not believe that the Commission would be that precise and rigid in the application of the state aid requirements (interview with regional official 19 April 2007). At the same time, the meeting with the Commission made the Province realise it had to accept that the state aid rules for the agricultural sector must be taken into account and that a notification had to be prepared. Further opposition would not be helpful and only further delay the introduction of the initiative; the Province realised that they 'had lost the discussion' on the application of the state aid requirements (interview with regional official 26 June 2008).

After the meeting, the Ministry of ANF and the Province agreed to progress together and notify the Green Services included in the LDP to the Commission. In the short term the

Province of Gelderland would indicate which projects of the LDP would be subject to the EU state aid rules, so that these could be notified to the Commission before the summer of 2005 (Ministry of ANF 2005).

### **Green Services Catalogue**

During the meeting in Brussels the relationship between Green Services in the Netherlands and the EU state aid notification procedure was also discussed in more general terms. In addition to the Ooijpolder-Groesbeek project, five other Dutch projects had been developed by regional governments and recently notified to the Commission. The various projects had generated a substantial workload for the Commission. To overcome resulting delays, the Commission requested the Netherlands to work on a complete and definite overview of the Green Services actors wanted to implement in the Netherlands (interview with regional official 3 May 2007; interview with former Commission official 11 June 2008).

This suggestion was welcomed by the Ministry of ANF, which perceived an opportunity to remove the long and uncertain state aid notification procedure. The Ministry of ANF suggested early on that the joint Provinces would develop this overview, given a major decentralisation impulse in the field of rural planning (interview with national official 21 March 2008; interview with regional official 26 June 2008; Second Chamber 13 October 2005). By introducing the 'Investment Fund for Rural Areas' (Investeringsbudget Landelijk Gebied, ILG), various duties and responsibilities in the field of rural planning were delegated from the Ministry of ANF to the Provinces (Roodbol and Van de Brink 2009). In the light of this transition, the Ministry of ANF considered it appropriate that the joint Provinces (Inter Provinciaal Overleg, IPO) would take the lead in developing this overview.

The joint Provinces (IPO) were ready to move forward on this basis; they had recently organised themselves around the concept of Green Services and had set out their ambitions and expectations (interview with regional official 26 June 2008). However instead of making a definite list of Green Services, IPO suggested that a flexible catalogue had to be developed. This catalogue would consist of numerous specific individual measures with a predefined maximum compensation. On the basis of these individual measures, a diversity of custom-made schemes could be developed without needing an individual approval by the Commission.

The individual measures would be based, amongst others, on the different Green Services projects that had been developed over the last few years by the various Provinces

and other regional actors involved (interview with regional official 3 May 2007). In total, more than 450 individual measures were included in the catalogue.

Initially, the Province of Gelderland decided not to participate in the development of the catalogue. The Province feared that their involvement would lead to a further delay for the implementation of the Green Services included in the LDP. The preparation of the notification and contact with the Ministry of ANF, however, did not proceed as well as planned. Communication with the Ministry of ANF to prepare the notification (as agreed after the meeting with the Commission) continued to be difficult and required more effort than had been anticipated. In addition, other Provinces put pressure on the Province of Gelderland to include the Green Services project in the catalogue as they wanted to be able to present a united stance on the catalogue (interview with regional official, 26 June 2008).

The option of joining the catalogue was being considered as more and more reasonable by the Province due to these developments. While working together with the other Provinces could possibly delay the implementation of their own Green Services projects, the Province realised that the catalogue made it possible to make the EU state aid requirements applicable to the Green Services explicit and would allow flexibility in developing and implementing Green Services. The catalogue was eventually accepted as a *modus vivendi*; the different Green Services projects of the LDP were included in the catalogue. The catalogue was approved a year later in February 2007 by the Commission (EC 2007).<sup>43</sup>

### **Regional and private financing**

In the mean time, financial resources had been allocated by the Ministry of ANF to implement various projects of the LDP that were not subject to the EU state aid regime (Minister of ANF 2 November 2005). The Minister of ANF was willing to allocate these resources for single investment projects, which would not be susceptible to the EU state aid regime.

Despite these finances, however, the Green Services of the LDP still could not be carried out as the catalogue at that time had not yet been approved by the Commission. As a result, the credibility of Green Services remained under pressure in the field. Owing to this pressure, the Province decided to support a number of Green Services projects that were

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<sup>43</sup> The Province of Gelderland was not directly involved with the notification and approval of the catalogue. This process is therefore not included in the narrative.

believed to be allowed under the EU state aid regime. The risk that these projects would not be compatible under the EU state aid regime was weighed against the risk of losing the confidence of local actors in the field in the Green Services (Provincial Executive of Gelderland 28 June 2006). At the end of 2006 the first contracts in the area were signed on the basis of this financial support.

Waiting for official approval by the Commission also encouraged other regional actors to look for options to finance these Green Services with private money. While private money was envisioned at the start of the project to support the Green Services, and had to fill the landscape fund together with public finances, relying solely on private money provided the opportunity to avoid the EU state aid requirements altogether. In order to raise private money the established landscape fund *Via Natura* organised a landscape auction in September 2007, together with a local nature organisation and an expertise centre in the field of economy and ecology.

Roughly thirty small and larger landscape elements were put up for 'sale' with bidding starting between € 500 and € 20 000. A much-used slogan was that urban dwellers would get the opportunity to participate financially in the 'green theatre' around them. The landscape fund's trustees contracted individual bidders such as civil society organisations, schools and private businesses, using this private money to contract farmers who were ready to provide Green Services. In total, € 110 000 that could be used to pay farmers for the landscape activities without having to meet the EU state aid requirements was raised.

## **7.5 Analysing the application episode**

In this section I will further analyse the application episode. Below I will first briefly discuss the EU formal rules that applied to the initiative and the various responses pursued by the Province of Gelderland. I continue discussing various features of the context in which the EU state aid rules were responded to. In the last sub-section, various social mechanisms are introduced that will link the EU state aid requirements and different contextual factors to the various responses.

### **7.5.1 EU state aid requirements**

Different EU state aid rules (possibly) applied to the governance initiative in this case. An important requirement has been Article 87(1) EC Treaty that lays down a general prohibition of state aid that threatens the functioning of the common market. Next to this



article different provisions that specify the criteria under which derogation to this general prohibition can be warranted applied to the governance initiative. A relevant formal rule involved in this case was Regulation (EC) 1257/1999 that specifies the state aid rules for the agricultural sector. This regulation, amongst others, stipulates that the granting of state aid for agri-environmental measures qualifies for derogation, but only when these measures go beyond what is legally obligated and the aid is based on additional labor costs and the foregone income.

Procedural state aid requirements also featured this case. An important provision of Regulation (EC) 659/1999 was the obligation imposed on Member States to notify planned aid to the Commission and wait for its approval. These procedural rules did not only provide for a broader setting in which the substantive state aid rules were applied to the governance initiative; in this case these procedural rules themselves also became the object of the Province's responses. It is for this reason that I discuss these procedural rules already in this sub-section, rather than discussing them as a part of the institutional context below.<sup>44</sup>

A final feature of the EU state aid regime that must be considered in the present case is the judgment of the European Court of Justice (ECJ) in the 'Altmark arrest'. In the arrest the ECJ decided that private actors who provide for so-called 'services of general interest' can make a reasonable profit, provided that these services are clearly defined and the compensation for these services (by public means) has been defined in advance. Under these conditions, moreover, these payments need not be notified to the Commission.

### 7.5.2 Responses

The narrative showed the Province of Gelderland did not passively conform to the EU state aid rules. Instead of conforming to the state aid rules for the agricultural sector and notifying the initiative to the Commission, a number of alternative responses was pursued by the Province. The pursued responses of the Province are described systematically below in order of appearance.

#### *Escaping (I)*

Initially the Province pursued a response of *escaping* in the present case. The response of escaping, which involves the effort to exit the domain in which institutional pressures are

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<sup>44</sup> In the Soil Remediation case these procedural rules were discussed as an aspect of the institutional context.

exerted, can be clearly observed in this example. By defining the Green Services as services of general interest the Altmark criteria would become applicable to the initiative. By doing so the Province attempted to avoid the state aid rules for the agricultural sector and the procedural state aid rules that required a notification of the initiative to the Commission.

#### *Influencing*

To take advantage of the 'escape route' provided by the Altmark arrest, the Province also pursued a response of *influencing* in this case. The Province attempted to convince the Ministry of ANF, and in a later stage the Commission, of 'the fact' that Green Services could be defined as services of general interest. In line with the definition of Oliver, the Province tried to manage other actors' interpretation of how to define the landscape activities of farmers and (thereby) the application of the EU state aid rules.

#### *Challenging and attacking*

The attempt of the Province to influence the Ministry of ANF was unsuccessful. The narrative shows that the Ministry could not be motivated to interpret the Green Services as a service of general interest; the Ministry maintained that the initiative had to be notified to the Commission before financial support would be granted.

The Province did not accept the Ministry's interpretation and started to *challenge* this. In line with the definition of Oliver, the Province openly questioned the Ministry's interpretation of the Green Service and the application of the state aid regime. It did so in direct contact with the Ministry but also by mobilising Members of Parliament. The narrative reveals that not only the interpretation of the Ministry was questioned by the Province. After pursuing a response of influencing and challenging the Province also pursued a (more aggressive) response of *attacking*: the Province openly questioned the expertise of (parts of) the Ministry on the application of the EU state aid regime.

#### *Conforming*

The Province's attempt to persuade the European Commission to interpret the Green Services as a service of general interest also failed. The response of *influencing* pursued in the direction of the Commission was unsuccessful.

The narrative shows that after pursuing this response, the Province of Gelderland quickly *conformed* to the state aid rules for the agricultural sector. The Province accepted the interpretation of the Commission that the Green Services had to be defined as an agri-

environmental activity and that the payment for Green Services had to be based on the state aid requirements for the agricultural sector.

#### *Buffering*

With respect to the procedural state aid rules, the Province did manage to defend itself against the notification requirement. It did so by pursuing a response of *buffering*. This response refers to the effort to reduce the extent to which actors are scrutinised by detaching particular activities from external contact. The Province's cooperation with the establishment of a Green Services Catalogue can be clearly recognised as a response of *buffering*: on the basis of the catalogue custom-made contracts with farmers could be established that were exempted from the *ex-ante* examination by the Commission.

#### *Dismissing*

While the Province of Gelderland decided to cooperate with the establishment of the catalogue, it also pursued a response of *dismissing* with regards to the procedural state aid rules. The narrative reveals that different Green Services projects were financed by the Province and introduced without having them notified to the Commission.

#### *Escaping (II)*

The narrative, to conclude, showed that the Province of Gelderland eventually did succeed in pursuing a response of *escaping*. It did so rather dramatically in this example by searching for private finances to reward farmers for their landscape management activities. By using private money - raised by regional actors through the organising of a landscape auction - it became possible to avoid the EU state aid requirements altogether.

### **7.5.3 Contextual factors**

If we want to explain why the Province pursued these responses we must consider different features of the context in which it operated and had to apply the EU state aid requirements to the governance initiative. In this section I will discuss the most important contextual factors involved in this final case. Factors of less importance, needed to explain the Province's responses, will emerge in the mechanism-based analysis in section 7.4.4. The various contextual factors are discussed below under the headings of (i) institutions (ii) activities of other actors and (iii) ideas.

### *Institutions*

An important feature of the institutional context has been the responsibility of the Province to support the bottom-up initiative that aimed to develop the Ooijpolder-Groesbeek area. The Province was endowed with this task by the Ministry of ANF in the context of different pilot projects.

Another key feature of the institutional context includes the responsibility of the European Commission to supervise the granting of state aid by Member States. Under the EC Treaty and secondary state aid legislation, the Commission has the authority and discretion to determine whether an aid measure is compatible with the functioning of the common market or qualifies for exemption. In this case the Commission acted much in line with these prerogatives; after being informed of the Green Service initiative in the Ooijpolder-Groesbeek area, the Commission adopted a formal stance on how to interpret the Green Services and which state aid rules were applicable to it.

At the same time, the Commission acted beyond these institutional prerogatives. Although the Commission adopted a strict stance on the application of the substantive state aid rules, it followed an accommodating stance to deal with the procedural state aid requirements. During a direct meeting with the Province and the Ministry of ANF, the Commission made a clear suggestion on how the procedural state aid rules and the need to notify Green Services to the Commission each and every time could be avoided.

### *Activities of other actors*

Besides the Commission, different domestic actors attempted to impact how the Province would respond to the EU state aid rules. In this case, first of all, the Ministry of ANF exerted a strong pressure on the Province of Gelderland to notify the initiative to the Commission. The Ministry required the initiative would be notified to the Commission and approved before financial support would be granted to the Province to introduce the initiative. The narrative shows the Ministry was guided in adopting this stance by its earlier contacts with the Commission on the Green Services concept. The requirement to notify the initiative to the Commission, importantly, remained steadily in place during the application episode.

During the application episode the Province was also affected by farmers in the area. The narrative reveals that they placed an expectation on the Province to introduce the Green Services within a reasonable time. The pressure of this expectation increased

during the application episode the longer it lasted before the first contracts with farmers could be signed.

### *Ideas*

From a societal and rural planning perspective the ideational context included various ideas on the situation in the Ooijpolder-Groesbeek area, which were initially articulated by local NGOs. The situation was perceived largely in problematic terms: the preservation of the landscape in the area was under pressure by different developments, such as housing developments and the transformation of agricultural land into nature. Local NGOs, however, also perceived various developments to further sustain the landscape, such as the increasing societal demand for recreation.

From a governing perspective the ideational context featured a clear problem image. During the development of a vision / strategy for the area, ideas were formulated to involve farmers in the implementation of the strategy by letting them take care of landscape management and development activities. Early on, local actors and the Province, however, received clear feedback that existing agri-environmental schemes were considered unattractive by farmers. The limited payment, short length of contracts and the limited possibility for custom-made solutions made the existing schemes uninviting. These signals were clearly spelled out in the results of a survey carried out in the area.

The Green Services concept, as formulated in the advice of the Council for the Rural Area, is obviously an important ideational factor to consider in this case. By redefining farmers' landscape activities in terms of a desirable societal demand, the concept underlined the appropriateness to move away from existing agri-environmental schemes and to reward farmers a market-related price for their landscape activities. The concept of Green Services could be used to sustain and develop the landscape at the regional level through the involvement of farmers on the basis of custom-made contracts.

Another important idea featuring the ideational context, to conclude, was the interpretation of the state aid regime that was provided in the advice of the consultancy office. The report of the office provided a strong cue for the Province how to define the Green Services (as services of general interest) and interpret the application of different EU state aid requirements. During the application episode these ideas were further supported by 'independent' legal experts that were consulted by the Province.

#### **7.5.4 A social-mechanism based explanation of the pursued responses**

In the section below I will expose the causal relationship between these different contextual factors, the formal state aid requirements and the responses pursued by Province. I will do so by turning to the activation of a number of social mechanisms, such as the logic of appropriateness, the attribution of threat and attribution of opportunity, the mechanism of decertification and the attribution of failure.

*Explaining the Province's commitment to introduce the scheme: activating the logic of appropriateness mechanism*

Before explaining the different responses of the Ministry I will explain first, as I did in the other empirical chapters, the Province's commitment to introduce the initiative. I will do by analysing the activation of a *logic of appropriateness* mechanism. To see how this social mechanism was activated, I will consider the Province's perception of the situation, its identity and particular ideas that specify what to do in such a situation.

After getting involved with the pilot project at the local level, the Province largely came to share the interpretation of local actors regarding the various (problematic) developments in the Ooijpolder-Groesbeek area. It is also shared local actors' ambition to develop the area in a pro-active manner, amongst others, by directly involving farmers in the landscape management. The results of the survey held in the area yet, provided a clear feedback that involving farmers to carry out landscape activities could be difficult.

On the basis of the results of the survey, the Province and local actors - both sharing responsibility for the development of the Ooijpolder-Groesbeek area - imagined what would be an appropriate way to involve farmers in landscape development activities at the regional level. Ideas were developed to do so by rewarding farmers with a market-based price on the basis of custom-made contracts. The *Green Services concept* strengthened the perceived appropriateness to do so defining farmers' landscape activities as services desired by society.

The activation and operation of a logic of appropriateness mechanism provides an important background condition that must be considered to explain how the Province responded to the various state aid requirements. To explain the different responses in detail, however, the operation of this mechanism must be analysed in combination with the activation of various other social mechanisms. I turn to this analysis below.

*Explaining escaping (I): activating the attribution of threat and of opportunity mechanism*

Given the commitment of the Province to introduce the initiative, the state aid rules for the agricultural sector activated an *attribution of threat* mechanism. This mechanism involves the process by which an actor interprets its environment, forms the belief that developments or events provide a threat to the realisation of its goals and takes action to remedy against this threat. In this example, the Province realised that conforming to these state aid requirements would set limits to the length of the contracts, the height of the payments and the possibilities to draw up custom-made contracts in a flexible manner. This threat mobilised the Province to find a way to avoid the need to conform to these specific state aid requirements for the agricultural sector.

The narrative shows that an *attribution of opportunity* mechanism - which involves the process by which an actor forms the belief that developments provide an opportunity to realise its ambitions and seize it - was fuelled by the advice of the private consultancy office to define the Green Services as a service of general interest. By defining the Green Services as such, the criteria of the 'Altmark arrest' could become applicable; doing so, provided a way to escape the EU state aid rules for the agricultural sector and introduce the initiative much as envisioned and without notification to the Commission.

*Explaining influencing (the Ministry of ANF): activating the attribution of threat*

The response of influencing, as noted, was pursued at different stages during the application episode by the Province. At the start, the response was pursued in an attempt to convince the Ministry of ANF that the Green Services could be defined as a service of general interest. This effort is explained here.

This effort was pursued in response to the requirement of the Ministry of ANF to notify the Green Services project to the Commission; approval of the Commission had to be obtained before financial support would be provided. This requirement triggered an *attribution of threat* mechanism: notifying the project to the Commission and awaiting its approval would prevent taking advantage of the escape route provided by the 'Altmark arrest'. Without notification, however, financial support would not be provided by the Ministry.

The activation of the attribution of threat mechanism mobilised the Province to pursue a response of influencing. The Province held a strong belief that the devised construction was compatible with the EU state aid regime and was confident that it could convince the Ministry to interpret the Green Services as a service of general interest on the basis of the

advice of the consultancy office. The threat of having to notify the initiative to the Commission could thereby be remedied.

*Explaining challenging and attacking: activating the attribution of threat mechanism and decertification mechanism*

The Ministry of ANF could not be persuaded to interpret the Green Services as services of general interest and did not let go the requirement to have the initiative notified to the Commission. The unaffected position of the Ministry strengthened the operation of the *attribution of threat* mechanisms. The stance of the Ministry, however, also triggered a so-called *decertification* mechanism. This mechanism involves the process by which an actor withdraws or denies the validation of particular claims or demands and/or those making them, after assessing these claims and the behaviour of the claim maker on the basis of particular standards. This mechanism was activated in this example by the Province's view that the Ministry was blaming 'Brussels' for its strict stance. This was not accepted by the Province as an argument to notify the initiative to the Commission. In concert with the Province's commitment to introduce the initiative and the threat to notify the initiative to the Commission, the withdrawal of the validation of the Ministry's requirement mobilised the Province to pursue a response of challenging.

The Province's growing feeling that the Ministry did not want to discuss the application of the state aid rules, strengthened the operation of the *decertification* mechanism. The perceived lack of a true discussion mobilised the Province to deny the validity of the Ministry itself, particularly the legal department. The Province, moreover, strengthened its own stance on how to interpret the state aid requirement. Given the Province's commitment to introduce the initiative and the perceived threats of notifying the initiative, the withdrawal of the validation of the Ministry led to aggravation and generated a response of attacking.

*Explaining influencing (the Commission): activating an attribution of failure and attribution of threat mechanism.*

The unaffected stance of the Ministry also activated the operation of the attribution of *failure* mechanism. This mechanism refers to the process by which actions come to be interpreted as unsuccessful and consequently rejected. The steady stance of the Ministry made the Province increasingly realise that it would be futile to continue its attempts to alter the interpretation of the Ministry by either influencing, challenging or attacking it. It became clear to the Province it had to notify the initiative to the Commission if it wanted



to receive the financial support. The decision to notify the scheme was also affected by pressures of local stakeholders (farmers) to introduce the Green Services. The delay which resulted from the long discussion with the Ministry started to undermine farmers' willingness to participate in the initiative. This activated an *attribution of threat* mechanism.

Together, these activated mechanisms mobilised the Ministry to adopt a different course of action. As the Province kept a strong belief that the Green Services could be defined as services of general interest, turning to the Commission, was considered a way to end the protracted discussion at the national level. Once properly explained, the Province anticipated, the Commission would agree that Green Services could be qualified as services of general interest. On the basis of this belief the Province decided to pursue a response of influencing once again.

#### *Explaining conforming: the attribution of failure*

The Province, as noted, had high expectations that it could influence the Commission. During the meeting with the Commission, however, it was soon confronted with a strict interpretation of the Commission on the application of the state aid rules; the Green Services had to be defined as an agri-environmental measure and had to meet the state aid rules for the agricultural sector. The strict interpretation of the Commission activated a strong operation of an *attribution of failure* mechanism. It can be argued that the strict stance of the Commission functioned as a shock or focussing event. Given the high expectations of the Province that it could influence the Commission, the strict interpretation of the Commission came as a blow and caused the Province to believe that it had no alternative option but to conform to the Commission's interpretation of the application of the state aid rules.

#### *Explaining buffering: the attribution of opportunity*

While the Commission adopted a strict stance on the application of the state aid rules for the agricultural sector, it took a more accommodating stance on the procedural state aid rules. During the direct meeting, the narrative shows, it requested and suggested that the Netherlands would make a single notification of the Green Services initiatives.

The narrative reveals that the suggestion of the Commission was readily perceived as an opportunity by both the Ministry of ANF and the joint Provinces (IPO) to develop a so-called catalogue on which basis custom-made contracts could be created. The request of the Commission, however, was not directly perceived as such by the Province of

Gelderland. Initially, it believed that developing the catalogue would lead to a further delay to introduce the Green Services. Given the local pressure to show results, it decided at first to notify their Green Service initiative individually to the Commission.

In the face of different other events and developments the request of the Commission eventually activated an *attribution of opportunity* mechanism. The notification of the Green Service initiative was delayed. More time was needed anyway to notify the Green Services that were included in the LDP and to get approval from the Commission. In the light of this development, the risk of joining the catalogue, as compared to preparing an individual notification equalled out. Second, there was a pressure of the joint Provinces (IPO) to join the catalogue and to take a common stance on the Green Services.

*Explaining dismissing: the attribution of threat*

Local pressure to show results in the field also motivated the Province to already sign a number of contracts with farmers without notifying them to the Commission. As there was no approval of the Commission of the catalogue yet, the pressure from below continued to activate an *attribution of threat* mechanism. This motivated the Province to partly dismiss the (at least procedural) state aid rules and to give financial support to farmers without having approval of the Commission. By doing so the threat of losing local support was countered.

*Explaining escaping: attribution of opportunity*

The Province, finally, avoided the need to conform to state aid requirements altogether by using private money to reward farmers for their landscape activities. The long delay and difficulties of setting up custom made contracts had motivated NGOs in the field to organise a landscape auction. The auction activated an *attribution of opportunity* mechanism. By using private finances to reward farmers for their landscape activities, the EU state aid regime could be (successfully) escaped.

## **7.6 Conclusion**

This final case study has provided a description and analysis of the application of the state aid regime at the regional level. In this case study various state aid rules had to be applied to a regional agri-environment scheme by the Province of Gelderland. The Province pursued a large variety of responses to deal with the EU state aid requirement. To explain

these various responses I turned to the activation of a number of social mechanisms by a variety of contextual factors.

In pursuing these different responses the Province was guided by different ideational and institutional factors. Through the activation of a *logic of appropriateness* mechanism, these factors mobilised the Province to adopt a committed stance to introduce the governance initiative.

The case showed the Province was aware that 'state aid rules for the agricultural sector' would limit the possibility to introduce the initiative. The activation of an attribution of threat mechanism mobilised the Province to find a way to avoid conforming to the state aid rules. Defining the Green Services as services of general interest provided a way to do so; a different set of state aid rules would as a result apply to the scheme; the so-called Altmark criteria. These criteria activated an *attribution of opportunity* mechanism.

A hurdle, however, was placed by the Ministry of ANF to take advantage of this opportunity. In order to receive financial support for the initiative the Province had to notify the scheme to the Commission. The requirement of the Ministry was not readily accepted by the Province and led to much debate on the national level. After attempting to influence the Ministry to accept a different interpretation on the application of the state aid rules, the response of the Province escalated as the requirement to notify the scheme remained in place and the stance and acting of the Ministry activated a *decertification* mechanism (I will return to this in the concluding chapter 9 of this study).

As the pressure coming from the field to show results increased (another activated attribution of threat mechanism) and the Province started to realise that further attempts to alter the Ministry's interpretation of the application of the state aid rules would be futile (attribution of failure), it eventually decided to notify the scheme to the Commission. The Province continued its response of influencing in the direction of the Commission, being confident the Commission would be persuaded to follow its interpretation of the application of the state aid rules. At the EU level however, the Province also had to give in: the possibility to take advantage of the 'Altmark arrest' was frustrated by the interpretation of the Commission that the Green Services had to be defined as agri-environmental measures. Eventually, the Province accepted this view and the consequence that the state aid rule for the agricultural sector had to be applied to the Green Services.

With regard to the procedural state aid rules, which provided a threat to establish custom-made contracts, the Province did eventually succeed to avoid these: the procedural state aid rules were buffered by establishing a catalogue on which basis individual custom-made contract could be made that needed no approval of the Commission.

# CHAPTER 8

## CONCLUSION I: COMPARATIVE ANALYSIS

### 8.1 Introduction

At the start of this study I drew attention to the possible troublesome relationship between different EU formal rules and the introduction of horizontal forms of governance at the Member State level. I expressed the ambition to gain a clearer understanding of this relationship.

I assumed that analysing the provisions of EU formal rules alone would not be satisfactory to meet this ambition; to understand the impact of EU formal rules on the introduction of horizontal governance initiatives, we must analyse and explain how these rules are applied or responded to.

A bottom-up perspective was adopted to achieve this; in this study I focused on the moment particular EU formal rules confronted the initiators of the horizontal governance initiatives. Subsequently, I analysed how initiating (public) actors, responsible for applying these rules, responded to them. I assumed that these responses would eventually define the impact EU formal rules would have on the introduction of the governance initiatives. The following four research questions were formulated for this study:

- 1) *Which EU formal rules apply to the horizontal governance initiatives?*
- 2) *How do actors (responsible for applying these rules) respond to them?*
- 3) *How can we explain actors' responses?*
- 4) *How do actors' responses affect the introduction of the horizontal forms of governance?*

To analyse in detail how actors responded to the EU formal rules, I relied on a typology of responses developed by Oliver (1991). From this typology, ten different responses that I considered helpful for describing how actors react to EU formal rules were selected. To explain the responses actors pursued, I adopted an institutional processual approach. With this approach, actors' responses are explained by taking into account the EU formal rules, a broad range of (changing) contextual factors and various activated and operating social mechanisms. These mechanisms provide the causal link between the EU formal rules and different contextual factors and the responses that initiating actors pursued.

In the different sections below I answer the research questions from a comparative perspective on the basis of the analytical concepts of responses, contextual factors and social mechanisms. The aim of this comparison is (1) to identify how different contextual factors and mechanisms fit together in one setting and generate a particular response and (2) to contrast this with how these factors and mechanisms fit together in another setting.

In section 8.2 I discuss the governance initiatives and the EU rules applicable to them. Section 8.3 answers how initiating actors responded to these rules and section 8.4 explains the different responses. I therefore first discuss a number of contextual factors in sub-section 8.4.1. In subsection 8.4.2, these different factors will be connected to actors' responses via a number of social mechanisms. In section 8.5, I answer how these responses affected the introduction of the horizontal governance initiatives.

## **8.2 Which EU formal rules are applicable to the horizontal forms of governance?**

The case studies show that different (types of) EU formal rules applied to the horizontal governance initiatives. Which particular provisions applied depends not only on the characteristics of the horizontal governance initiative and the exact relationship between public and private actors and activities, but also on the policy domain in which the initiative is introduced.

### *Phyto case (applying the Phytosanitary Directive)*

In the Phyto case, the governance initiative involved a reform of the Dutch plant inspection system through which phytosanitary (plant health) inspection tasks were *delegated* to different autonomous inspection bodies. These inspection bodies already carried out plant *quality* inspections as agencies (ZBOs). Delegating phytosanitary (plant *health*) inspection tasks from a contract agency of the Ministry of Agriculture, Nature and Food Quality (ANF) to these inspection bodies / ZBOs had to (i) increase the performance of the overall plant inspection system and (ii) reduce the inspection costs for the private sector.

In this first example, the Ministry of ANF was confronted with the obligation to conform to the EU Phytosanitary Directive (2000/29/EC), which requires Member States to take protective measures against the introduction and spread of organisms harmful to plants or plant products. Member States must therefore organise inspections tasks. Of particular relevance in this case was Article 2(1)g of the directive specifying that: '... Member States

may delegate [inspection] tasks (...) under their authority and supervision to any legal person, whether governed by public or private law, which under its approved constitution is charged exclusively with specific public functions, provided that such person, or its members, has no personal interest in the outcome of the measures it takes.'

*Soil Remediation and Green Services case (applying the EU state aid regime)*

In the Soil Remediation case, the governance initiative consisted of a covenant signed by the dry cleaning association, Netex, and the Ministry of Housing, Spatial Planning and the Environment (HSPE) to rehabilitate polluted soil. In the covenant it was agreed that the dry cleaning sector would be responsible for cleaning polluted sites and that the Ministry would provide them with financial assistance to overcome the risks of investing in soil remediation activities. Through a *financial support scheme*, public money was provided to dry cleaning companies to clean contaminated sites.

In the Green Services case, landscape management and development activities were to be *contracted out* by governmental actors to farmers in the Ooijpolder-Groesbeek area. Crucial elements of the governance initiative in this case were that (i) farmers would be rewarded for these activities with a market-based price and (ii) custom-made contracts would be signed.

In both cases the EU state aid regime applied to the governance initiatives. This regime provides for a complex set of substantive and procedural provisions. The EC Treaty lays down a general prohibition of state aid: in principle, any state aid that threatens to distort competition or the functioning of the common market is not allowed. In addition, the state aid regime provides for specific procedural requirements. Through these rules, Member States are required to notify the European Commission of any planned state aid and to wait for the Commission's approval (the role of the Commission and its authority is discussed further below as part of the institutional context).

Particular forms of aid, however, can be considered compatible with the common market or can be exempted from notification. The Treaty itself provides for various exceptions to the general ban on aid. In addition, there are various guidelines, specific regulations and pieces of case law that provide exemptions to this general ban on state aid. Specific exemptions were present in the two cases.

- In the Soil Remediation case, specific 'Community guidelines on aid for environmental protection' featured the EU formal setting. These guidelines specify that state aid for the

remediation of polluted soil can be granted except in instances 'where the person responsible for the [soil] pollution is clearly identified'. The so-called '*de minimis* Regulation,' which allows for aid of minor importance, was another relevant formal requirement in this case. Importantly, this regulation was amended during the application process by which the amount of state aid that can be granted without having to notify the Commission was raised. Finally, various pieces of case law, in which the European Court of Justice (ECJ) had concluded that state aid to companies near the border is acceptable, featured in this case.

- In the Green Services case, specific state aid rules for the agricultural sector provided an exemption to the general ban on providing state aid. On the basis of these rules, derogation is provided when agri-environmental measures go beyond what is legally obliged and are based on foregone income and additional labour costs. The so-called 'Altmark arrest,' in which the ECJ had laid down different criteria on aid for 'services of general interest,' also played an important role in this case. This arrest provides an exemption to the general prohibition of aid when certain conditions are met, and it excuses actors from notifying the Commission of state aid.

### **8.3 How do actors respond to these formal rules?**

The (public) actors - the Ministry of ANF, the Ministry of HSPE and the Province of Gelderland - responsible for applying these formal rules to the governance initiative responded to these rules in different ways. In addition to a conforming response, I identified seven other responses across and within the three cases. Figure 8.1 presents these other responses, the order responses were pursued and how responses were combined. Recurrent responses are discussed and compared below.



Phyto case	Soil remediation case	Green Services case
Influencing	Influencing (to escape) Pacifying	Influencing* (to escape)
Downplaying (challenging/ dismissing)	Pacifying & Challenging	Challenging* Attacking*
Pacifying	Escaping	Influencing
Conforming		Conforming
		Buffering
		Dismissing
		Escaping

**Table 8.1: Pursued responses  
(\* response pursued at the national level)**

*Influencing (to escape)*

Influencing refers to the effort by which an actor attempts to manage the view of its activities or to shape other actors' interpretation of the application of a particular rule. This response was pursued in all three cases.

- In the Phyto case, the Ministry of ANF attempted to influence the Commission's interpretation of the reform. By stressing that it would remain formally responsible for the phytosanitary status of the Netherlands and by emphasising that not much would change, the Ministry of ANF attempted to make clear that the reform would be in line with the Phytosanitary Directive.
- In the Soil Remediation case, the Ministry of HSPE tried to influence the Commission's interpretation of the functioning of the Dutch dry cleaning market and the activities of *dry cleaning companies operating near the border*. In the Ministry's notification letter to the Commission on the financial support scheme, the Ministry claimed that these companies had only a marginal turnover that could be attributed to consumers from abroad. Aid to these companies would therefore not distort the EU common market

and would be in line with the Treaty. It is worth noting that by pursuing this effort, the Ministry also attempted to preclude the support scheme being scrutinised by the Commission on the basis of the Community guidelines on aid for environmental protection. The Ministry's effort in this example can therefore also be interpreted as an *escaping* response, that is, the attempt of an actor to exit the domain in which particular institutional pressures are exerted in order to avoid the need to conform.

- In the Green Services case, an influencing response was also pursued to escape particular state aid requirements. In this case, the Province of Gelderland tried *escaping* the EU's rules on state aid for the agricultural sector at an early stage of the application process. It did so by defining Green Services as services of general interest. By doing so, the so-called 'Altmark criteria' would become applicable to the initiative; this would provide a way to introduce the initiative in an unconstrained way. In this case, the Province attempted to influence the view of other actors on the feasibility of this interpretation. Initially, it attempted to influence the Ministry of ANF's interpretation of how to define the Green Services. At a later stage of the application process, this influencing response was also pursued in the direction of the Commission (see Table 8.1).

#### *Challenging (dismissing and attacking)*

Challenging refers to actors' attempts to resist particular demands or legal pressures and to question these demands or pressures in an open manner. In all three cases this response was pursued after an initial attempt to influence others' interpretation of the (application of the) EU formal rules. Across the three cases, the challenging response was pursued with differing forcefulness and in combination with other responses.

- In the Phyto case, the Ministry of ANF employed this response after the Commission expressed concerns about the plant inspection reform. The Commission feared the reform would conflict with Article 2(1)g of the Phytosanitary Directive as there was a close connection between one of the inspection bodies / ZBOs (i.e. NAK) and its commercial subsidiary (i.e. NAK Agro). According to the Commission, this connection could jeopardise the independence of the phytosanitary inspections. The Ministry, however, insisted that the delegation of inspection tasks to NAK was in line with Article 2(1)g and it openly questioned the Commission's concern that the independence of the inspections would be at risk. The effort made by the Ministry of ANF, however, can also be interpreted in terms of *dismissing*; in this example, the Commission's concerns were

somewhat ignored by the Ministry. In this case, a more suitable label for the Ministry's response, as suggested in chapter 5, is that of *downplaying*.

- In the Soil Remediation case, a challenging response was also pursued by the Ministry after it was confronted with critical questions from the Commission. In this example, the Commission raised questions on the legality of granting aid to dry cleaning companies operating near the border. In response to these questions, the Ministry of HSPE continued to try to influence the Commission by stating that aid to these companies would be allowed and started challenging the Commission's (strict) interpretation of the application of the EU state aid rules.
- In the Green Services case, a challenging response can also be observed. In this example, the Province of Gelderland pursued a challenging response towards the Ministry of ANF. Unlike the Province, the Ministry was not convinced the Green Services could be defined as services of general interest; it therefore required that the European Commission be notified of the initiative. The Province did not accept this demand; it openly questioned the Ministry's interpretation of the state aid rules in a rather fierce manner.

In this example, the Province not only questioned the Ministry's interpretation, but at a somewhat later stage, the Province also openly questioned the Ministry's expertise on applying the EU state aid regime. This response of the Province can be described as an *attacking* response - a response by which actors openly assault or denounce particular demands *and* the 'constituents' that express these demands.

### *Pacifying*

A different response that was pursued across the cases is that of *pacifying*. Pacifying was defined as a response by which actors adhere to a level of non-conformity and devote their energy to appease the concerns of others.

- This response was pursued in the Phyto case at a somewhat later stage during the application episode (see Table 8.1). In response to the Commission's questions about the independence of the NAK inspections and a request to make a more formal separation between NAK and NAK Agro, the Ministry of ANF attempted to quell the Commission's concerns by stressing NAK's conformity to private ISO standards rather than separate NAK and NAK Agro.
- In the Soil Remediation case, the pacifying response was also pursued. In this case, the Ministry of HSPE pursued this tactic from the start of the episode in order to give aid to *internationally operating companies*. To quell (likely) concerns of the Commission, the

Ministry of HSPE initially emphasised that these companies would not likely make use of financial support. At a later stage, the Ministry promised that any aid to these companies would be specifically assessed.

### *Conforming*

Another recurrent response across the cases is that of conforming. In all three cases, actors conformed to particular EU formal rules (in a way demanded or considered acceptable by the Commission).

- In the Phyto case, the Ministry of ANF eventually conformed to the Commission's (strict) interpretation that a formal separation between NAK and its commercial subsidiary NAK Agro had to be made before the phytosanitary inspection tasks could be delegated. The NAK constitution was, therefore, eventually altered and a 'Chinese wall' was raised between NAK and NAK Agro to (formally) guarantee the independence of the phytosanitary inspection.
- In the Soil Remediation case, the Ministry of HSPE partly conformed to the general ban on state aid as specified by the Treaty. The Ministry accepted the Commission's view that aid to internationally operating companies could (threaten to) distort the common market. After trying to appease the Commission's concerns, internationally operating companies were excluded from joining the scheme.
- Finally, in the Green Services case, the Province of Gelderland accepted the Commission's interpretation on the application of the EU state aid rules. After an attempt to influence the Commission by maintaining that Green Services could be interpreted as 'services of general interest', the Province of Gelderland accepted the Commission's view that Green Services had to be defined as an agri-environmental activity. The Province accordingly, accepted that the financial reward for Green Services had to be based on the 'state aid requirements for the agricultural sector'.

### *Escaping and buffering*

Initiating actors also (successfully) pursued a response of escaping in the Soil Remediation and Green Services cases. This response, as noted, refers to an actor's attempt to exit the domain in which particular institutional pressures are exerted in order to avoid the need to conform.

- In the Soil Remediation case, the application episode ended with an escaping response. The Ministry of HSPE partly changed the goals of the financial support scheme to bring

the support scheme in line with the *de minimis* Regulation. Instead of financially supporting the complete remediation of the soil, the aid was redirected towards the remediation of the top-soil only. The support scheme could thereby qualify for derogation to the general prohibition of aid.

- In the Green Services case, the escaping response was more drastic. In this example, the Province avoided the need to conform to state aid requirements altogether by turning to private money to reward farmers for their landscape activities.

In addition to the response of escaping, the Province of Gelderland also pursued a response of *buffering* - a response that refers to the actor's effort to reduce the extent to which it is scrutinised by detaching particular activities from external contact. The Province decided to join the development of a so-called 'Catalogue of Green Services' that would be scrutinized and approved only once by the Commission. On the basis of the approved catalogue - consisting of detailed individual agri-environmental measures - different custom-made contracts with farmers could be established without needing specific Commission approval.

## **8.4 How can we explain actors' responses to the EU formal rules?**

To provide an explanation for these different responses we must consider a variety of contextual factors - besides the EU formal rules - and take into account the activation and operation of a number of social mechanisms. The contextual factors and social mechanisms are discussed and compared in the sections below.

### **8.4.1 Contextual factors**

To explain the different responses, we need to take into account a number of (changing) contextual factors that featured the three cases. These factors are discussed and compared below. On the basis of the theoretical framework, contextual factors are arranged under the general categories of (i) institutions (ii) other actors' activities and (iii) ideas. In this sub-section, the most important contextual factors are discussed and compared. More specific contextual factors are introduced in (sub-section) 8.3.2.

#### *Institutions*

An obvious aspect of the institutional context that must be considered is the (formal) role and responsibility of the initiating public actors.

- In the Phyto and Soil Remediation case, the role of the Ministry of ANF and of HSPE consisted of a more a general responsibility to look after the Dutch phytosanitary status or the sustainable use of Dutch soil. This responsibility included taking care of the implementation and management of specific policies.
- In the Green Services case, the Province of Gelderland was given a more specific responsibility. In the context of different pilot projects, it was made responsible by the Ministry of ANF to provide operational support for the introduction of a bottom-up initiative (in order) to increase the quality of the rural landscape.

Another important aspect of the institutional context across the cases has been the (formal) position and role of the European Commission. Its authority to closely monitor Member States' conformity to the EU formal setting played a crucial role in all three cases.

- This is most obvious in the Soil Remediation and the Green Services cases. Through the EC Treaty and secondary legislation, the European Commission was granted authority to determine whether notified state aid measures constitute illegal state aid or qualify for exemption from the general ban on state aid. The Commission's responsibility with regard to notifications of state aid included making either the decision (i) that a measure does not constitute aid, (ii) to raise no objection against the aid or (iii) to open a formal investigation procedure if it has insufficient information to decide on the aid. The Commission, moreover, was assigned the duty to demand repayment from recipients of state aid if the aid is given without going through the notification procedure and if it conflicts with the state aid regime.
- The Commission's role to monitor and enforce Member States' conformity was also a key feature of the institutional context in the Phyto case. Through the Phytosanitary Directive, the European Commission's Food and Veterinary Office (FVO) was granted the authority to (i) carry out 'on the spot' inspections, (ii) make recommendations and (iii) request Member States address any identified shortcomings.

In all three cases, the Commission met these responsibilities: after being informed of the different horizontal governance initiatives, it adopted a critical stance to scrutinise the initiatives' conformity to the EU legal framework. When initiating actors refrained from responding in an adequate way to the Commission's concerns and questions, the Commission made use of its authority and capacity to (increasingly) enforce actors' conformity to the EU formal rules by moving towards more formal investigation stages.

To derive an accurate understanding of the impact of the activities of the Commission on the responses of the initiating actors, it is crucial to go beyond these formal duties. In both

the Green Services and the Soil Remediation cases, the Commission also adopted a more accommodating - though within the boundaries provided by the state aid regime - stance. In both cases, the Commission made various suggestions on how to be exempted from particular EU state aid requirements. By making these suggestions, the burden placed on the Commission to scrutinise state aid measures could also be lessened.

#### *Activities of other actors*

As well as the position of the Commission, the position and actions of various domestic actors must be considered to account for the different responses pursued by actors. Across the cases, first of all, (semi-)private stakeholders exerted particular pressures and expectations on the initiatives to respond to the EU formal rules in a particular manner. The strength and direction of the pressures and expectations put on the initiating public actors by the stakeholders varied considerably across and during the cases.

- In the Phyto case, NAK (one of the autonomous inspection bodies / ZBOs) and the private sector initially went along with informing the Commission about the reform. Towards the end of the application episode, however, these parties became aware of the Commission's requirement to separate the activities of NAK and NAK Agro. To avoid doing so, NAK and the private sector put pressure upon the Ministry of ANF by, amongst other things, mobilising the media and a Member of Parliament.
- In the Soil Remediation case by contrast, the dry cleaning sector Netex put a strong expectation on the Ministry of HSPE to gain (legal) certainty that the support scheme would be accepted by the Commission. Before accepting the scheme, the dry cleaning sector wanted to be sure that the financial aid would not have to be returned. At the same time, however, Netex also expected the Ministry to get approval for a financial support scheme that would be open for the complete dry cleaning sector.
- In the Green Services case, the expectation put on the Province had been a more general one to sign custom-made contracts and show results. This pressure mounted the longer it took for the first contracts with farmers to be signed.

A crucial role in this case was played by the Ministry of ANF. In this case, the Ministry would provide financial support to the Province for implementing the Green Services initiative. To receive the financial support, the Commission would have to be notified of the Green Services initiative and approve the initiative.

### *Ideas*

Ideas that portrayed existing policy instruments and arrangements as a barrier to carrying out particular policies featured clearly in the ideational context of all three cases.

- In the Phyto case, researchers at the University of Leiden portrayed the existing plant inspection system as a 'patchwork'. Their study on the functioning of the plant inspection system concluded that the sharing of responsibilities between various parties was unclear and that plant quality inspections were inefficient and too costly for the private sector.
- In the Soil Remediation case, a number of studies have identified difficulties with existing policy instruments. These studies pointed out that the remediation of polluted soil in a functional manner had stagnated because of the limited effectiveness of hierarchical policy instruments. The top-down obligation to remediate polluted soil was considered ineffective to mobilise companies, and in particular, small companies such as dry cleaners. The extensive costs and risks attached to remediation made these companies reluctant to remediate polluted soil.
- Finally, in the Green Services case, difficulties with existing agri-environmental schemes were perceived and on the basis of direct feedback from farmers in the area, the existing schemes were perceived to be ineffectual in motivating farmers to get involved in landscape management and development activities.

Across the three cases we also find a number of different ideas that stressed the appropriateness of adopting specific (more horizontal) policy arrangements or instruments.

- In the Phyto case, the ideational context included broader ideas that related to questions on the tasks, responsibilities and authority of the Ministry of ANF. The slogan 'Ensuring, rather than taking care of' (re)defined the Ministry's role in terms of taking responsibility for setting particular norms and standards while granting space for initiatives of the private sector to meet these standards. The framework 'Supervising Control' provided a more specific standard regarding the conditions in which it would be appropriate for the Ministry of ANF to supervise the self-regulating activities of the private sector.
- In the Soil Remediation case, the ideational context included more established ideas on the appropriateness of using covenants and financial support schemes to deal with environmental problems. These instruments had been developed within the Ministry of HSPE to meet environmental goals where existing top-down instruments would be



ineffective. These ideas featured prominently in the ideational context from the start of the episode and remained stable. The underlying principle of the Dutch soil policy however, did change in this case. The limited effectiveness of the existing top-down policy instruments also feed back on the principle of *functional remediation*. This was replaced during the application episode by a principle of *monitoring and control*.

- In the Green Services case, the Green Services concept itself must be considered. This concept stressed the appropriateness to move away from existing agri-environmental schemes and look for alternative ways to govern rural area development. The concept redefined farmers' agri-environmental activities as a societal service and emphasised the appropriateness of rewarding agri-environmental activities with a market-based price on the basis of custom-made contracts.

Across the cases we can also recognise particular ideas that affected the interpretation of the initiating actors on the fit of the governance initiative with the EU formal setting.

- In the Phyto case, previous inspections by the Commission's FVO strongly influenced the Ministry of ANF's interpretation on the compatibility of the reform and the EU formal setting. During these inspections, no concerns had ever been raised by the FVO on the Dutch phytosanitary inspection system and the role of ZBOs in this system. The Ministry of ANF however, realised that on the basis of its activities at the international level, other parties might have difficulties understanding the role of ZBOs.
- In the Green Services case, an interpretation of the state aid regime was provided by way of advice from a consultancy office. The report by the consultancy office provided a strong cue for the Province on how to define Green Services (as services of general interest) and interpret the application of different EU state aid requirements.

Finally, we need to take into account various ideas concerning the wider application context. In both the Phyto and Soil Remediation case, *shared experiences* with the role and capacity of the Commission in supervising actors' conformity to the EU legal setting featured as an important aspect of the ideational context. Actors' experiences with the implications of entering a more formal enforcement stage, in particular, must be taken into account.

#### **8.4.2 Explaining actors' responses by the activation of social mechanisms**

In this section I connect the different contextual factors that featured in the cases and the various responses that were pursued by introducing different social mechanisms. The

activated and operating mechanisms are the logic of appropriateness, the attribution of threat, of opportunity and of failure and the mechanisms of certification and decertification. The comparative analysis shows not only how different contextual factors and mechanisms can generate a similar response, but also how similar factors and mechanisms, in combination with other factors and mechanisms, can generate different responses.

#### *Explaining actors' commitment*

In all three cases the initiating public actors were strongly committed to introducing the governance initiative. This commitment can be largely accounted for by turning to the activation and operation of a *logic of appropriateness* mechanism. The logic of appropriateness mechanism involves the process by which an actor considers its situation and identity (role) and follows or re-imagines the legitimate or appropriate standards attached to this identity and situation.

In all three cases, various research reports and studies provided initiating actors with clear feedback on the functioning of existing policy instruments and arrangements. These reports presented them with specific problematic descriptions and problem images of the situation by emphasising the limited performance of the existing instruments and arrangements in meeting particular policies or providing particular services.

Across the three cases it can be observed that initiating public actors attended to different established or shared ideas for guidance to address these problems.

- In the Phyto case, the Ministry of ANF turned to the 'Supervising Control' framework to reorganise the existing plant inspection system. This framework provided the Ministry with the idea to delegate tasks to the private sector under the supervision of the Ministry. Doing so was considered appropriate, particularly in light of the changing ideas on the role of the Ministry by which it would remain responsible for setting particular norms and standards yet provide room for initiatives of the private sector.
- In the Soil Remediation case, the Ministry of HSPE turned to a covenant and financial support instrument to mobilise dry cleaning companies into taking responsibility to clean up polluted soil. Ideas on the appropriateness of using these instruments to meet environmental goals had been well established within the Ministry of HSPE. Turning to these instruments was considered appropriate (or even obvious).
- In the Green Services case, the Province of Gelderland and local actors in the Ooijpolder-Groesbeek area had been directly involved in the development of ideas on how to involve farmers in carrying out landscape activities on the basis of custom-made

contracts and market-based prices. The wider sharing of these ideas by other parties involved with the development of rural areas in other regions and the articulation of the *concept* of *Green Services* in national policy documents strengthened the perceived appropriateness of paying farmers a market-based price on the basis of custom-made contracts.

The operation of the logic of appropriateness mechanism by these different contextual factors generated a committed and persistent stance to introduce the governance initiatives. To account for the responses initiating actors pursued, we must turn to the activation and operation of other social mechanisms that operated in concert with the logic of appropriateness mechanism. I turn to this below.

#### *Explaining influencing*

In the Phyto case, the Ministry of ANF anticipated that delegating phytosanitary inspection tasks to the autonomous inspection bodies / ZBOs could trigger questions by the Commission. From its shared experience, the Ministry knew that other parties often found it difficult to grasp the role of these bodies and expected that the reform could lead to questions from the Commission. Given the responsibility of the Ministry to guarantee the phytosanitary status of the Dutch plant sector (greatly strengthened by the economic importance attached to the plant sector) and the Ministry's mounting doubts, an *attribution of threat* mechanism was activated.

This activated attribution of threat mechanism - which involves the process by which an actor interprets its situation, comes to see it as a threat to the realisation of its goals and decides to remedy or prepare against it - mobilised the Ministry to contact the Commission. By pursuing a response of influencing it attempted to prevent the Commission from losing its confidence in the Dutch phytosanitary inspection system. On the basis of its own assessment of the formal setting, the Ministry was confident that the interpretation of the Commission on the reform could be managed by emphasising that the Ministry would remain formally responsible for the phytosanitary status of the Netherlands.

Perceived uncertainties on how the Commission would interpret the initiative also generated an influencing response in the Soil Remediation and Green Services cases. In these cases it did so in a less direct way.

- In the Soil Remediation case, the influencing response was greatly affected/influenced by a representative of the dry cleaning association Netex who wanted certainty that the financial support scheme would be 'Brussels proof'. The Netex representative expected the Ministry to notify the Commission of the scheme but also expected that the support scheme would be open for all dry cleaning companies (see below). Prior efforts by the Netex representative to motivate individual dry cleaning companies to join the scheme had activated a so-called *certification* mechanism. This mechanism involves the process by which an actor interprets the behaviour or the claims of another actor, assesses whether these meet acceptable criteria for acting or claim making and then validates these claims. On the basis of the Ministry's assessment of the representative's efforts, the Ministry validated its expectations and informed the Commission of the scheme.

Based on its experience with the state aid notification procedure, the Ministry, however, also knew that informing the Commission could delay the introduction of the support scheme as it expected the Commission would scrutinise the scheme on the basis of the guidelines on aid for environmental policy. Conforming to these guidelines would imply that a number of dry cleaning companies (i.e. those that could be held responsible for the pollution) had to be excluded from receiving aid. Notifying the Commission of the scheme activated an *attribution of threat* mechanism.

The operation of the attribution of threat mechanism mobilised the Ministry to combine a response of escaping and influencing. In the formal notification of the scheme, the Ministry depicted a somewhat selective image of the Dutch dry cleaning market and argued that financial support to dry cleaning companies would be in line with the Treaty. By doing so, it attempted to avoid a detailed scrutiny by the Commission on the basis of the guidelines on aid for environmental policy and defy the threat of notifying the scheme.

- In the Green Services case, an *attribution of threat* mechanism was activated by the state aid rules for the agricultural sector and the state aid notification duty. The Province realised that conforming to these requirements would set limits on the initiative; this would prevent market-based payments and establishing custom-made contracts. This threat mobilised the Province to find a way to avoid these rules. Advice from a private consultancy office fuelled an *attribution of opportunity* mechanism in this example. The consultancy office's recommendation to define the Green Services as services of general interest would make it possible to apply the criteria of the so-called Altmark arrest. The state aid rules for the agricultural sector and the notification duty could thereby be escaped.

The Ministry of ANF, however, required that the initiative would be brought to the attention of the Commission before financial support for the project would be provided. Seizing the opportunity provided by the 'Altmark arrest' was thereby prevented. The Ministry's demand activated an *attribution of threat* mechanism and mobilised the Province into taking action to counter this threat. On the basis of the advice from the consultancy office, the Province held a strong belief that Green Services could be defined as services of general interest: it was confident that it could convince the Ministry to relax its demand. Its belief that this threat could be prevented by changing the interpretation held by the Ministry of ANF mobilised the Province to pursue a response of influencing.

As noted in the Green Services case, the Province of Gelderland also attempted to influence the Commission. This response, as will become clear, was generated by the requirement of the Ministry of ANF to notify the Commission of the initiative. To fully explain this response, however, we must first consider a number of other responses pursued in the direction of the Ministry of ANF. The response of influencing the Commission is therefore discussed under a separate heading below.

#### *Explaining challenging*

The influencing response was unsuccessful in all three cases. In the Phyto and the Soil Remediation cases, the Commission was not persuaded by the Ministries. Instead, the Commission started asking (critical) questions about the compatibility of the initiatives with the EU formal setting. In both examples, the influencing response thus fed back onto the context and presented initiating actors with a stricter interpretation of the application of the EU formal rules. This interpretation, however, was not directly accepted and was challenged.

- In the Phyto case, the critical stance of the Commission followed in part from recent monitoring activities by the Commission's FVO and its findings of a possible breach with the Phytosanitary Directive. After being informed of the reform by the Ministry of ANF, the Commission was concerned that delegating the phytosanitary inspection tasks to NAK would enlarge this breach.

The Commission's critical stance activated an *attribution of threat* mechanism although its strength was somewhat weakened by the Ministry's belief that it could convince the Commission of the feasibility of the reform. This confidence was largely based on the Ministry's experience with the monitoring by the Commission's FVO: so far

this had not led to serious concerns by the Commission. The Ministry continued to believe that the Commission would eventually approve the reform once the reform was properly explained. This explains not only why the strict interpretation of the Commission was challenged by the Ministry but also why it was somewhat ignored.

- In the Soil Remediation case, the Commission also requested additional information on the functioning of the financial support scheme. The arguments in the notification of state aid presented by the Ministry of HSPE were insufficient for the Commission to make a decision. More importantly, the Commission adopted a critical stance on the possible support for companies near the border: the Commission made it clear that this would not be allowed. The Commission's interpretation activated an *attribution of threat* mechanism. Conforming to this interpretation would imply that a considerable number of dry cleaning companies would not receive financial support. The Ministry of HSPE did not accept this interpretation and on the basis of its understanding of various pieces of EU case law, it was convinced that aid to companies near the border would be feasible. This mobilised the Ministry to challenge the Commission's interpretation.
- In the Green Services case, the influencing response used against the Ministry of ANF was also ineffective. The Ministry was not convinced by the Province's arguments and it upheld its stance that the initiative had to be notified. Given the Province's commitment to introduce the governance initiative, this requirement strengthened the operation of an *attribution of threat* mechanism. In combination with its belief that notification was unnecessary, the Ministry's demand generated a challenging response from the Province.

The response of challenging, as noted, was pursued more fiercely in the Green Services case as compared to the other two cases. To explain this difference we must consider the activation of the *decertification* mechanism. This mechanism involves the process by which an actor withdraws the validity of particular claims and/or the validity of those making these claims. In the Green Services case, this mechanism was activated by the (lack of) arguments provided by the Ministry of ANF as to why the European Commission had to be notified of the scheme. The Province felt the Ministry too easily blamed the European Commission for the Ministry's (strict) position. This perceived lack of validity mobilised the Province to pursue a more assertive, challenging response.

The further lack of discussion on the application of the state aid rules strengthened the operation of the decertification mechanism. This caused the Province to question the validity of the Ministry. As a result, the Province not only challenged the notification

requirement but also openly questioned the expertise and authority of the Ministry of ANF. An attacking response was thus pursued.

#### *Explaining influencing the Commission*

In the Green Services case, the unaffected stance of the Ministry of ANF also activated an *attribution of failure* mechanism. This mechanism involves the process by which an actor interprets its previous efforts in light of its goals, assesses these efforts as unsuccessful and then rejects these efforts. The activation of this mechanism made the Province realise that it would be futile to continue its attempts to change the Ministry's view; the initiative had to be notified to the Commission if the Province wanted to receive financial support.

The delay that resulted from the ongoing discussion with the Ministry also started to threaten farmers' interest to participate in the initiative. This activated an *attribution of threat* mechanism. In light of this development, agreeing to notify the scheme was considered a way to end the protracted discussion at the national level and counter this threat. The Province, moreover, had high expectations it could persuade the European Commission: once the initiative was accurately explained, the Province anticipated that the Commission would agree that Green Services qualified 'as services of general interest'. The Province, therefore, decided to organise a meeting with the Commission (together with the Ministry of ANF) and pursued a response of influencing.

#### *Explaining conformity and pacifying*

During the meeting with the European Commission, however, the Commission held to a strict interpretation on the application of the state aid rules: Green Services had to be defined as an agri-environmental measure and, as such, had to meet the state aid rules for the agricultural sector. The Commission's strict interpretation activated a strong *attribution of failure* mechanism. Given the Province's (high) expectations that it could successfully influence the Commission, the Commission's strict position functioned as a shock or focus event and abruptly closed the 'window of opportunity' provided by the 'Altmark criteria'. This shock caused the Province to believe that it had no alternative but to conform to the Commission's interpretation.

Direct interference by the European Commission also generated a response of conformity in the Phyto case. As in the Green Services case, the Commission made clear that it would not accept the initiative unless the reform was brought in line with (the Commission's interpretation of the application of) the Phytosanitary Directive. In this case, the

Commission sent a formal letter to the Ministry of ANF in which it demanded a satisfactory answer to its questions about the independence of NAK and its relationship with NAK Agro. In this example, the letter functioned as a focus event: until this moment the Ministry of ANF strongly believed it could convince the Commission. By activating an *attribution of failure* mechanism, the letter made the Ministry realise that the Commission's concerns had to be taken seriously.

In this example, the formal stance did not directly lead to conformity. The Ministry's commitment to introduce the initiative initially made it search for a way to introduce the scheme without formally separating NAK and NAK Agro. An *attribution of opportunity* mechanism in this example was fuelled by the presence of private ISO standards. The Ministry hoped that conforming to these private standards would pacify the Commission's concerns and make the Commission open to the reform.

These private standards could not appease the Commission; the Commission made it clear that the reform would not be accepted unless NAK and NAK Agro were formally separated. The Commission's reaction activated another *attribution of failure* mechanism; this reinforced the Ministry's belief that there were few other options available but to follow the Commission's requirements. Even though the reforms' direct stakeholders (NAK and the private sector) exerted strong pressure on the Ministry not to concede to the Commission's demand, the Ministry was convinced it had little choice.

The need to adjust the initiative to conform to the particular EU rules - at least with regard to internationally operating dry cleaning companies - was recognised from the outset in the Soil Remediation case. In fact, the Ministry of HSPE considered it a threat to provide aid to these companies as this would likely lead to additional questions from the European Commission. Netex' expectations, however, motivated the Ministry to include these companies anyway. Realising that it would be futile to try to influence the Commission's view, the Ministry pursued a response of pacifying.

As the Ministry expected, the European Commission was not satisfied and requested that international companies be excluded from the scheme; if not, the scheme would not be approved. The Commission's firm stance activated an *attribution of threat* mechanism: without approval the scheme could not be introduced and not meeting this requirement could jeopardise the scheme in general. The Ministry of HSPE conformed to the state aid requirements in order to address this threat.



### *Explaining escaping and buffering*

- In the Soil Remediation case, the Commission increased its pressure to not only exclude internationally operating companies from the support scheme but also to exclude companies operating near the border. In case the Ministry would not agree to this, the Commission would open a formal investigation procedure - in line with the procedural state aid rules - to decide on this issue. The opening of a formal investigation procedure activated an *attribution of threat* mechanism. On the basis of its shared experience with this procedure, the Ministry of HSPE anticipated that entering this procedure would, at a minimum, lead to serious delay. Although the Ministry believed that giving aid to companies operating near the border was feasible, it realised that the formal investigation procedure had to be avoided.

The operation of the *attribution of threat* mechanism motivated the Ministry to turn to the Commission's earlier suggestion to meet the criteria of the *de minimis* Regulation: by lowering the amount of financial support, the scheme could be implemented without needing the approval of the Commission. So far, this had not been considered a viable option by the Ministry as lowering the amount of support would exclude a number of dry cleaning companies from joining the scheme. In light of the threat of a formal investigation, meeting the *de minimis* criteria was considered a reasonable alternative.

Changes in Dutch soil remediation policy and an invitation from the Commission to discuss the support scheme were needed before the Ministry turned to the *de minimis* Regulation. The change from a 'minimal functional remediation' principle towards the 'management and control' principle, made it possible to lower the remediation costs for dry cleaning companies and, thereby, the amount of financial support. The Ministry, however, was uncertain whether the Commission would accept this escape-route; it feared that explaining the change in Dutch soil remediation policy would lead to ambiguities and this would further delay the notification procedure. The Ministry of HSPE only dared to raise this policy change after the Commission invited the Netherlands to directly discuss the support scheme.

The Commission's suggestion to meet the *de minimis* criteria, the change in soil policy and the invitation for a direct meeting all activated the operation of an *attribution of opportunity* mechanism. This opportunity was seized by the Ministry to escape from conforming to Article 87(1) EC Treaty or the guidelines on aid for environmental protection and allowed it to introduce the support scheme.

- In the Green Services case, the Commission also suggested a way to deal with the state aid rules. While it stressed that the initiative had to conform to the 'state aid rules for the agricultural sector', it requested a single notification of all Green Services projects initiated in the Netherlands. Other domestic actors (including the joint Provinces) perceived this as an opportunity to avoid the lengthy and uncertain notification procedure. By compiling a so-called catalogue of individual measures that could be used to make custom-made contracts, individual projects could be buffered from notification duty.

The Province of Gelderland, however, did not directly perceive the Commission's suggestion as an opportunity; it felt that joining the catalogue could lead to further delay and jeopardise the enthusiasm of local actors in the field. Therefore, it decided to notify its initiative individually to the Commission. As in the Soil Remediation case, a number of other developments and events were needed before the Province seized the Commission's suggestion. The preparations for the notification firstly, were delayed; this made it less of a risk to join the single notification of the catalogue. In addition to that, an expectation was put on the Province by the joint Provinces to join the catalogue. In light of these events, joining the catalogue activated an *attribution of opportunity* mechanism: the Province eventually realised that the catalogue provided a way to establish custom-made contracts without needing to go through a process of European Commission notification.

In the Green Service case, the Province finally also succeeded in escaping the substantive state aid requirements by using private money to reward farmers for their landscape activities. The long delay and the difficulties in setting up custom-made contracts had motivated actors in the field to organise a landscape auction. The auction activated an *attribution of opportunity* mechanism. By using private finances to reward farmers for their landscape activities, the EU state aid regime could be escaped altogether.

### **8.5 How do actors' responses affect the introduction of horizontal forms of governance?**

Despite their engagement in a number of active responses, the initiating actors in all three cases, as noted above, eventually adjusted the governance initiatives to *conform* to the EU formal setting. The impact of this conforming stance on the introduction of the governance initiatives varied considerable across the cases.

- The delegation of phytosanitary inspection tasks to the different autonomous inspection bodies in the Phyto case was motivated by two main ambitions. The reform, as noted, aimed to (i) clarify the role and responsibilities of different parties involved with plant inspections and (ii) reduce the inspection costs for the private sector.

By conforming to the Commission's interpretation of the Phytosanitary Directive, the latter ambition could not be realised. By placing a 'Chinese wall' between NAK and its commercial subsidiary NAK Agro, it prevented the sharing of staff and equipment between NAK and NAK Agro. The expected cost reduction for the private sectors was, thereby, not accomplished. The ambition to clarify the roles and responsibilities of the different inspection bodies in the overall plant inspection system, however, was not greatly affected by the response of conformity. The delegation of the phytosanitary inspection tasks to the different autonomous inspection bodies was still implemented.

- In the Soil Remediation case, the Ministry of HSPE had to partly adjust its financial scheme to gain approval from the Commission: internationally operating dry cleaning companies were excluded from receiving aid. Doing so implied a compromise on the ambition to create a support scheme that would be open to all dry cleaning companies. Given the limited number of such companies (four) and the expectation that they would likely not make use of the scheme, this can be considered a minor adjustment.
- In the Green Services case, the Province of Gelderland also adjusted the initiative to gain approval from the European Commission. According to the Commission, market-based rewards (by public actors) could not be provided to farmers under the EU state aid rules for the agricultural sector: the reward for Green Services had to be based on a loss of revenue and additional labour costs. The Province conformed to this demand and agreed to adjust the height of the payments farmers could receive for their landscape activities. One of its main ambitions (i.e. paying farmers a market-based price) could thereby not be realized - at least not by using public finances (see below).

In both the Green Services and Soil Remediation cases, initiating actors succeeded in regaining some discretion or circumventing the EU formal rules. In both situations the possibility for this success was provided through a suggestion by the Commission made during the application episode. These suggestions also provided an opportunity for the Commission to reduce the workload of having to scrutinise the aid measures.

- In the Soil Remediation case, actors managed to escape different EU state aid requirements by lowering the amount of financial support offered. In order to make sure that dry cleaning companies operating near the border could receive support from the scheme, a lower amount of financial support was provided by the Ministry. By doing so,

the financial support could be brought in line with the exemptions provided by the EU state aid rules for aid of minor importance (*de minimis* Regulation).

- In the Green Services case, the EU state aid notification procedure - required to get approval for the custom-made contracts - was avoided. By establishing a single catalogue of individual agri-environmental measures that was approved in one hearing by the Commission, custom-made contracts could be created that would not require further Commission scrutiny and approval. The second ambition of the Province (i.e. establishing custom-made contract) was thereby realised.

As noted, the Province eventually succeeded in escaping the EU state aid requirements by using private money to reward farmers for their landscape activities.

## **8.6 Conclusion**

In this chapter I compared three different case studies in terms of the EU formal rules that confronted the governance initiatives and the way actors responded to these rules. To explain these responses, a range of contextual factors and social mechanisms were invoked. By taking into account the variable combination of the EU formal rules, the contextual factors and the activation and operation of different social mechanisms, it was possible to explain the differences and similarities within and between the three cases. By contrasting similar responses that were pursued across the three cases, the different configurations of contextual factors and mechanisms generating these responses were compared. In the final chapter of this study, I rely on this detailed comparison to discuss in more general terms how initiating actors responded to EU formal rules and what explains these responses.

# CHAPTER 9

## CONCLUSION II: DISCUSSION AND REFLECTION

In the previous chapter the main research questions of this study were answered from a comparative perspective. Successively, I answered and compared (i) which EU formal rules confronted the different governance initiatives; (ii) how (public) initiators exactly responded to these rules; (iii) how these responses can be explained; and (iv) how these responses affected the introduction of the horizontal governance initiatives. Section 9.1 of this final chapter will briefly summarise and further discuss the substantive results of this study. Section 9.2 will then reflect on the analytical approach adopted in this study. Section 9.3 will turn to various lessons that can be drawn from this research. The chapter concludes with some final remarks.

### 9.1 Struggling with Europe

In this study three cases were analysed in which EU formal rules frustrated the introduction of horizontal governance initiative. This study showed how initiating public actors struggled with the application of different EU formal rules that (threatened to) set limits to the introduction of horizontal forms of governance. It identified a number of recurrent elements across the cases.

In all three cases, to start with, all public initiators were strongly motivated to introduce the horizontal governance initiatives. To address the limited performance of existing policy instruments and governance arrangements, actors turned to various (new) ideas on horizontal forms of governance. These forms of governance were considered to provide for a more effective or efficient policy arrangements or instruments, but were also regarded appropriate given the initiating actor's roles and responsibilities. The (normative) commitment of initiators generated a persistent stance to introduce the governance initiatives. This persistent stance was further reinforced by the expectations of other direct involved stakeholders to the governance initiatives.

During the introduction of the initiatives, public initiators met different EU formal pressures that had to be dealt with. Conforming to these pressures in a *stringent* manner would imply that the initiatives had to be adjusted. The case analyses showed that the prospect of having to do so was considered a threat given actors' ambitions to introduce the horizontal governance initiatives. Initiating actors believed that conforming in a very strict way, was not unlikely; in all three cases initiators realised that the initiative could lack the understanding of the European Commission. The Commission - granted with the authority to enforce the application of EU formal rules - might impose a stricter interpretation of the application of the EU rules to the initiatives.

In all three cases public initiators contacted the Commission to make sure that the horizontal form of governance would be in line with the EU formal setting. The decision to contact the Commission was not taken straightforwardly in all cases. In the Soil Remediation and Green Services case, various domestic actors differed in their views on contacting the Commission or not. Initiating public actors realised that informing the Commission could provide certainty but would also be time-consuming. Different expectations and pressures by other domestic actors eventually mobilised public initiators to contact the Commission. Especially in the Green Services case, public initiators highly contested the need to contact and inform the Commission.

Recognising that the Commission could interpret the initiative differently and in a stricter manner, initiating actors consciously attempted to influence the Commission's perception of the governance initiatives. Initiating actors were confident about the possibility to do so. While realising that they were pushing the boundaries of the EU formal setting, they had a strong belief that the Commission would accept the initiatives. This confidence was based on previous experiences, EU case law or legal advice. This belief motivated initiating actors to engage in and sustain a number of responses to gain and maintain room for manoeuvre to introduce the initiatives, such as *influencing*, *challenging* and *pacifying*.

In hindsight, actors' efforts can be interpreted as opportunistic or naive (or a mixture of both); many of the responses actors pursued resorted little effect.<sup>45</sup> Despite their

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<sup>45</sup> A similar stance has been identified during the (problematic) implementation of the Council Directive 91/676/EEC concerning the Protection of Waters against Pollution caused by Nitrates from Agricultural Sources (the Nitrates Directive) in the Netherlands. Different authors concluded that national actors had little interest for the concerns of the European Commission on the way the Netherlands sought to implement the Nitrates Directive. The Netherlands operated from its own

attempts to gain or maintain room for manoeuvre, initiating actors had to adopt a more acquainting stance in the end to introduce the initiatives. A strict interpretation of the application of the rules had to be followed, although some opportunities to partly avoid (*escaping* and *buffering*) particular EU formal requirements could be seized across the cases as well.

Actors' unsuccessful attempts to gain or maintain room for manoeuvre were not without consequences. At various occasions during the application episodes the failed responses led to changes in the context which affected actors' responses at a later stage of the application episode. These changes often hindered the further attempts of the initiating actors to introduce the governance initiatives. In the section below, I turn more explicitly to the different dynamics that were generated by the pursuit of particular responses.

### **Reassembling the process: three recurrent patterns**

The range of responses pursued during the application episodes itself reflects the struggle of public initiators to find a way to introduce the different governance initiatives. The dynamics of this struggle, however, have remained somewhat opaque in the comparative analysis by turning to the *individual* responses that were pursued within and across the three cases. These 'snapshots' must be reconnected to shed light on the trajectories of the application episodes.

While the trajectories of the application episodes show sufficient variation, a number of (recurrent) patterns can be observed. Below I will turn to three patterns: (i) waking a sleeping watchdog (ii) going back and forth / trial and error, and (iii) heading for stalemate.

#### *Waking a sleeping watchdog*

In all three cases public initiators pursued a response of *influencing* in order to affect the Commission's interpretation of the governance initiative. Experienced uncertainty in all cases, as noted, motivated initiating actors to contact the European Commission in an attempt to convince it that the initiative would fit the EU formal setting. Initiators'

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position and remained committed to an *alternative* instrument to meet the goals specified by the directive. National officials could not imagine that the Commission would be against the use of this instrument, even though the use of the instrument did not strictly conform to the requirements that were laid down by the directive (Van Bavel et al 2004; Woldendorp 2003, 348).

commitment to the governance initiatives and their interpretation of the EU formal rules made them feel confident the Commission could be influenced.

However, instead of being convinced and giving its consent, the Commission asked critical questions on the functioning of the governance initiatives. The Commission, acting in accordance with its role as guardian of the treaties, in fact, put forward a stricter interpretation of the application of the EU formal rules than public initiators had foreseen. After being informed of the initiatives, the Commission wanted clear *legal* certainty that actor's compliance with EU formal rules would not be in jeopardy. By approaching the Commission, a sleeping watchdog was awakened that would not easily be calmed.

*Going back and forth / trial and error (under increasing pressure to conform)*

In more general terms the trajectories of the application episodes can be described in terms of going 'back and forth' or 'trial and error'. In both the Phyto and Soil Remediation case public initiators did not directly accept the Commission's strict interpretation of the application of the EU formal rules. Even though the Commission made various critical remarks, initiating actors remained confident that the Commission would eventually come to accept their interpretation. As a result, actors continued their attempts to *influence* the Commission but also started pursuing responses of *challenging* and *pacifying*.

In both cases, however, the Commission could not be motivated to lower its expectations; it was not convinced by actors' efforts. Instead it increased its pressure to make actors conform to (its interpretation of) the EU formal rules by threatening to move towards a more formal investigation stage in order to assess initiators' conformity to the EU formal setting. This increasing enforcement pressure mobilised initiating actors to adopt a more acquainting stance by activating two different social mechanisms; the attribution of threat and the attribution of failure.

On the basis of their shared experience initiating actors realised that entering a more formal investigation procedure would result likely in a delay; actors considered it a risk to enter this stage and decided to adopt a more acquainting stance. The Commission's continuing enforcement pressure, secondly, made actors adjust their perceptions of what would be possible; this caused them to change their (strategic) responses to introduce the initiatives. Eventually, initiating actors realised that it would be futile to continue their efforts to alter the Commission's interpretation on the application of the EU formal rules to the initiatives: initiators had to find a different way to introduce the initiative.



### *Heading for stalemate*

A third pattern, which can be observed in the Green Services case, will be referred to as 'heading for stalemate'. This pattern only took place in the Green Service case, but is well described in the (social-cognitive) literature on escalation (e.g. Pruitt and Rubin 1986); it is therefore worth singling out. It describes the patterns by which moderate responses are displaced by more extreme ones and that eventually results in a stalemate as actors are no longer willing or able to further escalate their responses. This pattern can be used to describe the interaction between the Province of Gelderland and the Ministry of ANF on how to interpret the application of EU state aid rules and the need to contact the European Commission.<sup>46</sup>

The Green Services case illustrates how the Province of Gelderland (the initiating actor in this case) turned to more assertive and aggressive responses after attempting (but failing) to influence the Ministry's interpretation of the application of the EU state aid rules to the initiative and the need to contact the Commission. The perceived threat of having to follow the Ministry's demand to inform the Commission and its strong belief that the governance initiative was in line with the EU state aid regime led the Province to *challenge* the interpretation of the Ministry. It did so in an increasing assertive manner as the Province felt the Ministry of ANF blamed 'Europe' too easily for its strict position. The Province denied the validity of the Ministry's requirement to notify the initiative to the Commission. Given the threat that was attributed to notifying the initiative, the Province rather fiercely challenged the Ministry's requirement.

Growing feelings that the Ministry did not seriously consider the Province's arguments during the on-going discussion eventually caused the Province to withdraw its support of the Ministry of ANF more in general. Given the attributed threat of notifying the Commission, the lack of respect for the Ministry of ANF eventually mobilised the Province to *attack* the Ministry.

This escalated process headed in the direction of a stalemate, as neither the Province nor the Ministry intended to change their interpretation of application of the state aid rules and the need to inform the Commission. Eventually a stalemate was prevented in this example as the Province increasingly came to realise that continue pursuing this response would be futile and started to experience a loss of support for its' actions (as it caused delay) by local stakeholder to the governance initiative. Without the local

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<sup>46</sup> This analysis is based on Zwaan and Goverde (2010).

expectations to get results this escalated process could have ended in a deadlock that would have further delayed the introduction of the initiative.

## **9.2 Theoretical and methodological reflection**

In this study an institutional processual (IP) approach was adopted to explain how public actors involved with the introduction of horizontal governance initiatives respond to EU formal rules. By adopting the IP approach different shortcomings found in recent institutional approaches to EU implementation were addressed; the way this was done is discussed in sub-section 9.2.1. The strengths and weaknesses of the IP approach in explaining EU implementation or application processes is further scrutinised in sub-section 9.2.2.

### **9.2.1 Integrating different factors**

By adopting the IP approach I aimed to integrate the diverse insights that have been provided by recent EU implementation studies - particularly those that draw on either rational choice *or* sociological (normative) institutionalism - within a single analytical approach. The different factors singled out by these studies to explain the implementation of EU formal rules may all be causally relevant. Instead of turning to these individual factors, we must consider different factors together and analyse the interaction between them. In doing so, moreover, greater attention should be paid to the role of *social-cognitive* ideational factors.

This study demonstrates the need to integrate different factors that have been singled out by rational choice and sociological (normative) institutional approaches. The case analyses showed that to explain actors' responses a variety of different factors must be considered together.

The different factors singled out in rational choice or sociological institutional approaches, importantly, do not lose their relevance for the study of implementation by adopting an IP approach. However, the causal relevance of a number of these factors can be put into perspective, as will be illustrated below.

Like sociological (normative) institutional approaches, this study has highlighted the need to take into account normative ideas (on policy instruments) at the Member State level to explain how EU formal rules are responded to. This study supports the (sociological institutional) argument that in case of a conflict between such ideas and EU

formal rules, implementation is not straightforward. This argument, however, can be further qualified. The present study shows that actors' commitment to the governance initiatives did not lead them to adopt only a resisting stance in the case of a conflict. The three cases, as discussed above, show that this can mobilise actors to turn to a number of active responses to alter the application of the EU formal rules and to lower the threat of conformity.

The three cases also show that the increasing *monitoring and enforcement activities* of the Commission closed in on actors' efforts to counter the threat of conformity to the EU formal rules. Eventually the increasing enforcement activities of the Commission - in line with the expectations of rational choice institutionalism - made actors adopt an acquainting stance. It is worth stressing, that the enforcement activities did not simply outweigh actors' commitment to introduce the initiatives. The cases demonstrate that it was largely *because* of actors' commitment to the horizontal governance initiatives that they eventually adopted an acquainting stance when the Commission moved to more formal investigation stages. Not doing so was expected to lead to a further delay to introduce the governance initiatives and possibly jeopardize the introduction of the initiatives altogether. Under this pressure actors realised that they had to adopt a pragmatic stance to introduce the initiatives.

This study, moreover, has clearly illustrated that the impact of the enforcement activities by the Commission was mediated by various ideas - in particular *shared experiences*. In the Soil Remediation case, the threat attributed to the monitoring activities of the Commission was shaped by the shared experience that it would be time consuming and difficult to 'win' a legal dispute with the Commission once it opened a more formal state aid investigation. In the Phyto case, by contrast, *shared experiences* limited the impact of the Commission's enforcement activities. On the basis of its experience with the inspections by the European Commission's Food and Veterinary Office (FVO), the Ministry of ANF did not expect that the Commission would increase its enforcement pressure to make the Ministry conform to the Commission's (strict) interpretation of the EU formal rules.

It has become clear from the cases that these ideas changed during the application process, largely as a result of direct experience gained during this process itself. In part this happened in an incremental way: by observing the consequences of their responses, actors increased their awareness of what response was possible and what was futile. This change also took place more rapidly as a result of unexpected events. In the *Phyto* and *Green Services* case unexpected actions by the Commission made actors revise their view

and realise that the EU formal rules had to be taken seriously. Surprisingly, little attention is given in EU implementation literature to these processes of (strategic) learning. This process deserves more consideration by EU implementation scholars.<sup>47</sup>

### **Dynamics and responses**

By adopting an institutional processual approach I also sought to acquire a more dynamic understanding of the application of EU formal rules. In part, as noted, such dynamics are reflected in various case studies on the implementation of EU formal rules. However, an explicit processual approach is not found in EU implementation literature; typically a variable oriented approach is adopted to explain the implementation of EU formal rules.

In this study I tried to shed light on these dynamics by analysing in detail how actors respond to EU formal rules *during* the application process.

This study illustrates that the way actors respond to EU formal rules can involve a number of efforts that are likely to change during the application episode. Either as a result of changes in the context or through processes of strategic learning, actors may adapt their responses to new (experienced) conditions. By analysing these responses, the way they changed the context and (thereby) fed back on actors' responses, it was made possible to identify a number of recurrent patterns in the trajectory of the application episode. Singling out these patterns and analysing the conditions under which they are likely to occur, can provide additional insights into the EU implementation or application process.

By analysing these responses, more in general, this study showed that the way actors respond to EU formal rules is more varied than is currently acknowledged in EU implementation literature. Between the responses of non-conformity and conformity a range of other responses can be pursued that can be addressed in a systematic way. Doing so can provide an opportunity to further theorise how and why actors respond to EU formal rules. By including responses such as *escaping* and *buffering*, for example, attention was drawn to actors' search for creative ways to avoid conformity to EU formal rules. Analysing these creative efforts - likely in combination with processes of (strategic)

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<sup>47</sup> In as far as attention is given to learning processes in EU implementation literature the focus is on processes of learning that change actors' identities. There is little attention to processes of direct (strategic) learning as a result of on-going experience in the EU implementation literature.

learning - can shed a somewhat alternative view on the application / implementation of EU formal rules.<sup>48</sup>

### **9.2.2 An institutional processual approach**

By adopting an IP approach I aimed to develop a general framework or approach to analyse and explain the application of EU formal rules rather than to highlight specific individual factors that may or may not have an impact on the implementation of EU formal rules. The framework developed in this study consisted of three basic 'building blocks': (i) contextual factors, (ii) social mechanisms and (iii) actors' responses. On the basis of these building blocks and their variable and changing interaction, a holistic and processual picture and explanation of the application process was presented. The substantive results gathered on the basis of this approach have been discussed above; below I will briefly reflect on the 'practicalities' of working with an IP approach.

#### **Three building blocks**

##### *Contextual factors*

To explain actors' responses, general categories of contextual factors were used in this study: a distinction was made between institutions, activities of other actors and ideas. As general categories these contextual factors were not further specified or operationalised. The concrete manifestation of these factors, as mentioned, had to be determined empirically - largely on the basis of actors' interpretations of the context in which they operated.

Doing so provided an opportunity to address aspects or dimensions of the context that might not be considered a priori by the researcher but were seen as relevant by the involved actors. This allowed me to capture in an open way how actors perceived the different aspects of the context and how these different aspects related. Relying on actors' perceptions of the context, however, also introduces the risk that certain contextual factors may be somewhat overlooked or are taken for granted or, conversely, are given too much attention. In part this was compensated by triangulating the empirical data. At different moments during the analysis of the cases, however, it became clear that

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<sup>48</sup> Such a view could be further developed by focusing on recent institutional literature that draws on the work of American pragmatists to account for creativity of actors. In this literature, as can be also observed in this study, creativity is depicted as a bounded process that arises from practical situations (see e.g. Jackson 2005, Ansell 2005, Scott 2008).

a more detailed understanding of the context was needed to describe its impact on actors' responses. The *comparative analysis* of the three cases, in addition, forced me to assess whether contextual factors that played a causal role in a particular case also featured the other cases. On both occasions, it was necessary to go back to the empirical data or contact interviewees again to clarify the story and construct a more coherent account. This can be time-intensive.

As expected, it can be difficult to fit specific aspects of the context into one of these general categories. Categorising the monitoring and enforcement activities of the Commission, for example, proved somewhat problematic. Following Barzelay, I decided to treat the role of the Commission - as guardian of the treaties - largely as part of the institutional context, even though the case studies revealed that the Commission acted on various occasions beyond this formal role. As an analytical building block these categories provided for sufficient guidance to research the different cases and to reconstruct the different application episodes; these categories adequately helped identifying those contextual factors that must be taken into account to explain actors' responses.

#### *Social mechanisms*

The different *social mechanisms* used in this study provided a useful catalogue as well. With the exception of the *attribution of success* mechanism, the different selected social mechanisms all played a role during the application episodes at some point. On the basis of these mechanisms - and by connecting them either in a subsequent manner or by combining them - it was possible to causally link the diverse aspects of the context to actors' responses.

It is worth noting that these mechanisms, of course, could have been used also to explain the efforts of other actors that featured the cases. For example, they could have been used to explain the actions of the European Commission or the efforts of other domestic actors. Doing so, in my view, would have complicated the research approach and in particular the systematic comparison of the different cases. Comparing the range of responses pursued by initiating actors within and across the three cases already proved hard. For this reason I decided to focus on explaining the activities/responses of the initiating actors and to treat the activities of other actors as part of the broader context. In as far as I provided an explanation for the activities of other actors I did so in narrative terms.

### *Responses*

On the basis of the work of Oliver (1991) a typology of different responses was distinguished. The typology of responses, as noted, provided the starting point from which to analyse the relationship between different contextual factors and mechanisms. The typology enabled identifying (intermediate) outcomes in the episodes and allowed for a systematic analysis of how actors actually (attempt to) respond to EU formal rules.

Applying these responses to actors' efforts was not always easy as responses were often combined by the initiating actors. The response of influencing, for example, was pursued in the Green Services case to find a way to escape the EU state aid rules for farmers. Applying the responses to the empirical data also demonstrated that particular responses may in fact include different sorts of efforts. The response of challenging provides for an example. This response varied considerably across the three cases. In the Plantkeur case the response of challenging moved in the direction of what I called downplaying (a combination of challenging and ignoring). In the Green Services case however, the response of challenging was pursued rather severely.

### **Putting the building blocks together...**

On the basis of the different building blocks used to analyse the case studies it was possible to present a holistic and processual analysis of how actors respond to EU formal rules. Investigating the different mechanisms and their operation in different contexts allowed for a number of limited analytical generalisations to be made on the responses actors will pursue under particular conditions and operating social mechanisms.

As stated already in the theoretical chapter, the institutional processual approach does not provide a parsimonious explanation for how actors respond to EU formal rules. A range of contextual factors and social mechanisms - that play a 'shifting explanatory role', depending on their combination - must be invoked (cf. Barzelay and Gallego 2010b). Given the complexity and dynamics of implementation / application processes, it is questionable whether EU implementation literature is best served by giving priority to parsimony: 'to the extent that knowledge of complexity is desired', as has been argued by Ragin, 'a parsimonious theory [may be] more of a burden than a blessing' (1987, 83).

However, working with a more general approach or framework that consists of various building blocks is not without difficulties either. While the empirical openness of the IP approach can be considered a strength as it allows us to analyse the complexity of a variety cases on the basis of a single approach, bringing together these different factors, mechanisms and responses requires much time and effort. Organising the building blocks

requires scholars to go back and forth between the empirical material and the different analytical concepts. Providing a mechanism based explanation of the application process can therefore be, like the application of EU formal rules itself, a dynamic and sometimes difficult struggle.

### **9.3 Lessons learned / recommendations**

*'Only those who will risk going too far can possibly find out how far one can go.'*

T.S. Elliot

This study has given an impression of the different ways actors can respond to EU formal rules and the effect of these responses. In doing so, various insights are provided for actors involved with the introduction of other horizontal governance initiatives that are confronted with (potentially) constraining EU formal requirements. These insights are described more explicitly in the following section. Before doing so, I will first briefly reflect on the relationship between EU formal rules and the introduction of horizontal forms of governance from a more normative position to ground these recommendations.

#### **Top-down / bottom up**

Traditional (domestic) implementation literature has long been characterised by normative discussions on the goal of implementation research. In particular, in the early 1980s the normative debate was polarised around the competing claims of so-called top-down and bottom-up implementation scholars. Apart from their different research methodologies, these scholars held different views on the issues at stake in implementation processes and what type of advice should be provided by scholars to policy makers / implementers (Barrett 2004).

In the view of top-down scholars, implementation was largely an issue of conformity and hierarchical control: implementers must stick to policy objectives as neatly as possible. This view was largely based on principles of representative democracy and issues of democratic accountability and legitimacy (Matland 1995). In democratic systems, according to these scholars, policy objectives decided upon by democratically elected representatives 'at the top' must be executed by others in conformity with the policy objectives (Barrett 2004, 254). A top-down view is also reflected in most EU implementation studies, although EU scholars have somewhat different reasons for



adopting this view. For these scholars, what is important when it comes to conformity to EU formal rules is the creation of a level playing field, i.e. that all actors play by the same set of rules.

Bottom-up scholars adopt a different view on implementation. In their view the issue is not so much one of conformity and control, but one of performance. Bottom-up scholars stress the importance of autonomy and flexibility when dealing with local conditions. Discretion is considered positive and even necessary as it allows for responsiveness and room to deal with local conditions and to produce more effective and efficient solutions (Matland 1995; Barrett 2004): local autonomy is 'seen as beneficial rather than the source of steering problems... [allowing] implementers to cope with, better still improve, 'bad policies'.' (Jordan et al. 1998, 1392). In many ways the bottom-up perspective aligns with the arguments of governance scholars that point to the responsive and innovative policy solutions that can be provided by horizontal forms of governance (see Buizer 2008 for a detailed discussion on discretionary space and, what she calls, room for innovation).

In agreement with an increasing number of scholars, I take the position that horizontal forms of governance and formal institutions (that call for conformity) can both have a legitimate function. It would be unhelpful to disqualify one of them at the expense of the other irrespective of their role. Instead of promoting either one at the expense of the other, we must look for ways to organise 'a side-by-side existence of horizontal forms of governance and vertical institutions' (Termeer 2009, 314) or couple both (Koppenjan et al. 2009, 772).

Relevant input to create such co-existence between horizontal forms of governance and vertical institutions may arise from practical, real-world situations and confrontation between particular forms of governance and existing formal institutions. A number of active responses can be appreciated from this point of view. By pursuing an active response (instead of passive conformity) the situation can be stirred up and the exact legal provisions hindering the introduction of the horizontal governance initiatives can be uncovered (cf. Weick 1984, 45). By making these barriers visible, it becomes clearer how to address these legal barriers or to find ways to link both forms of governing.

### **Responding to EU formal rules**

Active responses are not always successful; this study clearly showed that many responses in fact, were ineffective. It is therefore rather tempting to suggest that the efforts of actors to gain room for manoeuvre are likely to be futile (cf. Kersten and Veeneklaas

2010). Whether initiators will decide to pursue an active response - and which response exactly - obviously, has to be assessed by initiators themselves. In this respect, the different distinguished responses can provide an inspiring repertoire; but not one to simply pick and choose from. Their effect will be highly dependent on the specific context in which actors pursue them. The discussion of different responses below must therefore be seen as an aid, and not a substitute for actors' decisions on how to respond to EU formal rules.

### *Influencing?*

For initiating actors, there is much to win by pursuing a response of influencing. By affecting or shaping other's interpretation, the initiative is introduced in a way that would (possibly) have not been seen as being in line with the EU formal requirements.

However, this response can be risky. The cases showed that the response of influencing can easily backfire on the initiators; it can alert the Commission, cause it to ask difficult questions or to put forward its own stricter interpretation of the application of EU formal rules. By pursuing this response, as noted, a sleeping watch dog can be awakened. Subsequent attempts to quell the situation can then be harder and further complicate the application of EU formal rules and the introduction of the initiative.

It will require a great balancing act to prevent this from happening. On the one hand it is needed to disguise the innovative nature of the initiative and the possible challenge it may pose to EU formal rules; being too vague on the other hand can easily lead to critical questions and suspicion by the Commission. Before pursuing this response, initiating actors must carefully consider whether this balancing act may be successful and whether they have the time and energy to deal with these concerns and questions.

### *Challenging?*

An important question, in this respect, is not only 'what response to pursue' but also 'how long to continue it'. This study has shown that continuing a response of influencing is likely when actors are confronted with critical questions or a strict interpretation of the application of EU formal rules that is damaging for their ambitions. Particular when actors have a strong belief in their own interpretation, actors will be inclined to continue a response of influencing or even start a response of challenging others interpretations.

On the basis of this study we have to conclude that continuing such responses towards the Commission are likely to be a waste of time. Instead of being persuaded, the Commission will only increase its pressure to make actors conform to its own

interpretation. These responses of influencing and challenging, at least in the short term, will likely only delay the application process.<sup>49</sup> So, even though actors may feel they are correct, it is important that they realise that the time and place may not always be right to proof so.

Recognising the right moment to abandon a particular response is important for another reason as well. A strong focus on ones' own ideas and optimising these may cause actors to turn a blind eye towards possible opportunities to introduce the initiative in a compromised way. By allotting their time and energy to convince others of their own ideas, initiating actors risk ending up with nothing. In this study, the opportunities to find a compromise remained relatively open during the application episodes; when initiating actors did not seized them immediately they were able to do so later on. Obviously, this may not always be possible. From the literature on (policy) entrepreneurship we know that opportunities may open for a moment and actors must be ready to seize them (e.g. Kingdon 1994).

#### *Escaping and buffering?*

Responses of influencing and challenging may not always be ineffective; they can also generate changes, but expected and unexpected ones. These unexpected changes need not be always unwanted; they can create unforeseen openings. While the Commission could not be convinced in the selected cases to adopt a different interpretation of the EU state aid rules, contacting it provided a possibility for the Commission to think along and make a number of suggestions that could help initiating actors to either *escape* the EU formal rules or *buffer* their initiative from particular procedural requirements. Within legal boundaries the Commission adopted a constructive stance to find a solution, although high transaction costs for dealing with the initiators provided an important incentive for the Commission to do so as well. After some hesitancy, initiating actors successfully took advantage of the suggestions of the Commission to avoid the EU formal rules.

As the outcome of many active responses can be uncertain, escaping or buffering can be the safest responses to pursue to gain room for manoeuvre. Particular for actors in a hurry it can be recommended that they invest their time and energy in finding ways to avoid the EU formal rules, instead of partaking in likely troublesome and uncertain discussions on the application of these rules. Opportunities to do so however, may not always be present

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<sup>49</sup> In the long run these responses may contribute to a change in the formal institutional setting by providing valuable feedback on the functioning of EU rules in practice.

or perceived, or remain uncertain. The cases show that the opportunities for pursuing a response of escaping or buffering were largely identified during the application process, together with the Commission and often after pursuing various other responses.

#### **On the importance of social acuity**

In general this study points out that it is vital to be well-informed of the broader context to successfully respond to EU formal rules. To a different extent however, it has also shown that there is value in ignoring potential threats or operating somewhat opportunistically. While initiating actors adopted a somewhat naïve or arrogant stance at times by trusting that others would eventually accept the governance initiative, it is this confidence that made them continue their efforts to introduce the initiatives. While doing so can introduce a risk (as it can lead to unexpected and unwanted outcomes, delays or disappointments) it may also result in finding unexpected options to introduce the governance initiatives. This was demonstrated in particular in the Green Services case. As a result of the continuing efforts of the Province of Gelderland to gain room for manoeuvre - instead of strictly conforming to the EU state aid rules - direct contact with the Commission on the application of the state aid rules was established. This direct meeting eventually provided an opportunity to buffer the Green Services initiative from the EU state aid notification duty.

#### **9.4 Final remarks**

The three case studies in this study shed light on the possible difficult relationship between existing EU formal rules and horizontal forms of governance introduced at the Member State level. On the basis of this study we cannot conclude in general terms that EU formal rules and horizontal forms of governance are by definition incommensurable; the range of cases has therefore been too selective.<sup>50</sup> By selecting three problematic cases, this study does provide for a number of limited generalisations on how initiators of horizontal modes of governance may respond to constraints that follow from EU formal rules.

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<sup>50</sup> Given the variety and particulars of different forms of horizontal governance as well as EU formal requirements it is questionable whether any generalising statements can be made on this relationship.

The commitment of initiating actors to the governance initiatives has been an important feature of all three cases: it made initiators search for ways to either lower the threat of conforming to constraining EU formal requirements or search for opportunities to introduce the governance initiatives. Their commitment alone however, was not sufficient to introduce the initiatives; opportunities to establish the initiatives were not always discovered or seized and threats to their introduction were not always successfully remedied. The EU formal rules thereby continued to operate as a frustrating barrier to introduce the horizontal governance initiatives. Under these conditions it may be no surprise that initiators of horizontal forms of governance will eventually *escape* the EU formal rules in a dramatic way, as they did in the Green Services case that introduced the research objective of this study in chapter 1.

Finally, we should not forget that EU formal rules are not by definition resistant to change. In fact, such a change took place in the Soil Remediation case: particular state aid provisions were changed in this case during the unfolding of the application episode. In this respect there is an alternative to the response of escaping, although it might be acceptable only for those that (can) take their time. Actors that remain committed to particular ideas and can wait long enough may find the right moment to redirect EU formal rules in a way that provides room to introduce more horizontal forms of governance; time and patience may be all that is needed for change (cf. Termeer 2007).

In this regard it is worth noting that the *Green Services* concept and ideas on delegating phytosanitary inspection tasks towards the private sector are still on the Dutch policy agenda and brought into European discussions. After engaging in a number of efforts to gain room for manoeuvre within the existing EU formal setting, the time has come to alter the EU setting itself. Scheduled revisions of the Common Agricultural Policy (for the period 2014-2020) and the EU Phytosanitary Directive (2012) are seen as opportunities to push for legislative changes; actors' struggle with Europe, hence, has not yet come to an end.



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## Annex: List of Interviewees

### Phyto case

National official Ministry of ANF, Department of Agriculture	17 April 2007
National official Ministry of ANF, Department of Agriculture	20 March 2008
	11 April 2009
	28 July 2009
Researcher WUR	29 September 2008
Member of Parliament Conservative Liberals (VVD)	4 February 2009
Member of Parliament Christian Democrats (CDA)	4 February 2009
Representative of NAK	3 April 2009
National official Ministry of ANF, Department of Agriculture	6 April 2009
Official PPS (Plant Protection Service)	7 April 2009
National official Ministry of ANF, Permanent Representation in Brussels	8 April 2009

### Soil Remediation case

National official Ministry of HSPE Policy, Department Soil, Water and Rural Area	26 August 2009a
National official Ministry of HSPE official, Department of Legal Affairs	26 August 2009b
Former official European Commission, DG Competition	15 September 2009
National official Ministry of HSPE, Department Soil, Water and Rural Area	30 September 2009

### Green Services case

Regional official Province of Gelderland	19 April 2007
Regional official Province of Brabant / IPO	3 May 2007
WUR researcher	7 May 2007
Ministry of ANF Department of Legal Affairs	May 2008 (written responses)

National official Ministry of ANF, Department of Regional Affairs (DRZ-Oost)	7 March 2008
Regional official / employer <i>Via Natura</i>	26 June 2008
Former official European Commission, DG AGRI	10 June 2008
Official European Commission, DG AGRI	10 June 2008
Former official European Commission, DG AGRI	11 June 2008
Official European Commission, DG AGRI	11 June 2008
Secretary-General, Ministry of ANF	3 November 2009

# Summary

## Introduction

This study focuses on the difficult relationship between existing EU formal rules and forms of governance in which public actors work together or rely on private actors to provide for public services. In the present study these forms of governance are referred as horizontal forms of governance.

Analysing the potential restrictions that are laid down by the EU formal setting is of great importance when considering the likely further conversions towards more horizontal ways of supplying public goods and services at the EU Member State level. Increasingly, horizontal forms of governance are seen as a way of coping with complex policy problems, to enrich policy proposals and increase their realisation (as is shown in this study). Existing formal institutions - such as EU formal rules - however, can be expected to play a continuing role as well. In this regard, it is of much interest to increase our understanding of how horizontal modes of governance relate to EU formal requirements.

In this study I do not assume that the impact of EU formal rules on horizontal forms of governance depends on the specific legal provisions alone. The implementation or application of EU formal rules can be uncertain or ambiguous, and actors responsible for applying EU formal rules can respond to them in different ways. To understand how EU formal rules affect horizontal forms of governance we need to consider the application of these formal rules or, put more accurate, the way initiating actors respond to these rules in concrete situations.

A bottom-up perspective is adopted to achieve this; in this study I focus on the moment particular EU formal rules confronted the initiators of the horizontal governance initiatives. Subsequently, I analyse how (public) initiating actors, responsible for applying these EU rules, exactly respond to these rules. I assume that these responses will eventually define the impact EU formal rules have on the introduction of the governance initiatives. In chapter 1 the following research questions were formulated for this study:

- 1) *Which EU formal rules apply to the horizontal governance initiatives?*
- 2) *How do actors (responsible for applying these rules) respond to them?*
- 3) *How can we explain actors' responses?*

- 4) *How do actors' responses affect the introduction of the horizontal forms of governance?*

### **EU implementation literature**

EU implementation literature clearly demonstrates that the implementation or application of EU formal rules is not an automatic process: the implementation of EU formal rules can be affected by the preferences and values of different (domestic) actors, the interactions between these actors and the particular institutional settings in which these interactions take place.

Over the recent years there has been an increasing theoretical sophistication in EU implementation literature. Largely on the basis of *either* rational choice *or* sociological (normative) institutional approaches, various variables have been singled out that explain the ease of implementing EU formal rules. On the basis of a review of EU implementation literature in chapter 2, I identified four shortcomings: (i) the limited efforts to integrate rational choice and sociological (normative) institutional approaches; (ii) the limited attention given to interpretive processes and (social-cognitive) ideas; (iii) the limited insights on the dynamics of EU application / implementation processes; and (iv) the little systemised understanding of how actors actually respond to EU formal rules.

### **An institutional processual approach**

In chapter 3 a so-called institutional processual (IP) approach is presented and further specified to address the identified shortcomings. The IP approach has affinities with new institutional theory but adopts a more explicit processual outlook in order to account for the dynamic relationship between the role of (changing) structures (including institutions) and actors' efforts in policy processes. By adopting this approach a more general framework is provided to analyse the application of EU formal rules. This framework consists of three main building blocks: (i) social mechanisms, (ii) contextual factors and (iii) responses.

#### ***Social mechanisms***

In explaining policy processes, IP makes explicit reference to so-called 'social mechanisms'. Social mechanisms refer to recurring causal tendencies that provide the link between a specified outcome (in this case a response; see below) and specified contextual factors. In

this study, a number of social mechanisms are turned to in order to link various (combinations of) contextual factors to the concrete responses of initiating actors. These different social mechanisms are presented and summarised in the table below.

<b>Social mechanism</b>	<b>Involves:</b>
Logic of appropriateness	the process by which an actor considers its situation and identity; and follows or reimagines the legitimate standards (norms) attached to the situation and its identity.
Attribution of opportunity	the process by which an actor interprets its situation; comes to a view that the situation provides an opportunity for realising its goals; and seizes this opportunity.
Attribution of threat	the process by which an actor interprets its situation; comes to a view that the situation provides a threat for realising its goals; and decides to remedy or prepare against it.
Certification	the process by which an actor interprets the behaviour or the claims of another actor; assesses that these meet acceptable criteria for acting or claim making; and validates these claims or the actor as a claim maker.
Decertification	the process by which an actor interprets the behaviour or the claims of another actor, assesses that these fail to meet acceptable criteria for acting or claim making and denies the validity of these claims or the actor as a claim maker.
Attribution of success	the process by which an actor interprets the outcome of particular efforts; assesses that these are successful in the light of previously established goals and ambitions; and repeats or reinforces these efforts.
Attribution of failure	the process by which an actor interprets the outcome of particular efforts; assesses that these are unsuccessful in the light of previously established goals and ambitions; and terminates or cancels these efforts.

#### **A catalogue of social mechanisms**

#### ***Contextual factors***

Social mechanisms may generate different outcomes depending on the contextual factors that activate and sustain their operation. In order to explain how actors respond to EU formal rules, we must identify and consider those features of the context that will affect the operation of these different social mechanisms. When it comes to the context in

which actors operate, this study pays specific attention to (a) institutions, (b) the activities of other actors and (c) ideas.

*a) Institutions*

The institutional context refers to a broad conception of institutions. Generally speaking, institutions include formal and informal rules and governance arrangements that allocate responsibilities, authorities and capacities over particular actors and situations.

*b) Activities of other actors*

The institutional context can greatly affect which other actors can be involved in the application process by providing others with particular responsibilities and capacities. Within the IP approach these (institutional) actors are typically considered a feature of the institutional context. Taking into account these institutional actors alone however, may not be sufficient to explain how other actors affect the responses of those directly responsible for applying EU formal rules. A range of other (non-institutional) actors will be taken into account as well.

*c) Ideas*

Ideas, are used as a final general category to address those features of the context that shape how actors make sense of their environment. Ideas take rather different forms in the IP approach. In different studies we find references to narratives, guiding principles, (policy) programs or instruments, or shared experiences. Ideas moreover, have different content: they can take a normative content that provides actors with ideas of 'what is appropriate' or take a cognitive content providing actors with a more general sense of 'what is' (going on).

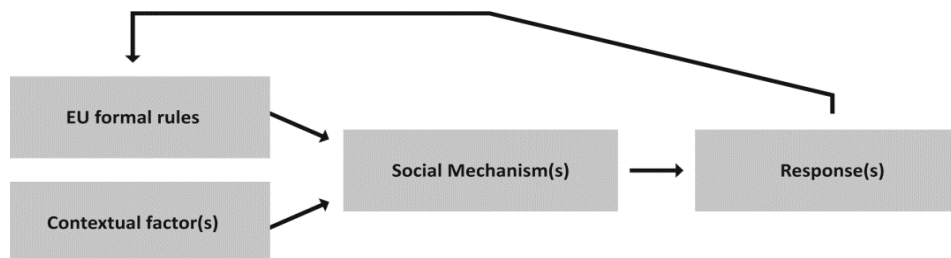
**Responses**

To further structure the analysis of the configuration of social mechanisms and contextual factors I rely on a typology of ten different responses that I considered helpful for describing how actors react to EU formal rules. These responses are presented in the table below.

Response	Example
Conforming	Obeying rules
Dismissing	Ignoring explicit rules
Challenging	Contesting rules and requirements
Attacking	Assaulting the sources of institutional pressure
Concealing	Disguising non-conformity
Pacifying	Appeasing institutional stakeholders
Bargaining	Negotiating with institutional stakeholders
Influencing	Shaping values or criteria
Escaping	Changing goals or a domain
Buffering	Loosening the number of inspections

**Responses to EU formal rules (selected from Oliver 1991, 152)**

The relationship between the different building blocks is presented in the figure below.



**Analytical framework**

### **A comparison of three cases**

On the basis of this approach / framework three different case studies are analysed and compared:

#### *Phyto case*

The first case study - the so-termed Phyto case - analyses the delegation of phytosanitary (i.e. plant health) inspection tasks. An agencification project - operation Plantkeur - was set up to delegate phytosanitary inspections tasks from the Ministry of Agriculture, Nature and Food quality (ANF) to four autonomous inspection bodies. The delegation of phytosanitary inspection tasks to the autonomous bodies, which already carried out plant *quality* inspections as agencies (Zelfstandige Bestuursorganen, ZBOS), had to clarify the responsibilities of different parties involved with the plant inspection system and reduce the inspection costs for the private sector.

#### *Soil Remediation case*

The second case study - the Soil Remediation case - describes the introduction of a financial support scheme established by the Ministry of Housing, Spatial Planning and the Environment (HSPE). The scheme was part of a covenant signed by the Ministry and the dry cleaning sector Netex in order to speed up the rehabilitation of polluted sites. In the covenant it was agreed that the Ministry would provide dry cleaning companies with financial assistance to overcome the risks of investing in the remediation of polluted sites. In return, the sector as a whole committed itself to participate in the scheme.

#### *Green Services case*

The third case study - the Green Services case - analyses the establishment of a regional agri-environmental scheme whereby landscape management activities are 'contracted out' to farmers. In return for their activities, farmers would receive a market-based payment on the basis of custom-made contracts. This case focuses on the responses of the Province of Gelderland that was involved with this initiative.

### **Responding to EU formal rules**

In the different case studies different (types of) EU formal rules applied to the horizontal governance initiatives. Which particular provisions applied depends on the characteristics of the horizontal governance initiative and the exact relationship between public and



private actors and activities; the specific policy domain in which the initiative is introduced plays an important role as well. In the Phyto case the EU Phytosanitary Directive affected the introduction of the initiative. In the two other cases specific state aid rules had to be applied.

The (public) actors responsible for applying these rules to the governance initiative responded to these rules in different ways. Besides a response of conforming, I identified seven different responses across and within the three cases. The figure below presents in what order particular responses were pursued and how they were combined.

Phyto case	Soil remediation case	Green Services case
Influencing	Influencing (to escape) Pacifying	Influencing* (to escape)
Downplaying (challenging/ dismissing)	Pacifying & Challenging	Challenging* Attacking*
Pacifying	Escaping	Influencing
Conforming		Conforming
		Buffering
		Dismissing
		Escaping

Pursued responses (\* response pursued at the national level)

### Explaining actors' responses

To explain for these different responses it is crucial to consider the strong commitment of initiating actors to introduce the governance initiative. This commitment can be largely accounted for by turning to the activation and operation of a *logic of appropriateness* mechanism.

In all three cases, this mechanism was activated by various research reports and studies that provided initiating actors with specific problematic descriptions and problem images of the situation (*ideas*). These studies emphasised the limited performance of the existing instruments and arrangements in meeting particular policies or providing particular services. To address the limited performance of existing policy instruments and governance arrangements, actors in all three cases turned to various (new) ideas on horizontal forms of governance. These forms of governance were considered to provide for a more effective or efficient policy arrangements or instruments, but were also regarded appropriate given the initiating actor's roles and responsibilities (*institutions*) for developing and implementing specific policies. The (normative) commitment of initiators generated a persistent stance to introduce the governance initiatives - a stance that was further reinforced, to a different extent, by the expectations of other direct involved stakeholders to the horizontal governance initiatives.

Perceived uncertainties on how the European Commission - responsible for supervising and enforcing the implementation of EU formal rules (*institution*) - would interpret the governance initiative and its compatibility with the EU formal setting played an important role in the three cases as well. In the Phyto case, it was recognised that the initiative could lack the understanding of the European Commission and that it might impose a stricter interpretation of the application of the so-called EU Phytosanitary Directive. This activated an *attribution of threat* mechanism. In the two other case studies, interestingly, public initiating actors were less concerned of this risk. Other domestic actors, involved with the introduction of the initiatives, however, were concerned of this possibility; therefore they put an expectation (*activity of another actor*) on the initiating actors to make sure that the Commission would accept the governance initiative.

In the Soil Remediation case this expectation was considered valid as a result of the activation of a so-called *certification* mechanism by the previous effort of the dry cleaning sector Netex. In the Green Services case by contrast, a *decertification* mechanism was activated by the demand of the Ministry of ANF to inform the Commission of the initiative - in line with the EU state aid procedural rules. The perceived lack of discussion on the application of these EU formal rules at the national level in this case, made the Province to escalate its response towards the Ministry to avoid contacting the Commission; after initially trying to *influence* the Ministry, it turned to a response of *challenging* and *attacking*. This led to a contested discussion at the national level that delayed the introduction of the governance initiative. This delay activated an *attribution of threat*

mechanism and, in part, caused the Province of Gelderland to accept that the Commission had to be informed of the initiative.

### ***Waking a sleeping watchdog***

This study shows that initiating actors consciously attempted to influence the Commission's perception of the governance initiatives as they realised that the Commission could interpret the initiative differently and in a stricter manner. By doing so the threat of conforming to a strict interpretation had to be prevented. Initiating actors were confident about the possibility to do so; while they realised they were pushing the boundaries of the EU formal setting, they had a strong belief that the Commission would accept the initiative once it would be properly explained. Across the cases, this confidence was based on previous experiences, EU case law or legal advice. This belief motivated actors to pursue a response of *influencing* towards the European Commission.

Instead of being convinced and giving its consent, the Commission however, asked critical questions on the functioning of the governance initiatives. The Commission, acting in accordance with its role as guardian of the treaties, in fact, put forward a stricter interpretation of the application of the EU formal rules in all three cases than public initiators had foreseen. After being informed of the initiatives, the Commission wanted clear *legal* certainty that actor's conformity to the EU formal rules would not be in jeopardy. By approaching the Commission, a sleeping watchdog was awakened:

- In the Phyto case the Commission made clear that before the phytosanitary inspection tasks could be delegated to the different autonomous inspection bodies / ZBOs, a (strict) separation had to be made between one of the ZBOs and its commercial daughter organisation. The sharing of staff and equipment between these organisations, according to the Commission, could bring into jeopardy the independence of the phytosanitary inspections and would thereby conflict with the EU Phytosanitary Directive.
- In the Soil Remediation case the Commission expressed concerns about the granting of public financial aid to internationally operating dry cleaning companies and to dry cleaners operating near the border. According to the Commission, this aid would conflict with the EU state aid rules, as this would lead to a distortion of the common market; aid to these specific dry cleaning companies could therefore not be allowed.
- In the Green Services case finally, the Commission made clear that the interpretation of the Province on how to qualify the Green Services could not be accepted. The Province had defined the Green Services as 'services of general interest'. By doing so a higher

amount of financial aid could be given to farmers. The Commission made clear that the Green Services had to be defined as agri-environmental measures.

### ***Trial and error (under increasing pressures to conform)***

In both the Phyto and Soil Remediation case public initiators did not directly accept the Commission's strict interpretation of the application of the EU formal rules. Even though the Commission made various critical remarks, actors remained confident that the Commission would eventually come to accept their interpretation. Actors therefore continued their attempts to *influence* the Commission but also started pursuing responses of *challenging* and *pacifying*.

Instead of changing its interpretation, the Commission though, continued to increase its pressure to make actors conform to (its interpretation of) the EU formal rules; eventually it indicated to move towards a more formal investigation stage in order to assess the initiatives conformity to the EU formal setting. The increasing enforcement pressure caused initiating actors adopt a more acquainting stance by activating two different social mechanisms; the *attribution of threat* and the *attribution of failure*. On the basis of their shared experiences (*ideas*), initiating actors realised that entering a more formal investigation procedure would result likely in a further delay; actors considered it a risk to enter this investigation stage and adopted a more acquainting stance. The Commission's continuing enforcement pressure, also made actors adjust their perceptions of what would be possible under the EU formal rules. Initiating actors started to realise that it would be futile to continue their efforts to alter the Commission's interpretation on the application of the EU formal rules to the initiatives.

### **Adjustments to the initiatives**

Under this increasing enforcement pressure initiating actors in all three cases eventually had to adjust the governance initiatives to *conform* to the interpretation of the Commission of the application of the EU formal setting.

- In the Phyto case, the reform aimed to (i) clarify the role and responsibilities of different parties involved with plant inspections and (ii) reduce the inspection costs for the private sector. By conforming to the Commission's interpretation of the Phytosanitary Directive, the latter ambition could not be realised; the expected cost reduction for the private sector was not accomplished by the demand of the Commission to separate the staff and equipment of one of the ZBOs and its commercial daughter. The general ambition to

clarify the roles and responsibilities of the different inspection bodies in the overall plant inspection system, yet, was not greatly affected by the response of conformity.

- In the Soil Remediation case the Ministry of HSPE had to partly adjust the financial scheme to gain approval from the Commission: internationally operating dry cleaning companies were excluded from receiving aid. Given the limited number of such companies (only four) and the Ministry's expectation that they would likely not make use of the scheme anyway, this can be considered a minor adjustment
- In the Green Services case the Province of Gelderland also adjusted the initiative to gain approval from the European Commission. According to the Commission the reward for the Green Services had to be based - in line with the state aid rules for the agricultural sector - on the basis of a loss of revenues and additional labor costs. The Province conformed to this demand and adjusted the height of the payments farmers could receive for their landscape activities. One of the main ambitions of the Green Services initiative, i.e. paying farmers a market based price, could thereby not be realised - at least not by using public finances (see below).

In both the Green Services and Soil Remediation cases initiating actors did succeed in (re)gaining some discretion or in circumventing the EU formal rules. In both situations the possibility for this success was provided through a suggestion by the Commission made during the application episode. These suggestions also provided an opportunity for the Commission reduce the workload of having to scrutinise the state aid measures.

- In the Soil Remediation case, initiating actors managed to *escape* different EU state aid requirements by somewhat lowering the height of the financial support. By doing so, the financial aid to dry cleaning companies could be brought in line with the exemptions provided by the EU state aid rules for aid of minor importance (*de minimis* Regulation). By lowering the amount of aid, dry cleaning companies near the border could be supported to carry out soil remediation activities.
- In the Green Services case, the EU state aid notification procedure - required to get approval for the custom-made contracts with farmers - was eventually avoided (*buffered*). By establishing a so-called 'catalogue' of individual agri-environmental measures, that was approved as a whole at once by the Commission, custom-made contracts could be created that would need to further scrutiny and approval of the Commission. The second ambition of the Province, i.e. establishing custom-made contract, was thereby realised. The Province finally, also succeeded to escape the substantive state aid requirements by using private money to reward farmers for their

landscape activities. The long delay and difficulties of setting up custom-made contracts had motivated actors in the field to organise a landscape auction. By using private finances to reward farmers for their landscape activities, the EU state aid regime could be escaped from altogether.

In sum, this study shows that the application of EU formal rules can be a struggle. The strong commitment of initiating actors to introduce the horizontal governance initiatives mobilised them to pursue an active stance to prevent that the initiatives had to be adjusted. The strong confidence that it would be possible to introduce these initiatives within the EU formal setting made them continue their efforts, despite various signals that this would not be possible. Largely as a result of an increasing enforcement pressure by the European Commission and the delay that resulted from this struggle itself, initiating actors eventually started to realise that it might be futile to continue their efforts to change the (interpretation of the) application of the EU formal rules; they realised they had to adopt a more pragmatic stance to introduce the governance initiatives.

# Samenvatting

## Inleiding

Steeds vaker betrekken overheden private partijen en burgers bij het creëren en implementeren van beleid en de uitvoering van publieke taken. Deze alternatieve sturingsarrangementen en -instrumenten worden in deze studie omschreven als 'horizontale vormen van governance'. Vanuit de beleidspraktijk en -wetenschappen is er de laatste jaren veel aandacht voor deze horizontale vormen van governance. Vaak worden zij gezien als een manier om beleid efficiënter en effectiever te maken, te komen tot innovatieve oplossingen voor complexe problemen en de uitvoering van beleid gemakkelijker te maken.

In de praktijk sluiten deze horizontale vormen van governance echter niet altijd aan bij bestaande (formele) instituties. In deze studie ga ik specifiek in op de moeizame relatie tussen horizontale vormen van governance en bestaande Europese regelgeving die moet worden toegepast in de EU lidstaten. Europese regelgeving kan daarmee (formele) grenzen stellen aan de mogelijkheid om horizontale vormen van governance te introduceren.

In dit proefschrift ga ik er van uit dat de precieze invloed van bestaande Europese regels op horizontale vormen van governance niet direct valt af te leiden uit de specifieke eisen die in de regelgeving worden gesteld. Om te kunnen begrijpen op welke wijze deze regels de introductie van horizontale vormen van governance beïnvloeden moeten we aandacht besteden aan de manier waarop initiatiefnemers van horizontale governance initiatieven op deze regels reageren. Het vertrekpunt van de analyse in deze studie vormt dan ook het moment waarop initiatiefnemers geconfronteerd worden met EU regelgeving. Vervolgens analyseer ik de wijze waarop initiatiefnemers op deze regels reageren. Deze respons bepaalt uiteindelijk de invloed van de Europese regelgeving op de horizontale governance initiatieven. In hoofdstuk 1 zijn de volgende onderzoeksvragen voor deze studie opgesteld:

- 1) *Welke Europese regels zijn van toepassing op de governance initiatieven?*
- 2) *Hoe reageren initiatiefnemers op deze regels?*
- 3) *Hoe kunnen we deze responsen verklaren?*

4) *Hoe beïnvloeden deze responses de introductie van de horizontale vormen van governance?*

### **EU implementatie literatuur**

EU implementatie literatuur laat zien dat de implementatie en toepassing van Europese regels niet altijd vanzelf plaatvindt; de toepassing van Europese regels wordt vaak beïnvloed door de doelen en waarden van verschillende actoren, hun interacties en de specifieke institutionele setting waarin deze interacties plaatsvinden. Op basis van historische, rationele keuze en sociologische (normatieve) institutionele benaderingen zijn er de afgelopen jaren verschillende factoren / variabelen benoemd die verschillen in de implementatie van Europese regelgeving kunnen verklaren.

In hoofdstuk 2 van dit proefschrift worden vier tekortkomingen in de recente EU implementatie literatuur gesignaleerd: (i) geringe pogingen om de verschillende inzichten uit de verschillende institutionele benaderingen te integreren; (ii) beperkte aandacht voor interpretatieve processen en (sociaal) cognitieve ideeën; (iii) geringe aandacht voor de dynamiek van EU implementatie processen; en tenslotte (iv) weinig systematische aandacht voor de wijze waarop actoren daadwerkelijk reageren op EU regelgeving.

### **Institutionele proces benadering**

Rekening houdend met deze tekortkomingen wordt in deze studie een zogenaamde institutionele process (IP) benadering gehanteerd. Deze benadering is deels gebaseerd op verschillende institutionele benaderingen maar is ook geïnspireerd op verschillende proces benaderingen. De IP benadering richt zich specifiek op de voortdurende interactie tussen de (veranderende) context en het concrete handelen van actoren in beleidsprocessen.

Aan de hand van de IP benadering wordt niet zozeer gekeken naar specifieke factoren die van invloed zijn op de wijze waarop EU regelgeving wordt geïmplementeerd of toegepast; deze benadering moet vooral gezien worden als een theoretisch raamwerk aan de hand waarvan verschillende implementatie processen kunnen worden geanalyseerd en verklaard. De benadering onderscheid daarvoor drie analytische bouwstenen: (i) sociale mechanismen (ii) context factoren, en (iii) responses.



### **Sociale mechanismen**

Sociale mechanismen beschrijven terugkerende / vaak-voorkomende causale processen. Zij helpen verklaren wat er gebeurd is onder bepaalde condities en tot welke uitkomst dit heeft geleid. Om een causaal verband te leggen tussen verschillende *context factoren* en de *responses* van initiatiefnemers zijn in deze studie zeven verschillende sociale mechanismen onderscheiden. Deze mechanismen zijn beschreven in de onderstaande tabel.

<b>Sociale mechanismen</b>	<b>Beschrijft:</b>
'Logic of appropriateness'	het proces waarbij een actor zijn / haar situatie en identiteit beschouwd en de standaarden die passen / horen bij deze situatie en identiteit volgt.
Herkennen van een kans	het proces waarbij een actor zijn / haar omgeving verkent en interpreteert; herkent dat deze een mogelijkheid biedt om zijn / haar doelen te realiseren en actie onderneemt om deze kans te verzilveren.
Herkennen van dreiging	Het proces waarbij een actor zijn / haar omgeving verkent en interpreteert; herkent dat deze een bedreiging vormt voor zijn / haar doelen en actie onderneemt om deze dreiging te voorkomen.
Certificering	het proces waarbij een actor het gedrag en de eisen / verwachtingen van andere actoren beschouwt; evalueert of deze overeenkomen met geaccepteerde criteria voor handelen of het neerleggen van claims; en zo ja, deze eisen / verwachtingen accepteert als valide.
Decertificering	het proces waarbij een actor het gedrag en de eisen / verwachtingen van andere actoren in acht neemt; evalueert of deze overeenkomen met geaccepteerde criteria voor handelen of het neerleggen van claims en zo nee, deze eisen niet accepteert als valide.
(H)erkennen van successen	het proces waarbij een actor de resultaten van zijn / haar eerdere handelingen interpreteert en evalueert in het licht van het bereiken van bepaalde doelen, concludeert dat deze handelingen succesvol zijn en deze vervolgens herhaalt.
(H)erkennen van fouten	het proces waarbij een actor de resultaten van zijn / haar eerdere handelingen interpreteert en evalueert in het licht van het bereiken van bepaalde doelen, concludeert dat deze handeling niet succesvol zijn en deze vervolgens achter zich laat.

### **Catalogus van sociale mechanismen**

### **Context factoren**

In deze studie worden verschillende categorieën van context factoren onderscheiden die de verschillende sociale mechanismen 'activeren': a) instituties; b) activiteiten van andere actoren; en c) ideeën.

#### *a) Instituties*

Een eerste algemene categorie van context factoren is instituties. Onder instituties worden informele en formele regels en arrangementen verstaan; zij kennen specifieke verantwoordelijkheden en capaciteiten toe aan actoren en bepaalde situaties.

#### *b) Activiteiten van andere actoren*

Een tweede categorie is 'activiteiten van andere actoren'. Door bepaalde verantwoordelijkheden en capaciteiten aan actoren toe te wijzen worden deze deels beïnvloedt door instituties. Naast deze 'institutionele' actoren zijn er ook andere actoren die invloed uitoefenen op de wijze waarop initiatiefnemers omgaan met of reageren op Europese regelgeving. De activiteiten van andere actoren dient daarom in brede zin beschouwd te worden als een onderdeel van de context.

#### *c) Ideeën*

Ideeën vormen de laatste categorie van context factoren. Deze factoren zijn van invloed op de wijze waarop actoren betekenis geven aan hun omgeving (waaronder de Europese regelgeving). Ideeën kunnen verschillende vorm hebben, zoals ideeën over bepaalde problemen, sturingsfilosofieën en –instrumenten of gedeelde ervaringen. Ideeën kunnen verder een meer normatieve of (sociaal) cognitieve lading hebben.

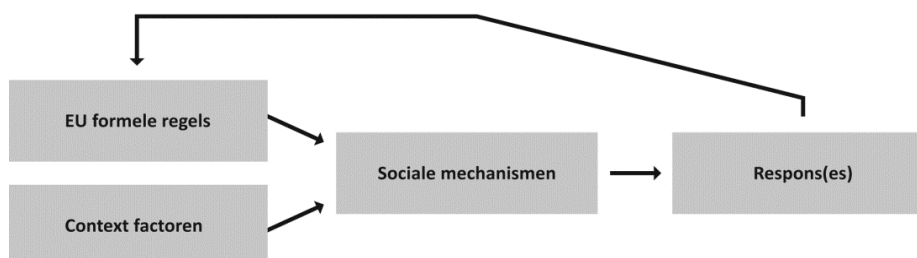
### **Responses**

Tenslotte wordt er in deze studie een onderscheid gemaakt tussen verschillende responses die het gevolg kunnen zijn van de activering van verschillende sociale mechanismen op basis van een typologie van Oliver (1991). Deze verschillende responses zijn weergegeven in de onderstaande tabel.

Respons	Voorbeeld
Conformereren	Naleven / opvolgen van regels
Negeren	Ontkennen van / naast zich neer leggen van regels
Ter discussie stellen	Openlijk bestrijden van regels en eisen
Aanvallen	Aanpakken / beledigen van de 'bron' van de institutionele druk
Verbergen	Bedekken van non-conformiteit
Pacificeren	Geruststellen van institutionele belanghebbenden
Afdingen	Onderhandelen met institutionele belanghebbenden
Beïnvloeden	Invloed uitoefenen op de interpretatie van normen en criteria
Ontsnappen	Veranderen van doelen en domein (om conformiteit te voorkomen)
Bufferen	Afschermen van activiteiten van inspecties

**Responses op Europese regelgeving (gebaseerd op Oliver 1991, 152)**

De relatie tussen de verschillende analytische bouwstenen is weergegeven in de onderstaande figuur.



**Analytisch kader**

### **Vergelijking van drie casussen**

Aan de hand van de IP benadering worden drie verschillende casussen geanalyseerd en onderling met elkaar vergeleken:

### *Fyto casus*

De Fyto casus beschrijft en analyseert de hervorming van het planteninspectiesysteem in Nederland. Met de hervorming van het planteninspectiesysteem zouden zogenaamde fytosanitaire (plantengezondheid) inspectietaken worden overgedragen van het (voormalig) Ministerie van LNV naar vier zelfstandige bestuursorganen (ZBOs). Deze ZBOs verrichtten al plantenkwiteit inspecties in de bestaande situatie. De overdracht van fytosanitaire inspectietaken moest allereerst het planteninspectiesysteem vereenvoudigen en de verantwoordelijkheden van verschillende betrokken partijen verduidelijken. Daarnaast zou de hervorming moeten leiden tot een vermindering van de inspectiekosten voor de private sector (telers, handelaren). De moeizame relatie tussen dit initiatief en de Europese fytosanitaire richtlijn staat in deze casus centraal.

### *Bodemsanering casus*

De tweede casus beschrijft de relatie tussen een financiële steunmaatregel en de Europese staatssteunregelgeving. De steunmaatregel vormde een belangrijk onderdeel van een convenant dat was gesloten door het (voormalig) Ministerie van VROM en de Nederlandse vereniging van textielreinigers (stomerijen), Netex. Met de steunmaatregel wilde het Ministerie het gestagneerde bodemsaneringsbeleid vlot trekken. Het saneren van vervuilde grond bleek vaak te kostbaar voor kleine textielreinigers / stomerijen; deze zouden hierdoor failliet gaan. Dit leidde er toe dat veel saneringsplannen niet uitgevoerd werden. In het convenant tussen het Ministerie van VROM en de Netex werd afgesproken dat een groot aandeel van textielreinigers zou deelnemen aan de saneringsregeling, voordat de steun gegeven zou worden.

### *Groene Diensten casus*

In de derde casus staat de verhouding tussen een regionaal / lokaal agri-milieu project en de Europese staatssteunregelgeving centraal. Om het cultuurlandschap in stand te houden wilden lokale actoren en de Provincie Gelderland agrariërs betrekken bij het onderhoud van het landschap en hen hiervoor een marktconforme betaling geven; in de betaling aan agrariërs moest de maatschappelijke waarde van het onderhouden landschap worden meegerekend. Daarnaast wilden men in het gebied flexibele contracten afsluiten voor een lange termijn (meer dan 10 jaar). Discussies over de toepassing van de Europese staatssteunregelgeving op zowel nationaal als Europees niveau leidde tot een vertraging van de introductie van het initiatief.

### Responses op EU regelgeving

Verschillende typen EU regelgeving zijn van toepassing op de horizontale governance initiatieven in de drie casussen. Dit is afhankelijk van de precieze relatie tussen publieke en private partijen en activiteiten binnen de initiatieven en het specifieke beleidsveld. Zoals opgemerkt is de fyto-sanitaire richtlijn van toepassing op het governance initiatief in de Fyto casus. In de twee andere casussen hebben (verschillende) Europese staatssteunregels een belangrijke effect op de introductie van de governance initiatieven.

De (publieke) initiatiefnemers van de horizontale governance initiatieven reageren verschillend op deze regelgeving. Naast een respons van *conformereren* worden zeven andere responses gehanteerd binnen de verschillende casussen. In de onderstaande figuur is weergegeven in welke volgorde deze responses worden gebruikt en hoe zij worden gecombineerd.

Fyto casus	Bodemsanering casus	Groene Diensten casus
Beïnvloeden	Beïnvloeden (om te ontsnappen) Pacificeren	Beïnvloeden* (om te ontsnappen) Pacificeren
Bagatelliseren (ter discussie stellen / negeren)	Pacificeren & Ter discussie stellen	Ter discussie stellen* Aanvallen*
Pacificeren	Ontsnappen	Beïnvloeden
Conformereren		Conformereren
		Bufferen
		Negeren
		Ontsnappen

Responses (\* respons gehanteerd op nationaal niveau)

### **Verklaring van de verschillende responses**

Om de verschillende responses van de initiatiefnemers te verklaren moet in de eerste plaats gekeken worden naar hun betrokkenheid bij de governance initiatieven. Deze betrokkenheid kan voor een belangrijk deel verklaard worden door de 'activering' van een zogenaamd *logic of appropriateness* mechanisme.

In alle drie de casussen wordt dit mechanisme geactiveerd door studies en rapporten die een helder beeld schetsen van problemen rond bestaand beleid en beleidsinstrumenten. De verschillende rapporten laten zien dat bestaande beleidsinstrumenten onvoldoende in staat zijn om vastgesteld beleid uit te voeren of bepaalde publieke diensten (efficiënt en effectief) te leveren. In de zoektocht naar alternatieve instrumenten worden initiatiefnemers aangetrokken tot *ideeën* over meer horizontale vormen van sturing. In de verschillende casussen wordt dit niet alleen gezien als efficiënt en effectief, maar vooral ook als passend (appropriate) bij de specifieke rol en verantwoordelijk van de initiatiefnemers bij het maken en implementeren van beleid. Deze betrokkenheid zorgt er voor dat initiatiefnemers sterk gemotiveerd zijn om de governance initiatieven te introduceren. In de verschillende casussen wordt deze betrokkenheid in meer of mindere mate versterkt door de verwachtingen van directe stakeholders bij de initiatieven.

Onzekerheid over de wijze waarop de Europese Commissie - formeel verantwoordelijk voor het toezicht op de naleving van regels (*institutie*) - de governance initiatieven interpreteert en beoordeelt, speelt een belangrijker rol in alle drie de casussen. In de Fyto casus, ten eerste, realiseren initiatiefnemers zich dat de hervorming van het planteninspectiesysteem mogelijk niet 'goed' begrepen zal worden door de Commissie. Dit kan mogelijk leiden tot vragen en het voorzoek om aanpassingen te doen zodat voldaan wordt aan de fytosanitaire richtlijn. Deze mogelijkheid activeert een zogenaamd *herkennen van dreiging* mechanisme.

In de twee andere casussen wordt dit mechanisme niet direct geactiveerd; de kans dat de Commissie vragen zal stellen of ingrijpt wordt minder hoog ingeschat door de initiatiefnemers. Andere stakeholders bij de governance initiatieven echter, herkennen deze mogelijkheid als een bedreiging voor de initiatieven; zij spreken dan ook de verwachting uit dat de initiatiefnemers er voor zorgen dat de Commissie instemt met de governance initiatieven.

- In de Bodemsanering casus wordt deze verwachting - uitgesproken door Netex - als *valide* ervaren door het Ministerie van VROM. De eerdere acties van Netex om stomerijen deel te laten nemen aan de steunmaatregel activeert in deze casus een

zogenaamd *certificering* mechanisme. Aan de verwachting van Netex komt het Ministerie van VROM dan ook tegemoet.

- In de Groene Diensten casus daarentegen, wordt een *decertificering* mechanisme geactiveerd. De verwachting om de Europese Commissie op de hoogte te stellen van het initiatief wordt in deze casus uitgesproken door het Ministerie van LNV. Het is een voorwaarde voor het Ministerie om financiële steun te verlenen aan het initiatief. Deze voorwaarde wordt door Provincie gezien als weinig valide. Het door de provincie ervaren gebrek aan argumentatie en discussie over de toepassing van de staatssteunregelgeving zorgt ervoor dat de Provincie niet direct instemt met de eis van het Ministerie. In plaats daarvan gebruikt de Provincie een aantal responses om te voorkomen dat de Commissie moet worden ingelicht: nadat de Provincie Gelderland het Ministerie van LNV probeert te *beïnvloeden* van een andere interpretatie van de staatssteunregelgeving stelt ze de interpretatie van het ministerie *ter discussie* en *valt* zij het Ministerie zelfs aan. Dit eindigt in een patstelling. De vertraging en het achterblijven van financiële steun als gevolg van deze patstelling activeert in deze casus uiteindelijk een *herkennen van dreiging* mechanisme: de Provincie ziet in dat de Commissie geïnformeerd moet worden wil zij het initiatief kunnen introduceren.

### ***Slapende honden wakker maken***

De vergelijking van de casussen laat zien dat initiatiefnemers de interpretatie van de Europese Commissie van de governance initiatieven proberen te *beïnvloeden*. Initiatiefnemers proberen te voorkomen dat de initiatieven op een andere wijze worden geïnterpreteerd en de Europese regelgeving op strikte wijze moeten worden toegepast op de initiatieven. In alle casussen zijn initiatiefnemers er van overtuigd dat zij hierin succesvol zullen zijn. Hoewel zij zich realiseren dat de grenzen van wat er binnen de Europese kaders toegestaan is worden opgezocht geloven de initiatiefnemers dat de Commissie de initiatieven zal toestaan. Op basis van eerdere ervaringen, jurisprudentie en juridisch advies denken zij dat dit vooral een kwestie is van juist uitleggen.

In plaats van zich te laten overtuigen en in te stemmen met de initiatieven neemt de Commissie echter een kritische houding aan. In haar rol als 'hoeder van het verdrag', hanteert zij een strikte interpretatie van de (toepassing) van Europese regelgeving. Nadat zij op de hoogte is gesteld van de governance initiatieven, wil de Commissie formele zekerheid dat de initiatieven passen binnen de Europese juridische kaders. In de drie casussen is de interpretatie van de regelgeving door de Commissie daarbij strikter dan de

initiatiefnemers vooraf hadden ingeschat. Door contact te zoeken met de Commissie en te vragen om haar instemming met de initiatieven worden slapende hond wakker gemaakt:

- In de Fyto casus maakt de Commissie duidelijk dat voordat de fytosanitaire inspecties overgedragen kunnen worden naar de ZBOs er een strikte formele scheiding gemaakt moet worden tussen de publieke en private taken van een van de ZBOs (NAK) en haar dochterorganisatie (NAK Agro). Het gezamenlijk gebruik van personeel en materiaal door deze organisaties zou, volgens de Commissie, de onafhankelijkheid van de fytosanitaire inspecties in gevaar brengen en daarmee conflicteren met de fytosanitaire richtlijn.
- In de Bodemsanering casus maakt de Commissie zich zorgen over de financiële steun aan internationaal opererende stomerijen en aan stomerijen die zich bevinden nabij de nationale grens. Volgens de Commissie conflicteert steun aan deze bedrijven met de EU staatssteunregelgeving omdat dit kan leiden tot een verstoring van de gemeenschappelijke markt: steun aan deze stomerijen kan daarom niet worden toegestaan.
- In de Groene Diensten casus tenslotte, stelt de Europese Commissie dat de interpretatie / definiëring van Groene Diensten als 'diensten van algemeen belang' door de Provincie Gelderland niet geaccepteerd kan worden. Door groene diensten als 'diensten van algemeen belang' te definiëren wilde de Provincie Gelderland het mogelijk te maken een hogere vergoeding te geven aan boeren die betrokken worden bij landschapsbeheer. Na hierover op de hoogte te zijn gesteld, geeft de Commissie duidelijk aan dat groene diensten gezien moeten worden als agri-milieumaatregelen en dat (daarom) de staatssteunregelgeving voor de agrarische sector van toepassing is op het initiatief.

#### ***'Trail-and-error'***

In de Fyto en Bodemsanering casus wordt de strikte interpretatie van de Commissie niet direct geaccepteerd door de initiatiefnemers. Ondanks kritische vragen en opmerkingen van de Commissie blijven initiatiefnemers overtuigd van de mogelijkheid om het initiatief te introduceren. Zij gaan dan ook door met hun pogingen om de Commissie te *beïnvloeden*, maar hanteren ook andere responses zoals *ter discussie stellen* en *pacificeren*.

De Commissie is hierdoor echter niet op ander gedachten te brengen. In plaats daarvan voert zij de druk op om initiatiefnemers (haar interpretatie van) de Europese regelgeving te laten naleven. Wanneer initiatiefnemers hieraan niet op tijd voldoen, kondigt de Commissie aan een meer formeel traject in te zetten om de naleving van de Europese regelgeving te kunnen toetsen.



De toenemende druk van de Commissie activeert twee sociale mechanismen: het *herkennen van dreiging* en het *(h)erkennen van fouten*. Op basis van hun eerdere ervaringen realiseren de initiatiefnemers zich dat het ingaan van een meer formeel traject zal leiden tot een verdere vertraging om de governance initiatieven te introduceren. Dit wordt gezien als een bedreiging; het zorgt ervoor dat initiatiefnemers een meer conformerende houding aannemen om te voorkomen dat dit traject wordt ingezet. De toenemende druk van de Commissie zorgt er ook voor dat initiatiefnemers zich realiseren dat het weinig zinvol is om verdere pogingen te ondernemen om de Commissie's interpretatie van de initiatieven en de toepassing van EU regels te beïnvloeden. Tot dusver zijn de verschillende responses weinig succesvol.

### **Aanpassing van de horizontal governance initiatieven**

Onder toenemende druk van de Commissie om de Europese regelgeving strikt na te leven besluiten initiatiefnemers zich te conformeren aan de interpretatie van de Commissie. De governance initiatieven worden hierdoor (gedeeltelijk) aangepast:

- In de *Fyto casus*, zoals gesteld, richtte de hervorming van het planteninspectiesysteem zich onder andere op het verduidelijken van de verantwoordelijkheden van verschillende betrokken partijen bij planteninspecties. Daarnaast moest de hervorming leiden tot een verlaging van de inspectiekosten voor de private sector. Door zich te schikken naar de eisen van de Commissie wordt dit laatste doel niet bereikt; de voorziene kostenverlaging voor de sector wordt uiteindelijk niet gerealiseerd doordat het personeel en materiaal niet (langer) gedeeld kan worden door de publieke en private tak van één van de ZBO's. De ambitie om de verantwoordelijkheden van verschillende partijen te verduidelijken wordt uiteindelijk wel gerealiseerd in deze casus.
- In de *Bodemsanering casus* past het Ministerie van LNV de steunmaatregel voor bodemsanering gedeeltelijk aan om te voldoen aan de eisen van de Commissie en goedkeuring voor de steun te krijgen: internationaal opererende stomerijen worden uitgesloten van het krijgen van financiële steun voor het uitvoeren van bodemsanering. In dit geval zijn dit slechts enkele (vier) bedrijven; de gevolgen van het strikt naleven van de Europese staatssteunregelgeving op het governance initiatief zijn in die zin gering.
- In de *Groene Diensten casus* tenslotte, wordt het initiatief ook aangepast om goedkeuring van de Commissie te verkrijgen. Volgens de Commissie, zoals gesteld, diende de vergoeding voor groene diensten gebaseerd te zijn op de specifieke staatssteunregels voor de agrarische sector. Deze staan betalingen aan boeren toe, maar

alleen als deze gebaseerd zijn op gedelfde inkomsten en extra arbeidskosten. Een van de voornaamste doelen van het governance initiatief, het verstrekken van een marktgerichte betaling kon daardoor niet gerealiseerd worden - althans, niet met publieke middelen.

In zowel de Bodemsanering als Groene Diensten casus zien we dat initiatiefnemers er uiteindelijk toch in slagen om enige ruimte te creëren binnen de Europese staatssteunregelgeving, dan wel een manier vinden om deze te vermijden. In beide gevallen overigens, worden ideeën hiervoor aangedragen door de Commissie gedurende de discussie over de toepassing van de Europese regelgeving. Deze ideeën bieden ook voor de Commissie een mogelijkheid om de werkdruk om staatssteunplannen te toetsen te verminderen.

- In de Bodemsanering casus slagen initiatiefnemers erin om aan specifieke 'staatssteunregels voor milieumaatregelen' te *ontsnappen* door de hoogte van de steun aan stomerijen te verlagen. Dit wordt onder andere mogelijk door een verandering in het nationaal bodemsaneringsbeleid. Door de hoogte van de steun aan stomerijen te verlagen valt de steunmaatregel onder een uitzonderingsmogelijkheid die wordt geboden voor zogenaamde *de minimis* steun. Hierdoor kunnen ook stomerijen nabij de nationale grens financieel ondersteund worden om bodemsaneringactiviteiten te ondernemen.
- In de Groene Diensten casus slagen initiatiefnemers er in om procedurele staatssteuneisen te omzeilen middels een respons van *bufferen*. Door een zogenaamde catalogus van individuele agri-milieumaatregelen te creëren - welke in een keer getoetst wordt door de Commissie - ontstaat de mogelijkheid om de meldingsplicht van geplande staatsteun te vermijden. Hierdoor wordt het mogelijk om flexibele contracten op te stellen zonder dat deze de afzonderlijk goedkeuring van de Commissie nodig hebben. De ambitie om flexibele contracten met boeren te sluiten wordt hierdoor gerealiseerd.

De Provincie Gelderland slaagt er uiteindelijk ook in om de inhoudelijke staatssteun eisen voor de agrarische sector te omzeilen. Door gebruik te maken van private financiering - bijeengehaald middels een landschapsveiling - kan de Europese staatssteunregelgeving voor de agrarische sector in zijn geheel vermeden worden en kunnen boeren een marktconforme betaling ontvangen voor hun landschapsbeheer.

Al met al laat deze studie zien dat het toepassen en omgaan met bestaande regelgeving een ingewikkelde en langdurige strijd kan zijn. Het is de grote betrokkenheid van initiatiefnemers die er voor zorgt dat zij zich niet direct schikken naar de bestaande Europese regelgeving. Een sterk geloof in de governance initiatieven en het idee dat deze binnen de bestaande Europese kaders zijn in te passen - ondanks signalen dat dit lastig zou kunnen zijn - zorgt voor een actieve en strijdbare houding bij de initiatiefnemers. Een toenemende druk van de Europese Commissie om de bestaande Europese regelgeving na te leven en een toenemende vertraging als gevolg van deze strijd leidt er uiteindelijk toe dat initiatiefnemers een meer pragmatische opstelling kiezen. Gaande het proces realiseren zij zich dat hun responses niet leiden tot het gewenste resultaat en dat een uitweg gezocht moet worden om de initiatieven (in aangepaste vorm) te introduceren.



## About the author

Pieter Zwaan was born in 1981, Rotterdam, the Netherlands. He holds a master's degree in Spatial Planning and Political Science from Radboud University Nijmegen. Since 2006 he has been working as a PhD-candidate and researcher at the Public Administration and Policy Group at Wageningen University. From October 2011 until March 2012 he has also been working in the research project 'Comparative Analysis of Moral Policy Change' (MORAPOL) of the Chair of Comparative Public Policy and Administration of the University of Konstanz as a country expert for the Netherlands. Since February 2012 he is also working as a deputy secretary for the Provincial Council on the Environment Gelderland.



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Completed Training and Supervision Plan**



Wageningen School  
of Social Sciences

Name of the course	Department / Institute	Year	ECTS (=28 hrs)
<b>General part</b>			
Information Literacy Course	WGS	2007	0,6
Techniques for Writing and Presenting a Scientific Paper	WGS	2007	1,2
Presentation Skills	WGS	2009	0,4
NWO Talent Class	NOW	2009	1,2
<b>Mansholt-specific part</b>			
Mansholt Introduction course	MG3S	2007	1,5
'Q & A; Complying with EU state aid requirements'	MG3S PhD-day	2010	1
'Green services and state aid requirements: New urban-rural relationships considered in institutional and sense-making perspective'	ESRS, Wageningen	2007	2
'Making sense of EU state aid requirements; The case of green services'	EGPA, Rotterdam	2008	2
'Making sense of compliance; a processual institutional approach to explain how actors respond to EU formal rules when they establish new modes of governance'	NIG, Enschede	2008	2
'Agencification under the shadow of Brussels'	NIG, Leiden	2009	2
'Getting by Europe; Establishing new modes of governance in a EU setting'	ECPR, Munster	2010	2
<b>Discipline-specific part</b>			
Research Methodology	MG3S	2007	4
Governance Course	MG3S	2008	3
ECPR Summer School in Methods and Techniques	ECPR / University of Ljubljana	2007	5
SIOO Summer School	SIOO	2008	4
Study Group on Governance	Public Administration and Policy Group, WUR	2006 - 2010	2
<b>Teaching and supervising activities</b>			
Teaching / Supervising working groups		2006 - 2010	4
<b>TOTAL</b>			<b>33,9</b>

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